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BUSINESS AND HUMAN RIGHTS IN SOUTHEAST ASIA:

A Practitioner's GuideKit for SMEs on Human Rights
Compliance regarding the Environment and Labour



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in association with



CALR
Collective of
Applied Law &
Legal Realism

with the support of



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Southeast and East Asia

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A Practitioner's GuideKit for SMEs on Human Rights
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COMMONLY USED ABBREVIATIONS

AHRD	ASEAN Human Rights Declaration
AMS	ASEAN Member States
ASEAN	Association of Southeast Asian Nations
BHR	Business and Human Rights
CSR	Corporate Social Responsibility
EDD	Environmental Due Diligence
EGM	External Grievance Mechanism
EIA	Environmental Impact Assessment
EMP	Environmental Management Plan
EMS	Environmental Management System
ESG	Environmental, Social and Governance
GDP	Gross Domestic Product
HRs	Human Rights
HRDs	Human Rights Defenders
HRDD	Human Rights Due Diligence
HREDD	Human Rights and Environmental Due Dilligence
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IOM	International Organization for Migration
ISO	International Organization for Standardization
MNCs	Multinational Corporations
NGOs	Non-governmental Organisations
OECD	Organisation for Economic Co-operation and Development
OGM	Operational-level Grievance Mechanism

OHCHR	United Nations Office of the High Commissioner for Human Rights
SDGs	Sustainable Development Goals
SLAPPs	Strategic Lawsuits Against Public Participation
SMEs	Small and Medium-sized Enterprises
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNGC	United Nations Global Compact
UNGPs	United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework
UNHRC	United Nations Human Rights Council
WGM	Worker Grievance Mechanism
WHO	World Health Organization

GLOSSARY

Adaptation	is the standardised process (i.e., review, revision and remediation) of continuous assessment of approaches to mitigating risk. It aims to reduce the impact, or probability of occurrence of a risk, but it is unlikely to remove the risk completely.
Adverse/negative human rights impact	occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.
Assessment	Risks are assessed and prioritised based on measurable criteria. The criteria are based on two elements: likelihood and consequences. The measurement is based on qualitative and quantitative observations.
Business relationships	include relationships with business partners, entities in its value chain and other non-state or state entities linked – whether directly or indirectly – to its business operations, products or services.
Human rights due diligence	involves the continuous process and actions taken by a company to identify and act on potential and actual human rights risks and impacts across its operations and throughout its supplier and business partner networks.
Human rights impact assessment	(similar to human rights due diligence) is a process to identify, assess and address the adverse effects of the business' projects or activities on the human rights enjoyment of rightsholders.

Mitigation	Mitigation activities and steps are identified to reduce the likelihood and consequences of risks. There may be a focus to reduce the impact and recurrence of high priority risks. Mitigation styles include avoidance, reduction, contingency/restoration and acceptance/offset.
Recruitment agency	A private employment company that recruits workers in source countries for a fee.
Remediation	is a process or act of providing a remedy to persons affected by the adverse human rights impact.
Rightsholders	are individuals or groups of people who hold particular entitlements and rights or are to be accorded such entitlements and rights under international human rights law, and whose views, interests and perspectives must be respected, heard, considered and acted on. All rightsholders are stakeholders.
Risks	is the probability of direct or indirect harm arising from activities or failure to anticipate such harm.
Small and medium-sized enterprises (SMEs)	There is no standard definition of SMEs. Some countries use the employee number, while others use business assets or annual turnover to classify SMEs.
Stakeholders	are individuals or groups of people – whether state or non-state entities – who may or may not be affected by a company's business operations or activities but whose views, interests and perspectives should be heard and considered. Not all stakeholders are rightsholders but all rightsholders are stakeholders.

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(The Law Association for Asia and the Pacific) and the International Union for Conservation of Nature (IUCN) World Commission on Environmental Law (WCEL). He was called to the New South Wales (Australia) Bar in 1991 and has consulted with the Asian Development Bank (ADB), UN Environment Programme (UNEP), United Nations Development Programme (UNDP), World Wildlife Fund for Nature (WWF) and Vermont Law School in Myanmar. In September 2016, he was appointed as a Visiting Scholar of the Myanmar Environmental Governance Program at Vermont Law School. He is an Honorary Research Fellow at the Myanmar Centre for Responsible Business and, from 2020, a Fellow of the Environment Institute of Australia and New Zealand (EIANZ). His doctoral dissertation at the University of Southern Queensland is on environmental impact assessments in Southeast Asia. He was appointed an Adjunct Lecturer at the College of Law (Australia) in 2021 to lead its ESG practice programme.



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Thomas Thomas is the founder and Chief Executive Officer of the ASEAN CSR Network (ACN) set up in 2010 to promote responsible business in the region. ACN is an accredited entity of the Association of Southeast Asian Nations (ASEAN). Currently, Thomas is leading the ASEAN Responsible and Inclusive Business Alliance (ARIBA) initiative with the ASEAN Business Advisory Council (ASEAN BAC). He has served on numerous

responsible business initiatives in the region and globally, and researched on business integrity and human rights issues. In 2004, he co-chaired the Singapore National Tripartite Initiative for CSR, leading to the formation of the Singapore Compact for Corporate Social Responsibility. He served as its founding Executive Director and was Singapore's focal point for the United Nations Global Compact (UNGC). He actively worked with trade unions, co-operatives, consumer associations and social enterprises. He was also a Nominated Member of Parliament in Singapore.



Umavathni Vathanaganthan is the Collective Operating Officer of the Collective of Applied Law and Legal Realism (CALR), a non-profit organisation working on business and human rights. She received a Bachelor of Social Science in International Studies from the University of Malaysia, Sarawak (UNIMAS) and a Master of Arts in Human Rights from the University of Manchester. She has working experience with the

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FOREWORD BY TAN SRI DATO' DR. MOHD MUNIR BIN ABDUL MAJID



Chairman, ASEAN Business Advisory Council (ASEAN BAC) Malaysia

Chairman, CARI ASEAN Research and Advocacy

Chairman, Institute for Capital Market Research Malaysia (ICMR)

Board Member, Institute of Strategic and International Studies (ISIS) Malaysia

The Southeast Asian economy is fuelled by over 140 million people employed by 70 million micro, small and medium-sized enterprises. More than 90% of all businesses in the region are considered SMEs, and their operations are far and wide, impacting not only their workers but also those in their supply chains and end consumers.

The UNGPs have cemented the link between business and human rights. Businesses must commit themselves to respect human rights and, more importantly, mitigate the negative impacts of their operations on human rights. They are expected to conduct human rights due diligence to identify gaps and provide effective mechanisms and remedies to address wrongs that arise.

Much has been said about how the UNGPs are to be implemented by large companies such as multinationals, but less emphasis has been put on the responsibility of SMEs to assess and manage their human rights risks. This should change. The momentum to apply the UNGPs to small operations is growing. SMEs cannot escape from their corporate responsibility under the UNGPs' second pillar to protect human rights and the third pillar to ensure adequate access to remedies for human rights victims and survivors.

However, to a large extent, SMEs face immense challenges in

living up to the expectations of the UNGPs. They lack resources, skills and expertise. High-level global BHR commitments must be “translated” internally into everyday operational procedures. The translation process is time-consuming. Often too, SMEs’ obligations are unclear because domestic laws have not sufficiently incorporated the appropriate BHR standards as a legally binding guide. These obstacles facing SMEs lead to a poor understanding of the UNGPs in practice, let alone compliance with the same.

Given the current BHR landscape concerning SMEs, AmerBON, *Advocates’* publication, *Business and Human Rights in Southeast Asia: A Practitioner’s GuideKit for SMEs on Human Rights Compliance regarding the Environment and Labour*, is timely. It is a first-of-its-kind regional guide containing essential and practical tools that SMEs can use to meet their BHR obligations under the UNGPs.

The GuideKit, written by an expert group, simplifies the applicable BHR concepts and standards, contains key tools and provides solutions SMEs can adopt in implementing the UNGPs. Common issues include the ethical recruitment of migrant workers, establishing an operational grievance mechanism to address labour rights violations, screening for adverse environmental human rights impacts and engaging on concerns raised by human rights defenders. Anyone tasked to operationalise an SME’s BHR compliance plan can use this GuideKit.

AmerBON, *Advocates’* specialisation in BHR work is well-known. As a law firm leading the way in BHR, I am glad it has been forward-looking and had the foresight to put together this vital publication. I commend the firm for contributing to the continuing conversation about how SMEs can and should implement their corporate BHR responsibilities.

BHR advocates can no longer ignore the role of SMEs in implementing the UNGPs. I share the hope of the authors that more SMEs in the region would be encouraged to better understand their operations’ negative impacts on human rights and are equipped to take proactive and effective measures to stem them.

I recommend this highly useful GuideKit to you.



*Head, Human Rights Division
The ASEAN Secretariat*

In response to the COVID-19 pandemic, new expectations have emerged on what we define as resilient and responsible corporate management. Businesses have to respect human rights as part of this development. Business activities affect not just customers, employees and contractors along their supply chains but also entire communities and the environment. It is vital that every business, large or small, respect and comply with human rights.

The region's business approach to human rights has evolved over the past decade. Discourse has moved away from whether companies have any responsibility for human rights to understanding the nature of such responsibility, the steps to meet it and the due diligence process to be followed.

However, human rights due diligence should not become a mere slogan for window dressing. Embedding due diligence in the business culture and practice not only upholds respect for human rights and the environment but also presents a business opportunity to create a virtuous circle of stability and inclusive economic growth. While efforts have been guided by the voluntary regime prescribed by the UNGPs, the recent emergence of mandatory human rights and environmental due diligence in Europe is pivotal in compelling enterprises to further their commitment to practising responsible corporate governance for a

sustainable future.

In this context, micro, small and medium-sized enterprises (MSMEs), which are integral to the economic development and growth of member states of the Association of Southeast Asian Nations (ASEAN), have an essential role to play in achieving sustainable economic growth and narrowing the development gap in the region. They must identify and, where necessary, prevent and mitigate adverse impacts of their activities on human rights and the environment.

While there is much talk about what businesses can do, little action has been seen. It is partly due to the lack of practical tools to address some of the complex implementation issues. While several states have introduced national rules and policies on due diligence as part of their national plans of action and many enterprises have taken measures on their initiative, more MSMEs need to act and scale up their engagement on the issues. Such an aim will be difficult without the necessary know-how and toolkits to assist the MSMEs.

This GuideKit provides a valuable framework and tools to help enterprises manage human rights risks and address adverse human rights impacts in their business activities. It can help close the gap between the paper obligations of companies and how they are being met in their business operations concerning labour and the environment. Businesses can readily adopt the tools and implement them immediately by adapting them for individual practices consistent with the embrace of measures promoting responsible and rights-compliant business conduct.

This GuideKit is also an essential reference resource for other stakeholders such as non-governmental organisations, and labour and environmental groups who work alongside businesses to tackle human rights issues and stand up for fundamental rights policies.

I sincerely hope that this GuideKit will be an inspiration – and form a practical reference point for enterprises in Southeast Asia and beyond – for those seeking to integrate human rights and due diligence in everything they do.

FOREWORD BY MORITZ KLEINE-BROCKHOFF



*Regional Director, Southeast and East Asia
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(FNF)*

On 16 June 2011, the UN Human Rights Council endorsed the UNGPs. The document includes three general principles: states must respect, protect and fulfil human rights; businesses must comply with laws and respect human rights; and when rights are violated, there must be remedies.

With these principles in mind, the UN laid out what governments and businesses can and should do. The principles aimed to guide states and businesses, but no new international law obligations were created.

Today, 11 years after the Guiding Principles were endorsed, where are we?

Few Southeast Asian states have drafted national action plans.

Few businesses have self-assessed their human rights practices.

While all businesses should self-assess their practices and create mechanisms to address deficiencies, it is harder to do so for SMEs than for big companies. The latter has more capacity and has compliance departments.

This publication is a guide for SMEs. It is a tool for a small or

medium-sized company to conduct human rights due diligence, including how to establish both an internal, operational grievance mechanism and an external one.

The authors also look closely at the treatment of employees, recruitment of migrant workers and forced labour, and ways to screen, assess and respond to adverse environmental impacts due to business operations.

In short: This GuideKit helps to operationalise SMEs' obligations to respect and protect human rights.

The Friedrich Naumann Foundation for Freedom promotes economic freedom. While we believe that businesses should be able to operate as freely as possible and that globalisation has, and continues to lift millions out of poverty, we also believe that rule of law compliance and human rights protection are non-negotiable. Businesses have moral and legal obligations to treat their employees well. They have to respect their dignity and ensure that workplace conditions are humane. It is also in the interests of businesses to do so.

Consumers continue to, rightfully so, ask tough questions about supply chains. Employees perform better when conditions are not only fair and free from harm but also pleasant. Businesses – big, medium or small – must respect and protect human rights.

I would like to thank Edmund Bon, his staff and all contributors for making this book possible. The Friedrich Naumann Foundation for Freedom is honoured to be associated with it.

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EDMUND BON TAI SOON

Editor and Head of Chambers (Civil)
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This GuideKit was not a solo effort.

On behalf of AmerBON, *Advocates*, I acknowledge the contributions of the authors – Thomas Thomas, Terence Too Yang-Yau, Matthew Baird, Andika Ab. Wahab and Umavathni Vathanaganthan – who spent their time and expertise writing the chapters. Tan Sri Dato’ Dr. Mohd Munir bin Abdul Majid, Le Thi Nam Huong and Moritz Kleine-Brockhoff have also been kind to provide the forewords.

I am extremely grateful to Jacqueline Hannah Albert. She was a pupil-in-chambers when we started this project but “graduated” to be called to the Malaysian Bar by the time we went to print. She has been sterling in her assistance and coordination, and instrumental to the completion of this publication within a reasonable time! She also checked the final proofs before they were sent to the printer.

Special thanks to Chong Su Weii for her design, formatting, illustrations and layout, and to Sher Hann Chua, who exercised her eagle eye to provide a fresh look at the drafts suggesting editorial and language amendments. Also to Luanne Poh for enthusiastically jumping on board as an additional proofreader. Christine Cheah, Fintan Ng and Sunita Kumar reviewed the early draft manuscripts with me.

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various parts of the GuideKit. I have learnt much from them, and without their technical value add, there would be no polished version of this publication.

