



HUMAN RIGHTS  
RESOURCE CENTRE



# Business and Human Rights in ASEAN

## A Baseline Study



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## **Business and Human Rights in ASEAN : A Baseline Study**

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## Foreword

It is with utmost pleasure I present you the 3rd report of HRRC which focuses on Business and Human Rights in ASEAN. This is the first study of its kind and it is our way of contributing to greater understanding on the UN Guiding Principles on Business and Human Rights which was adopted by the UN Human Rights Council in June 2011. The Study aims to capture the legal landscape in ASEAN particularly pertaining to the first pillar in the Guiding Principles on the State duty to protect. The Study, however, only managed to focus on nine out of ten ASEAN member States due to human resources constraint. Yet, I believe that this report will still provide you with valuable information and analysis about the region. The study would not have been possible without the guidance and support from our three advisors and editors, Prof. Christine Kauffman from Human Rights Competence Centre, University of Zurich, Professor David Cohen from University of California, Berkeley and Professor Kevin Tan from National University of Singapore. Our highest appreciation goes to Ms Delphia Lim as the team leader and the outstanding country rapporteurs and research assistants. Once again, this study has gathered bright young scholars from our network of partner and affiliated institutions. Last but not least, I would also like to express my gratitude to the Embassy of Norway in Indonesia, USAID, the Embassy of Switzerland in Indonesia, the Macarthur Foundation, Mazars and the East-west center for their support.



Jakarta, April 2013

Marzuki Darusman  
Executive Director HRRC

## Limitations of this report

This Baseline Study on Business and Human Rights in ASEAN is not an attempt at a comprehensive empirical survey of the situation in the ASEAN states. That would have been impossible given limitations of time and resources available to the researchers and to the Centre. Rather, it is a compilation, categorisation and analysis of the published material on the subject.

It is important to note that researchers could only work with materials that are in fact published and made widely available to the general public. Confidential reports and undisclosed statistics held by various government departments would obviously not be included unless they were unconditionally made available to the researchers.

The object of the Report is to gather, analyse and assess the depth of information available, prevalence, causes, and impact of business in human rights enforcement in each ASEAN country with the view to providing a comprehensive, objective assessment of the situation as revealed through the published literature. Where reports have been made available by state and quasi-state agencies to the researchers, every effort has been made to incorporate them in the reports. However, researchers are not obliged to contact such agencies in pursuit of data that is not publicly available.

# Business and Human Rights in ASEAN: A Baseline Study

## Introduction: Situating the Debate

Christine Kaufmann<sup>1\*</sup>

### 1. Business and Human Rights – The Complexity of the Issue

1 With economic growth on the rise, many ASEAN countries face new business opportunities and new actors, such as international business companies, taking the floor. The debate on human rights in a business context is not new but in many regards particularly challenging. It often takes place in an environment that is typically characterized by an imbalance with economically powerful companies, investors and states on the one side and individuals or even children or poor people as some of the most vulnerable members of society on the other.

2 From a conceptual perspective, the discussion on business and human rights involves different disciplines which developed fairly independently from each other, resulting in a rather fragmented body of regulations.<sup>2</sup> Another layer of complexity lies in the fact that the debate is characterized by a variety of actors and instruments. Unlike in traditional international law, non-state actors such as businesses and

<sup>1</sup> Professor of law, Chair of International and Constitutional Law and Head of the Competence Centre for Human Rights at the University of Zurich.

<sup>2</sup> Christine Breining-Kaufmann, *The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations*, in: Thomas Cottier/Joost Pauwelyn/Elisabeth Bürgi (Hrsg.), *Human Rights and International Trade*, Oxford 2005 (Oxford University Press), p. 95-136

non-governmental organisations play an important role. Accordingly, rules are often framed as formally non-binding or even voluntary instruments such as codes of conduct or guidelines.

3 Dealing with human rights and business issues therefore implies facing a *complex and dense web of regulations*, some of a binding, others of a non-binding nature, some situated at the national, others at the international level.

4 This baseline study does not attempt to provide a solution for all business-related human rights issues, let alone to tell ASEAN governments what measures need to be taken. In fact, this baseline study pursues a much more modest objective, by unravelling the mentioned “ball of rules” in ASEAN states and shedding light on the current legal situation with regard to business and human rights. The analysis is based on the *UN Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* as they have been unanimously adopted by the UN Human Rights Council in June 2011.<sup>3</sup> It is our hope that this baseline study will assist governments in first identifying potential gaps with the UN Framework and –second –based on this analysis support the development of an action plan to bring the national legal framework into line with the UN Guiding Principles. In order to better understand the broader context in which

<sup>3</sup> *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011.

the ongoing debate on business and human rights takes place, the key developments that influence the discussion in ASEAN states are briefly outlined below.

## 2. New Rules of the Game: The Road to the “Protect, Respect and Remedy” Framework

5 The traditional understanding of corporate social responsibility has for long time been dominated by the approach expressed in Nobel Prize winner Milton Friedman’s statement in 1962:

“There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.”<sup>4</sup>

6 Friedman’s argument has not only led to many multinational companies “outsourcing” social considerations to philanthropy projects but also to home and host country governments not playing an active role in influencing business and investor behaviour. Undoubtedly, many countries, including ASEAN member states were able to participate in the economic benefit from such investment activities. Yet, the existing legal framework as well as existing institutions were ill suited to accommodate new actors, keep up with the speed of market expansion and

address the potential negative impacts of these developments.<sup>5</sup> As a result, neither governments nor companies felt responsible for human rights abuses that occurred in the context of investment projects thus leaving the affected people in many cases without effective protection.

7 Since the 1970s all attempts of the international community to develop a framework which complements multinational companies’ economic and political power with corresponding binding responsibilities had failed. Not surprisingly, in a system of international law that is still substantially based on the Westphalian concept of sovereign states as the prime legal subjects, regardless of their impact on people’s lives, multinational companies cannot be accommodated easily.

8 The last proposal in this endeavour, the “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” tried to overcome the existing conceptual limits by legally binding *states* only while at the same time defining precise rules which as part of the state duty to protect should have been imposed on companies.<sup>6</sup> What was a well meant and – given the rigid framework of traditional international law – a logical approach, unfolded a whole matrix of problems: Why had only some

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4 Milton Friedman, *Capitalism and Freedom*, 1<sup>st</sup> edition 1962, Chapter VIII Social Responsibility and Labor. Emphasis by the author.

5 Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008, para. 104.

6 Economic, social and cultural rights: Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

human rights such as labour rights been included in the draft and not others? How could the sphere of influence which had to be established in order to hold companies responsible be defined?

9 In this difficult situation, Professor John Ruggie was entrusted with the mandate as Special Representative of the UN Secretary-General in 2005,<sup>7</sup> to essentially solve all of the remaining problems. Yet, the fact that the international community was not willing to accept companies as subjects of international law, which would have been a prerequisite to hold them legally accountable, had remained unchanged. Business associations such as the International Chamber of Commerce took a firm stand against the Draft Norms on an operational level,<sup>8</sup> although many multinational companies had started defining social policies that would include at least some human rights.

10 Based on these insights, John Ruggie eventually abandoned the traditional approach of strictly separating the realm of binding state obligations and voluntary corporate behaviour. The UN Human Rights Council followed his concept and adopted *The Protect, Respect and Remedy Framework* in 2008, followed by the complementary

<sup>7</sup> Based on Commission on Human Rights Resolution 2005/69, 20 April 2005; Renewal of the mandate by the Human Rights Council Res. 8/7, Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 18 June 2008.

<sup>8</sup> Joint views of the IOE and ICC on the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/NGO/44, 29 July 2003.

*Guiding Principles* in 2011.<sup>9</sup> It particularly recognized the Guiding Principles' role as a contribution to "socially sustainable globalization".<sup>10</sup>

### 3. The Relevance for ASEAN

#### a) A Change in Paradigm

11 The Guiding Principles are more than just another new UN instrument. Their particular strength lies in the fact that they are the result of six years of robust multi-stakeholder consultations, engaging an unprecedented variety of actors from the business community, to civil society organizations, employers and workers organizations, UN member states and international organizations.

12 With regard to ASEAN, a regional consultation took place in Bangkok in 2006.<sup>11</sup> The Philippines actively participated in a consultation of the Special Representatives

<sup>9</sup> Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008; *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011.

<sup>10</sup> Resolution adopted by the Human Rights Council at its 17<sup>th</sup> session, Human rights and transnational corporations and other business enterprises, A/HRC/Res/17/4, 6 July 2011, para. 4, at 2.

<sup>11</sup> Asian Regional consultation, held by the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, Bangkok, June 26-27, 2006. <http://www.reports-and-materials.org/Ruggie-Bangkok-consultation-report-26-27-Jun-2006.pdf>

with UN member states in 2010,<sup>12</sup> and the Malaysian Human Rights Commission, SUHAKAM, together with five other National Human Rights Commissions (NHRI) submitted an intervention in 2010.<sup>13</sup> In addition, civil society organisations from the region contributed to the shaping of the Guiding Principles.

13 At the core of the new UN instruments is the focus on the *interlinkages* rather than the differences between economic and social development. Other disciplines apply this approach in different ways: In international law, business responsibility has been part of a broader debate on the fragmentation of the international legal order,<sup>14</sup> while the discussion in economics is focussed on the concept of corporate governance<sup>15</sup> and creating shared value.<sup>16</sup> All these approaches have in common that they represent a

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12 Consultation with Member States on the Implementation of the UN “Protect, Respect and Remedy” Framework, Summary Note, 6 October 2010, <http://www.business-humanrights.org/media/documents/report-from-ruggie-govts-consultation-geneva-6-oct-2010.pdf>

13 Intervention on behalf of six NHRIs from Canada, Denmark, Malaysia, Korea, New Zealand and Venezuela following the Edinburgh conference, hosted by the Scottish Human Rights Commission on behalf of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) and the Office of the High Commissioner for Human Rights (OHCHR), Geneva, 12 October 2010, available at <http://www.business-humanrights.org/SpecialRepPortal/Home/Consultationsmeetingsworkshops/Multi-stakeholderconsultations/2010>.

14 Breining-Kaufmann, 97-107.

15 Andreas Georg Scherer, Guido Palazzo, Dirk Matten, *Globalization as a challenge for business responsibilities*, Business Ethics Quarterly, 19 (2009), 327-347.

16 The concept was first introduced in 2006 and significantly expanded in 2011: Michael E. Porter, *Strategy and Society, The Link between Competitive Advantage and Corporate Social Responsibility*, Harvard Business Review 84 (2006), 78-92; Mark R. Kramer, Michael E. Porter, Mark R. Kramer, *Creating Shared Value*, Harvard Business Review, 89 (2011), 62-77.

change in paradigm and react to a changing environment.

## b) “Principled Pragmatism”

14 Consequently, the Special Representative decided against developing new legal concepts and instead focused on the overall objective. What does the international community want to achieve? What does it mean for this goal that there is already an abundance of non-binding voluntary guidelines?

15 In essence, John Ruggie’s approach built on existing binding obligations for states and on the accepted ethical responsibility of companies. Substance is more important than form, in other words, form follows function.<sup>17</sup> The result is a farewell to “legal purism” and a very warm welcome to “principled pragmatism”.<sup>18</sup>

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17 Louis H. Sullivan, The tall office building artistically considered, Lippincott’s Magazine 57, March 1896, 403-409, printed in: Leland M. Roth, *America Builds: Source Documents in American Architecture and Planning*, New York 1983, 340-346.

18 Promotion and protection of human rights: Interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, E/CN.4/2006/97, 22 February 2006, para. 81.

#### 4. The Three Pillar Framework and the Guiding Principles

##### a) A first step in a journey which has just begun and a word of caution

16 Before engaging in a more detailed discussion of the Framework and the related Guiding Principles it is important to note that the essence of these instruments is rather on procedures than on substance. They do not re-define the content of human rights but instead develop a framework for implementing them in a business context. They are an important, yet only a first step on a journey that has just begun.

17 The UN human rights covenants impose a threefold set of obligations on states: a *duty to respect, protect and fulfil* human rights. While the duty to respect essentially requires the state to abstain from negatively interfering with human rights, the duty to protect and fulfil are of a positive nature as they call for concrete actions. It is the duty to protect which becomes most relevant with regard to business and human rights because it requires states to take the necessary measures for preventing human rights violations by third parties, including private actors such as businesses.

18 The first pillar of the “Protect, Respect and Remedy” Framework the *state duty to protect* human rights builds on these *existing legal obligations*. It requires states to prevent, investigate, redress and punish human rights abuses by private actors. State policies need to be coherent, both vertically among different levels of government such as in federal states, and horizontally among

different parts of government, for instance trade and foreign affairs departments.

19 The second pillar refers to the *corporate responsibility to respect* human rights. It does not build on existing legal obligations but on *perceived* corporate commitment not to contribute to human rights abuses.<sup>19</sup> Business is required to act with due diligence in order to avoid infringements of business activities on human rights. This implies compliance with national laws and respect of internationally recognized human rights.

20 Providing *access to remedy* for victims of human rights violations is a *shared responsibility* of states and businesses. This third pillar acknowledges the fact that access to formal judicial systems may be difficult for victims. It therefore includes non-judicial mechanisms and encourages states and business to explore such avenues.

##### b) Guiding Principles

21 Given the rather broad nature of the framework, the *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* which were unanimously adopted by the UN Human rights Council in 2011<sup>20</sup> provide further

<sup>19</sup> At the time of this writing, 302 companies with a human rights statement were listed on the Business and Human Rights Resource Center’s website: <http://www.business-humanrights.org/Documents/Policies>.

<sup>20</sup> Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011.

guidance to both states and businesses on the content of the three pillars. In addition, the Office of the High Commissioner for Human rights published an interpretative guide on “the corporate responsibility to respect human rights.”<sup>21</sup>

## 5. Relevant Developments for ASEAN countries

22 While opinions on the specifics of the new Framework may vary, it cannot be emphasised enough that for the first time in decades a consensus on a shared responsibility of states and business to implement human rights has been achieved. Accordingly, the Framework and the Guiding Principles have already been incorporated in the instruments of other international organisations. The key examples are the *OECD Guidelines for Multinational Enterprises*,<sup>22</sup> and the *Sustainability Framework of the International Finance Corporation*.<sup>23</sup>

23 Filling the Guiding Principles with concrete content requires a multi-dimensional joint

effort.<sup>24</sup> The UN Working Group on the Issue of Human Rights and Transnational Corporations which succeeded Professor John Ruggie, expects states to proceed in *three steps*: First to analyse the current state of affairs by *mapping* existing regulations, second to *identify* potential gaps or discrepancies with the Guiding Principles and third, based on steps one and two, to *develop* a country-specific *action plan*.

24 In the European Union the Commission issued a new *Corporate Social Responsibility Strategy* which calls on states and businesses to develop specific action plans for implementing the Guiding Principles in all their business activities, including in the ASEAN region.<sup>25</sup> According to the EU special representative for human rights, 19 out of 27 member states have already started to develop such action plans.<sup>26</sup>

25 At the international level, the Working Group calls on all UN organisations to mainstream the business and human rights

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21 The Corporate Responsibility to Respect Human Rights – an Interpretative Guide, New York/Geneva 2012.

22 OECD Guidelines for Multinational Enterprises, 2011 Edition, <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalemerprises/48004323.pdf>

23 International Finance Corporation, Sustainability Framework: Policy on Social and Environmental Sustainability, 2012, [http://www1.ifc.org/wps/wcm/connect/b9dacb004a73e7a8a273fff998895a12/IFC\\_Sustainability\\_+Framework.pdf?MOD=AJPERES](http://www1.ifc.org/wps/wcm/connect/b9dacb004a73e7a8a273fff998895a12/IFC_Sustainability_+Framework.pdf?MOD=AJPERES).

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24 Working Group member Alexandra Guáqueta talks about a “21<sup>st</sup> Century Governance Experiment”: Global Trends in the Implementation of the UN Guiding Principles on Business and Human Rights Remarks for the First UN Annual Forum on Business and Human Rights, 4 December 2012, <http://www.ohchr.org/EN/Issues/Business/Pages/StatementsduringForum.aspx>

25 A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM(2011) 681 final, 25 October 2011, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>.

26 Presentation by Stavros Lambrinidis at the First UN Forum on Business and Human Rights, 4 December 2012, <http://www.ohchr.org/Documents/Issues/Business/ForumSession1/SubmissionsStatements/StavrosLambrinidis.pdf>.

agenda into their activities.<sup>27</sup> The OECD and the IFC may serve as role models. The UN Treaty Bodies will play a particularly important role in further developing the Guiding Principles with regard to specific human rights.<sup>28</sup>

26 With regard to the business sector, pillar two of the Framework calls for concrete steps. Businesses are expected to develop a human rights commitment, assess their activities' impact on human rights and eventually include human rights into their daily business operations (due diligence). State guidance on what is expected from the business community will contribute to more efficient business policies.

27 All these developments, regardless of their geographical origin, are particularly relevant for the ASEAN region because it hosts numerous investment activities. Investments from OECD countries in ASEAN countries will have to follow the OECD Guidelines and therefore comply with some human rights obligations. The same is true for investors from the European Union. In addition, new initiatives such as the *EU-US Shared Principles on Investment* warrant attention because they contain a commitment to work towards expansion

27 Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights, Report of the Secretary General, 2 July 2012, A/HRC/21/21.

28 The Human Rights Committee recently interpreted the ICCPR in the light of the Guiding Principles by stating concrete obligations of member states vis-à-vis private companies: Concluding observations on the sixth periodic report of Germany, adopted by the Committee at its 106<sup>th</sup> session (15 October - 2 November 2012), 12 November 2012, CCPR/C/DEU/CO/6, para. 16.

of the OECD Guidelines on Multinational Enterprises beyond OECD members and their companies.<sup>29</sup>

28 In the interest of *coherence* and transparency, it is therefore essential for ASEAN countries to situate their own legal landscape with regard to business and human rights within these broader international developments.

29 In the same vein, it is noteworthy to point out that in some aspects ASEAN countries have taken the lead in implementing the Guiding Principles. In this respect, the Malaysian Stock Exchange is among the first<sup>30</sup> to have introduced reporting obligations for listed companies which include elements of Corporate Social Responsibility such as compliance with human rights standards.<sup>31</sup>

## 6. The Beginning of a Journey and the Road Ahead

30 The next years will be decisive in using the General Principles' momentum to advance the implementation of human rights in a business context. States, businesses as well as international organisations and civil society

29 Statement of the European Union and the United States on Shared Principles for International Investment, 10 April 2012, [http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc\\_149331.pdf](http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf)

30 Others are the Netherlands: Human Rights Council, Human rights and corporate law: trends and observations from a cross-national study conducted by the Special Representative, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Addendum, A/HRC/17/31/Add.2, 23 May 2011, para. 130.: the Hong Kong Stock exchange and the Bombay Stock Exchange: Sustainable Stock Exchanges Initiatives: <http://www.sseinitiative.org/>.

31 See Country report on Malaysia.

at large are equally called upon to act. States cannot delegate the issue to business but need to lead the process by setting clear standards and provide legal security. This is particularly relevant for ASEAN member states in their capacity as hosts for substantial international investment.

31 Filling the Guiding Principles with life requires a *three-step* approach as suggested by the UN Working Group: (1) *Map* the existing state of affairs, (2) *Identify* potential gaps with the Guiding Principles, (3) *Decide* on a national action plan.

32 This baseline study is a contribution to the mapping of existing legal provisions. It is hoped that it will thereby assist ASEAN country governments in their efforts to implement the Guiding Principles.

33 A comprehensive mapping will have to include the corporate responsibility to respect according to the second pillar of the UN Framework and thus non-binding instruments developed by the business sector and civil society to enhance human rights in a business context. CSR and human rights are at the heart of a study currently conducted by the ASEAN Intergovernmental Commission on Human Rights.<sup>32</sup> Ideally, both studies will complement each other in moving the business and human rights debate in the ASEAN region to the next level.

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32 <http://aichr.org/press-release/press-release-of-the-11th-meeting-of-the-asean-intergovernmental-commission-on-human-rights-aichr/>.

# **BUSINESS AND HUMAN RIGHTS IN ASEAN: A BASELINE STUDY**

## **SYNTHESIS REPORT**

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## ACRONYMS AND ABBREVIATIONS

AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
CLMV	Cambodia, Laos, Myanmar and Vietnam
CSR	Corporate Social Responsibility
EFTA	European Free Trade Association
EITI	Extractive Industries Transparency Initiative
ESG	Environmental, Social and Governance
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
<b>Guiding Principles</b>	United Nations Guiding Principles on Business and Human Rights
IFC	International Finance Corporation
ILO	International Labour Organisation
NHRI	National Human Rights Institution
MNC / MNE	Multi-National Corporation / Multi-National Enterprise
OECD	Organisation for Economic Co-operation and Development
OECD Guidelines	OECD Guidelines for Multinational Enterprises
OHCHR	Office of the High Commissioner for Human Rights
SOE	State-Owned Enterprise
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UN Framework	United Nations ‘Protect, Respect and Remedy’ Framework
UNSRSG	United Nations Special Representative to the Secretary General on the issue of human rights and transnational corporations and other business enterprises
WTO	World Trade Organization

## I. THE STUDY'S DESIGN

1. Our project focuses on the State's role in addressing what the United Nations has named "the issue of human rights and transnational corporations and other business enterprises."<sup>1</sup>
2. In Southeast Asia, some of the most pressing challenges in a business and human rights context include land acquisitions for development and corporate projects, such as by extractive, logging, manufacturing and real estate companies, which have sometimes given rise to violence, the displacement of people with no provision for alternative livelihoods or housing, and adverse social impacts particularly affecting indigenous communities. Allegations of land rights abuses make up the majority of complaints received by national complaints mechanisms in Cambodia, Lao PDR and Myanmar. The severity of the problem is illustrated by the fact that the governments of Cambodia and Lao PDR have issued moratoriums on land concessions. Serious forms of labour abuse and exploitation occur in certain parts of the region. Migrant labour abuse and trafficking, particularly affecting women and children, are of concern in all ASEAN countries.<sup>2</sup> Civil society and affected locals have raised their voices against, for example, in Cambodia, a dredging business in Koh Kong province; in Lao PDR, the management of toxic waste from chemical plants and factories; in Malaysia, the proposed construction of an advanced materials plant by Lynas and the construction of twelve hydroelectric dams in the state of Sarawak; and in Vietnam, the implementation of resettlement and post-resettlement plans in relation to the Hoabinh hydropower dam, to name a few.
3. This study focuses on the first pillar of the UN Framework, the State duty to protect. The State's role is fundamental: markets and economic actors function within and have their behaviour shaped by rules, customs and institutions, even in the case of "free markets" and the "rational" economic actor. These rules, customs and institutions, such as those relating to ownership and the corporate form, are often assumed and go unnoticed, yet are the foundations of the market.<sup>3</sup>
4. This study follows the lead of the UN Framework and Guiding Principles. Its findings can be understood through the lens of the following six themes:
  - (i) **Regulatory Capacity**

Regulation is as much about the enforcement of laws as it is about the laws themselves. This theme directs attention to gaps between laws on the books, and their actual realisation. Such gaps may be the result of weak technical capacity, corruption, and, in the case of transposed legal and judicial reforms, possible misalignments between the laws and regulations enacted, the judicial and executive institutions that are to support them, and their reception and internalisation by surrounding society.<sup>4</sup> This study has hence given attention to both the state of play of regulation and regulatory enforcement in ASEAN countries.

<sup>1</sup> Report of the UNSRSG to the Human Rights Council, "Protect, Respect and Remedy: A Framework for Business and Human Rights, A/HRC/8/5, 7 April 2008, at paras. 2 and 3.

<sup>2</sup> Human Rights Resource Centre, *Violence, Exploitation and Migration affecting Women and Children in ASEAN: A Critical Literature Review* (upcoming publication).

<sup>3</sup> David Kennedy, "Laws and Developments," *Law and Development: Facing Complexity in the 21<sup>st</sup> Century. Essays in honor of Peter Slim*, Hatchard and Perry-Kessarid ed., (Cavendish Publishing Ltd, 2003) at 20 ("de Soto rightly turns our attention to the background norms and institutions of ownership, exchange, money, security, risk, corporate form and so forth. Everything in a market is built on the back of norms, norms which remain, for the most part, in the background.")

<sup>4</sup> Trubek and Galanter, *Law and Society. Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 3 *Wisconsin Law Review* 720 (1972) at 1080 ("The Ethnocentric and Naïve Aspects of the Model of Law in Society"); Scott Newton, "The Dialectics of Law and Development," *The New Law and Economic Development. A Critical Appraisal*, Trubek and Santos ed., (Cambridge University Press 2006), at 194 ("Critique from Context").

### **(ii) The Corporate Form**

The corporate form, in all its variations, presents unique regulatory challenges. Some relevant features that may be found in corporate forms are, first, the corporation's separate legal personality, second, the legal and practical distinction between owners of a corporation and the directors and managers who run it; third, the diffusion of ownership among stockholders, especially in publicly-traded corporations; and fourth, the legal capacity of a corporation to own stock in other corporations. These give rise to challenges in balancing decision-making powers and attributing responsibility within and to a corporate entity, and among related corporate entities. This study was hence designed to spur critical analysis of these issues by examining existing principles of liability for corporations and their owners, directors and managers.

### **(iii) The Corporate Purpose**

This study does not propose a new framework for re-writing corporate policy choices, but builds on the UN Framework and Guiding Principles by canvassing the existence in ASEAN of regulatory tools that open spaces for influence by investors and consumers, such as corporate reporting and stock exchange indices; use soft law approaches such as guidance, awards and incentives; or leverage on business relationships, such as through financial institutions.

### **(iv) Global Economic Systems**

Regulatory decisions by States to encourage equitable income distribution<sup>5</sup> and protect social and environmental concerns, have been resisted by foreign investors, who invoke international investment treaties and laws, or investor-State contracts, or lobby their governments to bring

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5 E.g. South Africa's black empowerment laws were challenged by a European mining company in the case of *Piero Foresti, Laura De Carli and others v. Republic of South Africa* (International Centre for Settlement of Investment Disputes, Case No. ARB (AF)/07/1).

WTO challenges. The apparent potential conflict between the global systems of trade and investment law on one hand, and social justice on the other, has given rise to attacks by civil society on these systems and their institutions,<sup>6</sup> and a view that these systems now face a "legitimacy crisis."<sup>7</sup>

The Guiding Principles urge States to maintain adequate domestic policy space when entering into international economic obligations.<sup>8</sup> This study hence looked into what ASEAN States have done, when entering into free trade agreements and investment treaties and contracts, to maintain adequate domestic policy space to effect social purposes and benefits.

### **(v) Access to Remedies**

The growing significance of "access to justice"<sup>9</sup> can be understood as part of efforts to advance public participation in and democratise economic processes. In addition, there are pragmatic reasons for placing importance on the need for access to remedies. First, access to remedy is seen by the UN Framework and Guiding Principles as necessary to render meaningful the State's duty to investigate, punish and redress business-related human rights abuse.<sup>10</sup> On this view, complaints and suits by individuals and communities are akin to enforcement action

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6 Fred Block, "Introduction", in Karl Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time*, (Beacon Press, 2001 ed.), at xxxviii.

7 Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" 60 *International and Comparative Law Quarterly*, 573-596 (2011) at 575.

8 Guiding Principle 9 and accompanying commentary.

9 E.g. The World Bank has begun to focus on "access to justice" and support of direct efforts to empower advocates for the poor and other "unrepresented interests": Trubek and Santos, "Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice," *The New Law and Economic Development. A Critical Appraisal*, Trubek and Santos ed., (Cambridge University Press 2006), at 13.

10 Guiding Principle 25 and accompanying commentary; Report of the UNSRSG to the Human Rights Council, "Protect, Respect and Remedy: A Framework for Business and Human Rights," A/HRC/8/5, 7 April 2008, at para. 26.

complementing State prosecutorial mechanisms. Second, corporate-level non-judicial grievance mechanisms are beneficial to companies as they can deal with issues before they escalate and give rise to major campaigns or lawsuits.<sup>11</sup> This study has sought to map existing State-based judicial grievance mechanisms, and also given attention to State action to facilitate non-State-based grievance mechanisms.

*(vi) The Transnational Dimension*

The UN Framework and Guiding Principles bring into focus the transnational dimension of the business and human rights problem by highlighting the following issues:

*(a) Transnational business operations:* The Guiding Principles urges States to “set out clearly the expectation that businesses respect human rights abroad,” through direct extraterritorial regulation or domestic measures with extraterritorial effects.<sup>12</sup> They also draw particular attention to the role of home States (i.e. the national territory or jurisdiction where a corporation is domiciled) play in ensuring business respect in high-risk and conflict-affected areas.<sup>13</sup> This study has accordingly looked into what ASEAN States are doing as home States to foster business respect for human rights abroad, including subsidiaries operating overseas.

*(b) Transnational access to remedies:* The former UNSRSG has described available grievance mechanisms as a “patchwork” spanning “different levels of the international system, with different constituencies and processes.”<sup>14</sup> Gaps in this “patchwork”

inevitably arise due to the boundaries of national jurisdiction, weak or non-functioning national judicial systems, and a lack of awareness of available recourse. This study has hence given attention to cases that have sought to invoke cross-border avenues of recourse.

## II. METHODOLOGY, SOURCES AND LIMITATIONS

5. This baseline survey aims to provide a “lay of the land” overview of how the State duty to protect is manifesting itself in the ASEAN region. Its coverage is broad: the research questionnaire disseminated to each country researcher was formulated using the first and third pillars of the UN Guiding Principles, reports and surveys conducted by the UNSRSG, and relevant submissions to the UNSRSG. Adopting a broad research inquiry that spanned all Guiding Principles relating to the first and third pillars allowed the six key themes identified above to be reflected in our findings. The questions were framed broadly, to allow for a wide range of information to be collected, and for diversity in country contexts, such as political organisation and legal cultures, to be taken into account. The questionnaire is annexed as Annex A.
6. For uniformity and ease of referencing, researchers presented their research as answers to the questionnaire, adopting the questionnaire’s structure. Based on the information collected in the country reports, the relevant issues for Southeast Asia were crystallised and more precisely defined. The synthesis report’s content and structure reflects these crystallised issues.
7. We relied primarily on accessible sources such as publicly available legislation, official government data and statements, judicial decisions, and reports by credible third parties. In some cases, researchers were able to obtain information

<sup>11</sup> Business Ethics, *Business and Human Rights: Interview with John Ruggie*, 30 October 2011, at <http://business-ethics.com/2011/10/30/8127-un-principles-on-business-and-human-rights-interview-with-john-ruggie/>.

<sup>12</sup> Guiding Principle 2 and accompanying commentary.

<sup>13</sup> Guiding Principle 7, and accompanying commentary.

<sup>14</sup> Report of the UNSRSG to the Human Rights Council, “*Protect, Respect and Remedy: A Framework for Business and Human Rights*, A/HRC/8/5, 7 April 2008, at para. 102.

from written communications with officials or relevant organisations. Constraints were faced particularly in relation to ASEAN States where public databases, such as on court cases and investment agreements, are few, or completely absent. From this perspective, this study may be understood as a “baseline”: for further in-depth empirical research guided by its findings.

8. The fact that governmental policies may exist but are not made known publicly is an important qualifier in relation to all findings on whether or not ASEAN States are taking steps to address certain issues.
9. Finally, as we did not have a researcher for Brunei, a survey and analysis of the state of play of the State duty to protect in Brunei could not be conducted. Nevertheless, a list of potentially relevant laws of Brunei has been included as an annex, and relevant statistics on Brunei are included in this synthesis report.

### III. SUMMARY OF KEY FINDINGS

10. This summary of key findings uses the six themes delineated above as an analytical framework.<sup>15</sup> The main body of this synthesis report, on the other hand, organises findings according to the framework of the Guiding Principles, in order to track the research framework used in the country reports.

#### A. Regulatory Capacity

- *Challenges to regulatory effectiveness are, according to the World Bank Group’s Worldwide Governance Indicators, experienced in all ASEAN countries to varying degrees, and are particularly serious in the CLMV countries.*

- *These challenges have manifested themselves in, among other issues, the execution, monitoring and enforcement of regulatory requirements relating to environmental and social impact assessments. All ASEAN States have mandatory requirements for such assessments, although in Singapore such assessments are not mandated as a matter of course.*
- *Reported causes include a lack of implementation mechanisms, technical capacity and resources, inadequate awareness of relevant regulations, problems with central-local government coordination, pro-investment attitudes and policies that incentivise lax enforcement by local governments, and public corruption.<sup>16</sup>*
- *Reforms involving a considerable number of national laws relating to economic and social objectives, such as labour, investment and environmental protection laws, have taken place at a relatively intensive pace in certain ASEAN countries, such as Indonesia, Lao PDR, Myanmar and Vietnam. The ability of implementation and enforcement capacity to keep pace with law reforms might be another reason for gaps between laws and their realisation.*

- *In relation to combating public corruption:*
  - All ASEAN States have ratified the United Nations Convention against Corruption (UNCAC), which requires State parties to take measures to establish the civil, criminal or administrative liability of legal persons for participation in offences under the said convention.
  - Although corporate criminal liability for corruption is arguably unnecessary for compliance with the UNCAC, it is worth noting that, according to the Philippines and Vietnam Reports, laws in these countries do

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<sup>15</sup> See Section I, THE STUDY’S DESIGN, at 4, para. 6.

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<sup>16</sup> A comprehensive mapping of weaknesses in regulatory enforcement and their underlying causes in each country was outside the scope of this study.

not impose criminal liability on corporations for corruption. According to the Malaysia Report, offences under Malaysia's anti-corruption law, while arguably applicable to corporations, have yet to be enforced against any corporation in Malaysia.

- Uptake of the principles of the Extractive Industries Transparency Initiative (EITI) has been relatively low among most ASEAN countries with extractive resources but seems to be a priority for Myanmar.<sup>17</sup>

## B. Regulatory Methods to Suit The Corporate Form

- *All ASEAN countries apply the legal concept of "separate legal personality" in respect of certain business vehicles, commonly corporations. Statutory or judicially-created exceptions to this legal concept do exist to hold owners and/or managers of a corporation accountable in limited circumstances.*<sup>18</sup>
- *Vietnam is the only ASEAN country that applies criminal liability to only natural persons, and not to corporate entities with separate legal personality; corporations may nevertheless face administrative sanctions.*<sup>19</sup>

<sup>17</sup> As of 28 February 2013, Indonesia is an EITI candidate and is working towards its first EITI report, the Philippines has endorsed the EITI with some progress towards candidate status, Myanmar applied for EITI membership and reaffirmed its commitment to implement EITI <http://eiti.org/news-events/myanmar-reaffirms-intention-implement-eiti#>. and Cambodia, Lao PDR and Vietnam are in dialogue with EITI-associated agencies; Brunei is classified as an "extractive resource-rich country" not yet part of the EITI. EITI, International Secretariat, Workplan 2013, Oslo 20 November 2013. <http://eiti.org/files/EITI-Secretariat-Work-plan-and-Budget-2013.pdf>

<sup>18</sup> Canvassing such exceptions was not included as part of our research inquiry. Nevertheless, the existence of such exceptions in Malaysia, Philippines and Singapore was mentioned by the reports for these countries.

<sup>19</sup> Vietnam's National Assembly has in its legislative program for 2011 to 2016 made it a priority item to consider the enactment of criminal liability provisions for legal persons: Vietnam Report, Section III.2.1.1.

- *In relation to attributing individual responsibility for corporate wrongs:*

- Legal principles and concepts have been developed in some ASEAN countries to impose fault-based<sup>20</sup> criminal or civil liability on owners, directors, managers or other officers of companies for corporate wrongs. A diverse range of concepts are used by different countries to define the nature of the fault required to trigger responsibility, such as wilfulness, negligence, bad faith, consent, connivance, knowing authorisation, knowing permission, and failure to prevent. Even where similar or identical terms or phrases are used, the applicable standards would likely vary among countries.
- The legal principles on liability can take the form of defences, where an owner, director, manager or other officer will be held liable unless s/he can prove a defence applies. Defences based on the concept of due diligence have been employed, for example, in the Philippines, to impose general civil liability, and under Malaysia's anti-trafficking and anti-terrorism penal laws.
- It is common for the bases for attribution of liability to be different for owners / shareholders on one hand, and directors, managers or other officers on the other, although under some laws, the same bases for attribution apply to both.

## C. Shaping Corporate Purposes and Influencing Corporate Cultures

The following are examples of regulatory tools found in ASEAN countries that may open space for the shaping of corporate purposes, and influence corporate cultures respectful of human rights:

<sup>20</sup> The existence of strict liability for offences relevant to the intersection of business and human rights was not specifically investigated by this study.

- **Guidance that may shape corporate purposes:**

- Indonesia's 2006 General Guidelines on Good Governance refer to a corporate duty to care for society and the environment surrounding business operations.<sup>21</sup>
- Singapore's 2011 Guidebook for Directors encourages companies to "take into consideration and manage the impact of its activities on the environment, stakeholders and the community as a whole," and to consider public interest and concern for the environment in tandem with economic profit generation, as these are key parts of risk management and value creation.<sup>22</sup>
- The Stock Exchange of Thailand's 2006 Principles of Corporate Governance encourages listed corporations to "thoroughly consider matters which directly affect the business operation in order for the stakeholders to be assured that the business operation of the company takes into account the aspects on environment and the society for sustainable development."<sup>23</sup>

- **Due diligence-related tools:**

- Corporations may be required to conduct prescribed due diligence before they may be granted regulatory approvals or licenses. For example, all ASEAN States, except Singapore,<sup>24</sup> require environmental and/or social impact assessments to be conducted as a matter of course before certain project or business licenses will be granted.

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21 Indonesia Report, Section III.5.2.

22 Singapore Report, Section III.4.1.5.

23 Thailand Report, Section III.4.3.

24 In Singapore, studies on environmental pollution control and related matters may be required only for projects that, in opinion of the relevant authority, are "likely to cause substantial pollution of the environment or increase the level of such pollution": Article 36 of the Environmental Protection and Management Act (Cap. 94A).

- As one example of the use of binding norms of "due diligence" to prevent adverse social and environmental consequences, Singapore holds principal contractors of construction sites liable for the commission of pollutive offences by others, unless they can prove they had exercised due diligence to prevent the commission of such offences.

- **Binding CSR obligations:**

- In a novel and innovative step, Indonesia's 2007 Corporate Law, and accompanying regulation, bind companies to comply with their "social and environmental responsibilities." For companies doing business relating to natural resources, compliance is mandatory and non-compliance attracts sanctions. For companies doing business unrelated to natural resources, non-compliance does not attract any sanctions, but compliance will be rewarded with incentives.<sup>25</sup>

- **Use of "corporate culture" to impose liability:**

- None of the country reports identified the use of "corporate culture" to impose statutory corporate liability.<sup>26</sup>

- **Tools requiring or encouraging communication of actual or potential adverse impacts to affected, or potentially affected,**

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25 Indonesia Report, Section III.2.2 (citing Article 74 of the 2007 Corporate Law, and noting that difficulties are being faced in the implementation of the law).

26 At the request of the former UNSRSG, research was conducted into the use of corporate criminal liability based on "organizational liability", which is concerned with "corporate policies, procedures, practices and attitudes; deficient chains of command and oversight; and corporate 'cultures' that tolerate or encourage criminal offences." In Australia, for example, statutory provisions provide for organizational liability in relation to federal offences, including on the basis of "corporate culture": Allens Arthur Robinson, *Corporate Culture as a Basis for the Criminal Liability of Corporations*, (Report prepared for the UNSRSG), February 2008.

**individuals and communities:**<sup>27</sup>

- Requirements for public consultations to be held and/or information to be disclosed in the conduct of environmental and/or social impact assessments are found in the laws of Cambodia, Indonesia, Lao PDR, Malaysia, the Philippines, Thailand, and Vietnam. The extent of public participation and information disclosure required, and whether they apply generally or to specific sectors, varies across laws and countries. Of note are Thailand's legislation, which "affirms the rights and liberties of a person to include the rights to be informed of information concerning the enhancement and the promotion of environmental quality," and identifies twenty groups of stakeholders that must be given the opportunity to participate, and four different levels of participation, in the EIA process. Singapore's laws do not require public participation or public disclosure of information in the EIA process.<sup>28</sup>
- There are corporate governance tools to foster norms of communicating social impacts to affected stakeholders. The Philippines Revised Code of Corporate Governance requires directors of corporations covered by the said code to identify sectors in the community in which the corporations operate or are directly affected by their operations, formulate a clear policy of accurate, timely, and effective communication with them, and formulate a policy of communication between their corporations and communities directly affected by their operations.<sup>29</sup> Also,

<sup>27</sup> See Commentary to Guiding Principle 3 ("Communication by business enterprises on how they address their human rights impacts can range from informal engagement with affected stakeholders to formal public reporting. State encouragement of, or where appropriate requirements for, such communication are important in fostering respect for human rights by business enterprises. ...")

<sup>28</sup> See para. 77 below for this paragraph's references.

<sup>29</sup> Philippines Report, Section III.4.

Thailand's stock exchange has through its 2006 Principles on Corporate Governance for Registered Companies encouraged listed companies to disclose "relevant important information" to all stakeholders so that they may "more effectively participate in the operations of the company, to promote its sustainable stability."<sup>30</sup> These could very well be construed as including human rights impacts.

- **Formal corporate reporting of social and environmental impacts:**<sup>31</sup>

- Indonesia and the stock exchange of Malaysia have employed mandatory annual CSR reporting. Singapore's stock exchange has issued formal guidance to encourage sustainability reporting and the adoption of the Global Reporting Initiative Sustainability Reporting Guidelines and its Sector Supplements for specific industries.

- **ESG indices:**

- An environmental, social and corporate governance index is scheduled to be launched by *Bursa Malaysia* in 2013.<sup>32</sup>

- **Regulation of commercial relationships to prevent indirect support for or involvement in human rights-related abuses:**

- All ASEAN States, except Lao PDR, have, pursuant to their obligations under the International Convention on the Suppression of the Financing of Terrorism, enacted laws requiring financial institutions and law firms to conduct "know your client" procedures to ensure they do not service customers involved in these crimes, and to report suspicious

<sup>30</sup> Thailand Report, Section III.4.3.

<sup>31</sup> See paras. 37 to 37 below.

<sup>32</sup> [http://www.btimes.com.my/Current\\_News/BTIMES/articles/esg/Article/](http://www.btimes.com.my/Current_News/BTIMES/articles/esg/Article/).

transactions.<sup>33</sup>

- The Philippines' Anti-Child Pornography Act of 2009 imposes obligations to report the commission of child pornography acts on a range of relevant businesses, such as internet service providers, mall owners/operators, owners or lessors of other business establishments including photo developers, information technology professionals, credit card companies and banks.<sup>34</sup>

- **Incentives, awards, forums and guidance:**

- Financial and tax incentives are commonly used by ASEAN States, including in relation to the environment, labour, and persons with disabilities. Also common are awards for CSR practices or issue-specific practices such as workplace health and safety and the environment, as well as the issuance of operational guidance to businesses on compliance with labour obligations.
- CSR coordination forums led by local governments have been established in Indonesia.<sup>35</sup>

- **Tools applicable to business activities within the State-Business nexus:**

- *State-owned or controlled enterprises:* Indonesia and Malaysia have enacted regulations to encourage State-owned or controlled enterprises to undertake socially responsible operations or activities.<sup>36</sup> Also, Indonesia has used independent State-based monitoring mechanisms to investigate

alleged business-related human rights abuses by its State-owned or controlled companies.<sup>37</sup> Thailand's laws regulating State-owned enterprises safeguard labour rights,<sup>38</sup> and regulations in Vietnam provide for the implementation by SOEs of environmental protection obligations.<sup>39</sup>

- *State support and services for private businesses:* The country reports did not find information on State action relevant to this issue. ASEAN States may not be using the opportunity created when they provide support and services such as export credits, investment guarantees and other financial incentives, to encourage business enterprises to respect human rights in their operations.
- *Public procurement:* Based on the findings of the country reports, laws and regulations that seek to prevent adverse impacts in public procurement tend to relate to environmental protection, and not broader social impacts.
- *Privatisation of public services:* Vietnam has issued decrees and circulars requiring State-owned or controlled companies to ensure that labour rights are respected during the privatisation process, and to monitor compliance with obligations to respect labour rights after privatisation.<sup>40</sup> Indonesia's regulations governing private water service providers set out principles for determining price, including fairness.<sup>41</sup> Some country reports observed that issues of equitable distribution such as accessibility and affordability, tended not to be regarded as matters to be specifically regulated by

33 <http://www.anti-moneylaundering.org/asiapacific/asia.aspx>.

34 Philippines Report, Section III.2.2.

35 Indonesia Report, Section III.8.1.

36 Indonesia Report, Section III.6.1, citing the 2011 Regulation of the Ministry of State-owned Enterprises No. PER.01/MBU/2011; Malaysia Report, Section III.6.1, citing the Silver Book for Government-Linked Corporations (GLC) issued by the Putrajaya Committee on GLC High Performance.

37 Indonesia Report, Section III.1, referring to the Ombudsman and Corruption Eradication Commission.

38 Thailand Report, Section III.6.1.

39 Vietnam Report, Section III.6.1.

40 Vietnam Report, Section III.6.3.

41 Indonesia Report, Section III.6.3, citing Article 60 of the 2005 Government Regulation No. 16 on the Drinking Water Supply Systems.

statutory laws.<sup>42</sup>

- **Tools applicable in conflict-affected or high-risk areas:**
  - ASEAN States, as home States, do not seem to have taken measures to specifically address the situation of conflict-affected or high-risk areas.
  - The Thailand Report points to measures taken by Thailand to alleviate poverty along its southern border, where violent ethnic/religious tensions exist, as a means of solving the underlying conditions of poverty that may be supporting the conflict. Indonesia has issued guidelines to its national police in respect of their activities in providing security to extractive companies, which include as an element respect for human rights.<sup>43</sup> The Philippines has adopted the Guidelines on the Conduct of the Department of Labour and Employment and the Departments of Interior and Local Government, Justice, and National Defence, Armed Forces of the Philippines, and the Philippine National Police Relative to the Exercise of Workers' Rights and Activities, which safeguard workers' rights to freedom of association and related rights.<sup>44</sup> In these countries, extractive industries have operations in conflict-affected or high-risk areas. Also, labour strikes may escalate into high-risk situations.

42 Indonesia Report, Section III.6.3; Singapore Report, Section III.6.3.

43 Indonesia Report, Section III.5.2, citing the Guidelines on Joint Security Measures for the Upstream Oil and Gas Activities adopted by the recently dissolved BP Migas and the Indonesian police.

44 Philippines Report, Section III.8.1.

## D. Global Economic Systems

- *All ASEAN States, are members of the WTO.*
- *The trade-related chapters of ASEAN's FTAs usually contain general exceptions, similar to Article XX of the GATT and Article XIV of the GATS, that may preserve a State's discretion to apply regulatory measures for certain social and environmental purposes. Exceptions that may preserve a State's discretion to apply regulatory measures necessary to protect public morals, maintain public order, and protect human, animal, or plant life or health, among other things, are also found in the ASEAN-China Investment Agreement, the ASEAN Comprehensive Investment Agreement and the investment chapter of the ASEAN-Korea FTA.*
- *A number of ASEAN States' bilateral investment treaties and economic partnership agreements preserve the right of the State to take regulatory measures directed to the protection of its essential security interests, or the protection of public health and prevention of diseases etc.<sup>45</sup>*
- *With regard to human rights in trade and investment agreements:*
  - The 2002 EFTA-Singapore FTA has the distinction of being one of the few FTAs, if not the only one, in Southeast Asia, to make express reference to "universal human rights" principles.

45 E.g. Singapore-Jordan, Singapore-China, Singapore-Vietnam, Singapore-Pakistan, Singapore-Czech Republic, Singapore-Mongolia, Singapore-Egypt, Singapore-Mauritius and Singapore-Cambodia BITs: Mahnaz Malik, *South-South Bilateral Investment Treaties. The Same Old Story?*, Annual Forum for Developing Country Investment Negotiators, Background Papers, New Delhi, October 27-29, 2010, at 3; also, the Vietnam-Japan Economic Partnership Agreement, and the Indonesia-Japan Economic Partnership Agreement (this list is not exhaustive).

- Provisions supporting labour rights standards are found in the US-Singapore FTA and the Memorandum of Understanding on Labour Cooperation of the Trans-Pacific Strategic Economic Partnership Agreement among Chile, New-Zealand, Singapore and Brunei Darussalam (not exhaustive).
- The Thai NHRI's human rights impact assessment of the Thai-US FTA in 2006 is widely reported to be the first such assessment of an international trade agreement.<sup>46</sup> Malaysia's NHRI is reportedly considering conducting such an assessment of trade agreements that are under negotiation by Malaysia.<sup>47</sup>

## E. Access to Remedies

### • State-based grievance mechanisms:

- State-based grievance mechanisms in ASEAN include tiered court systems in all ASEAN States; specialised courts such as industrial, labour and consumer courts; non-judicial mechanisms such as arbitral tribunals and mediation centres dealing with issues such as labour and land disputes; complaints channels at government agencies; informal or community-based grievance mechanisms; and customary grievance mechanisms for indigenous communities.
- Mechanisms for recourse against State conduct, such as judicial review, and State-based monitoring mechanisms such as ombudsman offices, have been used to address

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<sup>46</sup> A draft report appears to have been circulated at the time, but a copy does not appear to be publicly accessible: [http://www.bilaterals.org/spip.php?page=print&id\\_article=7012](http://www.bilaterals.org/spip.php?page=print&id_article=7012) and <http://www.twinside.org.sg/title2/twninfo492.htm>; see also, Berne Declaration, Canadian Council for International Co-operation & Misereor (2010). Human Rights Impact Assessment for Trade and Investment Agreements. Report of the Expert Seminar, June 23-24, 2010, Geneva, Switzerland.

<sup>47</sup> <http://www.twinside.org.sg/title2/FTAs/info.service/2012/fta.info.200.htm>.

business-related human rights abuses.

- The Philippines has pioneered innovations relating to access to remedies. New measures to address environmental harm and preserve the constitutional right to a balanced and healthful ecology, include the designation of “green courts”, the creation of environmental protection orders and legal mechanisms such as environmental citizen suits.
- **State action to facilitate non-State-based grievance mechanisms:**
  - Examples of State laws or guidelines for corporate-level grievance mechanisms include the Philippines' laws requiring companies to establish ADR systems to settle intra-corporate disputes and disputes with third parties, and committees to investigate sexual harassment complaints. Also, Myanmar's 2011 Trade Dispute Act requires companies to establish workplace coordinating bodies to receive complaints from employers and workers.
  - Indonesia, Malaysia, the Philippines, and Thailand have statutorily empowered their NHRIs to receive and address complaints, including regarding business-related human rights abuses.
- **Non-State-based grievance mechanisms:**
  - The NHRIs of Indonesia, Malaysia, the Philippines and Thailand, as well as the national human rights bodies of Cambodia and Myanmar,<sup>48</sup> have all received and dealt with complaints of business-related human rights abuses.

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<sup>48</sup> The national human rights bodies of Cambodia and Myanmar do not appear to have founding legislation, and are not accredited by the UN International Coordinating Committee of National Institutions: <http://nhri.ohchr.org/EN/Pages/default.aspx>.

- As no ASEAN country is an OECD member, there are no OECD National Contact Points in the ASEAN region. Nevertheless, National Contact Points may play a role when settling disputes between foreign investors and ASEAN countries.<sup>49</sup>

## F. The Transnational Dimension

- *A noteworthy aspect of this dimension is that transnational economic activity within ASEAN is significant. Further, based on NGO reports and complaints to the World Bank Compliance Advisor Ombudsman, reported cases of business-related harm in ASEAN countries have involved corporations from other ASEAN countries.*

- **Transnational business operations:**

- With regard to direct extraterritorial regulation, the anti-trafficking,<sup>50</sup> anti-terrorism,<sup>51</sup> and anti-corruption laws<sup>52</sup> of some ASEAN States cover acts committed outside their territories. The Philippines' penal laws, on the other hand, generally do not apply to crimes committed outside the territory.<sup>53</sup>
- With regard to domestic measures applicable to overseas activities, Malaysia's stock exchange, according to the Malaysia Report, appears to require all public listed companies to disclose CSR activities and practices undertaken not only by them but also

their subsidiaries.<sup>54</sup> Also, Singapore's 2011 Guidebook for Directors calls for businesses to consider "cultural and business impacts especially when conducting business in a foreign environment" and states that "this also entails respecting and observing fundamental human rights in all aspects of operations."<sup>55</sup>

- **Transnational access to remedies:**

- A relevant case involving the use of a judicial forum is a complaint filed by Thai villagers before the Thai Administrative Court, seeking the cancellation of a Thai government agreement to purchase power from the Xayaburi dam in Lao PDR.<sup>56</sup>
- The NHRIs of Thailand and Indonesia have accepted complaints in relation to human rights abuses overseas. In particular, the Thai NHRI's investigation of a complaint against a Thai-owned sugar company allegedly involved in human rights abuses in Cambodia was described by the UN Special Rapporteur on the situation of human rights in Cambodia as "a success in transboundary human rights promotion and protection," and "a landmark case for international advocacy."<sup>57</sup>
- The World Bank Compliance Advisor Ombudsman has received complaints of business-related human rights abuses in Cambodia and Indonesia involving companies from, among others, Cambodia, Indonesia, the Philippines, Singapore and Thailand.<sup>58</sup>

49 For example the Final statement of the Norwegian National Contact Point in the Intex case, concerning the Mindoro Nickel project in the Philippines: [http://www.regjeringen.no/upload/UD/Vedlegg/ncp/intex\\_final.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/ncp/intex_final.pdf).

50 Malaysia and Thailand's anti-trafficking laws: Malaysia Report, Section III.2.2, and Thailand Report, Section III.2.2.

51 Malaysia's anti-terrorism law: Malaysia Report, Section III.2.2.

52 Malaysia and Singapore's anti-corruption laws: Malaysia Report, Section III.2.2, and Section 37 of the Singapore Prevention of Corruption Act (Cap. 241).

53 Philippines Report, Section III.2.2.

54 Malaysia Report, Section III.4.3.

55 Singapore Report, Section III.4.1.

56 <http://www.businessweek.com/news/2012-08-07/thai-lawsuit-threatens-to-derail-laos-plans-for-mekong-river-dam>.

57 *Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi. A human rights analysis of economic and other land concessions in Cambodia*, Human Rights Council, 21<sup>st</sup> Session, 24 September 2012, at para. 195.

58 [http://www.cao-ombudsman.org/cases/default.aspx?region\\_id=1](http://www.cao-ombudsman.org/cases/default.aspx?region_id=1).

- OECD National Contact Points received submissions concerning investment projects in ASEAN countries.<sup>59</sup>

## G. Other Findings

### • Role of stock exchanges and securities regulators:

- All ASEAN States except Brunei and Myanmar have stock exchanges; the stock exchanges of Lao PDR and Cambodia were established recently. Stock exchange and securities regulators have the potential to open space for market pressures to positively influence corporate cultures. The issuance of guidance and principles, reporting requirements, and ESG indices by the stock exchanges and relevant regulators in Indonesia, Malaysia, Singapore and Thailand are examples of such action.

### • Role of NHRIs:

- Besides investigating complaints of business-related human rights abuses, the NHRIs of Indonesia, Malaysia, the Philippines and Thailand have also been involved in activities relating to the UN Framework.

### • UN Global Compact:

- UN Global Compact local networks have been established in all ASEAN countries, save Brunei and Lao PDR.<sup>60</sup> A Lao PDR government official recently stated, in March 2012, that it was timely to establish a framework for CSR through a National

Compact.<sup>61</sup>

### • Indicators of ASEAN States' attitudes towards their duty to protect:

- Among ASEAN States, Indonesia has responded most overtly and positively to the UN Framework and Guiding Principles.<sup>62</sup>
- Recognition of duties of the State to protect certain rights and interests of the people is found in the constitutional instruments and laws of Indonesia, Lao PDR, the Philippines, Myanmar and Vietnam.

## IV. THE STATE DUTY TO PROTECT AS IT MANIFESTS IN THE ASEAN REGION

### A. Overview of Challenges in Southeast Asia at the Intersection of Business and Human Rights

11. Southeast Asia is an actively developing region of international significance. Except for Singapore, all ASEAN countries are developing countries according to the International Monetary Fund<sup>63</sup> Three ASEAN countries are “least developed countries”, namely, Cambodia, Lao PDR and Myanmar.<sup>64</sup> Myanmar’s situation is particularly challenging given its recent reforms to attract foreign investment.<sup>65</sup> The region is highly attractive to transnational corporations, with Indonesia, Thailand, Vietnam and Malaysia all ranked among the top twenty prospective

59 For example the Final statement of the Norwegian National Contact Point in the Intex case, concerning the Mindoro Nickel project in the Philippines: [http://www.regjeringen.no/upload/UD/Vedlegg/ncp/intex\\_final.pdf](http://www.regjeringen.no/upload/UD/Vedlegg/ncp/intex_final.pdf); Final statement by the Dutch National Contact Point in IHC Caland, a case relating to Myanmar: <http://www.oesorichtlijnen.nl/wp-content/uploads/NCP/Verklaringen/Joint%20statement%20IHC-FNVCNV.pdf>.  
60 <http://www.unglobalcompact.org/NetworksAroundTheWorld/index.html>.

61 Lao PDR Report - [http://www.undplao.org/newsroom/CSR%20Forum\\_12March2012.php](http://www.undplao.org/newsroom/CSR%20Forum_12March2012.php).

62 During the consideration of the Guiding Principles by the Human Rights Council, Indonesia delivered an official statement referring to the obligation of a State to take into consideration human rights when it deals with business, and outlined relevant steps Indonesia had taken: Indonesia Report, Section I.

63 International Monetary Fund, *World Economic Outlook*, April 2012, at 182..

64 <http://www.unohrills.org/en/ldc/25/>.

65 Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, A/67/383, 25 September 2012, para. 39.

host economies worldwide for investment by transnational corporations in 2012.<sup>66</sup> Singapore was ranked by UNCTAD as the top third country in the world in terms of the volume of foreign direct investment it attracted in 2011.<sup>67</sup>

12. Economic development is a key aspiration that permeates ASEAN states' policies and practices. The ASEAN Charter's preamble names "sustained economic growth" as a common desire of the regional bloc, placing it second behind the ideal of "peace, stability and security", and before "prosperity and social progress."
13. Economic activity in the region is fervent. Stock exchanges opened for the first time in Lao PDR and Cambodia in 2011 and 2012 respectively. In Vietnam, a number of decrees to privatise state-owned enterprises have been promulgated since around the mid-2000s, including a plan by the People's Committee of Ho Chi Minh City, approved in 2005, to reform and privatise state-owned enterprises.<sup>68</sup> Myanmar is assessing the merits of privatisation, and has plans to increase the role of the private sector in industries such as telecommunication, energy, forestry, education and health.<sup>69</sup>
14. ASEAN has been very active in trade and investment liberalisation, especially with its major East Asian partners, China, Japan and South Korea.<sup>70</sup> Apart from its own free trade area and a comprehensive investment agreement, ASEAN has entered into free trade agreements with these countries, as well as India, Australia and New Zealand. Negotiations are underway for an "ASEAN Regional Comprehensive

Partnership", involving the ten ASEAN countries, Australia, China, India, Japan, New Zealand and South Korea.<sup>71</sup>

15. ASEAN States' determined drive to achieve sustained economic growth, their vigorous economic and commercial activity, and the prevalence of common development challenges such as weak governance and technical capacity, has resulted in, and will continue to give rise to, serious challenges at the intersection of business and human rights.
16. This section briefly outlines some of the key challenges in relation to land, labour and the environment. These challenges and concerns are unfolding against a landscape with both positive, and absent or poor, governmental efforts that vary in different geographical areas and business sectors, and in relation to different corporate-related issues. This is a nuanced landscape that cannot be painted with a broad brush.
17. Here, the intent is not to criticise, but to identify some of the problems that need to be solved. This report will thereby support governments in developing action plans for implementing the UN Guiding Principles.

### (1) *Land*

18. Conflicts in rights to land are a common effect of privatisation and a particularly serious concern in Cambodia, Lao PDR and Myanmar. Land titling in Cambodia, Lao PDR and Myanmar is still very much a work in progress, giving rise to numerous and at times violent disputes over land ownership, and providing opportunities for land-grabbing and related human rights abuses. In Cambodia, for instance, thousands have been forcibly evicted from the capital to resettlement

66 UNCTAD, *World Investment Report 2012*, at 22.

67 UNCTAD, *World Investment Report 2012*. Online. Available [http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012\\_WebFlyer.aspx](http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/WIR2012_WebFlyer.aspx) (accessed 2 January 2013).

68 Vietnam Report, Section III.6.3.

69 Myanmar Report, Section III.6.2.

70 Masahiro Kawai and Ganeshan Wignaraja, "EAFTA or CEPEA: Which Way Forward?", *ASEAN Economic Bulletin*, Vol. 25 No. 2, August 2008 at 121.

71 Dion Bisara, "Indonesia to Lead Talks on Forming Big Trade Bloc," *Jakarta Globe*, 18 November 2012, accessed 2 January 2013 <http://www.thejakartaglobe.com/economy/indonesia-to-lead-talks-on-forming-big-trade-bloc/556750>.

locations outside the city with dismal living conditions.<sup>72</sup> In Lao PDR, government resettlement programs of ethnic minorities have reportedly led to land shortages and conflicts.<sup>73</sup> Businesses have been involved in these disputes. In Myanmar, for example, there have been reports of land confiscation and forced evictions involving local private companies linked with the military, and MNCs in joint ventures with State-owned or local businesses.<sup>74</sup> Forced evictions with poor resettlement plans and inadequate compensation give rise to problems of food security and loss of income.

19. Indicators for the severity of the situation are the high number of people affected and the serious effects of land rights abuses on their daily lives. In Cambodia and Myanmar, the majority of complaints received by their national human rights bodies related to alleged land rights abuses.<sup>75</sup> In Lao PDR, the largest proportion of hotline calls to the National Assembly related to concerns over livelihoods affected by land concessions.<sup>76</sup> Underscoring the gravity of the situation, in 2007 and 2012 respectively, the governments of Lao PDR and Cambodia imposed moratoriums on the grant of land concessions.<sup>77</sup> In July 2012, Cambodia cancelled land concessions covering over 40,000 hectares of land.<sup>78</sup> Myanmar has established a Parliamentary Commission on Land Confiscation Investigation.<sup>79</sup>

20. The situation in Cambodia is especially pressing. In 2011, the World Bank ceased loans to Cambodia until the government acted to

safeguard the rights of thousands facing eviction as a result of development projects by foreign investors.<sup>80</sup> The UN Special Rapporteur on human rights in Cambodia has highlighted the issue, and in October 2012 submitted a detailed report specifically on land rights in Cambodia.<sup>81</sup>

21. Human rights abuses relating to land are not unique to the least developed countries. Land acquisition for purported development purposes appears to be an issue in Indonesia, where land registration remains incomplete, although this seems less prevalent than before.<sup>82</sup> In the Philippines, there have been recent land conflicts involving harassment, intimidation, and displacement of indigenous peoples by government security forces engaged by landowners.<sup>83</sup> In Malaysia, native customary land rights of indigenous peoples have allegedly been violated by logging companies.<sup>84</sup>

## (2) *Labour*

22. Migrant labour abuse and human trafficking are a concern in all ASEAN countries. Businesses involved are recruitment agencies, employers and repatriation companies. Generally, Cambodia, Indonesia, Myanmar, Lao PDR, Philippines, and Vietnam are sending countries, and Malaysia, Singapore and Thailand are destination countries; a number are both. Countries with large migrant labour populations, namely, Malaysia, Singapore and Thailand, face particular challenges with migrant labour exploitation, abuse and

72 Cambodia Report, Section III.2.

73 Lao PDR Report, Section III.2.3.

74 Myanmar Report, Overview.

75 Cambodia Report, Section III.10; Myanmar Report, Snapshot Box.

76 Lao PDR Report, Overview.

77 Cambodia Report, Section III.1; Lao PDR Report, Overview.

78 Cambodia Report, Section III.1.

79 Myanmar Report, Section III.1.

80 Prak Chan Thul and Martin Petty, "World Bank Stops Funds for Cambodia Over Evictions," *Reuters*, 9 August 2011, <http://www.reuters.com/article/2011/08/09/cambodia-worldbank-idUSL3E7J920D20110809>.

81 Report of the Special Rapporteur on the situation of human rights in Cambodia Surya P. Subedi to the Human Rights Council at its 21<sup>st</sup> session, *A human rights analysis of economic and other land concessions in Cambodia*, A/HRC/21/63/Add.1/Rev.1, 11 October 2012.

82 Indonesia Report, Section III.2.2.

83 Philippines Report, Section III.2.3.

84 Malaysia Report, Section III.2.3.

discrimination. In many sending countries the need to protect children and women's rights from abuses by employment agencies has not yet been clearly articulated.<sup>85</sup>

23. Serious forms of labour abuses, including forced and child labour, are occurring, especially in the lesser developed countries. Labour strikes were noted in the country reports to be of significant prevalence in Vietnam and Myanmar.<sup>86</sup> Notably, the employers involved in 76.5% of strikes in Vietnam from 2009 to 2011 were foreign enterprises.<sup>87</sup>

### (3) Environment

24. Deprivation of livelihoods, housing and risks to health can be some of the consequences of adverse business-related impacts on the environment. Factories and development projects, such as hydropower dams, gas pipelines and extractive activities in many ASEAN countries have allegedly caused, or have the potential to cause, such impacts. Examples of reported cases include: in Cambodia, a dredging business in Koh Kong province investigated by Global Witness; in Lao PDR, the improper management of waste and chemicals from plants and factories; in Malaysia, the proposed construction of an advanced materials plant by Lynas and the construction of twelve hydroelectric dams in the state of Sarawak; and in Vietnam, the implementation of resettlement and post-resettlement plans in relation to the Hoabinh hydropower dam, investigated by Earthrights International.

25. One high-profile case in the Mekong sub-region draws attention to the trans-boundary effect such projects may have. At least eleven dams are to be built in Cambodia and Lao PDR along the

<sup>85</sup> Human Rights Resource Centre, *Violence, Exploitation and Migration affecting Women and Children in ASEAN: A Critical Literature Review* (upcoming publication).

<sup>86</sup> Myanmar Report, Overview; Vietnam Report, Section III.2.3.

<sup>87</sup> Vietnam Report, Section III.2.3.

Mekong river and its tributaries. This projects bears substantial risks for the displacement and/or negative effects on the livelihoods of people and particularly their social and economic rights along the river; some of them have already materialised.<sup>88</sup>

### (4) Transnational Business Activities within ASEAN

26. A noteworthy aspect of business and human rights challenges in ASEAN is the significant transnational economic activity taking place within ASEAN itself. Business-related human rights abuses taking place in Southeast Asia's less developed countries are the concern of the region's more developed countries. Countries such as Malaysia, Singapore and Thailand are in some cases the home States of businesses involved in these abuses.

27. Intra-ASEAN commerce and investment is increasing as ASEAN liberalises intra-regional trade and investment. Among ASEAN's top five sources of foreign direct investment from 2001 to 2005 was from within ASEAN itself.<sup>89</sup> Cambodia, Indonesia, Lao PDR, Myanmar, Thailand and Vietnam now count at least one other ASEAN country amongst their top three source countries for foreign direct investment. This opens not only risks but also opportunities for ASEAN member states to address these problems within ASEAN and set standards for the region.

<sup>88</sup> Pangsapa and Smith, "Political Economy of Southeast Asian Borderlands: Migration, Environment, and Developing Country Firms," *Journal of Contemporary Asia*, November 2008, Vol. 38, No. 4, 485, 488-493.

<sup>89</sup> ASEAN Secretariat, *Statistics of Foreign Direct Investment in ASEAN*, (8<sup>th</sup> ed., 2006), at 14.

Brunei	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
<b>Top Source Countries for Foreign Direct Investment<sup>90</sup></b>									
1. U.K. 2. Japan 3. Netherlands	1. M'sia 2. China 3. Taiwan	1. S'pore 2. Japan 3. South Korea	1. Thailand 2. China 3. Vietnam	1. U.S. 2. South Korea 3. Japan	1. China and Hong Kong 2. Thailand 3. South Korea	1. Japan 2. Netherlands 3. U.S.	1. Netherlands 2. U.S. 3. Japan	1. Japan 2. M'sia 3. U.S.	1. Taiwan 2. Korea, 3. S'pore

28. Specific known cases include a Thai State-owned enterprise's agreement to purchase power to be generated by the Xayaburi dam in Lao PDR. The matter is surrounded by controversy due to alleged potentially adverse impacts on the environment and communities.<sup>91</sup> The purchase of sand from Cambodia by a Singapore-based company contracted by the government was criticised, as the sand dredging operations in Cambodia reportedly resulted in adverse environmental impacts and deprived Cambodian fishermen of their livelihoods.<sup>92</sup> The investment

projects of Thai and Malaysian companies in the Yadana and Yetagun gas projects in Myanmar have allegedly resulted in human rights abuses and environmental destruction.<sup>93</sup> Further, the World Bank Compliance Advisor Ombudsman has received complaints of business-related human rights abuses in Cambodia and Indonesia involving companies from, among others, Cambodia, Indonesia, the Philippines, Singapore and Thailand.<sup>94</sup>

90 [http://www.dep.gov.bn/FDI/2011/FDI\\_2011\\_Q3.pdf](http://www.dep.gov.bn/FDI/2011/FDI_2011_Q3.pdf); Cambodia. 2012 Investment Climate Statement. January 2012. page 9; [http://www.investlaos.gov.la/show\\_encontent.php?contID=29](http://www.investlaos.gov.la/show_encontent.php?contID=29) (2000-2009); <http://thestar.com.my/news/story.asp?file=/2012/1/20/sarawak/10298525&sec=sarawak>; <http://www.theborneopost.com/2012/02/10/us-investment-flows-to-msia-expected-to-rise/>; [http://www.miti.gov.my/cmspreview/content.jsp?id=com.tms.cms.article.Article\\_2a539f77-c0a81573-12b612b6-bfc47ea2](http://www.miti.gov.my/cmspreview/content.jsp?id=com.tms.cms.article.Article_2a539f77-c0a81573-12b612b6-bfc47ea2); <http://biz.thestar.com.my/news/story.asp?file=/2012/3/31/business/11015235&sec=business>; <http://www.cfoinnovation.com/content/joint-venture-model-best-way-myanmar-says-analyst>; [http://www.nscb.gov.ph/fis/2012/1q\\_12/fdiapp1\\_12.asp](http://www.nscb.gov.ph/fis/2012/1q_12/fdiapp1_12.asp), posted on 2 July 2012; <http://sbr.com.sg/markets-investing/news/guess-who-are-singapore%E2%80%99s-top-foreign-investors-now>; [http://thailand.prd.go.th/view\\_news.php?id=6276&a=2](http://thailand.prd.go.th/view_news.php?id=6276&a=2); <http://www.vietpartners.com/statistic-fdi.htm> For years 2000-2010.

91 Thailand Report, Section III.8.2.

92 Singapore Report, Section III.8.

## B. The State Of Play of the State Duty to Protect in Southeast Asia

### (1) Regulatory Capacity

29. A crucial issue affecting the ability of States to fulfil their duty to protect is the regulatory capacity of ASEAN States.

93 Myanmar Report, Overview.

94 [http://www.cao-ombudsman.org/cases/default.aspx?region\\_id=1](http://www.cao-ombudsman.org/cases/default.aspx?region_id=1).

Brunei	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
<b>Regulatory Quality<sup>95</sup></b> (Indicates percentile rank of country among all countries in the world. 0: lowest rank.)									
84.8	35.1	41.7	19.4	74.4	1.4	43.6	97.2	56.4	29.4

### a. Regulatory Effectiveness

30. As the country reports show, ASEAN States have fairly robust legal frameworks governing the core areas of land, labour and the environment, although there is room for improvement. The key challenge is that laws governing corporate behaviour in these areas are not always being effectively implemented and forced. This is a challenge of varying degrees in all ASEAN countries as reflected in the graph below

31. The implementation of environmental impact assessments by ASEAN States provides an apt example of this issue. All ASEAN States have mandatory requirements for environmental impact assessments to be conducted before certain approvals and licenses for business operations will be granted. All ASEAN States, save Singapore, require that these assessments be conducted with the participation of affected stakeholders; all ASEAN States, save, it appears, Singapore and Cambodia, require that these assessments are made public. However, NGO reports have raised serious concerns about the implementation of these requirements. For example, in Cambodia, non-State actors report that the conditions for environmental impact assessments are often not met, executive and monitoring mechanisms are weak, and

95 This indicator captures “perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development”: World Bank Group, Worldwide Governance Indicators, accessed 14 January 2013 <http://info.worldbank.org/governance/wgi/index.asp>.

companies with mining licenses move ahead with extractive activities before the legal process for approvals is complete.<sup>96</sup> In Lao PDR, it is reported that enforcement of requirements for environmental and social impact assessments is uneven, and there is a lack of capacity and resources to monitor investments.<sup>97</sup> In Vietnam, there is a reported lack of monitoring and management mechanisms, and environmental impact assessment reports that had been approved by People’s Committees nevertheless had insufficient information on, for instance, environmental problems and hazardous waste management solutions.<sup>98</sup> Other reported problems are absent or slow compliance by local governments with laws enacted by the central government, lax enforcement of requirements by local governments, and the acceptance by local authorities of low land compensation rates in order to attract more investment.<sup>99</sup> In Malaysia, officials have raised the issue of inadequate awareness and implementation of laws and

96 Mining and Women in Asia: Experiences of women protecting their communities and human rights against corporate mining [Asia Pacific Forum on Women, Law and Development (APWLD)] [www.apwld.org/pdf/Mining%20with%20cover\\_opt.pdf](http://www.apwld.org/pdf/Mining%20with%20cover_opt.pdf), at 7; UN Committee on the Elimination of Racial Discrimination, “The rights of indigenous people of Cambodia”, Feb 2010 p 12; Cambodian Centre for Human Rights, *Business and Human Rights in Cambodia: Constructing the Three Pillars*, November 2010.

97 UNDP, Poverty Environment Initiative (PEI) Lao PDR, Issues Brief 08 /2010: Economic, social and environmental impacts of investments in mining, at 4.

98 Vietnam Report, Section III.2.3; The Extractive Industries Transparency Initiative and the Implementation Perspective of Vietnam (May 2011) at 44.

99 Vietnam Report, Section III.2.3.

regulations on environmental protection.<sup>100</sup> Logging companies in Malaysia have reportedly found ways to circumvent requirements to submit environmental assessment reports.<sup>101</sup>

32. The ineffectiveness of implementation of laws extends to other issues as well, such as the implementation of procurement legislation in Lao PDR,<sup>102</sup> and enforcement by labour inspectorates in Vietnam.<sup>103</sup>

33. Recent legal reforms in some ASEAN States require implementation and enforcement capacities to keep apace. ASEAN countries have recently undergone, or are undergoing, considerable regulatory change. Vietnam underwent major economic reforms in 1986 (a historic milestone known as *doi moi*), and has, between 2005 and 2012, enacted new regulations in respect of its labour code, enterprise law, environmental protection law, water resources law, investment law, and securities law. Myanmar is now undergoing its own milestone political reform, beginning in 2011, and is seeing the drafting and passing of a considerable number of new laws highly relevant to business and human rights, e.g. farmland and land management, environmental conservation, labour and investment. Indonesia has, between 2007 and 2012, enacted new regulations in respect of its corporate law, investment law, mining law, and land acquisition law. Lao PDR's current laws relating to enterprises, investment, labour and anti-corruption are also relatively new, having been enacted or amended between 2005 and 2009. Given reports that implementation and enforcement under existing laws are already a challenge in some of these countries, the pace of law reforms may not be accompanied by the necessary improvements in enforcement and implementation ability.

100 Malaysia Report, Section III.2.3.

101 Malaysia Report, Section III.2.3.

102 Lao PDR Report, Section III.6.

103 Vietnam Report, Section III.2.3.

## b. Rule of Law

34. Public corruption stymies effective enforcement and implementation of laws. Rent-seeking in the natural resource sector is of controversy in, for example, Cambodia<sup>104</sup> and Myanmar.<sup>105</sup> Officials in these countries have also allegedly engaged in land-grabbing and bribery in tenders for the benefit of their private businesses.<sup>106</sup> Public procurement in Lao PDR is, according to a UNDP study, subject to similar interference.<sup>107</sup>

35. Weakened effectiveness of national governments in a few discrete areas has permitted abuses by public and private security forces. State security forces in Indonesia, Myanmar and the Philippines have reportedly been involved in human rights abuses in the course of providing security to business enterprises, usually mining companies.<sup>108</sup> According to a recent study by the International Commission of Jurists, a few landowners in the Philippines have engaged private armed groups to prevent tenants and farmers from invoking and enforcing their legal rights, and to prevent the government from acquiring land for distribution to landless farmers.<sup>109</sup>

36. The following table sets out indicators of corruption and rule of law in ASEAN countries. Also relevant is a recent Southeast Asia-wide baseline study conducted on the state of play of the rule of law in the region.<sup>110</sup>

104 Global Witness, *Country For Sale*, February 2009.

105 Myanmar Report, Section III.6.1.

106 Global Witness, *Country For Sale*, February 2009; Myanmar Report, Overview.

107 Lao PDR Report, Section III.6.4.

108 Indonesia Report, Section III.7.1; ERI, "Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron's Yadana Gas Project in Military-Ruled Burma (Myanmar)," 2009; Philippines Report, Section III.9.2.

109 Philippines Report, Section III.9.2.

110 Human Rights Resource Centre, *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study* (2011).

Brunei	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
<b>Rule of Law<sup>111</sup></b> (Indicates percentile rank of country among all countries in the world. 0: lowest rank.)									
77.9	15.5	31.0	18.3	66.2	4.2	34.7	93.4	48.4	38.5
<b>Corruption Perceptions Index<sup>112</sup></b> (Ranks 183 countries/territories from the least corrupt at the top to the most corrupt at the bottom.)									
44	164	100	154	60	180	129	5	80	112

37. Article 26 of the UN Convention against Corruption (UNCAC) requires State parties to take measures to establish the liability of legal persons for participation in offences under the convention; such liability may be civil, criminal or administrative.<sup>113</sup> Significantly, the UNCAC has been ratified by all ASEAN States.

38. Not all ASEAN States provide for the criminal liability of corporations for corruption offences. According to the Philippines Report, anti-corruption laws do not appear to allow for the prosecution of corporations or other juridical persons.<sup>114</sup> Also, corporations in Vietnam do not have legal capacity to be prosecuted. The Vietnam government has declared in relation to the Article 26 of the UNCAC that it does not consider itself to be bound to establish a basis for the criminal liability of legal persons for corruption.

39. Even where corporate criminal liability for corruption offences may be imposed, these laws are not necessarily enforced against

111 This indicator captures “perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence”: World Bank Group, Worldwide Governance Indicators, accessed 14 January 2013 <http://info.worldbank.org/governance/wgi/index.asp>. The World Justice Project’s Rule of Law Index may also be useful, save that it does not cover all ASEAN countries: <http://worldjusticeproject.org/rule-of-law-index/>.

112 Transparency International Corruption Perceptions Index: <http://cpi.transparency.org/cpi2011/results/>.

113 Article 26, UNCAC.

114 Philippines Report, Section III.2.2.

corporations. For example, although Malaysia’s anti-corruption penal laws apply to corporations, statistics on prosecutions in Malaysia indicate that corruption-related offences have yet to be enforced against any corporation.<sup>115</sup>

40. Features of anti-corruption laws with extraterritorial effect warrant attention. Given today’s transnational economic activity, of significance is the ability to hold domestic companies accountable for corrupt acts committed overseas, especially the bribery of foreign public officials. Some anti-corruption laws in ASEAN have extra-territorial reach. Under Malaysia’s Anti-Corruption Commission Act 2009, Malaysian courts have jurisdiction for cases where the offence was committed by a Malaysian citizen or permanent resident regardless of where the offence took place. According to the Malaysia Report, the same would likely also apply to companies incorporated in Malaysia.<sup>116</sup> Similarly, Singapore’s Prevention of Corruption Act provides for jurisdiction in Singapore where the offence was committed by a Singapore citizen.<sup>117</sup> This can also apply to offences by Singapore-incorporated corporations.<sup>118</sup> With regard to the bribery of public officials, the Philippines’ Revised Penal Code penalises local public officers or public employees who receive

115 Malaysia Report, Section III.2.3.

116 Malaysia Report, Section III.2.2.

117 Section 37 of the Singapore Prevention of Corruption Act (Cap. 241).

118 <http://www.nortonrose.com/knowledge/publications/54322/anti-corruption-regulation-in-singapore>.

bribes, notwithstanding that the transaction took place outside the territory.<sup>119</sup>

41. Transparency and accountability in natural resource management is a key issue in Southeast Asia. Many ASEAN countries are rich in natural resources. These are, paradoxically, often the less developed countries, suffering from a phenomenon which economists have labelled the “Dutch disease”.<sup>120</sup> However, initiatives to enhance transparency are still in their infancy. The Extractive Industries Transparency Initiative (EITI) is one tool States can use to ensure transparency and accountability in the exploitation of their natural resources. The following table shows the participation of ASEAN States in the EITI.

42. Anti-corruption bodies can also ensure transparency and accountability through monitoring the grant of licenses and concessions. For example, Indonesia’s Corruption Eradication Commission has recently worked with institutions in the mineral and gas sector and tax authorities to monitor the issuance of business contracts between corporations and the State.<sup>122</sup>

Brunei	Cambodia	Indonesia	Laos	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
<b>Participation in the EITI<sup>121</sup></b>									
“Extractive resource-rich country” not yet part of the EITI	In dialogue	Candidate	In Dialogue	-	Expressed interest in joining	Endorsed EITI; some progress to candidate status	-	-	In Dialogue

119 Philippines Report, Section III.2.2.

120 Corden, W. Max, and J. Peter Neary, 1982, “Booming Sector and De-Industrialization in a Small Open Economy,” *Economic Journal*, Vol. 92, (December), No. 368, pp. 825-48.

121 World Bank Group, Country Portfolio Summary – World Bank EITI MDTF technical assistance work program, (showing MDTF FY12-13 work program), available at <http://siteresources.worldbank.org/INTEXTINDTRAINI/Resources/MDTF-EITICountryportfolio03-31-12.pdf>

122 Indonesia Report, Section III.1.

## (2) General Regulatory and Policy Functions

### a. Applicability of Laws to Businesses and Their Organs

#### (i) Attribution of Corporate Liability

43. All ASEAN jurisdictions have the doctrine of “separate legal personality.” The doctrine is applied in respect of certain business vehicles, e.g. corporations.<sup>123</sup> These businesses have legal capacity to be sued as legal persons, and face civil liability. Examples of business vehicles without separate legal personality are partnerships and trusts.
44. Criminal liability for certain offences may be imposed on corporations in all ASEAN States, except Vietnam. Vietnam’s Criminal Code expressly states that only natural persons may bear criminal liability.<sup>124</sup> Although a party to the UN Convention against Corruption, Vietnam has made a declaration that it does not consider itself bound by the convention’s provisions relating to the criminal liability of legal persons.<sup>125</sup> However, Vietnam’s National Assembly has in its legislative program for 2011 to 2016 made it a priority item to consider the enactment of criminal liability provisions for legal persons.<sup>126</sup> Importantly, businesses in Vietnam that are legal persons may still face administrative sanctions where the wrong done constitutes legal violations that do not amount to crimes.<sup>127</sup>
45. None of the country reports identified the use of “corporate culture” to impose statutory corporate

liability.<sup>128</sup>

#### (ii) Attribution of Individual Liability

46. The legal principle of “separate legal personality” protects owners and managers of businesses from liability for harm their businesses have caused. Owners may not be involved in all of the everyday operations of a business, and may be unable to directly supervise all employees. This is especially so for large corporations. Imposing personal liability on business owners and managers for all harm caused by their businesses’ operations may be too onerous.
47. Statutory and judicially-created exceptions exist in ASEAN States to ensure the doctrine does not unduly obstruct the accountability of business owners. For example, Malaysia, Singapore and the Philippines recognise, with perhaps slight variations, the concept of “piercing the corporate veil,” which will not allow a corporation’s separate legal personality to be used as a cloak for fraud or illegality.<sup>129</sup>
48. Legal principles and concepts have been developed in some ASEAN countries to impose fault-based<sup>130</sup> criminal or civil liability on owners, directors, managers or other officers of companies for corporate wrongs. A diverse range of concepts are used by different countries

123 The types of business vehicles to which the doctrine applies are set out in all country reports.

124 Vietnam Report, Section III.2.1.1.

125 Vietnam Report, Section III.2.1.1.

126 Vietnam Report, Section III.2.1.1.

127 Vietnam Report, Section III.2.1.1.

128 At the request of the former UNSRSG, research was conducted into the use of corporate criminal liability based on “organizational liability”, which is concerned with “corporate policies, procedures, practices and attitudes; deficient chains of command and oversight; and corporate ‘cultures’ that tolerate or encourage criminal offences.” In Australia, for example, statutory provisions provide for organizational liability in relation to federal offences, including on the basis of “corporate culture”: Allens Arthur Robinson, ‘Corporate Culture’ as a Basis for the Criminal Liability of Corporations, (Report prepared for the UNSRSG), February 2008.

129 This list of countries that recognize exceptions to separate legal personality is not exhaustive.

130 The existence of strict liability for offences relevant to the intersection of business and human rights was not specifically investigated by this study.

to define the nature of the fault required to trigger responsibility, such as wilfulness, negligence, bad faith, consent, connivance, knowing authorisation, knowing permission, and failure to prevent. Even where similar or identical terms or phrases are used, the applicable standards would likely vary among countries.

49. As examples of provisions attributing general criminal liability, company officers in the Philippines, by virtue of their managerial positions or other similar relationship to the company, can be held criminally liable for the company's criminal acts "if they had the power to prevent the act by virtue of their relationship to the company."<sup>131</sup> In Cambodia, any director or officer of the company who knowingly authorises, permits or acquiesces in the commission of an offense by the company is a party to and guilty of the offence.<sup>132</sup>

50. As an example of the attribution of civil liability, the Philippines has a general rule that directors or trustees who wilfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation are liable jointly and severally for all damages resulting from such acts.<sup>133</sup> Tort law may also provide a legal basis for imposing civil liability on the relevant individuals or entities. Common law tort, or similar statutory provision, is available in Brunei, Indonesia, Lao PDR, the Philippines, Malaysia, Singapore, Thailand and Vietnam. For example, Thailand's Civil and Commercial Code provides that a person who, wilfully or negligently, unlawfully injures any right of another person is obliged to make compensation for that injury.<sup>134</sup> Also,

Vietnam's Civil Code provides that those who "intentionally or unintentionally infringe upon the life, health, honour, dignity, prestige, property, rights, or other legitimate interests of individuals or infringe upon the honour, prestige and property of legal persons or other subjects and thereby cause damage shall have to compensate."<sup>135</sup>

51. In relation to specific corporate social and environmental impacts, Singapore's Environment Protection and Management Act imposes liability for offences under the Act committed by a body corporate on officers, members, partners and/or managers where the act was committed with their consent or connivance, or "attributable to their act or default".<sup>136</sup> The Philippines' anti-trafficking laws hold "the owner, president, partner, manager, and/or any responsible officer" liable where they participated in, or knowingly permitted or failed to prevent the commission of a crime under the said laws.

52. Due diligence may serve as a basis for attributing individual liability. For example, business owners in the Philippines are held responsible for damages caused by their employees in the course of their service and functions, unless they can prove that they observed "all the diligence of a good father of a family to prevent damage."<sup>137</sup> Similarly, Malaysia's Anti-Trafficking in Persons Act 2007 imposes liability for any offence under the Act by a body corporate on directors, managers, secretaries or other similar officers responsible for or assisting in the management, unless he or she proves the offence was committed without their knowledge, consent or connivance, and that they "exercised all such diligence to prevent the commission of the offence as he

131 Philippines Report, Section III.2.1.1.

132 Cambodia Report, Section III.2.1.

133 Philippines Report, Section III.2.1.1. According to a communication with the Philippines rapporteur, this applies to losses suffered by third parties.

134 Thailand Report, Section III.2.1.1.

135 Article 604, 2005 Civil Code of Vietnam: communication with Vietnam rapporteur.

136 Section 71, Environment Protection and Management Act (Cap. 94A).

137 Philippines Report, Section III.2.2.

ought to have exercised... ”<sup>138</sup> Malaysia’s penal laws on terrorism use the same technique to hold accountable persons managing and controlling the company.<sup>139</sup>

53. Directors have, in practice, been prosecuted and sued for the adverse human rights impacts of their businesses. For example, in one high-profile case, the president director of an Indonesian company was criminally prosecuted for the company’s environmentally harmful mining activities in Indonesia.<sup>140</sup> In Vietnam, employees have successfully obtained compensation orders against company directors for wrongful termination.<sup>141</sup> Wrongful termination is relevant to human rights, because corporations may fire employees for engaging in protests against human rights abuses, or for exposing adverse corporate human rights impacts by whistleblowing.

## b. Regulation of Extraterritorial Business Activities

54. The activities of transnational corporations internationally, as well as cross-border transactions and overseas investments by locally incorporated companies, can result in adverse impacts outside these companies’ home jurisdictions.
55. Regulatory measures with an extraterritorial effect, in the sense that they apply to human rights violations taking place abroad, can take the form of criminal laws. For example, Malaysia’s anti-trafficking laws provide for jurisdiction as

long as some aspect of the trafficking offence took place in Malaysia.<sup>142</sup> Thailand’s anti-trafficking laws have even wider reach, as they provide for universal jurisdiction over trafficking offences, subject to certain conditions.<sup>143</sup> As mentioned above, Malaysia and Singapore’s anti-corruption laws provide for jurisdiction based on the nationality principle, i.e. when the alleged offender is a citizen or permanent resident of the country.<sup>144</sup> Malaysia’s anti-terrorism laws also apply to acts committed abroad; this extraterritorial jurisdiction is based on the nationality principle.<sup>145</sup> In the Philippines, on the other hand, penal laws generally do not apply to crimes committed outside the territory.<sup>146</sup>

56. Domestic corporate governance measures may be used in relation to extraterritorial business activities, for example, by requiring or encouraging companies to report on the human rights impacts of their activities overseas. The Malaysia stock exchange, *Bursa Malaysia*, appears to require all public listed companies to disclose corporate social responsibility activities and practices undertaken not only by them but also their subsidiaries.<sup>147</sup> Also, Singapore’s 2011 Guidebook for Directors calls for businesses to consider “cultural and business impacts especially when conducting business in a foreign environment” and states that “this also entails respecting and observing fundamental human rights in all aspects of operations.”<sup>148</sup> Such non-binding requirements can be further strengthened by specific guidance on how businesses can do so.

<sup>138</sup> Malaysia Report, Section III.2.2.

<sup>139</sup> Criminal liability for terrorism offences by a body corporate is imposed on persons responsible for the management and control of the body corporate, unless they prove that the offence was committed without their consent or connivance and they exercised all such due diligence to prevent the commission of the offence: Malaysia Report, Section III.2.2.

<sup>140</sup> Indonesia Report, Section III.4.1.4.

<sup>141</sup> Vietnam Report, Section III.4.1.4.

<sup>142</sup> Malaysia Report, Section III.2.2.

<sup>143</sup> Thailand Report, Section III.2.2.

<sup>144</sup> See paragraph 40 above.

<sup>145</sup> Malaysia Report, Section III.2.2.

<sup>146</sup> Philippines Report, Section III.2.2.

<sup>147</sup> Malaysia Report, Section III.4.3.

<sup>148</sup> Singapore Report, Section III.4.1.

**c. Regulation of Commercial Relationships to Prevent Indirect Support For or Involvement In Human Rights-Related Abuses**

57. A corporation may be indirectly related to the human rights abuse by virtue of a commercial or contractual relationship. Examples include the purchase of power by a Thai State-owned company in the Xayaburi dam project, and the purchase of sand from Cambodia by a Singapore company contracted by the government.<sup>149</sup> The dam and sand dredging operations both reportedly had harmful human rights impacts. Whether States should discourage the entering into of such commercial transactions is open to debate.

58. In the Singapore sand purchase case, the government's position was that ensuring the sustainability of sand dredging operations through policing sand extraction licenses was Cambodia's responsibility, although it did state that it encouraged its contract vendors to deliver its projects in a responsible manner.<sup>150</sup> In the Thai power purchase case, a suit has been filed before the Thai administrative court to void the power purchase agreement. The court has not yet decided on whether it has jurisdiction.

59. The regulation of commercial relationships of businesses to ensure they do not indirectly participate in harm is not new. All ASEAN States have signed the International Convention on the Suppression of the Financing of Terrorism, and all, except Lao PDR, have enacted laws requiring financial institutions and/or law firms to conduct "know your client" procedures to ensure they do not service customers involved in these crimes,

149 See para. 28 above.

150 Neil Chatterjee, "Singapore sand demand damaging Cambodia environment," *Reuters*, 11 May 2010, accessed at <http://www.telegraph.co.uk/expat/expatnews/7710537/Singapore-sand-demand-damaging-Cambodia-environment.html>; Singapore Report, Section III.8.

and to report suspicious transactions.<sup>151</sup>

60. Financial institutions could similarly be required to take steps to ensure they do not finance development projects that will cause social and environmental harm. The lending practices of local financial institutions that finance reportedly harmful development projects have been flagged by EarthRights International.<sup>152</sup> Unlike international financial institutions, which have social and environmental safeguard policies, local financial institutions may not have similar internal lending policies. For example, in relation to the controversial Xayaburi dam, four Thai banks have continued their commitment to provide funding, even though the World Bank has withdrawn its financing.<sup>153</sup>

61. As another example, the Philippines' Anti-Child Pornography Act of 2009 imposes obligations to report the commission of child pornography acts on a range of relevant businesses, such as internet service providers, mall owners/operators, owners or lessors of other business establishments including photo developers, information technology professionals, credit card companies and banks.

**d. Due-diligence-related regulatory tools**

62. The Guiding Principles recommend that States advise corporations on appropriate methods to use to respect human rights, including human rights due diligence.<sup>154</sup> Due to the variety of legal systems and the complexity of business operations, State policies in this regard vary

151 <http://www.anti-moneylaundering.org/asiapacific/asia.aspx>.

152 EarthRights International, "Submission to the UN Working Group on Human Rights and Transnational Corporations and other business enterprises. First Session (16-20 January 2012)," 8 December 2011, <http://www.ohchr.org/EN/Issues/Business/Pages/Submissions.aspx>.

153 Carl Middleton "Thailand's Commercial Banks' Role in Financing Dams in Laos and the Case for Sustainable Banking," *International Rivers* (December 2009),

154 Commentary to Guiding Principle 3.c.

widely among ASEAN member States and across the globe.<sup>155</sup>

63. Binding norms on due diligence may be used. For example, Singapore's Environment Protection and Management Act holds the principal contractor liable for the pollution-causing activities of others at a construction site, unless the principal contractor proves it exercised due diligence to prevent the commission of the activities causing pollution. Also, all ASEAN States, except Lao PDR, have prescribed mandatory anti-money laundering due diligence procedures to be taken by financial institutions and law firms.<sup>156</sup>
64. Laws may require due diligence activities to be conducted as a condition for granting approvals and licenses for business activities. Requirements for social and/or environmental impact assessments to be conducted are an example. These assessments can be crucial to the sustainability of development projects.
65. All ASEAN States, except Singapore, require environmental and/or social impact assessments to be conducted as a matter of course before certain project or business licenses will be granted. Such requirements are new in Myanmar, having been enacted for the first time in its 2012 Environmental Conservation Act. In addition to environmental impacts, Malaysia has, in a policy relating to mining operations, called for social impact assessments to be conducted. What such assessments entail, however, was not explained by the policy or related documents.<sup>157</sup> While there are some instruments for assessing

155 The international perspective with a focus on Europe and the US is addressed in a recent study, conducted within the Human Rights Due Diligence Project, an initiative launched by several NGOs: Olivier de Schutter et. al, *Human Rights Due Diligence: The Role of States*, December 2012, available at <http://accountabilityroundtable.org/campaigns/human-rights-due-diligence/>.

156 <http://www.anti-moneylaundering.org/asiapacific/asia.aspx>.

157 Malaysia Report, Section III.2.2.

specific impacts on specific sets of human rights, work on developing an overall methodology for conducting social impact assessments is still in its infancy.<sup>158</sup>

66. Singapore is an exception. In Singapore, studies on environmental pollution control and related matters may be required only for projects that, in opinion of the relevant authority, are "likely to cause substantial pollution of the environment or increase the level of such pollution."<sup>159</sup> Singapore's Ambassador-at-Large has noted that environmental impact assessments conducted are not made public and are conducted without consultation with stakeholders. He has recently called for the enactment of a law on environmental impact assessment.<sup>160</sup>

#### e. Binding CSR Obligations

67. Indonesia's use of statutory law to recognise the environmental and social responsibilities of corporations is novel and innovative internationally. Limited liability companies are bound under Indonesia's 2007 Corporate Law, and accompanying regulation, to comply with their "social and environmental responsibilities." For companies doing business relating to natural resources, compliance is mandatory and non-compliance attracts sanctions. For companies doing business unrelated to natural resources, non-compliance does not attract any sanctions, but compliance will be rewarded with incentives. All limited liability companies must report on the budget allocated to achieving such compliance. This development in Indonesia faced resistance from business associations, who argued that

158 Frank Vanclay, Ana Maria Esteves, *Current issues and trends in social impact assessment*, Frank Vanclay and Ana Maria Esteves (eds), *New Directions in Social Impact Assessment*, (Edgar Elgar Publishing Ltd.: Cheltenham 2011), 3-19.

159 Article 36 of the Environmental Protection and Management Act (Cap. 94A).

160 Tommy Koh, "Green Thoughts Inspired by Stockholm and Rio," *The Straits Times*, 16 June 2012.

the law created legal uncertainty, and imposed additional economic burdens on businesses. Their petition to Indonesia's constitutional court to declare the law unconstitutional was, however, unsuccessful.<sup>161</sup>

68. Difficulties are being faced in the implementation of the law. Mechanisms for determining compliance, and what the incentives for compliance will be, are not defined. There have also been conflicting judicial opinions on the interpretation of the mandatory obligations for companies doing business related to natural resources.<sup>162</sup> The primary challenge appears to be the lack of definition of what "social and environmental responsibility" under the statute means.

#### **f. Encouraging Consideration of Human Rights Impacts When Making Business Decisions**

69. Some ASEAN countries have taken steps to encourage companies to consider the human rights impacts of their businesses when making business and operational decisions. For example, Singapore's 2011 Guidebook for Directors, issued by its Accounting and Corporate Regulatory Authority, encourages companies to "take into consideration and manage the impact of its activities on the environment, stakeholders and the community as a whole," and to consider public interest and concern for the environment in tandem with economic profit generation, as these are key parts of risk management and value creation. The Stock Exchange of Thailand's 2006 Principles of Corporate Governance, which seek to be in line with the OECD Principles of Corporate Governance 2004, encourage companies to ensure that their business operations take into account the aspects on environment and the society for sustainable development. Indonesia also has corporate

governance guidelines that refer to a corporate duty to care for society and the environment surrounding business operations.<sup>163</sup>

70. It may be argued that general binding duties imposed on directors encompass a duty to take into account their businesses' human rights impacts when making business decisions. For example, the Philippines' Revised Code of Corporate Governance promulgated in 2009 imposes a mandatory obligation on the board of directors of covered corporations to "identify key risk areas and monitor these with due diligence to enable the corporation to anticipate and prepare for possible threats to its operational and financial viability."<sup>164</sup> In the spirit of the Guiding Principles, such risks may be argued to encompass reputational and financial risks for the company related its negative human rights impacts.<sup>165</sup>

71. Laws that oblige directors to exercise reasonable care and/or diligence in carrying out their functions are found in Cambodia,<sup>166</sup> Indonesia,<sup>167</sup>

<sup>161</sup> Indonesia Report, Section III.2.2.

<sup>162</sup> Indonesia Report, Section III.2.2.

<sup>163</sup> These are the 2006 General Guidelines on Good Governance: Indonesia Report, Section III.5.2.

<sup>164</sup> Philippines Report, Section III.4.

<sup>165</sup> Guiding Principle 17, UN OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, Geneva/New York 2012, Q.26, p. 31.

<sup>166</sup> Article 289 of the Cambodian Law on Commercial Enterprises states that every director and officer in exercising his duties shall i) act honestly and in good faith with a view to the best interest of the company; and ii) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances: Cambodia Report, Section III.4.1.

<sup>167</sup> In Indonesia, directors of limited liability corporations have a duty to "manage her/his corporation with good faith and reasonable care in accordance with corporate interests and objectives": Indonesia Report, Section III.2.1.2.

Malaysia,<sup>168</sup> the Philippines,<sup>169</sup> Singapore,<sup>170</sup> Thailand,<sup>171</sup> and Vietnam.<sup>172</sup> However, these directors' duties of diligence are generally more commonly intended to safeguard shareholders' profit-driven interests. The extent to which directors' duties of diligence in ASEAN countries require or permit the consideration of social and environmental impacts requires further investigation.

### g. Encouraging Communication By Businesses of their Human Rights Impacts

72. The Guiding Principles recommend that States require or encourage businesses to communicate their human rights impacts to the authorities, stakeholders, or the public.<sup>173</sup>

73. Annual reporting obligations can be used to require or encourage such communication. The recipients of these annual reports are usually the authorities and the public. Indonesia and Malaysia have made it mandatory for certain types of corporations to include CSR as a component of their annual reporting obligations. In Indonesia, limited liability corporations are required to include reference to the implementation of

168 In Malaysia, 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": Malaysia Report, Section III.4.1.1.

169 In the Philippines, a director owes a duty to the corporation to be diligent, which is defined as diligence which persons prompted by self-interest generally exercise in their own affairs: Philippines Report, Section III.4.1.1.

170 In Singapore, a director is required to at all times act honestly and uses reasonable diligence in the discharge of the duties of his office: Singapore Report, Section III.4.1.1.

171 In Thailand, directors of limited companies directors must in their conduct of the business apply the diligence of "a careful business man": Thailand Report, Section III.4.1.1.

172 In Vietnam, directors have the obligation to perform assigned rights and duties in an honest, careful and optimal manner in order to ensure maximum lawful benefits of the company and its owner: Vietnam Report, Section III.4.1.1.

173 Commentary to Guiding Principle 3.

their social and environmental responsibilities, such as their plans and budgets, in their annual reports to shareholders.<sup>174</sup> Also, listed companies are required to submit CSR-related reports. Indonesia's capital market and financial institution supervisory agency, Bapepam-LK, has defined the content of such reporting as including information relating to the environment, labour issues, social and community development, and consumer health and safety.<sup>175</sup> In Malaysia, CSR reporting is mandatory for listed companies. The content of reporting is undefined and left to the discretion of the company. The *Bursa Malaysia Corporate Governance Guide* for listed companies encourages companies to report on issues of "community involvement, equal opportunity, workforce diversity, human rights, supplier relations, child labour, freedom of association and fair trade."<sup>176</sup> The Malaysia Report observed that the content reported by listed local companies related to activities of a charitable nature, while that reported by listed companies that were part of MNEs related to efforts made within the companies' business operations.

74. Singapore and Thailand encourage listed companies to communicate their social and environmental impacts through non-binding guidelines. In Singapore, the SGX Guide to Sustainability Reporting for Listed Companies encourages companies to adopt "internationally accepted reporting frameworks", such as the Global Reporting Initiative Sustainability Reporting Guidelines and its Sector Supplements for specific industries.<sup>177</sup> Notably, it offers a definition for the desired content: "sustainability reporting" is defined as "the publication of environmental, social and governance (ESG) information in a comprehensive and strategic manner that reflects the activities and outcomes

174 Indonesia Report, Section III.4.2.

175 Indonesia Report, Section III.4.3.

176 Malaysia Report, Section III.4.3.

177 Singapore Report, Section III.4.3.

across these three dimensions of an organisation's performance."<sup>178</sup> The Stock Exchange of Thailand's 2006 Principles of Corporate Governance for Registered Companies encourage companies to disclose "relevant important information" to all stakeholders so that they may more effectively participate in the operations of the company, to promote its sustainable stability.<sup>179</sup>

75. More general annual reporting requirements may require social and environmental impacts to be reported if they fall within broader categories of reporting obligations, such as the obligation to report liabilities,<sup>180</sup> or for listed companies, the obligation to disclose information that may materially affect the company's share price.<sup>181</sup>
76. Apart from annual reporting, States should also require or encourage corporations to communicate directly with stakeholders affected by their operations as and when the need arises. In the Philippines, directors of covered corporations are required to formulate a policy of communication between their corporations and communities directly affected by their operations.<sup>182</sup>
77. With regard to ensuring that companies communicate their human rights impacts to affected stakeholders, requirements for public consultations to be held and/or information to be disclosed in the conduct of environmental and/or social impact assessments are found in the

laws of Cambodia,<sup>183</sup> Indonesia,<sup>184</sup> Lao PDR,<sup>185</sup> Malaysia,<sup>186</sup> the Philippines,<sup>187</sup> Thailand,<sup>188</sup> and

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183 Cambodian Human Rights Action Committee (CHRAC) 'Losing Ground: Forced Evictions in Cambodia', September (2009), at 68, citing Land Law 2001 Articles 59, 61 and Sub-Decree No. 146 on Economic Land Concessions 2005. Cf. World Bank Environment and Social Development Department, East Asia and Pacific Region, "Annex 1: Cambodia", *Environmental Impact Assessment Regulations and Strategic Environmental Assessment Requirements. Practices and Lessons Learned in East and Southeast Asia*, April 2006, at 19 (noting that Article 1 of the EIA Sub-Decree on Environmental Impact Assessment issued in 1999 only "encourage[s]" public involvement in the EIA process.)

184 Indonesia Report, Section III.4.2, citing Article 26 of the 2009 Environmental Law.

185 Lao PDR Report, Section III.2.2, citing Article 8.5 of the 1999 Environmental Protection Law. See also, World Bank Environment and Social Development Department, East Asia and Pacific Region, "Annex 7: Lao PDR", *Environmental Impact Assessment Regulations and Strategic Environmental Assessment Requirements. Practices and Lessons Learned in East and Southeast Asia*, April 2006, at 49 (noting that Article 6 of the EIA Decree No. 1770/STEA issued in 2000 requires owners of covered projects to undertake public involvement activities that must include notification of stakeholders and dissemination of information about the project and its impacts.)

186 Azizan Marzuki, "A Review on Public Participation in Environmental Impact Assessment in Malaysia," in *Theoretical and Empirical Researches in Urban Management*, No. 3(12), August 2009, at 130 (noting that public participation by "workers and local community" was required by documents issued by the Department of Environment in 1994 and 1995, but were compulsory only at the detailed assessment stage; also, EIA reports appear to be confidential.) Cf. Stærdahl et. al, "Environmental Impact Assessment in Malaysia, South Africa, Thailand and Denmark: Background, layout, context, public participation and environmental scope," *Journal of Transdisciplinary Environmental Studies*, vol. 3, no. 1, 2004, at 9 (noting that public participation in the process was "essential" in the preliminary stage, and overall limited and mainly at the behest of the project proponent; also, terms of reference of the project are to be printed and advertised in the printed mass media for public comment.)

187 World Bank Environment and Social Development Department, East Asia and Pacific Region, "Annex 9: Philippines", *Environmental Impact Assessment Regulations and Strategic Environmental Assessment Requirements. Practices and Lessons Learned in East and Southeast Asia*, April 2006, at 57-58 (noting that EIS Regulation DAO 30/2003 "stipulates enhancement of public involvement and information disclosure", but implementation is weak.)

188 Thailand Report, Section III.2.2, citing Section 6(1) of the Environmental Quality Act.

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178 Singapore Report, Section III.4.3.

179 Thailand Report, Section III.4.3.

180 See Singapore Report, Section III.4.2.

181 See Singapore Report, Section III.4.2; Lao PDR Report, Section III.4.1.1.

182 Philippines Report, Section III.4.

Vietnam.<sup>189</sup> The extent of public participation and information disclosure required, and whether they apply generally or to specific sectors, varies across laws and countries. Of note are Thailand's legislation, which "affirms the rights and liberties of a person to include the rights to be informed of information concerning the enhancement and the promotion of environmental quality,"<sup>190</sup> and identifies twenty groups of stakeholders that must be given the opportunity to participate, and four different levels of participation, in the EIA process.<sup>191</sup> Singapore's laws do not require public participation or public disclosure of information in the EIA process.<sup>192</sup>

#### **h. Incentives, awards, forums and guidance**

78. Financial and tax incentives are commonly used by ASEAN States, including in relation to the environment, labour, and persons with disabilities. For example, the Philippines Environment Partnership Program, a partnership between government agencies and industry players, utilises a package of incentives and reward mechanisms to spur industry self-regulation and improved environmental performance.<sup>193</sup> Malaysia and Vietnam provide discounts, financing and tax incentives to enterprises producing or using green technology or environment-friendly products. Malaysia grants tax deductions to companies that provide safety training programmes, and that employ

189 Vietnam Report, Section III.2.2, citing 2005 Environment Protection Law, Articles 14, 18 and 32.

190 Thailand Report, Section III.2.2, citing Section 6(1) of the Environmental Quality Act.

191 World Bank Environment and Social Development Department, East Asia and Pacific Region, "Annex 11: Thailand", *Environmental Impact Assessment Regulations and Strategic Environmental Assessment Requirements. Practices and Lessons Learned in East and Southeast Asia*, April 2006, at 64. The four levels of participation listed are (1) Informed/public disclosure; (2) Consulted/public hearing; (3) Involved in decision making/public committee; and (4) Voted/public consensus.

192 See Environmental Protection and Management Act (Cap. 94A).

193 Philippines Report, Section III.5.1.

persons with disabilities. In Indonesia, the new law on corporate social responsibility in its 2007 Corporate Law states that incentives will be given to companies that comply with their "social and environmental responsibilities", although this does not appear to be implemented yet.

79. Awards for CSR practices or issue-specific practices such as workplace health and safety and the environment, and the issuance of guidance to businesses on compliance with labour obligations, are also common.

80. Notably, government-led CSR forums have been established in Indonesia. A coordination team was established by the local government in Jombang Regency to coordinate CSR and environmental programs, and a multi-stakeholder CSR forum was established by the local government in the city of Batam.<sup>194</sup>

#### **(3) State-Business Nexus**

81. The Guiding Principles have recommended that States ensure respect for human rights in the following policy areas that lie within what it terms the "State-Business Nexus."

##### **a. State-owned or State-controlled Enterprises**

82. The Guiding Principles give at least two reasons for why State-owned or State-controlled enterprises merit distinct attention.<sup>195</sup> First, their wrongful conduct may be attributable to the State. Second, these are enterprises that States can easily control through specific policies, laws and regulations, and over which States can exercise greater oversight.

83. Malaysia and Indonesia have specific regulations or guidance for good governance practices in

194 Indonesia Report, Section III.8.1.

195 Commentary to Guiding Principle 4.

respect of State-owned enterprises. Indonesia's Regulation of Ministry of State-owned Enterprises requires the board of directors to implement CSR and take into consideration the interests of all stakeholders including society in corporate decisions/policy, but non-compliance does not attract sanctions.<sup>196</sup> In Malaysia, the Putrajaya Committee on GLC High Performance has issued the Silver Book for GLCs. The Silver Book encourages GLCs to ensure activities that benefit society are an integral component of their business.<sup>197</sup>

84. States can also consider using independent mechanisms to monitor and investigate State-owned companies. Indonesia's Ombudsman has investigated complaints regarding maladministration by State-owned companies relating to labour conflicts, environmental pollution and discrimination. Indonesia's Corruption Eradication Commission has initiated a project to assess corruption in businesses, including State-owned enterprises, and has also monitored and supervised the transactions of several State-owned enterprises.

#### **b. State Support and Services for Private Businesses**

85. Government agencies may provide support and services to private businesses, particularly in the fields of investment and development. Examples of such agencies are export credit agencies, investment insurance and guarantee agencies, development agencies and development finance institutions.<sup>198</sup>

86. The country reports did not find information on whether ASEAN States are taking any steps to ensure its agencies do not support human rights abuses when providing support and services, and whether they are encouraging such government

196 Indonesia Report, Section III.6.1.

197 Malaysia Report, Section III.6.1.

198 Commentary to Guiding Principle 4.

agencies and beneficiary enterprises to exercise due diligence to respect human rights.

#### **c. Public Procurement**

87. Guiding Principle 6 regards commercial transactions between governments and businesses as having "unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts."<sup>199</sup> Public procurement is a significant example of such commercial transactions.

88. The Philippines has a Green Procurement initiative. Established by a presidential executive order, it requires all government departments, offices and agencies to establish their own Green Procurement Programs that (1) promote a culture of making environmentally-informed decisions, especially in the purchase and use of products, (2) include environmental criteria in public tenders "whenever possible and practicable," (3) establish specifications and requirements for products and services to be considered environmentally advantageous, and (4) develop incentive programs for suppliers of environmentally advantageous products or services.<sup>200</sup>

89. The other country reports noted a lack of specific regulations, policies or initiatives that would encourage respect for human rights in public procurement. Nevertheless, this need not necessarily indicate the absence of any action. Requirements encouraging respect for human rights may be found as specific contractual terms in procurement contracts. Systematically reviewing government procurement contracts, which are mostly confidential, was outside the scope of this study.

199 Commentary to Guiding Principle 6.

200 Philippines Report, Section III.6.4.

#### d. Privatisation of Public Services

90. States may have legislation governing the process of privatisation, and/or laws governing the provision of specific public services, e.g. the supply of water, by private enterprises. These laws and regulations, or contractual terms in service contracts, may be used by States to require respect for human rights in the delivery of privatised services. In Vietnam, a number of decrees and circulars require State-owned or State-controlled enterprises to ensure that labour rights are respected during the privatisation process, and to monitor compliance with obligations to respect labour rights after privatisation; these laws are not, however, consistently issued.<sup>201</sup> Indonesia's regulations governing private water service providers set out principles for determining price, including fairness.<sup>202</sup> Some country reports observed that issues of equitable distribution such as accessibility and affordability, tended not to be regarded as matters to be specifically regulated by statutory laws.<sup>203</sup>

91. The regulation of privatisation and privatised services is particularly pertinent in Myanmar as it undergoes economic reforms. According to the Myanmar report, a new privatisation commission led by Myanmar's Vice-President has been established and tasked to "evaluate privatised enterprises as to whether they promote national interests, and to report their pros and cons to the higher bodies concerned".<sup>204</sup>

201 Vietnam Report, Section III.6.3.

202 Indonesia Report, Section III.6.3, citing Article 60 of the 2005 Government Regulation No. 16 on the Drinking Water Supply Systems.

203 Indonesia Report, Section III.6.3; Singapore Report, Section III.6.3.

204 Myanmar Report, Section III.6.3.

#### (4) *Business Activities in Conflict-Affected and High-Risk Areas*

92. States should take measures to prevent business-related human rights abuses in conflict-affected and high-risk areas where such areas exist (host States), or the States that are the home jurisdictions of foreign business operating in such areas (home States). The Guiding Principles identify a number of measures both host and home States may take, namely:<sup>205</sup>

- *engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;*
- *providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;*
- *denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; and*
- *ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.*

93. ASEAN States do not appear to be systematically taking such measures. The reasons seem manifold: In some countries, conflict areas are not officially acknowledged as such and are therefore not subject to specific policies or regulations. Another layer of complexity is added by the fact that conflicts and high-risks often occur in areas that are rich in resources and therefore particularly important for the domestic economy. This may lead to a government being reluctant to impose human rights-related requirements on investors. Finally,

205 Guiding Principle 7.

conflict and high-risk areas tend to have weak local governments with often weak enforcement of existing laws.

#### a. Measures by Host States

94. A number of Southeast Asian countries are experiencing conflict; a number have areas at risk of conflict. Myanmar faces an ongoing conflict in Kachin State, and extractive industries, such as the China-Burma pipelines project, operate in areas of ethnic conflict. The areas of Papua and Aceh in Indonesia are at risk of conflict, arising from military involvement in providing security for extractive operations. The Philippines has experienced a long-standing conflict in the Mindanao area, and Thailand faces violent ethnic/religious tensions along its southern border.

95. Abuses in conflict-affected and high-risk areas have involved government security forces. Indonesia and the Philippines have issued guidelines to their security forces in respect of their activities in providing security to extractive companies and in responding to labour strikes. According to the Indonesia Report, Indonesia's now-defunct State-owned oil and gas regulatory authority, BP Migas, had a memorandum of understanding with Indonesia's national police that provides procedures for the latter in safeguarding oil and gas activities, including in conflict-affected areas, which refer to respect for human rights.<sup>206</sup> The guidelines were used by local-level police and private security forces as a basis for their own security strategies, and formed the basis for security strategies formulated between British Petroleum and the Indonesian national police.<sup>207</sup> According to the Philippines Report, the Philippines has issued guidelines on the conduct of certain government authorities, including its national defence,

armed forces and national police, relating to the exercise of workers' rights and activities. The said guidelines seek to ensure peace and order and security during labour disputes, while at the same time respecting the exercise of workers' and trade union rights in an environment free from violence, pressure, fear, and duress of any kind.<sup>208</sup>

96. Other measures to address the issue include incorporating the Voluntary Principles on Security and Human Rights into provisions in investor-State contracts.<sup>209</sup> Also, ASEAN States may consider participating in the Montreux Document on private military and security companies, which, together with the International Code of Conduct for private military and security companies, is relevant to strengthening their respect for human rights. Currently, no ASEAN State is a participant to the Montreux Document.<sup>210</sup>

97. The Thailand Report suggests the need to solve the underlying conditions of poverty that might be supporting conflict. In this regard, Thailand has designated the high-risk area prone to Buddhist-Muslim tensions along its southern border as a special development area, where the Halal food industry is promoted, including via a State-initiated Islamic micro-credit plan that provides financial assistance to the poor and low-income earners. This would ostensibly prevent business-related human rights abuses by empowering the local community and alleviating poverty.

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208 Philippines Report, Section III.8.1.

209 John G. Ruggie, "Keynote Remarks at Association of International Petroleum Negotiators Spring 2012 Conference," Washington D.C., 20 April 2012.

210 <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html>.

206 Indonesia Report, Section III.5.2.

207 Indonesia Report, Section III.5.2.

## b. Measures by Home States

98. In some instances, home States may be better able than host States to exercise regulatory control over the operations their businesses in conflict-affected or high-risk areas abroad. For example, unlike host States who are often unable to exercise ordinary government control in these areas, home States may have greater enforcement capacity to apply sanctions on enterprises incorporated in their territory.
99. No steps by ASEAN States to support business respect for human rights by domestic companies operating in conflict-affected or high-risk areas abroad were reported. The lack of publicly available information may be one reason for this. Another may be the argument by some that States have no obligation to regulate the overseas business activities of companies headquartered or incorporated in their territory.<sup>211</sup>

### (5) *Maintaining Adequate Regulatory Space: Investment and Trade Policies*

#### a. International Trade and Investment Agreements

##### (i) *How International Trade and Investment Agreements Constrain States' Regulatory Space*

100. States' obligations under WTO and international investment agreements may constrain their use of regulatory measures to ensure that businesses respect human rights,

<sup>211</sup> UNSRSG consultation summary report, "Business & Human Rights: The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations With Respect to Human Rights," Copenhagen, 8-9 November 2007, at 8. This was noted in relation to a separate but similar matter ("Responding to earlier arguments about home state complicity, a state representative said that states may not believe they should stop ECAs from supporting questionable projects abroad because they do not feel obliged to protect individuals in other jurisdictions.")

and to prevent business activities that could result in social and environmental harm. Regulatory measures taken to protect against corporate-related human rights abuses may by virtue of these obligations be regarded as prohibited trade restrictions or violations of investor protection standards.

101. In this regard, all ASEAN States save Lao PDR are WTO members.<sup>212</sup> Lao PDR is taking steps to become a WTO member.<sup>213</sup> In addition, all ASEAN States have entered into bilateral or multilateral trade and investment agreements.
102. The following case serves to demonstrate how investment and trade agreements can constrain States' right to regulate. It is part of a series of lawsuits and legal proceedings initiated by tobacco companies against countries implementing legislation to ban or limit smoking and the selling of tobacco products. Such proceedings are based on national laws, bilateral investment treaties or international trade agreements such as the GATT or the European Economic Area.<sup>214</sup>

<sup>212</sup> [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

<sup>213</sup> Lao PDR Report, Overview.

<sup>214</sup> Under the Agreement establishing the European Economic Area, the EFTA-Court decided against Philip Morris. The tobacco company had filed a complaint against Norway's ban of displaying tobacco products and smoking devices. Decision of the EFTA-Court, Case E-16/10, 12 September 2011 ([http://www.eftacourt.int/images/uploads/16\\_10\\_Judgment\\_EN.pdf](http://www.eftacourt.int/images/uploads/16_10_Judgment_EN.pdf)). For the Philippines see <http://www.gmanetwork.com/news/story/297279/news/nation/ca-junks-govt-plea-vs-marikina-court-ruling-on-tobacco-case>.

**Constraints In International Trade And Investment Agreements: The Case Of Australia-Tobacco Plain Packaging<sup>215</sup>**

Australia has passed legislation requiring all cigarettes sold in Australia to be packaged in identical packaging with graphic health warnings. Significantly, tobacco company logos and colours are disallowed. The cigarette brand name is required to be written in a standard typeface and colour at the bottom of the package.

Big tobacco companies affected by these legislative measures have sued Australia under the Hong Kong-Australia bilateral investment treaty. Should they succeed, Australia will be required to compensate for any losses caused to the tobacco companies by the measures.

Three tobacco-growing countries, Ukraine, Honduras and the Dominican Republic have also filed complaints with the WTO, alleging that these measures violate the GATT, the TRIPS Agreement and the Agreement on Technical Barriers to Trade. These cases are pending. Indonesia, Malaysia, the Philippines, Singapore, and Thailand, among others, have reserved their third party rights in respect of this case. In particular, the Philippines has expressed concern over how Australia's legislation violates the TRIPS Agreement.<sup>216</sup>

Should the complainants succeed, Australia will be required to bring its laws in compliance with its WTO obligations.

103. Another interesting case is the pending complaint brought by Norway and Canada against the European Union because of its import and marketing prohibition on seal products.<sup>217</sup> Some countries argue that hunting seals is necessary to protect environmental balance and the livelihood of the local population while for others animal protection prevails.

104. Complaints could conceivably be made against the decisions of Indonesia and Cambodia to ban sand exports.<sup>218</sup> The sand export bans may be

justified on environmental grounds – the sand-dredging involved can reportedly diminish fish stocks and result in landslides and flooding, affecting surrounding communities.<sup>219</sup>

105. The limiting effect of WTO obligations should not be overstated. In the above environment-related cases, effective alternative means of ensuring social and environmental protection are available to States, such as directly regulating the carrying out of the relevant business operations.<sup>220</sup> In addition, WTO law gives broad discretion to States in defining their domestic level of protection with regard to public interest policies as long as such policies are not arbitrarily discriminating or unnecessary impediments to international

<sup>215</sup> The Australian High Court upheld the policy in its decision of 15 August 2012, published 5 October 2012: <http://www.hcourt.gov.au/cases/case-s409/2011>. WTO Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging, WT/DS434, DS435, DS441. The Panel has been established, but not yet composed on 28 September 2012

<sup>216</sup> Minutes of TRIPS Council Meeting held on 7 June 2011, dated 2 September 2011, IP/C/M/66, at para. 203.

<sup>217</sup> European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, Constitution of the Panel Established at the Requests of Canada and Norway WT/DS400/5/Rev.1, WT/DS401/6/Rev.1, 5 November 2012.

<sup>218</sup> This point was drawn to the author's attention during discussions at Harvard Law School's International Trade course conducted by Assistant Professor of Law Mark Wu in Fall 2012.

<sup>219</sup> "Singapore's Sand Shortage: The Hourglass Effect," *The Economist*, 8 October 2009, <http://www.economist.com/node/14588255>.

<sup>220</sup> In other words, export restrictions are not necessary to protect against the potential environmental harm, and the main aim of such export restrictions might instead be to protect domestic industries that rely on the relevant products.

trade.<sup>221</sup> One of the challenges for developing countries lies in the lack of resources for the careful tailoring of such measures in order to avoid trade disputes.

**(ii) *Maintaining Regulatory Space through Provisions in Investment and Trade Agreements***

106. The WTO agreements provide for general exceptions that may apply to regulatory measures taken for certain social and environmental purposes. ASEAN's FTAs usually contain similar exceptions in their trade-related chapters.

107. ASEAN States have likewise taken steps to maintain adequate regulatory space in their international investment agreements. This is important particularly because these agreements usually allow investors to bring claims directly against States. ASEAN States have in their investment agreements included exceptions for measures necessary to protect public morals, maintain public order, and protect human, animal, or plant life or health, among other things. Such exceptions are found in the investment chapter of the ASEAN-Korea FTA, the ASEAN-China Investment Agreement and the ASEAN Comprehensive Investment Agreement. They serve to preclude the operation of investor protections when measures falling within the exceptions are used by State parties.

108. Singapore has taken steps to preserve its right to regulate in respect of security, public order, public health, and the environment. A considerable number of its bilateral investment treaties – at least 9 – contain a general exception, providing that the agreement's provisions

<sup>221</sup> United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US – Gambling), Report of the Appellate Body, 7 April 2005, WT/DS285/AB/R, paras. 296-298.

shall not “limit the right of a state to apply prohibitions or restrictions of any kind or take any other action” directed to the protection of its essential security interests, or the protection of public health and prevention of diseases etc.<sup>222</sup> Similar provisions are found in the Vietnam-Japan Economic Partnership Agreement, and the Indonesia-Japan Economic Partnership Agreement. These examples are not exhaustive.

109. Mere references in investment agreements to human rights or human rights-related issues, such as public health and the environment, do not necessarily maintain regulatory space. Much depends on how the specific provisions are drafted. For example, the India-Singapore bilateral investment treaty provides that the treaty shall not prevent the adoption of health, safety or environmental measures “consistent with this Chapter.” Also, the investment chapter in the US-Singapore FTA provides that the chapter does not prevent a party from adopting environmental protection measures “otherwise consistent with this Chapter.” The qualifiers in quotation marks may diminish the scope of these exceptions. They suggest that the measures in question must still be consistent with other treaty obligations that protect investors.

110. The 2002 EFTA-Singapore FTA, reaffirms the State parties' commitment to the principles of the UN Charter and the Universal Declaration on Human Rights. It has the distinction of being one of the few FTAs, if not the only one, in Southeast Asia to refer to “universal human

<sup>222</sup> Namely, the Singapore-Jordan, Singapore-China, Singapore-Vietnam, Singapore-Pakistan, Singapore-Czech Republic, Singapore-Mongolia, Singapore-Egypt, Singapore-Mauritius and Singapore-Cambodia BITs: Mahnaz Malik, *South-South Bilateral Investment Treaties. The Same Old Story?*, Annual Forum for Developing Country Investment Negotiators, Background Papers, New Delhi, October 27-29, 2010, at 3.

rights” principles.<sup>223</sup>

111. Future investment and trade agreements may contain more robust provisions that help States maintain the regulatory space needed to fulfil their duty to protect. For example, the Trans-Pacific Partnership FTA is likely to contain references to or provisions on labour and environmental protections.<sup>224</sup> Brunei, Malaysia, Singapore and Vietnam are involved in negotiating this treaty. Also, the EU and US’ recently adopted Shared Principles on Investment embody their commitment to secure compliance by non-OECD members with the OECD principles on investment, which has a human rights chapter.<sup>225</sup> This foreshadows the inclusion of human rights-related provisions in agreements they negotiate with ASEAN countries. In this regard, Indonesia and Thailand are currently negotiating economic partnership agreements with the EU.<sup>226</sup>

### ***(iii) Human Rights Impact Assessments for Trade and Investment Agreements***

112. Human rights impact assessments are an innovation that may ensure that trade and investment agreements do not adversely impact

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223 Howard Mann, “Session 2.2.: The policy framework for investment: the social and environmental dimensions. International Investment Agreements, Business and Human Rights: Key Issues and Opportunities,” OECD Global Forum on International Investment, 27-28 March 2008, at 10. (“REAFFIRMING their commitment to the principles set out in the United Nations Charter and the Universal Declaration of Human Rights”)

224 Agence-France Presse, “Obama launches TPP in Asia push,” 14 November 2011, accessed at <http://www.taipetitimes.com/News/front/archives/2011/11/14/2003518255>; Mergawati Zulfakar, “All eyes on Miti negotiations,” May 25, 2012, *The Star ePaper*, at pg. 33.

225 [http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc\\_149331.pdf](http://trade.ec.europa.eu/doclib/docs/2012/april/tradoc_149331.pdf).

226 Asia Regional Integration Centre, *Free Trade Agreements*, <http://aric.adb.org/FTAbyCountryAll.php>. (accessed 2 January 2011).

the enjoyment of human rights by restricting States’ regulatory space. The Thai NHRI’s human rights impact assessment of the Thai-US FTA in 2006 is widely reported to be the first such assessment of an international trade agreement.<sup>227</sup> Malaysia’s NHRI is reportedly considering conducting such an assessment of trade agreements that are under negotiation by Malaysia.<sup>228</sup>

### **b. Investor-State Contracts**

113. Mechanisms such as stabilisation clauses benefit investors by reducing the legal and financial risks of regulatory change, and are used by States as incentives to attract investment. Such clauses may exempt investors from the application of new environmental and social laws, or entitle investors to be compensated for losses incurred in bringing activities in line with new laws.<sup>229</sup> They may be found in investor-State contracts or domestic laws relating to investment, and may have the effect of “locking in” or hindering the State in improving its human rights protections through law reform. In this regard, States,

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227 A draft report appears to have been circulated at the time, but a copy does not appear to be publicly accessible: [http://www.bilaterals.org/spip.php?page=print&id\\_article=7012](http://www.bilaterals.org/spip.php?page=print&id_article=7012) and <http://www.twinside.org.sg/title2/twninfo492.htm>; see also, Berne Declaration, Canadian Council for International Co-operation & Misereor (2010). Human Rights Impact Assessment for Trade and Investment Agreements. Report of the Expert Seminar, June 23-24, 2010, Geneva, Switzerland.

228 <http://www.twinside.org.sg/title2/FTAs/info.service/2012/fta.info.200.htm>.

229 UNOHCHR, *Consultation Summary. Stabilization Clauses and Human Rights*, London, 22 May 2008, at 2; Andrea Shemberg, *Stabilization Clauses and Human Rights* (a research project conducted for IFC and the former UNSRSG), 11 March 2008.

particularly the lesser developed countries, may look to the UNCTAD Investment Policy Framework for Sustainable Development for guidance in striking the right balance between regulatory flexibility and investor protection.<sup>230</sup>

114. The following case involving Indonesia's former system of work contracts illustrates how such constraints play out in practice.

115. Another example found is Lao PDR's concession agreement in respect of its Nam Theun II project, which obliges Lao PDR to pay compensation to the project's investors if it enacts laws that negatively impact the profits from the project.<sup>235</sup>

#### Constraints In Investor-State Contracts: The Case Of Indonesia's Contracts of Work<sup>231</sup>

When granting exploitation rights and concessions to companies, Indonesia enters into contracts of work with them. The terms and conditions of Indonesia's contracts of work cannot be subject to changes in laws and regulations.<sup>232</sup>

In 1999, Indonesia passed a new Forestry Law that prohibited open-pit mining in protected forests. This appeared to conflict with several companies' mining and exploration rights. Affected companies maintained that their contracts of work superseded the new Forestry Law; some threatened to sue. Under pressure, Indonesia issued a government regulation in 2004 declaring that all contracts of work issued prior to the 1999 Forestry Law remained valid until the contractual expiry date.<sup>233</sup>

Whether existing contracts of work will prevent the application of new statutory environmental and human rights safeguards has been raised again recently. In 2008, Indonesia enacted a new Law on Mineral and Coal Mining. The law provides that it does not apply to contracts of work issued prior to its enactment. Accordingly, the government has had to open re-negotiations on all mineral and coal mining contracts in the country in order to bring them in line with the new mining law.<sup>234</sup> Whether the re-negotiations will be successful in doing so is inevitably uncertain.

<sup>230</sup> UNCTAD, World Investment Report 2012.

<sup>231</sup> The conception and drafting of this case brief benefited significantly from the contributions of Ms. Nadine Riera, LL.M candidate, University of Zurich, Switzerland.

<sup>232</sup> Kyla Tienhaara, "Mineral Policy in Developing Countries: Protecting Investors or the Environment," paper presented at the Berlin Conference on the Human Dimensions of Global Environmental Change, 17-19 November 2006, at 18, citing Barberis, D. (1998). *Negotiating Mining Agreements: Past, Present and Future Trends*. (The Hague: Kluwer Law International).

<sup>233</sup> Kyla Tienhaara, "Mineral Policy in Developing Countries: Protecting Investors or the Environment," paper presented at the Berlin Conference on the Human Dimensions of Global Environmental Change, 17-19 November 2006 at 20.

<sup>234</sup> Ranga D. Fadillah, *The Jakarta Post*, "Freeport 'Ready to Renegotiate Contract,'" 6 March 2012, accessed <http://www.thejakartapost.com/news/2012/03/06/freeport-ready-renegotiate-contract.html>.

#### (6) Access to Remedies

116. Ensuring access to remedy for the everyman is a universal aspiration. The recent ASEAN Human Rights Declaration recognises the right of every person to an effective and enforceable remedy. This certainly includes remedy for harm suffered as a result of business-related wrongs.

##### a. State-based Grievance Mechanisms

117. *Judicial mechanisms*: All ASEAN countries have well-established formal judicial systems with

<sup>235</sup> Lao PDR Report, Section III.8.2.

tiers of courts.<sup>236</sup> Some have specialised courts, such as Malaysia's industrial court, labour court and consumer tribunal, and Thailand's labour court. Indonesia has a Human Rights Court, which is mandated to deal with cases involving gross violations of human rights like genocide and crimes against humanity. The said Court has never dealt with corporate or corporate-related violations.<sup>237</sup>

118. *Non-judicial mechanisms:* ASEAN States also have non-judicial or quasi-judicial mechanisms specialising in specific issues such as labour and land. For example, Cambodia's Arbitration Council is a quasi-judicial body established under its labour law and in cooperation with the ILO to address claims of labour rights violations and resolve workplace disputes through conciliation and arbitration.<sup>238</sup> In a context where corruption is widespread, the council has been described as credible, politically-neutral and free from corruption.<sup>239</sup> Land disputes in Cambodia may be brought to the Cadastral Commission and the National Authority for the Resolution of Land Disputes. The latter's powers and jurisdiction are unclear.<sup>240</sup> Myanmar has recently established labour dispute settlement mechanisms, which involve conciliation and arbitration. In Indonesia, land and mining disputes may be brought to specialist mediators at the Indonesian Mediation Centre.<sup>241</sup>

119. *Governmental complaints channels:* Besides the courts, ASEAN States have instituted complaints channels with governmental bodies. For example, claims against employers for breaches of Singapore's Employment Act

may be lodged with the Ministry of Manpower, which also provides voluntary mediation assistance to managers and executives not covered by the said Act.<sup>242</sup> Vietnam has a system of land, labour and environment inspectorates at the local and central levels, which receive and address complaints.

120. *Informal mechanisms:* Informal or community-based justice mechanisms also exist. The Philippines' Barangay Justice System is a local-level, community-based mechanism for dispute resolution comprising over 7,000 offices; some barangay offices are able to handle human rights issues.<sup>243</sup> Lao PDR has over 8,000 village mediation units, which are a semi-formal adjudicative mechanism under the supervision of the country's justice ministry.<sup>244</sup>

121. *Customary mechanisms:* Indigenous peoples of some ASEAN States are allowed customary avenues for remedy. In Malaysia, indigenous peoples in the states of Sabah and Sarawak can elect to seek settlement of disputes before Native Courts, headed by native chiefs assisted by the village head. In Indonesia, laws in the areas of Papua and Aceh provide for adjudicative processes that rely on customary law and have tribal leaders as adjudicators. Indonesia's customary adjudicative mechanisms have been used to resolve land ownership disputes between corporations and society.<sup>245</sup>

(i) ***Innovations in Access to Remedy***

122. Conceivable governance gaps in relation to access to remedies are many, and include the absence of legal standing, judicial independence, lack of legal representation, and time and resource limitations. One innovation to strengthen access to remedies is the Justice

236 See Human Rights Resource Centre, *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study* (2011).

237 Indonesia Report, Section III.4.2.

238 Cambodia Report, Section III.9.1.

239 Cambodian Centre for Human Rights, *Business and Human Rights in Cambodia: Constructing the Three Pillars*, November 2010, at 65.

240 Cambodia Report, Section III.9.1.

241 <http://baseswiki.org/en/Indonesia>.

242 <http://www.mom.gov.sg/employment-practices/disputes-and-claims/Pages/lodge-claim-complaint.aspx>.

243 Philippines Report, Section III.10.

244 Lao PDR Report, Section III.9.1.

245 Indonesia Report, Section III.9.3.

on Wheels Program in the Philippines. The Philippines' Supreme Court has put in action mobile courts that have brought courtrooms to municipalities without regular courts, to detention facilities and youth reception centres, and others for whom the courthouse is not easily accessible.<sup>246</sup>

123. The Philippines' legal assistance fund for migrant workers and overseas Filipinos in distress is another initiative to facilitate access to remedies. For abused, exploited and/or trafficked migrant workers, the country in which the perpetrators of such crimes have

operations in would usually be the most suitable forum to bring suit. Even if legal avenues for remedy in these countries are available, these migrant workers, by the very nature of the crimes committed against them, would unlikely have the resources to do so. The fund is hence a practical solution for a key problem.<sup>247</sup>

124. The Philippines has also implemented significant innovations for providing remedy for environmental harm that violates the constitutional right to a balanced and healthful ecology.<sup>248</sup>

#### Remedy for Environmental Harm: Innovations in the Philippines<sup>248</sup>

The Supreme Court of the Philippines has recently instituted a number of significant measures to enhance access to justice in environmental cases. These include:

- *designating over 100 regular courts across the country as "green courts" with specific jurisdiction over violations of environmental laws;*
- *environmental protection orders, which compel persons or government agencies to act or refrain from certain acts, in order to protect, preserve or rehabilitate the environment;*
- *citizen suits may be filed by any Filipino citizen on behalf of others to enforce rights or obligations under environmental laws, whether or not he or she meets ordinary requirements for legal standing;*
- *the writ of Kalikasan, which allows suits to be brought before the country's higher courts against officials or private individuals or entities for actual or threatened large-scale environmental harm. Such suits may be brought by individuals and NGOs on behalf of others;*
- *reducing the financial burden on plaintiffs by deferring the payment of filing and other legal fees until after judgment; if the plaintiff is successful, such fees may be charged against the judgment award;*
- *the adoption of the precautionary principle, which resolves situations of scientific uncertainty over the likelihood of environmental damage in favour of upholding the constitutional right to a balanced and healthful ecology; and*
- *the enactment of a legal ground for courts to dismiss suits intended to harass plaintiffs in environmental cases and deter them from bringing or continuing suit.*

<sup>246</sup> Philippines Report, Section III.9.2.

<sup>247</sup> Philippines Report, Section III.2.2.

<sup>248</sup> Philippines Report, Section III.9.1.

**(ii) *Recourse against State Conduct in Business-Related Human Rights Abuses***

125. States may be involved in business-related human rights abuses by virtue of, for example, their role in granting licenses and concessions for potentially harmful business operations, and in entering into agreements related to potentially harmful development projects. They may also be regarded as involved when State-owned or controlled enterprises cause or contribute to human rights abuses. Avenues for seeking recourse in respect of such conduct are available in ASEAN States.

126. *Judicial review:* Judicial review mechanisms have been employed to prevent or remedy potential business-related human rights abuses. For example, a judicial review application was filed by residents in Kuantan, Malaysia, challenging a decision by the relevant government agency to grant a temporary operating license to Lynas Advanced Materials Plant to construct a plant to process raw materials for the extraction of rare earth.<sup>249</sup> In Thailand, the alleged failure of a governmental committee to declare an industrial estate a pollution control zone was the subject of a complaint by residents before a Thai administrative court, who sought a declaration that the area was a pollution control zone such that more stringent regulations would apply.<sup>250</sup> A more recent example of a similar case before a Thai administrative court is the abovementioned lawsuit in respect of the Xayaburi dam.

127. *State-based Monitoring Mechanisms:* In some ASEAN countries there are independent, State-created mechanisms for monitoring government conduct. For example, Indonesia's Ombudsman monitors public services

<sup>249</sup> Malaysia Report, Section III.2.3.

<sup>250</sup> Thailand Report, Section III.2.

performed by public and private institutions, including state-owned corporations, and has the power to investigate and make recommendations to the relevant authorities.<sup>251</sup> It has investigated certain cases involving business-related human rights abuses, such as environmental pollution by State-owned corporations and discriminatory practices by State-owned hospitals.<sup>252</sup> In Myanmar, the recently established Rule of Law and Stability Committee, chaired by Daw Aung San Suu Kyi, will serve as a mechanism for the general public to lodge complaints against government departments. Its mandate entails investigating and reporting on complaints.

**(iii) *Access to Remedy for Harm Caused by Overseas Business Activities***

128. Domestic avenues for remedy are often unavailable to individuals and communities in less developed countries harmed by business activities. They have hence sought ways to seek remedy through grievance mechanisms elsewhere. One well-known route is through civil litigation brought in the U.S. under its Alien Torts Claims Act against businesses for corporate-related human rights abuses occurring anywhere in the world.<sup>253</sup>

129. A relevant case involving the use of a judicial forum in ASEAN is a complaint filed by Thai villagers before the Thai Administrative Court, seeking the cancellation of a Thai government agreement to purchase power from the

<sup>251</sup> Indonesia Report, Section III.1.

<sup>252</sup> Indonesia Report, Section III.1.

<sup>253</sup> Whether or not U.S. courts can exercise universal jurisdiction over corporate torts under the Alien Torts Claims Act was an issue of continuing controversy, and now hinges on the pending decision from the U.S. Supreme Court in the case of *Kiobel v. Royal Dutch Petroleum*.

Xayaburi dam in Lao PDR.<sup>254</sup> The extent to which the arguably stronger judicial systems of more developed Southeast Asian countries have been or may be used to provide remedy for harm caused by corporate activities in other jurisdictions is not within the scope of this study.

## b. Non-State-Based Grievance Mechanisms

130. Besides easing the caseload of State-based mechanisms, non-State-based grievance mechanisms can also bridge jurisdictional gaps that arise where a case does not fall within the jurisdiction of a State-based grievance mechanism or there is no available reliable State-based grievance mechanism.

131. Some ASEAN States have used regulatory tools to require or encourage businesses to implement corporate-level grievance mechanisms. For example, in the Philippines, the Revised Code of Corporate Governance requires the board of directors of covered companies to establish and maintain a corporate alternative dispute resolution system to settle intra-corporate disputes, as well as disputes with third parties.<sup>255</sup> Also, the Philippines' Anti-Sexual Harassment Act of 1995 requires employers to create a committee on decorum and investigation of cases of sexual harassment.<sup>256</sup> In Myanmar, the 2011 Trade Dispute Act provides for the formation of a workplace coordinating body, comprising representatives appointed by workers and employers, which will receive complaints from workers or employers.<sup>257</sup>

### 132. A number of alternative accountability

254 <http://www.businessweek.com/news/2012-08-07/thai-lawsuit-threatens-to-derail-laos-plans-for-mekong-river-dam>.

255 Philippines Report, Sections III.4 and III.9.3.

256 Philippines Report, Section III.9.3.

257 Myanmar Report, Section III.9.1.

mechanisms have been used by individuals and communities harmed by corporate-related human rights abuses to seek remedy. These include national human rights institutions, the accountability mechanisms of international financial institutions, the OECD National Contact Points (NCPs) and the European Trade Commission.<sup>258</sup> In relation to the OECD NCPs, recourse may be sought in an investor's home country, provided the country is a member of the OECD or has adhered to the OECD Guidelines for Multinational Enterprises. An example is the Intex case brought before the Norwegian NCP against the Norwegian company's Mindoro Nickel Project in the Philippines. The NCP concluded that Intex had not complied with its obligation under the OECD Guidelines to consult with all indigenous people affected by the project.<sup>259</sup>

133. Non-State actors have been active in employing and strengthening these alternative accountability mechanisms. For example, Accountability Counsel, a non-profit organisation, specialises in using non-judicial accountability mechanisms, such as those of international financial institutions and OECD national contact points, to defend the environmental and human rights of communities around the world who are harmed by development projects. Also, a new global resource centre has been launched in The Hague called 'ACCESS', a global knowledge centre on non-judicial grievance mechanisms that will support practical access to dispute management resources for company-community conflicts.

258 *Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi. A human rights analysis of economic and other land concessions in Cambodia*, Human Rights Council, 21<sup>st</sup> Session, 24 September 2012, at paras. 191 to 195.

259 Norwegian National Contact Point, *Future in Our Hands vs. Intex ASA*, Final Statement, 6 December 2011. <http://www.responsiblebusiness.no>

134. The role NHRIs can play as accountability mechanisms, particularly for transnational harm, merits attention from States seeking to fulfil their duty to protect, since the mandates and powers of these institutions are ultimately defined by the State.

### (7) *Other Significant Actors*

#### a. **Stock Exchange and Securities Regulators**

135. Stock exchange and securities regulators have the potential to open space for market pressures to positively influence corporate cultures. All ASEAN States save Myanmar have stock exchanges. The stock exchanges of Lao PDR and Cambodia were only recently established.

136. Steps have been taken by regulators to encourage listed companies to be socially responsible. For example, the Stock Exchange of Thailand's 2006 Principles of Corporate Governance, encourages companies to ensure that their business operations take into account the aspects on environment and the society for sustainable development. Also, as described above, the relevant regulatory bodies of Indonesia, Malaysia, Singapore and Thailand have instituted mandatory or voluntary reporting of information relevant to corporate social and environmental responsibility.<sup>260</sup> Notably, an environmental, social and corporate governance index is scheduled to be launched by *Bursa* Malaysia in 2013.<sup>261</sup>

260 See paragraphs 73 and 74 above.

261 [http://www.btimes.com.my/Current\\_News/BTIMES/articles/esg/Article/](http://www.btimes.com.my/Current_News/BTIMES/articles/esg/Article/).

#### b. **National Human Rights Institutions**

137. NHRIs, as envisaged by the UN Paris Principles,<sup>262</sup> can play a significant role in monitoring the compliance of States and non-State actors, including businesses, with human rights, advising all relevant actors on how to prevent and remedy such abuses, providing and/or facilitating access to judicial and/or non-judicial remedies, and conducting research and undertaking education, promotion and awareness-raising activities. This was acknowledged by NHRIs from over 80 countries, including Malaysia, in the 2010 Edinburgh Declaration.<sup>263</sup> In this regard, Indonesia, Malaysia, the Philippines, and Thailand have NHRIs accredited by the UN International Coordinating Committee of National Institutions; while the national human rights bodies of Cambodia and Myanmar are not accredited.<sup>264</sup>

138. ASEAN NHRIs have been involved in addressing transnational business-related human rights abuse. The Thai National Human Rights Commission has accepted complaints in relation to human rights abuses overseas. One such complaint was in respect of the involvement of a Thai-owned sugar company in human rights abuses in Koh Kong Province, Cambodia; the Thai human rights commission accepted the complaint

262 <http://www.humanrights.dk/about+dihr/dihr%27s+mandate/what+is+a+national+human+rights+ins-titution-c7-/the+un+paris+principles>.

263 International Co-ordinating Committee Of National Institutions For The Promotion And Protection Of Human Rights (ICC), "The Edinburgh Declaration", 10 October 2010, Edinburgh, available at < [http://www.humanrightsbusiness.org/?f=nhri\\_working\\_group/icc\\_biennial](http://www.humanrightsbusiness.org/?f=nhri_working_group/icc_biennial)>.

264 <http://nhri.ohchr.org/EN/Pages/default.aspx>.

and has issued preliminary findings.<sup>265</sup> The UN Special Rapporteur on the situation of human rights in Cambodia described the case “a success in transboundary human rights promotion and protection,” and “a landmark case for international advocacy.”<sup>266</sup> The said human rights commission has also accepted a complaint brought by Thai villagers in respect of the Xayaburi dam.<sup>267</sup> The Indonesian national human rights commission, KOMNAS HAM, has received complaints relating to the treatment of Indonesian migrant workers overseas, from countries such as Saudi Arabia, Bahrain, Kuwait, Malaysia, Kenya, Singapore, Syria, United Arab Emirates, and the US.<sup>268</sup>

139. In December 2011, representatives from the NHRIs of Indonesia, Malaysia, the Philippines and Thailand attended a workshop on “Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform” in Bali, Indonesia. The workshop identified the UN Framework as a critical tool for dialogue on business and human rights. It also produced a “Bali Declaration on Human Rights and Agribusiness in Southeast Asia,” which expressly took into account the Edinburgh Declaration and welcomed the UN Framework.<sup>269</sup>

265 *Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi. A human rights analysis of economic and other land concessions in Cambodia*, Human Rights Council, 21<sup>st</sup> Session, 24 September 2012, at para. 195.

266 *Report of the Special Rapporteur on the situation of human rights in Cambodia, Surya P. Subedi. A human rights analysis of economic and other land concessions in Cambodia*, Human Rights Council, 21<sup>st</sup> Session, 24 September 2012, at para. 195.

267 Thailand Report, Section III.10.

268 Indonesia Report, Section III.10.

269 <http://www.forestpeoples.org/topics/palm-oil-rspo/news/2012/02/south-east-asian-human-rights-commissioners-and-indigenous-peoples>.

140. While Cambodia has drafted a regulation for a national human rights commission, that law has yet to be enacted. There are nevertheless three existing national-level human rights bodies. Cambodia’s National Assembly Commission on Human Rights is an advisory body to the government that responds to human rights complaints by writing to the relevant government departments.<sup>270</sup> The Senate Commission on Human Rights, another advisory body, was in 2011 described by the UN Special Rapporteur on the Situation of Human Rights in Cambodia as being relatively more proactive in occasionally engaging in fact-finding investigations.<sup>271</sup> The Cambodian Human Rights Committee has powers to investigate and remedy complaints relating to human rights, collect data on implementation, organise trainings, and disseminate information.<sup>272</sup>

141. Indonesia’s NHRI, KOMNAS HAM, has powers to receive and investigate complaints relating to human rights and provide recommendations to the relevant authorities.<sup>273</sup> It issues annual statistics reports on complaints received.

142. Malaysia’s NHRI, SUHAKAM, is mandated to promote awareness in relation to human rights; advise and assist the Government in formulating legislation and administrative directives and procedures and recommend the necessary measures to be taken; make recommendations to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights; and inquire into complaints regarding infringements of

270 Cambodia Report, Section III.10.

271 Cambodia Report, Section III.10.

272 Cambodia Report, Section III.10.

273 Indonesia Report, Sections III.1 and III.10.

human rights.<sup>274</sup> It has in practice resolved complaints by communicating and having meetings with the relevant government agencies and/or parties. SUHAKAM has organised three roundtable discussions with government agencies, corporations and civil society organisations on the issue of business and human rights.<sup>275</sup> It has in a joint statement reaffirmed the role of NHRIs in advancing the UN Framework within their mandates.<sup>276</sup>

143. The Myanmar National Human Rights Commission (MNHRC) was established on 5 September 2011 and has already received over a thousand complaints. The Commission cannot punish and redress human rights abuses, and is instead empowered to investigate complaints and contact the concerned person, company or government department to take action. Should their recommendations not be heeded, the MNHRC can advise the President to take action.<sup>277</sup> The foundational legislation of the MNHRC is still being drafted.

144. The Philippines' Commission on Human Rights has powers to, among other things, investigate all forms of human rights violations involving civil and political rights, on its own initiative or on receiving complaints, to establish programs for research, education and information on human rights, and to monitor the government's compliance with its international human rights obligations.<sup>278</sup> Its mandate to investigate business-related human rights abuses is implied through its mandate to monitor the government's compliance with its human rights obligations. It relies largely on the public to exert pressure on perpetrators

who fail to follow its recommendations.<sup>279</sup>

145. Thailand's National Human Rights Commission is mandated to, among other things, investigate and report human rights abuses, promote the study, research and distribution of knowledge on human rights, promote the collaboration and coordination between government entities, non-government organisations and other human rights organisations, and make recommendations regarding the amendment of laws and/or regulations to the government in order to promote the protection of human rights. It is tasked to forward its opinions or raise cases to adjudicative bodies, namely, the Constitutional Court, Administrative Court and Court of Justice.<sup>280</sup> Presently, the Commission has been mandated to conduct studies on business-related human rights abuses, and is looking into creating CSR guidelines aligned with the UN Global Compact and the OECD Principles.<sup>281</sup> Also significant is its acceptance of complaints relating to business-related human rights abuses occurring overseas, and its conduct of a human rights impact assessment for trade and investment agreements.

### c. Other Non-State Actors

146. It is clear from the country reports that businesses, academics and public interest organisations have been active in efforts to foster corporate respect for human rights in Southeast Asia. For example, UN Global Compact local networks have been established in all ASEAN countries, save Brunei and Lao PDR.<sup>282</sup> A Lao PDR government official

274 Malaysia Report, Section III.10.

275 Malaysia Report, Section III.10.

276 Malaysia Report, Section III.10.

277 Myanmar Report, Section III.1.

278 Philippines Report, Section III.10.

279 Philippines Report, Section III.10.

280 Thailand Report, Section III.10.

281 Thailand Report, Section I.

282 <http://www.unglobalcompact.org/NetworksAroundTheWorld/index.html>.

recently stated, in March 2012, that it was timely to establish a framework for CSR through a National Compact.<sup>283</sup>

147. A significant effort with regard to capacity building was the 2012 Summer Institute on Business and Human Rights, a unique collaborative effort of organising institutions from Asia, the United States, and Europe, involving the East-West Center (EWC), U.C. Berkeley's War Crimes Studies Center (WCSC), the Singapore Management University (SMU) School of Law, the University of Zurich Competence Centre for Human Rights, the Human Rights Resource Centre for ASEAN (HRRRC), and the International Institute for Child Rights and Development (IICRD). It was hosted by SMU in Singapore. The said conference brought together experts from 19 countries in the Asia-Pacific, Latin America, Europe and the United States, including UN and ASEAN officials, NGO practitioners and key business representatives, to discuss and examine issues relating to business and human rights in the Asia-Pacific region.<sup>284</sup>

**(8) ASEAN States' attitudes towards their Duty to Protect**

148. States do not necessarily need to be compelled by binding obligations to take action to address the challenges that lie at the intersection of business and human rights. An understanding of States' attitudes towards the nature of their duties is nevertheless useful.

<sup>283</sup> Lao PDR Report - [http://www.undplao.org/newsroom/CSR%20Forum\\_12March2012.php](http://www.undplao.org/newsroom/CSR%20Forum_12March2012.php).

<sup>284</sup> <http://www.eastwestcenter.org/research/asian-international-justice-initiative/summer-institute>

**a. State Responses to the UN Framework and Guiding Principles**

149. Indonesia, Malaysia and Thailand, as members of the UN Human Rights Council, voted in favour of the Council's endorsement of the Guiding Principles in June 2011. This nevertheless arguably falls short of being a clear endorsement or commitment. Indonesia appears to be the only ASEAN State that has responded overtly and positively to the Framework and Guiding Principles. During the consideration of the Guiding Principles by the Human Rights Council, Indonesia delivered an official statement referring to the obligation of a State to take into consideration human rights when it deals with business, and outlined relevant steps Indonesia had taken.<sup>285</sup>

**b. Recognition of the Duty to Protect in Domestic Legislation**

150. Domestic legislation may reveal the extent to which States accept that they have a duty to protect. Recognition of the State's duties to protect is found in the laws of Indonesia, Lao PDR, the Philippines, Myanmar and Vietnam. For example, Indonesia's Constitution expressly confirms the State's duty to "respect, protect, enforce and develop" human rights generally; further, Indonesia's Constitutional Court has on multiple occasions made reference to the State's obligation to protect against human rights abuses by third parties.<sup>286</sup> Recognition of the State duty to protect is also robust in the Philippines. Provisions throughout its Constitution repeatedly state that "the State shall protect" stated rights, including the right to health, to a balanced and healthful ecology, the rights of workers and ancestral land rights

<sup>285</sup> Indonesia Report, Section I.

<sup>286</sup> Indonesia Report, Section II.

of indigenous cultural communities.<sup>287</sup>

151. Vietnam's Constitution makes several references to the "obligation" and "responsibility" of the State to protect or ensure certain rights, such as "the legitimate rights and interests of citizens," the care and protection of mothers and children, the protection of "children's life, body, dignity and honour, the rights of employees, and women's equal right to work."<sup>288</sup> In Lao PDR, the Constitution declares that, "[t]he state protects the freedom and democratic rights of the people which cannot be violated by anyone." It also mandates all State organisations to produce and implement policies, regulations and laws "in order to guarantee the legitimate rights and interests of the people."<sup>289</sup> In Myanmar, the 2008 Constitution obliges the government to enact necessary laws to protect the rights of peasants and workers.<sup>290</sup> Such obligations are, however, not found in relation to indigenous peoples, minorities, children and the disabled.
152. In Malaysia, constitutional provisions do not, on their face, recognise any duty to protect. Case law appears to interpret the Constitution's safeguards as applicable only to direct rights violations by the State or its agencies, although the matter is arguable.<sup>291</sup> Laws in Singapore and Thailand do not appear to provide recognition of binding obligations on the State to protect individuals from conduct that would constitute human rights abuses by third parties. The Singapore and Thailand Reports did indicate that the substantive content of laws would contribute to the fulfilment of any State duty to protect.<sup>292</sup>

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287 Indonesia Report, Section II.

288 Vietnam Report, Section II.

289 Lao PDR Report, Section II.

290 Myanmar Report, Section II.

291 Malaysia Report, Section II.

292 Singapore Report, Section II; Thailand Report, Section II.

## V. CONCLUSIONS AND RECOMMENDATIONS FOR POTENTIAL NEXT STEPS

153. One of the significant features of the UN Framework and Guiding Principles is that they rightly employ a wide field of vision of what it will take to address the issues raised in the area of business and human rights. As this is a pioneer regional baseline study on business and human rights designed with the aim of embedding the UN Framework and Guiding Principles in ASEAN, we have sought to maintain and promote that breadth in perspective, in relation to how the State's role should be envisaged. We emphasise again that this is a *baseline study*, a survey that is programmatic and identifies gaps and issues that need to be addressed in more in-depth and narrowly focused individual studies.
154. More in-depth research and analysis are required to generate good policy proposals, which likely need to be country-specific. Bearing in mind the limits of our research, we make the following capacity-building and research recommendations to support the development of policy actions:
- *Establish a coherent, complementary and connected regional system to disseminate, embed and implement the UN Framework and Guiding Principles*
    - As identified by the former UNSRSG, a problem with earlier business and human rights-related initiatives was that they existed as separate fragments; the UN Framework and Guiding Principles were hence formulated to be an authoritative focal

point.<sup>293</sup> Initiatives in the region that seek to disseminate, embed and implement the UN Framework and Guiding Principles should be brought together to form a *coherent, complementary and connected* system. To do so, we recommend a stock-taking of these initiatives, and establishment of a regional focal point, network, forum and/or portal that encourages regular dialogue and sharing of research and knowledge.

- *Initiate engagement and collaboration by ASEAN States and NHRIs with other regional bodies, such as the EU and EU Group of NHRIs, on implementing the UN Framework and Guiding Principles*
  - The EU has developed a CSR policy framework,<sup>294</sup> and the EU Commission has invited EU Member States to develop national plans for implementing the Guiding Principles.<sup>295</sup> The European Group of NHRIs has developed a set of preliminary recommendations with regard to these national plans.<sup>296</sup> In the same vein, ASEAN has included CSR as an agenda item in its Socio-Cultural Community Blueprint,<sup>297</sup> which provides for the development of “a model public policy or legal instrument on

293 Lecture by Professor John G. Ruggie, UNSRSG, at the Sir Geoffrey Chandler Speaker Series organised by The Royal Society for the Encouragement of Arts, Manufacturers and Commerce, held in London on 11 January 2011.

294 European Commission website, *Sustainable and Responsible Business: Business and Human Rights*, available at [http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm).

295 Danish Presidency of the Council of the European Union 2012 website, *Presidency Conference on Business and Human Rights*, 4 May 2012, available at <http://eu2012.dk/en/NewsList/April/Uge-18/Conference-on-business-and-human-rights>.

296 European Group of NHRIs, *Implementing the UN Guiding Principles on Business and Human Rights: Discussion paper on national implementation plans for EU Member States*, June 2012.

297 ASEAN, *Roadmap for an ASEAN Community 2009-2015*, accessed at <http://www.aseansec.org/publications/RoadmapASEANCommunity.pdf> at 79-80.

CSR for ASEAN States to refer to.”<sup>298</sup> Further AICHR has conducted its own thematic study on CSR and human rights, and ASEAN’s NHRIs have together or individually taken steps to promote the UN Framework.<sup>299</sup> The time is ripe for engagement between these regional actors to share their experiences and open avenues for collaboration.

- *Build the capacity of less developed ASEAN States to meet business and human rights challenges*
  - Challenges in relation to this issue may differ among countries and contexts. We recommend undertaking research to understand the causes of weak regulatory effectiveness in respect of specific business and human rights-related issues, and tailoring prescriptions to local contexts. Capacity building programs can then be designed more effectively on such a foundation.
- *Engage key supporting actors, such as stock exchanges and securities regulators and NHRIs*
- *Strengthen existing measures to foster corporate cultures respectful of human rights, for example:*
  - *Sectoral standards:* The effectiveness of measures by ASEAN States to foster CSR can be greatly enhanced if complemented by concrete guidance for businesses on how environmentally and socially responsible policies and processes may be developed. The UN Working Group on business and human rights has on several occasions emphasised the importance of developing business and industry-related standards. Industries such as financial service providers or extractive

298 ASEAN, *Roadmap for an ASEAN Community 2009-2015*, accessed at <http://www.aseansec.org/publications/RoadmapASEANCommunity.pdf> at 79-80.

299 See Section IV.B(7)b, “National Human Rights Institutions” above.

companies, and the EU have taken up the call. The EU commissioned guidance for three specific sectors, namely, employment and recruitment agencies, information and communication technology, and oil and gas sectors.<sup>300</sup> ASEAN States and other stakeholders in the region may consider the development and use of similar guidance for businesses operating in Southeast Asia.

- *Sustainability reporting:* We recommend investigating the uptake and implementation of existing mandatory or voluntary sustainability reporting requirements. States and/or stock exchanges or regulators can consider issuing concrete guidance or conduct training on how to operationalize sustainability reporting.
- *Conduct follow-on multi-disciplinary research and multi-stakeholder dialogue:*
  - There are a wide range of issues covered by this baseline study that merit further research and dialogue, including but not limited to:
    - Identifying and using points of influence to ensure respect for human rights, e.g. the leverage of private and public financial institutions, export credit agencies, development agencies, and processes of privatisation and procurement;
    - Addressing the transnational dimension of business and human rights challenges, namely, gaps in the reach of national regulatory jurisdiction and gaps in transnational access to remedies;
    - How ASEAN States may address the apparent conflict between the global systems of trade and investment law on

300 The project is conducted by the Institute for Human Rights and Business in collaboration with Shift: <http://www.ihrb.org/project/eu-sector-guidance/index.html>.

one hand, and social justice on the other;

- Addressing policy domains where action by ASEAN States appears lacking, e.g. State-business nexus and conflict-affected and high-risk areas;
- Reconsidering the rules and institutions in which the profit-maximising corporate purpose is embedded, e.g. the legal concepts relating to directors' fiduciary duties, and "best interests of the company;" and
- Assessing the extent to which rules attributing corporate and individual liability for adverse corporate human rights impacts contribute to social equity.

155. This study has sought to map existing legislation with a view to implementing the UN Framework and the Guiding Principles and to identify some of the related challenges in ASEAN countries. Above all, it is hoped that this study will assist states in defining existing gaps and in developing action plans for coherent business and human rights policies.



BRUNEI

## Compilation of Laws Related to Business

<i>Subject</i>	<i>Relevant Provisions</i>
<b>Constitution of Brunei (Rev. Ed. 2011)</b>	
<b>Companies Act (Cap 39, Rev. Ed. 1984)</b>	
Membership of Company	Section 28 – Definition of Member
Private Companies	Section 29 – Meaning of private company
Directors and Managers	Section 144 – Limited company may have directors with unlimited liability
	Section 145 – Special resolution of limited company making liability of directors unlimited
<b>Consumer Protection (Fair Trading) Order, 2011</b>	

<i>Subject</i>	<i>Relevant Provisions</i>
<b>Employment Order, 2009</b>	
Contracts of Service	Section 9 – Contractual age
	Section 12 – Illegal terms of contract of service
Termination of contract of service	Sections 21 to 27
Payment of Salaries	Sections 37 to 52
Rest Days, Hours of Work, Holidays and Other Conditions of Service	Sections 63 to 65, 70 to 74, 79
Health, Accommodation and Medical Care	Sections 80, 83, 87
Employment of Women	Sections 90 to 99, 102
Employment of Children and Young Persons	Sections 103 to 110
Domestic Workers	Section 111 – Minister may apply Order to domestic orders
Immigrant Employees	Section 112 – Employment of immigrant employees
	Section 113 – Prohibition on termination of local for immigrant employee
Repatriation	Section 114 – Rights and obligations in respect of repatriation
	Section 117 – Offence
Complaints and Inquiries	Section 124 to 126, 132, 138

<i>Subject</i>	<i>Relevant Provisions</i>
<b>Brunei Forest Act, 1984</b>	
Reserved Forests	Section 4 – Power to constitute reserved forests
	Section 7 – New buildings and cultivation prohibited after proclamation
	10 – Regulation of foresting privileges
	Section 11 – Acquisition of alienated land for inclusion in a reserved forest
	Section 14 – Publication of notification of constituting reserved forests prior to operation thereof
	Section 15 – Rescission and modification of privileges and conditions
	Section 16 – Acquisition of special rights
	Section 18 – Power to stop way or water-course in a reserved forest
	Section 19 – Acts prohibited in a reserved forest
	Section 20 – Prohibition as to fire
	Section 22 – Power to declare forest no longer reserved
Penalties and Procedure	Section 25 – Presumption that forest produce belongs to government
	Section 27 – Unlawful possession of forest produce
	Section 33 – Compensation for damage caused by commission of a forest offence
Rules	Section 54 – Special provisions in favour of natives
	Section 56 – Liability of directors

<i>Subject</i>	<i>Relevant Provisions</i>
<b>Brunei International Business Companies Order, 2000</b>	
International Business Companies	Section 7 – Personal Liability
	Section 10 – Certificate of due diligence
	Section 17 – Powers of an IBC
	Section 18 – Validity of acts of IBC
	Section 19 – Requirement to maintain conditions of IBC
Directors, Secretary, Officers	Section 68 – Powers of Directors
	Section 76 – Officer and Agents
	Section 77 – Standard of Care
Foreign International Companies	Section 135 – Prohibition and restriction on foreign international company
Miscellaneous and General	Section 159 – Offences by bodies corporate
	Section 163 – Certificate of good standing
<b>Land Acquisition Act, 1955</b>	
Acquisition	Section 3 – Purposes for which land may be acquired
	Section 4 – Power to enter and survey
	Section 5 – Declaration that land is required for a public purpose
	Section 6 – Plan to be made and notices given
	Section 9 – When award of Land Officer to be final
	Section 10 - Power to take possession
	Section 12 – Adjustment of Compensation

<i>Subject</i>	<i>Relevant Provisions</i>
Reference to Court and Procedure Thereon	Section 17 - Matters to be considered in determining compensation.
	Section 18 - Matters to be disregarded in determining compensation.
	Section 19 - Rules as to the amount of compensation.
	Section 21 - Difference of opinion.
	Section 25 - Appeal to the Court of Appeal.
	Section 26 - Payment of interest on excess compensation.
Temporary Occupation of Land	Section 30 - Temporary occupation of waste or arable land.
	Section 31 - Power to enter and take possession.
	Section 31 - Dispute as to condition of land
	Section 36 - Government not bound to complete acquisition
	Section 38 - Bar of suits to set aside awards
	Section 39 - Power to make rules
<b>Brunei Mining Act, 1963</b>	
Prospecting Licenses	Section 4 - Prospecting Licenses
	Section 9 - Covenants
Mining Leases	Section 12 - Resumption of alienated land required for mining purposes
	Section 13 - Power to issue mining leases
	Section 16 - Lease subject to certain laws
	Section 21 - Restriction on transfer of coal leases
Rules	Section 23 - Power to make rules
	Section 24 - Trial of Offences

<i>Subject</i>	<i>Relevant Provisions</i>
<b>Limited Liability Partnerships Order, 2010</b>	
	Section 5 – Separate legal personality
	Section 9 – Limited liability of partners
	Section 10 – Power of partner to bind limited liability partnership
	Section 11 – Relationship of partners
	Section 18 – Power to refuse registration
	Section 35 – Disqualification of unfit manager of insolvent limited liability partnership
	Section 37 – Disqualification to act as manager on conviction for certain offences
	Section 46 – Penalty for providing false information
	Section 51 – Offences by limited liability partnerships
	Section 52 – Offences by other bodies corporate, partnerships etc.
	Section 59 – Criminal liability of partners and managers of limited liability partnerships under other written laws
<b>Petroleum Mining Act (Cap 44, Rev. Ed. 2002)</b>	
	Section 2A – Ownership of petroleum
	Section 2B – Mineral rights
	Section 3 – Restriction on prospecting or mining for petroleum
	Section 4 – Invitation to bid
	Section 12A – Liability of directors etc.

<i>Subject</i>	<i>Relevant Provisions</i>
<b>Trade Unions Act (Cap 128)</b>	
	Section 3 – Trade unions not criminal
	Section 4 – Trade unions not unlawful for civil purposes
	Section 5 – Trade unions prohibited from carrying on business unless registered
	Section 10 – Refusal of registration
	Section 19 – Protection of workers’ option to join a trade union
	Section 23 – Prohibition of payment of fines and penalties
	Section 24 – Use of funds for political purposes
	Section 27 – Rules of registered trade unions
<b>Water Supply Act (Cap. 121)</b>	
Administration and General Powers of the Water Authority	Section 4 – Custody and administration of waterworks
Particular Powers of the Water Authority	Section 11 – Authority may agree to supply water
	Section 13 – Power to restrict, suspend, etc. the supply of water
Offences and Penalties	Section 25 – Waste
	Section 26 – Offences relating to the waterworks, diverting streams or misappropriating water, etc.
	Section 30 – Pollution of the waterworks
Miscellaneous Provisions	Section 40 – Who may prosecute
	Section 42 – Court for trial of offences under this Act

<i>Subject</i>	<i>Relevant Provisions</i>
<b>Women and Girls Protection Act (Cap 120, Rev. Ed. 1984)</b>	
<i>Subject</i>	<i>Relevant Provisions</i>
	Section 3 – Selling or hiring for purpose of prostitution
	Section 4 – Traffic in women and girls
	Section 5 – Living on or trading in prostitutions
	Section 6 – Suppression of brothels
	Section 8 – Trials in camera in certain cases
	Section 9 – Trial of offences
	Section 10 – Detention pending judicial proceedings
	Section 14 – Girl under 21 used or trained for immoral purposes etc.
	Section 15 – Commissioner may order the detention of woman or girl in certain cases
	Section 20 – Power of search
	Section 22 – Presumption arising out of warrants
<b>Workmen’s Compensation (Cap 74, Rev. Ed. 1984)</b>	
	Section 2 – Meaning of “workman”
Workmen’s Compensation for Injury	Section 4 – Employer’s liability for compensation
	Section 5 – Compensation for occupational diseases
	Section 6 – Compensation limited to injuries received at work
	Section 7 – Persons entitled to compensations
	Section 8 – Amount of compensation
	Section 9 – Method of calculating earnings

<i>Subject</i>	<i>Relevant Provisions</i>
	Section 20 – Liability in case of workman employed by contractors
	Section 21 – Remedies both against employer and stranger
	Section 26 – Commissioner may pay wages earned by dead workman to dependants
The Commissioner and Arbitrators	Sections 29, 32, 36, 37, 41 to 44
<b>Workplace Safety and Health Order 2009</b>	
	Section 5 – Meanings of “workplace” and “factory”
	Section 6 – Meanings of “employee” and “employer”
General Duties of Persons at Workplaces	Section 10 – Duties according to different capacities
	Section 11 – Duty of occupier or workplace
	Section 12 – Duties of employers
	Section 14 – Duties of principals
	Section 15 – Duties of persons at work
	Section 16 – Duties of manufacturers and suppliers of machinery, equipment or hazardous substances used at work
	Section 17 – Duties of persons who erect, install or modify machinery or equipment and persons in control of machinery for use at work
	Section 18 – Other related duties of occupiers and employers
	Section 20 – Offence of breach of duty under this Part
Powers of Commissioner	Section 21 – Power to issue remedial order or stop-work order
	Section 22 – Appeal from order made by Commissioners
	Section 23 – Power to suspend certificate

<i>Subject</i>	<i>Relevant Provisions</i>
Investigations, Inquiries and Reporting of Accidents, Dangerous Occurrences and Occupational Diseases	Sections 24 to 27
Safety and Health Management Arrangements	Sections 28 to 31
	Section 38 – Offences under this Part
Inspections and Other Powers of Enforcement	Section 41 – Powers of inspectors
Offences, Penalties and Proceedings	Section 45 – Unregistered factories
	Section 46 – Onus of proving what is reasonably practicable
	Section 47 – offences by bodies corporate etc.
	Section 49 – General penalty
General	Section 58 – Relation to other laws
	Section 59 – Civil liability
	Section 60 – Limitation of liability
	Section 61 – Exempt workers, workplaces and equipment etc.
	Section 64 – Regulations



# CAMBODIA

by:

Phallack Kong

## BASELINE REPORT: CAMBODIA

### SNAPSHOT BOX

<p><b>Number of Multinational Business Enterprises operating in the country</b></p>	<ul style="list-style-type: none"> <li>- 23,302 Companies and Investment Companies</li> <li>- 254 Branches</li> <li>- 372 Representative Offices</li> <li>- 5,290 Sole Proprietorship<sup>1</sup></li> </ul> <p>Note:</p> <p>3,190 Companies registered in the Ministry of Commerce in 2011<sup>2</sup></p> <p>1,659 Companies have Khmer Nationality, i.e. at least 51 per cent of the shares are owned by natural persons or entities holding Cambodian citizenship<sup>3</sup></p> <p>1,531 Companies have foreign nationality, among them there are 37 Branches, 49 Representative Offices, and 141 Investment Companies</p>
<p><b>Number of Micro, Small and Medium Business Enterprises operating in the country per 1,000 people</b></p>	<p>According to the National Institute of Statistics' census 2011<sup>4</sup> there are 505,134 enterprises established in Cambodia which can be classified as below:</p> <ul style="list-style-type: none"> <li>- 484,691 enterprises with 5 or more employees</li> <li>- 39,537 enterprises with 5 and more employees</li> <li>- 13170 enterprises with 10 and more employees</li> <li>- 787 enterprises with more than 100 employees</li> <li>- 119 enterprises with 1000 and more employees.</li> </ul> <p>Two criterias are applied for qualifying SMEs:</p> <p><b>Statistics</b></p> <ul style="list-style-type: none"> <li>- Micro: Less than 10 employees</li> <li>- Small: Between 11-50 employees</li> <li>- Medium: Between 51-100 employees</li> <li>- Large: Over 100 employees</li> </ul> <p><b>Capital</b></p> <ul style="list-style-type: none"> <li>- Micro: Less than US\$50,000</li> <li>- Small: Between US\$50-250,000</li> <li>- Medium: Between US\$250-500,000</li> <li>- Large: Over US\$500,000</li> </ul>

1 Ministry of Commerce, Statistics of Business Registration in Cambodia from 1998-2011

2 See <http://www.akp.gov.kh/?p=18264>, 12 April 2012

3 Cambodia Investment Law, Art. 16

4 Ministry of Internal Affairs and Communications: Statistic Bureau, Director-General for Policy Planning (Statistical Standards) & Statistical Research and Training Institute of Japan, Final Results of Cambodian 2011 Economic Census, [http://www.stat.go.jp/english/info/meetings/cambodia/e11f\\_re1.htm](http://www.stat.go.jp/english/info/meetings/cambodia/e11f_re1.htm), to be published also at: <http://www.nis.gov.kh/index.php/pop-demog-stat/censuses>

<p><b>Number of State-owned Enterprises and the industries in which they operate</b></p>	<p><b>Statistics:</b> In 1989, there were 187 SOEs in Cambodia. By the end of 2000, 160 SOEs had been privatized, of which 139 were leased to the private sector, 12 transformed into joint-ventures, and 8 sold outright and 8 liquidated. In 2007, there were 17 major SOEs.<sup>5</sup></p> <p><b>Industries:</b> Telecom, Bank, Insurance, Education, Health, Water, Electricity, Agriculture (Green Trade and Rubber), Printing, Pharmaceutical Enterprise, Securities Exchange (CSX), Social Security (Workers), Crafts, Royal Railway, Ports and Ferries, Laboratories, Shipping Agency.</p>
<p><b>Flow of Foreign Direct Investment from 2008 to 2012 (or other recent 3 to 5 year range)</b></p>	<ul style="list-style-type: none"> <li>- 2008: US\$795 million</li> <li>- 2009: US\$ 515 million</li> <li>- 2010:US\$ 599 million</li> <li>- 2011: US\$ 676 million</li> <li>- 2012: US\$ 745 million<sup>6</sup></li> </ul>
<p><b>Main industries in the country</b></p>	<p>Tourism: US\$ 2503 Million Agriculture: US\$ 285 Million Garment/Textile: US\$ 280 Million Construction/Infrastructure: US\$ 101 Million Services: US\$ 91 Million Mining: US\$ 31 Million<sup>7</sup></p>
<p><b>Number 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</b></p>	<p>National Assembly Commission on Human Rights (“NACHR”): <i>1158 complaints (2006-2010)</i> Senate Commission on Human Rights (“SCHR”): <i>300 complaints</i></p>
<p><b>Have the Framework and/or the Guiding Principles been translated into the country’s languages and published in the country?</b></p>	<p>Yes, a Khmer version of the Guiding Principles is available in Khmer<sup>8</sup></p>

<sup>5</sup> UNCTAD, 2003, 74

<sup>6</sup> National Strategic Development Plan (NSDP updated 2009-2013), p.viii

<sup>7</sup> CIB (CDC-Approved investment Trend by Sector (Jan –Sept 2011), Cambodia Investment Guide 2012, p.II-7

<sup>8</sup> See [http://cambodia.ohchr.org/WebDOCs/DocPublications/Business-and-HR-Guidelines/Business%20and%20Human%20Rights\\_Khmer.pdf](http://cambodia.ohchr.org/WebDOCs/DocPublications/Business-and-HR-Guidelines/Business%20and%20Human%20Rights_Khmer.pdf)

## OVERVIEW OF THE COUNTRY’S BUSINESS AND HUMAN RIGHTS LANDSCAPE

<p>Cambodia’s main industries are tourism, agriculture, garment/textile, construction/infrastructure, and mining. The key human rights concerns in these areas include:</p> <p><b>Labour rights:</b> Key underlying issues are the lack of law enforcement and an ambiguity of laws and other factors. For example, 300’000 people were employed in the garment factory, and 65 per cent faced with work force.<sup>9</sup>The rights of Cambodian migrant workers are also an area of concern;</p> <p><b>Land Rights:</b> Land disputes resulting from construction and infrastructure development projects are an area of concern.<sup>10</sup></p> <p><b>Rights of indigenous peoples</b> - violation of native customary rights and land rights of indigenous people as a result of development projects, logging activities and building of hydroelectric plants etc.</p> <p><b>Child Labour:</b> Hazardous child labour in brick factories is a particular concern.<sup>11</sup></p> <p><b>Gender Discrimination:</b> Discrimination mostly occurs at the workplace, especially in factories.<sup>12</sup></p> <p><b>Right to health:</b> Women who work as a beer promoters and sellers face great risks with regard to their health and safety.<sup>13</sup></p>
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### Types of Business Enterprises in the Country

Name of the Type of Business Enterprise	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)
Sole Proprietorship	An enterprise owned by one person	Not explicitly, but it has to comply with laws and regulations related to businesses	Law on Commercial Rules and Register, Tax law and other related laws
General Partnership	A Contract between two or more general partners	Not explicitly, but it has to comply with laws and regulations related to businesses	Law on Commercial Rules and Register, Law on Commercial Enterprises and other related laws

9 Cambodian Centre of Human Rights, “Business and Human Rights in Cambodia: Constructing the Three Pillars,” 2010, 46.

10 Surya P. Subedi, “A Human Rights Analysis of Economic and Other Land Concessions in Cambodia,” Report of the Special Rapporteur on the Situation of Human Rights in Cambodia (A/HRC/21/63/Add.1/Rev.1,11 October 2012).

11 Cambodian Centre of Human Rights, “Business and Human Rights in Cambodia: Constructing the Three Pillars,” 48.

12 Kingdom of Cambodia, International Labour Organization, Better Factories Cambodia, “Twenty Fourth Synthesis Report On Working Conditions in Cambodia’s Garment Sector,” 30 April 2010, 14.

13 Global Business Initiative on Human Rights, “Business and Human Rights Round Table,” New Delhi, India, November 5th – 6th, 2009, 11.

Name of the Type of Business Enterprise	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)
Private Limited Company	Formed by Articles of Incorporation with a maximum of 30 shareholders and shares cannot be transferred or sold to the public	Not explicitly, but it has to comply with laws and regulations related to businesses	Law on Commercial Rules and Register, Law on Commercial Enterprises and other related laws
Public Limited Company	Formed by Articles of Incorporation and shares can be transferred or sold to the public	Not explicitly, but it has to comply with laws and regulations related to businesses	Law on Commercial Rules and Register, Law on Commercial Enterprises and other related laws
Public Enterprises with Economic Characteristics	An enterprise that all capital owned by the State and it has financial Autonomy and subject to commercial rules. For instance, universities, hospitals, National Social Security Fund, etc	Not explicitly, but it has to comply with laws and regulations related to businesses	Law on Commercial Rules and Register, Law on General Statute of Public Enterprises and other related laws
State Company	An enterprise that all capital owned by the State and it has financial Autonomy and subject to commercial rules. For Instance, Telecom Cambodia, Green Trade Company, etc	Not explicitly, but it has to comply with laws and regulations related to businesses	Law on Commercial Rules and Register, Law on General Statute of Public Enterprises and other related laws
Shared Enterprises	An enterprise that 51% of capital owned by the State and 49 % owned by private. It subjects to commercial rules.	Not explicitly, but it has to comply with laws and regulations related to businesses	Law on Commercial Rules and Register, Law on General Statute of Public Enterprises and other related laws
Representative Office (REP)	A foreign company has its representative office in Cambodia. REP cannot perform commercial activities and is under the management of a principal	Not explicitly, but it has to comply with laws and regulations related to businesses	Law on Commercial Rules and Register, Law on Commercial Enterprises and other related laws

Name of the Type of Business Enterprise	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)
Branch	A Foreign company has its branch in Cambodia. The branch can perform commercial activities and it is under the management of a principal	Not explicitly, but it has to comply with laws and regulations related to businesses	Law on Commercial Rules and Register, Law on Commercial Enterprises and other related laws
Subsidiary	A Partnership or a Company in which a foreign natural or legal person owns at least 51% of the shares. It has a separate legal personality.	Not explicitly, but it has to comply with laws and regulations related to businesses	Law on Commercial Rules and Register, Law on Commercial Enterprises and other related laws

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

So far, there has not been an official reaction from national human rights bodies to the framework. However, government officials from the Ministry of Commerce, Ministry of Economy and Finance, Ministry of Interior, Ministry of Labour and Vocational Training, ILO (Better Factories in Cambodia), and the Cambodia Human Right Committee (CHRC) participated actively in the workshop on business and human rights organized by the Office of the of the High Commissioner for Human Rights in Cambodia (OHCHR) on 20 March 2012 in Phnom Penh.<sup>14</sup>

The purpose of the workshop was to share information in relation to business and human rights with other interested institutions and

<sup>14</sup> Surya P. Subedi, Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, (A/HRC/21/63, 16 July 2012), 13.

ministries. The mentioned bodies were also able to express their view of how their institution or ministry implements the Guiding Principles on Business and Human Rights.<sup>15</sup>

All Ministries expressed concerns with regard to operationalizing the Guiding Principles: for instance, the representatives from Ministry of Industry Mines and Energy mentioned the need for a business registration process and a clear legal framework as prerequisites to hold businesses liable.

As the chair of the ASEAN Summit 2012, and on behalf of all ASEAN member states, Cambodia produced a statement with over 95 points, including a commitment by ASEAN member states to promote and protect human rights in the region, support

<sup>15</sup> A Khmer version of the Guiding Principles was published by the Office of the High Commissioner of Human Rights of Cambodia Office, at [http://cambodia.ohchr.org/WebDOCs/DocPublications/Business-and-HR-Guidelines/Business%20and%20Human%20Rights\\_Khmer.pdf](http://cambodia.ohchr.org/WebDOCs/DocPublications/Business-and-HR-Guidelines/Business%20and%20Human%20Rights_Khmer.pdf).

UN peacekeeping missions,<sup>16</sup> and implement the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers.<sup>17</sup>

On 7 May 2012, Prime Minister Hun Sen issued an order on Measures in Strengthening and Enhancing the Effectiveness of the Management of Economic Land Concessions on May 7, 2012. The purpose of the order is to impose a temporary halt on the granting of new economic land concessions, and to investigate existing land concession contracts with a view to protecting the interests of communities. The UN Special Rapporteur to Cambodia, Prof Surya P. Subedi welcomed this measure as a step in the right direction.<sup>18</sup> Between 1997 and 2012, 117 companies have received Economic Land Concession licenses, covering over 1'181'522 ha<sup>19</sup> of land.

## II. Is the State duty to protect against human rights abuse by third parties including businesses (“State Duty to Protect”), recognized in the country’s domestic legal system?

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

Despite no specific provisions in domestic laws related to human rights and business that requires a state duty to protect, Article 31 of the Constitution of the Kingdom of Cambodia states ‘The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter,

16 Chairman’s Statement of the 20th ASEAN Summit (Phnom Penh, April 3th -4th, 2012), page 4-5, point 25 and 32.

17 Ibid., 57, point 52.

18 Office of the High Commissioner of Human Rights, “SR Press Statement,” May 11, 2012, 4.

19 See <http://www.elc.maff.gov.kh/en/>.

the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights. Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status. The exercise of personal rights and freedom by any individual shall not adversely affect the rights and freedom of others. The exercise of such rights and freedom shall be in accordance with the law.’

Furthermore, Cambodia has ratified 13 ILO Conventions<sup>20</sup> and other elements of the International Bill of Human Rights such as the UN Covenant on Civil and Political Rights (ICCPR) and the UN Covenant on Economic, Social and Cultural Rights (ICESCR). Based on these international instruments, Cambodia has a duty to protect human rights also in the area of business. In a landmark decision in 2007, Cambodia’s Constitutional Council held that judges are bound by the law which includes not only national law but also “international conventions that Cambodia has recognized.”<sup>21</sup> Therefore, all of Cambodia’s laws

20 The 13 conventions are: 1. C4 Night Work (Women) Convention, 1919 (1969); 2. C6 Night Work of Young Persons (Industry) Convention, 1919 (1969); 3. C13 White Lead (Painting) Convention, 1921 (1969); 4. C29 Forced Labour Convention, 1930 (1969); 5. C87 Freedom of Association and Protection of the Right to Organise Convention, 1948 (1999); 6. C98 Right to Organise and Collective Bargaining Convention, 1949 (1999); 7. C100 Equal Remuneration Convention, 1951 (1999); 8. C105 Abolition of Forced Labour Convention, 1957 (1999); 9. C111 Discrimination (Employment and Occupation) Convention, 1958 (1999) ; 10. C122 Employment Policy Convention, 1964 (1971); 11. C138 Minimum Age Convention, 1973 (1999); 12. C150 Labour Administration Convention, 1978 (1999); 13. C182 Worst Forms of Child Labour Convention, 1999 (2006), at <http://www.ilo.org/ilolex/english/>

21 Decision of the Constitutional Council No. 092/003/2007 of 10 July 2007 regarding the applicability of the international human rights treaties by the courts in Cambodia. English translation at <http://cambodia.ohchr.org/WebDOCs/DocPublications/CCBHR%20Constitution/CCBHR-EN.pdf>,

related to business should be interpreted in the light of the conventions and covenants ratified by Cambodia.

Despite the lack of an explicit provision on the state duty to protect, the following regulations could be interpreted in the spirit of Cambodia's state duty to protect under human rights law:

- **Business Organizations & Investment:** Law on Commercial Rules and Register, Law on Commercial Enterprises, Law on General Statute of Public Enterprises, Cambodian Law on Investment, 1994 (as amended by the Law on the Amendment to the Law on Investment, 2003), Law on Commercial Arbitration and other executive regulations related to business and investment: These Laws provide a basis for the establishment of private and state owned enterprises and investment in Cambodia and require all merchants, whether natural or legal persons, to comply with all laws and regulations related to business. These laws are to be interpreted with a view to Cambodia's duty to protect under international human rights law.
- **Labour and Employment Law:** Labour Law (1997),<sup>22</sup> Law on Social Security, Ministerial orders (Prakas) on the Arbitration Council and other executive regulations related to employment and labour law in Cambodia. These laws and regulations provide the basis of the exercise of rights and performance of obligations of workers and employers resulting from the execution of employment contract. The ILO conventions ratified by Cambodia are particularly relevant in interpreting domestic labour laws.

<sup>22</sup> English version is at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---ilo\\_aids/documents/legaldocument/wcms\\_150856.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_150856.pdf).

- **Property Law:** Civil Code, Land Law, Concession Law, Sub Decree on State Land Management, Sub-Decree on Economic Land Concessions, Sub-Decree on Rules and Procedures on Reclassification of State Public Properties and Public Entities, Joint Ministerial Orders (Prakas) on Determination of Competence of the Court and Cadastral, Commission Regarding Land Disputes and Code of Civil Procedures and other executive regulations related to property: These laws provide the basis of property law and rules for economic land concessions and dispute resolution processes. As stated in several recommendations made to Cambodia during the 2009 UPR, Cambodia's existing human rights obligations are not yet adequately reflected in national property laws and their application.<sup>23</sup>
- **Environmental Laws and Protected Areas Law:** Law on Environmental Protection and Natural Resources Management (1996), Sub Decree No.72 ANK/BK on the Environmental Impacts Process (1999), Protected Areas Law (2008), Preah Reach Kret (Royal Decree) on the Protection of Natural Areas (1993), Forestry Law, Sub Decree on Forest Concession Management, Sub-Decree on Community Forestry Management, Sub-Decree on Procedure Establishment Classification and Registration of Permanent Forest Estate and other executive regulations related to environment and protected areas. Although these laws do not contain an explicit state duty to protect, they clearly provide the legal basis for environmental protection, protected areas, forestry exploitation and protection and the respective state obligations. However, many of

<sup>23</sup> Human Rights Council, "Report of the Human Rights Council at its 13th Session," (A/HRC/13/56, 8 February 2011), para.355-369. Cambodia accepted all recommendations.

these provisions are not fully implemented and applied in practice.<sup>24</sup>

- **Water and Fishery laws:** Law on Management of Water Resources in Cambodia, Law on Fishery, Sub-Decree of Community Fisheries to Council of Ministers and other executive regulations related to water and fishery: These laws provide the basis of water resources and fishery management.
- **Extractive industries and Energy Laws:** Law on Management and Exploitation of Mineral Resources (2001), Sub-Decree on Determination of Investment Principles of Mineral Resources, Petroleum Regulations (1991 with 1998 and 1999 amendments), Electricity Law and other executive regulations related to Mines, Petroleum and Energy: These laws provide a basis for exploitation of mines, petroleum, and energy in Cambodia.<sup>25</sup> There is however, no law on hydropower yet.<sup>26</sup>

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

Since there is no accessible comprehensive record of court decisions, it is not possible to evaluate the courts' position toward recognizing a state duty to protect. Under the law, the victims of human rights or other legal violations can exercise their rights before courts, the land dispute resolution commissions, the Arbitration Council and other ad hoc committees set up by the government.

24 Surya P. Subedi, "A Human Rights Analysis of Economic and Other Land Concessions in Cambodia," Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, paras.35- 42.

25 Human Rights Council, "Report of the Human Rights Council at its 13th Session", paras. 44-48.

26 Surya P. Subedi, "A Human Rights Analysis of Economic and Other Land Concessions in Cambodia," Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, Addendum, 48.

While it seems that the number of cases which are brought before these bodies because of an alleged violation of the state duty to protect is increasing, investigations and procedures have been criticised for a lack of transparency and due process.

The Phnom Penh Capital Court tried the administrative head and the marketing manager of Century Manpower, a recruitment company, together with a labour broker on an alleged case of illegal detention and human trafficking of 13 women sent to work as maids in Malaysia.<sup>27</sup> Another case was filed with the Svay Rieng Provincial Court against the then-Bavet municipality governor due to his alleged shooting of three female garment workers in a crowd of striking factory employees at an industrial park in Bavet's Special Economic Zone for foreign enterprises.<sup>28</sup> In January 2013, the Ministry of Justice ordered the Court of Appeals to reopen the case.<sup>29</sup>

While no statistics for court proceedings are available, the Arbitration Council has heard more than 1500 collective labour disputes cases since its establishment in 2003.<sup>30</sup> In 2012 alone, the number of registered cases rose from 171 in 2011 to 255 collective labour disputes<sup>31</sup> which involved 98,000 workers as compared to 173,000 workers in 2011. Observers identify a trend towards a higher number of cases involving fewer workers. The reasons for

27 "Labour Firm Staff Sentenced," Phnom Penh Post, April 6, 2012, at <http://www.phnompenhpost.com/index.php/2012050155893/National-news/labour-firm-staff-sentenced.html>.

28 For an account of the facts see : Open letter on the shooting of three female garment workers in Bavet town of SvayRieng province, 15 March 2012, <http://www.fidh.org/Open-letter,11486>.

29 Cambodia Daily, January 8, 2013.

30 See Arbitration awards at [www.arbitrationcouncil.org](http://www.arbitrationcouncil.org)

31 Arbitration Council Newsletter October-December 2012, at <http://www.arbitrationcouncil.org/Newsletter%20AC%20English%20October%20-%20December%202012.pdf>.

this development are not yet clear.<sup>32</sup> Most cases relate to wages and other benefits, discipline and termination procedures especially involving trade union activists in the garment and footwear industry, and labour rights of women.<sup>33</sup>

### 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, punishes and redresses business-related human rights abuses? If so, how have they done so?

There are no specific government bodies and/or State agencies responsible for preventing, investigating, punishing or providing redress for business-related human rights abuses. However, there are a number of government agencies which are empowered by law to deal with human rights or human rights-related issues under their jurisdiction. For example:

- The Ministry of Labour and Vocational Training is responsible for labour issues under the Labour Law. The Labour Inspection Department is responsible for inspection the workplace. The Health and Safety Department is responsible for health related issues. The Labour Dispute Resolution Department and Arbitration Council are responsible for conciliation and arbitration on labour disputes. In 2011, the Ministry of Labour and Vocational Training suspended a license of T&P Co Ltd because of allegations of violations of migrant workers' rights before

sending them to work in Malaysia.<sup>34</sup>

- The Ministry of Land Management, Urban Planning and Construction is responsible for land disputes. The Mandate of the Cadastral Commission has the mission to resolve the following conflicts between possessors over unregistered land subject to possession rights: disputes occurring outside adjudication areas and disputes within adjudication areas that cannot be conciliated by the Administrative Commission.<sup>35</sup>
- The Ministry of Environment is responsible for environmental protection and for overseeing environmental impact assessments before the commencement of business operations.
- Besides responsible ministries, there are number of councils and commissions or committees set up by the government to investigate specific issues. For instance, the National Sand Committee is responsible for oversight of sand licenses and assessing the impact of sand exploitation. The Anti-Corruption Unit is empowered to deal with corruption issues, etc.
- Additional relevant institutions include the National Assembly Commission on Human Rights (NACHR), the Senate Commission of Human Rights (SCHR) and the governmental Cambodian Human Rights Committee (CHRC). For the previous two terms, the Senate Commission has received 397 complaints from citizens, most of which are related

<sup>32</sup> Cambodia Daily, January 11, 2013.

<sup>33</sup> Arbitration Council Newsletter October-December 2012.

<sup>34</sup> "Government Suspends Malaysia maids Recruitment Firm," <http://www.opendevdevelopmentcambodia.net/news-source/the-cambodia-daily/government-suspends-malaysia-maids-recruitment-firm/>, Open Development Cambodia, accessed July 5, 2012.

<sup>35</sup> Ministry of Land Management Urban Planning and Construction, Cadastral Commission, 2012, at <http://www.mlmupc.gov.kh/?page=detail&menu1=23&ctype=article&id=23&lg=en>, accessed 5 July 2012.

to land disputes.<sup>36</sup> NACHR and SCHR are institutions for citizens to voice their concerns and complaints with regard to human rights violations. They are advisory bodies to the Royal Government of Cambodia. In contrast, CHRC's role is to investigate and mediate complaints relating to human rights, collect information relating to the implementation of human rights, and to organize training and disseminate information on human rights. It also responsible for preparing human rights reports for the UN.

However, these government agencies are not authorized to punish and redress business-related human rights abuses. The prosecution of offences is the sole responsibility of the Public Prosecutor and the competent courts.

In addition, it has been noticed that the sensitive issue of economic land concessions arose in Cambodia. While the objective of the concession policy is to foster economic development, it also affects the rights and livelihoods of individuals and communities. Because of the lack of formal land titles the indigenous populations and people living in rural areas are particularly vulnerable. In order to address this problem, on 7 May 2012, the government issued an order imposing an immediate moratorium on new concessions and called for a review of existing concessions. A few days later, on 11 May 2012, the UN Special Rapporteur published his preliminary findings on a recent mission called for a review of the government's land concession policy.<sup>37</sup> The Cambodian government

responded with a statement on 14 May 2012 that all illegal concessions would be revoked and that 10 per cent of the newly gained land would be set aside for Cambodian families. For implementing this plan a "New Mission on Existing Policy" was established in June 2012.<sup>38</sup> As a result, more than 300,000 Cambodian families applied claiming over 1.2 million ha of land. In order to provide the necessary land titles around 1,100<sup>39</sup> to 2,000<sup>40</sup> youth volunteers have been involved in a government-led land measurement mission.<sup>41</sup> While some 40,000 ha of land concessions were cancelled by the Prime Minister in July 2012,<sup>42</sup> at the time of this writing the success of these measures is not clear with many observers remaining sceptical.<sup>43</sup>

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38 Speech given by the Prime Minister, 14 June 2012, at the launch of the 2011 mid-term review report on the implementation of the National Strategic Development Plan Update (2009-2013) and the related Government decision: Government Decision No.24 Sor.Sor.Ro, 25 June 2012; See also: Surya P. Subedi, "A Human Rights Analysis of Economic and Other Land Concessions in Cambodia", Report of the Special Rapporteur on the Situation of Human Rights in Cambodia Addendum, 51.

39 See [http://www.cnv.org.kh/2012\\_releases/26jun12\\_youth%20mision%20to%20measure%20land\\_comments.html](http://www.cnv.org.kh/2012_releases/26jun12_youth%20mision%20to%20measure%20land_comments.html).

40 See <http://www.phnompenhpost.com/index.php/2012090558506/National-news/pm-will-hand-deliver-titles.html>.

41 Cambodia New Vision, Prime Minister's Speech, Selected Impromptu Statements and Comments during the Meeting with Youth Volunteers for Land Measuring Missions for the People, Koh Pij, 26 June 2012, at: [http://www.cnv.org.kh/2012\\_releases/26jun12\\_youth%20mision%20to%20measure%20land\\_comments.html](http://www.cnv.org.kh/2012_releases/26jun12_youth%20mision%20to%20measure%20land_comments.html)

42 David Boyle and May Titthara, The Phnom Penh Post, Economic land concessions in Prey Lang rejected, 6 August 2012, the letter dated 2 July 2012 declares that four ELCs totalling 40,618 hectares have been cancelled in Kampong Thom's Sandan district because they are located in the middle of evergreen and semi-evergreen forest inside "the largest low-land [contiguous evergreen] forest in Southeast Asia" – Prey Lang.

43 Surya P. Subedi, "A Human Rights Analysis of Economic and Other Land Concessions in Cambodia," Report of the Special Rapporteur on the Situation of Human Rights in Cambodia Addendum, 212.

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36 Senate of the Kingdom of Cambodia, H.E. Yang Sem, the Chairman of CHRC holding discussion with the German Senior Legal Officer attached to the Senate, at [http://www.senate.gov.kh/home/index.php?option=com\\_content&view=article&id=42&Itemid=245&lang=en](http://www.senate.gov.kh/home/index.php?option=com_content&view=article&id=42&Itemid=245&lang=en), accessed 5 July 2012.

37 Statement by the United Nations Special Rapporteur on the situation of human rights in Cambodia, Professor Surya P. Subedi, 11 May 2012, at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12144&LangID=E>.

**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?**

There are some laws that regulate the conduct of business enterprises and provide for accountability for businesses to respect human rights laws and regulations:

**a) Cambodian Labour law 1997**

According to the Cambodian Labour Law Article 25,<sup>44</sup> any regulations regardless of their legal status (formal laws, regulations, conventions or collective agreements) that suppress or limit the rights of workers, are null and void. The Labour Inspector shall require the inclusion of enforceable provisions in laws and regulations in effect.<sup>45</sup> In addition, the Government can define specific labour standards, such as the minimum wage or health allowance.<sup>46</sup> All employers and managers of establishments in which child labourers or apprentices less than eighteen years of age or women work, must watch over their good behaviour and protect their decency before the public.

<sup>44</sup> Cambodia Labour Law (1997), Art. 25.

<sup>45</sup> Ibid., Art.172.

<sup>46</sup> “Notification on the minimum wage of textile, garment, and shoe-sewing workers” (No. 049/10 K.B/S.C.N), 9 July 2010, at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/89827/103282/F1122638522/KHM89827.pdf>; Declaration of the Labour Advisory Committee on transportation and accommodation allowance and attendance bonus in the textile, garment, and footwear sector,” 11 July 2012, at [http://www.arbitrationcouncil.org/Declaration%20of%20the%20Labour%20Advisory%20Committee\\_En\\_Final.pdf](http://www.arbitrationcouncil.org/Declaration%20of%20the%20Labour%20Advisory%20Committee_En_Final.pdf); “Notification 041/11 on transportation and accommodation allowance and attendance bonus in the textile, garment, and footwear sector,” 1 September 2012, at [http://www.arbitrationcouncil.org/Declaration%20of%20the%20Labour%20Advisory%20Committee\\_En\\_Final.pdf](http://www.arbitrationcouncil.org/Declaration%20of%20the%20Labour%20Advisory%20Committee_En_Final.pdf); “Notification 206/11 on health allowance for textile and footwear workers” (No. 206 K.B/S.C.N), 13 December 2011, at [http://www.arbitrationcouncil.org/law/Notification-on-health-allowance\\_En.pdf](http://www.arbitrationcouncil.org/law/Notification-on-health-allowance_En.pdf).

According to the 2012 ILO/IFC report on labour conditions in garment factories, there are several areas where compliance with domestic labour standards needs to be improved. These areas include payments for maternity leave (54% compliance), acceptable heat levels in the factory (38% compliance), the limitation of overtime to 2 hours per day which is only observed in 14% of the factories and obeying the requirements for exceptional overtime with only 3% compliance.<sup>47</sup> The Fundamental Rights at Work as comprised in the ILO Core Conventions are generally observed with the exception of reported cases on interference with freedom of association (6%), underage workers and child labour (7%) and discrimination (19%). A particular challenge is strikes which took place in all the factories monitored during the last reporting period. In none of them did the workers comply with the legal requirements.<sup>48</sup> Similarly, safety regulations are neglected in 35 % of the cases. Finally, substantial improvements are necessary with regard to the 2 hour daily overtime limit which is only observed by 14%.

**b) Law on Environmental Protection and Natural Resource Management (1996)**

Due to the Law on Environmental Protection and Natural Resource Management, an environmental

<sup>47</sup> Kingdom of Cambodia, International Labour Organization, Better Factories Cambodia, “Twenty Fourth Synthesis Report On Working Conditions in Cambodia’s Garment Sector, 13.”

<sup>48</sup> The legal requirements for commencing a strike include striking for reasons permitted by law; attempting to settle the dispute using other peaceful methods first; union members’ approving the strike by secret ballot; and providing 7 working days prior notice to the employer and the Labour Ministry. If workers failed to comply with any one (or more) of these requirements, the strike is included in the figure above. Under Cambodian law, only a court has the authority to declare a strike illegal. See: International Labour Organisation and International Finance Corporation, Better Factories Cambodia, “Twenty-Eighth Synthesis Report on Working Conditions in Cambodia’s Garment Sector.”

impact assessment has to be conducted for every project, both private and public. The project and the results of the assessment are then to be examined and evaluated by the Ministry of Environment before the project is submitted to the Royal Government for decision. This assessment shall also be applicable for activities which are under process and for which environmental impacts have not yet been assessed.<sup>49</sup> The purpose of this assessment is to provide the public with the possibility to participate in the protection of the environment and the management of natural resources and thereby prevent any acts which may negatively affect the environment.

**c) Land Law 2001**

The Royal Government of Cambodia has issued Economic Land Concessions for thousands of hectares to private companies for investment purposes. According to Article 49 of the Land Law 2001, land concessions shall relate to a social or economic purpose.<sup>50</sup> In practice, however, concessional land can then be subject to infrastructural enhancements, or so-called beautification projects, which ostensibly appear to be purely economic redevelopments with serious impacts for the people being relocated under difficult conditions.<sup>51</sup>

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

The concepts for holding business enterprises legally accountable as legal persons are found in various Cambodian Laws:

<sup>49</sup> Law on Environmental Protection and Natural Resource Management (1996), Art.6.

<sup>50</sup> Land Law (2001), Art. 49.

<sup>51</sup> Cambodian Centre of Human Rights, "Business and Human Rights in Cambodia: Constructing the Three Pillars."

- **Law on Commercial Enterprises:** According to the Law on Commercial Enterprises, a general partnership has a legal personality separate from that of each partner.<sup>52</sup> This concept is also applied for a limited partnership.<sup>53</sup> Therefore, all obligations contracted by a general partner in his own name bind the general partnership when the obligation is within the scope of the business of the general partnership or when the subject matter is property used by the general partnership.<sup>54</sup> All general partners are jointly and severally liable for the obligations of the general partnership according to the law. Therefore, a third party is required to seek the enforcement of obligations against the general partnership and its assets prior to the seeking the enforcement against the general partners.<sup>55</sup> This provision is also applied to the limited partnership.<sup>56</sup> Furthermore, according to the Law on Commercial Enterprises, a company comes into existence and acquires legal personality on the date shown in the certificate of incorporation.<sup>57</sup> A company has the capacity, rights and privileges of a natural person.<sup>58</sup> Where a company commits an offence, any director or officer of the company who knowingly authorizes, permits or acquiesces in the commission of the offense is a party to the offence and liable to be fined.<sup>59</sup>

- **Labour Law: Chapter 16** of the Labour Law imposes civil and criminal sanctions on the employer, company heads, directors, managers or officers who violate provisions of the labour

<sup>52</sup> Law on Commercial Enterprises, Art. 12.

<sup>53</sup> Ibid., Art. 84.

<sup>54</sup> Ibid., Art. 41.

<sup>55</sup> Ibid., Art.42.

<sup>56</sup> Ibid., Art. 81.

<sup>57</sup> Ibid., Art. 98.

<sup>58</sup> Ibid., Art. 99.

<sup>59</sup> Ibid., Art. 291.

law.<sup>60</sup> For example, under article 369, any employer using forced labour or discrimination will be liable to a fine of sixty-one to ninety days of the base daily wage or to imprisonment of six days to one month.<sup>61</sup> Moreover, article 375 stipulates that Company heads, directors, managers, or officers-in-charge who personally violated the provisions of Articles 229 (Standard of hygiene and Sanitation), 230 (Prepared Proper Safety System) and 231 (Regulation imposed by Ministry of Labour) or the Ministerial Order (Prakas) for enforcing these articles are liable to a fine of thirty to one hundred twenty days of the basic daily wage.<sup>62</sup> Fines are imposed by the Labour Inspector and the Labour Controller.

- **Criminal Code:** According to the Criminal Code, a legal entity may be held criminally responsible for offenses committed on their behalf by their organs or representatives.<sup>63</sup>

**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 require individuals to ensure their business enterprises do so?**

There are no specific provisions in Cambodian Laws requiring business enterprises to avoid causing or contributing to adverse human rights impacts through their activities. However, all business enterprises are required to comply with all laws and

<sup>60</sup> Cambodia Labour Law (1997), Chapter 16, Art. 359-386.

<sup>61</sup> Ibid., Art. 369.

<sup>62</sup> Ibid., Art. 375.

<sup>63</sup> Royal Kram NS/RKM/1109/022, Law on the Promulgation of the Criminal Code 2009, Chapter. IV, Art. 42 regarding Responsibility of a Legal Entity.

regulations of the country. Therefore, when there is an alleged violation of laws and rights, the injured parties can file a complaint against the company or offenders to the respective agencies and competent courts.

**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?**

According to the law and current practice, each ministry is responsible for the implementation of the laws within the mandate of their ministry. For instance, the labour law is implemented by the Ministry of Labour and Vocational Training and the land Law is implemented by the Ministry of Land management, Urban Planning and Construction. Therefore, parties to the disputes can seek the enforcement of the law from the former if the case is related to the labour disputes and the latter if the case is related to the land disputes. If disputes cannot be settled by the respective ministry, parties can seek further enforcement by the court.

Despite these mechanisms, the enforcement of laws in Cambodia needs to be strengthened. The lack of adequate data related to enforcement makes it difficult assess accurately the current state of implementation and enforcement.

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

No, but on May 7 2012, Prime Minister Hun Sen issued an order to review all land concession contracts.

In March 2011, the Prime Minister Hun Sen signed an eight-article sub-decree on revocation of fishing lots which cancelled the allocation of 35 fishing lots.<sup>64</sup> The license revocation was made in order to make way for an investigation into fishery offences<sup>65</sup> and urged the authorities to prosecute the violators. Another important reason was the prevention of a further deterioration of natural fishing habitats and the hope to revive diminishing stocks for subsistence fishermen. All fishing lots must be handed over to the people in order to fish for daily life and create locations of conservation.

The Prime Minister mentioned that the investigation had showed that fishing lot operators had used banned fishing nets to catch even small fish; moreover, they used chemical substances to drive fish away from flooded forests into their lots in. However, Tonle Sap fishermen and fisheries experts said that illegal fishing on the lake had increased substantially since the cancellation of commercial fishing lots in March 2012.<sup>66</sup> So far, no legal proceedings against fishing lot operators or officials have been initiated.

Overall, the purpose of annulling the fishery contractual lot should be seen as (1) strengthening and expanding the fishery community, (2) empowering and giving ownership to the local community for the management of the fishery sector; (3) conserving natural resources, and (4) promoting the development of sustainable aquaculture.

64 Food Security Programme (2012), "Cambodia Cancels Fishing Lots around Tonle Sap Lake." The article says that the majority of the lots were around Tonle Sap Lake in the provinces Battambang, Siem Reap, Pursat, Kompong Chhnang and Kompong Thom and two others in Banteay Meanchey, at [http://www.foodsecuritylink.net/cambodia/index.php?option=com\\_k2&view=item&id=263:cambodia-cancels-fishing-lots-around-tonle-sap-lake&Itemid=40](http://www.foodsecuritylink.net/cambodia/index.php?option=com_k2&view=item&id=263:cambodia-cancels-fishing-lots-around-tonle-sap-lake&Itemid=40), accessed June 8, 2012.

65 The Philstar (2011), "Breaking News: Fishing Licenses around Cambodia's Tonle Sap Lake revoked," at <http://www.philstar.com/breaking-news/717051/fishing-licenses-around-cambodias-tonle-sap-lake-revoked>, accessed 8 June 2012

66 See <http://www.opendevdevelopmentcambodia.net/aquaculture/tonle-sap-illegal-fishing-increased-group-says/>

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

##### **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?**

There are no specific provisions in the Cambodian laws requiring or encouraging directors of business enterprises to exercise due diligence in ensuring that their business enterprises respect human rights, but the Law on Commercial Enterprises provides a provision of duty of care for directors and officers.

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

Article 289 of Law on Commercial Enterprises states that every director and officer in exercising his duties shall i) act honestly and in good faith with a view to the best interest of the company; and ii) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

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

There are no specific legal obligations that directors have to consider their business enterprises' human rights impacts in carrying out their duties, but under the labour law, directors are civilly liable regarding violations. Therefore, it can be held that directors shall consider human rights impacts on labour relations resulting from their business enterprises.

**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 4.1.2

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

There has been no specific enforcement by the State in relation to 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)?**

There are no non-binding guidelines encouraging directors to take into account (a) their businesses' human rights impacts in carrying out their duties. However, according to the sub-decree on Environmental Impact Assessment, all projects of private or state owned enterprises that affect the environment are required to have an Environmental Impact Assessment.

**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?**

See 4.1.4

**4.3. Is/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?**

The Stock Exchange started to operate in Cambodia in April 2012. According to the Law on the Issuance and Trading of Non-Government Securities and other related regulations, there is no provision related to the respect of human rights for business enterprises who wish to be listed on the Cambodia Stock Exchange (CSX).

To regulate the security exchange market, the Law on Insurance and Trading of Non-Government Securities was promulgated on 19 October 2007 in order to regulate the securities exchange, the securities depositories and other operators in the securities market. Its purpose is to develop and maintain the confidence of public investors in the kingdom of Cambodia by protecting their lawful rights and ensuring that the offer, issuance, purchase and sale of securities are carried out in a fair and orderly manner.<sup>67</sup>

The Securities and Exchange Commission of Cambodia (SECC) is the supervising authority for securities markets, both with regard to governmental and nongovernmental actors. Its mandate includes the power:

<sup>67</sup> Law on the Insurance and Trading on Non-Government Securities, Art. 2.

1. to enforce policy with respect to securities market;
2. to formulate conditions for granting approvals to the operators of a securities market, clearance and settlement facility, and securities depository;
3. to formulate conditions for granting licenses to securities companies and securities company representatives;
4. to promote and encourage compliance with the requirements of this law;
5. to play a role as an institution to examine and solve complaints against licensed legal entities' decision affecting the benefits of participants or investors;
6. to consult with any qualified person to develop policies for the purpose of developing a securities market in Cambodia<sup>68</sup>

**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?**

So far, there have not been any non-binding initiatives requiring or encouraging business enterprises to respect human rights in Cambodia.

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

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<sup>68</sup> Ibid., Art. 7.

Cambodia has not provided any guidance to business enterprises on how to respect human rights throughout their operations, but all business licenses and contracts with the government require all businesses to comply with existing laws in force.

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

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

According to article 4 of Law on General Statute of Public Enterprise, the management in all fields of public enterprises shall be in accordance with the principles and procedure of the law on commercial enterprises unless otherwise stipulated under the provisions of this law. Therefore, all rules and regulations which govern commercial enterprises shall apply to state-owned enterprises too. Until now, there is no requirement or encouragement from the state for state owned enterprise to respect human rights.

**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 requirements for businesses that receive substantial support and services from State agencies (“beneficiary enterprises”) to respect human rights.

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

There are no public records of cases of privatization where the state has taken steps to ensure that those enterprises assuming such services shall respect human rights.

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

Cambodia has been a member of the WTO since 13 October 2004.<sup>69</sup> The assumption of membership status had two important impacts: First, Cambodia has to bring its laws in accordance with WTO rules. Second, it sets an incentive to improve the quality of goods and services in the private sector. According to the Law on Environmental Protection and Natural Resource Management, public and private enterprises are required to undergo an environmental impact assessment before submitting projects to the Government decision. The purpose of this assessment is to prevent any act that may negatively affect the environment and to provide the public with the possibility to participate in the management of natural resources.<sup>70</sup> In addition, Cambodia also expressed a strong commitment to promote and protect human rights. Furthermore, Cambodia welcomed the involvement of ASEAN Nations especially Foreign Ministers and the ASEAN Intergovernmental Commission on Human Rights in human rights issues.<sup>71</sup>

<sup>69</sup> Available at [http://www.wto.org/english/thewto\\_e/countries\\_e/cambodia\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/cambodia_e.htm), accessed July 3, 2012.

<sup>70</sup> Law on Environmental Protection and Management of Natural Resource of Cambodia, Art.6.

<sup>71</sup> Chairman's Statement of the 20<sup>th</sup> ASEAN Summit Phnom Penh.

**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 area in relation to identifying, preventing and mitigating the human rights-related risk of their activities and business relationships?**

The region in the Northwest of Cambodia at the Thai border may be considered a conflict-affected and high risk area. Both Cambodian and Thai troops have clashed over land immediately adjacent to the Preah Vihear temple, leading to deterioration in relations. In the Northwest provinces of Preah Vihear and Ourdor Meanchay such armed conflicts occurred in areas adjacent to the border. At Preah Vihear province, there are some national and multinational extractive enterprises such as Delcom Cambodia Co. Ltd (Malaysian Company) and Ratanak Stone Cambodia Development Co. Ltd (Cambodian joint venture) which obtained licenses from the Ministry of Industry of Mine and Energy for their operations. There are no known records of State agencies engaging with these business enterprises so as to identify, prevent, or mitigate human rights related risks in carrying out their business operations.

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

There are no known records of state agencies providing assistance to business enterprises operating in conflict-affected and high-risk areas to assess and address the heightened risk of human rights abuses; particularly, gender-based and sexual violation.

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

There are no public records related to the State denying access to public support and services for business enterprises operating in conflict-affected and high-risk area that they are involved with human rights abuses and refuse to cooperate in addressing the situation.

**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 involving in human rights abuses in conflict-affected and high risk areas, and taken steps to address any gaps?**

There are no public records related to State review of 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.

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

**8.1. Is the state taking step to ensure that government all departments, agencies and other State-based institutions that shape business practices are aware of and observe that State's human rights obligations when fulfilling their respective mandates?**

The awareness of Human rights in business in the governmental departments, agencies and other State-based institutions is limited because this concept is very new in Cambodia. There has consequently been little or no activity regarding the development of coherent policies or the promotion of awareness in state agencies concerning the fulfilment of state obligations regarding human rights and the regulation of business practices.

**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?**

There is no official information or evident steps taken by the State to maintain adequate domestic

policy space to meet its human rights obligations when concluding economic agreements with other States or business enterprises. However, Cambodia is participating in an initiative launched by UNCTAD with a view to making investment agreements socially sustainable. This is particularly relevant because Cambodia is attractive for investors not least because of its inexpensive labour force.<sup>72</sup> A major step towards higher labour standards was achieved with the conclusion of the US – Cambodia Bilateral Textile Agreement in 1999. It granted higher export quotas to Cambodia’s garments under the condition that Cambodia demonstrated improvements in labour standards.<sup>73</sup> The agreement ran for three years and was then extended for another three years until the end of 2004 and Cambodia’s joining the WTO.<sup>74</sup>

It was in this context that the U.S. funded two ILO projects to improve working conditions and the application of labour laws – one to monitor working conditions in garment factories (today, Better Factory Project), and the other to help resolve labour disputes throughout Cambodia (the Labour Dispute Resolution Project, the establishment of Arbitration Council).

### **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?**

<sup>72</sup> UNCTAD, “Investment Policy Framework for Sustainable Development,” Geneva, 2012, 21.

<sup>73</sup> U.S. Cambodia Bilateral Textile Agreement, 20 January 1999, at [http://cambodia.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh\\_texttile.pdf](http://cambodia.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh_texttile.pdf).

<sup>74</sup> “U.S.-Cambodian Textile Agreement Links Increasing Trade with Improving Workers’ Rights, New Memorandum of Understanding Extends Bilateral Trade Agreement for Three Years,” 7 January 2002, at <http://www.fordschool.umich.edu/rsie/acit/LaborStandards/LaborInUSCambodiaTextile.pdf>

There is no official information or evident steps taken by the State to ensure and promote business respect for human rights when acting as members of multilateral institutions that deal with business-related issues. However, Article 3 of the Law on Investment in Cambodia states that the Council for the Development of Cambodia is the sole and one-stop service organization responsible for rehabilitation, development and over-seeing investment activities. Moreover, the Council for the Development of Cambodia is the Royal Government’s “Etat-Major” responsible for the evaluation and the decision making on all rehabilitation and development, and investment project activities.<sup>75</sup> Article 3 mentioned above provides for the jurisdiction of the state to oversee and make decision in terms of the investor’s activities. As the chair of the ASEAN Summit 2012, Cambodia contributed to the drafting of the final statement which contains the commitment of ASEAN to promote and protect human rights in the region, to support UN peacekeeping missions,<sup>76</sup> and to implement the ASEAN Declaration on the Protection and Promotion of the rights of migrant workers.<sup>77</sup>

### **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**

So far, there are two known cases, where the State took legal steps to ensure human rights compliance in a business context. The first case relates to alleged shooting of three garment workers on strike by the

<sup>75</sup> Cambodia Investment Law, Art. 3.

<sup>76</sup> Chairman’s Statement of the 20th ASEAN Summit.

<sup>77</sup> Ibid.

then Bavet Town Governor, Chhouk Bandith.<sup>78</sup> Legal proceedings were initiated but then closed in December 2012 and reopened again in January 2013.<sup>79</sup>

Another case relates to the death of an environmental activist, Mr. Chut Wutty. He was killed in April 2012 while researching alleged illegal logging and land seizures in Koh Kong Province.<sup>80</sup> The Prime Minister established a governmental investigation committee which led to proceedings before the Koh Kong Provincial Court.<sup>81</sup> In October 2012 the Court decided that Wutty had been killed by a military officer named Rattana who had then accidentally been shot to death by the head of the logging company's security guards in an attempt to prevent further shooting. As a consequence, the Court decided to close the case on Chut Wutty's death given the murderer's death. It proceeded to sentence the head of security to two years imprisonment for the accidental killing of Rattana.<sup>82</sup>

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

The Arbitration Council is a national labour arbitration institution established under the labour

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78 See <http://www.voanews.com/khmer-english/news/Court-Seeks-City-Leader-After-Garment-Protest-Shooting-141593083.html>.

79 See <http://www.voacambodia.com/content/appeals-court-picks-up-shooting-case-against-former-bavet-governor/1612021.html>

80 See <http://www.un.org/apps/news/story.asp?NewsID=41894&Cr=cambodia&Cr1=#.URYVuWfuxt0>

81 "Cambodia: Investigation Order in Killing of Activist," 01 May 2012, at <http://www.nytimes.com/2012/05/02/world/asia/investigation-ordered-in-killing-of-chut-wutty-in-cambodia.html>

82 "Cambodian Courts Drop Case of Murdered Environmental Activist Chut Wutty," 4 October 2012, at <http://www.globalwitness.org/library/cambodian-courts-drop-case-murdered-environmental-activist-chut-wutty>

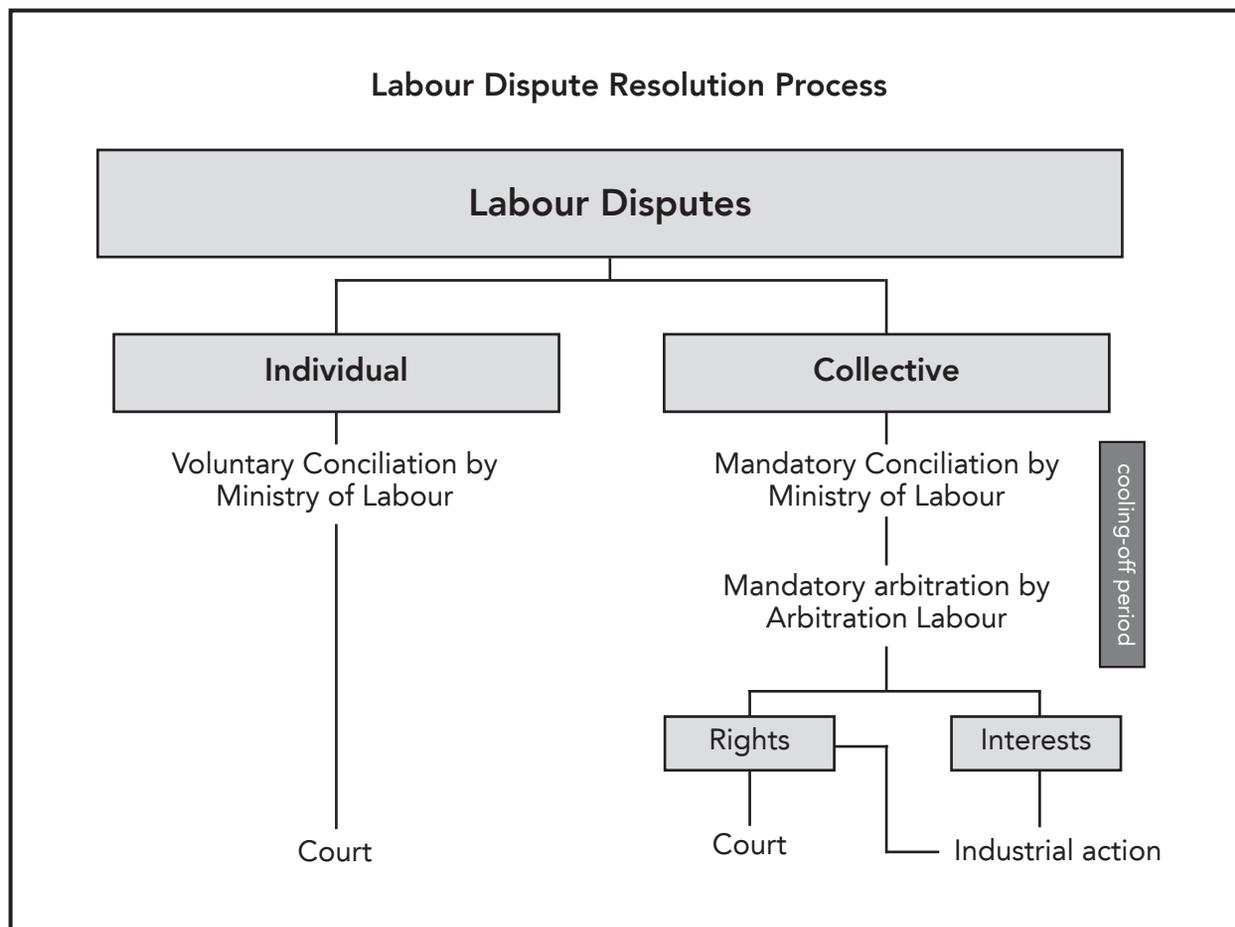
law to resolve collective labour disputes between employers and workers or their unions. The Council is a tripartite institution with its member being one third employers' representatives, one third union's representatives and one third representing the Ministry. The Council is mandated to resolve both 'rights disputes' – related to existing rights under the law, employment contracts or collective bargaining agreements, and 'interests disputes' – related to desired future benefits (mostly in the context of collective bargaining). It issues arbitral awards that are –in principle– non-binding on the parties.<sup>83</sup> While the conciliations process is mandatory for collective labour disputes, it is voluntary for individuals.

The arbitration award will be binding on the parties only with their agreement. If they do not agree, they can formally object within 8 days via the Secretariat. A timely objection means the award is unenforceable and triggers the parties' right to take industrial action (i.e., strike or lock-out) or, in the case of a rights dispute, proceed to the court. If no timely objection is filed, the award automatically becomes binding and enforceable. Under the law, if either party refuses to abide by an enforceable award, the other party can ask the court to enforce the award.<sup>84</sup>

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83 Hugo van Noord, Hans S.Hwang, Kate Bugeja, "Cambodian Arbitration Council: Institution Building in Development Country," ILO Working Paper No. 24, August 2011, 4, at [http://www.ilo.org/asia/whatwedo/publications/WCMS\\_166728/lang-en/index.htm](http://www.ilo.org/asia/whatwedo/publications/WCMS_166728/lang-en/index.htm)

84 Hugo van Noord, Hans S.Hwang, Kate Bugeja, "Cambodian Arbitration Council: Institution Building in Development Country," ILO Working Paper No. 24, August 2011, 5-6, at [http://www.ilo.org/asia/whatwedo/publications/WCMS\\_166728/lang-en/index.htm](http://www.ilo.org/asia/whatwedo/publications/WCMS_166728/lang-en/index.htm)

Overview of proceedings<sup>85</sup>

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

There are no governmental reports, but the UN Special Rapporteur concluded that the main problem is not a lack of a legal framework but its implementation:

“The majority of the challenges I have identified in this report [...] derive from a failure to apply the domestic legal framework – that is, the laws, policies and regulations that the Government itself has

developed [...]. The granting and management of economic and other land concessions in Cambodia suffer from a lack of transparency and adherence to existing laws. Much of the legal framework on these matters is relatively well developed on paper, but the challenge is with its implementation in practice.”<sup>86</sup>

<sup>85</sup> Ibid., 5.

<sup>86</sup> Surya P. Subedi, “A Human Rights Analysis of Economic and Other Land Concessions in Cambodia,” Report of the Special Rapporteur on the Situation of Human Rights in Cambodia (A/HRC/21/63/Add.1/Rev.1, 11 October 2012), 197.

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

The Cambodia Labour Law requires a company to develop its own internal regulations which normally would provide a grievance mechanism. According to Article 22 of the Cambodian Labour Law, every employer with eight or more workers is under an obligation to establish internal regulations after consultation with workers' representatives and review by the Ministry of Labor and Vocational Training.<sup>87</sup> In addition, the Labour Law also allows the company to develop a Collective Bargaining Agreement (CBA) with workers' representatives or trade union in the company. In practice, if a CBA is developed a grievance mechanism is included.<sup>88</sup>

**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?**

The term "National Human Right Institution"<sup>89</sup> in Cambodia now encompasses the National Assembly Commission on Human Rights (NACHR), the Senate Commission on Human Rights (SCHR), and Cambodian Human Rights Committee (CHRC).

Up to now, there is no evidence that the state is granting them sufficient powers to qualify as an NHRI under the Paris Principles.

However, according to Professor Surya Subedi, the United Nations ("UN") Special Rapporteur on the Situation of Human Rights in Cambodia in 2011, between 2006 and 2010 the NACHR received total of 1,158 complaints from members of the public, mostly relating to land disputes, and the NACHR wrote to the relevant government departments in a "good number" of cases. The total number of responses from the government departments received was around 250.<sup>90</sup> As for SCHR, the Special Rapporteur reports that in recent years the SCHR has received 300 complaints, and has received responses from government departments in approximately 100 of these cases. The SCHR has been regarded by the Special Rapporteur as being slightly more effective than the NACHR, being more proactive and occasionally engaging in "fact finding" missions under its own initiative.<sup>91</sup>

The CHRC's role is to investigate and remedy complaints relating to human rights, collect information relating to the implementation of human rights, organize training and disseminate information on human rights. It is also responsible for preparing human rights reports for the UN. It is not a National Human Rights Institution according to the Paris Principles.

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87 Cambodia Labour Law, Art. 24

88 Cambodia Labour Law, Art. 96 (2)

89 Cambodian Prime Minister, in 2006, committed to set up the National Human Right Institution according to the Paris Principles, the National Human Rights Institution is not yet established.

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90 Cambodia Centre of Human Rights, Fact Sheet: Institutions Series: National Human Rights Bodies in Cambodia, March 2012, Vol. 3, at [http://www.cchrcambodia.org/admin/media/factsheet/factsheet/english/2012\\_03\\_30\\_CCHR\\_Institutions\\_Series\\_Factsheet\\_National\\_Human\\_Rights\\_Bodies\\_ENG.pdf](http://www.cchrcambodia.org/admin/media/factsheet/factsheet/english/2012_03_30_CCHR_Institutions_Series_Factsheet_National_Human_Rights_Bodies_ENG.pdf)

91 Ibid., 1-2.

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

One of the active non-State actors to foster the State engagement in human right framework is the Office of the High Commissioner for Human Rights in Cambodia (OHCHR). OHCHR translated the Guiding Principles into Khmer language and has organized two meetings in December 2011 and in March 2012. The purpose of the meeting is to promote awareness of the Guiding Principles among all stakeholders including the government ministries. Besides OHCHR, the Cambodian Centre for Human Rights (CCHR) launched the Cambodian Business and Human Rights Project in August 2009 and published its first report on Business and Human Rights in Cambodia in November 2010. Furthermore, the Arbitration Council Foundation, a NGO registered with the Ministry of Interior, has played an important role in promoting healthy industrial relations in particular in the area of collective labour dispute resolution.

**World Bank:** In 2011 the World Bank Inspection Panel published a report on alleged forced evictions and resettlements in the Boeung Kak Lake area in the context of the Land Management and Administration Project sponsored by the International Development Agency. The report identified a willingness of the Cambodian Government to support the 2009 Action Plan, which had been issued by the Management in response to the Panel's first report on this case in 2009. Based on this Plan the Cambodian Project Management had undertaken several initiatives in order to mitigate the harm of people living in the affected area. It suggested :

- “(a) undertaking a social impact assessment on the affected communities in the BKL area and in other Project provinces;
- (b) preparing a mitigation plan for poor and vulnerable affected groups and developing economic opportunities;
- (c) using other IDA credits to provide a set of protection measures to the affected people in line with what they would have received under the RPF; and
- (d) assisting Government efforts to evaluate options to mitigate adverse environmental impacts from the filling of BKL.”<sup>92</sup>

Yet, as the Inspection Panel stated in its Report and the World Bank's Board of Executive Directors confirmed, these initiatives have not been sufficiently supported by the Government. Following the report, in August 2011, the Government issued a sub-decree (#183), giving over 700 families still living near the lake approximately 12 hectares of land on the planned development site and the government issued titles to 259 of these families on December 10, 2011.<sup>93</sup>

<sup>92</sup> International Bank for Reconstruction and Development, “International Development Association, Management Report and Recommendation in Response to the Inspection Panel Investigation Report: Cambodia, Land Management and Administration Project” (IDA Credit No. 3605-KH), (INSP/58016-KH, 21 January 2011), 45.

<sup>93</sup> World Bank Document, “Land Management and Administration Project: Implementation Completion and Results Report,” 27 December 2011, Report No: ICR1491), at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/03/16/000333038\\_20120316004734/Rendered/PDF/ICR14910P070870C0disclosed030140120.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/03/16/000333038_20120316004734/Rendered/PDF/ICR14910P070870C0disclosed030140120.pdf).

**ILO:** ILO plays an important role in Cambodia, both with regard to standards and technical assistance in their implementation. Two significant programmes have been initiated under the auspices of the ILO. The Better Factory Cambodia (BFC) monitoring and reporting on labour conditions in factories and the Labour Dispute Resolution (LDR) which facilitated the establishment of Arbitration Council (AC).

Non-governmental organisations are playing an important role in raising awareness for the human rights and business agenda. Many of these organisations cooperate under the umbrella of the NGO Forum Cambodia.<sup>94</sup>

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94 See [www.ngoforum.org.kh/](http://www.ngoforum.org.kh/)



# INDONESIA

by:

Patricia Rinwigati Waagstein

## BASELINE REPORT: INDONESIA

### SNAPSHOT BOX

<b>Number of Multinational Business Enterprises operating in the country</b>	Not clear <sup>1</sup>										
<b>Number of Micro, Small and Medium Business Enterprises operating in the country per 1,000 people</b>	53,823,732 units <sup>2</sup>										
<b>Number of State-owned Enterprises and the industries in which they operate</b>	141 State-owned Enterprise. <sup>3</sup>										
<b>Flow of Foreign Direct Investment from 2008 to 2012 (or other recent 3 to 5 year range)</b>	OECD <sup>4</sup> <table border="1"> <tr> <td>Inflow FDI</td> <td>2008</td> <td>2009</td> <td>2010</td> <td>2011</td> </tr> <tr> <td>Mln USD</td> <td>5 900</td> <td>2 249</td> <td>2 664</td> <td></td> </tr> </table>	Inflow FDI	2008	2009	2010	2011	Mln USD	5 900	2 249	2 664	
Inflow FDI	2008	2009	2010	2011							
Mln USD	5 900	2 249	2 664								
<b>Main industries in the country</b>	Extractive (natural resources), manufacture, agriculture, financial services, real estate, hotel and tourism, education, and commodities.										
<b>Number 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</b>	National Human Rights Commission (KOMNAS HAM) received complaints involving corporations: <sup>5</sup> <ul style="list-style-type: none"> <li>- 2010: 1119 complaint received <sup>6</sup></li> <li>- 2011 : 1068 cases received<sup>7</sup></li> </ul>										
<b>Have the Framework and/or the Guiding Principles been translated into the country's languages and published in the country?</b>	ELSAM (Institute for Policy Research and Advocacy) has translated the Guiding Principles into Indonesian. <sup>8</sup>										

1 It is quite difficult to get references on how many multinational enterprises are operating in Indonesia.

2 The statistic is based on the estimation in 2010. The number is a total unit and NOT based on per 1,000 people. See further: "Perkembangan Data Usaha Mikro, Kecil, Menengah (UMKM) Dan Usaha Besar (UB) Tahun 2009 - 2010," Ministry of Cooperation, <http://www.depkop.go.id/phocadownload/data%20usaha%20mikro%20kecil%20menengah%20umkm%20dan%20usaha%20besar%20ub%20tahun%202009%20-%202010.pdf>.

3 "Daftar BUMN [List of State-Owned Enterprise]," Ministry of State-owned Enterprise, <http://www.bumn.go.id/daftar-bumn/>.

4 "Country Statistical Profile: Indonesia 2012-2012," OECD, <http://www.oecd-ilibrary.org/docserver/download/fulltext/191100401e1t003.pdf?expires=1341173472&id=id&accname=freeContent&checksum=AFA6B245016450AC4A0EAAEB72087D57>. Further explanation will be discussed in Question 10.

5 Further discussion on the statistic, see the Question no. 10 on KOMNAS HAM

6 Compliance Unit of KOMNAS HAM received 1119 complaints from victims to the violation of human rights in 2010. See: "Klasifikasi Kasus Pelanggaran HAM Oleh Korporasi Tahun 2010 dan 2011," (Jakarta: KOMNAS HAM, 2012). Further explanation will be discussed in Question 10

7 *Ibid.* Further explanation will be discussed in Question 10.

8 Lembaga Studi dan Advokasi Masyarakat (ELSAM), "Prinsip-Prinsip Panduan Untuk Bisnis and Hak Asasi Manusia: Kerangka Perserikatan Bangsa-Bangsa: Perlindungan, Penghormatan, Dan Pemulihan," (2012).

## OVERVIEW OF THE COUNTRY'S BUSINESS AND HUMAN RIGHTS LANDSCAPE

Indonesia is the largest economy in Southeast Asia. It is market-based, but also has a significant degree of State involvement as there are a large number of State Owned Enterprises (SOEs), several of which are dominant within their respective fields. While there are many types of businesses operating in Indonesia, the main industry sectors are those of extraction, agriculture/plantation/forestry, and manufacturing.

The National Human Rights Commission (KOMNAS HAM) has stipulated that the main human rights issues in relation to business concern rights surrounding environment, health, water, life, ownership of property and land, indigenous people's rights, labour rights, and the right to information.

Indonesia has responded to emerging trends in business and human rights, as well as Corporate Social Responsibility (CSR), through various activities and regulations at national, sub-national, and corporate levels. As will be demonstrated in this study, several laws have been passed in relation to human rights for business, and some policies have been implemented on the national and sub-national level. The 2007 Corporate Law, for example, imposes mandatory duties to every limited liability corporation working directly or indirectly with natural resources in order to limit the environment and social impact of its activities. Several laws have also been passed since 2006 designed to prevent hazards and environmental damage. These regulations do not specifically address the issue of human rights *per se*, but rather deal with broad social issues which in many ways touch upon elements of human rights.

At the sub-national level, the issue of social responsibility among corporations, including human rights in business, has also begun to be discussed. Several cities or regencies have responded to this trend by issuing regulations implementing the 2007 Corporate Law. A forum devoted to planning and implementing CSR was also established in several cities and provinces.

At the international level, Indonesia has ratified several human rights treaties, namely: International Covenant on Civil and Political Rights; International Covenant on Economic, Social, and Cultural Rights; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Forced Labour Convention; ILO Conventions (No. 19, 27, 29,45,69,81,87,88,98,100,105,106,111,120,138,144, 182,& 185).

At the corporate level, several companies have adopted national and international voluntary initiatives. Moreover, in response to public pressure, a few extractive companies have established human rights departments within their corporate structures to deal with compliance. Others have begun conducting human rights impact assessments prior to their investment, or annual human rights audits. These are purely corporate initiatives, which go beyond what is required by law.

The study attempts to cover a wide range of material on business and human rights, including state and corporate practices in Indonesia. As a legal research, the sources of material are derived mainly from laws and regulations, court decisions, books, journal, as well as supporting articles from various medias. It is important to note that this study was written at a time when several issues concerning the operation and effects of the regulatory framework for human rights and business were being dealt with by national and sub-national bodies. Moreover, some regulations and institutions are being reviewed by related institutions in Indonesia. Therefore, this study covers only the materials that were publicly available and applicable at the time of completion namely August 2012.

## Types of Business Enterprises in the Country

<b>Name of the Type of Business Enterprise</b> <i>E.g. company, partnership, business trust etc.</i>	<b>Description of the Legal structure of the Type of Business Enterprise</b>	<b>Does incorporation of the business enterprise require any recognition of a duty to society, including human rights responsibility?</b>	<b>Any legislation specifically applicable to the Type of Business Enterprise</b> <i>(E.g. Corporations Law)</i>
1. A limited liability corporation	<ul style="list-style-type: none"> <li>• Important organs of a limited liability corporation: General Meeting of Shareholders, Supervisory Board (<i>Komisaris</i>), and Board of Directors.</li> <li>• Applies the concept of limited liability</li> <li>• A corporation is a legal subject carrying rights and obligations. It implies that it can sue and be sued as a separate entity.</li> <li>• To become a legal entity, a corporation requires Minister's Decree on the ratification of a company. Article 9 of the Company Law obliges the founders of the Company to submit an application to the Minister by filling in a form containing at least the basic information for the Company such the name of the company, the company's full address, purpose, objectives, and business activities of the Company, etc.</li> </ul>	<ul style="list-style-type: none"> <li>• The 2007 Corporate Law No. 40:</li> <li>• Art. 74 on Corporate Social and Environmental Responsibility</li> <li>• Article 66: reporting the implementation of social and environmental responsibility</li> <li>• 2012 Government Regulation No. 47 on Corporate and Environmental Responsibility</li> <li>• 2007 Law No. 25 on Investment</li> <li>• Article 15 : obligation to implement social responsibility</li> <li>• Article: 16: obligation to any investor to protect environment and provide health, comfort, and safety environment for their workers.</li> <li>• Art. 17: obligation to allocate fund for non-renewable environmental damages</li> </ul>	<ul style="list-style-type: none"> <li>• 2007 Corporate Law No. 40</li> <li>• <i>Burgerlijk Wetboek (BW)</i> or Indonesian Civil Code</li> </ul>

<p>2. Limited partnership (<i>Commanditaire-Vennotschaap/ CV</i>)</p>	<ul style="list-style-type: none"> <li>• It is a business entity but it is not a legal subject meaning CV does not have separated rights and obligations.</li> <li>• Important organs:</li> <li>• Silent/sleeping partners (if any)</li> <li>• General /active partner/ directors</li> <li>• Applies 'limited liability' in the limited sense:</li> <li>• Silent/sleeping partners are only responsible for its shares</li> <li>• General partner(s) is/are liable personally for any debts and obligations of the CV (personal and unlimited liability)</li> </ul>	<ul style="list-style-type: none"> <li>• 2007 Law No. 25 on Investment Articles. 15, 16, &amp; 17.</li> </ul>	<ul style="list-style-type: none"> <li>• Indonesian Civil Code.</li> <li>• Indonesian Commercial Code</li> </ul>
<p>3. Partnership (<i>persekutun perdata</i>)</p>	<ul style="list-style-type: none"> <li>• It applies personal and unlimited responsibility</li> </ul>	<ul style="list-style-type: none"> <li>• 2007 Law No. 25 on investment: Articles. 15, 16, &amp; 17.</li> </ul>	<ul style="list-style-type: none"> <li>• Indonesian Civil Code</li> </ul>
<p>4. Associate (<i>Persekutuan Firma</i>)</p>	<ul style="list-style-type: none"> <li>• It is a business entity but it does not carry a legal entity status.</li> <li>• It is similar with CV but it usually applies to certain professions such accountants or lawyers.</li> </ul>	<ul style="list-style-type: none"> <li>• 2007 Law No. 25 on Investment, Articles. 15, 16, &amp; 17</li> </ul>	<ul style="list-style-type: none"> <li>• Indonesian Civil Code</li> </ul>
<p>5. Proprietorship/ Individual company (<i>Perusahaan perseorangan</i>)</p>	<ul style="list-style-type: none"> <li>• It is a business entity runs by individual</li> <li>• It does not carry a legal entity status.</li> <li>• The owner is responsible personally for any debt or obligations of his/her company (unlimited liability)</li> </ul>	<ul style="list-style-type: none"> <li>• 2007 Law No. 25 on Investment: Articles. 15, 16, &amp; 17</li> </ul>	<ul style="list-style-type: none"> <li>• Indonesian Civil Code</li> </ul>

<p>6. Cooperative (Koperasi)</p>	<ul style="list-style-type: none"> <li>• It is a business entity with a legal entity status.</li> <li>• As a legal entity, the Cooperative has rights and obligations separated from its shareholders/ members. It can sue and be sued.</li> <li>• Different from limited liability corporation, the Cooperatives are established based on the principles of mutual cooperation, increasing community welfare and voluntary membership.</li> <li>• Requires endorsement/ ratification from related Ministry (Ministry's Decree) for its establishment as a legal entity.</li> <li>• Cooperatives are divided into two forms:             <ul style="list-style-type: none"> <li>• Primary cooperative with the minimum of 20 members</li> <li>• Secondary cooperative with the minimum of 3 cooperatives</li> </ul> </li> <li>• Organs of Cooperative (Koperasi):             <ul style="list-style-type: none"> <li>• General meeting of all members (shareholders)</li> <li>• Directors (or caretaker)</li> <li>• Supervisory board</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• 2007 Law No. 25 on Investment Articles. 15, 16, &amp; 17</li> </ul>	<ul style="list-style-type: none"> <li>• 1992 Law no. 25 on Cooperative (currently being amended at the Parliament)</li> <li>• 1994 Government Regulation No. 4 on the Requirement and Procedure for the establishment of a Cooperative</li> <li>• The Regulation of Ministry of Cooperative and Small and Medium Enterprise No. 01/Per/M. KUKM/I/2006 on the Guidelines for Establishment and Endorsement of Cooperative.</li> </ul>
<p>7. Foundation (Yayasan)</p>	<ul style="list-style-type: none"> <li>• It is a business entity which carries a legal entity status.</li> <li>• Its establishment requires endorsement/ratification from related Ministry (Ministry's Decree).</li> </ul>	<ul style="list-style-type: none"> <li>• Not clear whether 2007 Law No. 25 on investment applies to investors/ donors/testators in the context of Foundation.</li> </ul>	<ul style="list-style-type: none"> <li>• 2001 Law No. 16 on Foundation</li> <li>• 2004 Law No. 28 on the amendment of 2001 Law no. 16</li> </ul>

7. Foundation (Yayasan)	<ul style="list-style-type: none"> <li>• Different from any other business entities, Foundation is established for social, religious, and humanitarian purposes.</li> <li>• There is a separation between foundation assets and private assets.</li> <li>• The sources of assets: endowments, grants, donations or other ways which are not in conflict with laws and their charter.</li> <li>• The organs of Foundation: <ul style="list-style-type: none"> <li>• Trustee</li> <li>• The executive board</li> <li>• The supervisory board</li> </ul> </li> </ul>		<ul style="list-style-type: none"> <li>• Indonesian Civil Code (BW)</li> <li>• The 2008 Gov. Implementing Regulation No. 63 on Foundation</li> <li>• 1998 Presidential Order No. 20 on the financial sources of Foundation</li> </ul>
8. State owned corporation (BUMN)	<p>Divided into three types of BUMN:</p> <p><b>1. Public corporation / PERUM</b></p> <ul style="list-style-type: none"> <li>• An entity that is wholly owned by the State.</li> <li>• The organs is: <ol style="list-style-type: none"> <li>a. Ministry of State-owned corporation</li> <li>b. Board of Director</li> <li>c. Supervisory Board</li> </ol> </li> <li>• Responsibility: <ol style="list-style-type: none"> <li>a. Minister of State-owned Corporation is not responsible for any loss of the PERUM exceeding the value of state's assets.</li> <li>b. Board of Director is responsible for planning and implementing the corporate management. The board of Directors are elected by Minister.</li> <li>c. Supervisory Board is responsible for supervising the management of the public corporation. Supervisory Board is elected by the Ministry</li> </ol> </li> </ul>	Not clear whether 2007 Law No. 25 on investment applies to PERUM, and PERSERO	<ul style="list-style-type: none"> <li>• 2003 Law no. 19 on the state-owned corporation</li> <li>• 2003 Decision of Ministry of state-owned corporation No. Kep. 236/MBU/2003 &amp; 2007 Decision of the Ministry of State Owned Corporation NO. Per 05/MBU/2007 on the partnership with Small Enterprises and Environment Program</li> </ul>

<p>8. State owned corporation (BUMN)</p>	<p><b>2. PERSERO</b></p> <ul style="list-style-type: none"> <li>• A limited liability company wherein at least 51 % shares are owned by State of the Republic of Indonesia and which has as its principle objective to seek profit)</li> <li>• Organs of the PERSERO:             <ol style="list-style-type: none"> <li>a. Shareholders meeting in which Ministry of State-Owned Company is the decision maker.</li> <li>b. Board of Directors (elected by Ministry of State-Owned Companies)</li> <li>c. Supervisory Board and Supervisory Commissioner.</li> </ol> </li> <li>• Responsibility:             <ol style="list-style-type: none"> <li>a. Ministry is responsible for any direction of the company. He/she elects the Board of Directors and Supervisory Board including the Supervisory Commissioner.</li> <li>b. Board of Directors – responsible for managing the corporation.</li> </ol> </li> </ul> <p><b>3.PERSEROAN TERBUKA (or Public Listed Company)</b></p> <ul style="list-style-type: none"> <li>• An entity which has been publically offered consistent with the laws and regulations of Indonesia’s capital market.</li> <li>• all shares are open to the public</li> <li>• this is the same as the Limited Liability Corporation, therefore, the Corporate Law applies to this type of orporation.</li> </ul>	<ul style="list-style-type: none"> <li>• Art. 74 of the 2007 Corporate Law No. 40</li> <li>• 2007 Law No. 25 on investment applies</li> </ul>	<ul style="list-style-type: none"> <li>• 2003 Law no. 19 on the state-owned corporation</li> <li>• 2003 Decision of Ministry of state-owned corporation No. Kep. 236/MBU/2003 &amp; 2007 Decision of the Ministry of State Owned Corporation NO. Per 05/MBU/2007 on the partnership with Small Enterprises and Environment Program</li> </ul> <p>The 2007 Corporate Law No. 40</p>
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## I. How has the State reacted to the UN “Protect, Respect and Remedy” Framework (“Framework”)?

Indonesia has responded positively to the work of Prof. Ruggie, former Special Representative of the UN Secretary-General on Business and Human Rights including the Framework of “Protect, Respect, and Remedy.” In May 31, 2011, Indonesia clearly stated to the Human Rights Council that it is willing to learn further on the impact of business activities on human rights protection. Moreover, Indonesia highlighted two issues. The first refers to the obligation of a State to take into consideration human rights when it deals with business.<sup>9</sup> To implement this, Indonesia has established a national governance committee and a corporate governance sub-commission whose duties are to set up standards and monitor ethical business practises.<sup>10</sup> Second, Indonesia pointed out the importance of an independent judicial system. Indonesia has taken steps to implement this obligation.<sup>11</sup> Special attention has been given to right of women to have access to justice.<sup>12</sup>

Another Indonesian response had previously been articulated in the 2007 Human Rights Council’s session after the issuance of the 2007 Ruggie’s report. In its official letter to Ruggie, Indonesia clearly stated that the Ruggie’s report provides useful insight on the roles of those transnational corporations to play in the promotion and protection of human rights.<sup>13</sup> The letter also mentioned that the defining corporate responsibility at the international level would ensure that the best possible standards are created.<sup>14</sup> It also highlighted that the gap which exists between corporate accountability and national

norms on labour laws and human rights would be bridged by establishing a balance between corporate accountability and national responsibility.<sup>15</sup> In the end, the Indonesian government pointed to the importance of coordination among stakeholders to establish policy measures that reflect consistent national practices that protect human rights.<sup>16</sup> At the same time the State should be given space to create policies to meet its development obligations.<sup>17</sup>

Indonesia has also given its support and endorsement to the Framework as a member of the Human Rights Council which adopted this Framework.<sup>18</sup> Prior to this, it actively participated in consultations and discussions with the Special Representative on Business and Human Rights in Bangkok (2006) and New Delhi (2009).<sup>19</sup>

The Indonesian National Human Rights Commission, KOMNAS HAM, has referred to the Framework on several occasions. The first was during the workshop by the South East Asia Human Rights Institutions titled, ‘Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform’ in December 2011, which KOMNAS HAM hosted.<sup>20</sup> As one outcome of this workshop, the Bali Declaration on Human Rights and Agribusiness in South East Asia was adopted. The importance of

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> “Membership of the Human Rights Council,” UN Human Rights Council, <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm>.

<sup>19</sup> “Briefing Note on the Work of the Special Representative of the U.N. Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises,” United Nations (2011).

<sup>20</sup> The meeting focused on the challenges of ensuring respect for the rights of indigenous peoples and rural communities in the context of a rapid expansion of agribusiness, notably the palm oil sector, while recognizing the right to development and the need to improve the welfare and situation of indigenous peoples and rural communities. See: “Bali Declaration on Human Rights and Agribusiness in Southeast Asia,” in *Human Rights and Business: Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform* (Bali: Komisi Nasional Hak Asasi Manusia (KOMNAS HAM), 2011).

<sup>9</sup> “Statements by Govts at Human Rights Council Session,” 31 May 2011, see <http://www.business-humanrights.org/SpecialRepPortal/Home/ReportstoUNHumanRightsCouncil/2011#85935>.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> “State Responses to the Report by John Ruggie, Special Representative of the UN Secretary-General for Business and Human Right, at the United Nations,” United Nations (2007): 10.

<sup>14</sup> *Ibid.*

this Declaration is that it recognized the work of the UN Secretary General's Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises, and welcomed the related Working Group to deal with various cases involving business and human rights.<sup>21</sup>

The second reference is found in KOMNAS HAM's report to the 2012 Universal Periodic Review (UPR), where it mentions that ensuring the implementation of corporate responsibility to respect, protect, and remedy is one of the human rights obligations that the Indonesian government is trying to fulfil.<sup>22</sup> Nevertheless, the report does not elaborate further on where and how these corporate responsibilities to respect, protect, and remedy are being implemented.

## II. Is the State duty to protect against human rights abuses by third parties, including businesses (“State Duty to Protect”), recognized by 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?

There are a number of direct or indirect references to a State’s duty to protect in the laws and regulations of Indonesia:

#### Constitution

The 1945 *Constitution of Indonesia* and its amendments provide human rights protections as stipulated in Articles 27, 28A – 28J, and 29. Particularly Articles 28 A – I clearly address the

<sup>21</sup> *Ibid.*

<sup>22</sup> “Universal Periodic Review (UPR); 13th Session of the Working Group on the UPR,” The Indonesian National Human Rights Commission (KOMNASHAM) (2012): point 10 (g).

protection of certain human rights, which are recognized as constitutional rights. Article 28 J Paragraph (2), in contrast, sets a limitation on such rights by providing that citizens are subject to statutory limitations of these rights.

#### 1999 Human Rights Law No. 39

Law No. 39 of 1999 concerning human rights (the Human Rights Law) establishes a series of human rights obligations applying to states and individual(s). It pledges Indonesia’s commitment to promoting a society based on respect for fundamental economic, social, and cultural rights, as well as civil and political rights. The obligation to protect is clearly articulated in the following ways:

1. Article 7(2) of the Human Rights Law provides that international human rights instruments accepted by Indonesia form a part of domestic law. This is an indirect acknowledgement of the application of an obligation to protect, as articulated in those instruments.
2. Article 69 states that the term human rights corresponds to obligations to respect other people, in which State has a duty to respect, protect, enforce, and develop such rights.
3. Articles 71 and 72 reconfirm expressly the State’s obligation to respect, protect, enforce, and develop human rights.

#### 2008 Law No. 40 on the elimination of racial and ethnic discrimination

This law imposes the State’s obligation to provide effective protection to its citizens from any racial and ethnic discrimination, including that committed by private actors. This includes the obligation to prevent potential discrimination through the enactment of regulations and amendments to laws which are discriminatory, the obligation to bring the perpetrator to justice, and the obligation to provide access to remedies for the victims.

## International human rights instruments ratified by Indonesia

Indonesia has been a party to various international human rights instruments, namely: International Covenant on Civil and Political Rights, International Covenant on Economic, Social, and Cultural Rights, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Forced Labour Convention; ILO Conventions (No. 19, 27, 29, 45, 69, 81, 87, 88, 98, 100, 105, 106, 111, 120, 138, 144, 182, & 185).

The next question is how those instruments are applied in the Indonesian legal context. Is Indonesia applying a monist or dualist system? The answer is not very clear. Article 13 of the 2000 Law no. 24 on Treaty only requires the enactment of a law or presidential decree for any ratification of or accession to a treaty. Although the elucidation of Article 13 states that the registration of such a law in the State Gazette will directly bind all Indonesians, it is not apparent whether or not this ratification requires an implementing regulation in order to be applicable. For some scholars, Article 13 applies a monist system.<sup>23</sup> Others are of the opinion that the ratification of a treaty through enactment of a law or regulation will not be directly applicable by the Court, unless there is an implementing regulation.<sup>24</sup> In this case, a dualist model would apply.

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23 Damos Dumoli Agusman, "Status Hukum Perjanjian Internasional Dalam Hukum Nasional RI : Tinjauan Perspektif Praktik Indonesia," *Jurnal Hukum Internasional* 5, no. 3 (April 2008): 494-95; Mochtar Kusumaatmaja and Ety R. Agoes, *Pengantar Hukum Internasional (Introduction to International Law)*, 2 ed. (Bandung: PT Alumni, 2003), 57.

24 Hikmahanto Juwana, "Kewajiban Negara Mentransformasikan Ketentuan Perjanjian Internasional Ke Dalam Peraturan Perundang-Undangan: Studi Kasus Paska Keikutsertaan Dalam Capetown Convention," *Jurnal Hukum Bisnis* 28, no. 4 (2009).

Unfortunately, these practices vary. Some treaties require certain implementing laws to come into force. UNCLOS 1982, for example, which is ratified by 1985 Law No 17, required enactment of the 1996 Law No 6 within Indonesian waters. On the other hand, direct application of the treaty is found in the case of the ratification of Vienna Convention 1961/1963 on Diplomatic/Consular Relations, which is ratified by the 1982 Law No. 1. This law applied directly in the absence of any implementing law in the land dispute of the Saudi Arabian Embassy. Moreover, the Constitutional Court directly refers to universal practice and customary international law with respect to the case of Judicial Review of the 2004 Law No. 27 on the Truth and Reconciliation Commission. However, it does not clarify what it means by universal practice and customary international law.

What about human rights treaties? Article 10 of the 2000 Law No. 24 on Treaty requires a law, and not a presidential regulation, to ratify human rights treaties. Article 7 (2) of the 1999 Law No. 39 on Human Rights states that the various International Human Rights laws accepted by Indonesia comprise a unified national law. This article presumes a dualist system, because the law requires not only ratification but acceptance. However, neither the Human Rights Law nor the 2000 Law No. 24 provides guidelines as to what is implied by 'acceptance'. Again, the exact practice varies. For example, the Indonesian Human Rights Law, which articulates nearly all civil and political rights as well as economic, social, and cultural rights, was enacted in 1999; however, Indonesia only ratified the Covenant on Civil and Political Rights<sup>25</sup> and Covenant on Economic, Social Cultural Rights in 2005.<sup>26</sup> Since their ratification there has been no specific implementing regulation passed, but the Court - particularly the Constitutional Court - has referred to some rights from the two Covenants

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25 "The 2005 Law No. 12 on the Ratification of International Covenant on Civil and Political Rights," (2005).

26 "The 2005 Law No. 11 on the Ratification of International Covenant on Economic, Social, and Cultural Rights," (2005).

in several cases.<sup>27</sup> Meanwhile, Indonesia ratified the Convention on the Elimination of All Forms of Racial Discrimination in 1999,<sup>28</sup> followed by the special law on the Elimination of Racial and Ethnic Discrimination which was enacted in 2008.<sup>29</sup> Hence, it can be concluded that an implementing law is required if such law did not exist prior to the ratification. Moreover, such law is required if it concerns sanctions or punishment. The law on ratification usually does not specify certain sanctions or punishment for certain conduct. In order to impose sanctions or punishment to certain conducts, an implementing law is required.

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

The duty to protect is not a novel concept in the Indonesian legal system. At least two institutions, namely the Constitutional Court and KOMNAS HAM, have continually made reference to this duty in their cases.

In the first case, when interpreting certain articles of Indonesian law, the Constitutional Court has applied the doctrine of 'State obligation to protect' in making its verdicts. In the case of the judicial review of the 2007 Law No. 25 on Investment, which was decided in 2008, the Court interpreted Article 33 of the Constitution as requiring the State to be actively involved in respecting, protecting, and fulfilling the

<sup>27</sup> *Judicial Review of 2008 Law No. 40 on Limited Liability Corporation*, Constitutional Court Case No. 53/PUU-VI/2008 Judgment (2009), *Judicial Review of the Law No. 1/PNPS/1965 on Prevention of Religious Abuses and Defamation*, No. 140/PUU-VII/2009 Constitutional Court (2009), *Judicial Review of Article 39 of 2004 Law No. 39 on the Posting and Protection of Migrant Workers Abroad against Individual Employers Abroad.*, Case no. 028-029/PUU-IV/2006 Constitutional Court (2006), *Judicial Review of 2009 Law No. 4 on Mineral and Coal Mining*, Constitutional Court Decision Case No. 25/PUU-VIII/2010 (Decided 11 April 2012).

<sup>28</sup> "The 1999 Law No. 29 on the Ratification of International Convention on the Elimination of All Forms of Racial Discrimination 1965," (1999).

<sup>29</sup> "The 2008 Law No. 40 on the Elimination of Racial and Ethnic Discrimination," (2008).

economic, social, and cultural rights of its citizens.<sup>30</sup> The same obligation is reiterated in a later case, during the judicial review of the 2009 Law No. 4 on Mineral and Coal Mining.<sup>31</sup>

Another example is found in the case No 140/PUU-VII/2009, with the judicial review of Articles 1 through 4 of the Law no. 1/PNPS/1965 concerning the Prevention of Religious Abuse and/or Defamation. This case was filed by a group of NGOs and religious leaders who argued that Articles 1 through 4 were unconstitutional, as they were in conflict with the Constitution; particularly Articles 28 E (2), (3), 28 I (1) and 29 (2). In examining the case, the Court held the opinion that the Constitution's provisions relating to freedom of religion should be read differently from Article 18 of the ICCPR. The former not only recognizes rights to exercise individual belief or religion, but also impose obligations on the State and individual to respect and protect freedom of religion among others.<sup>32</sup> In contrast, the freedom of religion mentioned in Article 18 of the ICCPR only imposes a general obligation on the State to respect, protect and fulfil civil and political rights. No reference is made to individual obligations in the ICCPR.

The Constitutional Court further stated that the Constitutional provisions in question impose another obligation on the State: namely, to ensure that the implementation of this right is not violating the freedom of religion held by others.<sup>33</sup> In other words, the State is obliged to prevent any violation of this freedom of religion by other individuals or groups. This is similar to the meaning of the State obligation to protect. Moreover, the Court emphasizes that the related articles in Law No. 1/PNPS/1965 essentially implement the State's

<sup>30</sup> *Judicial Review of the 2007 Law No. 25*, Constitutional Court Decision No. 21-22/PUU-V/2007 (Decided in 17 March 2008).

<sup>31</sup> *Judicial Review of the 2009 Law No. 4 on Mineral and Coal Mining*, 84.

<sup>32</sup> *Judicial Review of the Law No. 1/PNPS/1965 on Prevention of Religious Abuses and Defamation*, paras. 3.34.12 & 3.34.13.

<sup>33</sup> *Ibid.*, para. 3.34.19.

obligation to prevent horizontal conflict between individuals with different [religious] beliefs; therefore, they are constitutional.<sup>34</sup>

The last reference concerns the case of judicial review of Article 35 (a) of the 2004 Law No. 39, on the Placement and Protection of Indonesian Migrant Workers Abroad. The case was filed by several domestic workers challenging the minimum age limit (21 years old) for working in the informal sector abroad. According to the petitioners, such a regulation is discriminatory and unconstitutional as it violates young people's right to work. To the contrary, the Court argued in its decision, the article is an implementation of the State's duty to protect its citizens from potential abuses by any individual employer.<sup>35</sup> As the State is bound to protect its citizens abroad, the age limitation is considered as a preventive measure aimed at such protection.<sup>36</sup> What is also interesting in this case is the recognition of the obligations to respect, protect, and fulfil human rights as constitutional obligations of states.<sup>37</sup>

KOMNAS HAM has also clearly used the duty to protect as a foundation when investigating and mediating human rights complaints involving corporations, individuals and state institutions. In several final recommendations to public institutions such as prosecutors or other relevant bodies, KOMNAS HAM emphasized the State's failure to meet its duty of protecting its citizens from private actors. Further explanation of these cases will be given in Question 10.

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

<sup>34</sup> *Ibid.*, para. 3.42.

<sup>35</sup> *Judicial Review of the 2004 Law No. 39 on Placement and Protection of Indonesian Migrant Workers Abroad*, Constitutional Court Decision on Case No. 028-029/PUU-IV/2006, 56 - 58 (Decided in 11 April 2007).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*, 70.

#### **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 this?**

There are several institutions that have the responsibility to deal with business related human rights abuses. The first such institution is KOMNAS HAM. As the national human rights institution, this institution deals with the issue of human rights abuses committed directly or indirectly by a legal entity including a corporation. Secondly, the national justice system, as a mechanism to uphold the rule of law, has the authority to examine and decide cases relating to the violation of the human rights laws or any provisions on human rights issues. Finally, there are, other institutions which do not deal directly with human rights issues, but their activities may have an impact on the protection and enjoyment of human rights.

While KOMNAS HAM will be further discussed in Question III.10, and the role of the Court further elaborated in III.2.3, this section will focus on the third category. Among all relevant institutions, this section only discusses two institutions as examples.

#### **A. Ombudsman**

Based on the 2008 Law No. 38, the mandate of this institution is limited to monitoring public services performed by public and private institutions, including state-owned enterprises.<sup>38</sup> To implement such a mandate, the Ombudsman receives complaints from individuals and/or legal persons concerning forgery, conspiracy, intervention, undue delay, in-competence, abuse of power, impartiality, corruption, illegal possession, and misleading practices of public and private institutions in providing public services. From these complaints, the Ombudsman determines whether the complaints should be followed up on or not. If they should, the Ombudsman will investigate and provide recommendations to various relevant institutions to take up the case.

<sup>38</sup> "The 2008 Law No. 36 on Ombudsman," (2008), Article 6.

It was reported in its annual reports that for the last three years around 5 to 7 % of the total complaints to the Ombudsman concern the maladministration by state-owned corporations.<sup>39</sup> The reports also reveal several issues which are commonly involved with state-owned corporations, such as the undue delay of pension payments by PT Taspen- a state-owned corporation on pension fund, labour conflicts in several state-owned corporations, environmental pollution, and discrimination against poor people by state-owned hospitals.<sup>40</sup> However, several kinds of cases brought to the Ombudsman indirectly involve private corporations. For example, the Ombudsman has monitored and investigated business licensees which were granted to private corporations to operate in protected forests or indigenous people's land not in accordance with the legal requirements.<sup>41</sup> Although the main focus of the Ombudsman's investigation was the Nation Land Agency or BPN or the related institutions which issued the licenses, corporations were also involved in the cases.<sup>42</sup>

In short, although the Ombudsman is not a human rights institution which specifically deals with implementation of human rights *per se*, its mandate can involve the implementation of human rights.

## B. Corruption Eradication Commission (KPK)

Although the prohibition of corruption does not describe a human right *per se*, corruption undermines the rule of law, which encompasses a number of civil and political rights. Corruption can also involve a direct violation of human rights or infringe upon human rights in other ways. For example, corruption relating to a state fund may

decrease the budget for the enjoyment of human rights directly or in other sectors, such as education or health. In considering the impact of corruption on human rights protections in Indonesia, the role of KPK is central.

The KPK was established in 2002 under Law no. 30/2002 on the Corruption Eradication Commission. The KPK's mandate is very specific, namely: to prevent corruption, monitor good governance in relation to corruption, and investigate cases of corruption.<sup>43</sup> In other words, the KPK takes the roles of both police and prosecutor in any corruption cases providing that they meet the criteria set in this law.<sup>44</sup> However, its authority is limited only to cases which involve public officials, attract public attention, and cause the State losses of at least Rp. 1,000,000,000-.<sup>45</sup>

The important question for our purposes is whether KPK has also dealt with corruption on the part of corporations. Indeed, as corruption can occur among both public and private actors, the organization addresses these business actors as well. Generally, the role of KPK is twofold. The first concerns prevention. The commission has coordinated and cooperated with different institutions and ministries dealing with natural resources and minerals, in order to prevent corruption. For example, in 2011, it worked with institutions in the mineral and gas sector such as BP Migas (a State oil and gas institution),<sup>46</sup> BPK (Financial Inspection Agency – *Badan Pemeriksaan Keuangan*), and tax authorities, to monitor the issuance of business contracts between those corporations and the State. KPK considers this sector to be especially vulnerable to corruption and has therefore prioritized prevention

39 "Pelayanan Pemda Terbanyak Dipermasalahan Masyarakat; Catatan Ombudsman Selama Tiga tahun Terakhir," *Rakyat Merdeka Online*, April 2, 2012, <http://www.rmol.co/read/2012/04/02/59431/Pelayanan-Pemda-Terbanyak-Dipermasalahan-Masyarakat->; "Yearly Report 2009," (Jakarta: Ombudsman of the Republic of Indonesia, 2009), 22.

40 "Yearly Report 2009."

41 *Ibid.*, 27 - 30.

42 *Ibid.*

43 "The 2002 Law No. 30 on the Corruption Eradication Commission," (2002), Article 6.

44 *Ibid.*, Article 10.

45 Rp. 1,000,000,000 is about US\$ 100,000. See *Ibid.*, Art. 11.

46 BP Migas was dissolved by the Constitutional Court in the case of judicial review of Law on Oil and Gas in November 2012. Its works were temporarily carried out by the Special Task Force Unit for Upstream Oil and Gas Business Activities.

in this area.<sup>47</sup>

The KPK has also initiated an anti-corruption program, *Program Prakarsa Anti Korupsi* (SPAK), for business organizations, including State-owned enterprises. This program is aimed at assessing anti-corruption initiatives with respect to each business entity. As a follow-up to that program, the KPK has assessed four State-owned enterprises as part of a pilot project, and is planning to expand this program to private businesses.<sup>48</sup> In addition, it has assisted several State-owned enterprises in monitoring and supervising their transactions, namely: PT INKA, PT Semen Gresik, SPGN, PT Kertas Leces, PT DOK, and Kodja Bahari.<sup>49</sup>

The second role of KPK is the investigation and monitoring of legal corruption cases. The organization has investigated various cases involving private and State-owned enterprise, as well as foundations and cooperatives. Those cases often concern bribery between business entities and the judiciary,<sup>50</sup> as well as other officials dealing with business activities such as bribery to win tenders or contracts.<sup>51</sup>

## **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?**

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47 “KPK Bidik Korupsi Besar Di Sektor Hulu Migas,” <http://news.detik.com/read/2012/07/10/211310/1962524/10/kpk-bidik-korupsi-besar-di-sektor-hulu-migas>; “Yearly Report 2011,” Komisi Pemberantasan Korupsi (Corruption Eradication Commission) (2011).

48 “Yearly Report 2011”: 35.

49 *Ibid.*, 48.

50 A case involving the bribery to a judge at the Commercial Court in relation to the sales of all assets of PT Skycamping Indonesia, a Indonesian corporation. Another example refers to a labour case filed by the labour union. The manager of PT Onamba gave a gift to judges with the intention that judges would dismiss the case. See: *Ibid.*, 87.

51 A case involves a gift given to PT Pertamina by PT Sugih Interjaya etc. See: *Ibid.*, 85 - 87.

### **2.1 To what extent do business enterprises and company organs face liability for breaches of law?**

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

The concept of limited liability applies in the Indonesian judicial system. Among different types of business entities, the separate legal personality principle only applies to three classes of entities: limited liability corporations,<sup>52</sup> the cooperative (*Koperasi*),<sup>53</sup> and the foundation (*Yayasan*).<sup>54</sup> “Separate legal personality” in this context means that such an entity can act as a legal person, holding and exercising rights as well as assuming obligations separate from the rights and duties of its owners. It also implies the legal capacity to enter into an agreement or contract, assume obligations, incur and pay debts, sue and be sued in its own right, and be held responsible for its actions. Moreover, each organ of a corporation has limited liability only in terms of its role as a shareholder, director, or supervisory board.

The separate legal personality applies in a very limited manner to CV, in the sense that the passive partner is only liable for the assets that he/she invested; the directors, meanwhile, can be held privately responsible for any debt or obligations of CV (unlimited responsibility).

The concept does not apply to other types of business entities such as partnerships, firms, or individual companies/proprietorships. These do not have any legal entity status; i.e., they do not have their own rights and obligations separate from their owners. Hence, personal and unlimited responsibility applies to the owners.

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52 “The 2007 Law No. 40 on Limited Liability Corporation,” (2007), Articles 3 (1) & 14.

53 “The 1992 Law No. 25 on Cooperative,” (1992), Articles 1 (1), 9, and 31.

54 “The 2001 Law No. 16 on Foundation,” (2001).

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

Which organs are liable for wrongful acts committed by the businesses they represent varies, depending on the type of entity. Moreover, the circumstances and nature of the breach of law also determine who should be held responsible.

The first case relates to limited liability corporations. In principle, the board of directors shall be responsible for the management of their corporation, as they are its “extended hand”;<sup>55</sup> hence, they should face liability for all company conducts, including wrongful acts by their corporation. However, each member of the board shall be fully and personally liable for corporate losses if those losses are due to the member’s fault or negligence, and/or he/she has not managed her/his corporation with good faith and full responsibility.<sup>56</sup> Alternatively, the board of directors are not liable if they can prove that they have not failed to govern in such a manner, or have taken action to prevent the losses.<sup>57</sup>

In cooperatives, where the caretakers are the decision/policy makers,<sup>58</sup> these people are responsible for any breach of law conducted by the cooperative.<sup>59</sup> This is due to the fact that all actions of the cooperative are attributed to the caretakers’ actions. The caretaker’s role in the cooperative resembles that of the board of director(s) in the limited liability corporation.

In the foundation, as in the above two examples, the caretakers as the “extended hand” are responsible for its day-to-day management with good faith and responsibility, in accordance with its purpose and

interests.<sup>60</sup> Thus, they also face liability when the foundation violates law.

### 2.2 (a) 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?

There are several laws and/or regulations that require business enterprises to avoid causing or contributing to adverse human rights impacts through their activities.

#### Human rights in general (1999 Human Rights Law No. 39)

Although the term ‘corporate human rights obligation’ is absent from the Human Rights Law, such an obligation can still be found indirectly in the interpretation of several articles:

1. The way in which this law is written focuses on the rights holder rather than duty holder, as found in the beginning of almost every right: “anyone has a right to...” Hence, these rights should be read to impose obligations to anyone including individual(s), the State, and a group of individuals. In Article 1(6), the law reconfirms the interpretation above that human rights violations can be committed by individual(s), groups of people, and the State. The next question is whether business actors are also covered by this law. Although the wording, ‘corporation or business actors or legal entity’ is not specifically used, a group of people or individuals can also be interpreted as to include any entities or institution including business entities established by individual or a group of individuals.

55 “The 2007 Law No. 40 on Limited Liability Corporation,” Article 95 para (2).

56 *Ibid.*, Article 95 para (3) (4).

57 *Ibid.*, Article 95 para (5).

58 “The 1992 Law No. 25 on Cooperative,” Article 30.

59 *Ibid.*, Art. 34.

60 “The 2001 Law No. 16 on Foundation,” Article 35; “The 2004 Law No. 28 on the Amendment of 2001 Law No. 16 on Foundation,” (2004).

2. Corporate human rights obligations can also be derived from any international human rights instruments accepted by Indonesia. Article 7(2) of the Human Rights Law recognises these instruments as a part of domestic law.<sup>61</sup>

### **Elimination of Racial and Ethnic Discrimination (2008 Law No. 40)**

Under the 2008 Law no. 40 on the Elimination of Racial and Ethnic Discrimination, corporations are subject to criminal and civil liability for discriminating against their employees based on race, religion, and ethnicity. For criminal liability, the punishment of a fine is higher if such discrimination is perpetrated by business entities rather than individuals. This law applies to all types of business entities regardless of their legal status.<sup>62</sup>

### **Corporate Social and Environmental Responsibilities**

There are several laws and regulations addressing social and environmental responsibilities at different levels.

#### **❖ 2007 Corporate Law No. 40 and its Implementing Regulation (2012 Government Regulation No. 47)**

The 2007 Corporate Law No. 40, in Article 74, clearly imposes environmental and social responsibility to limited liability corporations.<sup>63</sup> Sanctions can be imposed for failure to comply with such an obligation. After a five-year delay, the Government Regulation No. 47 was finally enacted to implement Article 74 of the 2007 Corporate Law. There are several important points highlighted in these two instruments:

61 Further discussion on the meaning of 'acceptance' will be elaborated later in this section.

62 All business entities regardless whether they carry legal personality or not can employ staff(s) to work for them.

63 "2007 Law No. 40 on the Limited Liability Corporation," Article 74.

#### **1. The types of responsibility**

There have been two types of 'social and environmental' responsibilities. First, according to Article 2 of the 2012 Government Regulation No. 47, every limited liability corporation as regulated in Corporate Law has social and environmental responsibility. This responsibility is voluntary meaning that it does not carry any punishment/sanction in the case of noncompliance. A reward may be granted to compliant institutions as an incentive.<sup>64</sup> Nevertheless, the law is absence of determining the type of and how a reward is given.

The second type of social and environmental responsibility is imposed on certain types of limited liability corporations, namely those doing business in the field of and/or in relation to natural resources.<sup>65</sup> This second form of responsibility is mandatory, and there will be sanctions in the case of violation.<sup>66</sup> This applies both within and outside the corporation.<sup>67</sup> However, the 2012 Government Regulation does not further clarify what it means by 'within and outside' the corporation. This may create a problem for implementing this regulation.

#### **2. The reporting system**

There is no obligation to report in the former scenario. In the case of mandatory responsibility, its planning and implementation should be reported in the annual company statement and approved by the General Meeting of Shareholders, the highest body within the corporate structure.<sup>68</sup> Here, the board of directors is the implementing agent.<sup>69</sup>

64 "The 2012 Government Regulation No. 47 on the Social and Environment Responsibility of Limited Liability Corporation," (2012), Article 8 para (2).

65 "The 2007 Law No. 40 on Limited Liability Corporation," Article 74.

66 "The 2012 Government Regulation No. 47 on the Social and Environment Responsibility of Limited Liability Corporation," Art. 7.

67 *Ibid.*, Article 3 para (2).

68 *Ibid.*, Article 4 para (1).

69 *Ibid.*, Article 4 para. (1).

### 3. Implementation

While there is no requirement specifying how responsibility should be executed in the former case, the implementation of mandatory responsibility is budgeted and calculated in the form of corporate costs/expenses, which should be appropriate and reasonable.<sup>70</sup> This implies that a corporation has the discretion to determine necessary expenses for enforcement of mandatory responsibility, based on its financial situation and the potential risks to the environment from its business activities.

### 4. Sanction

This mandatory responsibility as regulated by Article 74 is not an independence norm for imposing liability on business entities. The liability must instead be founded on other existing regulations. For example, although both Article 74 and its implementing regulation impose sanctions for noncompliance, they do not specify what kind of sanctions nor how they are imposed. Instead, they effectively refer to sanctions in other laws and regulations. The discussion over the sanction was highlighted by judges at the Constitutional Court on the case of judicial review of Article 74. The case was filed by the Indonesian Chambers of Commerce and business associations challenging the legality of Article 74. The petitioners argued that mandatory responsibility is discriminative, unconstitutional, and unjust. During one of the sessions, members of Parliament testified that the mandatory social and environmental responsibility is not something new; it has already been articulated in several bodies of laws such as environmental law, forestry law, water law, and mining law. Hence, the sanctions for not implementing the aforementioned regulation are based on those applied in this latter set of regulations.

The Constitutional Court, whose mandate is to review various laws alleged to violate the Constitution ruled in April 2009 that Article 74 is correct, non-discriminatory and just, and therefore not in conflict with the Constitution. In their

<sup>70</sup> *Ibid.*, Elucidation of Article 5.

deliberations, the Court held that CSR is a flexible concept which is subject to the interpretation of each country. For that reason, the mandatory nature of CSR is compatible with the current social, economic and legal nature in Indonesia. It does not conflict with existing law in fact it complement them. Moreover, the Court confirmed that this mandatory nature gives legal certainty to voluntary CSR and Indonesia's weak law enforcement system. The majority of judges also argued that Article 74 does not discriminate against particular corporations, as it is based on the potential risks posed by corporate behaviour to natural resources. Thus, according to them, it is logical for those parties impacting natural resources to be the ones to bear the burden.

However, three of nine judges dissented from the majority judges' reasoning, expressing their concerns about the potential conflict of laws particularly in the context of sanction. They used Articles 5 to 40 of the 1997 Law No. 23 on environmental management as an example. These Articles prohibit "everyone" from committing a series of polluting acts.<sup>71</sup> Article 74 of the Corporate Law, however, only prohibits a limited liability corporation. Hence, these three judges are of the opinion that articles 5 to 40 of the 1997 Law no. 23 cannot be applied in conjunction with Article 74 of the Corporate Law, as they address different legal subjects and actions, and therefore warrant different sanctions.<sup>72</sup> This will probably be the most difficult problem faced in implementing this law.

#### ❖ 2007 Investment Law No. 25

In its terminology, the 2007 Investment Law No. 25 does not use the term 'human rights' but rather applies the common terminology, 'corporate social responsibility'. It is defined as a responsibility borne

<sup>71</sup> *Judicial Review of the 2008 Law No. 40 on Limited Liability Corporation*, 106; "Verdict of Constitutional Court on the Judicial Review of Article 74 of the Corporate Law, Case no. 53/PUU-VI/2008," 106.

<sup>72</sup> *Judicial Review of the 2008 Law No. 40 on Limited Liability Corporation*, 108; "Verdict of Constitutional Court on the Judicial Review of Article 74 of the Corporate Law, Case No. 53/PUU-VI/2008," 108.

by every investor to foster a relationship in which it is in harmony and balance with, and suitable to, the local community's values, norms, and culture.<sup>73</sup> The law further defines 'investor' as an individual or a business entity that makes an investment, who may be either a domestic investor or foreign investor.<sup>74</sup> This implies that the law applies to all type of business entities regardless of their legal status.

In addition, this law requires every investor to preserve the environment and provide safety, health, convenience, and prosperity for workers.<sup>75</sup> Moreover, any investors exploiting non-renewable natural resources are required to allocate funds, in stages, for the recovery of the location in question, which will fulfil standards of environmental worthiness and whose implementation shall be in accordance with the rule of law.<sup>76</sup> Such an obligation is aimed at reversing environmental damage caused by any investment activity.

The law also imposes obligation on all investors to respect the cultural traditions of the community around the location of their business activities.<sup>77</sup> This is important particularly for any investment in an area in which indigenous people or traditional people live.

Does the law impose sanction? Yes, it imposes administrative sanctions such as written warnings, the limitation of business activities, temporary termination of business activities, and the complete withdrawal of business activities in order to fulfil social responsibilities and obligations to respect the cultural traditions of the people in the area of the activity. Additional sanctions may also be imposed if these related social responsibility activities refer to other laws.<sup>78</sup> A similar set of sanctions is imposed in relation to the obligation to preserve the environment and provide safety, health, convenience, and prosperity to workers.

73 "The 2007 Law No. 25 on Investments," (2007), Elucidation of Article 15.

74 *Ibid.*, Article 1 point 4.

75 *Ibid.*, Article 16.

76 *Ibid.*, Article 17.

77 *Ibid.*, Article 15 point (d).

78 *Ibid.*, Article 34.

## ❖ The Local Regulations on Corporate Social Responsibility (CSR)

To implement CSR at the sub-national level, several local governments<sup>79</sup> have initiated the enactment of a local regulation addressing this issue. East Belitung Regency, for example, has enacted the 2011 Local Law no. 13 on CSR. While the law restates Article 74 of Corporate Law and its elucidation, it also regulates specific issues: First, relating to the content, it specifies certain areas of CSR: namely, the development of infrastructure for social and public facilities, participation in the public sector, and engagement in or support to various religious, educational, health, sport, and cultural activities<sup>80</sup> Although the wording 'human rights' is absent from this law, the law indirectly regulates certain elements of human rights particularly economic, social, and cultural rights. Second, although this law distinguishes between business entities and limited liability corporations, the CSR obligations are imposed on any business entities residing in East Belitung regardless of legal status. Third, unlike the 2007 Corporate Law, the local law does not require a business entity to report its CSR activities. Fourth, the local government is mandated to monitor the implementation of CSR. To this end, it may establish a forum consisting of representatives from different business entities to assist the government in its efforts.

Another example is the 2012 Batam Regulation No. 2 on CSR. Similar to the East Belitung Local Regulation on CSR, this regulation covers several issues. First, it imposes obligations to all business entities operating or having an office in Batam, regardless of their legal status. The second concerns the content of the law. Like other CSR regulations, it does not mention the wording 'human rights'

79 Indonesia has 33 provinces and 497 cities/regencies. The autonomy law defines the local government as the head of province/cities/regencies and the local parliament. Local government at the cities or regencies level has autonomy to rule its own city/regency on certain issues such education, health, etc. See further information on "The 2004 Law No. 32 on Local Government," (2004).

80 "The 2011 Law of East Belitung Regency No. 13 on Corporate Social Responsibility," (2011), Article 6.

expressly but it does specify certain areas of business-related human rights such: education, health, public participation, sports, culture, religion, environmental sustainability, and other activities that may prove to increase the quality of human life.<sup>81</sup> This law further enumerates CSR programs relating to public empowerment, promotion, partnership, subsidies, social and financial assistance, public services, and social protection.<sup>82</sup> Last, like the East Belitung Law, this Batam Law also establishes a CSR Forum consisting of corporate representatives. It is designed to plan, monitor, evaluate and report on CSR to local government and parliament.<sup>83</sup>

## Labour issues

### *Labour law in general*

In general, labour is regulated by the 2003 Law No 13 on Manpower. The law addresses issues such as equal opportunity among workers, manpower planning and information, job training, job placement, extension of job opportunities, employment of foreign workers, employment and industrial relations, protection, wages, welfare, and sanctions.<sup>84</sup>

There are two main issues which are important to highlight in regards to this law. The first concerns its applicability. The law applies generally to any type of employer, including individuals, entrepreneurs, legal entities, or other entities that employ manpower by paying them wages or other forms of remuneration.<sup>85</sup> Although the law covers different types of work, its application is limited to employees and employers residing within Indonesia.

The second issue concerns its content, which establishes the rights and obligations of workers as well as employers. Here, the rights of the workers correspond to the rights of the employers, and *vice*

*versa*. This law also prohibits discrimination and child labour (with some exceptions), and regulates working hours and other necessary conditions of employment. In short, although the term ‘human rights’ is not expressly used, elements of certain rights such as the right to work, to a healthy working environment, to be free from discrimination, etc. are articulated in the law.

As the 2003 Law No. 13 is a basic law designed to cover basic conditions for employment, there are some other issues not covered here but instead addressed by other specific laws, such as migrant workers, outsourced labour, labour unions, and conflict settlement. Of these, especially important in relation to ASEAN is women and children as well as the issue of migrant workers.

### *Female Workers*

In relation to women, the Indonesian labour law mainly regulates three different issues: The first refers to discrimination. The Law on Manpower clearly prohibits any discrimination based on sex, ethnicity race, religion, and political orientation by entrepreneurs.<sup>86</sup> Moreover, the 1999 Law No. 21 on the Ratification of ILO Convention No. 111 clearly states that all workers should have the same opportunity and should be treated equally particularly in regard to job placement and job position including training, privileges, and promotion.

Secondly, in relation to working hours, this law has a special chapter on the requirement for employing female workers at night. Article 76 mainly prohibits female workers and labourers aged less than 17 years old from working between 11 pm to 7 am. However, an exception is allowed providing that employers meet some obligations namely: to provide nutritious food and drink to the female workers, to maintain decency/morality and security in workplace, and to provide roundtrip transport for female workers. Those requirements are further required in the

81 “The 2012 Batam Law No. 2 on Corporate Social Responsibility,” (2012), Article 10.

82 *Ibid.*, Article 11.

83 *Ibid.*, Articles 17-19.

84 “The 2003 Law No. 13 on Manpower,” (2003).

85 *Ibid.*, Article 1 points (4) & (5).

86 *Ibid.*, Articles 5-6.

Ministerial Decision on the Obligations of Employer to Employ Female Labour at Night.<sup>87</sup>

The third issue refers to the specific gender issues. Article 153 (2) of the 2003 Law No. 13 prohibits entrepreneurs from terminating the employment of a worker because she is getting married, or is pregnant, giving birth, having a miscarriage, or breast-feeding her baby. At the same time, they are also prohibited from employing pregnant female/workers/labourers who, according to a doctor's certificate, are at risk of damaging their health or harming their own safety and the safety of the baby if they work between 11 pm to 7 am.<sup>88</sup>

Moreover, female workers/labourers who feel pain during their menstruation period and notify the entrepreneur about this are not obliged to come to work on the first and second day of menstruation. In practice, this type of obligation creates tension.<sup>89</sup> Some corporations refuse to grant these two days of leave; some make it harder for female workers to demand this right by requiring a letter from a doctor stating that the female workers feel pain during their menstruation.<sup>90</sup>

In relation to the maternity leave, every women is entitled to have 3 (three) months maternity leave or 1,5 months leave due to miscarriage.<sup>91</sup> Entrepreneurs are also obligated to provide proper opportunity to female workers whose babies need breastfeeding during working hours.<sup>92</sup> Article 128 of

87 The food should contain 1,400 calories which is provided in break time and it cannot be substituted with money. The menu should be changed regularly. The maintain decency employer should provide security guard on the working place and provide a clear sanitary room with light separated between female and male . For further information see: "Ministerial Decision on the Obligations of Employer to Employ Female Labour between 23.00 to 07.00," (KEP.224/MEN/2003: Ministry of Manpower, 2003), Articles 3-4.

88 "The 2003 Law No. 13 on Manpower," Article 76.

89 Yusuf Wibisono, "Tuntut Cuti Haid, Buruh Demo Disnaker," *Berita Jatim*, July, 5, 2012, [http://www.beritajitim.com/detailnews.php/8/Peristiwa/2012-07-05/140421/Tuntut\\_Cuti\\_Haid\\_Buruh\\_Demo\\_Disnaker](http://www.beritajitim.com/detailnews.php/8/Peristiwa/2012-07-05/140421/Tuntut_Cuti_Haid_Buruh_Demo_Disnaker)

90 "Kesetaraan Gender Melalui Perundingan Bersama," (Jakarta: International Labour Organisation, 2004): 29.

91 "The 2003 Law No. 13 on Manpower," Article 82.

92 *Ibid.*, Article 83.

the 2009 Health Law No. 39 clearly states that family members, government, local government, and society should support the mother by providing time and special rooms for breastfeeding in work places and public places.<sup>93</sup> To implement such provision, the Ministry of Manpower, the Ministry of Women Empowerment, and the Ministry of Health passed a joint regulation to encourage entrepreneurs to provide breastfeeding places.<sup>94</sup>

### *Child Labour*

One chapter of the 2003 Law No. 13 specifically deal with child labour. In principle, an entrepreneur is prohibited from employing children. However, some exceptions are allowed for children aged between 13 years old and 15 years old for light work to the extent that such a job does not disrupt their physical, mental, and social development.<sup>95</sup> The law further lists certain requirements which have to be met in order to employ child labour namely: the entrepreneurs must have written permission from the parents or guardians of the children, the maximum working time is 3 hours a day, the job does not disturb school time, and entrepreneurs should provide occupational safety and wages in accordance with the prevailing provisions.<sup>96</sup> In the case children are employed together with adults, the children should be separated from the workplace for adult workers.

Another exception is found in Article 71 of the 2003 Law No. 13 in which children may work in order to develop their talents and interests in such activities as singing, dancing, etc. For this type of work, entrepreneurs should also meet some requirements such as that the work should be supervised by the parents or guardians, the children can only work 3 hours a day, and the working conditions and

93 "The 2009 Law No. 36 on Health," (2009), Article 128.

94 "Joint Regulation between Ministry of Women Empowerment, Ministry of Manpower and Transmigration, and the Ministry of Health on the Breastfeeding During Working Hours in Work Places," in *No. 48/MEN.PP/XII/2008, PER.27/MEN/XII/2008, 1177/MENKES/PB/XII/2008* (2008).

95 "The 2003 Law No. 13 on Manpower," Article 69.

96 *Ibid.*, Articles 69, 52.

environment should not disrupt their physical, mental, and social development, or interfere with school time.<sup>97</sup>

Article 74 lists different forms of child labour which are completely prohibited namely: slavery, prostitution, production of pornography, pornographic performances, gambling, trade in alcohol, narcotic, psychotropic and other additive substances, as well as some other harmful jobs. The list was further added to by the 2009 Regulation of the Ministry of Home Affairs No. 6 to include trafficking, debt bondage, and forced labour, including force labour in conflicts or war time. Article 3 of the Regulation also specifies certain sectors which are considered to be dangerous and harmful for children such mining, construction, offshore labour, production of exploded materials, working on the street, etc.<sup>98</sup>

In implementing these laws and regulations the Government has taken intensive actions directly or indirectly to eliminate child labour. The Direct Cash Transfer Programme in 2005 for example was designed to help poor and near-poor households to compensate for increased fuel prices. Every household received Rp. 100,000<sup>99</sup> per month for a period of one year. The programme was finally stopped in 2010 due to the strong debates over its efficiency and effectiveness in society.<sup>100</sup> In 2009, the President has enacted Presidential Regulation No. 6 addressing the coordinating mechanism to tackle poverty. At the same time, the Ministry of Home Affairs also issued a ministerial regulation No. 6 setting up the guidelines for the establishment of local action committees, the designation of regional action plans, and community empowerment in the elimination of the worst forms of child labour. This regulation has been accepted as a guideline for local

97 *Ibid.*

98 "Regulation of the Ministry of Home Affairs on Guidelines for the Establishment of Local Action Committee, Local Planning, and Society Empowerment for the Eradication of Worse Job for Child Labour," (Jakarta: 2009), Articles 16-21.

99 Rp. 100,000 is equivalent with US\$ 10 (2012)

100 Nina Triningsih and Masaru Ichihashi, "The Impact of Poverty and Educational Policy on Child Labor in Indonesia," (Hiroshima: Hiroshima University, 2010): 3.

governments to develop actions in their respective authorities. Nusa Tenggara Timur Province for example has developed a scholarship program called '*Program Bantuan Penanggulangan Pekerja Anak di Desa Tertinggal (P2ADT)*' as a follow up to those regulations.<sup>101</sup>

Despite all these programmes to eliminate child labour, it is not an easy problem to tackle in the Indonesian context. Besides poverty, many factors influence the incidence of child labour, such as unemployment, lack of social security, indebtedness, and other situations where families become dependent on their children's work.<sup>102</sup> Moreover, many children are working in informal sectors which are difficult to identify and regulate. Hence, what is required is an integrated approach by all institutions including private and public to eliminate child labour.<sup>103</sup> Such a program, however, has yet to be realized by the State.

### *Migrant workers*

In relation to migrant workers, the 2004 Law No. 39 addresses their placement and protection. With respect to this law, certain points need to be highlighted. First, it does not address conditions of work or protection for migrant workers in other countries; it only regulates private recruitment agencies and the recruitment process in Indonesia, as well as certain requirements for migrant workers before being sent abroad.

Article 13 requires limited liability corporations to obtain a license as a private recruiting agency. Moreover, this agency should have had a

101 Peter, "Kebijakan Dan Program Pemerintah Ntt Dalam Pemberdayaan Masyarakat," Kompasiana, <http://birokrasi.kompasiana.com/2012/01/16/kebijakan-dan-program-pemerintah-provinsi-ntt-dalam-pemberdayaan-masyarakat/>.

102 Nina Triningsih and Masaru Ichihashi, "The Impact of Poverty and Educational Policy on Child Labor in Indonesia," (Hiroshima: Hiroshima University, 2010): 3.

103 Agustiyanti, "New National Movement Aims to Tackle Child Labor in Indonesia," *Jakarta Globe*, January 18, 2012, <http://www.thejakartaglobe.com/home/new-national-movement-aims-to-tackle-child-labor-in-indonesia/492014>

representative office or partner in a destination country for at least three years.<sup>104</sup> This representative office or partner, in turn, must be a legal entity consistent with the law of the country where it is located. The agency in Indonesia should have a training centre, bank deposit, operating license, and meet other administrative requirements. The failure to meet such requirements will result in the rejection or withdrawal of its recruitment license.<sup>105</sup>

A second point relating to migrant workers concerns human rights. This term is mentioned in Articles 29 and 30, which require that the placement of migrant workers should include considerations of dignity, human rights, legal protection, working opportunities and work availability. However, it is not entirely clear how those articles can be implemented due to a lack of elaboration.

Third, this law puts more emphasis on the placement of migrant workers than their protection. Only eight out of a total of 109 articles, i.e. Articles 77 – 84, deal with protection, while 66 of them address the placement of migrant workers. Hence, there is a policy gap here.

Fourth, the law lacks a supervisory system, particularly during the post-placement period. Who should monitor the private recruitment agencies after they place migrant workers with different employers? Who should provide assistance to migrant workers when there are problems? Unfortunately, there is no clear provision guaranteeing protection for migrant workers at the post-placement level. Supervision of the private recruitment agencies is also absent from the law. Article 92, for example, generally requires the government to be responsible for protection at all levels (pre-placement, placement, and post-placement); however, it is not clear how this is to be conducted.

The fifth issue concerns the complexity of actors involved in the placement of migrant workers. The law assigns three institutions: namely, central and

local government, as well the Monitoring Agency for Placement and Protection Services for Migrant Workers (at both national and provincial levels). However, it does not specify how these are to be coordinated.<sup>106</sup> The situation is complicated due to the application of the Autonomy Law, which grants extensive autonomy to local governments in deciding and managing many local issues, including manpower,<sup>107</sup> but does not clearly address the division of labour between the local and central governments.<sup>108</sup> In the end, the lack of clarity on this question creates ambiguity in the law's use.

For all these reasons, there is a strong demand to amend the law.<sup>109</sup> The recent ratification of the International Convention on the Protection of Migrant Workers and their Families in 2012 has been a driving force for amendment.

### ***Labour Union***

Labour unions have been regulated specially in the 2000 Law No. 21 and its implementing regulation such as the Ministerial Decision concerning Procedures for the Official Recording of Workers Unions/Labour Unions (No. KEP 16/MEN/2001). These regulations basically highlight three different issues: The first of these concerns the law's applicability. The 2000 law No. 21 clearly states that it applies to all types of business entities residing in Indonesia.

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106 "Supporting Local Government in Governing Indonesian Migrant Worker Abroad," (Smeru Research Institute, 2011).

107 "Compilation Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragrah 5 of the Annex to Human Rights Council Resolution 16/21: Indonesia," (A/HRC/WG.6/13/IDN/2: Working Group on the Universal Periodic Review, Human Rights Council 12 March 2012).

108 "The 2004 Law No. 32 on Local Government," Arts. 13, 14.

109 Agustinus Supriyanto, "The Amendment Proposal to Law No. 39/2004 on the Placement and Protection of Indonesian Migrant Workers," *Smeru Newsletter* May- July, no. 31 (2011); "Perlu UU Tentang Penempatan Dan Perlindungan TKI Di Luar Negeri Direvisi Atau Diganti?," *Seputar Indonesia*, July 8, 2011, <http://www.seputar-indonesia.com/ediscetak/content/view/411382/>.

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104 "The 2004 Law No 39 on the Placement and Protection of Indonesian Migrant Workers Abroad," (2004), Article 13.

105 *Ibid.*

Second, the law regulates the administrative and procedural requirements to establish trade unions. The Ministerial Decision concerning Procedures for the Official Recording of Workers Unions/Labour Unions (No. KEP 16/MEN/2001) further provides procedures and forms to be used in respect of notifications to the government agency responsible for manpower affairs in the district where the union is registered and the recording and reporting functions of the local government agency as well as receipt of financial assistance from overseas.

The third refers to the protected right of workers to organise. Here, the law prohibits entrepreneurs and/or persons from preventing workers to form a union, joining or leaving a union or carrying out union activities. The prohibited conduct includes: dismissal, suspension, or otherwise prejudicing a worker in his/her employment, withholding or reducing wages, intimidation, and campaigning against the establishment of a union.<sup>110</sup> Employers must allow union officials and members outside of participate in union activities as provided under a collective labour agreement or as agreed between the parties.<sup>111</sup>

This law's enactment has resulted in massive union formation. However the law is not free from problems. Commentators argue that the law mainly concerns administrative and procedure on the establishment of union rather than protecting the freedom of unionism itself. Even in its procedural aspects the law lacks clarity on the responsibilities of central, provincial, and local governments to register unions. As a result, discrepancies and inconsistencies in the registration process of unions at different levels occur.<sup>112</sup>

The ILO has also highlighted the absence of representation in collective bargaining negotiations particularly in dealing with labour

disputes.<sup>113</sup> Reference to other rights, such as the right to express opinions freely and the right to strike are not mentioned either. Thus, although the number of trade unions has increasingly significantly, it is not clear how this impacts the position of labour in industrial relations. Industrial actions still often result in the arrest of union activists as happened in the past.<sup>114</sup>

## Land Issues

### *Protection of Land Rights in Indonesia*

The land issue in Indonesia is basically regulated by the Basic Agrarian Law No.6 of 1960 which has a dualistic nature, given that *Adat* [customary] law is also effective in addition to the national law. Article 33 (3) of the Constitution of Indonesia has influenced the underlying foundation of the Agrarian law namely that the land, the waters and the natural resources within Indonesia shall be under the power of the State and shall be used to the greatest benefit of the people. This reflects the socialist perspective of the Indonesian land law as it acknowledges that the right to control land is vested in the State. However, Article 4 of this law further acknowledges that several kinds of rights may be granted to and owned by person(s) and/or corporation(s).

In short, the law highlight several points. The first regards the title of the land. The law creates an array of categories of land rights including the right to ownership or freehold title (*Hak Milik*), the right of building (*Hak Guna Bangunan*), the right of use (*Hak Pakai*), cultivation right (*Hak-hak Guna Usaha*), forestry rights (*Hak Memungut Hasil Hutan*), and etc. Individuals or corporations may possess all titles. Each right is further regulated in a specific implementing regulation.

113 *Ibid.*

114 "2012 Annual Survey of Violations of Trade Union Rights - Indonesia," Tefworld, <http://www.unhcr.org/refworld/country,ITUC,IDN,,4fd8894730,0.html>; Riani Rachmawati, "Trade Unions Behaviour toward Multinationals in Indonesia," University of Birmingham (2009): 42.

110 "The 2000 Law No. 21 on Labour Union," (2000), Article 28.

111 *Ibid.*, Art. 29.

112 "The 2000 Law No. 21 on Labour Union: User Guide," (Jakarta: International Labour Office Jakarta and the Ministry of Manpower and Transmigration, 2000): 12-13.

Second, the Agrarian Basic Law also requires land registration. The 1961 Government Regulation No. 10 on land registration which was amended by 1997 Government Regulation No. 24 regulates the registration process of land which includes some activities:

- the measuring, mapping and recording of land;
- the registration of the rights on the land and the transfer of these rights;
- the issue of certificate of rights on land, which will be valid as strong evidence.

The registration is expected to guarantee the legal certainty to the land owner and society. Unfortunately, until 2006, only 30% of 85 million properties have been registered.<sup>115</sup> Hence, disputes concerning claims over ownership still remains a problem and can have significant impacts upon human rights.

The third issue is the usage of land for the public interest. Article 18 of the Agrarian Basic Law states that in the public interest, including the interest of the Nation and State as well as the common interest of the people, rights on land may be annulled with due compensation and according to a procedure laid down by this Law. However, the law does not clarify what it means by public interest or compensation.

The 2012 Law No. 2 on the Land Acquisition for Public Interest and the 2012 Presidential Regulation No. 71 provides some clarification on land acquisition for public interest. Law No 2 lists public places which fall under the category of this law namely: roads, toll roads, railways, stations, public communication facilities, etc. Both regulations impose an obligation on all institutions that want to acquire land for public infrastructure to formulate land-acquisition documents, which consist of planning, spatial suitability, land location, land area, land status and land appraisal estimates.

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<sup>115</sup> Pidato Juyo Winoto, Head of National Land Agency on the opening session of the national symposium and workshop in Tiara Hotel Medan, 13 November 2006

The documents will then be submitted to governors in those respective areas. The governor also must establish a preparation team consisting of the regent or mayor, a provincial apparatus working unit (SKPD) and other relevant institutions. The team will be in charge of conducting a public consultation on the planned land acquisition by inviting all stakeholders, including affected local communities, to determine the location of an infrastructure project.<sup>116</sup> Finally, compensation can be given in the form of cash, relocation, stock ownership or other forms based on the agreement made by all the stakeholders.<sup>117</sup>

The new regulation was welcomed by different parties. For State-owned construction companies, this regulation means increased potential for their projects and will assist with the acceleration of project completion.<sup>118</sup> For people, it provides more legal certainty of the compensation and time frame for land acquisition. This law is expected to eliminate arbitrary and forced land acquisition without adequate compensation in the name of the public interest as often occurred in the past.

In addition to the 1960 Basic Agrarian Law no. 6, several related land issues are also regulated in various different laws and regulations. For example, water is further articulated in 2004 Law No. 7 on water resources. The 2004 Law no. 19 particularly concerns forestry and the 2009 Law no. 4 regulates mining. The diversity of laws on land related issues leads to the conclusion that the land issue is not an isolated one as it relates to various other matters such mining, forestry, plantation, environment, water, building, apartment, and etc. Human rights can be impacted in all of these areas.

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<sup>116</sup> "The 2012 Presidential Regulation No. 71 on the Land Acquisition for Public Interest," (2012).

<sup>117</sup> *Ibid.*

<sup>118</sup> Natalia Sutanto and Anthony Alexander, "Analysis: Land Acquisition Law: Light at the End of the Tunnel," *Jakarta Post*, August 16 2012, <http://www.thejakartapost.com/news/2012/08/16/analysis-land-acquisition-law-light-end-tunnel.html>

In regard to this multiplicity of laws and regulations, legal harmonization is a significant issue. Each area of concern has different laws and regulations and such laws and regulations also mandate different institutions to implement them. Hence, legal harmonization as well as coordination between different institutions is the key to implement those laws and regulations effectively. Without these, conflicts of law as well as an unclear division of labour between different organizations will lead to land disputes and hinder their effective settlement in a way that will protect the rights of affected populations.

### ***Traditional people's rights<sup>119</sup> and land rights***

The protection of traditional peoples and the recognition of their rights are articulated in the Constitution and in various laws and regulations at the national and sub-national levels. Article 18B (2) of the Constitution acknowledges the existence of traditional societies, including their *adat* law (customary law). Such recognition is also mentioned in Article 67 (1) of the 1999 Law No. 41 on Forestry, Article 5 of the 1960 Agrarian Law No. 5, Article 9 (2) of the 2004 Law No. 18 on Plantations, and Article 15 (d) of the 2007 Law No. 25 on Investment. These laws imply that everyone, including every investor, should respect the application of *adat* law in all situations. However, among those articles, only Article 15(d) of the 2007 Law No. 25 on Investment penalizes business entities for the failure to meet such obligations. This sanction is administrative in nature, and is comprised of four progressive stages: a written warning, restriction of business activity, freezing of business activity and/or investment, and at the most severe level, closure of the business entity and/or investment facilities.<sup>120</sup>

119 As there is no official translation of 'masyarakat asli' and 'masyarakat tradisional', for the purpose of this research, the word indigenous people and traditional people are used interchangeably.

120 "The 2007 Law No. 25 on Investments," Article 15 para. (d).

Special attention is given to *adat* land rights (*Hak Ulayat*), as this type of land is always problematic in practice due to its collective nature of ownership and the absence of any ownership deed. This issue will be further discussed later in the section.