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Dated this 1st day of August 2022

BRIEF TIMELINE OF EVENTS IN THE PUBLICATION OF THIS GUIDEKIT AND DETAILS OF PARTICIPANTS WHO ATTENDED THE ONLINE CONSULTATIONS ON 2 OCTOBER AND 13 NOVEMBER 2021

14 September 2021

Conceptualisation.

2 October 2021

Online consultation with experts, corporate counsel and sustainability actors.* Authors presented their chapter drafts.

10 October – 10 November 2021

Drafting of chapters and internal reviews by editors.

13 November 2021

2nd online consultation with experts, corporate counsel and sustainability actors.* Authors presented the proposed BHR tools for SMEs.

15 November 2021 – 1 August 2022

Drafting, internal reviews and editing.

12 August 2022

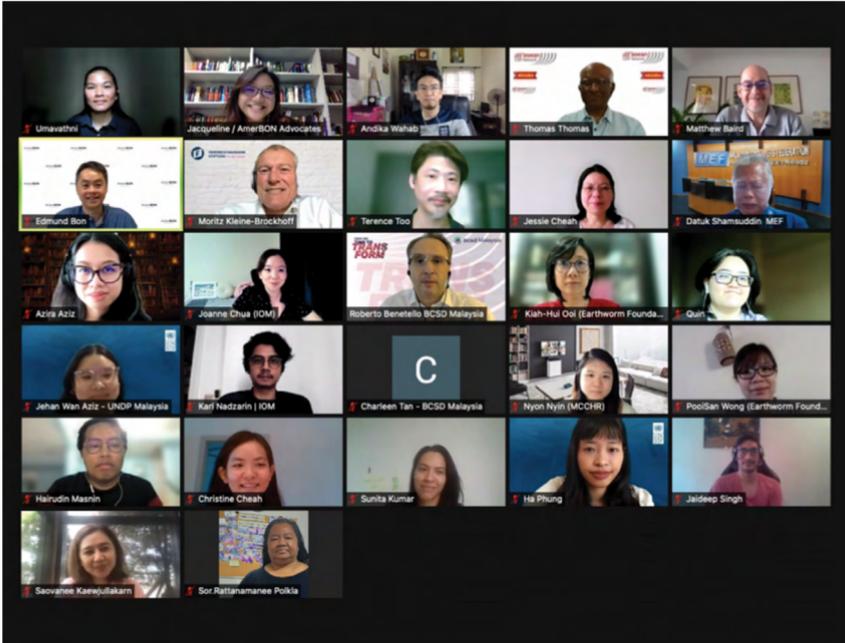
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19 August 2022

Launch of the GuideKit.

* In addition to the presenters (Edmund Bon, Thomas Thomas, Terence Too Yang-Yau, Matthew Baird, Andika Ab. Wahab and Umavathni Vathanaganthan) and the GuideKit's project coordinator, Jacqueline Hannah Albert, we were honoured to have been graced by the persons (named below) at both consultations. We are grateful for their time, expertise and inputs.

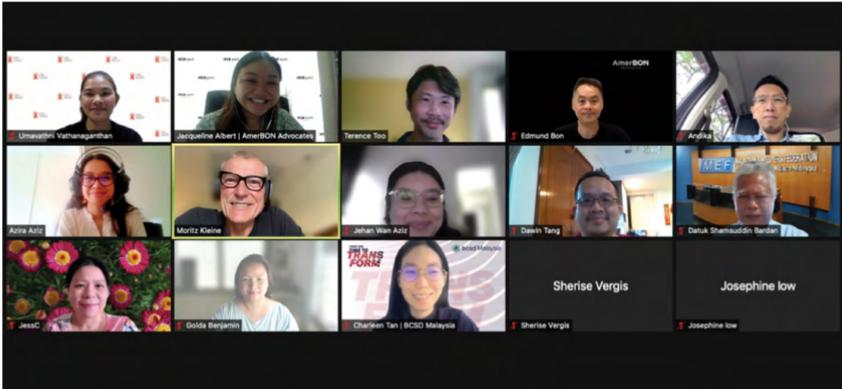
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2nd Consultation: 13 November 2021



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Christine Cheah	Reviewer	-
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INTRODUCTORY NOTES TO THE GUIDEKIT: MOVING THE NEEDLE IN HUMAN RIGHTS COMPLIANCE

EDMUND BON TAI SOON

Why this book?

The idea to publish a guide on BHR came about when I was teaching the subject in the Master of Laws (LLM) class on International Human Rights and Humanitarian Law at the University of Malaya in 2019. I could not find a textbook and had to cobble together reading materials from the internet. To the best of my knowledge, it was the first time BHR was being taught as an assessed subject in a university in Southeast Asia. Knowing full well that we should be more practical in our approach to education, I focused on relevant thematic issues such as labour, the environment and national action plans on BHR. And how we can operationalise the UNGPs.

Towards the end of 2020, and as work at the firm was picking up on BHR matters, I spoke to clients (including auditors, corporate counsel, operations managers and sustainability officers) and started to understand why it was so tricky to get BHR off the ground with companies. Not only was legally binding guidance lacking, but they were also saying that it was difficult to implement the high-level, highfalutin global commitments. While not excusing obstinate conduct, many of them felt that they wanted to comply with BHR commitments but did not know how to. We needed “plug-and-play” tools.

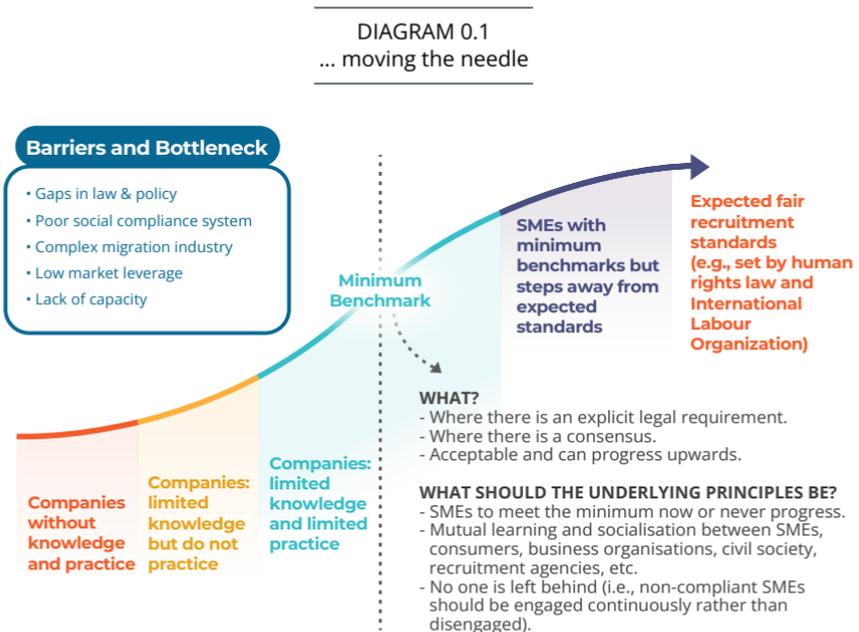
BHR advocacy assumes that corporations can comply with human rights easily. Small and medium-sized enterprises have also often been neglected. Even as there is no “one-size-fits-all” approach, many smaller companies do not have the capacity and resources to meet the growing demands of human rights law. Informally

organised companies are outside the sustainability conversation, and they are not aware of what is required to be more sustainable until they read of cases in the media. Directors are charged because their factory polluted a river. Goods are seized because forced labour was used. Only then do some businesses ask themselves: Could this happen to us one day? Are we doing the same thing? Should we change? How do we change?

I associate myself with Andika Ab. Wahab’s assessment during his presentation at the expert consultation on 2 October 2021. He said this:

We are not here to set standards. We know the standards. We are trying to help companies meet minimum benchmarks by implementation. Include legal obligations and consensus. And first layer base practices. If they don't meet the minimum, they will not even move!

Andika neatly illustrated his sentiments graphically in the diagram below, which I gratefully adopt (with some modifications).



Simply, we must start somewhere. If companies can move from a pure risk management perspective based on external demand and pressure to a rights-based approach, then the motivation will be an internal one: It will be a cultural shift from within. We want to help SMEs move into a leadership role on BHR compliance. Going beyond compliance, SMEs can then use BHR as one of their “value-add” to elevate their attractiveness to their consumers and markets.

How has this book been written?

The book was written with a practical approach in mind. It is an easy-to-use reference point for actors tasked with implementing human rights in companies. We describe the “how-to” processes, and with some adaptations, the tools can be used immediately. We have tried to demonstrate that transformation is possible by adopting the methods proposed in the chapters. They are measurable and achievable. No longer should compliance be done after companies consult with lawyers, consultants or auditors, and pay them. It should start at home, in-house.

This book is freely and publicly available to incentivise an uptake by SMEs to get with the game. Civil society can also use the same to engage companies on their human rights obligations and advocate on the issues with authority.

What does this book cover, and not cover?

This GuideKit does not comprehensively deal with all the issues that are needed. It kickstarts the BHR conversation for SMEs. This book is also not about reporting. It contains specific tools SMEs can use to conduct an impact assessment and due diligence in the areas of the environment and labour.

Thomas Thomas, in his usual style, introduces the BHR background, journey to date and the standards we ought to aspire for guided by the UNGPs. In chapter-2, Terence Too Yang-Yau elaborates on human rights due diligence as a process for businesses to comply with human rights. Matthew Baird (chapter-3) and Andika Ab. Wahab (chapter-4) set out what SMEs need to know about environmental and labour rights, respectively.

The complexities of assessing environmental risks are exhibited in Matthew's chapter-5 as he sets out a tool for first-layer screening. Andika's chapter-6 introduces a novel rating tool for SMEs to assess recruitment agencies that source migrant workers. Knowing that insufficient attention has been paid to pillar 3 of the UNGPs, and as a step to re-focus emphasis on it, Terence's chapter-7 provides for an operational-level grievance mechanism while Umavathni Vathanaganthan (chapter-8) explains how an external grievance mechanism can be used to reduce the number of court cases by companies against activists and human rights defenders. I conclude the GuideKit to signpost some key matters we should consider for the future.

We trust that the hard work the experts have put into this publication will not go to waste, and companies will benefit from it. We hope not only that the purpose of this book will be served but that one day when we see improvements to human rights compliance by businesses, this GuideKit will be mentioned for having moved them along that path.

BHR: BRIEF BACKGROUND, CONTEXT AND STANDARDS

Thomas Thomas

SMEs are the backbone of the Southeast Asian economy and outnumber large firms considerably. They employ many people and are generally entrepreneurial and innovative. They account for between 88.8% and 99.9% of total establishments and between 51.7% and 97.2% of total employment in the region.

The contribution of SMEs to each ASEAN Member States' (AMS) GDP is between 30% and 53%, and to exports, between 10% and 29.9%. SMEs form essential parts of the ASEAN supply chain¹ and generate much-needed employment and income through their widespread presence in suburban and rural areas.

Profits are essential for businesses to survive and thrive. However, the mindless pursuit of profits, without regard to ethics, principles or stakeholder interests, brings about corruption, distortion of markets, exploitation of people and environmental degradation.

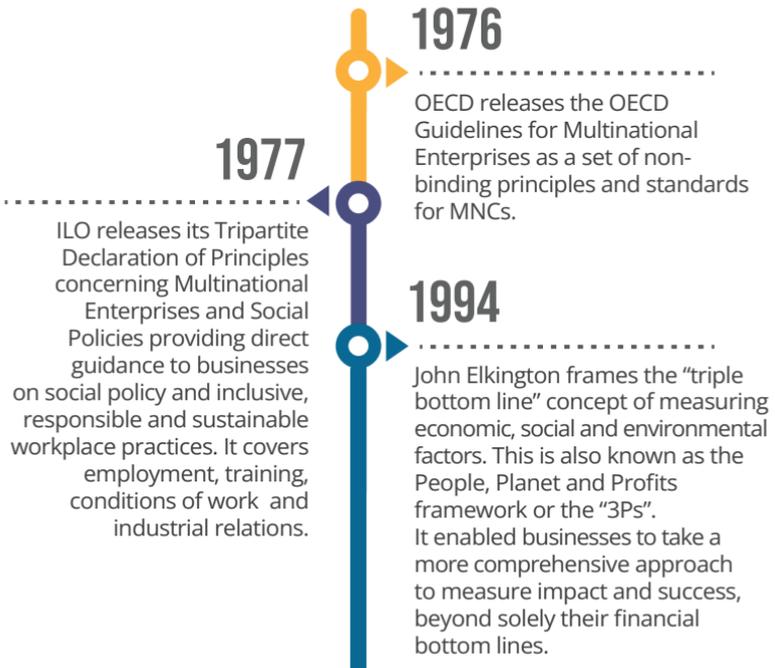
The BHR framework is a guidance for businesses to be accountable for the impact of their operations. It is a fixed international standard based on human rights, demanding businesses be morally, socially and ethically compliant. It extends beyond corporate social responsibility (CSR) efforts to hold businesses accountable for their actions towards individuals, workers and communities.

Applying the UNGPs in SMEs' operations

The United Nations Human Rights Council (UNHRC) endorsed the UNGPs in 2011. The UNGPs are guidelines for states and companies to prevent, address and remedy human rights violations and abuses committed by businesses. It is currently the most comprehensive instrument offering guidance on how businesses should respect human rights.²

The instrument draws reference from, among others, the Universal Declaration of Human Rights (UHDR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Principle 12 of the UNGPs reflects that at the minimum, the core benchmarks to be applied in evaluating business conducts are “those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work”.³

DIAGRAM 1.1
Snapshot timeline of the BHR journey



1998

ILO adopts the Declaration on Fundamental Principles and Rights at Work. It represents the international labour and human rights norm on forced labour, child labour, non-discrimination, freedom of association and collective bargaining. Every country is obliged to implement the ILO conventions through a process of annual reviews, reporting and technical cooperation, regardless of their ratification status. It also means that all businesses have to comply with the same everywhere they operate.

2000

UN Secretary-General Kofi Annan launches the UNGC to encourage businesses to adopt sustainable and socially responsible policies, and to report on their implementation. The UNGC is a set of ten non-binding principles in the areas of human rights, labour, the environment and anti-corruption.

2011

UNHRC endorses the UNGPs as the global standard to prevent, address and remedy human rights abuses linked to business activity. The UNGPs is a set of 31 principles guiding states and companies to implement their respective duties and obligations in their spheres of operations and influence.

2015

UNGA adopts the SDGs which are 17 global goals to achieve a better and more sustainable future for all.

... ONWARDS

Discourse moves towards greater “human rights” compliance measures in the language of ESG. Stock exchanges and governments introduce mandatory rules and increase non-mandatory initiatives on ESG and non-financial reporting.

The interest of investors in these reports and companies’ non-financial performance further drive the BHR agenda. A plethora of standards of reporting and tools on operationalising human rights due diligence emerge.

Businesses can implement the UNGPs by conducting human rights due diligence (HRDD) in their operations and providing remediation when human rights abuses occur. HRDD is a crucial element that operationalises the second pillar of the UNGPs, which is the corporate responsibility to avoid negative impacts caused by business operations and practices.

HRDD helps businesses to identify negative human rights impacts caused by the business. Where necessary, the HRDD process can identify mitigation and remedies to address these adverse human rights impacts. Unlike other due diligence processes, HRDD focuses on risks caused by the business to individuals and the community.

SMEs are not compelled to be human rights compliant as compared to multinational corporations (MNCs) and global companies, but the increasing pressure from social audits and expectations of consumers can be factors driving the change for human rights compliance. The operations of many SMEs implicitly recognise responsible business conduct and CSR practices.⁴ SMEs can take a further step beyond CSR efforts to meet the standards of the UNGPs.

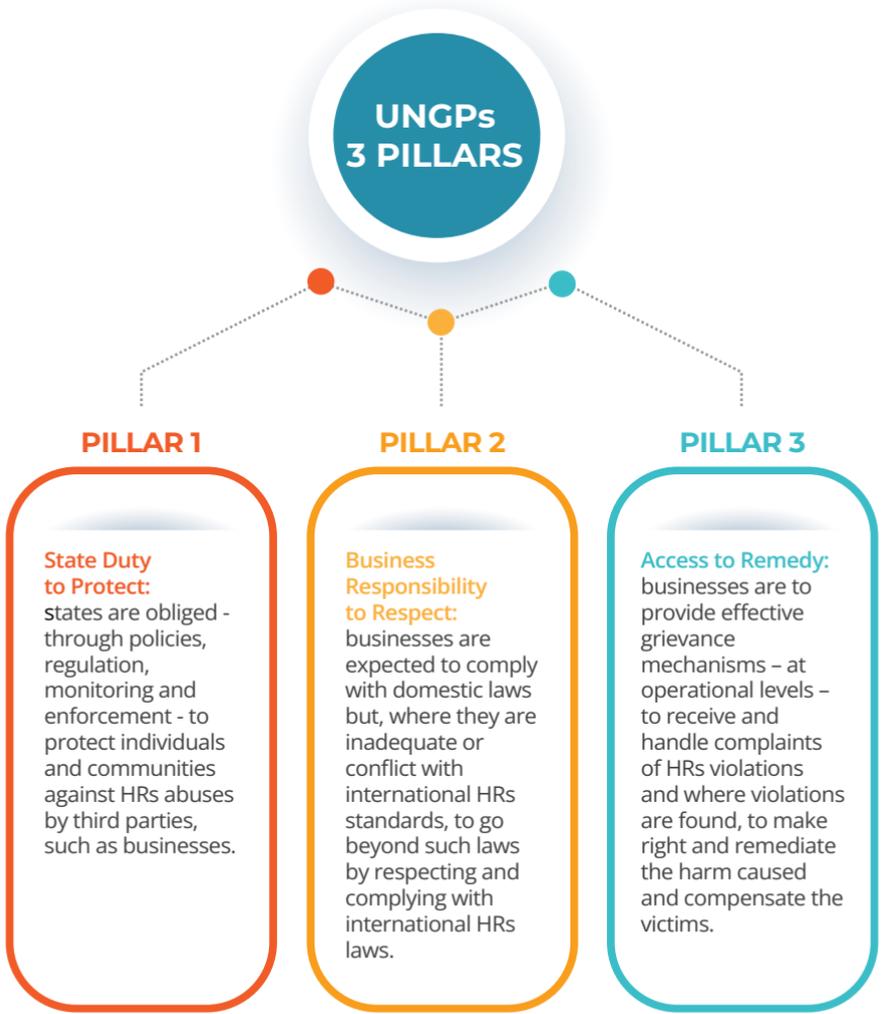
Owing to their size, SMEs have the potential to be flexible and innovative in how they comply with the UNGPs. Being closer to their communities, SMEs have a distinct advantage if they adopt an integrated approach towards BHR. Nonetheless, they also face numerous challenges such as the inability to benefit from the economies of scale, reduced access to finance and markets, stiff competition, adaptability to fast-evolving market demand and technological change, and capacity constraints regarding knowledge and creativity.

As such, SMEs need to be supported in their BHR journey, and this GuideKit will (hopefully) provide the appropriate guidance to SMEs to navigate the requirements and expectations of the global community.

CSR and BHR in Southeast Asia

The ASEAN Charter, which was ratified in 2008 by AMS, has explicit provisions on human rights. Its ratification meant that ASEAN governments must respect, promote and protect human rights. Unfortunately, there are no provisions for sanctions when there is non-compliance with any provisions of the ASEAN Charter.

DIAGRAM 1.2
The UNGPs 3 pillars



ASEAN has created two human rights bodies: The ASEAN Intergovernmental Commission on Human Rights (AICHR), established in 2009, and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), established in 2010. The ASEAN Human Rights Declaration (AHRD) was signed in 2012 and committed ASEAN to the UDHR and international human rights norms that AMS are parties to.

In 2014, a baseline study on CSR and human rights was commissioned by the AICHR, and the report revealed challenges faced by governments and businesses regarding the CSR agenda.⁵ A follow-up workshop was held two years later, and a regional strategy document was drafted, committing ASEAN to the UNGPs and elaborating on the role of governments, businesses, trade unions and civil society to realise better CSR practices.

To date, this strategy document has yet to be adopted. However, AICHR has been actively promoting the BHR agenda and the UNGPs but leaving much of the heavy lifting on BHR to be taken up by individual governments and NGOs.

Further, the ASEAN labour ministers adopted the ASEAN Guidelines for Corporate Social Responsibility on Labour in 2016.⁶ The guidelines are based on some of the ILO conventions. Even though they are not binding on governments, they can be considered to be recommendations of good business practices.

Other business organisations such as the ASEAN Business Advisory Council (ASEAN BAC) and the ASEAN CSR Network (ACN) are also currently building an ASEAN Responsible and Inclusive Business Alliance to promote responsible and inclusive business practices based on a code incorporating the UNGPs.

While there are numerous BHR initiatives at national and regional levels, political systems and general understanding of human rights and freedoms impact how Southeast Asian governments implement the UNGPs in their countries. A clear example is the difference in how Southeast Asian and Western countries manage the COVID-19 pandemic. Restrictions in movement were prevalent in Southeast Asian countries while many Western countries adopted a fluid approach in relaxing border restrictions.

Where do we go from here?

The COVID-19 crisis has shone a light on indiscriminate business practices that have detrimentally impacted people. There is a need for urgent action on social and environmental issues. Governments in the West are already legislating to enforce mandatory due diligence and enacting more stringent standards to eradicate forced labour and increase environmental protection and sustainability. These

measures will impact SMEs in our region.

In several stock exchanges in the region, non-financial reporting for listed companies is a mandatory requirement. Such reporting will require businesses to measure the social and environmental impacts of their operations. These “people” aspects of reporting will be given greater priority, which means that supply chains of MNCs and smaller sized local companies will come under greater scrutiny.

Unfortunately, the level of commitment for the UNGPs in the region remains low.⁷ In sustainability reporting, the least disclosed indicators are human rights, labour practices and industrial relations. Nevertheless, given the global BHR headwinds impacting our governments and businesses in the region – some of which have been mentioned above – positive changes are expected in the near future.⁸

It is imperative that companies understand that meeting BHR standards will be beneficial for the company's growth in the long run. This GuideKit thus leverages various sources of business commitments for a “better world”, such as the Sustainable Development Goals, to provide practical means for SMEs to adopt throughout their BHR journey.

Notes

1. (2015) Integrating SMEs into Global Value Chains: Challenges and Policy Actions in Asia, Manila: Asian Development Bank (ADB) and Asian Development Bank Institute (ADBI).
2. See also J. G. Ruggie (2013) Just Business: Multinational Corporations and Human Rights, New York: W. W. Norton & Company.
3. (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, New York, Geneva: OHCHR.
4. For instance, see (2010) ISO 26000:2010 – Guidance on Social Responsibility, Geneva: International Organization for Standardization (ISO).
5. T. Thomas and A. Chandra (2014) Baseline Study on the Nexus Between Corporate Social Responsibility & Human Rights: An Overview of Policies and Practices in ASEAN. Jakarta: AICHR.
6. (2017) ASEAN Guidelines for Corporate Social Responsibility (CSR) on Labour. Jakarta: ASEAN.

7. M. Mullen, D. Polomski, T. Soares, E. Klukas, and T. Thomas (2019) Human Rights Disclosure in ASEAN. ACN, Institute of Human Rights and Peace Studies (IHRPS), Mahidol University and Article 30.
8. L. Loh and S. Tan (2020) "Impact of Sustainability Reporting on Brand Value: An Examination of 100 Leading Brands in Singapore". *Sustainability*, 12(18), 7392. See also L. Loh and T. Thomas (2018) Sustainability Reporting in ASEAN Countries: Indonesia, Malaysia, Philippines, Singapore and Thailand, ACN and Center for Governance, Institutions and Organisations (CGIO), National University of Singapore (NUS) Business School.

OPERATIONALISING COMPLIANCE: HUMAN RIGHTS DUE DILIGENCE (HRDD)

TERENCE TOO YANG-YAU

HRDD is a continuous process which a company undertakes to assess its operational impacts. Steps could then be taken to anticipate, prevent or mitigate any negative impacts, and enhance positive impacts. It is a mechanism for businesses to proactively manage their involvement in any practice that may be a human rights violation.

As businesses are responsible for impacts they may have caused – directly or indirectly – the HRDD process should be conducted periodically by the management on the company’s operations and its supply chain.

Each company’s operations and needs differ. Therefore, there is no “one-size-fits-all” HRDD approach. It is recommended that a due diligence process be tailored to each business circumstance and context, and conducted with all of its rightsholders, such as its workers and the local community.

This chapter presents the key steps of an HRDD process¹ and some practical tools to implement each step.

Step 1: Embed responsible business conduct

Through a human rights policy, the company should make a public commitment to develop, adopt and communicate a process to identify, prevent or mitigate human rights risks.

DIAGRAM 2.1
Due diligence process and supporting measures



Adapted from (2018) OECD Due Diligence Guidance
for Responsible Business Conduct (page 21)

A human rights policy should:²

- State the company's approach to human rights in its operations.
- Embed the approach into its management systems and processes, including with its suppliers and other business entities.
- Guide the company to address its most significant risks.
- Be regularly reviewed and updated.

Step 2: Identify and assess adverse impacts

The company should conduct a stocktaking exercise of its activities that could potentially impact human rights and prioritise the impacts which are severe and require urgent attention.

The assessment should be led by the top management and involve key personnel in contact with employees, local communities and suppliers.

Prioritisation is gauged based on the most severe impacts.

TABLE 2.2
Severity prioritisation and materiality

Scale	The gravity or seriousness of the impact. <i>Key considerations: the nature of abuse, manner of execution, the status of the victim, etc.</i>
Scope	The number of people impacted.
Irremediability	Any limits to restoring the affected person(s) back to a situation before the impact. <i>Key consideration: promptness of action to remediate, etc.</i>

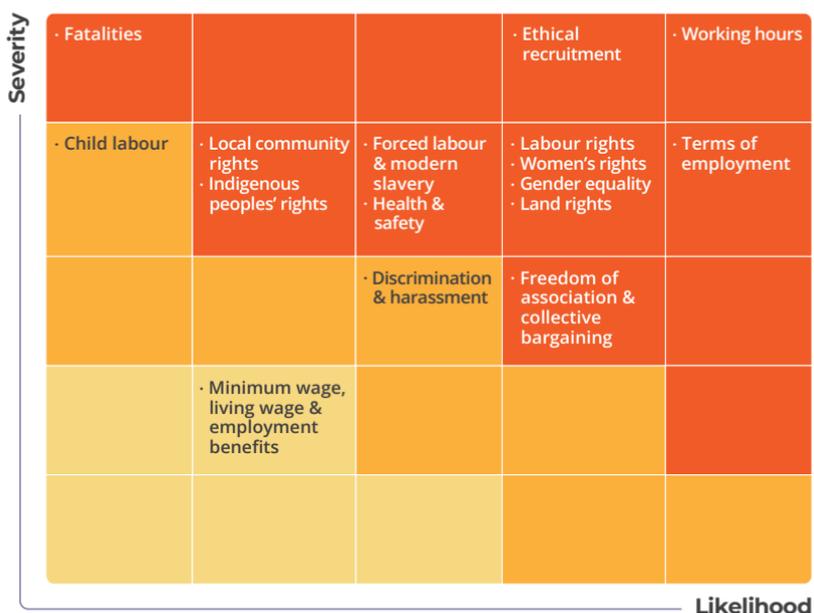
To be considered severe, an impact does not need to have more than one element. If a potential adverse impact is identified, the company should take into account its probability.

To identify if a low probability of a severe impact should be prioritised, a heat map can be used. The map is a tool to identify and prioritise salient issues to the company, where:

$$\text{SCALE} + \text{SCOPE} + \text{IRREMEDEIABILITY} = \text{SEVERITY}$$

$$\text{SEVERITY} + \text{LIKELIHOOD} = \text{PRIORITY}$$

DIAGRAM 2.3
Heat map tool (with common examples)



Below are some sample questions – for specific areas – that can be asked when conducting the internal prioritisation assessment.³ These questions and areas are not exhaustive.