### ***Definition***

What is *Hak Ulayat*? The Agrarian Law provides neither a definition of *Ulayat* land nor of "traditional society." However, the Regulation of the Agrarian State Ministry/National Land Agency<sup>121</sup> No. 5 of 1999, on the Guidelines for Dispute Settlement of *Hak Ulayat*, defines *Ulayat* land as land which has been granted *Hak Ulayat* status by a group representing traditional society. It implies that the traditional society itself should determine its own land. Article 1 of this regulation further defines *Hak Ulayat* as a communal right, based on *adat* law, to use the land and its natural resources for the survival of a certain traditional society. This right is recognized due to a close existing relationship between such traditional people and their land.

At the sub-national level, the regulations of several cities and regencies have provided some clarification on the definition. The 2001 Lebak Regency Regulation no. 32 on *Hak Ulayat*, for example, defines it as a right to utilize land and natural resources for the welfare of a traditional society.<sup>122</sup> Unlike the previous regulations, the 2008 Law no. 16 of the West Sumatra Province considers it to be a collective right of traditional people to own *Ulayat* land and to benefit from such land and the natural resources it contains.<sup>123</sup> In other words, the West Sumatra Law goes further by adding the right of ownership to *Hak Ulayat*.

121 Agrarian Ministry (Menteri Negara Agraria) was changed to 'National Land Agency' (Badan Pertanahan Nasional).

122 "The 2001 Lebak Law No. 65 on the Protection for Hak Ulayat of Baduy People," (2001), Article 1 point 4.

123 "The 2008 West Sumatra Province Law No. 16 on Hak Ulayat," (2008), Article 1 point 7.

### *The Ownership of Land*

The question of ownership is important, particularly in the case of land acquisition for purposes including businesses. The 1999 Regulation of the Agrarian State Ministry/National Land Agency No. 5 states that a traditional society may transfer its land ownership to any parties. For some types of business such as farming, plantations, etc., which requires certain titles - namely the right to use land (*Hak Pakai*) or the right to build (*Hak Guna Bangunan*) - a traditional people may hand over their right to use *Ulayat* land on a temporary basis through an agreement. The State should respect and comply with this agreement between traditional people and the land user/business actor.<sup>124</sup> Consequently, the State cannot issue licenses to use the land on a temporary basis in the absence of such an agreement.<sup>125</sup>

In the context of plantations, Article 9(2) of the 2004 Law No. 18 on Plantations states that people or business enterprises who intend to build a plantation on land owned by traditional people must obtain those people's consent for handover of such land. However, the law does not impose any sanction for non-compliance.

In the context of forestry, the specific rights of traditional people are limited. The 1999 Law on Forestry effectively mandates that the State holds primary ownership of all forests in Indonesia. *Hak Ulayat* is defined as a right to collect forest products and cultivate forest for the welfare of the traditional people.<sup>126</sup> The law also restricts the application of *Hak Ulayat*, stating that these rights are only recognized if such *Ulayat* land still exists and they are not contrary to the national interest. However, it does not clarify how to determine the existence of *Ulayat* land.

In addition to national law, various sub-national laws have been enacted to require business actors

to respect the lands of traditional people. The West Sumatra province, for example, has a special law governing *Hak Ulayat* which specifies the rights-holders and regulates its definition, function, registration, and the procedure for its transfer to another party. The law allows investor(s) to use *Ulayat* land, provided that there is a formal agreement between rights-holders and investor (s). The law also imposes an obligation on investors to give a certain share of company profits to these traditional people.<sup>127</sup> However, there is no sanction for non-compliance. Similarly, the Regency of Kampar in Riau province also adopted a law requiring land users to obtain consent from all members of traditional society if they wish to use the *Ulayat* land.<sup>128</sup> Once again, no sanction is imposed for the failure to meet such an obligation.

### *Land Dispute Settlement*

The Agrarian State Ministry/National Land Agency, as mentioned earlier, has passed a regulation on the Guidelines for Dispute Settlement of *Hak Ulayat*. However, the regulation is very general covering only two points: ownership and determination of *Hak Ulayat*. It does not deal with the issue of mechanisms to transfer ownership or to settle land disputes. The National Land Agency has provided a mechanism to settle any complaints relating to the land, however, it only refers to disputes regarding the title of the land. The 1999 Law No. 30 on Arbitration and Alternative Dispute Settlement offers a dispute settlement mechanism by using a mediator or arbitration providing that parties to dispute agree to do so.<sup>129</sup> In regard to arbitration, the requirements of the law can only be applied in disputes regarding commercial issues. Moreover, the alternative dispute settlement mechanism in this law can only be exercised in disputes concerning

124 "The 1999 Regulation of Ministry of Agrarian No. 5 on Guidelines of Dispute Settlement of *Hak Ulayat*," (1999).

125 *Ibid.*, Article 4.

126 "The 1999 Law No. 41 on Forestry," (1999), Article 67.

127 "The 2008 West Sumatra Province Law No. 16 on *Hak Ulayat*," Article 10.

128 "The 1999 Law No. 12 of Kampar Regency on Land with *Hak Ulayat*," (1999), Article 7.

129 "The 1999 Law No. 30 Arbitration and Alternative Dispute Settlement," (1999).

civil matters.<sup>130</sup> However, in its general elucidation, this law recognises others type of alternative dispute settlements including reconciliation, experts' opinions, etc. Specific government regulations have also been issued to implement this law in regard to different issues.<sup>131</sup>

Has this alternative dispute mechanism been applied in the context of land disputes? Dispute settlement outside the court system (non-litigation mechanism) has been applied in various land disputes prior to the passing of 1999 Law on Arbitration and Alternative Dispute Settlement. The law basically legitimises non-judicial dispute resolutions outside the court system as part of legal system. It also set up the time frame for mediation and arbitration processes. This law is supported by the 2007 Law No. 17 on the Long Term National Planning Year 2005 – 2025 which focuses on the development of dispute settlement on land issue through the administrative and court system as well as through other means of alternative dispute resolution.

In the case of land disputes, negotiation or mediation usually involves the customary leaders, officials from National Land Agency, activists, or KOMNAS HAM as a mediator.<sup>132</sup> Although the mediation mechanism provides a speedy and inexpensive mechanism to settle a land dispute, it can only work effectively if parties to a dispute have good faith, as its nature is voluntary and depends on the consent and good will of the parties.<sup>133</sup>

#### *Problems on land right and right of traditional society*

Although the protection of traditional societies and their culture, including land rights and particularly *Hak Ulayat*, has been regulated, some challenges remain. First, the land laws concerning *Hak Ulayat*

130 *Ibid.*

131 For example: 2000 Government Regulation No. 54 on the Agency for Settling Environmental Disputes.

132 Irin Siam Musnita, "Penyelesaian Sengketa Tanah Ulayat Masyarakat Malamoi Di Kabupaten Sorong," University of Diponegoro (2008): 88.

133 *Ibid.*, 104.

are very complicated in term of ownership. Who are the traditional people? The decision of the Director General of Forestry and Plantation No. 922/VI-PHT/2000 on the Guidelines for Dispute Settlement for *Hak Ulayat* defines traditional society as a group of people who are bound by traditional law based on a similarity of residence or descent. This law states that it applies only if that society is still bound by traditional law, and if the traditional law applies to such land.<sup>134</sup>

In practice, it is not easy to determine which traditional society holds this right due to the process of integration and transmigration.<sup>135</sup> It is commonly found that a tribe controls a certain area for the purpose of living, cultivating and producing for future generations, but it not really clear whether such land carries *Hak Ulayat* or not.<sup>136</sup> The local government attempts to define what traditional society means in the local context; nevertheless, as mentioned earlier, this is not easy due to the diversity and mobility of these people.

This speaks to the second problem: namely, a lack of proof of ownership. The national law on land rights requires a property right deed as a proof of ownership; however, traditional (*adat*) law does not.<sup>137</sup> Although there have been efforts by some local governments to register this type of land in order to obtain a deed,<sup>138</sup> the practice varies. Not all local governments require such formal registration. The difference between State and customary

134 Letter of Director General of Forestry and Plantation No. 922/VI-PHT/2000 on the Guidelines for Dispute Settlement for *Hak Ulayat*.

135 Laurens Bakker, "Can We Get *Hak Ulayat*?: Land and Community in Pasir and Nunukan, East Kalimantan," Center for Southeast Asia Studies, UC Berkeley (2008).

136 I Ketut Gunawan, *The Politics of the Indonesian Rainforest: A Rise of Forest Conflicts in East Kalimantan During Indonesia's Early Stage of Democratisation* (Bonn: Civillier Verlag Gottingen, 2004), 76.

137 There have been an effort to register the *Ulayat* land but not all traditional society understands and registers the land. Moreover, there are few regencies which do not want to register *Hak Ulayat*. See: "The 2001 Lebak Law No. 65 on the Protection for *Hak Ulayat* of Baduy People."

138 "The 1999 Law No. 12 of Kampar Regency on Land with *Hak Ulayat*."

laws often leads to a problem in the case of land acquisition.

Third, the aforementioned laws are sporadic and lacking in harmonisation. Hence, there is always the risk of a conflict of laws. For example, the Decision of Agrarian Ministry [National Land Agency], which applies throughout the country, only defines *Hak Ulayat* as the right to use *Ulayat* land, while according to the Law of West Sumatra as mentioned earlier, *Hak Ulayat* means the right to own and use land. The question, then, is which should be applied: the national regulation or local law or *adat* law? The complexity of regulatory bodies and institutions involved, and the lack of coordination among such bodies, further complicates the situation.

#### ❖ Environmental Protection (The 2009 Environmental Law No. 32)

This law relates to the control of pollution and environmental damage, and has three major areas of focus: prevention, countermeasures, and recovery. As an environmental law, it does not make any direct reference to human rights as such. However, it does touch upon several aspects, particularly living conditions.

There are three interesting points which need to be highlighted. First, this law applies to any business entities such as corporations, associations, foundations, or other organisations in whose name unlawful action is committed, and to the individuals who ordered that the act be performed.<sup>139</sup>

Second, the law refers to obligations. It not only imposes an obligation on the State to prevent and control pollution and environmental damage, but also on certain kinds of business activities which tend to cause significant environmental impact. For such high-risk activity, any legal entity must provide an environmental impact assessment

(AMDAL)<sup>140</sup> or environmental management and monitoring plan (UKL-UPL) depending on its business activities.<sup>141</sup> The implementing regulations further elaborate the requirements and elements to be assessed in carrying out the AMDAL or UKL-UPL.<sup>142</sup> Although an assessment of human rights violations is not specifically required, certain aspects are included; namely, the impact of business activities on environment, public health, and human safety. Without either of these documents, a business license will be not granted.

In addition to the environmental assessment, the law specifies further obligations: to provide prompt and correct information to society, pursue environmental sustainability, and meet all environmental standards as provided in the existing regulations.<sup>143</sup> Sanctions may be imposed for noncompliance.<sup>144</sup>

Third, the law gives legal standing for anyone to bring a civil or criminal action against a business whose activities have given rise to a significant adverse environmental impact, which uses hazardous or toxic waste, or has polluted the environment.<sup>145</sup> Any violation can carry prison terms and fines.<sup>146</sup>

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140 Articles 22 & 23 of the 2009 Environment Law No. 32 requires certain types of business activities to carry out environmental impact assessments; namely, any business/activities which: (a) alter landform or landscape; (b) exploit natural resources; (c) potentially cause pollution and/or environmental damage, and waste or degrade natural resources; (d) affect the natural, manmade, and social-cultural environment; (e) affect the preservation of natural resources and/or protection of cultural heritage; (f) use certain type of plants, animals, and micro-organisms; (g) manufacture and use biological and non-biological materials; (h) have highly affected the state security; (i) apply sophisticated technologies which may affect the environment

141 "The 2009 Law No. 32 on Protection and Management of the Environment," Articles 23-35.

142 *Ibid.*, Articles 22-41.

143 *Ibid.*, Article 68.

144 *Ibid.*, Article 116.

145 *Ibid.*, Articles 84 - 93.

146 *Ibid.*, Articles 97 - 120.

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139 "The 2009 Law No. 32 on Protection and Management of the Environment," (2009).

## Mining and Extractive Issues

The 2009 Law No. 4 on Minerals and Coal Mining is an amendment to the previous 1967 Law No. 11 on Mining, which was considered insufficient to meet the current situation and future challenges of the globalisation era. This law applies to individual and/or business entities, including corporations, which conduct mining operations of any scale and have a mining license.

The law does not impose any specific human rights obligation to business, but it defines three types of obligations – concerning the environment, labour, and public protection – which either directly or indirectly relate to the enjoyment of human rights. In this case, that includes labour rights, the right to a healthy environment, and the right to life. With respect to environmental protection, this law requires business entities to carry out mining in a safe and healthy manner; monitor the mining environment, including reclamation and post-mining activities;<sup>147</sup> maintain the sustainability and capacity of water resources;<sup>148</sup> and finally, allocate reclamation and post-mining deposit funds.<sup>149</sup> Administrative sanctions such as a written warning, temporary termination of business/mining activities, and/or withdrawal of the mining license will be imposed to such an entity in the case of noncompliance.

The second set of obligations regards workplace and labour conditions. The business entity is required to ensure the occupational safety and health of its workers in accordance with existing laws.<sup>150</sup> Moreover, it is expected to foster societal development and empower the community surrounding the mining operations by employing local workers and engaging local entrepreneurs.<sup>151</sup> The failure to give priority to local labour will lead to administrative sanctions.

147 “The 2009 Law No. 4 on Mineral and Coal Mining,” (2009), Article 96.

148 *Ibid.*, Article 98

149 *Ibid.*, Article 100.

150 *Ibid.*, Articles 70, 79, 96.

151 *Ibid.*, Articles 701, 79, 96, 107.

The third obligation concerns public protection, as stipulated in Article 145. This provision grants a right to those in society who are directly and negatively impacted by mining business activities to receive a reasonable remedy for any violations of law, and to bring a legal suit against mining businesses before the court.<sup>152</sup>

### 2.2 (b) Do laws and/or regulations require individuals to ensure that their business enterprises 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?

As mentioned earlier, there is no direct reference addressing the duty of an individual to ensure that his or her business will respect human rights. However, there are several laws that directly or indirectly impose certain obligations to individual(s) to respect and protect business-related human rights.

First, the Human Rights Law imposes obligations to individuals in Indonesia to obey written or customary law as well as international law accepted in that country relating to human rights.<sup>153</sup> Under this law, the protection of human rights implies that all individuals are obliged to respect the human rights of others.<sup>154</sup> This obligation is perceived as a general obligation of individual toward human rights.

Second, in relation to discrimination, a business entity or anyone in the capacity to act on its behalf are prohibited from discriminating against certain people or groups based on race, religion, and ethnicity. In the case of noncompliance, the business entity and/or its directors are liable for criminal charges.<sup>155</sup>

152 *Ibid.*, Article 145.

153 “The 1999 Law No. 39 on Human Rights,” (1999), Article 67.

154 *Ibid.*, Article 69.

155 “The 2008 Law No. 40 on Elimination of Discrimination,” Article 16-19.

Third, in the context of the environment, the 2009 Law No. 32 on Environmental Protection generally prohibits any person from causing an environmental hazard. The law also forbids anyone to bring hazardous waste into Indonesian territory, conduct unlawful genetic experiments, carry out deforestation, and provide false information on environmental hazards to the public.<sup>156</sup> Criminal and administrative punishments may be imposed for noncompliance. Moreover, if such prohibitions are violated by business actors, the board of director(s) or caretakers of the entities in question are liable for such damages.

Fourth, regarding labour rights, the 2003 Law No. 13 on Manpower sets several obligations for employers to comply with certain labour standards when employing workers. Article 1 of this law clearly defines ‘employer’ as an individual(s) and/or business entity, and covers both formal and informal sectors of employment. The law further regulates the rights and obligations of workers and employers, including working hours,<sup>157</sup> annual leave,<sup>158</sup> health and safety in the workplace environment,<sup>159</sup> and certain requirements relating to the employment of women (and more specific requirements covering pregnant women) and children as discussed earlier. Moreover, employers are prohibited from employing children.<sup>160</sup> Exceptions are granted under certain conditions required by law.

If the aforementioned laws are binding on individual(s), can it be assumed that he/she must also ensure that his/her business will not violate human rights? The answer is yes. As the law prohibits certain conduct that directly or indirectly violates another person’s enjoyment of human rights, the individual should ensure that his/her daily actions are in accordance with the law, including when running her/his business.

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156 “The 2009 Law No. 32 on Environment,” Article 69.

157 “The 2003 Law No. 13 on Manpower,” Article 77.

158 *Ibid.*, Article 79.

159 *Ibid.*, Article 89.

160 *Ibid.*, Articles 68-74.

### **2.3 To what extent, how, and by whom have the laws and/or regulations identified in Question 2.1.2 above been enforced by the State?**

Different laws and regulations establish different institutions to implement and monitor their compliance. Such implementation may involve various governmental bodies, private-public institutions, or civil society. In human rights, for example, KOMNAS HAM is the primary body which monitors potential human rights abuses and initiates investigations. In addition, the police, prosecution service, and the court each play an important role when further investigating, following up, and settling human rights cases. On environment-related issues, the 2009 Law No. 32 requires a number of different institutions to monitor compliance, such as local government at the provincial and city levels, the Ministry of Environment and other related ministries, the Commission for Environmental Impact Assessment, the National Bank for the reclamation budget, police, prosecutors, and courts. When a law requires many institutions to enforce it, coordination among them may become a problem. Finally, related institutions dealing with mining or business licenses such as the governor’s and mayor’s administrations, and related ministries like the Ministry of Mining, National Land Agency, etc.,<sup>161</sup> also play an important role in imposing administrative sanctions such as written warnings, temporary termination of business activities, or withdrawal of the business license.<sup>162</sup>

Despite these differences, all laws mandate the courts to deal with their implementation. In general, the court’s role can be seen as twofold. First, it deals with the question of interpretation and related conflict of law. The Constitutional Court, for example, has dealt with the interpretation of Article 74 of the 2007 Limited Liability Corporation Law on social and environmental responsibility. This article requires companies conducting their business activities in or related to the field of natural

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161 Related institutions to issue mining license may vary depending on the type of mining sectors.

162 “The 2009 Law No. 4 on Mineral and Coal Mining.”

resources to implement social and environmental responsibility, which can be considered a corporate cost. The petitioners, consisting of business associations and the Indonesian Chamber of Commerce, argued that such an article creates legal uncertainty as it is not in accordance with the CSR movement's voluntary emphasis; it is unjust and discriminatory, particularly towards corporations, and by creating an additional burden will negatively impact the economic situation in general.<sup>163</sup> The Court, however, was of the opinion that Article 74 is correct, non-discriminatory, and just; therefore, it is not in conflict with the Constitution.<sup>164</sup> Moreover, the Court confirmed that this mandatory nature gives legal certainty to voluntary CSR in the context of Indonesia's weak law enforcement system.

In short, the Indonesian courts, particularly the Constitutional Court and Supreme Court, are playing an important role in interpreting the Constitution and other existing laws. They are also expected to give a definite meaning to ambiguous laws and to solve conflict-of-laws issues. This indeed has served to directly develop the application of human rights to business in the Indonesian legal system.

The second role of the court system is an adjudicatory function, in which courts rule on business-related human rights cases brought before it. The civil (including tort cases), criminal, and administrative courts, as well as more specialised courts, may be consulted to assess the responsibility of a corporation for the failure to meet its relevant obligations under certain laws; particularly in the context of environmental, labour, and land issues. Here, the court is expected to be a place where victims can seek justice and obtain remedies for any violation by corporations. Unfortunately, there is no comprehensive data on how many cases are dealt with by each court. Hence, it is difficult to conclude whether the laws mentioned earlier are being enforced. Nevertheless, some limited numbers

<sup>163</sup> *Judicial Review of 2008 Law No. 40 on Limited Liability Corporation*.

<sup>164</sup> *Ibid.*

can be found at the Supreme Court website, which mentions 303 cases under the category of environmental harms committed by individuals and corporations.<sup>165</sup> In the case of the Human Rights Court, a special court dealing with cases involving gross violations of human rights like genocide and crimes against humanity,<sup>166</sup> statistics compiled by a human rights NGO reveal that this institution has never dealt with any such violation conducted by a corporation or corporate personnel.<sup>167</sup> This is probably due to multiple reasons: the jurisdiction of Human Right Court is limited to individual(s) and its focus has been on state actors; no extensive interpretation on this legal subject has yet been carried out; the human rights courts have not functioned for several years.<sup>168</sup>

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

No.

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

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

Before answering this question, it is important to understand the concept of "directors" within the Indonesian legal system. The terminology of "director" or "board of directors" is commonly used in the context of limited liability corporations. The 2007 Law No. 40 on the Limited Liability Corporation defines board of directors as the

<sup>165</sup> Further discussion see: "Pidana Khusus," accessed July 12, 2012, <http://putusan.mahkamahagung.go.id/pengadilan/mahkamah-agung/direktori/pidana-khusus>.

<sup>166</sup> "The 2000 Law No. 26 on the Human Rights Court," (2000).

<sup>167</sup> "Pengadilan HAM," <http://www.pengadilanham.or.id/>.

<sup>168</sup> "Pengadilan HAM," <http://www.pengadilanham.or.id/>.

organ of a corporation that has the authority and full responsibility to manage the corporation in accordance with its purposes and objectives, as well as represent it either within or outside the court.<sup>169</sup> Director (s), according to this law, can be either one or more than one individual. A similar concept is applied for other business entities like cooperatives and foundations, although both use the term ‘caretakers’ instead of ‘director (s)’ or ‘board of directors’.

In addition, the term “director” is often used in the context of CV, firms and partnerships to identify the owner(s) or business partners. In individual companies, the owner acts as the director. For firms or partnerships which have been established by more than one person, the owners or partners can act as a ‘board of directors’ in which every partner has the same authority to decide their firm’s policy and day-to-day management. They are also responsible, both personally and collectively, for any action taken by their firm. In the case of CV, the term ‘director’ is usually used to designate the caretaker (the active partner). However, this person’s duties and responsibility is different from the director of limited liability corporations, as he/she is personally responsible for all actions of the CV.

#### 4.1.1 What are the general legal due diligence obligations with which directors have to comply?

Generally, the main task of the director, as stated in the 2007 Corporate Law No. 40, is to manage her/his corporation with good faith and reasonable care in accordance with corporate interests and objectives.<sup>170</sup> This implies that the board of directors are obliged to take any actions to avoid corporate losses. If the board either intentionally or negligently fails to perform its duties, each member shall be fully and personally liable for the resulting losses.<sup>171</sup>

169 “The 2007 Law No. 40 on Limited Liability Corporation,” Article 1 point 5.

170 *Ibid.*, Articles 95 para. (3) & para. 97 (5).

171 *Ibid.*, Article 97.

As mentioned earlier, a similar concept is applied in the context of cooperatives and foundations. Article 35 of the 2001 Law No. 16 on the Foundation clearly imposes an obligation to the caretakers to fulfil their duties with good faith and full responsibility in line with the interests and purposes of the foundation. Moreover, the caretakers are personally responsible for any loss that occurs due to their actions which are not in accordance with the aim of the foundation. This regulation is the consequence of the fiduciary relationship between the foundation and its caretakers.

For cooperatives, there is no clear reference to the duty of care; the law simply imposes the obligation to caretakers to manage the cooperative in accordance with its interests and purposes.<sup>172</sup>

For other types of business entities such as the CV, firm, and partnership, there is no clear provision in either the Indonesian Civil Code or Indonesian Commercial Code specifying that the business entity must be managed with good faith and reasonable care. The Indonesian Commercial Code simply states that partners should not take any actions which are not in the line with the business entities and/or agreements among the partners/owners.<sup>173</sup> Hence, they should be personally responsible for any loss due to such actions. Additionally, Article 1619 of the Indonesian Civil Code requires that all partners should conduct their activities with *halal* ways and in accordance with the interest of all partners.<sup>174</sup>

172 *Ibid.*, Article 30.

173 “Indonesian Civil Code : Burgerlijk Wetboek”; “Kitab Undang-Undang Hukum Dagang / Wetboek Van Koophandel Voor Indonesie [Indonesian Commercial Code],” (1847-23), Article 17.

174 “Indonesian Civil Code: Burgerlijk Wetboek,” Article 1619.

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

There is no direct reference to any obligations of directors to consider human rights impacts in carrying out their duties. However, there are several laws that address certain obligations in regards to issues such as social responsibility and environment.

As articulated in Article 74 of the 2007 Law No. 40 on Limited Liability Corporations, the board of directors is the implementing organ of such responsibility. The board must plan and budget activities related to this area, as well as account for them in the corporate annual report and at the General Meeting of Shareholders.<sup>175</sup>

In the area of environment, managers or directors of certain types of businesses that may cause environmental hazards have special obligations. A director must make an environmental impact assessment prior to exploration activity, hold regular environmental audits, and provide remedies for people affected by environmental damage.<sup>176</sup> The director should also publish any information relating to environmental protection and organisation, pursue environmental sustainability, and comply with environmental standards as provided in the law.<sup>177</sup>

The last instance deals with corruption. The 1999 Corruption Law prohibits corruption by business entities or any person on behalf of a business entity. In the event of corruption, it is treated as a separated legal entity, and/or its caretaker/directors can be held liable for such actions.<sup>178</sup> Where a business entity is made liable for corruption, the punishment is 1/3 greater than the maximum punishment for an

175 "The 2007 Law No. 40 on Limited Liability Corporation"; "The 2012 Government Regulation No. 47 on the Social and Environment Responsibility of Limited Liability Corporation".

176 "The 2009 Law No. 32 on Protection and Management of the Environment," Articles. 48 - 50.

177 *Ibid.*, Article 68.

178 "The 1999 Law No. 31 on the Eradication of Corruption," (1999), Article 1 point 1.

individual.<sup>179</sup>

#### 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)?

There is no specific legal obligation for directors to take into account the human rights impact of subsidiaries, suppliers, and other business. However, in the context of mining contractors and suppliers, the BP Migas [The Upstream Activity of Oil and Gas Agency] - the supervisory body for oil and gas mining - provides guidelines for working together with suppliers.<sup>180</sup> The guidelines are aimed to provide integrated technical and administrative requirements for all oil and gas companies in Indonesia in organising the supply chain, including dispute settlement issues.

While the guidelines focus more on the technical details of contract, pricing, recording, there is also one chapter referring to ethical business practices. Here, the relevant parties or procurement body in organising and monitoring supply chain should comply with ethical standards, namely: to work in accordance with the existing laws, to avoid any unhealthy competition and conflict of interest, any potential lost to the company and corruption. Moreover, they also are also obliged to create a healthy and safe work environment.<sup>181</sup> However, the guideline does not further elaborate what it means by a healthy and safe work environment.

179 *Ibid.*, Article 20.

180 BP Migas was dissolved by the verdict of the Constitutional Court in November 2012. It was replaced temporarily by SKK Migas. (Satuan Kerja Khusus Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi - Special Task Force for Upstream Oil and Gas Business Activities Republic Indonesia). For further information see: <http://www.skspmigas-esdm.go.id/en/>

181 Guidelines on the cooperation with suppliers, BP Migas No. 007/Revisi-II/PTK/2011, pp. 6 & 7

It is important to update here that BP Migas was dissolved by the verdict of Constitutional Court on the case of judicial review of 2001 Law No. 22 on Oil and Gas in November 2012. Its role has been temporarily replaced by SKK Migas (*Satuan Kerja Khusus Pelaksana Kegiatan Hulu Minyak dan Gas Bumi* – Special Task Force for Upstream Oil and Gas Business Activities in the Republic of Indonesia). Until the time of the research completion, it is not clear whether all regulations/guidelines adopted by the previous institution are still applicable or not.

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

There have been several cases brought before public institutions involving the responsibility of directors for business-related human rights abuses. As it is difficult to obtain statistics on the number of cases dealt with by the Court or other institutions, just one example will be highlighted here. This is a high-profile criminal case, reported by some environmental activists that involved environmental degradation in the Buyat area by PT Newmont Minahasa Raya. The activists claimed that Newmont had exceeded the acceptable mining waste level under the existing regulation, and had contaminated the area with hazardous materials. The President Director of Newmont, Richard Ness, was brought before the court by the Public Prosecutor to hold him liable for the action of his company under Articles 41 (1), 45, 46 (1), and 47 of 1997 Environmental Law No. 23.<sup>182</sup> In addition to the director, the Public Prosecutor also held the corporation responsible, considering PT Newmont to be a legal entity which has its own rights and obligations. On April 24, judges at the District Court in Medan decided to exonerate PT Newmont Minahasa Raya and the President Director, Richard

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182 The 1997 Law No.23 on Environmental Law was later amended by the 2009 Law No. 32.

Ness, finding them innocent of all charges.<sup>183</sup> Judges were of the opinion that the environmental pollution and destruction caused by PT Newmont had not been proven, and that the public prosecutor had misinterpreted the facts.

#### **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)?**

See 4.1.3.

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

The State requires the business entity to communicate or disseminate information on any action taken to address business-related human rights impacts, in two different contexts. The first concerns social and environmental responsibility. Article 66 of the Corporate Law requires all limited liability corporations to place the implementation of such responsibility, including planning and budgeting, into their annual report presented before the annual shareholders' meeting.

The second context refers to the Environmental Impact Assessment (AMDAL). As mentioned earlier, this environmental assessment is a compulsory element of certain business activities which carry a high risk of damaging the environment. Prior to any operation/activities, an environmental assessment should be conducted and reported to the authorities

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183 PT Newmonth Minahasa Raya, *The Appeal Is against Law and Baseless; Newmont Files Counter Memorandum against Public Prosecutor's Appeal to the Supreme Court*, (2007).

in order to gain an approval and recommendation for a business license. Without an AMDAL, any license, including mining licenses, will not be issued. In conducting the assessment, the law requires transparency and public participation in order to provide inputs and criticism.<sup>184</sup> In the end, as AMDAL is a public document, the law requires that it be made accessible to everybody whose participation is needed at any stage of assessment.

#### **4.3 Is/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 is no regulation specifically requiring business enterprises listed on the stock exchange to respect human rights. The only instance in which such social issues are taken into account is the publication of the annual corporate report at the stock exchange. Bapepam-LK (Capital market and financial institution supervisory agency), the supervisory body for capital market and funds, has required certain information to be included in the annual corporate report. One of them is the report on corporate ethics, the whistle blowing system in a company regarding activities that may put company or stakeholders in the risk, and activities and budget spent to enforce social and environment responsibility.<sup>185</sup> Bapepam-LK in its new decision further does not set a particular reporting format but it does specify the content of information to be published. The first reporting requirement refers to the environment. The Bapepam-LK lists some examples such green energy, energy saving, the usage of recycle materials, waste system,

certification for environmental product, etc.<sup>186</sup> The second concerns labour issues consisting of the safety and health of the working environment, gender perspectives in the company policy, workplace opportunities, employee turnover, training, prevention of accidents at the working place, etc.<sup>187</sup> The third category involves social and community development including the preference to employ local labour, community development in areas surrounding a company, improving public infrastructure, donation, etc.<sup>188</sup> The last category refers to any information regarding the company's responsibility for the product affecting the health and safety of the consumer, as well as product information, facilities, statistic and settlement of consumer's complaints, etc.<sup>189</sup> This information can be articulated in the annual corporate report or a separate report, such as a sustainability report or corporate social responsibility report, but it should be submitted together with the annual corporate report to Bapepam-LK.<sup>190</sup>

#### **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?**

There is no incentive system provided for a business entity to specifically respect human rights. However, in the context of social and environmental responsibility, as mentioned earlier, Article 74 of the 2007 Corporate Law No 40 on limited liability corporations and its implementing regulation provides a reward for any limited liability corporations other than those required specifically under this law that can be shown to be

<sup>184</sup> Article 26 of the 2009 Environmental law

<sup>185</sup> Decision of the Head of Supervisory Body for Capital Market and Funds No.KEP -134/BL2006 on the obligation to submit annual report for financial corporation and public corporation. P. 10 which was amended by "Decision of the Head of Capital Market and Financial Institution Supervisory Agency No. Kep-431/Bl/2012," ed. Capital Market and Financial Institution Supervisory Agency Ministry of Finance (2012).

<sup>186</sup> *Ibid.*, Appendix, point h (1a).

<sup>187</sup> *Ibid.*, Appendix, point h (1b).

<sup>188</sup> *Ibid.*, Appendix, point h (1c).

<sup>189</sup> *Ibid.*, Appendix, point h (1d).

<sup>190</sup> *Ibid.*, Appendix, point h (2).

implementing corporate social and environmental responsibility.<sup>191</sup> Nevertheless, the laws are silent when it comes to determining the type of reward and the mechanism for granting that reward.

In addition to a reward system, the same law imposes a punishment or sanction for non-compliance, although the type of sanction and its implementing mechanism are not yet clear. This is due to the fact that Article 74 on CSR is not an independent provision; its implementation depends on other existing laws.<sup>192</sup>

Regardless of this absence of incentives and punishment, many business entities have adopted various national and international non-binding initiatives on various issues including labour standards, environmental protection, human rights, security in mining operations, etc. British Petroleum, for example, has adopted human rights instruments into their operations, such as: Universal Declaration of Human Rights; UN Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights; OECD Guidelines of Multinational Enterprises; International Labour Organisation Concerning Indigenous and Tribal People in Independent Countries; World Bank Operational Directive with Respect to Indigenous People; US-UK Voluntary Principles on Security and Human Rights; Equator Principles; Global Compaq Principles; UN Code of Conduct for Law Enforcement Officials; and UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.<sup>193</sup> These standards, and BP's own Code of Conduct, have become operational principles to be universally applied to BP's operations throughout the world. Another example is Freeport Indonesia,

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191 See the discussion on Q. 2.2.

192 See Question II.2.2.

193 "BP's Code of Conduct Makes It Clear That Certain Provisions, Such as BP's Stance On the Rights and Dignity of Communities, Relate Directly to Human Rights," <http://www.bp.com/sectiongenericarticle800.do?categoryId=9040217&contentId=7073401>.

which has adopted the Universal Declaration of Human Rights and US-UK Voluntary Principles on Security and Human Rights.<sup>194</sup> Freeport has taken an additional step by establishing a Human Rights Compliance Unit to oversee the process of documenting any allegations and assigning an internal team to conduct an assessment.<sup>195</sup> The outcome of the assessment process is reported to the Corporate Human Rights Legal Counsel, Corporate Human Rights Compliance Unit, site management, the complainant, and the individual respondent.<sup>196</sup>

These are examples in which corporations have voluntarily adopted various business-related human rights instruments, and taken necessary actions to protect human rights when conducting their business. Although it is true that the main driving force for adopting regional or international non-binding initiatives is public or consumer pressure, some corporations are pursuing this out of goodwill and a genuine desire to respect human rights.<sup>197</sup>

From the discussion above two conclusions can be made. First, State incentives to respect human rights or disincentives for non-compliance are just one aspect shaping corporate behaviour. Pressure from society is another crucial element in monitoring corporate compliance, and to be effective, both should work in tandem. Second, corporate initiatives - either through self-regulation (corporate code of conduct) or corporate participation in various voluntary standards - are important for filling the gap in the absence of any explicit government regulation or incentives to respect human rights. In this case, corporate commitment can actually act as

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194 "Voluntary Principles on Security and Human Rights; 2011 Report to the Plenary," (Ottawa: Freeport-McMoRan Copper & Gold Inc., 2012).

195 *Ibid.*

196 *Ibid.*, p. 4.

197 "APP to Conduct Company Human Rights Audit," Agroasia, <http://www.agroasianews.com/news/society-environmental/11/09/15/app-conduct-company-human-rights-audit>.

a co-regulation and reaffirm existing standards.<sup>198</sup>

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

There have not been specific guidelines issued by a government body encouraging business to respect human rights. However, there are a few guidelines adopted by certain government institutions or universities that address broader issues such as good governance and/or CSR. For example, the National Commission on Governance Policy – a state body established by Coordinating Ministry for Economics – adopted a General Guidelines on Good Governance in Indonesia on October 7, 2006. While the wording of ‘human rights’ or ‘corporate obligation to protect human rights’ is absent from the guidelines, they do mention an obligation of directors to implement corporate social responsibility: namely, the duty to care for society and the environment surrounding business operations.<sup>199</sup>

Moreover, the guidelines enumerate a list of corporate ‘obligations’ in the field of community development, labour, and prohibition of corruption.<sup>200</sup> They encourage corporations to respect the interest of shareholders as well as other stakeholders, based on principles of reasonableness, non-discrimination, and fairness.<sup>201</sup> Corporations are expected to treat their workers professionally, and without any discrimination based on ethnicity, religion, race, gender, or physical disability.<sup>202</sup>

198 The joint regulation between BP Migas and Indonesian police on the security measures in the oil and gas operations was inspired by the case of Tangguh Project. Further discussion see: Patricia Rinwigati Waagstein, “From ‘Commitment’ to ‘Compliance’: The Analysis of Corporate Self-Regulation in the BP Tangguh Project, Indonesia,” *Unpad Journal of International Law* (2006).

199 National Commission on Governance Policy, *General Guidelines on Good Governance in Indonesia* (2006), 26.

200 *Ibid.*, 16

201 *Ibid.*, 14

202 *Ibid.*, 16

Finally, the Guidelines suggest that a corporation be liable for any negative impact resulting from its business activity in the place of operation.<sup>203</sup>

Another such instance is the Implementation of Security Measures for the Upstream Oil and Gas Activities, following the MOU between BP Migas and POLRI in 2003.<sup>204</sup> A Guidelines on Joint Security Measures for the Upstream Oil and Gas Activities was adopted by BP Migas and the Indonesian police. This provides a mechanism for police to safeguard oil and gas activities in Indonesia, including in areas of conflict. A respect for human rights is one of the elements articulated therein. Although the Guidelines is not a legal document and hence lacks a binding nature and sanction, it has been accepted by local police and the private security arms of various companies as a basis for developing security strategy in mining operations.<sup>205</sup> One example can be found in British Petroleum’s operation at the Tangguh Project. British Petroleum (BP), together with Indonesian Police in Papua, have adopted their own Guidelines on Security Measures Strategy to safeguard gas operations at the Tangguh Project. These are based on the aforementioned MOU between BP Migas and the Indonesian police, as well as their own Guidelines.<sup>206</sup>

As the BP Migas was dissolved and its role is replaced by SKK Migas, it is not clear whether such guidelines are still applicable or not. Even if the instrument is no longer applicable, it may still be used as a reference for the new institution to

203 *Ibid.*, 31

204 MOU Between BP Migas and Indonesian Police No. 251/BP00000/2003-S0 and No. Pol: B/1228/v/2003 dated 20 May 2003 on the Implementation of Security Measures for the Upstream Oil and Gas Activities

205 MOU between BP Migas and Indonesian Police No. 251/BPD000/2003 – B1 and No. Pol: Skep/592/VIII/2003 dated 22 August 2003 on the Implementation Guidelines for Joint Security Measures.

206 “Joint Decision between Head of the Indonesian Police in Papua and the Head of the Country Bp Indonesia on the Guidelines of Security Measure Strategy in LNG Tangguh Project,” in No. Pol. SKEP/196/VIII/2009 & No. 0072/POLRI/BERAU/8/2008 (Papua: 2009).

develop similar guidelines in the future.

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

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

As mentioned earlier, there are three different types of State-owned enterprises:

1. PERUM or Public State-owned enterprise, in which all shares are owned by the State.
2. PERSERO or Private-public enterprise, in which more than 51 % of total shares are owned by the State.
3. *Perusahaan Terbuka* or Public Listed Corporation as a legal entity which has been publically offered consistent with the laws and regulations of Indonesia's capital market

The type of corporation will determine the applicable law, the organs of the enterprise, and their responsibility. The 2003 Law No. 19 on State-owned Enterprise applies to all types of State-owned enterprises. However, the 2007 Law No. 40 on Limited Liability also applies to *Perusahaan Terbuka* or Public Listed Corporation, as it is essentially a limited liability corporation. Therefore, all obligations and responsibilities articulated in that law, including social and environmental responsibility, are also imposed on open enterprises. As the limited liability corporation has been discussed in earlier sections, this section will focus on PERUM and PERSERO.

As with the limited liability corporation, there is no direct obligation of a PERUM or PERSERO to respect human rights. However, the 2003 Law No. 19 on State-owned Enterprises regulates certain obligations in relation to social issues. First, in

regard to labour, the Law on Manpower should also be applied to the employees of State-owned corporations. This implies that PERUM and PERSERO should respect and protect labour rights as articulated in the Law on Manpower. Second, corruption is strictly prohibited. Third, in regards to CSR in State-owned enterprise, the business must donate 2% of its net profit for the implementation of partnerships and capacity-building in social programs throughout Indonesia.<sup>207</sup> As part of this partnership program, State-owned enterprises are obliged to empower small businesses by providing training, loans, etc. In addition, they must contribute to improvement of social conditions by developing and providing assistance to educational and health programs.

Moreover, under the Regulation of the Ministry of State-owned Enterprises No. PER.01/MBU/2011 regarding the implementation of good governance by State-owned enterprises, issued on August 1st, 2011, the board of directors is required to implement CSR and take into consideration the interests of all stakeholders - including society as a whole - in corporate decisions and policies.<sup>208</sup> The directors should also ensure that their corporation meets labour standards, particularly in regards to a safe and healthy working environment as described in the existing regulations.<sup>209</sup> However, the Regulation does not provide any sanction in the case of non-compliance.

Regarding environmental protection, all requirements and standards regulated in the 2009 Law no. 32 on Environmental Protection are applicable to all State-owned enterprises. This implies that all of their activities that are likely to create significant environmental impact require an

<sup>207</sup> "The 2003 Law No. 19 on the State-owned enterprise & Regulation of the Ministry of State-owned enterprise NO. PER-05/MBU/2007."

<sup>208</sup> "Regulation of Ministry of State owned enterprises No. PER.01/MBU/2011 issued on Agustus 1<sup>st</sup> 2011 on the implementation of good governance on state owned enterprises," Article 19 para. (1).

<sup>209</sup> *Ibid.*, Article 36.

environmental impact assessment. Similarly, in the mining sector, State-owned enterprises must meet the requirements and obligations articulated in laws and regulations on mining, like the Law on Mineral and Coal Mining.

**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 is no clear reference on whether the State requires or encourages businesses that receive substantial support and services from State agencies to respect human rights.

**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?**

The process of privatisation is governed by the 2003 Law No. 19 on State-owned Enterprises, as well as its implementing regulation, the 2005 Government Regulation No. 33 on the Procedure of Privatisation for State-owned Enterprise (PERSERO). Those regulations govern the requirements, procedure, assets, and management related to privatisation. However, they do not regulate private service providers or the outcome of privatisation for society, such as pricing and accessibility – particularly when it comes to privatisation of public services and public goods. Hence, other laws should also be applied in order to fill this gap. To clarify the issue of privatisation and human rights, it will be helpful to highlight an example involving the privatisation of a public good: namely, water.

In Indonesia, water services can be provided by private business enterprises. In Jakarta, such services are managed by two large corporations: PT Palyja and PT Aetra. While the privatisation

process was regulated by the 2003 Law no. 19 on State-owned Enterprise, the private water service provider is regulated by Government Regulation No. 16/2005 on Drinking Water Supply Systems. This regulation imposes several obligations on the service provider: to provide drinking water to customers in accordance with existing regulations, provide clear information on any changes in quality and quantity of either the service or drinking water, provide a remedy to customers for any loss that they have suffered due to water service, and protect and preserve the environment.<sup>210</sup> Moreover, the suppliers are obliged to develop specific plans for their water supply system that include infrastructure, pricing, and customer access to water. The planning should take into consideration any poor and dry areas, the larger goal of improving the welfare of society, and possible ways of avoiding any negative social impact.<sup>211</sup> For these reasons, the regulation also specifies pricing policies. Article 60 establishes some principles that need to be considered when determining price, namely: fairness, quality of service and goods, total expenses, efficiency, transparency, and availability of water supply.<sup>212</sup>

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

There are no specific guidelines or regulations in which the government requires and encourages respect for human rights on public procurement. Due to the issue of corruption, State procurement contracts are made through an open tender system. Nevertheless, the contracts are usually not available for the public scrutiny.

<sup>210</sup> “The 2005 Government Regulation No. 16 on the Drinking Water Supply System,” (2005), Article 68 para. (2).

<sup>211</sup> *Ibid.*, Article 14.

<sup>212</sup> *Ibid.*, Article 60.

## **7. Is the State taking steps to support businesses' 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?**

The conflict mentioned here refers to two different conditions. The first concerns conflict that exists due to the presence of corporations; for example, the clash between corporations and society over land ownership. The second refers to any situation of conflict which already existed prior to business activities, but is further complicated by their presence.

There is no clear reference or regulation found which requires states agencies to distinguish between conflict-prone and non-conflict areas for business and investment. The 2007 Investment Law only requires investors to respect the rights of local people in the surrounding area. Hence, it can be concluded that whether one is in a conflict or non-conflict area is not deemed to be a special condition when it comes to investment activity.

However, the same does not hold true regarding security measures for business activities. Special treatment is applied to business operations that are considered nationally important. The question is who should provide security measures to safeguard such business activities.

The 2004 Presidential Decree No. 63 on the Security Measure for National Vital Objects regulates two layers of security. The first responsibility falls to the manager of such a "vital object," who is expected to provide internal security personnel to safeguard its compound. Second, the Indonesian police can provide assistance to these internal personnel, depending on the level of need and the threat/

attack faced. Here, the police will regularly assess the security measures being taken, and if required, can ask for assistance from the Indonesian military (TNI).

What are these national vital objects? The Decree defines them very broadly as covering any area/place/building/operation of business activities which concerns society's welfare and/or national interests, and is considered to carry strategic value for the State. Furthermore, the Ministry of Energy and Natural Resources has issued a list of business activities which are considered national vital objects.<sup>213</sup> According to this list, only business activities which provide significant income for the State can be deemed to be vital objects. For the others, only internal security personnel employed by corporations are responsible for security.

Prior to the 2004 Decree, the responsibility for safeguarding fell under the authority of the Indonesian military. As reported in various media, there have been a number of allegations of human rights abuses committed by TNI personnel in the course of carrying out their duties securing mining areas, as in the cases of Freeport in Papua,<sup>214</sup> and PT Arun and Exxon Mobile in Aceh.<sup>215</sup> Bearing this in mind, President Megawati Soekarno Putri issued this Decree to limit the military's involvement in providing security for business activities.

The Decree highlights two issues. First, it is true that it has filled the gap resulting from an absence of security strategies for important business activities. However, it does not mention conflict-prone border areas between Indonesia and other countries. This

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213 "Ministerial Decree No. 2288/K/07/Mem/2008 on the Amendment of Ministerial Decree No. 1762/07/Mem/2007 on the Security Measure of National Vital Objects in Energy and Natural Resources Sector," ed. Ministry of Energy and Natural Resources (2008).

214 "Too High a Price: The Human Rights Cost of the Indonesian Military's Economic Activities," Human Rights Watch (2006).

215 Ross Clarke, "A Matter of Complicity? Exxon Mobil on Trial for Its Role in Human Rights Violation in Aceh," International Center for Transitional Justice (2008).

issue is important, as many national vital objects – particularly business activities – are located in these areas or at borders which the TNI has a responsibility to safeguard. Currently, the Decree is not very clear on the division of labour between private security, police, and the TNI. If there is a violation, it may be difficult to pinpoint who should be responsible.

Second, it fails to mention the source of funding for these security personnel: is it the national/local or corporate budget? This financial question is important, as it is necessary to avoid any conflict of interest faced by law enforcement officers who are assigned to safeguard business activities. Is the goal to secure the interests of the corporation, or to protect society? The absence of clarity on this issue may lead to the situation in which human rights abuses are at risk.

**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 clear reference to the State providing assistance to business enterprises operating in conflict areas that is specifically aimed at assessing and addressing the heightened risk of human rights abuses including gender-based and sexual violence. However, as mentioned in the earlier Questions – particularly 2.2, 2.3 and 7.1 – the State has been engaged when it comes to solving problems related to security measures, land conflict, environmental degradation, and labour conflict including the protection of women that often lead to the violation of human rights by state or non-state (business) when business enterprises are operating in conflict-affected or high-risk areas. This action consists of the issuance of new legislation, or amendment of regulations considered problematic and ambiguous.

**7.3 Is the State denying access to public support and services for business enterprises operating in conflict-affected and high-risk areas which 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?**

No references found.

**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 has it taken steps to address any gaps?**

Yes. However, reviews are made on an *ad hoc* basis; usually in response to public pressure. One area of improvement has been in the context of security measures related to mining or national vital objects, as mentioned earlier in Question 7.1. Although the Decree has some weaknesses, it shows the State's commitment to addressing human rights abuses in conflict-affected areas.

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

**8.1 Is the State taking steps to ensure that governmental departments, agencies and other State-based institutions shaping business practices are aware of and observe these human rights obligations when fulfilling their respective mandates?**

Indonesia does not have a formal procedure for ensuring coordination between State bodies when it comes to human rights in business activities. In fact,

this issue is not even a regular item of discussion in meetings between governmental departments, agencies, or other institutions. However, Indonesia has several formal and informal bodies for coordinating certain elements of human rights. The three mentioned below are examples of how coordination between different state agencies has been set up to deal with certain social issues.

#### Coordinating Ministry for Political, Law and Security Affairs

The mandate of this Ministry is quite broad, namely: to coordinate the planning and drafting of policies in the fields of politics, law, and security; to synchronize the implementation of these policies; and, to conduct evaluations and studies that help guide this coordination process.<sup>216</sup> In other words, the Ministry coordinates the work of other relevant Ministries that deal with issues relating to politics, law and security, such the Ministry of Foreign Affairs, Ministry of Internal Affairs, Ministry of Law and Human Rights, Indonesian police, Indonesian military, Intelligence Agency, etc.

Does the issue of human rights fall under the Ministry's authority? The answer is yes. In addition to its participation in developing the National Strategy for Implementing Human Rights in 2011 – 2014, it has also been actively engaged in responding to human rights cases. For example, the Ministry has publicly promised to resolve the shooting incident that took place in the Freeport region of Papua, through coordination with other relevant institutions. Another example is the incident in Mesuji involving the massacre that resulted from the land conflict between the Palm Oil Company and people of Mesuji. The Ministry was assigned by the President to coordinate relevant institutions in investigating the case, and bring the perpetrators to

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216 Coordinating Ministry for Political, Law and Security Affairs, "Rencana Strategis Kementerian Koordinator Bidang Politik, Hukum Dan Keamanan Tahun 2010 - 2014," <http://www.polkam.go.id/LinkClick.aspx?fileticket=fS6FybPguF8%3D&tabid=63&language=id-ID>

justice.<sup>217</sup>

#### The Forum of MAKHUMJAPOL

This forum was initiated in 2010 by the Ministry of Law and Human Rights as a place for coordination and consultation on all enforcement institutions; namely: the Supreme Court, Ministry of Law and Human Rights, Attorney General's Office, and Indonesian National Police.<sup>218</sup> The forum was designed to discuss and settle various issues relating to law enforcement and justice; in particular: corruption, legal mafia, justice for victims, political intervention, reintegration of convicts into society, and crime prevention.<sup>219</sup>

Many commentators have doubts as to the effectiveness and efficiency of this forum, due to negative experiences associated with a similar effort in the past.<sup>220</sup> During the Suharto period, there was a coordination forum named MAHKEJAPOL. Many commentators questioned its efficiency as in several cases members of the forum tried to intervene in the on-going judicial process separately

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217 Asep Dadan Muhandan, "Presiden Minta Kasus Mesuji Diselesaikan," *Bisnis Indonesia*, December 15, 2011, <http://en.bisnis.com/articles/presiden-minta-kasus-mesuji-diselesaikan>.

218 Aliyudin Sofyan, "Pemerintah Bentuk Sekber Mahkumjakpol," *Jurnal Nasional*, January 11, 2012, [http://www.ham.go.id/modul.php?md=mod\\_artikel&modnews=3&mnnow=0&data=982468&modeseach=](http://www.ham.go.id/modul.php?md=mod_artikel&modnews=3&mnnow=0&data=982468&modeseach=).

219 Sulaksana, "Koordinasi Aparat Penegak Hukum Melalui Forum Mahkumjakpol."

220 "Komisi Yudisial: Mahkumjakpol Undang Kecurigaan Publik," *Tempo*, May 6, 2010, [Jambi Independence, May 8, 2010, \[http://www.jambi-independent.co.id/jio/index.php?option=com\\\_content&view=article&id=8866:mahkumjakpol-menuai-kritik&catid=25:nasional&Itemid=29\]\(http://www.jambi-independent.co.id/jio/index.php?option=com\_content&view=article&id=8866:mahkumjakpol-menuai-kritik&catid=25:nasional&Itemid=29\).](http://www.tempo.co/read/news/2010/05/06/063246057/Komisi-Yudisial-Mahkumjakpol-Undang-Kecurigaan-Publik; JPNN, )

instead of utilizing the forum.<sup>221</sup> Moreover, some alleged that the forum has been used as a venue for corruption and collusion.<sup>222</sup> However, due to a great need for coordination - particularly in terms of expanding access to justice to everyone, including the poor - the similar forum was established.<sup>223</sup> MAHKUMJAKPOL is expected to operate not only at the national level, but also the sub-national level, where all law enforcement institutions in a city or province will work together on court management as well as on the harmonization of different laws.

Has the forum discussed the issue of human rights and business? There are no official references found to this subject and the forum is still at an early stage of development. Hence, it is quite difficult to assess which direction that the forum will go. However, the possibility remains open in the future for discussing high-profile human rights case involving corporations.

221 J.E. Sahetapy, *Runtuhnya Etik Hukum* (Jakarta: PT Komnas Media Nusantara, 2009), 88; Suhartono, "Denny: Penahanan Anak Jalan Terakhir," January 20, 2012, <http://nasional.kompas.com/read/2012/01/20/19594297/Denny.Penahanan.Anak.Jalan.Terakhir>.

222 Hifdzil Alim, "Mahkumjakpol," *Kompas*, 18 May 2010, <http://cetak.kompas.com/read/2010/05/18/0255268/mahkumjakpol>; "Satgas Tanpa Gas," *Kompas*, January 14, 2010, <http://lipsus.kompas.com/grammyawards/read/2010/01/14/0302340/Satgas.Tanpa.Gas>; "Forum Mahkejapol Sebaiknya Dibubarkan," *Kompas*, February 24, 2000, <http://www.kompas.com/kompas-cetak/0002/24/nasional/foru08.htm>.

223 Recently, there are robust public debates, including in public media and TV shows, on cases involving the right to justice of the poor, rooted between procedural justice and the community sense of justice. Cases at hand are, for examples, the theft of three cacao and peanuts by an old lady in Banyumas, theft of a pair of sandals by a 15 year-old in Palu, and the theft of 1 kilo oxtail and 6 plates by an elderly domestic helper in Ciputat. Those cases exemplified the dilemma of pursuing justice in its real terms, especially after being exposed in the media. These cases have been pushing the Government to find the policy how to tackle petty crimes. One of the solutions is to establish this forum. See further discussion in: "National Report Submitted in Accordance with Paragrah 5 of the Annex to Human Rights Council Resolution 16/21: Indonesia," (A/HRC/WG.6/13/IDN/1: Working Group on the Universal Periodic Review, Human Rights Council, 7 March 2012), para. 57.

## CSR Coordination Forum

There have been forums established by local governments in several regencies or cities for the implementation of CSR. An example is found in Jombang Regency, Central Java, where the local government has set up a coordination team consisting of different organs of the local government. The team is mandated to plan, coordinate, integrate, and synchronize CSR and environmental responsibility programs in that region.<sup>224</sup> Another example is the city of Batam, where pursuant to the enactment of the 2011 Local Law no. 13 on Corporate Social Responsibility, a private-public forum on CSR consisting of representatives from different companies and local government was set up to design, plan, implement, and monitor CSR there.<sup>225</sup>

### **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?**

It is not clear whether Indonesia has taken such steps; there is no official reference or statement on this issue. However, some practices indicate this occurring in the context of loans from financial institutions, particularly the Asian Development Bank (ADB). In various loan agreements, ADB requires private or state borrowers to conduct environmental impact assessments as a requirement for receiving the loan. Examples are loan proposals for the Tangguh Project, Regional Roads Development Project (RRDP), and Reconstruction of Cement Production Facility in Aceh Project. These are cases in which the borrowers must conduct initial environmental

224 "Decision of the Head of Local Development Planning; Jombang Recency No. 188/14/Skep/li/415.38/2011 on the Permanent Secretariat for Coordination Team on Corporate Social Responsibility Program and Partnership Program on Environmental Responsibility (Pkbl - Tjsl)," (2011).

225 "The 2011 East Belitung Law No. 13 on Corporate Social Responsibility," (East Belitung Regency, 2011), Articles 1 para. (11), 11.

examinations (IEE) based on the ADB's Safeguard Policy Statement (ADB SPS 2009), in addition to the environmental impact assessment (AMDAL) required by Indonesian law.<sup>226</sup> This IEE covers the general environmental profile of the project, and includes an overview of the potential environmental impacts during various project phases.<sup>227</sup> The assessment should also include the set of mitigation and management measures to be taken during project implementation to avoid, reduce, mitigate or compensate for adverse environmental impact.<sup>228</sup>

### **8.3 Is the State taking steps to ensure and promote business respect for human rights when acting as a member of a multilateral institution dealing with business-related issues?**

Although Indonesia is a member of the International Financial Corporation, there is no official reference in which it is taking such steps specifically as such a member.

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226 There are some differences between the environmental impact assessment (AMDAL) according to Indonesian law and the Initial Environmental Examination (IEE). IEE has higher standard than AMDAL involving public participation. Another difference lies on the purpose of doing different assessment. AMDAL is a requirement to get operating license from Indonesian government; IEE is the requirement to get a loan from ADB. See: "ADB Environmental Assessment Guidelines," Asian Development Bank, <http://www.adb.org/documents/adb-environmental-assessment-guidelines>.

227 "Summary Environmental Impact Assessment : Tangguh LNG Project in Indonesia," (2005); "Initial Environmental Examination for the Asian Development Bank : Ino: Regional Roads Development Project," ed. Ministry of Public Works Directorate General of Highways (DGH or Ditjen Bina Marga) (Jakarta: October 2011), 5.

228 "Indonesia: Reconstruction of Cement Production," (2006); "Initial Environmental Examination for the Asian Development Bank : Ino: Regional Roads Development Project": 1.

## **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?**

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

The State-based mechanisms available to those seeking a remedy for business-related human rights abuses are primarily divided into two types: the judiciary and investigation and mediation by KOMNAS HAM. The former has been discussed in Question II.2.3, and the role of KONAS HAM will be further elaborated in Question 10.

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

While the barriers to obtaining remedies through the mechanism of KOMNAS HAM will be discussed in Question II.2.10, this section will only elaborate the problems found in the context of remedy through the judicial system.

Although the State has taken various steps for ensuring a fair, simple, integrated and low-cost judicial system, some challenges remain. First, Indonesia is a huge country, and different regions reflect distinct conditions. In certain regions, particularly ones that are disadvantaged and physically remote, financial problems and geographical conditions have hindered victims' access to justice.<sup>229</sup> Second, the problem of corruption in the judiciary has been one of the major barriers to providing justice for all. In addition to KPK, a special working group dealing

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229 "Compilation Prepared by the Office of the High Commissioner for Human Rights in Accordance with Paragrah 5 of the Annex to Human Rights Council Resolution 16/21: Indonesia."

with the issue of the corruption in the judicial justice system was established by the President to coordinate all relevant institutions, for the purpose of eradicating corruption in the court system.<sup>230</sup> As the working group is still at an early stage, it is difficult to assess its effectiveness.

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

In Indonesia, *adat* or customary law is officially recognised as part of the legal system. In addition to providing norms which have to be obeyed in societies preserving and applying such law, it also offers a mechanism to settle disputes. This type of settlement is expected to reduce the workload of courts, and to ensure speedy and efficient access to justice for all members of society.

In general, *adat* law regulates all aspects of social life including marriage, death, birth, inheritance, and criminal acts. However, three limitations apply. First, in criminal cases, State law usually restricts the application of *adat* law to minor crimes. Here, the method for settlement is mediation led by tribal leaders. Second, if there is a conflict between *adat* law and State law, the latter applies. Third, if one of the parties to the conflict is not satisfied with the outcome of the mediation, he/she can continue to pursue justice through the formal judicial process.

Two examples are highlighted here. First, the sub-national law of Aceh no. 17 of 2000 provides that tribal leaders in Aceh are given priority to settle disputes in each village within one month. If that period of time has passed and the dispute has not been resolved, or one of the parties to the dispute is not satisfied with the outcome, he/she may file the case with a judicial institution. The earlier decision by *adat* leaders may be used as a consideration

230 Gunanto, "Satuan Tugas Pemberantasan Mafia Peradilan Diragukan," *Tempo Online*, November 27, 2009, <http://www.tempo.co/read/news/2009/11/27/063210778/Satuan-Tugas-Pemberantasan-Mafia-Peradilan-Diragukan>

by law enforcement officers in coming to a final decision.<sup>231</sup>

A similar law has been adopted by the local government in Papua. The 2008 Law No 20 on the Establishment of *adat* trials in Papua mandated the people of Papua to establish an *adat* trial, which will deal with both private and criminal conduct. The *adat* law is only applicable to people originally from Papua,<sup>232</sup> or outsiders who accept the authority of the trial. As in Aceh, if the *adat* trial cannot settle the dispute or one of the parties is not satisfied with the decision, he/she can file the case with the District Court. In criminal cases, the exoneration of a defendant by the *adat* decision will require an approval from the District Court and Local Prosecution Office. If the Court rejects the decision, then the police and prosecutor will continue to process the defendant by applying State law.<sup>233</sup> The decision from the *adat* trial may be taken into consideration by the District Court in deciding the case.<sup>234</sup>

While the *adat* law mechanism may provide an alternative means of settling disputes, and thereby reduce the workload of law enforcement officers while improving access to justice, it is not free from problems. First, while this mechanism has been utilised in areas of civil and criminal law, and for mediation between corporations and society in relation to *Hak Ulayat* (land ownership),<sup>235</sup> the extent to which it can be utilised to deal with human rights violations - including labour rights - is not clear.

The second problem relates to its legitimacy and application, particularly with respect to land ownership. As mentioned earlier, under the Indonesian legal system, a land deed is used to certify such ownership. However, this system is not recognised in *adat* law, which relies on customary

231 "The 2000 Aceh Law no. 7 on the Application of Adat Law in Aceh," (2000).

232 "The 2008 Law No. 20 on the Adat Trial in Papua," (2008).

233 *Ibid.*, Article 8.

234 *Ibid.*

235 See the discussion on the Hak Ulayat before.

law. When there is a transfer of ownership – usually from forest owned by *adat* society to a business – conflict is unavoidable. In this case, the *adat* law and its dispute mechanism may not be able to resolve the conflict because its position is superseded by national law.

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

The Human Rights Law provides a statutory basis for the National Human Rights Commission (KOMNAS HAM) to monitor human rights implementation in Indonesia. Article 89 of the law imposes certain mandates on KOMNAS HAM, namely: research and development, observation, investigation, and mediation.<sup>236</sup> Based on these mandates, KOMNAS HAM is obliged to receive complaints from victims of human rights violations, investigate them, and provide recommendations to related authorities.<sup>237</sup> In certain situations, it can also conduct mediation among the parties to the conflict. Here, it may either act as a mediator or merely facilitate the mediation (observation).

In 2008, with the passage of Law No. 40 on the Elimination of Racial and Ethnic Discrimination, the mandate of KOMNAS HAM was expanded to include monitoring the implementation of this law. Like the Human Rights Law, Law No. 40 grants KOMNAS HAM authority to receive complaints or reports from victims of racial or ethnic discrimination by any parties, including business entities, to investigate them, and to provide further recommendations to any relevant bodies.<sup>238</sup> The question, then, is whether KOMNAS also deals with corporations and human rights. Indeed, the answer is yes – this issue is not novel for the organization. Currently, it addresses the issue in two ways.

<sup>236</sup> “The 1999 Law No. 39 on Human Rights,” (2009).

<sup>237</sup> *Ibid.*, Articles 89-90.

<sup>238</sup> “The 2008 Law No. 40 on the Elimination of Racial and Ethnic Discrimination,” (2008) Articles 8, 20.

First, KOMNAS HAM has been actively disseminating and developing the concept and content of business and human rights through a series of discussions. As mentioned in Question 1, it held a workshop on this topic with the title, ‘Plural Legal Approaches to Conflict Resolution, Institutional Strengthening and Legal Reform,’ in which the Bali Declaration on Human Rights and Agribusiness was adopted.<sup>239</sup> Internally, discussions have been conducted on the relationship between land, violence, and business actors.<sup>240</sup>

The second role of KOMNAS HAM relates to its mandate to observe and investigate human rights violations. As mentioned earlier, every year its Complaint and Investigation Department has to deal with more than 1000 complaints involving business-related human rights abuses. That figure consists of around 800 new complaints, and 200 ongoing cases.<sup>241</sup> The statistic also highlights several issues:

- a. The number of cases involving business-related human rights abuses is quite high – about 15 % of the total cases dealt with every year. This makes corporations (both private and state-owned) second only to the police as perpetrators of human rights violations.
- b. The yearly statistical report of KOMNAS HAM specifies issues commonly reported by victims of human rights violations, namely: land and labour issues, racial and ethnic discrimination, environmental hazards, right to health, migrant workers, forced evictions, right to education, children’s rights, and women’s rights.<sup>242</sup>

<sup>239</sup> “Bali Declaration on Human Rights and Agribusiness in Southeast Asia.”

<sup>240</sup> The result of discussion with the Head of Compliance and Investigation Unit.

<sup>241</sup> It bears noticing that in the Indonesian language, there is only a single translation for the terms “violation” and “abuses”; namely, ‘pelanggaran.’ See the statistic earlier. For further information see: “Laporan Tahunan 2008,” Komisi Nasional Hak Asasi Manusia (KOMNAS HAM) (2008) and “Laporan Tahunan 2010,” Komisi Nasional Hak Asasi Manusia (KOMNAS HAM) (2010).

<sup>242</sup> “Klasifikasi Kasus Pelanggaran HAM Oleh Korporasi Tahun 2010 Dan 2011.”

- c. The complaints come not only from different regions in Indonesia, but from other countries such as Papua, Saudi Arabia, Bahrain, Kuwait, Malaysia, Kenya, RRC, Singapore, United Arab Emirates, and the USA.<sup>243</sup> Complaints from overseas usually concern Indonesian migrant workers who are living abroad.
- d. Most cases are complex in the sense that one violation of rights will lead to another violation. Moreover, most cases involve multiple actors, which in certain situations may create ambiguity as to who should be responsible for what. An example of this can be found with the land dispute in Bengkulu (Taba Tebat and Pering Baru villages) involving the state-owned tea company (PTPN VII), the people of Taba Tebat Sibun and Pering Baru, local police, and local government. The petitioners, residents of Taba Tebat Sibun and Pering Baru, claimed that their rights - particularly the right to life and right to fair treatment - had been violated due to intimidation by local government and police during the resettlement process. They also accused the corporation of providing incorrect information about the land acquisition and resettlement. In its investigation, KOMNAS HAM found that PTPN VII and the local government provided false information to the villagers to make them give up their land.<sup>244</sup> Moreover, violence and intimidation by police were documented.<sup>245</sup>

Another case refers to the conflict between a security guard for PT Satya Agung (a corporation), who was also a member of the Indonesian police, and the people in Simpang Keuramat. This conflict resulted in the killing of [how many?] two members of the village. During its investigation, KOMNAS HAM questioned PT Satya Agung about its employment of the Indonesian police to safeguard corporate assets, given that the corporation is not considered a national vital

object.<sup>246</sup> KOMNAS HAM pointed out that the employment of police officers for business security would place them in a compromised position: protect the business's assets, or protect the village people.

This extended discussion of KOMNAS HAM leads us to several conclusions. First, human rights violations or abuses can be committed by private actors alone, or in complicity with states and other institutions. The two cases above (PTPN VII and PT Satya Agung) confirm this. The first case referred to a violation indirectly committed by a corporation, in which it together with the local government disseminated false information to the people. The second case reflected the direct involvement of a corporation, by employing a police officer as private security personnel who killed the other persons.

Second, it is true that KOMNAS HAM has been active in disseminating and developing the concept of human rights and business; however, the emphasis has primarily been on NGOs and special activities. The organization could also promote this issue among business communities and assist them in integrating human rights into day-to-day corporate policy but has not done so. To this end, cooperation with other institutions such as universities, State-owned corporations, the Indonesian Chamber of Commerce, and the larger business community could enhance its present activities.

Third, as mentioned, KOMNAS HAM has been active in responding to violations of human rights by corporations; however, its involvement comes mainly after the incident has occurred. Additional emphasis could be placed on prevention related activities.

There may be a possibility for expanding the role of KOMNAS HAM so that it will be more engaged during the earlier process of investment. Here, human rights impact assessment is a useful starting point. While such assessments can be carried out by private auditing companies or other relevant

243 *Ibid.*

244 "Laporan Tahunan 2010," 75-76.

245 *Ibid.*

246 *Ibid.*, 78-79.

institutions, KOMNAS HAM could require this for all investments, in addition to the environmental impact assessment made prior to business activities.

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

In addition to KOMNAS HAM, some non-state actors - namely, NGO's and business communities - have also been engaged with the Framework and Guiding Principles. Sawit Watch and Forest People Program, two NGOs focusing on the monitoring of palm oil plantations in Indonesia and abroad, have sent a letter to the UN High Commissioner for Human Rights in response to the Ruggie Report. In their letter, they called for the UN Secretary-General on Business and Human Rights to include a discussion of human rights conditions at palm oil plantations in the report.<sup>247</sup> Another Indonesian NGO, the Indonesian Centre for Ethics (ICE), has used the Framework as a basis for its program to develop voluntary principles on security and human rights; particularly for extractive business. Finally, ELSAM, a human rights NGO, has translated the Framework into the Indonesian language to make it accessible to local readers.

Within the business sector, Asian Pulp and Paper (APP) has taken an extra step to adopt this Framework in assessing and addressing human rights policies throughout its operations.<sup>248</sup> To realise its commitment, APP has appointed Mazars Indonesia, an auditing company, to independently assess its stated policies, principles and performance across its corporate operations, including eight Indonesian pulp and paper mills and their supply chain.<sup>249</sup> Hopefully, APP's move will be followed by

247 "Letter to Office of the United Nations High Commissioner for Human Rights on the Inputs to the United Nations Secretary-General's Report on Business and Human Rights and the UN System," (Forest Peoples Programme & Sawit Watch, 7th March 2012).

248 "Asia Pulp & Paper Follows UN Lead, Commits to First-Ever Human Rights Audit," ed. Mazars and Asia Pulp & Paper (2012).

249 *Ibid.*

other corporations. Mazars Indonesia has adopted the Framework as a basis for its human rights auditing process. Its assistance to APP in incorporating the Framework into the latter's corporate strategies provides a model for how Indonesian companies can use the Framework in developing the human rights dimensions of company policies.

## **IV. Conclusion**

This study is built by a premise that there is a need to provide a robust comparative analysis of the duty of the State to protect against human rights abuses by business enterprises. It is not expecting to identify exhausted set of rules which can be applicable to all corporations nor a set of compilation which can cover the whole aspects of corporation and human rights. It is only a small contribution to detect and map best practices by analysing human rights policies in relation to corporate responsibility to protect. The expectation is that this study can provide the basis for the development of future empirical research on business and human rights in ASEAN region. It is just the start of the beginning.

In the context of Indonesia, it can be concluded that the issue of human rights and business is not novel as it has been incorporated directly or indirectly in various laws, regulations, and private initiatives. However, the last ten years, Indonesian governments as well as business society particularly in Indonesia have begun to pay attention seriously to the issue and various steps have been taken to integrate human rights into business activities. Indeed, more efforts are needed to disseminate the issue among decisions makers, business society, and civil society.

Based on this study, there are some gaps which need to be addressed further in the future. First concerns the implementation of regulatory framework. While the current research has shortlisted various regulations as well as initiatives adopted by Indonesia and society, their efficacy and implementations in the practice is beyond the scope of this study, therefore, it is deserved a special analytical

and empirical research. Having a regulation on business and human rights is important but how such regulations ensure corporate compliance and postulate efficacy cannot be neglected.

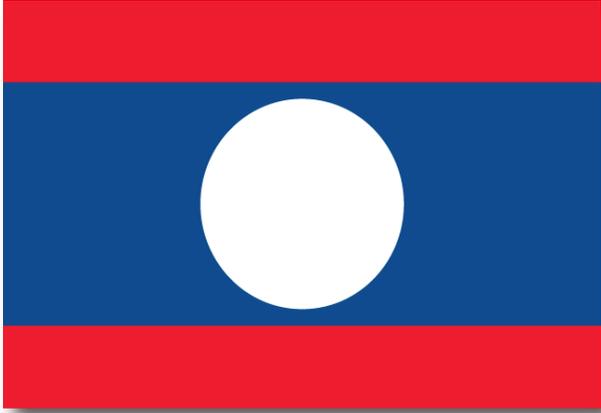
Second, in relation to issues, this study has identified several high profile issues on business and human rights in Indonesia such environment, security, corruptions by business actors, land rights, etc which need to be further addressed and discussed in separated research in order to get in-depth understanding on each of them. Hence, it is suggested to have a series of thematic issue studies involving different stakeholders such society, business, and government.

Third, a specific study on grievance mechanism for business and human rights also needs to further be developed. This issue is very important to implement the obligation to provide remedy as stipulated in the Ruggie's Framework.

Finally, it is very obvious that the issue of business and human rights is broad involving various branches of laws. Moreover, it relates many company activities and touches every human rights aspect of individual. Hence, more in-depth studies on specific aspects of human rights and business are indeed very welcomed.

## ABBREVIATION

ADB		Asian Development Bank
AMDAL	Analisis Dampak Lingkungan	Environmental Impact Assessment
APP		Asia Pulp and Paper
BAPEPAM-LK	Badan Pengawas Pasar Modal dan Lembaga Keuangan	
BP Migas	Badan Pelaksana Kegiatan Usaha Hukum Minyak dan Gas Bumi	The Upstream Activity of Oil and Gas Agency
BUMN	Badan Usaha Milik Negara	State-owned Enterprise
CSR	Pertanggungjawaban Social Perusahaan	Corporate Social Responsibility
CV	Commanditaire Vennotschaap	Limited Partnership
IEE		Initial Environmental Examination
KOMNAS HAM	Komisi Nasional Hak Asasi Manusia	National Commission on Human Rights
KPK	Komisi Pemberantasan Korupsi	Corruption Eradication Commission
MAHKEJAPOL	Mahkamah Agung, Departemen Kehakiman, Kejaksaan Agung, Polisi	Consultative forum of law-enforcing offices
PERUM	Perusahaan Umum	Public State-Owned Enterprises
SPAK	Program Prakarsa Anti Korupsi	Prakarsa Anti Corruption Programme
TNI	Tentara Nasional Indonesia	Indonesian Military
UN	Persatuan Bangsa Bangsa	United Nations



Lao PDR

by:

Geetanjali Mukherjee

**BASELINE REPORT: Lao PDR<sup>1</sup>****SNAPSHOT BOX**

<b>Number of Multinational Business Enterprises operating in the country</b>	N/A.
<b>Number of Micro, Small and Medium Business Enterprises operating in the country per 1,000 people</b>	As of June 2009, 78,461 enterprises were registered with the Tax Departments in Laos <sup>2</sup> . About 90 per cent are SMEs. <sup>3</sup>
<b>Number of State-owned Enterprises and the industries in which they operate</b>	30, in sensitive and / or important sectors such as banking. <sup>4</sup>
<b>Flow of Foreign Direct Investment from 2008 to 2012 (or other recent 3 to 5 year range)</b>	US\$ 228 million (2008), US\$ 319 million (2009), US\$ 333 million (2010), US\$ 450 million (2011). <sup>5</sup>
<b>Main industries in the country</b>	Mining (copper, tin, gold, and gypsum); timber, electric power, agricultural processing, rubber, construction, garments, cement, tourism. <sup>6</sup>
<b>Number 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</b>	N/A.
<b>Have the Framework and/or the Guiding Principles been translated into the country's languages and published in the country?</b>	No.

1 Note: Amounts in USD converted from Kip are accurate as of 6th October 2012, and rounded up to the nearest dollar.

2 Lao-German Programme on Human Resource Development for a Market Economy, Enterprise Survey 2011, Volume 1: Main Report, November 2012, 39, accessed 3 March 2013, <http://www.investlaos.gov.la/files/giz2012-human-resource-development-laos-en.pdf>

3 "SMEs in Laos," Lao National Chamber of Commerce and Industry, accessed August 4, 2012, [http://www.laocci.com/index.php?option=com\\_content&view=article&id=62&Itemid=66&lang=en](http://www.laocci.com/index.php?option=com_content&view=article&id=62&Itemid=66&lang=en).

4 Bertelsmann Stiftung, "BTI 2012 — Laos Country Report," (Gütersloh: Bertelsmann Stiftung, 2012)

5 UNCTAD, World Investment Report 2012, 170.

6 Central Intelligence Agency (CIA), "The World Factbook Laos," accessed August 3, 2012, <https://www.cia.gov/library/publications/the-world-factbook/geos/la.html>.

## Types of Business Enterprises in the Country

<p><b>Name of the Type of Business Enterprise</b></p> <p><i>E.g. company, partnership, business trust etc.</i></p>	<p><b>Description of the Legal structure of the Type of Business Enterprise</b></p>	<p><b>Does incorporation of the business enterprise require any recognition of a duty to society, including human rights responsibility?</b></p>	<p><b>Any legislation specifically applicable to the Type of Business Enterprise</b></p> <p><i>(E.g. Corporations Law)</i></p>
<p>Private Enterprises</p> <p>Enterprises are classified in three forms:</p> <p>(i). Sole-trader enterprise</p> <p>(ii). Partnership enterprise</p> <p>(iii). Company</p>	<p>There is no definition that describes the legal structure of private enterprise per se, however, Art. 9 of the Law on Enterprise states that: "A private enterprise may elect to use any form or category of enterprise stipulated in Article 10<sup>7</sup> and Article 11 of this law for the establishment and operation of its enterprise."</p>	<p>Yes, Article 5 of the Law on Enterprises, 2005 states that: "enterprises have the obligation to conduct their business operations in accordance with their business purposes, to keep accounting books, to perform fiscal obligations towards the government, <b>to protect the workers' legitimate rights and interests, to preserve the environment</b>, and to uphold other relevant laws and regulations of the Lao PDR. "</p> <p>Further, Article 6 of the same Law also states that: "The State encourages and promotes domestic and foreign persons and organisations to establish enterprises or to participate in business activities in all non-restricted sectors by issuing customs and tax policies, regulations, [and] measures, [and by] providing information, services and other facilities to enterprises <b>to contribute to socio-economic development</b>. The legitimate rights and interests of enterprises, namely their capital and property, are protected by laws".</p>	<p>Law on Enterprises 2005</p>

<sup>7</sup> The form of an enterprise [refers to] the business organisation that is the basis for the establishment and business operations of all types of enterprises.

(i)Sole-trader enterprise	<p>"...[A] form of enterprise owned by an individual. A sole-trader enterprise operates under the name of its owner who holds unlimited liability for the debts of the enterprise."</p>		Article 2, Law on Enterprises 2005
<p>(ii)Partnership enterprise</p> <p>Partnership enterprises are classified in two categories:</p> <ul style="list-style-type: none"> <li>• General partnership enterprise;</li> <li>• Limited partnership enterprise</li> </ul>	<p>Article 2 of the Law on Enterprises states that:</p> <p>"...form of enterprise established on the basis of a contract between at least two investors who contribute capital to joint business operations for the purpose of sharing profits."</p> <p>Article 2 of the Law on Enterprise states that:</p> <p>"... form of partnership enterprise which is jointly operated by the partners primarily based on mutual trust and where all partners have joint and unlimited liability for the debts of the enterprise."</p> <p>Article 2 of the Law on Enterprise states that:</p> <p>"...form of partnership enterprise in which some of the partners have unlimited liability for the debts of the enterprise and are referred to as "general partners", and the other partners have limited liability and are referred to as "limited partners".</p>		
<p>(iii). Company</p> <p>Companies are classified in two categories:</p> <ul style="list-style-type: none"> <li>• Limited company, including one-person limited company;</li> <li>• Public company.</li> </ul>	<p>Article 2 of the Law on Enterprises states that:</p> <p>"...form of enterprise established through the division of its capital into shares, each share having equal value. A shareholder is only liable for the company's debts up to an amount not exceeding the unpaid portion of [such shareholder's] shares."</p>		Law on Enterprises 2005

Limited Company	<p>Article 2 of the Law on Enterprises states that:</p> <p>"...form of company with at least two and no more than thirty shareholders, except in the cases described in paragraph one, Article 85 of this law, and a limited company with a single shareholder is called a "one-person limited company."</p>		Article 2 of the Law on Enterprises
Public Company	<p>Article 2 of the Law on Enterprises states that:</p> <p>"...a form of company with at least nine shareholders who are the promoters, and the company's shares can be freely transferred and openly offered to the public."</p>		
State enterprises	<p>Article 2 of the Law on Enterprise states that:</p> <p>"...established by the State and managed under rules applicable to companies and it shall not sell more than forty-nine per cent of its shares."</p>		Law on Enterprises 2005
Joint enterprises	<p>Article 2 of the Law on Enterprise:</p> <p>"a company jointly established between the State and another sector, whether domestic or foreign, in which each party holds fifty per cent of the shares."</p>		Law on Enterprises 2005
Collective enterprises	No definition is provided for this.		

## OVERVIEW OF THE COUNTRY'S BUSINESS AND HUMAN RIGHTS LANDSCAPE

### Background

Lao PDR is among the Least Developed Countries (LDC) in the world, ranking 138<sup>8</sup> of 187 countries, according to the UNDP's Global Human Development Index (HDI) of 2011.<sup>8</sup> It is a land-locked country, sharing its borders with five countries. Its population of 6.25 million people is divided into 49 ethnic groups.<sup>9</sup> About 67% of its population is Buddhist.<sup>10</sup> In 1975, the previous monarchy ended and Laos became a socialist regime.<sup>11</sup> It started to accept foreign investment and establishment of private enterprise in 1988, and Laos became a member of ASEAN in 1997.<sup>12</sup> Currently Laos is ruled by the Lao People's Revolutionary Party (LPRP), the country's only political party. The State Party is directed by a Politburo of 11 men, and a Central Committee of 53 members.<sup>13</sup>

### Domestic and International Legal Framework

Laos adopted its Constitution in 1991 and amended it in 2003.<sup>14</sup> Laos' legal system has a civil law system similar in form to that of the French.<sup>15</sup> Lao has adopted legislation covering several key areas of business and human rights such as land, labour and environment. Subordinate legislation such as decrees and ordinances supplement and define the implementation of state legislation. Additionally, customary law, or traditionally unwritten practices

<sup>8</sup> United Nations Development Programme, International Human Development Report 2011, Geneva 2012, 127.

<sup>9</sup> United Nations Development Programme, "Laos PDR Universal Periodic Review to Human Rights Council," UN Doc A/HRC/WG.6/8/LAO/1, May 2010, paras. 5-6.

<sup>10</sup> United Nations, "Lao UPR Review," paras. 5-6.

<sup>11</sup> CIA, "World Factbook."

<sup>12</sup> Ibid.

<sup>13</sup> Lao Movement for Human Rights, "Situation in Lao People's Democratic Republic," Forum Asia Democracy Hearing on Cambodia, Laos & Vietnam, European Parliament, Subcommittee on Human Rights, Brussels, September 12, 2005, 11.

<sup>14</sup> United Nations, "Lao UPR Review," ¶ 8.

<sup>15</sup> CIA, "World Factbook."

that have evolved over time, provides an important basis, especially for Lao's many ethnic groups.<sup>16</sup>

Lao PDR is a party to six core human rights conventions and two optional protocols: International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Convention on the Rights of Persons with Disabilities (CRPD), Convention on the Rights of the Child (CRC) and the latter's two Optional Protocols regarding the Sale of Children, Child Prostitution and Child Pornography, and the Involvement of Children in Armed Conflict. Laos has also signed the Convention for the Protection of All Persons from Enforced Disappearance. Laos has a dualist legal system, which requires international treaty obligations to be incorporated into domestic law in order to be invoked before domestic courts. In principle, the provisions of these human rights treaties have been largely incorporated into the Lao PDR's national laws and regulations.<sup>17</sup> In addition, Laos is also a party to eight ILO conventions (Conventions No. 4, 6, 13, 29, 100, 111, 138, 182).<sup>18</sup> The Laos government also received training in UN human rights conventions from international donors, and cooperated with the International Committee of the Red Cross in the implementation of international humanitarian law.<sup>19</sup>

### Economy

According to a Bertelsmann Stiftung (BTI) Report Laos has a "distorted market economy marked by weak financial institutions, uneven competition, poor transparency and political interference, and

<sup>16</sup> United Nations Development Programme, "People's Perspective on Access to Justice Survey in Four Provinces of Lao PDR," (Vientiane: UNDP, 2011).

<sup>17</sup> United Nations, "Lao UPR Review," ¶ 17.

<sup>18</sup> Ibid., ¶ 18.

<sup>19</sup> U.S. Department of State, "2011 Country Reports on Human Rights Practices: Laos," <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>, 14-15.

sapped by pervasive corruption.”<sup>20</sup> Commercial risk ratings rate Lao as one of the highest risk countries for investment, and the World Bank ranked Lao 163 out of 185 for ease of doing business in 2013.<sup>21</sup> Despite this, foreign direct investment in Lao has increased from US \$187 million in 2003 to US\$450 million in 2011.<sup>22</sup>

Laos’ growth rate increased from 4.38% in 1998 to 8.041% in 2011.<sup>23</sup> While overall number of people living below the poverty line declined substantially from 33.5% in 2002 to 27.6% in 2008,<sup>24</sup> it is still almost twice as high in rural areas than in urban areas.<sup>25</sup> Especially in the rural areas which account for the largest part of the country. Most households in Lao still depend on subsistence agriculture.<sup>26</sup> An important development is the structural shift from agriculture to natural resource based industry. While the contribution of agriculture to GDP constantly declined over the last decade, natural resources have been growing very rapidly, resulting in share in GDP almost tripling between 1998 and 2010 with 16% by 2010 compared to 5.9% in 1998.<sup>27</sup>

Backed by the World Bank and ADB, the government is committed to a poverty-reduction program that will raise Lao from Least Developed Country status by 2020.<sup>28</sup> The Laos government is driven by its commitments under the ASEAN Free Trade Agreement and became a member of the WTO on 2 February 2013. Laos opened its first

securities exchange in 2011 with a view to attract capital.<sup>29</sup>

## Labour

Urbanization is increasing, with the urban population rising from 15.4% to 34% between 1990 and 2011.<sup>30</sup> The ILO estimates that 67,000 workers enter the workforce annually, and Lao will have a workforce of 4 million by 2020.<sup>31</sup> This should place even more demands on employment, and increase the demand for migration with its inherent risk of trafficking. Women comprise the majority of workers in SMEs, but there are few women workers in larger enterprises.<sup>32</sup> The poorly skilled workforce is cited as the third biggest problem of doing business in Laos.<sup>33</sup>

High levels of unexploded ordnance contamination remain a threat to around 25% of villages, which result in approximately 300 injuries and deaths annually, most of them related to farming.<sup>34</sup>

There is a right to organise collectively or form labour unions in Laos, yet all labour unions need to be affiliated with the government sanctioned.<sup>35</sup> All forms of forced labour are prohibited by law. The Lao Government has expressed its intention to ratify the ILO Convention No. 105 on the prohibition of forced labour.

Laos is particularly exposed to trafficking both as a transit and a destination country. Tens of thousands of young people migrate from Laos to Thailand,

20 Bertelsmann Stiftung, “Laos Country Report,” 3.

21 “Ease of Doing Business in Laos,” World Bank, accessed February 1, 2013, <http://www.doingbusiness.org/data/exploreconomies/lao-pdr/>.

22 UNCTAD, World Investment Report 2012, 170.

23 IMF, World Economic Outlook 2012, 194 and IMF World Economic Outlook Database, October 2012.

24 World Bank, World Development Report 2012, Washington D.C. 2012, 394.

25 Lao PDR, Ministry of Foreign Affairs, Accelerating Progress towards the MDGs: Innovative options for reaching the unreached, September 2010, 38.

26 International Development Association and International Finance Corporation, Country Partnership Strategy for Lao PDR for the Period FY12-FY-16, Report No. 66692-LA, 25 January 2012, para. 7.

27 Ibid., para. 13.

28 Bertelsmann Stiftung, “Laos Country Report,” 13.

29 Lao Securities Exchange, History of LSX, <http://www.lsx.com.la/en/about/history.jsp>.

30 UNDP, International Human Development Indicators, urban population, <http://hdrstats.undp.org/en/indicators/45106.html>.

31 ILO, “Report: Lao PDR 2006-09”, 7.

32 Ibid., 8.

33 Ibid.

34 Ibid., 7.

35 2012 Annual Review under the 1998 ILO Declaration, Compilation of Baseline Tables, Country Baseline Lao People’s Democratic Republic, Freedom of Association and the Effective Recognition of the Right to Collective Bargaining, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_091262.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_091262.pdf).

typically on a seasonal basis.<sup>36</sup> Although initially many of them are voluntary migrants, a large number of them become victims of trafficking<sup>37</sup>. Many children are also found exploited as child labour in various industries.

Strong demand in Thailand for cheap labour and the need for alternate means of livelihood for rural youth fuels the demand for illegal migrants, who are smuggled across difficult to police borders by middlemen and corrupt officials.<sup>38</sup> The ILO estimates that 200,000 Lao workers are currently in Thailand, mostly low-skilled, generating annual remittances of US\$100 million.<sup>39</sup> However, due to the global economic situation, the ILO reports that 2,000 documented migrant workers returned from Thailand to Laos from garment factories that closed.<sup>40</sup>

## Environment

Lao PDR is blessed with considerable natural resources, including minerals such as gold, lignite and copper. The country depends on its natural resources for most of its economy. The Lao government has targeted tourism, especially ecotourism, as a major area of future growth.<sup>41</sup> This could potentially lead to concern for maintaining the environment and the country's natural resources.

36 International Labour Organization, "Meeting the challenge: Proven Practices for Human Trafficking Prevention in the Greater Mekong Sub-region," October 29, 2008, [http://www.ilo.org/wcmsp5/groups/public/---asia/---ro\\_bangkok/documents/publication/wcms\\_099806.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro_bangkok/documents/publication/wcms_099806.pdf).

37 ILO, "Meeting the challenge."

38 Anne T. Gallagher, "A Shadow Report on Human Trafficking in Lao PDR: The U.S. Approach v. International Law," *Asian and Pacific Migration Journal* 16.1 (2007), available at: [http://works.bepress.com/anne\\_gallagher/4](http://works.bepress.com/anne_gallagher/4); also Inthasone Phetsiriseng, "Preliminary Assessment on Trafficking of Children and Women for Labour Exploitation in Lao PDR," Mekong Sub-Regional Project to Combat Trafficking in Children and Women, (Bangkok: International Labour Organisation, 2003).

39 ILO, "Report: Lao PDR 2006-09", 9.

40 Ibid., 34.

41 Lao PDR, Ministry of Foreign Affairs, Accelerating Progress towards the MDGs: Innovative options for reaching the unreached, September 2010, 45.

Deforestation of the extensive forest cover is a pressing environmental concern.<sup>42</sup> This is reportedly reduced from 70% in 1940.<sup>43</sup> The rich biodiversity of the country is also under threat. Agricultural land is also compromised due to the large areas of land rendered unusable by the presence of cluster munitions and unexploded ordnance.<sup>44</sup>

There is a flourishing trade in illegal timber between Vietnam and Laos.<sup>45</sup> Laos' law prohibits timber trade, however it continues unabated. Illegal logging threatens Laos' forest cover as well as the livelihood of 4.2 million of the rural population of Laos who depend on the forests.

Hydropower is one of the primary earners of foreign income for development in Laos.<sup>46</sup> A significant business and human rights concern is the development of hydropower projects in the Mekong river basin. The Mekong River runs through six countries and is home to 65 million people. There are 9 proposed dams in Laos itself, part of a larger proposed development of the entire region. The rural population rely on the wild fish stocks and small subsistence farming is a dominant way of life in many communities that live near the Mekong river.<sup>47</sup> There are concerns that the hydropower projects would impact the food security of the communities living in the area, as well as create negative environmental impacts.<sup>48</sup> The World Bank

42 World Bank, "Lao PDR Environment Monitor," (Washington DC: World Bank, 2005).

43 World Bank, "Environment Monitor."

44 See generally United Nations Development Programme, "Hazardous Ground: Cluster Munitions and UXO in the Lao PDR," (UNDP, 2008).

45 Environmental Investigation Agency, "Crossroads: The Illicit Timber Trade between Laos and Vietnam," (UK: Emmerson Press, 2011).

46 World Bank, "Environment Monitor," viii.

47 Ian G. Baird and Mark S. Flaherty, "Mekong River Fish Conservation Zones in Southern Laos: Assessing Effectiveness Using Local Ecological Knowledge," *Environmental Management* 36 (2005): 440-441.

48 Earth Rights International, "I Want to Eat Fish, I Cannot Eat Electricity: Public Participation in Mekong Basin Development," (2009), accessed August 20, 2012, <https://www.earthrights.org/publication/i-want-eat-fish-i-cannot-eat-electricity-public-participation-mekong-basin-development>.

has withdrawn its financial support; however, four Thai banks continue to provide funding.<sup>49</sup> The Xayaburi dam project is the most controversial of these proposed projects.<sup>50</sup> However, there are problems with many of the other projects as well.<sup>51</sup>

Other challenges result from insufficient managing of waste and chemicals from plants, leading to problems for both the people situated around the plants as well as reduction in fish stocks.<sup>52</sup>

## Land

Approximately 5 million hectares of land in Laos is leased or conceded to domestic or foreign parties, corresponding to 21% of the land area of the country.<sup>53</sup> Of these, the largest types of concessions are mining and agricultural investments.<sup>54</sup>

The granting of land concessions is a major area of concern in Laos. In 2007, the Prime Minister announced a moratorium on further land concessions, in order to review the policies and practices of government agencies in this area.<sup>55</sup> Figures estimate that 4% of Laos land has been given away in concessions, in order to attract FDI, improve

infrastructure and create employment.<sup>56</sup> Land concessions are not always granted with attention to comprehensive land surveys and Environmental and Social Impact Assessments.<sup>57</sup> These concessions may impact villagers adversely, by limiting access to farmland and therewith food security, by loss of income, jeopardizing of cultural and social values, amongst others.<sup>58</sup> The largest proportion of hotline calls to the National Assembly concerned problems related to livelihoods and poverty reduction, especially related to land concessions.<sup>59</sup> The NA Deputy Office Head Viseth Savengsuksa said that “while people do not always protest the deals, they ask for fair compensation to be issued quickly.”<sup>60</sup>

A land titling program has been undertaken in the larger towns, and is being extended to the countryside.<sup>61</sup> In rural areas, families possess user rights to agricultural land, which can be transferred and are heritable. Communities may also exercise traditional rights to non-agricultural land, including those ethnic minorities who practice shifting slash-and-burn agriculture.

Villagers in rural areas rely on forests for a large portion of their income, and the changing landscape creates several problems. Traditionally wild cardamom grows in mountainous regions of Laos, which provided the rural population with up to one-fifth of their income.<sup>62</sup> Deforestation caused by rubber monocultures has led to forest loss and

49 Carl Middleton, “Thailand’s Commercial Banks’ Role in Financing Dams in Laos and the Case for Sustainable Banking,” *International Rivers*, December 2009.

50 Prashanth Parameswaran, “Laos Backtracks on Controversial Dam,” *The Diplomat*, July 16, 2012, accessed August 20, 2012, <http://thediplomat.com/asean-beat/2012/07/16/laos-backtracks-on-controversial-dam/>.

51 See generally Özgür Can and Sheldon Leade, “Nam Theun 2 Hydroelectric Project: Memorandum of Legal Issues In Relation to The Concession Agreement: An Analysis For Mekong Watch,” Human Rights Centre, UK: Essex University, 2005; Baird and Flaherty, “Mekong River Fish”; also see Earth Rights, “I Want to Eat Fish.”

52 Times Reporters, “Villagers cry foul over factory odours,” *Vientiane Times*, April 8, 2010.

53 Dominik Wellmann, “Discussion Paper on The Legal Framework of State Land Leases and Concessions in the Lao PDR,” *Integrated Rural Development in Poverty Regions of Laos under the Northern Upland Development Programme*, (GIZ, 2012), 3.

54 Wellmann, “Discussion Paper,” 3.

55 Bertelsmann Stiftung, “Laos Country Report,” 2.

56 Cor H. Hanssen, “Lao Land Concessions, Development for the People?” (paper presented at International Conference on Poverty Reduction and Forests: Tenure, Market and Policy Reforms, Regional Community Forestry Training Center for Asia and Pacific, Bangkok, September 3-7, 2007).

57 Miles Kenney-Lazar, “Land Concessions, Land Tenure, and Livelihood Change: Plantation Development in Attapeu Province, Southern Laos,” National University of Laos: 2011, 6.

58 Kenney-Lazar, “Land Concessions.”

59 Somxay Sengdara, “Assembly hotline calls focus on economic issues,” *Vientiane Times*, June 24, 2010, <http://laovoices.com/assembly-hotline-calls-focus-on-economic-issues/>

60 Sengdara, “Assembly hotline.”

61 World Bank, “Environment Monitor,” 17.

62 Chalathon et al., “Income Options for the Poorest of the Poor: The Case of Cardamom in Northern Laos,” *Small-scale Forestry* April (2012), doi 10.1007/s11842-012-9207-1, 18-19.

the loss of wild cardamom collection opportunities for villagers. However, it has been argued that the cultivation of cardamom has the potential to enhance rural livelihoods and promote sustainable land use in upland areas of northern Laos.<sup>63</sup>

### Corruption

Although Lao has a robust framework of anti-corruption law, international actors allege that this law isn't adequately implemented, and in practice, corruption is rampant.<sup>64</sup> The UN Office on Drugs and Crime identified three particular reasons for Laos to take measures against corruption: "(1) Misappropriation of public funds, taking of bribes, improper exercise or non-exercise of authority and neglect of official duties will deprive the Lao nation of their assets and opportunities for development; (2) Because Laos is substantially relying on assistance from international cooperation, such deprivation of assets and opportunities simultaneously occurs to the international community as well; (3) Unjust enrichment of corrupt officials and their business partners without any risk of prosecution and deprivation of their property will discourage civil society's aspiration for prosperity through legitimate business activities, or may even destabilize the Government by discrediting its legitimacy and capacity to govern."<sup>65</sup> Laos is currently undergoing the review procedure in the context of the United Nations Convention against Corruption (UNCAC). However, the 2012 BTI report states that as a result of international pressure, partly from its membership of ASEAN, and partly due to Laos' wish to join the WTO, the government has begun reforms in the economic and financial arena.<sup>66</sup>

63 Chalathon et al., "The Case of Cardamom," 18.

64 United Nations Office on Drugs and Crime, <http://www.unodc.org/laopdr/>.

65 <http://www.unodc.org/laopdr/en/Overview/Rule-of-law/Anti-corruption.html>

66 World Bank, "Environment Monitor," 3.

### Human Rights

The Constitution provides for equal treatment under the law for all citizens.<sup>67</sup> However, in reality ethnic minorities and those living in rural areas are often disadvantaged, due to lack of resources and access to public services.<sup>68</sup>

All candidates are vetted by the Party before being allowed to participate in the elections and no elections take place at the local level.<sup>69</sup> There are no opposition parties, and all media organisations are controlled by the Party.<sup>70</sup>

Civil society is weak in Laos as no interest groups are allowed to function outside the control of the ruling party.<sup>71</sup> In 2009, the government agreed to allow the formation of Lao NGOs, which must apply to the government for registration.<sup>72</sup> Estimates state that at the time there were about 100 informal organizations working in areas such as health, education and rural development, and around 80 international NGOs.<sup>73</sup> The decision to permit the formation of NGOs may encourage the creation of a stronger civil society in Laos.

### Women and Children

Lao is mainly a source country for human trafficking, with Thailand being the most prominent destination country, for both sexual exploitation and labour.<sup>74</sup> Trafficking in persons is a problem across the Southeast Asian region, and it is difficult to regulate due to the problems presented by lack of implementing infrastructure, natural boundaries and the lack of employment opportunities in the rural regions.

67 Article 22 Constitution of the Lao People's Democratic Republic, August 13-15, 1991 (1991 Constitution)

68 Bertelsmann Stiftung, *Laos Country Report*, 8.

69 Ibid.

70 Ibid., 9.

71 World Bank, "Environment Monitor," 12.

72 Decree 115/PM on Associations, April 29, 2009.

73 Bertelsmann Stiftung, "Laos Country Report," 12.

74 United Nations Inter-Agency Project on Human Trafficking, SIREN Human Trafficking Data Sheet Lao PDR, March 2008, [http://www.no-trafficking.org/reports\\_docs/laopdr/datasheet\\_laopdr\\_march08\\_ENG.pdf](http://www.no-trafficking.org/reports_docs/laopdr/datasheet_laopdr_march08_ENG.pdf).

Girls receive lower levels of education than boys, and are therefore more vulnerable to trafficking.<sup>75</sup> Women also face greater challenges accessing justice due to traditional customary practises, lack of education and awareness and financial constraints.<sup>76</sup> CEDAW expressed serious concern at the disadvantaged position of women in rural and remote areas, facing poverty, illiteracy, difficulties in access to health, education and social services, and lack of participation in decision-making.<sup>77</sup>

### Corporate Social Responsibility

The International Law Forum “Corporate Social Responsibility (CSR) in Laos” brought together senior government officials, business representatives, experts and stakeholders in Vientiane on 12<sup>th</sup> March 2012 to exchange views and share ideas on the concept of CSR and its relevance to Laos.<sup>78</sup> Generally, Lao PDR companies do not participate in initiatives such as the Global Compact (only one Lao NGO is a participant).<sup>79</sup> This suggests that the concept of CSR is very new in Lao, but there is growing interest. This forum concluded that the next step for the Lao PDR is to study the possibility of establishing a National CSR Compact, which will assist in CSR work in the country and ensure that public and private sectors take into account CSR as well as environmental and social impact in development projects and investments.<sup>80</sup>

75 Phetsiriseng, “Preliminary Assessment on Trafficking.”

76 See generally UNDP, “Access to Justice Survey.”

77 Committee on the Elimination of Discrimination against Women (CEDAW), “Concluding observations of the Committee on the Elimination of Discrimination against Women: Lao PDR,” August 7, 2009, ¶ 21.

78 Times Reporters, “Corporate social responsibility vital for equitable development,” *Vientiane Times*, March 13, 2012, <http://laovoices.com/corporate-social-responsibility-vital-for-equitable-development/>.

79 See question 5.1 below.

80 Times Reporters, “CSR vital.”

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

The Laos Government has not specifically reacted to the UN Framework.

## II. Is the State duty to protect against human rights abuses by third parties, including businesses (“State Duty to Protect”), recognized 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 ?

Lao law does not contain any specific reference to business and human rights, nor does it specifically use the language of the UN Framework. However, there is general language that can be interpreted as containing a duty to protect.

#### A) Constitution of Lao PDR

Lao PDR adopted a Constitution in 1991, which was amended it in 2003.<sup>81</sup> Article 6 sets out that “the state protects the freedom and democratic rights of the people, which cannot be violated by anyone.”<sup>82</sup> Unity and equality among all ethnic groups is also enshrined in the Constitution.<sup>83</sup> “All ethnic groups have the righ[t] to protect, preserve, and promote the fine customs and cultures of their own tribes and of the nation.” This article is important in the context of development projects, where the cultural practises of ethnic groups may be at risk. Freedom of religion is included in the amendment, and all acts that create a

81 Laos’ first, French-written and monarchical constitution was promulgated in 1947, as part of the French Union. The revised constitution of 1957 omitted reference to the French Union, though close ties persisted with the former colonial power. The 1957 document was abrogated on December 3, 1975, when a communist People’s Republic was proclaimed.

82 Article 6 in 1991 Constitution and maintained in the 2003 amendment.

83 1991 Constitution, Article 8.

division between religious groups are banned.<sup>84</sup> The “conservation of the unique culture and fine tradition of the nation” is also included in the amendment.<sup>85</sup>

Article 19 specifically states that “all organizations and citizens must protect the environment and natural resources: land, underground, forests, fauna, water sources and atmosphere.”<sup>86</sup>

Education for ethnic groups, women, children and those who live in remote areas is a state priority, and the state encourages the private sector to invest in the development of education of the nation.<sup>87</sup> The Constitution also includes a provision explicitly stating the need to “protect the legitimate rights and interests of the workers.”<sup>88</sup> The development and advancement of women, and the protection of mothers and children is another amendment included in the 2003 Constitution.<sup>89</sup>

Article 41 grants access to remedies: “Lao citizens have the right to complaint, file petitions and propose comments to relevant state organizations in connection with issues pertaining to the rights and interests of collectives or of their individuals.”<sup>90</sup>

## B) Law on Labour 2006

Labour protections are a fundamental aspect of business and human rights. The Labour Law was enacted in 1994 by the Lao Government, and subsequently amended in 2007. The law requires employers to provide safe working conditions, payment of salary or fair compensation and to implement provision of social security for employees.<sup>91</sup> Forced labour is unlawful.<sup>92</sup> Employees are also allowed to participate as members of lawful mass organisations and social organisations.<sup>93</sup>

84 2003 Constitution, Article 9.

85 Ibid., Article 23.

86 1991 Constitution, Article 19.

87 2003 Constitution, Article 22.

88 Ibid., Article 27.

89 Ibid., Article 29.

90 Ibid., Article 41.

91 Law on Labour 2006, Article 3.4.

92 Ibid., Article 3.10.

93 Ibid., Article 3.6.

Laos labour law purports to develop its workforce,<sup>94</sup> through requiring that employees hire local people, needing approval for employing foreign workers.<sup>95</sup> Additionally the law requires that people employed should be able to develop skills as a result of the work,<sup>96</sup> and the skill-building should be consistent with the demands of the market and the development plan of the country.<sup>97</sup> Employers have a direct obligation to train their labour force and build skills, using 1% of the employees’ salary or wages reserve fund to cover expenses.<sup>98</sup>

## C) Environmental Protection Law 1997

Article 4 of the Environmental Protection Law states that “[a]ll Lao people, resident aliens, stateless persons and residing foreigners, engaged in any production or service have a responsibility to protect the environment.”<sup>99</sup> According to this law, the duty of the state is restricted to providing relevant information, raising awareness and providing education on the importance of the environment.<sup>100</sup>

Article 5 of this Law sets out the basic principles of protection<sup>101</sup>:

1. Environmental protection shall be the priority consideration, and environmental mitigation and restoration are considered to be less preferable, but also important activities;
2. The national socio-economic development plan shall include provisions to protect the environment and natural resources;
3. All persons and organizations residing in the Lao PDR shall have an obligation to protect the environment;
4. Whoever causes damage to the environment is responsible for the impact under the law;

94 Ibid., Article 4.

95 Ibid., Article 3.5.

96 Ibid., Article 3.11.

97 Law on Labour 2006, Article 3.12.

98 Ibid., Article 10.

99 Environmental Protection Law 1999, Article 4.

100 Ibid.

101 Ibid., Article 5.

5. Natural resources, raw materials and energy shall be used in an economical manner, which minimizes pollution and waste and allows for sustainable development.

Additionally, article 13 of the Law states that “[a]ll persons and organizations have an obligation to protect natural resources. Persons or organisations that witness any event which leads to losses of natural resources, have an obligation to report the event to the responsible agency for timely action and protection.”<sup>102</sup>

Article 18 states that “[a]ll persons and organizations have an obligation to protect and take action against disasters... local authorities shall cooperate in order to determine methods to protect and take action against such disasters, and shall mobilize the population and other organizations to contribute initiative, labour, funds, transport vehicles and other necessary tools to protect and take action against such events in a timely manner.”

In 2005 an Environmental Protection Fund was launched with Prime Minister Decree 146 aiming at strengthening environmental protection, sustainable natural resources management, biodiversity conservation and community development.<sup>103</sup>

#### D) Land Law 2003

The 2003 Land Law states that “the State protects the legal interests of the holder of land use rights... ”<sup>104</sup> The law also states that “[a]ll individuals and organisations shall have the obligation to protect the land to ensure that it is in a good condition in which there is no soil erosion, land subsidence, and soil degradation...”<sup>105</sup>

<sup>102</sup> Ibid., Article 13.

<sup>103</sup> UNDP, Case Study Report: Environmental Protection Fund in Lao PDR, 2012, <http://www.snap-undp.org/elibrary/default.aspx>

<sup>104</sup> Land Law 2003, Article 5.

<sup>105</sup> Ibid., Article 6.

Article 59 of the Land Law 2003 further states that State, political, mass, economic organisations, or the Lao National Front for National Construction that have the right to use land “only have the rights to protect and use such land and have no right to transfer, lease or grant concessions or to use land as a share contribution or guarantee.”

#### 2. Has the State Duty to Protect been recognized by the State’s courts?

No information available.

### 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?

While there are no specific bodies mandated with business and human rights issues, there are some bodies that look at the wider area of human rights. Lao PDR has inter-agency mechanisms such as the National Steering Committee on the Preparations for the Ratification and Implementation of the International Covenants on Human Rights, and the National Steering Committee on the Preparations for the UPR, the National Steering Committee on reporting under and implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, the National Commission for the Advancement of Women, the National Commission for Mothers and Children, the National Committee for Disabled People, the National Committee for Rural Development and Poverty Alleviation, and the National Committee Against Human Trafficking.<sup>106</sup>

<sup>106</sup> United Nations, “Lao UPR Review,” ¶ 19.

Environmental agencies may also take human rights into consideration. The Environmental Protection Law provides for the following bodies for Environment Management and Monitoring:<sup>107</sup>

1. The Science, Technology and Environment Agency
2. Environment Management and Monitoring units at the ministerial level
3. Environment Management and Monitoring units at the provincial, municipal or special zone level
4. Environment Management and Monitoring units at the district level
5. The village administrations
5. To monitor and control the implementation of strategic plans, programs, projects, regulations, and laws relating to the environment;
6. To issue or revoke licenses of any organization engaging in environment related services;
7. To instruct development projects and activities to prepare environment impact assessment reports according to the regulations on environmental impact assessment;
8. To receive and response petitions from the population and other parties regarding environmental issues;
9. To co-operate with authorized concerned sectors in giving orders to adjust, suspend, remove or close down any activities that cause adverse impacts to human health, life, animals, plants and the environment;

#### **Article 36. Rights and duties of the Science, Technology and Environment Agency**

The Science, Technology and Environment Agency (STEA), being the environmental

management and monitoring organization at the central level, has the following rights and duties:

1. To act as a secretary to the Government in making and translating environment strategies and policies into plans, detailed projects and relevant regulations for the management and monitoring of the environment;
2. To implement management and monitoring activities, and to report the situation of the environment of the country regularly to the Government;
3. To act as the coordinating centre between the concerned sectors and local administrations for managing and monitoring any environment activities;
4. To conduct research and identify methods to protect, mitigate, and restore the environment by using appropriate advanced science and technology;
10. To train and upgrade the skills of the environment technical staff, and to educate and raise environmental awareness for all strata of the population in the country in close cooperation with the sectoral agencies and local administrations;
11. To disseminate, collect and analyse data concerning the environment and natural resources for use as inputs in the national socio-economic planning process;
12. To promote external relations and cooperation related to environmental issues;
13. To perform other rights and duties assigned by the Government, or as stipulated in the regulations and laws.

#### **Article 37. Rights and Duties of Environment Management and Monitoring Units at the Ministerial Level.**

If a ministry is required to establish its environment and monitoring unit, it has to

cooperate with the Science, Technology and Environment Agency.

<sup>107</sup> Environmental Protection Law, Article 35.

The environment management unit at the ministerial level has the following rights and duties for conducting its sectoral activities:

1. To make and implement plans and regulations about environmental protection concerning its sector based on the general plans and regulation issued by the Science, Technology and Environment Agency;
2. To research, analyses and identify methods to protect, mitigate, and restore environmental problems concerning its sector by using advanced science and technology;
3. To instruct the development projects and activities in its sector to prepare environment impact assessment reports;
4. To monitor the implementation of the environment protection regulations and law;
5. To recommend the authorized authority to issue orders to adjust, suspend, remove or close down any activities in its sector that have caused negative impacts to the human health, life, animals, plants and environment;
6. To report, participate in discussions and exchange experiences with the Science, Technology and Environment Agency, the local authorities, and other concerned parties for mitigating environmental impacts;
7. To train and upgrade the skills of its environmental technical staff and to educate as well as to raise the environmental awareness of all parties in its sector;
8. To disseminate, summarize, and analyse environmental and natural resource information;
9. To promote external relations and cooperation with international organizations on environmental protection issues;
10. To perform other rights and duties for protecting the environment, as assigned by the ministry or as stipulated in regulations and laws.

## **Article 38. Rights and duties of Environment Management and Monitoring**

### **Units on Provincial, Municipal, and Special Zone Level.**

Provinces, municipalities and special zones shall establish their own environmental

management and monitoring units in cooperation with the Science, Technology and

Environment Agency.

The provincial, municipal and special zone environment management and monitoring units have the following rights and duties to conduct activities in their areas:

1. To make and implement plans and regulations about environmental protection at the provincial, municipal or special zone level, in accordance with the national environmental protection plan;
2. To research, analyse, and identify methods to protect, mitigate and restore the environment in their respective area by using advanced science and technologies;
3. To report, participate in and exchange experiences on environmental activities with the Science, Technology and Environment Agency, local authorities and the sectoral agencies for mitigating environment impacts;
4. To monitor the implementation of laws, decrees, regulations, and rules on environmental protection;
5. To receive and consider the petitions of the population and other parties on environmental problems;
6. To recommend the authorized authorities to issue orders to adjust, suspend, remove and close down any activities in their areas that have caused negative impact to health and life of human, animals, plants, and the environment;

7. To collect, summarize, analyse, and disseminate environmental and natural resource information;
8. To train and upgrade the skills of the environment technical staff, and to educate as well as to raise the public awareness on environment protection issues;
9. To perform other rights and duties assigned by the Governor, Mayor, and the special zone chief, or as stipulated in regulations and law.

### **Article 39. Rights and duties of Environment Management and Monitoring**

#### **Units on District Level.**

Districts shall establish their own environmental management and monitoring units in cooperation with the environmental management and monitoring units at the provincial, municipal and special zone level, in which they are located.

The district environment management and monitoring units have the following rights and duties to conduct activities in their district areas:

1. To make and implement plans and regulations about environmental protection at the district level, based on the provincial, municipal and special zone environmental protection plan;
2. To research, analyse and identify methods to protect, mitigate and restore the environment in their respective district by using advanced science and technologies;
3. To monitor the implementation of laws, decrees, regulations, and rules on environmental protection;
4. To report, participate in and exchange experiences on environmental activities with the provincial, municipal or special zone's environmental management and monitoring units, local authorities and district sectors for mitigating environment impacts;

5. To receive and consider complaints of the people and other parties concerning the environment;
6. To recommend authorized authority to issue orders to adjust, suspend, remove or close down any activities that have caused adverse impacts to the environment related to their area;
7. To collect, summarize, analyse, and disseminate environmental and natural resource information;
8. To train and upgrade the skills of its environment technical staff, and to educate as well as to raise the people's and other parties in their district awareness of environment protection issues;
9. To perform other rights and duties assigned by the district chiefs, and the environmental management and monitoring units of the province, municipality and special zone, or as stipulated in regulations and law.

### **Article 40. Rights and Duties of the Village Administration on Environmental**

#### **Management and Monitoring**

The village administrations have the following rights and responsibilities with regard to environmental management and monitoring:

1. To make and implement plans and regulations on environmental protection based on plans, order, rules, and instructions of the district;
2. To disseminate, educate ,and raise public awareness and to direct the village people to participate in activities related to protection, mitigation and restoration of the village environment;
3. To monitor the implementation of plans, regulations, rules and instructions on environmental protection;
4. To report, participate in and exchange experiences on environmental activities with the district environmental management and

monitoring units, district authorities and other concerned parties for mitigating environment impacts;

5. To perform other rights and duties assigned by the district or the district environmental management and monitoring units or as stipulated in regulations and laws.

The National Environment Committee (NEC) was established in 2002 under PM Decree No.09/PM and revised by the Decree pertaining to the organization and functions of the National Environment Committee, No. 162/PM, dated 21 June 2009. Its main responsibilities are to coordinate and provide advice to the Government and its agencies regarding environmental management, strategies, regulations and plans. The NEC consists of management level officials from 14 key agencies, and is chaired by the Vice Prime Minister.<sup>108</sup>

It is a non-standing committee at the central level, with the Department of Environment within the Environment and Water Resource Agency as its secretary (currently upgraded to Ministry of Natural Resources and Environment, MONRE). It has an important role in guiding legal framework in terms of natural resources and environment management and protection.

The Decree on Environmental Impact Assessments provides for the Water Resources and Environment Administration (WREA) to undertake the monitoring of both Category 1 and 2 projects, albeit with different responsibilities for each category.<sup>109</sup> The WREA has a duty to inspect the implementation of prevention and mitigation measures of social and environmental impacts.<sup>110</sup> It also has a duty to provide technical advice, build capacity and provide training for environmental and social monitoring units.<sup>111</sup>

108 World Bank, Lao PDR Environment Monitor, 2006, 43.

109 Article 23 Decree on Environmental Impact Assessment (EIA Decree) February 16, 2010 (Unofficial translation).

110 EIA Decree, Article 24.

111 Ibid.

The Land Law 2003 provides for a National Land Management Authority<sup>112</sup> to manage the land, with rights and duties including:

1. Study and develop policies, laws and regulations.
2. Undertaking surveys of the land, land classification and land use planning.
3. Coordinate with concerned sectors and local administration to plan, protect and develop land, define land areas for certain uses and monitor use.
4. Settle land disputes.
5. Manage State land and protect the environment.<sup>113</sup>

The Ministry of Agriculture and Forestry is tasked with managing forest land,<sup>114</sup> which is land that is covered by forests or determined by the State to be forest land,<sup>115</sup> as well as water area land.<sup>116</sup> The Ministry of Industry and Handicrafts is tasked with managing industrial land.<sup>117</sup> Communication land, part of roads, airports, railways, etc. is managed by the Ministry of Communications,<sup>118</sup> while cultural land is managed by the Ministry of Information and Culture.<sup>119</sup> The Ministry of National Defence and Ministry of Security manage land for national defence and security.<sup>120</sup>

The Counter-Corruption Organisation is a State organization that has the mandate to “prevent and counter corruption” by assigning to the State Inspection Authority the task of implementation.<sup>121</sup> This organization has powers of investigation. However, at the time of the UNDP translation of this

112 Land Law 2003, Article 8.

113 This is not an exhaustive list, please see Article 10 Land Law 2003 for a full list of rights and duties.

114 Land Law 2003, Article 20.

115 Ibid., Article 19.

116 Land Law 2003, Article 24.

117 Ibid., Article 28.

118 Ibid., Article 31.

119 Ibid., Article 34.

120 Ibid., Article 36.

121 Anti-Corruption Law 2005, Article 37.

law, in 2006, there existed no such organization.<sup>122</sup>

## **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?**

There are four types of enterprises under the Law on Enterprises 2005:<sup>123</sup>

1. Private enterprise.
2. State enterprise.
3. Joint enterprise.
4. Collective enterprise.

Within private enterprises, sole-trader enterprises bear unlimited liability. Partnership enterprises and companies, the other types of private enterprise, have status as a legal entity.<sup>124</sup> As a legal entity, a partnership enterprise possesses “[t]he legal capacity to exercise rights and obligations, and to be a plaintiff or defendant [in legal proceedings] in the same manner as natural persons.”<sup>125</sup>

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

Article 43 of the Law on Enterprises states that managers of partnerships, among other rights and duties, must act in “the best interests of

the general partnership enterprise.”<sup>126</sup> Partners bear unlimited liability for debts of the general partnership enterprise.<sup>127</sup> General partners in a limited partnership enterprise have unlimited liability for the debts of the limited partnership enterprise; while partners with limited liability in a limited partnership enterprise will be liable to an amount not exceeding the unpaid portion of their subscribed shares.<sup>128</sup>

### **2.2. Do laws and/or regulations: (a) 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?**

#### **a) Labour**

##### Working Period

Workers should not work beyond eight hours a day or forty-eight hours a week.<sup>129</sup> For certain hazardous work, such as exposure to radiation or harmful chemicals, the working hours shouldn’t exceed thirty-six hours a week.<sup>130</sup>

The following activities are included within time period of work:<sup>131</sup>

- Time spent on technical preparation at the start and end of work.
- Hourly breaks not exceeding 15 minutes, in certain shift work or differentiated tasks.
- A 45-minute meal break per shift.

122 See notes to Article 37 Anti- Corruption Law 2005, UNDP Draft Translation 2006

123 Law on Enterprises 2005, Article 9.

124 Ibid., Article 34 for partnership enterprises; Article 79 for companies.

125 Ibid., Article 34.

126 Law on Enterprises 2005, Article 43.

127 Ibid., Article 48.

128 Ibid., Article 69.

129 Law on Labour 2006, Article 16.

130 Ibid.

131 Ibid., Article 17.

The employer must also provide five to ten minutes rest every two hours of work.<sup>132</sup> Employees can be asked to work overtime, with the consent of the union and the employees.<sup>133</sup> Overtime should not exceed forty-five hours a month, or three hours a day. It is also not allowed to work overtime every day, with the exception of a natural disaster or other dangerous accident.<sup>134</sup> Workers are also entitled to one day off a week.<sup>135</sup> Workers employed on an annual basis, are entitled to fifteen days of annual leave.<sup>136</sup>

### Trade Unions

The law states that the role of a trade union is to act as representatives of the workers, as well as to promote solidarity, educate, train and encourage workers to have labour discipline, and to successfully perform work in accordance with production plans; to protect and promote legitimate interests of workers; to encourage the employer and employees to implement the Labour Law and employment contract correctly and to participate in the settlement of labour disputes.<sup>137</sup> A trade union must be established in all labour units, and where there is no trade union, workers' representatives must be established.<sup>138</sup> Only official trade unions under party control are allowed in Laos.<sup>139</sup>

### Employment of Women

Women who are pregnant or caring for a new-born child cannot perform the following types of work:<sup>140</sup>

- Lifting or carrying heavy loads.
- Work which entails standing continuously for long periods.
- Hazardous work specified above in Article 16.

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132 Ibid.

133 Ibid., Article 18.

134 Ibid.

135 Ibid., Article 19.

136 Ibid., Article 21.

137 Law on Labour 2006, Article 5.

138 Ibid.

139 Bertelsmann Stiftung, "Laos Country Report," 12.

140 Law on Labour 2006, Article 38.

Pregnant women or women with children under twelve years cannot be employed to work overtime or during holidays.<sup>141</sup>

Women employees are entitled to at least ninety days of maternity leave, however at least forty-two days of such leave must be taken after giving birth.<sup>142</sup> During the one-year period after giving birth, the worker has the right to one hour per day of rest in order to feed or take care of her child if she brings her child to a nursery and to take her child to immunisations.<sup>143</sup>

A woman employee is entitled to maternity support; an allowance of at least sixty per cent of the minimum wages to be paid by the employer or by the social security fund, if contributions to the social security fund have been fully paid.<sup>144</sup> If she gives birth to two or more children at the same time, [she] will receive an additional allowance of fifty per cent of the maternity allowance. If she suffers from a certified miscarriage, she is still entitled to this allowance.<sup>145</sup>

### Child Labour

Children who are at least fourteen years of age and less than eighteen years of age, can be employed if they do not work for more than eight hours a day and are not employed in sectors involving heavy work or work that is dangerous to their health, such as:<sup>146</sup>

- Mining,
- Activities that use chemicals, explosives or toxic substances,
- Work involving the handling of human corpses,
- Work in environment with excessive noise,
- Work in places serving alcohol or with gambling,

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141 Ibid.

142 Ibid., Article 39.

143 Ibid.

144 Ibid., Article 40.

145 Ibid.

146 Ibid., Article 41.

- Work at night from 10 p.m. to 5 a.m. of the next day,
- Work specified in Article 16.

### Disabled Workers

Approximately 70,000 people in Lao have a disability, corresponding to 13% of the population, contributed by the unexploded ordnance problem.<sup>147</sup> The definition of ‘disabled’ is unclear, and therefore ambiguous about whom the law protects.<sup>148</sup>

Although there is no separate legislation covering disabled workers, the Labour Law specifies that “labour units shall give priority to disabled or handicapped persons to work in their units in accordance with their abilities and skills, and shall give them suitable positions with regular salary or wages as other general workers.”<sup>149</sup>

PM’s Decree No. 18 in 1995 appointed the National Commission for Disabled Persons to protect the legal rights of disabled persons, develop policies, raise awareness about issues pertaining to disabled persons, and examine the laws relating to disabled persons, among other duties.<sup>150</sup>

### Protection of Workers

Employers need to be responsible for ensuring that the workplace, machinery, equipment, and production process, are safe and not dangerous to the health of workers.<sup>151</sup>

Necessary measures to ensure labour safety include:<sup>152</sup>

- Installing appropriate lights or sufficient natural light, limitation of excessive noise,

[and] ventilation for air, dust and odours which are dangerous to health,

- A supply of clean drinking-water, showers, toilets, a cafeteria, and changing room for workers,
- A storage room where toxic substances can be kept safely without risk of leakage,
- The provision, free of charge, in a sector where necessary, of personal safety equipment and clothing required by workers,
- The installation of safety equipment or fencing around any dangerous machinery or other dangerous places, and other measures such as devices that warn against or prevent electric shocks, [and] fire and others, as necessary.

Employers must arrange for workers to undergo a medical examination at least once a year, particularly those engaged in heavy work or dangerous work.<sup>153</sup> If a worker has an occupational disease derived from the workplace, the employer must be responsible for payment of his medical treatment in accordance with regulations.<sup>154</sup> In the case of a contagious occupational disease, [the employer] must give the worker leave to undertake treatment and afterwards reinstate him. All labour units must be equipped with a first-aid kit.<sup>155</sup> Units employing fifty or more workers should have a permanent medical staff to treat the health of the workers.<sup>156</sup>

Employers must provide appropriate help to a worker suffering from a labour accident or occupational disease, as well as pay for the cost of treatment.<sup>157</sup> Alternately if an employee is a member, the social security organisation will bear the costs. In the event that the worker suffers from a serious labour accident or occupational disease or dies, the employer must report to the nearest labour

147 UNDP, “Access to Justice Survey,” 89.

148 Ibid.

149 Law on Labour 2006, Article 26

150 Article 2 of PM Decree No. 18, the Decree of Appointing the National Commission of Disabled Persons. This is not an exhaustive list, please see Article 2 for full list.

151 Law on Labour 2006, Article 42.

152 Ibid.

153 Ibid., Article 43.

154 Ibid.

155 Law on Labour 2006, Article 43.

156 Ibid.

157 Ibid., Article 55.

administration agency within forty-eight hours.<sup>158</sup> If the employee dies, the employer will be responsible for funeral expenses as appropriate but not less than six months' wages.<sup>159</sup>

## b) Environment

### Environmental Protection Law

“The Environmental Protection Law specifies necessary principles, rules and measures for managing, monitoring, restoring and protecting the environment in order to protect public, natural resources and biodiversity, and to ensure the sustainable socioeconomic development of the nation.”<sup>160</sup>

According to Article 8, environmental impact assessments are a process of estimating impacts on the environment by development projects and activities.<sup>161</sup> It also identifies methods and standards for mitigating and reducing such anticipated impacts on the social and natural environment. Development projects and activities that have or will have the potential to affect the environment must submit an EIA report for an environment compliance certificate before starting the project.<sup>162</sup> Development projects operating before the enactment of this Law, that have caused losses to the environment, must propose measures to mitigate such losses.<sup>163</sup> EIAs include the participation of the local administration, mass organizations, and the population likely to be affected by the development project.<sup>164</sup>

Businesses have the obligation to use advanced technologies that reduce the harm to the environment, and comply with industry-specific technical standards.<sup>165</sup>

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158 Ibid.

159 Ibid.

160 Environmental Protection Law 1999, Article 1.

161 Ibid., Article 8.

162 Ibid., Article 8.3.

163 Ibid., Article 8.4.

164 Ibid., Article 8.5.

165 Ibid., Article 9.

Regarding restoration of the environment, the Law states that “[a]ny person or organization engaged in commercial production, service or other undertaking that causes a disaster is obligated to mitigate the damage and to restore the affected area under the supervision of the local authority or the concerned sectoral agency.”<sup>166</sup> The law states that persons and organizations have an obligation to actively participate in environmental restoration,<sup>167</sup> but it does not specify under what conditions these obligations are applied.

Breaches of these obligations carry the following sanctions under the Environmental Protection Law:

#### **Article 44. Sanctions**

Persons or organizations which have violated this law and related legislation on

environmental protection shall be subject to the following sanctions: warning, fines,

civil sanction, and criminal charges, according to the severity of their case.

#### **Article 45. Warning**

Persons or organizations that commit minor violations of this law and related legislation on environmental protection shall be warned and re-educated.

#### **Article 46: Fines**

Persons or organizations shall be fined if they:

1. Were warned and re-educated, but did not change their behaviour;
2. Littered or discharged waste causing pollution and affecting public order and beauty of the city;
3. Caused deterioration to water, air, and/or soil quality below the prescribed levels;

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166 Ibid., Article 28.

167 Ibid., Article 27.

4. Used or discharged excessive amounts of vibrations, noise, colours, glare, odour, toxic chemicals or radioactive substances, thus violating established standards or other legislation and causing hazards to human health and life, to animals, plants and the environment;
5. Did not comply with the mitigation measures outlined in their respective Environmental Impact Assessment reports;
6. Denied or refused to cooperate with the concerned environmental inspection officers.

#### **Article 47: Indemnity measures**

Persons or organizations that have violated this law and related legislation on environmental protection, and so doing cause loss of state, communal or private property will be held financially responsible for such losses.

#### **Article 48: Application of criminal charges**

Persons found guilty of criminal violations of this law or other related environmental legislation by: forging environmental compliance certificates or other environmental documentation, or violating environmental standards or other environmental guidelines leading to loss of health and life, will be punished according to the criminal act.

#### **Article 49: Additional punishment**

Apart from regular punishment for applicable violations, mentioned under article 45, 46, 47, and 48, guilty persons or organizations may be charged with additional measures such as: suspension of activities, withdrawal of license, closing of enterprise and confiscation of equipment and vehicles that were used in the violation.

#### **Decree on Environmental Impact Assessment**

The Decree on Environmental Impact Assessment (EIA) issues further guidance on implementing Article 8 of the Environmental Protection Law on EIAs.<sup>168</sup> The additional objectives of the decree are (emphasis added):

1. To define principles and rules, and adopt measures on establishment, functions, management and monitoring of environmental impact assessment;
2. To ensure that all public and private investment projects, both domestic and foreign, operating in Lao PDR (hereafter called ‘investment projects’) which create or may **create adverse environmental and social impacts**, are designed with the correct and appropriate environmental and social impact prevention and mitigation measures or environmental management and monitoring plans (EMMP) and social management and monitoring plans (SMMP);
3. To effectively **prevent, minimise and resolve adverse environmental and social impacts** derived from investment projects;
4. To contribute to and make **national socio-economic development sustainable**.

The Decree is applicable to all investment projects, which are divided into two categories:

- 1) small-scale projects with minimum environmental and social impacts, which require an Initial Environmental Examination (IEE),<sup>169</sup> and 2) larger-scale projects with significant impacts, which require an Environmental Impact Assessment

<sup>168</sup> EIA Decree, Article 1.

<sup>169</sup> Article 3 EIA Decree defines Initial environmental examination (IEE) as “studying, surveying, researching and analysing data to estimate initial environmental and social impacts, including impacts on health which may arise from investment projects...as well as identify measures to prevent and mitigate possible environmental and social impacts.”

(EIA).<sup>170</sup>

The Decree states that project developers are liable for the accuracy of the information contained in the reports, as well as the expenses in undertaking the IEE or EIA as required.<sup>171</sup>

Article 7 states that stakeholders and those affected by the project have the right to receive information on the development plan, IEE or EIA, the benefits they will receive if any, and the environmental and social impacts from the project.<sup>172</sup> Additionally, they also have the duty to provide information on the local environment and society in the location and vicinity of the project, to assist the preparation of the IEE or EIA.<sup>173</sup> Stakeholders also have the right to participate in consultations at all levels, and to participate in discussions on compensation, resettlement and restoration of the environment.<sup>174</sup>

The Decree gives detailed instruction on the process to be undertaken for EIAs,<sup>175</sup> screening of investment projects<sup>176</sup> and the participation process<sup>177</sup> for stakeholders. It further describes in detail the procedures and duties of the Water Resources and Environment Administration (WREA) for undergoing an IEE,<sup>178</sup> an EIA,<sup>179</sup> and an Environment Compliance Certificate,<sup>180</sup> which is issued by the WREA to approve the report on IEE

170 Article 3 EIA Decree defines Environmental impact assessment (EIA) as “studying, surveying, researching-analysing and estimating of possible positive and negative impacts on the environment and society, including short and long term impacts on health created by the investment projects... as well as offering appropriate alternatives, environmental management and monitoring plan (EMMP), and social management and monitoring plan (SMMP) to prevent and mitigate possible impacts which are likely to happen during construction and operation of the investment projects.”

171 EIA Decree, Article 4.5.

172 Ibid., Article 7.

173 Ibid.

174 Ibid.

175 Ibid., Article 5.

176 Ibid., Article 6.

177 Ibid., Article 8.

178 EIA Decree, Chapter 3.

179 Ibid., Chapter 4.

180 Ibid., Chapter 5.

or EIA.<sup>181</sup>

### Mineral Law

The Mineral Law 2008 replaced the Mining Law 1997. The Law states that permission must be sought from the Ministry of Energy and Mines for undertaking i) the gathering of basic geological data; (ii) the analysis of mineral samples in the Lao PDR or overseas; (iii) the granting of licenses for prospecting, exploration and mining activities; and (iv) the establishment of mineral processing plants.<sup>182</sup>

In order to acquire a mining license, the investor must conduct a feasibility study. This is also needed to negotiate a mining concession agreement.

The maximum initial term for a prospecting license is 2 years, with a possible renewal of 1 year; for an exploration license, 3 years, with a possible renewal of 2 years; and for a mining license 20 years, which may be renewed for 5 years.

Foreign investors wanting to enter this sector must negotiate an agreement with the Government, yet the terms of such an agreement are not specified within the Mineral Law.<sup>183</sup> The Government may additionally exercise its right to participate as a shareholder in mining companies; to do so it must notify the company within 120 days of receiving the feasibility study.<sup>184</sup>

181 Ibid., Article 17.

182 This was summarized from the following document, as an English translation of the original law was not found: DFDL Mekong, “Legal Update: Laos Monthly Law Update,” February 2010, accessed January 29, 2013, <http://www.google.com.sg/url?sa=t&rc=1&q=&esrc=s&frm=1&source=web&cd=2&sqi=2&ved=0CDUQFjAB&url=http%3A%2F%2Fwww.dfdl.com%2Fresources%2Flibrary%2Flegal-update-archives%2Fcategory%2F17-law-updates-laos%3Fdownload%3D128%253A1ao-law-update-feb-2010&ei=kIwLUf2SGIuMrg-e4zICQCw&usq=AFAQjCNEeXUePRH-QCsYAiGzdEWjE-qio8Q&sig2=EGoAIME8Ik2Vo6qdJ-I8aQ&bvm=bv.41867550,d.bmk>.

183 DFDL Mekong, “Legal Update.”

184 Ibid.

Holders of an exploration license do not have an automatic right to exploit if a viable deposit is discovered.<sup>185</sup> Existing mining licenses under the 1997 Mining Law will continue in accordance with their agreements. Entities wanting their current agreements to come under the Mineral Law, would have to inform the Ministry of Energy and Mines within 120 days after the Mineral Law's entering into force. In fact, the law has been in force since 18 March 2009 but it was not published immediately and therefore not available to the public.<sup>186</sup>

The Minerals Law makes it a requirement that investors contribute to community development funds, with the intention that these funds be used to compensate the community and provides local benefits.<sup>187</sup>

### c) Land

Land is the most abundant resource for Lao PDR and therefore an important “engine for economic growth.”<sup>188</sup> The country's key challenges are rooted both in deficient rules as well as in incorrect implementation of the policies and laws.<sup>189</sup>

Land law in Laos is governed by the 1997 Land Law which was amended in 2003, and further instructions for implementation have been provided by several decrees. Of particular relevance is also the Law on the Promotion of Foreign Investment of 2001 which imposes a responsibility to prevent investment which causes a negative impact on the

environment on the respective ministries.<sup>190</sup>

### Land registration and use

Land registration certifies the land use rights of an individual or organisation.<sup>191</sup> There are two forms of registration:<sup>192</sup> (i) systematic land registration which is undertaken without request in a particular area, and (ii) land registration based on request, which is undertaken at the request of an individual or organisation. A land title is “the only document which is considered as the main evidence for permanent land use rights.”<sup>193</sup>

The holder of land use rights has the following rights under Article 53:

- Right to protect land
- Right to use land
- Right of usufruct
- Right to transfer the land use right
- Right relating to inheritance of the land use right

These rights are further defined in Articles 54 – 58 of the Land Law 2003.

Persons who do have the right to use land have some obligations, including:<sup>194</sup>

- to not cause damage to land quality and to not cause adverse impact to the natural or social environment;
- to not violate the rights and interest of other persons.

Foreign individuals and organisations have certain obligations for land use, including:<sup>195</sup>

- To not cause damage to land quality and to not cause adverse impact to the natural or social environment.

185 Ibid.

186 Ibid.

187 “Lao PDR: Government partners with the mining sector to support local communities,” World Bank, accessed January 29, 2013, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/0,,contentMDK:23007191~menuPK:208943~pagePK:2865106~piPK:2865128~theSitePK:226301,00.html>

188 Ministry of Planning and Investment, Lao PDR World Bank Group, Lao PDR Investment and Access to Land and Natural Resources: Challenges in Promoting Sustainable Development - A Think Piece (A basis for dialogue), a jointly prepared report, November 2011, 1.

189 Ibid., 7.

190 Ibid., 15.

191 Land Law 2003, Article 43.

192 Ibid., Article 44.

193 Ibid., Article 49.

194 Ibid., Article 60. This is not an exhaustive list.

195 Land Law 2003, Article 67.

- To not violate the rights and interest of other persons.

### Communal Land

Community land registration and titling (CLRT) projects are being undertaken by the Land Issues Working Group (LIWG) in rural areas of Laos.<sup>196</sup> According to the LIWG 2012 report, the primary obstacle to widespread registration is that the procedures are not fully developed.<sup>197</sup> International donors have reviewed the procedures and created guidelines for CLRT programs.

Article 3, Decree 88/PM on the Implementation of the Land Law, 2008 provides a definition of state land and collective or communal land. Ministerial Direction No. 564/PM/NLMA, 2007 Paragraph 4.11 provides a definition of individual or private land. Ministerial Approval/Decision No. 0054/MAF 1998, relating to customary rights and the use of forest resources, provides that customary rights are respected in all dealings between users and third parties,<sup>198</sup> custom prevails in disputes, resolved in the village system<sup>199</sup> and compensation will be provided where the means of livelihood is affected.<sup>200</sup>

The objectives of communal land titling include ensuring equitable access to resources, poverty reduction, ensuring sustainable use of natural resources, and effectiveness and acceptance of formal land registration by reducing the gap between customary and statutory systems.<sup>201</sup> However, there are some challenges with this process. Customary mechanisms for land allocation are not in line with government goals of gender equity.<sup>202</sup> Also, demarcation of boundaries of communally held

196 Department of Lands, National Land Management Authority Land Issues Working Group (LIWG), "Draft Report On Policy Overview on Community Land Registration and Titling (CLRT)," February, 2012, 2.

197 LIWG, "Draft Report On CLRT," 2.

198 Ministerial Approval/Decision No. 0054/MAF, Article 7.

199 Ibid., Article 8.

200 Ibid., Article 9.

201 LIWG, "Draft Report On CLRT," 17.

202 Ibid.

lands may create inter-community conflicts, particularly when members of the communities have different access to resources as well as bargaining power.<sup>203</sup>

Collective land is defined by Instruction 564/NLMA, 2007 as "land that the State grants to a group or a collective. The group or collective has the right to protect and to use the land however, the group does not have the right to sell, transfer, lease, or use the land as collateral. The land must not be owned by an individual and the group or collective must consider the land communal land that each member of the group or collective may use. The land must be zoned as a type of land that is approved as communal land."

Collective land can be registered by the village at no cost, cannot be sold, the state cannot grant land use rights to the land, which protects the villagers from illegal evictions, and it encourages security and tenure of the village.<sup>204</sup> However, the state may requisition the land without compensation, and the collective may be dominated by some members with power.<sup>205</sup> Agricultural land and village use forests can be deemed collective land, however the legislation is not clear on what is and is not eligible for collective land status, there seems to be some ambiguity about it in the literature.<sup>206</sup>

### Concessions

State land is zoned and classified based on the geographical landscape and socio-economic situation in each zone by Article 50 of the Law on Investment. Incentives regarding taxes and custom duties are granted depending on the area and level of the investment.<sup>207</sup>

The Land Law states that land lease or concessions from the State to "aliens...or their organisations... [shall not] exceed thirty years, but may be extended

203 Ibid.

204 LIWG, "Draft Report On CLRT," 19.

205 Ibid.

206 Ibid., 19-21.

207 Wellmann, "Discussion Paper," 6.

on a case by case basis in accordance with the approval of the government.<sup>208</sup> Lease of developed land by Lao citizens to foreigners cannot exceed twenty years, unless with the approval of the local administration.<sup>209</sup> Article 65 of the Land Law states that state land lease or concessions can have a maximum duration of 50 years, but may be extended by the government on a case by case basis.<sup>210</sup> This contradicts Decree 135/PM giving 60 to 70 years for concessions.<sup>211</sup> The process for granting a land concession should include, by statute, a land survey, a land map and a land use plan.<sup>212</sup>

### Moratorium 2007

As a response to escalating social, environmental and economic concerns expressed on land concessions, in May 2007, the Prime Minister announced an indefinite moratorium (Announcement No. 743) of land areas over 100 ha for industrial trees, perennial plants and mining purposes. The reason for the moratorium was twofold, the Government saw a need to improve its concession strategy with a view to concerns about the lack of financial returns from concessions as well as social and environmental problems related to concessions. Despite the moratorium, there was still considerable activity with some large projects being divided into smaller parts in order to circumvent the moratorium. A brief lift of the moratorium in 2009 was quickly withdrawn.<sup>213</sup>

## **d) Economic Law**

### Investment Promotion Law

The Law on Investment Promotion of 2009 stipulates principles and regulations regarding

208 Land Law 2003, Article 65.

209 Ibid.

210 Ibid.

211 Wellmann, "Discussion Paper," 17.

212 Ibid., 7.

213 Ministry of Planning and Investment, Lao PDR World Bank Group, Lao PDR Investment and Access to Land and Natural Resources: Challenges in Promoting Sustainable Development - A Think Piece (A basis for dialogue), a jointly prepared report, November 2011, 16.

the promotion and management of domestic and foreign investments. Article 5 of the Law provides certain principles for investments to comply with:

1. To comply with the policy guideline, strategy, socio-economic development plan, development plan of the sector and region, the economic and social expansion in each period, the increase in the living condition of the peoples; and to comply with the laws and regulations;
2. To firmly link with the strengthening of the management of the State in a centralized and uniform manner throughout the country;
3. To ensure that the investment has received the services which are convenient, speedy, transparent, fair and equal before the law through the application of the investment's one-door-services;
4. To formulate the promotion policy in various fields which can attract and mobilize the investments;
5. To recognize and ensure the protection of lawful ownership, legitimate rights and interests of the investors from the State;
6. To ensure the protection and development of environment, peace and security in the society and in the investment area.

Article 8 of the Law divides investment in Laos into three categories: general business, concession business and activities for development of Special Economic Zones and Specific Economic Zones.

The Law further states that "the applicant for investment in concession activities shall be subjected to the selection made on case by case basis by using different methods, such as: comparison, bidding or evaluation which are performed by the concerned Planning and Investment sector in coordination with the concerned sectors and the local administrative organization in consistence with the laws and regulations. In the selection of investor, the transparency, openness and accountability shall be

ensured.”<sup>214</sup>

Article 69, which states the obligations of investors, includes Clause 3:

“To introduce the **social insurance and social security system for the workers** in their enterprises in compliance with the relevant law; to promote the employment of Lao labour; give the emphasis on **labour skill development**, upgrading of specialized skill and transfer of technology to Lao workers.”

In addition, Clause 5 provides:

“To coordinate with the local administrative organization with regard to the business activities; pay the **compensation for the damages** which are caused by their business; make the contribution to the **eradication of poverty** of the peoples and to the **local development** in the area where their projects are located.”

Article 70 further states that investors have the obligation to protect the environment:<sup>215</sup>

“The investors have the obligations to protect and develop the environment, ensure that the business operations have no significant negative impacts to the public, the security and social order or to the health of the labourers. In case of the occurrence of the environmental problems, the investors have the obligation to take necessary measures to solve such situation in a timely manner in accordance with the laws and regulations.”

Article 76, setting out the terms for termination of the investment, includes the following as Clause 1: “The organization issuing the license will be charged with issuing the notification of warning to the investor in case it is found that the business operations are **not in compliance with the concession agreement**, laws and regulations and have **harmful impact to the environment** in order to allow the investor to find the solutions and to make the improvement within a period of ninety days, commencing from

<sup>214</sup> Law on Investment Promotion 2009, Article 22.

<sup>215</sup> Ibid., Article 70.

the date of the notification, and a memorandum shall be made with the investor.”

### Foreign Investment Law

The Law on the Promotion of Foreign Investment, 2004, states that foreign investors can invest in all sectors and industries except for those “activities that are detrimental to national security or cause a negative impact on the environment in the present or long term, or are detrimental to health...”<sup>216</sup>

Foreign investors can invest in Lao through:<sup>217</sup>

1. Business cooperation by contract,
2. Joint ventures between foreign and domestic investors, and
3. 100% foreign owned enterprises.

These forms are further defined in the Law.

Foreign investors have several rights and benefits which are set out in Article 12 of the Law, including:

1. The right to receive support from the government in establishing and operating their production.
2. To receive leases and concessions on land, and various rights arising from that.
3. The use of foreign labour, restricted to 10% of the labour force.

The obligations of foreign investors under Article 13 of the Law include:

1. The obligation to pay the necessary taxes, duties and other fees.
2. To give priority to recruiting Lao workers and to train and upgrade their skills.
3. To address matters of social security, health and safety of their employees.

<sup>216</sup> Law on the Promotion of Foreign Investment 2004 (Foreign Investment Law), Article 3.

<sup>217</sup> Ibid., Article 5.

4. To protect the environment and ensure that their activities do not severely impact the public, national security or public order.

The Law has determined 3 promoted zones for foreign investment based on geographical location and socio-economic conditions.<sup>218</sup> Each zone has different taxes and duties incentives.<sup>219</sup> The Committee for Promotion and Management of Investment (CPMI) is responsible for monitoring and managing foreign investment.<sup>220</sup>

### Enterprise Law

The 2005 Enterprise Law is the primary law governing all enterprises. One of its primary provisions was to reduce the amount of time in incorporating a new business, which could take up to 219 working days.<sup>221</sup> The new Law changes the principle from requiring permission to notification and registration, with the exception for the “negative list” of certain important sectors, which undergo a slightly more detailed procedure.<sup>222</sup> The new EL also removed the need for minimum capital requirements.<sup>223</sup> In keeping with the desire for transparency, the law allows anyone to access the registration documents of a business for a fee.<sup>224</sup> The company registry is meant to be a single access point that brings together different agencies.<sup>225</sup>

### Anti-Corruption Law 2005

The Anti-Corruption Law defines principles and measures to prevent and counter corruption.<sup>226</sup> The Act defines corruption as “the act of an official who opportunistically uses his position, powers, and duties to embezzle, swindle [or] receive bribes

218 Ibid., Article 17.

219 Ibid., Article 18.

220 Ibid., Article 21.

221 LNCCI Business Centre, “The New Enterprise Law : A Major Step Towards Improving Business Environment in Lao PDR,” *Business Issues Bulletin* 3 (2006):1.

222 LNCCI, “The New Enterprise Law,” 1.

223 Ibid., 3.

224 Ibid., 4.

225 Ibid.

226 Anti-Corruption Law 2005, Article 1.

or any other act provided for in Article 10...to benefit himself or his family, relatives, friends, clan, or group and causes damage to the interests of the State and society or to the rights and interests of citizens.”<sup>227</sup>

The Act is concerned with both preventing corruption from taking place as well as fighting and punishing corruption already taking place, which is termed as “countering” in the Act.<sup>228</sup> The obligation to prevent and counter corruption rests with government organisations, social organisations, the media as well as citizens.<sup>229</sup>

The Act enumerates a number of actions that constitute corruption, such as:<sup>230</sup>

- Embezzlement of state property or collective property.
- Taking bribes.
- Abuse of position and power to take state, collective or individual property.
- Cheating or falsification of technical construction standards.
- Forging documents.
- Disclosure of state secrets for personal benefit.<sup>231</sup>

These actions are further defined in the Law.<sup>232</sup>

The State has the following duties to prevent corruption:<sup>233</sup>

- Educate the public to respect and comply with the laws.
- Improve governance mechanisms to ensure transparency.
- Define and implement policies toward government staff at each level.

227 Ibid., Article 2.

228 Ibid., Article 4.

229 Ibid., Article 6.

230 Ibid., Article 10.

231 Article 10 for a full list.

232 Ibid., Articles 11 – 21.

233 Ibid., Article 23.

- Impose discipline and punishment on offenders.
- Promote public participation in preventing and countering corruption.<sup>234</sup>

#### Sanctions and Punishment:

For minor offences, willingly reported and where full restitution is made, the offender will be given a warning and “education measures.”<sup>235</sup>

For minor offences that were not willingly reported, the disciplinary measures include:<sup>236</sup>

- Criticism and a note in his file.
- Suspended from receiving a promotion or raise.
- Removal or transfer from the position.
- Dismissal from position.

All property that was taken must also be returned.

Where there is evidence, the counter-corruption organisation must send the case to the public prosecutor.<sup>237</sup> If the public prosecutor fails to prosecute within 30 days, the counter-corruption organisation can submit to a higher level of prosecutor.

Actions enumerated under Article 10 are subject to penal sanctions.<sup>238</sup> For cheating or falsifying technical standards, the offender will be subject to five years’ imprisonment and fined 1% of the damages.<sup>239</sup> For falsifying “on a regular basis,” the punishment is five to fifteen years and fined 1% of the damage. When undertaking this as part of “an organised group and caus[ing] severe damage,” the punishment is fifteen to twenty years and fined 1% of the damage.<sup>240</sup> For disclosure of state secrets, the punishment is 3 months to one year, with a 1,000,000 to 5,000,000 Kip fine (USD 126 – USD 628).<sup>241</sup>

<sup>234</sup> See Article 23 for full list

<sup>235</sup> Anti-Corruption Law 2005, Article 32.

<sup>236</sup> Ibid., Article 33.

<sup>237</sup> Ibid., Article 34.

<sup>238</sup> Ibid., Article 46.

<sup>239</sup> Ibid., Article 47.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid., Article 50.

Additional regulations that relate to anti-corruption are the changes to the Penal Code to include specific penalties for corruption and money laundering which were approved in October 2005, as well as the Anti-Money Laundering Decree which was approved in May 2006. Lao PDR signed the UN Convention against Corruption in 2003. There are wide-ranging requirements imposed by the Convention, many of which Lao PDR doesn’t have the capacity to implement.<sup>242</sup> Lao PDR is also a party to the UN Convention against Trans-national Crime.

Additionally, the Law on Promotion of Investment contains the following provisions on prohibition of taking bribes:

#### Article 72. Prohibitions for Officials

The officials are prohibited to perform the following acts:

1. To abuse the power, functions, position for illegal personal benefits;
2. To accept the bribe from the investors or from the persons seeking personal interest from the investment;
3. To disclose the confidential documents of the nation, of the offices and of the investors;
4. To delay or extend [the] time to consider the documents of the investors without reason;
5. Perform other acts which are the prohibitions stipulated in the laws and regulations.

#### Article 73. Prohibitions for the Investors

The investors are prohibited to perform the following acts:

1. To give the bribe to State authority and officials in charge of the concerned works;

<sup>242</sup> United Nations Development Programme (UNDP), “Baseline Study for the preparation of a National Anti-Corruption Strategy,” (Bangkok: UNDP, 2006), 23.

2. To evade the fulfillment of the obligations; conceal the revenue, profits as well as the figures relating to the custom duties and taxes payment;
3. To make the false allegations or slandering propaganda against the State organization and the officials;
4. Perform other acts which are the prohibitions stipulated in the laws and regulations.

### e) Women and Children

#### General Rights and Protection

The Law on the Development and Protection of Women 2004 aims to protect the rights of women, and outline the measures to be undertaken for developing and promoting their advancement in society. The Law specifically states that women in Laos play a role in all sectors of the country, including politics, the economy, national defence, and protection of the environment.<sup>243</sup> The development of women refers to these aspects:<sup>244</sup>

- Physical development
- Mental development
- Educational development
- Professional and skills development

These aspects are further defined in the Law in Articles 9-12. The Law also states that men and women possess equal rights,<sup>245</sup> equal political rights,<sup>246</sup> equal economic rights,<sup>247</sup> equal cultural and social rights<sup>248</sup> and equal rights in the family.<sup>249</sup> Women have the equal right to inherit property, and a wife has equal right to matrimonial property.<sup>250</sup>

<sup>243</sup> Law on the Development and Protection of Women 2004 (Protection of Women Law), Article 2.

<sup>244</sup> Ibid., Article 8.

<sup>245</sup> Ibid., Article 13.

<sup>246</sup> Ibid., Article 14.

<sup>247</sup> Ibid., Article 15.

<sup>248</sup> Ibid., Article 16.

<sup>249</sup> Ibid., Article 17.

<sup>250</sup> Ibid.

Women have the right to “work in safe conditions and environments, to social security, and to remuneration and other benefits... ”<sup>251</sup>

#### Trafficking of Women

Trafficking is defined in Laos Law as “the recruitment, hiding, moving, transportation, transfer, harbouring, [or] receipt of women, within or across national borders, by means of deception, the giving or receiving of bribes, threats, the use of force, [the use of] other forms of coercion, abduction, debt bondage or by other means, for forced labour, [for] prostitution, [for] publishing pornography and what is in contradiction to fine national culture, [for] the removal of various body parts, or for other unlawful purposes.”<sup>252</sup>

Victims have the right, among others, to request for compensation, to be rehabilitated, to receive protection and not to be prosecuted on any charge of trafficking.<sup>253</sup> The law also makes provision for a national committee for prevention of trafficking in humans.<sup>254</sup>

In June 2000, the National Project Committee for the collaboration with the UN Inter-agency Project to Combat Trafficking in Women and Children in the Mekong Sub-region was established.<sup>255</sup> In 2002, Lao PDR and Thailand concluded a bilateral agreement attempting to improve the management of labour migration between the two countries.<sup>256</sup> In 2005, they concluded an MOU on Trafficking to combat human trafficking, especially women and children.<sup>257</sup> Lao PDR has also concluded extradition agreements with Thailand, Vietnam,

<sup>251</sup> Ibid., Article 19.