TABLE 2.4
Questions and areas for internal assessment

ENVIRONMENTAL CONSERVATION	<ol style="list-style-type: none"> 1. Does the energy used by the company adversely affect the energy needs of other users in the region or area where the company is operating? 2. Does the water used by the company adversely affect the water requirements of other users in the region or area where the company is operating? 3. Do the company's activities create permanent damage to the flora or fauna in the region or area where the company is operating? 4. Do the products or packages the company uses contain plastic or other non-biodegradable materials? 5. Do the company's activities generate pollutants exceeding national standards? If so, have they been suitably treated? 6. Do the company's activities generate wastewater with elements of pollutants exceeding national standards? If so, have they been suitably treated? 7. Is the solid waste generated from the company's activities considered hazardous waste? If so, has it been suitably treated?
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LOCAL COMMUNITIES	<ol style="list-style-type: none"> 1. Do the company's activities disturb or damage the local communities living and working nearby? 2. Do the company's operations require relocating individuals or groups living in the area or who depend on the area for their livelihoods? 3. Is the company aware of the methods used by the local authorities to relocate the individuals or groups involved? 4. Does the relocation compromise their lifestyle or livelihood? 5. Does the company carry out initiatives or projects favouring the local communities (such as improving community infrastructure)? 6. Does the construction of the company's infrastructure prevent or hinder access to places or areas of value (such as religious and cultural sites) for the local communities?
MEASURES TO MONITOR AND MITIGATE POTENTIAL IMPACTS	<ol style="list-style-type: none"> 1. Does the company have a specific process or mechanism to receive complaints, grievances and suggestions from employees (such as whistleblowing practices and a confidential hotline)? 2. Does the company have a specific process or mechanism to receive reports of problems, difficulties or complaints from clients or third parties (such as a grievance channel accessible to the public)? 3. Is there a person or a group responsible for investigating the reports and implementing solutions? 4. Has the company ever received unofficial or informal reports of problems, difficulties or abuse employees face? 5. If the company does not have one, should the company have a specific process or mechanism allowing clients or third parties to report problems, difficulties or abuse? 6. If the company does not have one, should the company have a specific process or mechanism allowing employees to report problems, difficulties or abuse? 7. Has the company discussed the risks of human rights violations with other companies or business associations? 8. Does the company have a code of conduct on human rights or doing responsible business, or comply with a sector-specific code of conduct on the same? 9. Has the company endorsed standards or been certified by the International Organization for Standardization (ISO) or other organisations concerning social responsibility? 10. Does the company engage with its employees and third parties in awareness-raising activities regarding its participation and implementation of programmes, projects, codes of conduct or standards regarding human rights compliance?

Different industries have different salient issues of concern, and a materiality map in Diagram 2.5 will assist in identifying the ones relevant to a company.

DIAGRAM 2.5
Sustainability Accounting Standards Board (SASB) Materiality Map 4

		Extractives & Minerals Processing										Financials	Food & Beverage
Dimension	General Issue Category	Consumer Goods	Coal Operations	Construction Materials	Iron & Steel Producers	Metals & Mining	Oil & Gas - Exploration & Production	Oil & Gas - Midstream	Oil & Gas - Refining & Marketing	Oil & Gas - Services			
Environment	GHG Emissions												
	Air Quality												
	Energy Management												
	Water & Wastewater Management												
	Water & Hazardous Materials Management												
	Ecological Impacts												
	Human Rights & Community Relations												
	Customer Privacy												
	Data Security												
	Access & Affordability												
Social Capital	Product Quality & Safety												
	Customer Welfare												
	Selling Practices & Product Labeling												
Human Capital	Labour Practices												
	Employee Health & Safety												
	Employee Engagement, Diversity & Inclusion												

The category addresses management of the relationship between businesses and the communities in which they operate, including, but not limited to, management of direct and indirect impacts on core human rights and the treatment of indigenous peoples. More specifically, such management may cover socio-economic community impacts, community engagement, environmental justice, cultivation of local workforces, impact on local businesses, license to operate, and environmental/social impact assessments. The category does not include environmental impacts such as air pollution or waste which, although they may impact the health and safety of members of local communities, are addressed in separate categories.

Step 3: Cease, prevent or mitigate

Based on the assessment conducted, the next step is to cease, prevent and mitigate adverse impacts. An action plan should be drawn up.

While some problems can be addressed in the short or medium term, other issues may be complex or multi-faceted with no apparent solutions. A roadmap on steps to cease or mitigate the harmful activities should be developed in consultation with stakeholders (such as the impacted rightsholders).

Good practices to implement this step are as follows:

- Assigning a senior manager to oversee the process of ceasing, preventing and mitigating the identified impact or potential impact.
- Updating the relevant company policy and conducting personnel training to raise awareness.
- Consulting and engaging with the impacted and potentially impacted rightsholders and their representatives, and developing and implementing actions to cease, prevent and mitigate the adverse impact.
- Strengthening monitoring and reporting mechanisms.
- Collaborating with other stakeholders to address common issues and problems.

Step 4: Track

Next is to monitor and track the implementation of the action plan. The objective is to gauge the measures' effectiveness to cease, prevent or mitigate the impact. These measures should be regularly checked and may be done through independent reviews or audits. Rightsholders should also be engaged and consulted as part of the process.

Step 5: Communicate

A critical component of the HRDD process is communicating the

company's risks, impacts, and how the company addresses them. Relevant information on the due diligence process and findings should also be shared. Reporting on these matters may make a big difference when a company faces accusations of human rights violations.

The report should be publicly accessible and complemented by other forms of communication such as through dialogues, consultations and meetings. Some matters to address are highlighted in Diagram 2.6.

DIAGRAM 2.6
Reporting the HRDD process and outcomes



PART 01 | Summary of risks and gaps

Relevant questions to be asked and answered:

- What are the key risks and gaps identified from the company's assessment?
- What are the views of external stakeholders and rightsholders?
- What official mechanisms are in place for complaints, communication and feedback?
- Does the company engage stakeholders or rightsholders in other ways, such as through informal dialogue sessions?
- How well do these mechanisms capture complaints and feedback? Are they enough to provide the company with relevant and timely information on actions that could cause human rights violations?



PART 02 | Immediate / Short-term actions

Depending on the impacts to be addressed, examples of actions to be taken include:



**REMOVING
GENDER-BASED
PAY GAPS**



**UPGRADING EQUIPMENT
TO REDUCE HAZARDOUS
WASTE AND POLLUTANTS**



**IMPLEMENTING A SYSTEM
FOR WORKERS TO KEEP
THEIR PASSPORTS**

These measures by the company and their implementation results should be documented in the report.



PART 03 | Long-term actions

In consultation with stakeholders and rightsholders, a roadmap to address the root causes of the more complex impacts should be developed and adopted. The roadmap contains specific, measurable, achievable, relevant and time-based goals. In the meantime, training and capacity-building activities on human rights should continue.



Step 6: Provide for compensation and cooperate in remediation

Based on the UNGPs' third pillar, if a company has caused adverse human rights impacts, the affected persons should be restored to a situation they would have been in had the impacts not occurred.

To this end, companies must provide grievance mechanisms that allow complaints to be received and remediation facilitated for the complainants. The mechanisms should be appropriate, accessible and trusted by their intended users.⁵ Companies must also cooperate in good faith with the grievance process.

Stakeholder engagement

At all stages of the HRDD process, the company should engage with its stakeholders. They should be identified early in the process and usually include workers, local communities, governmental

authorities, suppliers, contractors and non-governmental organisations.

A human rights-based approach requires that engagement with rightsholders be conducted in a non-discriminatory manner. It means that vulnerable and marginalised individuals or groups need to be prioritised. It entails the recognition of particular groups (such as women, children, indigenous peoples and persons with disabilities) who enjoy specific protections under international human rights law.

HRDD, properly and genuinely done, adds value to the company. It reduces adverse impacts, operationalises human rights compliance, and enhances a company's profile and reputation in the eyes of the public.

Notes

1. (2018) OECD Due Diligence Guidance for Responsible Business Conduct (<https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>: accessed 3 March 2022), OECD.
2. (2015) A Guide for Business: How to Develop a Human Rights Policy, 2nd edition, UNGC and OHCHR.
3. (2020) Human Rights Impact Assessment Guidance and Toolbox, Copenhagen: The Danish Institute for Human Rights. See also (2015) Business and Human Rights: Pathways to Compliance in SMEs. From Self-Assessment to Due Diligence, The AVSI Foundation.
4. This Materiality Map was discontinued in October 2021 and replaced with a Materiality Finder. See <https://www.sasb.org/wp-content/uploads/2021/11/MMap-2021.png> and <https://www.sasb.org/standards/materiality-map/>: both accessed 3 March 2022.
5. CAO Grievance Mechanism Toolkit (<https://www.cao-grm.org/>: accessed 3 March 2022), Office of the Compliance Advisor Ombudsman (CAO), World Bank Group. See also (2019) Worker Grievance Mechanisms: Guidance Document for the Oil and Gas Industry, London: IPIECA.

ENVIRONMENTAL RIGHTS PROTECTION: RISK ASSESSMENT AND DUE DILIGENCE

MATTHEW BAIRD

This chapter looks at the key environmental issues that can create risks for SMEs (in existing or new facilities or operations) and how human rights are one of the thematic areas of focus when considering environmental risks. It also examines some of the environmental risk assessment and due diligence approaches that could be used to tackle the risks for SMEs.

Human rights impacts flowing from the failure of environmental governance can be significant, creating serious legal, financial and reputational risks for SMEs. As such, environmental issues are very important and should be addressed at the board level. SMEs often overlook many of these issues or relegate them to being governed by an inadequate, simple environmental policy.

Following the explainer in this chapter, risk management and due diligence can assist SMEs in identifying and addressing the risks.

Right to a safe, clean, healthy and sustainable environment

On 8 October 2021, the UNHRC recognised the right to a safe, clean, healthy and sustainable environment. This right was also recognised as necessary for safeguarding other human rights. It brings into consideration various matters: air quality, access to clean water, protection of human health from pollution and waste, and ensuring that the surrounding biodiversity can sustain itself and the people.

The right encompasses the following:

- procedural environmental rights;
- substantive environmental rights; and,
- non-discrimination and attention to vulnerable groups.

Procedural elements include the right to access information, the right to participate in decision-making and the right to effective remedies. Monitoring and enforcing these rights are the responsibility of the same national authorities that enforce substantive rights.

Substantive environmental rights can be broken down into other related rights, such as the right to breathe clean air, a safe climate, safe drinking water and sanitation, and the right to non-toxic environments to live and work in.

Some of these rights are translated into environmental laws imposing legal obligations on entities and enterprises in their business operations. For example, there are laws to regulate town planning, pollution and waste disposal. A new project may require an environmental impact assessment (EIA) to be conducted and approved prior to construction. These obligations must be complied with, or the company (and its directors and personnel) will breach the law and expose itself to the risk of prosecution and fines or imprisonment.

Substantive obligations can also include financial obligations for environmental risk disclosure as stock exchanges or financial institutions require.

Some environmental laws attempt to embed both procedural and substantive environmental rights, for example, by using environmental management systems, requiring prior evaluations through EIAs, pollution control permits and licensing, and obligations on waste control and other environmental impacts. They can also include community engagement and grievance mechanisms, occupational health and safety practices, and auditing and reporting requirements.

Thirdly, attention to vulnerable groups is emerging as a vital issue in environmental protection. Members of groups at risk, include children, women, ethnic, religious, linguistic and cultural minorities,

indigenous communities, migrants, persons with disabilities, older persons, refugees, asylum seekers and stateless persons. They are generally among the poorest, the most marginalised and the least powerful people. Their interests must be given foremost consideration.

In handling environmental issues, the participation of all stakeholders is vital. In the SME context, they include customers, the community and workers in the enterprise and throughout the supply chain. It is essential to provide them opportunities to engage with the enterprise and raise concerns about environmental and social impacts. A system to record these concerns and respond to them should also be put in place.

The must-do: Environmental risk assessment

The basic approach recommended here for SMEs is to adopt a three-stage process:

1. The first stage is to conduct a scoping review of the environmental risks that apply to the activities and operations of the SME.
2. The second stage is to conduct an environmental risk assessment of the risks using the relevant tools.
3. After conducting the assessment, the third stage is to develop an environmental management system to mitigate or avoid those impacts. The system will include ways to track compliance and report on the same.

The following table identifies some common environmental risks associated with an existing or potential project. Depending on the operations of the SME, the company should address these issues in the company's environmental policy.

TABLE 3.1
Common environmental risk elements

RISK ELEMENT	DESCRIPTION
Climate risk	is the risk to the project from climate-induced impacts.
Greenhouse Gas (GHG) emissions	from the project or activities.
Pollution	including air, water, noise and soil pollution.
Resource use	requiring an examination of the sustainability of the SME's activities.
Biodiversity impacts	including any impacts on flora and fauna.
Waste – hazardous and toxic	including any impacts relating to the management and disposal of all waste, including reduction and recycling.
Occupational health and safety	such as working conditions and grievance redress mechanisms.
Land tenure	relating to both existing activities and potential new activities where resumption may occur.
Resettlement and livelihood	due to activities and operations that have significant human rights impacts.

Going further: Environmental Due Diligence (EDD)

Environmental compliance has historically been based on the legal requirements for businesses under national laws governing planning and development approvals, pollution permits and waste management. Since then, numerous international and regional guidelines and standards have incorporated human rights obligations. Many of the obligations are considered by enterprises to be “voluntary”, but this fails to recognise that breaches of environmental law compliance may have potential human rights consequences.

Recent developments in ESG reporting have also highlighted the need to identify the impact of environmental matters such as harms to people and the planet, and the exposure of communities to health risks due to pollution and waste. Given this, EDD

practices have grown. It is more comprehensive in scope than environmental risk assessment, and for many enterprises, it is now an integral part of decision-making and risk management systems.

EDD is an ongoing, proactive and reactive process-oriented activity that supports compliance with domestic environmental protection and resource management laws but also goes further to consider “best practice” conduct that can have positive environmental benefits. The extent and detail of due diligence processes should be commensurate with the risks, and appropriate to a specific enterprise’s circumstances and context. Ideally, it should cover an enterprise’s operations and business relationships, including its wider supply chain.

Due diligence involves the following:

- *identifying and assessing* actual and potential adverse environmental impacts of activities and associated relationships on stakeholders;
- *integrating* the findings from the impact assessment across internal processes;
- *tracking* environmental performance to verify whether adverse impacts are being effectively addressed; and,
- *communicating* publicly, including formal reporting, on company responses to actual and potential environmental impacts.

Identification and assessment of risk can be done first through a scoping exercise to identify the key risks or those likely to cause a significant impact on the environment or society. The exercise aims to collate data identifying the risks (in terms of likelihood and severity) and the potential stakeholders whom these risks may impact. Bearing this in mind, the company should, throughout the conduct of the EDD, take into account the interests of those affected when assessing the risks.¹

The assessment of potential impacts should be based on an appropriate risk assessment methodology and apply relevant national and international environmental standards. Environmental standards can take the form of targets (for instance, water quality targets), emissions standards (for instance, pollutant levels), production requirements (for instance, best available technology) and procedural

obligations (for instance, public participation).

Accurately and systematically assessing the risk of environmental impacts associated with a company's operations, including supply chains, is critical to address impacts and build mitigation mechanisms into ongoing activities.

Once the significant potential environmental impacts have been identified, the best practice is to apply the mitigation hierarchy in developing response measures. The hierarchy recognises that the management of risks and impacts is most effective and efficient if it follows the logical prioritisation of:

- first: *avoiding* impacts before they can occur;
- second: *minimising* the duration, intensity, significance and extent of impacts;
- third: where impacts occur, *rehabilitating* or *restoring* the environment, site and affected communities; and,
- fourth: where significant impacts remain, *offsetting* or *compensating* them.

Environmental Management System (EMS)

An EMS is a process used by an organisation to help enhance its environmental performance, comply with environmental duties and achieve its environmental objectives in line with its environmental policy.²

An enterprise's EMS establishes clear internal steps on its environmental objectives, risks, obligations, decision points, information disclosure and accountabilities. It can integrate and track the company's environmental performance across its identified risks and support reporting to its stakeholders, including the public.

From a risk-reduction standpoint, it is recommended that all enterprises, regardless of size or sector, develop an EMS appropriate to their activities and structure. It involves five main parts:

- Environmental policy: Articulating the organisation's environmental commitments.
- Planning: Identifying the environmental aspects of the organisation's operations and legal obligations as the basis of its environmental objectives, targets and action plan (including clear steps and responsibilities).
- Implementing the action plan: Creating structures and operating procedures, allocating resources and conducting training.
- Evaluating the measures taken: Monitoring the actions adopted for compliance and performance.
- Reviewing the effectiveness of the EMS: To be conducted by management and for revisions to be made to improve performance.

Guidance is available on developing an EMS that can address all possible environmental impacts, including air, water, noise and soil pollution; waste (including hazardous and toxic waste); land; climate risk; occupational health and safety; and other impacts.³ Pollution control standards usually include technological parameters and benchmarks, such as emissions and ambient quality standards, and may also refer to the best available technology for activities and practices with potential environmental impacts.

The World Health Organization (WHO) guidelines further reinforce the substantive link between pollution control laws that national environmental enforcement authorities are responsible for enforcing, and the human rights to health and a healthy environment. They include environmental causes of harm to human health: air pollution, climate change and environmental health.⁴

Ultimately, an effective EMS will require regular monitoring and reporting performance benchmarked against the enterprise's environmental policy and targets. In addition to helping meet the environmental due diligence recommendation to make information about environmental impacts public, reporting broader performance against the enterprise's environmental policy is consistent with international best practices.

Notes

1. (2016) Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers, International Bar Association (IBA).
2. Drawn from (2017) ISO 14001:2015 – Environmental Management Systems: A Practical Guide for SMEs, Geneva: ISO.
3. (2001) Environmental Management Systems: An Implementation Guide for Small and Medium-Sized Organisations, 2nd edition, Michigan: NSF International. See also the EU Eco-Management and Audit Scheme (EMAS) User's Guide and tools here: https://ec.europa.eu/environment/emas/emas_publications/guidance_en.htm: accessed 3 March 2022.
4. For more information, see WHO's website here: <https://www.who.int/health-topics>: accessed 3 March 2022.

LABOUR RIGHTS: STANDARDS, NON-COMPLIANCE AND GOOD PRACTICES

ANDIKA AB. WAHAB

This chapter summarises international standards on labour and describes typical cases of non-compliance while recommending good practices SMEs can adopt.

International labour standards

The applicable international labour standards and employees' rights at work are contained in the International Labour Organization's (ILO) eight fundamental conventions covering issues such as forced labour, child labour, freedom of association, collective bargaining, equal remuneration and non-discrimination. These conventions are legally binding, and countries may accept them through ratification.

The table 4.1 summarises the ratification status of the eight core conventions by Southeast Asian countries.¹

Non-compliance with labour standards

In recent years, we have read and heard about numerous cases of labour breaches not only by large business enterprises but also by SMEs across the region:

- forced labour;
- child labour;
- abuse and harassment at work;

TABLE 4.1
Ratification status of ILO fundamental conventions by Southeast Asian countries

ILO Instruments / Country	Brunei	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
Forced Labour Convention, 1930 (No. 29)	No	Yes (1969)	Yes (1950)	Yes (1964)	Yes (1957)	Yes (1955)	Yes (2005)	Yes (1965)	Yes (1969)	Yes (2007)
Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)	No	Yes (1999)	Yes (1998)	No	No	Yes (1955)	Yes (1953)	No	No	No
Right to Organise and Collective Bargaining Convention, 1949 (No. 98)	No	Yes (1999)	Yes (1957)	No	Yes (1961)	No	Yes (1953)	Yes (1965)	No	Yes (2019)
Equal Remuneration Convention, 1951 (No. 100)	No	Yes (1999)	Yes (1958)	Yes (2008)	Yes (1997)	No	Yes (1953)	Yes (2002)	Yes (1999)	Yes (1997)
Abolition of Forced Labour Convention, 1957 (No. 105)	No	Yes (1999)	Yes (1999)	No	Denounced (1990)	No	Yes (1960)	Denounced (1979)	Yes (1969)	Yes (2020)
Discrimination (Employment and Occupation) Convention, 1958 (No. 111)	No	Yes (1999)	Yes (1999)	Yes (2008)	No	No	Yes (1960)	No	Yes (2017)	Yes (1997)
Minimum Age Convention, 1973 (No. 138)	Yes (2011)	Yes (1999)	Yes (1999)	Yes (2005)	Yes (1997)	Yes (2000)	Yes (1998)	Yes (2005)	Yes (2004)	Yes (2003)
Worst Forms of Child Labour Convention, 1999 (No. 182)	Yes (2008)	Yes (2006)	Yes (2000)	Yes (2005)	Yes (2000)	Yes (2013)	Yes (2000)	Yes (2001)	Yes (2001)	Yes (2000)
Total number of Conventions ratified	2	8	8	5	6	4	8	6	6	7

- intermediaries charging excessive recruitment fees;
- discrimination at the workplace at various stages, including during the recruitment and promotion stages, and in the provision of employment benefits;
- unpaid wages, unfair compensation and inadequate protection for the workers' welfare;
- excessive work hours;
- denial of the right to join trade unions and to benefit from collective bargaining; and,
- the lack of occupational health and safety measures at work.

Four typical cases are highlighted here.

Case study 1: Forced labour

Many SMEs rely on foreign workers to fill the gaps in the labour force. Given the lack of sufficient protection and weak law enforcement in the region, we have seen forced labour manifesting in several different ways:

- Using debt or retaining wages to compel the workers to stay with their employers.
- Restricting the workers' movement by holding their identity documents.
- Issuing threats of harm to the workers and their families.
- Threatening to lodge reports with the national authorities to have the workers deported.
- Imposing overtime without the prior consent of the workers.

Forced labour is defined as work or service exacted from any person under the menace of any penalty and for which the person has not offered himself or herself voluntarily. The ILO has identified 11 indicators of forced labour that represent the most

common signs a person is working involuntarily or under duress.²

DIAGRAM 4.2
ILO indicators of forced labour



ABUSE OF
VULNERABILITY



DECEPTION



RESTRICTION OF
MOVEMENT



ISOLATION



PHYSICAL AND
SEXUAL
VIOLENCE



INTIMIDATION
AND THREATS



RETENTION OF
IDENTITY
DOCUMENTS



WITHHOLDING
OF WAGES



DEBT
BONDAGE



ABUSIVE WORKING
AND LIVING
CONDITIONS



EXCESSIVE
OVERTIME

Case study 2: Child labour

The ILO defines child labour as work that deprives children of their childhood, their potential, and dignity, and which is harmful to their physical and mental development. It refers to work that:³

- is mentally, physically, socially or morally dangerous and harmful to children; or,
- interferes with their schooling by depriving them of the opportunity to attend school, obliging them to leave school prematurely, or requiring them to attempt to combine school attendance with heavy work or excessively long hours of work.

Companies have been found procuring children's services – whether intentionally or otherwise – to perform economic activities benefitting the enterprises in exchange for wages. While child labour occurs in different sectors, such labour is highly prevalent in agriculture and the informal economy.

In the context of SMEs, the following business practices are likely to intensify the incidences of child labour:

- The company does not keep accurate information about its workers, including their demographic data.
- The company does not have an internal system to verify the age of its workers, especially during the recruitment process. In cases where third parties handle recruitment, the company does not demand evidence of the workers' age for verification.
- The company tends to employ children to save costs.

Case study 3: Unpaid wages and unfair compensation

The non-payment of wages and unfair compensation to workers are commonly reported. The problem is compounded when companies:

- do not provide a written employment contract to their workers, clearly stipulating the workers' salary, including overtime pay;
- do not provide the applicable legal minimum wage and statutory benefits (including for overtime);
- intentionally employ workers on a short-term, seasonal or casual basis, thus denying the workers' right to receive the applicable employment benefits; and,
- make unauthorised or illegal deductions from the workers' salaries.

Case study 4: Excessive work hours

Excessive work hours imposed by companies, beyond the

maximum permitted by law is also a regular occurrence. Further, some companies require their workers to work during public holidays or rest days.

Workers are not informed of their rights and of the legal limit of work hours, while companies do not have an internal mechanism to guide the allocation of overtime work for their workers. Companies often lack proper records of the number of hours their employees have worked, particularly for those working on a piece-rated or productivity basis where their wages are based on the number of items produced or sold instead of being paid based on time spent on the job worked. More often than not, production or sale targets require extended periods of work hours not sanctioned by law.

Consequences to businesses

Business case 1: Legal action in the courts

More than a hundred migrant workers from various countries filed complaints against a company in the industrial court between 2019 and 2020.

The allegations were that the company breached the collective agreement to provide annual bonuses, allowances and increments. The workers' passports were also withheld to prevent them from complaining to external parties.

The court ruled in favour of the complainants. The company was ordered to pay back wages and comply with the collective agreement.

Business case 2: Negative reputation and image

In recent years, complaints of labour exploitation have been made against the big industry players in the palm oil industry. Domestic law enforcement investigations and prosecutions have been conducted on a range of labour breaches. These cases have caused a ripple effect and detrimentally impacted small-sized oil palm estates, growers and traders as part of the value chain.

Targeted campaigns have tarnished the industry's reputation and image, resulting in financial and non-financial losses. Companies that have suffered now require a longer lead time and substantive resources to restore their stakeholders' confidence and corporate brand.

Business case 3: Disruption to business operations

A large group of migrant workers staged a strike and refused to work, protesting against their mistreatment and abuse by their employer. The allegations included the non-payment of wages, unfair working conditions and overcrowded accommodation.

The workers' refusal to work caused significant financial loss to the company's operations for several days.

Business lessons learned

Past cases have shown how companies are affected by their breaches of labour standards. Such effects are cascaded when they face multiple allegations at the same time. Public campaigns run by activists against the companies also result in negative brand reputation and possible legal actions with financial implications.

Companies subjected to such reputational hits take longer to recover, especially in rebuilding their corporate image and the trust of their shareholders and stakeholders. In most cases, the companies have to make a sizeable commitment to finance their remedial measures, such as building new facilities and implementing new workforce recruitment practices.

In light of how social media is used today, once allegations of non-compliance are made public accompanied by visual evidence, companies lose the ability to manage the human rights fallout. They would be subjected to public criticism, business pressures, legal actions, and law enforcement scrutiny. By this time, measures taken by the companies may be too late in the eyes of a layperson.

Good practices to adopt

Given the current state of affairs, some companies have taken positive steps to comply with international labour standards, such as by:

- returning the identity documents of migrant workers;
- providing safe deposit boxes for the workers to keep and access their identity documents;
- reimbursing the recruitment fees paid by migrant workers to free them from debt bondage; and,
- allowing non-governmental organisations and auditors to regularly review and evaluate the companies' labour practices

Notes

1. See the country ratifications at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:11001:0::NO>; accessed 3 March 2022.
2. ILO Indicators of Forced Labour: Special Action Programme to Combat Forced Labour (https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf; accessed 3 March 2022), International Labour Office, Geneva: ILO.
3. See how child labour is defined and the different forms of such labour at <https://www.ilo.org/ipec/facts/lang--en/index.htm>; accessed 3 March 2022.

AN ENVIRONMENTAL RISK MANAGEMENT SCREENING TOOL

MATTHEW BAIRD

Good practice requires companies to identify (or screen) key environmental risks, assess and mitigate them, and adapt and improve on the enterprise's environmental management system and plan.

The tool in this chapter helps companies do two things: first, identify and screen for environmental risk management (stage 1) and second, assess the severity and likelihood of the risks (stage 2). Five risks have been selected as examples. Note, however, that the tool is not designed to provide a complete assessment of the risks.

Once the assessment is made, senior management of the business will have to make decisions based on the assessment. External consultants may be engaged as appropriate if a mitigation process is involved.

In using the screening tool, it is assumed that the management of the business has adopted a company-wide environmental policy. As described in chapter-3, this is the first step in the EMS and a due diligence process.

Following the environmental policy, the business can then focus on the environmental risk assessment of its operations. Such assessment typically involves:

- Setting the risk context, including the objectives and proposed activities.
- Identifying potential impacts associated with the relevant

environmental and social factors.

- Determining the management measures for each of the identified impacts. Depending on the phase of the project or activities, these measures are based on existing controls and standard practices or are additional mitigation controls required to reduce the risk to as low as reasonably practicable.
- Assigning a severity and likelihood factor for each potential impact to determine the risk rating and its significance – low, moderate or major.

Throughout these stages, the business should provide for disclosure of relevant information to workers and other stakeholders. This will build trust with them and assist in gathering valuable feedback.

Stage 1: Identification and screening checklist of potential risks and impacts

In stage 1, the focus is on identifying and screening key risks and impacts. Information needed at this stage includes the location, size and type of the project or activity.

To demonstrate how the screening checklist tool operates, five risks are deployed as examples: biodiversity and heritage; pollution and chemicals; waste; land tenure and land disputes (including resettlement); and the occupational health and safety of workers. The tool can also be applied to other risks.

TABLE 5.1
Stage 1: Screening checklist tool

Issue A – Biodiversity and heritage	Yes	No	Not known	Comments
1. Is the project or operations located in or near mangrove areas, coral reefs or seagrass?				
2. Is the project or operations located in or near a designated protected area, public forest, marine park, scientific reserve or wildlife sanctuary?				
3. Is the project or operations located in or near a cultural heritage area, archaeological area or area of historical significance?				
4. Has there been any assessment of the biodiversity of the impacted area?				
5. Has there been any assessment of the cultural or built heritage of the impacted area?				
6. Will the project or operations impact biodiversity, heritage or environmental quality?				
7. Does the company's environmental management plan (EMP) provide for actions to avoid, minimise or mitigate the environmental impacts?				
8. Are there plans to communicate with stakeholders about the possible impacts and mitigation measures?				