<sup>252</sup> Protection of Women Law 2004, Article 24.

<sup>253</sup> Ibid., Article 25.

<sup>254</sup> Ibid., Article 26.

<sup>255</sup> Phetsiriseng, “Preliminary Assessment on Trafficking,” 4.

<sup>256</sup> “MOU between Lao PDR and Thailand (Thailand and Lao PDR) on Employment Cooperation,” October 18, 2002, [http://www.no-trafficking.org/resources\\_laws\\_regional.html](http://www.no-trafficking.org/resources_laws_regional.html).

<sup>257</sup> “MOU between Lao PDR and Thailand (Thailand and Lao PDR) on Cooperation to Combat Trafficking in Persons, Especially Women and Children,” July 13, 2005, [http://www.no-trafficking.org/resources\\_laws\\_regional.html](http://www.no-trafficking.org/resources_laws_regional.html).

China and Cambodia which could potentially cover suspected traffickers.<sup>258</sup> Laos is also a member of the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT) and signed the COMMIT Ministerial Declaration and corresponding MOU in 2004.

### Children's Rights

The Law on the Protection of the Rights and Interests of Children 2006 defines a child as a person under 18 years of age.<sup>259</sup> The rights provided by the law to children include the right to education, access to health care, participation in sports, artistic and literary activities, and protection from abuse.<sup>260</sup> The Law states that the "best interests of the child" will be the deciding factor in decisions about the welfare of the child.<sup>261</sup> Article 6 states that "[a]ll children are equal in all aspects without discrimination..."<sup>262</sup>

The State will create conditions for access to health care for children,<sup>263</sup> care of children affected by HIV,<sup>264</sup> education for disabled children<sup>265</sup> and education for children with HIV.<sup>266</sup> Disclosure of the HIV / AIDs status of children is illegal.<sup>267</sup>

The law requires the Ministry of Labour and Social Welfare to establish a Committee for Protection and Assistance to Children, to monitor children who are at risk and need special protection and provide assistance and inspection of services provided.<sup>268</sup> A Child Labour and Child Trafficking Office (CLCT Office) was set up within the Ministry of Labour and Social Welfare (MOLSW) in 2001 to coordinate interventions for confronting the child labour

problem, including the trafficking of children. Additionally, the Lao Government ratified ILO Conventions No. 138 and No. 182 in 2005.

### Sanctions

Persons committing trafficking against women and children will be punished with five – fifteen years of imprisonment and fined 10,000,000 – 100,000,000 Kip (USD 1,257 – USD 12,566).<sup>269</sup> With organised offenders, offending against multiple victims or child victims, the punishable term is fifteen – twenty years, with a fine of 100,000,000 – 500,000,000 Kip (USD 12,566 – USD 62,830). Where the victim is infected with HIV, incapacitated for life or killed, the offender will receive life imprisonment and fined 500,000,000 – 1000,000,000 Kip (USD 62,830 – USD 125,660). Accomplices will receive four-ten years and fined 5,000,000 – 50,000,000 Kip (USD 628 – USD 6283).<sup>270</sup>

Producing, distributing, selling any item of child pornography is punished by one – three years imprisonment and fine of 2,000,000 – 6,000,000 Kip (USD 251 – USD 754).<sup>271</sup> Using child labour in hazardous sectors is punishable by imprisonment of three months to a year, with a fine of 1,000,000 – 2,000,000 Kip (USD 126 – USD 251).<sup>272</sup> If the use of child labour causes disability or death, the term of imprisonment is three – seven years and 3,000,000 – 7,000,000 Kip (USD 377 – USD 880).<sup>273</sup>

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258 Gallagher, "Shadow Report," 19.

259 Law on the Protection of the Rights and Interests of Children (Protection of Children Law) 2006, Article 2.

260 Ibid., Article 3.

261 Ibid., Article 4.

262 Ibid., Article 6.

263 Ibid., Article 15.

264 Ibid., Article 17.

265 Ibid., Article 30.

266 Ibid., Article 31.

267 Ibid.

268 Protection of Children Law 2006, Article 36.

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269 Protection of Women Law 2004, Article 49.

270 Ibid.

271 Protection of Children Law 2006, Article 86.

272 Ibid., Article 87.

273 Ibid.

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

#### a) Labour

##### General labour law

The ILO report states that the implementation of the 2006 labour law is patchy, and the ratification by Lao of certain ILO conventions would require changes to the current domestic law.<sup>274</sup> The MOLSW is hampered in its effectiveness due to limited technical capacity, management capacity and information deficits.<sup>275</sup>

The establishment of an Occupational Safety and Health (OSH) Master Plan in 2005 by the MOLSW was an important step, however, implementation and enforcement remains a challenge.<sup>276</sup> The use of new technologies and chemicals within industrial processes lead to risks unknown by workers or, in some cases, OSH inspectors.<sup>277</sup> Lao PDR is currently coordinating the ASEAN Occupational Safety and Health Network (ASEAN-OSHNET).<sup>278</sup>

The LFTU, established in 1966, is the only national workers' organization, and it maintains the status of a ministry with subsidy support (both staff and activities) from the Government.<sup>279</sup>

The Lao National Chamber of Commerce and Industry (LNCCI) was established in 1989, and it provides the Government with views and comments on business operations as well as protecting the rights and interests of enterprises.<sup>280</sup>

274 ILO, "Report: Lao PDR 2006-09," 8; Equal Remuneration Labour Convention, 1952 (No. 100), and the Discrimination (Employment and Occupation) Labour Convention, 1958 (No. 111).

275 ILO, "Report: Lao PDR 2006-09," 35.

276 Ibid., 9.

277 ILO, "Report: Lao PDR 2006-09," 9.

278 Ibid.

279 Ibid., 35.

280 Ibid.

#### Trafficking

A National Plan of Action against Trafficking in Persons (2007–2012) was developed in consultation with the ILO, although it wasn't officially inaugurated.<sup>281</sup> Through the project, village funds were established to provide alternative economic opportunities and reduce migration.<sup>282</sup> This initiative is reported to have reduced migration levels. Additionally, a public awareness campaign of the risks of migration through radio, TV and print media has reportedly reached an estimated 1.4 million persons.<sup>283</sup>

#### b) Environment

The Lao government has many laws and regulations governing environmental issues, such as requiring Environmental Impact Assessments (EIAs), requiring the negative impact on the environment to be minimised, and ensuring that those affected by projects are adequately compensated. However, most of these regulations are implemented patchily at best, and lack of adequate data renders the level of implementation unclear.<sup>284</sup>

Strategic Environmental Assessments (SEA) is a systematic processes to evaluate the environmental consequences of policies, plans and programs.<sup>285</sup> SEAs provide information beyond just a single project, and are thus useful for regional level planning.<sup>286</sup> Lao doesn't have a policy for conducting SEAs, however some have been conducted, such as one commissioned by the Mekong River Commission.<sup>287</sup>

281 Ibid., 24-25.

282 Ibid., 25.

283 Ibid.

284 See generally Earth Rights, "I Want to Eat Fish"; Environmental Investigation Agency, "Crossroads."

285 UNDP, "Economic, social and environmental impacts of investments in mining," Poverty-Environment Initiative Lao PDR Issues Brief, 2010, 3.

286 Ibid., 4.

287 Ibid.

## Hydropower Projects

Spatial data can be helpful to determine more accurately the extent of impact from mining and hydropower projects on the vulnerable populations in the vicinity; however, there is no database in Laos that combines such data for these projects.<sup>288</sup> A preliminary analysis conducted on the available data suggests that with the information available at the time of the study, 293 villages would be affected by the proposed hydropower projects,<sup>289</sup> affecting around 100,000 people.<sup>290</sup> Around 49,000 people live within an hour's walk of a current or planned reservoir, many of whom will be affected by direct or indirect effects.<sup>291</sup>

The biggest hydropower project in the country's history is currently being realised: the Nam Theun II project. A pre-feasibility and environmental study conducted on the Ban Kum Hydropower project illustrated the negative impacts that the project would have on the people living in villages in the vicinity. It would flood four villages, on both sides of the Mekong River, and have a negative impact on fisheries on the river, impacting the food security of villages dependant on that income.<sup>292</sup> The report also found that the EIA conducted previously was inadequate, and ignored the potential impacts on the villages' ecosystem.<sup>293</sup> Another report states that villagers are not consulted on dam projects, but informed of the location of the dam once the agreements are signed.<sup>294</sup>

288 Nina Fenton and Magnus Lindelow, "The socio-geography of mining and hydro in Lao PDR: Analysis Combining GIS Information with Socioeconomic Data," Lao PDR Development Report 2010, Natural Resource Management for Sustainable Development, (World Bank, 2010), 3.

289 Fenton and Lindelow, "Socio-geography of mining and hydro," 6. The study only took into account those projects which had concluded a Memorandum of Understanding, and the projects for which GIS data was available, which was 42 out of 90 current or planned hydropower projects. According to the Ministry of Energy and Mines, there are 63 projects for which there is no MOU and these were not included in the analysis.

290 Ibid., 7.

291 Ibid.

292 Earth Rights, "I Want To Eat Fish," 113.

293 Ibid., 117.

294 Ibid., 124.

On another project, the French company EDF has been accused of violating OECD Guidelines regarding their services to the Nam Theun 2 hydropower project, and a coalition of 62 NGOs referred the issue to the French National Contact Point.<sup>295</sup> Members of the Lao diaspora are deeply opposed to the project, fearing that the economic benefits wouldn't trickle down to the poor, and the costs would have to borne disproportionately by the disadvantaged.<sup>296</sup>

## Mining

According to the MEM, by November 2010, there were 263 mining projects in Lao,<sup>297</sup> although 16 mining concessions have been revoked by the Government.<sup>298</sup> According to a Vientiane Times article, the Mines Department Deputy Director General stated that "the ministry was inspecting the operations of mining projects around the country, aiming to complete a full assessment by early 2013. Several officials at the Mines Department admitted their capacity for managing mining operations is limited as the government had approved too many mining projects."<sup>299</sup> It is difficult to estimate the numbers affected by mining concessions, but the study estimates that around 114,000 people are living in mining exploitation areas and would be potentially affected.<sup>300</sup> As many mining projects are small and medium-sized, they are less likely to implement environmental standards.<sup>301</sup> Artisanal and informal mining are also contributing to pollution and erosion problems.<sup>302</sup> In addition, mining projects also require access to infrastructure, which often needs to be subsidised by the Lao government.<sup>303</sup>

295 Lao Movement for Human Rights, "Situation in Lao PDR," 12.

296 Ibid.

297 UNDP, "Impact of investments in mining," 2.

298 Ibid., 3. This data is accurate as of December 2010.

299 Times Reporters, "Lao Govt to close mines that flout the rules," *Vientiane Times*, 8 December 2010.

300 Fenton and Lindelow, "Socio-geography of mining and hydro," 8.

301 UNDP, "Impact of investments in mining," 2.

302 Ibid.

303 Ibid., 3.

Data collected from the 2005 Census, and other available data suggest that those affected by the hydropower and mining concessions are among the poorest households in Laos; they are also disproportionately likely to be illiterate and belong to an ethnic minority group.<sup>304</sup> The areas targeted are generally remote and lack access to health and education.<sup>305</sup> When the mining and hydropower projects have negative impacts on society and the environment therefore, they disproportionately impact the poorest, and those from the minority communities; causing the costs of development to be borne by those who can least afford it.

### Investments and concessions

There is evidence to suggest that the government, in its zeal to acquire investment, is failing to secure the most economic advantages for its people. Perera argues that the Lao government is under the mistaken assumption that unless financial incentives are offered, foreign investors will not be interested in investing in Laos.<sup>306</sup> The Government offers tax holidays for up to 10 years for certain sectors, exempt import and export duties and income tax for public sector investments.<sup>307</sup> Incentives for concession investments are negotiated on a case-by-case basis, and the final details are not released to the public, thus blocking transparency.<sup>308</sup>

Ideally, natural resource wealth can be used to promote better governance rather than, potentially, exacerbating poor governance and corruption (resource curse).<sup>309</sup> Yet, in the case of hydropower investments, often land conversion fees are waived, unlimited foreign labour is permitted, and various other waivers and tax exemptions, which make the

304 Fenton and Lindelow, "Socio-geography of mining and hydro," 8.

305 Ibid.

306 Oshani Perera, "Investment incentives for sustainable development: The case of Lao PDR," Poverty-Environment Initiative, (UNDP, 2011), 3.

307 Perera, "Investment incentives," 3.

308 Ibid., 4.

309 Ian C. Porter and Jayasankar Shivakumar (eds), *Doing a Dam Better: The Lao People's Democratic Republic and the Story of Nam Theun 2*, World Bank 2011, 34.

State reliant on royalties for revenue, and reduce the resources available for development of the country.<sup>310</sup> The World Bank performed an extensive review of the Nam Theun II Project in order to draw lessons for "turning the resource curse on its head" in future projects.<sup>311</sup>

### Deforestation and illegal logging

There is a flourishing trade in illegal timber between Vietnam and Laos.<sup>312</sup> Laos' law prohibits timber trade, however it continues unabated. Illegal logging threatens Laos' forest cover as well as the livelihood of 4.2 million of the rural population of Laos who depend on the forests. A UN study found that non-timber forest products account for 90% of income for the poorest families in Laos.<sup>313</sup> An order by the Prime Minister explicitly stated that raw logs are banned from export and that only finished timber products can be exported.<sup>314</sup> The laws are however not enforced due to problems of corruption and poor governance within Laos.<sup>315</sup>

In 2005, the World Bank Environment Monitor estimated that 41.5% of the country was under forest cover.<sup>316</sup> This is reportedly reduced from 70% in 1940.<sup>317</sup> The rich biodiversity of the country is also under threat. Soil erosion and 'slash-and-burn' agriculture further compounded environmental problems.<sup>318</sup>

310 Perera, "Investment incentives," 4.

311 Ian C. Porter and Jayasankar Shivakumar (eds), *Doing a Dam Better: The Lao People's Democratic Republic and the Story of Nam Theun 2*, World Bank 2011, 34, 163.

312 Environmental Investigation Agency, "Crossroads."

313 Pei Sin Tong, "Lao People's Democratic Republic Forestry Outlook Study," (United Nations Food and Agriculture Organization, 2009).

314 Lao PDR Prime Minister Order No. 18 on Forest Management Policy, 2002

315 Environmental Investigation Agency, "Crossroads," 3.

316 World Bank, "Environment Monitor," viii.

317 Ibid.

318 Ibid.

### c) Land

#### Land resettlement programs

Government resettlement programs of ethnic minorities has led to land shortages and conflicts, as the new land is of poor quality, forcing the community to travel to their old land for economic reasons.<sup>319</sup> Government policy to replace shifting cultivation has resulted in the movement away from upland rice to annual cash crops, which has negatively impacted the soil quality and environment, and has implications for food security.<sup>320</sup>

The Land and Forest Allocation (LFA) Policy, 1996, was meant to encourage productive use of land in rural areas and halt environmental degradation by controlling the expansion of shifting cultivation, especially in the upland areas.<sup>321</sup> However, Fujita and Phanvilay argue that LFA has instead contributed to unexpected social and environmental problems.<sup>322</sup> The LFA was credited with being a progressive land management policy, with the government recognising the customary resource use practises of the local population, as well as collective and private use of land.<sup>323</sup> LFA allowed villages to draw up a resource use policy together with local officials, and by 2003, more than 5,000 villages were stated to have completed this procedure.<sup>324</sup>

However, Fujita and Phanvilay argue that the LFA reduced the villager's access to swidden and fallow lands, adversely impacting their income.<sup>325</sup> The government reportedly ignored the customary use of the land, and the reclassification resulted

in shortening the fallow period, lower rice production and soil erosion.<sup>326</sup> The authors argue that the government's zoning simplified a complex relationship between the people and the land, which negatively impacted both.<sup>327</sup> This was partly due to dwindling funds allocated for the implementation of the program resulting in an inadequate monitoring system.<sup>328</sup>

#### Land registration and titling

On average, an agricultural household has between 0.5 – 3 hectares of land for private use, aside from access to village and communal land.<sup>329</sup> Deforestation is a significant concern, with the forest cover having reduced from 41.5% in 2002 to 35% in 2007.<sup>330</sup> It is estimated that land concessions count for up to 13% of total land area of Lao, between 2 – 3 million hectares.<sup>331</sup> According to Wellmann, often the legal background and framework for granting state land leases are unclear to the parties involved.<sup>332</sup> A GTZ report states that concessions are even granted twice on the same land, contributing to land conflicts.<sup>333</sup>

There are 6 types of legal documents related to land ownership and land use: land title, land survey certificate, temporary land use certificate, land tax declaration, land tax receipts and village heads certificate on land ownership.<sup>334</sup> The need for multiple documentation reduces transparency and due to the various fees may foster corruption.<sup>335</sup> Even a completed documentation does not guarantee protection when conflicts related to land concessions arise.<sup>336</sup>

319 Oliver Schoenweger and Alfons Üllenberg, "Foreign Direct Investment in Land in the Lao PDR," (Germany: GTZ, 2009), 8.

320 Ministry of Agriculture and Forestry, "Policy Brief #2: Rural Land Management and Land Administration," The Sub-Working Group on Uplands Development, August 28, 2008, 1-2.

321 Yayoi Fujita and Khamla Phanvilay, "Land and Forest Allocation in Lao People's Democratic Republic: Comparison of Case Studies from Community-Based Natural Resource Management Research," *Society and Natural Resources* 21 (2008): 121

322 Ibid.

323 Ibid., 122.

324 Ibid., 123.

325 Ibid., 124.

326 Fujita and Phanvilay, "Land and Forest Allocation in Lao PDR," 124.

327 Ibid., 130.

328 Ibid.

329 Schoenweger and Üllenberg, "Foreign Direct Investment in Land," 6.

330 Ibid.

331 Ibid., 6-7.

332 Wellmann, "Discussion Paper," 4.

333 Schoenweger and Üllenberg, "Foreign Direct Investment in Land," 7.

334 Ibid., 10-11.

335 Ibid., 14.

336 Ibid., 11.

In 2010, the National Assembly urged the government to complete the formulation of a national master plan for land survey and allocation as a way to resolve land disputes.<sup>337</sup> According to the *Vientiane Times*, the deputy head of the NA's Economic, Planning and Finance Committee, Dr Souvanpheng Bouphanouvong, said that without specific land allocation, land disputes would be impossible to settle.<sup>338</sup>

### Land management

Current land management strategy in Laos is characterised by high levels of local and foreign investment in agriculture, mining and hydropower.<sup>339</sup> Despite positive regulatory action on the part of the government, such as the moratorium on new land concessions, the effectiveness of the programs is hampered by the lack clear definitions of roles and responsibilities for the different agencies.<sup>340</sup> Often the various agencies duplicate tasks and even compete with each other.<sup>341</sup> This problem is compounded by the fact that provincial authorities often exceed and improperly execute their mandate with regard to new projects, and fail to carry out proper environmental assessments.<sup>342</sup>

Table summarising key issues and policy options<sup>343</sup>

337 Times Reporters, "Assembly urges govt to accelerate land master plan," *Vientiane Times*, November 17, 2010.

338 Ibid.

339 Ministry of Agriculture and Forestry, "Policy Brief #2," 1.

340 Ibid.

341 Ibid.

342 Ministry of Agriculture and Forestry, "Policy Brief #2," 1.

343 Ibid., 3.

**Table 2: Summary of key issues and policy options**

Areas	Issues
<b>Agriculture land concessions &amp; Contract farming</b>	<b>Concessions</b> <ul style="list-style-type: none"> <li>▪ No accurate information on extent of land concessions</li> <li>▪ Lack of provincial capacity to manage</li> <li>▪ Insufficient capacity to manage</li> <li>▪ Poor investor-village relationships</li> <li>▪ Reduces village land use options</li> <li>▪ Lack of coordination between sectors</li> </ul>
	<b>Contract Farming</b> <ul style="list-style-type: none"> <li>▪ Lack of clear and models and guidelines</li> <li>▪ Increasing land disputes and land grabbing</li> <li>▪ Unclear contract arrangements; villagers not well informed</li> <li>▪ Unclear marketing arrangements</li> </ul>
<b>Land Classification and Land Zoning</b>	<ul style="list-style-type: none"> <li>▪ Duplication and competition between NLMA and MAF</li> <li>▪ Land suitability maps and soil surveys are inadequate land use planning tools; need more socio-economic input</li> <li>▪ No evaluations of zoning methods</li> </ul>
<b>Land and forest allocation</b>	<ul style="list-style-type: none"> <li>▪ Reduction and access to agriculture land</li> <li>▪ Systems for data record keeping inadequate</li> <li>▪ Land certificates not adequate for registration purposes</li> <li>▪ Monitoring focused on enforcement</li> <li>▪ Programme under-resourced financially and staff wise</li> </ul>
<b>Shifting Cultivation Stabilisation-Elimination</b>	<ul style="list-style-type: none"> <li>▪ Inadequate guidelines and planning procedures</li> <li>▪ Misinterpretation of policy intentions</li> <li>▪ Inadequate extension support</li> <li>▪ Increased degradation of lands due to permanent agriculture</li> </ul>
<b>Rural Land Tenure</b>	<ul style="list-style-type: none"> <li>▪ Temporary land use certificates did not provide adequate security</li> <li>▪ Land titling programs have not assisted rural poor to date</li> <li>▪ Communal land agreements are not recognized when approving land concessions</li> </ul>
<b>Village Re-location and Consolidation</b>	<ul style="list-style-type: none"> <li>▪ Inequities in land distribution among different ethnic groups</li> <li>▪ Village land conflicts and boundary disputes increased</li> <li>▪ Out migrations of original residents</li> </ul>
<b>Land Information Systems</b>	<ul style="list-style-type: none"> <li>▪ Inadequate land information systems for effective management</li> <li>▪ Information scattered between various agencies and levels</li> <li>▪ Lack of staff capacity to develop and utilize land information systems</li> </ul>
<b>Institutional Relationships Between MAF and NLMA</b>	<ul style="list-style-type: none"> <li>▪ Unclear roles and responsibilities and duplication of effort</li> <li>▪ Technical agencies being under utilized in making decisions on land investments by administrative authorities</li> </ul>

#### d) Economic Law

##### Anti-Corruption

The government of Mr. Bouasone Bouphavanh stressed their commitment to addressing issues of corruption by creating more transparency.<sup>344</sup> Over the past 5 years there has been more delineation between the responsibilities of the Party and the role of the government.<sup>345</sup>

344 UNDP, "Anti-corruption Baseline Study," 1.

345 Ibid., 7.

The factors that contribute to corruption are the extent of government involvement in the economy, the quality of governing institutions, the lack of economic and political competition, the prevalence of poverty and inequality, and the lack of media freedom to provide checks and balances.<sup>346</sup> Laos' abundant natural resources also create opportunities for rent-seeking activities leading to the natural resource curse.<sup>347</sup> It has also been argued that international aid agencies may unknowingly

346 UNDP, "Anti-corruption Baseline Study," 8.

347 Ibid.

contribute to the culture of corruption.<sup>348</sup>

The UNDP Baseline Study on Corruption groups the factors affecting corruption in Laos into five categories: political, economic, developmental, institutional and legal.<sup>349</sup> Transition of government from a command economy to a market economy, and the opening up of the country created an impetus for demand for material goods, and the desire for corrupt practises.<sup>350</sup> Also, some elite groups are influential enough to control policy decisions, and benefit themselves.<sup>351</sup>

The State is involved at every level of decision-making, and can interfere in cases of corruption. The Baseline Study postulates that this explains why no high-level official has been prosecuted for corruption; the political will to implement the law against corruption is lacking.<sup>352</sup> Politicisation in appointments, the entrenched patronage system, low government salaries and a culture of secrecy compound the problem.<sup>353</sup> Smuggling of natural resources, especially illegal timber logging takes place not only with official knowledge but also collusion, as members of the military are said to own timber companies.<sup>354</sup>

The prevalence of corruption reduces the available funds for public services due to the reduced revenue collections, and contributes to widening the gap between the rich and poor.<sup>355</sup> In the longer run, it also impacts the credibility of the government and foreign donors' support.<sup>356</sup> Domestically, there are political, economic and social effects that impact the stability and security of the country.<sup>357</sup>

348 Ibid.

349 Ibid.

350 Ibid.

351 Ibid., 9.

352 Ibid., 9-10; also see Bertelsmann Stiftung, *Laos Country Report*, 5.

353 UNDP, "Anti-corruption Baseline Study," 11-12.

354 Ibid., 16; also Environmental Investigation Agency, "Crossroads," 3.

355 UNDP, "Anti-corruption Baseline Study," 17.

356 Ibid., 18.

357 Ibid.

## e) Women and Children

### Trafficking and Migration

The UN Protocol on Trafficking<sup>358</sup> adopted a definition of trafficking: "the buying, selling and movement of persons within or between countries through (in the case of adults) a range of means such as coercion and deception, for the express purpose of exploiting them."<sup>359</sup> Lao's law against trafficking contains a similar definition, but does not include the trafficking of men, although many of whom are vulnerable.<sup>360</sup>

There are no official statistics on the number of trafficked persons in Laos available. In 2011 the Lao Government reported investigating 49 cases of trafficking, and convicting 37 offenders.<sup>361</sup> However, weak institutions, bureaucratic inefficiencies, lack of resources, and the inability of the government to identify victims of trafficking were cited as reasons for slow positive progress.<sup>362</sup>

Laos' definition of trafficking in children is consistent with the UN Trafficking Protocol.<sup>363</sup> According to official Lao figures, between 1997 and 2000 90 children were rescued from Thailand and sent back to Laos; however, the ILO report stated that many returnees were undocumented by the ministry.<sup>364</sup> Most illegal labourers returned to Laos are between the age of 14 and 24, and 60% of them are women and girls.<sup>365</sup> Many of them have been repeatedly arrested and sent back by Thai authorities.<sup>366</sup>

358 United Nations, "Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Trafficking Protocol)," November 15, 2000, <http://www2.ohchr.org/english/law/protocoltraffic.htm>.

359 Trafficking Protocol, Article 3.

360 Article 24 of the Law on Development and Protection of Women (No. 70/PO, 2004) protects women and children; Article 90 of the Law on the Protection of the Rights and Interests of Children (No. 04/PO, 2007) protects children.

361 US Dept of State, "Trafficking in Persons Report 2012," 216.

362 Ibid., 216-7.

363 Law on the Protection of the Rights and Interests of Children (No. 04/PO, 2007), Article 90.

364 Phetsiriseng, "Preliminary Assessment on Trafficking," 4.

365 Ibid., 16.

366 Ibid.

There is a greater tendency for girls to drop out of school than boys.<sup>367</sup> Girls represent 40% of students completing primary school, but also 77% of those dropping out early.<sup>368</sup>

Due to its situation at the hub of the Greater Mekong Subregion and its shared borders with Cambodia, China, Myanmar, Thailand and Viet Nam Lao PDR is – in the words of the World Bank – “extremely vulnerable” to trafficking.<sup>369</sup> Trafficking networks exist in villages close to the border areas that recruit illegal migrants for border crossings.<sup>370</sup> The high number of school drop outs, resulting low level of education, lack of vocational opportunities, high level of dropouts among girls, a narrow industrial base and organised trafficking networks are the primary factors that lead to the high levels of trafficking in Laos.<sup>371</sup>

In addition, the Mekong River creates a natural border between parts of Lao and Thailand, and creates additional challenges for monitoring trafficking across the border, especially as border crossings for social and economic purposes is common.<sup>372</sup>

The judicial system in Laos is ill-equipped to prosecute crimes of trafficking that are complex and difficult to prove.<sup>373</sup> The Lao Anti-People Trafficking Unit (LAPTU) receives complaints regarding trafficking and is the primary agency responsible for investigating trafficking. In order to strengthen the criminal justice response to human trafficking, UNFOC launched a three-year project in partnership with the Ministry of Justice in 2011 and is making available US\$750,000.<sup>374</sup>

367 Ibid., 20.

368 Ibid., 21.

369 Yury Fedotov, UNODC Executive Director, 6 December 2012, <http://www.unodc.org/unodc/en/frontpage/2012/December/lao-pdr-extremely-vulnerable-to-trafficking-by-transnational-organized-crime-groups-says-unodc-executive-director.html>.

370 Phetsiriseng, “Preliminary Assessment on Trafficking,” 32.

371 Ibid., 52-54.

372 Ibid., 16.

373 Gallagher, “Shadow Report,” 12.

374 <http://www.unodc.org/laopdr/en/stories/new-project-to-fight-human-trafficking.html>

While the law provides for support such as medical treatment, counselling<sup>375</sup> and protection and assistance from the Lao embassy to victims of trafficking abroad,<sup>376</sup> implementation is difficult. Several countries noted that Lao PDR made progress in combatting trafficking during the last UPR but nevertheless called for additional efforts.<sup>377</sup>

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

A number of the relevant laws detailed above have been enacted after 2000, and the Constitution of Lao itself was amended in 2003. This might be a sign that the Government, which is keen to attract foreign investment and is cooperating with international organisations such as UNDP, is open to address gaps in the existing laws. However, it appears that enforcement of laws is a bigger challenge, especially where enforcement mechanisms lack the capacity for enforcement of laws.<sup>378</sup>

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

Article 5 of the Law on Enterprises states that business enterprises “have the obligation to conduct their business operations in accordance with their business purposes, to keep accounting books, to perform fiscal obligations towards the government, to protect the workers’ legitimate rights and interests, to preserve the environment, and to uphold other relevant laws and regulations of the Lao PDR.” This article suggests that at the very least, protecting the rights of workers and the protection

375 Protection and Development of Women Law, Article 33.

376 Ibid., Article 28.

377 Report of the Working Group on the Universal Periodic Review: Lao People’s Democratic Republic Lao UPR, A/HRC/15/5, 15 June 2010, paras. 24, 35, 46, 61, 68, 81, 82, 86, 96.11-13, 96.28, 96.47, 98.21.

378 See generally UNDP, “Access to Justice Survey,” and UNDP, “Anti-corruption Baseline Study.”

of the environment are obligations that businesses must fulfil.

#### **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?**

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

The Law on Enterprises states that a director will be liable for the following acts:<sup>379</sup>

1. Acting outside the scope of the limited company's business purpose specified in its bylaws or in the contract of incorporation;
2. Breaching the bylaws of the limited company;
3. Exercising rights and performing duties beyond the assigned scope of power;
4. Failing to exercise assigned rights or perform assigned duties.

Directors can be held liable for breach of duties towards third parties and can be held liable by limited companies.<sup>380</sup> However, this liability is only for breach of their duties. The Law states that the duties of directors include:<sup>381</sup>

1. Administering the business of the limited company in compliance with the contract of incorporation, the bylaws of the limited company and the resolutions of the shareholders' meeting;
2. Calling and collecting payments for shares at the determined amount and at the defined time;
3. Managing and using the capital of the limited company in accordance with the defined purpose and goal;

<sup>379</sup> Law on Enterprises 2005, Article 121.

<sup>380</sup> Ibid., Article 122.

<sup>381</sup> Ibid., Article 124.

4. Establishing the accounting system, maintaining and filing all documents of the limited company;
5. Cooperating with the auditors by providing clarifications on the source and accuracy of numbers and information appearing in the balance sheets before submitting them to the shareholders' meeting for adoption;
6. Sending copies of the balance sheet to the shareholders and keeping copies for review by holders of bearer shares when required;
7. Properly distributing the profits;
8. Administering and deploying officers or employees of the limited company;
9. Informing the company of their direct or indirect involvement in transactions of the limited company that could benefit them or of any increase or reduction of their shareholding in the limited company or in the company's subsidiaries within the accounting year.

The above duties cannot be interpreted easily to include obligations to consider the human rights impacts of their businesses.

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

See above answer.

**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)?**

**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 information available

**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)?**

**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?**

Not to our knowledge.

**4.3. Is/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?**

The Lao Stock Exchange was established in 2010 as part of the 5 year plan adopted by the 6<sup>th</sup> Session of the National Assembly.<sup>382</sup> There is a paucity of information on the fledgling stock exchange. In its Disclosure Regulation, the LSX has a provision for voluntary disclosure for companies:<sup>383</sup>

382 "The History of LSX," last accessed January 29, 2013, <http://www.lsx.com.la/en/about/history.jsp>

383 Article 9, Disclosure Regulation, Lao Securities Exchange, January 7, 2011.

"In addition to the material business matters prescribed in [Article 7], if the matters which may have material influence on the decisions of investors or about which the investors must be informed, have taken place, the concerned stock-listed corporation may report the details of such matters or decisions. In this case, the report shall be made by the next day after the concerned cause occurred."

This could be interpreted to include voluntary human rights reporting.

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

Laos is a member of the Kimberley Process Certification Scheme. The Kimberley Process is an initiative between States and companies that currently has 51 participants, both countries and business representatives.<sup>384</sup> The Process regulates the diamond industry, to ensure that the sale of diamonds is not financing rebel movements. It is implemented through national legislation by its participants. The certification scheme requires its members to take stringent steps to ensure legitimate shipments, and only trade with other members. If a member fails to adhere, they lose membership and are no longer able to trade with members of the Process.<sup>385</sup> However, recently there have been some doubts about the efficacy of the scheme, with Global Witness, one of the primary movers behind the creation of the Process, leaving the Kimberley Process.<sup>386</sup>

384 "Basics," Kimberley Process, last accessed January 29, 2013, <http://www.kimberleyprocess.com/web/kimberley-process/kp-basics>.

385 "Basics."

386 Global Witness, "Global Witness leaves Kimberley Process, calls for diamond trade to be held accountable," December 5, 2011, <http://www.globalwitness.org/library/global-witness-leaves-kimberley-process-calls-diamond-trade-be-held-accountable>.

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

One Lao PDR NGO, the Greater Mekong Sub-region Business Forum (GMS-BF) is an active participant of the Global Compact since 2005.<sup>387</sup> The GMS-BF is the only participant of the Global Compact from Lao PDR.

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

No official information is available.

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

Laos has a decentralised system of public expenditure, giving provincial administrations extensive discretion over the use of resources.<sup>388</sup> There is very little transparency over the budget process, and the budget cycle is limited, leaving no room for consultation.<sup>389</sup>

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

Between 1989 and 1997, Laos privatised most of its State-owned enterprises, with the exception of 20 enterprises that were deemed to be ‘strategic’, and a few that were difficult to sell.<sup>390</sup> Some resource extraction companies are also said to be controlled by senior members of the military.<sup>391</sup> There not seem to be a specific human rights policy in place for state-owned or controlled enterprises.

387 “Participants and Stakeholders,” UN Global Compact, last accessed January 29, 2013, <http://www.unglobalcompact.org/participant/4401-GMS-Business-Forum-GMS-BF->

388 UNDP, “Anti-corruption Baseline Study,” 34.

389 Ibid.

390 Bertelsmann Stiftung, “Laos Country Report,” 4.

391 Ibid., 15.

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

The government-owned banks had to be restructured and refinanced due to non-performing loans made to state-owned enterprises and politically well-connected persons.<sup>392</sup> However, the World Bank has reported that the level of new loans is still too high, an indicator that the policies have not been changed.<sup>393</sup> There is no indication that support has been linked to any human rights policy or commitment.

**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?**

No information available.

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

According to the Baseline Study on corruption, public procurement in Lao is subject to interference, both explicit and implicit, in terms of openly promoting a company with ties to the government, and reduced competition, arbitrary pre-qualification of bids and breaching confidentiality of bids.<sup>394</sup>

In 1997, the Government established a Procurement Management Office to clarify procurement procedures.<sup>395</sup> This office was closed in 2000, but re-established in 2003.<sup>396</sup> It revised the Procurement Decree, developed new rules and regulations and drafted a manual for district officials.<sup>397</sup> Human

392 Ibid., 16.

393 Bertelsmann Stiftung, “Laos Country Report,” 16.

394 UNDP, “Anti-corruption Baseline Study,” 43.

395 Ibid.

396 Ibid., 43-44.

397 Ibid., 44.

rights are not explicitly mentioned in these documents.

Aid agencies like the World Bank and ADB are interested in ensuring that public procurement becomes as transparent as possible, as that improves the distribution of aid funds. The World Bank prepares Country Procurement Assessment Reports (CPAR) “intended to be an analytical tool to diagnose the health of the existing system in a country.”<sup>398</sup>

Where specific procurement procedures are prescribed by multilateral and foreign donors in their loan, credit or grant agreements with the Government, these take precedence over national procedures.<sup>399</sup> Approximately 80% of Government capital expenditure is currently assisted by multilateral credits or grants from donors.<sup>400</sup>

The 2003 World Bank CPAR found that many government officials were unaware of the existing procurement legislation’s provisions, due to lack of training and frequent turnover of staff.<sup>401</sup>

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

Officially Laos does not have any conflict-affected areas within the country. However, until recently there was an armed conflict between the government and the Hmong people. The plight of the Hmong people has only been brought to light recently, not least during the last UPR in 2010.<sup>402</sup>

398 “Procurement,” World Bank, accessed Sep 22, 2012, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20108359~menuPK:84285~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>.

399 UNDP, “Anti-corruption Baseline Study,” 44.

400 Ibid.

401 World Bank, “Lao PDR Country Procurement Assessment Report,” (Bangkok: World Bank, 2002), 24.

402 Report of the Working Group on the Universal Periodic Review: Lao People’s Democratic Republic Lao UPR, A/HRC/15/5, 15 June 2010, paras. 34-35, 64, 69, 71, 76.

While numerous human rights violations have been listed with regard to the Hmong people, there does not seem to be a considerable amount of business involvement.

It seems that the passing away of former Hmong leader General Vang Pao in 2011 eventually ended the conflict. Hmong members now serve on the LPRP Central Committee, as ministers in the government, and as governors of provinces.<sup>403</sup>

### **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?**

As there is no conflict officially, there are no policies by the State concerning businesses operating in this area.

### **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?**

### **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?**

See above.

403 Bertelsmann Stiftung, “Laos Country Report,” 7.

**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?**

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

**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?**

**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?**

Can and Leader argue that the Nam Theun II project Concession Agreement (CA), which has as much legal binding as a legal regulation, binds the Government in a way so as to potentially violate its international obligations.<sup>404</sup> The CA combines two roles of the Government, as an investor and as protector of potential environmental and social concerns.<sup>405</sup>

According to the CA, the Government would have to compensate the investors if it enacts laws that negatively impact the profits from the project above

a certain, not disclosed threshold.<sup>406</sup> On the other hand, the company would have to compensate the government for respective increases in profit or cost reduction.<sup>407</sup> Since the thresholds have not been disclosed to the public, assessing the impact of the compensation clause is difficult. Generally, such clauses bear the risk of preventing a government from changing its social and environmental law due to the involved costs.

**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?**

The CEDAW report stated that the various government agencies mandated with responsibilities for women's issues were uncoordinated, lacking sufficient resources and clear mandates to be effective.<sup>408</sup>

The domestic status of the Convention on the Elimination of Discrimination against Women (CEDAW) is unclear.<sup>409</sup> There is no definition of discrimination in any domestic legislation. The CEDAW report states that women are not aware of their rights under the Convention, especially in remote areas.<sup>410</sup>

The CEDAW report recommended putting in place a comprehensive strategy to remove stereotypes and traditional practises that discriminate against women, in conformity with articles 2(f) and 5(a) of the Convention.<sup>411</sup> The report also recommends ensuring equal opportunities for women in the labour market, in accordance with article 11 of the

<sup>406</sup> Summary of the Concession Agreement (published by the World Bank), as of November 2005, para. 71, <http://siteresources.worldbank.org/INT/LAOPRD/Resources/293582-1092106399982/492430-1092106479653/SummaryofCA.pdf>.

<sup>407</sup> Ibid., para. 72.

<sup>408</sup> CEDAW, "Concluding observations," ¶ 17.

<sup>409</sup> Ibid., ¶ 9.

<sup>410</sup> Ibid., ¶ 11.

<sup>411</sup> Ibid., ¶ 22.

<sup>404</sup> Can and Leader, "Memorandum Of Legal Issues," 2-3.

<sup>405</sup> Ibid., 2.

Convention.<sup>412</sup>

**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?**

In 2005, the Lao Government presented a policy paper indicating its intention to strengthen the Rule of Law to improve governance.<sup>413</sup> In 2006, a draft Legal Sector Master Plan (LSMP) was drafted, which evaluated the legal system.<sup>414</sup> The LSMP aims to co-ordinate legal system development between the various stakeholders, official and unofficial, in the sector and is based upon four ‘pillars’ of the system:

- i. The framework of laws, decrees and regulations;
- ii. The law-related institutions that implement the legal framework;
- iii. The means for educating and training officials on the use of the system; and
- iv. The means for ensuring that all laws and regulations are accessible to both state bodies and citizens.<sup>415</sup>

The LSMP was officially endorsed by the government in 2009.<sup>416</sup>

Among the key issues with regard to the justice system raised in a survey conducted by UNDP were land conflicts and especially for women labour issues.<sup>417</sup>

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412 CEDAW, “Concluding observations,” ¶ 36.

413 UNDP, “Access to Justice Survey,” 89.

414 Ibid.

415 Ibid., 90.

416 Ibid.

417 Ibid., 94-95. The data can be seen in the original report, this is a simplification of the results, for the purposes of an overview.

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

The Ministry of Justice (MoJ), aside from preparing draft legislation, is also tasked with, among others, the dissemination of legislation, administering lower courts, overseeing the legal profession, and monitoring the work of Village Mediation Units (VMUs).<sup>418</sup>

There are four levels of courts: area, provincial, regional and People’s Supreme Court. In 2009, approximately 8,500 cases were brought to court throughout Laos.<sup>419</sup> Due to the type of cases they handle and their proximity to the people, area courts are most significant.<sup>420</sup>

The Office of the Public Prosecutor is also present at different levels. Aside from prosecutorial functions, the Office also serves to monitor general compliance with the law, as well as ensuring the fairness of dispute resolution mechanisms.<sup>421</sup>

A Village Mediation Unit is a semi-formal mechanism under the supervision of the MoJ. A UNDP report stated that in 2011 there were 8,766 VMUs in Laos, dealing with 8,118 complaints.<sup>422</sup>

Petitions by Citizens

The Law on the Handling of Petitions “defines principles, regulations and measures relating to petitions and to dealing with the petitions of citizens or organisations.”<sup>423</sup>

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418 “Ministry of Justice, Tasks and Powers,” accessed August 18, 2012, <http://moj.gov.vn/en/pages/tasks%20and%20powers.aspx>

419 UNDP, “Access to Justice Survey,” 81.

420 Ibid.

421 Law on the Office of the Public Prosecutor of the Lao PDR 2003, Article 3.

422 UNDP, “Access to Justice Survey,” 83.

423 Law on Handling Petitions 2005, Article 1.

Article 2 of the Law sets out three types of petitions:

1. A “request” presented to a State administrative authority
2. A “claim” presented to an investigation organisation, the Office of the Public Prosecutor or the People’s Courts
3. A “petition for justice” presented to the National Assembly.

These terms are defined in Articles 16, 21 and 23 of the Law.

Article 4 states that “[a] citizen or organisation has the right to present a petition to the organisation that has the right and duty to protect the interests of the State [and] collectives or [such citizen’s or organisation’s] own rights and legitimate benefits that have been infringed or that are subject to conflicting claims by [another] individual or organisation.”

Article 6 states that petitions will be dealt with in “a timely manner;”<sup>424</sup> “comprehensively, completely and objectively;”<sup>425</sup> and the petitioner must be informed in writing of the outcome of their petition.<sup>426</sup> If the petitioner is not satisfied, he or she may make a claim in court or present a petition for justice to the National Assembly.<sup>427</sup>

A petitioner is prohibited from:

- Presenting a petition without actual facts;
- Misusing a petition to defame another person, or to cause public disorder;
- Giving bribes to, making threats against, or suppressing the person who has the right and duty to deal with the petition.<sup>428</sup>

<sup>424</sup> Ibid., Clause 2 Article 6.

<sup>425</sup> Ibid., Clause 3 Article 6.

<sup>426</sup> Ibid., Clause 4 Article 6.

<sup>427</sup> Ibid., Clause 6 Article 6.

<sup>428</sup> Ibid., Article 31.

A person subject to a petition is prohibited from:

- Giving bribes to, making threats against, using force against, or suppressing the person who has the right and duty to deal with the petition [or] the petitioner;
- Concealing, hiding, or destroying information and evidence relating to the petition.<sup>429</sup>

### Environmental Issues

Regarding environmental complaints, the Environmental Protection Law states that “[p]etition or complaint about any undertakings that cause negative impacts to the environment shall be sent to the local authority or the environmental management and monitoring unit of the area where the damage occurs, which shall consider the issue within 30 days from the date of receiving the complaint. Urgent issues shall be addressed immediately. When local authorities or responsible sectoral agencies cannot resolve the issues, they have to report the complaint to the next higher level in their chain of command or to the higher environment management and monitoring organisation within seven days. The responsible agency shall resolve the petition or complaint within 30 days, and shall notify the petitioner of the result.”<sup>430</sup>

The EIA Decree provides the following guidance:<sup>431</sup>

In case the dispute is between a project developer and a project developer, they should first enter into negotiation. If they cannot reach an agreement, they may take the matter to the Economic Dispute Arbitration Organisation to arbitrate. If they are not satisfied with the arbitration, they may file a lawsuit with a People Court of Lao PDR, unless the terms of their contract stipulate otherwise.

In case the dispute is between a project developer and the people are (will be) affected by an investment project:

<sup>429</sup> Ibid., Article 32.

<sup>430</sup> Environmental Protection Law 1999, Article 25.

<sup>431</sup> EIA Decree, Article 35.

The project developer must consider the complaint and solve the environmental disputes through transparent consultation/discussion and with compromise to each other. If a compromised agreement cannot be reached, the parties can request the environmental management and monitoring agency and local administrations, at each level, to resolve. If the environmental management and monitoring agency and the local administration fail to resolve the dispute, the parties may take the matters to a People Court to adjudicate, in compliance with the laws.

The project developer must listen to the complaint/petition and solve social disputes by following the Prime Minister's Decree on Compensation and Resettlement of People Affected by Development Projects No. 192/PM, dated 7 July 2005 and Regulatory Provisions on Implementation of Decree on Compensation and Resettlement of People Affected by Development Projects No 1432/STEA, dated 11 November 2005, or other regulations which replace those regulations.

In case the dispute is between a project developer and a State organisation, a local administration or an international organisation, the dispute must be settled in compliance with the laws of Lao PDR or the conventions or treaties which Lao is a member party or a signatory (if any).

### Land Conflicts

Land conflicts are of two types, administrative and civil. Administrative land cases are those about using land without authorization or in contradiction of its objectives and regulations. Civil cases relate to inheritance and transfer of land use rights.

Articles 78-82 of the Law on Investment Promotion regulate that in the case of a conflict related to investment, the involved parties should make all efforts to solve the conflict by consultation and mediation, to reach a mutually beneficial agreement. The NLMA is mandated by the Land Law to resolve disputes arising from administrative land cases. NLMA is also mandated by Decree 135/

PM to review all state land leases or concessions for compliance with regulations.

Settlement of civil disputes will be brought to the village administration, and if not resolved, can be taken to the people's court. Individuals or organisations that violate the laws will be fined or punished "depending on the gravity of the case," and will include compensation for the losses caused. Individuals who have violated the laws including abuse of power, taking bribes and falsifying documents can be subject to criminal penalties, including compensation.

Where the State requisitions the land of an individual or organisation for public purposes, the State will pay "appropriate compensation" to the individual or organisation. A committee consisting of "representatives of concerned parties" will determine the value of the loss and decide compensation. Decree on State Land Lease or Concession, No. 135/PM, 2009, states that if compensation is required, the owner of the project must provide compensation to the land use holders.

Article 3 of Decree on the Compensation and Resettlement No. 192/PM 2005 defines compensation as "payment in cash or in kind for an asset to be acquired or affected by projects at replacement cost". "Replacement cost" is the "amount in cash or in kind needed to replace lands, houses, infrastructure or assets on the lands...and other assets...affected by the development projects". Compensation principles are further elucidated by Article 6 of 192/PM.

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

Cultural factors affect the ways and means in which justice is sought by the people. A culture of deference to authority, acceptance of the status quo, values of non-confrontation and non-violence and respect of elders leads to reduced reliance of legal redress of

grievances.<sup>432</sup> People usually resolve disputes outside the legal process, and minor offenses are mostly solved through mediation by local authorities.<sup>433</sup> At the same time, changing livelihoods, breaking down of traditional social structures and altering economic realities are fuelling the demand for access to justice mechanisms.<sup>434</sup>

There are very few lawyers practising in Lao PDR, and the status of lawyers is low in the country.<sup>435</sup> Lawyers are not accorded the same status as other legal personnel in the court system.<sup>436</sup> The situation is slowly changing, with increasing numbers of law graduates joining the Bar,<sup>437</sup> however the lack of well-trained, professional legal advocates creates a serious barrier to justice.

Due to factors such as isolation and poverty, some ethnic groups reportedly find it difficult to access information on their rights under State law.<sup>438</sup> Some customary practises are at odds with State law and even with Lao's international obligations.<sup>439</sup>

Women are generally more disadvantaged in access to resources and services, as well as in seeking remedy to conflict.<sup>440</sup> They are under-represented in decision-making processes.<sup>441</sup> Children are also vulnerable, due to lack of knowledge of their rights, and a lack of basic education.<sup>442</sup> Here again, girls are more prone to problems, as they have even less years of schooling than boys.<sup>443</sup>

The UNDP survey also found that lack of legal awareness is the primary obstacle to accessing the justice system, and those who received education, were more likely to consider using the system.<sup>444</sup>

432 UNDP, "Access to Justice Survey," 86.

433 UNDP, "Anti-corruption Baseline Study," 37.

434 UNDP, "Access to Justice Survey," 86.

435 Ibid.

436 Ibid., 85.

437 Ibid.

438 Ibid., 87.

439 Ibid., 88.

440 UNDP, "Access to Justice Survey," 88.

441 Ibid.

442 Ibid., 89.

443 Phetsiriseng, "Preliminary Assessment on Trafficking."

444 UNDP, "Access to Justice Survey," 104.

Lack of enforcement of judgements was also a major concern.<sup>445</sup> A cultural preference for non-confrontation also led to the favouring of semi-formal mechanisms like the naiban, a customary court.<sup>446</sup> Women also prefer informal mechanisms to formal ones.<sup>447</sup> Lack of legal aid and the poverty of the respondents, as well as the distance from rural areas to legal mechanisms were other significant barriers to access.<sup>448</sup> To solve this problem, creation of mobile courts could help.<sup>449</sup>

The UNDP Baseline Study on corruption found that the judiciary is politicised and lacking independence, and the corruption within the judiciary further spreads the "culture of impunity" and erodes trust in the system,<sup>450</sup> which can form a significant barrier to justice as well as the perception of justice. At the same time, the judiciary is understaffed and lacking in the technical skills necessary to fight corruption.<sup>451</sup> Few corruption cases are brought to the courts, and those that are involve lower ranking officials.<sup>452</sup>

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

Not to our knowledge.

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

Lao PDR does not have an NHRI.

445 Ibid.

446 Ibid., 113.

447 Ibid.

448 Ibid., 101-102.

449 Ibid., 112.

450 UNDP, "Anti-corruption Baseline Study," 37-38.

451 Ibid., 38.

452 Ibid., 37.

It has been stated that Lao lacks an effective mechanism for receiving complaints, especially from women from ethnic minorities.<sup>453</sup> The CEDAW report calls for Lao to establish a national human rights institution in accordance with the Paris Principles.<sup>454</sup> The report states that the institution should be given a broad mandate on human rights, as well as adequate financial, technical and human resources to function effectively.<sup>455</sup> Further, the State should collect statistics on the number of complaints filed, types of complaints and their outcomes.<sup>456</sup>

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

On 16-18 September 2011, Earth Rights International (ERI) hosted the fourth meeting of the Mekong Legal Network (MLN) in Chiang Mai, Thailand.<sup>457</sup> The MLN is an independent group of experienced Mekong region legal professionals and civil society leaders from Burma, Cambodia, China, Lao PDR, Thailand, and Vietnam.<sup>458</sup> MLN works to promote the rule of law in the Mekong and ASEAN regions, especially in relation to regional and cross-border development issues. They have studied the impact of the controversial hydropower projects in Laos, especially the environmental and social consequences.

The MLN discussed how to ensure current national, regional and international legal frameworks are utilized to ensure that planning decisions adequately consider the impacts of the projects and allow for greater public participation, as well as legal strategies to help ensure the 1995 Mekong Agreement governing the lower Mekong Basin is implemented.<sup>459</sup>

During the meeting, MLN representatives discussed CSR and human rights in ASEAN with reference to the Guiding Principles on Business and Human Rights.<sup>460</sup> The MLN is also conducting a research study on CSR and human rights in ASEAN to complement a similar study to be conducted by the ASEAN Intergovernmental Commission on Human Rights (AICHR).<sup>461</sup>

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453 CEDAW, "Concluding observations," ¶ 13.

454 Ibid., ¶ 14.

455 CEDAW, "Concluding observations," ¶ 14.

456 Ibid.

457 Earth Rights International, "Mekong legal advocates' network meets to discuss dams, corporate social responsibility, and other regional rule-of-law issues," September 22, 2011, <http://www.earthrights.org/legal/mekong-legal-advocates-network-meets-discuss-dams-corporate-social-responsibility-and-other>

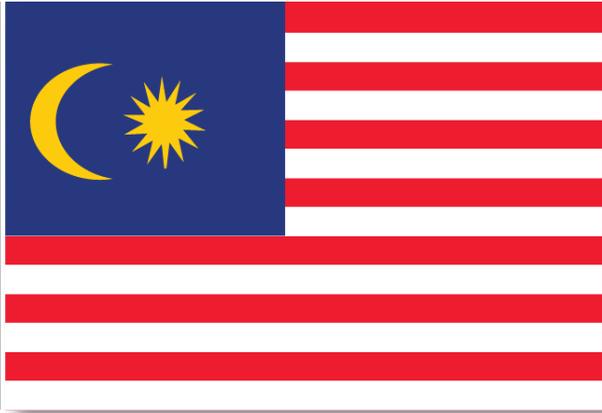
458 ERI, "Mekong legal advocates' network."

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459 Ibid.

460 Ibid.

461 Ibid.



# MALAYSIA

by:

Long Seh Lih

**BASELINE REPORT: MALAYSIA<sup>1</sup>****SNAPSHOT BOX**

<b>Number of Multinational Business Enterprises operating in the country</b>	45 transnational corporations <sup>1</sup>
<b>Number of Micro, Small and Medium Business Enterprises operating in the country per 1,000 people</b>	Total number of Small and Medium Business Enterprises operating in Malaysia – 552,849. <sup>2</sup>
<b>Number of State-owned Enterprises and the industries in which they operate</b>	118; social, infrastructure and public facilities, economy, and technology. <sup>3</sup>
<b>Flow of Foreign Direct Investment from 2008 to 2012 (or other recent 3 to 5 year range)</b>	<ul style="list-style-type: none"> <li>- US\$ 11.6 billion (2011);</li> <li>- US\$ 9.1 billion (2010);</li> <li>- US\$ 1.4 billion (2009);</li> <li>- US\$ 7.3 billion (2008);</li> <li>- US\$ 8.5 billion (2007).<sup>4</sup></li> </ul>
<b>Main industries in the country</b>	- Services, manufacturing, mining (including oil and gas) and agriculture. <sup>5</sup>
<b>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</b>	<p>(i) The Human Rights Commission of Malaysia (SUHAKAM) received 39 complaints against companies (2007 – April 2012)<sup>6</sup>, 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;<sup>7</sup></p> <p>(ii) There are no other national human rights bodies in Malaysia empowered to hear human rights complaints, apart from SUHAKAM and the Courts;</p> <p>(iii) None.</p>
<b>Have the Framework and/or the Guiding Principles been translated into the country's languages and published in the country?</b>	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 Nasional 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](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](http://data.worldbank.org/country/malaysia#cp_wdi); UNCTAD Global Investment Trends Monitor, [http://unctad.org/en/docs/webdiaeia2012d1\\_en.pdf](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](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, physical 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.<sup>9</sup> 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

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

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

<p><b>Name of the Type of Business Enterprise</b></p> <p>E.g. company, partnership, business trust etc.</p>	<p><b>Description of the Legal structure of the Type of Business Enterprise</b></p>	<p><b>Does incorporation of the business enterprise require any recognition of a duty to society, including human rights responsibility?</b></p>	<p><b>Any legislation specifically applicable to the Type of Business Enterprise</b></p> <p>(E.g. Corporations Law)</p>	<p><b>Laws which the Type of Business Enterprise are expressly excluded from</b></p>
Trusts	<p>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.</p> <p>For a trust to be workable there must be a settlor, at least one trustee and at least one beneficiary.</p> <p>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).</p> <p>No separate legal personality; trustees are held liable for any breach of trust.</p>	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.<sup>10</sup> 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

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.

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.<sup>11</sup> 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.<sup>12</sup>

Also, SUHAKAM, during the 15<sup>th</sup> Asia Pacific Forum 2010 Annual Meeting reaffirmed its commitment to working on human rights and business and to take into account the Ruggie report.<sup>13</sup> In October 2010, SUHAKAM took part in the 10<sup>th</sup> International Conference of NHRIs and ICC Bureau Meeting in Edinburgh, United Kingdom, which led to the adoption of the Edinburgh Declaration;<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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.

<sup>16</sup> 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.

*(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*

*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,<sup>17</sup> right to fair trial,<sup>18</sup> prohibition of slavery and forced labour,<sup>19</sup> right to equality,<sup>20</sup> prohibition of banishment and freedom of movement,<sup>21</sup> freedom of speech, assembly and association,<sup>22</sup> freedom of religion,<sup>23</sup> and rights to property.<sup>24</sup> A constitutional right to privacy was judicially identified but its exact ambit is uncertain.<sup>25</sup> 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.<sup>26</sup>

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”.*

<sup>26</sup> 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*<sup>27</sup>, the Court stated that article 12(1)(a) of the Federal Constitution,<sup>28</sup> 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*,<sup>29</sup> 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”.<sup>30</sup> 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.”<sup>31</sup> As the national carrier had not been proven to be “a government agency”, this fundamental liberty did

<sup>27</sup> [1981] 2 MLJ 356, 363.

<sup>28</sup> 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.”

<sup>29</sup> [2005] 3 MLJ 681.

<sup>30</sup> *Ibid.*, para. 5, 469.

<sup>31</sup> *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.<sup>32</sup>

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*.<sup>33</sup>

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*,<sup>34</sup> 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.<sup>35</sup> Similarly, in *Jakob Renner*

*v Scott King, Chairman of Board of Directors of the International School of Kuala Lumpur*<sup>36</sup>, 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*<sup>37</sup>, 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.<sup>38</sup> 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](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.<sup>39</sup>

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<sup>40</sup> (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.<sup>41</sup>

#### 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.<sup>42</sup> Other functions of the DOE include formulating and reviewing relevant

40 Replacing the Anti-Corruption Agency (ACA).

41 Article 145(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.

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.

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,<sup>43</sup> and require an environmental impact assessment (EIA) report before an activity is carried out.<sup>44</sup>

#### 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.<sup>45</sup>

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.<sup>46</sup> 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).<sup>47</sup> In 2010, the Labour Court heard 14,384 cases, an increase of approximately 2,000 cases compared to the previous year;<sup>48</sup> 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.<sup>49</sup>

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.<sup>50</sup>

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.<sup>51</sup>

#### 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.<sup>52</sup>

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*<sup>53</sup> was recognised in the case of *Hew Sook Ying v Hiew Tin Hee*<sup>54</sup> - 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,<sup>55</sup> to have separate liabilities from its shareholders,<sup>56</sup> perpetuity of

<sup>53</sup> [1897] AC 22 (House of Lords).

<sup>54</sup> [1992] 2 SCR 257.

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

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

<sup>51</sup> Ibid.

<sup>52</sup> Companies Commission of Malaysia Act 2001, Section 17.

corporate existence,<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup>

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.

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.

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,<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> In most cases, corporations are held criminally responsible for crimes in the area of environment, such as open burning and illegal toxic waste disposal.<sup>64</sup>

**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,*

61 Penal Code, Section 11.

62 Lim Chee Wee, "Criminal Liability of Companies Survey," 2008, LexMundi 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<sup>65</sup>)*

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;<sup>66</sup>
- 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;<sup>67</sup>
- 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;<sup>68</sup>
- Recruit a person to participate in trafficking of persons;<sup>69</sup>
- Provide facilities or services in support of trafficking in persons;<sup>70</sup>

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.

- 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.<sup>71</sup>

Specifically for body corporates,<sup>72</sup> 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.*

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.<sup>73</sup>

#### 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<sup>74</sup> 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

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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.

beyond the limits of Malaysia.<sup>75</sup> 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.<sup>76</sup> 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

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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.<sup>77</sup> Reading the Employment Act 1955 and the Companies Act 1965 together, these obligations apply to domestic and foreign employers<sup>78</sup> 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.<sup>79</sup>

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;<sup>80</sup> employees are entitled to paid holiday.<sup>81</sup>

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

<sup>77</sup> Ibid., Section 42.

<sup>78</sup> 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.

<sup>79</sup> *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.

<sup>80</sup> Employment Act 1955, Section 60A.

<sup>81</sup> Ibid., Section 60D

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.<sup>82</sup>

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.<sup>83</sup>

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

<sup>82</sup> OSHA 1994, Section 16.

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

to the border with Thailand where they were handed over to trafficking syndicates.<sup>84</sup> To tackle the number of illegal workers in Malaysia, an estimate of two million illegal immigrants,<sup>85</sup> the government launched the 6P programme,<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup> A private employment agency is required to obtain a licence from the Director General of Labour before carrying out their business.<sup>89</sup> Conditions to be fulfilled for a grant of the licence includes that the person-

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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.

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.<sup>90</sup>

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.<sup>91</sup> 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

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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 ongoing, which would contribute to the development of the sector guidance.

workers from Indonesia.<sup>92</sup>

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.<sup>93</sup>

### 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.<sup>94</sup>

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.<sup>95</sup> The NREO 1994 states that the public may be invited to comment on the proposed project, which has been subjected to detailed EIA.<sup>96</sup>

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," *JOANGO HUTAN*, April 2010, <http://www.bmf.ch>

96 Carol Yong, "Logging in Sarawak and the Rights of Sarawak's Indigenous Communities," *JOANGO HUTAN*, 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<sup>97</sup> or inland waters;<sup>98</sup> 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;<sup>99</sup> 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;<sup>100</sup> 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,

97 EQA 1974, Section 22.

98 Ibid., Section 25.

99 Ibid., Section 24.

100 EQA 1974, Section 29A.

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.<sup>101</sup> 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

101 MDA 1994, Section 19.

management of social impacts.<sup>102</sup> The said policy provides for rehabilitation and environmental control;<sup>103</sup> 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.<sup>104</sup>

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](http://www.townplan.gov.my/devo/en_content.php?ID=221)

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.<sup>105</sup>

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.<sup>106</sup> 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

105 The EIA Guidance, available at [http://eia.doe.gov.my/portal/?page\\_id=839](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<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup>

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.<sup>111</sup> 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

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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;<sup>112</sup> section 11 of the Aboriginal Peoples Act 1954 states that,

*“where an aboriginal community establishes a claim to fruit or rubber trees on 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*,<sup>113</sup> the High Court held that right to compensation under the Aboriginal Peoples Act 1954 is complementary to the rights under common

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.

law and article 13 of the Federal Constitution<sup>114</sup>; 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.<sup>115</sup>

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

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](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.<sup>116</sup>

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.<sup>117</sup> In *Pacific Engineering v Haji Ahmad Rice Mill*,<sup>118</sup> 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.<sup>119</sup> 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*,<sup>120</sup> 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.*,<sup>121</sup> 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,<sup>122</sup> 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

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

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.<sup>123</sup>

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

<sup>123</sup> <http://www.doe.gov.my>

widespread.<sup>124</sup> 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.<sup>125</sup> 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

124 APEC, *APEC Malaysia Environmental Industry 2010 Case Study*, 7, available at [http://egs.apec.org/uploads/docs/final\\_malaysia\\_egs\\_case\\_study.pdf](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>

research and development, half of which should go towards research on residue management.<sup>126</sup>

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).<sup>127</sup> 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.<sup>128</sup>

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.<sup>129</sup>

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

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<sup>130</sup> 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<sup>131</sup> 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.<sup>132</sup>

The Auditor-General's Report of Sarawak further showed that out of the randomly audited 178 PEC in the Forest Department in Sibul, 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.<sup>133</sup> 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.<sup>134</sup>

#### 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.<sup>135</sup>

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," *JOANGO HUTAN*, April 2010, available at [http://www.bmf.ch/files/news/Logging\\_in\\_Sarawak\\_JOANGO HUTAN\\_report.pdf](http://www.bmf.ch/files/news/Logging_in_Sarawak_JOANGO HUTAN_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://indigenouseoplesissues.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.<sup>136</sup>

### 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;<sup>137</sup> of the nine cases prosecuted, CCM obtained two convictions.<sup>138</sup> The Prosecution Section also took other proactive measures to monitor convicted directors in Malaysia. This was done through the regular monitoring of

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://eadult.ssm.com.my/AR2010/Eng\\_Web/report%20enforcement.pdf](http://eadult.ssm.com.my/AR2010/Eng_Web/report%20enforcement.pdf)

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.<sup>139</sup>

### **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.<sup>140</sup> 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.<sup>141</sup> 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*

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](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](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),<sup>142</sup> 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,<sup>143</sup> 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.<sup>144</sup>

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](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.<sup>145</sup>

The Silver Book, MCCG 2012 and the *Bursa* Malaysia CSR Framework applies only to GLCs (Silver Book)<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup>

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.<sup>149</sup>

#### **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<sup>150</sup>

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

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

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.<sup>151</sup>

**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

<sup>151</sup> 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.<sup>152</sup>

**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.

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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.<sup>153</sup> 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

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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.<sup>154</sup>

**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.<sup>155</sup> 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 its 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

<sup>155</sup> *Bursa Malaysia, Corporate Governance Guide - Towards Boardroom Excellence*, 2009, available at [http://www.bursamalaysia.com/website/bm/regulation/corporate\\_governance/downloads/CG\\_Guide.pdf](http://www.bursamalaysia.com/website/bm/regulation/corporate_governance/downloads/CG_Guide.pdf)

<sup>154</sup> *Ibid.*, 14-15.

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.<sup>156</sup>

#### **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  
<sup>156</sup> PCG, *The Silver Book: Achieving Value Through Social Responsibility*, 8.

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).<sup>157</sup> 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.<sup>158</sup> 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

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

<sup>158</sup> Bursa Malaysia, *CSR Framework*, 2006, available at [http://www.csr-weltweit.de/uploads/tx\\_jpdownloads/Boerse\\_Malaysia.pdf](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.<sup>159</sup>

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.<sup>160</sup>

#### Rights of persons with disabilities

- Companies setting-up and managing a school for children with learning disabilities will qualify for tax exemption;<sup>161</sup>
- Companies employing persons with disabilities qualify for double tax deduction on remuneration paid for the said employment;<sup>162</sup>
- 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.<sup>163</sup>

#### 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;<sup>164</sup>

159 The Green Technology Financing Scheme, available at <http://www.gtfms.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;<sup>165</sup>
- Companies or individuals acquiring property with Green Building Index (GBI) certification<sup>166</sup> is entitled to exemption of stamp duty;<sup>167</sup>
- 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;<sup>168</sup>
- Tax exemption for income derived from trading of Certified emission Reductions certifications;<sup>169</sup>
- Accelerated capital allowances for recycling of wastes and renewal energy.<sup>170</sup>

## 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

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.

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.<sup>171</sup>

## 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.<sup>172</sup> (see above)

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

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.<sup>173</sup>

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.<sup>174</sup>

### **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

<sup>173</sup> Sunway Holdings Berhad, *Annual Report 2010*, 70 – 79.

<sup>174</sup> 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 6<sup>th</sup> 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.<sup>175</sup>

**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.<sup>176</sup>

**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,

<sup>175</sup> "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>

<sup>176</sup> See [http://www.wto.org/english/tratop\\_e/gproc\\_e/overview\\_e.htm](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.<sup>177</sup> 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.<sup>178</sup>

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.<sup>179</sup> 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.<sup>180</sup>

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,<sup>181</sup> Myanmar, Iraq and Democratic Republic of Congo.<sup>182</sup> 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.<sup>183</sup> 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](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)<sup>184</sup> and Human Rights Watch (HRW)<sup>185</sup> 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.<sup>186</sup>

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?**

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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.

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-affected 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.

**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 implement 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;<sup>187</sup> 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.<sup>188</sup> 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.

<sup>187</sup> 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.

<sup>188</sup> 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.<sup>189</sup>

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)<sup>190</sup> will aim to raise international standards in areas like workers' rights, environmental protection and intellectual property rights.<sup>191</sup> 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.<sup>192</sup> It will address, amongst others, new and emerging trade issues and 21<sup>st</sup>-century challenges in the Asia Pacific Region.<sup>193</sup>

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189 UNCTAD, *World Investment Report 2010*, 131, available at [http://www.unctad.org/en/docs/wir2010\\_en.pdf](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.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;<sup>194</sup> 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.<sup>195</sup>

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

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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](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.<sup>196</sup>

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.

<sup>196</sup> “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>

**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.<sup>197</sup>

<sup>197</sup> 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](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.<sup>198</sup> 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.<sup>199</sup> 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<sup>200</sup> and that the training given to the Judiciary tend not to

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.

focus on application of human rights.<sup>201</sup>

## 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

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](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.<sup>202</sup>

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.<sup>203</sup> 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.<sup>204</sup>

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

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*.

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.<sup>205</sup> In October 2010, SUHAKAM took part in the 10<sup>th</sup> International Conference of NHRIs and ICC Bureau Meeting in Edinburgh, United Kingdom, which led to the adoption of the Edinburgh Declaration;<sup>206</sup> 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.<sup>207</sup>

SUHAKAM is accredited with status A by the ICC.<sup>208</sup> 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

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.<sup>209</sup> 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.<sup>210</sup>

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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.<sup>211</sup> 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.<sup>212</sup> 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".<sup>213</sup> 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.<sup>214</sup> In 2011, UNICEF and CCM launched its 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](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.<sup>215</sup>

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.<sup>216</sup>

In 2010, the UN Resident Coordinator in Malaysia underlined the importance of the respect of human rights by companies.<sup>217</sup>

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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 (recognition 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.



# MYANMAR

by:

Hnin Wut Yee

## BASELINE REPORT: Myanmar (Burma)

### SNAPSHOT BOX

<b>Number of Multinational Business Enterprises operating in the country</b>	529 Permitted enterprises as of 31/12/2012. <sup>1</sup>
<b>Number of Micro, Small and Medium Business Enterprises operating in the country</b>	Small and medium business enterprises in Myanmar in 2008 is 40194 in total <sup>2</sup>
<b>Number of State-owned Enterprises and the industries in which they operate</b>	<p>About 33 State Economic Enterprises under the government ministries.<sup>3</sup></p> <p>652 industry enterprises owned by government agencies in 2010, operating in food and beverages, clothing, construction materials, personal goods, household goods, printing and publishing, industrial raw materials, mineral and petroleum products, agricultural equipment, machinery and equipment, transport vehicles, workshops and dockyards, etc.<sup>4</sup></p> <p>More than 90 state-owned businesses were privatized in 2008, more than 300 in 2009, more than 100 in 2010, and 76 privatized in 2011.<sup>5</sup> One state owned oil refinery to be privatized this year.<sup>6</sup></p>

1 Foreign enterprises permitted to invest in Myanmar as of 31/12/2012 by sector: 5 in Power, 113 in Oil and Gas, 67 in Mining, 216 in Manufacturing, 46 in Hotel and Tourism, 19 in Real Estate, 26 in Livestock and Fishers, 16 in Transport and Communication, 3 in Industrial Estate, 9 in Agriculture, 2 in Construction and 7 in Other Services.

Foreign enterprises permitted to invest in Myanmar as of 31/07/2012 by country are 34 from China, 61 from Thailand, 40 from Hong Kong, 52 from Republic of Korea, 54 from U.K, 76 from Singapore, 43 from Malaysia, 2 from France, 15 from U.S.A, 12 from Indonesia, 5 from the Netherlands, 25 from Japan, 8 from India, 2 from Philippine, 2 from Russia Federation, 14 from Australia, 2 from Austria, 2 from Panama, 4 from Viet Nam, 1 from United Arab Emirates, 15 from Canada, 2 from Mauritius, 2 from Germany, 2 from Republic of Liberia, 1 from Denmark, 1 from Cyprus, 2 from Macau, 1 from Switzerland, 2 from Bangladesh, 1 from Israel, 1 from Brunei Darussalam, 1 from Sri Lanka.

“Data on Foreign Investment, Local Investment and Company Registration,” Directorate of Investment and Company Administration, and Ministry of National Planning and Economic Development, accessed Sep 20, 2012, <http://www.dica.gov.mm/dicagraph.htm>.

2 Dr.Pussadee Polsaram, and Ms Thaw Dar Htwe, “Small & Medium Enterprises Development Policies in Myanmar,” p. 3, accessed July 10, 2012, <http://www.aseansec.org/documents/SME%20Development%20Policies%20in%204%20ASEAN%20Countries%20-%20Myanmar.pdf>

3 State Economic Enterprises: Agricultural Enterprises, Myanmar Timber Enterprises, Myanmar Fisheries Enterprise, Livestock, Foodstuff and Milk Products Enterprise, Industry 1 and 2, Myanmar Oil and Gas Enterprise, Myanmar Petrochemical Enterprise, Myanmar Petroleum Products Enterprise, Myanmar Electric Power Enterprise, Off-Shore Project, Public Works, Myanmar Five Star Line, Inland Water Transport, Myanmar Port Authority, Myanmar Shipyards, Myanmar Airways, Myanmar Railways, Road Transport, Myanmar Post and Telecommunications, Central Bank of Myanmar, Myanmar Economic Bank, Myanmar Foreign Trade Bank, Myanmar Agricultural and Rural Development Bank, Myanmar Investment and Commercial Bank, Myanmar Insurance, Security and Printing Works, Myanmar Small Loan, Trade Enterprises, Information, Social Security Board. Central Statistical Organization, *Ministry of National Planning and Economic Development, The Government of the Republic of the Union of Myanmar: Statistical Year Book 2010* (Nay Pyi Taw, 2012), pages. 365-366.

4 Central Statistical Organization, *Ministry of National Planning and Economic Development, The Government of the Republic of the Union of Myanmar: Statistical Year Book 2010* (Nay Pyi Taw, 2012), page 163

5 “Privatisation Schemes Fuelling Inflation and Mistrust, Business People Say,” *Eleven Myanmar*, January 16, 2013, accessed January 31, 2013, <http://elevenmyanmar.com/business/2144-privatisation-schemes-fuelling-inflation-and-mistrust-business-people-say>; “Myanmar to Privatize 76 more State-owned Enterprises,” accessed July 20, 2012, <http://www.asean-cn.org/Item/1809.aspx>.

6 “Myanmar to Privatize Oil Refineries,” *Eleven Myanmar*, July 25, 2012, accessed July 30, 2012, <http://elevenmyanmar.com/business/380-myanmar-to-privatize-oil-refineries>.

	<p>SOEs will be sold off within 10 years and within 5 years, there will be fewer SOEs.<sup>7</sup></p> <p>Out of 33 State Economic Enterprises, under the Ministry of Transport, 4 enterprises including Inland Water Transport, Myanmar Port Authority, Shipyards, and Airways are to be privatized within (2012-13) fiscal year(April-March).<sup>8</sup> Myanmar Posts and Telecommunications (MPT), one of State Economic Enterprises will be turned into an independent corporation this year.<sup>9</sup></p>
<p><b>Flow of Foreign Direct Investment from 2008 to 2012 (or other recent 3 to 5 year range)</b></p>	<p>US \$ 714.9 Million (2007-08)</p> <p>US \$ 975.6 Million (2008-09)</p> <p>US \$ 963.3 Million (2009-2010)</p> <p>While FDI inflow is stated at US \$ 20 billion for the fiscal year 2010-11 by UNESCAP, referring to the Ministry of Commerce of Myanmar,<sup>10</sup> the actual FDI flow was \$756 million for 2011 according to UNCTAD.<sup>11</sup></p> <p>According to the Myanmar Investment Commission, Myanmar received US\$794 from April 1 to December 31 2011.<sup>12</sup></p>
<p><b>Main industries in the country</b></p>	<p>Agricultural and related manufacturing firms in Food and Beverages<sup>13</sup>; oil and gas, mineral and petroleum products, Clothing and wearing apparel, wood and wood products, Construction materials, Pharmaceutical, Personal and Household Goods, Industrial raw materials; Livestock and Fisheries; Hotel and Tourism</p>

7 Win Ko Ko Latt, "State-owned Firms to be Sold Off Within 10 years: Government," *Myanmar Times*, September 5-11,2011, accessed July 10, 2012, <http://www.mmmtimes.com/2011/business/591/biz59106.html>.

8 "Myanmar to Privatize 4 State Enterprises," *Xinhua*, February 6, 2012, accessed July 10, 2012, <http://www.asean-cn.org/Item/4507.aspx>.

9 "Telecom Agency Set To Become Independent Corporation," *Eleven Myanmar*, January 31, accessed February 1, 2013, [www.elevenmyanmar.com/business/2301-telecom-agency-set-to-become-independent-corporation](http://www.elevenmyanmar.com/business/2301-telecom-agency-set-to-become-independent-corporation).

10 UNESCAP, "Myanmar: Opening Up To Its Trade And Foreign Direct Investment Potential," (Trade and Investment Division, Staff Working Paper 01/12, September 20, 2012, revised December 31, 2012), p. 5.

11 UNCTAD, "World Investment Report 2012: Towards A New Generation of Investment Policies," 2012, pg.204. See also Jared Bissinger, "Behind Burma's Rising FDI," *The Diplomat*, August 31, 2011, accessed October 30, 2012, <http://thediplomat.com/asean-beat/2011/08/31/behind-burmas-rising-fdi/>

12 Kyin Myo Thwe, "Myanmar Foreign Investment almost \$800m in 9 months," *Mizzima*, February 11, 2012, accessed February 12, 2012, [www.mizzima.com/business/8887-myanmar-foreign-investment-almost-800m-in-9-months.htm](http://www.mizzima.com/business/8887-myanmar-foreign-investment-almost-800m-in-9-months.htm).

13 Food and Beverages amount 65.36% of SMEs in 2008, clothing and wearing apparel, 4.49% (See Dr. Pussadee Polsaram, and Ms Thaw Dar Htwe, "Small & Medium Enterprises Development Policies in Myanmar).

<p><b>Number 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</b></p>	<p>According to the ALRC citing a local news, the majority of over 1700 complaints received by the Myanmar National Human Rights Commission (MNHRC) in the first six months of its operations concerned land grabbing cases reportedly committed by army-owned companies, joint ventures and other economically and politically powerful operations with connections to the military.<sup>14</sup> As of September 2012, according to U Win Mra, Chairman of MNHRC, 'around 30 complaint letters come daily to Myanmar National Human Rights Commission and most are related to farmland problems.'<sup>15</sup></p>
<p><b>Have the Framework and/or the Guiding Principles been translated into the country's languages and published in the country?</b></p>	<p>A local NGO called Spectrum operating in Myanmar is translating the Guiding principles, overall framework, implementation guidelines, and principles of responsible contracting. They are also drafting summary guides on the UN framework appropriate for short guidance notes and for broad scale distribution.<sup>16</sup></p>

14 The Asian Legal Resource Center (ALRC), "Myanmar at Risk of Land-Grabbing Epidemic," June 6, 2012, accessed July 20, 2012, <http://www.alrc.net/doc/mainfile.php/hrc20/717/>.

15 "Human Rights Commission Receives Lots of Complaints Daily," *Weekly Eleven*, September 14, 2012, accessed Oct 30, 2012, <http://elevenmyanmar.com/politics/692-human-rights-commission-receives-lots-of-complaints-daily>

16 Data from Email Communication with David Allen, Director of the Spectrum

17 The 1988 Foreign Investment Law was replaced by The Foreign Investment Law, The Pyidaungsu Hluttaw Law No.21/2012, The 3<sup>rd</sup> Waning of Thadingyut, 1374 M.E. 2<sup>nd</sup> November, 2012. See more detail for the procedural regulation for establishing a business presence for foreign investors in Chapter 3 of the FDI regulations, the Republic of the Union of Myanmar, Ministry of National Planning and Economic Development, Notification No. 11/2013, The 5<sup>th</sup> Waning day of PyarTho 1374, M.E.(31<sup>st</sup> January, 2013). The main framework of the procedures is the same with the 1988 FDI Law such as obtaining a permit issued by the Myanmar Investment Commission (MIC) and a permit for registering the company by the Directorate of the Investment and Company Administration (DICA) (See also UNESCAP, "Myanmar: Opening Up To Its Trade And Foreign Direct Investment Potential.")

## Types of Business Enterprises in the Country

<p><b>Name of the Type of Business Enterprise</b></p> <p><i>E.g. company, partnership, business trust etc.</i></p>	<p><b>Description of the Legal structure of the Type of Business Enterprise</b></p>	<p><b>Does incorporation of the business enterprise require any recognition of a duty to society, including human rights responsibility?</b></p>	<p><b>Any legislation specifically applicable to the Type of Business Enterprise</b></p> <p><i>(E.g. Corporations Law)</i></p>
<p>Sole Proprietorship</p>	<p><i>A sole proprietorship is a business owned by an individual which usually operates under the name of the owner. Establishment and operation is simple. It is not required to register. Capital formation and withdrawal can be performed at one's will. However, the proprietor's liability is unlimited.</i></p>		
<p>Partnerships</p>	<p><i>A group of individuals may enter into partnerships in order to carry on a business. The partnership's rights and obligation are based on the agreements between the partners and the Partnership Act of 1932. In accordance with the Act, the number of partnerships is limited to twenty. A partnership firm may be registered, but registration is not compulsory. All partnerships formed in Myanmar are of unlimited type as the Partnership Act does not permit a limited partnership. When no provision is made for the period of time, the partnership will be dissolved when all partners are willing to do so.</i></p>		<p><i>The Partnership Act(1932)</i></p>

<p>Companies Limited by shares</p>	<p><i>In a Private Limited Liability Company, the transfer of shares is restricted, the public cannot be called upon to subscribe for shares, and the number of members is limited to fifty.</i></p> <p><i>In a Public Limited Liability Company, the number of shareholders must be at least seven. The company, after registration, must apply for a Certificate of Commencement of Business to enable to start the business operation.</i></p> <p><i>Joint Venture Company Limited formed under the foreign investment law 2012<sup>17</sup> (Joint Venture between the foreigner and local investors registered under the Myanmar Company Act 1914; between Foreign Company and State Owned Economic Enterprises and registered under the Special Company Act 1950.</i></p> <p><i>Joint Venture Company Limited: Joint Venture between State Owned Economic Enterprises and Private Entrepreneurs registered under the Special Company Act 1950</i></p>	<p><i>Although Company law 1914 has no provision requiring the business enterprise to recognize a duty to society, the new Foreign Investment Law 2012 and its regulations have some provisions on social impact assessment (SIA) and environmental impact assessment (EIA) requirements to apply for investment permit from the Myanmar Investment Commission (MIC) specifically for big projects with large amount of investment and projects required to do EIA and SIA according to the rules of the Ministry of Environmental Conservation and Forestry (article 33 of FDI regulations)</i></p>	<p><i>The Myanmar Companies Act 1914 for the limited companies, Myanmar Companies Rules 1940, Myanmar Companies Regulations 1957</i></p> <p><i>The Special Company Act 1950 for a company with share contribution of the State</i></p>
<p>Associations not for Profit</p>			

Sources: Central Statistical Organization, Statistical YearBook 2010<sup>18</sup>.

<sup>18</sup> National Planning and Economic Development, "Business Organization," accessed August 10, 2012, <http://www.dica.gov.mm/Citizen%27s.htm>.

## OVERVIEW OF MYANMAR'S BUSINESS AND HUMAN RIGHTS LANDSCAPE

The business and human rights landscape of Myanmar becomes visible in the forms of labour protests, demanding justice for victims of land confiscation and concern for environmental damage directly linked with business operations especially in extractive industries. Until recently when the quasi-civilian government has started to take substantial steps that led to some political and economic reform measures, Myanmar has been criticized and sanctioned for its human rights records for decades.<sup>19</sup> Critics have noted that political instability, economic mismanagement of the former regime and the resulting poverty serve as main driving forces behind the nexus of business activities and human rights violations such as forced migration, exploitation and trafficking.<sup>20</sup>

19 See more reports on the concluding observations of the CRC and CEDAW committees for more human rights concern and also reports of human rights organizations such as Human Rights Watch (HRW) and the Earth Rights International (ERI). Some references: Convention on the Rights of the Child (CRC), "Consideration of the reports submitted by States Parties under 44 of the Convention: Third and Fourth Periodic Reports of States Parties due in 2008: Myanmar," CRC/C/MMR/3-4, 17 May, 2011. Committee on the Rights of the Child (CRC), "Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Concluding Observations: Union of Myanmar," CRC/C/MMR/CO/3-4, 3 February, 2012. Committee on the Elimination of Discrimination against Women (CEDAW), "Concluding Observations of the Committee on the Elimination of Discrimination against Women: Myanmar," CEDAW/C/MMR/CO/3. 7 November, 2008; Human Rights Watch (HRW), "The Recruitment and Use of Child Soldiers in Burma," 2007, accessed December 30, 2011. <http://www.hrw.org/en/reports/2007/10/30/sold-be-soldiers>; Earth Rights International (ERI), "The Burma-China Pipelines: Human Rights Violations, Applicable Law, and Revenue Secrecy," 2011, accessed January 10, 2012. <http://www.earthrights.org/sites/default/files/documents/the-burma-china-pipelines.pdf>.

20 CRFB, "CRC Shadow Report Burma."; Elaine. Pearson et.al., "The Mekong Challenge: Underpaid, Overworked and Overlooked: The Realities of Young Migrant Workers in Thailand," ILO, 2006, accessed December 30, 2011, [www.ilo.org/public/english/region/.../underpaid-eng-volume1.pdf](http://www.ilo.org/public/english/region/.../underpaid-eng-volume1.pdf); U.S. Department of State, "Trafficking in Persons Report 2011: Burma."; International Council on Social Welfare (ICSW), "Trafficking and Related Labour Exploitation in the ASEAN region," November 2007; CRFB, "CRC Shadow Report Burma."; PWO, "Stolen Lives."; KWAT, "Eastward Bound."

The former military regime has moved away from a socialist system to a so called market oriented system since 1990s. Until recently the economic system of the country informally operated under the control of the ruling military elites and their allies, with a set of "rules of the game" favouring rather narrow interests.<sup>21</sup> Until 2010, according to the assessment of Sean Turnell, an economist with a special focus on Myanmar, Myanmar's economy was unbalanced and volatile without the institutions and qualities required for sustainable economic growth and development in addition to rampant corruption.<sup>22</sup> In fact, the economy had been sluggish over the past decades, a situation which according to the ADB was attributable to factors such as 'low investment, limited integration with global markets, dominance of state-owned enterprises in key productive sectors of the economy, and frequent episodes of macroeconomic instability'.<sup>23</sup>

In addition to the poor economic situation, the low public investment in health, education and social services has led to very low human development since 1980. According to the UNDP, Human Development Index (HDI) of Myanmar was very low at 0.3 and even though it has slightly increased since 2000, it is still below the average of the East Asia and the Pacific.<sup>24</sup> In 2011, Myanmar's HDI was 0.483 at a rank of 149 out of 187 countries.<sup>25</sup> As of 2010, around 25% of the population was living below the national poverty line that was MMK 376'151 (Around US \$ 437 at an exchange rate of US

21 Sean. Turnell, "Burma's Economy 2010: A Fresh Look at Some Elemental Issues," September, 2010.

22 Ibid.

23 ADB, "Myanmar in Transition," 3-4.

24 Human Development Index (HDI) was introduced "as an alternative to conventional measures of national development, such as level of income and the rate of economic growth. The HDI represents a push for a broader definition of well-being and provides a composite measure of three basic dimensions of human development: health, education and income." "Human Development Index (HDI)," UNDP, accessed Sep 20, 2012, [www.hdr.undp.org/en/statistics/hdi](http://www.hdr.undp.org/en/statistics/hdi).

25 UNDP, "Human Development Report 2011: Sustainability and Equity: A Better Future for All," 2011.

\$ 1= MMK 860) per adult per year.<sup>26</sup> While poverty serves as the root cause for human rights violations such as various forms of labour exploitation, the lack of adequate laws, policies and protection mechanisms exacerbated the situation.

Labour issues have been one of the main human rights concerns directly related to business practices apart from land confiscation and environmental damages as highlighted in the following section. While reform-friendly governmental personnel and members of parliament are trying to respond to these issues by drafting and enacting new laws and regulations, obstacles and challenges still lie ahead. At the same time, it is the most crucial time for the country to tackle these challenges and prevent business related human rights abuses.

## **Issues of business related human rights concerns**

### **1) Labour Rights**

#### *Labour Exploitation*

Between 1 May to 30 June 2012, workers staged strikes against extremely low salaries at 90 factories including garment, purified water, foot wear, plastic, laces, chemical fertilizer, furniture, electrical apparatus, wig, liquor, snacks, construction and petroleum products in the industrial zones in Yangon.<sup>27</sup> For instance, workers from Crown Steel factory, a Chinese-owned steel factory in Hmawbi in Yangon Region, went on hunger strike to get 40,000 kyat (\$48) per month as their basic salary. Their basic earning was 160 kyat (less than US \$0.20) a day and ranging from 4,500 to 10,000 kyat (\$5.35 to \$12) a month including overtime pay and various

allowances.<sup>28</sup> In other words, their income was far below the national poverty line of 376151 kyats per adult per year or 1000 kyat per day in 2010.<sup>29</sup>

Similarly, at the Hi Mo High Art Wig factory, workers went on strike for the second time in late May following the company owners' refusal to pay the wage increases which had been agreed after the protests in early May.<sup>30</sup> After the strikes, the minimum salary for workers in industrial zones was temporarily set at 56,770 kyats (around US\$66)<sup>31</sup> including overtime payment, as suggested by the Union Chamber of Commerce.<sup>32</sup> The current state of the law on the minimum wage in Myanmar is the Minimum Wages Act of 1949 that is outdated and not in accordance with the changing economic reality of the country. Recently the new minimum wage law has been drafted by the Ministry of Labour, Employment and Social Security. It has yet to be discussed at the Parliament.

In spite of the temporary agreement of the minimum salary, the breach of the agreement by some employers at some factories has led to workers' protests over low salaries again at some factories later in 2012. Other reasons for protests include poor working conditions and the fact that many employers disapprove the formation of labour unions and as a consequence dismissed employees

26 IHLCA Project Technical Unit, "Integrated Household Living Conditions Survey in Myanmar (2009-2010): Poverty Profile," UNDP Myanmar, June, 2011, accessed [http://www.mm.undp.org/ihlca/01\\_Poverty\\_Profile/index.html](http://www.mm.undp.org/ihlca/01_Poverty_Profile/index.html). (Around US \$ 437 at an exchange rate of US \$ 1= MMK 860)

27 More detail in "Labour Dispute Settlement," Ministry of Labour, Employment and Social Welfare, accessed Sep 29, 2012, [www.mol.gov.mm/mm/departments/departments-of-labour/dol-regional-and-coordination-division/all-list/](http://www.mol.gov.mm/mm/departments/departments-of-labour/dol-regional-and-coordination-division/all-list/).

28 "Myanmar Steel Workers Go Hunger Strike," 25 May 2012, accessed August 3, <http://www.thaivisa.com/forum/topic/557906-myanmar-steel-workers-go-on-hunger-strike/>

29 IHLCA Project Technical Unit, "Integrated Household Living Conditions Survey in Myanmar."

30 Nyein Nyein, "Factory Workers End Strike." *The Irrawaddy*, June 6, 2012, accessed August 3, 2012, <http://www.irrawaddy.org/archives/5996>.

31 Exchange rate 1 US\$ = MMK 860

32 Ma Moe Wai, labour activist told that workers' minimum salary is around MMK 30,000 excluding overtime payment during an informal talk with Ma Moe Wai, Labour Activist on 23, Sep, 2012. Current earning of most of the workers in industrial zones at around 30,000 kyats (around US \$ 34) per month is the lowest salary in ASEAN region. "Local Business Owners will Find Difficulty to Find Workers if Minimum Wage Cannot Be Defined Before AFTA," *The Yangon Times*, Vol 8, No.28, Aug 1, 2012.(Burmese)

who took the lead in such organisations.<sup>33</sup> With the enactment of the labour organization law, the formation of labour unions is now legally permitted.<sup>34</sup>

### *Child Labour*

A recent study conducted by the UNDP and the government found that child labour participation rate (aged 10-14) among the poor is 18%<sup>35</sup> and school enrolment rate for those poor working children is very low at 11.6%.<sup>36</sup> Child labour can be seen in various sectors, such as food-processing, street-vending, refuse collection, light-manufacturing industries, restaurants, teashops, family agricultural activities, and large-scale development projects in the extractive and energy industries.<sup>37</sup> Children in vulnerable situations such as homeless children, street children, children affected by armed conflicts or disasters have a high risk of being exploited. They are reportedly subjected to dangerous and hazardous working conditions with low wages and working the same hours as adults, with the absence of systematic labour inspections.<sup>38</sup> For instance, according to the Human Rights Foundation of Monland, child labour abuse cases were found near Thai-invested Dawei economic zone in 2011.<sup>39</sup> There were cases of children reportedly working on

road building projects as wage earners.<sup>40</sup>

### *Forced Labour Issues*

Following progress in the attempt of the new government in eliminating forced labour including signing a Memorandum of Understanding with the ILO and developing a joint strategy to eliminate forced labour by 2015, the ILO has lifted some of the “restrictions” it had imposed on Myanmar in 1999 and 2000.<sup>41</sup> Forced labour is prohibited under the law amending the 2012 Ward and Village Administration Act.<sup>42</sup>

Although the ILO still received 158 forced labour complaints between June 1 and October 11, 2012 compared with 148 in the same period in 2011. According to the ILO the actual incidence of the use of forced labour is declining with an increasing awareness of communities to lodge complaints with the ILO.<sup>43</sup> During 2011, alleged records of forced labour relating to business activities included forced farming with local authorities threatening workers with fines, loss of farm land and imprisonment. Force labour benefitted mostly the military, defence-owned commercial interests, and large private corporations.<sup>44</sup>

33 “More Protests Against Low Salaries, Unfair Dismissal,” *Eleven Myanmar*, November 2, 2012, accessed Dec 30, 2012, <http://elevenmyanmar.com/national/1149-more-protests-against-low-salaries-unfair-dismissal>.

34 The Labour Organization Law, The Pyidaungsu Hluttaw Law No.7/2011, The 14<sup>th</sup> Waxing day of Thadinkyut 1373, M.E. (11<sup>th</sup> October, 2011).

35 IHLCA Project Technical Unit, “Integrated Household Living Conditions Survey in Myanmar, p. 51.

36 Ibid.

37 “2012 Concluding Observations of the CRC Committee,” at para.69; WCRP cited in CRFB, “CRC Shadow Report Burma,” p. 3; U.S Department of State, “Trafficking in Persons Report 2011: Burma.”

38 CRFB, “CRC Shadow Report Burma,” p. 23-24. “2012 Concluding Observations of the CRC Committee,” para. 69.

39 Kyaw Kha, “Report Documents Child Abuse Cases Near Dawei Economic Zone,” *Mizzima*, January 17, 2012, accessed July 10, 2012, [www.mizzima.com/news/inside-burma/6428-report-documents-child-abuse-case-near-dawei-economic-zone.html](http://www.mizzima.com/news/inside-burma/6428-report-documents-child-abuse-case-near-dawei-economic-zone.html).

40 Ibid.

41 ILO, “Resolution concerning the measures on the Subject of Myanmar Adopted under Article 33 of the ILO Constitution,” 101st session, Geneva, May-June 2012.

42 Punishment is not more than one year imprisonment or not more than MMK 100,000 or both. See Law amending Ward or Village Administration Act, The Pyidaungsu Hluttaw Law No.7/2012, The 6<sup>th</sup> Waxing day of Tagu 1373, M.E. (8<sup>th</sup> March, 2012).

43 “Myanmar Acting to Cut Forced Labour: ILO,” *AFP*, November 12, 2012. <http://www.google.com/hostednews/afp/article/AleqM5iCyVyNYRoNc7Z1Lx65ZFiYQNGi2g?docId=CNG.5091d95ca15cd3fd981dde37c5a8a02d.1b1>.

44 UN General Assembly, “Report of the Special Rapporteur on the Situation of Human Rights in Myanmar,” A/66/365. 16 September 2011, paras. 64-66, 68-69; Human Rights Council, “Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana\*,” A/HRC/19/67. 7 March 2012, paras.53-56; U.S Department of States, “Trafficking in Persons Report 2011: Burma.”; U.S Department of States, “Trafficking in Persons Report 2012: Burma.”

Table 1: Major Laws Relating to Labour Rights Issues

Issue	Recently enacted laws	Laws under review or drafting <sup>45</sup>	Law Repealed	Existing Laws
<b>Labour Rights in general</b>	<p>The Labour Organization Law, The Pyidaungsu Hluttaw Law No.7/2011, The 14<sup>th</sup> Waxing day of Thadinkyut 1373, M.E. (11<sup>th</sup> October, 2011)</p> <p>The Settlement of Labour Dispute Law, The Pyidaungsu Hluttaw Law No. 5/2012, The 6<sup>th</sup> Waxing day of Tagu 1373, M.E. (28<sup>th</sup> March, 2012)</p> <p>The Social Security Law, The Pyidaungsu Hluttaw Law No.15/2012, The 14<sup>th</sup> Waxing day of Wargaung 1373, M.E. (31<sup>st</sup> August 2012)</p>	<p>Minimum Wage Act (Draft Issued)</p> <p>Employment and Skill Development Act(Draft Issued)</p> <p>Leave and Holidays Act, 1951</p> <p>Wokmen's Compensation Act (1923)</p> <p>Disability Employment Act of 1958</p> <p>The Occupational and Skill Development Draft Law</p>	<p>The Trade Unions Act, 1926</p> <p>The Trade Disputes Act, 1929</p> <p>The Social Security Act, 1954</p>	<p>Constitution 2008<sup>2</sup></p> <p>Factories Act, 1951</p> <p>Shops and Establishments Act (1951)</p> <p>Leave and Holidays Act 1951</p> <p>Payment of Wages Act 1936.</p> <p>Employment and Training Act, 1950</p> <p>Employment Statistics Act, 1948</p> <p>Oil fields Labour and Welfare Act, 1951</p> <p>The Rangoon Foreshore Labour Employment Control Order, 1958</p> <p>The Regulation Protecting the Inland Freight Handlers, 1970</p> <p>Instruction of the Central Inland Freight Handling Committee Office, 2005</p>
<b>Forced Labour related laws including migration</b>	<p>Ward or Village Tract Administration Act, The Pyidaungsu Hluttaw Law, No. 1/2012, The 3<sup>th</sup> Waxing day of Tapaung 1373, M.E. (24<sup>th</sup> February, 2012) &amp; its Amendment on 28<sup>th</sup> March, 2012)</p>		<p>Ward or Village Tract Administration Act, 1907</p>	<p>The Anti Trafficking in Persons Law, The State Peace and Development Council Law No. 5/ 2005, The Waxing Day of Tawthalin, 1367, M.E., September, 2005</p> <p>Law Relating to Overseas employment, The State Peace and Development Council Law No 3/99, The 12<sup>th</sup> Waning Day of First Waso, 1363 M.E. (9<sup>th</sup> July, 1999)</p>

45 Article 24 of the 2008 Constitution stated “The Union shall enact necessary laws to protect the rights of workers.”

Numerous reports of the ILO and Earth Rights International (ERI) have also documented forced labour cases in the oil and gas sector.<sup>46</sup> In 1996, villagers who had been subjected to relocation, forced labour, torture, murder and rape on the Yadana pipeline project filed a lawsuit under the Alien Tort Claims Act against Unocal, an American Oil Company for its complicity in those human rights abuses committed by the military.<sup>47</sup> In 2005, Unocal agreed to compensate the plaintiffs before it came to trial at the Superior Court of California and the case was withdrawn.<sup>48</sup> Until recently, forced labour has still been a human rights concern associated with oil and gas industries in addition to other issues such as land confiscation with lack of adequate compensation and negative environmental impacts.<sup>49</sup>

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46 ILO, Report of the Commission of Inquiry established to examine the complaint concerning the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), made by delegates to the 83rd Session (1996) of the Conference under article 26 of the Constitution of the ILO, GB/273/5; Earth Rights International (ERI), "Energy Insecurity: How Total, Chevron, and PTTEP Contribute to Human Rights Violations, Financial Secrecy, and Nuclear Proliferation in Burma (Myanmar)," 2010; Earth Rights International (ERI), "The Human Cost of Energy: Chevron's Continuing Role in Financing Oppression and Profiting from Human Rights Abuses in Military-Ruled Burma (Myanmar)," 2008; ERI, "The Burma-China Pipelines: Human Rights Violations, Applicable Law, and Revenue Secrecy," 2011, accessed January 10, 2012, <http://www.earthrights.org/sites/default/files/documents/the-burma-china-pipelines.pdf>.

47 "Burmese Win Appeal in U.S Alien Tort Case Against Unocal," Human Constitutional Rights, accessed Sep 24, 2012, <http://www.hrcr.or/hottopics/burmese.html>.

48 "Doe v. Unocal Case History," Earth Rights International (ERI), accessed [www.earthrights.org/legal/doe-v-unocal-case-history](http://www.earthrights.org/legal/doe-v-unocal-case-history).

49 ERI, "Energy Insecurity," p. 11; ERI, "Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron's Yadana Gas Project in Military-Ruled Burma (Myanmar)," 2009; Earth Rights International (ERI), "Energy Insecurity"; ERI, "Total Impact." ; ERI, "The Burma-China Pipelines: Human Rights Abuses, Applicable Law, and Revenue Secrecy," Situation Briefer No.1, March 2011; Shwe Gas Movement, "Corridor of Power: China's Trans-Burma Oil and Gas Pipelines," September 2009.

## 2) Land Confiscation and forced displacement

### *Trend in Land Confiscation*

Land confiscation, forced displacement and forced resettlement without informed consent or adequate compensation have been a major business related human rights issue. The main actors have been local private companies linked with the military, multinational companies in joint ventures with State owned enterprises or local businesses.<sup>50</sup> Over the past decades, the practices of land confiscation have been widespread across the country for various purposes including infrastructure projects such as railways, roads and airports, expansion of urban areas, establishment of industrial zones, building army battalions, construction of state owned factories, and leasing the land to private companies for agriculture and livestock business projects, resource extraction projects such as oil and gas, mining and hydropower projects.<sup>51</sup>

For instance, ERI has documented a letter dated March 16, 2010, sent by the MOGE to local villagers in Arakan State in the area of the "Burma-China pipelines" under construction. The letter gives notice to villagers to vacate their land within five days in accordance with a contract between villagers and Daewoo International for the Shwe gas pipeline. But the letter does not mention any information on the terms and conditions of the contract and what compensation villagers will receive.<sup>52</sup> According to interviews conducted by ERI with affected villagers on Maday Island in Arakan State, some of the villagers were still waiting to receive compensation

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50 The Asian Legal Resource Center (ALRC), "Myanmar at Risk of Land-Grabbing Epidemic," June 6, 2012, accessed July 20, 2012, <http://www.alrc.net/doc/mainfile.php/hrc20/717/>; See also Ta'ang Students and Youth Organization, "Grabbing Land: Destructive Development in Ta'ang Region," November 2011; Lahu Women Organization, "Grab For White Gold: Platinum Mining In Eastern Shan State," 2011.

51 The Burma Environmental Working Group (BEWG), "Burma's Environment."; Lawi Weng, "MPs Form Committee to Probe Land Grabs," *The Irrawaddy*, July 25, 2012, accessed August 3, 2012, <http://www.irrawaddy.org/archives/10028>; Man Thu Shein, "Famous Companies Involved in Land Confiscation Cases," *Weekyleven*, No.43, vol.7, August 1, 2012. (Burmese)

52 ERI, "The Burma China Pipelines," p. 8 and 9.

for their land seized by the government to make way for the natural gas storage facility. Some received no compensation for their paddy fields which were flooded during the construction work and left permanently unsuitable for farming.<sup>53</sup> In the case of Latpadaung Copper mine project<sup>54</sup>, over 7,800 acres (3,250 hectares) of farmland in Salingyi Township, Sagaing Division, has been confiscated for the project jointly operated by an economically and politically powerful joint venture of the Union of Myanmar Economic Holding Ltd. (UMEHL)<sup>55</sup> and China's Wan Bao mining company. The project reportedly began in late 2011 and landowners were forced to leave the area in early 2012 without an adequate compensation.<sup>56</sup>

In some cases of land confiscation in the Yangon Region, companies privately owned by some members of parliament from the ruling Union Solidarity and Development Party (USDP) and some Union Ministers, former military officials

and serving administrative officials were involved.<sup>57</sup> These companies are not state-owned, but they are businesses privately owned by some people in power. Some rich businessmen entered the 2010 election as representatives of the ruling USDP party and became MPs. For instance, about 1000 acres of farm land from Mingaladon Township in the Yangon Region were leased to Zay Kabar Company which is owned by a businessman who became USDP member of Parliament after the 2010 election. The seizure took place in 2010 and farmers were forced to accept a compensation below the market price.<sup>58</sup> In 2011, Zay Kabar Company started to develop industrial zone although the land concession had been issued for agricultural purposes. Since it is not legal to use agricultural land for other purposes without issuing "La Na,"<sup>59</sup> the administrative office of the Yangon Region's Mingaladon Township issued a stop order.<sup>60</sup> Regardless of this order, according to the news, the Company reportedly continued to

53 Ibid.

54 Currently the project and the incident of violent crackdown on protestors against the project in November, 2012 are under investigation by an investigation body led by Aung San Suu Kyi.

55 The Union of Myanmar Economic Holding Ltd. (UMEHL) is one of the economic entities owned by the military. Another one is the Myanmar Economic Corporation (MEC). "UMEHL shareholding is restricted to only the military, active and retired, and their family members." See more at Sikder Haseeb Khan and Pervaz Shams, "Banker, Trader, Soldier, Spy," *Forum*, Volume 3, Issue 3, March 2008, accessed July 10, 2012, [www.thedailystar.net/forum/2008/march/banker.htm](http://www.thedailystar.net/forum/2008/march/banker.htm); According to Source Watch and Institute for Defence Studies and Analyses, MEC is an agency of Myanmar's Ministry of Defence. MEC and UMEHL have reportedly taken the dominant position in a wide range of economic activities.

56 Khin Oo Thar, "Massive Land Confiscation for Copper Mine," *The Irrawaddy*, May 4, 2012, accessed August 20, 2012, [www.irrawaddy.org/archives/3655](http://www.irrawaddy.org/archives/3655); For another example of the land seizure among others involved by the UEMH, see also Network of Safeguarding Farmers' Rights, "Land Confiscation and pieces of success story," 2011 (In Burmese). It is about a joint venture project of the UEMH with a Chinese Company and a local private company, Htoo Trading in Magwe Region.

57 For instance, companies involved in land grabbing reportedly include those owned by Union Minister of Agricultural and Irrigation Ministry and Union Minister of Economics and Trading Ministry, Chairman of Union of Myanmar Federation of Chamber and Commerce Industry (UMFCCI), Chairman of Myanmar Rice Trading Association, Three MPs from the ruling USDP party; See more at Man Thu Shein, "Famous Companies Involved in Land Confiscation Cases" (in Burmese); The Asian Legal Resource Center (ALRC), "Myanmar at Risk of Land-Grabbing Epidemic."

58 While the market price is around 2,000,000 MMK per acre, farmers were paid only 300,000MMK per acre. See Man Thu Shein, "Famous Companies Involved in Land Confiscation Cases."

59 Under Article 39 of the 1953 Land Nationalization Act, agricultural land can be used for other purposes such as for building houses or building fish ponds or industrial zones with the approval of the Ministry of Agriculture and Irrigation. However, final decision to give this grant was made by the former regime, the State/Division Peace and Development Council. The official document for this permission is called 'La Na 39'; See UNHCR, and UNHABITAT, "Guidance Note on Land Issues, Myanmar." Note: 1953 Land Nationalization Act was abolished with enactment of Farmland Law, The Pyidaungsu Hluttaw Law No.11/2012, The 8<sup>th</sup> Waxing day of Tagu 1373, M.E. (30<sup>th</sup> March, 2012). However, for land cases that dated prior to the enactment of this Farmland Law, 'La Na 39' can be regarded as still applicable as advised by famous activist lawyer Phoe Phyu.

60 William Boot, "Land Grabs Intensify as Burma 'Reform' Races Ahead of Law," *The Irrawaddy*, May 15, 2012, accessed July 15, 2012, <http://www.irrawaddy.org/archives/4239>.

bulldoze snatched land without complying with the order of the township authorities.<sup>61</sup>

In some cases, companies with an agricultural concession reportedly adopt the model of contract farming especially if their profit is comparably low because they lack governmental support or they are located on marginal lands. In such cases, companies grant loans to farmers for fertilizers, pesticides and seeds while farmers provide the land and labour. Then Businesses can export the agricultural produce purchased from farmers since they obtained agricultural commodity export quotas along with their concessions. Although this model seems better for farmers than obtaining little compensation and losing their livelihoods, it represents a shift in the country's agricultural sector that pushes farmers from working their land towards being wage labourers for large and powerful companies.<sup>62</sup> However, according to some activists and lawyers working on land issues, the number of farmers who could work on contract farming is relatively small compared with the number of farmers who lost their livelihoods due to loss of their farmlands to large scale land concessions or other purposes as seen in the cases mentioned above.<sup>63</sup> Such a case is what happened in Hugawng Valley in Kachin State.<sup>64</sup>

Yuzana Company, owned by U Htay Myint, a businessman and currently a member of Parliament for the USDP Party, was granted a 200,000 acre agricultural concession in Hugawng Valley bordering and within the Hugawng Valley Tiger Reserve in western Kachin State in 2006. Yuzana made an agreement with the then Northern Regional Commander Maj. Gen. Ohn Myint on the concession area, and then the township SLRD<sup>65</sup>

was brought into the negotiations. The Forest Department was excluded. The land that the SLRD demarcated to Yuzana included both villagers' customary farming and village land (even though some of the land was registered and marked on SLRD maps) as well as the Hugawng Valley Tiger Reserve. The concession land comprises forest, wetland, and flooded land, as well as villager's paddy farms. The Forest Department made Yuzana keep a 10 km forested corridor for tigers to potentially pass through the valley from one mountain to the next. Reportedly nearly 14 villages are included within the concession area, with an estimated 5,000 villagers alone in just one part of Yuzana's concession.

The Hugawng Valley Development and Agricultural Planning Committee (HVDAPC), composed of 19 representatives from five different villages and over 800 farmers, sent a petition letter in 2007 to Senior General Than Shwe about the impact of the Yuzana concession on their lives and livelihoods and their lack of adequate compensation. Despite these grassroot movement efforts, by February 2010 over 150 households out of about 1,000 in a total of 6 villages (Warazup, Nansai, Bankawk, La Ja Pa, Awnggra and Jahtuzup) were forced off their lands and relocated to a Yuzana 'model village' with poor farming land and without fishing grounds. One NGO has so far documented 3,600 acres of land confiscated in 11 villages. Many of the villagers were forced to accept financial compensation, although some resisted as they found it inadequate. The situation escalated when in July 2010 a group of the affected farmers filed a lawsuit on behalf of all the farmers whose land was taken against Yuzana. Farmers rejected Yuzana's offer of payments of 80,000 Kyat (\$80) per acre (300,000 Kyat per acre is claimed to be a more accurate value).<sup>66</sup>

In spite of the effort of the farmers, Kachin State court ordered Yuzana to pay the same low amount

61 Ibid.

62 The Burma Environmental Working Group (BEWG), "Burma's Environment."

63 Phoe Phyu, a well-known activist and lawyer gave this comment based on his own experience. An informal talk with Phoe Phyu on 23, Sep, 2012.

64 The Burma Environmental Working Group (BEWG), "Burma's Environment."; See also The Kachin Development Networking Group (KDNG), "Tyrants, Tycoons and Tigers: Yuzana Company Ravages Burma's Hugawng Valley," 2010.

65 The Settlement and Land Record Department (SLRD).

66 The Burma Environmental Working Group (BEWG), "Burma's Environment."

that the company was supposed to pay in 2011.<sup>67</sup> In late August 2012, the farmers went on strike in front of Yuzana company in Yangon and the news reported that UHtay Myint agreed to return a thousand acres of farmland after negotiations with the farmers' representatives. According to the same news source, in another case, more than fourty thousand acres of confiscated land were returned to the government to give it back to farmers.<sup>68</sup> Except that, until the end of this year, most of farmlands were not returned to the farmers.<sup>69</sup>

### Legal Framework

Under a set of rules, "Procedures Conferring the Right to Cultivate Land/ Right to Utilize Land for Agriculture, Livestock Poultry Farming, and Aquaculture Purposes," adopted by the former regime in 1991, the government leased the cultivable land, fallow land and waste land to state-owned economic organizations, joint-ventures including foreign investment, other organizations and private individuals on a commercial basis such as for agriculture, livestock poultry farming and aquaculture purposes.<sup>70</sup> Most villagers could not prove ownership of their land, because they did not have a formal land registration title.

According to Win Myo Thu, managing director of ECoDev, a local NGO, one third of rural farmers are landless and only 15% of farmers who own land have land use certificates.<sup>71</sup> In many cases, customary land use of farmers was ignored and agribusinesses were awarded such "vacant' land

given it was not registered with the SLRD. Even if farmers registered their land with the SLRD and had the land use certificate, land confiscation was still possible.<sup>72</sup> For instance, in Phyarpone Township in Ayeyarwaddy Region, in a farmer's narration, his farmlands were confiscated as a punishment for his failure to sell a compulsory quota of the produce to the state in 1996.<sup>73</sup> Similarly, village and township authorities reportedly confiscated land for a variety of reasons and then resold it to their friends or relatives. In Phyarpone Township, about 3000 Acres were confiscated in 1996 for leasing the land to a Singaporean company<sup>74</sup>. Farmers were not given any compensation.

The new laws related to land use, "Farmland Law' and "Vacant, Fallow and Virgin Lands Management Law (VFV Law)"<sup>75</sup> enacted by the new government and passed by the Parliament in March also do not seem to adequately address the problem of land grabbing.<sup>76</sup> According to article 37(a) of the 2008 Constitution, the State still owns all land and resources. Although farmers can get their land use

72 The Burma Environmental Working Group (BEWG), "Burma's Environment."

73 Since 1964 under the Revolutionary Council (RC) regime, farmers were required to sell a compulsory quota of the produce to the state at low prices. The system was continued by the socialist government and the State Law and Order Restoration Council (SLORC), which later changed its name to the State Peace and Development Council (SPDC) until 2002; Tin Soe, "Myanmar in Economic Transition: Constraints and Related Issues Affecting the Agriculture Sector," *Asian Journal of Agriculture and Development* 1, 2 (n.d.): p. 58-68.

74 According to farmers, later they were informed of a joint project between Yuzana Company and the Ministry of Agriculture and Irrigation on those farmlands in 1998. But until now, only one third of the land was utilized and the rest was wasted and abandoned; See "Land confiscated and abandoned," *The Yangon Times*, Vol.8, No.33, Aug.30, Sep 5, 2012. (Burmese).

75 The Vacant, Fallow and Virgin Lands Management Law, The Pyidaungsu Hluttaw Law No. 10/2012, The 8<sup>th</sup> Waxing day of Tagu 1373, M.E. (30<sup>th</sup> March, 2012); Farmland Law, The Pyidaungsu Hluttaw Law No.11/2012, The 8<sup>th</sup> Waxing day of Tagu 1373, M.E. (30<sup>th</sup> March, 2012).

76 The Asian Legal Resource Center (ALRC), "Myanmar at Risk of Land-Grabbing Epidemic." Thomas Kean, "More Warnings Over Land Bills: Experts Say Two Pieces of Draft Legislation Have 'Major Gaps' that could be Exploited for Land Grabs," *MyanmarTimes*, Vol 31, No. 615, February 20-26, 2012. <http://www.mmmtimes.com/2012/news/615/news61510.html>

67 Khin Hnin Htet, "Court' cheats' Yuzana Land Grab Victims," *DVB*, 11 January 2011, accessed July 15, 2012, <http://www.dvb.no/news/court-%E2%80%98cheats%E2%80%99-yuzana-land-grab-victims/13662>.

68 Ibid.

69 Tun Tun Win, "Land Grabbing Cases of Military and Private Companies," *Eleven*, 08 January 2013, accessed January 30, 2013, <http://elevenmyanmar.com/component/article/53-top-events-2012/business/2039-land-grabbing-cases-of-military-and-private-companies>.

70 The Burma Environmental Working Group (BEWG), "Burma's Environment"; See also UNHCR, and UNHABITAT, "Guidance Note on Land Issues, Myanmar."

71 Conversation with Win Myo Thu on 14 Sep, 2012 on problems of new Farmland Laws.

certificates (LUC)<sup>77</sup> under the 2012 Farmland Law including the right to sell, the right to exchange, the right to access credit, the right to inherit, and the right to lease<sup>78</sup>, shifting cultivators in upland areas of the country are excluded from such provisions<sup>79</sup>. Shifting cultivators cannot apply for land use certificates under the rule that requires farmers not to leave the land without sound reasons. These shifting cultivations can be regarded as ‘vacant and fallow land’ and therefore be subject to land concessions to businesses. 42% of farmers live in upland areas and their livelihood is agriculture. Less than 10% of them have land use certificates.<sup>80</sup>

The 2012 Farmland Law also restricts freedom of farmers to choose crop. If land is registered as paddy land, they cannot grow other crops and if they want to do so, they have to apply to the government.<sup>81</sup> According to Win Myo Thu, it hampers the practice of integrated farming and the rights of farmers to adapt their crop choice from time to time to land fertility and to the market situation. If farmers fail to comply with the rule for growing other crops, their LUC can be revoked.<sup>82</sup>

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77 Articles 4 to 8, Chapter II of the 2012 Farmland Law contain provisions on granting land use titles. Land use certificates can be issued by township Farmland Administrative Body (FAB). First applications on land use titles have to be submitted to township SLRD offices through township FAB. Township SLRD need to make investigation of land use applications and report to the township FAB. Finally the approval to issue land use certificates will be decided by the district FMB. Upon this approval made by the district FAB, farmers need to give registration fee to the township SLRD and after that, the township FMB will issue the certificate accordingly.

78 Article 9, Chapter III, the 2012 Farmland Law.

79 The FAO defines shifting cultivation as “a system in which relatively short periods of continuing cultivation are followed by relatively long periods of fallow”. 1982, FAO/University of Ibadan Workshop on Shifting Cultivation and Extension, <http://www.fao.org/docrep/r1340e/r1340e04.htm>.

80 Meeting with Win Myo Thu, Managing Director of Eco Dev and a local expert in land and environmental issues and doing research on these areas.

81 Article 12(8), Chapter IV, The 2012 Farmland Law.

82 The LUC will also be revoked if farmers fail to inform the Farmland Administrative Body (FAB) of reasons for land remaining fallow or not to build structures without permission

Provisions in the Farmland Law on compensation for land being seized for development projects of the government are not sufficient.<sup>83</sup> In addition, the law does not require the ‘free, informed and prior consent’ of affected farmers. According to Win Myo Thu, the lack of a clear definition of what is meant by “the state” and “projects for its benefits,” can jeopardize the effective application of the protection which the law wants to provide.<sup>84</sup>

In addition, Farmland Administrative Bodies (FAB) are vested with the power to oversee land dispute cases and the decision power at various administrative levels such as the ward and village tract level, the township level, the district level and regional or state level.<sup>85</sup> The Central level FAB is chaired by the Minister and Deputy Minister of the Ministry of Agriculture and Irrigation (MOAI) and the Director General of the SLRD department is the secretary and heads of relevant government departments are members. The central body will have to establish respective FABs at various administrative levels.

The fact that decisions of the FAB may not be appealed to a court of law, denies the rights of farmers’ access to an independent judicial system.<sup>86</sup> And it renders the mechanism unconstitutional due to lack of separation of powers between the legislative, executive and judicial branches of the government as espoused in the current Constitution. Given the history of the former Land Committees which rarely recognized the interests and rights of smallholder farmers, it is essential to improve existing dispute resolution mechanisms in order to strengthen tenure security for these.<sup>87</sup>

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83 Article 26 and 27, Chapter IX, The 2012 Farmland Law, deal with remedy and compensation.

84 Meeting with Win Myo Thu on 14 Sep, 2012.

85 Articles 22-25, Chapter 8, the 2012 Farmland Law.

86 Articles 11 and 19, Constitution 208 the right of citizens to access to an independent judiciary

87 See also Food Security Working Group’s Land Core Group, “Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law: Improving the Legal and Policy Frameworks Relating to Land Management in Myanmar,” November 2012.

The VFV law is identical to the 1991 Prescribing Duties and Rights of the Central Committee for the Management of Cultivable Land, Fallow Land and Waste Land with regard to allowing the lease of VFV land to citizens, private sector investors, government entities and NGOs for agricultural developments, mining and other purposes allowed by law. However, article 25 of the new VFV Land law does recognize the usage of VFV land by farmers without formal recognition by the government and grants protection of their interests.<sup>88</sup> The law in conjunction with the Farm Land Law allows the existing use of VFV land by farmers to be formally recognized by the government and to be reclassified as farmland and hence apply for land use certificates.<sup>89</sup>

In contrast to the 1991 VFV rules, the 2012 VFV law and its bylaw do consider some protection mechanisms for farmers. However, they still need to be enhanced to effectively allow equitable resolution of land conflicts between smallholder farmers, the State, the private sector and investors by establishing an independent dispute resolution procedure and adjudication mechanisms. According to the 2012 VFV law and its bylaw, the Central Committee for the Management of Vacant, Fallow and Virgin Lands (CCVFV) has the overall management responsibilities regarding VFV lands including dispute resolution in coordination with other government departments and agencies.

CCVFV is a national, multi-ministerial committee formed at the President's discretion who may appoint the Minister of MOAI as Chairperson; the Director General of the SLRD as the Secretary and individuals from various government organs, or other suitable persons of his choosing, as members of the CCVFV.<sup>90</sup> One of the functions of CCVFV

is to fix the rate of security fees to be deposited for the use of VFV land, to intervene when acquired VFV land is not being developed within the allotted time frame and to eventually revoke the lease accordingly.<sup>91</sup> If the law is implemented effectively, it might be able to prevent land speculation and facilitate the returning of undeveloped land to farmers.

Article 12 of the VFV Law permits the lease of VFV land to foreign investors or organizations consisting of foreign investors for businesses that citizens are not capable of undertaking.<sup>92</sup> On the one hand, there are no adequate mechanisms to protect the rights and interests of small holding farmers against land confiscation and forced relocation in the VFV law. On the other, land confiscation and forced relocation is prohibited under Article 126 of the new Foreign Investment Rules by not permitting the lease of land for the investment purpose if there is objection from affected communities.<sup>93</sup> The provision also requires the consent from communities and permission from the relevant government departments in giving compensations at market value. Besides, investors need to ensure relocation and resettlement of local people and provide jobs to them in their investment projects. Article 35 of the 2012 Foreign Investment Law allows foreign investments in joint venture with local businesses to utilize land for agriculture and livestock rearing. According to Article 31 and 32 of the 2012 FIL Law, land lease periods to foreign investors from the government or from authorized private owners are up to 50 years, depending on the type and size of the investment. Leases can be extended twice for another ten years.

88 Article 25, Chapter 2012 VFV Law.

89 Article 10 (4), Chapter 4 of the VFV law allows rural farmers families to apply for the use of a maximum area of 50 acres of VFB to be developed and managed. And it is in conjunction with Article 8, Chapter 2, Article 34 of Chapter 11 of the Farmland law where VFB land can be reclassified as Farmland and the land use certificate can be applied.

90 Article 3, Chapter II, the 2012 VFV Law.

91 Article 36, Chapter 4, the VFV by law and article 22, Chapter 7, the 2012 VFV Law.

92 Article 12, Chapter 4, the 2012 VFV Law

93 Article 126, Chapter 15, Foreign Investment Rules.

Table 2: Major laws in relation to land rights issues

Issue	Recently Enacted Laws	Laws under Review	Laws Repealed	Existing Laws
<b>Laws related to Land rights issues</b>	<p>The Vacant, Fallow and Virgin Lands Management Law, The Pyidaungsu Hluttaw Law No. 10/2012, The 8<sup>th</sup> Waxing day of Tagu 1373, M.E. (30<sup>th</sup> March, 2012).</p> <p>Farmland Law, The Pyidaungsu Hluttaw Law No.11/2012, The 8<sup>th</sup> Waxing day of Tagu 1373, M.E. (30<sup>th</sup> March, 2012).</p> <p>The Foreign Direct Investment Law, 2012, The Pyidaungsu Hluttaw Law No.21/2012), The 3<sup>rd</sup> Waning of Thadingyut, 1347 M.E. (2<sup>nd</sup> November, 2012)</p> <p>The FDI regulations, the Republic of the Union of Myanmar, Ministry of National Planning and Economic Development, Notification No. 11/2013, The 5<sup>th</sup> Waning day of PyarTho 1374, M.E.(31<sup>st</sup> January, 2013).</p>	<p>The Vacant, Fallow and Virgin Lands Management Law, The Pyidaungsu Hluttaw Law No. 10/2012, The 8<sup>th</sup> Waxing day of Tagu 1373, M.E. (30<sup>th</sup> March, 2012).</p> <p>Farmland Law, The Pyidaungsu Hluttaw Law No.11/2012, The 8<sup>th</sup> Waxing day of Tagu 1373, M.E. (30<sup>th</sup> March, 2012).</p> <p>Forest Law (1992)</p>	<p>The Law Safeguarding Peasants Rights, 1963</p> <p>The Land Nationalization Act, 1953</p> <p>The Tenancies Law, 1963</p> <p>Foreign Investment Law, 1988</p>	<p>Constitution 2008</p> <p>Protection of Wildlife and Conservation of Natural Areas Law(1994)<sup>94</sup></p> <p>Duties and Rights of the Central Committee for the Management of Culturable Land, Fallow Land and Waste Land (1991)<sup>95</sup></p> <p>Land Acquisition Act 1894</p>

### 3) Environmental and Social Impact

Over the last decades, extractive industries such as logging, mining and oil and gas extraction have negatively affected the rights to food security, to livelihood and the right of indigenous people to live their own cultural practices people. In addition deforestation, , soil erosion, landslides, river siltation, damaging topsoil fertility by chemicals, and pollution had negative impacts on the right to

94 “The Law provides a mechanism for compensating individuals or businesses who have existing rights to the land under relevant acquisition laws” (Article 8), and the Director General of the Forest Department can “make provisions for reasonable rights and privileges in respect of the affected rights of the people in the region” where the natural area is established (Article 11); See also Food Security Working Group’s Land Core Group, “Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law.

95 It is not clear if these rules have been formally repealed.

health.<sup>96</sup>

#### *Logging*

In Myanmar logging is mainly responsible for deforestation. Several logging projects along the Thai-Myanmar Border and the China Border in northern Myanmar during the 1990s and 2000s contributed to deforestation in Myanmar. Myanmar has been regarded as having one of the highest deforestation rates in the world with an

96 See also at The Burma Environmental Working Group (BEWG), “Burma’s Environment: People, Problems, Policies,” 2011; Kachin Development Networking Group (KDNG), “Valley of Darkness: Gold Mining and Militarization in Burma’s Hugawng Valley,” 2007; Ye Yint Aung, “Please Rain, Rain Come” *Weekyeleven*, No.42, vol.7, July 25, 2012 ( In Burmese); Earth Rights International (ERI), “Total Impact: The Human Rights, Environmental, and Financial Impacts of Total and Chevron’s Yadana Gas Project in Military-Ruled Burma (Myanmar),” 2009.

estimated 800,000 to 1 million hectares a year.<sup>97</sup> Logging concessions for valuable woods such as teak, ironwood and rosewood were given to local, Chinese and Thai business people with good connections to the government or to insurgent groups which concluded ceasefire agreements with the government since the mid 1990s.<sup>98</sup> Although logging might have somewhat decreased over the past years, until recently, timber export has still been a major source of income for the military regime<sup>99</sup> and the ethnic armed groups in ceasefire agreements according to a 2009 report of Global Witness.<sup>100</sup> A warning issued by the Union Minister of Environmental Conservation and the Minister of Forestry that punitive action will be taken against illegal timber trading indicates that it still an issue today.<sup>101</sup>

### *Mining*

Since 1988 when the economy was opened to foreign investments, the Ministry of Mines has reportedly given hundreds of mining concessions for the rich mineral resources of Myanmar to local and foreign investors mostly from China.<sup>102</sup> For instance, gold mining sites in Hugawng Valley in Kachin State along Chindwin River had increased from 14 in 1994 to 31 in 2006 and the number of machine or hydraulic mining and pit mines had reached about 100 by 2006. Moreover, this particular example of gold mines in Hugawng Valley indicates how large-

scale mechanized industry has higher negative impact on environment and the local people.<sup>103</sup>

Another example are the copper mine projects known as the Sabetaung and Kyisintaung mine projects (S&K mines) and the Letpadaungtaung project in Monywa township in Sagaing Region. The Sabetaung mine project operated by Myanmar's state-owned Mining Enterprise No.1 and RTB-Bor Copper Institute of Yugoslavia, reportedly operated from 1983 until the mid-1990s. Chemical run off from the mine had destroyed farmlands and polluted underground clean water with the result that the locals' livelihood, food security, health and access to clean water was severely jeopardized.<sup>104</sup> Full scale commercial operations at the S&K mine began in 1998 with the involvement of Ivanhoe company and due to high level of acid released from the mine, farmlands in this area have been destroyed to an extent that trees cannot grow there anymore.<sup>105</sup> In addition, local people reportedly developed skin diseases and severe breathing and eye problems.<sup>106</sup> Nevertheless, the Letpadaungtaung mine project became operational in 2011. It is run by UMEHL and China's Wan Bao mining company and local villagers are currently demanding to stop the project. In addition to inadequate compensation for their loss of farmland and livelihood, there is a high concern about the destruction of the cultural heritage important not only for the region but also for the country.<sup>107</sup>

97 Martin Smith cited in BEWG, "Burma's Environment"; See also Global Witness, "A Choice for China: Ending the Destruction of Burma's Northern Frontier Forests," London, 2009; Global Witness, "A Disharmonious Trade: China and the Continued Destruction of Burma's Northern Frontier Forests," London, 2009.

98 Global Witness, "A Disharmonious Trade," 2009, p.69-84.

99 Revenue from logging on average amounts to USD 200 million a year. Martin Smith cited in BEWG, "Burma's Environment."

100 Global Witness, "A Disharmonious Trade."

101 "Union Minister Said Illegal Timber Trading Will Be Punished," *Yangon Times*, August 9-15, 2012 (in Burmese).

102 The Burma Environmental Working Group (BEWG), "Burma's Environment: People, Problems, Policies," 2011; Kachin Development Networking Group (KDNG), "Valley of Darkness: Gold Mining and Militarization in Burma's Hugawng Valley," 2007.

103 KDNG, "Valley of Darkness."

104 Testimonies of a local farmer and former project manager at S&K project at a ceremony calling for stopping Letpadaungtaung Mine Project organized by 88 students on 30, Sep. 2012.

105 Ibid.

106 Ibid.; See also findings from Australian scholars at Thomas Maung Shwe, "Ivanhoe Mines Receives \$ 103 million from Monywa Mine Sale," *Mizzima*, August 5, 2011, accessed September 20, 2012, <http://www.mizzima.com/business/5729-ivanhoe-mine-sale.html>.

107 The Venerable Ledi Sayadaw U Nānadhaja (1846-1923) stayed in Ledi village near the town of Monywa. He is regarded as the most outstanding Sayadaw of the age. Many of his work on Buddhism are still available both in Burmese and English as well. Due to mine operations, memorial places related to the Sayadaw has been damaged.

### *Oil and Gas*

Myanmar is rich in oil and gas. As of January 2011, proven crude oil reserves of Myanmar stood at 50 million barrels which is rank 79 worldwide.<sup>108</sup> Proven gas reserves stood at 283.2 billion cubic meters which is rank 40 as of January 2011.<sup>109</sup> Richness of oil and gas reserves in Myanmar has attracted foreign investments since the former regime intensified the opening of the sector in 2004. As of August 2012, altogether 20 foreign companies were engaged in 10 onshore and 27 offshore blocks.<sup>110</sup>

The first foreign investment projects were Yadana and Yetagun gas projects undertaken by French, American, Thai, Malaysian, and Japanese oil companies in partnership with the Myanmar Oil and Gas Enterprise (MOGE), the State Owned Enterprise in the 1990s. Natural gas is being exported from Yadana and Yetagun projects and it is expected that the export from other large projects, the Zawtika and Shwe Gas projects which are under construction, will begin in 2013.<sup>111</sup> The Zawtika project is a joint venture between the MOGE and the state owned PTTEP Oil Company of Thailand.<sup>112</sup>

The Shwe Gas projects are led by Chinese, South Korean, and Indian multinational companies in partnership with the MOGE, local companies and the state security forces. The projects are also known as the “Burma-China pipelines,”<sup>113</sup> consisting of the

Shwe Natural Gas Project and the Burma-China oil transport project. Two massive pipelines will transport gas from Myanmar and oil from the Middle East and Africa across Myanmar to China.

According to Arakan Oil Watch, mining operations for the construction of the deep sea port on Madaya Island where China’s crude oil tankers will dock on their way to China from the Middle East and Africa, killed hundreds of fish and destroyed important fishing grounds where local people have been fishing for centuries.<sup>114</sup> In addition, there are other social problems as well. Roads have been damaged by the project construction in Kyaukphyu Township and the locals in Arakan State have not seen a new public jetty for them yet since the existing public jetty is now being used solely for the ships for the project.<sup>115</sup>

### *Environmental and Social Impact Assessment (ESIA assessment)*

#### *ESIA Legal Framework*

Article 45 of the 2008 Constitution stated “The Union shall protect and conserve natural environment.” Article 390 also includes a provision on environmental conservation. The legal mechanism for ESIA is now put in place with the 2012 Environmental Conservation Act.<sup>116</sup> Article 7 (13) of Chapter 4 mentions the need for SIA and EIA for any project operated by the government or organizations or individuals. Article 14 is related with waste disposal in accordance with environmental standards and Article 19 is related to maintenance of cultural heritage. For violations of bylaws, regulations and directives issued under this law, punishment is not more than one year or fine or both under Article 32.<sup>117</sup> And critics indicate

114 Arakan Oil Watch cited in BEWG, “Burma’s Environment.”

115 Juliet Shwe Gaung, “Concern Remain over Shwe Gas Benefits,” *The Myanmar Times*, August 2012.

116 Environmental Conservation Act, Pyidaungsu Hluttaw Law No. 9/2012, The 8<sup>th</sup> Waxing day of Tagu 1373, M.E. (30<sup>th</sup> March, 2012).

117 Article 7 (13), Chapter IV. Article 14, 19 and 32 of the 2012 Environmental Conservation Act.

108 “The World Factbook: Myanmar,” Central Intelligence Agency,” accessed September 23, 2012, <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html>.

109 Ibid.

110 “20 Foreign Companies engage in 37 onshore and offshore oil and gas blocks,” *Weekly Eleven*, No.44, Vol.7, August 8, 2012 (In Burmese).

111 Nyein Chan Win, “Myanmar Estimates US \$ 800m from Gas Revenue,” *Weekly Eleven*, accessed July 30, 2012, [http://eversion.news-eleven.com/index.php?option=com\\_content&view=article&id=977:myanmar-estimates-us-800m-from-gas-revenue-&catid=43:bi-weekly-eleven-news&Itemid=110](http://eversion.news-eleven.com/index.php?option=com_content&view=article&id=977:myanmar-estimates-us-800m-from-gas-revenue-&catid=43:bi-weekly-eleven-news&Itemid=110).

112 “Zawtika Gas Project Opens Temporary Base Camp,” *Mizzima*, February 1, 2011, accessed July 30, 2012, <http://democracyforburma.wordpress.com/2011/02/01/zawtika-gas-project-opens-temporary-base-camp/>.

113 Earth Rights International (ERI), “The Burma-China Pipelines: Human Rights Abuses, Applicable Law, and Revenue Secrecy,” March 2011.

weak enforcement penalties.<sup>118</sup> Currently, the new Environmental Conservation Law is said to be in the process of revision.<sup>119</sup>

Recently enacted foreign investment rules do require ESIA specifically for large projects according to the rules of the Ministry of Environmental Conservation and Forestry (article 33 of FDI regulations).

### *ESIA Implementation*

The aforementioned two recently enacted laws and rules still need to be enforced. According to scholars, most of the environmental and social problems associated with extractive industries have been attributed to a lack of ESIA or inadequate ESIA over the past decades.

Some critics have pointed out the weak enforcement of the existing mining laws and regulations, the lack of provisions in the 1994 mining law for EIA or SIA and the lack of provisions for prosecution or fines in case of pollution releases such as mercury.<sup>120</sup> Although the 1996 Myanmar Mines rules mention the duty of large scale mineral production to “backfill arrange, vegetation or reclaim the land in the areas already mined out to the satisfaction of the Ministry,”<sup>121</sup> no grievance or enforcement mechanisms and no formal requirements for EIA is mentioned.

According to the Ministry of Mines, environmental problems are related to artisanal miners and illegal

gold miners.<sup>122</sup> The Ministry said it has issued directives prohibiting use of cyanide by artisanal and small-scale miners with effect from 1<sup>st</sup> January 2000. However, the Ministry admits that “it is rather difficult to impose environmental rules on them unless action is taken according to law.”<sup>123</sup> Under section 32 of the Mining law 1994, there are provisions that the holder of a permit who violates any of the rules relating to section 13 will be punished with one year imprisonment or with a fine of 10,000 kyats or with both. One of the rules under section 13 is related to environmental conservation.<sup>124</sup> However, there are no specific provisions for punishment for using toxic chemicals.

The Ministry of Mines also said that it is the policy of the Ministry that require all large scale mining projects to undertake EIA as part of their feasibility study. “The foreign companies either follow the World Bank standards or standards not lower than those existing in their countries.”<sup>125</sup> However, as having seen in the earlier examples, in practice, this rule was weak and ineffective. Recently, the Ministry of Mines issued an order in March 2012, banning mining along the country’s four major river courses or closer than 90 meters to the river banks.<sup>126</sup> To what extent this rule can be enforced is yet not clear.

Similar problems with weak SIA or EIA practices were found in the oil and gas sectors and hydropower project sites.<sup>127</sup> According to a remark of U Win Myo Thu, efforts to prevent social problems were not encouraged, or SIA or EIA were not done effectively.<sup>128</sup> ERI has also documented the failure of the then government to do SIA and EIA or encourage multinational companies to do

118 Nay Lin Aung, “Burma’s Environmental Law Undergoes Revisions,” *Mizzima*, 25 July 2012, accessed July 30, 2012, <http://www.mizzima.com/news/inside-burma/7596-burmas-environment-law-undergoes-revisions.html>.

119 Nay Lin Aung, “Burma’s Environmental Conservation Act Undergoes Revisions,” *Mizzima*, 25 July 2012, accessed July 30, 2012, <http://www.mizzima.com/news/inside-burma/7596-burmas-environment-law-undergoes-revisions.html>.

120 BEWG, “Burma’s Environment”; KDNG, “Valley of Darkness.”

121 Soe Mra, “Status and Current Issues of Mining Regulatory Regime in Myanmar,” Department of Mines, accessed July 20, 2012, <http://www.freewebs.com/myanmarmines/regulatory.htm>.

122 Ibid.

123 Ibid.

124 Ibid.

125 Ibid.

126 Yawdlao, “Myanmar Bans Mining on Four Major Rivers,” *Mizzima*, March 30, 2012, accessed <http://howdyasia.com/buram-bans-mining-on-four-major-rivers/>.

127 The Burma Environmental Working Group (BEWG), “Burma’s Environment.”

128 Win Myo Thu at the ceremony calling for stopping Letpadaungtaung Mine Project organized by 88 students on 30, Sep. 2012.

so.<sup>129</sup> Even if EIA and SIA were done, it was neither disclosed to the public nor did it include public consultation. For instance, one SIA done by China National Petroleum Corporation (CNPC) that is building the crude oil pipeline in collaboration with the MOGE in Arakan State, was a needs assessment for socio-economic programs for villagers rather than assessment of potentially negative impacts of the pipeline projects.

*Extractive Industries Transparency Initiative (EITI)<sup>130</sup>*

*Table 3: Existing Major Laws related to ESIA assessments*

Issue	Recently enacted laws	Laws under review or drafting <sup>132</sup>	Law Repealed	Existing Laws
<b>Laws Relevant to ESIA</b>	<p>Environmental Conservation Act, Pyidaungsu Hluttaw Law No. 9/2012, The 8<sup>th</sup> Waxing day of Tagu 1373, M.E. (30<sup>th</sup> March, 2012).</p> <p>The Myanmar Mines Law, 1994, The State Law and Order Restoration Council Law No. 8/94, the 2<sup>nd</sup> Waxing Day of Tawthalin, 1356 M.E. (6<sup>th</sup> September, 1994)</p> <p>Foreign Investment Law (2012)</p> <p>Foreign Investment Rules (2013)</p>	<p>The Myanmar Mines Law, 1994, The State Law and Order Restoration Council Law No. 8/94, the 2<sup>nd</sup> Waxing Day of Tawthalin, 1356 M.E. (6<sup>th</sup> September, 1994)</p>		<p>Constitution 2008</p> <p>The Conservation of Water Resources and Rivers Law (2006)<sup>133</sup></p> <p>Protection of Wildlife and Conservation of Natural Areas Law (1994)<sup>134</sup></p>

In spite of such problems during the past regime, the new government has shown its commitment to adopt good practices in extractive industries including incorporating ESIA measures in its legislation. Especially, the government is determined to be a member of EITI and for this purpose, EITI Leading Authority was formed with Union Minister of President Office as Chairman and Union Minister of Ministry of Finance and Revenue as Secretary and

3 Union Members from Ministry of Environmental Conservation, Ministry of Energy and Ministry of Mines as members.<sup>131</sup> Main tasks of the Committee include ensuring better management for extractive industries by developing responsible environment and cooperating with relevant stakeholders from both private and public sectors.

**Recent Developments and challenges ahead**

The new quasi-civilian government has started to undertake a series of economic and political reforms since it took office in March 2011 ending the military rule after more than half a century.

Several measures are being undertaken to strengthen the rule of law and to move towards a more open society. For instance, hundreds of political prisoners

129 ERI, “The Burma China Pipelines,” p.14, 15  
 130 See also Section 6 (6.1) about EITI initiative mechanisms the state started to adopt.

131 ‘Formation of Extractive Industry Transparency Initiative Leading Authority,’ Notification No 99/2012, 1<sup>st</sup> Waxing of Nadaw, 1347 ME (14 December 2012).  
 132 Note: This list is not exhausted, just only based on information available, the list was drawn. Other existing laws might or might not be reviewed.  
 133 Although no ESIA assessments are included in the law, the law contains penalty provisions for causing damage to water resources and rivers (Article 25-29).  
 134 The Law also contains for penalty provisions for causing damage to any ecosystems within a natural area (Article 36).

have been released although there are still remaining ones. Peace talks are ongoing with ethnic rebels in spite of difficulties and problems that remain to be solved.<sup>135</sup> Other measures include easing media and internet control to some extent, legalizing protests, and reforming decades of complicated dual exchange rate system to a managed floating rate. Such reform measures have given hope for a democratic future in Myanmar. As a reward, many countries lifted the sanction imposed in the 1990s and now allow investments in Myanmar<sup>136</sup>

Attracted by such new developments and rich natural resources, foreign investors show great interest in Myanmar and are prepared to engage in various business sectors that are still underdeveloped. The most attractive sector is extractive industries especially in oil, gas and mining. At the same time, incoming investors face many challenges, most importantly inadequate physical,<sup>137</sup> financial and legal infrastructures to support trade and business presence; and human rights related risks associated the existing and ongoing investment projects as seen in the above.

135 "CSW Calls on Burma Army to Stop Attacks on Kachin and Begin a Peace Process after One Year of War," Christian Solidarity Worldwide, <http://dynamic.csw.org.uk/article.asp?t=press&id=1378>

136 See also ADB, "Myanmar in transition."

137 Access to electricity is only 13% of the whole population in 2009 and internet user is only 1 person per 100 people in 2011 although it has increased from 0.1% in three consecutive years since 2007 and 0.3% in 2010. ("Access to Electricity (% of population)," The World Bank, 2012, accessed Sep 30, 2012, [data.worldbank.org/indicator/EG.ELC.ACCS.ZS](http://data.worldbank.org/indicator/EG.ELC.ACCS.ZS).) As of 2011, mobile cellular user is only 1.244 million out of around 6 million population ranking 148 out of 218 countries, "The World Factbook: Myanmar," Central Intelligence Agency." In the past, while SIM cards were affordable to almost everybody in neighbouring countries like Thailand, SIM cards were incredible expensive in Myanmar and it was a luxurious thing and a symbol of status and power. A SIM card alone could cost around US \$ 2000 about 5 years ago. Nowadays, situation is much improved and more accessible to the grass root level compared with the past. Even that, percentage of the population that can use mobile is still very low). Given this backdrop, if the capital that will be coming in Myanmar cannot reach out to remote areas and if it only concentrates in few big cities, gap between the rich and the poor will be getting wider and wider. Consequently, it can lead to social unrest.

Myanmar is still at the beginning stage to upgrade and improve its infrastructure needs in line with the 21<sup>st</sup> century.<sup>138</sup> Similarly, improving legal and financial systems will take some time. In the meantime, cronyism and rent seeking is still a remaining issue. Recent privatization of SOEs was still under control of companies closely associated with the authorities.<sup>139</sup> Eradicating widespread poverty, improving public health, education and providing adequate social services still need to be carried out effectively.

Given this backdrop, in this transitional period, human rights principles and standards such as participation, non-discrimination, transparency, accountability and the rule of law need to be integrated and complied with in the country's economic and social development process. To create a fair and equitable society, it is of utmost importance to eradicate corruption and establish an independent judicial system.

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

Even though the state has not made an official endorsement of the UN "Protect, Respect and Remedy" Framework, the government recognizes the importance of the principles and its implementation. During 2012, the Institute for Human Rights and Business, IHRB, held several

138 Patricia Lee, "Corruption and Unsophisticated Legal System Topped List of Risks in Myanmar, Experts Say," *Thomson Reuters*, June 21, 2012, accessed July 21, 2012, <http://www.trust.org/trustlaw/news/corruption-and-unsophisticated-legal-system-topped-list-of-risks-in-myanmar-experts-say/>; Flavia Krause-Jackson, "Myanmar's Corruption Legacy Shadows Opening to Investors," May 17, 2012, accessed July 20, 2012, <http://www.businessweek.com/news/2012-05-17/myanmar-s-corruption-legacy-shadows-opening-to-investors>.

139 "Burmese Government "Cronies" Said Benefiting from Privatization," *BBC Morning Asia Pacific*, July 22, 2010, <http://www.accessmylibrary.com/article-1G1-232373247/burmese-government-cronies-said.html>; Zaw Htaik, "An Official from World Bank said Myanmar needs an effective strategy for successful economic reform," *Yangon Times*, Vol 8, No. 30. August 15, 2012.

multi stakeholder workshops on the UN Guiding Principles and their application to Myanmar, both inside and outside of the country. During those workshops, senior level government officials have expressed their intention to adhere to the UN “Protect, Respect and Remedy” framework.

## **II. Is the State duty to protect against human rights abuses by third parties, including businesses (“State Duty to Protect”), recognized 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 ?**

Myanmar has not enacted human rights and anti-discrimination laws yet.

#### *The 2008 Constitution*

Although the 2008 Constitution contains some provisions on human rights including education, health, security, privacy, freedom of expression, association, religion, culture, language and literature,<sup>140</sup> There is no general provision on the state duty to protect but several Articles implicitly refer to it: Articles 34 and 354 grants freedom of opinion, freedom of speech, peaceful assembly, freedom of association, and freedom to profess and practice religion. Under Article 372, the state guarantees property rights and under article 19, the right to access to independent justice is guaranteed.

Regarding the acceptance, granting and guarantee of the rights, there is concern about some clauses that can impose limitations on rights and freedom, such as state security, prevalence of law and order, community peace and tranquillity or public order, public morality, health and the other provisions of the Constitution.<sup>141</sup> Most of the rights are subject to

140 2008 Constitution, Section 34, 353, 354, 365.

141 2008 Constitution, Section 34, 354.

limitations provided for in other laws. This has raised critique because laws issued by the former military regime did not follow democratic procedures and may result in overruling the Constitution.<sup>142</sup> Although the government recently repealed Martial Law Order 2/88 that was used to sentence dissidents to long prison terms, a number of such draconian laws and rules targeting opposition groups, rights activists and journalists, such as the Electronic Act, Section 5 (j) and Section 505 (b) of the Penal Code, and Article 17/1 of the Illegal Organization Act remain in place.<sup>143</sup> Even laws promulgated by the parliament such as the new laws on labour, land and environment,<sup>144</sup> still need to be reviewed so that they can give adequate legal protection.

However, article 23 (a) and 24 of the 2008 Constitution state “The Union shall enact necessary laws to protect the rights of the peasants,” and “The Union shall enact necessary laws to protect the rights of workers.” These two provisions indicate the state’s recognition of their duty to protect the rights of workers and peasants by promulgating laws and regulations. On the other hand, rights of indigenous peoples, minorities, children and the disabled are not specifically mentioned in the Constitution.<sup>145</sup>

142 Yash Ghai, “The 2008 Myanmar Constitution: Analysis and Assessment,” [http://www.burmalibrary.org/docs6/2008\\_Myanmar\\_constitution--analysis\\_and\\_assessment-Yash\\_Ghai.pdf](http://www.burmalibrary.org/docs6/2008_Myanmar_constitution--analysis_and_assessment-Yash_Ghai.pdf)

143 Saw Yan Naing, “Ban Repeal Welcomed, Amid Calls for More Reform.” *The Irrawaddy*, January 30, 2013, accessed February 1, 2013, <http://www.irrawaddy.org/archives/25598>; “Discussion on Old Laws to Be Repealed,” *Radio Free Asia*, 15 August, 2012, accessed 17 August 2012, <http://www.rfa.org/burmese/news/parliament-law-discuss-08152012113221.html>.

144 Refer to Table 1, 2 and 3 for detailed references of the recently enacted laws related to labour, land and environment.

145 Yash Ghai, “The 2008 Myanmar Constitution: Analysis and Assessment,” [http://www.burmalibrary.org/docs6/2008\\_Myanmar\\_constitution--analysis\\_and\\_assessment-Yash\\_Ghai.pdf](http://www.burmalibrary.org/docs6/2008_Myanmar_constitution--analysis_and_assessment-Yash_Ghai.pdf).

### *Laws on Labour Rights Issues*

According to Article 24, three new laws relating to labour protection have been enacted.<sup>146</sup> The Labour Organization Law of 2011<sup>147</sup> was drafted based on the ILO Convention No.87 on Freedom of Association. It grants legal rights to a worker to form and to be a member of labour organizations. Under articles 18 and 44 (d), workers' freedom of association is protected. However, as Phoe Phyu, a lawyer and activist points out, the law does not provide adequate protection to the rights of workers in performing organizational activities to establish a union.<sup>148</sup> In some cases, worker leaders found themselves being dismissed or transferred to remote workstations. In such cases, employers claimed disturbances at workplace or breach of contracts – even in cases where there was no written contract – as reasons for the dismissal.<sup>149</sup> According to the affected workers, the real reason is their role as leaders to initiate and organize unions. Two such cases happened in the ADK garment factory in Yangon Region and Aung Sein Factory in Mandalay Region. In both cases, worker leaders who organized the unions were dismissed.<sup>150</sup> In the case of Aung Sein Factory, workers got their jobs back after interventions by labour associations all over the country.<sup>151</sup> However, in the case of the ADK factory, only seven workers were allowed to go back

146 Refer to table 1.

147 The Labour Organization Law, The Pyidaungsu Hluttaw Law No.7/2011, The 14<sup>th</sup> Waxing day of Thadinkyut 1373, M.E. (11<sup>th</sup> October, 2011)

148 An informal interview with Phoe Phyu, a lawyer and activists on 23, September, 2012

149 An informal interview Ma Moe Wai, a labour activist on 23, September, 2012

150 Informal Conversation with Ma Moe Wai; “Decision of Yangon Region on Labour Dispute at ADK Garment Factory,” The Ministry of Labour, July 17, 2012, accessed September 30, 2012, <http://www.mol.gov.mm/adk/>; “Decision of Mandalay Region on Labour Dispute at Aung Sein Factory,” The Ministry of Labour, July 25, 2012, accessed September 30, 2012. <http://www.mol.gov.mm/mm/departments/central-trade-disputes-committee/>

151 Informal Conversation with Ma Moe Wai on 23 September 2012.

to work while two leaders lost their jobs.<sup>152</sup>

Another thing critics point out is the provisions on registration and the requirement to give notice to the employer prior to a strike. In case of workers in a public utility service, notice needs to be given at least 14 days in advance under section 38 (a) and in case of workers outside of the public utility service is at least three days in advance under section 39. In addition, applying for registration of a union seems to be a burdensome process.

Protection against forced labour is provided under the “Law amending Ward or Village Administration Act”.<sup>153</sup> According to ILO, the definition of “forced labour” under the Act is directly derived from Article 2 of the 1930 Forced Labour Convention that Myanmar ratified in 1955. Section 27 (A) criminalizes forced labour and foresees the same penalties as section 374 of the penal code pertaining to forced labour, which amount to “imprisonment, of either description for a term which may extend to one year, or with fine, or with both.”<sup>154</sup> The ILO Committee noted that these penalties were not in line with the Labour Convention, reiterating that “the imposition of just a fine or a maximum one-year prison sentence could not be considered effective, given the seriousness of the offence and the dissuasive effect that the penalties should have”.<sup>155</sup> The Committee also observed that article 359 of the Constitution of Myanmar still permits forced labour imposed by the State in the interest of the public, which “amounts to a blanket authorization for the use of forced labour”.<sup>156</sup>

152 Kyaw Phone Kyaw, “Union-level Tribunal Rules in Labour Dispute,” *Mizzima*, August 01, 2012, accessed September 20, 2012, <http://www.mizzima.com/business/7653-union-level-tribunal-rules-in-labour-dispute.html>

153 Law amending Ward or Village Administration Act, The Pyidaungsu Hluttaw Law No.7/2012, The 6<sup>th</sup> Waxing day of Tagu 1373, M.E. (8<sup>th</sup> March, 2012).