Issue B – Pollution and chemicals	Yes	No	Not known	Comments
1. Does the company need any pollution permits or approvals? If so, have these permits or approvals been obtained?				
2. Will the project or operations produce or handle hazardous or toxic waste? Or produce or emit high levels of pollution?				
3. Has the company considered the air, water or noise pollution impacts and how to reduce pollution production?				
4. Will the project or operations produce or handle pesticides or chemicals? Has the company considered the impacts of these pesticides or chemicals and how to reduce their production?				
5. Is there an annual independent audit of the company's pollution and chemicals management plan?				<i>(The audit – findings of which should be made public – ensures that the company complies with its obligations.)</i>

Issue C – Waste	Yes	No	Not known	Comments
1. Has the company considered how to manage and dispose of waste, and reduce waste production?				
2. Does the company produce or use plastic and plastic products? If so, has the company considered how to reduce plastic pollution and the use of plastic?				
3. Is there a waste and plastic plan to minimise or mitigate waste and plastics?				
4. Are all waste disposal contractors licensed and have appropriate insurance protection to cover accidents and spills?				
5. Is there an annual independent audit of the company's waste management plan?				<i>(The audit – findings of which should be made public – ensures that the company complies with its obligations.)</i>

Issue D – Land tenure and land disputes (including resettlement)	Yes	No	Not known	Comments
1. Do the operations or activities of the project require the resettlement of people?				
2. Do the operations or activities of the project affect land tenure arrangements, community-based property rights, customary land rights or natural resources?				
3. Has a “no-resettlement” alternative been considered?				
4. Is there a proposed resettlement and livelihood plan?				
5. Are there safeguards in place to ensure that the resettlement and livelihood action plan is implemented and complied?				
6. Is there an independent audit to ensure compliance with all the obligations regarding resettlement and livelihood?				

Issue E – Occupational health and safety of workers	Yes	No	Not known	Comments
1. Is on-site worker accommodation required?				
2. Has the company assessed worker accommodation according to international good practices and domestic law?				
3. Is the worker accommodation protected from extreme heat or extreme precipitation events?				<i>(Air conditioning and protection from floods and other disasters may be required.)</i>
4. Are outdoor workers protected from extreme heat or extreme precipitation events?				
5. Does the company provide for and implement an occupational health and safety plan for its workers?				
6. Does the company comply with all the legal requirements regarding the occupational health and safety of its workers?				

7. Does the company have an occupational grievance redress mechanism or operational or project dispute resolution process?				<i>(The mechanisms should be for both workers and other stakeholders.)</i>
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The screening checklist tool is designed to highlight key risks that will need to be evaluated in stage 2.

Stage 2: Risk assessment of potential risks and impacts

Following the identification of key environmental risks in stage 1, it is possible to assess those risks. What is required is that the assessment is undertaken on each of the risks identified in stage 1.

A risk assessment comprises two metrics: likelihood or frequency and severity. Each can be given a numeric value from 1 to 5 with increasing likelihood or frequency and severity. The following tables can be used to assist in the risk assessment. They may be tailored to suit the specific needs of each company.

Table 5.2 describes the likelihood or frequency while table 5.3 phases the severity of the risks.

TABLE 5.2
Likelihood of impact assessment

LEVEL	DESCRIPTOR	DETAIL OF DESCRIPTION
5	Almost Certain/ Frequent	is expected to occur in most circumstances, or is of a continuous nature, or likelihood is unknown.
4	Probable/Likely	will probably occur during project activity lifetime.
3	Occasional	could occur in most projects/activities of this type.
2	Remote/Unlikely	could occur in some projects/activities, but not expected to occur.
1	Improbable/Rare	occurs only in exceptional circumstances.

Some degree of subjectivity cannot be avoided in the risk assessment exercise. For example, a waste management facility will generate air pollution through odour, methane, and possible particulate pollution if the waste catches on fire. Also, such facilities are likely to cause water pollution through stormwater

TABLE 5.3
Severity of impact assessment

LEVEL	DESCRIPTOR	DETAIL OF DESCRIPTION
5	Catastrophic	<p>Health: death, widespread health effects or toxic release off-site with detrimental effects.</p> <p>Environmental: extreme permanent changes to the natural environment and not able to be practically or significantly rehabilitated or alleviated.</p> <p>Social: major public outrage.</p> <p>Financial: huge loss (e.g. more than \$500,000). <i>Or the consequences are unknown.</i></p>
4	Critical	<p>Health: extensive injuries or significant staff numbers incapacitated resulting in a loss of production capability.</p> <p>Environmental: substantial and significant changes to the natural environment and only partially able to be rehabilitated or alleviated.</p> <p>Social: will attract public concern in the wider community.</p> <p>Financial: major loss (e.g. \$200,000 to \$500,000). <i>Or the consequences are substantial if cumulative effects are considered.</i></p>
3	Moderate	<p>Health: medical treatment required.</p> <p>Environmental: significant local changes, but can be rehabilitated or alleviated with difficulty, at significant cost and with outside assistance.</p> <p>Social: will attract concern of the adjoining community.</p> <p>Financial: high loss (e.g. \$100,000 to \$200,000).</p>
2	Minor	<p>Health: first aid treatment required.</p> <p>Environmental: on-site release immediately contained, very local consequence with no significant long-term changes and may be rehabilitated.</p> <p>Social: not of significant concern to the wider community.</p> <p>Financial: medium loss (e.g. \$50,000 to \$100,000).</p>
1	Negligible	<p>Health: no injuries.</p> <p>Environmental: negligible environmental impact.</p> <p>Social: unlikely to be noticed by the public.</p> <p>Financial: low loss (e.g. less than \$50,000).</p>

discharge and leachate if the facility is not correctly lined and walled to prevent water pollution. In both cases, air and water pollution are almost certain to occur. Determining the severity of the impact will require some subjective assessment. Odour pollution, except in extreme cases, may not result in physical injury, but it can still create significant public outrage from communities living close to the facility.

Once the likelihood and severity of the impact have been documented, the data can be applied to a risk assessment matrix to complete the screening process.

DIAGRAM 5.4
Risk assessment matrix

	Improbable/ Rare	Remote/ Unlikely	Occasional	Probable/ Likely	Almost Certain/ Frequent
Catastrophic	Red	Red	Red	Red	Red
Critical	Orange	Orange	Red	Red	Red
Moderate	Green	Orange	Orange	Red	Red
Minor	Green	Green	Orange	Orange	Red
Negligible	Green	Green	Green	Orange	Orange

The risk level is indicated by a colour code, with the green denoting generally acceptable risks and red denoting generally unacceptable risks. The intermediate orange zone requires careful examination of the particular activity to identify the level of acceptability, where risks are reduced to as low as reasonably practicable following environmental management measures adopted by a business.

The matrix will assist the company to undertake a mitigation process according to the applicable standards for the risks (in orange and red) at the next stage.

A TOOL TO ASSESS RECRUITMENT AGENCIES FOR MIGRANT WORKERS

ANDIKA AB. WAHAB

SMEs usually outsource their search for migrant workers to recruitment agencies. Engaging these specialised agencies lowers SMEs' hiring costs as they have networks in source countries, routinely seek out aspiring workers and regularly engage with the authorities on the recruitment application process.

Often, SMEs choose the cheapest services on offer. Unfortunately, many agencies have been accused of unethical practices such as deceiving workers about the nature and conditions of work and charging excessive recruitment fees.¹

Further, the lax enforcement of laws coupled with the lack of protective regulations concerning migrant worker recruitment in their countries of origin allow agencies to exploit those seeking a better life elsewhere.

The tool in this chapter assists SMEs in assessing recruitment agencies that they currently work with and prospective agencies. It has been designed to be easily used in a straightforward manner. There are three steps to be undertaken. At the final (third) step, a score will be assigned to the agency under assessment. The score guides the SME on whether it should engage the agency or not.

This tool is based on the core fair recruitment benchmarks derived and adapted from the principles and guidelines developed by the International Labour Organization (ILO)² and the International Organization for Migration (IOM).³ They are the minimum ethical

practices and standards companies and recruitment agencies are expected to follow.

The benchmarks (shown in the table below) have been selected for their relevance and practicality to SMEs' sphere of influence, given their relatively smaller operations, available resources and market leverage.

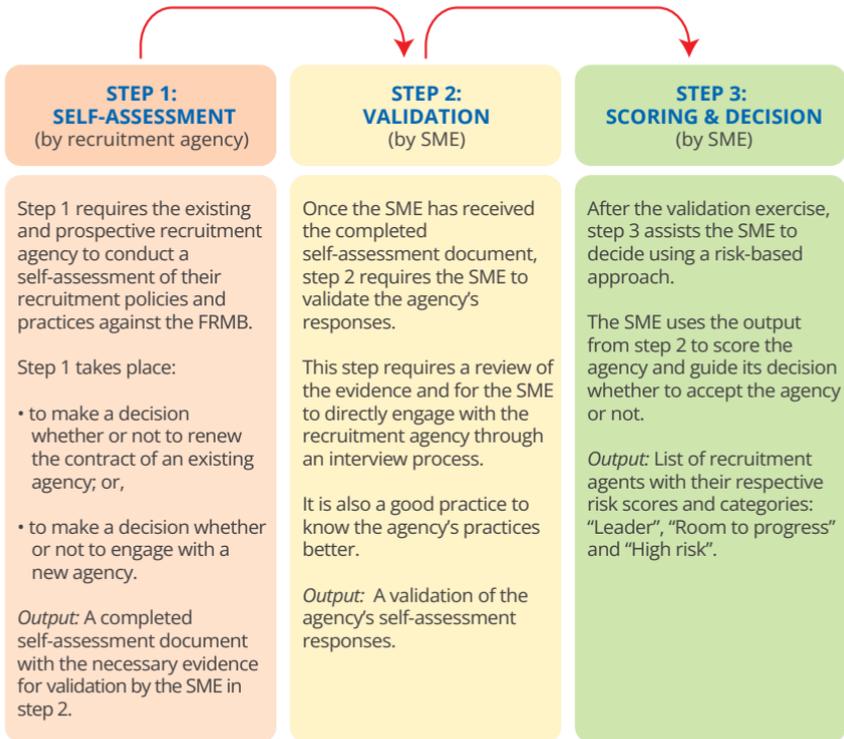
TABLE 6.1
Fair recruitment minimum benchmarks (FRMB)

FRMB1	The recruitment of workers takes place in a way that respects, protects and fulfils the <i>human rights</i> of workers.
FRMB2	The recruitment process complies with the applicable recruitment <i>laws</i> and <i>policies</i> , and further implements <i>practices</i> that promote transparency and the protection of the most vulnerable workers.
FRMB3	No <i>recruitment fees</i> or related costs are charged to or in any other form borne by the workers or job seekers.
FRMB4	The <i>terms and conditions</i> of the worker's employment are stated clearly and in an appropriate, verifiable and easy-to-understand document (preferably through a contract or agreement). The contents of the employment document are explained to, and understood by, the worker. The worker should voluntarily enter into employment free from deception or coercion.
FRMB5	The worker's <i>personal data</i> are at all times protected and treated in strict confidence. The data cannot be shared with third parties without the prior informed consent of the worker or unless required by law.
FRMB6	The worker's <i>freedom of movement</i> is at all times respected and protected. The employer shall not hold the worker's identity and personal documents (except for administering the recruitment with the relevant authorities such as to obtain approvals) and personal property (such as title documents and bank cards).
FRMB7	All workers understand the use of, and can freely access, <i>grievance</i> and other <i>dispute resolution mechanisms</i> without retaliation or reprisal. Such mechanisms must be effective and be able to provide appropriate remedies to remediate harm that has occurred.

The assessment tool

The tool presented here consists of first, self-assessment by the recruitment agency, second, validation by the SME, and third, scoring and decision by the SME. Here is an overview of the steps to be taken when using the tool.

DIAGRAM 6.2
Overview of the assessment tool and steps



A template for each step is set out in the diagrams below. The templates can be adopted for immediate use.

Step 1: Self-assessment by the recruitment agency

The step 1 template below is to be disseminated to the existing and prospective recruitment agencies for them to complete. Once they have completed the same, they are to be returned to the SME together with the supporting evidence and documents for step 2 to be undertaken.