154 ILO, “Report of the Committee on the Application of Standards,” 101<sup>st</sup> Session of International Labour Conference, Geneva, May-June 2012.

155 Ibid.

156 Ibid.

Exploitation of labour is protected under the Anti Trafficking in Persons Law of 2005.<sup>157</sup> Myanmar acceded to United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime on 30 March 2004. In compliance with the UN Trafficking Protocol, the Anti-Trafficking in Person Law of 2005 covers all aspects of trafficking, including trafficking in men, women and children, domestic and international trafficking, and trafficking for all forms of exploitation.<sup>158</sup>

Under section 11 and 12, dignity, physical and mental security of women, children and youth trafficked survivors are protected. Section 16 provides special protection of women, children and youth survivors and the necessary assistance.<sup>159</sup> However, under section 13(b) of the Anti-Trafficking in Persons Law (2005), it is stated that the Law “shall determine whether or not it is appropriate to take action against the trafficked victims for any other offence arising as direct consequences from trafficking in persons.”<sup>160</sup> It shows limited protection since trafficked survivors might be prosecuted with trafficking related offences such as prostitution.<sup>161</sup> Prostitution is illegal in Myanmar and punishment is 1-5 years in prison, with the liability of a fine.<sup>162</sup>

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157 The Anti Trafficking in Persons Law, The State Peace and Development Council Law No. 5/ 2005, The Waxing Day of Tawthalin, 1367, M.E., September, 2005

158 Fiona David, “ASEAN and Trafficking in Persons: Using Data as a Tool to Combat Trafficking in Persons,” IOM, 2006, p. 86; Gerard Smith, “The Criminal Justice Response to Human Trafficking.”

159 2005 Anti Trafficking in Persons Law, Section 11, 12 and 16.

160 UNIAP (2010, 60-63) cited in Gerard. Smith, “The Criminal Justice,” p. 11; CEDAW, “Second and Third Periodic Reports of the State Party,” para. 83, subsection e.

161 Gerard. Smith, “The Criminal Justice,” p. 11.

162 Burma Lawyers’ Council and Human Trafficking cited in Human Rights Foundation of Monland (HRFM), “Report: Why Burmese Women Become Sex Workers,” 2009, accessed January 5, <http://rehmonnya.org/archives/1156>.

## *2012 Foreign Investment Law, FIL and 2013 FIL Rules*

According to the 2012 FIL Law, foreign investment is prohibited in business which can affect the traditional culture and customs of the national ethnic groups within the Union; business which can affect the public health.<sup>163</sup> These two provisions indicate that the state has acknowledged that they have to prohibit potential abuses of right to health and right to cultural practices by businesses specifically foreign and joint venture investments. Although the law does not explicitly mention that the state has the duty to protect the above mentioned rights against abuses by businesses, the criteria for allowing foreign investment can be regarded as an implicit protection mechanism provided by the state. Article 126 of the 2013 FIL law also contains provisions to protect farmers from being evicted or relocated forcibly without consent as the result of land concession to foreign and local joint ventures.

### **2. Has the State Duty to Protect been recognized by the State’s courts?**

No information is available whether the court has already recognized or applied some aspects of a state duty to protect. See more in Section III, No.1 on “Court.”

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163 2012 Foreign Investment Law, Article 4.

### 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?

##### *Court*

Under the Union Judiciary Law (2000), the Supreme Court, State and Divisional Courts, District Courts, Township Courts and other law courts were formed. Since the inception of the new government, in accordance with the Section 293, Chapter 6 of the Constitution, the Supreme Court of the Union, High Courts of Regions, High Courts of the State, Courts of Self-Administered Divisions, the Courts of Self-Administered Zones, District Courts, and Township Courts were established. The Supreme Court is the highest organ of judiciary and the final court of appeals for the decisions, judgments and orders of the lower courts. The Courts adjudicate criminal and civil cases under the provisions of the Criminal Procedure Code, the Civil Procedure Code and the Evidence Act.

Especially throughout the former military regime, the state judiciary has somewhat lost its reputation with regard to impartiality, independence, and accountability, both domestically and internationally.<sup>164</sup> With the intake of the new government, a Parliamentary Committee, *the Rule of Law and Stability Committee*, was formed on 7 August, 2012.<sup>165</sup> Within one month it received over 10,000 complaint letters relating to courts within

164 Human Rights Resource Centre, "Rule of Law for Human Rights in the ASEAN Region: The Republic of the Union of Myanmar," 2011.

165 See also *the Rule of Law and Stability Committee* at supra notes 212-216 and accompanying texts.

the Yangon Division.<sup>166</sup> The committee undertook fact-finding trips to investigate the country's judicial system. It recently pointed out that the executive branch still dominates the judiciary which is in contradiction with the provision of the 2008 Constitution that establishes the separation of powers.<sup>167</sup>

##### *Myanmar National Human Rights Commission (MNHRC)*

The Myanmar National Human Rights Commission (MNHRC) was established on 5 September 2011<sup>168</sup> by Notification No.34/2011 of the Government of the Republic of the Union of Myanmar.<sup>169</sup> There is no legal framework for its foundation; hence, the Commission is currently in the process of drafting its founding legislation.

MNHRC has received over 1700 complaints in the first six months of its operations and the majority of cases concerned land grabbing.<sup>170</sup> The Commission cannot punish and redress human rights abuses including business related ones. The Commission can investigate complaints raised by citizens and contact the concerned person, company or government department to take action.<sup>171</sup> If those who committed human rights abuses do not adhere to MNHRC's recommendation, a letter can be sent to the president advising him to take action.

166 Lawi Weng, "Rule of Law Probe Inspects Rangoon Courts," *The Irrawaddy*, September 28, 2012, accessed October 3, 2012, <http://www.irrawaddy.org/archives/15129>.

167 "Separation of power is still lacking with dominance of the executive branch of the government over the judicial branch," *Weekly Eleven*, Vol 8, No.18, February 6, 2013. (Burmese)

168 "Notification No. (34/2011), Myanmar National Human Rights Commission Formed," *New Light of Myanmar*, September 6, 2011, accessed November 10, 2011, <http://www.myanmar.com/newspaper/nlm/>.

169 Presentation by U Win Mra, Chairman of the Myanmar National Human Rights Commission [http://www.iseas.edu.sg/myan\\_forum/Win%20Mra.pdf](http://www.iseas.edu.sg/myan_forum/Win%20Mra.pdf)

170 MNHRC cited in the Asian Legal Resource Center (ALRC), "Myanmar at Risk of Land-Grabbing Epidemic."

171 Myanmar National Human Rights Commission, "The Republic of the Union of Myanmar: Myanmar National Human Rights Commission Accepting of Complaint," *New Light of Myanmar*, October 6, 2011, accessed November 12, 2011, <http://www.myanmar.com/newspaper/nlm/>.

Without a legal framework, there has been concern over an independent and effective operation of the Commission<sup>172</sup> and organizations such as the EU, OHCHR, the Asia Pacific Forum and National Human Rights Institutions (NHRIs) in other ASEAN countries have already initiated programs to build up the capacity of MNHRC with the aim of promoting its role in accordance with the development of the country's political situation.<sup>173</sup>

### *Ministry of Labour, Employment and Social Security*

#### i) Department of Labour

Various departments under the Ministry of Labour have are responsible for protecting labour rights. The Local and Overseas Employment Sub-Division in the Department of Labour is responsible for migrant workers' affairs. The Department of Labour overseas the licensed agencies so that they practice in accordance with existing laws and regulations.

The deputy labour minister of Myanmar and the Myanmar ambassador to Thailand lead the Protection Committee for Myanmar migrant workers in Thailand.<sup>174</sup> The Committee works with labour protection groups in Thailand<sup>175</sup> According to the government's data, from 10 July 2009 to 28 February 2011, temporary Myanmar passports and identity cards have been issued to 408,160 migrant

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172 "2012 Concluding Observations of the CRC Committee," para.15.

173 See at Asia Pacific Forum, Myanmar Rights Body Charts Path Ahead, 14 August, 2012 <http://www.asiapacificforum.net/carousel/news/myanmar-rights-body-charts-path-ahead>; Charile Campbell, "Empowering the Myanmar Human Rights Commission," *The Irrawaddy*, May 9, 2012, accessed July 16, 2012, <http://www.irrawaddy.org/archives/3860>.

174 "Burmese migrant (127) received estimated (3) millions Baht for their allowance!," *Democracy For Burma*, 2011, accessed January 10, 2012, <http://democracyforburma.wordpress.com/2011/10/20/burmese-migrant127-received-estimated-3-millions-baht-for-their-allowance/>.

175 Nay Thwin, "Burma Appoints Labour Official for Thailand," *Democratic Voice of Burma*, 2011, accessed January 10, 2012 <http://www.dvb.no/uncategorized/burmese-embassy-in-thailand-appoints->

workers in Thailand.<sup>176</sup>

The department of labour encourages adopting a systematic employment contract to prevent disputes between the employer and the employee in industrial settings in the country. Township Workers' Supervisory Committees have been formed consisting of an official from the Ministry of Labour as its secretary, the employer or his or her manager and the employee.<sup>177</sup> Committees have settled 317 disputes resulting in 2,540 workers being paid 15.1 million of Kyats.<sup>178</sup> According to the Ministry of Labour's official website, Township Workers' Compensation Scrutiny Committees were formed to settle workplace fatalities and Workers' Welfare Association to look after welfare and grievances of workers and dependents.<sup>179</sup>

#### ii) The Factories General Labour Laws Inspection Department

The Factories General Labour Laws Inspection Department has responsibility for the enforcement of labour laws and for providing occupational safety and health training and advisory services.<sup>180</sup> However, critics have noted a lack of systematic labour inspection mechanisms to prevent, punish

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176 "21<sup>st</sup> Day Session of Pyidaungsu Hluttaw Held," *The New Light of Myanmar*, 17 March 2012, accessed March 10, 2012, [www.burmalibrary.org/docs13/PYIDH-NLM2012-03-17-day21.pdf](http://www.burmalibrary.org/docs13/PYIDH-NLM2012-03-17-day21.pdf).

177 Human Rights Council, "National Report," at para.63.

178 Ministry of Labour, <http://www.mol.gov.mm/en/departments/department-of-labour/>

179 According to the official Website of the Ministry of Labour, through township Workers' Compensation scrutiny Committees, within the period 1 April 1995 to 14 November 1997, out of 362 compensation cases, 321 cases were settled and 177 workers got 1,302,050 kyats as compensation. A total of 2,234 Workers Welfare Association were formed with 483,283 members. "Department of Labour, Ministry of Labour, Employment and Social Security", <http://www.mol.gov.mm/en/departments/department-of-labour/> Note: The official website lacks information on whether those committees are still in operation or not and analysis on the quality of services they provide.

180 "FGLLID Function Ministry of Labour, Employment, and Social Security," <http://www.mol.gov.mm/en/departments/factories-general-labour-laws-inspection-dept/fglid-main-function/>

and redress labour rights abuses effectively.<sup>181</sup> The Minister of Labour also noted an inadequate institutional structure to effectively monitor labour rights issues.<sup>182</sup>

### iii) Department of Labour Relations

The central Trade Disputes Committee was reorganized as the Department of Labour Relations in 2012 in order to facilitate dispute settlement between the employer or employer organizations on the one hand and the worker or the Labour Organizations on the other hand<sup>183</sup> in accordance with the 2012 Settlement of Labour Dispute Law.

### iv) The Supplementary Understanding Mechanism

The Ministerial Working Group (WG) chaired by the Deputy Minister for Labour, headed by the Director General of the Department of Labour and comprised of officials from related departments, has responsibility to investigate force labour cases submitted through the Supplementary Understanding (SU) mechanism in coordination with ILO. Upon receipt of a complaint the WG instructs the enquiry team to investigate the case and recommend appropriate action to seek for legal redress for the victim and punishment for the perpetrator.<sup>184</sup> During the former military regime, there were cases reported in which the filing of a complaint led to intimidation, harassment, prosecution or other form of reprisal or retaliation. However, there have not been any such cases since

181 Lynn Bo Bo, "Industry Minister Calls for Trade Union Support," *Mizzima*, 5 June 2012, accessed 20 June 2012, <http://www.mizzima.com/business/7255-industry-minister-call>; see also U.S. Department of State, "2010 Country Reports on Human Rights Practices: Burma," p. 47; "2008 Concluding Observations of the CEDAW Committee," para.37; "2012 Concluding Observations of the CRC Committee," paras. 85 and 86.

182 "21<sup>st</sup> Day Session of Pyidaungsu Hluttaw Held," *The New Light of Myanmar*, 17 March 2012, accessed March 10, 2012, [www.burmalibrary.org/docs13/PYIDH-NLM2012-03-17-day21.pdf](http://www.burmalibrary.org/docs13/PYIDH-NLM2012-03-17-day21.pdf).

183 Ministry of Labour, <http://www.mol.gov.mm/en/departments/department-of-labour/>

184 ILO, "Forced Labour Complaint Mechanism," accessed <http://www.ilo.org/yangon/complaints/lang--en/index.htm>.

2011.<sup>185</sup>

### *The National Committee on the Rights of the Child*

The National Committee on the Rights of the Child (NCRC) that was formed in 1993 and reactivated recently after being inactive for a long period,<sup>186</sup> is responsible for protecting children from human rights abuses including business related abuses, such as labour exploitation. State, Regions, District and Township level committees were set up and voluntary social welfare officers were assigned in 10 States and Regions.<sup>187</sup> According to the 2012 Concluding Observations of the CRC Committee, systematic collaboration of different ministries is still needed to implement child rights protection.<sup>188</sup> The Committee has indicated the need to improve the sustainability, mandate, resources and effectiveness of the Child Rights Committees. Official assessment data on the work and impact of these committees in business related cases is not yet available.<sup>189</sup>

### *Land Confiscation Investigation Commission*

The Parliamentary Commission on Land Confiscation Investigation was formed on 8 August 2012. The commission consists of 60 members and will last for one year term. The duty of the commission is to investigate land confiscation cases occurred from 1989 onwards with a particular focus on the purpose, compensation and compliance with existing laws.<sup>190</sup> The Commission has no mandate to decide on the merits of a case after investigation. Instead, it has to submit its findings to the Parliament

185 U.S. Department of State, "2012 Trafficking in Persons Report."

186 "2012 Concluding Observations of the CRC Committee," para.11.

187 Human Rights Council, "National Report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Myanmar," para.46.

188 "2012 Concluding Observations of the CRC Committee," para.11.

189 See also detail in Ministry of National Planning and Economic Development and UNICEF, "Situation Analysis of Children in Myanmar," 2012; "2012 Concluding Observations of the CRC Committee."

190 See also Food Security Working Group's Land Core Group, "Legal Review of Recently Enacted Farmland Law and Vacant, Fallow and Virgin Lands Management Law."

which will discuss them and submit them to the President. As of January, 2013, out of about 4'000 cases over 300 have been investigated.<sup>191</sup> Difficulties the Commission has to face are unwillingness of local authorities to cooperate and poor education of farmers.<sup>192</sup>

The Commission started an investigation in Rakhine State in December and found that in most cases of land confiscation, families of former military generals were the beneficiaries.<sup>193</sup> According to the military, about 4000 acres were returned and 999.258 million kyats were given for crop compensation in 2012.<sup>194</sup> Out of 280 complaints sent directly to the military 42 cases were settled. Another 551 complaints sent to the Commission were also settled. The Commission has encouraged the military to investigate the cases of land confiscated for economic benefits and to take action accordingly. And the chief military officials have also responded to the request of the Commission by stating that they will continue giving compensation accordingly.<sup>195</sup>

#### *Land Allotment and Utilization Security Committee*<sup>196</sup>

A cabinet level Committee on Land Allotment and Utilization Security was formed within the executive branch of the government with the purpose of managing land distribution in investment projects in accordance with existing laws and policies. The

191 Noe Noe Aung, "Commission Will Report Over 300 Land Grabs to Myanmar MPs," *The Myanmar Times*, December 17-23, 2012, accessed January 10, 2013, <http://www.globalpolicy.org/component/content/article/217-hunger/52166-commission-will-report-over-300-land-grabs-to-myanmar-mps-html>.

192 Ibid.

193 Tun Tun Win, "Land Grabbing Cases of Military and Private Companies," *Eleven*, 08 January 2013, accessed January 30, 2013, <http://elevenmyanmar.com/component/article/53-top-events-2012/business/2039-land-grabbing-cases-of-military-and-private-companies>; Nyein Zaw Linn, Zin Bo Lwin, "Giving Compensation to Farmers For farmed Land Confiscated by the Military," *The Weekly Eleven*, Vol 5, No.44, February 1, 2013. (Burmese)

194 Nyein Zaw Linn, Zin Bo Lwin, "Giving Compensation to Farmers For farmed Land Confiscated by the Military."

195 Ibid.

196 Ibid.

Committee consists of 12 members including the Union Minister of Environmental Conservation and Forestry Department. According to the news, the Committee will carry out reviewing existing laws on land management, taxation law, regulations and it is also supposed to cooperate with the relevant organizations. A local expert welcomes the formation of committee with the hope that land distribution and utilization will be effectively monitored so that it can prevent misuse and abuse in land distribution and utilization.<sup>197</sup>

#### *The Ministry of Mines*

Under the existing mining law, the Ministry of Mines has the responsibility to ensure that mining operations by businesses do not jeopardize the environment. As mentioned in afore,<sup>198</sup> the Ministry of Mines needs to encourage an effective implementation of EIA and SIA among businesses and to cooperate effectively with all the stakeholders including the other Ministerial departments such as the Ministry of Environmental Conservation and Forestry, civil societies and most importantly with local people to prevent, investigate and punish mining related human rights abuses.

#### *Ministry of Environmental Conservation and Forestry*

The Ministry of Environmental Conservation and Forestry that was renamed from the Ministry of Forestry in September, 2011 is responsible for environmental conservation, and in cooperation with other relevant Ministries such as the Ministry of Mines, for preventing environmentally hazardous behaviour of extractive industries. In the past, the Ministry focused only on forest conservation and protection and environmentalists urged the Ministry to commit more strongly to addressing environmental issues.<sup>199</sup> The newly released Foreign

197 "Land Distribution Management Committee was formed for effective land management in investment projects," *Weekyleven*, No.43, vol.7, August 1, 2012. (Burmese)

198 See more in "ESIA Implementation."

199 Ei Ei Toe Lwin, "Green Groups Call on Govt to Expand Ministry Activities," *The Myanmar Times*, September 12-18, 2011, accessed July 30, 2012, <http://www.mmmtimes.com/2011/news/592/news59213.html>.

Investment Rules give the Ministry the mandate to issue recommendations to the Myanmar Investment Commission (MIC) on whether permits should be granted to businesses in investment projects with potential social and environmental risks.<sup>200</sup> The Ministry has to scrutinize EIA and SIA assessments conducted by permit applicants as required by the FIL rules.<sup>201</sup>

### *Letpa Taung Inquiry Commission*<sup>202</sup>

The Commission was formed on 3<sup>rd</sup> Dec 2012 as the response to the public outcry for action after a violent crackdown of protesters in the Letpadaung Project area in late November. Some of the monks were severely burned due to the alleged use of tear gas, water cannons and incendiary devices by the riot police.<sup>203</sup> Protesters have been demanding the closure of the mine project jointly operated by China's Wan Bo Company and the military-owned Union of Myanmar Economic Holdings Ltd.

After the incident, the official government commission was formed and is led by Aung San Suu Kyi. It includes some MPs, one senior consultant, government officials from the relevant ministries, a member of the Myanmar National Human Rights Commission (MNHRC), and three local persons. The Commission is mandated to investigate whether the project is being implemented in accordance with the international standards for environmental protection and what the social and environmental impacts of the projects are.<sup>204</sup>

200 2013 Foreign Investment Rules, Article 42 and 44.

201 Article 37, Chapter 5 of the 2013 FIL rules.

202 "Reforming the Inquiry Commission, Notification of the President Office of the Union Myanmar, No.95/2012, the 5<sup>th</sup> Waning of Tazaung Mone, 1374, December 3, 2012,"; The President Office, The Union of Myanmar, accessed January 20, 2013, [www.president-office.gov.mm/briefing-room/notifications/2012/12/03/id-2050](http://www.president-office.gov.mm/briefing-room/notifications/2012/12/03/id-2050).

203 Zarni Man, "Thousands Gather To Mark Copper Mine Crackdown." *The Irrawaddy*, January 30, 2013, accessed February 3, 2013, <http://www.irrawaddy.org/archives/25560>.

204 "Reforming the Inquiry Commission, Notification of the President Office of the Union Myanmar, No.95/2012, the 5<sup>th</sup> Waning of Tazaung Mone, 1374, December 3, 2012,"; The President Office, The Union of Myanmar, accessed January 20, 2013, [www.president-office.gov.mm/briefing-room/notifications/2012/12/03/id-2050](http://www.president-office.gov.mm/briefing-room/notifications/2012/12/03/id-2050).

According to the notification of the President, if necessary, the Commission can appoint scholars and experts from the related fields and the investigation can be carried out in accordance with the legal procedures such as summoning witnesses, requiring documents and having field visits. The legal report of the Commission was set to be released by 31<sup>st</sup> January 2013. However, it is not released yet as of 8 February 2013.<sup>205</sup>

### *Parliamentary Committees relating to human rights protection and rule of law in general*<sup>206</sup>

#### The Rule of Law and Stability Committee

The Committee was formed on 7 August, 2012 and its tenure is for one year. The Committee consists of 15 members and is chaired by Daw Aung San Suu Kyi.<sup>207</sup> One of the duties of the Committee is to oversee "law enforcement among Pyithu Hluttaw (House of Representatives) representatives, judicial bodies, government employees and the media."<sup>208</sup> If the committee concludes that matters need to be followed up, they will have to be submitted to the Parliament. One of the duties of the Committee is to review laws as applied by various government departments and to report to the Parliament on laws to be repealed and redrafted.

The Rule of Law and Stability Committee serves as a mechanism for the general public to lodge complaints against various government departments. As of 21<sup>st</sup> October 2012, the Committee had received 1,700 complaint letters mostly on judicial and legal matters and land confiscation cases.<sup>209</sup> The Committee plans to seek cooperation with related ministries to

205 See also, Daniel Scharf, <http://www.voanews.com/content/copper-mine-confusion-tests-burma-democracy-leader/1595342.html>

206 Some of the Committees of the Parliament have some overlapping tasks.

207 "Rule of Law and Stability Committee," Pyithu Hluttaw, 2012, accessed 11 September, 2012, [www.pyithuhluttaw.gov.mm](http://www.pyithuhluttaw.gov.mm)

208 "Daw Suu to Chair Newly Formed Parliament Committee," *Eleven News*, 07 August 2012.

209 "Rule of Law Committee Handling 1,700 Complaints," *Eleven Myanmar*, October 21, 2012, accessed Dec 30, 2012, <http://elevenmyanmar.com/politics/1020-rule-of-law-committee-handling-1-700-complaints>.

respond to those complaints. The Committee plans to submit its findings on the inspection on courts to the Parliament.<sup>210</sup>

### Committee on the citizens' rights, democracy and human rights

The Committee consists of 15 members. Its tenure lasts for one year. The duties of the Committee include the promotion of citizens' rights, democracy and human rights, ensuring citizens' access to justice and right to non discrimination, reviewing laws practiced by the various government departments and reporting to the Hluttaw for laws to be repealed, amended and drafted.<sup>211</sup> The Committee also has the power to investigate complaints and appeals of the public against various government departments and report to the Parliament accordingly. The duty of the Committee is quite similar to the Committee of the Rule of Law and Stability Committee.

### National Parliamentary Committee on Matters regarding Complaints and Appeals of the Public

The functions of the Committee formed in May, 2012 include accepting complaints and appeals from the public and sending them to the Union Government to take appropriate action. The Committee would then reply to the public in regard with the decision of the Union Government. Within three months, the Committee received 1693 complaints mostly related to grievances such as treatment of public servants towards the public, bribery and corruption involved by police and judicial officers in court cases and land confiscation cases. The complaints related both to the past and the present regime.<sup>212</sup> The Committee urged the Union Government to handle these complaints expeditiously in accordance with laws and regulations.

<sup>210</sup> Ibid.

<sup>211</sup> "Committee on Citizens' Rights, Democracy and Human Rights," Pyithuhluttaw, 2012, accessed September 15, 2012, [www.pyithuhluttaw.gov.mm](http://www.pyithuhluttaw.gov.mm)

<sup>212</sup> "Union Government Needs to Respond to Complaint and Appeal Letters Expediently," *Eleven Myanmar*, August 19, 2012, accessed August 19, 2012, [http://www.weeklyeleven.com/index.php?option=com\\_content&view=article&id=15026:2012-08-19-06-15-16&catid=42:2009-11-10-07-36-59&Itemid=112](http://www.weeklyeleven.com/index.php?option=com_content&view=article&id=15026:2012-08-19-06-15-16&catid=42:2009-11-10-07-36-59&Itemid=112).

## **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?**

In the case of *the Union of Myanmar Inland Transportation Group (Plaintiff) v. People Service Co.Ltd. (Respondent)* (1967),<sup>213</sup> the court clarified that a company is an artificial legal entity, created and recognized by law. The court said that the acts of the managing director bind the company since the managing director is appointed to carry out business on behalf of the company. Consequently, the court decided that the defendant company was liable since it had purchased the goods from the plaintiff and it had to pay for the cost of goods purchased.

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

A law suit was filed by 22 local farmers against six gold-mining companies claiming that the companies had contaminated their land with mining discharge that contains mercury.<sup>214</sup> The farmers' petition was made in May, 2012, under Section 55 of the Specific Relief Act of 1877, amended in 1954 that allows the court to issue injunctions in cases involving disputes

<sup>213</sup> Thein Han, *Myanmar Law Digest*, 1967, B.L.R (C.C) 484 cited in Ma Ma Thant, "Directors' Duties and Shareholders' Remedies in Myanmar: A Comparative Approach to Reform" (PhD diss., The University of Nagoya, 2011).

<sup>214</sup> "Mines Halt Operations as Court Hears Contamination Case," March 24, accessed 25 July, 2012, <http://howdyasia.com/mines-halt-operations-as-court-hears-contamination-case/>.

over property rights.<sup>215</sup> In those cases, the managing directors of the companies were sued as defendants.

Labour laws and regulations such as the 1951 Factories Act and 1951 Leave and Holidays Act states that owners, managers, directors or shareholders are liable for failing to adhere to provisions provided by these laws and regulations to protect the rights of workers regarding leaves and holidays, workplace safety and security measures and health care measures.<sup>216</sup>

**2.2 Do laws and/or regulations: (a) 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?**

*Labour*

*Migrants*

The Law relating to overseas employment aims to curtail malpractice of employment agencies and ensure that migrant workers receive the rights they are entitled to. Under section 29, any service agent licence holder is punishable with imprisonment for a term extendable to 1 year or with a fine of Kyats 5,000 or with both in case of violations of any rules, procedures, orders or directives issued under the law relating to overseas employment.<sup>217</sup> Recently, the Ministry of Labour, Employment and Social Security announced its plan to encourage employment agencies to educate migrant workers

<sup>215</sup> Ibid.

<sup>216</sup> Factories and Labour Laws Inspection Department, *Regulations and Instructions for Factories, Establishments and Workstations within and outside the Industrial zone*. n.d. (Burmese)

<sup>217</sup> Law Relating to Overseas employment, The State Peace and Development Council Law No 3/99, The 12<sup>th</sup> Waning Day of First Waso, 1363 M.E. (9<sup>th</sup> July, 1999)

before sending them abroad.<sup>218</sup>

*Women and Children*

The Social Security Law of 2012,<sup>219</sup> and the Leave and Holiday Act (1952) include provisions on maternity benefits and maternity leave. Articles 93 of the 2012 Social Security Law penalize employers who fail to contribute to the related social security fund and fund to compensate work related damages, with imprisonment of not more than one year or fine or both. The Shops and Establishments Act, 1951 does not allow children under 13 years old to work at any industrial setting. Regulations imposed by the Factories Labour Law Inspection Department states that child workers older than 13 years are only allowed to work with a medical certificate guaranteeing their ability to work. No work between 6pm and 6am is permissible for them. Child workers above 13 years and under 15 years old cannot be asked to work more than four hours a day. If the regulations are breached, managers and owners will be punished with imprisonment for not more than 3 months or Kyats 500 or both.<sup>220</sup>

*Workers at Factories, Shops and Establishments within and outside Industrial Zones*

In accordance with the 1951 Factories Act, measures to protect workplace safety and security; welfare and health care provisions for workers; working hours, day off and overtime payment are adopted.<sup>221</sup> Labour Inspection officers from the Factories and

<sup>218</sup> “Myanmar to Train Migrate Workers about their Rights,” *Eleven Myanmar*, February 12, 2013, accessed February 14, 2013, <http://elevenmyanmar.com/business/2445-myanmar-to-train-migrate-workers-about-their-rights>.

<sup>219</sup> The Social Security Law, The Pyidaungsu Hluttaw Law No.15/2012, The 14<sup>th</sup> Waxing day of Wargaug 1373, M.E. (31<sup>st</sup> August 2012)

<sup>220</sup> Factories and Labour Laws Inspection Department, *Regulations and Instructions for Factories, Establishments and Workstations within and outside the Industrial zone*. n.d. (Burmese) “13 years old and above Child Workers cannot be asked to work for more than four hours a day,” *Business Today*, No. 26, Vol. 2, 13 July, 2012. The imprisonment term is inadequate and should be amended to curtail child labour exploitation.

<sup>221</sup> The 1951 Factories Act; Factories and Labour Laws Inspection Department, *Regulations and Instructions* (Burmese).

Labour Laws Inspection Department are authorized to inspect factories as needed. The punishment for breach of regulations is 2 year imprisonment in maximum.

The 1951 Shops and Establishments Act and its rules and regulations also provide working hours, overtime fee, regular payment of wages for workers at shops and establishments.<sup>222</sup> In case of breaching such regulations, the punishment is up to 2 year imprisonment.

Similarly, the 1951 Leaves and Holidays Act provides rights to leaves and holidays for workers at factories, shops and establishments and in the case of breaching laws and regulations, the punishment is 2 year imprisonment in maximum.<sup>223</sup>

#### *Labour Organizations*

The Labour Organization Law (2011) aims to protect the rights of the workers by establishing good relations among the workers or between the employer and the worker. Under section 44, employers cannot “dismiss a worker for his membership in a labour organization, for the exercise of organizational activities or participating in a strike in accordance with this Law.”<sup>224</sup> Any employer who violates provisions in section 44 is punishable with imprisonment for a term not more than one year or a fine not more than Kyats 100,000 or both under section 51.

#### *Land*

Article 126 of the new Foreign Investment Rules explicitly prohibits land confiscation and forced relocation by not permitting the lease of land for the investment purpose if there is objection from affected communities.<sup>225</sup> The provision also requires

222 See more detail for types of relevant workplace at The 1951 Shops and Establishment Acts; Factories and Labour Laws Inspection Department, *Regulations and Instructions* (Burmese).

223 The 1951 Leaves and Holidays Act; Factories and Labour Laws Inspection Department, *Regulations and Instructions* (Burmese).

224 2011 Labour Organization Law, Section 44, Chapter XII.

225 2013 Foreign Investment Rules, Article 126, Chapter 15.

the consent from communities and permission from the relevant government departments in giving compensations in market rates. Besides, investors need to ensure relocation and resettlement of local people and provide jobs to them in their investment projects.<sup>226</sup>

#### *Environment and Social Protection*

To prevent negative social and environmental impact assessment, the 2012 Environmental Conservation Act require governmental departments, organizations or individuals to conduct environmental and social impact assessments for their intended projects and programs.<sup>227</sup> According to Article 22, owner or a responsible person who are in charge of factories, workplace or establishments that are identified by the government as businesses that have risk of damaging environment are required to obtain a permit. Article 32 states that anyone who breaches rules and regulations issued in accordance with the Environmental Conservation Act 2012 is punishable to up to 1 year imprisonment or fine or both punishments. Article 34 imposes imprisonment from 3 to 5 years or MMK 100,000 to 2,000,000 or both on anyone who imports or exports or produces or stores or trades any substance that is restricted due to its negative environmental affect. On the other hand, Article 37 gives some businesses of government departments and individuals an exemption or relaxation in observing some provisions of the Act with approval of the Union government for the benefit of the state and the public. This broad exemption opens the door for abuses and corruption.

The 2013 Foreign Investment Rules require large investment projects to conduct SIA and EIA assessments.<sup>228</sup> The existing Mining Laws and regulations have some provisions on preventing hazardous mining operation.<sup>229</sup>

226 Ibid.

227 2102 Environmental Conservation Act, Article 7 (13) Chapter 4.

228 2013 FDI Rules, Article 33, Chapter 5.

229 See *Implementation of ESIA*.

***Other Major Existing Laws and Laws Under Review Relating to Businesses<sup>230</sup>***

Existing Laws	Under Review or Being Drafted
The Myanmar Citizens Investment Law, The State Law and Order Restoration Council Law No.4/94, the 5 <sup>th</sup> Waning Day of Tabaung, 1355 M.E. (31 <sup>st</sup> March, 1994)	The Myanmar Citizens Investment Law, The State Law and Order Restoration Council Law No.4/94, the 5 <sup>th</sup> Waning Day of Tabaung, 1355 M.E. (31 <sup>st</sup> March, 1994)
The Myanmar Special Economic Zone Law (MSEZ), The State Peace and Development Council Law No.8/2011, 8 <sup>th</sup> Waxing day of Partho, 1372, M.E.(27 <sup>th</sup> January, 2011)	The Myanmar Special Economic Zone Law (MSEZ), The State Peace and Development Council Law No.8/2011, 8 <sup>th</sup> Waxing day of Partho, 1372, M.E.(27 <sup>th</sup> January, 2011)
The Dawei Special Economic Zone Law (DSEZL), The State Peace and Development Council Law No.17/2011, 8 <sup>th</sup> Waxing day of Partho, 1372, M.E.(27 <sup>th</sup> January, 2011)	The Dawei Special Economic Zone Law (DSEZL), The State Peace and Development Council Law No.17/2011, 8 <sup>th</sup> Waxing day of Partho, 1372, M.E.(27 <sup>th</sup> January, 2011)
State-Owned Economics Enterprises Law (1989), The State Law and Order Restoration Council Law No.9/89, The 10 <sup>th</sup> Waning Day of Tabaung, 1350 M.E) (13 <sup>th</sup> March, 1989)	
The Private Industrial Enterprise Law (1990), The State Law and Order Restoration Council Law No. 22/90, The 10 <sup>th</sup> Waxing Day of Nadaw, 1325 M.E. (26 <sup>th</sup> November, 1990)	
the Promotion of Cottage Industries Law (1991), The State Law and Order Restoration Council Law No.13/91, The 2 <sup>nd</sup> Waxing Day of Thadinkyut, 1353 M.E. (10 <sup>th</sup> October, 1991)	

One of the basic principles of the Private Industrial Enterprise Law (1990) is avoiding or reducing environmental pollution.<sup>231</sup> Duties and powers of Supervisory Body which has a responsibility to grant or terminate the registration of private industrial enterprises include ensuring that private industrial enterprises do not cause harm to public health in the vicinity of their operations, avoid environmental damage and pollution, and ensure workplace safety.<sup>232</sup> If private industrial enterprises operate without registration, in the case of a small scale private industrial enterprise, it is punishable

230 The list is not exhaustive and specifically includes laws mostly related to human rights impact.

231 1990 Private Industrial Enterprise Law, Section 3. Chapter II.

232 Ibid., Section 11 (c), Chapter V.

with a fine from a minimum of Kyats 5,000 to a maximum of Kyats 10,000. In the case of a medium enterprise, the fine starts with Kyats 10,000 and goes up to a maximum of Kyats 20,000. In the case of a large enterprise, the fine starts at Kyats 20,000 to a maximum of Kyats 50,000.<sup>233</sup> If enterprises violate the rules and regulations issued by the Ministry of Industry and the Director General of the Directorate of Regional Industrial Co-ordination and Industrial Inspection, actions will be taken such as warnings, payment of damages and suspension or cancellation of registration.<sup>234</sup> There is no specific provision on prohibiting environmental damage or negative human rights impacts in the 1989 State Owned

233 Ibid., Section 28, Chapter XIII.

234 Ibid., Section 30, Chapter XIII.

## Economic Enterprises Law.

The 2011 Myanmar Special Economic Zone Law (MSEZ) has been amended and approved by the Parliament in order to improve compliance with international standards for both local and foreign firms.<sup>235</sup> A Draft for a Common Industrial Zone Law is also under way. Its goal is to streamline working procedures of all industrial zones including Thilawa, Kyaukphyu and Dawei special economic zones across the country.

The 2011 MSEZ and DSEZ contain some provisions on environmental protection and labour rights. Section 8 (g) of MSEZ states that the State will encourage businesses to conserve and protect the natural environment. Accordingly, the functions and duties of the Management Committees<sup>236</sup> of MSEZ and DSEZ include supervising and inspecting environmental conservation, waste control, health, education, and security.<sup>237</sup> DSEZ law requires the Management Committee to scrutinize the disposal system of industrial wastes and ensure that the developer or investor performs in conformity with the stipulations.<sup>238</sup> Both MSEZ and DSEZ Laws require the developer or investor to take “responsibility for not causing environmental

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235 “Parliament to Review Amended Law on Economic Zones,” *Eleven Myanmar*, January 11, 2013, accessed January 30, 2013, <http://elevenmyanmar.com/politics/2086-parliament-to-review-amended-law-on-economic-zones>.

236 It is not clear who will serve on the committee of MSEZ. There is no provision as such except the provision that the central body will form the Central Working Bodies and Management Committees with the approval of the Government. The Central Body will also be formed by the Government with a suitable person as Chairman and suitable persons from the relevant ministries, Government departments and organizations as members (Article 9 (a), Article 10c). Under article 9 (3) of the DSEZ Law, the Management Committee consists of the Chairman, and the Secretary and the Joint-Secretary from the stipulated government departments and organizations for enabling to carry out the duties contained in the Law. The Chairman is determined as the level of Union Minister. There will be a representative from the Government of the Tanintharyi Region in the Committee.

237 Section 13 (c), Chapter IV, MSEZ Law, Section 10 (c), (j), Chapter IV, DSEZ Law

238 Section 10 (j), Chapter IV, DSEZ Law

pollution and air pollution in respect of his enterprise.<sup>239</sup> However, the law does not provide an enforcement mechanism or any penalties for violation of these duties.

Management Committees of the MSEZ and DSEZ are required to inspect and supervise businesses to ensure the rights of employees, technicians and staff in accordance with existing labour laws and regulations including minimum wages, bonus, leave, holiday, overtime fees, compensation for dismissal and workers’ compensation etc. <sup>240</sup> The Committees are required to serve as mediators facilitating settlements in disputes between employers and employees, technicians or staff.<sup>241</sup>

### 2.3 To what extent, how, and by whom have the laws and/or regulations identified in Question 2 above been enforced by the State?

#### Labour Issue

##### *Employment Agencies*

In 2008, the Department of Labour warned 110 licensed employment agencies that used clandestine methods in sending female migrants abroad that they could lose their license or face imprisonment.<sup>242</sup> In 2011, altogether 14 overseas employment agencies that violated licenses’ provisions were terminated and in a total of 17 cases, brokers sent workers overseas illegally and they were charged in accordance with the laws.<sup>243</sup> On the other hand, according to some news, Myanmar agents reportedly sent underage maids to Singapore<sup>244</sup>

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239 Section 34, Chapter VI, MSEZ Law; Section 31, Chapter VI, DSEZ Law

240 Section 48, Chapter XI, MSEZ Law; Section 47, Chapter XI, DSEZ Law

241 Section 48 (c), Chapter XI, MSEZ Law; Section 47 (c), Chapter XI, DSEZ Law

242 Irrawaddy cited in NCGUB, “The Situation of Migrant,” p. 977.

243 “Minister for Labour Responds to Question of Dr Myat Nyana Soe,” accessed June, 10, 2012, [http://www.burmalibrary.org/docs12/PYIDH-NLM2011-03-migrant\\_workers-29.pdf](http://www.burmalibrary.org/docs12/PYIDH-NLM2011-03-migrant_workers-29.pdf).

244 Amelia Tan, “Myanmar Agents Send Underage Maids,” *The Strait Times*, July 23, 2012.

and some officials in Myanmar were alleged to help forged the age of such maids in their passports.<sup>245</sup>

### *Child Labour*

During an inspection of factories in Hlaing Tharyar Industrial Zone, the Department of Factories and Labour Laws Inspection found 47 child workers under the age of 13.<sup>246</sup> According to the news, children were asked to leave the job and given a salary and compensation. However, no information on whether and what actions were taken against the employers is available. A key problem lies in the fact that child labour will not simply disappear by asking children to leave their jobs even if they are being paid and compensated. In fact, the situation may worsen because some of these children will be forced into street begging and eventually leave them more vulnerable to international trafficking. Only a twofold action plan which aims at addressing poverty as the root of the problem on the one hand and prosecuting and punishing the employers that benefit from exploitative child labour. Many children need to work in order to contribute to their family income but they also have a right to education. Providing them with access to schools while they can still work is therefore essential.<sup>247</sup>

### *Labour Organization and Dispute Settlement*

New labour laws still need to be enforced although there are altogether 396 basic workers' associations, 17 basic employers' associations, four township workers' associations, one workers' federation and one employers' federation as of February, 2013.<sup>248</sup>

245 Ibid.

246 "13 years old and above Child Workers cannot be asked to work for more than four hours a day," *Business Today*, No.26, Vol.2, 13 July, 2012.

247 Aung Mint Htwe, "Challenges of New Generation that have been far away from school bells," *The Voice*, No.35, September 3-9, 2012.

248 The Ministry of Labour, "Workers' Federation, Employers' Federation, Basic Workers' Associations and Basic Employers' Associations." accessed February 5, 2013, <http://www.mol.gov.mm/mm/wp-content/uploads/downloads/2013/01/Org-List24-1-2013.pdf>.

As in the example mentioned afore,<sup>249</sup> some worker leaders who started organization activities for forming a union were dismissed at two factories. According to the procedure mentioned in the Settlement Dispute Act of 2012, when the case could not be settled by the Conciliation Body, the case was lodged at the Dispute Settlement Arbitration Body<sup>250</sup> which consists of workers' representatives, employers' representatives and personnel from the Ministry of Labour. The Arbitration Body upheld the dismissal.<sup>251</sup> According to Ma Moe Wai, a labour activist and Phoe Phyu, a lawyer and activist, worker representatives have little voice in those bodies. Such cases prompted an action from labour activists to ask the ILO for assistance in effectively implementing the new labour laws. According to the ILO technical adviser, the ILO has plans to organise trainings on new Laws for the relevant parties including employers and importantly to the Dispute Settlement Arbitration Body.

For the implementation of other labour laws, please see the section on the Ministry of Labour, Employment and Social Security.<sup>252</sup>

### **Environmental and Social Impact Assessment**

Please refer to the section on "ESIA Implementation"<sup>253</sup>. Recently the government announced that an environmental impact assessment, EIA for Yangon Region's Thilawa Special Economic Zone is going to be conducted with the lead of Japan in one month's time.<sup>254</sup> The Thilawa Special Economic Zone will cover 2,400

249 Supra notes. 151 to 154 and accompanying texts.

250 The Dispute Settlement Arbitration Body was formed under the Trade Dispute Act, 2011 consisting of the government officials, employer and worker representatives.

251 An informal interview Ma Moe Wai, a labour activist on 23, September, 2012 and the accompanying texts at Section II, No.1.

252 See notes 175-186 and accompanying texts at Section III, No.1.

253 See notes 121-130 and accompanying texts.

254 "Officials Ready to Move on EIA for Massive Economic Zone," *Eleven Myanmar*, January 25, 2013, accessed January 31, 2013, <http://eversion.news-eleven.com/business/2242-officials-ready-to-move-on-eia-for-massive-economic-zone>.

hectares and will cost an estimated US \$ 12.6 billion. However, at this point in time, three villages and approximately 200 acres of farmland around Thilawa SEZ are threatened by forced evictions requiring the villagers to leave within 14 days. According to a government official, the land had been taken by the government from the villagers “with fair compensation” many years ago.<sup>255</sup>

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

As mentioned earlier, Myanmar is in a transition period emerging from a decade long authoritarian rule. It is currently in the process of reviewing its existing laws and drafting, consulting and enacting new laws related to labour rights, land rights and environmental protection. Parliamentary Committees and Commissions such as the Committee on the citizens’ rights, democracy and human rights, the Rule of Law Committee; the Commission on Assessment of Legal Affairs and special cases have all mandates related to assessment of law, rules and regulations and their relevance with the current situations of the country.<sup>256</sup>

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

#### **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?**

No information as such so far.

255 Noe Noe Aung, “Impending Evictions Taint Thilawa Economic Zone,” *Myanmar Times*, February 17, 2013, accessed February 11, 2013, <http://www.mmtimes.com/index.php/national-news/4046-impending-evictions-taint-thilawa-economic-zone.html>.

256 “Committees and Commissions,” Pyithuhluttaw, 2012, accessed September 15, 2012, <http://www.pyithuhluttaw.gov.mm/committees>.

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

The Myanmar Companies Act 1914 was modelled on the UK Companies Act 1908 which had “no provision specifically articulating directors’ duties or providing for minority shareholders’ remedies.”<sup>257</sup> Although the Company Act has been updated several times, the core provisions related to directors’ duties and minority shareholders’ remedies have remained unchanged. Since detailed directors’ duties are not specifically codified in Myanmar, the sole source of law governing directors’ duties is case law. In this regard, the case law is not sufficiently developed.

Although there are some specific provisions regulating particular behaviours that fall within the general ambit of fiduciary duties such as the regulation of loans to directors and the disclosure of conflicts of interest, broader provisions related to fiduciary duties are absent both in the Company Act and case law.<sup>258</sup>

The general law governing directors’ duties is mainly found in a very limited body of case law. Specific provisions that obligate directors to act in the interests of shareholders rather than their own self-interests can be found in the company’s memorandum and articles of association and the Myanmar Companies Act.<sup>259</sup> The articles of association also known as Table A are applied to all companies public and private under the Myanmar Companies Act.

Specific provisions relating to the duty of directors are not tantamount to more general directors’ duties, and they are specifically tailored to particular types of behaviours or situations.<sup>260</sup> The Act requires directors to hold a specific amount

257 Ma Ma Thant, “Directors’ Duties and Shareholders’ Remedies in Myanmar: A Comparative Approach to Reform” (PhD diss., The University of Nagoya, 2011).

258 Ibid, p.19.

259 Ibid, p.20.

260 Ibid, p.21

of shares in the company to qualify as a director and in the case of failure to do so, the liability is a fine.<sup>261</sup> A direct conflict of interest is prevented by restricting a company to make a loan to one of its directors in the case of public companies.<sup>262</sup> In case of failure to comply with the rule, there is a fine not exceeding five hundred kyats and the director will be disqualified. . A director is required to make a general disclosure of interests in any transaction entered into by or on behalf of the company. If the provision is contravened, directors are liable to a fine not exceeding one thousand kyats.<sup>263</sup> However, there are no more detailed statutory provisions or extensive case law to guide enforcement of these provisions enforceable.<sup>264</sup> Every company has to maintain books of account in Myanmar or English and if any director or directors contravene the provision, they are liable to a fine not exceeding one-thousand kyats.<sup>265</sup>

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

No information as such.

**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)?**

No information as such.

<sup>261</sup> The Myanmar Companies Act 1914, Schedule I, Table A, art. 70 cited in Ma Ma Thant, "Directors' Duties."

<sup>262</sup> The Myanmar Companies Act 1914, s.86D cited in Ma Ma Thant, "Directors' Duties."

<sup>263</sup> The Myanmar Companies Act 1914, s.91A (1) and (2) cited in Ma Ma Thant, "Directors' Duties."

<sup>264</sup> Ma Ma Thant, "Directors' Duties," p.24.

<sup>265</sup> The Myanmar Companies Act 1914, s. 130 and Schedule I, Table A, art. 105.

**4.1.4 Have any of the directors' duties identified above been enforced by the State in relation to 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)?**

No information.

**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?**

No information.

**4.3 Is/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?**

No stock exchange yet.

**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?**

As part of economic reform of the new government, workshops and fora on corporate social responsibility, Green Economy and Green Growth were held with the support of the Hanns

Seidel Foundation (HSF). International experts and the government agencies such as the Ministry for Environmental Conservation and Forestry and business organizations including the UMFCFI participated.<sup>266</sup> The UN launched the UN Global Compact (UNGC) in Myanmar on 1 May 2012 and the UMFCFI and 14 other local Myanmar companies signed the UNGC charter.<sup>267</sup>

HSF signed an MOU with UMFCFI to increase capacity building efforts for the creation of a better business environment, enhance knowledge sharing and targeted grassroots level development.<sup>268</sup> With the cooperation and support of the HSF, the Ministry of Hotel and Tourism promote responsible tourism aiming to encourage every travel company, operator, hotel and destination to take action not only for the sustainability of tourism but also not to have a negative impact on the communities.<sup>269</sup>

With the facilitation of the British Government, the government of Myanmar participated in a workshop around the UN Guiding Principles and their application to Myanmar. The workshop was jointly held by the Institute of Human Rights and Business in London, the French Delegation and the UK Trade Delegation. The chairman of the Myanmar Investment Commission and some economic and political advisers of the government attended workshops held by the IHRB on responsible investment measures both domestically and

266 "Workshop Enhances Integration of Corporate Social Responsibility in Myanmar's Economic Development," accessed July 30, 2012, <http://www.hss.de/southeastasia/en/myanmar.html>; "First Green Economy and Green Growth Forum in Myanmar," accessed July 30, 2012, <http://www.hss.de/southeastasia/en/myanmar/news-events/2011/first-green-economy-and-green-growth-forum-in-myanmar.html>.

267 "Launch of the UN Global Compact in Myanmar," accessed July 27, 2012, <http://www.csringsingapore.org/c/resources/newsletters-archive-2012/archive/view/listid-1-mailinglist/mailed-22-may-2012>.

268 "Memorandum of Understanding signed with Union of Myanmar Federation of Chambers of Commerce and Industry," accessed July 30, 2012, <http://www.hss.de/southeastasia/en/myanmar.html>.

269 "The Draft Responsible Tourism Policy for Myanmar Formulated Successfully," accessed July 30, 2012, <http://www.hss.de/southeastasia/en/myanmar.html>.

internationally and express their political will and commitment to help foster responsible investment practices in Myanmar.

The government recently established an EITI (Extractive Industry Transparency Initiative) leading authority, with the aim of developing good investment environment; better management of extractive industries and "create opportunity for a frank and transparent discussion between private investors and the people and join hands with the public-based societies of the private sector so as to be able to affectively deal with the tasks of extractive industry transparency initiative on behalf of the State."<sup>270</sup>

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

No information.

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

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

Although the State has not adopted measures that require State-owned Economic Enterprises to conduct human rights due diligence or human rights impact assessment, the new government has taken some initial steps to curtail malpractices related to SOEs during the former military regime. During the military government, SOEs mostly in the extractive industries and some other sectors were

270 "Formation of Extractive Industry Transparency Initiative Leading Authority, President Office, Republic of the Union of Myanmar, Notification No 99/2012, 1<sup>st</sup> Waxing of Nadaw, 1374 ME(14<sup>th</sup> December, 2012)," *The New Light of Myanmar*, Vol.XX, No.239, December 15, 2012.

alleged for their lack of transparency, corruption and lack of adequate measures to prevent or reduce negative impact of joint venture business enterprises on local communities and the environment.<sup>271</sup> In spite of some remaining shortfalls, initiatives taken by the current government include starting the EITI membership application process, measures to eradicate corruption and the newly introduced requirement for ESIA assessments.

As part of the economic reform process, the government plans to sign up to the Extractive Industries Transparency (EITI) standards.<sup>272</sup> EITI will enable people to be in a position to hold the government accountable for the management of resources and revenues overseen by a multi-stakeholder group of government, companies and civil society.<sup>273</sup> Better management in natural resources is highly related to the government's capacity to protect social and economic rights of its citizens. In the case of Myanmar, transparency in the government's income from the extractive industries can pave the way to better allocation of those revenues and can help increase expenditure on basic necessities for development such as health and education.<sup>274</sup>

During the former regime, proceedings and revenues from SOEs were not made public especially in oil and gas sector. Presumably, revenue lost has occurred and it has negative effect on revenue allocation. Consequently, the former regime spent very little on

271 See notes and accompanying texts under "Oil and Gas"; also notes and accompanying texts under "ESIA Implementation."

272 See note 131-132 and accompanying texts about EITI. EITI mechanism requires companies and governments to disclose payments for natural resources through an EITI report, where tax and royalty payments are independently verified and reconciled.

273 "Govt Gives Positive Signals on EITI," *The Myanmar Time*, July 24, 2012, accessed July 30, 2012, <http://www.shwe.org/news-update/govt-gives-positive-signals-on-eiti/>.

274 Revenue allocation is not part of the EITI's requirements. Critics also raised concern over the government's ability to effectively create a functional, independent multi-stakeholder group to oversee the EITI process. (Kate Kelly, "Burma Set To Join Transparency Initiative," July 18, 2012 accessed July 30, 2012, <http://www.dvb.no/news/burma-set-to-join-transparency-initiative/22942>).

health and education and the fundamental rights of children's access to education and health has been violated. For instance, for years, only 1.3 per cent of the government budget was spent on education while about 25 per cent was allocated to the armed forces.<sup>275</sup> Although the budget for education was increased in April, 2012 from \$ 340 million to \$740 million, it is still criticized as inadequate.<sup>276</sup>

According to the IMF, the military regime did not accurately include gas revenue in its national budgets by using old official exchange rate of 6 Kyats per dollar.<sup>277</sup> In 2008, the annual Yadana Project income was estimated at US \$ 1.7 billion in of which, an estimated US \$ 1.02 billion reportedly went directly to the military regime without being used for the public.<sup>278</sup> Revenue was reportedly kept in two leading offshore banks in Singapore.<sup>279</sup> However, the current government made its gas revenue public it amounts to US \$800 million from April 1 to July 13 of the 2012-2013 fiscal year.<sup>280</sup>

A second initiative adopted by the government is the eradication of corruption practices and bribery in governmental organizations. The government recently organized an Action Committee against Corruption with the vice president as Chairman and including union members, the Union Attorney General and a legal advisor to the President as

275 "Myanmar Pays Price for Lost Generation of Educated," *Associated Press*, June 28, 2012, accessed September,30, 2012. [www.foxnews.com/world/2012/06/28/myanmar-pays-price-for-lost-generation/](http://www.foxnews.com/world/2012/06/28/myanmar-pays-price-for-lost-generation/)

276 Ibid.

277 Confidential Report of IMF received by ERI, cited in "Total Impact," p.42,43.

278 Earth Rights International (ERI), "Total Impact," p.42, 43.

279 Ibid.

280 "Myanmar Estimates US \$ 800M From Gas Revenue," *Eleven News*, July 25, 2012, accessed August 11, 2012, [www.elevenmyanmar.com/business/383-myanmar-estimates-us-800m-from-gas-revenue](http://www.elevenmyanmar.com/business/383-myanmar-estimates-us-800m-from-gas-revenue).

members.<sup>281</sup>

Although the 1989 State Owned Economic Enterprise Law has no provision on EIA and SIA, it has become the policy of the new government to conduct them. According to the Nay Pyi Taw Accord for Effective Development Cooperation presented to development partners by the Minister of National Planning and Economic Development and approved at the First Myanmar Development Cooperation Forum in Nay Pyi Taw on 20<sup>th</sup> of January 2013, adequate ESIA needs to be undertaken and designed and delivered development activities need to be in line with the result.<sup>282</sup>

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281 “Organizing Action Committee against Corruption, Notification of the President Office of the Union Myanmar, No.9/2013, the 11<sup>th</sup> Waning of Nadaw, 1374 ME, January 8, 2013,” The President Office, Republic of the Union of Myanmar, accessed January 20, 2013, [www.president-office.gov.mm/briefing-room/notifications/2013/01/09/id-1377](http://www.president-office.gov.mm/briefing-room/notifications/2013/01/09/id-1377).

After a few days of its formation, complaint letters were sent to the committee against the custom department under the Ministry of Finance and Revenue. The allegation said that cumbersome customs procedures and corruption practices have triggered grievances to the public and sustaining heavy losses of the government revenue. (“Please Tell the President that now is the Best Time to Start Handling Bribery and Corruption Cases,” *Eleven Myanmar*, January 30, 2013, accessed January 31, 2013, <http://elevenmyanmar.com/national/2294-an-interview-on-bribery-and-corruption-of-myanmar-customs-department>.)

Other complaints are related to red tape and inconsistent procedures of the department that foster corruption and put small and medium businesses at a disadvantage. Meanwhile big businesses including cronies and joint venture businesses have allegedly got exemption from custom duties with the permission of the Myanmar Investment Commission (MIC) gaining a comparative advantage. (“Red Tape procedures of the Custom Department foster Corruption Practices putting small and medium import businesses at a disadvantage,” *Bi Weekly Eleven*, No.43, Vol.5, January 25, 2013 (Burmese).

Exemption is granted from customs duty on machinery and other capital goods imported as part of operation under the 1988 foreign investment policy. Most of the policy framework remains are the same under the 2013 foreign investment policy. Most of the foreign investments are Joint Venture businesses operating large projects with SOEs or large private investors.)

282 “Nay Pyi Taw Accord for Effective Development Cooperation,” The President Office, The Union of Myanmar, accessed January 30, 2013, [www.president-office.gov.mm/en/briefing-room/announcements/2013/01/29/id-1493](http://www.president-office.gov.mm/en/briefing-room/announcements/2013/01/29/id-1493).

At the third Planning Commission Meeting basic framework for economic and social reforms were approved on 26<sup>th</sup> Dec, 2012. The Committee emphasized the need to conduct ESIA in implementing industrial zones and urbanization.<sup>283</sup> New environmental law and foreign investment rules also require investments and development projects to adopt ESIA practices.<sup>284</sup>

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

The government has recently formed the Central Committee and the Work Committee for development of small and medium enterprises.<sup>285</sup> SMEs will be receiving support and services from the government and private banks. The Committee and Work Committee are assigned to formulate and promulgate laws, regulations and procedures for SMEs development. It remains to be seen whether SMEs are required to comply with the international standards and codes and conducts to respect human rights.

## **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?**

Myanmar is in the privatization process and has plans to increase the role of the private sector in industries such as telecommunication, energy, forestry, education and health. There is political

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283 “Industrialization is a Must to Improve Economic Performance of the Nation,” *The New Light of Myanmar*, Vol XX, No.252, December 28, 2012.(Burmese)

284 See notes and accompanying texts under “*ESIA Legal Framework*.”

285 “Formation of Central Committee and Work Committee for Development of Small and Medium Enterprises, No.11/2013, the 12<sup>th</sup> Waning of Nadaw, 1374 ME, January 9, 2013,” The President Office, The Union of Myanmar, accessed January 20, 2013, [www.president-office.gov.mm/en/briefing-room/notifications/2013/01/03/id-1382](http://www.president-office.gov.mm/en/briefing-room/notifications/2013/01/03/id-1382).

will to improve the privatization process. For instance, with the support of Swedish International Development Cooperation Agency, SIDA, the Ministry of National Planning and Economic Development held a workshop on “Privatization Process” in mid- October 2012. Civil society also had an opportunity to provide their input to the process.

A new Privatization Commission led by the vice-president was set up and tasked to evaluate privatized enterprises as to whether they promote national interests and to report their pros and cons to the higher bodies concerned.<sup>286</sup> On the other hand, privatization process is still subjected to criticism due to lack of transparency and it is reportedly beneficial mostly to crony businesses.<sup>287</sup> Most of the privatised services lack is not regulated by law, except for the Private School Registration Act.<sup>288</sup> Although the Act provides clauses for assurance of quality education, boarding and monitoring mechanisms, there is no provision related to equal right to quality education for both the poor and the rich.<sup>289</sup>

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

Until this point in time, no policy guidelines that promote respect for human rights in public

286 Min Thiha Zaw, and Kyaw Thura, “Privatized Enterprises in National Interests,” *Eleven Myanmar*, July 30, 2012, accessed August 8, 2012, [http://eversion.news-eleven.com/index.php?option=com\\_content&view=article&id=1004:privatized-enterprises-in-national-interests&catid=42:weekly-eleven-news&Itemid=109](http://eversion.news-eleven.com/index.php?option=com_content&view=article&id=1004:privatized-enterprises-in-national-interests&catid=42:weekly-eleven-news&Itemid=109).

287 “Privatization Schemes Fuelling Inflation and Mistrust, Business People Say,” *Eleven Myanmar*, January 16, 2013, accessed January 30, 2013, <http://elevenmyanmar.com/business/2144-privatisation-schemes-fuelling-inflation-and-mistrust-business-people-say>”; See also Jason Szep and Andrew R.C. Marshall, “Special Report: An Image Makeover For Myanmar Inc.,” *Reuters*, April 12, 2012, accessed Oct 7, 2012, [www.reuters.com/article/2012/04/12/us-myanmar-cronies-image-idUSBRE83BOYU20120412](http://www.reuters.com/article/2012/04/12/us-myanmar-cronies-image-idUSBRE83BOYU20120412)

288 The Private School Registration Act, Pyidaungsu Hluttaw No.14, The 7<sup>th</sup> Waxing Day of Nadaw, 1373, December 2, 2011.

289 Ibid.

procurement, have been developed.<sup>290</sup> However, according to the Nay Pyi Taw Accord for Effective Development Cooperation approved at the First Myanmar Development Cooperation Forum in Nay Pyi Taw on 20<sup>th</sup> of January 2013, the government stated its policy commitment to strengthen public administration by enhancing the transparency and effectiveness of government programs and foreign assistance.<sup>291</sup> The government said misuse of development cooperation will be prevented by improving public procurement and implementing the anticorruption law. Laws and regulations that prohibit government corruption in public procurement include the Penal Code,<sup>292</sup> the Suppression of Corruption Act (1948), the Control of Money Laundering Law and Rules and the Public Property Protection Act.<sup>293</sup>

290 A paper on corruption control in public procurement presented by an official of the Attorney General office of Myanmar in 2008, includes a sample of “Invitation to Tender” advertised in dailies by the government ministries and departments. Although specifics are given in the advertisement such as the name of the government agency, the items that will be purchased, the quantity of the items, tender closing date, tender documents that are required and other details, there is no information on conditional requirements that contractors comply with such as environmental, social and governance standards. (Phyu Mar Wai, “Corruption Control in Public Procurement,” (paper presented at second regional seminar on Good Governance for Southeast Asian Countries, Bangkok, July 23-25, 2008), p. 87); See also Tender advertisement in “Open Tender from Public Construction Work, Tanintharyi Region,” *MyanmarAlinn Daily*, Vol.52, No.134, February 11, 2013.

291 “Nay Pyi Taw Accord for Effective Development Cooperation,” The President Office, The Union of Myanmar.

292 Section 162 to 165 of the Penal Code provides that offence of bribery and corruption committed by public servants is punishable with a maximum of three years imprisonment.

293 The Control of Money Laundering Law, The State Peace and Development Council Law no.6/2002, The 7<sup>th</sup> Waxing Day of Nayon, 1364 M.E. June 17, 2002; The Public Property Protection Act (1947), Burma Act LXXXIII, December 24, 1947.

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

There is no information on what steps the current government has taken to support business respect for human rights in operating in such areas. However, as mentioned afore, there is now a political commitment to conduct ESIA assessments in extractive industries.<sup>294</sup> Extraction businesses in Myanmar such as logging, mining, hydropower projects, and oil and gas extraction are mostly operated in conflict affected and high risk, resource-rich ethnic areas. Throughout the former military regime, no regard had been shown in relation to negative human rights impact on local communities incurred by extractive industries.<sup>295</sup> There was no regulatory oversight over businesses in those areas and local communities had no access to redress to seek compensation for their injuries.<sup>296</sup>

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294 See notes and accompanying texts under “*ESIA Legal Framework*.”

295 ERI, “Capitalizing on Conflict: How Logging and Mining Contribute to Environmental Destruction in Burma,” 2003; ERI, “The Burma-China Pipelines.” KDNNG, “Valley of Darkness.”; ERI, “Energy Insecurity”; ERI, “Broken Ethics: the Norwegian Government’s Investments in Oil and Gas Companies Operating in Burma (Myanmar),” December 2010.

296 Resource extraction was a lucrative business for both the military and the insurgent groups to reinforce their own armed forces and groups. And it had increased tension in an attempt of controlling over natural resources. For instance, cease fire groups with the military were allowed to retain their weapons, control some territory, and granted business concessions. They have become significant fighting forces against their rival groups and frequently acted as proxies for the military. (See BEWG, “Burma’s Environment.”)

In many cases, increased military security along gas pipelines and hydropower projects had increased tension. (ERI, “The Burma-China Pipelines.” “Investors’ Haste to Build Big Dams is Undermining Fragile Peace Process in Karen State,” *Karen Rivers Watch*, March 14, 2012, accessed July 10, 2012, <http://www.burmapartnership.org/2012/03/investors-haste-to-build-big-dams-is-undermining-fragile-peace-process-in-karen-state/>). For instance, there was a violent conflict in the vicinity of “the China-Burma pipelines” project between the Shan State Army-North (SSA-N) and the army and between the ethnic Kokang armed group and the army in 2009. And over 30,000 refugees fled to China. (ERI, “The Burma-China Pipelines.”p.18, 19)

Since the inception of the new government, significant efforts have been made to foster peace talks with insurgent groups that aim to lead to political dialogue. But the real political dialogue still needs to be developed.<sup>297</sup> Particularly the fighting in Kachin State still needs to come to an end.

Both the president and Daw Aung San Suu Kyi have stated that it is crucial to ease ethnic conflicts and establish national reconciliation for economic development and democratic processes. It is one of the national priorities to ‘accelerate peace-building, political reforms and development initiatives to promote reconciliation and national harmony in recent conflict and cease fire areas.’<sup>298</sup> It aims to establish mechanisms to provide transparent and equitable assistance in cease fire and conflict affected 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?**

No information.

### **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?**

No information.

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297 See “Kachin Groups Asks UN to take ‘action’ to Stop Conflict,” *Mizzima News*, September 26, 2012, accessed October 2, 2012, [www.mizzima.com/special/kachin-battle-report/8104-kachin-group-ask-un-to-take-action-to-stop-conflict.html](http://www.mizzima.com/special/kachin-battle-report/8104-kachin-group-ask-un-to-take-action-to-stop-conflict.html).

298 “Nay Pyi Taw Accord for Effective Development Cooperation,” The President Office, The Union of Myanmar.

**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?**

No information.

**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?**

No information.

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

According to the government during the Universal Periodic Review process, the “Law review has been made by all ministries with a view to submission to the Hluttaw either to amend, repeal or promulgate new laws. They review whether existing laws are compatible with the Constitution<sup>299</sup> and international norms.”<sup>300</sup>

299 The constitution itself is in controversy in terms of its human rights protection provisions. See also under “*The 2008 Constitution*.”

300 Human Rights Council. “Report of the Working Group on the Universal Periodic Review: Myanmar,” A/HRC/17/9. 24 March, 2011, para. 103 (d).

**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?**

According to the then Minister of Labour in 2011, the Ministry of Foreign Affairs, the Ministry of Home Affairs and the Ministry of Immigration and Population are working closely as a task force on the protection of migrant workers. An association for safeguarding Myanmar workers was formed including Myanmar ambassadors in receiving countries as patrons and Myanmar entrepreneurs as members.<sup>301</sup>

The new foreign investment rules give mandate the Myanmar Investment Commission (MIC) to form a scrutiny body to study the investment permit application.<sup>302</sup> The body includes the government departments such as the Directorate of Investment and Company Administration (DICA), the Customs Department, the Revenue Department, the Department of Labour, the relevant department from the Ministry of Electric Power, the Department of Human Settlement and Housing Development, the Directorate of Trade, and the department of environmental conservation. When the new body examines the application, it can invite experts and scholars from the government and non government organizations if necessary. However, the MIC has the decision power over granting the permit or not.<sup>303</sup> One of the requirements for the investment permit application is to carry out ESIA for large investments and investments are required to conduct ESIA in under the rules of the Ministry of environment and forestry department to do ESIA.<sup>304</sup>

301 “Minister for Labour Responds to Question of Dr Myat Nyana Soe,” accessed June, 10, 2012, [http://www.burmalibrary.org/docs12/PYIDH-NLM2011-03-migrant\\_workers-29.pdf](http://www.burmalibrary.org/docs12/PYIDH-NLM2011-03-migrant_workers-29.pdf).

302 2013 Foreign Investment Rules, Chapter 5 and 6, Article 37, 38, 39, 40 and 41.

303 Ibid., Chapter 8, Article 48.

304 Ibid., Chapter 5, Article 33.

## 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?

Economic agreements made between the State and other States or business enterprise still need to be made transparent as the reformist government has taken some political and economic reform steps. The government of Myanmar and Thailand government signed a Memorandum of Understanding (MOU) on the comprehensive development of the Dawei Special Economic Zone and adjacent areas during the president's visit to Thailand in late July 2012. A ministerial-level working group was set up to implement projects.<sup>305</sup> Meanwhile, local people near the Dawei-deep-sea port area called on the governments to provide details of the MOUs since it has already caused widespread concern among the local population with regard to their agriculture-based livelihoods due to lack of adequate consultation and information sharing by the government and companies concerned in the past.<sup>306</sup>

The MOU signed by the new government is mainly to boost a US\$80-billion project on building an industrial zone and a deep-sea port in Dawei agreed by Thailand and the former military government in 2008. Aung San Suu Kyi made a remark at the World Economic Forum in June 2012 that Italian-Thais investors planned deep-sea port excluded people in regard to the content of the contracts.<sup>307</sup>

305 Supalak Ganjanakhundee, "Sweeping Cooperatoin Deal with Myanmar," *The Nation*, July 24, 2012, accessed July 30, 2012, <http://www.nationmultimedia.com/business/Sweeping-cooperation-deal-with-Myanmar-30186843.html>.

306 "Dawei Residents Want a Seat at the Table," *Mizzima News*, July 25, 2012, accessed July 30, 2012, <http://www.mizzima.com/business/7597-dawei-residents-want-a-seat-at-the-table.html>.

307 Daniel Ten Kate, "Thailand Seeks Concrete Progress on Dawei Port, Yingluck Says," *Bloomberg*, July 23, 2012, accessed <http://www.bloomberg.com/news/2012-07-22/myanmar-president-to-meet-yingluck-over-stalled-deep-sea-port.html>; Piyanart Srivalo, "Countries Want Japan in Dawei Port Project," *The Nation*, December 18, 2012, accessed January 10, 2013, <http://www.nationmultimedia.com/national/Countries-want-Japan-in-Dawei-port-project-30196340.html>

A 4,000 megawatt coal-fired plant was included in the project without considering its environmental impact and it has only been cancelled with the decision of the new government on environmental ground.<sup>308</sup>

Meanwhile, the new government has made a policy commitment to conduct ESIA for investment projects with a potential risk for negative environmental and social impacts. In this light, the government has proposed to the Indian government to conduct an ESIA for Kaladan River multi-purpose transport project with the administration of a Third Party. The project will include road construction from Sittwe in Arakan State of Myanmar to India border that is expected to finish by 2016.<sup>309</sup>

Meantime, the existing problems such as land grabbing and negative environmental and social impacts mainly arose because of a lack of transparency, adequate participation of communities and lack of adequate or inadequate ESIA or human rights due diligence process in extractive industry projects and large economic zone projects.<sup>310</sup> Economic agreements concluded during the former military regime appear to have neglected human rights obligations.

One case is that of the Myintsone dam project, a Chinese funded project. Environmentalists and activists had raised concern on the negative environmental and social impacts of the project on local people not only in Kachin State where the dam would be built, but also in the regions along the Ayeyarwaddy River. As the result, in September 2011, the president announced that the project had

308 Jason Szep and Amy Sawitta Lefevre, "Exclusive-Japan, Thailand Race to Rescue of Myanmar's Struggling Dawei," *Reuters*, Sep 21, 2012, accessed Sep 30, 2012, in.reuters.com/article/2012/09/21/Myanmar-thailand-dawei-idINL4E8KL2A L2012091?rpc=RSS&feedName=domesticNews&rpc=401.

309 "Myanmar asked India to do EIA and SIA by Third Party for Kaladan River Project" *Weeklyeleven*, No.42, vol.7, July 25, 2012 (In Burmese).

310 See more at "Overview of Myanmar's Business and Human Rights Landscape."

to be halted during the tenure of his government. Until the implementation of the project, affected local people were not informed of the construction of the project let alone consulting them in conducting EIA that was inadequately done.<sup>311</sup> The implementation of the project started in 2007 by Asia World Company and the China Power Investment Corporation in spite of objections of environmentalists and local residents. An estimated 12,000 people from 63 villages had been relocated until the project was halted in 2011.<sup>312</sup>

Another example is the project known as “Burma-China pipelines.” The economic agreement between China and former regime had not been made public. According to an expert from World Wildlife Fund, damage to local people such as forest and soil depletion, losses of farmlands and people’s livelihoods and possible extensive ecosystem degradation could be substantial. Activists claim that the project will result in an overall loss for Myanmar since the projected income of US \$13.8 million is unjustifiably low in relation to the damage that the project has already incurred and will incur. An opposition MP has called for reviewing the project.<sup>313</sup>

### **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?**

Not relevant.

311 “Irrawaddy Myintsone Dam,” *International Rivers*, Sep 30, 2011, accessed Aug 11, 2012, [www.internationalrivers.org/campaigns/irrawaddy-myintsone-dam-0](http://www.internationalrivers.org/campaigns/irrawaddy-myintsone-dam-0)

312 “Burma to Halt Myintsone Dam Project: Media Reports,” *Mizzima*, September 30, 2012, accessed Oct 1, 2012, [http://eversion.news-eleven.com/index.php?option=com\\_content&view=article&id=941:myanmar-china-gas-pipeline-project-calls-for-review&catid=43:bi-weekly-eleven-news&Itemid=110](http://eversion.news-eleven.com/index.php?option=com_content&view=article&id=941:myanmar-china-gas-pipeline-project-calls-for-review&catid=43:bi-weekly-eleven-news&Itemid=110).

313 “Myanmar-China Gas Pipeline Project Calls for Review,” *Shwe Gas Movement*, July 20, accessed July 30, 2012, <http://www.shwe.org/news-update/myanmar-china-gas-pipeline-project-calls-for-reviewhttpwww-shwe-orgwp-adminpost-new-php/>

### **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?**

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

##### **Non-Legal State-Based Grievance Mechanisms**

###### *Labour Dispute Settlement Mechanisms under Trade Dispute Act, 2011*

Under section 10, Chapter III of the 2011 Trade Dispute Act, the Region or State Government shall form the *Conciliation Body* in the townships within the Region or State. It is chaired by a person assigned by the relevant Region or State Government. Members include three employer representatives; three worker representatives; two distinguished persons trusted and accepted by employer and labour organizations; a relevant departmental representative of the township level and a person assigned by the Ministry of Labour as Secretary. The Conciliation Body has a two-year tenure. Disputes that cannot be settled under the mechanism of the Coordinating Committee<sup>314</sup> are to be submitted to the Conciliation Body. The cases submitted to the Body need to be settled within 3 days excluding the official holidays.<sup>315</sup> In case of non settlement through the mechanism of the Conciliation Body, the detailed report of the case file needs to be handed over to the relevant Arbitration Body within two

314 Under Section 3 to 9, Chapter II, Trade Dispute Act, 2011, a non state based mechanism is formed at workplace stations as Workplace Coordinating Body that is consisted of representatives of workers and employers. Workers or employers can lodge complaint their grievances to the Body. Only when the Body cannot settle the dispute, the case will be submitted to the Conciliation Body.

315 2012 Settlement and Labour Dispute Law, Article 24, Chapter VI

days, excluding the official holidays and also submit the summary report to the relevant Region or State Government.<sup>316</sup>

Under Section 16 (a), Chapter IV, The Ministry, with the approval of the Union Government, shall form a Dispute Settlement Arbitration Body in the Regions or States. The composition of Chair, Members and Secretary is similar to that of the Conciliation Body. The Arbitration Body also has a two-year tenure. The Body needs to make decision on the case file that cannot be settled under the Conciliation Body within seven days not including the official holidays and inform the concerned parties within two days excluding the official holidays.<sup>317</sup>

Working methods, procedures and program of the Arbitration Body are stipulated by the Dispute Settlement Arbitration Council.<sup>318</sup> The Council shall be formed by the Ministry of Labour with the approval of the Union Government, with 15 qualified persons of good standing from legal experts and experts in labour affairs. They are five persons selected by the Ministry, five selected by the employer organizations and five by the labour organizations.<sup>319</sup> The term of the Council is two years. The Arbitration Council is assigned to act as the independent and impartial organization based on social justice, decent work and principles of equity in making decisions.<sup>320</sup>

If either party of the dispute is not satisfied with the decision of the Arbitration Body, except for a decision in respect of essential services, they can apply to the Arbitration Council within seven days not including official holidays or carry out a lock out or strike in accordance with the relevant law.<sup>321</sup> In respect of essential services, they can apply to the Arbitration Council within seven days, but they are

not allowed to strike.<sup>322</sup> The Council then forms and assigns a Tribunal with three people from the Council members.<sup>323</sup> The Council prescribes the working methods, procedures and programs of the Arbitration Body and the Tribunal while the Council is act in accordance with the procedures stipulated by the Ministry.<sup>324</sup> The Tribunal needs to make a decision on the dispute, except for a decision in respect of essential services, within fourteen days, not including the official holidays and in regard to essential services, within seven days.<sup>325</sup> After three months from the day of coming into force, the decision of the Arbitration Body or the Arbitration Council can be amended.<sup>326</sup> The Body and the Council are authorized to enter the workplace and examine the documents or persons related to the case file.<sup>327</sup>

Article 52 gives access to mechanisms based in the law at the same time by stipulating that “No party shall be barred to proceed with the right to institute criminal proceedings in respect of such dispute during conciliation or arbitration.” And according to the article 53, The Ministry of Labour can coordinate with the Supreme Court of the union to establish Labour Courts to try the labour disputes. The article 55 prohibits charging fees to the parties in respect of the process of negotiation, conciliation and arbitration of the dispute.

#### *Supplementary Understanding mechanism (SU)*

(Please Refer to Section III, No.1), notes 185 and 186 and accompanying texts.

#### *Land Confiscation Investigation Commission*

(Please Refer to Section III, No.1), notes 191-198 and accompanying texts.

316 Ibid., Article 25, 26, Chapter VI.

317 Ibid., Article 26, 27, Chapter VI.

318 Ibid., Article 18, Chapter IV, Article 21 (c), Chapter V.

319 2012 Settlement and Labour Dispute Law, Article 19, Chapter V.

320 Ibid., Article 21 (a), Chapter V.

321 Ibid., Article 28, Chapter VI.

322 Ibid., Article 29, Chapter VI.

323 Ibid., Articles 19-20, 21 (b), Chapter V, Article 30, Chapter VI.

324 Ibid., Articles 21 and 22, Chapter V.

325 Ibid., Articles 31 and 32, Chapter VI.

326 Ibid., Article 36, Chapter VII.

327 Ibid., Articles 44 and 45, Chapter VIII.

*Letpataung Copper Mine Inquiry Committee*

(Please Refer to Section III, No. 1), notes 203-206 and accompanying texts.

**Legal State-Based Grievance Mechanisms**

*Court* (Please Refer to Section III, No.1), notes 169-174 and accompanying texts.

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

While there is prospect for improvement with the formation of the new Anti Corruption Committee,<sup>328</sup> up to now corruption, bribery and influence of the executive branch over the judicial branch have still been the main barriers to access to independent judicial remedy.<sup>329</sup> Labour Dispute Mechanisms formed under the Trade Dispute Act of 2012 still need to be applied effectively to ensure access to remedy for affected workers.<sup>330</sup> According to ILO and labour activists, awareness and understanding about the freedom of organization and assembly is still weak among employers and some authorities. Hence, there have been cases of workers who were dismissed from their jobs for organizing union formation. And in such cases, affected workers could not get access to justice and remedy through labour dispute mechanisms due to lack of systemic arbitration procedures and due to discrimination against workers.<sup>331</sup>

328 The anti bribery law to be approved at the Parliament, as of February 8, the bill is not yet approved.

329 Kim Jolliffe, "Law Without Order in Myanmar," *Asia Times*, accessed August 10, 2012, [http://www.atimes.com/atimes/southeast\\_Asia/NG26Ae02.html](http://www.atimes.com/atimes/southeast_Asia/NG26Ae02.html); "Courage and Cowardice in the Courtroom," *The Irrawaddy*; Khin Hnin Htet, "Court cheats Yuzana Land Grab Victims." According to the Transparency International, Myanmar ranks 180 out of 183 countries for the 2011 Corruption Perceptions Index that is the perceived levels of public-sector corruption. Transparency International, "Corruption Perceptions Index 2011," 2011.

330 See also notes.249-253 and accompanying texts.

331 Ibid.

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

Section 3 to 9, Chapter II, Trade Dispute Act, 2011 contains detailed provisions on the formation of Workplace Coordinating Body consisting of workers' and employers' representatives. Workers or employers can lodge complaints to the Body. Only when the Body cannot settle the dispute, the case will be submitted to the Conciliation Body.<sup>332</sup>

Under the president's notifications, Letpa Taung Inquiry Commission was formed.<sup>333</sup>

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

About MNHRI, please refer to Section III.1, supra notes 172-177, accompanying texts.

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

The Institute for Human Rights and Business (IHRB) in cooperation with the British Council Yangon held two multi stakeholder workshops to engage the UN guiding principles to the State, businesses and civil societies. The Chairman and the Myanmar Investment Commission, some economic advisors of the government and the Chair of the Myanmar National Human Rights Commission (MNHRC) attended the workshops and gave opening speeches at both workshops. On these occasions, they have mentioned that it is necessary for the State to adhere to the international norms including the UN guiding principles to

332 2012 Settlement of Labour Dispute Law, Article 3 to 9, Chapter II.

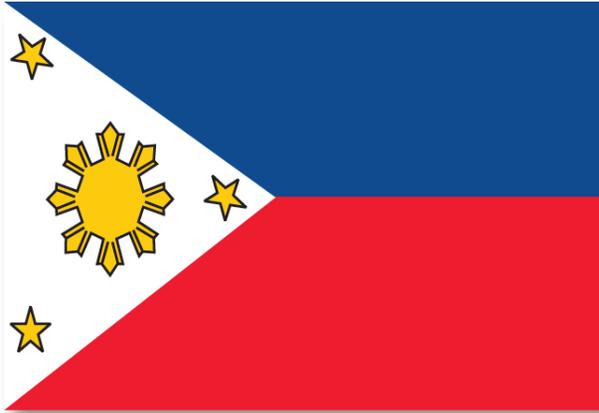
333 See notes 203-206 and accompanying texts.

promote responsible investment. A local NGO called Spectrum has also started initiating guiding principles to the government, MNHRI and businesses by holding workshops and seminars on extractive industries.

## **Conclusion and Summary**

As part of its political and economic reform process, Myanmar has been promulgating new laws and reviewing or updating the outdated laws to be in accordance with the current situations of the country. The 2008 Constitution recognizes the state duty to protect the rights of workers and peasants by promulgating laws and regulations. Except this, the Constitution does not contain an explicit, general provision on the state duty to protect. Two new laws on forming labour associations and settling labour disputes have been enacted while Minimum Wage Act, Employment and Skill Development Act and the Occupational and Skill Development Law have been drafted. Two newly enacted land laws, Farmland law and Vacant, Fallow and Virgin Lands Management Law are controversial due to their inadequate protection for small holding farmers. The state has established non legal based labour dispute settlement mechanisms to safeguard the rights of workers and to establish good working relationship between employees and employers and to offer grievance mechanisms to the affected parties. . Yet, implementation is still weak due to lack of adequate knowledge about the newly enacted laws by the parties concerned. To respond to land confiscation cases, a parliamentary committee on land confiscation inquiry was formed, however without a mandate to give binding decisions.

The Court is the legal grievance mechanism of the state. Its main challenges include bribery, corruption and influence of the executive branch over the independent decisions of the judicial branch. Meanwhile, a anti-corruption committee was formed and a anti-bribery law is soon to be approved by the Parliament. The state has shown its political and policy commitments to carry out Environmental and Social Impact Assessments in accordance with international norms. The state also encourages businesses to adhere to non- binding CSR mechanisms such as the Global Compact. And recently an EITI leading initiative authority was formed to promote transparency and accountability in the extractive industries. In spite of such initiatives, the outdated 1914 Myanmar company law and 1940 and 1957 Myanmar company rules have very scant provision on general legal obligation of directors let alone specific legal obligations to take into account the human rights impacts of their business enterprises. Until this point in time, the state has not taken steps to encourage business respect for human rights in conflict affected and high-risk areas. However, the state has recognized the need for accountability when acting in these areas. To improve public procurement is one of its policy priorities. Although there is no official endorsement of the Framework and the UN guiding principles, there is some recognition on this by high level officials. While the state has shown its effort to solve problems on labour, land and environmental issues, barriers such as lack of transparency in privatization process still hinder progress and eventually the creation of a fair and just society that adheres to human rights.



# PHILIPPINES

by:

Ian Ramos

## BASELINE REPORT: The Philippines

### SNAPSHOT BOX

<b>Number of Multinational Business Enterprises operating in the country</b>	No official data available
<b>Number of Micro, Small and Medium Business Enterprises operating in the country per 1,000 people</b>	As of 2009, there were 780,437 business enterprises operating in the Philippines. Of these, 99.6% (777,357) are micro, small, and medium enterprises (MSMEs) <sup>1</sup> and the remaining 0.4% (3,080) are large enterprises. Of the total number of MSMEs, 91.4% (710,822) are micro enterprises, 8.2% (63,529) are small enterprises, and 0.4% (3,006) are medium enterprises. <sup>2</sup>
<b>Number of State-owned Enterprises and the industries in which they operate</b>	As of August 2010, there were 604 Government –Owned and –Controlled Corporations (GOCCs) in the Philippines. Industries in which they operate include finance, public utilities, area development, agriculture, trading, promotion, and science. <sup>3</sup>
<b>Flow of Foreign Direct Investment from 2008 to 2012 (or other recent 3 to 5 year range)</b>	FDI applications received and approved in the first quarter of 2012 by the Authority of the Freeport Area of Bataan (AFAB), Board of Investments (BOI), Clark Development Corporation (CDC), Philippine Economic Zone Authority (PEZA), and Subic Bay Metropolitan Authority (SBMA) decreased by 16.3 per cent from PhP 22.0 billion in Q1 2011 to PhP 18.4 billion. <sup>4</sup>  Total foreign direct investments (FDI) approved in the fourth quarter of 2011 by the six investment promotion agencies (IPAs), namely: Board of Investments (BOI), Clark Development Corporation (CDC), Philippine Economic Zone Authority (PEZA), and Subic Bay Metropolitan Authority (SBMA) as well as the Authority of the Freeport Area of Bataan (AFAB) and Board of Investments Autonomous Region of Muslim Mindanao (BOI-ARMM) amounted to PhP 165.8 billion. <sup>5</sup>

1 Micro, small, and medium enterprises (MSMEs) are defined as any business activity/enterprise engaged in industry, agribusiness/services, whether single proprietorship, cooperative, partnership, or corporation whose total assets, inclusive of those arising from loans but exclusive of the land on which the particular business entity's office, plant and equipment are situated, must have value falling under the following categories:

By Asset Size\*

Micro:	Up to P3,000,000
Small:	P3,000,001 - P15,000,000
Medium:	P15,000,001 - P100,000,000
Large:	above P100,000,000

Alternatively, MSMEs may also be categorized based on the number of employees:

Micro:	1 - 9 employees
Small:	10 -- 99 employees
Medium:	100 -- 199 employees
Large:	More than 200 employees

\*As defined under *Small and Medium Enterprise Development (SMED) Council Resolution No. 01 Series of 2003 dated 16 January 2003*. <http://www.dti.gov.ph/dti/index.php?p=532>

2 See <http://www.dti.gov.ph/dti/index.php?p=321>

3 See <http://www.senate.gov.ph/publications/PB%202010-08%20%20Issues%20and%20challenges.pdf>

4 See [http://www.nscb.gov.ph/fiis/2012/1q\\_12/fdiapp1\\_12.asp](http://www.nscb.gov.ph/fiis/2012/1q_12/fdiapp1_12.asp)

5 See [http://www.nscb.gov.ph/fiis/2011/4q\\_11/Default.asp](http://www.nscb.gov.ph/fiis/2011/4q_11/Default.asp)

	Total foreign direct investments (FDI) approved in the fourth quarter of 2010 by the four major investment promotion agencies (IPAs), namely: Board of Investments (BOI), Clark Development Corporation (CDC), Philippine Economic Zone Authority (PEZA), and Subic Bay Metropolitan Authority (SBMA) amounted to PhP 116.6 billion, up by 33.2 per cent from PhP 87.5 billion approved in the fourth quarter of 2009. Total approved FDI for 2010 reached PhP 196.1 billion, 61.0 per cent higher than the PhP 121.8 billion registered in 2009. <sup>6</sup>
<b>Main industries in the country</b>	textiles and garments, pharmaceuticals, chemicals, wood products, paper and paper products, tobacco products, beverage manufacturing, food processing, machinery and equipment, transport equipment, electronics and semiconductor assembly, mineral products, hydrocarbon products, fishing, business process outsourcing services <sup>7</sup>
<b>Number 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</b>	<i>Awaiting official data from CHR.</i>
<b>Have the Framework and/or the Guiding Principles been translated into the country's languages and published in the country?</b>	No.

<sup>6</sup> See <http://www.nscb.gov.ph/fiis/2010/4q-10/Default.asp>

<sup>7</sup> See <http://www.state.gov/r/pa/ei/bgn/2794.htm>

## Types of Business Enterprises in the Country

<b>Name of the Type of Business Enterprise</b>	<b>Description of the Legal structure of the Type of Business Enterprise</b>	<b>Does incorporation of the business enterprise require any recognition of a duty to society, including human rights responsibility?</b>	<b>Any legislation specifically applicable to the Type of Business Enterprise</b>  (E.g. Corporations Law)	<b>Laws which the Type of Business Enterprise are expressly excluded from</b>
Sole/individual proprietorship	Unincorporated, with no legal personality distinct from owner.	No	None	None
Partnership	Two or more persons bound to contribute money or industry to a common fund with the intention of dividing the profits among themselves.  A partnership has a juridical personality separate from the people composing it.	No	None	None
Corporation	A corporation is an artificial being created by operation of law, having the right of succession and only the powers, attributes, and properties expressly authorized by law or incident to its existence. <sup>8</sup>  It is a juridical person capable of having rights and obligations, with a personality distinct from its members or stockholders. Stockholders cannot be held liable for corporate obligations. Neither may a corporation be held liable for the personal obligations of its stockholders.	No	Corporation Code  Securities Regulation Act	None

<sup>8</sup> Batas Blg. 68, Sec. 2 (The Corporation Code)

	<p>A corporation has continued existence during the term stated in its articles of incorporation. It is not affected by any change in the members or stockholders or by transfer of shares by a stockholder to a third person.</p>			
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<b>OVERVIEW OF THE COUNTRY'S BUSINESS AND HUMAN RIGHTS LANDSCAPE</b>
<p>The Philippines is no stranger to the tension between business interests and human rights. Nowhere is this more apparent or notorious than in the mining industry. The Philippines is one of the world's most highly mineralized countries, with untapped mineral wealth estimated at more than \$840 billion. Philippine copper, gold, and chromate deposits are among the largest in the world.<sup>9</sup> However, concerns over environmental degradation, violations of indigenous peoples and cultural communities' rights, and even extrajudicial killings and enforced disappearances of anti-mining advocates have led many to condemn and oppose mining activities in the country.<sup>10</sup></p> <p>The Philippines' business process outsourcing (BPO) industry accounts for about 15% of the global outsourcing market and has been the fastest-growing segment of the Philippine economy. Although industry revenues slowed from 40% growth during 2006 and 2007, the BPO sector exhibited resilience amid the global financial turmoil, generating more than \$6 billion in revenues in 2008 (up 26%) and \$7.2 billion in 2009. BPO revenues rose 26% to nearly \$9 billion in 2010, and will likely surpass 20% growth in 2011. The sector created about 100,000 new jobs in 2011, bringing total BPO employment to about 600,000.<sup>11</sup> Up until recently, antiquated provisions in the Labour Code presented obstacles to equal employment opportunities and gave a loophole for companies to adopt hiring policies against women.</p> <p>The Philippines also benefits from foreign currency remittances by migrant workers. Annual deployment of Filipino migrant workers has been increasing steadily since the 1970s. By 2010 there were a staggering 2.043 million OFWs (men: 1.068 Million (52.3%), women: 975,000 (47.7%)) who were working or had worked abroad in recent months.<sup>12</sup> These workers are susceptible to whole host of human rights abuses such as labour trafficking and white slavery.</p> <p>The Philippines has been reported to be a source country and, to a much lesser extent, a destination and transit country for men, women, and children subjected to sex trafficking and forced labour. A significant number of Filipino men and women who migrate abroad for work are subsequently subjected to conditions of involuntary servitude worldwide. Men, women, and children are subjected to conditions of forced labour in factories, at construction sites, on fishing vessels, on agricultural plantations, and as domestic workers in Asia and increasingly throughout the Middle East. A significant number of Filipino women working in domestic service in foreign countries also face rape, physical violence, and sexual abuse. Skilled Filipino migrant workers, such as engineers and nurses, are also subjected to conditions of forced labour abroad.<sup>13</sup></p>

9 See <http://www.state.gov/r/pa/ei/bgn/2794.htm>  
 10 See Ibid.; also [http://www.asiasentinel.com/index.php?option=com\\_content&task=view&id=4705&Itemid=214](http://www.asiasentinel.com/index.php?option=com_content&task=view&id=4705&Itemid=214)  
 11 See <http://www.state.gov/r/pa/ei/bgn/2794.htm>  
 12 See <http://www2.ohchr.org/english/bodies/cmw/docs/ngos/CMA.Philippines.CMW16.pdf>  
 13 See <http://manila.usembassy.gov/2012traffickinginpersons.html>

## OVERVIEW OF THE COUNTRY'S BUSINESS AND HUMAN RIGHTS LANDSCAPE

Trafficking in men, women, and children within the country also remains a significant problem in the Philippines. People are trafficked from rural areas to urban centres. Men are subjected to forced labour and debt bondage in the agriculture, fishing, and maritime industries. Women and children are trafficked within the country for forced labour as domestic workers and small-scale factory workers, for forced begging, and for exploitation in the commercial sex industry. Hundreds of victims are subjected to forced prostitution each day in well-known and highly visible business establishments that cater to both domestic and foreign demand for commercial sex acts. Filipino migrant workers, both domestically and abroad, who become trafficking victims are often subject to violence, threats, inhumane living conditions, non-payment of salaries, and withholding of travel and identity documents.<sup>14</sup>

Traffickers, in partnership with organized crime syndicates and corrupt law enforcement officers, regularly recruit family and friends from villages and urban neighbourhoods, often masquerading as representatives of government-registered employment agencies. Fraudulent recruitment practices and the institutionalized practice of paying recruitment fees often leave workers vulnerable to forced labour, debt bondage, and commercial sexual exploitation.<sup>15</sup>

Child sex tourism remains a serious problem in the Philippines, with sex tourists coming from Northeast Asia, Australia, New Zealand, Europe, and North America to engage in the commercial sexual exploitation of children. Increasingly, Filipino children are coerced to perform sex acts for Internet broadcast to paying foreign viewers.<sup>16</sup>

Child labour is also a pressing issue. The 2011 Survey on Children in the Philippines revealed that of the 29 million Filipino children aged 5-17 years old, there were roughly about 5.5 million working children, of which almost 3 million were engaged in hazardous child labour.<sup>17</sup>

The Philippine government appears to be cognizant of human rights issues arising from business activities. In its submission to the working committee during the 2012 Universal Periodic Review, the Philippine government expressed an aspiration to “fully engage the private sector as [a] partner in promoting human rights, especially with respect to the affirmation and enforcement of the whole array of economic, social, and cultural rights.”

The passing of a law on Corporate Social Responsibility (CSR) with explicit provisions on the corporate obligation to respect human rights would be a welcome step in this direction. At present, the Philippines has no CSR law, leaving companies to decide how and whether to adopt any CSR policies or initiatives.

14 Ibid.

15 Ibid.

16 Ibid.

17 See [http://www.ilo.org/manila/info/public/pr/WCMS\\_184097/lang--en/index.htm](http://www.ilo.org/manila/info/public/pr/WCMS_184097/lang--en/index.htm)

## **I. How has the State reacted to the UN “Protect, Respect and Remedy” Framework (“Framework”)?**

It appears that the Philippine Government has not made any statements with specific reference to the Framework. If any such statements have in fact been made, they are not readily available to the public.

## **II. Is the State duty to protect against human rights abuses by third parties, including businesses (“State Duty to Protect”), recognized 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?**

Although the Philippine Government does not appear to have taken a position specifically regarding the Framework, Philippine law does recognize an existing state duty to protect human rights, and consequently, a duty to protect against human rights abuses.

#### **State Duty to Protect under the 1987 Constitution**

The Philippine Constitution abounds with provisions indicating recognition and acceptance of the state’s duty to protect against human rights abuses. Article II of the Constitution, for instance, declares state policies to guarantee full respect for human rights, protect the family as a social institution, protect the youth, ensure the equality of women and men, protect the rights to health and environment, and protect the rights of workers:

Section 11. The State values the dignity of every human person and guarantees full respect for human rights.

Section 12. The State recognizes the sanctity of family life and shall protect and strengthen the

family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception. The natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall receive the support of the Government.

Section 13. The State recognizes the vital role of the youth in nation-building and shall promote and protect their physical, moral, spiritual, intellectual, and social well-being. It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs.

Section 14. The State recognizes the role of women in nation-building, and shall ensure the fundamental equality before the law of women and men.

Section 15. The State shall protect and promote the right to health of the people and instil health consciousness among them.

Section 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

Section 18. The State affirms labour as a primary social economic force. It shall protect the rights of workers and promote their welfare.

Aside from these State policies, the Constitution also devotes Article XIII entirely to social justice and human rights, with sections specifically relating to labour, agrarian and natural resources reform, urban land reform and housing, health, women, and people’s organizations. The following provisions under Article XIII clearly denote a state duty to protect:

Section 1. The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity, reduce social, economic, and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.

To this end, the State shall regulate the acquisition, ownership, use, and disposition of property and its increments.

Section 3. The State shall afford full protection to labour, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all.

It shall guarantee the rights of all workers to self-organization, collective bargaining and negotiations, and peaceful concerted activities, including the right to strike in accordance with law. They shall be entitled to security of tenure, humane conditions of work, and a living wage. They shall also participate in policy and decision-making processes affecting their rights and benefits as may be provided by law.

The State shall promote the principle of shared responsibility between workers and employers and the preferential use of voluntary modes in settling disputes, including conciliation, and shall enforce their mutual compliance therewith to foster industrial peace.

The State shall regulate the relations between workers and employers, recognizing the right of labour to its just share in the fruits of production and the right of enterprises to reasonable returns to investments, and to expansion and growth.

Section 14. The State shall protect working women by providing safe and healthful working conditions, taking into account their maternal functions, and such facilities and opportunities that will enhance their welfare and enable them to realize their full potential in the service of the nation.

In addition to these, the State also undertakes to “protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.”<sup>18</sup>

### **State Duty to Protect in Philippine Statutes**

The State duty to protect against human rights abuses by third parties, including businesses, is also recognized in the Philippines’ statutory enactments. Most notable of these are laws pertaining to labour, indigenous peoples, children, human trafficking, and the environment.

#### **Labour**

In keeping with the State policies on labour established by the Constitution, the Labour Code of the Philippines declares that the State “shall afford protection to labour, promote full employment, ensure equal work opportunities regardless of sex, race or creed and regulate the relations between workers and employers. The State shall assure the rights of workers to self-organization, collective bargaining, security of tenure, and just and humane conditions of work.”<sup>19</sup>

The Philippines also has an avowed duty to protect Filipino migrant workers from human rights abuses beyond the country’s borders. The Migrant Workers and Overseas Filipinos Act of 1995 express this duty in the following declarations:

(a) In the pursuit of an independent foreign policy and while considering national sovereignty, territorial integrity, national interest and the right to self-determination paramount in its relations with other states, the State shall, at all times, uphold the dignity of its citizens whether in country or overseas, in general, and Filipino migrant workers, in particular, continuously monitor international conventions, adopt/be signatory to and ratify those that guarantee protection to our migrant workers, and endeavour to enter into bilateral agreements with countries hosting overseas Filipino workers.

(b) The State shall afford full protection to labour, local and overseas, organized and unorganized, and promote full employment and equality of employment opportunities for all. Towards this

18 CONSTITUTION, ART. XII, § 5.

19 Labour Code, Presidential Decree No. 442, Art. 3.

end, the State shall provide adequate and timely social, economic and legal services to Filipino migrant workers.

(c) While recognizing the significant contribution of Filipino migrant workers to the national economy through their foreign exchange remittances, the State does not promote overseas employment as a means to sustain economic growth and achieve national development. The existence of the overseas employment program rests solely on the assurance that the dignity and fundamental human rights and freedoms of the Filipino citizens shall not, at any time, be compromised or violated. The State, therefore, shall continuously create local employment opportunities and promote the equitable distribution of wealth and the benefits of development.

(d) The State affirms the fundamental equality before the law of women and men and the significant role of women in nation-building. Recognizing the contribution of overseas migrant women workers and their particular vulnerabilities, the State shall apply gender sensitive criteria in the formulation and implementation of policies and programs affecting migrant workers and the composition of bodies tasked for the welfare of migrant workers.

(e) Free access to the courts and quasi-judicial bodies and adequate legal assistance shall not be denied to any person by reason of poverty. In this regard, it is imperative that an effective mechanism be instituted to ensure that the rights and interest of distressed overseas Filipinos, in general, and Filipino migrant workers, in particular, whether regular/documented or irregular/undocumented, are adequately protected and safeguarded.<sup>20</sup>

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20 Republic Act No. 8042, § 2, as amended by Republic Act No. 10022. "An Act amending Republic Act no. 8042, otherwise known as the migrant workers and overseas Filipinos Act of 1995, as amended, further improving the standard of protection and promotion of the welfare of migrant workers, their families and overseas Filipinos in distress, and for other purposes."

## Indigenous Peoples

The Indigenous Peoples Rights Act of 1997 (IPRA) was enacted in an attempt to fulfil the State's undertaking under the Philippine Constitution to "protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being."<sup>21</sup> Section 2 of the IPRA articulates the State's policies in this regard:

The State shall recognize and promote all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) hereunder enumerated within the framework of the Constitution:

- a) The State shall recognize and promote the rights of ICCs/IPs within the framework of national unity and development;
- b) The State shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social and cultural wellbeing and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain;
- c) The State shall recognize, respect and protect the rights of ICCs/IPs to preserve and develop their cultures, traditions and institutions. It shall consider these rights in the formulation of national laws and policies;
- d) The State shall guarantee that members of the ICCs/IPs regardless of sex, shall equally enjoy the full measure of human rights and freedoms without distinctions or discriminations;
- e) The State shall take measures, with the participation of the ICCs/IPs concerned, to protect their rights and guarantee respect for their cultural integrity, and to ensure that members of the ICCs/IPs benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population and

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21 Supra, note 1.

- f) The State recognizes its obligations to respond to the strong expression of the ICCs/IPs for cultural integrity by assuring maximum ICC/IP participation in the direction of education, health, as well as other services of ICCs/IPs, in order to render such services more responsive to the needs and desires of these communities.

Towards these ends, the State shall institute and establish the necessary mechanisms to enforce and guarantee the realization of these rights, taking into consideration their customs, traditions, values, beliefs, their rights to their ancestral domains.

### Children's Rights

The Special Protection of Children against Child Abuse, Exploitation and Discrimination Act (Anti-Child Abuse Law) declares in no uncertain terms the state duty to protect children against abuse. Its latest iteration<sup>22</sup> sets forth the following policies and principles:

It is hereby declared to be the policy of the State to provide special protection to children from all forms of abuse, neglect, cruelty, exploitation and discrimination, and other conditions prejudicial to their development including child labour and its worst forms; provide sanctions for their commission and carry out a program for prevention and deterrence of and crisis intervention in situations of child abuse, exploitation and discrimination. The State shall intervene on behalf of the child when the parent, guardian, teacher or person having care or custody of the child fails or is unable to protect the child against abuse, exploitation and discrimination or when such acts against the child are committed by the said parent, guardian, teacher or person having care and custody of the same.

<sup>22</sup> Republic Act No. 7610. In 2003, the law was amended by Republic Act No. 9231, (An Act providing for the elimination of the worst forms of child labour and affording stronger protection for the working child, amending for this purpose Republic Act no. 7610, as amended, otherwise known as the "Special Protection of Children against Child Abuse, Exploitation and Discrimination Act")

It shall be the policy of the State to protect and rehabilitate children gravely threatened or endangered by circumstances which affect or will affect their survival and normal development and over which they have no control.

The best interests of children shall be the paramount consideration in all actions concerning them, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, and legislative bodies, consistent with the principle of First Call for Children as enunciated in the United Nations Convention on the Rights of the Child. Every effort shall be exerted to promote the welfare of children and enhance their opportunities for a useful and happy life.<sup>23</sup>

### Human Trafficking

The Anti-Trafficking in Persons Act of 2003<sup>24</sup> expresses the state duty to protect in Section 2, which states:

It is hereby declared that the State values the dignity of every human person and guarantees the respect of individual rights. In pursuit of this policy, the State shall give highest priority to the enactment of measures and development of programs that will promote human dignity, protect the people from any threat of violence and exploitation, eliminate trafficking in persons, and mitigate pressures for involuntary migration and servitude of persons, not only to support trafficked persons but more importantly, to ensure their recovery, rehabilitation and reintegration into the mainstream of society.

It shall be a State policy to recognize the equal rights and inherent human dignity of women and men as enshrined in the United Nations Universal Declaration on Human Rights, United Nations

<sup>23</sup> Republic Act No. 7610, § 2, as amended by Rep. Act. No. 9231.

<sup>24</sup> Republic Act No. 9208

Convention on the Rights of the Child, United Nations Convention on the Protection of Migrant Workers and their Families. United Nations Convention Against Transnational Organized Crime Including its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and all other relevant and universally accepted human rights instruments and other international conventions to which the Philippines is a signatory.

## Environment

In the Clean Air Act,<sup>25</sup> the Philippines recognizes and undertakes to protect the following rights:

- The right to breathe clean air
- The right to utilize and enjoy all natural resources according to the principles of sustainable development
- The right to participate in the formulation, planning, implementation and monitoring of environmental policies and programs and in the decision-making process
- The right to participate in the decision-making process concerning development policies, plans and programs,(?) projects or activities that may have adverse impact on the environment and public health
- The right to be informed of the nature and extent of the potential hazard of any activity, undertaking or project and to be served timely notice of any significant rise in the level of pollution and the accidental or deliberate release into the atmosphere of harmful or hazardous substances
- The right of access to public records which a citizen may need to exercise his or her rights effectively under the Act
- The right to bring action in court or quasi-judicial bodies to enjoin all activities in violation of environmental laws and regulations, to compel the rehabilitation and clean up of

affected area, and to seek the imposition of penal sanctions against violators, including private actors, of environmental laws

- The right to bring action in court for compensation of personal damages resulting from the adverse environmental and public health impact of a project or activity

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

The state duty to protect against human rights abuses by non-state entities has been recognized by the Supreme Court of the Philippines.

In *International School Alliance of Educators (ISAE) v. Quisumbing*,<sup>26</sup> the Supreme Court upheld the principle of “equal pay for equal work” in the International Covenant on Economic, Social, and Cultural Rights and ruled against the validity of International School, Inc.’s policy of paying foreign teachers hired abroad 25% more than their counterparts who were hired locally. The Court said:

That public policy abhors inequality and discrimination is beyond contention. Our Constitution and laws reflect the policy against these evils. The Constitution in the Article on Social Justice and Human Rights exhorts Congress to “give highest priority to the enactment of measures that protect and enhance the right of all people to human dignity, reduce social, economic, and political inequalities.” The very broad Article 19 of the Civil Code requires every person, “in the exercise of his rights and in the performance of his duties, [to] act with justice, give everyone his due, and observe honesty and good faith.

International law, which springs from general principles of law, likewise proscribes discrimination. General principles of law include principles of equity, *i.e.*, the general principles of fairness and justice, based on the test of what is

25 Republic Act No. 8749

26 G.R. No. 128845, June 1, 2000.

reasonable. The Universal Declaration of Human Rights, the International Covenant on Economic, Social, and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Discrimination in Education, the Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation — all embody the general principle against discrimination, the very antithesis of fairness and justice. The Philippines, through its Constitution, has incorporated this principle as part of its national laws.

In the workplace, where the relations between capital and labour are often skewed in favour of capital, inequality and discrimination by the employer are all the more reprehensible.

The Constitution specifically provides that labour is entitled to “humane conditions of work.” These conditions are not restricted to the physical workplace — the factory, the office or the field — but include as well the manner by [sic] which employers treat their employees.

The Constitution also directs the State to promote “equality of employment opportunities for all.” Similarly, the Labour Code provides that the State shall “ensure equal work opportunities regardless of sex, race or creed.” It would be an affront to both the spirit and letter of these provisions if the State, in spite of its primordial obligation to promote and ensure equal employment opportunities, closes its eyes to unequal and discriminatory terms and conditions of employment.

Discrimination, particularly in terms of wages, is frowned upon by the Labour Code. Article 135, for example, prohibits and penalizes the payment of lesser compensation to a female employee as against a male employee for work of equal value. Article 248 declares it an unfair labour practice for an employer to discriminate in regard to wages in order to encourage or discourage membership in any labour organization.

Notably, the International Covenant on Economic, Social, and Cultural Rights, *supra*, in Article 7 thereof, provides:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

a. Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work...

The foregoing provisions impregnably institutionalize in this jurisdiction the long honoured legal truism of “equal pay for equal work.” Persons who work with substantially equal qualifications, skill, effort and responsibility, under similar conditions, should be paid similar salaries.<sup>22</sup> This rule applies to the School, its “international character” notwithstanding.

The School contends that petitioner has not adduced evidence that local-hires perform work equal to that of foreign-hires. The Court finds this argument a little cavalier. If an employer accords employees the same position and rank, the presumption is that these employees perform equal work. This presumption is borne by logic and human experience. If the employer pays one employee less than the rest, it is not for that employee to explain why he receives less or why the others receive more. That would be adding insult to injury. The employer has discriminated against that employee; it is for the employer to explain why the employee is treated unfairly.

The employer in this case has failed to discharge this burden. There is no evidence here that foreign-hires perform 25% more efficiently or effectively than the local-hires. Both groups have similar functions and responsibilities, which they perform under similar working conditions.

The School cannot invoke the need to entice foreign-hires to leave their domicile to rationalize the distinction in salary rates without violating the principle of equal work for equal pay.

While we recognize the need of the School to attract foreign-hires, salaries should not be used as an enticement to the prejudice of local-hires. The local-hires perform the same services as foreign-hires and they ought to be paid the same salaries as the latter. For the same reason, the “dislocation factor” and the foreign-hires’ limited tenure also cannot serve as valid bases for the distinction in salary rates. The dislocation factor and limited tenure affecting foreign-hires are adequately compensated by certain benefits accorded them which are not enjoyed by local-hires, such as housing, transportation, shipping costs, taxes and home leave travel allowances.

The Constitution enjoins the State to “protect the rights of workers and promote their welfare,” “to afford labour full protection.” The State, therefore, has the right and duty to regulate the relations between labour and capital. These relations are not merely contractual but are so impressed with public interest that labour contracts, collective bargaining agreements included, must yield to the common good. Should such contracts contain stipulations that are contrary to public policy, courts will not hesitate to strike down these stipulations.

In this case, we find the point-of-hire classification employed by respondent School to justify the distinction in the salary rates of foreign-hires and local hires to be an invalid classification. There is no reasonable distinction between the services rendered by foreign-hires and local-hires. The practice of the School of according higher salaries to foreign-hires contravenes public policy and, certainly, does not deserve the sympathy of this Court.

This decision is significant not only because it expressly recognizes the State’s obligation to promote and ensure equality in employment, but also because it demonstrates that the duty includes protecting the right to equality against infringement by non-State actors.

### **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?**

In the Philippines, there is no single agency tasked specifically with the prevention, investigation, punishment, and redress of human rights abuses. Although the Philippine has a National Human Rights Institution called the Commission on Human Rights (CHR), it does not have any prosecutorial or adjudicatory powers.<sup>27</sup> Thus, there is not much it can do on its own in terms of actual prevention, punishment, and redress of business-related human rights abuses.

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<sup>27</sup> This was the essence of the Supreme Court’s ruling in *Cariño v. Commission on Human Rights*, G.R. No. 96681, December 2, 1991:

The most that may be conceded to the Commission in the way of adjudicative power is that it may *investigate*, *i.e.*, receive evidence and make findings of fact as regards claimed human rights violations involving civil and political rights. But fact finding is not adjudication, and cannot be likened to the *judicial function* of a court of justice, or even a quasi-judicial agency or official. The function of receiving evidence and ascertaining therefrom the facts of a controversy is not a judicial function, properly speaking. To be considered such, the faculty of receiving evidence and making factual conclusions in a controversy must be accompanied by the authority of *applying the law to those factual conclusions to the end that the controversy may be decided or determined authoritatively, finally and definitively, subject to such appeals or modes of review as may be provided by law*. This function, to repeat, the Commission does not have.

However, the country does have a number of executive agencies responsible for preventing, investigating, punishing, and redressing acts or omissions violating domestic laws that may be characterized as business-related human rights abuses.

The Department of Justice (DOJ) serves as the government's prosecution arm and administers the country's criminal justice system by investigating crimes and prosecuting offenders. As will be discussed below, many acts or omissions constituting human rights abuse are considered crimes under Philippine law. The Department of Labour and Employment, through the various bureaus and offices under it, is responsible for the administration and enforcement of the country's labour laws, including those protecting the rights of Migrant Workers. The responsibility for enforcing and administering laws relating to the environment and mining is vested in the Department of Environment and National Resources and exercised through the specialized boards and agencies under it, such as the Pollution Adjudication Board and the Mines and Geosciences Bureau. The responsibility for implementing laws for the protection of indigenous peoples' rights, on the other hand, belongs primarily to the National Commission on Indigenous Peoples.

## **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?**

Under Philippine law, partnerships and corporations are juridical persons, i.e., they possess legal personality separate and distinct from their

members. As a consequence of their separate personality, business enterprises organized as partnerships or corporations can be held legally accountable as legal persons. A sole proprietorship, on the other hand, does not possess a juridical personality separate and distinct from the personality of the owner of the enterprise,<sup>28</sup> and cannot, therefore, be held liable as a legal person. As a result, only the owner of the enterprise can be held responsible.

With respect to partnerships, the Civil Code provides that where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of co-partners, loss or injury is caused to any person not a member of the firm, or any penalty is incurred, the partnership is liable to the same extent as the partner so acting or omitting to act.<sup>29</sup> Under such circumstances, all partners are solidarily liable with the partnership.<sup>30</sup>

On the principle of mutual agency, the partnership, or every member of the partnership, is solidarily liable for torts committed by one of its members acting within the scope of the firm's business, even though they do not participate in, ratify, or have knowledge of such torts. This liability extends to a wrong committed by an employee or agent. The test of liability is whether the wrong was committed in behalf of the partnership and within the reasonable scope of its business. If it was so committed, the partners are all liable as joint tortfeasors. However, if the wrongful acts of a partner were done outside the scope of the partnership's business, innocent partners will not be held responsible.<sup>31</sup>

Where criminal acts are committed through the operation of the partnership, the partnership may, in a proper case, be held responsible for such acts to the same extent as the partner or partners

<sup>28</sup> *Mangila v. Court of Appeals*, 435 Phil. 870, 886 (2002)

<sup>29</sup> Civil Code, Art. 1822

<sup>30</sup> *Ibid.*, Art. 1824

<sup>31</sup> Esteban R. Bautista, *Treatise on Philippine Partnership Law*, 249 (1995)

committing them.<sup>32</sup> After all, the Civil Code does state explicitly that the partnership is liable for any penalty incurred by reason of any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of co-partners.<sup>33</sup> Obviously, however, this cannot apply where the only penalty that can be imposed is imprisonment.

As stated above, corporations have a legal personality separate and distinct from their owners, stockholders, or members. Consequently, complaints for damages can be directed against the corporation itself. On the other hand, directors or trustees who wilfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation are liable jointly and severally for all damages resulting from such acts.<sup>34</sup>

The doctrine of piercing the corporate veil is well recognized in Philippine case law. While a corporation may exist for any lawful purpose, the law will regard it as an association of persons or, in case of two corporations, merge them into one, when its corporate legal entity is used as a cloak for fraud or illegality. The doctrine applies only when corporate fiction is used to defeat public convenience, justify wrong, protect fraud, or defend crime, or when it is made as a shield to confuse the legitimate issues, or where a corporation is the mere alter ego or business conduit of a person, or where the corporation is organized and controlled and its affairs are conducted in such a way as to make it merely an instrumentality, agency, conduit or adjunct of another corporation. Moreover, to disregard the separate juridical personality of a corporation, the wrongdoing must be established clearly and convincingly. It cannot be presumed.<sup>35</sup>

The Supreme Court, in *Ching v. Secretary of Justice*,<sup>36</sup> recognizes two doctrines on corporate criminal liability. According to the Court, a corporation may be charged and prosecuted for a crime if the imposable penalty is a fine. Even if the statute prescribes both fine and imprisonment as the penalty, a corporation may be prosecuted and, if found guilty, may be fined. On the other hand, if the State, by statute, defines a crime that may be committed by a corporation but prescribes the penalty for it to be suffered by the officers, directors, or employees of the corporation, or other persons responsible for the offense, only those individuals will suffer the penalty. Corporate officers or employees through whose act, default, or omission the corporation commits a crime are themselves individually guilty of the crime. The principle applies whether or not the crime requires the consciousness of wrongdoing. It applies to those corporate agents who themselves commit the crime and to those, who, by virtue of their managerial positions or other similar relation to the corporation, could be deemed responsible for its commission, if by virtue of their relationship to the corporation, they had the power to prevent the act. Most of the penal laws surveyed in this study are framed in this manner.

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

*See 2.1.1.*

<sup>32</sup> Ibid., 250

<sup>33</sup> Civil Code, Art. 1822

<sup>34</sup> Corporation Code, §31

<sup>35</sup> *Rivera v. United Laboratories, Inc.*, G.R. No. 155639, April 22, 2009.

<sup>36</sup> G.R. No. 164317, February 6, 2006

**2.2. Do laws and/or regulations: (a) 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?**

There are many Philippine laws prohibiting conduct that would cause or contribute to adverse human rights impacts. Inasmuch as these laws apply to all persons, natural and juridical, within Philippine jurisdiction, business enterprises are required to comply with them.

Although these laws do not explicitly impose a positive obligation on individuals to ensure their business enterprises comply with these laws, penal clauses imposing criminal liability on the individuals responsible for managing the enterprise, such as corporate directors and managing partners, provide an impetus for these individuals to ensure that their businesses do not run afoul of the law. However, these penal laws do not reach beyond Philippine territory, and it is highly doubtful whether a Philippine company can be held liable for violations committed by it or its agents or subsidiaries overseas.

### **Labour**

Violations of workers' rights can result in civil, criminal, and/or administrative liability. Complaints against employers for violations of labour laws on security of tenure and labour standards are prevalent in the Philippines, with thousands of cases being filed each year. Consequently, many employers, including corporations and corporate officers, have been made to compensate workers whose rights have been violated.<sup>37</sup>

Under Article 288 of the Labour Code, violation of any provision declared to be unlawful shall be punished with a fine of PhP 1,000 to PhP

<sup>37</sup> Access to Justice: Human Rights Abuses Involving Corporations – Philippines, International Commission of Jurists, (2010)

10,000 (approximately \$24 USD to \$235 USD) or imprisonment of three months to three years, or both, at the discretion of the court. These penalties apply to acts such as unlawful withholding of wages,<sup>38</sup> retaliatory measures for filing complaints or testifying in proceedings relating to violations of conditions of employment,<sup>39</sup> discrimination against women employees,<sup>40</sup> violations of the right to self-organization,<sup>41</sup> and other acts falling within the definition of “unfair labour practice.”<sup>42</sup>

Aliens found guilty of any such violation considered unlawful under the Labour Code shall be summarily deported after service of sentence.<sup>43</sup> If the offense is committed by a corporation, trust, firm, partnership, association, or any other entity, the penalty shall be imposed on its guilty officer or officers.<sup>44</sup>

Employers who fail to comply with the country's minimum wage law<sup>45</sup> face stiffer penalties. Under the law, any person, corporation, trust, firm, partnership, association or entity which refuses or fails to pay any of the prescribed increases or adjustments in the wage rates shall be punished by a fine ranging from PhP 25,000 to PhP 100,000 (approximately \$585 USD to \$2330 USD) or two to four years in prison, or both, at the discretion of the court, without the benefits provided for under the Probation Law. In any event, the erring employer will also be liable for an amount equivalent to double the unpaid benefits owing to the employees. If the violation is committed by a corporation, trust, firm, partnership, association or any other entity, the penalty of imprisonment shall be imposed upon the entity's responsible officers, including, but not limited to, the president, vice-president, chief executive officer, general manager, managing director or partner.

<sup>38</sup> Labour Code, Arts. 111 and 116

<sup>39</sup> Ibid., Art. 118

<sup>40</sup> Ibid., Arts. 135-137

<sup>41</sup> Labour Code, Art. 246

<sup>42</sup> Ibid., Art. 247 & 248.

<sup>43</sup> Ibid., Art. 288

<sup>44</sup> Ibid., Art. 289

<sup>45</sup> Republic Act No. 6727, Wage Rationalization Act, as amended by Republic Act No. 8188

Republic Act No. 10151, which was signed into law in June 2011, repealed the Labour Code provisions prohibiting night work and introduced new articles in their stead imposing obligations on employers to provide night workers free health assessments, suitable first-aid facilities, safe and healthful working conditions, and alternatives to night work for female employees before and after they give birth. Any violation of the Act and the rules and regulations issued pursuant to its mandates shall be punished with a fine ranging from PhP30,000 to PhP50,000 (approximately \$700 USD to \$1,165 USD) or imprisonment of at least six months, or both, at the discretion of the court. If the offense is committed by a corporation, trust, firm, partnership, association or any other entity, the penalty shall be imposed on the guilty officer or officers.<sup>46</sup>

The Migrant Workers Act seeks to protect overseas Filipino workers from illegal recruitment and other abusive acts of recruiters and employers. The most serious violations can result in a fine of up to PhP 5,000,000 and life imprisonment.<sup>47</sup> The law punishes principals, accomplices, and accessories. In the case of juridical persons such as corporations, liability will attach to the officers having ownership, control, management, or direction of their business who are responsible for the commission of the offense and the responsible employees or agents.<sup>48</sup> One of the limitations of the Migrant Workers Act, however, is its failure to provide for extraterritorial reach. Thus, only acts committed in the Philippines are punishable under its provisions. Presumably to address this shortcoming, the law established a legal assistance fund amounting to at least one hundred million pesos (approximately \$2.4M USD) to be used exclusively to provide legal services to migrant workers and overseas Filipinos in distress. The legal expenditures contemplated include the fees for foreign lawyers to be hired by the Legal Assistant for Migrant Workers Affairs to represent migrant workers filing charges against erring or abusive

employers abroad.<sup>49</sup>

### Land and Indigenous Peoples' Rights

The Constitution provides that urban or rural poor dwellers shall not be evicted nor their dwellings demolished, except in accordance with law and in a just and humane manner.<sup>50</sup> Consistent with this mandate, the Urban Development and Housing Act of 1992 (also known as the Lina Law)<sup>51</sup> declares that eviction or demolition as a practice shall be discouraged. Eviction or demolition may be allowed, however, in the following situations:

- When persons or entities occupy danger areas such as railroad tracks and riverbanks, and other public places such as sidewalks and roads
- When government infrastructure projects with available funding are about to be implemented
- When there is a court order for eviction and demolition

The Lina Law also lays down a mandatory procedure for the execution of eviction or demolition orders involving underprivileged or homeless citizens. The procedure entails, among others, prior notice upon, and adequate consultations with, the affected persons; the presence of local government officials or their representatives during the eviction or demolition; and a prohibition of the use of heavy equipment except for permanent structures made of concrete materials.<sup>52</sup>

Any person who violates the provisions of the Lina Law can be imprisoned for up to six years and/or fined up to PhP 100,000. If the offender is a corporation, partnership, or other juridical entity, the penalty will be imposed on the officer or officers who caused the violation.<sup>53</sup>

Rights to agricultural land, on the other hand, cannot be discussed without considering the

46 Republic Act No. 10151, § 8

47 Republic Act No. 8042, § 7, as amended by Republic Act No. 10022

48 Ibid., § 6

49 Ibid., §§ 25 & 26, as amended by Republic Act No. 10022

50 CONSTITUTION, Art. XIII, § 10

51 Republic Act No. 7279

52 Republic Act No. 8371, § 28

53 Ibid., § 45

provisions of the Comprehensive Agrarian Reform Law (CARL).<sup>54</sup> Signed into law in 1988, the CARL established the Comprehensive Agrarian Reform Program whereby public and private agricultural lands are supposed to be redistributed to qualified farmer-beneficiaries.<sup>55</sup>

Among the acts prohibited by the CARL are the following:

- The ownership or possession, for the purpose of circumventing the provisions of the CARL, of agricultural lands in excess of the total retention limits or award ceilings by any person, natural or juridical, except those under

54 Republic Act No. 6657, as amended by Republic Act No. 9700

55 Republic Act No. 6657, § 22 provides:

The lands covered by the CARP shall be distributed as much as possible to landless residents of the same barangay, or in the absence thereof, landless residents of the same municipality in the following order of priority:

- agricultural lessees and share tenants;
- regular farmworkers;
- seasonal farmworkers;
- other farmworkers;
- actual tillers or occupants of public lands;
- collectives or cooperatives of the above beneficiaries; and
- others directly working on the land.

Provided, however, that the children of landowners who are qualified under Section 6 of this Act shall be given preference in the distribution of the land of their parents: and provided, further, that actual tenant-tillers in the landholdings shall not be ejected or removed therefrom.

Beneficiaries under Presidential Decree No. 27 who have culpably sold, disposed of, or abandoned their land are disqualified to become beneficiaries under this Program.

A basic qualification of a beneficiary shall be his willingness, aptitude, and ability to cultivate and make the land as productive as possible. The DAR shall adopt a system of monitoring the record or performance of each beneficiary, so that any beneficiary guilty of negligence or misuse of the land or any support extended to him shall forfeit his right to continue as such beneficiary. The DAR shall submit periodic reports on the performance of the beneficiaries to the PARC.

If, due to the landowner's retention rights or to the number of tenants, lessees, or workers on the land, there is not enough land to accommodate any or some of them, they may be granted ownership of other lands available for distribution under this Act, at the option of the beneficiaries.

Farmers already in place and those not accommodated in the distribution of privately-owned lands will be given preferential rights in the distribution of lands from the public domain.

collective ownership by farmer-beneficiaries

- The forcible entry or illegal detainer by persons who are not qualified beneficiaries under the CARL to avail themselves of the rights and benefits of the CARP
- Any conversion by, any landowner of his/her agricultural land into any non-agricultural use with intent to avoid the application of this Act to his/her landholdings and to dispossess his/her bonafide tenant farmers
- The malicious and wilful prevention or obstruction by any person, association or entity of the implementation of the CARP<sup>56</sup>

Forcible entry into, or illegal detainer of, agricultural land by persons not qualified to be beneficiaries of the CARP can result in imprisonment for three years and one day to six years and/or a fine of PhP 50,000 to PhP 150,000.<sup>57</sup>

Landowners who convert their land to any non-agricultural use with the intent to avoid the application of the CARP, and those who maliciously and wilfully prevent or obstruct the implementation of the CARP can be imprisoned for six years and one day to 12 years and/or fined PhP 200,000 to PhP 1M.<sup>58</sup>

Similar to other penal laws, criminal liability in the case of a corporate offender will fall on the officer responsible for the offense.<sup>59</sup>

The Indigenous Peoples Rights Act of 1997<sup>60</sup> (IPRA) was enacted to protect indigenous peoples' rights to their ancestral lands and domains,<sup>61</sup> to self-governance and empowerment,<sup>62</sup> to cultural integrity,<sup>63</sup> and to social justice and human rights.<sup>64</sup> Under the IPRA's penal clause, any person who

56 Republic Act No. 6657, § 73

57 Republic Act No. 6657, § 74, as amended by Republic Act No. 9700

58 Ibid.

59 Republic Act No. 6657

60 Republic Act No. 8371

61 Ibid., §§ 4-12

62 Ibid., §§ 13-20

63 Ibid., §§ 29-37

64 Ibid., §§ 21-28

violates any of the IPRA's provisions, such as, but not limited to, those against unauthorized or unlawful intrusion upon any ancestral lands or domains, employment of any form of force or coercion against indigenous peoples, discrimination with respect to employment, exploration of archaeological sites of indigenous peoples for the purpose of obtaining materials of cultural value without the free and prior informed consent of the community concerned, and defacement, removal, or destruction of artefacts of great importance to the preservation of indigenous peoples' cultural heritage, shall be punished in accordance with the indigenous peoples' customary laws or, alternatively, imprisonment of nine months to 12 years and/or a fine of PhP 100,000 to PhP 500,000.<sup>65</sup> In addition, the offender shall be obliged to pay to the indigenous peoples concerned whatever damage they may have suffered as a consequence of the offense. If the offender is a juridical person, all its officers responsible for the offense, such as its president, manager, or head of office, will be criminally liable for it.<sup>66</sup> Any of these violations will also result in the cancellation of the juridical person's certificate of registration and/or license.<sup>67</sup>

### Environmental Protection

Established in 1978 by presidential decree,<sup>68</sup> the Environmental Impact Statement (EIS) System requires all agencies and instrumentalities of the national government, including government-owned or controlled corporations, as well as private corporations, firms, and other such entities to prepare, file, and include in every action, project, or undertaking which significantly affects the quality of the environment an environmental impact statement.<sup>69</sup> Under this system, no

<sup>65</sup> Ibid., § 72

<sup>66</sup> Ibid., § 73

<sup>67</sup> Ibid.

<sup>68</sup> Presidential Decree No. 1586

<sup>69</sup> An EIS must state the following in detail:  
the environmental impact of the proposed action, project or undertaking;  
any adverse environmental effect which cannot be avoided should the proposal be implemented;

person, partnership, or corporation is allowed to undertake or operate in any environmentally critical project or area<sup>70</sup> without first securing an

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alternative to the proposed action;  
a determination that the short-term uses of the resources of the environment are consistent with the maintenance and enhancement of the long-term productivity of the same; and  
whenever a proposal involves the use of depletable or non-renewable resources, a finding must be made that such use and commitment are warranted.

<sup>70</sup> Presidential Proclamation 2146 identifies Environmentally Critical Projects and Environmentally Critical Areas as follows:

- A. Environmentally Critical Projects
  - I. Heavy Industries
    - a. Non-ferrous metal industries
    - b. Iron and steel mill
    - c. Petroleum and petro-chemical industries, including oil and gas
    - d. Smelting plants
  - II. Resource Extractive Industries
    - a. Major mining and quarrying projects
    - b. Forestry projects
      1. Logging
      2. Major wood processing project
      3. Introduction of fauna (exotic-animals) in public/private forests
      4. Forest occupancy
      5. Extraction of mangrove products
      6. Grazing
    - a. Fishery Projects
      1. Dikes for/and fishpond development projects
  - III. Infrastructure Projects
    - a. Major dams
    - b. Major power plants (fossil-fuelled, nuclear fuelled, hydroelectric or geothermal)
    - c. Major reclamation projects
    - d. Major roads and bridges
- B. Environmentally Critical Areas
  - I. All areas declared by law as national parks, watershed reserves, wildlife preserves and sanctuaries;
  - II. Areas set aside as aesthetic potential tourist spots;
  - III. Areas which constitute the habitat for any endangered or threatened species of indigenous Philippine Wildlife (flora and fauna);
  - IV. Areas of unique historic, archaeological, or scientific interests;
  - V. Areas which are traditionally occupied by cultural communities or tribes;
  - VI. Areas frequently visited and/or hard-hit by natural calamities (geologic hazards, floods, typhoons, volcanic activity, etc.);
  - VII. Areas with critical slopes;
  - VIII. Areas classified as prime agricultural lands;
  - IX. Recharged areas of aquifers;

Environmental Compliance Certificate (ECC) from the government.<sup>71</sup> Any person, partnership, or corporation found violating this requirement or the terms and conditions of the ECC shall be punished by the suspension/cancellation of its certificate and/or a fine.<sup>72</sup> Under the Mining Act, any person who wilfully violates or grossly neglects to abide by the terms and conditions of the ECC and causes environmental damage through pollution may be penalized with imprisonment of six months to six years or a fine ranging from PhP 50,000 to PhP 200,000, or both, at the discretion of the court.<sup>73</sup>

The Clean Air Act declares the principle that “polluters must pay.”<sup>74</sup> Violations of the Clean Air Act are treated as crimes punishable by fine, imprisonment, or both. If the offender is a juridical person such as a corporation, the penalty will be imposed on the president, manager, directors, trustees, the pollution control officer, or the officials directly in charge of the operations that led to the violation.<sup>75</sup> Similarly, liability for a company’s violations of the Clean Water Act, which can result in fines of up to PhP 3M for each day of violation and/or imprisonment of up to 10 years, falls on the

- X. Water bodies characterized by one or any combination of the following conditions:
  - a. tapped for domestic purposes;
  - b. within the controlled and/or protected areas declared by appropriate authorities;
  - c. which support wildlife and fishery activities;
- XI. Mangrove areas characterized by one or any combination of the following conditions:
  - a. with primary pristine and dense young growth;
  - b. adjoining mouth of major river systems;
  - c. near or adjacent to traditional productive fry or fishing grounds;
  - d. which act as natural buffers against shore erosion, strong winds and storm floods;
  - e. on which people are dependent for their livelihood.
- XII. Coral reefs, characterized by one or any combination of the following conditions:
  - a. With 50% and above live coralline cover;
  - b. Spawning and nursery grounds for fish;
  - c. Which act as natural breakwater of coastlines.

71 Presidential Decree No. 1586, § 4

72 Ibid., § 9

73 Republic Act No. 7942, § 108

74 Republic Act No. 8749, § 2

75 Ibid., §§ 45-48

president, manager, and the pollution control officer or the official in charge of the operation.<sup>76</sup>

### Child protection

The Philippines has several pieces of legislation devoted to the protection of children, and a number of these are specifically aimed at preventing and punishing child abuse in the context of business.

Republic Act No. 9231 (“An Act Providing For The Elimination Of The Worst Forms Of Child Labour And Affording Stronger Protection For The Working Child”), which amended certain sections of the Child Abuse Law, regulates the employment of children and imposes obligations on their employers, violation of which can result in closure of the employer’s business and criminal liability in the form of fines and/or imprisonment.<sup>77</sup> For instance,

76 Republic Act No. 9275, §29

77 Republic Act No. 9231, §§ 2, 3, 5, & 6. Section 3 sets out the prohibition against the “worst forms of child labour” as follows: No child shall be engaged in the worst forms of child labour. The phrase “worst forms of child labour” shall refer to any of the following:

All forms of slavery, as defined under the “Anti-trafficking in Persons Act of 2003”, or practices similar to slavery such as sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including recruitment of children for use in armed conflict; or

The use, procuring, offering or exposing of a child for prostitution, for the production of pornography or for pornographic performances; or

The use, procuring or offering of a child for illegal or illicit activities, including the production and trafficking of dangerous drugs and volatile substances prohibited under existing laws; or

Work which, by its nature or the circumstances in which it is carried out, is hazardous or likely to be harmful to the health, safety or morals of children, such that it:

Debases, degrades or demeans the intrinsic worth and dignity of a child as a human being; or

Exposes the child to physical, emotional or sexual abuse, or is found to be highly stressful psychologically or may prejudice morals; or

Is performed underground, underwater or at dangerous heights; or

Involves the use of dangerous machinery, equipment and tools such as power-driven or explosive power-actuated tools; or

Exposes the child to physical danger such as, but not limited to the dangerous feats of balancing, physical strength or contortion, or which requires the manual transport of heavy loads; or

Is performed in an unhealthy environment exposing the child to

where a child below the age of 15 is employed in public entertainment or information through cinema, theatre, radio, television, or other forms of media, the employer must “ensure the protection, health, safety, morals and normal development of the child,” “institute measures to prevent the child’s exploitation or discrimination,” and “formulate and implement, subject to the approval and supervision of competent authorities, a continuing program for training and skills acquisition of the child.”<sup>78</sup> The employment of children as models in “any advertisement directly or indirectly promoting alcoholic beverages, intoxicating drinks, tobacco and its by-products, gambling, or any form of violence or pornography” is forbidden.<sup>79</sup> In the case of corporate violations, the penalties will be imposed on the board of directors/trustees and officers, including the president, treasurer, and secretary who participated in or knowingly allowed the violation.<sup>80</sup>

Aside from prohibiting the production, sale, publication, and possession of child pornography, the Anti-Child Pornography Act of 2009<sup>81</sup> also requires certain business enterprises to take positive steps to report violations and prevent the proliferation of child pornography. Failure to take these steps can itself amount to a crime.

Internet service providers (ISPs) have a duty to notify the Philippine National Police (PNP) or the National Bureau of Investigation (NBI) within seven days from obtaining knowledge of facts and circumstances indicating that any form of child pornography is being committed using its server or

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hazardous working conditions, elements, substances, co-agents or processes involving ionizing, radiation, fire, flammable substances, noxious components and the like, or to extreme temperatures, noise levels, or vibrations; or

Is performed under particularly difficult conditions; or

Exposes the child to biological agents such as bacteria, fungi, viruses, protozoans, nematodes and other parasites; or

Involves the manufacture or handling of explosives and other pyrotechnic products.”

78 Ibid., § 2

79 Ibid., § 5

80 Ibid., § 6

81 Republic Act No. 9775

facility. They are also required to install technology or software to ensure that access to or transmittal of any form of child pornography will be blocked or filtered. ISPs who knowingly, wilfully, and intentionally violate these duties face fines of up to PhP 2M and revocation of their license to operate.<sup>82</sup>

Mall owners/operators and owners or lessors of other business establishments have a similar duty to notify the PNP or the NBI within seven days of gaining knowledge of facts and circumstances indicating that child pornography is being committed in their premises. Where child pornography is publicly displayed within their premises, they will be conclusively presumed to have knowledge of it.<sup>83</sup> Photo developers, information technology professionals, credit card companies, and banks have a duty to report any suspected child pornography materials or transactions to the proper authorities within seven days from discovery thereof.<sup>84</sup> Those found guilty of wilfully and knowingly failing to comply with this obligation can be penalized with fines of up to PhP 3M, revocation of their licenses to operate, and immediate closure of their establishments.

Internet content hosts may not host any form of child pornography on their internet addresses. The failure of the internet content host to remove child pornography within 48 hours of receiving notice that child pornography is hitting its server will be considered conclusive evidence of wilful and intentional violation of the law. Like the other business enterprises identified above, internet content hosts have a duty to report the presence of any form of child pornography, as well as the particulars of the person maintaining, hosting, distributing, or in any manner contributing to such internet address, to the proper authorities, and preserve such evidence for purposes of investigation and prosecution by the relevant authorities. Upon the request of the proper authorities, internet content hosts must also furnish the particulars of users who gained or attempted

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82 Ibid., §§ 9 & 15(k)

83 Ibid., § 10 & 15(l)

84 Ibid.

to gain access to an internet address that contains child pornography. An internet content host who knowingly, wilfully, and intentionally violates these duties can be penalized with imprisonment, a fine of up to PhP 3M, revocation of its license to operate, and immediate closure of its establishment.<sup>85</sup>

### Trafficking

Under the Anti-Trafficking in Persons Act of 2003,<sup>86</sup> it is unlawful for any person, natural or juridical, to commit any of the following acts:

- To recruit, transport, transfer; harbour, provide, or receive a person by any means, including those done under the pretext of domestic or overseas employment or training or apprenticeship, for the purpose of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude or debt bondage;
- To introduce or match for money, profit, or material, economic or other consideration, any person or any Filipino woman to a foreign national, for marriage for the purpose of acquiring, buying, offering, selling or trading him/her to engage in prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude or debt bondage;
- To offer or contract marriage, real or simulated, for the purpose of acquiring, buying, offering, selling, or trading them to engage in prostitution, pornography, sexual exploitation, forced labour or slavery, involuntary servitude or debt bondage;
- To undertake or organize tours and travel plans consisting of tourism packages or activities for the purpose of utilizing and offering persons for prostitution, pornography or sexual exploitation;
- To maintain or hire a person to engage in prostitution or pornography;
- To adopt or facilitate the adoption of persons for the purpose of prostitution, pornography, sexual exploitation, forced labour, slavery, involuntary servitude or debt bondage;
- To recruit, hire, adopt, transport or abduct a person, by means of threat or use of force, fraud, deceit, violence, coercion, or intimidation for the purpose of removal or sale of organs of said person; and
- To recruit, transport or adopt a child to engage in armed activities in the Philippines or abroad.
- To knowingly lease or sublease, use or allow to be used any house, building or establishment for the purpose of promoting trafficking in persons;
- To produce, print and issue or distribute unissued, tampered or fake counselling certificates, registration stickers and certificates of any government agency which issues these certificates and stickers as proof of compliance with government regulatory and pre-departure requirements for the purpose of promoting trafficking in persons;
- To advertise, publish, print, broadcast or distribute, or cause the advertisement, publication, printing, broadcasting or distribution by any means, including the use of information technology and the internet, of any brochure, flyer, or any propaganda material that promotes trafficking in persons;
- To assist in the conduct of misrepresentation or fraud for purposes of facilitating the acquisition of clearances and necessary exit documents from government agencies that are mandated to provide pre-departure registration and services for departing persons for the purpose of promoting trafficking in persons;

<sup>85</sup> Ibid., §§ 11 & 15(j)

<sup>86</sup> Republic Act No. 9208

- To facilitate, assist or help in the exit and entry of persons from/to the country at international and local airports, territorial boundaries and seaports who are in possession of unissued, tampered or fraudulent travel documents for the purpose of promoting trafficking in persons;
- To confiscate, conceal, or destroy the passport, travel documents, or personal documents or belongings of trafficked persons in furtherance of trafficking or to prevent them from leaving the country or seeking redress from the government or appropriate agencies; and
- To knowingly benefit from, financial or otherwise, or make use of, the labour or services of a person held to a condition of involuntary servitude, forced labour, or slavery.

Violators can be penalized with fines of up to PhP 5M and/or a prison term of up to 20 years.<sup>87</sup> If the offender is a corporation, partnership, association, club, establishment or any other juridical person, the penalty will be imposed upon the owner, president, partner, manager, and/or any responsible officer who participated in the commission of the crime or knowingly permitted or failed to prevent its commission. In addition, the registration and license to operate of the erring agency, corporation, association, religious group, tour or travel agent, club or establishment, or any place of entertainment shall be cancelled and revoked permanently. Significantly, the law expressly provides that the owner, president, partner, or manager of the establishment shall not be allowed to operate similar establishments under a different name.<sup>88</sup>

Like the Migrant Workers Act, the Anti-Trafficking Law is silent on extraterritoriality. However, Filipino victims of trafficking are expressly considered “Overseas Filipinos in Distress” and, as such, may avail of free legal assistance when they press charges abroad.<sup>89</sup>

87 Republic Act No. 9775, § 10

88 Ibid.

89 Ibid., § 24

## Corruption

Philippine anti-corruption laws, as far as private individuals and entities are concerned, have remained mostly static since the passing of the Anti-Graft and Corrupt Practices Act<sup>90</sup> in the 1960s and the Plunder Law<sup>91</sup> in 1991. Before then, the only criminal laws against corruption were the Revised Penal Code provisions on crimes committed by public officers, Article 212 of which addresses corruption of public officials and punishes any person who bribes a public officer<sup>92</sup> or gives the officer gifts by reason of his or her office<sup>93</sup> with a fine and/or imprisonment. Under the Revised Penal Code, the public officer or employee on the other side of the transactions contemplated in Article 212 can be prosecuted in the Philippines for violating the Code even though the transaction took place outside Philippine national territory.<sup>94</sup> However, this extraterritorial reach (which counts as one of the only five exceptions to the rule that Philippine penal laws apply only to crimes committed within the country)<sup>95</sup> does not extend to private individuals or entities.

The Anti-Graft and Corrupt Practices Act makes it unlawful for “any person” knowingly to induce or cause a public official to commit any of the

90 Republic Act No. 3019

91 Republic Act No. 7080

92 Revised Penal Code, Art. 210

93 Ibid., Art. 211

94 Ibid., Art 2 (4)

95 Ibid., Art 2. *Application of its provisions.* — Except as provided in the treaties and laws of preferential application, the provisions of this Code shall be enforced not only within the Philippine Archipelago, including its atmosphere, its interior waters and maritime zone, but also outside of its jurisdiction, against those who:

Should commit an offense while on a Philippine ship or airship  
Should forge or counterfeit any coin or currency note of the Philippine Islands or obligations and securities issued by the Government of the Philippine Islands

Should be liable for acts connected with the introduction into these islands of the obligations and securities mentioned in the presiding number;

While being public officers or employees, should commit an offense in the exercise of their functions; or

Should commit any of the crimes against national security and the law of nations, defined in Title One of Book Two of this Code.

corrupt practices defined in the Act.<sup>96</sup> The Plunder Law punishes persons who participate with public officers in the commission of plunder, such as business associates, with life imprisonment.<sup>97</sup> Although both laws indicate that the word “person” includes natural and juridical persons “unless the context indicates otherwise,”<sup>98</sup> a corporation or other juridical person cannot be prosecuted under these statutes, as the only penalties imposed on the offender are imprisonment and perpetual disqualification from holding public office.<sup>99</sup>

### Civil liability

Business enterprises and the individuals running them may also be held civilly liable under the Civil Code’s provisions on quasi-delicts (torts), human relations, and nuisances.

In its chapter on human relations, the Civil Code declares that every person must, in the exercise of his rights or in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.<sup>100</sup> The Civil Code also binds persons to respect the dignity, personality, privacy, and peace of mind of other persons. Vexing or humiliating another for his or her religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition can give rise to a cause of action for damages, prevention, and other relief.<sup>101</sup>

An action for damages can also be brought against any person who, contrary to law, wilfully or negligently causes damage to another,<sup>102</sup> or wilfully causes loss or injury to another in a manner that is contrary to law, morals, good customs, or public policy.<sup>103</sup>

Notably, non-state actors can be held liable for damages when they directly or indirectly obstruct, violate, or in any manner impede the civil and political rights of another, such as the freedom of speech and religion, the freedom from arbitrary or illegal detention, the right against deprivation of property without due process of law, the right to equal protection, and other rights protected under the Constitution’s Bill of Rights.<sup>104</sup> It has been observed, however, that this particular provision has yet to be invoked or relied upon in any significant manner.<sup>105</sup>

The Civil Code’s provisions on quasi-delicts, the Philippines’ version of torts, can also be used as a basis for an indemnity suit against a natural or juridical person who causes damage to another. Article 2176 defines quasi-delicts as follows: “Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict...”

The obligation imposed by Article 2176 is demandable not only for one’s own acts or omissions, but also for those of persons for whom one is responsible.<sup>106</sup> Thus, under Article 2180, owners and managers of an establishment or enterprise are responsible for damages caused by their employees in the service of the branches in which the latter are employed or on the occasion of their functions. In order to avoid liability under this provision, the owner or manager must prove that he or she observed “all the diligence of a good father of a family to prevent damage.”<sup>107</sup>

The Civil Code’s provisions on nuisances are of particular relevance to the rights to health and the environment. A nuisance, as defined by the Civil Code, is any act, omission, establishment, business, condition of property, or anything else which injures

96 Republic Act No. 3019, § 4, in relation to § 3

97 Republic Act No. 7080, § 2

98 Republic Act No. 3019, § 2(d); Republic Act No. 7080, § 1(c)

99 Republic Act No. 3019, § 9(a); Republic Act No. 7080, § 2

100 Civil Code, Art. 19

101 Ibid., Art. 26

102 Ibid., Art. 20

103 Ibid., Art. 21

104 Ibid., Art. 32

105 Access to Justice: Human Rights Abuses Involving Corporations – Philippines (2010), 7.

106 Civil Code, Art. 2180

107 Ibid., The diligence of a “good father of a family” is the standard of ordinary due diligence in the Civil Code.

or endangers the health or safety of others; annoys or offends the senses; shocks, defies, or disregards decency or morality; obstructs or interferes with the free passage of any public highway or street, or any body of water; or hinders or impairs the use of property.<sup>108</sup>

A nuisance is either public or private. A nuisance is considered public if it affects a community or neighbourhood or any considerable number of persons, although the extent of the annoyance, danger, or damage upon individuals may be unequal. Any other nuisance that does not fall within this definition is classified as a private one.<sup>109</sup> The distinction between private and public nuisances determines what remedies may be availed of. Public and private nuisances can be the subject of a civil action or abatement without judicial proceedings, but only a public nuisance can lead to criminal prosecution.<sup>110</sup>

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

According to the DOJ's 2010 Annual Report,<sup>111</sup> 976 cases of human trafficking have been filed since 2003. Of the 976 cases, 85 had been archived and 190 had been dismissed, dropped, or withdrawn. As of 2010, prosecutions had resulted in 39 convictions and two acquittals.

In its most recent Universal Periodic Review (UPR) Report,<sup>112</sup> the Philippine Government stated that the number of convictions had risen to 66 by December 2011.<sup>113</sup> However, there was no mention of the status of the several hundred more cases that were pending at the close of 2010.

108 Civil Code, Art. 694

109 Ibid., Art. 695

110 Ibid., Arts. 699 & 705

111 <http://www.doj.gov.ph/files/2010Annual.pdf>

112 National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21 – Philippines (Philippines UPR Report), A/HRC/WG.6/13/PHL/1.

113 Ibid., 14.

Recent Government measures to combat trafficking in persons highlighted in the UPR Report include the following:

- Department of Justice Circular No. 49 issued on 25 June 2010, and No. 57 on 29 July 2010, directing Prosecutors to prioritize and fast-track the resolution and trial of trafficking in persons cases, with further instruction to oppose Motions designed to delay the prosecution, and with the prohibition to dismiss cases on grounds of affidavits of desistance executed by the victims or his/her guardians;
- Department of Interior and Local Government-Department of Justice-Department of Social Welfare and Development Joint Memorandum Circular No. 2010-1 issued on 18 October 2010, on the creation of Local Committees on Anti-Trafficking and Violence Against Women and their Children to establish and strengthen local structures to collaboratively address the problems of trafficking in persons and violence against women and children, through policies and legislations;
- Memorandum of Agreement on 18 October 2010 by the Department of Interior and Local Government with the Blas Ople Policy Centre and Training Institute, Visayan Forum Foundation, Inc., Association of Child Caring Agencies of the Philippines and the Philippine Centre for Islam and Democracy, to better coordinate anti- trafficking in persons efforts of the government with that of civil society and private groups.<sup>114</sup>

The Supreme Court, for its part, issued in October 2010 a circular<sup>115</sup> directing all trial courts nationwide to expedite and prioritize the disposition of trafficking in persons cases.<sup>116</sup>

114 Ibid.

115 OCA Circular No. 151-2010 Re: Speedy Disposition of Cases For Violations of Republic Act No. J9208 (The Anti- Trafficking In Persons Act Of 2003) or Trafficking in Persons Cases

116 Philippines UPR Report, 14-15.

From January to August 2011, the NCIP reported five cases of human rights violations due to land conflict, including the May 17 killing of Agta tribal leader Armando Maximino in Casiguran, Aurora Province. The violations included harassment, intimidation, and displacement of indigenous people by government security forces in Tanay, Rizal Province; Iriga City; and Bayog, Zamboanga del Sur Province. The NCIP referred these cases to the CHR, PNP, and OPAPP; all were under investigation at the close of 2011. Other NGOs reported the use of security forces to protect mining and other private interests in indigenous areas.<sup>117</sup>

The government has imposed fines and instituted criminal prosecutions for child labour violations in the formal sector, such as in manufacturing. DOLE has also exerted efforts to remove child workers from hazardous situations. From January to September 2011, DOLE conducted four operations involving the removal of 24 child labourers.<sup>118</sup> In the same year, labour inspectors made 1,843 checks on company compliance with general labour and working standards and found 140 to have violations.<sup>119</sup>

Despite the existence of penal sanctions in the minimum wage law, violations of minimum wage standards and the use of contract employees to avoid the payment of required benefits continued in 2011. During the year the DOLE, through its Bureau of Working Conditions, inspected 30,727 firms: 10,049 were found to have violated core labour standards, 6,066 of which were found to be out of compliance with minimum wage rates.<sup>120</sup> The government also continued to place financial sanctions on, and bring criminal charges against, domestic recruiting agencies found guilty of illegal recruitment. For example, in May 2011 the POEA cancelled the recruitment license of Great World International Management, Inc., and in August the DOJ filed cases against three suspected recruiters

from the firm who reportedly recruited women illegally to work as domestic workers in Kuwait.<sup>121</sup>

In 2008, the Pollution Adjudication Board (PAB) ordered several companies to pay fines amounting to 9.7 million pesos for violating the Clean Water Act.<sup>122</sup>

It has been observed, however, that despite the considerable number of penal laws applicable to business enterprises, criminal complaints against corporations and their officers remain rare; much rarer are actual convictions where corporate officers have been imprisoned or fined.<sup>123</sup>

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

Most of the laws discussed above provide for “periodic review” by the State. However, it is not clear how, and how often, if at all, these laws are actually reviewed.

Nonetheless, from the number and substance of amendatory laws and supplemental regulations issued after the enactment of these laws, it can be gathered that the country’s laws on labour, child protection, and the environment are being reviewed with a view to addressing gaps.

One example is the recent enactment of Republic Act No. 10151 (An Act Allowing the Employment of Night Workers, repealing articles 130 and 131 of the Labour Code), which removes regulations that can be seen as sexual discrimination in the work force. This is particularly relevant in view of the country’s burgeoning BPO and call centre industry, where night work is common.