TABLE 6.3
Step 1: Self-assessment template

Criteria	Yes	No	Unsure	List of evidence or documents in support and to be submitted by agency
FRMB1: The recruitment of workers takes place in a way that respects, protects and fulfils the human rights of workers.				
1.1	<i>Does the agency have a clear written policy respecting international human rights law and labour standards, particularly the prevention of forced, bonded, and child labour?</i>			
1.2	<i>Does the agency have a procedure or process to monitor its recruitment practices regularly, evaluate its risks and identify mitigation and remediation actions where actual or potential violations have been found?</i>			
1.3	<i>Does the agency ensure that all of its workers or aspiring workers are treated equally and are not discriminated against on the basis of ethnicity, gender, nationality, religion, sexual orientation, physical ability and health, or any other status prohibited by international law?</i>			
FRMB2: The recruitment process complies with the applicable recruitment laws and policies, and further implements practices that promote transparency and the protection of the most vulnerable workers.				
2.1	<i>Does the agency possess a valid licence or approval to recruit workers in the countries where it operates?</i>			
2.2	<i>Does the agency have any court decisions or administrative and regulatory barriers hindering or prohibiting it from performing cross-border recruitment of workers?</i>			
2.3	<i>Does the agency work only with authorised and legally-compliant recruiters, sub-agents, partners, or parties in recruiting workers?</i>			
2.4	<i>Does the agency have a procedure or process to verify the age of workers and aspiring workers?</i>			
FRMB3: No recruitment fees or related costs are charged to or in any other form borne by the workers or job seekers.				
3.1	<i>Does the agency have a clear written policy prohibiting the charging of recruitment fees and related costs to workers at all levels of the recruitment process?</i>			

3.2	Does the agency clearly state in all public communication channels (including advertisements and materials used by its recruiters, sub-agents, partners, or parties) that no recruitment fees or related costs are charged?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
3.3	Does the agency confirm that any expenses payable by the workers that are not recruitment fees and related costs comply with and are consistent with local laws and regulations, and these expenses are itemised and recorded?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
FRMB4: The terms and conditions of the worker's employment are stated clearly and in an appropriate, verifiable and easy-to-understand document (preferably through a contract or agreement). The contents of the employment document are explained to, and understood by, the worker. The worker should voluntarily enter into employment free from deception or coercion.					
4.1	Does the agency ensure that the written employment contract detailing the terms and conditions is easily understood and written in a language that the workers understand?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
4.2	Does the agency ensure that the terms and conditions of the employment contract are consistent with those in the job placement request (issued by the requesting company) and in its advertisements and other recruitment materials?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
4.3	Does the agency ensure that the contract terms and conditions signed by the workers comply with the applicable laws in the source and destination countries?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
4.4	Does the agency ensure that the workers are properly and adequately briefed on their employment terms and conditions and they have entered into the contract voluntarily and freely?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
FRMB5: The worker's personal data are at all times protected and treated in strict confidence. The data cannot be shared with third parties without the prior informed consent of the worker or unless required by law.					
5.1	Does the agency have a clear written policy treating workers' personal data as confidential and protecting the same as such?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
5.2	Does the agency's data protection and privacy policy comply with the applicable laws in the source and destination countries?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
5.3	Does the agency have an internal management procedure or process to collect, store and share workers' personal data in a legal, safe and confidential manner?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

5.4	Does the agency have a procedure or process to inform workers about how their personal data will be treated and obtain their informed consent on the same?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	(All the workers or aspiring workers must sign the informed consent form and be provided with a copy of the same for their record. As such, the signed form should be produced here.)
FRMB6: The worker's freedom of movement is at all times respected and protected. The employer shall not hold the worker's identity and personal documents (except for administering the recruitment with the relevant authorities such as to obtain approvals) and personal property (such as property documents and bank cards).					
6.1	Does the agency have a clear written policy prohibiting the holding of the workers' identity and personal documents?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
6.2	Does the agency have a clear written policy prohibiting the holding of the workers' personal property?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
FRMB7: All workers understand the use of, and can freely access, grievance and other dispute resolution mechanisms without retaliation or reprisal. Such mechanisms must be effective and be able to provide appropriate remedies to remediate harm that has occurred.					
7.1	Does the agency have a clear written policy to receive and address grievances from workers or aspiring workers at all levels of the recruitment process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
7.2	Does the agency inform the workers or aspiring workers about the grievance procedure or mechanism at all levels of the recruitment process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	

Step 2: Validation by the SME

In step 2, the SME reviews the evidence and documents provided to make its findings. It should also interview the agency's representative to ask further questions. The SME can use the template below for step 2.

TABLE 6.4
Step 2: Validation template

Criteria	Guidance for validation and findings		
	Evidence and document review	Engagement and questions for further disclosure	Findings (for internal record)
FRMB1: The recruitment of workers takes place in a way that respects, protects and fulfils the human rights of workers.			
1.1	<p>Consider:</p> <ul style="list-style-type: none"> • Written policy to respect human rights and labour standards. • Look for references to international human rights laws and standards. • Look for specific commitments to prohibit forced, bonded, and child labour; provide fair compensation; protect personal data; uphold freedom of movement; and provide access to grievance mechanisms. 	<p>Ask:</p> <ul style="list-style-type: none"> • How does the agency formulate its human rights and/or labour standard commitments? • How does the agency communicate its policy to third parties involved in the recruitment process? • How does the agency communicate its policy to workers? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
1.2	<p>Consider:</p> <ul style="list-style-type: none"> • Written procedure or process on due diligence. • Records of due diligence conducted, including scope and frequency. • Remediation undertaken. 	<p>Ask:</p> <ul style="list-style-type: none"> • How does the agency conduct its due diligence? • Does the due diligence cover third parties involved in the recruitment process? • What are the risks in working with third parties? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>

<p>1.3</p>	<p>Consider:</p> <ul style="list-style-type: none"> • Written policy on the agency's commitment to ensure equal treatment and non-discrimination. 	<p>Ask:</p> <ul style="list-style-type: none"> • How does the agency practice equal treatment and non-discrimination in the recruitment process? • Is the agency aware of any barriers hindering equal treatment and non-discrimination during recruitment in the source country? • Is the agency aware of any barriers, including legal and administrative rules, that potentially treat workers unequally and in a discriminatory manner? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>FRMB2: The recruitment process complies with the applicable recruitment laws and policies, and further implements practices that promote transparency and the protection of the most vulnerable workers.</p>			
<p>2.1</p>	<p>Consider:</p> <ul style="list-style-type: none"> • Licence or approval to operate. Ensure that the licence is not expired. 	<p>Ask:</p> <ul style="list-style-type: none"> • Is the agency aware of the laws, rules, and regulations that govern its licence or approval? • Is the agency permitted to engage intermediaries or "middle persons" in the recruitment process? • Is the agency aware of the destination countries its workers go to? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>2.2</p>	<p>Consider:</p> <ul style="list-style-type: none"> • Verification methods through source country authorities, independent or online resources to confirm that the agency is allowed to operate. 	<p>Ask:</p> <ul style="list-style-type: none"> • The agency to provide credible sources or platforms (such as governmental websites) to assist in the verification process. • Is the agency aware of any recruitment agencies that have been prohibited from operating? If so, why? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>

<p>2.3</p>	<p>Consider:</p> <ul style="list-style-type: none"> Any evidence, including the details of third parties involved in the recruitment process, and the agency's contracts with them. Any evidence, including the third parties' licence or approval to operate. 	<p>Ask:</p> <ul style="list-style-type: none"> What is the agency's business relationship with the third parties? Is the agency aware of the risks in working with third parties? If yes, what are these risks? Is there a need to work with the third parties? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>2.4</p>	<p>Consider:</p> <ul style="list-style-type: none"> Written procedure or process on age verification. Any evidence, including how the procedure or process is implemented. 	<p>Ask:</p> <ul style="list-style-type: none"> Is the agency aware of the minimum working age at the source and destination countries? What documents are used to verify the worker's age? If the worker's documents (such as a birth certificate or identity card) are not available, how will the agency verify the age? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>FRMB3: No recruitment fees or related costs are charged to or in any other form borne by the workers or job seekers.</p>			
<p>3.1</p>	<p>Consider:</p> <ul style="list-style-type: none"> Written policy prohibiting the charging of recruitment fees and related costs. Any evidence that defines "recruitment fees" and "related costs". 	<p>Ask:</p> <ul style="list-style-type: none"> If the agency understands what "recruitment fees" and "related costs" cover? If the agency maintains a list of expenses related to the recruitment? How the agency monitors the implementation of the "zero recruitment fee" policy? What is the agency's course of action if third parties are found to have violated the "zero recruitment fee" policy? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>

<p>3.2</p>	<p>Consider:</p> <ul style="list-style-type: none"> Any public documents, including advertisements and materials, used in the recruitment process. 	<p>Ask:</p> <ul style="list-style-type: none"> How the agency monitors the public communication channels used by itself and third parties? If the agency trains its staff and third parties regarding the prohibition on charging recruitment fees or related costs? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>3.3</p>	<p>Consider:</p> <ul style="list-style-type: none"> Any evidence showing the details of expenses paid by the worker and that the same comply with local laws and regulations. 	<p>Ask:</p> <ul style="list-style-type: none"> Is the agency aware if the expenses paid comply with local laws and regulations? If yes, what are these expenses for? Is the agency aware of the sums paid by the worker and the recipients of those sums? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>FRMB4: The terms and conditions of the worker's employment are stated clearly and in an appropriate, verifiable and easy-to-understand document (preferably through a contract or agreement). The contents of the employment document are explained to, and understood by, the worker. The worker should voluntarily enter into employment free from deception or coercion.</p>			
<p>4.1</p>	<p>Consider:</p> <ul style="list-style-type: none"> Any evidence, including the signed employment contract. The review should also look at the language used in the contract for adequacy and intelligibility.⁴ 	<p>Ask:</p> <ul style="list-style-type: none"> How the agency ensures that the worker fully understands the contents of the employment contract before signing it? How the agency ensures that third parties working with the agency in the recruitment process ensure that the worker fully understands the contract before signing it? Whether a copy of the signed employment contract is given to the worker? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>

<p>4.2</p>	<p>Consider:</p> <ul style="list-style-type: none"> Any evidence, including the job placement request (issued by the requesting company), the agency's advertisements and other recruitment materials, for consistency with the terms and conditions of the employment contract. 	<p>Ask:</p> <ul style="list-style-type: none"> How the agency ensures that the terms and conditions of the employment contract are consistent with those in the job placement request, advertisements and other recruitment materials? How the agency monitors the advertisements and recruitment materials of third parties it works with? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>4.3</p>	<p>Consider:</p> <ul style="list-style-type: none"> The terms and conditions of the employment contract to ensure that they comply with the applicable laws in the source and destination countries. 	<p>Ask:</p> <ul style="list-style-type: none"> How the agency verifies that the terms and conditions comply with said laws? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>4.4</p>	<p>Consider:</p> <ul style="list-style-type: none"> Any evidence, including details of the briefing or discussion sessions such as dates, times, venues and names of attendees. 	<p>Ask:</p> <ul style="list-style-type: none"> How the agency conducts the sessions with the workers? If the agency monitors how third parties it works with conduct the sessions with the workers? How the agency ensures that the worker enters into the contract voluntarily and freely? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>FRMBS: The worker's personal data are at all times protected and treated in strict confidence. The data cannot be shared with third parties without the prior informed consent of the worker or unless required by law.</p>			
<p>5.1</p>	<p>Consider:</p> <ul style="list-style-type: none"> Written data protection and privacy policy. 	<p>Ask:</p> <ul style="list-style-type: none"> If the agency explains its policy to the worker, including his or her rights? How the agency explains to the worker about protecting his or her personal data and keeping the same confidential? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>

<p>5.2</p>	<p>Consider:</p> <ul style="list-style-type: none"> • The provisions of the policy to ensure that they comply with the applicable laws in the source and destination countries. 	<p>Ask:</p> <ul style="list-style-type: none"> • How the agency verifies that the provisions comply with said laws? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>5.3</p>	<p>Consider:</p> <ul style="list-style-type: none"> • Written internal management procedure or process regarding the workers' personal data. 	<p>Ask:</p> <ul style="list-style-type: none"> • How the agency ensures that the worker's personal data is protected even when needed to be shared with third parties? • If the agency trains its staff and third parties regarding its internal management procedure or process? • How the agency monitors third parties it works with on protecting the worker's personal data? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>5.4</p>	<p>Consider:</p> <ul style="list-style-type: none"> • Written procedure or process to inform the workers about how their personal data will be treated, including the informed consent form. 	<p>Ask:</p> <ul style="list-style-type: none"> • How the agency informs the worker about its data protection and privacy policy? • How the agency ensures that the worker fully understands the policy? • How the agency monitors third parties it works with to implement the agency's policy? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>

FRMB6: The worker's freedom of movement is at all times respected and protected. The employer shall not hold the worker's identity and personal documents (except for administering the recruitment with the relevant authorities such as to obtain approvals) and personal property (such as property documents and bank cards).

<p>6.1</p>	<p>Consider:</p> <ul style="list-style-type: none"> • Written policy prohibiting the holding of the workers' identity and personal documents. 	<p>Ask:</p> <ul style="list-style-type: none"> • How the agency ensures that its staff and third parties it works with understand and implement the prohibition? • How the agency monitors third parties it works with to implement the prohibition? • How the agency monitors third parties it works with to ensure that they communicate the prohibition to the worker and he or she understands it? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>6.2</p>	<p>Consider:</p> <ul style="list-style-type: none"> • Written policy prohibiting the holding of the workers' personal property. 	<p>Ask:</p> <ul style="list-style-type: none"> • How the agency ensures that its staff and third parties it works with understand and implement the prohibition? • How the agency monitors third parties it works with to implement the prohibition? • How the agency monitors third parties it works with to ensure that they communicate the prohibition to the worker and he or she understands it? • If the agency monitors whether the worker has borrowed money from banks, financial institutions or moneylenders? If yes, what are the repayment terms and the interest rate charged? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>

FRMB7: All workers understand the use of, and can freely access, grievance and other dispute resolution mechanisms without retaliation or reprisal. Such mechanisms must be effective and be able to provide appropriate remedies to remediate harm that has occurred.

<p>7.1</p>	<p>Consider:</p> <ul style="list-style-type: none"> • Written policy, including the procedure or process to receive, handle and manage grievances from workers or aspiring workers during the recruitment process. The review should also look at the accessibility of the grievance mechanism and the estimated time frames to process the grievance. • Records of the grievances received, including the status of the grievances. 	<p>Ask:</p> <ul style="list-style-type: none"> • If the agency has a dedicated team or staff member in charge of grievance management? • How the agency trains and monitors third parties it works with on the grievance mechanism policy? • What types of grievances have been received in the past two years? • What solutions have been provided or agreements reached to resolve such grievances? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>
<p>7.2</p>	<p>Consider:</p> <ul style="list-style-type: none"> • Any evidence, including posters, electronic mail communications, social media messages and training materials. • Reports or documents of briefing or discussions sessions such as dates, times, venues and names of attendees. 	<p>Ask:</p> <ul style="list-style-type: none"> • If the agency briefs the worker on the availability of a grievance mechanism and the procedure to raise a grievance? If yes, how is it done? • How the agency ensures that the worker fully understands the mechanism and procedure? • How the agency monitors third parties it works with to ensure that they communicate to the worker the availability of a grievance mechanism and the procedure to raise a grievance? 	<p>Strengths:</p> <p>Weaknesses:</p> <p>Improvement areas:</p>

Step 3: Scoring and decision by the SME

In step 3, the SME scores the agency to rank it. The templates below can be used to guide its decision-making process.

TABLE 6.5
Step 3: Scoring template

Criteria	Agency is fully compliant. [Score: 2]	Agency is partially compliant and shows willingness and commitment to improve. [Score: 1]	Agency is non-compliant and is unlikely to improve or shows no willingness or commitment to improve. [Score: 0]
FRMB1: The recruitment of workers takes place in a way that respects, protects and fulfils the human rights of workers.			
1.1	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:
1.2	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:
1.3	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:
FRMB2: The recruitment process complies with the applicable recruitment laws and policies, and further implements practices that promote transparency and the protection of the most vulnerable workers.			
2.1	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:
2.2	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:
2.3	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:
2.4	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:

FRMB3: No recruitment fees or related costs are charged to or in any other form borne by the workers or job seekers.