117 See [http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic\\_load\\_id=186301](http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dynamic_load_id=186301)

118 Ibid.

119 Ibid.

120 Ibid.

121 Ibid.

122 See [http://emb.gov.ph/pab/template/PABHits\\_4firms.htm](http://emb.gov.ph/pab/template/PABHits_4firms.htm)

123 Access to Justice: Human Rights Abuses Involving Corporations – Philippines (2010), 11.

The Mining Act of 1995, which presently faces “unprecedented opposition from a broad cross-section of society,” including indigenous communities, schools, church groups, environmental groups, and armed rebels in the countryside for having “opened the floodgates to widespread plunder of [the country’s] natural wealth, unprecedented environmental degradation, and worsening human rights violations”<sup>124</sup> is also being reviewed with a view to its possible repeal and replacement.

One gap that appears to have at times escaped the country’s lawmakers’ notice, however, relates to fines, the potential deterrent effect of which declines as years pass and potential offenders’ ability to pay increases. One example is the fine for committing certain acts, such as the unlawful withholding of wages, prohibited by the Labour Code, a law passed in 1974. The maximum fine that can be imposed under the Labour Code is PhP 10,000, which is measly compared to laws of more recent vintage, such as the Wage Rationalization Act of 1996, which imposes a minimum fine of PhP 25,000 up to a maximum of PhP 100,000 on employers who fail to comply with the country’s minimum wage law.

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

In the Philippines, corporate governance is understood to be the framework of rules, systems, and processes in the corporation that governs the performance by the Board of Directors and management of their respective duties and responsibilities to the stockholders.<sup>125</sup> The

124 See <http://www.minesandcommunities.org/article.php?a=11579>

125 SEC Memorandum Circular No. 6, Series of 2009, Revised Code of Corporate Governance. The Code applies only to “registered corporations and to branches or subsidiaries of foreign corporations operating in the Philippines that (a) sell equity and/or debt securities to the public that are required to be registered with the [Securities and Exchange] Commission, or (b) have assets in excess of Fifty Million Pesos and at least two hundred (200) stockholders who own at least one hundred (100) shares each

Philippines has yet to use corporate governance measures to unequivocally require or encourage respect for human rights. Nevertheless, the Revised Code of Corporate Governance<sup>126</sup> promulgated in 2009 does contain some provisions that may be interpreted as implying a duty to respect human rights, at least insofar as these rights have been translated into domestic law enforceable against non-state entities.

For instance, the Code imposes a duty on the Board of Directors to ensure the corporation’s faithful compliance with all applicable laws, regulations, and best business practices.<sup>127</sup> To this end, the Board is required to appoint a Compliance Officer who shall monitor the corporation’s compliance with the code and other applicable rules and regulations, report violations to the Board, recommend disciplinary action on parties responsible for any violations, and the adoption of measures to prevent their repetition.<sup>128</sup> It is also the Board’s duty to identify sectors in the community in which the corporation operates or are directly affected by its operations, and formulate a clear policy of accurate, timely, and effective communication with them.<sup>129</sup> Another duty of the Board is to identify key risk areas and monitor these with due diligence to enable the corporation to anticipate and prepare for possible threats to its operational and financial viability.<sup>130</sup> Such risks may also entail reputational and financial risks related to negative human rights impacts. The Board also has a duty to establish and maintain an alternative dispute resolution system in the corporation that can amicably settle not only intra-corporate disputes, but disputes between the corporation and third parties as well.<sup>131</sup> This duty can easily be linked to the access to remedy in the UN Guiding Principles.<sup>132</sup>

of equity securities, or (c) whose equity securities are listed on an Exchange; or (d) are grantees of secondary licenses from the Commission.”

126 Ibid.

127 Ibid., Art. 3 (F)2(c)

128 Ibid., Art. 3 (M)(i)

129 Ibid., Art. 3 (F)2(e)

130 Ibid., Art. 3 (F)2(g)

131 Ibid., Art. 3 (F)2(j)

132 According to the Guiding Principles on Business and Hu-

Covered corporations<sup>133</sup> face a fine of not more than PhP 200,000 (approximately \$4,800 USD) for every year that they are found, after notice and hearing, to have violated the provisions of the Code, without prejudice to other sanctions that the SEC may be authorized to impose under the law.<sup>134</sup>

#### **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?**

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

A director owes a three-fold duty to the corporation – to be diligent, to be loyal, and to be obedient. The duty of obedience imposes on the directors the obligation to act only within the corporate powers, on pain of liability for damages unless they acted in good faith and with due diligence. Because of this duty, directors should furthermore not assume to act alone in situations where the law has given the stockholders the power of final approval.<sup>135</sup>

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man Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms. One category of non-State-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group. They are non-judicial, but may use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. These mechanisms may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.

133 As stated above, the Code applies only to “registered corporations and to branches or subsidiaries of foreign corporations operating in the Philippines that (a) sell equity and/or debt securities to the public that are required to be registered with the [Securities and Exchange] Commission, or (b) have assets in excess of Fifty Million Pesos and at least two hundred (200) stockholders who own at least one hundred (100) shares each of equity securities, or (c) whose equity securities are listed on an Exchange; or (d) are grantees of secondary licenses from the Commission.”

134 Revised Code of Corporate Governance, Art. 11

135 Jose Campos Jr. & Maria Clara Lopez-Campos, *The Corporation Code: Comments, Notes and Selected Cases*, Vol. 1, at 641

Even in cases where directors have acted within their powers, liability may still arise if they have not observed due diligence or have been disloyal to the corporation. Under Section 31 of the Corporation Code, “directors or trustees who wilfully and knowingly vote for or assent to patently unlawful acts of the corporation or who are guilty of gross negligence or bad faith in directing the affairs of the corporation or acquire any personal or pecuniary interest in conflict with their duty as such directors or trustees shall be liable jointly and severally for all damages resulting therefrom suffered by the corporation, its stockholders or members and other persons.”

The degree of care and diligence required of directors is usually that which persons prompted by self-interest generally exercise in their own affairs.<sup>136</sup> In determining whether reasonable diligence has been exercised, the particular circumstances of each case, such as the nature of the business are an important factor. Thus, a director of a bank is usually held to a higher degree of diligence than that of an ordinary commercial corporation.<sup>137</sup>

Aside from being held liable for damages, directors who have been grossly negligent or have fraudulently mismanaged the corporation may be removed by the stockholders.<sup>138</sup> They may also be held criminally liable under Section 144, which makes “[v]iolations of any of the provisions of [the] Code” punishable by a fine and/or imprisonment.

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

No.

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(1990)

136 *Ibid.*, 643

137 *Ibid.*

138 Corporation Code, Section 28

**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)?**

No.

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

As stated earlier, violations of any of the provisions of the Corporation Code, including those setting out the duties of directors, can result in criminal liability. It is not clear whether the State has ever enforced these duties by means of criminal prosecution. As a practical matter, however, it is highly unlikely that directors would be penalized under the penal provision of the Corporation Code, as there is a plethora of more specific crimes with which they can be charged for their part in 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)?**

No.

**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?**

Business enterprises are generally not required or encouraged to communicate their human rights impacts or any action taken to address them. As discussed above, however, there are a few exceptions. Companies engaged in activities which significantly affect the quality of the environment are required to submit Environmental Impact Statements. Also, the boards of directors of corporations covered by the Revised Code of Corporate Governance are required to identify sectors in the community in which the corporations operate or are directly affected by their operations, and formulate a clear policy of accurate, timely, and effective communication with them, which could very well be construed as including human rights impacts.

**4.3. Is/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?**

No.

**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?**

**Labour**

DOLE has been working with industry players to develop a guide on responsible outsourcing practices to include compliance with labour standards, observance of due process, consultations with affected workers, provision of unemployment or transition benefits, and voluntary dispute settlement mechanisms. As a result of these efforts, industry tripartite councils have been established

and tasked to formulate Codes of Good Practices in the fields of broadcasting, education, transport, electronics, business process outsourcing, medical tourism, and mining.<sup>139</sup>

## Environment

Through the Philippine Environment Partnership Program (PEPP), a partnership program with industries, in cooperation with the other environment-related agencies, the DENR aims to support industry self-regulation towards improved environmental performance. The PEPP provides a package of incentives and reward mechanisms to industries in effective voluntary self-regulation and improved environmental performance.<sup>140</sup>

In December 2010, the DENR recognized 16 companies for their exemplary environmental performance and awarded them a DENR Official Seal of Approval. The award came with relaxed reportorial requirements as to frequency of submission, longer validity of permits, and simplified requirements for securing an Environmental Compliance Certificate for expansion projects.<sup>141</sup>

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

DOLE has been particularly active in this regard. In 2008, for example, the DOLE issued the Policy Guidelines Governing the Occupational Safety and Health of Workers in the Call Centre Industry.<sup>142</sup> Other than this, the State does not appear to be providing any sort of guidance to other businesses on how to respect human rights.

139 See <http://www.nmp.gov.ph/frames/pdf/President's%2022-Point%20Agenda%20on%20Labour%20and%20Employment.pdf>

140 See <http://emb.gov.ph/pepp/index.html>

141 See [http://emb.gov.ph/pepp/awarding/news%20release\\_PEPP%20Awarding%20Dec172010.pdf](http://emb.gov.ph/pepp/awarding/news%20release_PEPP%20Awarding%20Dec172010.pdf)

142 See <http://bwc.dole.gov.ph/userfiles/file/DC%2001-08.pdf>

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

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

State-owned or controlled business enterprises (commonly referred to in the Philippines as Government-owned or –controlled corporations, or GOCCs) are required to obey laws protecting human rights. However, GOCCs with original charters, i.e., those not incorporated under the Corporation Code (and presumably performing governmental -- as opposed to proprietary -- functions) are not covered by the Labour Code, but, rather, the Civil Service Law and regulations issued by the Civil Service Commission, which do not permit civil servants to stage strikes.

At any rate, there is no indication that the State requires or encourages these enterprises to conduct human rights due diligence or take any special measures geared towards human rights protection or promotion.

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

As above, there is no indication that the State requires or encourages these enterprises to conduct human rights due diligence or take any special measures geared towards human rights protection or promotion.

**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?**

There is no indication that the Philippines is taking steps to ensure that business enterprises performing privatized services respect human rights.

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

The Philippines is not a party to the WTO General Procurement Agreement. Public procurement in the country is regulated by the Government Procurement Reform Act<sup>143</sup> (Procurement Act). It applies to the procurement of infrastructure projects, goods, and consulting services by all branches and instrumentalities of government, including government-owned and/or -controlled corporations and local government units.<sup>144</sup>

Although the Procurement Act contains no language specifically requiring or encouraging respect for human rights in public procurement, it does establish principles of transparency and equal opportunity, as well as a system of accountability where public officials and private parties can be investigated and held liable for their actions relative to the procurement process and the implementation of procurement contracts.<sup>145</sup> The Procurement Act also provides for public monitoring of the procurement process and the implementation of awarded contracts with the end in view of guaranteeing that contracts are awarded in accordance with law and that they are performed strictly according to specifications.<sup>146</sup>

In 2004, the President of the Philippines issued Executive Order No. 301 (EO 301) calling for the establishment of a Green Procurement Program in all government departments, offices, and agencies. EO 301 requires these government bodies to establish their own Green Procurement Programs that (1) promote a culture of making environmentally-informed decisions, especially in the purchase and use of products, (2) include environmental criteria in public tenders “whenever possible and practicable,” (3) establish specifications and requirements for products and services to be considered environmentally advantageous, and (4) develop incentive programs for suppliers of environmentally advantageous products or services.<sup>147</sup>

The progress of this Green Procurement initiative has been observed to be slow.<sup>148</sup> In January 2012, however, the Department of Environment and Natural Resources (DENR) joined other agencies in launching a green public procurement project to promote the use of environmentally friendly products and services in the supply chain.<sup>149</sup>

The launch was capped with the signing of a memorandum of understanding (MOU) for the “Pilot Project for the Implementation of Green Public Procurement among selected Government Institutions.” The MOU was signed by representatives of the DENR, the Department of Budget and Management (DBM), the Department of Trade and Industry (DTI), the Department of Energy (DOE), the Department of Science and Technology (DOST), the Philippine Centre for Environmental Protection and Sustainable Development, Inc. (PCEPSDI); the Philippine Economic Zone Authority (PEZA); the Development Academy of the Philippines (DAP); the Quezon City local government, and the International Green Purchasing Network (IGPN).<sup>150</sup>

143 Republic Act. No. 9184

144 Ibid., § 4

145 Ibid., § 3

146 Ibid.

147 Executive Order No. 301 (s2004), § 1

148 See <http://www.manilatimes.net/index.php/opinion/5164-green-philippines>

149 See <http://www.gov.ph/2012/01/13/denr-joins-other-government-agencies-in-green-procurement-program/>

150 Ibid.

Under the MOU, the DENR, DBM, PEZA, DTI, DOST, DOE, and Quezon City will undergo training on Green Procurement and enlist the participation of all officials, related offices, businesses, and other stakeholders involved in their supply chains. The PCEPSDI, DAP, and IGPN will conduct training on Green Public Procurement, eco-labelling, and other sustainable consumption and production tools, and assist the participating government institutions in developing their respective Green Procurement Programs.<sup>151</sup>

The DENR Secretary expressed the hope that the project would “encourage more companies, especially small and medium enterprises, to shift to environment-friendly business practices, provide choices by making green products and delivering green services not only for the government’s supply chain but for every consumer in the country as well.”<sup>152</sup>

**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 indication that the Philippines is 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.

**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 indication that the Philippines is providing assistance to business enterprises operating in conflict-affected and high-risk areas to assess and address the heightened risks of human rights abuses

**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 is no indication that the Philippines is denying access to public support and services for business enterprises operating in conflict-affected and high-risk areas that are involved with human rights abuses and refuse to cooperate in addressing the situation.

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

**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?**

In the field of child protection alone, the Philippines has at least three inter-agency bodies tasked with the coordination and monitoring of the implementation of the country’s child protection laws that have a

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

nexus with business: the Inter-Agency Council Against Trafficking (IACAT), the Inter-Agency Council Against Child Pornography (IAC-ACP), and the Committee for the Special Protection of Children (CSPC).

The CSPC is principally responsible for coordinating and monitoring the investigation and prosecution of cases involving violations of R.A. No. 7610 and other child-related criminal laws.<sup>153</sup> Chaired by the Secretary of Justice and co-chaired by the Secretary of Social Welfare and Development, the CSPC has the following members:

- Chairperson of the Commission on Human Rights
- Secretary of Foreign Affairs
- Secretary of Labour and Employment
- Secretary of Tourism
- Secretary of the Interior and Local Government
- Secretary of Health
- Secretary of Education
- Commissioner of Immigration
- Director of the National Bureau of Investigation
- Chief of the Philippine National Police
- Prosecutor General
- Three representatives of non-government or private organizations working and/or advocating for the protection of children.<sup>154</sup>

The CSPC has the following responsibilities:

- Establish a system of collecting periodic reports from member agencies on cases filed before them including the status of such cases
- Request member agencies and other government instrumentalities to address specific issues brought to the Committee's attention that require immediate action

- Coordinate with other inter-agency councils and other similar structures and mechanisms for synchronization and harmonization of actions on the legal protection of children
- Develop and/or recommend policies and guidelines to address gaps and issues identified in the investigation and prosecution of cases as well as in the legal protection of children
- Formulate a uniform protocol for capacity-building of duty bearers and other stakeholders with emphasis on multi-disciplinary approach
- Call upon non-member agencies for assistance when necessary in the exercise of its functions and duties<sup>155</sup>

The IACAT was created by virtue of the Anti-Trafficking in Persons Act of 2003. It is composed of the Secretary of the Department of Justice as Chairperson and the Secretary of the Department of Social Welfare and Development as Co-Chairperson, and the following members:

- Secretary, Department of Foreign Affairs;
- Secretary, Department of Labour and Employment;
- Administrator, Philippine Overseas Employment Administration;
- Commissioner, Bureau of Immigration;
- Director-General, Philippine National Police;
- Chairperson, National Commission on the Role of Filipino Women; and
- Three representatives from NGOs, with one representative each from among the sectors representing women, overseas Filipino workers, and children, with a proven record of involvement in the prevention and suppression of trafficking in persons.

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<sup>153</sup> Executive Order No. 53 (s2011)

<sup>154</sup> Ibid., § 3

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<sup>155</sup> Ibid., § 4

The IACAT has the following powers and functions:

- Formulate a comprehensive and integrated program to prevent and suppress the trafficking in persons;
- Promulgate rules and regulations as may be necessary for the effective implementation of the Anti-Trafficking in Persons Act
- Monitor and oversee the strict implementation of the Anti-Trafficking in Persons Act
- Coordinate the programs and projects of the various member agencies to effectively address the issues and problems attendant to trafficking in persons;
- Coordinate the conduct of massive information dissemination and campaign on the existence of the law and the various issues and problems attendant to trafficking through the LGUs, concerned agencies, and NGOs;
- Direct other agencies to immediately respond to the problems brought to their attention and report to the Council on action taken;
- Assist in filing of cases against individuals, agencies, institutions or establishments that violate the provisions of the Anti-Trafficking in Persons Act;
- Formulate a program for the reintegration of trafficked persons in cooperation with DOLE, DSWD, Technical Education and Skills Development Authority (TESDA), Commission on Higher Education (CHED), LGUs and NGOs;
- Secure from any department, bureau, office, agency, or instrumentality of the government or from NGOs and other civic organizations such assistance as may be needed to effectively implement the Anti-Trafficking in Persons Act
- Complement the shared government information system for migration established under Republic Act No. 8042, otherwise known as the “Migrant Workers and Overseas

Filipinos Act of 1995” with data on cases of trafficking in persons, and ensure that the proper agencies conduct a continuing research and study on the patterns and scheme of trafficking in persons which shall form the basis for policy formulation and program direction;

- Develop the mechanism to ensure the timely, coordinated, and effective response to cases of trafficking in persons;
- Recommend measures to enhance cooperative efforts and mutual assistance among foreign countries through bilateral and/or multilateral arrangements to prevent and suppress international trafficking in persons;
- Coordinate with the Department of Transportation and Communications (DOTC), Department of Trade and Industry (DTI), and other NGOs in monitoring the promotion of advertisement of trafficking in the internet;
- Adopt measures and policies to protect the rights and needs of trafficked persons who are foreign nationals in the Philippines;
- Initiate training programs in identifying and providing the necessary intervention or assistance to trafficked persons; and
- Exercise all the powers and perform such other functions necessary to attain the purposes and objectives of the Anti-Trafficking in Persons Act.<sup>156</sup>

Aside from establishing the IACAT, the Anti-Trafficking in Persons Act also mandates other government agencies to implement programs for the prevention of human trafficking and the protection and rehabilitation of trafficked persons.<sup>157</sup>

<sup>156</sup> Republic Act No. 9208, § 21

<sup>157</sup> Republic Act No. 9208, § 16: Programs that Address Trafficking in Persons. - The government shall establish and implement preventive, protective and rehabilitative programs for trafficked persons. For this purpose, the following agencies are hereby mandated to implement the following programs; Department of Foreign Affairs (DFA) - shall make available its

resources and facilities overseas for trafficked persons regardless of their manner of entry to the receiving country, and explore means to further enhance its assistance in eliminating trafficking activities through closer networking with government agencies in the country and overseas, particularly in the formulation of policies and implementation of relevant programs. The DFA shall take necessary measures for the efficient implementation of the Machine Readable Passports to protect the integrity of Philippine passports, visas and other travel documents to reduce the incidence of trafficking through the use of fraudulent identification documents. It shall establish and implement a pre-marriage, on-site and pre-departure counselling program on intermarriages.

Department of Social Welfare and Development (DSWD) - shall implement rehabilitative and protective programs for trafficked persons. It shall provide counselling and temporary shelter to trafficked persons and develop a system for accreditation among NGOs for purposes of establishing centres and programs for intervention in various levels of the community.

Department of Labour and Employment (DOLE) - shall ensure the strict implementation and compliance with the rules and guidelines relative to the employment of persons locally and overseas. It shall likewise monitor, document and report cases of trafficking in persons involving employers and labour recruiters.

Department of Justice (DOJ) - shall ensure the prosecution of persons accused of trafficking and designate and train special prosecutors who shall handle and prosecute cases of trafficking. It shall also establish a mechanism for free legal assistance for trafficked persons, in coordination with the DSWD, Integrated Bar of the Philippines (IBP) and other NGOs and volunteer groups.

National Commission on the Role of Filipino Women (NCRFW) - shall actively participate and coordinate in the formulation and monitoring of policies addressing the issue of trafficking in persons in coordination with relevant government agencies. It shall likewise advocate for the inclusion of the issue of trafficking in persons in both its local and international advocacy for women's issues.

Bureau of Immigration (BI) - shall strictly administer and enforce immigration and alien administration laws. It shall adopt measures for the apprehension of suspected traffickers both at the place of arrival and departure and shall ensure compliance by the Filipino fiancés/fiancées and spouses of foreign nationals with the guidance and counselling requirement as provided for in this Act.

Philippine National Police (PNP) - shall be the primary law enforcement agency to undertake surveillance, investigation and arrest of individuals or persons suspected to be engaged in trafficking. It shall closely coordinate with various law enforcement agencies to secure concerted efforts for effective investigation and apprehension of suspected traffickers. It shall also establish a system to receive complaints and calls to assist trafficked persons and conduct rescue operations.

Philippine Overseas Employment Administration (POEA) - shall implement an effective pre-employment orientation seminars and pre-departure counselling programs to applicants for

The Inter-Agency Council Against Child Pornography (IAC-ACP) was created by the Anti-Child Pornography Act.<sup>158</sup> It is composed of the Secretary of the DSWD and the following as members:

- Secretary of the Department of Justice
- Secretary of the Department of Labour and Employment
- Secretary of the Department of Science and Technology
- Chief of the Philippine National Police
- Chairperson of the Commission on Information and Communications Technology
- Commissioner of the National Telecommunications Commission
- Executive Director of the Council for the Welfare of Children
- Executive Director of the Philippine Centre for Transnational Crimes
- Executive Director of the Optical Media Board

overseas employment. It shall likewise formulate a system of providing free legal assistance to trafficked persons.

Department of the Interior and Local Government (DILG) - shall institute a systematic information and prevention campaign and likewise maintain a databank for the effective monitoring, documentation and prosecution of cases on trafficking in persons.

Local government units (LGUs) - shall monitor and document cases of trafficking in persons in their areas of jurisdiction, effect the cancellation of licenses of establishments which violate the provisions of this Act and ensure effective prosecution of such cases. They shall also undertake an information campaign against trafficking in persons through the establishment of the Migrants Advisory and Information Network (MAIN) desks in municipalities or provinces in coordination with DILG, Philippine Information Agency (PIA), Commission on Filipinos Overseas (CFO), NGOs and other concerned agencies. They shall encourage and support community based initiatives which address the trafficking in persons. In implementing this Act, the agencies concerned may seek and enlist the assistance of NGOs, people's organizations (Pos), civic organizations and other volunteer groups.

158 Republic Act No. 9775

- Director of the National Bureau of Investigation
- Three representatives from children's nongovernmental organizations<sup>159</sup>

The IAC-ACP is charged with the following functions:

- Formulate comprehensive and integrated plans and programs to prevent and suppress any form of child pornography
- Promulgate rules and regulations as may be necessary for the effective implementation of this Act
- Monitor and oversee the strict implementation of this Act
- Coordinate the programs and projects of the various members agencies effectively address the issues and problems attendant to child pornography
- Conduct and coordinate massive information disseminations and campaign on the existence of the law and the various issues and problems attendant to child pornography
- Direct other agencies to immediately respond to the problems brought to their attention and report to the Council on the action taken
- Assist in the filling of cases against individuals, agencies, institutions or establishments that violate the provisions of the Act
- Formulate a program for the reintegration of victims of child pornography
- Secure from any department, bureau, office, agency or instrumentality of the government or from NGOs and other civic organizations such assistance as may be needed to effectively implement the Act
- Complement the shared government information system relative to child abuse and exploitation and ensure that the proper

agencies conduct a continuing research and study on the patterns and schemes of any form of child pornography which form basis for policy formulation and program direction

- Develop the mechanism to ensure the timely, coordinated and effective response to cases of child pornography
- Recommend measures to enhance cooperative efforts and mutual assistance among foreign countries through bilateral and/or multilateral arrangements to prevent and suppress any form of child pornography
- Adopt measures and policies to protect the rights and needs of the victims of child pornography who are foreign nationals in the Philippines
- Maintain a database of cases of child pornography
- Initiate training programs in identifying and providing the necessary intervention or assistance to victims of child pornography

Inter-agency cooperation also takes place in the area of workers' rights protection. Recently, the Department of Labour and Employment and the Departments of Interior and Local Government, Justice, and National Defence, Armed Forces of the Philippines, and the Philippine National Police signed the Guidelines on the Conduct of the DOLE, DILG, DND, DOJ, AFP, and PNP Relative to the Exercise of Workers' Rights and Activities, a historic document which all the signers said will promote workers right to freedom of association, collective bargaining, concerted peaceful actions, and other trade union activities.<sup>160</sup>

The Guidelines seek to ensure peace and order and security during labour disputes, while at the same time respecting the exercise of workers' and trade union rights in an environment free from violence, pressure, fear, and duress of any kind. It also outlines workers' and trade union rights relative

<sup>159</sup> Ibid., § 20

<sup>160</sup> See <http://www.dole.gov.ph/secondpage.php?id=2842>

to the exercise of freedom of association; during the conduct of AFP and PNP internal peace and security operations; modes of coordination between the DOLE, AFP, PNP, and local government units (LGUs) during labour disputes; remedies in cases of violation; and modes of monitoring and evaluation of the Guidelines' implementation.

The Guidelines require that members, personnel, and officers of the signatory agencies conduct themselves in accordance with the provisions of the 1987 Philippine Constitution; Labour Code of the Philippines, as amended; Republic Act No. 7160 or the Local Government Code of the Philippines; United Nations Universal Declaration of Human Rights; International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Labour Organization (ILO) Protocols and Recommendations and International Labour Standards, in particular ILO Convention on Freedom of Association and Protection of the Right to Organize (Convention No. 87) and Convention on the Right to Organize and Collective Bargaining (Convention No. 98); International Humanitarian Law (IHL); Presidential Memorandum No. 393; Joint Circular 2-91 (Directing the AFP and the PNP to Re-affirm their Adherence to the Principles of Humanitarian Law and Human Rights in the Conduct of Security/Police Operations); and President Benigno S. Aquino III's Social Contract with the Filipino People.

## **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?**

The Philippines has forged bilateral labour agreements with several countries with a view to ensuring protection of migrant workers' rights.<sup>161</sup>

<sup>161</sup> See [http://www.poea.gov.ph/lmi\\_kiosk/labor\\_agreements.htm](http://www.poea.gov.ph/lmi_kiosk/labor_agreements.htm)

The Philippines is internationally recognized for its high regard for its workers abroad. Its eminent priority on the protection of overseas workers is enshrined as one of the three pillars in Philippine foreign policy. Because of this, the Philippine government incorporates the promotion of the rights and welfare of overseas Filipino workers (OFWs) in its global affairs and bilateral relations.<sup>162</sup>

The efforts of the Philippine government towards protecting its citizens abroad are most visible during crisis situations when their lives are at risk. Recently, it has been active in evacuating Filipinos overseas in disaster-stricken areas in Japan and in conflict-ridden countries in the Middle East.<sup>163</sup>

The Philippine government provides an evaluation of labour-receiving countries based on the provisions in RA 10022 or the Amended Migrant Workers and Overseas Filipinos Act of 1995 that took effect in 2009. The amendment states that the Philippines shall allow "the deployment of OFWs only in countries where the rights of Filipino migrant workers are protected." It mandates the Department of Foreign Affairs (DFA) to certify countries that comply with any of the following guarantees for migrant worker protection, that the country:

- has existing labour and social laws to protect the rights of migrant workers;
- is a signatory to and/or ratifier of multilateral conventions, declarations or resolutions relating to the protection of migrant workers; and
- has concluded a bilateral agreement with the Philippines on the protection of the rights of OFWs.

<sup>162</sup> Andrea Chloe Wong, Protecting OFWs: An Assessment of the POEA Lists and its Labour Agreements, <http://philippinesintheworld.org/?q=node/1171>

<sup>163</sup> Ibid.

Based on these criteria, POEA released two Governing Board Resolutions classifying compliant and non-compliant countries. As of November 2011, there are a total of 125 compliant countries that have concrete measures to protect OFWs. Meanwhile, there are 41 non-compliant countries that have been included in the deployment ban due to their lack of protection guarantees. Some of these countries include conflict-affected countries such as Lebanon, Syria, Iraq, and Afghanistan.<sup>164</sup> The lists are considered important in determining which countries are generally safe or risky for OFWs. The deployment ban, in particular, is regarded as a significant attempt by the Philippine government to protect migrant workers from possible danger and abuse in non-compliant countries.<sup>165</sup>

Aside from classifying labour-receiving countries, the Philippine government also strives to forge more bilateral labour agreements (BLAs) to advance the social, economic, and legal interests of OFWs. The POEA has already tailor-made several draft BLAs to reflect the peculiar conditions and idiosyncrasies of each labour-receiving country. It has since signed several labour and maritime agreements with Bahrain, Canada, Japan, Jordan, Taiwan, and Norway among others.

However, analysts contend that these cannot be trumpeted as banner accomplishments. For one, not all of the top OFW destination countries have signed labour agreements with the Philippine government. Second, these labour agreements are more like memoranda of agreements that are merely statements of mutual cooperation regarding the recruitment of foreign workers. Moreover, the provisions in these agreements pertain mostly to social security matters that have few specifics on the issue of labour protection.<sup>166</sup>

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164 Ibid.

165 Ibid.

166 Ibid.

## **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?**

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

The primary recourse against human rights abuses in the Philippines continues to be through the courts.<sup>167</sup> Most cases must be initiated either in the first level Municipal or Metropolitan Trial Courts (MTC), Municipal Circuit Trial Courts (MCTCs), or the Regional Trial Courts (RTC) distributed among thirteen judicial regions throughout the country.<sup>168</sup> Decisions of the MTCs/MCTCs may be appealed to the RTCs, whose decisions are in turn appealable to the Court of Appeals, and thence, to the Supreme Court, the court of last resort.<sup>169</sup>

Cases which make their way through the entire appellate process up to the Supreme Court typically take more than seven years until finally resolved, with cases lasting more than 10 years not considered unusual.<sup>170</sup>

Civil cases are brought by affected persons directly to the regular court of appropriate jurisdiction, either MTC / MCTC or RTC, usually determined by the cause of action and the amount sought to be recovered. The amount claimed also fixes the amount of filing fees to be paid at the time when the complaint is filed. The filing fees required by an initiatory complaint start from a low of PhP 1,000.00

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167 International Commission of Jurists, *Access To Justice: Human Rights Abuses Involving Corporations - Philippines* (2010), 12.

168 Batas Pambansa Blg. 129, *The Judiciary Reorganization Act of 1980*.

169 Ibid; Constitution, Art. VIII, § 4

170 International Commission of Jurists, *Access To Justice: Human Rights Abuses Involving Corporations - Philippines* (2010), 12.

to any higher sum determined by the amount which is the subject of the claim.<sup>171</sup>

Parties usually go through institutionalized mediation processes, which are conducted for a fee of about Php 500.00, before going through a trial process that allows parties to present respective evidence to substantiate or refute claims.<sup>172</sup>

Interlocutory and final decisions of a judge may be brought through several levels of appeal, each one requiring the payment of fees of Php 3,000.00.<sup>173</sup>

A criminal action is commenced either by a complaint (a sworn written statement by the offended party, any peace officer, or other public officer charged with the enforcement of the law violated) or by “information,” a written accusation signed by the prosecutor and filed with the court.<sup>174</sup>

In general, criminal court procedure consists of arraignment, trial, and the court’s judgment and sentencing.<sup>175</sup> Except where the right against double jeopardy would be violated, decisions may be brought on appeal to the Court of Appeals and ultimately to the Supreme Court. Like civil cases, each stage of appeal requires the payment of fees of approximately Php 3,000.00.

Criminal cases usually last for more than seven years from the filing of the complaint to the final decision of the Supreme Court.<sup>176</sup>

The Rules of Court exempt “indigent litigants” from payment of legal fees, including filing fees. To be declared indigent, a person has to execute an affidavit that (1) he/she and his/her immediate family do not earn a gross income double the monthly minimum wage of an employee and he/she does not own real property with a fair market value

(as stated in the current tax declaration) of more than PhP 300,000. A person who does not meet these requirements may nonetheless be allowed an exemption from paying legal fees upon a showing at a hearing that he/she has no money or property sufficient and available for food, shelter, and basic necessities for himself/herself and his/her family.<sup>177</sup> However, those allowed to litigate as indigents must shoulder other costs arising from litigation such as photocopying, mailing, notarial fees, and transportation expenses.

In recent years, the Supreme Court has instituted new measures to enhance access to justice in environmental cases. In 2008, the Supreme Court designated 117 regular courts across the country as “green courts” with jurisdiction over violations of environmental laws.<sup>178</sup> And in 2010, the Supreme Court issued the Rules of Procedure For Environmental Cases,<sup>179</sup> effectively placing the courts “near the frontlines of environmental protection.”<sup>180</sup> Among the innovations introduced by the new rules are the writ of continuing mandamus,<sup>181</sup> the environmental protection order (EPO), the use of the precautionary principle in deciding cases, citizen suits, the writ of *Kalikasan*,<sup>182</sup> and defenses against “SLAPP” suits. Except for continuing mandamus petitions, which can be filed only against government agencies or agents, these innovations can have a direct impact on environmental litigation against business enterprises.

171 Ibid., 13; Rules of Court, Rule 141, § 4

172 Ibid.; Rules of Court, *See generally* Rules 1-39 & 141

173 Ibid.; Rules of Court, Rule 141, § 4

174 Rules of Court, Rule 110, §§ 3 & 4.

175 Rules of Court, Rule 110-127

176 International Commission of Jurists, *Access To Justice: Human Rights Abuses Involving Corporations - Philippines* (2010), 14.

177 *Algura v. City of Naga*, G.R. No. 150135, October 30, 2006

178 Supreme Court Administrative Order No. 23-2008, Re: DESIGNATION OF SPECIAL COURTS TO HEAR, TRY AND DECIDE ENVIRONMENTAL CASES

179 A.M. No. 09-6-8-SC

180 International Commission of Jurists, *Access To Justice: Human Rights Abuses Involving Corporations - Philippines* (2010), 15.

181 Continuing mandamus is a writ issued by a court in an environmental case directing any agency or instrumentality of the government or officer thereof to perform an act or series of acts decreed by final judgment which shall remain effective until judgment is fully satisfied. RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 1, § 4(c).

182 “*Kalikasan*” means environment or nature in Filipino.

An EPO is an order issued by the court directing or enjoining any person or government agency to perform or desist from performing an act in order to protect, preserve, or rehabilitate the environment.<sup>183</sup> It may issue upon rendition of judgment in a civil or criminal case, or in a special civil action for a writ of *Kalikasan*, and, where its issuance appears to be a matter of extreme urgency and the applicant stands to suffer grave injustice and irreparable injury, a temporary environmental protection order (TEPO) may be granted in the course of the proceedings. Unlike provisional injunctive relief in ordinary court proceedings, the TEPO's issuance is not conditioned on the posting of a bond.<sup>184</sup>

Under the new rules, standing and real-party-in-interest rules are relaxed, as any Filipino citizen in representation of others, including minors or generations yet unborn, may file a citizen suit to enforce rights or obligations under environmental laws.<sup>185</sup> Moreover, the payment of filing and other legal fees is deferred until after judgment, and may be charged against the judgment award.<sup>186</sup> This relieves the plaintiff of the burden of raising money for filing fees (which could prove prohibitive in environmental cases involving millions of pesos in damages) before setting a court case in motion.

The writ of *Kalikasan* is a remedy available to natural or juridical persons, entities authorized by law, people's organizations, non-governmental organizations, or public interest groups accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation, by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.<sup>187</sup>

183 RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 1, § 4(d)

184 *Ibid.*, Rule 2, § 8

185 *Ibid.*, Rule 2, § 5

186 *Ibid.*, Rule 2, § 12

187 *Ibid.*, Rule 7, § 2

No docket fees are required.<sup>188</sup> One of the more distinctive features of the writ of *Kalikasan* is that it forecloses resort to multiple stages of appeal or other forms of judicial review such as *certiorari* – a tactic often used to delay proceedings and prevent judgments from attaining finality – by requiring petitions for the writ to be filed only in the Court of Appeals or the Supreme Court.<sup>189</sup> One drawback to this, however, is that attendance at hearings may prove costly for petitioners and counsel who reside in areas far-removed from the nation's capital (where the Supreme Court is located) and the relatively few stations of the Court of Appeals.

One of the features of the new rules that should prove to be of crucial value to environmental litigation is the adoption of the precautionary principle, which states that when human activities may lead to threats of serious and irreversible environmental damage that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that threat.<sup>190</sup> Under the new rules, courts hearing environmental cases must apply this principle when there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect and give the constitutional right of the people to a balanced and healthful ecology the benefit of the doubt.<sup>191</sup> This principle should have the effect of skewing borderline decisions in favor of the plaintiff or petitioner in an environmental case, but whether this will be borne out in practice remains to be seen.

Finally, in a remarkable show of percipience on the part of the Supreme Court, the new rules established a ground for dismissal of trumped-up suits intended to harass plaintiffs and petitioners in environmental cases, namely, the SLAPP suit defence. "SLAPP" stands for Strategic Lawsuit against Public Participation. It is a term of art that refers to an action, whether civil, criminal, or administrative, brought against any person or entity with the intent to harass, vex, exert undue pressure

188 *Ibid.*, Rule 7, § 4

189 *Ibid.*, Rule 7, § 3

190 *Ibid.*, Rule 1, § 4(f)

191 RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, Rule 20, § 1

or stifle any legal recourse that such person or entity has taken or may take in the enforcement of environmental laws, protection of the environment, or assertion of environmental rights.<sup>192</sup> In other words, a SLAPP is a lawsuit filed against a person or entity with the intent to dissuade that person or entity from commencing or pursuing legal action for environmental preservation. Under the new rules, a person faced with a SLAPP can have it dismissed by showing substantial evidence that his acts for the enforcement of environmental law is a legitimate action for the protection, preservation, and rehabilitation of the environment, while the party filing the action assailed as a SLAPP must prove by a preponderance of evidence that the action is not a SLAPP and is a valid claim.<sup>193</sup> By this measure, the burden of proof that the action is legitimate (and not retaliatory or pre-emptive) is placed on the party filing the supposed SLAPP,<sup>194</sup> skewing the decision in favour of the defendant.

## Labour

Cases involving violations of labour rights such as unfair labour practices, illegal dismissal (unlawful termination), and unlawful lockouts are subject to compulsory arbitration.<sup>195</sup> The process begins with the lodging of a complaint before a labour arbiter. Decisions of labour arbiters may be appealed to the National Labor Relations Commission (NLRC), which reviews labour arbiters' decisions in divisions composed of three commissioners. Parties dissatisfied with the NLRC's decision must file a motion for reconsideration if they wish to open avenues to judicial review by the Court of Appeals

<sup>192</sup> Ibid., Rule 1, § 4(g)

<sup>193</sup> Ibid., Rule 6, § 3

<sup>194</sup> "Substantial evidence," which is defined as "that amount of relevant evidence which a reasonable mind might accept as adequate to justify a conclusion," (Rules of Court, Rule 133, § 5) is the least demanding burden of proof known in the Philippines, and normally holds sway only in administrative proceedings where technicalities give way to expeditious resolution, whereas "preponderance of evidence" is a higher standard that usually applies in civil cases, where a party must show that his/her allegations are more likely true than not.

<sup>195</sup> Labor Code, Art. 217

and the Supreme Court. Once the NLRC issues a resolution on the motion for reconsideration, parties aggrieved by it may seek judicial review by filing a petition for certiorari in the Court of Appeals, which can nullify and reverse or modify the NLRC's decision upon a finding that the latter committed grave abuse of discretion amounting to lack or excess of jurisdiction.<sup>196</sup> The Court of Appeals' decision may be appealed to the Supreme Court, but only on questions of law, as the Supreme Court is not a trier of facts.<sup>197</sup>

Experts and practitioners have commented on the length of time before labour cases are finally resolved. Typically labour cases filed with the NLRC may last upwards of five years from filing to disposition by the Supreme Court. Workers are often told of the slow pace of process and of the difficulty of sustaining cases in an attempt to convince them to accept early settlement of their claims, usually at much reduced terms.<sup>198</sup>

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

The International Commission of Jurists published a study<sup>199</sup> in 2010 discussing access to justice in the Philippines in relation to corporate abuses of human rights and identifying principal obstacles to access to justice in this context. Its findings, insofar as they continue to hold true today, are reproduced below.

Prosecuting and maintaining a case in the Philippines is characterized by substantial expenses and costs, prohibitive to many potential litigants. A party in a litigation in the Philippines may face the following costs: (1) filing fees paid to the court;

<sup>196</sup> RULES OF COURT, Rule 65

<sup>197</sup> RULES OF COURT, Rule 45

<sup>198</sup> International Commission of Jurists, Access To Justice: Human Rights Abuses Involving Corporations - Philippines (2010), 20-21.

<sup>199</sup> International Commission of Jurists, Access To Justice: Human Rights Abuses Involving Corporations - Philippines (2010)

(2) attorney's fees; and (3) incidental expenses to maintain a case including costs of transportation, photocopying, mailing, notarization, and the like.<sup>200</sup>

Filing fees for a complaint depend on the nature of the case, the value of the subject matter involved, or the size of the demand made. The standards of indigence allow only for the poorest persons to be exempted from paying these fees.<sup>201</sup>

To cite an extreme application of the rule on filing fees in civil cases, the victims of abuse under martial law, when enforcing a favourable judgment rendered by a US court involving millions of dollars before Philippine courts, were assessed filing fees amounting to an incredible Php 472 million. It was only after six years that the litigants were allowed to file their claim with a reduced fee of Php 410.186. Even as the Marcos victims' experience is an exceptional case, filing fees remain to be significant obstacles to filing claims before courts.<sup>202</sup>

Apart from court fees, litigants pay the incidental costs, photocopying, transportation, mailing, etc. To illustrate the amount of photocopying expenses which are required on appeal, no less than seven copies of initiatory petitions filed with the Court of Appeals are required, each bearing annexes comprised of all relevant pleadings previously filed. These petitions should be verified, requiring costs for notarization of typically two or more documents. In addition, a number of copies must be filed with the court, as the adverse party or parties each must be furnished a copy of the petition plus annexes. Petitions filed with the Supreme Court, 17 copies are required and likewise must be verified and each must contain a complete set of any annexes. With all this, litigants typically have to spend about Php 3,500 just for photocopying expenses for filing with the Court of Appeals and more than Php 10,000 for a Supreme Court filing.<sup>203</sup>

200 Ibid., at 36

201 Ibid., at 37

202 Ibid.

203 Ibid.

Related to the issue of transportation is that of physical accessibility of courts. Litigants in remote areas of the Philippines have recounted the need to endure hours of hard travel just to attend a court hearing. This experience is so common that the Supreme Court launched a programme it called "Justice on Wheels" in late 2004 which involves a number of buses customized to serve as court rooms and mediation chambers. Even as it makes headway as a welcome innovation, especially for persons who have allegedly been unduly imprisoned, the programme has yet to provide a long term and sustained solution to lack of access to courts and judges in many parts of the country.<sup>204</sup>

Access to justice in the Philippines may thus be characterized as severely restricted by a fee charging system where litigants typically pay directly for the services of the judiciary through court and other fees. While exemptions are offered to indigent litigants, only the very poorest are saved from the fees and even then, not from expensive incidental costs of maintaining the suit.<sup>205</sup>

A related obstacle to obtaining justice is the sheer length of litigation before Philippine courts. Anecdotal evidence confirms that criminal and civil cases usually last in excess of five years until they reach the Supreme Court where cases may await final resolution for several more years. Usually the trial is not continuous, and hearing dates are usually separated by several months. Schemes to postpone hearings by parties and lawyers abound and include absences of parties, lawyers, or witnesses and filing of dilatory motions and pleadings. Interlocutory orders are also challenged before higher courts simultaneous with a call for the suspension of the proceedings at the lower courts while the challenge is pending.<sup>206</sup>

Beyond the amounts expended in the course of trial and appeal, the cost engendered by the protracted litigation is quite substantial. It is common that

204 Ibid.

205 Ibid., 39-40

206 Ibid., 40

parties prefer to enter into a settlement of the claims, regardless of objective merit, to avoid the long drawn out process of litigation.<sup>207</sup>

Also woven into the fabric of litigation in the Philippines is the corruption widely perceived by practitioners and reflected in indexes and surveys. Instances of corruption inherently evade documentation. Still, there are a few examples that have come to the public knowledge, giving hints of the true nature and scope of corruption in the Philippines.<sup>208</sup>

There have been numerous instances of extrajudicial killings, enforced disappearances, torture and other acts of violence, as outlined in the report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, who visited the country in 2007. There is a wide range of agents responsible, from “death squads,” private armed groups, to elements of the country’s security forces. Human rights violations in the sector of labour are widely reported. Potential and actual trade unionists experience violence to discourage and stop union activities. In the area of agrarian reform, it has been noted that private security forces constrain the full implementation of reforms in rural areas. They are engaged by big landowners to suppress tenants and farmers from invoking their rights under agrarian laws. Private armed groups prevent the government from acquiring big haciendas for distribution to landless farmers and farm workers. In cases where land has already been awarded to farmer beneficiaries, private armed groups and paramilitary groups are able to prevent the award from being actually enforced.<sup>209</sup>

There are reports that indigenous people and local fishermen in Bugsuk in Southern Palawan, employed by a company in cultivating and harvesting pearls, were driven out by private armed groups. Similar instances of forcible evictions have taken place in other parts of Mindanao in relation to activities of

logging, mining, and large plantations. According to a report made to the US government by a human rights organization in the Philippines, a number of extrajudicial killings took place, belying the Philippine government’s claim that steps have been taken to improve the country’s human rights record. These include attacks against leaders of indigenous peoples for opposing mining activities. In another report made by a fact-finding mission to the Philippines, members of the Subanon indigenous peoples revealed that hundreds of armed security guards allegedly hired by a Canadian mining company were in checkpoints blocking access to their ancestral domains. The report refers to the claim that military operations were done jointly with other paramilitary forces and private security firms.<sup>210</sup>

Paramilitary groups, such as the Civilian Armed Forces Geographical Unit (CAFGU), are named in the report of the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, together with the formal military establishment in a significant number of killings.<sup>211</sup>

Apart from serious violent attacks, including instances of arbitrary killings and enforced disappearances, persons who choose to go up against corporations must also contend with harassment or SLAPP suits. In the Philippines, it is common for advocates, individuals and groups, and their supporters to face complaints in court filed or prompted by parties whose interests are threatened or otherwise affected by their advocacy.<sup>212</sup>

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207 Ibid.

208 Ibid.

209 Ibid., 42

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210 Ibid., 42-43

211 Ibid., 43

212 Ibid.

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

The Anti-Sexual Harassment Act of 1995<sup>213</sup> requires employers to create a committee on decorum and investigation of cases of sexual harassment.<sup>214</sup> Failure to do so can result in criminal liability for the employer.<sup>215</sup>

As discussed above, the Revised Corporate Governance Code also requires corporations to establish and maintain an alternative dispute resolution system in the corporation that can amicably settle not only intra-corporate disputes, but disputes between the corporation and third parties as well.

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

The Philippines has a National Human Rights Institution called the Commission on Human Rights (CHR). As of December 2011, the CHR has kept its A status with the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC).<sup>216</sup>

The CHR is an independent, constitutionally created body with the following powers and functions:

1. Investigate, on its own or on complaint by any party, all forms of human rights violations involving civil and political rights;
2. Adopt its operational guidelines and rules of procedure, and cite for contempt for violations thereof in accordance with the Rules of Court;
3. Provide appropriate legal measures for the

<sup>213</sup> Republic Act No. 7877

<sup>214</sup> Ibid, § 4

<sup>215</sup> Ibid, § 7

<sup>216</sup> See <http://nhri.ohchr.org>

protection of human rights of all persons within the Philippines, as well as Filipinos residing abroad, and provide for preventive measures and legal aid services to the underprivileged whose human rights have been violated or need protection;

4. Exercise visitorial powers over jails, prisons, or detention facilities;
5. Establish a continuing program of research, education, and information to enhance respect for the primacy of human rights;
6. Recommend to Congress effective measures to promote human rights and to provide for compensation to victims of violations of human rights, or their families;
7. Monitor the Philippine Government's compliance with international treaty obligations on human rights;
8. Grant immunity from prosecution to any person whose testimony or whose possession of documents or other evidence is necessary or convenient to determine the truth in any investigation conducted by it or under its authority;
9. Request the assistance of any department, bureau, office, or agency in the performance of its functions;
10. Appoint its officers and employees in accordance with law; and
11. Perform such other duties and functions as may be provided by law.<sup>217</sup>

<sup>217</sup> Const. Art. XIII, § 18.

The CHR does not, however, have any prosecutorial or adjudicatory powers.<sup>218</sup> Thus, there is not much it can do on its own in terms of actual prevention, punishment, and redress of human rights abuses. Nevertheless, the CHR has on several occasions investigated and spoken out against business-related human rights abuses. It has investigated complaints from indigenous peoples regarding the conduct of mining operations within their ancestral domains without their prior consent and issued human rights advisories urging stakeholders to respect indigenous peoples' rights.<sup>219</sup> More recently, the CHR investigated an incident in which a 6-year old boy was made to simulate a striptease on a local television show.<sup>220</sup> The CHR condemned it as a criminal violation of children's rights and issued a press statement inviting the TV station and other stakeholders to a discourse on the rights and role of children in media.<sup>221</sup>

218 This was the essence of the Supreme Court's ruling in *Cariño v. Commission on Human Rights*, G.R. No. 96681, December 2, 1991:

The most that may be conceded to the Commission in the way of adjudicative power is that it may *investigate*, *i.e.*, receive evidence and make findings of fact as regards claimed human rights violations involving civil and political rights. But fact finding is not adjudication, and cannot be likened to the *judicial function* of a court of justice, or even a quasi-judicial agency or official. The function of receiving evidence and ascertaining therefrom the facts of a controversy is not a judicial function, properly speaking. To be considered such, the faculty of receiving evidence and making factual conclusions in a controversy must be accompanied by the authority of *applying the law to those factual conclusions to the end that the controversy may be decided or determined authoritatively, finally and definitively, subject to such appeals or modes of review as may be provided by law*. This function, to repeat, the Commission does not have.

219 CHR, "On the Recognition of the Ancestral Domain of Indigenous Cultural Minorities," (2001), available at <http://www.chr.gov.ph/MAIN%20PAGES/about%20hr/advisories/abthr026-030.htm#ancestdom>, last viewed April 13, 2012.

220 Philippine Daily Inquirer, "Revillame treatment of dancing boy in tears criminal-CHR," (2011), available at <http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20110330-328356/Revillame-treatment-of-dancing-boy-in-tears-criminalCHR>, last viewed April 13, 2012.

221 CHR, "CHR Invites TV5, all Media Stakeholders, Child Rights Experts, Advocates and the Public to Discourse on 'Rights and Role of Children in Media,'" (2011), available at [http://www.chr.gov.ph/MAIN%20PAGES/news/PS\\_28April2011\\_RnRof-Child.htm](http://www.chr.gov.ph/MAIN%20PAGES/news/PS_28April2011_RnRof-Child.htm), last viewed April 13, 2012.

The CHR has a weak mandate to investigate corporate-related human rights. This mandate is not expressly stipulated but implied through the PCHR's mandate of monitoring the Government's compliance with international treaties to which Philippines is a party. Nonetheless, CHR is generally active in investigating business-related human rights abuses. The CHR does not have strong investigative or enforcement powers for corporate-related human rights abuses either. If parties fail to follow CHR's recommendations, the CHR largely relies on the public to exert pressure on the perpetrators. The Philippines has an active local-level dispute resolution system – the Barangay Justice System (BJS), which is an alternative, community-based mechanism for the dispute resolution of conflicts. The CHR also utilizes these offices as a resource for human rights dispute resolution. Though there are over 7,000 barangay offices throughout the country, only 2,342 are functional to handle human rights issues. These offices are reportedly understaffed.<sup>222</sup>

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

It appears that the Framework and Guiding Principles have not gained much traction in the Philippines. Although representatives from the University of the Philippines and NGOs participated in the consultations on the Framework,<sup>223</sup> little has been heard from State or non-state actors, such as human rights NGOs, on the subject.

222 See [http://baseswiki.org/en/National\\_Human\\_Rights\\_Commission,\\_Philippines#cite\\_ref-6](http://baseswiki.org/en/National_Human_Rights_Commission,_Philippines#cite_ref-6)

223 See <http://198.170.85.29/Report-Ruggie-consultation-Delhi-5-6-Feb-2009.pdf> and <http://www.valoresociale.it/detail.asp?c=1&p=0&id=310>

## Summary

At the time this report was prepared, the Philippine government had yet to make any statement readily available to the public with specific reference to the UN “Protect, Respect, and Remedy” Framework (“Framework”) or its Guiding Principles. Nevertheless, a survey of Philippine law does seem to support the proposition that, despite the apparent absence of any explicit recognition accorded to the Framework, the Philippines already does recognize an existing State duty not only to respect, but also to protect, human rights against abuses by non-state actors, including those committed by business enterprises.

The Philippine Constitution is rife with provisions recognizing and accepting the State’s duty to protect against human rights abuses, specifically with respect to those relating to workers, women, children, health, environment, and land. In at least one case, the Supreme Court of the Philippines has recognized that the State duty to protect includes protecting the right to equality in employment against non-state actors. Prevailing jurisprudential wisdom in the Philippines holds, however, that most of these constitutional provisions are not, by themselves, actionable in a court of law, and enabling legislation must be passed to make resort to the courts a viable option for redress and enforcement.

In the past few decades many laws have been passed to enable enforcement of constitutional provisions relating to human rights protection that might otherwise have been consigned to practical inefficacy. Most notable of these are laws seeking to protect rights relating to labour, indigenous peoples, children, human trafficking, and the environment by delineating rights and obligations of the government and private entities and individuals, and imposing administrative, civil, and criminal penalties for violations. These exist alongside a few civil and criminal code provisions, some of which were enacted more than half a century ago, that could still provide bases for causes of action against human rights abuses by non-state actors in a court of law.

By and large, Philippine laws may be resorted to for redress against human rights abuses by business enterprises and the individuals behind them. Civil and administrative liabilities in the form of damages and fines are imposed on businesses, incorporated or not, all the time, usually in cases involving labour and environmental law violations. Criminal statutes and provisions, however, have a decided tendency to emphasize individual responsibility, imposing liability on the actual individual perpetrators and higher-ups who may have directed or knowingly assented to violations. For violations committed by private individuals or entities, these laws do not have extra-territorial reach.

The proliferation of laws regulating private entities in recent years has contributed to the burgeoning bureaucracy in a government already swathed in red tape. There is no single agency tasked specifically with the responsibility for preventing and investigating human rights abuses. Redress can be had, if not primarily, then almost invariably and inevitably, through the courts. This process (which can, and often does, prove costly due to court and representation fees and litigation-related expenses), can take up to ten years before a final and irreversible conclusion can be reached.

The Philippines has a National Human Rights Institution in the form of the Commission on Human Rights (CHR). The CHR, however, has no prosecutorial or adjudicatory powers. Moreover, although the CHR does investigate business-related human rights abuses, it has no clear and unequivocal mandate to do so. The CHR can make recommendations to the parties involved or the government prosecutors, but it cannot direct the government’s prosecution arm to go forward with a case.

To its credit, the Philippine government has taken a proactive stance towards the protection of migrant workers and the fight against human trafficking. It appears to fall short, however, in terms of providing guidance (in the form of encouragement, incentive, or outright regulation) to Philippine businesses

operating overseas or in conflict-affected areas locally or abroad, on how to respect human rights, as there is no indication it is doing so. Corporate governance and social responsibility are other avenues that the Philippine government has yet to explore or exploit to the fullest to the end of human rights protection.

The Philippines, as it stands, has a fairly robust legal and regulatory framework that can address many human rights abuses by businesses. There are observable gaps, but none that cannot be bridged by the cooperation of government and business in the pursuit of respect for, and protection of, human rights.



# SINGAPORE

by:

Rachel Chhoa-Howard

## BASELINE REPORT: SINGAPORE<sup>1</sup>

### SNAPSHOT BOX

<b>Number of Multinational Business Enterprises operating in the country</b>	There were approximately 160,000 enterprises in Singapore in 2011, of which about 24,000 or 15% were majority foreign-owned enterprises. <sup>2</sup>																				
<b>Number of Micro, Small and Medium Business Enterprises operating in the country per 1,000 people</b>	34 869 [2007] <sup>3</sup>																				
<b>Number of State-owned Enterprises and the industries in which they operate</b>	The exact figure is unknown, but estimated to make up approx. 50% of Singaporean businesses. Industries range from manufacturing, finance, transportation, trading, shipbuilding and services. <sup>4</sup>																				
<b>Flow of Foreign Direct Investment from 2008 to 2012 (or other recent 3 to 5 year range)</b>	<p><b>FDI Inflows (Millions of US Dollars)<sup>5</sup></b></p> <table border="1"> <thead> <tr> <th>2007</th> <th>2008</th> <th>2009</th> <th>2010</th> <th>2011</th> </tr> </thead> <tbody> <tr> <td>376,980</td> <td>412,724</td> <td>502,071</td> <td>502,071</td> <td>526,860</td> </tr> </tbody> </table> <p><b>FDI Outflows (Millions of US Dollars)<sup>6</sup></b></p> <table border="1"> <thead> <tr> <th>2007</th> <th>2008</th> <th>2009</th> <th>2010</th> <th>2011</th> </tr> </thead> <tbody> <tr> <td>256,960</td> <td>252,567</td> <td>299,955</td> <td>331,455</td> <td>337,031</td> </tr> </tbody> </table>	2007	2008	2009	2010	2011	376,980	412,724	502,071	502,071	526,860	2007	2008	2009	2010	2011	256,960	252,567	299,955	331,455	337,031
2007	2008	2009	2010	2011																	
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1 The author is a Researcher on Governance & Human Rights at Singapore Institute of International Affairs (SIIA). Special thanks to Ms Jolyn Ang, a rising fourth year student at the National University of Singapore, Faculty of Law, and Ms Natalie Koh, Intern at SIIA, who provided valuable legal research and input.

2 Foreign owned enterprises are those with less than 50% local equity

3 Singapore Department of Statistics, at <http://www.singstat.gov.sg/pubn/business/sme2007.pdf>, accessed 24 Jun 2012.

4 Carlos D Ramirez & Tan Ling Hui, 'Singapore Inc vs. the Private Sector: Are Government Linked Companies Different?', IMF Working Paper (2003), at <http://www.imf.org/external/pubs/ft/wp/2003/wp03156.pdf>, accessed 24 Jun 2012.

5 Singapore Department of Statistics, 'Foreign Direct Investment in Singapore by Country/Region, 2007–2011,' at <http://www.singstat.gov.sg/stats/themes/economy/investment.html>, accessed 13 Feb 2013.

6 Singapore Department of Statistics, 'Singapore's Total Direct Investment Abroad by Country/Region, 2007–2011' at <http://www.singstat.gov.sg/stats/themes/economy/investment.html>, accessed 13 Feb 2013.

<p><b>Main industries in the country</b></p>	<p>International banking, trade finance, maritime finance, insurance, treasury operations, asset and wealth management, electronics, chemicals, pharmaceuticals, oil drilling equipment, petroleum refining, rubber processing and rubber products, processed food and beverages, ship repair, offshore platform construction, life sciences, entrepot trade.<sup>7</sup></p>
<p><b>Number 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</b></p>	<p>There appear to be none – no NHRI or any other national human rights body exists and Singapore is not party to the complaints mechanisms of the two international treaties it has ratified, the International Convention on the Rights of the Child, and the International Convention on All Forms of Discrimination Against Women.<sup>8</sup> The Universal Periodic Review of Singapore, conducted in 2011 also did not reveal human rights violations involving business.</p>
<p><b>Have the Framework and/or the Guiding Principles been translated into the country's languages and published in the country?</b></p>	<p>No. English is one of Singapore's 4 official languages and the administrative language of the country.</p>

**Overview of the country's business and human rights landscape**

Ranked the world's easiest place to do business, first in the world as the city with the best investment potential as well as the most transparent country in Asia<sup>9</sup>, it is easy to see why companies thrive in Singapore. This report examines the ability of Singapore to protect its inhabitants against human rights violations by corporate enterprises, and identify areas where additional research is necessary. With an ideal environment for business, Singapore is well placed to implement business and human rights principles.

Singapore is a leading provider of services such as international banking, trade finance, maritime finance, insurance, treasury operations, and asset and wealth management within the region, and the fourth largest foreign exchange trading centre in the world.

<sup>7</sup> Singapore Economic Development Board, Industries, at [http://www.edb.gov.sg/edb/sg/en\\_uk/index/industry\\_sectors.html](http://www.edb.gov.sg/edb/sg/en_uk/index/industry_sectors.html), accessed 20 April 2012.

<sup>8</sup> University of Minnesota Human Rights Library. *Ratification of Human Rights Treaties – Singapore*, at <http://www1.umn.edu/humanrts/research/ratification-singapore.html>, accessed 24 June 2012.

<sup>9</sup> Economic Development Board, Singapore Rankings, at [http://www.edb.gov.sg/edb/sg/en\\_uk/index/why\\_singapore/singapore\\_rankings.html#rank\\_chart](http://www.edb.gov.sg/edb/sg/en_uk/index/why_singapore/singapore_rankings.html#rank_chart), accessed 27 May 2012.<sup>9</sup> Singapore Institute of International Affairs, Stakeholder's Universal Periodic Review Submission to the UN Human Rights Council, May 2011, 2, at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSGStakeholdersInfoS11.aspx>, accessed 12 Feb 2013.

## Overview of the country's business and human rights landscape

When it comes to human rights in Singapore, by many accounts, the country has done well in promoting the rule of law, and preventing and combating corruption. However, Singapore does not fare particularly well in terms of internationally recognised civil, political and minority rights.<sup>10</sup>

Key human rights concerns include a low level of accession to and ratification of international human rights law conventions. Singapore has not for example, acceded to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of Racial Discrimination.<sup>11</sup> Despite limitations on media freedom, its civil society has grown increasingly vocal on rights issues over the past few years. Following the general elections in 2011, online media has become a space for greater discourse and the government is making increasing efforts to appear more transparent and inclusive.<sup>12</sup>

At the regional level, Singapore is an active member of the Association of South East Asian Nations (ASEAN) and helped draft and is now party to the 2007 ASEAN Charter which states, inter alia, that members should adhere to 'principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms.'<sup>13</sup> The Charter also created an ASEAN Inter-Governmental Commission of Human Rights ('AICHR') designed to 'promote and protect human rights and the fundamental freedoms of the peoples of ASEAN.'<sup>14</sup> On 18 November 2012, Singapore joined its other ASEAN partners in unanimously endorsing the ASEAN Declaration on Human Rights.

In the field of business and human rights, basic concerns include labour rights of migrant workers (especially those of foreign domestic workers and unskilled or low-skilled foreign workers)<sup>15</sup> and sexual harassment.<sup>16</sup> Singapore has recently named leader of AICHR's first study on Corporate Social Responsibility (CSR)<sup>17</sup> & human rights.

10 Singapore Institute of International Affairs, Stakeholder's Universal Periodic Review Submission to the UN Human Rights Council, May 2011, 2, at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSGStakeholdersInfoS11.aspx>, accessed 12 Feb 2013.

11 CEDAW Committee, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1, 2.

12 Wong Chun Han, 'Ruling Party Suffers Blow in Singapore By-Election,' Wall Street Journal, at <http://online.wsj.com/article/SB10001424127887323539804578266192267043164.html>, accessed 28 January 2013.

13 ASEAN Charter, Article 1(7).

14 Ibid., Articles 1(7) & 14.

15 CEDAW Committee, Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1, 10.

16 According to a 2008 NGO survey on workplace sexual harassment of both men and women, about 214 of the 500 respondents were women who had experienced sexual harassment in the workplace. HRRRC Baseline Study on Women and Children Study, citing Association of Women for Action and Research (AWARE) Research Study on Workplace Sexual Harassment, 2008.

17 UN General Assembly, Report of the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises, at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/459/11/PDF/N1245911.pdf?OpenElement>

## **I. HOW HAS THE STATE REACTED TO THE UN ‘PROTECT, RESPECT AND REMEDY’ FRAMEWORK (‘FRAMEWORK’)?**

The State has not directly responded to the Framework in an official capacity.

However, former Singapore Representative to the ASEAN Intergovernmental Commission on Human Rights (AICHR) Richard Magnus expressed support for the Ruggie Principles on Business and Human Rights in a letter to Professor Ruggie in May 2011.<sup>18</sup> Magnus, as the Singapore government’s representative to AICHR, may legitimately be seen to represent the views of the State.<sup>19</sup>

The Framework and/or the Guiding Principles have not been translated into three all of Singapore’s four official languages: Chinese, Malay and Tamil. However, as English is an official language, and more important, the administrative language in Singapore, the lack of translations has not been an impediment to its dissemination or implementation.

## **II. IS THE STATE DUTY TO PROTECT AGAINST HUMAN RIGHTS ABUSES BY THIRD PARTIES, INCLUDING BUSINESSES (‘STATE DUTY TO PROTECT’), RECOGNIZED 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?**

18 Richard Magnus to John Ruggie, at <http://www.business-humanrights.org/media/documents/ruggie/singapore-letter-to-ruggie-re-guiding-principles-23-may-2011.pdf>, accessed 11 Apr 2012.

19 Most other representatives to the ASEAN Inter-governmental Human Rights Commission, with the exception of Indonesia, were also selected by their governments.

Singapore operates a common law system, with a Westminster-style parliamentary democracy. Courts in Singapore are broadly divided into the Supreme Court and the Subordinate Courts. The Supreme Court comprises the Court of Appeal and the High Court, with the Court of Appeal being Singapore’s highest judicial tribunal. The Subordinate Courts comprises of the District Courts, Magistrate Courts, Juvenile Courts, and Coroners Courts. Apart from the Supreme Court and the Subordinate Courts, there are other tribunals set up to hear disputes on specific areas of law in Singapore, notably the Syariah Court, Industrial Arbitration Court and Military Court.<sup>20</sup>

The Singapore Constitution does not include an express recognition of the State’s Duty to Protect. However, Part IV of the Constitution contains general provisions guaranteeing the following rights – the right to life and personal liberty,<sup>21</sup> prohibition of slavery and forced labour,<sup>22</sup> protection against retrospective criminal laws and repeated trials,<sup>23</sup> right to equality,<sup>24</sup> prohibition of banishment and freedom of movement,<sup>25</sup> freedom of speech, assembly and association,<sup>26</sup> freedom of religion<sup>27</sup> and prohibition of discrimination on the grounds only of religion, race, descent or place of birth in respect of education.<sup>28</sup>

Although the Singapore Constitution does not contain an explicit recognition of the State’s Duty to Protect, the generality of the language of the fundamental liberties provisions in Part IV of the Singapore Constitution may provide a basis for the courts to interpret the State Duty to Protect into these guarantees. This is especially so since

20 See Yeo Tiong Min, ‘Jurisdiction of the Singapore Courts’ in Kevin YL Tan (ed), *The Singapore Legal System*, 2 ed (Singapore: Singapore University Press, 1999), 249–296.

21 Constitution of the Republic of Singapore, Article 9.

22 Ibid., Article 10.

23 Ibid., Article 11.

24 Ibid., Article 12.

25 Ibid., Article 13.

26 Ibid., Article 14.

27 Ibid., Article 15.

28 Ibid., Article 12(2).

the courts have opined that in interpreting Part IV fundamental liberties, a 'generous' rather than legalistic interpretation to ensure individuals the 'full measure' of their liberties is adopted.<sup>29</sup>

Singapore has ratified two of the nine core human rights treaties: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CRC). It is also party to a number of other treaties containing normative standards relevant to business and human rights.<sup>30</sup> In applying international law to the domestic setting, the Singapore Court of Appeal has adopted a dualist approach.<sup>31</sup> Ratification of an international treaty does not make its rules automatically applicable to Singapore. It must first be transformed and incorporated into domestic law by an act of Parliament before having effect. Absent the act of Parliament, the obligations in the international conventions do not have binding force and courts have no power to incorporate international treaties into the local legislation or to give superiority to these types of treaties over national laws. Therefore,

29 *Ong Ah Chuan v PP* [1980-1981] SLR 48 (PC)

30 These include the Convention on the Prevention and Punishment of the Crime of Genocide, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, the United Nations Convention Against Corruption, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Convention on Biological Diversity (CBD), ILO Convention No. 29 Forced Labour, ILO Convention No. 105 on Abolition of Forced Labour, ILO Convention No. 94 on Labour Clauses (Public Contracts), ILO Convention No. 98 on Rights to Organise and Collective Bargaining, ILO Convention No. 100 on Equal Remuneration, ILO Convention No. 138 on Minimum Age, ILO Convention No. 144 on Tripartite Consultation (International Labour Standards) and ILO Convention No. 182 on the Worst Forms of Child Labour. Source: University of Minnesota Human Rights Library, *Ratification of International Human Rights Treaties*, Singapore, Accessed: 25 September 2012, <http://www1.umn.edu/humanrts/research/ratification-singapore.html>

31 *Yong Vui Kong v PP* [2010] SGCA 20; see also CL Lim, 'Public International Law before the Singapore and Malaysian Courts' [2004], 8, *Singapore Yearbook of International Law*, 243.

even if international treaties impose a positive State Duty to Protect, the obligation will have to be incorporated into Singapore law by an act of the Singapore Parliament. Given that Parliament has so far declined to amend the Constitution or enact laws to explicitly impose a State Duty to Protect, much would likely depend on the courts' interpretation of the existing constitutional provisions.

What the courts have done is to take cognisance of Singapore's international obligations in interpreting the Constitution. In the case of *Yong Vui Kong*, the Court of Appeal appears to have accepted the presumption of compatibility, by stating that domestic law should 'as far as possible' be consistently interpreted with Singapore's international obligations.<sup>32</sup>

The Constitution does not explicitly impose a State Duty to Protect, and courts have not interpreted the Constitution to include such a duty and remain cautious about incorporating general principles of international human rights law. However it is arguable that recent cases such as *Yong Vui Kong* could set a precedent towards greater recognition of international human rights principles and norms, as well as the State Duty to Protect.

Domestic law prevails when it conflicts with an incompatible rule of international law and any domestic law incorporating treaty obligations would prevail in the event of conflict with the treaty itself.<sup>33</sup> There is the interesting theoretical argument that should the courts interpret the Constitution to include a State Duty to Protect, the said duty would trump all other domestic law. This point has however not been raised for consideration before the Singapore courts.

32 Ibid.

33 See *Nguyen Tuong Van v Public Prosecutor* [2004] SGCA 47; see also CL Lim, 'The Constitution and the Reception of Customary International Law: *Nguyen Tuong Van v Public Prosecutor*' [2005] *Singapore Journal of Legal Studies* 218; and Thio Li-ann, 'The Death Penalty as Cruel and Inhuman Punishment Before the Singapore High Court? Customary Human Rights Norms, Constitutional Formalism and the Supremacy of Domestic Law in *PP v Nguyen Tuong Van* (2004); (2004) 4(2), *Oxford University Commonwealth Law Journal*, 213-236.

Lastly, given that Singapore has not ratified the Optional Protocols of the CRC or CEDAW, which allow for individual complaints against the state, there are limited opportunities to file complaints for human rights violations at the international level. Singapore currently does not have a national human rights institution or other national human rights body to monitor the protection and promotion of human rights.

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

Hitherto, there have been no cases in which the courts have been called upon to consider the State Duty to Protect against human rights abuses by businesses.

**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 institutions tasked with dealing with corporate human rights abuses. However, there are a number of State agencies with jurisdiction to oversee issues that may relate to corporate human rights abuses such as corruption, labour rights and environmental protection. Their general jurisdiction may allow them to prevent, investigate, punish and redress business-related human rights abuses.

**Companies and Businesses**

The **Accounting and Corporate Regulatory Authority** ('ACRA') is Singapore's corporate regulator as well as the independent regulator for public accountants. It is a statutory body under the supervision of the Ministry of Finance.<sup>34</sup> ACRA reports and make recommendations to, and advises the Government on matters relating to the registration and regulation of business entities and public accountants. It also has a mandate to ensure a responsive and trusted regulatory environment for businesses and public accountants, and is responsible for administering the Accounting and Corporate Regulatory Authority Act (Cap 2A), the Accountants Act (Cap 2), the Business Registration Act (Cap 32), the Companies Act (Cap 50), the Limited Liability Partnerships Act (Cap 163A) and the Limited Partnerships Act 2008 (Act 37 of 2008).

Apart from monitoring and regulating corporates, ACRA is also tasked with promoting public awareness about new business structures, compliance requirements, corporate governance practice and any matter under the purview of the Authority.<sup>35</sup>

The Registrar of Businesses is empowered to refuse registration of a company if the 'proposed business is likely to be used for an unlawful purpose or for purposes prejudicial to public peace, welfare or good order in Singapore.'<sup>36</sup> The Registrar also has power to cancel the registration of business for the same reasons.<sup>37</sup> An equivalent power is found in the Companies Act. The Registrar of Companies may refuse to register a company if the 'proposed company is likely to be used for an unlawful purpose or for purposes prejudicial to public peace, welfare or good order in Singapore.'<sup>38</sup> Similar power to refuse registration and cancellation can also be

<sup>34</sup> Accounting and Corporate Regulatory Authority (ACRA), *About ACRA*, at [http://www.acra.gov.sg/About\\_ACRA/About\\_Us.htm](http://www.acra.gov.sg/About_ACRA/About_Us.htm), accessed 20 July 2012.

<sup>35</sup> *Ibid.*

<sup>36</sup> Singapore Statutes, Section 9(1)(a) Business Registration Act (Cap 32).

<sup>37</sup> Singapore Statutes, Section 10(1)(a).

<sup>38</sup> *Ibid.*, Section 20(2)(a), Companies Act (Cap 50).

found in the Limited Liability Partnerships Act<sup>39</sup> and the Limited Partnerships Act.<sup>40</sup>

### Labour Issues

The main legislation governing labour in Singapore is the Employment Act.<sup>41</sup> Administration and oversight of the Act comes under the **Ministry of Manpower (MOM)**. The Act sets out the minimum standards regarding contracts of employment, termination of employment, maternity leave, and employment of foreign employees. Any employee covered by the Act who wishes to lodge a claim against his employer regarding the Act can do so by meeting with an Advisory Officer from the MOM. Alternatively, the claim may be made online on MOM's website. However, the latter is only intended for employees who have left employment and wish to recover salaries and other statutory payments such as overtime pay, public holiday and annual leave pay from their former employers.

Employees can lodge complaints online via MOM's ESOL (Employment Standards Online for individual users). Unlike a claim, all information provided in the complaint is kept confidential, and the identity of the employee is kept anonymous. If an employee seeks to appeal against unfair dismissal, he may write to MOM within one month from the date of dismissal. MOM will contact the appellant if it believes there are sufficient grounds to proceed with the appeal.<sup>42</sup>

A separate Employment of Foreign Manpower Act<sup>43</sup> covers the rights of foreign labourers including domestic workers. The Act covers standards regarding contracts and termination of employment.

39 Ibid., Section 17(1)(a), Limited Liability Partnerships Act (Cap 163A).

40 Ibid., Section 13(1)(a) & section 14(1)(a) Limited Partnerships Act (Cap 163B).

41 Ibid., Cap 91.

42 Ministry of Manpower, *Claims, Complaints and Appeals*, at <http://www.mom.gov.sg/employment-practices/disputes-and-claims/Pages/lodge-claim-complaint.aspx>, accessed 18 May 2012.

43 Singapore Statutes, Cap 91A.

A 2012 Amendment to this legislation included enhanced penalties, the penalisation of errant employers and the appointment of Commissioners to enforce regulations more stringently. Changes are scheduled to take effect by the end of 2012, alongside a separate MOM review of the Act. According to Acting Minister for Manpower Tan Chuan-Jin, the MOM review will 'rationalise and clarify the employment responsibilities of employers, foreign workers and foreign domestic workers.'<sup>44</sup>

In the event of a dispute, the MOM encourages domestic worker employers and employees to resolve it amicably through conciliation. A Well-Being Department under MOM's Foreign Manpower Management Division and a special toll-free foreign domestic worker hotline has been set up to deal with complaints from at-risk workers. In situations where conciliation does not lead to a satisfactory outcome and the employers are at fault, the MOM has a duty to prosecute.

MOM also circulates an advisory booklet to all foreign workers, including those who are coming to work in Singapore for the first time. The advisory booklet highlights their rights and obligations while working in the country. It also provides numbers which foreign workers can call in the event of an emergency, including contact numbers for medical help, a one-stop social service, agencies including the Samaritans of Singapore, the Labour Relations and Welfare Department, the Work Permit Department of MOM as well as various embassy helpdesk lines.<sup>45</sup>

The MOM also oversees the Workplace Safety and Health Act,<sup>46</sup> which 'require stakeholders to take reasonably practicable measures to ensure the safety and health of workers and other people

44 Speech of Tan Chuan Jin at the Second Reading of the Employment of Foreign Manpower (Amendment) Bill, 11 Sep 2012, para 34, at <http://www.mom.gov.sg/newsroom/Pages/Speeches-Detail.aspx?listid=401>, accessed 10 Feb 2013.

45 CEDAW Committee, *Fourth Periodic Report of States Parties (Singapore)*, 3 April 2009, at <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.SGP.4en.doc>

46 Singapore Statutes, Cap 354A.

that are affected by the work being carried out.<sup>47</sup> In addition, it oversees the Work Injury Compensation Act (WICA) that provides injured employees an alternative to common law to settle compensation claims.

### Environmental Issues

The **Ministry of the Environment and Water Resources** is responsible for the provision of a healthy living environment and the protection of public health. Established on 1 July 2002, the National Environment Agency (NEA) is the leading public organization responsible for improving and sustaining a clean and green environment in Singapore, while the Public Utilities Board is responsible for ensuring an adequate and clean supply of water. The main Act under the Ministry is the **Environmental Protection and Management Act**.<sup>48</sup> Under this Act, the NEA has extensive powers to control the use and discharge of substances that may pollute the air, water, or land. This includes the power to demand entry into a premises, arrest a suspect, demand for addresses of offenders, and power of search and seizure.<sup>49</sup> According to Environmental Law Professor Lye Lin Heng, 'Singapore has a well-integrated environmental management system that works effectively, particularly in relation to pollution control. Complaints are quickly investigated by officers from the National Environment Agency (NEA), which administers the environmental laws relating to pollution and public health.'<sup>50</sup> There have so far been no enforcement actions on the basis of human rights abuses.

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47 Ministry of Manpower, *The Workplace Health and Safety Act: What it covers*, at [http://www.mom.gov.sg/workplace-safety-health-act.aspx](http://www.mom.gov.sg/workplace-safety-health/wsh-regulatory-framework/Pages/workplace-safety-health-act.aspx), accessed 4 April 2009.

48 Singapore Statutes, Cap 94A.

49 Environmental Protection and Management Act, Part XI.

50 Lye Lin Heng, *The Judiciary and Environmental Governance in Singapore*, (2010) 3 No.1, *Journal of Court Innovation* 133-155, at [http://www.law.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/IJIEA/Heng\\_Singapore\\_3\\_16.pdf](http://www.law.pace.edu/school-of-law/sites/pace.edu.school-of-law/files/IJIEA/Heng_Singapore_3_16.pdf), 5.

Most of the prosecutions have been with respect to environmental pollution rather than hazards posed to workers.

### Separate Legal personality

In Singapore, a company incorporated under the Companies Act (Cap. 50) is recognized in law as having a separate legal personality of its own apart from the persons who comprise it. The Companies Act does not explicitly mention the concept of separate legal personality but Section 19(5) of the Companies Act sets out the general effect of incorporation – the company may sue and be sued in its own name, it has perpetual succession in that it can survive indefinitely until it is wound up, it may hold land, and the liability of its members is limited in the event the company is wound up.

These powers are based on the principles espoused in the English case of *Salomon v. A Salomon & Co Ltd*<sup>51</sup> that a company has a distinct legal personality from the individuals that form it and cases have repeatedly affirmed this principle.<sup>52</sup> The most important consequence of this is that the debts and obligations incurred by the company are its own and its members do not share the company's liabilities. Creditors of the company may only look to the company for payment of debts owed to them by the company. If the company is insolvent and cannot pay its debts, the creditors will have to bear the loss however solvent the company's individual members may be.

However, in certain situations a court will ignore the separate legal personality of a company and look to the members or the controllers of the company. These situations fall into two categories: statutory exceptions and common law exceptions to the principle. Statutory exceptions to the principle

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51 [1897] AC 22 (House of Lords).

52 *Salomon v Salomon* was followed in the Singapore Court of Appeal decision of *Gabriel Peter & Partners v Wee Chong Jin & Ors* [1997] 3 SLR(R) 649; [1997] SGCA 53.

## TYPES OF BUSINESS ENTERPRISES IN THE COUNTRY

<b>Name of the Type of Business Enterprise</b> <i>E.g. company, partnership, business trust etc.</i>	<i>Creation</i>	<i>Separate Legal Personality</i>	Governing documents and law <i>(E.g. Corporations Law)</i>
1. Sole Proprietorship	No separate process for creation but registration encouraged under the Business Registration Act	No	Business Registration Act (Cap. 32)
2. Partnership	Either express written or implied (oral agreement or by conduct)	No	Partnership Act (Cap. 391) but parties have flexibility to design terms of their relationship
3. Limited Liability Partnership	Registration - can be created through conversion of existing partnership or PLC	Yes	Limited Liability Partnerships Act (Cap. 163A) but parties have flexibility to design terms of their relationship Excludes applicability of general partnership law
4. Limited partnership	Registration Each limited partner must also be registered.	No	Limited Liability Partnerships Act (Cap. 163A) but parties have flexibility to design terms of their relationship Does NOT exclude applicability of general partnership law
5. Registered business trust	Not a legal entity and is created by a trust deed	No	Business Trusts Act (Cap. 31A) establishes the regulatory framework for the governance of business trusts
6. Statutory corporation	Created by special Acts of Parliament	Yes	The incorporating statute
7. Company	Registration	Yes	Companies Act (Cap. 50)

include cases of fraudulent trading,<sup>53</sup> the making of false and misleading statements,<sup>54</sup> the payment of dividends when there are no available profits out of which to pay them,<sup>55</sup> fraudulent inducement of investment<sup>56</sup> and fraud by officers of the company.<sup>57</sup> Judicial exceptions to the principle include agency, cases where it is established that the corporate structure was a sham (in that the acts done or documents executed by the parties were intended to appear to third parties that legal rights and obligations were created, and these rights and obligations were not the actual legal rights and obligations the parties intended to create)<sup>58</sup> and evasion of legal obligations or duties.<sup>59</sup>

### Note on Subsidiaries

The concept of a corporate group as a single economy entity does not justify any departure from the rule that each company in a group of companies is a separate legal entity.<sup>60</sup> The law recognizes the creation of subsidiary companies, which though in one sense are creatures of their parent companies, will nevertheless under general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.<sup>61</sup>

The court is however entitled to investigate the relationship between the parent and the subsidiary. That relationship may be relevant in determining whether the subsidiary was acting as the parent's

53 Singapore Statutes, Section 340 of the Companies Act (Cap 50).

54 Ibid., Section 401.

55 Ibid., Section 403.

56 Ibid., Section 404.

57 Ibid., Section 406.

58 *Win Line (UK) Ltd v Masterport (Singapore) Pte Ltd* [2000] 2 SLR 98; and *TV Media Pte Ltd v De Cruz Andrea Heidi and other appeal* [2004] SGCA 29.

59 *Gerhard Hendrik Gispen & Ors v Ling Lee Soon Alex & Anor* [2001] SGHC 350; and *Nagase Singapore Pte Ltd v Ching Kai Huat and Others* [2008] 1 SLR 80.

60 *Win Line (UK) Ltd v Masterport (Singapore) Pte Ltd* [2000] 2 SLR 98.

61 *DHN Food Distributors Ltd* [1976] 1 WLR 852.

agent because if so, the principal may be held liable for the acts of the agent.<sup>62</sup> The court may also ignore the subsidiary's separate legal personality if it finds that it was merely a sham company created to advance an illegal or improper purpose of the parent company.

### Other Types of Business Forms

The principle of separate legal personality applies only to companies and Limited Liability Partnerships. In other types of business forms e.g. a sole proprietorship, a partnership or a limited partnership, the sole proprietor or partner himself can be held legally accountable directly for all the debts and obligations of the firm.

As for 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.

### Power to Refuse Incorporation

As we noted above, the Registrar of Companies may refuse to incorporate a company if the company is likely to carry out an unlawful activity or one that is prejudicial to public peace, welfare or good order in Singapore, or contrary to national security.<sup>63</sup>

### Criminal Liability of Companies

Section 11 of the Penal Code (Cap. 224) regards 'person' to include any company or association or body of persons, whether incorporated or not,<sup>64</sup> 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,

62 Ibid.

63 *Cotty Vivant Marchisio & Lauzeral, Corporate Law Tools Project, Mandate of the Special Representative of the Secretary General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, September 2009 at 9* [hereinafter 'CVM&L 2009 Report'].

64 Section 11, Penal Code (Cap 224), Singapore Statutes.

delisting or dissolution by the Minister.<sup>65</sup> Also, the prosecution of a company is confined to certain offences, to the exclusion of personal natured crimes such as rape.

For other offences, a company could be said to have committed a criminal offense when the act in question has been brought about by individuals who can be said to be the controlling mind and will of the company and if the act is criminal.<sup>66</sup> The *mens rea* of the company is evidenced by the state of mind of these individuals.

### 2.1. 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?

There are no laws and regulations in Singapore that explicitly 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. However, there are several laws and regulations that achieve such an effect despite the lack of explicit wording.

Section 2 of the Interpretation Act outlines how laws may be applicable to businesses, stating that, 'In this Act, and in every written law enacted before or after 28th December 1965, the following words and expressions shall, without prejudice to anything done prior to that date, have the meanings respectively assigned to them unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided: 'person' and 'party' include any company or association or body of

<sup>65</sup> See observations of VK Rajah J (as he then was) in *Angliss Singapore Pte Ltd v Public Prosecutor* [2006] 4 SLR(R) 653; [2006] SGHC 155.

<sup>66</sup> *Tesco Supermarkets Ltd v Natrass* [1972] AC 153.

persons, corporate or unincorporated.' In other words, the word 'person' and 'party' in legislation may include business forms.

### Labour laws and Regulation

Provisions in the Employment Act<sup>67</sup> and Retirement and Re-employment Act<sup>68</sup> ensure that employers refrain from certain actions that may violate the rights of employees. The Industrial Relations Act<sup>69</sup> provides for the regulation of the relations of employers and employees and the prevention and settlement of trade disputes by collective bargaining and conciliation and arbitration and for tripartite mediation of individual disputes. Other statutes dealing with various aspects of employment are the Central Provident Fund Act,<sup>70</sup> the Factories Act,<sup>71</sup> Workplace Safety and Health Act,<sup>72</sup> Work Injury Compensation Act,<sup>73</sup> Trade Unions Act<sup>74</sup> and Employment of Foreign Manpower Act.<sup>75</sup>

The right to join or form a trade union is guaranteed by law. Section 17 of the Employment Act 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, whether as an officer of the trade union or otherwise or to associate with any person to organise a trade union.

### Employment Act

*The Employment Act covers every employee regardless of nationality except persons employed in a managerial or executive position; seamen; domestic workers and any person employed by a Statutory Board or the government.*

<sup>67</sup> Singapore Statutes, Cap 91.

<sup>68</sup> *Ibid.*, Cap 274A.

<sup>69</sup> *Ibid.*, Cap 136.

<sup>70</sup> *Ibid.*, Cap 36.

<sup>71</sup> *Ibid.*, Cap 104.

<sup>72</sup> *Ibid.*, Cap 354A.

<sup>73</sup> *Ibid.*, Cap 354.

<sup>74</sup> *Ibid.*, Cap 333.

<sup>75</sup> *Ibid.*, Cap 91A.

Part II renders every term of a contract of service, which provides a condition of service that is less favourable to an employee than any of the conditions of service prescribed by the Act. The conditions of service prescribed by the Act include conditions relating to notice of termination of contract, possible actions that can be taken by employees to punish an employee for misconduct. It also protects minors under the age of 18 years by stating that no contract of service as an employee shall be enforceable against them and no damages or indemnity shall be recoverable from them in respect of a contract of service unless it is for their benefit.

Part III secures the rights of employees to payment of salary. Some rights include the right to be paid a salary at least monthly and the right to be paid salary due to the employee upon dismissal or upon termination by employee.

Part IV provides for rest days, hours of work and other conditions of service but also applies to workmen earning not more than \$4,500 basic monthly salaries and employees earning not more than \$2,000 basic monthly salaries.

Part VIII covers the employment of children (a person who has not completed his 15<sup>th</sup> year of age) and young persons (a person who has completed his 15<sup>th</sup> year of age but who has not completed his 16<sup>th</sup> year of age), for which minimum rates of salary are applicable. Employers are not allowed to employ a child in an industrial undertaking unless only members of the same family are employed in the undertaking. An industrial undertaking includes mines, quarries, factories, shipyards, businesses and companies carrying out construction work, transport (including bus, ship, car, lorry) operators. Children of 13 years and above may be employed in a non-industrial undertaking to do light work suited to their capacity. A child or young person in respect of whom any of the offences mentioned in the part has been committed may also appeal to the Juvenile Court for care or protection.

Part XI provides for maternity protection and benefits and childcare leave for parent. It entitles female employees to paid maternity leave 4 weeks before and 4 weeks after delivery of their child<sup>76</sup> and makes it unlawful for an employer to give a female employee a notice of dismissal during her absence or on such a day that the notice will expire during her absence if the female employee absents herself from work in accordance with the provisions of this part. In January 2013 also announced one week of paternity leave for fathers of Singaporeans born from May that year and they will also be able to share one week of their wife's maternity leave entitlement.<sup>77</sup>

Part X entitles employees to holidays and sick leave. Enhancements to the Employment Act in 2008 include expanded coverage and the reduction of the qualifying employment period for paid sick leave from 6 to 3 months.<sup>78</sup>

Part XIV contains general provisions, including a provision prohibiting the refusal to allow an employee whose contract of service has been determined to leave his service. Fraudulently inducing an employee to emigrate through force, intoxication or ill treatment, intimidation or fraud, or by means of false representations, to work beyond the limits of Singapore is also an offence under this Part.

### ***Discrimination***

The only type of employment discrimination that is explicitly prohibited is discrimination based on age. Notwithstanding any contrary agreement, the

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76 The Law Society of Singapore, *Employment*, at <http://www.lawsociety.org.sg/forPublic/YoutheLaw/Employment.aspx>, accessed 11 August 2012.

77 Yahoo News, *Bigger baby bonus, paternity leave announced*, 21 January 2013, at <http://sg.news.yahoo.com/bigger-baby-bonus--paternity-leave-announced-054119367.html>

78 UN General Assembly, *National Report to the Human Rights Council (Singapore)*, 2 February 2011, at <http://daccess-ods.un.org/TMP/6866388.9169693.html>

Retirement and Re-employment Act<sup>79</sup> prohibits dismissal of any employee who is below the retirement age of 62 (or other retirement age prescribed by the Minister of Manpower) on the grounds of age.<sup>80</sup> Unlike the Employment Act, the provisions of the Retirement and Re-employment Act apply to all employees including executives, managers and professionals.<sup>81</sup>

Singapore does not have any equal opportunities legislation and there are no explicit laws preventing gender and racial discrimination. Article 12 of the Constitution does however provide that all persons are entitled to the equal protection of the law<sup>82</sup> and that there shall be no discrimination based on religion, race, descent or place of birth.<sup>83</sup> Challenges on constitutional grounds are however rare in Singapore. The scheme of Article 12 is two-fold. First, discrimination is absolutely forbidden on the sole grounds of religion, race, descent or place of birth.<sup>84</sup> Second, Article 12(1) provides that all persons are 'equal before the law' and are 'entitled to the equal protection of the law'. The courts have interpreted these clauses to mean that 'all persons in like circumstances should be treated alike.' Discrimination is thus legal if it satisfies the reasonable classification test first expounded in the Malaysian Federal Court in case of *Datuk Harun bin Idris v PP*<sup>85</sup> and followed in the Singapore Court of Appeal decision in *PP v Taw Cheng Kong*.<sup>86</sup> Under the reasonable classification test, the targeted class must be based on an intelligible differentia (e.g all foreign work permit holders); and there must exist a rational nexus between the class being discriminated and the object and purpose of the impugned legislation. The problem with this test is that much depends on how the court reads the

79 Singapore Statutes, Cap 274A.

80 Ibid., Section 4.

81 Section 2 of the Act an 'employee' is anyone who has 'entered into or works under a contract of service with an employer.'

82 Article 12(1).

83 Article 12(2).

84 Article 12(2).

85 [1977] 2 MLJ 155.

86 [1998] 2 SLR 410; [1998] SGCA 37.

object of the act. The narrower the object of the act, the more likely a discriminatory law will pass muster.

The government has stated that it believes legislation in the area of equal opportunities will not be effective. Instead, it has chosen to address the issue using moral persuasion. For example, the Singapore National Employers Federation, the National Trades Union Congress and the Ministry of Manpower recently issued guidelines on job advertisements. The guidelines stipulate that race, religion, marital status, age and gender should not be used as job criteria in advertisements. Although these guidelines do not have the force of law, they are likely to have some influence on general employment practices.

With regards to gender discrimination, as mentioned above, the Employment Act does provide statutory entitlement to maternity leave and protection from dismissal for female employees while on maternity leave.

### Sexual Abuse and Harassment

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 provisions are section 509 of the Penal Code and sections 13A and 13B of the Miscellaneous Offences (Public Order and Nuisance) Act.

### Migrant Workers

Singapore is currently reviewing the Employment of Foreign Manpower Act and specifically laws on the treatment of domestic workers, who have up until now been left out of the Employment Act. Such persons therefore do not enjoy the protection of the provisions in the Act that mandates minimum conditions of work, hours of work, holidays, termination and retirement benefits. However, the government recently enacted a mandatory one-

day of rest for all domestic workers commencing January 2013.<sup>87</sup>

The main problem has been the unscrupulous practices of employment agencies and the vulnerability of migrant workers to exploitation from such agencies. Thus the Employment Agencies Act,<sup>88</sup> which lays out the obligations and liabilities of recruitment agencies, was revised in April 2011<sup>89</sup> after pressure from numerous reports that agents were charging foreign workers exorbitant fees. The Act, which gives extensive investigative and punitive powers to employment agency inspectors, aims to stop the operation of unlicensed employment agencies and reduce the amount of exploitation of workers in Singapore. Since this change was made, the State has been more proactive in prosecuting agencies, though much work remains to be done.

In 2011, the Commissioner for employment agencies at the Ministry of Manpower, Mr Aw Kum Cheong pledged that a crackdown on rogue agencies would continue, stating that the 'MOM will continue to step up enforcement and take strong punitive actions against those who act against the law, and undermine the integrity of the work pass framework.'<sup>90</sup>

Under Section 22C of the same Act, any key appointment holders or employment agency personnel will be disqualified should he be convicted, whether in Singapore or elsewhere, of an offence involving human trafficking. Any person who in any application for a licence makes any statement, which is false in any material, particular shall be guilty of an offence. Additionally, a person

who charges or receives himself or through another person, for his services, any sum greater than the prescribed fee; knowingly and voluntarily deceives any person by giving false information; instigates or induces any person not to admit in his service any worker who has not applied for employment, work or position through his employment agency; or knowingly sends, directs or takes any girl or woman to any place for immoral purposes or to a place where she is likely to be morally corrupted, shall be guilty of an offence.

### Employees with Disabilities

Singapore does not have comprehensive disability legislation aimed at moving away from viewing persons with disabilities as 'objects' of charity and towards viewing them as 'subjects' with rights. In November 2012, Singapore signed the Convention on the Rights of Persons with Disabilities. Like most other human rights conventions, the Convention requires all states parties to 'adopt all appropriate legislative, administrative and other measures for the implementation of the rights' under the Convention,<sup>91</sup> as well as 'all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.'<sup>92</sup> As this was a very recent development and as Singapore has yet to ratify the Convention, Parliament has yet to pass any legislation pursuant to its treaty obligations.

### Anti Trafficking Laws

Anecdotal evidence suggests that many migrant workers, including foreign domestic workers, are deceived about the nature of their employment or salary and the conditions they would face in Singapore, and faced confiscation of their passports, restrictions on their movement, and illegal

87 O'Callaghan, John, Maids' day off fuels Singapore foreigners debate, *Reuters*, March 6 2012, at, <http://www.reuters.com/article/2012/03/06/uk-singapore-foreigners-idUSLNE82501X20120306>, accessed April 4 2012

88 Singapore Statutes, Cap 92.

89 See Employment Agencies (Amendment) Act 2011, No 5 of 2011.

90 'Spore PR fined \$50k for unlicensed employment agency,' *AsiaOne*, 31 Jan 2012, at <http://business.asiaone.com/print/Business/News/Story/A1Story20120131-325125.html>, accessed 14 Apr 2012.

91 Article 4(1)(a).

92 Article 4(1)(b).

withholding of their pay.<sup>93</sup> In particular, many owe alleged debts associated with their employment,<sup>94</sup> rendering them vulnerable to forced labour.

No specific Act exists against labour trafficking however; the Women's Charter,<sup>95</sup> the Children's and Young Persons Act,<sup>96</sup> and the Penal Code<sup>97</sup> include offences, which prohibit trafficking in persons. For the purposes of this report, the focus will be on labour trafficking and not sex trafficking and as such, the Women's Charter will not be discussed.

The Children and Young Persons Act makes it an offence to unlawfully transfer the possession, custody or control of child<sup>98</sup> and details trafficking offences against children.

The Penal Code also criminalises the selling, buying or hiring of minors for purposes of prostitution,<sup>99</sup> importing women for purposes for prostitution<sup>100</sup> and compelling any person to labour against the will of that person.<sup>101</sup> For all offences except the last, punishment includes, but is not limited to, a fine and/or imprisonment for a term that may extend to 10 years. The punishment for the last offence includes, but is not limited to, a fine and/or imprisonment for a term that may extend to one year.

### Environmental Laws and Regulations

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

the environment. Key of these laws and regulations is the Environmental Protection and Management Act,<sup>102</sup> which consolidates the laws relating to environmental pollution control, and provides for the protection and management of the environment and resource conservation.

Where an offence under the Environmental Protection and Management Act is committed by a business entity is proved to have been committed with the consent of an officer/partner depending on the business form or is attributable to any act or default on his part, the officer as well as the business entity will be guilty of the offence.<sup>103</sup> This creates an incentive for officers and partners to monitor the affairs and activities of the company and take preventive measures.

The Environmental Protection and Management Act requires businesses to apply for written permission from the Director-General of Environmental Protection before occupying and using any scheduled premises.<sup>104</sup> The application must give details of the trade, industry or process proposed to be carried in or on the premises, the measures the applicant undertakes to adopt to control pollution from the premises and the measures the application undertakes to adopt to manage hazardous substances and to treat and dispose of toxic substances originating from or stored within the premises.<sup>105</sup> The Director-General, should he grant a written permission, may then impose conditions to ensure that pollution of the environment, as well as hazardous substances, are adequately managed and controlled.<sup>106</sup>

93 United States Department of State, *Trafficking in Persons Report 2010 - Singapore*, at <http://www.state.gov/j/tip/rls/tiprpt/2010/142761.htm>, accessed 8 May 2012; SCWO, *CEDAW Shadow Report*, June 2011, 27; AWARE, *CEDAW Shadow Report*, May 2011, para. 6.20-6.21,

94 SCWO, *CEDAW Shadow Report*, June 2011, 27.

95 Singapore Statutes, Cap 353.

96 *Ibid.*, Cap 38.

97 *Ibid.*, Cap 224.

98 Section 12.

99 Penal Code, Sections 372 and 373.

100 *Ibid.*, Section 373A.

101 *Ibid.*, Section 374.

102 *Ibid.*, Cap 94A.

103 Environmental Protection and Management Act, Section 71.

104 *Ibid.*, Section 6.

105 *Ibid.*

106 Environmental Protection and Management Act, Section 7.

### **Air Pollution**

Occupiers of industrial or trade premises must maintain fuel burning equipment and air pollution control equipment installed in or on the premises in an efficient condition.<sup>107</sup> The emission of dark smoke from a chimney of, or used in connection with, those premises,<sup>108</sup> as well as air impurities in excess of the standard of concentration or rate of emission prescribed in respect of that industry, process, fuel burning or industrial plant, is prohibited.<sup>109</sup>

### **Water Pollution**

Discharge of any trade effluent, oil, chemical, sewage or other polluting matters into any drain or land without written permission from the Director-General is an offence.<sup>110</sup> The occupier of the trade premises must treat any trade effluent discharged before the trade effluent is discharged into any drain or land in pursuance of a written permission.<sup>111</sup> Discharge of toxic substances or hazardous substances into inland water is also an offence.<sup>112</sup>

The Director-General has the power to require the removal and cleaning up of toxic substances or trade effluent, oil, chemicals, sewage, hazardous substances and any other polluting matters<sup>113</sup> and to require businesses to take measures to prevent water pollution due to storage of transportation of these polluting matters.<sup>114</sup>

### **Land Pollution**

The National Environment Agency is authorised to make regulations to control the pollution of land whereby the condition of the land is so changed as to make or be likely to make the land or the produce

of the land obnoxious, noxious or poisonous.<sup>115</sup>

### **Hazardous Substances Control**

Importation, manufacture, possession for sale, sale or offer for sale of any hazardous substance is prohibited unless the person holds a licence granted by the Director-General for such purpose.<sup>116</sup> The importation, manufacture, possession for sale, sale or offer for sale of the hazardous substance must be effected in accordance with the provisions of the licence and by or under the personal supervision of the person named in the licence.<sup>117</sup> Further, proper records of the sale must be kept.<sup>118</sup>

Every person storing, using or otherwise dealing with any hazardous substance and every agent, servant or employee of such person shall do so in such a manner as not to threaten the health or safety of any person, or to cause pollution of the environment.<sup>119</sup> The Director-General also has the power to require removal of hazardous substances from premises<sup>120</sup> and to require the owner or occupier of hazardous installations to carry out impact analysis studies.<sup>121</sup>

### **Noise pollution**

The Director-General is empowered to, by notice in writing, impose requirements (such as the plant or machinery which is, or is not, to be used, the hours during work the works may be carried out and the level of noise or vibration which may be emitted from the premises or at any specified part of the premises or which may so be emitted during specified hours) as to the way in which construction works are to be carried out.<sup>122</sup> He is also empowered

107 Ibid., Section 10.

108 Ibid., Section 11.

109 Ibid., Section 12.

110 Ibid., Section 15.

111 Ibid., Section 16.

112 Ibid., Section 17.

113 Ibid., Section 18.

114 Ibid., Section 19.

115 Ibid., Section 20.

116 Environmental Protection and Management Act, Section 22.

117 Ibid., Section 23.

118 Ibid.

119 Ibid., Section 24.

120 Ibid., Section 25.

121 Ibid., Section 26.

122 Ibid., Section 28.

to prohibit the owner or occupier of any work place from carrying out any specified activity or operate any specified plant in which a manner as to cause noise in excess of the specified level to be emitted.<sup>123</sup> He may also require the owner or occupier to take adequate measures to control the noise on the premises.<sup>124</sup>

### Due Diligence and Principal Contractors

In addition to placing the onus on the owner or occupier of the work sites or industrial sites to control pollution, Section 35 of the Environmental Protection and Management Act places a burden on the principal contractor of a construction site who has control of the construction site to prevent any commission of an offence specified under Sections 14, 15 or 17 of the Act. Where there is a contravention of any of these sections, it shall be presumed that the principal contractor of the construction site had control of the site, knowledge of the commission of the offence and had permitted the commission of the offence.<sup>125</sup> These presumptions will not be rebutted unless the defendant proves that he had exercised due diligence to prevent the commission of the offence at the construction site.<sup>126</sup> Due diligence involves taking all reasonable measures to prevent the offence from being committed at the construction site.<sup>127</sup>

The imposition of a due diligence duty on principal contractors strengthens the legal infrastructure that encourages businesses to monitor and be responsible for the adverse land-related human rights impacts flowing from their business activities because it fosters a culture of taking preventive action instead of remedial action.

<sup>123</sup> Ibid., Section 29(1).

<sup>124</sup> Ibid., Sections 29(2).

<sup>125</sup> Environmental Protection and Management Act, Section 35(2).

<sup>126</sup> Ibid., Section 35(3).

<sup>127</sup> Ibid., Section 35(4).

### Prevention of Pollution of the Sea Act

The Prevention of Pollution of the Sea Act<sup>128</sup> is an act to give effect to the International Convention for the Prevention of Pollution from Ships 1973 as modified and added to by the Protocol of 1978, and to other international agreements relating to the prevention, reduction and control of pollution of the sea and pollution from ships. It makes provision generally for the protection of the marine environment and for the prevention, reduction and control of pollution of the sea and pollution from ships.

Part II (sections 3-5) deals with the prevention from pollution from land and apparatus, Part III (sections 6-10) deals with the prevention of pollution from ships and Part IV (sections 11-16) imposes duties on businesses to take preventive measures against pollution of the sea, keep oil and cargo record books as well as to report discharges of harmful substances from ships and land or apparatus.

Part V of the PPSA provides the Maritime and Port Authority of Singapore with substantive powers to recover the considerable costs of cleaning operations and Part VI of the PPSA provides the Maritime and Port Authority of Singapore powers to take preventive measures to prevent pollution, including denying entry to or detaining ships.

### Extraterritoriality and Subsidiaries

Unfortunately, the provisions of the Environmental Protection and Management Act only apply to businesses conducting their operations here in Singapore. It does not apply to businesses and subsidiaries of these businesses who conduct their operations overseas. Similarly Section 3 and 6 of the PPSA only applies to businesses operating places or apparatus that discharge noxious substances into Singapore waters, it does not apply to businesses operating places and apparatus overseas.

<sup>128</sup> Singapore Statutes, Cap 243.

Nonetheless Section 7 of the PPSA concerning the discharge of oil and oily mixtures from ships has potential extraterritorial application because it covers the discharge of oil or oily mixture from a Singapore ship into any part of the sea, not just Singapore waters.

### Anti-Corruption Laws

Widespread corruption hampers the State from meeting its obligations to protect human rights. The obligation to protect requires states to prevent, suppress or punish forms of corruption that causes or lead to violation of human rights. The primary Singapore statutes prohibiting bribery are the Prevention of Corruption Act (the PCA)<sup>129</sup> and the Penal Code.<sup>130</sup>

The PCA contains provisions that prohibit bribery in general.<sup>131</sup> The general prohibitions relate to both private commercial activities and acts of a public nature, target both giver and recipient of the bribe and extend to both private individuals and public officials. In addition, there are specific provisions in the PCA pertaining to domestic public officials.<sup>132</sup> The PCA does not specifically target bribery of foreign public officials, although such bribery could fall under the ambit of the general prohibitions.

The Penal Code also contains provisions that deal with bribery of public officials.<sup>133</sup> These provisions describe the following scenarios:

- A public servant taking a gratification, other than legal remuneration, in respect of an official act;
- A person taking a gratification in order to influence a public servant by corrupt or illegal means;
- A person taking a gratification for exercising personal influence over a public servant;

129 Singapore Statutes, Cap 241.

130 Ibid., Cap 224.

131 Prevention of Corruption Act, Sections 5 and 6.

132 Ibid., Sections 11 and 12.

133 Ibid., Sections 161 to 165.

- Abetment by a public servant of the above offences; and
- A public servant obtaining anything of value, without consideration or with consideration the public servant knows to be inadequate, from a person concerned in any proceedings or business conducted by such public servant.

‘Gratification’ is defined very broadly and includes gifts, travel expenses, meals and entertainment.

### Foreign Bribery and Subsidiaries

There are no provisions in the PCA or the Penal Code, which specifically prohibits bribery of a foreign public official. However, the general prohibition against bribery in the PCA, read together with section 37 of the PCA (which deems a bribery offence committed outside Singapore by a Singapore citizen to be committed within Singapore) prohibits, in effect, the bribery of a foreign public official by a Singapore citizen.<sup>134</sup> This means that companies that operate overseas, if incorporated in Singapore, could be held liable for bribery of foreign public officials under the PCA.

In addition, the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (CDSA) deals with the prevention of laundering of the proceeds of corruption and crime. Section 47 of the CDSA provides that any person who knows or has reasonable ground to believe that any property represents another person’s benefits from criminal conduct is guilty of an offence, if he conceals, disguises, converts, transfers or removes that property from the jurisdiction for the purposes of assisting any person to avoid prosecution. Therefore if the proceeds of corruption gained by a subsidiary operating overseas, whether incorporated in Singapore or not, is channeled back to a company incorporated in Singapore, the parent company could be held liable under Section 47 of the CDSA

134 See *PP v Tan Cheng Kong* [1998] 2 SLR 410; [1998] SGCA 37.

if it was aware of the corruption overseas.

In contrast, the provisions in the Penal Code focus on the bribery of domestic public officials.

### Criminal and Civil Enforcement

Criminal enforcement against corrupt activities is provided for in both the PCA and the Penal Code. In particular, if the court rules that there has been a violation of the general prohibitions on bribery in the PCA, a fine and/or imprisonment will be imposed on the offender. The offender may also have to pay the quantum of the bribe as part of the fine imposed.

However, for civil enforcement, only where gratification has been given to an agent, the principal may recover as a civil debt, the amount or the money value thereof either from the agent or the person paying the bribe.<sup>135</sup> This provision is without prejudice to any other right and remedy that the principal may have to recover from his agent any money or property. Anyone else who is not a principal but has suffered loss that flowed from the corruption has no access to civil remedies.

## 2.2 To what extent, how, and by whom have the laws and/or regulations identified in Question 2 above been enforced by the State?

### Enforcement of Labour and Regulations Labour Trafficking

In 2011, there were a reported 67 cases with elements of labour trafficking that were still under investigation. Unofficially, there were 146 reported cases of male and female victims of forced prostitution and forced labour, and 676 Employment Act contraventions for migrant workers at NGO shelter. The previous year, there were 8 labour trafficking convictions, while in 2009 there were

8 official reported cases where employers were prosecuted for failing to pay the wages of foreign domestic workers, 2 convictions of employment agencies and 33 'stern warnings' for withholding the passports of foreign workers. In addition there were 228 prosecutions of employment agencies and employers for breaches of employment laws (breach not stated) and 476 convictions for breaches of the Employment of Foreign Manpower Act (breach not stated). Figures were higher in 2008 when there were 276 official reported cases of unpaid wages collected by authorities on behalf of FDWs.<sup>136</sup>

### Prosecutions of Breaches of Labour Laws Relating to Migrant Workers

There have been reports of employers hiring repatriation companies, which employ intimidation, coercion, violence and wrongful confinement, to escort foreign workers to the airport, and ensure they have no opportunity to pursue complaints and redress, such as for payment of wages and forced labour.<sup>137</sup> In 2010, 2 cases of forced repatriation and wrongful confinement by repatriation companies were investigated. An employee from a repatriation company was prosecuted and sent to jail for voluntarily causing hurt to a foreign worker. The employers who had engaged the repatriation companies were also given stern warnings for the

<sup>136</sup> Delphia Lim, Singapore Country Report in Violence, Exploitation and Abuse & Discrimination in Migration affecting Women and Children in ASEAN: A Baseline Study, Human Rights Resource Centre in ASEAN (2013).

<sup>137</sup> United States Department of State, *Trafficking in Persons Report 2011 - Singapore*, <http://www.state.gov/j/tip/rls/tiprpt/2011/164233.htm>, accessed 8 May 2012; AWARE, *CEDAW Shadow Report*, May 2011, para. 6.24; TWC2 and the Global Alliance Against Traffic in Women, *Singapore Shadow Report: 4<sup>th</sup> Periodic Review*, 4 & 12 Jun 2011; Lin Wenjian, 'Manpower Ministry warns 2 repatriation companies,' *Straits Times*, 15 Dec 2011; 'Missing migrant workers hunted down in Singapore,' *Asiaone*, 6 Aug 2011, at <http://www.asiaone.com/News/AsiaOne+News/Singapore/Story/A1Story20110806-293029.html>. It should however be noted that while these incidents were raised in reports on women's issues, the reports canvassed referred only to male workers, or did not distinguish between male and female workers.

<sup>135</sup> Prevention of Corruption Act, Section 14.

abetment of wrongful restraint.<sup>138</sup>

According to the government, the number of complaints made against repatriation companies has remained small over the years. Since 2010 to November 2011, authorities received 7 complaints against 3 such companies.<sup>139</sup> These figures may not reflect the full extent of the problem, as victims subject to such forced removal from Singapore would not often be in a position to make complaints, given the use of intimidation and coercion prior to their departure.

### Enforcement of Anti-Trafficking Laws

Data compiled on the prevalence of cases involving or related to sexual and labour trafficking are set out below. Unless otherwise stated in this report, the figures are not disaggregated by age or sex, and references to ‘trafficking’ were not disaggregated into labour trafficking and sex trafficking. Shaded boxes indicate the unavailability of information.<sup>140</sup>

*Figures on Abuse of Foreign Workers in Singapore*

	Official numbers	Unofficial numbers
2010	<ul style="list-style-type: none"> <li>• 5 prosecuted for endangering the lives of FDWs in 2009 and 2010</li> </ul>	<ul style="list-style-type: none"> <li>• 685 injury cases for migrant workers</li> <li>• 676 Employment Act contraventions for migrant workers</li> </ul>
2009	<ul style="list-style-type: none"> <li>• 60 cases of abuse of FDWs</li> <li>• 32 jailed for abuse of FDWs from 2001 to 2009</li> </ul>	<ul style="list-style-type: none"> <li>• 1,388 migrant domestic workers who suffered violations provided shelter</li> </ul>
2008	<ul style="list-style-type: none"> <li>• 53 cases of abuse of FDWs<sup>140</sup></li> </ul>	<ul style="list-style-type: none"> <li>• 80,000 to 100,000 migrant workers were not given proper accommodation.</li> </ul>
2007	<ul style="list-style-type: none"> <li>• 68 cases of abuse of FDWs</li> </ul>	
2006	<ul style="list-style-type: none"> <li>• 42 cases of abuse of FDWs</li> </ul>	
2005	<ul style="list-style-type: none"> <li>• 59 cases of abuse of FDWs</li> </ul>	<ul style="list-style-type: none"> <li>• 147 FDWs died from workplace accidents or suicides from 1999 to 2005.</li> </ul>

Source: Singapore Country Report in Violence, Exploitation and Abuse & Discrimination in Migration affecting Women and Children in ASEAN: A Baseline Study

138 Ministry of Foreign Affairs, *Singapore Inter-Agency Task-force’s Detailed Response to the 2011 US State Department’s Trafficking In Persons Report*, 1 August 2011, paras. 16 and 18, at <http://www.mom.gov.sg/newsroom/Pages/PressReleasesDetail.aspx?listid=374>

139 ‘Written Questions filed in Parliament: 21 November 2011’, Singapore 2025 (blog), 22 November 2011, at <http://singapore2025.wordpress.com/2011/11/22/written-questions-filed-in-parliament-21-november-2011>.

140 Fact sheet: Foreign Domestic Workers in Singapore (Complaints and Abuses), TWC2, at <http://twc2.org.sg/2011/11/16/fact-sheet-foreign-domestic-workers-in-singapore-complaints-and-abuses/>; referring to Theresa Tan, ‘Looking Better’, *Straits Times*, 25 November 2005. accessed 30 March 2012

**Figures relating to Commercial Sexual Exploitation, and Labour and Sex Trafficking in Singapore (2009 -2011)**

	2011	2010	2009
<b>Official reported cases</b>	<ul style="list-style-type: none"> <li>• 43 reported cases of sex trafficking</li> <li>• 67 cases with elements of labour trafficking</li> </ul>	<ul style="list-style-type: none"> <li>• 94 arrests for pimping</li> <li>• 81 trafficking victims, of whom 23 were children in prostitution; 1 from Singapore</li> <li>• 50 alleged cases of sex trafficking, of which 7 were 'successfully investigated'</li> </ul>	<ul style="list-style-type: none"> <li>• 7614 arrests of foreign women for vice activities</li> <li>• 32 reported cases of alleged trafficking</li> <li>• 0 reported cases of forced labour</li> <li>• 89 minors aged from 14 to under 18 arrested for prostitution offences</li> <li>• 15 victims of sexual exploitation under 16, with 14 under 14</li> </ul>
<b>Unofficial reported cases</b>		<ul style="list-style-type: none"> <li>• 146 male and female victims of forced prostitution and forced labour (non-governmental actors)</li> </ul>	<ul style="list-style-type: none"> <li>• 105 female sex trafficking victims (foreign embassies)</li> </ul>
<b>Convictions</b>		<ul style="list-style-type: none"> <li>• 5 sex trafficking convictions</li> <li>• 8 labour trafficking convictions</li> </ul>	<ul style="list-style-type: none"> <li>• 2 trafficking convictions</li> </ul>

Source: Singapore Country Report in Violence, Exploitation and Abuse & Discrimination in Migration affecting Women and Children in ASEAN: A Baseline Study

**Figures relating to Commercial Sexual Exploitation, and Labour and Sex Trafficking in Singapore (2006 – 2008)**

	2008	2007	2006
<b>Official reported cases</b>	<ul style="list-style-type: none"> <li>• 5047 arrests of foreign women for vice activities</li> <li>• 20 victims of sexual exploitation under 16, with 17 under 14</li> </ul>	<ul style="list-style-type: none"> <li>• 5400 arrests of foreign women for vice activities</li> <li>• 28 cases of forced prostitution and importation of women by false pretenses</li> <li>• 5 victims of sexual exploitation under 16, with 4 of under 14</li> </ul>	<ul style="list-style-type: none"> <li>• 33 investigated cases of trafficking in women and girls</li> </ul>
<b>Unofficial reported cases</b>	<ul style="list-style-type: none"> <li>• 136 trafficking cases (Philippines embassy)</li> <li>• At least 53 of foreign females arrested and deported for vice activities were children</li> </ul>	<ul style="list-style-type: none"> <li>• 17 trafficking cases (Thai embassy)</li> <li>• 212 trafficking cases of which about 57 involved prostitution and coercion to have sex (Philippines embassy)</li> <li>• 60 female minors involved in prostitution deported<sup>141</sup></li> </ul>	<ul style="list-style-type: none"> <li>• 125 trafficking cases (Philippines embassy)</li> <li>• 34 Vietnamese women and children rescued and repatriated from Singapore (Vietnam government)</li> </ul>
<b>Convictions</b>	<ul style="list-style-type: none"> <li>• 2 sex trafficking-related convictions, 1 conviction for child commercial sexual exploitation</li> </ul>	<ul style="list-style-type: none"> <li>• 15 prosecutions for pimping</li> <li>• 30 prosecutions for vice-abetting</li> <li>• 0 trafficking convictions</li> </ul>	

Source: Singapore Country Report in Violence, Exploitation and Abuse & Discrimination in Migration affecting Women and Children in ASEAN: A Baseline Study

141 United States Department of State, Trafficking in Persons Report 2008 – Singapore, at <http://www.state.gov/j/tip/rls/tiprpt/2008/index.htm>, 225, accessed 8 May 2012

## Enforcement of Environmental laws and regulations

Environmental laws and regulations in Singapore are enforced by the National Environmental Agency and the Maritime and Port Authority of Singapore.

Prosecutions have been brought against business entities for violation of the provisions of the Environmental Protection and Management Act<sup>142</sup> also previously known as the Environmental Pollution Control Act,<sup>143</sup> such as in *PP v Grit Blasting Pte Ltd*<sup>144</sup> and *PP v Sinsar Trading Pte Ltd*.<sup>145</sup> There have not been many prosecutions brought but that is because in the case of a first violation, provisions of the Act allows the Agency to first issue notices requiring companies to remedy the situation and companies often do so in fear of being prosecuted.

In *PP v Grit Blasting* for example, prosecution was brought only after the company failed to remedy the problem and comply with the NEA's notice issued under section 13(1) of the Environmental Pollution Control Act.

It is also pertinent to note that the courts impose relatively strict standards of due diligence on businesses to ensure compliance with environmental laws and regulations. In *PP v Grit Blasting Pte Ltd*, the court held that

... it is not sufficient merely to give instructions to the supervisors and workers and [leave] it at that. The defendant company must show that it had taken active steps to ensure compliance with the conditions stipulated in the notice... For example, the other steps which the company could have taken to discharge the due diligence requirement might include, inter alia, regular briefings to the staff to emphasise the

142 Singapore Statutes, Cap 94A.

143 Act 9 of 1999, Singapore Statutes. This Act was enacted in 1999 and replaced by the Environmental Protection and Management Act in 2011 (Act 12 of 2011).

144 [2006] SGDC 4.

145 [2004] SGHC 137.

importance of complying with [environmental laws and regulations], periodic checks or inspections carried out by supervisors to ensure that the workers are complying with [environmental laws and regulations], the imposition of hefty fines or other sanction against supervisors and/or workers for non-compliance, placing of notices at the premises to remind the workers not to conduct [the acts in violation of environmental laws and regulations] in the open, or even internal guidelines concerning the matter which are disseminated to all the company's staff.

Even the above measures listed were stated to not be 'definitive or exhaustive.'

Similarly, the Maritime and Port Authority of Singapore has brought suits against businesses pursuant to PPSA. In *Ventura Navigation Inc. v Port of Singapore Authority (PSA) and Ors* [1989] SLR 626, the PSA (predecessor of the Maritime and Port Authority of Singapore) took measures to remove oil from an accidental spill to prevent and reduce the damage caused by oil pollution. The PSA then successfully sought to recover the costs incurred on the basis of section 14 of the previously applicable law, which was repealed and replaced by a similar provision in current PPSA. The right to recover costs for cleaning operations is now contained within Part V of the PPSA.

Lastly, although the acts discussed above do not provide a civil private cause of action to encourage compliance with the legislation, the possibility of being sued in tort by private individuals may serve as deterrence against violations of environmental laws and regulations in Singapore. For instance, in the area of noise pollution, private individuals may sue in the tort of nuisance as was done in *Lim Sor Choo v Sato Kogyo Pte Ltd*<sup>146</sup> even though the claim was ultimately unsuccessful because the judge found that the defendant had taken reasonable precautions and measures to reduce noise emissions.

146 [2006] SGDC 212.

## Enforcement of Anti-corruption Laws

Corrupt Practices Investigation Bureau (CPIB) heads up corruption investigations and prosecutions. Relevant to this report is corporate bribery of public officers and according to Singapore Public Sector Outcomes Review 2012, only 6 out of 135 offenders charged with corruption in 2011 were public sector employees. The government's swift and resolute response to public sector corruption cases is testament to the Government's 'resolve to uphold the highest standards of integrity in the public sector'.<sup>147</sup> In March 2012, Deputy Prime Minister Teo Chee Hean said that the number of public servants charged with corruption has remained stable over the past three years – accounting for 7.5 per cent of those prosecuted by the CPIB.<sup>148</sup>

High profile public sector corruption cases have been rare. However, a spate of arrests took place in early 2012, with the investigation and subsequent prosecution of the former Director of the Central Narcotics Bureau (CNB) and the former commissioner of the Singapore Civil Defence Force (SCDF).<sup>149</sup> The former Director of the CNB was charged for accepting sexual favours from a IT sales executive in exchange for furthering the business interests of two IT companies she worked for by favouring tenders from them.<sup>150</sup> The former commissioner of the SCDF was charged for having corruptly obtained sexual favours for himself from several women in exchange for advancing their firms' business interest with the SCDF. The two men are the first senior public officials in Singapore to

147 Ministry of Finance, *The Singapore Public Sector Outcomes Review 2012*, December 2012, Accessed: 19 Jan 2012 <http://app.mof.gov.sg/data/cmsresource/SPOR/2012/SPOR%202012.pdf>,

148 Woo Sian Boon, Public sector corruption cases formed 'only a small part', *Today Online*, 27 Dec 2012. <http://www.todayonline.com/singapore/public-sector-corruption-cases-formed-only-small-part>

149 Ramesh, S & Joanne Chan, CPIB confirms arrest of ex-chiefs of CNB & SCDF, *Channel News Asia*, 26 January 2012, at <http://www.channelnewsasia.com/stories/singaporelocalnews/view/1179024/1/.html>

150 On 14 Feb 2013, the District Court found Ng Boon Gay, former Director of CNB not guilty of corruption. See *The Straits Times*, 15 Feb 2013.

be charged with corruption since 1995, when the former deputy chief of the national water agency, the Public Utilities Board, was jailed for 14 years for taking about \$13.9 million in bribes in exchange for privileged information about board contracts when he was in a position of influence and control over the operations of Singapore's public utilities projects.<sup>151</sup>

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

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

The Singapore Compact for CSR is a national society committed to bringing the Corporate Social Responsibility (CSR) movement forward. Founded by the National Tripartite Initiative for CSR in January 2005, its partners included the Ministry of Manpower (MOM), National Trades Union Congress (NTUC) and the Singapore National Employers Federation (SNEF).

Though not a complaints mechanism, the Singapore Compact functions as a multi-stakeholder platform that recognises the role and contributions of all CSR stakeholders. It offers 3 types of membership: Corporate, open to all companies and government agencies, Institutional, open to all trade unions, cooperative societies or business associations and Associate, open to institutions, academia, VWOs, NPOs, NGOs and other interest groups. Its Current President is CEO of a major Singapore company, while its Vice Presidents are the Chiefs of the Singapore National Employers Foundation, the Singapore Business Federation and Senior Managing Director of a locally-based multi-national.<sup>152</sup> On the

151 Chun Han Wong, Singapore Charges Former Police Officer in Corruption Case, *Wall Street Journal*, 12 June 2012, at <http://online.wsj.com/article/SB10001424052702303768104577461792447322030.html>

152 Singapore Compact, 'Our Committee,' <http://www.csr-singapore.org/c/about/our-committee>, accessed 10 Feb 2013).

22nd of February 2012, the Compact organized an event aimed to introduce various companies as well as CSR practitioners on how to use ISO 26000 and implement it in various organizations. As the business world begins to see the importance of Corporate Social Responsibility (CSR), it said it was imperative for firms to be able to know how to implement CSR practices in the workplace.

The National Trades Union Congress is the only national trade union centre in Singapore. Currently, over 98% of members of trade unions are members of NTUC. Closely aligned with the government, it rarely supports radical changes from government policy, but according to its mandate, exists to protect workers and their rights, to maintain good working conditions and a fair return for labour, and providing ways to train and upgrade the skills of working people.<sup>153</sup> Membership, with a fee, is open to anyone above 16 years of age, except personnel from Singapore Police Force, Singapore Prisons, Auxiliary Police bodies, students and foreign domestic workers. Criticism of NTUC over being a toothless body when it comes to defending employees' rights has been rebutted by the Union. In an article in the Straits Times, the union insisted that it ensures labour disputes are treated seriously, though most of them are settled away from the glare of publicity.<sup>154</sup>

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

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

153 NTUC, 'About Us,' at <http://www.ntuc.org.sg/wps/portal/up2/home/aboutntuc/organisationprofile/aboutus>, accessed 10 Feb 2013.

154 NTUC not a toothless body when defending employees' rights, *Straits Times*, May 24 2012, at [http://www.straitstimes.com/The-Big-Story/The-Big-Story-4/Story/STISStory\\_802530.html](http://www.straitstimes.com/The-Big-Story/The-Big-Story-4/Story/STISStory_802530.html),

Directors, as fiduciaries of the company, are subject to common law fiduciary and negligence duties.<sup>155</sup>

#### **Fiduciary Duties**

**Duty to act bona fide in the interests of the company.** A director is required to have a subjective honest belief that he is acting in the interests of the company. Even though the test is subjective, where a transaction is not objectively in the company's interests, a judge may draw an inference that the director was not acting honestly.<sup>156</sup> Directors are allowed to take a wider view of what the company's interests are. A transaction that seems on the face of it to be a bad one numerically may be commercially justifiable if it leads to other intangible benefits to the company.<sup>157</sup> Section 157(1) of the Companies Act is the statutory equivalent of this duty. The effect of the statute is to make a person who acts in breach of this duty liable both civilly and criminally.

**Duty to avoid conflicts of interest.** There are three aspects of the duty to avoid conflicts of interest: the no conflict rule, the no secret profit and corporate opportunities rule and the no misappropriation of corporate assets rule.

Under the no conflict rule, the director cannot place himself in a position where the interests of the company whom he is bound to protect comes into conflict with either his personal interest or the interest of a third party for whom he acts unless he has disclosed the potential conflict to the company and the company gives its fully-informed consent.

Under the no secret profit and corporate opportunities rule, a director is not allowed to profit from his position unless he provides full disclosure, obtains the informed consent of the company (which at general law means the shareholders at general meeting and the profit cannot be made through

155 On the general duties of directors, see ACRA, *Guidebook for Directors*, at <http://www.acra.gov.sg>, accessed 10 Feb 2013; see also, Tan Cheng Han (ed), *Water Woon on Company Law*, Rev 3 ed (Singapore: Sweet & Maxwell Asia, 2009), chapter 8.

156 Cheam Tat Pang v PP [1996] 1 SLR 541

157 Intraco Ltd v Multi-Pak Singapore Pte Ltd [1995] 1 SLR 313

misappropriation i.e. profit or opportunity was not taken from the company.

Under the no misappropriation of corporate assets rule, a director cannot use company property to take a corporate opportunity for his own personal advantage or for the benefit of any third party. Further, a director who misapplies corporate property for his own benefit may be guilty of criminal breach of trust.

Sections of the Companies Act complement these three common law rules to impose criminal liability in some cases:

- Section 157(2) prohibits officers (including past officers) or agents of the company from making improper use of information that they acquire by virtue of their position as officers or agents of the company to gain either directly or indirectly a benefit for themselves or any other person. An officer in breach will be liable to pay damages or to account for profits, in addition to criminal penalties.
- Section 156(1) of the Companies act requires directors to make appropriate disclosure to the board if they are directly or indirectly interested in a transaction or proposed transaction with the company where the interest is a material interest.
- Section 156(5) requires directors who hold any office or property where duties or interests might, whether directly or indirectly, be created in conflict with their duties or interest as directors, to declare the fact, nature, character and extent of the conflict to the Board of Directors.
- Section 162 prohibits companies from granting loans or entering into any guarantee in relation to loans made to their directors or the directors of their related companies. The director may be made to indemnify for any loss suffered by the company as a result of an unauthorised grant.
- Sections 168 and 169 prohibits companies from making any payment to a director as compensation for loss of office as an officer of the company or as consideration for or in connection with his retirement from any such office subject

to exceptions. A company also cannot provide or improve emoluments for a director in respect of his office unless the provision is approved by a resolution in a general meeting that is not related to other matters. A director who receives money in breach of these sections will be deemed to hold the money in trust for the company.

### Negligence

The common law imposes a duty on directors to act with reasonable care, skill and diligence. This duty is treated as comprising of three distinct components: care, skill and diligence and is based on minimum objective standards, which are made more stringent (but not lowered) based on a director's role in the company, the type of decision being made, the size of the company, the business of the company and the director's particular expertise, knowledge or experience.

In a well-known Australian case, *AWA Ltd v Daniels*,<sup>158</sup> which was followed in Singapore High Court case of *Lim Weng Kee v PP*,<sup>159</sup> the New South Wales Court of appeal proposed the following as minimum standards of care, skill and diligence expected of all directors:

- A director must acquire a basic understanding of the business of the company and must be familiar with the fundamentals of the company's business.
- A director is under a continuing obligation to keep himself informed about the activities of the company.
- Detailed inspection of day-to-day activities is not required but a general needs to monitor a company's business affairs.
- A director should attend board meetings regularly.
- A director should maintain familiarity with the financial status of the company by a regular review of financial statements.

<sup>158</sup> (1992) 7 ACSR 759 (Court of Appeal, New South Wales).

<sup>159</sup> [2002] 4 SLR 327 (High Court, Singapore).

The continuum of standards depending on the various factors listed above means that executive directors are subject to a higher standard of care, skill and diligence. With respect to diligence, they are expected to attend all meetings unless there is a good reason not to and to give continuous attention to the affairs of the company. Non-executive directors on the other hand, may only be expected to provide intermittent attention to the company.

These standards also apply in deciding whether a director acted in breach of Section 157(1) of the Companies Act, which similarly imposes a duty to act honestly and use reasonable diligence in the discharge of directors' duties. As far as a duty to exercise reasonable diligence is concerned, the courts have viewed the duty as merely an aspect of the common law duty to act with reasonable care, skill and diligence.<sup>160</sup> Section 157 is essentially a codification of the common law duties and courts have used the case law concerning the common law duty to interpret Section 157.

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

There is no duty or obligation in common law and in the Companies Act requiring directors to consider the business enterprises' human rights impacts in carrying out their duties.

That said, in discharging their overriding duty to the company to act in the company's best interests, directors are required to have regard to the interests of the company's employees generally, as well as the interests of its members.

Further, the common law duty to use powers only for their proper purposes may be used by an interventionist court to impose a legal obligation on directors to consider the human rights impacts of the company's business or activities. Under the duty, directors are not permitted to use their powers

to prosecute objectives outside the scope of the purpose for which the powers are conferred. On first sight this might seem to be a simple inquiry into whether the exercise of the powers falls within the scope of the powers, which is clearly defined by a company's Constitution and Articles of Association. However, academics have argued that such an approach is flawed from a public policy perspective, to the extent that the consequences flowing from it (*viz* the possibility of circumventing the rule altogether by means of felicitous drafting of the Articles of Association) render the doctrine artificial and ineffectual as a means of controlling directors' exercise of power.<sup>161</sup> An emphasis on corporate government and responsibility might therefore prompt a court to hold an exercise of power to be improper and outside of its scope should it result in far-ranging negative human rights impacts.

The Singapore courts have displayed a disposition for a more hands-off approach towards the review of corporate decisions and it is unlikely that they will advocate a stricter or more rigid adherence to the proper purpose rule where the directors are acting in the best interest of the company and where there has been no instances or complaints of unfairness or discrimination as between the different classes of shareholders *inter se*.

#### 4.3. **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)?**

There are no specific legal compliance requirements for all companies to take into account human rights impacts of subsidiaries, suppliers and other business partners, directors of companies listed on the Singapore Stock Exchange (SGX) that are part of a supply chain are encouraged to conduct

<sup>160</sup> *Lim Weng Kee v PP* [2002] 4 SLR 327

<sup>161</sup> Mok Cui Ling, 'Re-Thinking Directors' Duties: An Analysis of the Proper Purpose Doctrine', 2002.

sustainability reporting.<sup>162</sup> In addition, general recommendations in the ACRA Guidebook for Directors 2011 stipulate:

As a director, you should ensure that the company adopts socially responsible practices such as fair employment practices, non-discrimination towards employees and provision of a safe working environment as well as opportunities for employee development...The company should also conduct business ethically and morally by not compromising on the safety of its products or workers in order to maximise profits.<sup>163</sup>

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

No examples have been found.

**4.5. 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)?**

As part of its awareness initiative, ACRA published a Guidebook for Directors in 2011.<sup>164</sup> According to the authority: 'The handbook is written for new or aspiring directors to better understand their responsibilities and duties. It also serves as a practical hands-on guide for these directors

on the know-how in performing their statutory duties and meeting their legal and compliance requirements.' Section 7 of the Guide – covering corporate governance and social responsibility – outlines the importance of corporate governance, the Code of Corporate Governance, corporate social responsibility, adopting ethical and socially responsible practices, engaging with society and protection of the environment and sustainable development. In addition, ACRA recognizes the Singapore Compact for CSR and endorses CSR.

The Guide includes a reference to the 15 principles of the Code of Corporate Governance, including the Board's Conduct of Affairs, The Boards Composition and Guidance, Division of Power and Responsibilities, Division of Powers, Appointment of Directors, Assessment of Board Performance, Internal Auditing, and Remuneration Policies and Levels.

Significantly, it states that companies should take into consideration and manage the impact of its activities on the environment, stakeholders and the community as a whole. It states that public interest and concern for the environment should be considered in tandem with economic profit generation, arguing that these are key parts of risk management and value creation. The guide also recommends that directors ensure that their company adopts socially responsible practices such as fair employment practices, non-discrimination towards employees and provision of a safe working environment.

Apart from explaining the purpose of the Global Compact (Human Rights, Labour, Environment and Anti-corruption), the guidelines also mention ISO 26000 and the Global Reporting Initiative (GRI).

The Guide appears to address company activity abroad, saying that consideration should be given to cultural and business impacts especially when conducting business in a foreign environment. In a reference to human rights, it states that 'in particular contexts, this also means respecting and

162 Singapore Exchange, *Sustainability Reporting Guide 2011*, at [http://rulebook.sgx.com/net\\_file\\_store/new\\_rulebooks/s/g/SGX\\_Sustainability\\_Reporting\\_Guide\\_and\\_Policy\\_Statement\\_2011.pdf](http://rulebook.sgx.com/net_file_store/new_rulebooks/s/g/SGX_Sustainability_Reporting_Guide_and_Policy_Statement_2011.pdf), accessed 8 Oct 2012.

163 ACRA, *Guidebook for Directors*, at <http://www.acra.gov.sg/NR/rdonlyres/F687FCD3-9485-497A-AE05-BC6881361B94/0/Section7.pdf>, Section 7, accessed 8 Oct 2012.

164 ACRA, *Guidebook for Directors*.

observing fundamental human rights in all aspects of operations,' although it gives no detail on what these rights are. It also does not make any mention of what would happen if a company failed to observe these recommendations.

In fact, the guide explicitly says that although there are laws that promote CSR such as employment laws and pollution regulations, not all aspects of CSR can be regulated. It says that 'by definition CSR implies a more proactive stance than mere compliance and is often a statement of a company's ethical capital.' Directors are urged to 'play a part by ensuring that the company adopts the best practices even if they are not mandated by law.'<sup>165</sup>

This section of the guide sums up Singapore's attitude towards business and human rights. Though it appears to recognise a thin layer of rights exist, when it comes to corporate activity, it is reluctant to go beyond the traditional employment rights accorded to individuals, or develop the law to include these rights. Instead it relies on companies to take a proactive response in behaving ethically, without the legal obligation to do so.

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

In Singapore, companies (whether listed or not) are required to annually disclose their annual accounts, management report and, if any, consolidated accounts and group management report. In these annual reports, companies shall state any liabilities affecting their financial situation, including liabilities arising from the impact of their operations on non-shareholders. In addition, under the *Listing Manual*, listed companies are required to describe in their annual reports their corporate governance practices with specific reference to the principles of the *Code of Corporate Governance*, as well as to disclose and explain any deviation from it.

<sup>165</sup> ACRA, *Guidebook for Directors*.

A listed company has an obligation, except under certain circumstances, to immediately disclose information that may have an effect on the market, and as such, information relating to their activities affecting non-shareholders, including human rights impacts, if they have an effect on the market.

There does not however, appear to be an obligation to disclose the impact of the company's operations on non-shareholders; for example, laws and regulations on the environment or corruption do not provide a statutory obligation to report or disclose.<sup>166</sup>

Commentators and business figures responded to the revised Code of Corporate Governance released by the Monetary Authority of Singapore (MAS) at the end of 2011 and following a public consultation on its initial proposals in mid-2011, MAS published its proposed revisions, which emphasised increasing the responsibility on boards and directors.<sup>167</sup> On 2 May 2012, MAS accepted recommendations made by the Corporate Governance Council on the Code of Corporate Government and issued a revised Code which took effect on 1 November 2012. Compliance with the Code is not mandatory but listed companies are required under SGX Listing Rules to disclose their corporate government practices and give explanations for deviations from the Code in their annual reports.

Under the Global Reporting Initiative, as of 2009, no businesses were listed under the reporting framework. However, CSR Asia and Singapore Compact for CSR were listed under Singapore as GRI organisational stakeholders.<sup>168</sup> The SGX also emphasised the importance of the framework in its Mainboard Rules' Guide to Sustainability Reporting for Listed Companies. Rule 4.2 under this guide states that 'The exchange encourages the adoption

<sup>166</sup> ACRA, *Guidebook for Directors*.

<sup>167</sup> Singapore Compact, *Revisions to Code of Corporate Governance Will Increase Boardroom Accountability and Demands*, at <http://www.csrsgapore.org/c/news/98-revisions-to-code-of-corporate-governance-will-increase-boardroom-accountability-and-demands>, accessed 25 August 2012.

<sup>168</sup> CSR Digest, *The Global Reporting Initiative*, at <http://www.csrdigest.com/2009/04/the-global-reporting-index>, accessed 27 May 2012

of internationally accepted reporting frameworks, such as the Global Reporting Initiative (GRI) Sustainability Reporting Guidelines, in disclosing the company's sustainability performance.<sup>169</sup> With respect to industry-specific reporting, it similarly encourages listed companies to adopt the GRI Sector Supplements for selected industries.

#### 4.7. **Is/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?**

The *Singapore Exchange* ('SGX') is both a regulator of the market and a listed company. As of April 2012 there were 769 companies listed in total – Industrial, Consumer Goods and Finance being the main sector.<sup>170</sup> It should be noted that the SGX signed a deed of undertaking in 2007 in favour of MAS (Monetary Authority of Singapore), which allows the MAS to make all decisions and take action in relation to SGX. The SGX is a corporation that has been designated by the Monetary Authority of Singapore ('MAS') as an approved exchange. The SGX is regulated by the Securities and Futures Act ('SFA'), of which Division 2 Subdivision 1 of the Act ('Obligations of approved exchanges') is of particular importance.

Section 8 of the SFA empowers the MAS, a government body, to approve the corporation as an approved exchange and specifies the conditions for qualifying as an 'approved exchange'. Section 16 of the SFA sets out the general obligations of an approved exchange, which include the duty to ensure that the market is fair, orderly and transparent under Section 16(1)(a), and to refrain

169 Singapore Exchange, *Rulebook*, at [http://rulebook.sgx.com/en/display/display.html?rbid=3271&record\\_id=7615&element\\_id=5868&highlight=Global+Reporting+Initiative#r7615](http://rulebook.sgx.com/en/display/display.html?rbid=3271&record_id=7615&element_id=5868&highlight=Global+Reporting+Initiative#r7615), accessed 7 May 2012

170 SGX, *Statistical Report 2012*, at <http://www.sgx.com/wps/wcm/connect/f66414804b1c0976b5e8b51561d4001f/SGX+Monthly+Statistics+%28April+2012%29.pdf?MOD=AJPERES&CACHEID=f66414804b1c0976b5e8b51561d4001f>, accessed 27 May 2012

from acting contrary to the interests of the public under Section 16(1)(d).<sup>171</sup>

The Code on Corporate Governance, which is monitored by MAS and SGX, provides principles and guidelines to listed companies and their boards to move them towards a higher standard of corporate governance, with the objective of creating sustainable and financially sound enterprises.

Under the Listing Manual, companies are required to describe their corporate governance practices with specific reference to the principles of the Code in their annual reports and to disclose any deviations from any guideline of the Code together with appropriate explanations. Principle 5 of the Code states that there should be a formal annual assessment of the effectiveness of the Board as a whole and its committees and the contribution by each director to the effectiveness of the Board. Section 1.1, which defines the board's role, includes the consideration of '...sustainability issues, e.g. environmental and social factors,' as part of its strategic formulation.<sup>172</sup>

Some of SGX's statutory obligations under that section include ensuring that access for participation in its facilities in subject to criteria that are fair and objective and ensuring that it appoints or employs fit and proper persons as its chairman, chief executive officer, directors and key management officers.

As noted above, the current Code came into operation on 1 November 2012. Compliance with the Code is not mandatory but listed companies are required under SGX Listing Rules to disclose their corporate government practices and give explanations for deviations from the Code in their annual reports.

171 Attorney General's Chambers, *Statutes*, at <http://statutes.agc.gov.sg/aol/home.w3p>, accessed 27 May 2012

172 Global Reporting, *Current Corporate Social Responsibility Disclosure Efforts by National Governments and Stock Exchanges 2010*, at <http://www.globalreporting.org/NR/rdonlyres/649A345D-8BD7-413D-A696-7E12F6E-A37C5/4198/Carrrots2010final.pdf>, 61.

The SGX has powers to investigate and inspect broker-dealers under the *SGX Rules*. In the event of a violation of the SFA, *SGX Rules* or any other SGX requirements, disciplinary proceedings may be commenced. However, broker regulation is progressively falling under the scope of MAS. The SGX also has supervisory functions, including the supervision of listed companies, admission of members, market surveillance and risk management for the clearing of securities and derivatives trades.<sup>173</sup>

The SGX does not have a responsible investment index, but private entities offer a wide range of services linked with corporate social responsibility and socially responsible investments. Firms like the Dow Jones Group or the FTSE Group provide indexes whose constituents are sometimes companies listed in Singapore. One private entity, OWW Consulting, provides a SRI Index specifically dedicated to Singapore.<sup>174</sup>

The SGX announced a policy to encourage listed companies to disclose their environmental and social impacts. On 27 June 2011, The SGX Sustainability Reporting Guide represents a new initiative by the local Exchange to cultivate holistic disclosure by listed companies. The guide encourages but does not require that issuers assess and disclose the environmental and social aspects of their organisational performance, in addition to the financial and governance aspects that are already part of the customary and regulatory disclosure practiced.

Under SGX's Policy Statement on Sustainability Reporting, section 2 defines sustainability reporting as 'the publication of environmental, social and governance (ESG) information in a comprehensive and strategic manner that reflects the activities and outcomes across these three dimensions of an organisation's performance'. The guidelines could become legally binding in the future. SGX said it would start with voluntary reporting for its companies but hoped that the voluntary measures would become everyday practice, in the same way

173 CVM&L 2009 Report, 8

174 Ibid., 10.

Singapore companies follow guidance and rules on corporate governance under the Code of Corporate governance.<sup>175</sup>

SGX encourages all listed companies to undertake sustainability reporting, stressing that this is particularly relevant to businesses that operate in industries susceptible to environmental and social risks, produce significant environmental pollutants, are heavy natural resource users, or are part of a supply chain where end-customers demand that businesses behave responsibly.

Prior to the release of SGX's voluntary guidelines for sustainability reporting, a research report by Singapore Compact found that only 79 out of 562 mainboard-listed companies at the end of 2010 had some form of non-financial reporting, with only a handful of reports approaching comprehensiveness.<sup>176</sup>

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

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

Apart from the above, the government launched 'BizSAFE' – an initiative of the *Workplace Safety Health Advisory Committee* – to promote and offer assistance to small and medium enterprises to

175 SGX, *Policy Statement on Sustainability Reporting*, at [http://rulebook.sgx.com/en/display/display\\_main.html?rbid=3271&element\\_id=5864](http://rulebook.sgx.com/en/display/display_main.html?rbid=3271&element_id=5864), accessed 27 May 2012.

176 Singapore Compact, *Sustainability Reporting in Singapore: Non-financial reporting among mainboard listed companies in Singapore, A view of the Sustainability Reporting Landscape in 2010-2011*, at <http://www.csr.singapore.org/c/news/88-singapore-compact-releases-research-findings-on-sustainability-reporting-in-singapore>, accessed 27 May 2012.

improve their workplace safety and health standards through a certification process.<sup>177</sup> Prosecutions are routinely carried out against companies for unsafe practices.

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

In relation to the environment, the government has initiated a wide range of funding and incentive schemes related to energy efficiency, clean energy, green buildings, water and environmental technologies, green transport and shipping, waste minimisation, energy and greenhouse gas management, and environmental initiatives and training.<sup>178</sup>

In February 2012, it was announced that employers who hire disabled workers will receive a pay out, with the government giving employers who hire special school graduates a credit of 16 per cent of the employees' wages. The incentive was in addition to a special employment credit of 16% that is granted to disabled workers.<sup>179</sup> In December 2012, it was announced that a total of 1,358 employed persons with disabilities received \$449,000 under the scheme, and 1,150 employers who hired 1,863 working persons with disabilities were allotted \$1.24 million under the SEC.<sup>180</sup>

With respect to the protection of women and children, the Singapore government ratified CEDAW (Convention on the Elimination of All

Forms of Discrimination against Women) and the CRC (Convention on the Rights of the Child) in 1995. Subsequently, in 1996, the Inter-Ministry Committee (IMC) on CEDAW was set up to oversee the implantation of the Convention in Singapore. It comprises 16 ministries and public sector agencies, which coordinate and implement initiatives under their purview to better address the needs of women. An inter-ministry committee on the CRC was also established at the same time, as the national mechanism to co-ordinate policies relating to children, and to monitor the implementation of the Convention in Singapore<sup>181</sup>

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

Although there has been some guidance on how business enterprises should respect human rights in their operations, the Singapore government appears keener to promote responsible business practice through the prism of Corporate Social Responsibility or 'CSR'. When it comes to Corporate Social Responsibility, some commentators suggest that the CSR movement in Singapore is largely government-led. According to Professor Eugene Tan, this means that the government maintains control and influence over how CSR is enforced. As such, there remains 'an aversion to undue CSR activism on the part of NGOs and civil society' which may 'detract from the business of generating profits.'<sup>182</sup>

177 CVM&L 2009 Report, 44.

178 Eugene Tay, *2012 Guide to Singapore Government Funding and Incentives for the Environment*, at <http://www.greenfuture.sg/2012/05/30/2012-guide-to-singapore-government-funding-and-incentives-for-the-environment>, accessed 30 May 2012.

179 'Hire disabled workers and get pay out,' *Straits Times*, 18 Feb 2012, at <http://www.spring.gov.sg/NewsEvents/ITN/Pages/Hire-disabled-workers-and-get-payout-20120218.aspx>, accessed 30 May 2012.

180 Ministry of Social and Family Development, '\$1.7M Paid Out Under Special Employment Credit (SEC) and Workfare Income Supplement (WIS) for Persons with Disabilities,' 20 Dec 2012, at <http://app.msf.gov.sg/PressRoom/17MPaidOutUnderSpecialEmploymentCredit.aspx>, accessed 10 Feb 2013.

181 Ministry of Community Development, Youth and Sports (MSYC), *Singapore's Initial Report to the Committee on the Rights of the Child*, December 2011, at [www.news.gov.sg/public/.../Media%20Release\\_Annexes.doc](http://www.news.gov.sg/public/.../Media%20Release_Annexes.doc), accessed 7 May 2012.

182 Eugene Tan, *The State of Play of CSR in Singapore*, Lien Centre for Social Innovation, July 2011, at <http://www.lcsi.smu.edu.sg/downloads/TheStateOfPlayOfCSRinSingapore.pdf>, accessed 30 May 2012.

Bodies like the Singapore Compact have been encouraged to promote CSR in Singapore, and the National Trades Union Congress (NTUC), has also played a large role. According to the Singapore Compact, Corporate Social Responsibility is about businesses doing well and doing good at the same time. 'CSR is about the long term strategy of aligning business strategy and operations with universal values to achieve positive and sustainable outcomes for customers, suppliers, employees, shareholders, communities, other stakeholders and as well as the environment.'<sup>183</sup>

At an event to introduce ISO 26000 to companies and CSR practitioners in February 2012, the Singapore Compact also made reference to the 3 pillars of protect, respect and remedy under the Ruggie Framework. During the session, 'due diligence' was discussed as an integral part of social responsibility. The Compact emphasised that the 3 pillars must be considered as part of the due diligence process.<sup>184</sup>

As the 'the local focal point for the UN Global Compact (UNGC)', the Singapore Compact supports its members to become participants of the UNGC. The ten accepted principles of the UNGC cover the protection of internationally recognised human rights, labour, the environment and anti-corruption. The Compact educates members on the UNGC and helps them to complete their Communications on Progress, part of the reporting procedure of signatories. As of August 2011,

Singapore had 78 participants in the UNGC.<sup>185</sup>

Though the Singapore Compact supports the UNGC, Singapore has yet to ratify some of the Conventions under its principles, such as the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise.

The Singapore National Employers Federation represents the interests of employers and participates in studies on employment related issues. It is an independent, autonomous, non-profit organization funded by membership fees and revenue from consultancy, training, research and other activities, but mostly consults on industrial relations. Both NTUC and SNEF are founder members of the Singapore Compact.<sup>186</sup>

Apart from the above, the Tripartite Alliance for Fair Employment Practices ensures that workers are hired on the basis of merit and are not discriminated against on the grounds of age, gender or other non-work-related factors.<sup>187</sup>

Although awareness of CSR has grown, efforts to fully implement CSR have been limited in Singapore, as with other countries elsewhere, as many local companies remain indifferent to the cause. The CSR movement in Singapore is largely based on a three-part system involving the government, employers and unions, and most local businesses view CSR as a compliance issue, rather than as a way to do business. Singapore's approach to CSR coincides with Singapore's political and cultural values where the promotion of collective social responsibility (individual and group), harmony, cohesion, and stability are given priority. As such, rather than encompassing human rights, at least

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183 Singapore Compact, *International Singapore Compact CSR Summit 2010*, at <http://www.csrsgroup.org/c/past-events/29-international-singapore-compact-csr-summit-2010>, accessed 23 Jan 2013.

184 Singapore Compact, Introduction to ISO 26000 International Guidance Standard to Social Responsibility – A Practical Introduction to Implementing CSR in All Types of Organizations, at <http://www.csrsgroup.org/c/past-events/111-introduction-to-iso-26000-international-guidance-standard-to-social-responsibility-a-practical-introduction-to-implementing-csr-in-all-types-of-organizations>, accessed 14 Apr 2012.

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185 Singapore Compact, *United Nations Global Compact (UNGC)*, at <http://www.csrsgroup.org/c/ungc>, accessed 20 May 2012.

186 Singapore Compact, *Singapore Compact for CSR*, at <http://www.singaporecsrsummit.org/about.asp>, accessed 9 Apr 2012.

187 Singapore UPR Report 2011, 9.

one commentator believes that CSR in Singapore to date has been focused on philanthropy or ‘cheque-book’ CSR and corporate governance issues.<sup>188</sup>

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

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

Singapore has thus far preferred a consensual approach over enacting law to regulate businesses, (e.g. Guidelines for Directors and the Code on Corporate Governance). Even so, more and more measures have been adopted to enhance corporate governance and corporate social responsibility (‘CSR’) via guidelines (non-binding), incentives, awards and certifications. In practice, statutory boards and ministries take most of the actions.<sup>189</sup> There is some coordination between government bodies to ensure consistency between human rights obligations and business practice, but the extent of such coordination is unclear.

One example is the 2010 initiative by the Ministry of Manpower and the Ministry of Home Affairs, to form an Inter-agency Taskforce on Trafficking in Persons. Civil society was asked to participate in a 3-month consultation process with the Inter-agency taskforce, in which a number of forums were held to feedback into the creation process of a National Plan of Action (NPA) on Trafficking in Persons. The taskforce has also received information, training and support in respect of observing human rights

188 Eugene Tan, *The State of Play of CSR in Singapore*, Lien Centre for Social Innovation, July 2011, at <http://www.lcsi.smu.edu.sg/downloads/TheStateOfPlayOfCSRinSingapore.pdf>, accessed 30 May 2012.

189 CVM&L 2009 Report, 15.

obligations when fulfilling their mandates.<sup>190</sup>

### 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 explicit State guidelines or regulations requiring or encouraging businesses receiving substantial support and services from State agencies to respect human rights. However, as noted above, the government works hard to promote better CSR practices amongst companies without legislating. Guidelines on Family Friendly Workplace Practices; Non-Discriminatory Job Advertisements; Flexible Work Schedules, and Best Work-Life Practices are a few examples, of recommendations that are encouraged. Awards to encourage better employment practices such as the work-life excellence award, family friendly organisation award and workplace safety and health awards have also been instituted. All organisations, including Government linked companies and beneficiary enterprises are encouraged to apply.<sup>191</sup>

190 Ministry of Manpower, *Singapore Inter-Agency Taskforce on Trafficking in Persons*, at <http://www.mom.gov.sg/foreign-manpower/trafficking-in-persons/Pages/default.aspx>, accessed 23 January 2013.

191 Melissa Ong, *Contextualising Corporate Social Responsibility in Singapore*, September 2009, at <http://www.spp.nus.edu.sg/docs/wp/2009/wp0916.pdf>

**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?**

There are no specific laws that apply to the privatisation of services that may impact on the enjoyment of human rights. Instead, Singapore relies on political, rather than legal checks to govern privatised services. The State takes measures to regulate the cost of housing and other services, including water. The rising cost of living has been a top concern for Singaporeans, and high property prices, pushed up by increased demand from a growing population, has contributed significantly to the problem.<sup>192</sup> In January 2013, the government took further measures to introduce stamp duties on foreign property buyers and announced that it was building 700,000 new government homes, in an effort to combat rising housing costs.<sup>193</sup>

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

Singapore is a member to the WTO General Procurement Agreement. When issuing public tenders, State bodies usually include 'detailed guidelines' which outline stipulations, prohibitions and restrictions on contractor obligations, particularly in relation to the environment. For example, in a tender on the lease of state land for a fish export centre, the detailed guidelines stipulated that 'Activities shall not produce any toxic

<sup>192</sup> Dara Ranasinghe, *Singapore's High Cost of Living May Come at a Cost*, 30 January 2013, at <http://www.cnn.com/id/100418370>, accessed 31 January 2013.

<sup>193</sup> Imelda Saad, *5,200 hectares more land to accommodate projected 6.9m population: govt*, 31 January 2013, at <http://www.channelnewsasia.com/stories/singaporelocalnews/view/1251352/1.html>, accessed 31 January 2013.

product/s or by-product/s that can adversely affect surrounding use.<sup>194</sup>

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

Not applicable.

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

Though it has a strong domestic regulatory framework for businesses, Singapore's framework for the regulation of business overseas is more limited.

### Child Sex Tourism

Under the Convention of the Rights of the Child, Singapore has international treaty obligations to enact extraterritorial law to cover child sex offences.

From 2004-2006, public support for government proposed extraterritorial legislation was tremendous. A State media poll showed that 1 in 5 pollsters knew of at least one Singaporean man who had sex with under-age prostitutes abroad.<sup>195</sup> As a result, in 2006 the Singapore government decided to take firm action and amend the laws to extend extra-

<sup>194</sup> Singapore Land Authority, *Tender for State Land - Lorong Chencharu*, at [http://www.sla.gov.sg/Land\\_Sales/lorong\\_chencharu/Parcel%2010%20\\_FULL%20COT%20with%20APPENDICES\\_.pdf](http://www.sla.gov.sg/Land_Sales/lorong_chencharu/Parcel%2010%20_FULL%20COT%20with%20APPENDICES_.pdf), accessed 14 April 2012.

<sup>195</sup> AWARE Singapore, *Beyond Borders: Sex with Children, Implementing extraterritorial legislation for Singaporeans*, January 2006, at <http://www.aware.org.sg/wp-content/uploads/Beyond-Borders-Sex-with-Children.pdf>

territorial jurisdiction over Singapore nationals who sexually exploit minors overseas. The Penal Code was amended in 2007 to make it an offence for any person who is either a citizen or permanent resident of Singapore to engage in commercial sex with a minor under the age of 18 outside of Singapore.<sup>196</sup> These amendments hold liable any person who organises any travel arrangements for another person with the intention of facilitating the commission of such an offence (sex tourism).<sup>197</sup> Although the law has now been in effect for over 5 years, there have yet been no reported prosecutions of any Singapore national or permanent resident for child sex tourism.<sup>198</sup>

### Prevention of Corruption

Before enacting laws against child sex tourism, Singapore had already implemented extra-territorial laws to address other business and human rights concerns, including the Prevention of Corruption Act<sup>199</sup> and the Computers Misuse Act.<sup>200</sup>

The Prevention of Corruption Act addresses acts of corruption taking place outside and within Singapore and is actionable against Singapore citizens only. The extraterritorial dimension was added to the 1966 Amendment bill, which was passed without much debate.

The extremely broad legislation can tackle acts of corruption abroad by a Singaporean, which have no impact on Singapore. A citizen can fly to Indonesia for example, and participate in corrupt activities and

can be prosecuted in Singapore upon his return.<sup>201</sup>

### Other Business Activities

Despite its relatively strong business regulatory framework, Singapore came under fire in 2010, when the NGO Global Witness released a report alleging that Singapore's sand imports from Cambodia had a devastating effect on Cambodia's ecosystems and its citizens' livelihoods.<sup>202</sup>

Although the Cambodian government banned sand exports, the country's sand industry is largely unregulated and continues to export sand. Dredging operations from one province alone, worth an estimated US\$248 million annually, were carried out in rivers and estuaries along Cambodia's coastline, inside protected areas and in close proximity to ecosystems and habitats that are home to endangered aquatic species. There were also complaints from fishermen that their livelihoods have been adversely affected as seafood harvests diminished once dredging was carried out.<sup>203</sup>

Singapore's response was that the sand was not imported by the Singapore government but rather by private companies. The government also stated that the companies in Cambodia that had concessions and that they operated within Cambodia's laws and regulations to legally procure the sand. As long as the sand was not smuggled or illegally procured, Singapore said it would not stop the import of the sand.

The Singapore government maintained that all government agencies constantly reminded the

196 Penal Code, Section 376C; Singapore Statutes (Cap 224). Under section 376B, a person convicted of this offence may be punished with imprisonment of up to 7 years, or with a fine, or both.

197 Ibid., Section 376D.

198 United States Department of State, *Trafficking in Persons Report*, June 2011, at [www.state.gov/j/tip/rls/tiprpt/2011](http://www.state.gov/j/tip/rls/tiprpt/2011)

199 Singapore Statutes, Cap 241.

200 Ibid., Cap 50A.

201 AWARE Singapore, *Beyond Borders: Sex with Children: Implementing Extraterritorial Legislation for Singaporeans*, accessed 30 Dec 2012.

202 Global Witness, *Shifting Sand: How Singapore's demand for Cambodian sand threatens ecosystems and undermines good governance*, at [http://www.globalwitness.org/sites/default/files/pdfs/shifting\\_sand\\_final.pdf](http://www.globalwitness.org/sites/default/files/pdfs/shifting_sand_final.pdf), 4, accessed 30 Dec 2012.

203 Ibid., 15.

contract vendors for their projects to act responsibly while delivering their projects. Checks for valid documents and licenses were constantly carried out by the government agencies and the Singapore customs investigated all imported goods for the legality of documentation and procurement.

The Ministry of National Development further stated that it was not up to Singapore to police or enforce such laws on exporters; such responsibility lay with Cambodia as a sovereign state with control over access to these resources. The press statement, however, did state that sand needed to be extracted in an environmentally sustainable manner.<sup>204</sup>

#### *Relationship with Myanmar*

Singapore's cumulative foreign direct investment into Myanmar between 1989-2012 was USD1818 million, making it the second largest direct foreign investor in the country from the Association of Southeast Asian Nations as of 2012.

However, as there exists no international extraterritorial human rights obligations that govern the financial and investment relationships of states, it is unclear how this relationship should be addressed. As a large foreign creditor of Myanmar, Singapore is well placed to insist on responsible investment, now that reforms in the country are underway.<sup>205</sup>

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204 Fazlin Abdullah and Goh Ann Tat, *The Dirty Business of Sand – The Case of Cambodia Sand Dredging*, at [http://www.spp.nus.edu.sg/docs/case/LKYSPPCaseStudy12-01\\_Dirty\\_Business\\_of\\_Sand.pdf](http://www.spp.nus.edu.sg/docs/case/LKYSPPCaseStudy12-01_Dirty_Business_of_Sand.pdf)

205 Mahdev Mohan, Lan Shiow Tsai & Salil Tripathi, 'Human Rights Challenges Amidst Myanmar's Gold Rush', 28 Sep, 2012, at <http://www.ihrb.org/publications/op-eds/human-rights-challenges-amidst-myanmars-gold-rush.html>, accessed 8 Oct 2012.

### **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?**

It is not known to what extent human rights and business feature as part of discussions and coordination between governmental departments, agencies and other State-based institutions in Singapore. However, Singapore's Civil Service College is the public sector's core institution for training, learning, research and staff development, and offers public servants in Singapore courses in a wide range of areas, including governance, management practices and social policy, including racial discrimination among others.<sup>206</sup>

### **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?**

When concluding economic agreements with other States or business enterprises, it is not clear if the Singapore government has proactively taken steps to ensure adequate domestic policy space.

As a member of ASEAN, Singapore has been part of ASEAN-Asia FTAs, which mention labour and environmental standards.<sup>207</sup>

The US-Singapore FTA is the first FTA which the US has with an Asian country. It is the only FTA (of a total of 18), which requires Singapore to adhere

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206 Civil Service College Singapore, *Programmes*, at <http://www.cscollege.gov.sg/Programmes/Pages/Default.aspx>

207 IE Singapore, *Singapore FTAs*, at [http://www.fta.gov.sg/fta\\_acfta.asp?hl=2](http://www.fta.gov.sg/fta_acfta.asp?hl=2), accessed 27 May 2012.

to certain protocols, which govern human or labour rights. In Chapter 17 of the FTA, entitled 'Labour', both governments were required to reaffirm their respective obligations as members of the International Labour Organization (ILO) and their commitment to the ILO Declaration of Fundamental Principles and Rights at Work. The agreement also requires that both governments ensure that they do not waive domestic labour laws in a manner that weakens the country's adherence to internationally recognized labour rights so as to encourage trade or investment. In addition, Chapter 18 of the agreement dictates that both countries need ensure that they undertake environmental measures necessary to protect human, animal, or plant life or health, and do not weaken domestic environmental protections to encourage trade or investment.

However, there have been concerns that the agreement 'Integrated Sourcing Initiative' (ISI) has created a loophole by allowing products produced in the Indonesian islands of Bintan and Batam to be treated as if they were of Singaporean origin, even though the labour laws and environmental protection schemes under the FTA do not apply to these islands.<sup>208</sup> That said, the production from these two islands is largely in the hands of Singaporean companies or multinationals headquartered in Singapore.<sup>209</sup>

Negotiations for the EU-Singapore FTA concluded in 2012. The EU Trade Commissioner Karel De Gucht previously said that a Partnership and Cooperation Agreement (PCA) would be needed before the EU would enter into FTA talks with any country. This is of significance because PCAs normally include significant political clauses, including the respect

208 Carnegie Endowment Fund, *Serious Flaw in U.S.-Singapore Trade Agreement Must Be Addressed*, 1 April 2003, at <http://www.carnegieendowment.org/2003/04/01/serious-flaw-in-u.s.-singapore-trade-agreement-must-be-addressed/eit>, accessed 27 May 2012.

209 IE Singapore, *Overview of United States (USSFTA)*, at [http://www.fta.gov.sg/fta\\_ussfta.asp?hl=13](http://www.fta.gov.sg/fta_ussfta.asp?hl=13), accessed 27 May 2012.

for democratic principles and fundamental human rights.<sup>210</sup>

As noted above, Singapore is a member to the WTO General Procurement Agreement, which encourages State bodies to issue detailed guidelines when issuing public tenders.

### 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?

Singapore is a member of the International Monetary Fund (IMF), World Bank, Asian Development Bank (ADB), and ASEAN. Apart from as a member of ASEAN, it is not known if Singapore has referred to business and human rights principles in its statements at other institutions.

Within ASEAN, Singapore has engaged with business and human rights through its former representative to the ASEAN Intergovernmental Committee on Human Rights, Richard Magnus. In 2010, the Special Advisor of the SRSG met with the ASEAN Intergovernmental Commission on Human Rights during its visit to the United States and in March 2011 there was a further meeting in Singapore. Singapore, Indonesia and Malaysia were part of the SRSG's Corporate Law Project involving independent submissions from over 20 leading corporate law firms on how corporate and securities law in over 40 jurisdictions encourages companies to respect human rights.<sup>211</sup>

210 EU Centre in Singapore, 'The EU-Korea FTA and its Implications for the Future EU Singapore FTA', June 2011, at <http://www.eucentre.sg/articles/296/downloads/BackgroundBrief-The%20EU-Korea%20FTA%20and%20its%20Implications%20for%20the%20Future%20EU-Singapore%20FTA.pdf>, 31, accessed 27 May 2012.

211 Business and Human Rights Resource Centre, *SRSG Corporate Law Project*, at <http://www.businesshumanrights.org/SpecialRepPortal/Home/CorporateLawTools>, accessed: 14 Apr 2012.

Singapore 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 1 January 2012; this would presumably mean that Singapore would need to ensure that investments by IFC in Singapore 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. In February 2012, it was announced that the IFC plans to tie up with GIC (Government of Singapore Investment Corporation) Singapore to set up a US\$1 billion infrastructure fund to further the adoption of sustainability by banks.<sup>212</sup>

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212 Rachel Kelly, 'Financial institutions heeding call to address climate change,' *Channel News Asia*, 9 Feb 2012, at <http://www.channelnewsasia.com/stories/singaporebusinessnews/view/1182016/1/.html>, accessed 30 May 2012.

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?**

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

Singapore does not have a formal state-administered Human Rights Institution. Its existing legislative framework addresses most of the relevant corporate related human rights concerns in the country. See 3.2 above.

However, the Singapore judicial system has expanded beyond the traditional scope of judicial adjudication and actively promulgates court-based mediation or out-of-court settlement mechanisms with capabilities to address human rights issues, including corporate-related human rights abuses. These private and state-administered institutions form a loose network of grievance mechanisms in Singapore, with huge potential to provide remedies for victims of business-related human rights abuses in the country.

#### **Private Commercial Arbitration/Mediation**

The Singapore International Arbitration Centre handles civil and commercial arbitration.

The Singapore Mediation Centre (SMC) handles any civil matter so long as parties agree to mediation. It has handled a wide range of cases, which include probate disputes, construction disputes, corporate disputes and tenancy disputes. Mediation aims for parties to come to an agreement on an outcome that

is acceptable to both parties. If there is an agreed outcome after the mediation, the mediator will draft a contract known as the Settlement Agreement and both parties will have a chance to review this Agreement. Once both parties have signed the Settlement Agreement, they are bound by the terms of the contract. If any party refuses to adhere to any term in the Settlement Agreement, the Agreement can be enforced via usual methods of enforcing a contract e.g. bringing the defaulting party to court.

In terms of business and human rights issues, to date, SMC has not been involved in disputes between companies and communities, nor corporate-related human rights disputes for the community. Three main obstacles to a corporate-related human rights abuse case being brought to SMC have been identified. First, the publicity for SMC's services has been on commercial entities and thus victims of corporate-related human rights abuse might not be aware of this mechanism. Second, the relatively high mediation fees might be an unbearable financial hurdle for most victims of corporate human rights abuse. Third, as the concept of 'mediation' is promised on the consensus, both parties in a disagreement must agree and commit to the mediation process in order for it to be successful. Without due leverage to persuade corporate entities to participate in mediation conducted by SMC, using SMC as a platform to address issues of corporate human rights abuse may pose challenges.

### Court-Based Mediation

Court-based mediation takes place after the commencement of litigation proceedings in the Subordinate Courts, where the Primary Dispute Resolution Centre (PDRC) coordinates it. Upon written application for court dispute resolution (CDR), the PDRC Administrator will fix a CDR session and parties concerned will be notified by

letter to appear before a Settlement Judge on a given date and time.

In certain CDR processes, the Settlement Judge will conduct an early neutral evaluation and give a non-binding indication of how he sees the merits of the case based upon the evidence presented by parties or their lawyers at the time of the CDR process. This indication is not binding on the parties but may function as a guide to the parties on the terms of a settlement.

Alternatively, the parties may wish to obtain a binding evaluation from the judge. Parties can agree, by writing, to be bound by the Settlement Judge's evaluation.

There is also the mediation-arbitration procedure, by which if a Settlement Judge has settled most of the issues in a dispute, the Settlement Judge can direct, if parties agree, to refer the outstanding issues for hearing in chambers before a Deputy Registrar of the Subordinate Courts.

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

In Singapore, the Courts remain one of the main remedies for any violations of the law, including violations of human rights. Although many Singapore laws guard against violations of business and human rights and allow access to remedy, there remains room for the improvement of legislation, particularly in relation to the protection of migrant workers.

According to the CEDAW Committee's 2011 Report on Singapore, the Committee said that it remained concerned at the continuing prevalence of trafficking in women and girls in the country. It also said that such issues will always be sensitive to Singapore, and

a balance must be struck between free expression and preservation of race and religious harmony.<sup>213</sup>

To combat discrimination in the workplace, the Committee recommended that Singapore remove the indication of one's ethnic background on identification documents, so as not to perpetuate ethnic categorization of citizens and to lessen the significance of ethnic identity in one's interactions with the State and within Singaporean society at large. In addition, the Committee recommended a stand-alone law dedicated to the prohibition of racism, racial discrimination, xenophobia and related intolerance in the country.<sup>214</sup> In response, the Singapore government asserted that existing provisions are sufficient to prevent and combat racism and discrimination and that a non-discrimination statute of a general nature might not be the best option for the country. It also said that such issues will always be sensitive to Singapore, and a balance must be struck between free expression and preservation of race and religious harmony.<sup>215</sup>

Apart from ethnic and religious groups, the discrimination of other minorities in the workplace, including LGBT persons,<sup>216</sup> as well as the disabled, has been raised by civil society.<sup>217</sup> In

213 Imelda Saad & Jeremy Koh, 'Maintaining racial harmony imperative to Singapore's survival', *Channel News Asia*, 28 Apr 2010, at <http://www.channelnewsasia.com/stories/singaporelocalnews/view/1053184/1.html>, accessed 27 Oct 2012.

214 UN CEDAW Committee, *Concluding Observations of the Committee of All Forms of Discrimination against Women*, at <http://app1.mcys.gov.sg/Portals/0/Files/CEDAW-C-SGP-CO-4.pdf>, accessed 24 Jul 2012.

215 Imelda Saad & Jeremy Koh, 'Maintaining racial harmony imperative to Singapore's survival.'

216 Sayoni, 'Shadow Report (CEDAW) on Discrimination against Women in Singapore based on Sexual Orientation and Gender Identity Version,' 8 Aug 2011, at [http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Sayoni\\_Singapore49.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/Sayoni_Singapore49.pdf), accessed 27 Oct 2012.

217 Disabled People Association, '2nd Consultation on the Convention on the Rights of People with Disabilities,' 2 Dec 2012, at <http://www.dpa.org.sg/?our-event=2nd-consultation-on-the-convention-on-the-rights-of-people-with-disabilities>, accessed 10 Feb 2013.

an effort to improve the rights of the disabled in the workplace, Singapore acceded to the United Nations Convention on the Rights of Persons with Disabilities on 30 November 2012.

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

There are no 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 powers to enable it to contribute to the area of business and human rights?**

Singapore does not have an NHRI, though the Human Rights Committee recommended that one be established during the Universal Periodic Review in July 2011. Singapore's response was that UN member countries continue to have different approaches to the idea of a National Human Rights Institution.

It further stated that it prefers a decentralised, but inter-locking and mutually reinforcing system of human rights protection, which from its experience, has worked well. However, it is unclear what this purported 'inter-locking and mutually-reinforcing system of human rights protection' involves or includes. In fact, the need to have a centralised supervising body is enhanced, not diminished by an 'interlocking and mutually-reinforcing' system of human rights protection.

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

In July 2012, the Singapore Management University joined forces with the East-West Centre, Honolulu, the University of Zurich, the War Crimes Study Centre at the University, Berkely, the Human Rights Resource Centre, and the International Institute for Child Reights and Development to host the Summer Institute on Business and Human Rights, which brought together distinguished experts from 19 countries in the Asia-Pacific, Latin America, Europe and the United States, including lawyers, policy-makers, United Nations (UN) and ASEAN officials, NGO practitioners and key business representatives, to discuss and examine issues relating to ‘Business and Human Rights’ in the Asia-Pacific region. A representative of the ASEAN Intergovernmental Commission was also present.<sup>218</sup>

In November 2011, the Lee Kuan Yew School of Public Policy at the National University of Singapore hosted Salil Tripathi, Director of Policy at the Institute for Human Rights and Business in London, at a lunchtime talk. His lecture on ‘The Protect-Respect-Remedy Framework for Business and Human Rights’ outlined the Ruggie Framework and its various challenges.<sup>219</sup>

Finally, non-governmental organisations that focus on migrant worker rights reached out to business in April 2012, at an event entitled ‘Developing Business Partnerships to Combat Human Trafficking’. The event brought together senior level business executives, Singapore Compact, NGOs

and a Singapore Minister of State to discuss human trafficking in Singapore, however as the Framework and Guiding Principles are not yet well known, the event did not refer to them explicitly.<sup>220</sup>

218 Singapore Management University, ‘SMU hosts Summer Institute on Business and Human Rights,’ 16 Jul 2012, at [http://www.smu.edu.sg/news\\_room/press\\_releases/2012/20120716.asp](http://www.smu.edu.sg/news_room/press_releases/2012/20120716.asp), accessed 24 Jul 2012.

219 Asif Mehmood & Salil Tripathi, ‘The Protect-Respect-Remedy Framework For Business and Human Rights,’ Lee Kuan Yew School of Public Policy, at [http://www.spp.nus.edu.sg/20111114\\_Salil\\_Tripathi.aspx](http://www.spp.nus.edu.sg/20111114_Salil_Tripathi.aspx), accessed 24 Jul 2012.

220 One Singapore, ‘Developing Business Partnerships to Combat Human Trafficking,’ 27 Apr 2012, at <http://www.onesingapore.org/events/developing-business-partnerships-to-combat-human-trafficking>, accessed 24 Jul 2012.

## Summary

Although the Singapore Constitution does not contain an explicit recognition of the State's Duty to Protect, the generality of the language of fundamental liberties provisions in the Singapore Constitution may provide the basis for judicial the courts to read into the Constitution, the State Duty to Protect. While there is no single law or set of regulations in Singapore that explicitly require business enterprises to avoid causing or contributing to adverse human rights impacts through their activities, operations, products or services, there are several laws and regulations that could be said to have this effect despite the lack of specific wording.

Singapore has done well in promoting the rule of law, and preventing and combating corruption. However, it has not acceded to most of the core international human rights conventions. It has only acceded to and ratified the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), among the nine core conventions. In addition, it has acceded to and ratified the Convention on the Prevention and Punishment of the Crime of Genocide and most recently acceded to but not yet ratified the Convention on the Rights of Disabled Persons. Business and human rights issues include labour rights of migrant workers; especially that of foreign domestic workers and unskilled or low-skilled foreign workers; and sexual harassment.

Singapore has a number of State agencies with responsibility to prevent, investigate, punish and redress business-related human rights abuses such as the Accounting and Corporate Regulatory Authority ("ACRA"), Ministry of Manpower and the Ministry of Environment and Water Resources. These agencies are charged with the responsibility of examining a range of issues that fall within the spectrum of human rights abuses, such as corruption, labour rights and environmental protection. In terms of directors' duties, there is no duty or obligation in common law or in legislation requiring directors to consider businesses human

rights impacts in carrying out their role. However, directors are required to act in the company's best interests, and correspondingly, have regard to the interests of the company's employees generally, as well as the interests of its members.

As part of awareness initiatives, State agencies have released and constantly updated guidelines on corporate governance and social responsibility. For the most part, Singapore relies on companies to take a proactive response in behaving ethically, without the legal obligation to do so. With a strong record in implementing and enforcing the rule of law, Singapore is well placed to implement the Ruggie Framework and the State Duty to Protect against business and human rights abuses.



THAILAND

by:

Pawat Satayanurug

## BASELINE REPORT: THAILAND

### Overview

The Kingdom of Thailand (Thailand) is situated in Southeast Asia, with its area covers 513,120 sq.km, bordering Myanmar to the West, Cambodia and Laos to the East, and Malaysia to the South. Thailand's economy has largely depended on exports, and from since 1997-1998 crisis, Thailand has experience consistent economic growth at the average rate of 4%. In 2010, the country experienced the highest economic growth since 1995 at 7.8% before plunging to around 4% in 2011 due to historic flooding. The GDP per capita is roughly at \$9,500 in 2011, and its labour force at 39.62 million makes Thailand the World's 16th.<sup>1</sup>

In relation to business and human rights, Thailand is party to seven major international human rights instruments namely Convention on the Rights of the Child (CRC), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social, and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Racial Discrimination (CERD), Convention Against Torture (CAT), and Convention on the Rights of Persons with Disabilities (CRPD).<sup>2</sup>

Due its dualist approach, Thailand has implemented its international obligations into its domestic legislations. In addition, Thailand's Constitution establishes the National Human Rights Committee (NHRC) to become the major focal point of contact to receive complaints of potential human rights violation. One of its current projects is to conduct active strategic studies on business-related human rights violations – encompass, among others, issues concerning labour, environment, and women and children – at greater length including the proposition to create Corporate Social Responsibility (CSR) guidelines that relatively mirror the one issued by the UN Global Compact and the OECD.

Moreover, at the corporate level, it is welcoming that certain business firms begin to voluntarily incorporate CSR into their business strategy, by, for instance, adopting international CSR best practices such as the Global Reporting Initiative (GRI) into their business operation.

1 CIA World Fact Book, "Thailand," at <https://www.cia.gov/library/publications/the-world-factbook/geos/th.html>, accessed 1 September 2012

2 Office of the National Human Rights Commission of Thailand, "Thailand's International Human Rights Obligations," at [http://www.nhrc.or.th/2012/wb/th/contentpage.php?id=21&menu\\_id=2&groupID=2&subID=19](http://www.nhrc.or.th/2012/wb/th/contentpage.php?id=21&menu_id=2&groupID=2&subID=19), accessed 1 September 2012

### Snapshot Box

Types of business entities permitted by law <sup>3</sup>	<p>Under CCC</p> <ul style="list-style-type: none"> <li>• Ordinary partnerships (1,027)</li> <li>• Limited partnerships (157,506)</li> <li>• Limited companies (343,216)</li> </ul> <p>Under the PLC Act</p> <ul style="list-style-type: none"> <li>• Public limited companies (920)</li> </ul> <p>State-owned or-controlled enterprises</p> <ul style="list-style-type: none"> <li>• State-owned, incorporated by Act</li> <li>• State-owned, incorporated by Royal Decree pursuant to the B.E.2496 Act</li> <li>• State-owned banks</li> <li>• State-owned or –controlled limited companies</li> </ul>
Number of Multinational Business Enterprises operating in the country	N/A
Number of Small and Medium Business Enterprises operating in the country	N/A
Number of State-owned Enterprises and the industries in which they operate	<p>9 categories</p> <ol style="list-style-type: none"> <li>1) Energy (4)</li> <li>2) Transportation (11)</li> <li>3) Communication (4)</li> <li>4) Public Facilities (6)</li> <li>5) Industrial and Commercial (8)</li> <li>6) Agriculture (6)</li> <li>7) Natural Resources (3)</li> <li>8) Society and Technology (5)</li> <li>9) Financial Institutions (10)</li> </ol>
Flow of Foreign Direct Investment from 2008 to 2012	N/A
Number of cases involving business-related human rights abuses reported to NHRIs, and/or other national human rights bodies or international human rights bodies	<p>NHRC</p> <ul style="list-style-type: none"> <li>• 1 October 2011 – 10 February 2012: 173 cases</li> <li>• 1 October 2010 – 30 September 2011: 694 cases</li> <li>• 1 October 2009 – 30 September 2010 707 cases</li> </ul>

<sup>3</sup> Department of Business Development Royal Thai Government, “Information Concerning the Registration of Juristic Persons – February 2012,” issued 1 March 2012.

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

The subject of correlation between business and human rights has recently gained an increasing prominence at the international level, as the topic has been placed on agenda at various meetings of international organizations, undoubtedly including the United Nations. Resulting from such meetings are several initiatives to form guidelines in order to provide guidance for the protection of human rights caused by business-related operations. Two notable examples are the UN Global Compact and the OECD Guidelines for Multinational Enterprises; the instruments that recognize that business activities can have a negative impact on human rights. Furthermore, in 2011, the United Nations endorsed Guiding Principles prepared by the team of Special Rapporteur Professor John Ruggie called the United Nations “Protect, Respect and Remedy” Framework [hereinafter referred to as “the UN Framework”].<sup>4</sup>

The UN Framework rests on three pillars: “protect, respect and remedy”.<sup>5</sup> Accordingly, the UN Framework elaborated upon a State duty to protect human rights, a corporate responsibility to respect human rights, and the need for effective remedies in the event following corporate breaches of human rights.<sup>6</sup> Regarded as the “authoritative focal point”<sup>7</sup> for further discussion and research at the greater depth, the UN Framework is used in this report as a skeleton for the purpose of examining the business and human rights issue in Thailand.

At present, the government of Thailand has neither made any formal reaction nor reference specifically to the UN Framework, whether through any formal declarations or court judgments. However, similar

4 John Ruggie, Report of the Special Representative of the Secretary-General on the issues of human rights, transnational corporations and other business enterprises, “Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, 21 March 2011. A/HRC/17/31

5 Ibid.

6 Ibid.

7 Ibid., 3

to other members of the Human Rights Council, Thailand endorsed the Council resolution on the Guiding and the establishment of a Working Group on Business and Human Rights. At the broader level, Thailand has made international pledge to voluntarily affirm human rights, as it stated “Thailand is firmly committed to the respect for human dignity, justice, compassion, non-discrimination, and a sense of mutual obligations to the fellow human beings.”<sup>8</sup> Thailand is also committed to fully cooperate with the Human Rights Council and to reaffirm its belief that all human rights are indivisible, interdependent and interrelated and will continue to promote and protect all human rights, be they civil, political, economic, social, and cultural rights, and the right to development on an equal footing.<sup>9</sup>

With reference to business and human rights, echoing the outcome of the Final Report by the Advisory Council of Jurist (ACJ), an independent organ, at the Asia Pacific Forum that various ‘soft law’ initiatives such as the OECD Guidelines and the ILP Declaration of Principles for Multinational Enterprises have been generally proven to attain a higher level of achievement than the binding international rules<sup>10</sup>, the scenario of corporate human rights accountability in Thailand also rely on guidelines and best-practices rather than the binding legal rules. This will be further elaborated at the later part of this research.

### Status of Business-related Human Rights Violation in Thailand

While Thailand has neither made any formal reaction nor reference to the UN Framework as indicated, the National Human Rights Commission of Thailand (NHRC) is currently given mandated to conduct active strategic studies on business-related

8 The Permanent Mission of Thailand to the United Nations, “Thailand’s Voluntary Pledges and Commitments in the field of human rights,” Letter No.56101/643, April 24, 2006

9 Ibid.

10 ACJ Reference on Human Rights, Corporate Accountability and Government Responsibility Report, see <http://www.oecd.org/dataoecd/56/36/1922428.pdf>

human rights violation at greater length.<sup>11</sup> Its studies include the proposition to create Corporate Social Responsibility (CSR) guidelines that relatively mirror the one issued by the UN Global Compact and the OECD; the study that will seek cooperation with the CSR Asia organization, commencing July 2012.<sup>12</sup>

However, at this point, it is premature to canvass a definite character of what issue would constitute business-related human rights violations, as a number of claims to NHRC seem to have business elements added to them. At the moment, the NHRC receives claims on human rights violation pertaining to a number of contexts, ranging from labour rights to environment. Certain relating areas are highlighted in Question III.2.2.

## **II. Is the State duty to protect against human rights abuses by third parties, including businesses (“State Duty to Protect”), recognized in the country’s domestic legal system?**

Thailand is a party to most major international human rights instruments; hence, by virtue of its dualist approach, its domestic laws, particularly the Constitution and the Criminal Procedure Code, incorporate and endorse such international human rights obligations. Notwithstanding the general human rights protection accorded under the existing domestic laws, Thailand has not ratified certain international instruments, such as International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which should deal directly with the problems of human rights abuses involving business activities. Among the issues, which could potentially become the problem of human rights abuses involving business activities, is the problem on migrant workers. Being an important hub for migrant workers, the context in Thailand largely

implicates the abuses of the rights of migrant workers, including poor working conditions and working rights restrictions. Furthermore, the problem could also aggravate to involve forced labour or even child labour. Therefore, it is fair to conclude that specific consideration on the human rights protection involving abuses by business activities is still lacking in Thailand.

On another angle, Thailand’s corporate laws do not contain any specific reference to corporate human rights accountability. Rather, they merely prescribe requirements needed to form a business entity, general duty of directors, and responsibilities of directors in time of breach or damage.

### **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?**

Thailand has not taken a specific position in response to the Framework on State Duty to Protect. However, there exist a number of Thailand’s obligations to uphold fundamental human rights and to prevent human rights violations.

#### **a) Constitution**

In general, the Constitution of the Kingdom of Thailand B.E.2550 (2007), or the Constitution,<sup>13</sup> expressly provides a basis for the affirmation of fundamental human rights, which undoubtedly encompasses the issues on business-related human rights, and reflects the State’s duty to protect those who are violated. The Constitution affirms that all persons, men and women, are equal before the law and shall enjoy equal protection under the law.<sup>14</sup> The Constitution also prohibits unjust discrimination against a person on the grounds of difference in origin, race, language, sex, age, physical and health condition, personal status, economic or social standing, religious belief, education, or Constitution

11 Thai National Human Rights Commission officer, interview by Pawat Satayanurug, Bangkok, Thailand, June 19, 2012

12 Ibid.

13 Constitution of the Kingdom of Thailand B.E. 2550 (2007) [“Constitution”]

14 Constitution, Article 30, para. 1

political views.<sup>15</sup>

In addition, the Constitution affirms that all persons shall enjoy the liberties to engage in an enterprise or an occupation and to undertake fair and free competition,<sup>16</sup> as well as to have the right to receive the guarantee of personal safety and security at his or her work, including the guarantee of life security both during and after his or her working period, as provided by law.<sup>17</sup>

## b) Labour

One of the most notable obligations relating to the prevention of human rights violation arising from the course of business conduct is undoubtedly the obligation to ensure labour protection. To ensure that fundamental protection of human rights for labours is carried out, the Labour Protection Act B.E. 2541 (1998)<sup>18</sup> was enacted, and subsequently amended in 2008. It imposes the duties to employers not to engage in human rights violation arising from the course of the work against all workers regardless of nationality and legal status. However, certain types of employers are excluded from its obligation under the Act: central, provincial, and local administrations; state enterprise under the law of the State Enterprise Labour Relation; and other employers as specified in the Ministerial Regulations.<sup>19</sup> Such other employers include those carrying on the business of a private school under the law governing private schools on the position of headmasters and teachers<sup>20</sup>, those who recruit employees for housework and who are not involved in any business whatsoever<sup>21</sup>, and those who undertake non-profit activities<sup>22</sup>. Moreover, certain types of work are given different labour protection rules as prescribed in the Ministerial Regulations:

15 Constitution, Article 30, para. 2

16 Constitution, Article 43

17 Constitution, Article 44

18 Labor Protection Act B.E. 2541 (1998) ["Labor Protection Act"]

19 Labor Protection Act, Section 4

20 Ministerial Regulations B.E. 2541 (1998) issued under the Labor Protection Act B.E. 2541 (1998), Issue 1, Section 1

21 Ibid., Issue 2, Section 2

22 Ibid.

agriculture, sea fishing, loading or unloading of marine cargoes, home work, transport work, and any other work as mentioned in the Royal Decree. Explicit exclusion from the compliance with the Act are the business organizations that are governed by Security and Stock Exchange Act B.E. 2539 (1996) and High Private Institute Education Act B.E. 2546 (2003).

Generally, the employers are bound to treat the employees in accordance with the rights and duties prescribed in the CCC.<sup>23</sup>

## c) Environment

Another probable aspect of human rights violation arising from the course of business conduct encompasses environment. Declared as one of the fundamental rights all individuals are entitled to enjoy, particularly and specifically addressed under the Constitution<sup>24</sup>, Thai law contains a number of environment-related legislations aiming to address the issue. Before 1975, Thailand has yet enacted any law, which directly and holistically concerns the management of environmental problem. Only specific laws dealing with particular problems such as those concerning the regulation of industrialized factories or the maintenance of public health were enacted. The very first comprehensive environmental legislation was enacted in 1975, titled 'the Enhancement and Conservation of National Environmental Quality B.E.2518', establishing the National Environmental Committee, and the Office of the National Environmental Committee to be responsible for all environmentally-related issues in a holistic picture. The Act was superseded in 1992 by the B.E.2535 Act<sup>25</sup> of the same title, replacing the Office of the National Environmental Committee by establishing Office of the Natural Resources and Environmental Policy and Planning, Pollution Control Department, and Department of Environmental Quality Promotion.

23 Labor Protection Act, Section 14

24 Constitution, Part 8

25 The Enhancement and Conservation of National Environmental Quality Act B.E.2535 (1992) ["Environmental Quality Act"]

Among the ultimate objects and purposes of the 1992 Act are to encourage individuals and private entities to promote and conserve environmental quality; to accord the powers and duties of government agencies (both central and locals), public entities, and state enterprise to coordinate and be jointly tasked to promote and conserve environmental quality; and to clearly identify the responsibility of those whose actions cause pollution and/or other harms to the environment.<sup>26</sup>

#### d) Land

Thailand is an agricultural country, and the large part of its income relies on the agricultural sector that utilizes land. As affirmed in the Constitution, the state must fairly distribute the land ownership and strive to ensure the ownership or right to make use of land for agricultural purpose to farmers.<sup>27</sup> In addition, to ensure that those working in the agricultural sector possess land, the Land Reformation for Agriculture Act B.E.2518 (1975), with the latest revision in 1989, was enacted to alleviate the problem of non-ownership of land that once forced many to let land and pay a great sum of money, to fairly distribute lands to maximize their utility, and to narrow the gap of social inequality.<sup>28</sup> Consequently, the promulgation of the Act indicates Thailand's intention to protect its nationals from the non-ownership of land, and to ensure their fundamental right to work.

Moreover, to prevent the excessive exploitation and deterioration of land quality from, for instance, business operations, the Land Development Act B.E.2551 (2008) was enacted. The term "land development" refers to any acts carried out to improve land quality or to increase productivity without compromising the land quality, and also refers to the improvement of land that is infertile naturally or by excessive uses.<sup>29</sup> The Act stipulates measures to conserve land and water to reduce the

erosion rate and to prevent landslide, and prohibits any acts that may cause pollution or contamination to land.<sup>30</sup> Hence, business entities are prohibited from operating in the way that would pose harmful effects to land.

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

Recognition on the State Duty to Protect by the Thai courts has not been made explicit. However, the recent development in the case concerning the industrial pollution to the local community caused by the Map Ta Phut industrial estate, or the "Map Ta Phut" case, deserves an attention. The crux of the case concerns the alleged negligence of the National Environmental Committee (the Committee) to declare the Map Ta Phut and the surrounding areas to be the pollution control zone, and thus resulted in the excessive polluting activities by the firms operating in the area. The Rayong Administrative Court ruled in favour of the plaintiffs and ordered the Committee to declare the area as the pollution control zone. The Committee subsequently made such declaration on 16 March 2009.<sup>31</sup>

The sequel continues in that the Anti-Global Warming Association et.al. sued the Committee and 8 government agencies relating to the approval of 76 projects in the area on the account of non-compliance with the requirement prescribed in the Constitution. Section 67 of the Constitution imposes a number of obligations and the most important ones are the requirement that the Environmental Impact Assessment (EIA) be carried out and public hearing be conducted.<sup>32</sup> The Rayong Administrative Court issued provisional measures to halt all 76 projects until the release of the final judgment. Entrepreneur and investors then sought appeal to the Supreme Administrative Court, citing

26 Environmental Quality Act, Remarks at the end of the 1992 Act

27 Constitution, Article 85

28 Land Reformation Act for Agriculture B.E.2518 (1975)

29 Land Development Act B.E.2551 (2008) ["Land Development Act"], Section 5

30 Ibid., Section 15

31 National Human Rights Commission, Assessment Report on Human Rights Situation in Thailand (2009-2009) ["NHRC Report"], 68

32 Constitution, Section 67

the importance of the projects and the significant financial damage to the Thailand's economy. On 2 December 2009, the Supreme Administrative Court delivered its judgment by ordering the halt of 65 projects, thus allowing 11 projects to continue their operations. The judgment, as expected, received unfavourable response by the local community.<sup>33</sup>

At the time being, the government has set up a committee to follow the developments of the situation in the area. Consequently, it is fair to conclude at this stage based on the Map Ta Phut case that Thai courts do recognize the State Duty to Protect, but at the same time they take into consideration other factors in reaching the judgment.

### **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?**

In Thailand, there is no government body, which bears direct responsibility to prevent and/or address human rights abuses by businesses. However, there exist two government bodies, whose mandates are to prevent and/or address human rights abuses in general: the National Human Rights Commission of Thailand (NHRC) and the Rights and Liberties Protection Department (RLPD).

##### **a) The National Human Rights Commission of Thailand**

The NHRC is established under the auspice of the Constitution of the Kingdom of Thailand B.E.2550 (2007) as one of the "other institutions under the Constitution". It comprises one president and six

members of the committee. Its nine mandates are:<sup>34</sup>

- (1) Investigating and reporting the act or omission amounting to violation of human rights or in violation of Thailand's international human rights obligations, and proposing appropriate solutions to such individuals or entities. In case of non-compliance, the NHRC shall report to the parliament for further actions.
- (2) Forwarding the issue with opinion to the Constitutional Court: In cases where there are complaints regarding the unconstitutionality of the law, particularly those constituting the human rights violation, the NHRC, upon receiving the complaints, may forward the issue to the Constitutional Court. The law in question must possess the status of the Act, the law promulgated by the parliament, or its equivalent.
- (3) Forwarding the issue with opinion to the Administrative Court: In cases where there are complaints regarding the illegality of the law, regulations, or other administrative measures, particularly those constituting the human rights violation, the NHRC, upon receiving the complaints, may forward the issue to the Administrative Court.
- (4) Instigating the case to the Court of Justice on behalf of the victims: In cases where the NHRC is asked by the victims and it considers appropriate for the purpose of human rights protection as a whole, the NHRC may instigate the case to the Court of Justice on behalf of the victims.
- (5) Providing recommendations regarding the amendment of laws and/or regulations to the parliament or cabinet in order to promote the protection of human rights.
- (6) Promoting the study, research, and distribution of knowledge on human rights.
- (7) Promoting the collaboration and coordination between government entities, non-government organizations, and other human rights organizations.

<sup>33</sup> NHRC Report, 69

<sup>34</sup> NHRC Report, Annex

- (8) Providing annual assessment report on human rights in situation in Thailand to the parliament.
- (9) Performing other duties as prescribed in other laws.

As previously mentioned, the NHRC reports annually to the parliament, and coordinates with the Office of the Parliamentary Ombudsman to avoid duplication of work.<sup>35</sup> It is headed by the Chair of the NHRC with 24 major sub-committees and 17 ad hoc sub-committees, all labelled under four categories: 7 for Civil, Political, and Community rights; 10 for Economic, Social, and Cultural rights; 9 for Law and Rights to Justice; and 11 for other matters. Each of the NHRC sub-committees is headed by a specific Commissioner,<sup>36</sup> and they are mandated to review complaints relating to their designated issues.

The procedure for NHRC grievance mechanisms for those seeking remedy for business-related human rights abuses are subsequently reported in Question III.10.

#### **b) The Rights and Liberties Protection Department (RLPD)**

The RLPD is established in 2002 as a department under the Ministry of Justice in response to the growing numbers of human rights violation in the country. Before the RLPD, the Ministry of Justice lacks a specific body to address the issue on inadequate human rights protection as well as to coordinate between relevant bodies to provide both the protection and remedy to the victims. Hence, the RLPD operates under the vision “to promote and to integrate greater human rights protection with innovations towards universality level.” To ensure that human rights protection is widely and equally provided, the RLPD is mandated with eight duties.

- (1) Provide a system to manage the protection of rights and liberties
- (2) Promote and develop the protection of rights and liberties
- (3) Promote and develop the dispute resolution mechanism within the society
- (4) Coordinate on the protection of rights and liberties with both public and private sectors, both domestically and internationally
- (5) Develop a system and measures to ensure adequate assistance of the victims of crime and innocent convicts, and to ensure that those affected are remedied and compensated in accordance with the law concerning the remedy and compensation of victims and defendants in criminal cases
- (6) Monitor and evaluate the outcome of the operation of its mandates
- (7) Ensure protection of witnesses in accordance with the law concerning the witness protection in criminal cases
- (8) Carry out other tasks as prescribed by law.<sup>37</sup>

RLPD has also been active in carrying out various initiatives to ensure protection of rights and liberties. From its most recent published report, the RLPD has conducted a series of public education training aiming to educate public and government officials to become aware of their rights and liberties, and most commendably some of the training were held in the southern provinces of Thailand.<sup>38</sup> However, most of the tasks that RLPD carries out concern the witness protection in criminal cases, and it rarely receives complaints relating to business and human rights.

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<sup>35</sup> Report on the National Human Rights Commission of Thailand 2010, 273

<sup>36</sup> Ibid., 276

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<sup>37</sup> Rights and Liberties Protection Department, “Mandates,” at [http://www.rlpd.moj.go.th/rlpd/index.php?option=com\\_content&task=blogcategory&id=22&Itemid=38](http://www.rlpd.moj.go.th/rlpd/index.php?option=com_content&task=blogcategory&id=22&Itemid=38), accessed 11 July 2012

<sup>38</sup> RLPD Annual Report 2011, at [http://www.rlpd.moj.go.th/rlpdnew/images/AnnualReport/Annual\\_Report\\_54.pdf](http://www.rlpd.moj.go.th/rlpdnew/images/AnnualReport/Annual_Report_54.pdf), accessed 11 July 2012

**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?**

Generally, there are two major laws that govern types of business entities: the Civil and Commercial Code of Thailand or the CCC<sup>39</sup> and the Public Limited Company Act B.E. 2535 (1992) or the PLC Act. The CCC governs three types of partnerships or companies: ordinary partnerships, limited partnerships, and limited companies.<sup>40</sup>

A partnership or company, upon registration being made at the Registration Office of the part of kingdom where the principal business office of the partnership or company is situated,<sup>41</sup> constitutes a juristic person distinct from the partners or shareholders of whom it is composed.<sup>42</sup> At the same time, the PLC Act governs, as the name suggests, public limited companies. Both legislations operate alongside, depending on the type of business entity they govern.

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39 The Civil and Commercial Code of Thailand [“CCC”]

40 CCC, Section 1013

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41 Ibid., Section 1016

42 Ibid., Section 1015

### Types of Business Enterprises in the country

<b>Name of the Type of Business Enterprise</b>	<b>Description of the Legal structure of the Type of Business Enterprise</b>	<b>Does incorporation of the business enterprise require any recognition of a duty to society, including human rights responsibility?</b>	<b>Any legislation specifically applicable to the Type of Business Enterprise</b>  (E.g. Corporations Law)	<b>Laws which the Type of Business Enterprise are expressly excluded from</b>
Ordinary partnerships	<ul style="list-style-type: none"> <li>• The kind of partnership in which all the partners are jointly and unlimitedly liable for all the obligations of the partnership.<sup>43</sup></li> <li>• Each partner must bring a contribution, whether in the form of money, other properties, or services, to the partnership,<sup>44</sup> and in case of doubt, contributions are presumed to be of equal value.<sup>45</sup></li> <li>• If nothing has been agreed between the partners as to the management of the business of the partnership, such business may be managed by each of the partners provided that no partner may enter into a contract to which another partner objects, and each partner is a managing partner.<sup>46</sup></li> <li>• The provisions of the CCC concerning Agency govern the relations of the managing partners with the other partners.<sup>47</sup></li> </ul>	No	The Civil and Commercial Code of Thailand	The Public Limited Company Act B.E. 2535 (1992)

43 CCC, Section 1025

44 Ibid., Section 1026

45 Ibid., Section 1027

46 CCC, Section 1033

47 Ibid., Section 1042

Limited partnerships	<ul style="list-style-type: none"> <li>• The kind of partnership in which there are one or more partners whose liability is limited to such amount as they may respectively undertake to contribute to the partnership, and one or more partner who are jointly and unlimitedly liable for all the obligation of the partnership.<sup>48</sup></li> <li>• Until registration, a limited partnership is deemed an ordinary partnership in which all the partners are jointly and unlimitedly liable for all the obligations of the partnership.<sup>49</sup></li> <li>• A limited partnership must be managed only by the partners with unlimited liability,<sup>50</sup> and if the partners with limited liability interfere with the management of the partnership, he or she becomes jointly and unlimitedly liable for all the obligations of the partnership.<sup>51</sup></li> <li>• Opinions and advice, votes given for the appointment or dismissal of managers in cases provided by the contract of partnership, are not considered as interference with the management of the partnership.<sup>52</sup></li> </ul>	No	The Civil and Commercial Code of Thailand	The Public Limited Company Act B.E. 2535 (1992)
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48 Ibid., Section 1077

49 Ibid., Section 1079

50 Ibid., Section 1087

51 Ibid., Section 1088, para.1

52 CCC, Section 1088, para.2

<p>Limited companies</p>	<ul style="list-style-type: none"> <li>• The kind of which is formed with a Capital divided into equal shares, and the liability of the shareholders is limited to the amount, if any, unpaid on the shares respectively held by them.<sup>53</sup></li> <li>• Any three or more persons may, by subscribing their names to a memorandum and otherwise complying with the provisions of this Code, promote and form a limited company.<sup>54</sup></li> <li>• The memorandum must contain the following particulars: the name of the proposed company that must always end with the word "limited", the part of the Kingdom in which the registered office of the company shall be situated, the objects of the company, a declaration that the liability of the shareholders shall be limited, the amount of share capital with which the company proposes to be registered, and the divisions thereof into shares of a fixed amount, and the names, addresses, occupations and signatures of the promoters, and the number of shares subscribed by each of them.<sup>55</sup></li> </ul>	<p>No</p>	<p>The Civil and Commercial Code of Thailand</p>	<p>The Public Limited Company Act B.E. 2535 (1992)</p>
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53 Ibid., Section 1096

54 Ibid., Section 1097

55 CCC, Section 1098

Public Limited Company	<ul style="list-style-type: none"> <li>• A company established for the purpose of offering shares for sale to the public and the shareholders shall have the liability limited up to the amount to be paid on shares, and the said purpose must be indicated in the memorandum of association of the company.<sup>56</sup></li> <li>• Any fifteen or more natural persons may form a public limited company upon the preparation of a memorandum of association of the company as well as complying with other requirements prescribed in the Act.<sup>57</sup></li> <li>• The memorandum must contain the following particulars: the name of the company under section 11(1) (the use of the name beginning with the term "Company" and ending with the term "Limited (Public)" or beginning with the abbreviation "PLC." instead of the term "Company" and "Limited (Public)" in Thai characters); the purpose of the company in offering shares for sale to the public; the objects of the company, including a clear statement of the categories of business; the registered capital, including the type, number and value of shares; the location of the head office indicating the locality in the Kingdom in which it will be located; the names, dates of birth, nationalities and addresses of the promoters, and the number of shares subscribed by each promoter.<sup>58</sup></li> <li>• Also, the name of the company shall not be under any of the prohibitions as prescribed in the Ministerial Regulations.<sup>59</sup></li> </ul>	No	The Public Limited Company Act B.E. 2535 (1992)	The Civil and Commercial Code of Thailand
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56 Public Limited Company Act B.E.2535 (1992) ["PLC Act"], Section 15

57 Ibid., Section 16

58 PLC Act, Section 18

59 Ibid.

## **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?**

Corresponding with other legal regimes, the CCC, as the main legal instrument on civil and commercial matter, provides that a juristic person can come into existence only by virtue of the CCC or of other law.<sup>60</sup> Hence, a juristic person has rights and duties in conformity with the provisions of the CCC or of other law within the scope of its power and duties, or its object as provided by or defined in the law, regulation or constitutive act.<sup>61</sup> Additionally, subject to Section 66, a juristic person enjoys the same rights and is subject to the same duties as a natural person, except those, which, by reason of their nature, may be enjoyed or incurred only by a natural person.<sup>62</sup> Therefore, a business entity shall be held accountable as a juristic person for human rights abuses involving its business activities.

Moreover, the CCC requires that the relations between the directors, the company and third persons be governed by the provisions of the CCC concerning Agency.<sup>63</sup> Therefore, a business entity (a principle) shall be held accountable as a juristic person for human rights abuses involving its business activities that are carried out by its directors (agents), under the purpose of that business entity (scope of authority).

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

60 CCC, Section 65

61 Ibid., Section 66

62 Ibid., Section 67

63 Ibid., Section 1167

## **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?**

In the course of the conduct of business operations, companies may engage in human rights violation. At present, there are a number of notable issues relating to business and human rights in Thailand.

### **a) Labour**

During 2008-2009, there have been a number of cases relating to human rights abuses to labour, with the most notable one being the industrial sector using the temporary sub-contract mechanism to avoid having to comply with relevant obligations under the labour law.<sup>64</sup> This resulted in the unfair dismissal of many labours, which necessitated the intervention by the government to resolve the problem and to ensure the stability of the employment against unfair dismissal.<sup>65</sup> However, positive developments to ensure greater labour protection were carried out twice in 2008 and once in 2010 by the amendment of the Labour Protection Act.

The first amendment of the Act in 2008 involves the following changes:

- 1) Prohibiting employers from requesting or accepting guarantee in relation to damage arising from the course of employment;
- 2) According power to Labour Court to order that the employment contract and regulations stipulated by the employers be fair and reasonable;
- 3) Allowing both employers and employees to combine the working hours that were not utilized under the eight-hour-a-day requirement with the working hours of the other day, provided

64 NHRC Report, 48

65 Ibid.

that the combined working hours of that day do not exceed nine hours;

- 4) Requiring the Labour Welfare Committee established under the Labour Protection Act to order the employers to pay compensation in place of providing advance notification concerning the relocation of workplace;
- 5) Requiring employers to submit the form bearing the employment status and working condition; and
- 6) Adjusting relevant punishment provisions to correspond with the amendment.

The second amendment of the Act in 2008 further provides assurance that the minimum wage be adjusted in an efficient and fair manner, as well as requires subsequent monitoring of the wage development plan in accordance with the Act. The third amendment of the Act in 2010 adjusts certain provisions in the Act in order to be in line with the newly-promulgated law concerning safety, welfare, and working environment.

With the Labour Protection Act, the state duty to protect in terms of labour protection is given a legislative base. Three notable issues, which directly concern the protection of human rights of labours, are duty of the employers to ensure equal treatment, prohibition of sexual harassment, and protection of working conditions.

#### *i. Duty to ensure equal treatment*

In the course of employment, the employers shall treat both male and female employees equally, except where it is not possible to do so due to the nature or the conditions of the work.<sup>66</sup> This provision must be highlighted in that it is for the first time that the Thai labour law addresses the issue on gender equal treatment.

#### *ii. Prohibition of sexual harassment*

In addition to the duty to ensure gender equal treatment, the Act prohibits the employers, or any

person holding a superior position, such as a chief, a supervisor, or an inspector, to perform any sexual harassment or disturbances against employee.<sup>67</sup> Initially, Article 16 only encompasses protection for female and child employees, but subsequent amendment in 2008 extends the protection to male employees by eliminating the word “female and child”.

#### *iii. Protection of working conditions*

The Labour Protection Act prescribes many obligations, which employers must undertake to ensure protection of human rights and prevent human rights violation arising from the course of business operation.

#### Ordinary working period

The Act requires that the employer notify the ordinary working period to the employee, and such period may not exceed eight hours a day and not more than forty-eight hours a week. However, for the work, which may be harmful to health and safety of the employee as prescribed by the Ministerial Regulations, such period may not exceed seven hours a day and not more than forty-two hours a week. The daily commencing and ending time of the working period may be determined by the employer, but such period shall not exceed the maximum length as prescribed by the Act.<sup>68</sup>

At present, the types of work, which are considered to be harmful to health and safety of the employee, are prescribed by Ministerial Regulations No.2 (B.E.2541) pursuant to the Article 23 para.1 of the Labour Protection Act. The types are the work which requires the employees to work underground, underwater, in cave, in tunnel, or in places with insufficient air; the work relating to radioactivity; welding; transportation of dangerous items; manufacturing of dangerous chemicals; the work which requires the use of tools or machineries that cause undue quake and/or danger; and the work which may be dangerous to employees due to

<sup>67</sup> Ibid., Section 16

<sup>68</sup> Labor Protection Act, Section 23

<sup>66</sup> Labor Protection Act, Section 15

extreme hotness or coldness.<sup>69</sup>

In addition to ordinary working period, the employer must undertake to provide sufficient rest period during the working period on the working day. The rest period shall not be less than one hour after the employee has worked for not more than five consecutive hours. This requirement may be agreed otherwise, but only to the benefit of the employee with the minimum length of one hour.<sup>70</sup>

### Welfare

Labour welfare is considered an ethical concern where businesses, employers, and/or labour union are obliged to provide the adequately comfortable, clean, and safe working conditions to employees. To ensure that the employee is entitled to enjoy such condition, the Act requires that the Minister of Labour issue Ministerial Regulations to prescribe any welfare to be provided by the employer or to prescribe standards of the welfare to be provided.<sup>71</sup>

By virtue of such requirement, the Minister of Labour issue Ministerial Regulations Concerning the Provision of Labour Welfare in Workplace B.E.2548 (2005)<sup>72</sup> to oblige employers to provide the followings to their employees as welfare:

- (1) One clean drinking water station for every forty employees
- (2) Clean restrooms, built in accordance with the plan prescribed by the Building Control Act, separating between male, female, and employee with disability, with regular cleaning to ensure the high level of hygiene
- (3) Sufficient medical kit for a firm of more than ten employees; in case of a firm having more than 200 employees, the employer is obliged to provide a standard medical room with at least one standby certified nurse and a doctor who

must be on site for at least two times a week and not less than six hours a week

In addition to such requirement, the employer of fifty employees or more is obliged to establish the welfare committee in the workplace. The welfare committee must consist of at least five representatives of the employees, elected in accordance with the rules and procedure as determined by the Director-General of the Department of the Labour Protection and Welfare. The existing employees' committee in the workplace, as the case may be, shall act as the welfare committee of that workplace under this Act.<sup>73</sup> The welfare committee of the workplace has the following the powers and duties: to jointly consult with the employer in providing welfare for the employees; to give advice and recommendations to the employer in providing welfare for the employees; to inspect, control and supervise the welfare provided for the employees by the employer; to give recommendation and guideline in providing welfare for the employees to the Labour Welfare Committee<sup>74</sup> established by virtue of Article 92.<sup>75</sup>

#### **a. Migrant workers**

The problem of migrant workers continue to persist, despite the prohibition of forced or compulsory labour enshrined in the Constitution, except in the case of national emergency, war, or under the martial law,<sup>76</sup> and the government's effort in trying to eliminate forced labour. In most cases, the migrant workers are often seized of their travel document by their employers, thus restricting them from moving away.<sup>77</sup> At present, Thai law does not have specific legislations concerning the protection of migrant workers. Affirming the principle of equality, all migrant workers, whether legally or illegally entered the Kingdom of Thailand, are entitled to be protected under the Labour Protection Act. As

69 Ministerial Regulations No.2 (B.E.2541) pursuant to the Article 23, para. 1 of the Labor Protection Act

70 Labor Protection Act, Section 27

71 Ibid., Section 95

72 Ministerial Regulations Concerning the Provision of Labor Welfare in Workplace B.E.2548 (2005)

73 Labor Protection Act, Section 96

74 Ibid., Section 97

75 Ibid., Section 92

76 Constitution, Article 38

77 US Department of State Bureau of Democracy, Human Rights and Labor, "Country Reports on Human Rights Practices for 2011", 49-50

previously mentioned, there are circumstances, which exempt certain employers from complying with the obligations under the Labour Protection Act.<sup>78</sup> Therefore, without the inclusion into the list, migrant workers of all statuses are entitled to be protected under the Act.

Statistically, Thailand has been alleged to be one of the major hubs for human trafficking, both as a country of origin, destination, and point of transit. Most humans, both males and females, involved are destined to be for forced labour as well as forced prostitution.<sup>79</sup> In addition to the general labour protection, migrant workers who are trafficked are entitled for protection under the Anti-Trafficking in Persons Act B.E.2551 (2008). The Act defines exploitation as actions, which include seeking benefits from the prostitution, production or distribution of pornographic materials, other forms of sexual exploitation, slavery, causing another person to be a beggar, forced labour or service, coerced removal of organs for the purpose of trade, or any other similar practices resulting in forced extortion, regardless of such person's consent.<sup>80</sup> Also, force labour or services, which refer to the act of compelling the other person to work or provide service by putting such person in fear of injury to life, body, liberty, reputation or property, of such person or another person, by means of intimidation, use of force, or any other means causing such person to be in a state of being unable to resist<sup>81</sup>, are included as prohibited acts. The consequence of violation of the obligations under the Act is to receive imprisonment from 4 to 10 years, equivalent to crimes of severe characters such as rape, or from 6 to 12 years in case of child trafficking.<sup>82</sup> For extra-territorial application, The Act stipulates that for the violation committed abroad, the violator shall be punished in Thailand, by virtue of Section 10 of

78 Ibid.

79 Anne Gallagher and Elaine Pearson, "The Detention of Victims of Human Trafficking: An Analysis of Law and Policy", AusAID, August 2008

80 Anti-Trafficking Act in Persons Act B.E.2551 (2008) ["Anti-Trafficking Act"], Section 4

81 Ibid.

82 Ibid., Section 52

Thailand Penal Code.<sup>83</sup>

## b. Women

The Labour Protection Act confers special protection to female employees by listing types of work to be prohibited from employing female workers, and adjusting working time. Also, additional provisions concerning pregnant employees are stipulated.

Concerning the types of work, Section 38 of the Act prohibits women employment in the following works: mining or construction work to be performed underground, underwater, in a cave, in a tunnel or mountain shaft, except when the conditions of work are not harmful to health or body of the employee; work on a scaffold of ten meters or more above the ground; production or transportation of explosive or inflammable materials, except where the conditions of work are not harmful to health or body of the employee; and any other works as prescribed in the Ministerial Regulations.<sup>84</sup> In addition, the Act requires that employers appropriately change or reduce the female employees' night working hours (between 00.00 and 06.00 hours) in the event that the labour inspector opines that the work may be hazardous to their health and safety and such condition has been reported to the Director-General of the Department of Labour Welfare and Protection, Ministry of Labour.<sup>85</sup>

Pregnant employees are also given special protection, in addition to them being females. They are not to be employed in certain types of work: work involving vibrating machinery or engine; driving or taking place into a vehicle; lifting, carrying on the back, carrying on shoulder, carrying with a pole across shoulder, carrying on a head, pulling or pushing of loads of more than fifteen kilograms; work on a boat; or any other works as prescribed in the Ministerial Regulations.<sup>86</sup> Employers of pregnant workers are prohibited to require them to work between 22.00 and 06.00 hours, to work overtime, or to work on

83 Ibid., Section 11

84 Ibid., Section 38

85 Ibid., Section 40

86 Labor Protection Act, Section 39

holidays. However, employers of the child-bearing employees working as an executive, an academic, a clerk, an accountant, or other related occupation may require such employees to work overtime in the working days as long as there is no effects on her health and with her prior consent on each occasion.<sup>87</sup> In addition, the Labour Protection Act ensures the right to maternity leave<sup>88</sup>, right to temporary change of duties before or after delivery<sup>89</sup>, and right not to see the employment contract terminated on the grounds of pregnancy.<sup>90</sup>

### c. Children

The Labour Protection Act also confers special protection to children. As a general rule, any employer shall not employ a child under fifteen years of age<sup>91</sup>, but the child under eighteen years of age, hereinafter referred to as 'young worker', may be employed when the employers comply with the following duties: duty to notify the labour inspector regarding the employment of a young worker within fifteen days from the work commencement; duty to prepare a record of employment conditions in case of a change, and keep this record in the business premises or at the office of the employer, available for inspection by the labour inspector during working hours; and duty to notify the labour inspector regarding the termination of employment of a young worker within seven days from the date of employment termination.<sup>92</sup> Additionally, to ensure that young workers are not forced to work long hours, employers are required to provide young workers with rest period of not less than one consecutive hour after the employee has worked for not more than four hours, and during such four-hour work period, the employers may grant additional rest periods to the young workers.<sup>93</sup>

In terms of working period, employers shall not require young workers to work between 22.00

87 Ibid., Section 39 (1)

88 Ibid., Section 41

89 Ibid., Section 42

90 Ibid., Section 43

91 Ibid., Section 44

92 Ibid., Section 45

93 Ibid., Section 46

and 06.00 hours, similar to the provision applied to female workers, unless permission in writing is granted by the Director-General of the Department of Labour Welfare and Protection, Ministry of Labour, or a person entrusted by the Director-General.<sup>94</sup> However, in the case of young workers aged below eighteen who acts in movies, on stage, or similar, the employers shall provide them with proper rest periods.<sup>95</sup> In any event, it is prohibited to require young workers below eighteen years of age to work overtime or to work on a holiday.<sup>96</sup>

In terms of financial protection for young workers, the Labour Protection Act prescribed that employers are prohibited from demanding or receiving safety deposit for any purpose from young workers<sup>97</sup>, as well as from paying wages of the young workers to any other person.<sup>98</sup> The latter requirement undoubtedly makes it illegal for child traffickers, among others, to exploit the child by receiving payment on behalf of that child.

In addition to working period and financial protection for young workers, the Labour Protection Act also lists certain works that shall not be carried out by young workers: metal smelting, blowing, casting or rolling; metal pressing; work involving heat, cold, vibration, noise and light of an abnormal level which may be hazardous as prescribed in the Ministerial Regulations; work involving hazardous chemical substances as prescribed in the Ministerial Regulations; work involving poisonous microorganism which may be a virus, bacterium, fungus, or any other germs as prescribed in the Ministerial Regulations; work involving poisonous substances, explosive or inflammable material, other than work in a fuel service station as prescribed in the Ministerial Regulations; driving or controlling a forklift or a crane as prescribed in the Ministerial Regulations; work using an electric or motor saw; work that must be done underground, underwater, in a cave, tunnel, or mountain shaft; work involving radioactivity as prescribed in the Ministerial

94 Ibid., Section 47 (1)

95 Ibid., Section 47 (2)

96 Labor Protection Act, Section 48

97 Ibid., Section 51 (1)

98 Ibid., Section 51 (2)

Regulations; cleaning of machinery or engines while in operation; work which must be done on scaffolding ten meters or more above the ground; or other work as prescribed in the Ministerial Regulations.<sup>99</sup> Additionally, young workers are prohibited to work in the following places: a slaughterhouse; a gambling place; a recreation place in accordance with the law governing recreation places; and any other place as prescribed in the Ministerial Regulations.<sup>100</sup>

Furthermore, given the young age of the young workers, the Labour Protection Act also recognizes the right to education of young workers. To develop and promote the quality of life and employment of young people, any young worker aged below eighteen shall be entitled to take leave to attend meetings or seminars, get education or training, or leave for another matter which is arranged by an academic institution, or a government or private agency approved by the Director-General, provided that the young worker shall notify the employer in advance stating clearly that the reason for the leave and presenting relevant evidence, if any.<sup>101</sup> Such recognition corresponds with the obligation under the Child's Protection Act B.E. 2546 (2003), which affirms that there shall be no discrimination due to age.<sup>102</sup> In addition, the Act prohibits child employment, which may affect his or her physical or mental growth or development,<sup>103</sup> and specifically prohibits coercive acts to force a child to play sports or other kinds of activities for commercial purpose, which may affect his or her physical or mental growth or development.

Evidently, young workers are given special protection and consideration under the Labour Protection Act and Child's Protection Act, in line with, or exceeding the minimum standard of, Thailand's obligation under the Convention of the Rights of the Child.

<sup>99</sup> Ibid., Section 49

<sup>100</sup> Ibid., Section 50

<sup>101</sup> Ibid., Section 52

<sup>102</sup> Child's Protection Act B.E.2546 (2003) ["Child's Protection Act"], Section 22

<sup>103</sup> Ibid., Section 26 (6)

#### d. Persons with disabilities

Workers with disabilities are protected by law to be treated equally as other workers. Beyond the sphere of labour, all persons with disabilities are to be as equally treated as those without disabilities. In order to ensure that persons with disabilities receive equal treatment without unjust discrimination, the Promotion and Development of Quality of Life for Persons with Disabilities Act B.E.2550 (2007) is enacted.<sup>104</sup> "Persons with disabilities" means any person with limitations in carrying out his or her daily life activities and/or in participating in the society due to defects in hearing, sight, movement, communication, mentality, emotion, behaviour, education, or other defects, and it becomes necessary for his or her to receive special assistance in carrying out his or her daily life activities and/or in participating in the society.<sup>105</sup>

In relation to business, the Act requires that employer, both public and private sectors, employ persons with disabilities according to the appropriate nature of the assigned work with the condition of such persons.<sup>106</sup> Ministerial Regulations, issued by the Ministry of Labour by virtue of the Act, specifies that the employers and the owners of the workplace of more than 100 employees must employ one person with disabilities for every 100 employees. The remaining number, if exceeding 50, shall be counted as 100, requiring an employment of another person with disabilities.<sup>107</sup> The same ratio also applies to the governmental bodies.<sup>108</sup> The assessment of the number of employees for the purpose of determining the number of required employment of persons with disabilities shall be carried out annually on 1 October.<sup>109</sup>

<sup>104</sup> Promotion and Development of Quality of Life for Persons with Disabilities Act B.E.2550 (2007) ["Persons with Disabilities Act"]

<sup>105</sup> Ibid., Section 4

<sup>106</sup> Ibid., Section 33

<sup>107</sup> Ministerial Regulations Concerning the Number of Employment of Persons with Disabilities and the Amount of Money Required to be Transferred to the Fund B.E.2554 (2011), Rule 3

<sup>108</sup> Ibid., Rule 4

<sup>109</sup> Ibid., Rule 3 and 4

In cases where the employers, the owners of the workplace, or governmental bodies determine not to employ persons with disabilities according to the prescribed ratio, the giving of concession, the outsourcing of certain work, or the lending of assistance as the case may be, may substitute the aforementioned obligations.<sup>110</sup> Failing to perform either of the obligations results in that the employers, the owners of the workplace, or governmental bodies, must transfer a certain sum of money, to be calculated based on minimum wage prescribed by the Labour Protection Act on the previous year multiplied by 365, then multiplied by the number of persons with disabilities the employers fail to employ pursuant to the Ministerial Regulation,<sup>111</sup> to a Promotion and Development of Quality of Life for Persons with Disabilities Fund, established under the Act.<sup>112</sup> The Fund will then be used in relation to the promotion and development of quality of life of the persons with disabilities including the provision of education and occupational training.

To further promote the employment of persons with disabilities, the Royal Decree Pursuant to Revenue Code No. 499/2553<sup>113</sup> is issued to waive certain corporate income tax to companies that employ persons with disabilities in accordance with the Persons with Disabilities Act. The amount waived shall be determined by the full amount of expense paid for such employment. Moreover, the companies or workplaces that provide facilities to accommodate persons with disabilities may have parts of their corporate income tax waived for the amount spent on the construction or the procurement of such facilities.<sup>114</sup>

#### e. Trade unions

Thai law recognizes to right to form trade union (or labour union as literally translated from the original text), and is governed by the Labour Relations Act B.E.2518 (1975). “Trade Union” refers to an

organization established by workers in accordance with the Labour Relations Act.<sup>115</sup> The trade union typically involves in concluding agreements with employers relating to work conditions, which encompass the followings: working days and working hours; wages; welfare; termination of employment; any benefits received by an employer or an employee in relation to work such as retirement compensation, special benefits for long length of service, bonuses, allowance for transport and/or accommodation, and medical benefits.

Generally, both employers and employees as individuals can, in writing, establish a new work conditions agreement, or amend the existing one.<sup>116</sup> Names and signatures are compulsory in instigating such an agreement.<sup>117</sup> However, a trade union may submit an agreement request to the other party on behalf of the employees who are members of the union.<sup>118</sup> In the event that the trade union initiates the request, it is not required to give names and signatures of the employees involved in the request. Nevertheless, it is required that the number of employees who are members of the trade union must not be less than one fifth (20%) of the total number of employees. In case of doubt whether the employees involved in the request are members of the union and whether the number exceeds the percentage required, a written application to the Conciliation Officer, a person appointed by the Minister of Labour pursuant to the Act<sup>119</sup>, for examination and certification may be submitted.<sup>120</sup>

To ensure that the negotiation proceeds in a timely manner, the Act requires that both parties begin the negotiation within three days of receiving the request.<sup>121</sup> If the negotiation is successful, the working condition agreement must be made in writing and signed by all parties, Then the employer shall, within three days of the date of the agreement,

110 Persons with Disabilities Act, Section 35

111 Persons with Disabilities Act, Section 35

112 Ibid., Section 23

113 Royal Decree Pursuant to Revenue Code No. 499/2553 (2010), Rule 3

114 Ibid., Rule 4

115 Labor Relations Act B.E.2518 (1975) [“Labor Relations Act”], Section 5

116 Ibid., Section 13

117 Ibid., Section 13 (2), (3)

118 Ibid., Section 15

119 Labor Relations Act, Section 5

120 Ibid., Section 15

121 Ibid., Section 16

openly display a notice of the work conditions for at least thirty days at the place where employees involved in the request work, as well as register the work conditions agreement with the Director-General's services within fifteen days of the date of agreement.<sup>122</sup>

In the event of an unsuccessful negotiation; that is, there has been no negotiation within three days from the date of receiving the demand or there is no agreement after the negotiation for whatever reason, it is considered having a labour dispute.<sup>123</sup> To mitigate the damage with regards to the unsettled work conditions, the Labour Relations Act required the party who initiated the request to notify a Conciliation Officer in writing within 24 hours after it is deemed that the negotiation failed.<sup>124</sup> Then, within five days after the notification, the Conciliation Officer shall start a procedure of settlement between the parties, with an initial duty to present all facts underlying the conflict to the parties and the legislations that may apply. If a settlement can be reached within five days of the notification, obligations under Article 18 shall be apply *mutatis mutandis*. However, if no settlement can be reached within five days of the notification, the labour dispute shall be regarded as a dispute that cannot be settled.<sup>125</sup> From this point, the parties may agree to appoint a labour dispute arbitrator<sup>126</sup>, the employer may start the lockout, or the trade union may go on strike.<sup>127</sup>

The party who wish to start the lockout or go on strike must give notice to the Conciliation Officer and to the other party at least 24 hours before starting the action.<sup>128</sup> To protect the labour in the event of illicit lockout by the employer, wages are due to the employees since the lockout is prohibited by the law. On the other hand, in the case of strike, the employees on strike, even a licit strike, are not entitled to their wages since they do not perform

their work duties for the employer.<sup>129</sup>

## b) Environment

A number of environmental problems resulting from the conduct of business operations in Thailand take various forms. To combat environmental damage, the general application of the Enhancement and Conservation of National Environmental Quality Act requires that a business entity conduct the Environmental Impact Assessment (EIA) as a pre-condition in order to seek approval before commencing a project. In addition, the EIA requirement expands to obligate all projects whether initiated by the government agencies, state-owned enterprises, or the private sectors, to conduct the EIA.<sup>130</sup> The Act also affirms the rights and liberties of a person to include the rights to be informed of information concerning the enhancement and the promotion of environmental quality<sup>131</sup>, the rights to receive compensation from the government in the event of damage caused by the operation of the government agencies or state-owned enterprises<sup>132</sup>, and the right to file claims against government officials in the event of witnessing the conduct of pollution or the violation of the conservation of natural resources.<sup>133</sup>

On the more specific scope, the major evident environmental problem appears to be from the management of the industrial estate. The Industrial Estate Authority of Thailand Act B.E.2522 (1979)<sup>134</sup> was revised in 2007 to introduce the Free Trade Zone, a zone designated for industrial or commercial activities, or any other activities relating to industrial or commercial activities, for the purpose of economic development, natural security, people's welfare, environmental management, and any other purposes to be determined by the Industrial Estate Authority of Thailand. Entities allowed to operate in the Free Zone will be granted tax privileges

122 Ibid., Section 18

123 Ibid., Section 21

124 Ibid., Section 21

125 Ibid., Section 22

126 Ibid., Section 26

127 Ibid., Section 34

128 Ibid.

129 Ibid., Section 35

130 Environmental Quality Act, Section 46

131 Ibid., Section 6(1)

132 Ibid., Section 6(2)

133 Ibid., Section 6(3)

134 Industrial Estate Act B.E.2522 (1979) ["Industrial Estate Act"]

and fee exemption in accordance with the law.<sup>135</sup> The introduction of the Free Zone results in the expansion of industrial activities in Thailand. To complement the expansion, many supplementary projects are carried out, including the construction of the Pakbara Port in Satun province.<sup>136</sup>

The expansion of industrial activities undoubtedly raises concerns over the impact on environment. This is because the body tasked to monitor and control the industrial activities is not the Department of Industrial Works under the Ministry of Industry, which initially grants approval for the establishment of the industrial factory, but is accorded to the Provincial Industrial Office under the Office of the Permanent Secretary of the Ministry of Industry.<sup>137</sup> Concerns centre on the fact that with the Provincial Industrial Office for each province having a number of industrial factories to oversee, and working under the Local Administration body. When the industrial factories cause environmental impact to the local community without genuine intervention or solution by the Provincial Industrial Office, the Report by the NHRC indicates that the Office often cite the insufficient of personnel as the cause of non-responsive address to the problem. Further, the Local Administration body, which the Provincial Industrial Office works under, is often criticized to have been influenced by the industrial entrepreneurs in the area.<sup>138</sup>

### **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 are enforced by the State through two major channels: filing complaints to the National Human Rights Committee and instigate claims at the court of justice. Concerning the NHRC, as will also be subsequently discussed in Question III.10, it serves as the major focal

point of contact to receive complaints of potential human rights violation. Ultimately, it can instigate claims on the claimant's behalf to the Constitutional Court to inquire regarding the constitutionality of any legislation, which has effect on human rights.<sup>139</sup> For instance, in the Constitutional Court's Decision 33/2554 (2011)<sup>140</sup>, the Court was asked to determine the constitutionality of Section 6 of the National Park Act B.E.2504 (1961) concerning the declaration of any area to be designated as part of national park, where those affected argued that the declaration was made arbitrarily by the relevant officials without prior consultation with the locals. The Court then ruled that despite the authority vested upon the official to designate any area that it found interesting and appropriate to become national park, prior consultation must be made with the locals in order to affirm the rights to community<sup>141</sup> and rights to conserve, protect, and use natural resources as well as other biodiversity.<sup>142</sup>

In addition to NHRC and Constitutional Court, general courts of justice also serve as the enforcer of the legislations identified in Question 2.2. Depending on the jurisdiction of each courts and the nature of the case, those seeking redress have access to justice by filing their claims to the court of justice. For labour-related issue, Labour Court shall have prior jurisdiction over the case. Recently, Labour Court has been one of the most important venues to settle labour dispute and serve as the enforcer of the legislation concerning labour. For instance, in its Decision No. 8131/2553 (2010), it ruled that the plaintiff could not arbitrarily order the moratorium of working days due to inconsistent stock order, as it is normal in the course of business for such inconsistency to occur. Such inconsistency cannot lawfully be served as a ground for the moratorium.<sup>143</sup> Hence, the legislations identified in Question 2.2 are enforced by both the NHRC and

139 Constitution, Article 257 (2)

140 Constitutional Court Decision 33/2554, dated 23 November 2011

141 Constitution, Article 66

142 Ibid., Article 67

143 Decision No. 8131/2554, at <http://deka2007.supremecourt.or.th/deka/web/docdetail.jsp>, accessed 2 September 2012

135 Ibid., Section 4

136 NHRC Report, 63

137 Ibid.

138 NHRC Report, 63

the Courts of Justices.

*Laws and/or regulations which hold individuals accountable for business-related human rights abuses*

In addition to Question 2.1, despite the fact that the types of businesses must be primarily determined, rules to hold individuals accountable in their capacity as company organs share certain similarity: the requirement that the acts done must be in the ordinary course of business. For instance, in the case of ordinary partnerships, all the partners are bound by the acts done by any of them in the ordinary course of the business of the partnership and are jointly and unlimitedly liable for the performance of the obligations incurred in such management.<sup>144</sup> Similarly, in the case of limited partnerships, those unlimitedly and jointly liable are bound by the provisions governing the ordinary partnerships, but those with limited liability are to be liable only to the extent agreed upon among the parties in the partnerships.<sup>145</sup> However, a partner with limited liability who expressly or impliedly consents to the use of his or her name in the firm name will be liable to third persons in the same matter as if he or she was a partner of unlimited liability.<sup>146</sup>

In the case of limited companies, the shareholders shall have their liability limited, as it is a requirement that the memorandum establishing the company must contain, among others, a declaration that the liability of the shareholders shall be limited.<sup>147</sup> In case of the directors, the liability of the directors of a limited company is generally limited, but such liability may be unlimited following a statement inserted in the memorandum that the liability of certain directors of a limited company may be unlimited.<sup>148</sup> Therefore, in the event of liability, individuals, whether being partners or directors, can be held accountable in their capacity as company organs.

144 CCC, Section 1050

145 Ibid., Section 1080

146 Ibid., Section 1082

147 Ibid., Section 1098

148 Ibid., Section 1101

In addition, the general rule of wrongful acts, or known in the Common Law regime as tort, remains applicable. In other words, partners or directors can still be held individually liable in the event of the wrongful acts conducted by them. The CCC provides that a person who, wilfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.<sup>149</sup> Consequently, the partners or directors found in violation of human rights by causing damage to the employees or third persons arising from the course of business operation can also be held individually liable.

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

Thai law, once promulgated, is not static. Similar to other countries, the law can be amended, terminated, or superseded by a new law. Evidently, Thai laws are periodically assessed in order to address the situation in a timely manner. For instance, the Labour Protection Act are periodically assessed to address the emerging issues, as previously indicated in Question 2.2 (a); that is, among others, to accord power to Labour Court to order that the employment contract and regulations stipulated by the employers be fair and reasonable<sup>150</sup>, and to provide assurance that the minimum wage be adjusted in an efficient and fair manner in its amendment in 2008.<sup>151</sup>

Generally, it is the duty of the Council of State, or “Krisdika” office in Thai, to oversee the development of Thai law. One of its mandates, in addition to providing recommendation regarding the proposal of new laws, is to render advice and develop Thai law “in order for it to serve as a tool for economic and

149 Ibid., Section 420

150 See Question III.2.2 on the amendments of the Labor Protection Act

151 Ibid.

social development and to protect public interest.”<sup>152</sup> It must be noted that, according to its annual report, the Council of State has been fulfilling its mandate. In 2009, it set a target to achieve 800 cases, encompassing all of its mandates including providing recommendation to promulgate a new law or to amend existing laws, and they were able to achieve 835 cases, exceeding its set target.<sup>153</sup>

In addition to the work of the Council of State, there are other channels to seek amendment of laws. The amendment of the law can be done through the promulgation of the new law of the same title, and the latter version shall have the number of amendment labelled to its name. For instance, the Labour Protection Act B.E. 2541 (1998) had its first amendment in 2008; hence, the new Act entitled “the Labour Protection Act (Issue 2) B.E. 2551 (2008)” had to be enacted, with provisions designated to replace the then-existing provisions of the relevant content.

To promulgate a new law, the Constitution allows certain entities to first propose a new law. Such entities are government cabinet, at least 20 members of the House of Representatives, Courts or independent organs under the Constitution (only the law relating to the management of the Court or the matter which falls under the mandate of the President of such organization), or at least 10,000 eligible voters.<sup>154</sup> The draft of the amended law shall be submitted to the House of Representatives; with the assurance that the public has access to it. The draft shall then be deliberated throughout, first, the House of Representatives, and, second, to the House of Senate. In the event of no correction or objection, the draft shall be signed by His Majesty the King,

152 Office of the Council of State, “Philosophy, Mandate, and Organizational Chart,” at [http://www.krisdika.go.th/wps/portal/general/!ut/p/c/04\\_SB8K8xLLM9MSSzPy8xBz9CP0os3g\\_A2czQ0cTQ89ApyAnA0\\_\\_EIOAQGdXAwM\\_Y30\\_j\\_zcVP2CbEdFAFGmRSc!/dl3/d3/L2dJQSEvUUt3QS9ZQnZ3LzZfTjBDNjFBNDfJUUSQjBJT1QwUFFDRTAwVjA!](http://www.krisdika.go.th/wps/portal/general/!ut/p/c/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g_A2czQ0cTQ89ApyAnA0__EIOAQGdXAwM_Y30_j_zcVP2CbEdFAFGmRSc!/dl3/d3/L2dJQSEvUUt3QS9ZQnZ3LzZfTjBDNjFBNDfJUUSQjBJT1QwUFFDRTAwVjA!/), accessed 14 June 2012

153 Office of the Council of State, “Operational Report on the Fiscal Year of 2009,” at <http://web.krisdika.go.th/data/news/news11109.pdf>, accessed 14 June 2012

154 Constitution, Article 142

and subsequently become law upon the publication in the Royal Gazette.<sup>155</sup> In case of correction or objection by the House of Senate, the draft shall be reconsidered by the House of Representatives after having been put on hold for 180 days for the ordinary draft<sup>156</sup>, or right away for the draft concerning financial matter.<sup>157</sup> If the House of Representatives affirms with not less than half of the members present during the deliberation, the draft is deemed to have been approved by both Houses and shall be processed as if the draft contains no correction or objection.<sup>158</sup>

Therefore, the Constitution provides bases for the amendment of the existing law should one believes necessary, in addition to the work of the Council of State.

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

##### **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?**

Thai law does not contain specific provisions to require or encourage directors of business enterprises to exercise due diligence with regards to the respect of human rights. However, it imposes rather general duties of the directors that they have to comply with, as set out below.

155 Constitution, Article 150

156 Ibid., Article 148(1)

157 Ibid., Article 148(2)

158 Ibid., Article 148(1)

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

In general, the CCC does not explicitly impose the so-called “fiduciary duties”, as commonly found in the Common Law system, to directors of the company. However, the fiduciary duties are applied by virtue of Section 1167, which imposes that the provisions of the CCC concerning Agency shall govern the relations between the directors, the company and third persons.<sup>159</sup> Hence, in the event that the directors, as “agents”, cause any injury resulting from his or her negligence or non-execution of agency, or from an act done without or in excess of authority, he or she is liable to the company.<sup>160</sup> In cases of liability to third persons, the company is bound to third persons by the acts, which the directors have done within the scope of his or her authority by virtue of his “agency”.<sup>161</sup> However, if the directors act without authority or beyond the scope of his or her authority, such act does not bind the company, as principal, unless the company ratifies it.<sup>162</sup> If the company does not ratify such act, the directors shall be personally liable to third persons, unless he or she proves that such third persons knew that he or she was acting without authority or beyond the scope of the authority.<sup>163</sup>

In cases of *ultra vires*, if the directors act in excess of his or her authority, but the third person had reasonable grounds, arising from the act of the company, to believe that it was within his or her authority, the company is liable to third persons acting in good faith in the same matter as if the directors act within the scope of his or her authority.<sup>164</sup>

Other specific duties are expressly stated in the section concerning limited companies. Generally, the directors must in their conduct of the business

apply the diligence of “a careful business man”.<sup>165</sup> In particular, the directors are jointly responsible for the payment of shares by the shareholders being actually made, for the existence and regular keeping of books and documents prescribed by law, for the proper distribution of the dividend or interest as prescribed by law, and for the proper enforcement of the resolutions of the general meetings.<sup>166</sup> In addition, a director must not, without the consent of a general meeting of shareholders, undertake commercial transactions of the same nature as and competing with that of the company, either on his or her own account or that of a third person, nor may he or she be a partner with unlimited liability in another commercial concern carrying on a business of the same nature as and competing with that of the company.<sup>167</sup>

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

No.

#### 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)?

No.

#### 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.

<sup>159</sup> CCC, Section 1167

<sup>160</sup> Ibid., Section 812

<sup>161</sup> Ibid., Section 820

<sup>162</sup> CCC, Section 823, para. 1

<sup>163</sup> Ibid., para. 2

<sup>164</sup> Ibid., Section 822, 821

<sup>165</sup> Ibid., Section 1168, para. 1

<sup>166</sup> Ibid., para. 2

<sup>167</sup> Ibid., para. 3

**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)?**

Not applicable

**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?**

See Question III.5

**4.3. Is/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?**

Despite the lack of any specific 'hard law' initiatives, Thailand also lacks specific 'soft law' initiatives to require or encourage business enterprises to respect human rights. However, the closest 'soft law' initiative, which mentions human rights, is the Principles of Corporate Governance for Registered Companies B.E.2549 (2006)<sup>168</sup>, issued by the Stock Exchange of Thailand (SET).

Being an instrument issued by SET, the precondition to be governed by this instrument is that a company must be registered at the Stock Exchange of Thailand to have its shares traded in the stock market. This is the case for limited companies, but not public limited companies as the latter are automatically required to be listed in the stock market, as one of their purposes of incorporation is to offer shares for

168 "Principles of Corporate Governance for Registered Companies B.E.2549 (2006)" ["2006 Principles"], Stock Exchange of Thailand

sale to the public.<sup>169</sup> Consequently, the Principles only apply to registered or listed limited companies and public limited companies.

The 2006 Principles amended the 2002 Principles in order to be in line with the OECD Principles of Corporate Governance (2004) and the recommendation by the World Bank on Corporate Governance – Reports on the Observance of Standards and Codes (CG-ROSC). The SET claims that it receives good cooperation from listed companies in self-investigating whether their business operations comply with the 2006 Principles.<sup>170</sup>

The 2006 Principles contain 5 sections: rights of shareholders, equal treatment of shareholders, roles of stakeholders, disclosure of information and transparency, and responsibility of directors. Reference to human rights can be found in the third and fifth sections on roles of stakeholders. In the meantime, the term "committee" refers to committee of the company or board of directors.

*Section 3: Roles of Stakeholders*

There exist various groups of stakeholders under the corporate governance mechanism. Most importantly, they are customers, employees, business partners, shareholders, investors, creditors, communities where the company is located, society, and government. Other groups of stakeholders include rivals and independent auditors.<sup>171</sup>

*Principles*<sup>172</sup>

- 1) All stakeholders should receive treatment from a company in accordance with all relevant law. Committee should consider establishing a mechanism to promote greater cooperation between the company and its stakeholders in

169 PLC Act, Section 15

170 2006 Principles, Preface

171 2006 Principles, 8

172 Ibid., 8

order to generate wealth, financial stability, and enterprise sustainability.

- 2) Committee should issue policies to ensure that treatment to all stakeholders involve consideration of their rights in accordance with the law or any agreement with the company. The company should not perform in any ways that violate the rights of those stakeholders, and at the same time should ensure that the compensation measure arising from violation is prescribed.
- 3) Committee should develop mechanisms to encourage the participation of stakeholders in complementing the operation of the company in order to promote sustainable stability of the company, and should also adequately disclose relevant important information to them for more effective participation.
- 4) Committee should endorse measures to receive claims or complaints on matters relating to violation of law, the accuracy of financial reports, the deficiency of internal control, and unethical conducts. Committee should also instigate a mechanism to protect the rights of such informants.
- 5) Committee should issue clear policies in relation to the protection of environment and the society.

#### *Best Practices*<sup>173</sup>

- 1) Committee should specify groups of stakeholders as well as their rights in accordance with the law.
- 2) Committee should implement clear measures to receive claims or complaints. Such measures may be directed through independent committee or audit committee in order to perform investigations in accordance with the procedure prescribed by the company and subsequently report the findings to the committee.

<sup>173</sup> Ibid., 8, Best Practice

- 3) Concerning the policies in relation to the protection of environment and the society, committee should thoroughly consider matters which directly affects the business operation in order for the stakeholders to be assured that the business operation of the company takes into account the aspects on environment and the society for sustainable development.

#### *Section 5: Responsibility of Directors*

There are a number of responsibilities of directors, which the 2006 Principles aim to implement. Followings are selected principles and best practices with relevance to human rights.

#### *Principles*<sup>174</sup>

- 1) Committee, as an important body to govern a company to maximize its benefits, must be responsible for the outcome of the operation to shareholders, and be independent from the management.
- 2) Committee should possess leadership, vision, and be independent in decision-making. Committee should implement a system to divide roles, duty, and responsibility between the committee and the management, as well as to ensure that the operation of the company is in accordance with the law and morality.

#### *Best Practices*<sup>175</sup>

Committee should promote the creation of the code of conduct in writing in order for all the committee, executives, and employees to understand the ethical standards that the company uses in business operation. Committee should subsequently monitor the serious compliance of the ethical standards.

Consequently, despite the 2006 Principles containing a number of initiatives which encourage the respect

<sup>174</sup> 2006 Principles, 10

<sup>175</sup> Ibid., 12, Best Practice 3.3

of human rights from various aspects, the Principles still lack its effectiveness in assuring compliance, as it is *per se* a guidance. Also, the scope of application is limited as the Principles only cover listed limited companies and public limited companies in the stock market. However, practice shows that despite the lack of official legal status, companies trading in the stock market treat the 2006 Principles as one of the guidance to comply, and non-compliance may discourage other companies to conduct stock trading with.

## **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?**

#### **a) Investment Promotion**

In light of the lack of specific provisions to require business enterprises to respect human rights, Thai law does contain a mechanism to encourage business enterprises to respect human rights. Such mechanism operates on an incentive-giving basis to the business enterprises wishing to be promoted when they invest. For this, despite the status as the Act, the Investment Promotion Act B.E. 2520 (1977) was promulgated, with subsequent amendments in 1991 and 2001, to set up certain conditions required for any business enterprises wishing to be eligible for investment promotion.<sup>176</sup> In other words, it is not required for a business enterprise to receive investment promotion, thus not having to comply with the provisions under this Act, but those who wish to receive such promotion must comply with the obligations prescribed in this Act.

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<sup>176</sup> Investment Promotion Act B.E. 2520 (1977) ["Investment Promotion Act"]

The first gateway to be eligible for investment promotion is for the business enterprise to have activities, which are important and beneficial to the economic and social development, and security of the country, involve production for export, have high content of capital, labour or service, or utilize agricultural produce or natural resources as raw materials, provided that in the opinion of the Board of Investment (BOI), they are non-existent in the Kingdom, or existent but inadequate, or use out-of-date production processes.<sup>177</sup> In addition, the investment project to which the Board may grant promotion shall be one, which incorporates appropriate measures for the prevention and control of harmful effects to the quality of the environment in the interest of the common good of the general living of the public and for the perpetuation of mankind and nature.<sup>178</sup> Once the BOI approved the initial application, it may stipulate other conditions in the promotion certificate for the compliance by the promoted entity.<sup>179</sup> Conditions relevant to the protection of human rights are the conditions on nationality and number of workers, technicians and experts, and training and employment of manpower.<sup>180</sup> Also, conditions may encompass prevention and control of damaging elements to the quality of the environment.<sup>181</sup>

With the promotion certificate, that business enterprise is eligible to receive a number of privileges following the compliance with the obligations prescribed. For instance, the promoted entity is entitled to be granted permission to bring foreign nationals who are skilled workers, experts, or spouses of those mentioned into Thailand for the periods of time determined by the BOI, even though such period is in excess of the quotas or period of time permitted to stay in Thailand as prescribed by the law on immigration.<sup>182</sup> Also, the promoted entity, even a foreign entity, shall be permitted to own land in order to carry on the promoted activity

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<sup>177</sup> Ibid., Section 16

<sup>178</sup> Ibid., Section 19

<sup>179</sup> Ibid., Section 20

<sup>180</sup> Ibid., Section 20 (5), (6)

<sup>181</sup> Ibid., Section 20 (7)

<sup>182</sup> Ibid., Section 25

to such an extent as the BOI deems appropriate, even in excess of the permissible limit under other laws. However, the foreign entity that dissolves its activity or transfers it to another person shall dispose of the land it has been permitted to own within one year of the date of dissolution or transfer.<sup>183</sup> Concerning the exemption of import duties, the promoted entity shall be granted exemption for payment of import duties on machinery upon the approval of the BOI, provided that such machinery comparable in quality is not being produced or assembled within the Kingdom in sufficient quantity to be acquired for used in such activity.<sup>184</sup>

Therefore, under the Investment Promotion Act, business entities, which falls under the category pursuant to the first gateway, and are able to demonstrate the compliance with the conditions, including the ones on human rights protection and promotion, prescribed by the Act and the BOI, are eligible to receive investment promotion.

In addition to the conditions under the Act, the BOI regularly issues announcements to further promote investment. Each announcement contains conditions, which allow the business entity to take advantage of investment promotion should it satisfies the conditions. Empirically, most announcements by the BOI that concern human rights protection relate to environment. For instance, the BOI Announcement No.3/2550 (2007) on Environmental Problem-Solving Measures stipulates that, by virtue of Section 16 of the Investment Promotion Act that allows the BOI to make announcement designating the types and sizes of investment activity eligible for promotion and may stipulate therein the conditions under which promotion is to be granted and may amend or abolish those conditions at any time<sup>185</sup>, it would give incentive to companies that carry out measures to solve environmental problems. From this announcement, the companies must be from the following types: oil refinery, natural gas separation, power generation, chemicals and petrochemicals, and minerals and base metals.

183 Investment Promotion Act, Section 27

184 Ibid., Section 28

185 Ibid., Section 16

They must comply with the environmental management criteria and conditions as specified by the government with pollutant values less than the legal control rate, and ultimately the projects must reduce their environmental impact according to criteria and methods specified by the Office of Board of Investment. The incentives for such compliance are as follows: the promoted project will be granted exemption from import duty on machinery for machinery improvement to reduce their environmental impact; the promoted projects will be granted a 3-year corporate income tax exemption on the revenue of existing projects, accounting for 70% of the investment value of the improvement excluding cost of land and working capital, and the corporate tax exemption period will be counted from the date of income derivation after the issuance of investment promotion certificate onwards. Even though it is stipulated that the business entity must complete the improvements according to the environmental impact reduction plan by March 31, 2011<sup>186</sup>, this indicates that the State implementing non-binding initiatives requiring or encouraging business enterprises to respect human rights. Another example is the BOI Announcement No.Sor.2/2551 (2008) concerning the investment promotion for activities that use hi-technology and produce of eco-friendly materials and products, where companies that satisfy the conditions are eligible to receive 8-year corporate income tax exemption without being subject to corporate income tax exemption cap.<sup>187</sup>

Each of the BOI Announcements has its own condition and time period of application. The announcements are made easily accessible on the website of the BOI.<sup>188</sup> Therefore, the BOI Announcements indicate that the Thailand is implementing non-binding initiatives to require or

186 BOI Announcement No.3/2550 (2007) on Environmental Problem-Solving Measures, at [http://www.boi.go.th/english/download/law\\_regulations/501/No.3-2550\\_rev131207.pdf](http://www.boi.go.th/english/download/law_regulations/501/No.3-2550_rev131207.pdf), accessed 17 June 2012

187 BOI Announcement No.Sor.2/2551 (2008), at [http://www.boi.go.th/english/download/law\\_regulations/559/sor2\\_2551\\_eng.pdf](http://www.boi.go.th/english/download/law_regulations/559/sor2_2551_eng.pdf), accessed 17 June 2012

188 See [http://www.boi.go.th/index.php?page=boi\\_announcements](http://www.boi.go.th/index.php?page=boi_announcements)

encourage business enterprises to respect human rights.

#### **b) Corporate Social Responsibility (CSR)**

The Thai government has acknowledged and included its pledge to promote corporate governance and to foster corporate cultures respectful of human rights in its current policy.<sup>189</sup> Under the heading of economic development policy, the current Thai government pledged to develop industrial sector to become environmentally friendly and to foster corporate social responsibility by improving production technology, reducing the use of natural resources and greenhouse gases emissions, promoting of use of recycled and reused materials as well as alternative energy in order for the entrepreneurs to generate extra income from selling carbon credits, and promoting local participation in problem-solving and environmental investigation leading to the status of the low-carbon society.<sup>190</sup> On the different aspect, the Thai government pledges to promote corporate governance in the private sector, particularly the system to investigate transparency and to promote corporate social responsibility.<sup>191</sup> The acknowledgement in the policy, therefore, predominantly calls for the examination of Corporate Social Responsibility (CSR) in Thailand.

The notion of CSR coincidentally reflects the traditional way of teaching that is deep-rooted in the Thai culture; that is, to “do good deeds for others and making merits”.<sup>192</sup> As a person in the society, a business entity is expected to perform such an ethical duty, which is typically done through “donations” or “philanthropy”.<sup>193</sup> Also, the concept

of social responsibility has been further emphasized owing to the recommendation by His Majesty King Bhumibol Adulyadej on the philosophy of “sufficiency economy”. This philosophy, in brief, calls for the Thai people to have a balanced way of life in order to achieve the “sustainable development”. Since the focus of this philosophy encompasses other aspects of life such as social development and environmental protection, in addition to the economic growth, it can be concluded that the philosophy of sufficiency economy plays a catalytic role in fostering the fundamental concept of CSR in Thailand.<sup>194</sup>

Consequently, with this emergence and the trend as reflected in the most recent government policy, business entities that have caused harm to the location they operate are called upon to perform this ethical duty by, among others, helping contribute to the society to achieve a better quality of life. In practice, good business entities conduct their business operation in the manner that balance and integrate their economic, social and environmental responsibilities, while minimizing societal harm.<sup>195</sup> At present, a number of companies in Thailand implement CSR via a number of forms. Some entities provide regular donations, while others go further to incorporate CSR in their business strategy. From the study, it is illustrated that SMEs in Thailand are performing well in terms of regular donations, while bigger firms, which are pressured by the societal expectation to perform CSR and realized its competitive societal advantage of doing so, proceed to incorporate CSR in their business strategy and corporate missions.<sup>196</sup>

The types of firms that are likely to be pressured to incorporate CSR into their business strategy are those whose business operations tend to pose unfavourable impacts to environment and society and those whose business operations tend to create harm to their workers or people living in the society. In Thailand, the company that receives the most

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189 Official Declaration of Policy B.E. 2554 (2011) of the Royal Thai Government under Her Excellency Prime Minister Yingluck Shinawatra to the Parliament, at [http://www.cabinet.thaigov.go.th/bb\\_main31.htm](http://www.cabinet.thaigov.go.th/bb_main31.htm), accessed 25 June 2012

190 Ibid., 18

191 Ibid., 42

192 Human Resources Development Working Group, “Corporate Social Responsibility in the APEC region: Current Status and Implications (Economic Paper: Thailand),” APEC#205-HR-01.2, HRDWG, December 2005, at <http://libguides.radford.edu/content.php?pid=49958&sid=366938>

193 Ibid.

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194 Ibid.

195 Ibid.

196 Ibid., 4

commendation for its outstanding CSR initiatives is the Siam Cement Group of Companies, for its adoption of international CSR best practices such as the Global Reporting Initiative (GRI) into its business operation.<sup>197</sup> Another company that is praised for its commitment to CSR is PTT Group, an oil company that was once state-owned but now privatized. In its Corporate Sustainability Report 2011, it explicitly states that PTT, including its Board, executives, and employees, must respect and comply with relevant laws, customs and traditions, and culture of each country in which PTT has invested or engaged businesses. Most importantly, it further states that adherence to human rights under the Universal Declaration of Human Rights, including non-violation and non-support of any acts violating the human rights, and adherence to the corporate governance principles and code of conduct, is mandatory.<sup>198</sup>

In addition to CSR, the Socially Responsible Investing (SRI) has not been formally incorporated into the Thai legislation concerning business operations, nor has any guidelines been issued by the government or the Stock Exchange of Thailand. However, there have been certain initiatives to call for the greater implementation of the SRI<sup>199</sup>, as it encourages investment to be conducted directly to community-based organizations, bypassing the traditional financial organizations. This approach is believed to create greater social impact in the long run. Nevertheless, this approach undoubtedly requires “a lot of efforts from all key stakeholders”<sup>200</sup>

197 Ibid., 4

198 Sustainability Report of 2011, PTT, 41

199 Socially Responsible Investing, at <http://www.calendar-thailand.com/topic/Socially-Responsible--Investing/41/>, accessed 2 September 2012

200 Suluck Pattarathammas, “On the Possibility of Socially Responsible Investing Funds in Thailand,” the TBS Public Lecture of Corporate Social Responsibility, at <http://www.bus.tu.ac.th/uploadPR>, accessed 2 September 2012

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

### a) Labour Standards

At present, specific official guidance to business enterprises on how to respect human rights issued by the Thai government is limited. The most important initiative by the Thai government on the issue is the introduction of Thai Labour Standards (TLS). The Ministry of Labour has issued the TLS No.8001-2546 on 27 June 2003 with the aim to promote corporate social responsibility of business entities in Thailand. The application of TLS is voluntary, but encouraged as such application would foster development of the business operation and management to be in line with international standards, particularly on the improvement of the quality of life of labours.<sup>201</sup> The introduction of the TLS reflects Thailand’s commitment to uphold the labour protection rights as enshrined in the Constitution and its international obligations under the International Labour Organization Convention and the Charter of the United Nations. The TLS No.8001-2546 was replaced by the new version of TLS No.8001-2553 in 2010 following some adjustments.

The TLS No.8001-2553<sup>202</sup> prescribes a number of standards pertaining to the good practice of labour standards, echoing the international standard of ISO 26000. The standards encompass various areas of labour protection, ranging from work conditions to labour safety. The standards are divided into two categories: labour management system and labour rights. The standards on labour management system aim to provide guarantee that the treatment of labour complies with requirements under ISO 9000, whereas the standards on labour rights and protection aim to ensure compliance with the ILO convention and the existing labour laws. Some of

201 Ministry of Labor, “Thai Labor Standard,” at <http://www.labor.go.th/th/webimage/images/load/file/tls17.pdf> , accessed 26 June 2012

202 Ministry of Labor, “Thai Labor Standard TLS No.8001-2553,” at <http://tls.labor.go.th/attachments/article/170/F7E7Ad01.pdf><http://tls.labor.go.th/attachments/article/170/F7E7Ad01.pdf>, accessed 26 June 2012

the standards prescribed by TLS No.8001-2553 require that the labour management system be regularly assessed to ensure compliance with the TLS; that no forced labour be permitted; that wages be paid for the amount of no less than required by law; that number of working hours, working days, and holidays be set in accordance with the law; that discrimination in relation to employment, work conditions and dismissal be prohibited; that no punitive and physical and mental punishment be carried out; that no child labour (aged under 15) be employed and no workers at the age of 15 to 18 be employed in the conditions that may cause harmful effects to their health; that no female workers be employed in the conditions that may cause harmful effects to their health, and no pregnant workers be seized of privileges and perks due to pregnancy; that the liberty to form union and initiate negotiations be affirmed; that the workplace be continually monitored to ensure the standard level of safety, hygiene, and environment; and that the welfare, toilets, drinking water, and canteen be clean and sufficiently provided.<sup>203</sup>

The mechanism under the TLS No.8001-2553 allows business entities to self-declare its compliance with the TLS. The self-declaration mechanism, based on the international standard of ISO/IEC 17500, requires the business entities to produce report to be made publicly available with regards to their compliance with the TLS. This would indicate the commitment by the business entities to be socially responsible in an effective manner, and thus improve the image of the respective entities.

#### **b) Investment Promotion for Sustainable Development**

The BOI issued an Announcement No.2/2553 (2010) on Investment Promotion for Sustainable Development<sup>204</sup> to discern the character of some of the preferred type of activities, which can

<sup>203</sup> Ministry of Labor, “Thai Labor Standard TLS No.8001-2553.”

<sup>204</sup> BOI Announcement No.2/2553, at [http://www.boi.go.th/english/download/law\\_regulations/690/No.%202-2553.pdf](http://www.boi.go.th/english/download/law_regulations/690/No.%202-2553.pdf), accessed 26 June 2012

be viewed as recommendation or guidance to business enterprises on how to promote sustainable development – a long-term human rights protection. For instance, for a business entity relating to energy conservation and alternative energy to receive investment promotion, its business activities must manufacture alcohol or fuel from agricultural products including scrap, garbage and/or waste; manufacture energy-conserving machinery or equipment that uses alternative energy; or alternatively use the production of electricity from alternative energy such as from agricultural material, biogas, and wind.<sup>205</sup>

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

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

Overall, there are no provisions under Thai law to require State-owned or controlled business enterprises (SE) to respect human rights with specific reference to the term ‘human rights’ itself. However, to determine whether there are any references to the notion of human rights in case of SE, one must discern from specific Acts that create the SE.

In Thailand, the SE is divided into the one that possesses legal personality and the other that does not. Examples of the latter include Thailand Tobacco Monopoly and the Government Lottery Office.

The SE that possesses legal personality performs its business operations as if it is incorporated by private sectors, and is divided into four categories: (1) the SE created by the incorporating Act such as the State Railway of Thailand and the Port Authority of Thailand; (2) the SE created by the Royal Decree promulgated pursuant to the Incorporation of

<sup>205</sup> Ibid.

Government-run Organization Act B.E.2496 (1953) and receives its entire financial support from the government such as Forest Industry Organization and Fish Marketing Organization; (3) Government-owned or –controlled banks such as the Bank of Thailand and the Government Savings Bank; and (4) Government-owned or –controlled limited companies such as Thai Airways International PLC and Aeronautical Radio of Thailand Ltd.

For the first category, reference to human rights-related matter can be found in the incorporating Acts. Unsurprisingly, the only reference to human rights-related matter is the mechanism to allow employees to seek appeal in the event of punishment pursuant to the rules and/or regulations of that SE. For instance, both the State Railway of Thailand Act B.E.2494 (1951) and the Port Authority of Thailand Act B.E.2494 (1951) contain mechanism to allow employees to seek appeal subsequent to the punishment under the rules and/or regulations of the SE.<sup>206</sup> Even for this regulation, it does not directly an issue of human rights abuses resulting from business operations, but rather an issue of rights to seek appeal in the event of the violation of the internal rules and/or regulations.

For the second category, the Royal Decrees to incorporate the government-run organization only contain provisions relating to, among others, the structure of the management and the management of budget. There are no provisions concerning the respect of human rights found in these legislations.

For the third category, there exist provisions with respect to human rights, which can be found in the incorporating Act of respective banks. However, such provisions only concern the protection of its staff's labour rights. No provisions to specify the duty to respect human rights are promulgated. For instance, Section 12(17) of the Small and Medium Enterprise Development Bank (SME Bank) Act B.E.2545 (2002) requires that the bank provide appropriate welfare for its employees and their family

<sup>206</sup> State Railway of Thailand Act B.E.2494 (1951), Section 45, and Port Authority of Thailand Act B.E.2494 (1951), Section 41

members.<sup>207</sup> However, no such provision is found in the Export and Import Bank (EXIM Bank) B.E.2536 (1993).<sup>208</sup> Furthermore, the Bank for Agriculture and Agricultural Co-operatives Act B.E.2509 (1966) contains objectives to provide financial support and remedy to farmers and other relating agricultural persons. Section 9(13) of the Act requires that the bank participate in the remedial project for those whose agricultural products are affected by natural disasters.<sup>209</sup> Nevertheless, there are still no provisions concerning the remedy for human rights abuses arising from business operations.

For the fourth categories, given the more flexibility nature of the operation of this type of companies, there are no legal provisions to require them to respect human rights. However, the CSR concept dictates that they employ certain projects or initiatives to give back to the society and ensure respect of human rights.

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

No.

**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?**

No.

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

Not applicable

<sup>207</sup> Small and Medium Enterprise Development Bank (SME Bank) Act B.E.2545 (2002), Section 12(17)

<sup>208</sup> Export and Import Bank (EXIM Bank) B.E.2536 (1993)

<sup>209</sup> Bank for Agriculture and Agricultural Co-operatives Act B.E.2509 (1966), Section 9(13)

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

The definition of conflict-affected and high-risk areas varies and none attains universal acceptance. However, the broad meaning of such terms can be discerned from various sources. For instance, a conflict-affected area is identified by the presences of armed conflict, widespread violence or other risks of harm to people, acknowledging the influence of the international humanitarian law. Furthermore, a high-risk area may encompass situations that involve, among others, political instability or repression, institutional weakness, insecurity, a collapse of civil infrastructure and widespread violence.

Recent developments of unrest in Thailand, especially in the Southern Border Provinces, may lead foreign observers to conclude that the area is considered conflict-affected or having high risk. However, it is premature to conclude so, without the formal endorsement of the Government of the Kingdom of Thailand. According to the Report of the Working Group on the Universal Periodic Review on Thailand, it appears that Thailand, despite not formally endorsing the Southern Border Provinces as conflict-affected, acknowledges the situation as challenges. It reiterates that the situation in the Southern Border Provinces is not an armed conflict, but rather it involves protracted violence.<sup>210</sup> Provided the sensitivity of such endorsement, it is fair to conclude at this stage that, without prejudice to the status of the situation and for the purpose of this report, the area can be considered conflict-affected, and that there have been developments in terms of imposing special legislations in the area. One of the most notable legislations is the Emergency Decree on Public Administration in Emergency Situation

B.E. 2548 (2005).<sup>211</sup> However, the content in the Emergency Decree only addresses the restriction of certain rights and liberties, particularly concerning criminal justice process, and is rather criticized to be violating fundamental human rights, not encouraging greater protection.

From 2004 to 2009, there have been 9,446 violence incidents causing 4,100 casualties and 6,509 injuries.<sup>212</sup> In 2008, there were 821, but the number rise up to 1,035 in the following year. Statistically, there were more Muslim-Thai casualties than Buddhist-Thai, while more Buddhist-Thai were injured than Muslim-Thai. In 2009, the National Human Rights Committee received 20 complaints in relation to violence occurring in the Southern Border Provinces, but they were all related to criminal justice process. For instance, 10 complaints related to violence and/or torture committed by government officials, 3 complaints related to effect from the violence, and 4 complaints related to reassessment of undue detention.<sup>213</sup> To date, the region continues to be threatened by perpetrators of violence, which cause physical and psychological harm on the locals.<sup>214</sup>

Human rights violation in the Southern Border Provinces takes a number of forms: violation of rights to justice by government officials; use of violence affecting life and living condition of the public; biases based on race, religion, culture, discrimination, and access to resource and public services. In addition, other sources of problems are, but not limited to, as follows: lack of education and professional training, continuous unemployment, poor healthcare scheme, and illegal trading such as drugs and human trafficking.<sup>215</sup> However, efforts to alleviate the problem, with particular emphasis on rehabilitation of victims, have been made by the government in 2008-2009. Notwithstanding the lack of specific address to business entity to respect

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210 Office of the High Commissioner on Human Rights, United Nations, "Report of the Working Group on the Universal Periodic Review" ["UPR Report"], at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/172/64/PDF/G1117264.pdf?OpenElement>, 4, para. 9, accessed 27 June 2012

211 Emergency Decree on Public Administration in Emergency Situation B.E. 2548 (2005)

212 NHRC Report, 76

213 Ibid., 77

214 UPR Report, 5, para. 9

215 NHRC Report, 77

human rights and ensure no human rights violation is committed, the government had issued various policies with the aim to assist and rehabilitate those affected by the violence. Particular emphasis was made to orphans, widows, students, teachers, and academic officers.<sup>216</sup> Plans to offer financial support, skill building, business management training, and to promote the establishment of small and medium enterprises to generate income for the locals are issued.

Furthermore, the government designated the Southern Border Provinces to become special development area with the initiation of Halal food industry and tax privilege scheme.<sup>217</sup> For instance, the BOI has issued an announcement No.9/2552 (2009) to promote and develop industry in three southern provinces, namely Pattani, Yala, and Narathiwat, for social and security benefits of the area. The promotion is, similar to other announcements, based on incentive providing, with the approved entity given 8-year of corporate income tax exemption and 50% corporate income tax reduction of net profit derived from its investment for 5 years after the exemption period, as well as given double deduction for transportation, electricity and water costs for 15 years from the first date of income derivation from promoted project. The entity wishing to be included in the scheme must submit an investment promotion application of the project within December 31, 2012.<sup>218</sup> There is an example of a Malaysian businessperson being granted investment promotion for the 100-room hotel project in Betong district, Yala province. The project was granted investment promotion as the BOI considers it to be beneficial to the development of the area, as the hotel would serve to accommodate visitors traveling to the area and thus generate

business activity.<sup>219</sup> Also, the Thai government has issued a policy to promote the area to become a halal food production centre. With the centre, it would reinstate and secure jobs to the locals and consequently generate more income to improve the quality of life.<sup>220</sup>

Hence, Thailand has taken a non-legislative approach in addressing the promotion of human rights in the Southern Border Provinces, but such an approach is rather general and subsequent monitoring to ensure implementation is required. In relation to business-related human rights violation in conflict-affected or high-risk areas, there are still no specific addresses on the issue.

#### **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?**

Human rights abuses can be mitigated, or prevented, through the empowerment of the people. That is why the Thai government has issued a policy to develop the areas in the southern provinces, which have been in reality affected by continuous unrests. Poised with the aim to strengthen the local community, the Thai government has initiated an Islamic Micro-credit plan, which requires assistance from relevant government agencies and state-owned organizations in terms of technical, management, and financial support. Currently, the Islamic Bank of Thailand serves as the major institution to provide support for the Islamic Micro-credit plan.

The interest-free Islamic Micro-credit plan is intended to provide financial assistance to the poor and low-income earners, operating in accordance with the religious teachings, by granting small

216 Ibid.

217 NHRC Report, 77

218 BOI Announcement No.9/2552 (2009), at [http://www.boi.go.th/english/download/law\\_regulations/664/No9\\_2552\\_eng\\_1%20%20.pdf](http://www.boi.go.th/english/download/law_regulations/664/No9_2552_eng_1%20%20.pdf), accessed 26 June 2012

219 "Incentives and Financial Measures to Help Develop Southern Border Provinces," Inside Thailand Review, at <http://thailand.prd.go.th/ebook/review/content.php?chapterID=18>, accessed 29 June 2012

220 Ibid.

loans, which they would normally be denied in the ordinary cases, to enable them to start small business entrepreneurship and earn more income. In addition to the financial assistance, the plan is also to provide knowledge and understanding about transaction and financial mechanisms that are not in contravention with the Islamic teachings.<sup>221</sup> With more income, economic development entails, and the living standard of the locals improves. The empowerment and promotion of entrepreneurship would evidently mitigate the human rights abuses arising from business operations in the area.

**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?**

See 7.1

**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?**

Not applicable

**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?**

Not applicable

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

Thailand has taken steps, in addition to the periodic assessment mechanisms mentioned in Question III.3, to ensure coherence in its policies domestically and internationally. As previously stated, Thailand is a party to major international human rights conventions, and it is therefore obliged to abide by its international obligations. Recently, Thailand has presented its report to the United Nations Human Rights Council under the Universal Periodic Review (UPR) regime on 5 October 2011. The Working Committee, led by H.E. Mr. Sihasak Phuanketkeow, presented Thailand's report, which covered the human rights situations in Thailand as well as other developments in terms of promoting human rights protection and social development in the country.

At the UPR session, Thailand received 172 recommendations from various countries, and has declared its acceptance for 100 recommendations. The remaining 72 recommendations were put on hold, and 34 of which were accepted during the 19<sup>th</sup> Session of the UN Human Rights Council on Consideration of the Universal Periodic Review Report of Thailand on 15 March 2012.<sup>222</sup>

<sup>222</sup> Statement by H.E. Mr. Sihasak Phuanketkeow, Permanent Secretary for Foreign Affairs and Special Envoy of the Royal Thai Government at the Consideration of the Universal Periodic Review Report of Thailand 19<sup>th</sup> Session of the UN Human Rights Council Geneva, 15 March 2012

<sup>221</sup> "Incentives and Financial Measures to Help Develop Southern Border Provinces," Inside Thailand Review.

In total, Thailand has accepted 134 out of 172 recommendations from the recent UPR session.

In ensuring the implementation of its international human rights obligations, particularly in relation to business and human rights, Thailand has pledged to follow the recommendations on, among others, labours and human trafficking. Thailand pledges to continue with its efforts to promote and protect the right to work, the right to health and the right to education of its people in order to maintain an adequate standard of living for all, as recommended by Brunei Darussalam, and to continue to focus its efforts in ensuring full protection of the human rights for all migrant and foreign workers, particularly to enhance their safety and welfare, as recommended by Myanmar.<sup>223</sup> In relation to human trafficking, Thailand agrees to accede to the Palermo Protocol and continue improving its implementation of policy and legal framework related to human trafficking, as recommended by Norway, and to continue to strengthen its efforts to combat trafficking and abuses of labour rights, particularly against vulnerable migrants, as recommended by New Zealand.<sup>224</sup>

### **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?**

It can be discerned from the recent Official Declaration of Policy of the current Thai government to the parliament that Thailand is presently taking steps to ensure that the 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

223 Office of the High Commissioner on Human Rights, United Nations, "National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1- Thailand."

224 Ibid.

their respective mandates.<sup>225</sup> Under Section on Good Governance relating to law and justice, the Thai government pledges to reform law enforcement mechanism in order for the state-based institutions to enforce law fairly, equally, transparently, and effectively, in accordance with the Rule of Law and the Universal Declaration of Human Rights. Furthermore, the Thai government pledges to promote the implementation of moral and ethical standards as well as good governance to public and government officials in order to ensure transparency of their conducts, and to seriously suppress corruptions and wrongful conducts of public and government officials in order to boost confidence of the general public.<sup>226</sup>

### **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 the general perspective, Thailand has pledged internationally to comply with its human rights obligations. This undoubtedly encompasses all aspects of Thailand's conduct, including when it concludes economic agreements with other States or business enterprises. However, the recent development on the potential construction of the Xayaburi dam, located in the north of Laos, with the power-purchase agreement by the Electricity Generating Authority of Thailand (EGAT) and the Ch. Karnchang, one of the leading construction firms in Thailand, raises concerns as to Thailand's compliance with its international human rights obligations.

According to the statement by the representative of EGAT at the meeting with Thailand's NHRC, the government of Thailand and Laos has concluded a memorandum of understanding concerning

225 Official Declaration of Policy B.E. 2554 (2011) of the Royal Thai Government under Her Excellency Prime Minister Yingluck Shinawatra to the Parliament, 49, at [http://www.cabinet.thaigov.go.th/bb\\_main31.htm](http://www.cabinet.thaigov.go.th/bb_main31.htm), accessed 29 June 2012

226 Ibid., 41

international electricity, by agreeing that Laos will determine an appropriate amount of energy to be sold to Thailand.<sup>227</sup> Since the Xayaburi dam is located in the international river of Mekong that flows to the side of Thailand's north-eastern territory, its effect on Thailand is inevitable. The dam is to be located approximately 30 kilometres from the town of Xayaburi and is 200 kilometres from Thailand. The main objective for the construction of the dam is to generate more income for the purpose of economic and social development in Laos, since allegedly 95 percent of the electricity produced is believed to be sold to Thailand under the aforementioned power-purchase agreement in July 2010.

The construction of the dam is heavily criticized as being a highly potential cause of environmental damage to the area as well as the areas down the river. According to International Rivers, a non-governmental organization based in the US with the main objective to stopping destructive river projects and promoting better options, the Xayaburi dam will cause severe environmental damage, including the critical block of fish migration, the destruction of river's complex local ecosystem, and the block of sediments flows in the Mekong River.<sup>228</sup> With the potential environmental damage, the Xayaburi Dam project had to be submitted for approval by the region's governments through a regional decision-making process called the "Procedures for Notification, Prior Consultation and Agreement" (PNPCA), which is facilitated by the Mekong River Commission (MRC).

The concerned governments agreed in December 2011 to postpone the decision on the Xayaburi dam pending the completion of the joint study on the trans-boundary impacts of the Mekong mainstream dams. However, with the power-

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227 Office of the National Human Rights Commission of Thailand, "Public Hearings Concerning the Potential Construction of the Xayaburi Dam on 5 March 2012," at [http://www.nhrc.or.th/2012/wb/th/news\\_detail.php?nid=186&parent\\_id=1&type=highlight](http://www.nhrc.or.th/2012/wb/th/news_detail.php?nid=186&parent_id=1&type=highlight), accessed 1 July 2012

228 "Xayaburi Dam", International Rivers, at <http://www.internationalrivers.org/campaigns/xayaburi-dam>, accessed 1 July 2012

purchase agreement still in place, it raises a concern on the position of Thailand's compliance with its international obligations.

Prompted by concerned public that filed complaint, the NHRC invited both government and private agencies to provide information on the matter. Among the attendees of this meeting on 21 February 2012 are representatives from EGAT, Ministry of Energy, Ministry of Foreign Affairs, Department of Water Resources, the MRC, the Ch. Karnchang, Kasikorn bank, Krung Thai bank, and Siam Commercial bank. However, the outcome of the meeting has yet been completed, but at least the meeting indicates Thailand's intention to comply with its international obligations.<sup>229</sup>

**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?**

Not applicable

**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?**

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

In addition to the non-legal State-based grievance mechanisms, which are conducted by the NHRC and will be discussed in Question III.10, there exists such kind of mechanism relating to environment. Beginning in 2003, the Department of Environmental

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229 Ibid.

Quality Promotion (DEQP) has collaborated with United States-Asia Environmental Partnership (US-AEP) and United States Environmental Protection Agency (US-EPA)<sup>230</sup> to establish a framework in its mediation program, including the training of mediators and the campaign to promote the use of the program.<sup>231</sup> At present, the work of mediation relating to environmental dispute in Thailand is still at its fledgling stage. The Division of Public Participation Promotion, one of DEQP's subdivisions, is tasked with mandate to develop the environmental dispute resolution mechanism.<sup>232</sup>

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

Not applicable

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

At present, there is no specific legislation, which directly requires or encourages the establishment of non-State-based grievance mechanism. However, according to the Official Declaration of Policy, the current government pledges to improve the assistance mechanism for those facing unfairness by implementing proactive measures for them to access justice and fairness in the expedite manner.<sup>233</sup>

<sup>230</sup> "Ministry of Natural Resources and Environment pushes forward the environmental mediation program", <http://www.ryt9.com/s/prg/144101>, accessed 2 September 2012

<sup>231</sup> "Mediation Institutions," at [http://baseswiki.org/en/Thailand#Mediation\\_Institutions](http://baseswiki.org/en/Thailand#Mediation_Institutions), accessed 2 September 2012

<sup>232</sup> Ministerial Regulations B.E. 2555 (2012) issued under the State Administration Act. B.E. 2532 (1990), modified B.E. 2543 (2000), Section 10(6)

<sup>233</sup> Official Declaration of Policy B.E. 2554 (2011) of the Royal Thai Government under Her Excellency Prime Minister Yingluck Shinawatra to the Parliament, at [http://www.cabinet.thaigov.go.th/bb\\_main31.htm](http://www.cabinet.thaigov.go.th/bb_main31.htm), accessed 2 September 2012

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

Established and empowered by the Constitution, the National Human Rights Committee (NHRC) remains the major focal point of contact to receive complaints of potential human rights violation. To file complaints, the NHRC published procedures which are made easily accessible on its website and on free-distribution of pamphlets. Those who can file the case are victims of human rights abuses, human rights-related private organization, or the NHRC itself. Ways of filing the case include by phone at call-centre 1377, by post, by email, in person, through designated human rights-related private organization or directly to the NHRC.<sup>234</sup> Relevant details such as name of person filing complaints, name of person alleged to have violated human rights, and the description of the act or the situation alleged to be in violation of human rights.

Once the complaint is received, the NHRC then convenes a preliminary consideration on the situation and assesses whether it amounts to human rights violation and falls under the mandate of the NHRC. If the result is positive, the NHRC then suggests the parties to go through reconciliation process and produce a memorandum of agreement between them. If the reconciliation process is not possible for whatever reasons, the NHRC shall reconsider the case and produce a report to recommend relevant authorities or persons to comply with its recommendation. In the event of non-compliance, the NHRC shall report directly to the Prime Minister for further actions. Also, should the Prime Minister remains inactive on the matter, the NHRC is empowered to report the case to the Parliament for further actions. During the 2011 fiscal year (1 October 2010 – 30 September 2011), the NHRC received 694 cases, 7 of which

<sup>234</sup> Office of the National Human Rights Commission of Thailand, "Information on Filing Claims," at [http://www.nhrc.or.th/2012/wb/th/contentpage.php?id=24&menu\\_id=2&groupID=3&subID=22](http://www.nhrc.or.th/2012/wb/th/contentpage.php?id=24&menu_id=2&groupID=3&subID=22), accessed 19 March 2012

are from overseas.<sup>235</sup> Police ranks first as the type of civil servant receiving the highest complaints at 85 cases.<sup>236</sup> Very recently, from 1 October 2011 to 10 February 2012, the NHRC received the total of 173 cases.

The NHRC has recently been involved in the investigation of the alleged human rights violation in Sre Ambel District, Koh Kong Province, Cambodia, following the complaint filed by lawyers from the Community Legal Education Centre (CLEC) in Cambodia. The nexus of the NHRC and the situation is the involvements of a Thai sugar company that possesses 70 per cent investment and has effective operational control over two companies that hold the Cambodian concessions. The alleged human rights violation occurred in the form of forced land confiscation from the locals via violent means such as the killing of livestock and threats by armed security groups.<sup>237</sup> As with other situations, the NHRC affirms its commitment to promote human rights by accepting the complaint and embarking on the investigation.

In addition to the investigations, the NHRC is also mandated to produce annual reports on the assessment of human rights situation in Thailand, and provide recommendation to the government and the parliament to promote human rights protection.

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235 Office of the National Human Rights Commission of Thailand, NHRC Annual Operational Report of 2011, at <http://www.nhrc.or.th/2012/wb/webdoc/stat2555.pdf>, accessed 19 March 2012

236 Ibid.

237 Earth Rights International, "Thai Human Rights Commission blazes the trail in hearing transnational human rights cases," at <http://www.earthrights.org/blog/thai-human-rights-commission-blazes-trail-hearing-transnational-human-rights-cases>, accessed 10 July 2012

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

See Question III.5.1 b) on CSR

### Conclusion

By adopting the UN Framework as the basis for the study, the Report has presented Thailand's existing "works" on the protection of human rights, particularly those arising from the course of business operations, as of October 2012. As indicated at the outset, the present scenario of corporate human rights accountability in Thailand mostly relies on guidelines and best practices rather than binding legal rules. The Report also points out Thailand's inactive role to encourage business enterprises to have respect for human rights, as well as Thailand's not taking adequate steps to ensure such respect. However, the Report highlights that Thailand's comprehensive labor rules and regulations can serve as welcoming examples of the country's initial commitment to ensure the protection from human rights violations from business operations.

Further research on this contemporary topic is timely and necessary. It is interesting to observe whether the following of the UN Framework by ASEAN countries will be successful in combining voluntary and mandatory tools and mechanisms of corporate human rights accountability to produce a new normative business and human rights practice in ASEAN. Thailand's current practice could be seen as a stepping-stone towards such an ambition, and through consistent external pushes and encouragement may such an ambition be realized.



# VIETNAM

co-authored:  
Hao Duy Phan

## BASELINE REPORT: VIETNAM\*

### SNAPSHOT BOX

<b>Number of Multinational Business Enterprises operating in the country</b>	There is no official information on the number of multinational business enterprises in Vietnam in 2012. In 2009, the number of foreign invested enterprises in Vietnam was 5,625. <sup>1</sup> As of October 2012, there are 14,198 foreign invested projects. <sup>2</sup>
<b>Number of Micro, Small and Medium Business Enterprises operating in the country</b>	More than 500,000 small and medium business enterprises in total. <sup>3</sup>
<b>Number of State-owned Enterprises and the industries in which they operate</b>	3,328. <sup>4</sup>
<b>Flow of Foreign Direct Investment from 2008 to 2012 (or other recent 3 to 5 year range)</b>	<p><b>2008</b> – Number of projects: 1,557; total registered capital (Mill. USD): 71,726; total implemented capital (Mill. USD): 11,500.</p> <p><b>2009</b> – Number of projects: 1,208; total registered capital (Mill. USD): 23,107; total implemented capital (Mill. USD): 10,000.</p> <p><b>2010</b> – Number of projects: 1,237; total registered capital (Mill. USD): 19,886; total implemented capital (Mill. USD): 11,000.</p> <p><b>2011</b> – Number of projects: 1,186; total registered capital (Mill. USD): 15,598; total implemented capital (Mill. USD): 11,000.<sup>5</sup></p>
<b>Main industries in the country</b>	Food processing, garments, mining, coal, steel, cement, oil, chemical fertilizers, shoes, machine-building, glass, tires, oil, mobile phones. <sup>6</sup>

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1 General Statistics Office of Vietnam, *Enterprises in Vietnam during the first Nine Years of the 21st Century*, Statistical Publishing House, 2010, 9, available at [www.gso.gov.vn/Modules/Doc\\_Download.aspx?DocID=11470](http://www.gso.gov.vn/Modules/Doc_Download.aspx?DocID=11470), (last visited 11 November 2012).

2 See Vietnam Government News, “Doanh nghiệp nhỏ và vừa: bước tiến lớn”, available at <http://fia.mpi.gov.vn/News.aspx?ctl=newsdetail&p=2.44&aID=1276>, (last visited 11 November 2012).

3 Number estimated by the Government in 2011. See Vietnam Government News, “Doanh nghiệp nhỏ và vừa: bước tiến lớn”, available at <http://baodientu.chinhphu.vn/Home/Doanh-nghiep-nho-va-vua-buoc-tien-lon/2011/58354.vgp>, (last visited 11 November 2012).

4 Number estimated in 2009, according to General Statistics Office of Vietnam, *Enterprises in Vietnam during the first Nine Years of the 21st Century*, Statistical Publishing House, 2010, 9, available at [www.gso.gov.vn/Modules/Doc\\_Download.aspx?DocID=11470](http://www.gso.gov.vn/Modules/Doc_Download.aspx?DocID=11470), (last visited 11 November 2012). In 2000, the number of state-owned enterprises was 5759. The number of private enterprises in 2009 was 196,799.

5 General Statistics Office of Vietnam, *Foreign Direct Investment Projects licensed in Period 1988-2011*, available at [http://www.gso.gov.vn/default\\_en.aspx?tabid=471&idmid=3&ItemID=13121](http://www.gso.gov.vn/default_en.aspx?tabid=471&idmid=3&ItemID=13121), (last visited 11 November 2012).

6 Central Intelligence Agency, *The World Factbook – Vietnam*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html>, (last visited 11 November 2012).

<p><b>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</b></p>	<p>There is no information on cases involving business-related human rights violations that have been reported to a national human rights institution or any other national and international bodies. In fact, no national human rights institutions or bodies, including ombudsmen, has been established in Vietnam. Vietnam has not accepted individual complaints mechanisms provided for under any international human rights treaties that it has ratified.<sup>7</sup> The Universal Periodic Review of Vietnam, conducted in 2009 did not reveal human rights violations involving business activities.<sup>8</sup></p>
<p><b>Have the Framework and/or the Guiding Principles been translated into the country's languages and published in the country?</b></p>	<p>Not yet. There is currently no known plan to translate the Framework and the Guiding Principles and publish these documents on official websites in Vietnam.</p>

## OVERVIEW OF THE COUNTRY'S BUSINESS AND HUMAN RIGHTS LANDSCAPE

Vietnam is a one-party state ruled by the Communist Party. The Party leadership is mandated by the country's Constitution.<sup>9</sup> The 1992 Constitution (amended in 2001) provides legal bases for the protection of basic political, civil, economic, cultural and social rights<sup>10</sup> and, at the same time, requires the entire people to participate in defending the socialist motherland<sup>11</sup> and safeguard national security and social order.<sup>12</sup> All acts violating the interests of the people shall be severely punished.<sup>13</sup> The state's goal is to build a rich and strong country in which social justice prevails, and people enjoy freedom, happiness, and all necessary conditions for complete development.<sup>14</sup> In terms of economic policy, the state promotes a multi-component commodity economy functioning in accordance with market mechanisms under the state management and following a socialist orientation.<sup>15</sup>

7 For status of ratification of international human rights treaties, see UN Treaty Collection, Status of Treaties, Chapter IV, Human Rights, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>, (last visited 11 November 2012).

8 See UN Human Rights Council, National Report Submitted Universal Periodic Review: Vietnam, Document A/HRC/WG.6/5/VNM/1 dated 16 February 2009, available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A\\_HRC\\_WG6\\_5\\_VNM\\_1\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A_HRC_WG6_5_VNM_1_E.pdf), (last visited 11 November 2012).

9 The 1992 Constitution of the Socialist Republic of Vietnam as amended in 2001 [hereinafter 1992 Constitution (amended in 2001)], Article 4. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10450](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10450), (last visited 11 November 2012).

10 Ibid., Article 50

11 Ibid., Article 44

12 Ibid., Article 3

13 Ibid.

14 Ibid.

15 Ibid., Article 15.

Since the reform policy (known in Vietnamese as *Doi Moi*) launched in 1986, Vietnam has reached a turning point in economic growth. People's living standards have remarkably improved. One of the country's most outstanding achievements is its success in poverty reduction, which is recognized by the World Bank and many other international institutions. In fact, Vietnam has been listed as the eighth most popular destination for transnational corporations' foreign direct investment in 2010-2012.<sup>16</sup> The country, however, has also faced many economic and social problems, notably the rich-poor gap, urban-rural disparity, environmental issues, land rights violations and labour rights problems.<sup>17</sup> One of the biggest challenges facing Vietnam is to strike a balance between increasing economic growth and ensuring sustainable development, social security and the people's full enjoyment of human rights.

As indicated in this Report, the Government of Vietnam has made many efforts to address these challenges. In terms of legal framework, it has promulgated and amended thousands of laws and by-law documents,<sup>18</sup> many of which contain provisions on protecting human rights against possible abuses by business activities. Relevant legal documents which have been adopted in recent years, shortly before and after the Human Rights Council's adoption of the "Protect, Respect and Remedy" Framework in 2008, include the 2012 Labour Code, 2012 Water Resources Law, 2012 Legal Education Law, 2012 Labour Union Law, 2011 Law against Human Trafficking, 2011 Complaint Law, 2011 Denunciation Law, 2010 Law on Persons with Disability, 2010 Customers Protection Law, 2010 Law on Adoption, 2010 Law on Economic and Sufficient Use of Energy, 2010 Law on Food Safety, 2009 Law on Elderly People, 2009 Law on Medical Examination and Treatment, 2009 Law on State Compensation Liability, 2008 Biodiversity Law, 2008 Law on Health Insurance, 2008 Law on Promulgation of Legal Documents, 2006 Gender Equality Law, 2006 Law on Legal Assistance, 2006 Securities Law, 2006 Law on Social Insurance, 2006 HIV-counteracting Law, 2005 Investment Law, 2005 Enterprise Law and 2005 Environment Protection Law (the content of these legal documents shall be addressed later in the Report).<sup>19</sup>

<sup>16</sup> Allens, Legal Guide to Investment in Vietnam, 2012, 3, available at <http://www.vietnamlaws.com/pdf/LegalGuidetoInvestmentinVietNam.pdf>, (last visited 11 November 2012)

<sup>17</sup> See Earth Rights International Mekong School, I Want to Eat Fish, I Cannot Eat Electricity: Public Participation in the Mekong Basin River for discussion on the impact of the hydropower projects developed by the government on the indigenous community, the possible erosion of their culture, and problems of relocation and livelihood, available at <https://www.earthrights.org/sites/default/files/publications/I-Want-To-Eat-Fish.pdf>, (last visited 11 November 2012); see Human Rights Watch, The Rehab Archipelago Report 2011 for concerns raised by NGOs over the use of forced labour from detention centres by businesses in the cashew industry. This report gives a good overview of the problems in this area in Vietnam; for concerns expressed by other states on Vietnam human rights records, see UN Human Rights Council, the Report of the Working Group on Universal Periodic Review: Vietnam, Document A/HRC/12/11\* dated 5 October 2009, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/163/82/PDF/G0916382.pdf?OpenElement>, (last visited 11 November 2012)

<sup>18</sup> According to the Report of the Vietnamese government to the Human Rights Council under the Universal Periodic Review, since 1986, Vietnam has promulgated and amended around 13,000 laws and by-law documents in which rights are protected. These rights are present throughout the chapters and sections of the Constitution and are enumerated in many important legal documents, including the Law on the Organization of the National Assembly, Law on the Election of National Assembly Deputies, Law on the Organization of the Government, Law on the Election of the People's Council Members, the Law on the Organization of the People's Councils and People's Committees, Law on the Organization of the People's Court, Law on the Organization of the People's Procuracy, the Civil Code, Civil Procedures Code, Penal Code, Criminal Procedures Code, the Press Law, Law on Publication, Law on Complaints and Petitions, Law on Amnesty and the Ordinance on Religion and Belief, Law on Protection of the People's Health, Labour Code, Education Law, Land Law, Law on Social Insurance and Law on HIV/AIDS Prevention and Control; see UN Human Rights Council, National Report Submitted Universal Periodic Review: Vietnam, Document A/HRC/WG.6/5/VNM/1 dated 16 February 2009, available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A\\_HRC\\_WG6\\_5\\_VNM\\_1\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A_HRC_WG6_5_VNM_1_E.pdf), (last visited 11 November 2012).

<sup>19</sup> For a comprehensive list of Vietnamese legal documents (in Vietnamese, visit: <http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban>, (last visited 11 November 2012).

The 1992 Constitution (amended in 2001) provides that business enterprises belonging to all components of the economy are all equal before the law and must fulfil all their obligations to the state.<sup>20</sup> Business enterprises that violate the laws shall bear civil and administrative liability. Individuals who commit crimes shall be held criminally liable. In 2012, the National Assembly adopted the new Labour Code, mentioning for the first time in an important legal document the term “social responsibility of employers.” Article 4(2) of the 2012 Labour Code states that it is the State’s policy to ensure the legitimate rights and benefits of employers, but at the same time also ensure democracy, fair and civilized labour management and employers’ social responsibility.<sup>21</sup>

At the international level, Vietnam is a party to the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; and Convention on the Rights of the Child.<sup>22</sup> The country has also ratified 19 conventions of the International Labor Organization, including C006 - Night Work of Young Persons (Industry) Convention, 1919; C014 - Weekly Rest (Industry) Convention, 1921; C027 - Marking of Weight (Packages Transported by Vessels) Convention, 1929; C045 - Underground Work (Women) Convention, 1935; C080 - Final Articles Revision Convention, 1946; C116 - Final Articles Revision Convention, 1961; C120 - Hygiene (Commerce and Offices) Convention, 1964; C123 - Minimum Age (Underground Work) Convention, 1965; C124 - Medical Examination of Young Persons (Underground Work) Convention, 1965; and C155 - Occupational Safety and Health Convention, 1981.<sup>23</sup> In addition, Vietnam has signed a Cooperation Framework on Promoting Decent Work with ILO. In 2011, it received three independent experts of the UN Human Rights Council who have mandates related to issues of implication for business activities on human rights: Independent Expert on the Effects of Foreign Debt and other Related International Financial Obligations of States on the Full Enjoyment of Human Rights, particularly Economic, Social and Cultural Rights,<sup>24</sup> Independent Expert on the Question of Human Rights and Extreme Poverty,<sup>25</sup> and Independent Expert on Minority Issues.<sup>26</sup>

In terms of treaty implementation, the 2005 Law on the Conclusion, Accession and Implementation of Treaties reiterates the principle of *pacta sunt servanda*<sup>27</sup> and emphasizes that, in cases where a legal document of Vietnam and a treaty to which Vietnam is a party contains different provisions on the same matter, the provisions of the treaty shall prevail.

20 1992 Constitution (amended in 2001), Article 3

21 2012 Labour Code, Article 4(2), available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=163542](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=163542), (last visited 11 November 2012).

22 For status of ratification of international human rights treaties, see UN Treaty Collection, Status of Treaties, Chapter IV, Human Rights, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>, (last visited 11 November 2012).

23 International Labour Organization, Ratifications of ILO Conventions: Vietnam, available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:1906111866322950:::P11200\\_INSTRUMENT\\_SORT:1](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:1906111866322950:::P11200_INSTRUMENT_SORT:1), (last visited 11 November 2012).

24 Human Rights Council, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights - Preliminary note on mission to Vietnam, A/HRC/17/37/Add.2, dated 18 May 2011, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/132/44/PDF/G1113244.pdf?OpenElement>, (last visited 11 November 2012).

25 Human Rights Council, Report of the Independent Expert on Question of Human Rights and Extreme Poverty, A/HRC/17/34/Add.1, dated 9 May 2011, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/131/12/PDF/G1113112.pdf?OpenElement>, (last visited 11 November 2012).

26 Human Rights Council, Report of the Independent Expert on Minority Issues, A/HRC/16/45/Add.2, dated 24 January 2011, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/103/82/PDF/G1110382.pdf?OpenElement>, (last visited 11 November 2012).

27 2005 Law on the Conclusion, Accession and Implementation of Treaties, Article 3(6), English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5509](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5509), (last visited 11 November 2012).

The promulgation of legal documents must ensure that they shall not obstruct the implementation of treaties which contain provisions on the same matter and to which the Vietnam is a party.<sup>28</sup> The Law also opens up the possibility of direct application of treaties in Vietnam by stipulating that on the basis of the requirements, contents and nature of a treaty, relevant authorities, when deciding to consent to be bound by the treaty, shall also decide on the direct application of the whole or part of the treaty to agencies, organizations and/or individuals in case the provisions of the treaty are explicit and specific enough for implementation.<sup>29</sup>

Many initiatives and activities on corporate social responsibility are being carried out nationwide by state agencies, international organizations, non-governmental organizations and the business community. Notably, the Office of Business for Sustainable Development under the Vietnam Chamber of Commerce and Industry (VCCI), the Ministry of Labour, Invalids and Social Affairs, the Ministry of Planning and Investment, the Ministry of Industry and Trade, the Ministry of Natural resources and Environment, the Vietnam General Confederation of Labour, the Bureau of Environmental Police, and its international partner organizations have organized the annual national Corporate Social Responsibility Awards. Five Annual Awards have been granted so far with the fifth Awards being presented in August 2012.<sup>30</sup> In 2007, the United Nations, in partnership with the Vietnam Chamber of Commerce and Industry (VCCI), launched the Global Compact Network Vietnam (GCNV), aiming to support the business community in implementing effective corporate social responsibility plans, programs and initiatives and to promote responsible business practices in the country. Their four main pillars are defending human rights, improving labour conditions, protecting the environment, and supporting anti-corruption. As part of their job, GCNV has worked to identify, anticipate and diffuse the tensions between business and communities, business and the environment, business and the government, and business and the consumer, contributing to sustainable businesses.<sup>31</sup>

The landscape is, however, far from being perfect. Even recognized by the government, the Vietnamese legal system still contains inconsistencies and overlapping and conflicting laws at several points.<sup>32</sup> As demonstrated later in the Report, law enforcement is a big challenge. Abuses of rights still occur. Corruption is still serious. Coordination between the central and the local levels is not always smooth. Awareness of law and treaties to protect human rights are still limited among public servants and the populace.<sup>33</sup> The “Protect, Respect and Remedy” Framework and the Guiding Principles on Business and Human Rights have not been translated into Vietnamese. The government has not made any specific references to the Framework and the Guiding Principles. No national human rights institution has been established. Official capacity still needs to be strengthened. Much needs to be done to realize the state’s goal, mentioned in the 1992 Constitution, to build a rich and strong country in which social justice prevails, and people enjoy freedoms, happiness, and all necessary conditions for complete development.

28 2005 Law on the Conclusion, Accession and Implementation of Treaties, Article 6(1), (2), English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5509](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5509), (last visited 11 November 2012).

29 Ibid., Article 6(3).

30 See “Hội thảo công bố tiêu chí và phát động giải thưởng” <http://www.globalcompactvietnam.org/detail.asp?id=140>, (last visited 11 November 2012).

31 For more information about the Global Compact Network Vietnam and the job it has done, visit <http://www.globalcompactvietnam.org>, (last visited 11 November 2012).

32 UN Human Rights Council, National Report Submitted Universal Periodic Review: Vietnam, Document A/HRC/WG.6/5/VNM/1 dated 16 February 2009, available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A\\_HRC\\_WG6\\_5\\_VNM\\_1\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A_HRC_WG6_5_VNM_1_E.pdf), (last visited 11 November 2012).

33 Ibid.

## TYPES OF BUSINESS ENTERPRISES IN THE COUNTRY

<b>Name of the Type of Business Enterprise</b> <i>E.g. company, partnership, business trust etc.</i>	<b>Description of the Legal structure of the Type of Business Enterprise</b>	<b>Does incorporation of the business enterprise require any recognition of a duty to society, including human rights responsibility?</b>	<b>Any legislation specifically applicable to the Type of Business Enterprise</b> <i>(E.g. Corporations Law)</i>	<b>Laws which the Type of Business Enterprise are expressly excluded from</b>
Limited liability companies with two or more members	<ul style="list-style-type: none"> <li>- Members may be organizations and/or individuals.</li> <li>- The total number of members shall not exceed fifty.<sup>34</sup></li> </ul>	<ul style="list-style-type: none"> <li>- 2005 Enterprise Law<sup>35</sup></li> <li>- 2005 Investment Law<sup>36</sup></li> <li>- 2005 Environment Protection Law<sup>37</sup></li> </ul>	2005 Enterprise Law <sup>38</sup>	None

<sup>34</sup> 2005 Enterprise Law, Article 38.

<sup>35</sup> Ibid., Article 3, the incorporation, organization and operation of enterprises of all economic sectors shall comply with the provisions of this Law and other relevant laws; Article 6, enterprises are obliged to respect and create favourable conditions for their labourers to establish and participate in political and socio-political organizations within enterprises shall operate within the framework of the Constitution and laws as well as charters of these organizations which are in accordance with the provisions of law; Article 9, enterprises shall ensure rights and interests of employees in accordance with labour legislation; to implement the regimes of social insurance, medical insurance and other insurance for employees in accordance with the law on insurance.

<sup>36</sup> 2005 Investment Law. Article 48, investment dossier and examination of investment projects shall cover land use and environment solution; Article 58, investors shall take responsibility for work quality and environment protection; Article 20, investors are obliged to perform obligations in accordance with the law on insurance and on labour, to respect the honour and dignity of employees and the customs of Vietnam, to respect and create favourable conditions for labourers to establish and participate in political or socio-political organizations and observe environmental protection legal regulations.

<sup>37</sup> 2005 Environment Protection Law. Article 24-26, business enterprises have to make written environmental protection commitments (location of execution, type and scale of production, business or service and materials and fuel used, kinds of wastes generated, commitments to apply measures to minimize and treat wastes and strictly comply with the provisions of law on environmental protection) and register the commitments at district-level people's committee before they can commence operation; Article 14, planning for land use, forest protection and development; exploitation and utilization of other natural resources in inter-provincial or inter-regional areas and planning for development of key economic regions are subject to strategic environmental assessment reports; Article 18, owners of the following projects must submit and elaborate environmental impact assessment reports: projects of national importance, projects planned to use part of land of or exerting adverse impacts on, the natural sanctuaries, national parks, historical and cultural relic sites, natural heritages or beautiful landscapes which have been ranked; projects to potentially exert adverse impacts on the river watershed, coastal areas or areas of protected ecosystems; projects to construct infrastructure works in economic zones, industrial parks, hi-tech parks, export-processing zones or craft village areas; projects to construct new urban centres or concentrated residential areas; projects to exploit and use groundwater or natural resources on a large scale; other projects having potential risks or adverse impacts on the environment; Article 21, environmental impact assessment reports shall be appraised by appraisal councils or appraisal service organizations; Article 32, project owners must report on contents of decisions approving environmental impact assessment reports to People's Committees of places where projects are executed; publicly post up at project sites information on kinds of wastes, treatment technologies, standard parameters of wastes and environmental protection solutions for population communities to know, inspect and supervise; properly and fully implement environmental protection contents in environmental impact assessment reports and requirements stated in decisions approving environmental impact assessment reports. English translated version is available at [http://moj.gov.vn/vbqp/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5961](http://moj.gov.vn/vbqp/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5961), (last visited 11 November 2012).

<sup>38</sup> 2005 Enterprise Law, Chapter III, Section I.

One-member limited liability companies	<ul style="list-style-type: none"> <li>- Owned by one organization or individual (hereinafter referred to as the company owner).</li> <li>- The company owner is liable for debts and other property liabilities of the company within the charter capital of the company.<sup>39</sup></li> </ul>	<ul style="list-style-type: none"> <li>- 2005 Investment Law</li> <li>- 2005 Environment Protection Law</li> <li>- 2005 Enterprise Law</li> </ul>	2005 Enterprise Law <sup>40</sup>	None
Joint-stock companies	<ul style="list-style-type: none"> <li>- Charter capital is divided into equal portions known as shares.</li> <li>- Shareholders may be organizations and/or individuals; the minimum number of shareholders shall be three and shall not be restricted to any particular maximum number.</li> <li>- Shareholders shall be liable for debts and other property liabilities of such enterprise within the limit of the value of their capital contribution to the enterprise.</li> <li>- Shareholders shall be entitled to freely transfer their shares.<sup>41</sup></li> </ul>	<ul style="list-style-type: none"> <li>- 2005 Investment Law</li> <li>- 2005 Environment Protection Law</li> <li>- 2005 Enterprise Law</li> </ul>	2005 Enterprise Law <sup>42</sup>	None
Partnerships	<ul style="list-style-type: none"> <li>- There are at least two partners who are co-owners of the company, jointly conduct business under one common name.</li> <li>- In addition to general partners, there may also be limited partners.</li> <li>- General partners to a partnership must be individuals who are liable for all obligations of the partnership with his/her own entire property.</li> <li>- Limited partners shall be liable for debts of the partnership only to the extent of their capital contribution to the partnership.<sup>43</sup></li> </ul>	<ul style="list-style-type: none"> <li>- 2005 Investment Law</li> <li>- 2005 Environment Protection Law</li> <li>- 2005 Enterprise Law</li> </ul>	2005 Enterprise Law <sup>44</sup>	None

<sup>39</sup> Ibid., Article 63.

<sup>40</sup> Ibid., Chapter III, Section II.

<sup>41</sup> 2005 Enterprise Law, Article 78.

<sup>42</sup> Ibid., Chapter IV.

<sup>43</sup> 2005 Enterprise Law, Article 130.

<sup>44</sup> Ibid., Chapter V.

Private enterprises	<ul style="list-style-type: none"> <li>- Owned by an individual.</li> <li>- Owner is liable for all of its operations with his/her entire property.<sup>45</sup></li> </ul>	<ul style="list-style-type: none"> <li>- 2005 Investment Law</li> <li>- 2005 Environment Protection Law</li> <li>- 2005 Enterprise Law</li> </ul>	2005 Enterprise Law <sup>46</sup>	None
Group of companies	<ul style="list-style-type: none"> <li>- Combination of companies which have long-term interrelations in terms of economic benefits, technology, market and other business services.</li> <li>- Groups of companies include:                             <ul style="list-style-type: none"> <li>+ Parent company - subsidiary company;</li> <li>+ Economic conglomerate;</li> <li>+ Other forms.<sup>47</sup></li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>- 2005 Investment Law</li> <li>- 2005 Environment Protection Law</li> <li>- 2005 Enterprise Law</li> </ul>	2005 Enterprise Law <sup>48</sup>	None

<sup>45</sup> Ibid., Article 141.

<sup>46</sup> Ibid., Chapter VI.

<sup>47</sup> Ibid., Article 146.

<sup>48</sup> Ibid., Chapter VII

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

The government of Vietnam has not made any specific reference to the “Protect, Respect and Remedy” Framework and the Guiding Principles on Business and Human Rights. No declarations have been issued by either the National Assembly (legislative branch) or the Courts (judicial branch) on the Framework and the Guiding Principles. There is no information available on statements delivered by Vietnam at the adoption of the Framework and the endorsement of the Guiding Principles at the Human Rights Council in 2011.

Some representatives in academia, however, have had their own reactions to the Framework and the Guiding Principles. In April and May 2012 in Ha Noi and Ho Chi Minh City respectively, the Vietnam Academy of Social Sciences (VASS), a research institution under the government of Vietnam, organized two seminars on corporate social responsibility. Participants at the two seminars, including researchers and lecturers from different research institutes and universities nation-wide, discussed a broad range of issues regarding the social responsibility of business enterprises, including the content and significance of the Framework and the Guiding Principles and called for awareness-raising and implementation of the Framework and the Guiding Principles in Vietnam.<sup>49</sup>

## II. Is the State duty to protect against human rights abuses by third parties, including businesses (“State Duty to Protect”), recognized in the country’s domestic legal system?

<sup>49</sup> See Vietnam Academy of Social Sciences, “Tọa đàm khoa học: Những vấn đề lý luận và lịch sử về trách nhiệm của doanh nghiệp đối với quyền con người,” available at: <http://gass.edu.vn/vi/news/Nghien-cuu-cua-giang-vien/Toa-dam-khoa-hoc-Nhung-van-de-ly-luan-va-lich-su-ve-trach-nhiem-cua-doanh-nghiep-doi-voi-quyen-con-nguoi-218>, (last visited 11 November 2012).

## 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?

Vietnam has a civil law system in which the major source of law is written legislation, commonly referred to in the country as legal documents. As provided by the 2008 Law on Promulgation of Legal Documents, legal documents in Vietnam include the Constitution; laws and resolutions of the National Assembly; ordinances and resolutions of the Standing Committee of the National Assembly; orders and decisions of the President; decrees of the Government; decisions of the Prime Minister; resolutions of the Justices Council of the Supreme People’s Court and circulars of the Chief Justice of the Supreme People’s Court; circulars of the President of the Supreme People’s Procuracy; circulars of Ministers or Heads of Ministry-equivalent Agencies; decisions of the State Auditor General; joint resolutions of the Standing Committee of the National Assembly or the Government and the central offices of socio-political organizations; joint circulars of the Chief Justice of the Supreme People’s Court and the President of the Supreme People’s Procuracy; those of Ministers or Heads of Ministry-equivalent Agencies and the Chief Justice of the Supreme People’s Court, the President of the Supreme People’s Procuracy; those of Ministers or Heads of Ministry-equivalent Agencies and legal documents of Peoples Councils and Peoples Committees.<sup>50</sup>

The body of national law is currently made up of more than 13,000 legal documents,<sup>51</sup> including those that provide a basis for the State Duty to Protect.

<sup>50</sup> 2008 Law on Promulgation of Legal Documents, Article 2. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10500](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10500), (last visited 11 November 2012).

<sup>51</sup> See UN Human Rights Council, National Report Submitted Universal Periodic Review: Vietnam, Document A/HRC/WG.6/5/VNM/1 dated 16 February 2009, available at [http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A\\_HRC\\_WG6\\_5\\_VNM\\_1\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session5/VN/A_HRC_WG6_5_VNM_1_E.pdf), (last visited 11 November 2012).

Under the 1992 Constitution (amended in 2001), the State ensures and constantly promotes people's rights in all spheres.<sup>52</sup> The State protects the citizen's right of lawful ownership and right of inheritance.<sup>53</sup> The Government has the duty to take measures to protect the legitimate rights and interests of citizens and create conditions for them to exercise their rights and fulfil their obligations, take measures to protect property and the interests of the State and society, and to protect the environment.<sup>54</sup>

The State prohibits all acts of discrimination<sup>55</sup> and acts that cause damage to the environment. State organs, economic and social bodies and all individuals must abide by State regulations on the rational use of natural wealth and on environmental protection.<sup>56</sup> If people feel that their rights are violated, they have the right to lodge complaints and denunciations with the competent state authorities against the illegal doings of state organs, social or economic organizations, or individuals.<sup>57</sup>

All acts violating the interests of the State, the rights and legitimate interests of citizens shall be dealt with severely in time.<sup>58</sup> The person who has suffered loss and injury shall be entitled to damages for any material harm suffered and his reputation rehabilitated.<sup>59</sup> The 1992 Constitution, in short, guarantees people's rights. It should also be noted that the Constitution also requires the entire people to participate in defending the socialist motherland<sup>60</sup> and safeguarding national security and social order.<sup>61</sup>

Criminal law and civil law are considered by the State as sharp and effective legal instruments to protect rights. The 2005 Civil Code provides the framework for legal status, legal standards for the conduct of

individuals and legal persons, and the rights and obligations of subjects regarding personal identities and property in civil, marriage, family, business, and trade and labour relations.<sup>62</sup> The 1999 Criminal Code (amended in 2009), on the other hand, defines crimes and penalties for offenders committing crimes in and outside Vietnam (Vietnamese citizens who commit offenses outside the territory of Vietnam may be examined for criminal liability in Vietnam according to the Criminal Code; foreigners who commit offenses outside the territory of Vietnam may also be examined for criminal liability in circumstances provided for in the international treaties to which Vietnam is a party).<sup>63</sup> Both Codes are tasked with protecting legitimate rights and interests of individuals and organizations, the state interests and public interests; ensuring legal equality and safety, contributing to the creation of conditions for meeting the material and spiritual demands of people, and to the promotion of socio-economic development while at the same time educating people in the sense of law observance and the struggle to prevent and combat violation of laws.<sup>64</sup>

In 2012, the Vietnamese National Assembly adopted the new Labour Code, maintaining that it is the State policy to ensure the legitimate rights and benefits of employees.<sup>65</sup>

Every person has the right to work, to choose freely the type of work or occupation, to receive a salary on the basis of an agreement reached with the employer, to be entitled to labour protection, safe

52 1992 Constitution (amended in 2001), Article 3.

53 Ibid., Article 58.

54 Ibid., Article 112.

55 Ibid., Article 5.

56 Ibid., Article 29.

57 Ibid., Article 74.

58 Ibid.

59 Ibid.

60 Ibid., Article 44.

61 Ibid., Article 3.

62 2005 Civil Code, Article 1. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=6595](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=6595), (last visited 11 November 2012).

63 1999 Criminal Code (amended in 2009), Article 6. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=6595](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=6595), (last visited 11 November 2012).

64 Ibid., Article 1.

65 2012 Labour Code, Article 4, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=163542](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=163542), (last visited 11 November 2012).

and hygienic working conditions and collective welfare, among others.<sup>66</sup> The State shall ensure women's rights to work on a basis of equality with men in every aspect.<sup>67</sup> The State shall establish policies to encourage employers to create conditions for women to work on a regular basis and apply widely the policy of flexible working time, part-time and casual employment and working from home.<sup>68</sup> Employers are prohibited from the following acts: discriminating based on gender, race, colour, social class, marital status, belief, religion, participation in trade unions, HIV – AIDS infection, or disability; maltreating employees; sexual harassment; forced labour; making use of apprenticeship or on-the-job training for the purpose of getting benefits for oneself and exploiting employees, or enticing or compelling an apprentice or on-the-job trainee to carry out illegal activities; making enticement, false promises, or false advertising to deceive employees or making use employment service or the export of labour to foreign countries to do illegal acts; employing illegally child labour; obstructing the establishment or joining of trade unions and participation in union activities.<sup>69</sup> Employees shall have the right to strike and to form or join in union activities, and to participate in dialogue with employers or management. These rights are, however, subject to other relevant laws and regulations.<sup>70</sup> Under the 2012 Law on Trade Union, for example, all unions belong to the Vietnam General Confederation of Labour, which is placed under the leadership of the Communist Party.<sup>71</sup>

The Government also issued Decree 122/2007/CP-ND dated 27 July 2007 (amended in 2011) providing a list of enterprises which may not go on strike (those producing and providing public-utility

products and services and enterprises playing an essential role in the national economy)<sup>72</sup> and Decree 12/2008/ND-CP dated 30 January 2008 stating that a strike shall be postponed or suspended when it poses risks of causing serious damage to the national economy and/or public interests.<sup>73</sup>

Other examples of legal provisions on the State duty to protect include, among others, the 2010 Law on Customer Protection, in which the State is stated as having the duty to protect the rights of customers.<sup>74</sup> The 2010 Law on Persons with Disability provides that state agencies and organizations, within the scope of their respective tasks and powers, have the duty to care for and protect the legitimate rights and interests of persons with disabilities.<sup>75</sup> According to the 2007 Law on Countering Domestic Violence, all acts of domestic violence must be promptly detected, stopped and handled in accordance with the laws. Acts of forcing, inciting, instigating and assisting other people to commit acts of domestic violence and hindering the detection, reporting and handling of acts of domestic violence are also prohibited.<sup>76</sup> Those who commit acts in violation

<sup>72</sup> Decree 122/2007/CP-ND dated 27 July 2007 provides the list of enterprises which may not go on strike and the settlement of requests of labour collectives in those enterprises. English translated version is available at [http://vbqpl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=3448](http://vbqpl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=3448), (last visited 11 November 2012).

<sup>73</sup> Decree 12/2008/CP-ND dated 30 January 2008 detailing and guiding the implementation of article 176 of the Labour Code on postponement or suspension of strikes and settlement of labour collective interests. English translated version is available at [http://vbqpl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=2970](http://vbqpl.moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=2970), (last visited 11 November 2012).

<sup>74</sup> 2010 Law on Customer Protection, Article 7 available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=98755](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=98755), (last visited 11 November 2012).

<sup>75</sup> 2010 Law on Persons with Disability. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10482](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10482), (last visited 11 November 2012).

<sup>76</sup> 2007 Law on Countering Domestic Violence, Article 8. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=3030](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=3030), (last visited 11 November 2012).

<sup>66</sup> Ibid., Article 5.

<sup>67</sup> Ibid., Article 152.

<sup>68</sup> 2012 Labour Code.

<sup>69</sup> Ibid., Article 8.

<sup>70</sup> Ibid., Article 5.

<sup>71</sup> 2012 Law on Trade Union, Article 7 and Article 1, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=163545](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=163545), (last visited 11 November 2012).

of the law on domestic violence prevention and control shall, depending on the nature and severity of their violations, be administratively sanctioned, disciplined or examined for criminal liability. If causing damage, they shall pay compensation as required by law.<sup>77</sup> In accordance with the 2005 Investment Law, the State shall recognize and protect the right to ownership of assets, investment capital and incomes as well as other legitimate rights and interests of investors, and shall recognize the long-term existence and development of investment activities.<sup>78</sup> Under the 2004 Law on Child Protection, Care and Education, the family, the State and society have the responsibility to protect children's lives, bodies, dignity and honour, and to take measures to prevent accidents harming children. All acts of infringing upon children's lives, bodies, dignity and honour shall be handled in time and strictly according to the law.<sup>79</sup> In short, it is safe to say that, there are Vietnamese domestic laws including the Constitution that provide a basis for the State Duty to Protect. How that is translated into reality, however, is a different question.

At the international level, Vietnam is a party to the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; and Convention on the Rights of the Child.<sup>80</sup> The country has also ratified 19 conventions of the International Labor Organization, including C006 - Night Work of Young Persons (Industry) Convention, 1919; C014

- Weekly Rest (Industry) Convention, 1921; C027 - Marking of Weight (Packages Transported by Vessels) Convention, 1929; C045 - Underground Work (Women) Convention, 1935; C080 - Final Articles Revision Convention, 1946; C116 - Final Articles Revision Convention, 1961; C120 - Hygiene (Commerce and Offices) Convention, 1964; C123 - Minimum Age (Underground Work) Convention, 1965; C124 - Medical Examination of Young Persons (Underground Work) Convention, 1965; C155 - Occupational Safety; and Health Convention, 1981.<sup>81</sup> As a party to these treaties, Vietnam is legally bound by various obligations provided thereof, including the obligations to protect human rights.<sup>82</sup> In cases where a legal document of Vietnam and a human rights treaty to which Vietnam is a party contains different provisions on the same matter, the provisions of the treaty shall prevail. If the provisions of a human rights treaty are explicit and specific enough for direct implementation, relevant authorities, when deciding to consent to be bound by the treaty, shall also decide on the direct application of the treaty.<sup>83</sup>

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

The Vietnam judicial system is composed of the Supreme People's Court, the local People's Courts, the Military Tribunals and the other tribunals established by law.<sup>84</sup> The local People's Courts consist of the People's Courts of the provinces and centrally run cities and the People's Courts of the rural districts, urban districts, provincial capitals

77 Ibid., Article 42(1).

78 2005 Investment Law, Article 4. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5946](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5946), (last visited 11 November 2012).

79 2004 Law on Child Protection, Care and Education, Article 26. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=7824](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=7824), (last visited 11 November 2012).

80 For status of ratification of international human rights treaties, see UN Treaty Collection, Status of Treaties, Chapter IV, Human Rights, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>, (last visited 11 November 2012).

81 International Labour Organization, Ratifications of ILO Conventions: Vietnam, available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:1906111866322950:::P11200\\_INSTRUMENT\\_SORT:1](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:1906111866322950:::P11200_INSTRUMENT_SORT:1), (last visited 11 November 2012).

82 2005 Law on the Conclusion, Accession and Implementation of Treaties, Article 3(6). English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5509](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5509), (last visited 11 November 2012).

83 Ibid., Article 6(3).

84 1992 Constitution (amended in 2001), Article 127.

and provincial cities.<sup>85</sup> The courts adjudicate criminal, civil, family, labour, and economic and administrative cases and settle other matters as prescribed by law. According to the Supreme People's Court, in 2011, the People's Courts in Vietnam handled 60,925 criminal cases, 81,438 civil cases, 115,331 family cases, 8,418 economic cases, 2,043 labour cases and 1,236 administrative cases.<sup>86</sup>

Under the 1992 Constitution, the People's Courts, within their functions, have the duty to safeguard socialist legality, the socialist regime and the people's mastery, the property of the State and the collectives, the lives, property, freedom, honour and dignity of the citizen.<sup>87</sup> Judges are aware of the legal provisions on the State Duty to Protect. There are papers written by judges available on the website of the Supreme People's Court that examine the State Duty to Protect.<sup>88</sup> Unfortunately, as the People's Courts do not make publicly available a record of their judgments, it is difficult to find court judgments to see whether and to what extent the State Duty to Protect has been recognized in judicial decisions.

The Vietnam Chamber of Commerce and Industry has a website that gives business enterprises access to some draft legal documents and court judgments and decisions.<sup>89</sup> The number of judgments/decisions posted on the website, however, is very limited – 324 judgments/decisions as of 11 November 2012. Most of them are related to economic disputes between business enterprises. Reference to the State Duty to Protect has not been found in these judgments.

85 2002 Law on the Organization of the People's Court, Article 2. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10450](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10450), (last visited 11 November 2012).

86 First-instance judgments. These numbers are available at <http://www.toaan.gov.vn/portal/page/portal/tandtc/5901712>, (last visited 11 November 2012).

87 1992 Constitution (amended in 2001), Article 126.

88 See, for example, Judge Pham Minh Tuyen, Paper "*Bảo vệ quyền của người dân tộc thiểu số và người tàn tật theo quy định của pháp luật tố tụng hình sự, thực tiễn áp dụng và những vấn đề vướng mắc.*" available at [http://www.toaan.gov.vn/portal/page/portal/tandtc/Baiviet?p\\_cateid=1751909&item\\_id=5423761&article\\_details=1](http://www.toaan.gov.vn/portal/page/portal/tandtc/Baiviet?p_cateid=1751909&item_id=5423761&article_details=1), (last visited 11 November 2012).

89 See VIBonline at <http://www.vibonline.com.vn/Banan/default.aspx>, (last visited 11 November 2012).

### 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?

Vietnam does not have a national human rights institution or other human rights bodies, e.g. ombudsmen. There are no government bodies or State agencies that are specifically tasked with the responsibility to prevent, investigate, punish and redress business-related human rights abuses in Vietnam. However, there are different state agencies that, within their bounds of functions, are responsible for different issues which could be associated with business-related human rights abuses such as labour rights (Ministry of Labour, Invalids and Social Affairs), environmental rights (Ministry of Natural Resources and Environment), land rights (Ministry of Natural Resources and Environment), ethnic minority rights (Committee for Ethnic Affairs), anti-corruption (Anti-corruption Steering Committee, Government Inspectorate,

Ministry of Justice, Ministry of Public Security), health rights (Ministry of Health), education rights (Ministry of Education and Training), and legal awareness (Ministry of Justice).

These government agencies do their job by drafting, submitting to the government for approval, and then implementing strategies, plans, programs, projects, proposals, and specialized management standards relating to rights issues under their management scopes. They also draft and submit legal documents, organize the instruction, guidance, and implementation and monitor the enforcement of these legal documents. The provincial and district People's Committees and their departments also participate in implementing and monitoring the

observance of these documents.<sup>90</sup>

In ensuring the respect of laws and policies in their respective areas or localities, these agencies or authorities may conduct inspections as to whether rights violations are committed and, if violations are detected, may impose administrative sanctions against violators (specific forms of sanctions are identified in answer to Question 2.2). In cases of violations of the Criminal Code, it is the investigating bodies of the People's Police that handles the investigation.<sup>91</sup> Prosecution of crimes rests with the People's Procuracy (public prosecutor). Adjudication responsibility belongs to the People's Courts.

### Labour rights

The Ministry of Labour, Invalids and Social Affairs is the "head agency" for handling issues related to labour rights. Its responsibilities include, among others, exercising state management over labour issues, building mechanisms to promote labour rights and inspections, and handling complaints, denunciations or cases of labour rights violations.<sup>92</sup> Other ministries and ministerial agencies are responsible for collaborating with the Ministry of Labour,

Invalids and Social Affairs. The People's Committee at each level exercises state management over labour in its locality.<sup>93</sup>

A labour inspectorate system from central to district levels has been established under the Ministry of Labour, Invalids and Social Affairs. They are responsible for inspecting compliance with regulations on employment, labour, vocational training, labour safety and hygiene; social insurance; investigating work accidents and violations of standards for labour hygiene; joining in guiding application of standards and norms of working conditions, labour safety and hygiene; addressing labour appeals and complaints in accordance

90 1992 Constitution (amended in 2001), Article 23.

91 2003 Criminal Procedure Code, Article 110..

92 2012 Labour Code, Article 235.

93 Ibid., Article 236.

with laws; remedying under competence and petitioning competent authorities to remedy labour law violations.<sup>94</sup> If violations of labour rights are committed, but do not yet constitute crimes under the Criminal Code, labour inspectorates and chairpersons of the People's Committees at the local levels may impose administrative sanctions (see Answer to Question 2.1. below).<sup>95</sup>

### Environment

The Ministry of Natural Resources and Environment is the lead agency when it comes to environmental issues. Other ministries and ministerial agencies are responsible for collaborating with the Ministry of Natural Resources and Environment. The People's Committees at all levels exercise state management over the environment in their localities.

The environmental protection inspectorates under the Ministry of Natural Resources and Environment supervise and inspect the environmental protection performed by business enterprises,

based on the laws and the environmental impact assessment reports that they have approved.<sup>96</sup> Provincial-level environmental protection inspectorates supervise and inspect the environmental protection performed by economic organizations and non-business units regarding projects with environmental impact assessment reports approved by provincial-level People's Committees. District-level People's Committees supervise and inspect the environmental protection performed by administrative agencies and non-business units and by small-sized production, business and service establishments at their localities. Commune-level People's Committees supervise the environmental protection performed

94 2012 Labour Code.

95 Decree 47/2010/ND-CP of the Government dated 6 May 2010 on Administrative sanctions imposed upon Violations of the Labour Code, Chapter III. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10629](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10629) (last visited 11 November 2012).

96 2005 Environment Protection Law, Article 126.

by households and individuals.<sup>97</sup>

In case of necessity, environmental protection inspectorates at all levels and district-level People's Committees have to assist and coordinate with commune-level People's Committees in supervising and inspecting the environmental protection performed by organizations or individuals that show signs of serious violation of the environmental protection law.<sup>98</sup> State management agencies at all levels and concerned professional agencies, upon request, have to assist and coordinate with environmental protection inspectorates in inspecting and supervising the environmental protection.<sup>99</sup>

If violations are found, but do not yet constitute crimes under the Criminal Code, environmental protection inspectorates and chairpersons of the People's Committees at the local levels may impose administrative sanctions (see answer to Question 2.2. below).

### **Land rights**

The Ministry of Natural Resources and Environment is accountable to the government for state management over land issues. The People's Committees at all levels perform the state management function over land in their respective localities.<sup>100</sup>

At the central level, land inspection is undertaken by the Ministry of Natural Resources and Environment whereas at the local levels, the task is given to local management agencies. The land inspectorates have the responsibility to detect, check and handle violations of land legislation according to competence or propose competent State agencies to handle violations of land legislation.<sup>101</sup> Land inspection shall cover inspection of the state

97 2005 Environment Protection Law, Article 126. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5961](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5961), (last visited 11 November 2012).

98 Ibid.

99 Ibid.

100 2003 Land Law, Article 7.

101 Ibid.

management over land by the People's Committees at all levels and inspection of the observance of land legislation by land users, including organizations and individuals.<sup>102</sup>

### **Education rights**

At the Sixth Congress of the Communist Party in December 1986, Vietnam launched a series of free-market reforms to transition its planned economy to a market economy. For the first time, the government opened up education to non-public sectors. Private schools and international schools since then have flourished and are now available for all levels of education. The privatization of education (referred to in Vietnam as "socialization of education") and activities of private educational institutions are subject to the relevant rights protection regimes provided in different human rights treaties to which Vietnam is a party and must conform to minimum standards as laid down by Vietnam's legal documents, in particular the 2005 Education Law.

According to the 2005 Education Law, the Ministry of Education and Training is accountable to the government for performing the State management of education. Other ministries and ministerial-level agencies coordinate with the Ministry of Education and Training in performing the State management of education according to their competence. The People's Committees at all levels are tasked to perform the State management of education and have to assure that conditions on teachers, finance, material foundations and teaching equipment of public schools under their management meet the requirements of expanding and raising the educational quality and efficiency in their localities.<sup>103</sup>

Educational inspection agencies comprise the educational inspectorate of the Ministry of Education and Training and the educational inspectorates of

102 Ibid., Article 132.

103 2005 Education Law, Article 100. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=6906](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=6906) (last visited 11 November 2012).

the provincial/municipal Education and Training Services.<sup>104</sup> Educational inspectorates shall have the following tasks: inspecting the implementation of policies and law on education; settling complaints and denunciations in education according to the provisions of law on complaints and denunciations; handling of administrative violations in education in accordance with the provisions of law on administrative violation handling; performing tasks of preventing and fighting corruption in education in accordance with the provisions of anti-corruption law and proposing measures to ensure the enforcement of education law as well as amendments and supplements to the State's policies and regulations on education.<sup>105</sup>

### **Anti-corruption**

The Central Steering Committee for Corruption Prevention and Combat has the responsibility to direct, coordinate and inspect anti-corruption activities nationwide.<sup>106</sup> The Committee is assisted by a standing division operating on a full-time basis.<sup>107</sup> People's Councils at all levels, within the ambit of their respective tasks and powers have the responsibility to supervise anti-corruption work in their respective localities.<sup>108</sup>

The Government Inspectorate is responsible to organize, direct and guide the inspection of the observance of anti-corruption legal provisions and, in case of detection of corrupt acts, to request competent agencies or organizations to handle them and to build up systems of general data on

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104 Ibid., Article 113.

105 Ibid., Article 111.

106 The Central Steering Committee used to be chaired by the Prime Minister. Under an amendment to the Anti-corruption Law in 2012, the Prime Minister does have the Chairmanship role of the Committee. The Chairmanship is expected to be undertaken by the Secretary-General of the Vietnamese Communist Party.

107 2005 Anti-Corruption Law, Article 73. English translated version is available at <http://www.oecd.org/site/anti-corruptioninitiative/46817414.pdf>, (last visited 11 November 2012).

108 Ibid., Article 74.

anti-corruption.<sup>109</sup>

The State Audit, within the ambit of its tasks and powers, has the responsibility to organize audit activities to prevent and detect corruption. In case of detecting corrupt acts, it shall request competent agencies or organisations to handle them.<sup>110</sup>

Heads of inspectorates, the State Audit, investigating bodies, procuracies, and courts must enhance the management of their officials and employees and direct the internal inspection and examination in order to prevent acts of law violation in anti-corruption activities. Officials and public employees of inspectorates, the state audit, investigating bodies, procuracies, court who violate the law on anti-corruption activities shall, depending on the nature and seriousness of their violations, be disciplined for criminal liability.<sup>111</sup>

## **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?**

In Vietnam, business enterprises of all types have the legal capacity to exercise certain rights and assume certain obligations separate to the rights and duties of their owners or other individuals. They may be held legally accountable as legal persons. Their liability may be civil or administrative, but not criminal.

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109 Ibid., Article 76.

110 Ibid., Article 77.

111 2005 Anti-Corruption Law, Article 83.

### Civil liability

As provided in the 2005 Civil Code, an organization shall be recognized as a legal person when it is established lawfully, has an organized structure,

possesses property independent from that of individuals and other organizations, bears its own liability with such property, and independently enters into legal relations in its own name.<sup>112</sup> State enterprises, cooperatives, limited liability companies, joint-stock companies, foreign-invested enterprises and other economic organizations that meet these requirements are considered legal persons.<sup>113</sup>

The civil legal capacity of a legal person arises from the time it is established and terminates when it ceases to be a legal person.<sup>114</sup> The representative at law or the authorized representative of a legal person shall act in the name of the legal person in civil relations.<sup>115</sup> A legal person (obligor) that fails to perform or performs improperly its obligation must bear civil liability to the obligee.<sup>116</sup> A legal person shall bear civil liability with its own property and shall not bear civil liability for its members with respect to civil obligations established and performed by such members not in the name of the legal person.<sup>117</sup> Members of a corporate legal person shall not bear civil liability for the legal person with respect to civil obligations established and performed by the legal person.<sup>118</sup> The liability to compensate for damage includes the liability to compensate for material damage and the liability to compensate for mental damage.<sup>119</sup>

112 2005 Civil Code, Article 84. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=6595](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=6595), (last visited 11 November 2012).

113 Ibid., Article 103.

114 Ibid., Article 86.

115 Ibid.

116 Ibid., Article 302.

117 Ibid., Article 93.

118 Ibid.

119 Ibid., Article 307.

### Administrative liability

According to the 2002 Ordinance on Sanctioning Administrative Violations, individuals and organizations, whether domestic or foreign, intentionally or unintentionally committing violations prescribed by law, which do not constitute crimes defined under the Criminal Code, must be held accountable and face administrative sanctions.<sup>120</sup> All consequences caused by acts of administrative violation must be remedied by violators.<sup>121</sup> The violating individuals or organizations shall be subject to either warnings or fines.<sup>122</sup> In addition,

depending on the nature and seriousness of their violations, individuals or organizations that commit violations may be stripped of the right to use permits, professional practice certificates or may suffer confiscation of material or means used to commit the violations.<sup>123</sup> The violating individuals and organizations may also be subject to the application of one or many of the following consequence-overcoming measures: (i) restoration of the initial state altered due to the administrative violations or forcible dismantling of illegally constructed works; (ii) application of measures to redress the environmental pollution or epidemics caused by the administrative violations; (iii) destruction of articles which cause harm to human health, domestic animals and cultivated plants, and harmful cultural products; and other measures prescribed by the Government (see answers to Question 2.2. and Question 2.3. below for examples of specific administrative sanctions imposed in cases of violations).<sup>124</sup>

120 2002 Ordinance on Sanctioning Administrative Violations, Article 2. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10046](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10046), (last visited 11 November 2012).

121 Ibid., Article 4.

122 Ibid., Article 12.

123 Ibid.

124 Ibid.

## **Criminal liability**

Under current Vietnamese laws, legal persons such as business enterprises do not bear criminal liability. Article 2 of the 1999 Criminal Code (amended in 2009) clearly states that only individuals who commit crimes defined by the Criminal Code shall bear criminal liability.<sup>125</sup> Article 8 of the Code further clarifies that a crime is an act dangerous to the society prescribed in the Code, committed intentionally or unintentionally by a person having the penal liability capacity, infringing upon the independence, sovereignty, unity and territorial integrity of the Fatherland, infringing upon the political regime, the economic regime, culture, defense, security, social order and safety, the legitimate rights and interests of organizations, infringing upon the life, health, honor, dignity, freedom, property, as well as other legitimate rights and interests of citizens or infringing upon other socialist legislation.<sup>126</sup>

It should be noted, however, that a comprehensive review and amendments to the Criminal Code have been scheduled in the law-making program of the National Assembly in its 2011-2016 tenure, among which the enactment of criminal liability measures for legal persons is a priority to be considered.<sup>127</sup>

In addition to adopting domestic legislation, Vietnam has also ratified various treaties that contain provisions on the liability of legal persons. Article 26 of the United Nations Convention against Corruption, for example, states that each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons (civil, administrative or criminal) for participation in the offences established in accordance with the Convention. Each State Party shall, in particular, ensure that legal persons

<sup>125</sup> 1999 Criminal Code (amended in 2009), Article 1.

<sup>126</sup> *Ibid.*, Article 8.

<sup>127</sup> Conference of the State Parties to the United Nations Convention against Corruption, Implementation Review Group: Viet Nam, CAC/COSP/IRG/I/2/1/Add.4 dated 21 August 2012, 4, available at <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1255476e.pdf>, (last visited 11 November 2012).

held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.<sup>128</sup> The United Nations Convention against Transnational Organized Crimes also has a very similar provision regarding legal persons' liability.<sup>129</sup> It is worth noting, however, that when ratifying these treaties, Vietnam has always made a declaration that, consistent with its legal principles, it does not consider itself bound by the provisions with regard to the criminal liability of legal persons.<sup>130</sup>

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

Whether, which and to what extent an organ of a business enterprise shall face liability when the enterprise breaches law depends on the type of the enterprise and the circumstance and nature of the breach of law.

For a private enterprise, its owner is liable for all of its operations with his/her entire property.<sup>131</sup>

For a one-member limited liability company, its owner is liable for all debts and other property liabilities of the company within the charter capital of the company.<sup>132</sup>

<sup>128</sup> UN Convention against Corruption, Article 26, available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf), (last visited 11 November 2012).

<sup>129</sup> UN Convention against Transnational Organized Crime, Article 41(1), available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>, (last visited 11 November 2012).

<sup>130</sup> United Nations Treaty Collection, Status of the United Nations Convention against Transnational Organized Crimes, available at [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en#EndDec](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en#EndDec) and Status of the United Nations Convention against Corruption, available at [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-14&chapter=18&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en), (last visited 11 November 2012).

<sup>131</sup> 2005 Enterprise Law, Article 141.

<sup>132</sup> 2005 Enterprise Law, Article 63.

For a limited liability company with two or more members, its members are liable for debts and other property liabilities of the enterprise within the amount of capital that they have committed to contribute to the enterprise.<sup>133</sup> They are liable individually when acting in the name of company if they breach the laws, conduct business or other transactions not in the interest of the company but causing damage to other persons, or pay off undue debts when there is a financial danger facing the company.<sup>134</sup>

For a joint-stock company, shareholders shall be liable for debts and other property liabilities of such enterprise within the limit of the value of their capital contribution to the company.<sup>135</sup> Ordinary shareholders are liable individually when, acting in the name of the company, they breach the laws, conduct business or other transactions for self-seeking purposes or interests of other organizations or individuals, or pay undue debts when the company is facing possible financial risks.<sup>136</sup>

For a partnership, general partners are liable for all obligations of the partnership with his/her own entire property, while limited partners are liable for debts of the partnership only to the extent of their capital contribution to the partnership.<sup>137</sup>

For a group of companies, in case the parent company interferes beyond its competence or forces the subsidiary companies to carry out business activities that run counter to normal business practices, or conducts unprofitable activities without proper compensation in the fiscal year, causing losses to the subsidiary companies, the parent company must be liable for such losses. Managers of the parent company who interfere in, or force the subsidiary companies to conduct business activities shall be jointly liable with the parent company for such losses. If these business activities are conducted by subsidiary companies and yield profits for other subsidiary companies of the same

133 Ibid., Article 38.

134 Ibid., Article 42.

135 Ibid., Article 77.

136 Ibid., Article 80.

137 Ibid., Article 130.

parent company, such subsidiary companies shall be jointly responsible with the parent company for returning such profits to the subsidiary companies suffering from losses.<sup>138</sup>

**2.2. Do laws and/or regulations: (a) 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?**

Although the term “human rights” per se is not frequently used in laws and regulations in Vietnam, there are quite a number of Vietnamese legal documents that require business enterprises (generally referred to in many legal documents as “organizations”) and individuals to take action to avoid causing or contributing to adverse impact on the rights of people through their activities, or to prevent or mitigate adverse human rights impacts directly linked to their operations, products and services.

**Impact on labours rights: safety and health of labours**

According to the 1996 Mineral Law (amended in 2005), organizations and individuals permitted to mine minerals must comply with the provisions of the law in relation to occupational safety and labour hygiene and with regulations, standards, criteria on occupational safety and labour hygiene.<sup>139</sup> In the case of a threat relating to occupational safety, the organizations or individuals managing mining activities shall immediately apply necessary measures to eliminate the possible causes of such

138 Ibid., Article 147.

139 1996 Mineral Law (amended in 2005), Article 33. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=2164](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=2164), (last visited 11 November 2012).

an adverse event.<sup>140</sup> They must render first aid and evacuate people from the dangerous area; promptly report the event to the competent State authority; protect the assets and keep intact the site in accordance with the law. The organizations or individuals licensed to mine minerals also have to comply with the regulations on periodical and irregular reporting with regard to labour safety and hygiene in accordance with law.<sup>141</sup> They are under the obligation to pay compensation for any damage caused by their activities.<sup>142</sup>

Under the 2005 Labour Code, employers (including enterprises, agencies, organizations, cooperatives, households, individuals with full civil act capacity)<sup>143</sup> are obliged to ensure that the enterprise's work place satisfies the requirements of space, ventilation, dust, steam, gas, radiation, magnetism, heat, noise, vibration and other harmful elements prescribed in the relevant regulations. They must also ensure that labour safety conditions and machinery, equipment, workshops and warehouse hygiene conditions meet the requirements of national technical regulations on labour safety and hygiene. They are responsible for evaluating the dangerous and toxic elements at the workplace, for working out prevention measures for potential risks and dangers, and improving working conditions and providing health care for the employees. They must prepare a feasibility study outlining all measures to ensure labour safety and hygiene at the work environment. They have to provide instruction boards for labour safety on machinery and equipment, as well as labour hygiene. These safety boards must be put in a place where they can be seen easily and read clearly. They must also consult their employees when building a plan and implementing activities ensuring labour safety and hygiene.<sup>144</sup>

Employers shall also be responsible for organizing annual health checks for their employees. For

employees working in heavy and harmful conditions and for employees who are disabled, adolescent or elderly, the health check must be done at least every six months.<sup>145</sup> Employees working in conditions with a high risk of work-related diseases must receive health checks in accordance with regulations stipulated by the Ministry of Health.<sup>146</sup> Any employee who is injured in a work-related accident or has a work-related disease must have a medical examination to determine the level of injury and the reduction in working capacity and receive treatment, nursing and rehabilitation of working capacity in accordance with the law.<sup>147</sup> If that employee continues working after being injured or having work-related disease, he or she will be assigned to an occupation suitable for his/her health in accordance with the conclusion of the Council for occupational health examination. Employers must ensure that employees working at places exposed to risks of exposure to toxic substances or infection shall, after work-hours, be provided with detoxification or disinfection measures and other personal hygiene measures.<sup>148</sup>

If these provisions are violated, Decree 47/2010/ND-CP of the Government dated 6 May 2010 on Administrative Sanctioning of Violations of the Labour Code provides different levels of sanctions against employers.<sup>149</sup> A fine of between VND 1,000,000 and VND 5,000,000,<sup>150</sup> for example, shall be imposed on employers that fail to fully provide employees with labour protection devices. A fine of between VND 5,000,000 and VND 10,000,000 shall be imposed on employers that fail to install equipment to ensure labour safety, fail

145 2012 Labour Code, Article 152.

146 Ibid.

147 Ibid.

148 Ibid.

149 Decree 47/2010/ND-CP of the Government dated 6 May 2010 on Administrative sanctions imposed upon Violations of the Labour Code. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10629](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10629), (last visited 11 November 2012).

150 Exchange Rate as of 11 November 2012 is USD 1 = VND 20,825. See Vietcombank, Exchange of Currency, <http://www.vietcombank.com.vn/en/exchange%20rate.asp>, (last visited 11 November 2012).

140 Ibid.

141 Ibid., Article 35.

142 Ibid., Article 33.

143 2012 Labour Code, Article 2.

144 Ibid., Article 138.

to meet work place standards, or violate labour safety standards.<sup>151</sup> Fines shall also be imposed on employers that fail to implement the regime of compensation in kind for performers of jobs involving dangerous or hazardous elements; fail to provide examination of occupational diseases for employees or provide periodical medical check-ups for insufficient number of employees; fail to compile separate health records for employees suffering from occupational diseases;<sup>152</sup> fail to check machines, equipment, supplies and substances subject to strict requirements on labour safety and hygiene; fail to institute remedies or stop operation of workplaces, machines or equipment which likely cause labour accidents or occupational diseases;<sup>153</sup> fail to pay medical expenses for first-aid, emergency and treatment for employees who suffer labour accidents or occupational diseases; or fail to pay allowances and compensations to employees who suffer labour accidents or occupational diseases.

### **Impact on labour rights: rights of women and children**

A minor labourer is one under 18 years of age (employment of children below 15 years of age is strictly prohibited, except in exceptional cases provided by the Ministry of Labour, Invalids and Social Affairs).<sup>154</sup> Where the employment of minors occurs, there must be a separate record of each minor's full name, date of birth, current jobs, the result of each periodical health check, which must be provided on request by the labour inspector.<sup>155</sup> Employers are allowed to employ minors only for jobs suited to a minor's health in order to protect their physical and intellectual development as well as their personality. Employers have the responsibility to take care of minor employees in terms of labour, wages, health and education during employment. It is forbidden to employ minors in heavy and

dangerous jobs or jobs allowing exposure to noxious substances prescribed in the list published by the Ministry of Labour, Invalids and Social Affairs and the Ministry of Health.<sup>156</sup> The work hours of a minor employee may not exceed seven hours per day or 42 hours per week. The employer may assign minor employees to overtime work or night time work only in a number of occupations and jobs listed by the Ministry of Labour, Invalids and Social Affairs.<sup>157</sup>

For enterprises that employ a large female labour force, the persons responsible at the managerial board must assign an individual to monitor female labour affairs. Before taking any decisions related to the rights and interests of female employees and their children, consultation must be made with representatives of female employees. There must be an appropriate number of women among labour inspectors.<sup>158</sup>

Employers are not allowed to employ a female employee from her seventh month of pregnancy or sixth month of pregnancy in remote areas, border areas, and island areas or who is nursing a child under 12 months of age to work at night or in distant places.<sup>159</sup> A female employee doing heavy, toxic or dangerous works, on reaching her seventh month of pregnancy, shall be transferred to lighter work until their child reaches 12 months, or have her daily working time reduced by one hour but shall still receive her full salary.<sup>160</sup> Employers are prohibited from laying off or unilaterally terminating the labour contract with a female employee for reasons of her marriage, pregnancy, maternity leave, or that she is nursing a child under 12 months of age, except when the enterprise ceases its activities.<sup>161</sup> During the time of pregnancy, maternity leave, or nursing a child under 12 months of age, the female employee shall not be subject to any labour disciplinary

151 Decree 47/2010/ND-CP of the Government dated 6 May 2010 on Administrative sanctions imposed upon Violations of the Labour Code, Article 18 & Article 19.

152 Ibid., Article 19.

153 Ibid., Article 20.

154 2012 Labour Code, Article 119 and Article 120.

155 Ibid.

156 Ibid., Article 121.

157 Ibid., Article 122.

158 Ibid., Article 118.

159 Ibid., Article 155.

160 Ibid.

161 Ibid.

measures against her.<sup>162</sup>

Female employees are entitled to maternal leaves over a period of six months.<sup>163</sup> In case the employee gives birth to more than one child at one time, she shall be entitled to one additional month of leave for each child counted from the second one. During maternity leave, female employees shall enjoy maternity benefits in accordance with legal regulations on social insurance. After the statutory maternity leave, if so required, a female employee may take additional leave without pay under the terms agreed upon with the employer.<sup>164</sup> A female employee may return to work before the expiration of her statutory maternity leave provided that she has taken at least four months of postnatal leave and has a health centre's certificate confirming that early resumption of work does not affect her health. In that case, in addition to the wages for working days, the female employee shall continue to enjoy maternity benefits in accordance with regulations on social insurance.<sup>165</sup>

A fine between VND 300,000 and VND 10,000,000 shall be imposed on employers that discriminate against female employees; fail to consult representatives of female employees when deciding on matters related to the rights and interests of women and children in enterprises; employ female employees who are seven or more months pregnant or who are nursing their children under 12 months of age for overtime work, night-time work or working trips; fail to transfer female employees doing heavy jobs to lighter ones or to reduce their working time by one hour while paying them full salaries; fail to give female employees 30 minutes off each day during their menstrual period or 60 minutes off each day when they are nursing their children under 12 months; employ female, elderly or disabled employees for heavy and or hazardous jobs or jobs requiring exposure to toxic substances on the lists promulgated by the Ministry of Labour, Invalids and Social Affairs and the Ministry of

Health; employ female employees for jobs requiring exposure to toxic substances that adversely affect reproductive and child nursing function or for frequent work in mines or under water; fail to open books to monitor employees' health and give them periodical medical check-ups; employ minor or disabled employees to work for more than seven hours a day or 42 hours a week; sack or unilaterally terminate labour contracts with female employees due to their marriage, pregnancy, maternity leave, nursing of under 12-month-old children unless enterprises terminate their operation; employ minor employees for heavy or dangerous jobs or jobs in contact with toxic substances, or for jobs or at workplaces adversely affecting their personality, which are on the lists promulgated by the Ministry of Labour, Invalids and Social Affairs and the Ministry of Health.<sup>166</sup>

In addition, a fine of between VND 500,000 and VND 3,000,000 shall be imposed on employers that fail to hand-sign labour contracts with employees.<sup>167</sup> A fine of between VND 2,000,000 and VND 5,000,000 shall be imposed on employers that refuse to negotiate for conclusion or amendment and supplementation of collective labour accords when receiving a request for such negotiation.<sup>168</sup> A fine of between VND 2,000,000 and VND 10,000,000 shall be imposed on employers that fail to pay salaries fully and on time to employees or pay salaries late without making compensation.<sup>169</sup> A fine of between VND 1,000,000 and VND 10,000,000 shall be imposed on employers that fail to ensure necessary working means for trade unions, discriminate against employees who set up and join trade unions or participate in trade union activities or obstruct the establishment of trade union organizations at enterprises or obstructing activities of trade union organizations.<sup>170</sup>

162 Ibid.

163 Ibid., Article 157.

164 2012 Labour Code, Article 157.

165 Ibid.

166 Decree 47/2010/ND-CP of the Government dated 6 May 2010 on Administrative sanctions imposed upon Violations of the Labour Code, Article 13.

167 Ibid., Article 7.

168 Ibid., Article 9.

169 Ibid., Article 10.

170 Ibid., Article 16.

### **Impact on the environment**

The 1996 Mineral Law (amended in 2005) provides that organizations and individuals permitted to mine or process minerals shall be responsible for protecting mineral resources in the areas that they are operating.<sup>171</sup> They must comply with requirements to protect and rehabilitate the environment, ecology and land in accordance with approved feasibility studies.<sup>172</sup> They must deposit a fund at a Vietnamese bank or a foreign bank licensed to operate in Vietnam as security for the rehabilitation of the environment, ecology and land. They must use technology, equipment and materials and comply with other provisions of the Environment Protection Law in order to minimize any adverse impact on the environment and rehabilitate the environment, ecology and the land after the termination of each phase or the entirety of mineral activity.

They must also bear all expenses related to the protection and rehabilitation of the environment, ecology and land, which are determined in environmental impact assessment reports, mineral mining or processing feasibility studies or mineral exploration proposals.<sup>173</sup>

To avoid potentially adverse impacts on the environment caused by business and investment activities, the 2005 Environment Protection Law specifically requires business enterprises to make and register with the local people's committees written environmental protection commitments specifying location of operation, type and scale of production, business or service and materials and fuel used, kinds of wastes generated and commitments to apply measures to minimize and treat wastes and strictly comply with the provisions

171 1996 Mineral Law (amended in 2005), Article 9(4). English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=2164](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=2164), (last visited 11 November 2012).

172 Ibid., Article 7(2).

173 Ibid., Article 16.

of law on environmental protection before they can commence operation.<sup>174</sup> The Law also requires owners of the many types of projects to submit an elaborate strategic environmental assessment report or environmental impact assessment report.<sup>175</sup> Environmental impact assessment reports must include detailed description of the project's construction components, construction area, time and workload; operational technology for each component and the entire project; overall assessment of the environmental status at the project site and neighbouring areas; the sensitivity and load capacity of the environment; detailed assessment of possible environmental impacts when the project is executed and environmental components and socio-economic elements to be impacted by the project; prediction of environmental incidents possibly caused by the project; specific measures to minimize bad environmental impacts, prevent and respond to environmental incidents; commitments to take environmental protection measures during project construction and operation; lists of project items; cost estimates for building environmental protection works within the total cost estimate of the project; opinions of the local People's Committees and representatives of population communities where the project is located; opinions against the project location or against environmental protection solutions and citation of sources of figures, data,

174 2005 Environment Protection Law, Articles 24, 25 & 26. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5961](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5961), (last visited 11 November 2012).

175 Projects of national importance; projects planned to use part of land of or exerting adverse impacts on, the natural sanctuaries, national parks, historical and cultural relic sites, natural heritages or beautiful landscapes which have been ranked; projects to potentially exert adverse impacts on the river watershed, coastal areas or areas of protected ecosystems; projects to construct infrastructure works in economic zones, industrial parks, hi-tech parks, export-processing zones or craft village areas; projects to construct new urban centres or concentrated residential areas; projects to exploit and use groundwater or natural resources on a large scale; other projects having potential risks or adverse impacts on the environment.

and assessment methods.<sup>176</sup>

Environmental impact assessment reports shall be appraised by appraisal councils or appraisal service organizations.<sup>177</sup> Project owners must: report on the content of decisions approving environmental impact assessment reports to People's Committees of places where projects are executed; publicly post at project sites information on the kinds of wastes, treatment technologies, standard parameters of wastes and environmental protection solutions for population communities to know, inspect and supervise; properly and fully implement environmental protection contents in environmental impact assessment reports and requirements stated in decisions approving environmental impact assessment reports.<sup>178</sup>

The 2005 Enterprise Law and the 2005 Investment Law also obliges investors (individuals or organizations) of all kinds to comply with environmental protection legal regulations.<sup>179</sup> Investment dossiers submitted to relevant authorities for consideration must include possible impact assessments on the environment and propose environmental solutions. Examination of investment projects shall cover land use and environmental solution.<sup>180</sup>

In case environment protection obligations are violated, legal documents such as Decree 117/2009/ND-CP of the Government dated 31 December 2009 of Handling Violations in Environment Protection.<sup>181</sup> Decree 159/2007/ND-CP of the Government dated 30 October 2007 on Administrative Sanctions Imposed upon Violations in the Domain of Forest<sup>176</sup> 2005 Environment Protection Law, Article 14 and 18. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5961](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5961), (last visited 11 November 2012).

177 Ibid., Article 21.

178 Ibid., Article 32.

179 2005 Enterprise Law, Article 9; 2005 Investment Law, Article 20.

180 2005 Investment Law, Article 48.

181 Decree 117/2009/ND-CP of the Government dated 31 December 2009 of Handling Violations in Environment Protection, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=92587](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=92587), (last visited 2 November 2012).

Management, Forest Protection and Forest Product Management and Decree 105/2009/ND-CP of the Government dated 11 November 2009 on Administrative Sanctions imposed upon Violations in the Land Domain provide different levels of sanctions against violators. A fine between VND 1,000/m<sup>2</sup> and 10,000/m<sup>2</sup>, for example, shall be imposed on individuals or organizations that cut down forest trees, intentionally burn forest trees, excavate, level, explode mines, dig and build tidal water banks, discharge toxics and engage in other acts that cause damage to forests for whatever purposes without permission of competent state agencies or not in accordance with granted permits.<sup>182</sup> A fine between VND 500,000/m<sup>2</sup> and 3,500,000/m<sup>2</sup> shall be imposed for individuals' and organizations' acts of collecting forest products in forests without permission of competent state agencies (if such exploitation is subjected by law to licensing) or not in accordance with granted license.<sup>183</sup> A fine of between one time and six times the value of material evidences shall be imposed for acts of hunting, shooting, catching, raising, and slaughtering forest animals not of endangered, precious or rare species without permission of competent state agencies or not in accordance with the provisions of granted permits.<sup>184</sup>

### Impact on land rights

As a matter of principle, business enterprises and individuals, when using land, must comply with the 2003 Land Law and other relevant laws. Their use of land must be environmentally protective and not harmful to the legitimate rights and interests of other land users.<sup>185</sup> Acts of encroaching upon land, using land not for the right purposes, violating

182 Decree 159/2007/ND-CP of the Government dated 30 October 2007 on Administrative Sanctions imposed upon Violations in the Field of Forest Management, Forest Protection and Forest Product Management, Article 18. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=3219](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=3219), (last visited 11 November 2012).

183 Ibid., Article 19.

184 Ibid., Article 20.

185 2003 Land Law, Article 107. English translated version is available at [http://moj.gov.vn/vbpq/en/\\_layouts/printeng.aspx?id=8269](http://moj.gov.vn/vbpq/en/_layouts/printeng.aspx?id=8269), (last visited 11 November 2012).

land-use plans, destroying land, failing to strictly comply with law provisions when applying land users' rights, and failing to perform or performing inadequately the obligations and responsibilities of land users are strictly prohibited.<sup>186</sup>

Organizations or individuals who use land for construction of industrial zones must comply with detailed land use planning and detailed industrial-zone construction planning that have been already approved by competent State agencies. The elaboration of detailed industrial-zone construction planning must ensure their synchronization with planning on dwelling houses and public works in service of the daily life of labours working in the industrial zones.<sup>187</sup>

Organizations or individuals who use land as ground for construction of production or business establishments must comply with the detailed land use planning, detailed land use plans, urban construction planning or rural population quarter construction planning, which have been already approved, and comply with regulations on environment protection.<sup>188</sup>

Organizations or individuals who use lands for mineral activities must apply measures for environment protection, waste treatment and other measures so as not to cause damage to land users in the areas and nearby regions; and use land in accordance with the tempo of mineral exploration or exploitation. Upon the completion of mineral exploration or exploitation,

they have the responsibility to return the land strictly in the state prescribed in the land lease contracts.<sup>189</sup>

Those who commit violations of the land legislation, shall, depending on the nature and seriousness of their violations, be administratively handled or examined for penal liability according to law

<sup>186</sup> Ibid., Article 15.

<sup>187</sup> Ibid., Article 90.

<sup>188</sup> Ibid., Article 93.

<sup>189</sup> Ibid., Article 94.

provisions.<sup>190</sup> Those who commit acts of violations that cause damage to the State or other persons must also compensate according to the extents of actual damage to the State or the persons suffering from the damage.<sup>191</sup> Acts of degrading land quality, polluting land or causing land utility decline or loss are subject to a fine of between VND 500,000 and VND 500,000,000.<sup>192</sup> Acts of encroaching upon or appropriating land within the safety protection corridors of works, land within urban areas, land with historical-cultural vestiges, scenic places protected by provincial People's Committees are subject to a fine of between VND 2,000,000 and VND 500,000,000.<sup>193</sup>

### 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 above examination of Vietnamese legal documents shows that Vietnam does not lack a legal framework to protect certain human rights from being violated by business enterprises, at least when it comes to the issues of land, environment and labour rights. What remains to be seen is the enforcement of these legal documents. This section aims to briefly examine how the State or state agencies have enforced these laws, with a focus on labour rights, environment rights and land rights. Statistical data or some cases of violations are used in this section or elsewhere in the Report to indicate the extent of law implementation and enforcement by state agencies. The section, in other words, does not seek to provide a detailed analysis on how business enterprises have violated Vietnamese laws and regulations because that is beyond the scope of this report.

<sup>190</sup> Ibid., Article 140.

<sup>191</sup> Ibid., Article 142.

<sup>192</sup> Decree 105/2009/ND-CP of the Government dated 11 November 2009 on Administrative sanctions imposed upon Violations in the Land Domain, Article 9. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10701](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10701), (last visited 11 November 2012).

<sup>193</sup> Ibid.

As indicated in the answer to Question 1, different state agencies are responsible for the implementation of different laws and regulations concerning protecting people's rights from abuses by business enterprises. The Ministry of Labour, Invalids and Social Affairs is accountable to the government for exercising state management and implementing laws and policies on labour issues. The Ministry of Natural Resources and Environment serves as the lead agency for environmental and land rights. They are entrusted with the tasks of: drafting and submitting strategies, plans, programs, projects, proposals, and specialized management standards relating to issues of preventing business-related human rights abuses under their management scopes; drafting and submitting legal documents, and organizing the instruction, guidance, implementation and monitoring of the enforcement of these legal documents. These agencies certainly do not act alone. Other ministries and ministerial agencies have the obligation to collaborate with these focal points in enforcing relevant laws and regulations.<sup>194</sup> The People's Committees at all levels also participate in implementing and monitoring the observance of the laws and regulations in their localities.<sup>195</sup> In managing and ensuring the respect of laws and policies in their respective areas or localities, these agencies or authorities may conduct inspections as to whether violations are committed and, if committed violations are found, may impose administrative sanctions against violators. Again, prosecution of crimes rests with the People's Procuracy.

### **Labour rights**

On the implementation of the 2012 Labour Code, on 29 October 2012, the Ministry of Labour, Invalids and Social Affairs issued a Plan of the Code Implementation.<sup>196</sup> According to the Plan,

<sup>194</sup> 2012 Labour Code, Article 236.

<sup>195</sup> 1992 Constitution (amended in 2001), Article 23.

<sup>196</sup> Decision 1511/QD-LDTBXH dated 29 October 2012 on Approving the Implementation Plan of the 2012 Labour Code, available in Vietnamese at <http://www.molisa.gov.vn/docs/VBPL/detailVBPL/tabid/213/DocID/10290/TabModuleSettingsId/450/language/vi-VN/Default.aspx>, (last visited 11 November 2012).

three groups of activities will be conducted, namely (i) raising awareness about the 2012 Labour Code and important labour rights provided therein (e.g., seminars and workshops are being organized,<sup>197</sup> the Labour Code is being translated into English)<sup>198</sup>; (ii) drafting, submitting and adopting documents to guide the implementation of the Code and amending existing documents that have conflicting provisions with the Code; and (iii) monitoring, inspecting and reviewing the implementation of the Code (a national review conference on the subject will be held in 2017).<sup>199</sup>

The 2012 Labour Code, however, will only enter into force on 1 May 2013. Until then, the Labour Code that was adopted in 1994 and amended in 2002, 2006 and 2007 is still in force (see answer to Question 3 for a brief introduction of major changes made in the 2012 Labour Code). To implement the 1994 Labour Code, the Ministry of Labour, Invalids and Social Affairs has drafted, and submitted to the Government for adoption, various guiding documents, including: Decree 12/2008/ND-CP dated 30 January 2008 guiding the implementation of Article 176 of the Labour Code on postponement or suspension of strikes;<sup>200</sup> Decree 133/2007/ND-CP dated 8 August 2007 detailing and guiding the implementation of the Law amending and

<sup>197</sup> See, for instance, the Seminar on Implementation of the 2012 Labour Code held on 19 October 2012 by the Ministry of Labour, Invalids and Social Affairs, <http://www.molisa.gov.vn/news/detail/tabid/75/newsid/55919/language/vi-VN/Default.aspx?seo=Thu-truong-Pham-Minh-Huan-chu-tri-Hoi-thao-Trien-khai-huong-dan-quy-dinh-cua-Bo-luat-Lao-dong-nam-2012-ve-lao-dong-giup-viec-gia-dinh>, (last visited 11 November 2012).

<sup>198</sup> See the plan to translate the 2012 Labour Code into English, <http://www.molisa.gov.vn/news/detail/tabid/75/newsid/55814/seo/Nhung-noi-dung-moi-va-cac-hoat-dong-trien-khai-thuc-hien-Bo-Luat-lao-dong-nam-2012/language/vi-VN/Default.aspx>, (last visited 11 November 2012).

<sup>199</sup> Decision 1511/QD-LDTBXH dated 29 October 2012 on Approving the Implementation Plan of the 2012 Labour Code.

<sup>200</sup> Decree 12/2008/ND-CP dated 30 January 2008 guiding the implementation of Article 176 of the Labour Code on Postponement or Suspension of Strikes and Settlement of Labour Collective Interests. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=2970](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=2970), (last visited 11 November 2012).

supplementing a number of articles of the Labour Code regarding settlement of labour disputes;<sup>201</sup> Decision 233/2006/QĐ-TTg dated 18 October 2006 by the Prime Minister on Improvement of the National Program on Labour Protection, Safety and Hygiene to 2010 (the total amount of state budget allocated for this Program was VND 242 billion); and Decree 145/2004/ND-CP dated 14 July 2004 detailing the implementation of the Labour Code regarding the Vietnam Labour Confederation's and employer representatives' opinions contributed to State agencies on policies, laws and matters related to labour relationships.<sup>202</sup>

Awareness-raising activities on the Labour Code and relevant legal documents, including holding seminars, organizing training courses, publishing booklets, and producing TV, radio and online programs, have been carried out by the Ministry of Labour, Invalids and Social Affairs and the Vietnam General Confederation of Labours. A system of labour inspectorates from the local level to the central level has been established with a total number of more than 300 inspectorates.<sup>203</sup>

Localities with vigorous business and investment activities have been provided with more labour inspectorates (e.g., the number of labour inspectorates in Ho Chi Minh City has increased

201 Decree 133/2007/ND-CP dated 8 August 2007 detailing and guiding the implementation of a number of articles of the law amending and supplementing a number of articles of the Labour Code regarding settlement of labour disputes. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=3396](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=3396), (last visited 11 November 2012).

202 Decree 145/2004/ND-CP dated 14 July 2004 detailing the implementation of the Labour Code regarding Vietnam Labour Confederation's and employer representatives' opinions contributed to State agencies on policies, laws and matters related to labour relationships. English translated version (summary) is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=7808](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=7808), (last visited 11 November 2012).

203 The Ministry of Labour, Invalids and Social Affairs, Report on 15 years of implementing the Labour Code (2011), 34. Available in Vietnamese at [http://duthaonline.quochoi.vn/DuThao/Lists/DT\\_TAILIEU\\_COBAN/Attachments/117/BC\\_15\\_nam\\_thi\\_hanh\\_LLD.pdf](http://duthaonline.quochoi.vn/DuThao/Lists/DT_TAILIEU_COBAN/Attachments/117/BC_15_nam_thi_hanh_LLD.pdf), (last visited 11 November 2012).

from 18 to 30, in Dong Nai from 9 to 17, and in Binh Duong from 6 to 10).<sup>204</sup> A total of 2,394,000 cases of violations have been handled and violators fined with the amount of VND 18,000 billion.<sup>205</sup>

It should be noted that 2,394,000 is the number of cases of violations that have been addressed so far. There are possibly many cases of violation that are not detected or, even if detected, not efficiently or promptly addressed. The entire country has only 300 labour inspectorates but, according to the International Labor Organization, it needs at least 800 to 1,000 labour inspectorates.<sup>206</sup> As inspectorates are mainly located at the central and provincial levels, the number of inspectorates at district level or inside industrial zones is even more limited.<sup>207</sup> As a result, labour inspectorates can inspect merely 3.4% of the total number of enterprises at their localities.<sup>208</sup>

The limited number of labour inspectorates, not to mention the quality of inspectorates, is among the major problems that Vietnam is facing in enforcing labour rights law. Implementation of labour rights law needs to be monitored and ensured by inspection activities. The lack of monitoring and inspection may contribute to the lack of action from employers to protect labour rights and ensure workplace hygiene and labour safety. Hygiene and safety standards are reportedly out of date.<sup>209</sup> There is currently no clear division of work between different local departments (health, labour, industrial zone management body, etc.) in terms of management over workplace hygiene and labour safety.<sup>210</sup> According to government, the number of labour accident is still high.<sup>211</sup> There are also reports

204 Ibid.

205 Ibid.

206 Ibid.

207 Ibid.

208 Ibid.

209 Ibid., 22.

210 Ibid., 34.

211 Le Thanh Ha, "Những bức xúc của công nhân lao động hiện nay và biện pháp giải quyết", <http://www.molisa.gov.vn/news/detail/tabid/75/newsid/55192/seo/Nhung-buc-xuc-cua-cong-nhan-lao-dong-hien-nay-va-bien-phap-giai-quyet/language/vi-VN/Default.aspx>, (last visited 11 November 2012).

of many children working in exploitative labour conditions, for instance in gold mines despite the prohibition in the laws.<sup>212</sup> 80% of private enterprises and 60% foreign-invested enterprises do not have labour unions.<sup>213</sup> There were 1,712 labour strikes from 2009 to 2011, of which 76.5% happened in foreign invested enterprises.<sup>214</sup>

Many labourers, especially those in service-sector enterprises and medium and small enterprises are not aware of their rights.<sup>215</sup> Awareness-raising activities are organized only at certain times, i.e. when legal documents have just been adopted. Funding for these kind of activities is limited.<sup>216</sup> Not all labour rights lecturers and reporters have the required knowledge to do their job.<sup>217</sup>

### Environment

To implement environmental laws, the Ministry of Natural Resources and Environment has drafted and submitted to the Government for adoption many guiding documents,

including Decree 29/2011/ND-CP dated 18 April 2011 providing strategic environmental assessment, environmental impact assessment and environmental protection commitment;<sup>218</sup> Decree 117/2009/ND-CP dated 31 December 2009 on the handling of violations against environment

212 CRS Report for Congress, Vietnam's Labour Rights Regime: An Assessment (2001), 21, available at <http://www.policyarchive.org/handle/10207/bitstreams/1173.pdf>, (last visited 11 November 2012).

213 The Ministry of Labour, Invalids and Social Affairs, Report on 15 years of implementing the Labour Code (2011), 29.

214 Le Thanh Ha, "Những bức xúc của công nhân lao động hiện nay và biện pháp giải quyết", <http://www.molisa.gov.vn/news/detail/tabid/75/newsid/55192/seo/Nhung-buc-xuc-cua-cong-nhan-lao-dong-hien-nay-va-bien-phap-giai-quyet/language/vi-VN/Default.aspx>, (last visited 11 November 2012).

215 The Ministry of Labour, Invalids and Social Affairs, Report on 15 years of implementing the Labour Code (2011), 34.

216 Ibid.

217 Ibid.

218 Decree 29/2011/ND-CP dated 18 April 2011 providing strategic environmental assessment, environmental impact assessment and environmental protection commitment. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10586](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10586), (last visited 11 November 2012).

protection law;<sup>219</sup> Decree 25/2009/ND-CP dated 6 March 2009 on integrated management of natural resources and environmental protection of the sea and islands;<sup>220</sup> Decree 04/2009/ND-CP dated 14 January 2009 providing for incentives and supports for environmental protection activities;<sup>221</sup> Decree 112/2008/ND-CP dated 20 October 2008 on management, protection and integrated exploitation of resources and environment of hydropower and irrigation reservoirs;<sup>222</sup> Decree 174/2007/ND-CP dated 29 November 2007 on environmental protection charges for solid wastes;<sup>223</sup> and Decree 140/2006/ND-CP dated 22 November 2006 providing for the environmental protection at stages of elaboration, evaluation, approval and implementation of development strategies, plans, programs and projects.<sup>224</sup> In September 2012, the Government adopted the National Strategy on Environment Protection to 2020, with a Vision to 2030.<sup>225</sup> The National Plan on Environment Protection to 2020 is expected to be completed by the end of 2012.<sup>226</sup>

219 Decree 117/2009/ND-CP dated 31 December 2009 on the handling of law violations in the domain of environmental protection. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10706](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10706), (last visited 11 November 2012).

220 Decree 25/2009/ND-CP dated 6 March 2009 on integrated management of natural resources and environmental protection of the sea and islands.

221 Decree 04/2009/ND-CP dated 14 January 2009 providing for incentives and supports for environmental protection activities.

222 Decree 112/2008/ND-CP dated 20 October 2008 on management, protection and integrated exploitation of resources and environment of hydropower and irrigation reservoirs.

223 Decree 174/2007/ND-CP dated 29 November 2007 on environmental protection charges for solid wastes.

224 Decree 140/2006/ND-CP dated 22 November 2006 providing for the environmental protection at stages of elaboration, evaluation, approval and implementation of development strategies, plans, programs and projects.

225 National Strategy on Environment Protection to 2020, with a Vision to 2030, available in Vietnamese [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=2&\\_page=1&mode=detail&document\\_id=163495](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=2&_page=1&mode=detail&document_id=163495), (last visited 11 November 2012).

226 See "Góp ý dự thảo Kế hoạch bảo vệ môi trường quốc gia", <http://www.monre.gov.vn/v35/default.aspx?tabid=428&Ca teID=24&ID=120187&Code=DKRY120187>, (last visited 11 November 2012).

In terms of institution building, the Government has established the Vietnam Agenda 21 Office, which is responsible to draft and submit action plans to implement the Vietnam Agenda 21 on sustainable development. The duties of this office require it to, organize and manage the implementation of the Vietnam Agenda 21, coordinate the development of sustainable development programmes; supervise, monitor, and evaluate the results of those programs and projects in the country.<sup>227</sup> The Prime Minister also established the National Council of Sustainable Development that includes a Deputy Prime Minister, Minister of Planning and Investment as the standing member, representatives from the Ministry of Natural Resources and Environment, Ministry of Science and Technology, and 40 other members from Party agencies, the National Assembly, other ministries, local enterprises and social agencies.<sup>228</sup> The role of this body is to advise the Prime Minister and: to organize, instruct and steer the implementation of the Strategic Orientation for Sustainable Development, Natural Resources and Environment; to direct education and awareness raising for all sectors, levels and people about sustainable development; to build and operate information systems on sustainable development issues; to propose new initiatives and search for resources to advance sustainable development. Under the Ministry of Natural Resources and Environment, there is also a Committee established to assist the Minister of Natural Resources and Environment in implementing the Environment Protection Law, relevant legal documents, and the Strategic Orientation for Sustainable Development, Natural Resources and Environment.<sup>229</sup>

In terms of monitoring compliance of business enterprises with the environmental protection law, from 2009 to 2011, inspectorates of the Ministry

227 See Vietnam Agenda 21 Office, <http://www.agenda21.monre.gov.vn/default.aspx?tabid=231>, (last visited 11 November 2012).

228 Decision No. 1032/QĐ-TTg of the Prime Minister.

229 See “*Nâng cao ý thức bảo vệ môi trường qua hoạt động thanh tra*,” <http://www.agenda21.monre.gov.vn/Default.aspx?tabid=394&ItemID=2693>, (last visited 11 November 2012).

of Natural Resources and Environment conducted inspections in 1,703 enterprises and industrial zones, detecting violations and imposing a total amount of administrative fines at VND 59.837 billion against violators.<sup>230</sup> Inspectorates of the General Department of Environment Protection conducted a series of inspection missions in 2011 across 32 provinces and 375 industrial zones, among which 154 were concluded as violating legal documents on environment protection.<sup>231</sup> In the province of Binh Duong alone, 30 enterprises were fined with the amount of more than VND 1.7 billion for violating the environmental protection law.<sup>232</sup> In addition, inspections were also conducted and violations handled at companies like Hyundai Vinashin and Tan Phat Tai.<sup>233</sup>

Inspection results, however, suggest that in some cases both the state authorities and business enterprises have failed to fully implement the laws on environmental protection. Some local authorities, for instance, did not assess potential environmental impacts when examining investment dossiers, which they considered as a measure to attract investment.<sup>234</sup> Some other local authorities have either failed to adopt, or adopted at a very slow pace, local regulations on environmental protection at their localities to the extent that the Ministry of Natural Resources and Environment had to issue a Circular in 2007 directing local authorities to promptly adopt local regulations on environmental

230 Ministry of Natural Resources and Environment, Answer to the National Assembly, [www.na.gov.vn/OpenAttach.asp?idfile=1757](http://www.na.gov.vn/OpenAttach.asp?idfile=1757), (last visited 11 November 2012).

231 See Committee on Sustainable Development <http://www.agenda21.monre.gov.vn>, (last visited 11 November 2012).

232 See “*Nâng cao ý thức bảo vệ môi trường qua hoạt động thanh tra*,” <http://www.agenda21.monre.gov.vn/Default.aspx?tabid=394&ItemID=2693>, (last visited 11 November 2012).

233 Ibid.

234 See “*Tăng cường thực hiện luật bảo vệ môi trường*,” <http://www.baomoi.com/Tang-cuong-thuc-hien-Luat-Bao-ve-moi-truong/45/4058140.epi>, (last visited 11 November 2012).

protection.<sup>235</sup> Some did not even bother to take notice of serious damage to the environment caused by business activities in the areas under their management.

In one of the most visible cases of an environmental law violation by a business enterprise in Vietnam, the Taiwanese food manufacturer Vedan Co., Ltd was able to illegally dump waste into the Thi Vai River from its Monosodium Glutamate for more than 10 years and the violation was only officially detected in 2008. At first, the company declined to bear responsibility. In the end, it was required to pay a fine of VND 267 million and another VND 127 billion as an environmental protection fee.<sup>236</sup> The company was also forced to shut down some factories and reduce its operations to 67% of its capacity.<sup>237</sup> With the support of the Ministry of Natural Resources and Environment and the Vietnam Environment Fund, many farmers in the three affected areas, namely Ba Ria – Vung Tau province, Cu Chi District of Ho Chi Minh City and Dong Nam province, decided to sue the company.<sup>238</sup> After many rounds of negotiation and under a lot of pressure, the company agreed to pay VND 53 billion to affected people in Ba Ria – Vung Tau province, VND 45 billion to affected people in Ho Chi Minh City and VND 120 billion to affected people in Dong Nai province.<sup>239</sup> The case clearly illustrates the problem of enforcement of environmental law in Vietnam that needs to be addressed. It results from a combination of the weakness of state management

235 Circular 02/CT-BTNMR dated 19 November 2007 on the implementation of land law, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=15&mode=detail&document\\_id=51995](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=15&mode=detail&document_id=51995), (last visited 11 November 2012).

236 See “Tăng cường thực hiện luật bảo vệ môi trường”, <http://www.baomoi.com/Tang-cuong-thuc-hien-Luat-Bao-ve-moi-truong/45/4058140.epi>, (last visited 11 November 2012).

237 Ibid.

238 Ibid.

239 See “Nông dân được tạm ứng 2,6 tỷ đồng để kiện Vedan,” at <http://vnexpress.net/gl/xa-hoi/2010/08/3ba1ede7> and “Bộ Tài nguyên và Môi trường: Kiện Vedan là chắc thắng,” at <http://vnexpress.net/gl/xa-hoi/2010/07/3ba1e930/>, (last visited 11 November 2012).

at local level, lack of capacity, shortcomings of inspection activities, defects in environmental impact assessments, lack of awareness, and a loose coordination mechanism between the central and local agencies.

## **Lands**

To implement the 2003 Land Law, the Government has issued 22 guiding documents,<sup>240</sup> including: Decree 105/2009/ND-CP dated 11 November 2009 on the sanctioning of administrative violations in the land domain;<sup>241</sup> Decree 88/2009/ND-CP dated 19 October 2009 on grant of certificates of land use rights and house and land-attached asset ownership;<sup>242</sup> Decree 69/2009/ND-CP dated 13 August 2009 on land use planning, land prices, land recovery, compensation, support and resettlement;<sup>243</sup> Circular 02/CT-BTNMT dated 19 November 2007 on the implementation of land law;<sup>244</sup> and Decree 181/2004/ND-CP dated 29 October 2004 on the

240 Ministry of Natural Resources and Environment, Report on the Implementation of the 2003 Land Law, available in Vietnamese at [http://duthaonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_LUAT/View\\_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781](http://duthaonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781), (last visited 11 November 2012).

241 Decree 105/2009/ND-CP dated 11 November 2009 on the sanctioning of administrative violations in the land domain. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10701](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10701), (last visited 11 November 2012).

242 Decree 88/2009/ND-CP dated 19 October 2009 on grant of certificates of land use rights and house and land-attached asset ownership. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10697](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10697), (last visited 11 November 2012).

243 Decree 69/2009/ND-CP dated 13 August 2009 on land use planning, land prices, land recovery, compensation, support and resettlement. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10688](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10688), (last visited 11 November 2012).

244 Circular 02/CT-BTNMR dated 19 November 2007 on the implementation of land law, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=15&mode=detail&document\\_id=51995](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=15&mode=detail&document_id=51995), (last visited 11 November 2012).

implementation of land law,<sup>245</sup> among others. A lot of education and awareness raising activities have been carried out, including holding training courses, publishing the law and relevant materials, producing radio and TV programs, organizing a national competition about the Land Law, issuing CDs and CD-ROMs, and even holding online chat sessions.<sup>246</sup>

From 2005 to 2010, the Ministry of Natural Resources and Environment sent many working missions to 64 provinces, 160 districts, 159 communes, 500 enterprises and met more than 20,000 people to monitor the implementation of the Land Law.<sup>247</sup> In 2008 and 2010, monitoring work focused on the use of land for golf projects and found 27 cases of violations.<sup>248</sup> From 2009 to late 2011, nearly 2,000 complaints and denunciations, the majority of which involves land clearance and land return, piled up waiting for the Government Inspectorate to resolve. On orders from the Prime Minister, in May 2012, the Government Inspectorate selected 528 of the most complicated cases for review by the end of the year. By October 2012, the Government Inspectorate had reviewed 486 out of 528 complicated cases, in which 282 cases has already been settled by central agencies, 131 cases sent back to local authorities for settlement, 41 cases

245 Decree 181/2004/ND-CP dated 29 October 2004 on the implementation of land law, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=18&mode=detail&document\\_id=13310](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=18&mode=detail&document_id=13310), (last visited 11 November 2012).

246 Ministry of Natural Resources and Environment, Report on the Implementation of the 2003 Land Law, available in Vietnamese at [http://duthaoonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_LUAT/View\\_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781](http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781), (last visited 11 November 2012).

247 Ministry of Natural Resources and Environment, Report on the Implementation of the 2003 Land Law, available in Vietnamese at [http://duthaoonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_LUAT/View\\_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781](http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781), (last visited 11 November 2012).

248 Ministry of Natural Resources and Environment, Report on the Implementation of the 2003 Land Law, available in Vietnamese at [http://duthaoonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_LUAT/View\\_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781](http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781), (last visited 11 November 2012).

awaiting decisions from the Prime Minister, and 32 are pending for decisions by ministries and sectors at the central level.<sup>249</sup>

The large number of complaints and denunciations about violations of land rights reveals many problems in land law and land law enforcement in Vietnam. Given the competition among different localities to attract investment, some local authorities accept compensation rates that are favourable to investors' interest in order to attract more investment to their localities. Many local authorities also fail to arrange properly resettlement areas for people whose land is subject to confiscation and are not concerned with the issue of job creation for affected people.<sup>250</sup> Inspections at the local level are not conducted on a regular basis and do not meet the demands of practice. Coordination mechanisms between central agencies and local authorities do not run smoothly. Many detected violations are not handled in a timely and efficient manner<sup>251</sup> and even sanctions usually are not strong enough to prevent and deter violations. Not all awareness raising activities are effective and, as a result, many people, especially those in the remote areas, are not well aware of their rights under the Land Law.<sup>252</sup>

As observed by the World Bank in its 2012 Policy Note "Revising the Land Law to Enable Sustainable Development in Vietnam,"<sup>253</sup> although the 2003 Land Law states that the State's land prices would be in line with market prices and the Government

249 Tuoitre News, "Government resolves land-rights complaints," available at <http://www.tuoiitrenews.vn/cmmlink/tuoiitrenews/society/government-resolves-land-rights-complaints-1.89439>, (last visited 11 November 2012).

250 Ministry of Natural Resources and Environment, Report on the Implementation of the 2003 Land Law, available in Vietnamese at [http://duthaoonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_LUAT/View\\_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781](http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781), (last visited 11 November 2012).

251 Ibid.

252 Ibid.

253 The World Bank, Policy Note "Revising the Land Law to Enable Sustainable Development in Vietnam," (2012), [http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/10/29/000386194\\_20121029021618/Rendered/PDF/707260Revised00d0Policy0Notes.Final.pdf](http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/10/29/000386194_20121029021618/Rendered/PDF/707260Revised00d0Policy0Notes.Final.pdf), (visited 5 November 2012).

Decreets 17/2006/ND-CP, 123/2007/ND-CP and 69/2009/ND-CP require that the land compensation price reflect market prices, in practice, there is no concrete guidance on how to implement this policy and each province therefore currently follows different price schemes. Ho Chi Minh City is one of the exceptional cases where the authorities hire an independent land appraiser for each investment project and compensation rates are closer to market rates. In many other localities, land compensation prices are much lower than prevailing market prices, leading to dissatisfaction of land users and long lasting complaints. This situation negatively affects both economic development and social stability, as well as reducing the attractiveness of Vietnam's investment environment.<sup>254</sup>

Another major problem identified by the World Bank is the compulsory land acquisition scheme according to which land is being taken in a mandatory manner not only for the purposes of national defence, security, and national and public interests, but also for some economic development purposes such as projects to construct infrastructure for economic areas, hi-tech parks, industrial zones, service zones, urban and rural residential areas, projects with 100% foreign investment (including ODA and FDI), and projects with a high level of investment funds.<sup>255</sup> This, as observed by the World Bank, often causes unfairness in benefit sharing between land users, investors and the State, inefficient land use, corruption, and prolonged complaints of the land users.<sup>256</sup> The World Bank therefore makes the following proposals:<sup>257</sup> enhancing effectiveness of land use, creating transparent and equitable land acquisition by limiting the use of compulsory land acquisition only to cases for the public's benefit, relying predominantly on voluntary land conversions, changing the focus of land compensation pricing, strengthening the land use rights of vulnerable groups, such as women, the poor and ethnic minority communities and

making the governance system more effective and accountable.<sup>258</sup>

As for cooperation with other countries in terms of preventing and combating crimes or law violations, in addition to signing and ratifying multilateral treaties such as the United Nations Convention against Corruption or the United Nations Convention on Transnational Organized Crimes, Vietnam has also concluded many bilateral agreements on crime prevention, mutual legal assistance and extradition. Examples of recent bilateral agreements include the 2007 Vietnam - India Agreement on Mutual Legal Assistance in Criminal Matters; the 2009 Vietnam - United Kingdom Agreement on Mutual Legal Assistance in Criminal Matters; the 2010 Vietnam - Thailand Agreement on Transfer of Sentenced Persons and Cooperation in Execution of Criminal Sentences; the 2010 Vietnam - Algeria Agreement on Mutual Legal Assistance in Criminal Matters; the 2010 Vietnam - Algeria Agreement on Extradition and the 2011 Vietnam - Kazakhstan Agreement on Mutual Legal Assistance Civil Matters.<sup>259</sup> Vietnam is also a party to the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters. The Law on Mutual Legal Assistance has been in force for 5 years.<sup>260</sup> The Government also issued the Decree No. 92/2008/ND-CP dated 22 August 2008 guiding the Implementation of the Law.<sup>261</sup>

<sup>258</sup> Ibid.

<sup>259</sup> Full list is available at Ministry of Foreign Affairs, Consular Department, <http://lanhsuvietnam.gov.vn/Lists/BaiViet/Bai%20viet/DispForm.aspx?List=dc7c7d75%2D6a32%2D4215%2Dafeb%2D47d4bee70eee&ID=414>, (last visited 5 November 2012).

<sup>260</sup> 2007 Law on Mutual Legal Assistance, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=50875](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=50875), (last visited 5 November 2012).

<sup>261</sup> Decree No. 92/2008/ND-CP dated 22 August 2008 guiding the Implementation of the 2007 Law on Mutual Legal Assistance, available in Vietnamese at <http://thuvienphapluat.vn/archive/Nghi-dinh/Nghi-dinh-92-2008-ND-CP-huong-dan-Luat-Tuong-tro-tu-phap-vb69747t11.aspx>, (last visited 5 November 2012).

<sup>254</sup> Ibid., 6.

<sup>255</sup> Ibid., 5.

<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

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

According to the 2008 Law on Promulgation of Legal Documents, legal documents shall be periodically reviewed and assessed. Legal document contents that are proven wrong or no longer appropriate shall be amended, revised, replaced or abolished.<sup>262</sup> State agencies, within the limits of their responsibilities and powers, shall be responsible for regularly reviewing legal documents. Upon detecting any legal documents that are contradictory, overlapping or no longer appropriate or suitable with the development of the country, they shall by themselves, or request competent State authorities, to revise, amend, replace, abolish and suspend the implementation of such legal documents. Agencies, organizations and citizens shall have the right to petition the State to consider revising, amending, replacing, abolishing and suspending the implementation of legal documents.<sup>263</sup>

**Labour Code**

The Labour Code was adopted by the National Assembly on 23 June 1994 and entered into force on 1 January 1995.<sup>264</sup> In 2000, the Government organized nationwide activities to assess the Code and review its five years of implementation. Many proposals for amendments were made afterwards. On 2 April 2002, the National Assembly adopted the Law on Amending and Supplementing a number of Articles of the Labour Code.<sup>265</sup> In 2005, the Code's ten years of implementation was reviewed, the result of which was the adoption of the second Amendment Law on

26 November 2006.<sup>266</sup> On 2 April 2007, in response to many calls from the society to increase the number of public holidays, the National Assembly again amended the Code with the third Law on Amending and Supplementing a number of Articles of the Labour Code.<sup>267</sup>

Most recently, nationwide activities to assess the Labour Code (last amended in 2007) were again conducted in 2010, 15 years after the Labour Code came into effect. This time the Government decided to recommend a new Labour Code instead of submitting another draft law to amend the current one. On 18 June 2012, the National Assembly adopted the new Labour Code after working on it for two years.<sup>268</sup> The new Code will enter into force on 1 May 2013.

The adoption of the new Labour Code marks a move of the State in the right direction to provide workers and employees with greater protection. The 2012 Labour Code contains 242 articles with many new sections on invalid labour contracts, training and improving professional skills, collective bargaining, and industrial collective labour agreements. Changes in employees' working conditions include: among other, an increased minimum salary during the probation period (from 70 per cent to 85 per cent of the salary of the relevant job);<sup>269</sup> more specified regulations on the probation period (the probationary period does not exceed 60 days for employment with a job position requiring

<sup>266</sup> For changes made to the Labour Code, see 2006 Law on Amending and Supplementing a number of Articles of the Labour Code. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=3782](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=3782), (last visited 11 November 2012).

<sup>267</sup> For changes made to the Labour Code, see 2007 Law on Amending and Supplementing a number of Articles of the Labour Code, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=4&mode=detail&document\\_id=80046](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=4&mode=detail&document_id=80046), (last visited 11 November 2012).

<sup>268</sup> 2012 Labour Code, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=163542](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=163542), (last visited 11 November 2012).

<sup>269</sup> Ibid., Article 28.

<sup>262</sup> 2008 Law on Promulgation of Legal Documents, Article 87. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10500](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10500), (last visited 11 November 2012).

<sup>263</sup> Ibid.

<sup>264</sup> See 1994 Labour Code.

<sup>265</sup> For changes made to the Labour Code, see 2002 Law on Amending and Supplementing a number of Articles of the Labour Code. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10196](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10196), (last visited 11 November 2012).

college-level qualifications or above; 30 days for employment with a job position requiring vocational intermediate and professional intermediate level qualifications, technical workers and professional staff; and 6 days for other cases);<sup>270</sup> increased salary rates for overtime during night shifts (an additional 20 per cent);<sup>271</sup> increased official holiday leave (from 4 days to 5 days);<sup>272</sup> and extended maternity leave (from 4 months to 6 months).<sup>273</sup>

### Environment Protection Law

The first Environmental Protection Law of Vietnam was adopted by the National Assembly on 27 December 1993 and entered into force on 10 January 1994.<sup>274</sup> In 1999 and 2004 respectively, after holding a national review of the Law after five years and ten years of implementation, the Government decided that a new law on Environmental Protection was needed. On 29 November 2005, the National Assembly adopted the new Law on Environmental Protection.<sup>275</sup>

The 2005 Environmental Protection Law contains 136 articles, including, among others, new provisions on required strategic environmental impact assessments, environmental impact assessments (EIA) and a commitment to environmental protection.<sup>276</sup> The Law also adds provisions on the duty of organizations, business enterprises and individuals: to provide environmental information relevant to their activities to specialized environmental protection

agencies; to publicly post at project sites information on the kinds of wastes, treatment technologies, standard parameters of wastes and environmental protection solutions for population communities to know, inspect and supervise; and to properly and fully implement environmental protection contents in environmental impact assessment reports and requirements stated in decisions approving environmental impact assessment reports.<sup>277</sup>

Activities to assess the 2005 Environmental Protection Law and review its five years of implementation are now being carried out.

The National Assembly has already placed the Law on its agenda for consideration and discussion of amendments in 2013.

### Land Law

On 29 December 1987, one year after the launch of *Doi Moi*, Vietnam adopted its first Land Law. The Law came into effect on 8 January 1988.<sup>278</sup> On 15 October 1993, a new Land Law entered into force.<sup>279</sup> Ten years later, the National Assembly passed yet another new Land Law (2003 Land Law).<sup>280</sup> In 2009, the 2003 Land Law was amended by the Law Amending and Supplementing Article 126 of the House Law and Article 121 of the Land Law, according to which some overseas Vietnamese are

<sup>270</sup> Ibid., Article 27.

<sup>271</sup> Ibid., Article 87.

<sup>272</sup> Ibid., Article 28.

<sup>273</sup> Ibid., Article 157.

<sup>274</sup> See 1993 Environment Protection Law, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=48&mode=detail&document\\_id=2035](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=48&mode=detail&document_id=2035), (last visited 11 November 2012).

<sup>275</sup> For changes made to the Labour Code, see 2007 Law on Amending and Supplementing a number of Articles of the Labour Code.

<sup>276</sup> 2005 Environment Protection Law, Article 14 and 18. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5961](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5961), (last visited 11 November 2012).

<sup>277</sup> Ibid., Article 32.

<sup>278</sup> 1988 Land Law, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=19&mode=detail&document\\_id=218](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=19&mode=detail&document_id=218), (last visited 11 November 2012).

<sup>279</sup> 1993 Land Law, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=18&mode=detail&document\\_id=1832](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=18&mode=detail&document_id=1832), (last visited 11 November 2012).

<sup>280</sup> 2003 Land Law, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=18&mode=detail&document\\_id=32479](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=18&mode=detail&document_id=32479), (last visited 11 November 2012).

eligible to own house in Vietnam.<sup>281</sup> In 2010, the Prime Minister issued a Directive on Assessing the 2003 Land Law and Reviewing its Implementation. The Report on 10 years implementation of the 2003 Land Law were submitted to the National Assembly, in which various shortcomings were identified (see answer to Question 2.3).<sup>282</sup> The National Assembly is expected to consider amending the 2003 Land Law in the near future.

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

##### **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?**

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

As provided by the 2005 Enterprise Law, company's directors or general directors are responsible for their company's day-to-day business operations.<sup>283</sup> They have the right and duty to, among other things, implement the business plans and investment plans of the company and conclude contracts on behalf of the company and recruit labourers.<sup>284</sup> They have the obligation to perform assigned rights and duties in

<sup>281</sup> Law Amending and Supplementing Article 126 of the House Law and Article 121 of the Land Law, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=10&mode=detail&document\\_id=91022](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=10&mode=detail&document_id=91022), (last visited 11 November 2012).

<sup>282</sup> Ministry of Natural Resources and Environment, Report on the Implementation of the 2003 Land Law, available in Vietnamese at [http://duthaonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_LUAT/View\\_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781](http://duthaonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=528&TabIndex=2&TaiLieuID=781), (last visited 11 November 2012).

<sup>283</sup> 2005 Enterprise Law, Article 55, Article 70 and Article 116. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5953](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5953), (last visited 11 November 2012).

<sup>284</sup> Ibid.

an honest, careful and optimal manner in order to ensure maximum lawful benefits for the company and its owner. They are not permitted to use information, know-how and business opportunities of the company and abuse their status, position and property of the company for self-seeking purposes or for the benefit of other organizations or individuals. They must promptly, fully and accurately notify their company of other enterprises in which they or their related persons are owners or have dominant shares or capital shares. They are also required to perform other obligations as provided for by law and the company's charter.<sup>285</sup>

Under the 2010 Credit Institutions Law,<sup>286</sup> directors of credit institutions have the obligation to perform the rights and obligations in accordance with provisions of applicable laws, the Charter of the credit institution, and resolutions and decisions of the Shareholders' General Assembly or the owner or capital contributing members of the credit institution in an honest, cautious manner for the benefit of the credit institution, its shareholders, capital contributing members and owner. They are not allowed to use information, know-how, and business opportunities of the credit institution and abuse the position, title and assets of the credit institution for personal benefit or for the sake of another organization or individual that causes damage to the benefit of the credit institution, its shareholders, capital contributing members and owner. They must ensure that records of the credit institution are kept to supply data to serve management and control over all activities of the credit institution, and the inspection, supervision, and examination by the State Bank. They are required to be knowledgeable about various types of risks in the activities of the credit institution. They also have the duty to timely, fully and accurately notify the credit institutions of their rights and interests at other organizations, their transactions with other organizations or individuals which may

<sup>285</sup> Ibid., Article 56, Article 72 and Article 119.

<sup>286</sup> 2010 Credit Institutions Law, Article 38. English translated version is available at <http://www.sbv.gov.vn/wps>, (last visited 11 November 2012).

conflict with the interests of the credit institution. They are only authorized to participate in such transactions when they are approved by the Board of Directors or Board of Members.

They cannot facilitate themselves or their related persons to borrow capital, use other banking services of the credit institution with more preferential conditions than general regulations of the credit institution, and they are not entitled to salary, remuneration increase or bonus payments in the event where the credit institution faces losses.<sup>287</sup>

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

It is not evident from the law that directors have specific legal obligations to consider their business enterprises' human rights impact in carrying out their duties. However, there are a number of laws that provide rights-related obligations for enterprise directors.

First, according to the 2005 Enterprise Law and the 2010 Credit Institutions Law, directors are not permitted to abuse their status, position or the property of the enterprises that they are working for to violate the interests of other organizations and individuals.<sup>288</sup> Violations of the 2005 Enterprise Law and the 2010 Credit Institutions Law – if they do not yet constitute a crime under the Criminal Code – are subject to civil or administrative sanctions (see answer to Question 2.2.).

Second, in mining activities, if there is a risk of an adverse event relating to occupational safety, the managing director must immediately apply necessary measures to eliminate the possible causes

of such an event. Upon the occurrence of any adverse event relating to occupational safety, the managing director must apply emergency measures in order to eliminate the causes of such event, render first aid and evacuate people from the dangerous area, promptly report the event to the competent State authority, protect the assets and keep intact the site in accordance with the law.<sup>289</sup> Violations of the 2005 Mineral Law, do not yet constitute a crime under the Criminal Code, but are subject to civil or administrative sanctions (see answer to Questions 2.2 and 2.2).

Third, directors, like other individuals, may be subject to criminal liability if they commit crimes defined under the Criminal Code. Any violation of the rights of others which constitute a crime is handled in accordance with the 1999 Criminal Code (amended in 2009). Article 128 of the Criminal Code, for example, stipulates that, those who, for their own benefit or other personal motivation illegally force labourers or public employees to leave their jobs, causing serious consequences, shall be subject to warning, non-custodial reform for up to one year, or a prison term of between three months and one year. Those who: discharge into the air different kinds of smoke, dust, toxic matters or other harmful elements; emit radiation and/or radioactive elements in excess of the permitted criteria; or have already been administratively sanctioned but still deliberately refuse to apply remedial measures as mandated by the decisions of the competent agencies, thus causing serious consequences, shall be subject to a fine of between ten million VND and one hundred million VND, non-custodial reform for up to three years, or a prison term of between six months and three years.<sup>290</sup>

<sup>287</sup> Ibid.

<sup>288</sup> 2005 Enterprise Law, Article 56, Article 72 and Article 119, English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5953](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5953), (last visited 11 November 2012); 2010 Law on Credit Institutions, Article 38, English translated version is available at <http://www.sbv.gov.vn/wps>

<sup>289</sup> 2005 Mineral Law, Article 35.

<sup>290</sup> 1999 Criminal Code (amended in 2009), Article 182.

**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)?**

It is not evident from law that 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.

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

There is no information available on how the State or state agencies have specifically enforced the director's obligations to consider their business enterprises' human rights impacts in carrying out their duties (see answer to Question 2.3 for steps that have been taken to enforce relevant business-related human rights protection legislation).

There have been lawsuits, however, brought by labourers against directors of companies who violated their rights or contracts signed between them and the directors. In June 2009, Mr. Nguyen Van Binh was fired by the Director of Ham Thuan Bac post office (a state enterprise) for collecting an extra amount of VND 30,000 from a phone customer. Having worked for the post office for 30 years and never been disciplined, Mr. Binh found his labour rights violated by the Director and decided to sue him. In April 2010, the Phan Thiet City People's Court issued a judgment revoking the firing decision and requiring the Director to pay Mr. Binh nine months of salary during the time of termination of his employment as well as mental

damages equal to two month's salary<sup>291</sup> (it is not yet possible to obtain statistics on the total number of cases like this from the People's Court or other institutions).

**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)?**

There is no information available on any non-binding guidelines published by state agencies to encourage *directors* to take into account their businesses' human rights impacts in carrying out their duties, and the human rights impacts of subsidiaries, suppliers and other business partners. The State, however, has issued non-binding guidelines and initiatives to encourage *business enterprises* to respect human rights throughout their operations (see answers to Question 5.1. and Question 5.2. for further information).

**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?**

Under the 2005 Environmental Protection Law, business enterprises are required to make public all environmental information relating to their activities.<sup>292</sup> Environment-related project owners are required to publicly post at their project sites information on kinds of wastes,

<sup>291</sup> Phap Luat Online, "Một nhân viên bưu điện thăng kiện giám đốc," available at <http://phapluattp.vn/20100414121258701p1063c1016/mot-nhan-vien-buu-dien-thang-kien-giam-doc.htm>, (last visited 11 November 2012).

<sup>292</sup> 2005 Environment Protection Law, Article 103.

treatment technologies, standard parameters of wastes and environmental protection solutions for population communities to know, inspect and supervise.<sup>293</sup> Their impact assessment reports shall be appraised by appraisal councils or appraisal service organizations.<sup>294</sup>

As provided in the 2012 Labour Code, employers must communicate sufficient information related to the current status of work accidents, occupational diseases, dangerous and harmful factors, all measures taken to ensure occupational safety and hygiene at the workplace to their employees.<sup>295</sup> They must put information and instructions on labour safety and labour hygiene at public places where they can be easily seen and clearly read. They must consult their employees when formulating plans and implementing activities that may affect labour safety and hygiene.<sup>296</sup> When making a decision which might affect the rights and interests of women or children in the enterprises, they must ensure communication and consultation with representatives of female employees.<sup>297</sup> Every two months, they have to submit an updated report on labour recruitment to relevant agencies.<sup>298</sup> If they fail to implement this reporting obligation, depending on the nature and severity of their violations, business enterprises may be administratively sanctioned or disciplined in accordance with Decree 47/2010/ND-CP of the Government dated 6 May 2010 on Administrative Sanctioning of Violations of the Labour Code.

The 2005 Enterprise Law also requires business enterprises to publish basic information about their companies, within 30 days from the date of receiving the business registration certificate, on the registration office website, newspaper or electronic newspaper. The required information under the 2005 Enterprise Law, however, does not include

293 Ibid., Article 23.

294 Ibid., Article 24.

295 2012 Labour Code, Article 151.

296 Ibid., Article 138.

297 Ibid., Article 154.

298 Decree No. 39/2003/ND-CP dated 18 April 2003 detailing and guiding the implementation of a number of articles of the labour code regarding employment, Article 10.

human rights impacts.<sup>299</sup> The obligation does not extend to human rights impacts abroad and to the impacts of subsidiaries, suppliers and other business partners, whether occurring at home or abroad.

#### **4.3. Is/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 regulations specifically requiring business enterprises listed on the stock exchange to respect human rights. Examining public information from the Hanoi Stock Exchange<sup>300</sup> and the Ho Chi Minh Stock Exchange<sup>301</sup> turns up no guidelines, policies or incentives to encourage enterprises listed on the exchanges to respect human rights. Business enterprises listed on the stock exchange, however, are still subject to relevant requirements of the 2012 Labour Code, 2005 Environment Protection Law, 2005 Enterprises Law, 2005 Investment Law, and 2003 Land Law while doing their businesses.

#### **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?**

#### **Labour rights**

A check on the website of the Ministry of Labour, Invalids and Social Affairs reveals that the Ministry has indeed published many articles, papers and comments to raise awareness and encourage business

299 2005 Enterprise Law, Article 28.

300 Hanoi Stock Exchange, <http://www.hnx.vn/en>, (last visited 11 November 2012).

301 Ho Chi Minh Stock Exchange, [http://www.hsx.vn/hsx\\_en/default.aspx](http://www.hsx.vn/hsx_en/default.aspx), (last visited 11 November 2012).

enterprises to assume their social responsibilities.<sup>302</sup> This kind of activity is expected to be carried out further once the 2012 Labour Code comes into force (the Code has a provision on the State's policy to promote employers' social responsibility).<sup>303</sup>

To encourage business enterprises to respect labour rights, the Ministry of Labour, Invalids and Social Affairs has also collaborated with other agencies and institutions in organizing and offering awards to business enterprises with outstanding records in implementing the Labour Code. Starting from 2005, in collaboration with the Vietnam Chamber of Commerce and Industry, the Ministry introduced the Annual Award "Corporate Social Responsibility in the Footwear and Textiles Industry."<sup>304</sup> In 2011, it cooperated with the Ministry of Planning and Investment and the Korean Ministry of Knowledge Economy to hold a ceremony honouring six Korean investors in Vietnam with Corporate Social Responsibility Awards.<sup>305</sup> Most notably, it has worked with the Office of Business for Sustainable Development under the Vietnam Chamber of Commerce and Industry (VCCI), the Ministry of Planning and Investment, the Ministry of Industry and Trade, the Ministry of Natural resources and Environment, the Vietnam General Confederation of Labour, the Bureau of Environmental Police, and its international partner organizations to organize the annual national Corporate Social Responsibility Awards to honour enterprises with greatest contributions in the two areas of environment and

302 Visit the website of the Ministry of Labour, Invalids and Social Affairs at <http://www.molisa.gov.vn> and search "trách nhiệm xã hội" ("social responsibility"), (last visited 11 November 2012).

303 2012 Labour Code, Article 4(2).

304 See "Phát động Giải thưởng trách nhiệm xã hội doanh nghiệp ngành giày da và dệt may 2006," <http://www.molisa.gov.vn/others/faq/faqdetail/tabid/211/newsid/49546/language/vi-VN/Default.aspx?seo=Phat-dong-Giai-thuong-%E2%80%9CTrach-nhiem-xa-hoi-cua-Doanh-nghiep-2006-%E2%80%93Nganh-da-giay-va-det-may-Viet-Nam%E2%80%9D>, (last visited 11 November 2012).

305 See "Trao giải thưởng thực hiện tốt trách nhiệm xã hội doanh nghiệp cho các doanh nghiệp Hàn Quốc tại Việt Nam," <http://www.molisa.gov.vn/news/detail/tabid/75/newsid/53705/language/vi-VN/Default.aspx>, (last visited 11 November 2012).

labour. Five Annual Awards have been granted so far with the fifth Awards being presented in August 2012.<sup>306</sup>

### Environment protection

There are a variety of initiatives that have been implemented to encourage business responsibility to protect the environment.

First, the Environmental Protection Awards are biennially presented to individuals and organizations with outstanding records in environmental protection.<sup>307</sup> The Awards are co-organized by the Ministry of Natural Resources and Environment, the Ministry of Science and Technology, the Vietnam Chamber of Commerce and Industry and Vietnam Television. Expenses for selecting award winners and organizing awarding ceremonies are covered by the non-business environmental funding source, the Environmental Protection Fund of Vietnam, and financial contributions from other organizations and individuals.<sup>308</sup>

Second, enterprises and cooperatives conducting environmental protection activities such as manufacturing environmentally friendly products, manufacturing environmental protection equipment, applying new environmentally friendly technologies, applying biotechnology to environmental protection, conducting research and development of techniques for treating and recycling wastes and transferring waste treatment technologies, etc. are eligible for enterprise income tax incentives under the law on enterprise income

306 See "Hội thảo công bố tiêu chí và phát động giải thưởng" <http://www.globalcompactvietnam.org/detail.asp?id=140>, (last visited 11 November 2012).

307 See <http://vea.gov.vn/vn/truyenthong/giaithuong/Pages/trangchu.aspx>, for more information about the Awards (last visited 11 November 2012).

308 Decree 04/2009/ND-CP dated 14 January 2009 providing for incentives and supports for environmental protection activities, Article 20. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10652](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10652), (last visited 11 November 2012).

tax.<sup>309</sup>

Third, support is provided for investment projects in building technical infrastructure works and work items (roads, electricity transmission lines, water supply and drainage works) outside project areas and connected with common regional technical infrastructure systems.<sup>310</sup>

Fourth, the State encourages individuals and enterprises to advertise environment-friendly products, make scientific films on environmental protection to raise public awareness about environmental protection and use of environmentally friendly products, and supply free of charge tools for people to sort daily-life garbage at source. Expenses for these activities shall be accounted for as production costs of organizations, individuals, enterprises and cooperatives.<sup>311</sup>

### Global Compact Network in Vietnam

In 2007, the Vietnam Chamber of Commerce and Industry (VCCI), in partnership with the United Nations, launched the Global Compact Network Vietnam (GCNV) to support the business community in implementing effective corporate social responsibility plans, programs and initiatives and to promote responsible business practices in the country. The GCNV has four main pillars: defending human rights, improving labour conditions,

protecting the environment and supporting anti-corruption. It works to identify, anticipate and diffuse the tensions between business and communities, business and the environment, business and the government, and business and the consumer, leading to sustainable businesses.<sup>312</sup>

309 Decree 04/2009/ND-CP dated 14 January 2009 providing for incentives and supports for environmental protection activities, Article 13. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10652](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10652), (last visited 11 November 2012).

310 Ibid., Article 8.

311 Ibid.

312 For more information about the Global Compact Network Vietnam and the job it has done, visit <http://www.globalcompactvietnam.org>, (last visited 11 November 2012).

The VCCI is also working with the UN Industrial Development Organization (UNIDO) to implement the project “Helping Vietnamese SMEs Adapt and Adopt Corporate Social Responsibility for Improved Linkages with Global Supply Chain in Sustainable Production.” The aim of the project is to raise awareness and entrench Corporate Social Responsibility standards in small and medium enterprises.<sup>313</sup>

It is not clear, however, to what extent state agencies, including the Ministry of Labour, Invalids and Social Affairs and the Ministry of Natural Resources and Environment have engaged in these projects. The Vietnam Chamber of Commerce and Industry, albeit being established by the government and tasked with assisting the government in many areas, is not a state agency.<sup>314</sup>

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

#### Labour rights

As provided in response to Question 2.3, the Government has issued many legal documents to guide the implementation of the Labour Code, including Decree 133/2007/ND-CP dated 8 August 2007 guiding the implementation of the Law amending and supplementing a number of articles of the Labour Code regarding settlement of labour disputes,<sup>315</sup> Decision 233/2006/QD-TTg dated 18 October 2006 by the Prime Minister on

313 Brigitte Hamm, Corporate Social Responsibility in Vietnam: Integration or Mere Adaptation, Pacific News Number 38, (July/August 2012), 6.

314 According to the Decision of the Prime Minister to establish the Vietnam Chamber of Commerce and Industry, the Chamber is referred to as a non-governmental organization.

315 Decree 133/2007/ND-CP dated 8 August 2007 detailing and guiding the implementation of a number of articles of the law amending and supplementing a number of articles of the Labour Code regarding settlement of labour disputes. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=3396](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=3396), (last visited 11 November 2012).

Improvement of the National Program on Labour Protection, Safety and Hygiene to 2010 (the total amount of state budget allocated for this Program was VND 242 billion); and Decree 145/2004/ND-CP dated 14 July 2004 detailing the implementation of the Labour Code regarding the Vietnam Labour Confederation's and employer representatives' opinions contributed to State agencies on policies, laws and matters related to labour relationships.<sup>316</sup>

The Ministry of Labour, Invalids and Social Affairs has also published many separate guidance documents for employers on how to protect the rights of their employees such as the Notes on Giving Allowance to Employees or the Notes on Benefit Schemes for Labourers on Leave of Absence.<sup>317</sup> The website of the Ministry of Labour, Invalids and Social Affairs has a "Q&A Section" where employers and employees can ask questions about how labour rights are protected.<sup>318</sup> A recent report of the government states that brochures, handbooks and information tools on how to implement the Labour Code and respect labour rights have been disseminated but does not specify these brochures and handbooks.<sup>319</sup>

316 Decree 145/2004/ND-CP dated 14 July 2004 detailing the implementation of the Labour Code regarding Vietnam Labour Confederation's and employer representatives' opinions contributed to State agencies on policies, laws and matters related to labour relationships. English translated version (summary) is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=7808](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=7808), (last visited 11 November 2012).

317 See list of documents on the Ministry of Labour, Invalids and Social Affairs' website, <http://www.molisa.gov.vn/Default.aspx?tabid=192&temidclicked=675>, (last visited 11 November 2012).

318 See Ministry of Labour, Invalids and Social Affairs, <http://www.molisa.gov.vn/Default.aspx?tabid=70&temidclicked=84>, <http://www.molisa.gov.vn/others/faq/faqdetail/tabid/211/newsid/49699/seo/Quyen-loi-khi-tham-gia-bao-hiem-that-nghiep/language/vi-VN/Default.aspx>, or <http://www.molisa.gov.vn/others/faq/faqdetail/tabid/211/newsid/55582/seo/Quyen-co-ban-cua-nguoi-su-dung-lao-dong-trong-linh-vuc-viec-lam/language/vi-VN/Default.aspx>, (last visited 11 November 2012).

319 The Ministry of Labour, Invalids and Social Affairs, Report on 15 years of implementing the Labour Code (2011), 34.

## Environment

Guiding documents have been issued in the form of legal and non-legal documents. Examples of legal documents include Decree 29/2011/ND-CP dated 18 April 2011 providing strategic environmental assessment, environmental impact assessment and environmental protection commitment;<sup>320</sup> Decree 25/2009/ND-CP dated 6 March 2009 on integrated management of natural resources and environmental protection of the sea and islands;<sup>321</sup> Decree 112/2008/ND-CP dated 20 October 2008 on management, protection and integrated exploitation of resources and environment of hydropower and irrigation reservoirs;<sup>322</sup> Decree 174/2007/ND-CP dated 29 November 2007 on environmental protection charges for solid wastes;<sup>323</sup> and Decree 140/2006/ND-CP dated 22 November 2006 providing for the environmental protection at stages of elaboration, evaluation, approval and implementation of development strategies, plans, programs and projects.<sup>324</sup> Examples of non-legal documents

320 Decree 29/2011/ND-CP dated 18 April 2011 providing strategic environmental assessment, environmental impact assessment and environmental protection commitment. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10586](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10586), (last visited 11 November 2012).

321 Decree 25/2009/ND-CP dated 6 March 2009 on integrated management of natural resources and environmental protection of the sea and islands. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10663](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10663), (last visited 11 November 2012).

322 Decree 112/2008/ND-CP dated 20 October 2008 on management, protection and integrated exploitation of resources and environment of hydropower and irrigation reservoirs. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10768](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10768)

323 Decree 174/2007/ND-CP dated 29 November 2007 on environmental protection charges for solid wastes. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=3113](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=3113), (last visited 11 November 2012).

324 Decree 140/2006/ND-CP dated 22 November 2006 providing for the environmental protection at stages of elaboration, evaluation, approval and implementation of development strategies, plans, programs and projects. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=4626](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=4626), (last visited 11 November 2012).

include, among others, Guiding Document on Nature and Environment Protection,<sup>325</sup> Guidance on Water Resource Protection,<sup>326</sup> Handbook on Environmental Communication,<sup>327</sup> and Guiding Document on Cleaner Production in the Textile Industry.<sup>328</sup>

In terms of non-legal guidelines and activities, there is an online chat session held monthly at the Ministry of Natural Resources and Environment's website where leaders of the Ministry answer questions that business enterprises and people may have on a wide range of issues regarding environmental protection.<sup>329</sup> There is also a Q&A section on the website and a telephone hotline where people and enterprises may contact the Ministry to report on cases of violations or ask questions on how to protect rights related to natural resources and environment.<sup>330</sup>

## Lands

The Government has issued 22 legal documents guiding the implementation of the 2003 Land Law,<sup>331</sup> including Decree 105/2009/ND-CP dated 11 November 2009 on the sanctioning of

325 See information about the publication of this Guiding Document at <http://www.monre.gov.vn/v35/default.aspx?tabid=428&cateID=24&id=73238&code=VDRMP73238>, (last visited 11 November 2012).

326 See information about the drafting of this document at <http://www.monre.gov.vn/v35/default.aspx?tabid=428&cateID=5&id=75741&code=WTRXE75741>, (last visited 11 November 2012).

327 See information about the publication of this Handbook at <http://www.monre.gov.vn/v35/default.aspx?tabid=428&CateID=24&ID=110810&Code=YPOJ110810>, (last visited 11 November 2012).

328 See the Guiding Document at <http://vncpc.vn/upload/publication/VNs/Tai%20lieu%20huong%20dan%20SXSH%20nganh%20det%20nhuom.pdf>, (last visited 11 November 2012).

329 The latest chat was held on 28 October 2008. For more information, see [www.monre.gov.vn](http://www.monre.gov.vn), (last visited 11 November 2012).

330 For more information, see [www.monre.gov.vn](http://www.monre.gov.vn), (last visited 11 November 2012).

331 Ministry of Natural Resources and Environment, Report on the Implementation of the 2003 Land Law, available in Vietnamese at [http://duthaonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_LUAT/View\\_Detail.aspx?ItemID=528&TabIdx=2&TaiLieuID=781](http://duthaonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=528&TabIdx=2&TaiLieuID=781), (last visited 11 November 2012).

administrative violations in the land domain;<sup>332</sup> Decree 88/2009/ND-CP dated 19 October 2009 on grant of certificates of land use rights and house and land-attached asset ownership;<sup>333</sup> Decree 69/2009/ND-CP dated 13 August 2009 on land use planning, land prices, land recovery, compensation, support and resettlement;<sup>334</sup> Circular 02/CT-BTNMT dated 19 November 2007 on the implementation of land law;<sup>335</sup> and Decree 181/2004/ND-CP dated 29 October 2004 on the implementation of land law,<sup>336</sup> among others.

A lot of educational and awareness raising activities have been carried out, including organizing training courses, publishing the law and relevant materials, producing radio and TV information shows and holding online chat sessions.<sup>337</sup> A report of the government states that brochures, CDs and CD-ROMs have been disseminated although it does not

332 Decree 105/2009/ND-CP dated 11 November 2009 on the sanctioning of administrative violations in the land domain. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10701](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10701), (last visited 11 November 2012).

333 Decree 88/2009/ND-CP dated 19 October 2009 On grant of certificates of land use rights and house and land-attached asset ownership. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10697](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10697), (last visited 11 November 2012).

334 Decree 69/2009/ND-CP dated 13 August 2009 on land use planning, land prices, land recovery, compensation, support and resettlement. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10688](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10688), (last visited 11 November 2012).

335 Circular 02/CT-BTNMR dated 19 November 2007 on the implementation of land law, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=15&mode=detail&document\\_id=51995](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=15&mode=detail&document_id=51995), (last visited 11 November 2012).

336 Decree 181/2004/ND-CP dated 29 October 2004 on the implementation of land law, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=18&mode=detail&document\\_id=13310](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=18&mode=detail&document_id=13310), (last visited 11 November 2012).

337 Ministry of Natural Resources and Environment, Report on the Implementation of the 2003 Land Law, available in Vietnamese at [http://duthaonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_LUAT/View\\_Detail.aspx?ItemID=528&TabIdx=2&TaiLieuID=781](http://duthaonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=528&TabIdx=2&TaiLieuID=781), (last visited 11 November 2012).

specify these brochures, CDs and CD-ROMs.<sup>338</sup>

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

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

On 26 November 2003 the National Assembly adopted the Law on State-owned enterprises, providing legal bases for the establishment, reorganization, dissolution, ownership conversion, organization of management and operation of state-owned enterprises.<sup>339</sup> According to the Law, state-owned enterprises are economic organizations where the State owns the entire charter capital or holds dominant shares or contributed capital, which are organized in the form of State companies, joint-stock companies or limited liability companies.

<sup>340</sup> In terms of labour rights protection, state-owned enterprises have the obligation to ensure the rights and interests of labourers according to labour legislations, including labourers' rights to participate in the management of companies. In terms of environmental protection, state-owned enterprises must comply with relevant legislation on natural resources and the environment while doing their business. In addition, they are also required to observe laws and regulations on culture, social order and safety, ensure product quality and conduct business in accordance with their registered production and business lines.<sup>341</sup> When participating in public-utility activities, they are obliged to sell public-utility products or provide public-utility services to the right subjects, at the prices and

charge levels set by the State and held accountable to the State for their public-utility activities and to their customers and laws for the public-utility products or services that they provide.<sup>342</sup> Directors of state-owned companies have to do their job with honesty and responsibility and have to compensate for damage according to law provisions and the companies' charters if breaching the companies' charters, making decisions ultra vires or abusing their positions and powers. When committing labour violations that are not serious enough to be examined for criminal liability, directors shall be disciplined according to the seriousness of their violations.<sup>343</sup>

With the entry into force of the 2005 Enterprise Law, all state-owned enterprises established under the 2003 Law on State-owned Enterprises had four years to transform into limited liability companies or joint-stock companies.<sup>344</sup> The idea is to create an equal playing field for all types of business enterprises. In fact, the transformation period ended on 1 July 2010 and from that time, the 2003 Law on State-owned Enterprises expired. State-owned enterprises are now defined as enterprises of which over 50 per cent of charter capital is owned by the State and subject to the 2005 Enterprise Law.<sup>345</sup> They are equally bound by law to comply with relevant provisions on rights issues such as labour rights, environment protection (environmental impacts assessments obligation included) or land rights (refer to answer to Question 2 for more details). Their directors also have the same rights and obligations, including due diligence obligations, as directors of other limited liability companies or joint-stock companies (refer to answer to Question 4).

338 Ibid.

339 2003 Law on State-owned Enterprises, Article 2. English-translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=8259](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=8259), (last visited 11 November 2012).

340 Ibid., Article 1.

341 Ibid., Article 16.

342 Ibid., Article 2.

343 Ibid., Article 19.

344 2005 Enterprise Law, Article 166. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5953](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5953), (last visited 11 November 2012).

345 Ibid., Article 4.

Certain separate legal documents have been issued to further ensure implementation by state-owned enterprises of environment protection obligations. Decree 81/2007/ND-CP dated 23 May 2007, for example, provides detailed guidance on how to organize environment divisions at state agencies and state-owned enterprises. According to the Decree, the management board, director-general or director of state-owned enterprises must establish environmental task forces in the enterprises, set up expert and advisory panels on environmental issues, and assign specific leaders or managers to be responsible for directing the implementation of legal provisions on environmental protection.<sup>346</sup>

In the Vietnam Electricity (EVN), a state-owned enterprise which produces, transmits and distributes electricity for the country, there is a division on Science, Technology and Environment.<sup>347</sup> Each electricity project has its own environmental impact assessment report and environmental protection policy or commitment, which are usually posted online.<sup>348</sup> Many planned reservoirs, however, do not have strategic environmental assessment reports.<sup>349</sup> A lot of inter-provincial scale projects which started before the entry into force of the 2005 Environmental Protection Law have not met all requirements set out in the document.<sup>350</sup> The lack

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346 Decree 81/2007/ND-CP dated 23 May 2007 on the Organization of Environment Divisions at State Agencies and State-owned Enterprises, Article 10, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=25761](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=25761), (last visited 11 November 2012).

347 See EVN structure, available in Vietnamese at <http://www.evn.com.vn/Home/Detail/tabid/84/ItemId/1133/View/2/CateId/131/language/vi-VN/Default.aspx>, (last visited 11 November 2012).

348 See, for example, environment protection policy of Thac Ba project, available in Vietnamese at <http://www.thacba.evn.com.vn/Pages/2/24/CHINH-SACH-MOI-TRUONG.aspx>, (last visited 11 November 2012).

349 Nhan dan Online, “Đánh giá tác động các công trình thủy điện,” available in Vietnamese at <http://www.nhandan.com.vn/cmlink/nhandandientu/toisu/chinh-tri/cung-suy-ngam/anh-gia-tac-ng-moi-tr-ng-cac-cong-trinh-th-y-i-n-1.371640>, (last visited 11 November 2012).

350 Ibid.

of an integrated strategic impact assessment of the ladder system of reservoirs on the environment was accompanied by the lack of necessary measures to reduce the impact or restrictions. As a result, developments of hydropower projects in many cases have caused damage to the ecosystem, destroyed vegetation and affected communities, including ethnic minorities, living near the project areas.<sup>351</sup> Inspection missions by the Ministry of Natural Resources and Environment in the Central Highlands and the northern mountainous provinces have reported that hydropower projects have contributed to destroying a natural part of the forest area and forest watershed in these localities. A review of some of the environmental impact assessment reports which were already appraised by the provincial People’s Committee reveals that these reports did not have sufficient information on the progress of construction, environmental problems and hazardous waste management solutions.<sup>352</sup> Again, the challenge is not really the lack of legal provisions but rather a lack of effective mechanisms to enforce these provisions in practice.

## 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 is no information available regarding legal or policy documents that specifically require “beneficiary enterprises” (enterprises that receive substantial support and services from State agencies) to respect human rights. The establishment, organization, operation, and the rights and responsibilities of these enterprises are regulated by those documents applicable to all other enterprises, including the 2012 Labour Code, 2005 Enterprise Law, 2005 Environment Protection Law, 2005 Investment Law and 2003 Land Law. Under the 2005 Investment Law, for instance, investors, in general, have the obligation to comply with

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351 Ibid.

352 Ibid.

the provisions of law on investment procedures; carry out investment activities strictly according to contents of investment registration and their investment certificates; implement the provisions of law on accountancy, audit and statistics; perform obligations provided by insurance and labour laws; respect the honour, dignity and ensure the legitimate interests of labourers; respect and create favourable conditions for labourers to establish and participate in political or socio-political organizations; observe the provisions of environmental protection law, and perform other obligations in accordance with the provisions of law.<sup>353</sup>

**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?**

Decree No. 59/2011/ND-CP dated 18 July 2011 of Government on the Transformation of Enterprises with 100% state-owned Capital into Joint Stock Enterprises requires these enterprises to ensure labour rights during and after the privatization process.<sup>354</sup> Circular 2/CT-BXD dated 16 July 2007 of the Ministry of Construction provides that during privatization process, special attention shall be given to ensure labour rights. In their privatization plans, enterprises under the Ministry of Construction must provide solutions on the use of their land. Lands that are not approved for use by the privatized enterprises shall be returned to the

State.<sup>355</sup> Circular 11/2008/CT-UBND dated 6 June 2008 of the People's Committee of Ba Ria – Vung Tau Province directs the province's Department of Labour, Invalids and Social Affairs to continue monitoring privatized enterprises in the province to ensure their compliance with laws and regulations, including their obligations to respect labour rights.<sup>356</sup>

An examination of a number of other decisions made by the central and local authorities to privatize certain state-owned enterprises, including Decision 131/2005/QD-TTg dated 2 June 2005 approving the Plan of the People's Committee of Ho Chi Minh City to reform and privatize state-owned enterprises,<sup>357</sup> Decision 6213/QD-UN dated 9 December 2004 of the People's Committee of Ho Chi Minh City privatizing ADC Construction, Design and Architecture Company,<sup>358</sup> and Decision 6211/QD-UN dated 9 December 2004 of the People's Committee of Ho Chi Minh City privatizing

<sup>353</sup> 2005 Investment Law, Article 20.

<sup>354</sup> Decree 59/2011/ND-CP dated 18 July 2011 of Government on the Transformation of Enterprises with 100% state-owned Capital into Joint Stock Enterprises, Article 10, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=101801](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=101801), (last visited 11 November 2012).

<sup>355</sup> Circular 2/CT-BXD dated 16 July 2007 of the Ministry of Construction on Strengthening the Transformation of Enterprises with 100% state-owned Capital under the Ministry of Construction into Joint Stock Enterprises, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=2&mode=detail&document\\_id=89468](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=2&mode=detail&document_id=89468), (last visited 11 November 2012).

<sup>356</sup> Circular 11/2008/CT-UBND dated 6 June 2008 of the People's Committee of Ba Ria – Vung Tau Province on the Transformation of State Enterprises into Joint Stock Enterprises in the province, available at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=81266](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=81266), (last visited 11 November 2012).

<sup>357</sup> Decision 131/2005/QD-TTg dated 2 June 2005 approving the Plan of the People's Committee of Ho Chi Minh City to reform and privatize state-owned enterprises.

<sup>358</sup> Decision 6213/QD-UN dated 9 December 2004 of the People's Committee of Ho Chi Minh City to privatizing ADC Construction, Design and Architecture Company, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=13611](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=13611), (last visited 11 November 2012).

Nhatico Company,<sup>359</sup> however, indicates that there are no provisions specifying obligations imposed upon privatized enterprises to ensure human rights protection.

In short, state agencies have taken steps, albeit not very consistently, to ensure that privatized business enterprises respect human rights. At a minimum, whether they are state-owned enterprises which provide public services, e.g. water and electricity, or privatized enterprises which provide services that may affect human rights, e.g. education, they are subject to the 2012 Labour Code, the 2005 Enterprise Law, the 2005 Environment Protection Law, the 2005 Investment Law and 2005 Education Law and have relevant obligations to respect labour rights and land rights and to protect the environment in accordance with these documents.

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

Vietnam enacted the Law on Procurement in November 2005. This Law introduces greater transparency into procurement procedures and creates a Procurement Gazette to provide general information on tendering activities, invitations for tender, lists of bidders participating in limited tendering proceedings, and criteria for bids selection. The Law also aims at decentralizing procurement decision-making to government ministries, agencies, and local authorities. The Law includes a definition of what constitutes fraudulent behaviour and establishes sanctions against such misconduct. Competition for government procurements may take any of several forms: sole source direct negotiation, limited tender, open tender, appointed tender or special purchase. Different ministries and agencies have different threshold values for the

359 Decision 6211/QD-UN dated 9 December 2004 of the People's Committee of Ho Chi Minh City to privatizing Nhatico Company, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=13619](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=13619), (last visited 11 November 2012).

purchase of material or equipment which must be subject to competitive bidding.<sup>360</sup>

Article 32 is the only provision in the Law that mentions environmental elements, according to which bidding documents must include, among other things, information on environmental requirements. Besides that, there are no further requirements for contractors to report on social, environmental or ethical considerations in respect of their relevant projects. The State does not have a public policy favouring companies that respect human rights norms. It is also not known that the State has among public tender conditions a requirement that contractors comply with environmental, social and governance standards.

At the international level, Vietnam is currently not a party to the WTO Agreement on Government Procurement.<sup>361</sup>

#### **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?**

It is not clear whether the State is working with business enterprises to identify, prevent or mitigate human rights-related risks in conflict-affected and high-risk areas that they are operating in. In fact, there is no information that Vietnamese enterprises are currently operating in conflict-affected and

360 2005 Law on Procurement, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=4&mode=detail&document\\_id=29535](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=4&mode=detail&document_id=29535), (last visited 11 November 2012).

361 See Parties and Observers to the GPA, [http://www.wto.org/english/tratop\\_e/gproc\\_e/memobs\\_e.htm#parties](http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm#parties), (last visited 11 November 2012).

high-risk areas. Websites of the government, different ministries and many enterprises, including some that have investment projects overseas, such as Viettel, a state-owned telecommunication company under the Ministry of Defence, do not reveal such engagements or measures.

**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 State 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 is no information on human rights violations committed by Vietnamese enterprises operating in conflict-affected and high-risk areas. There are no laws, regulations or policies that allow the government to impose sanctions on business enterprises operating in conflict-affect and high-risk areas because they are involved with human rights abuses. No known sanction has been imposed by the government on business enterprises that have committed violations.

**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 indication yet 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.

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

**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?**

There are different mechanisms to ensure that the State in general, and state agencies, government ministries and other State-based institutions in particular, are aware of and observe obligations accepted by Vietnam. These mechanisms are not only limited to human rights obligations, but also extended to obligations under all treaties to which Vietnam is a party.

First, according to the 2005 Law on the Conclusion, Accession and Implementation of Treaties, the Ministry of Foreign Affairs shall prepare certified copies of treaties in force and transmit them to the National Assembly, the State President and

the Government for reporting purposes, to all relevant agencies, organization and institutions for implementation, and to the Government's Office for publication on the Official Gazette, within 15 days from the date of receipt of the bilateral treaty in force or 30 days from the date of receipt of the notification from the depositary of the multilateral treaty of the entry into force of such multilateral treaty with respect to Vietnam.<sup>362</sup> Treaties in force shall be published in the Yearbook of Treaties.<sup>363</sup> Again, the Yearbook of Treaties is also available to all state agencies, organizations and institutions.

Second, an inter-agency approach is applied to basically all major steps in the procedure of concluding and implementing treaties in Vietnam. For each treaty, there is one lead and several relevant agencies working with each other in process of drafting, negotiating and making recommendations to the State or government on the conclusion of the treaty (the recommendations must always be accompanied by opinions of the Ministry of Foreign Affairs and the Ministry of Justice).<sup>364</sup> The lead agency, in collaboration with relevant agencies, on the basis of the nature and contents of a treaty and its assigned duties and powers, shall submit to the government a plan for implementation of the treaty. The plan for treaty implementation shall contain steps intended to publicize, popularize, disseminate and raise awareness within and without the govern on the treaty. The plan should also include: a schedule for implementation; proposed responsibilities of relevant state agencies in organizing the implementation of the treaty; recommendations on amendment, supplement, repeal or promulgation of legal normative documents for the implementation of the treaty and measures of organization, management, and financing.<sup>365</sup> Upon the decision made by the Prime

Minister on the plan for treaty implementation, the lead agency and relevant agencies and organizations within the scope of their duties and powers shall be responsible to implement the plan.<sup>366</sup>

Third, there is a reporting mechanism whereby all state agencies have to periodically inform the Ministry of Foreign Affairs of the steps they have taken, within their respective scope of state management, to publicize and implement treaties to which Vietnam is a party. The Ministry of Foreign Affairs then has the obligation to submit to the government a comprehensive report on Vietnam's implementation of its treaties.<sup>367</sup> As some ministries, however, have failed to implement their reporting obligations, recently the Prime Minister has issued a Directive, ordering state agencies and local authorities to strictly implement their reporting obligations and to coordinate with the Ministry of Foreign Affairs and relevant agencies to handle difficulties in the implementation process in a timely manner.<sup>368</sup>

Fourth, there also exist interaction and dialogue mechanisms between state agencies responsible for labour rights, environment or land issues, and other stakeholders, including trade unions, non-governmental organizations, international organizations and business enterprises on Vietnam's implementation of international instruments. The International Labour Organization, the Ministry of Labour, Invalids and Social Affairs, the Vietnam Chamber of Commerce and Industry (VCCI) and the Vietnam General Confederation of Labour (VGCL), for example, have jointly organized the National Tripartite forum on Labour and Social Issues in the past.<sup>369</sup> The Ministry of Natural Resources and Environment has, on its website,

<sup>366</sup> Ibid.

<sup>367</sup> Ibid., Article 99.

<sup>368</sup> *Thủ tướng chỉ thị tăng cường công tác quản lý nhà nước về điều ước quốc tế, thỏa thuận quốc tế*, <http://www.mof.gov.vn/portal/pls/portal>, (last visited 11 November 2012).

<sup>369</sup> International Labour Organization, Follow-up on and the promotion of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, <http://www.ilo.org/public/english/standards/relm/gb/docs/gb279/pdf/mne-1.pdf>, (last visited 11 November 2012).

<sup>362</sup> 2005 Law on the Conclusion, Accession and Implementation of Treaties, Article 68. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5509](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5509), (last visited 11 November 2012).

<sup>363</sup> Ibid., Article 69.

<sup>364</sup> Ibid., Chapter II.

<sup>365</sup> Ibid., Article 71.

guidelines for enterprises to comply with the Montreal Protocol.<sup>370</sup> A section on instruments of the International Labour Organization is also available on the website of the Ministry of Labour, Invalids and Social Affairs.<sup>371</sup>

## 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, it is not clear to what extent the State has maintained an adequate domestic policy space to meet its human rights obligations when concluding bilateral economic or investment agreements with other States or business enterprises.

First, not all bilateral economic agreements are available online. For those that are accessible online, there are agreements that have no provisions on human rights obligations while doing business, e.g. the Vietnam-China Agreement on Economic Cooperation.<sup>372</sup> There are, however, agreements that provide domestic policy space for a party to prepare, adopt, and apply regulations to fulfil its rights and obligations objectives. The Vietnam-Japan Agreement for an Economic Partnership, for example, states that nothing shall limit the right of a party to adopt domestic regulations to protect national security, prevent deceptive practices and protect human health or safety, animal or plant life or health, or the environment.<sup>373</sup> On 27 June

2012, Vietnam and EU signed the Partnership and Cooperation Agreement (PCA), regulating all aspects of cooperation between Vietnam and EU in areas such as science and technology, education and training, agro-forestry and fisheries, natural disaster prevention and mitigation. Unfortunately, the PCA text is not available online now for scrutiny.

Second, a check of available bilateral investment agreements concluded between Vietnam and its counterparts reveals that there are no provisions in these agreements obliging investors to respect human rights while doing business. We should note that, again, not all bilateral investment agreements are available online, although all of them are required by the 2005 Law on the Conclusion, Accession and Implementation of Treaties to be published in paper on the Official Gazette.<sup>374</sup> Third, there have not been any reported instances where an economic agreement to which Vietnam is a party has constrained Vietnam from fully implementing its human rights obligations. The State has not made any statement with specific reference to human rights issues or to the relationship between domestic human rights obligations and international investment or economic obligations, although as stipulated in the 2005 Law on the Conclusion, Accession and Implementation of Treaties, in cases where a legal document of Vietnam and a treaty to which Vietnam is a party contains different provisions on the same matter, the provisions of the

370 See “Thông báo cho các công ty xuất nhập khẩu các chất làm giảm tầng ô zôn”, [http://www.noccop.org.vn/modules.php?name=Ozon\\_protec&op=ndetail&n=33&nc=88](http://www.noccop.org.vn/modules.php?name=Ozon_protec&op=ndetail&n=33&nc=88), (last visited 11 November 2012).

371 <http://www.molisa.gov.vn/Default.aspx?tabid=356&temid=687>, (last visited 11 November 2012).

372 Agreement on Economic Cooperation between Vietnam and China, available in Vietnamese at <http://trungtamwto.vn/cachiepdingkhac/hiiep-dinh-hop-tac-kinh-te-giua-chinh-phu-nuoc-cong-hoa-xa-hoi-chu-nghia-viet-nam-va>, (last visited 11 November 2012).

373 Agreement between Vietnam and Japan for an Economic Partnership, available at <http://www.mofa.go.jp/region/asia-paci/vietnam/epa0812/agreement.pdf>, (last visited 11 November 2012).

374 There is no single database where one can have access to every investment agreements signed between Vietnam and its counterparts. Some of the agreements are available online, at different websites, such as the agreement between Vietnam and Denmark at <http://www.thuongmai.vn/thuong-mai-quoc-te/hiiep-dinh-thuong-mai/hiiep-dinh-song-phuong/94192-hiep-dinh-ve-khuyen-khich-va-bao-ho-dau-tu-giua-chinh-phu-cong-hoa-xa-hoi-chu-nghia-viet-nam-va-chinh-phu-vuong-quoc-dan-mach.html>, between Vietnam and Argentina at <http://danangwto.center.gov.vn/vi/van-kien/hiiep-dinh-song-phuong-da-phuong/165-hiep-dinh-khuyen-khich-va-bao-ho-au-tu-lan-nhau-giua-chinh-phu-chxhcn-viet-nam-va-chinh-phu-ch-argentina>, between Vietnam and Laos at <http://trungtamwto.vn/cachiepdingkhac/hiiep-dinh-ve-khuyen-khich-va-bao-ho-dau-tu-giua-cong-hoa-xa-hoi-chu-nghia-viet-nam--1>, (last visited 11 November 2012).

treaty shall prevail.<sup>375</sup>

### 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?

Vietnam is a member of many multilateral institutions and cooperation frameworks dealing with business-related issues, such as the World Bank, Asian Development Bank, APEC, ASEAN, TPP (negotiations on the Trans-pacific Partnership are still on-going). These institutions, to different extents, have taken steps to ensure or promote respect for human rights in business enterprises. However, it is not known whether and to what extent these steps were initiated by Vietnam, or only initiated by other members of the institutions or the institutions themselves.

As of February 2012, the World Bank's cumulative commitment to Vietnam was almost US\$ 15 billion for 111 projects.<sup>376</sup> These projects concentrate on infrastructure, including transportation and urban development, rural development, energy, water resources management, public administration reforms, finance, education, health, social services, environment<sup>377</sup> and other areas that the World Bank sees as contributing to the promotion of human rights.<sup>378</sup> Creating the conditions for the attainment of human rights, as stated by the World Bank, is a central goal of its development policy.<sup>379</sup> Documents

375 2005 Law on the Conclusion, Accession and Implementation of Treaties, Article 6. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5509](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5509), (last visited 11 November 2012).

376 World Bank, Vietnam Projects and Programs, <http://www.worldbank.org/en/country/vietnam/projects>, (last visited 11 November 2012).

377 World Bank, Vietnam Projects and Programs, <http://www.worldbank.org/en/country/vietnam/projects>, (last visited 11 November 2012).

378 World Bank, Human Rights, <http://web.worldbank.org/WBSITE>, (last visited 11 November 2012).

379 Ibid.

such as “Human Rights and Development: the Role of the World Bank” (1998), “World Development Report, Equity and Development” (2006), “Legal Opinion on Human Rights and the World of the World Bank” (2006) indicate that human rights may represent legitimate considerations for the Bank where they have economic ramifications or impacts.<sup>380</sup> The Bank has published policies for safeguards on natural habitats, pest management, cultural property, involuntary resettlement, indigenous peoples, safety of dams, projects on international waterways, and projects in disputed areas designed to prevent unintended impact from its projects on individuals and the environment.<sup>381</sup>

Similarly, the Asian Development Bank (ADB) also has different projects that are purported to contribute to the promotion of human rights in different areas, e.g., improving poor people's access to healthcare, education, water and public transport; promoting development in areas of indigenous peoples and improving social services for the poor. The 2012-2015 ADB's country partnership strategy (CPS) for Vietnam focuses support on six core sectors: agriculture and natural resources, education, energy, finance, transport, and water supply and other municipal infrastructure.<sup>382</sup> Loan agreements concluded between Vietnam and the ADB, similar to those concluded between Vietnam and the World Bank, have requirements for environmental impact assessments.<sup>383</sup> One of the stated goals of the ADB is also to support structural and policy reforms including state-owned enterprise (SOE) reforms, promote inclusive growth by targeting disadvantaged regions, and strengthen the government's ability to address environmental and climate change challenges.<sup>384</sup>

380 Ibid.

381 World Bank, Policies and Procedures, <http://web.worldbank.org/WBSITE>, (last visited 11 November 2012).

382 ADB, Strategy - Vietnam, <http://www.adb.org/countries/viet-nam/strategy>, (last visited 11 November 2012).

383 See, for example, <http://www2.adb.org/Documents/Environment/Vie/36352-VIE-EIA.pdf>, or <http://www2.adb.org/Documents/Environment/Vie/36352-VIE-EIA.pdf>, (last visited 11 November 2012).

384 ADB, Strategy - Vietnam.

At the ASEAN level, the 2009 ASEAN Comprehensive Investment Agreement provides that, subject to its immigration and labour laws, regulations and national policies relating to the entry, temporary stay and authorization to work, each Member State shall grant entry, temporary stay and authorization to work to investors, executives, managers and members of the board of directors of a juridical person of any other Member State, for the purpose of establishing, developing, administering or advising on the operation in the territory of the former Member State of an investment to which they, or a juridical person of the other Member States that employs such executives, managers and members of the board of directors, have committed or are in the process of committing a substantial amount of capital or other resources.<sup>385</sup> Article 44 of the 2008 Agreement on Economic Comprehensive Partnership among ASEAN Member States and Japan states that nothing in the Agreement shall limit the right of a Party to prepare, adopt and apply standards and technical regulations, to the extent necessary, to fulfil a legitimate objective. Such legitimate objectives are, *inter alia*, national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In pursuance of this, each Party retains all authority to interpret its laws, regulations and administrative provisions.<sup>386</sup>

The Trans-Pacific Partnership Agreement (which currently covers Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, and the United States), once completed, is also expected to contribute to raising standards on labour, environment and property rights while promoting trade, investment, innovation,

<sup>385</sup> 2009 ASEAN Comprehensive Investment Agreement, Article 22, available at [http://www.aseansec.org/documents/ASEAN%20Comprehensive%20Investment%20Agreement%20\(ACIA\)%202012.pdf](http://www.aseansec.org/documents/ASEAN%20Comprehensive%20Investment%20Agreement%20(ACIA)%202012.pdf), (last visited 11 November 2012).

<sup>386</sup> 2008 Agreement on Economic Comprehensive Partnership among ASEAN Member States and Japan, Article 44, available at <http://www.aseansec.org/agreements/AJCEP/Agreement.pdf>, (last visited 11 November 2012).

economic growth and development in the region.<sup>387</sup> Participating countries have stated their aim to work together to ensure that the agreement appropriately addresses important environmental challenges, enhances the mutual supportiveness of trade and environment, establishes mechanisms to ensure cooperation, coordination, and dialogue on labour issues of mutual concern, and enhances animal and plant health and food safety.<sup>388</sup>

**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?**

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

First and generally speaking, in Vietnam, if people find their rights and legitimate interests violated, they can either lodge a complaint or denunciation with competent state agencies or initiate a lawsuit at the Court against the violator. As provided in the 2011 Law on Complaints and the 2011 Law on Denunciations, those whose rights are violated can make complaints and denunciations and seek for remedies. They are entitled to complain about administrative decisions and administrative acts of State agencies or state officials if they have grounds to believe that such decisions or acts have contravened laws or infringed upon their legitimate

<sup>387</sup> See Outlines of the Trans-Pacific Partnership Agreement, <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>, (last visited 11 November 2012).

<sup>388</sup> See *Ibid.*

rights and interests.<sup>389</sup> They are also entitled to denounce to competent agencies, organizations or individuals illegal acts committed by any agencies, organizations or individuals that cause damage or threaten to cause damage to the interests of the State or their legitimate rights and interests.<sup>390</sup> Agencies, organizations and individuals shall, within their respective functions, tasks and powers, have to receive people who come to make complaints, denunciations, petitions and reports; and to receive and settle complaints and denunciations in a timely manner and according to laws.

Second, according to the 2002 Ordinance on Sanctioning Administrative Violations, individuals and organizations, whether domestic or foreign, intentionally or unintentionally committing violations prescribed by law, which do not constitute crimes defined under the Criminal Code, must be held accountable and face administrative sanctions.<sup>391</sup> All consequences caused by acts of administrative violation must be remedied by violators.<sup>392</sup> The violating individuals or organizations shall be subject to either warning or fines.<sup>393</sup> In addition, depending on the nature and seriousness of their violations, individuals or organizations that commit administrative violations may be stripped off the right to use permits, professional practice certificates or have their materials or means used to commit the violations confiscated.<sup>394</sup> Violating individuals and organizations may also be subject to the application of one or more of the following

389 2011 Law on Complaints, Article 2, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=162374](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=162374), (last visited 11 November 2012).

390 2011 Law on Denunciation, Article 2, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=162375](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=162375), (last visited 11 November 2012).

391 2002 Ordinance on Sanctioning Administrative Violations, Article 2. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10046](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10046), (last visited 11 November 2012).

392 Ibid., Article 4.

393 Ibid., Article 12.

394 Ibid.

consequence-overcoming measures: (i) restoration of the initial state altered due to the administrative violations or forcible dismantling of illegally constructed works; (ii) application of measures to redress the environmental pollution or epidemic spreads caused by the administrative violations; (iii) destruction of articles which cause harms to human health, domestic animals and cultivated plants, and harmful cultural products; and other measures prescribed by the Government<sup>395</sup> (See answers to Question 2.2. and Question 2.3. for available number of cases of complaints and inspection and amount of fines imposed and compensation paid in some examples of violations, including the dumping case of the Taiwanese food manufacturer Vedan Co., Ltd).

Third, as elaborated in response to Question 2.2 and Question 2.3, relevant laws on labour, environment and land rights in Vietnam, including the 2012 Labour Code,<sup>396</sup> the 2005 Environment Protection Law<sup>397</sup> and the 2003 Land Law,<sup>398</sup> all have a provision on the handling of violations, stating that agencies, organizations or individuals who commit unlawful acts, depending on the nature and levels of violations, shall be dealt with by disciplining and administrative sanctions and required to pay compensation in case of causing damage. Each of these laws is accompanied by a decree that specifies administrative violations, sanctioning forms and levels, remedies, and competence and procedures for administratively sanctioning violations of the laws. For the 2012 Labour Code, there is Decree 47/2010/ND-CP of the Government dated 6 May 2010 on Administrative Sanctioning of Violations

395 Ibid.

396 Ibid., Article 239.

397 2005 Environment Protection Law, Article 127. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=5961](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=5961), (last visited 2 November 2012).

398 2003 Land Law, Articles 140-142. English translated version is available at [http://moj.gov.vn/vbpq/en/\\_layouts/printeng.aspx?id=8269](http://moj.gov.vn/vbpq/en/_layouts/printeng.aspx?id=8269), (last visited 2 November 2012).

of the Labour Code.<sup>399</sup> For the 2005 Environment Protection Law, there is Decree 117/2009/ND-CP of the Government dated 31 December 2009 of Handling Violations in Environment Protection.<sup>400</sup> For the 2003 Land Law, there is Decree 105/2009/ND-CP of the Government dated 11 November 2009 on Administrative Sanctioning of Violations in the Land Domain<sup>401</sup> (see example of sanctions in answer to Question 2.2. and Question 2.3). If the violation constitutes a crime defined under the Criminal Code, the violating individuals shall be criminally prosecuted.

Fourth, relevant laws in Vietnam, including the 2012 Labour Code,<sup>402</sup> the 2005 Environment Protection Law<sup>403</sup> and the 2003 Land Law,<sup>404</sup> all establish a system of specialized central and local inspectorates. Labour inspectorates, environmental protection inspectorates and land inspectorates have the responsibility to receive and address appeals, complaints and denunciations made by the people and to either provide a remedy or petition competent authorities to remedy violations in accordance with the provisions of laws on complaints and denunciations and the Labour Code, the Environment Protection Law and the Land Law. In the land domain, for instance, from 2009 to late 2011, nearly 2,000 complaints and denunciations,

399 Decree 47/2010/ND-CP of the Government dated 6 May 2010 on Administrative sanctions imposed upon Violations of the Labour Code, Chapter III. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10629](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10629), (last visited 2 November 2012).

400 Decree 117/2009/ND-CP of the Government dated 31 December 2009 of Handling Violations in Environment Protection, available in Vietnamese at [http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class\\_id=1&\\_page=1&mode=detail&document\\_id=92587](http://vanban.chinhphu.vn/portal/page/portal/chinhphu/hethongvanban?class_id=1&_page=1&mode=detail&document_id=92587), (last visited 2 November 2012).

401 Decree 105/2009/ND-CP of the Government dated 11 November 2009 on Administrative sanctions imposed upon Violations in the Land Domain. English translated version is available at [http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View\\_Detail.aspx?ItemID=10701](http://moj.gov.vn/vbpq/en/Lists/Vn%20bn%20php%20lut/View_Detail.aspx?ItemID=10701), (last visited 2 November 2012).

402 2012 Labour Code, Article 237.

403 2005 Environment Protection Law, Article 126.

404 2003 Land Law, Article 132.

the majority of which involve land clearance and land return, piled up waiting for resolution by the Government Inspectorate. On orders from the Prime Minister, in May 2012, the Government Inspectorate selected 528 of the most complicated cases for review by the end of the year. By October 2012, the Government the Government Inspectorate has reviewed 486 out of 528 complicated cases, in which 282 cases were settled by central agencies, 131 cases were sent back to local authorities for settlement, 41 cases awaiting a decision from the Prime Minister, and 32 are pending for decisions by ministries and sectors at the central level.<sup>405</sup>

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

First, in regard to complaint and denunciation mechanisms, the Government has acknowledged<sup>406</sup> that many agencies, especially those at the district and department levels have failed to properly perform their assigned responsibilities in receiving citizens and addressing and handling citizens' concerns, denunciations and complaints. Not all localities have established effective or well-organized mechanisms to handle complaints and denunciations by citizens. Coordination between central and local authorities has not run smoothly. The number and the capacity of state officials handling complaints and denunciations, in many places, are limited. The process of handling complaints and denunciations is sometimes too slow or complicated. In some cases, while relevant authorities manage to promulgate decisions to settle complaints, they fail to promptly implement their decisions or provide remedies to those whose

405 Tuoitre News, "Government resolves land-rights complaints," <http://www.tuoitrenews.vn/cmlink/tuoitrenews/society/government-resolves-land-rights-complaints-1.89439>, (last visited 11 November 2012).

406 Report 1198/BC-TTCT dated 16 May 2012 on the Handling of Complaints and Denunciations from 2008 to 2011, available in Vietnamese at <http://thuvienphapluat.vn/archive/Bao-cao-1198-BC-TTCT-ket-qua-cong-tac-tiep-cong-dan-giai-quyet-khieu-nai-to-cao-vb140561.aspx>, (last visited 2 November 2012).

rights are affected. In other cases, local governments have not complied with specific directions of the Prime Minister on handling the violations. It is also reported that a number of state officials have tried to cover up violations to for illegal personal gains.<sup>407</sup>

Second, as for the People's Court system as one of the main venues for remedies for violations of the law, concerns have been expressed over the independence of judges,<sup>408</sup> who are typically chosen from among the Communist Party officials working in the courts, and whose candidacy must be endorsed by the Party.<sup>409</sup> With regard to judges' capacity, Resolution 49/NW-TW of the Communist Party on Judicial Reform Strategy to 2020 recognizes that there is still a shortage of judicial and judicial support staff.<sup>410</sup>

Third, legal fees in Vietnam are still high relative to average incomes.<sup>411</sup> To a certain extent, the state-run legal aid system has proved to be helpful in facilitating disadvantaged group's access to justice. However, in recent years, the need for legal aid of vulnerable groups has rapidly increased, putting resource strains upon the system.<sup>412</sup> With approximately one lawyer per 10,000 people in the country (or 6,000 lawyers in total), legal representatives are few in number and the level of lawyer qualifications and proficiency can vary widely.<sup>413</sup>

Fourth, as even the government has admitted, corruption in Vietnam is serious in many sectors that have an impact on business-related human rights and access to remedies for those whose

rights are violated.<sup>414</sup> In 2007, Vietnam scored 2.6 points on the Transparency International index, ranking 123 out of 179 countries and territories. In 2008, it scored 2.7, ranking 121/180; in 2009 2.7 points, ranking 120/180; in 2010 2.7 points, ranking 116/178.<sup>415</sup> The World Bank in 2012 observed that land-related matters continue to dominate the complaints that the government receives and corruption related to land matters is perceived to be widespread.<sup>416</sup> A recent study conducted by the Vietnam Chamber of Commerce and Industry (VCCI) and the Development and Policies Research Centre (DEPOCEN) suggests that many business enterprises are engaging in corrupt practices in exchange for favourable conditions for business activities.<sup>417</sup> The study findings are based on direct interviews with 270 enterprises, associations and governmental officials. Most of the respondents admitted they are victims of corruption but also bribe-givers themselves. Some 40% of the respondents said unofficial expenditures accounted for around 1% of the total annual business expenditures while 13% said such expenses made up 5%. As high as 40% of the enterprises believed they had to have personal relationships to receive allocated and transferred land.<sup>418</sup>

Fifth, many people are not aware of their rights and do not know about available mechanisms that they can resort to in search of a remedy for business-related human rights abuses.

407 Report 1198/BC-TTCTP dated 16 May 2012 on the Handling of Complaints and Denunciations from 2008 to 2011, available in Vietnamese at <http://thuvienphapluat.vn/archive/Bao-cao-1198-BC-TTCTP-ket-qua-cong-tac-tiep-cong-dan-giai-quyet-khieu-nai-to-cao-vb140561.aspx>, (last visited 2 November 2012).

408 US Department of State, Country Reports on Human Rights Practice for 2011: Vietnam, available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>, (last visited 11 November 2012).

409 Human Rights Resource Centre, Rules of Law for Human Rights in the ASEAN Region: a Baseline Study, 293.

410 Ibid., 294.

411 Ibid.

412 Ibid., 292.

413 Ibid., 294.

414 Tuoitre News, Corruption in Vietnam is serious, blatant and rampant, <http://tuoitrenews.vn/cmlink/tuoitrenews/politics/corruption-in-vietnam-is-serious-blatant-rampant-1.85998>, (last visited 2 November 2012).

415 Ibid.

416 The World Bank, Policy Note "Revising the Land Law to Enable Sustainable Development in Vietnam."

417 Vietnamnet Bridge, Corruption still popular among local businesses, <http://english.vietnamnet.vn/en/business/20901/corruption-still-popular-among-local-businesses.html>, (last visited 2 November 2012).

418 Ibid.

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

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

**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?**

N/A (Vietnam currently does not have an NHRI).<sup>419</sup>

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

As mentioned above (see answer to Question 5), many activities have been organized by international organizations in Vietnam and non-governmental organizations or jointly organized by state agencies, international organizations and non-governmental organizations to raise awareness and promote business enterprises' respect for labour, environment and land rights. These activities and programs, however, have yet to make any specific reference to the "Protect, Respect and Remedy" Framework and the Guiding Principles on Business and Human Rights. There is no information on the projects or activities that non-state actors are

<sup>419</sup> In the Universal Periodic Review, a lot of countries (Mexico, Azerbaijan, New Zealand, Germany, France, Mauritius) recommended Vietnam to establish a national human rights institution in accordance with the Paris Principle. Vietnam responded that this recommendation did not enjoy the support of Vietnam. See UN Human Rights Council, the Report of the Working Group on Universal Periodic Review: Vietnam, Document A/HRC/12/11\*, dated 5 October 2009, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/163/82/PDF/G0916382.pdf?OpenElement>, (last visited 11 November 2012).

implementing to foster State direct engagement with the Framework and the Guiding Principles (also see answer to Question I).

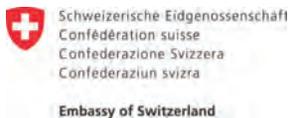
## CONCLUSION

The above examination shows that Vietnam has a legal framework to protect human rights from being violated by business enterprises. As provided in the Constitution and many legal documents, the State ensures and constantly promotes people's rights in all spheres. Business enterprises and individuals are required to take action to avoid causing or contributing to adverse impact on the rights of people through their activities, or to prevent or mitigate adverse human rights impacts directly linked to their operations, products and services. Business enterprises that violate the laws shall bear civil and administrative liability. Individuals who commit crimes shall also be held criminally liable. Legal documents are periodically reviewed and assessed. Treaties to which Vietnam is a party may be directly implemented and if there is a conflict between human rights treaties and domestic legal documents, human rights treaties shall prevail. There are different state agencies that, within their bounds of functions, are responsible for different issues which could be associated with business-related human rights abuses such as labour rights (Ministry of Labour, Invalids and Social Affairs), environmental rights (Ministry of Natural Resources and Environment), land rights (Ministry of Natural Resources and Environment), ethnic minority rights (Committee for Ethnic Affairs), anti-corruption (Anti-corruption Steering Committee, Government Inspectorate, Ministry of Justice, Ministry of Public Security), health rights (Ministry of Health). A variety of non-binding initiatives has been implemented to encourage business responsibility to protect rights. A system of specialized central and local inspectorates has been established. Efforts have been made to enforce laws. There exist also legal and non-legal State-based grievance mechanisms available to those seeking remedy for business-related human rights abuses.

The picture is, however, not perfect. It is not evident from law that business enterprises have to communicate their human rights impacts, as well as any action taken to address those impacts. Legal documents do not require businesses that receive substantial support and services from State agencies (“beneficiary enterprises”) to respect human rights. It is not stated in law that directors have to take into account the human rights impacts of subsidiaries, suppliers and other business partners, whether occurring at home or abroad. There are no regulations specifically requiring business enterprises listed on the stock exchange to respect human rights. It is not known that the state is taking steps to require the respect for human rights in public procurement and to support business

respect for human rights in conflict-affected and high-risk areas. The government has not made any specific references to the “Protect, Respect and Remedy” Framework and the Guiding Principles on Business and Human Rights. No national human rights institution has been established. Law enforcement is a big challenge. Abuses of rights still occur. Corruption is still serious. Barriers to access to remedy remain. Much needs to be done to fully realize to the “Protect, Respect and Remedy” Framework and the Guiding Principles on Business and Human Rights.

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