3.1

[to insert score]

Reason:

[to insert score]

Reason:

[to insert score]

Reason:

3.2

[to insert score]

Reason:

[to insert score]

Reason:

[to insert score]

Reason:

3.3

[to insert score]

Reason:

[to insert score]

Reason:

[to insert score]

Reason:

FRMB4: The terms and conditions of the worker's employment are stated clearly and in an appropriate, verifiable and easy-to-understand document (preferably through a contract or agreement). The contents of the employment document are explained to, and understood by, the worker. The worker should voluntarily enter into employment free from deception or coercion.

4.1

[to insert score]

Reason:

[to insert score]

Reason:

[to insert score]

Reason:

4.2

[to insert score]

Reason:

[to insert score]

Reason:

[to insert score]

Reason:

4.3

[to insert score]

Reason:

[to insert score]

Reason:

[to insert score]

Reason:

4.4

[to insert score]

Reason:

[to insert score]

Reason:

[to insert score]

Reason:

FRMB5: The worker's personal data are at all times protected and treated in strict confidence. The data cannot be shared with third parties without the prior informed consent of the worker or unless required by law.

5.1

[to insert score]

Reason:

[to insert score]

Reason:

[to insert score]

Reason:

5.2

[to insert score]

Reason:

[to insert score]

Reason:

[to insert score]

Reason:

5.3

[to insert score]

Reason:

[to insert score]

Reason:

[to insert score]

Reason:

5.4	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:
FRMB6: The worker's freedom of movement is at all times respected and protected. The employer shall not hold the worker's identity and personal documents (except for administering the recruitment with the relevant authorities such as to obtain approvals) and personal property (such as property documents and bank cards).			
6.1	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:
6.2	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:
FRMB7: All workers understand the use of, and can freely access, grievance and other dispute resolution mechanisms without retaliation or reprisal. Such mechanisms must be effective and be able to provide appropriate remedies to remediate harm that has occurred.			
7.1	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:
7.2	[to insert score] Reason:	[to insert score] Reason:	[to insert score] Reason:
TOTAL SCORE	[to insert total score]	[to insert total score]	[to insert total score]

TABLE 6.6

Step 3: Risk scoring, category of agency and guidance for decision

Risk Score	Category	Guidance for decision
30 – 44	Leader	Agency complies with the FRMB and has a high level of commitment. Decision: To engage the agency.
16 – 29	Room to progress	Agency partially complies with the FRMB. It has a moderate level of commitment and is attempting to improve its recruitment practices. Decision: May engage the agency subject to strict conditions and regular monitoring of its practices.
0 – 15	High risk	Agency exhibits only a low level of commitment and is unlikely to improve. Decision: To avoid engaging the agency. However, if the agency intends to be engaged, it may be assessed again in the future.

Notes

1. B. Farbenblum (2017) "Governance of Migrant Worker Recruitment: A Rights-Based Framework for Countries of Origin", *Asian Journal of International Law*, 7(1), 152.
2. For example, see (2019) General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs (https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_536755.pdf; accessed 3 March 2022), International Labour Office, Geneva: ILO.
3. For example, see the International Recruitment Integrity System (IRIS) Standard (<https://iris.iom.int/sites/g/files/tmzbdl201/files/documents/IRIS%20Standard%20Report%20.pdf>; accessed 3 March 2022), Geneva: IOM.
4. For further guidance, see J. Holliday (2020) Enhancing Standard Employment Contracts for Migrant Workers in the Plantation and Domestic Work Sectors in Malaysia (https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_749704.pdf; accessed 3 March 2022), International Labour Office, Geneva: ILO.

ACCESS TO EFFECTIVE REMEDIES FOR EMPLOYEES: AN INTERNAL OPERATIONAL-LEVEL GRIEVANCE MECHANISM

TERENCE TOO YANG-YAU

Grievance is a feeling of resentment or unhappiness over something believed to be wrong or unfair. Employees may feel that they have been poorly treated or that their rights have been infringed. Complaints of bullying and harassment, non-payment of wages, excessive work hours and discrimination are often raised. Unresolved grievances can negatively affect work productivity and open the space for even more grievances.

It is thus good practice for companies to address grievances early and resolve them directly with their workers. To this end, a company should establish and implement a communication channel through an internal operational-level grievance mechanism (OGM) for its employees to raise their concerns towards an amicable solution. Grievance mechanisms are sometimes also called worker grievance mechanisms (WGM) or complaints, redress or accountability mechanisms.

This chapter focuses on company-based non-judicial mechanisms that are faster, more efficient, and cost-effective than state-based judicial ones. Two matters are described here: first, the basic steps to establish an OGM, and second, the process to handle a worker's grievance. A company may adopt both to implement its grievance mechanism.

Importantly, it must be stressed that company grievance

mechanisms do not limit or replace access to state-based judicial remedies such as the courts, labour centres and administrative tribunals.

Features of an effective grievance mechanism

An effective OGM can remediate harm, help the company comply with its obligations, improve working conditions and workforce relations, and act as an early warning system to prevent issues from escalating.¹

An effective OGM must have the following eight criteria:²

- *Legitimate*. It must be perceived as trustworthy and accountable by those who may need to use it.
- *Accessible*. Its procedures should be kept as simple as possible, and all workers should be informed about the mechanism and understand how it works.
- *Predictable*. It should have a clear and known procedure with an indicative time frame for each stage.
- *Equitable*. The complainant should have access to sources of information, advice and expertise necessary to engage in the grievance process.
- *Transparent*. The complainant should be kept informed about the status and progress of the grievance and be allowed to monitor the implementation of any outcomes.
- *Rights-compatible*. Outcomes and remedies should be consistent with international human rights principles and laws.
- *A source of continuous learning*. Management should conduct regular reviews of the grievances raised and actions taken. Lessons learned should be used to improve the mechanism and prevent future grievances and harm.
- *Based on engagement and dialogue with stakeholders*. The OGM should be established and implemented in consultation with stakeholders to ensure that it meets their needs and will be

used. The focus of the mechanism should be on dialogue to address and resolve grievances.

Steps to establish an OGM

How is an OGM established? The diagram below sets out the steps. Some overlap each other and should be tailored to meet the company's needs.

DIAGRAM 7.1
Steps to establish an OGM³

STEP 01 | Conduct risk assessment

- Assess and understand the gaps and potential risks faced by the company (e.g. national laws, buyer requirements and human rights issues).
- This could include a HRDD assessment including internal management assessment and engagement with workers and other stakeholders.

STEP 02 | Set up OGM entry points

- Survey existing mechanisms in place for workers to raise grievances (e.g. trade union processes, on-site complaint boxes, telephone hotline, audits and online complaint forms).
- Key criteria: accessible, confidential and private.

STEP 03 | Clarify roles and responsibilities

- Nominate staff to be grievance officers who will be responsible to deal with the grievances raised. These individuals should be trusted by workers and management.
- Develop clear guidelines on how a grievance should be handled and escalated.

STEP 04 | Build staff capacity

- Train grievance officers on grievance management procedures.
- Build awareness and knowledge of workers on the OGM so that they know about the grievance mechanism and how to use it.

STEP 05 | Establish oversight mechanism

- Appoint a senior manager, or preferably a joint team of workers and management, tasked with overseeing the grievance process and working towards resolutions.
- The team should regularly meet to discuss the grievances received and responses taken by the company to resolve the grievances as well as to regularly report to senior management.

Having an OGM does not mean that grievances cannot be brought to the company's attention through informal discussions with worker committees or trade union representatives. Conversely, informal arrangements should not be a barrier for workers to raise grievances through the OGM.

Informally managing less serious matters saves time and costs. However, more severe complaints such as sexual harassment and physical abuse cannot be handled informally.

Process to handle a worker's grievance

The diagram below summarises the process a company should adopt on receiving an official complaint or formal grievance through the OGM.⁴

Here are some points to note when going through the grievance process:

A. Receive and acknowledge grievance:

- The grievance officer should provide the worker with an estimated time frame for each process stage. The time taken should be reasonable and not excessively long, depending on the nature of the grievance.

B. Initial review:

- When conducting the review, the officer should identify the key issues raised, the root causes and the possible outcomes to resolve the grievance.
- Cases that require immediate attention or reveal clear acts of criminality should be referred to senior management or law

enforcement authorities as appropriate.

C. Investigation:

- Serious cases will require the officer to conduct a more detailed investigation. Such cases are when the grievance raised involves acts of criminality, multiple parties (including external ones) or represents a repetitive or group complaint.

D. Decision and meeting:

- Once the review and investigation are completed, the officer should present the findings and proposed outcomes to the complainant.
- Parties should then discuss and agree on the outcomes for remediation.
- The complainant should be allowed to appeal any decision to senior management.

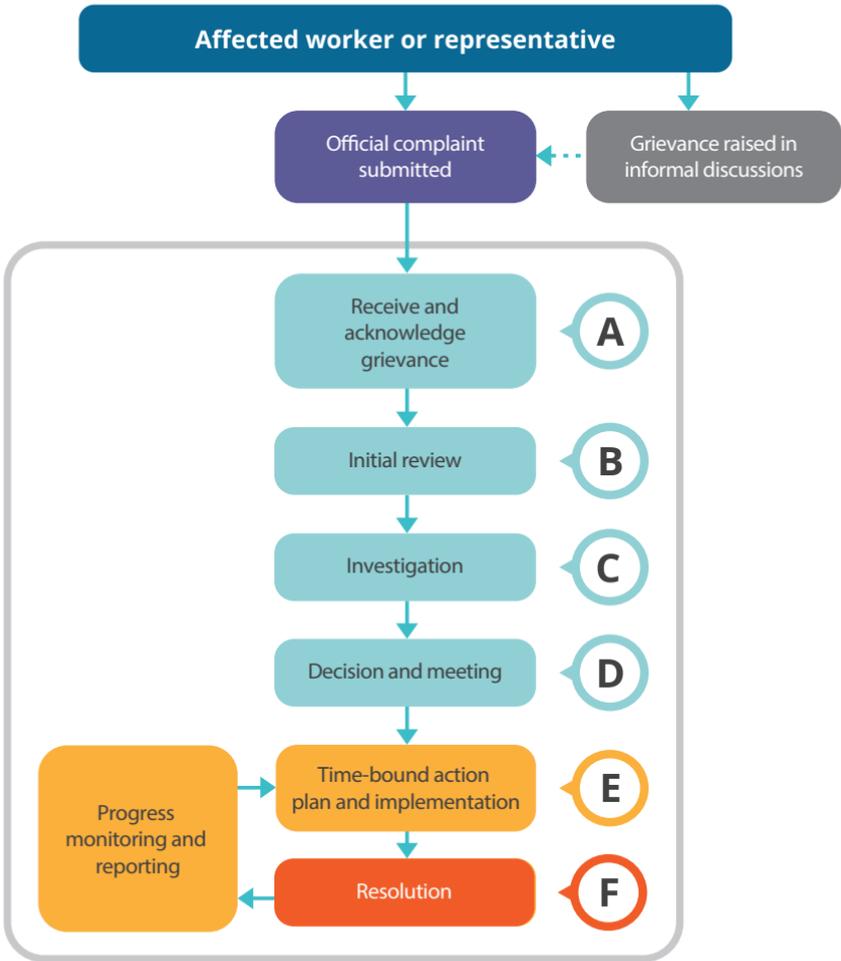
E. Time-bound action plan and implementation:

- If there is a remediation agreement, a time-bound action plan should be developed to implement the agreement. Key staff responsible for carrying out the agreement should be identified.
- The action plan should include a mechanism for regular progress monitoring and reporting.

F. Resolution:

- Once the action plan has been implemented, parties should meet and confirm that the agreed outcomes have been met.

DIAGRAM 7.2
Process to handle a worker's grievance⁵



Notes

1. See (2019) Worker Grievance Mechanisms: Guidance Document for the Oil and Gas Industry, London: IPIECA.
2. Adapted from Principle 31 of the UNGPs.
3. Adapted from (2019) Worker Grievance Mechanisms: Guidance Document for the Oil and Gas Industry, London: IPIECA and (2020) Guidance on Grievance Management: An Introduction to the Series (<https://www.proforest.net/resources/publications/guidance-on-grievance-management-an-introduction-to-the-series-14065/>: accessed 3 March 2022), Proforest and Fair Labor Association (FLA).
4. The company should put in place different ways its employees can send their grievances, such as through an employee satisfaction survey, complaints box, electronic mail communication and telephone or WhatsApp hotline. Management can also directly receive grievances through employee written representations, or by worker committees or trade unions. Increasingly, external sources such as non-governmental organisations, the press and social media users have highlighted employee grievances. Independent social audits by professionals and third parties such as business and industry organisations are often helpful for revealing employee dissatisfaction that would detail the operational issues of concern. The company should treat all grievances, complaints and reports seriously and equally. Further, it should have a clear policy of non-retaliation and non-reprisal against the complainants.
5. Adapted from (2019) Worker Grievance Mechanisms: Guidance Document for the Oil and Gas Industry, London: IPIECA and (2020) Guidance for Forced Labour Grievances (<https://www.proforest.net/resources/publications/guidance-for-forced-labour-grievances-13815/>: accessed 3 March 2022), Proforest and Fair Labor Association (FLA).

ENGAGING HUMAN RIGHTS DEFENDERS TO DO AWAY WITH STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPS): AN EXTERNAL GRIEVANCE MECHANISM

UMAVATHNI VATHANAGANTHAN

Company A is an established business of over 15 years, with several factories in the country. For years now, activists and human rights defenders have complained to the authorities that the company's operations are detrimental to the environment, but no action has been taken. Recently, water in a river close to the factory becomes black and emits a foul-smelling odour.

The community takes action. They mobilise and hold a demonstration in front of one of the factories. They make public statements about the company and demand that it stops operations. The media reports on the protest. The company still does not respond.

Subsequently, the company files a court case against the protestors for trespass, malicious falsehood and slander. It asks the court to issue an order to stop the community from making statements regarding the pollution while the case is pending in court.

Whether the company is right on the case merits or not, the court action taken would today be considered a "Strategic Lawsuit Against Public Participation" (SLAPP). It is a form of action commonly used by businesses to intimidate or silence their critics. Through SLAPPS, the courts are used to deter individuals and groups from exercising their right to freedom of expression

on matters of public interest. Most of the time, SLAPPs are filed by powerful parties against weaker actors such as community leaders, journalists, civil society organisations and human rights defenders. They are sanctioned for expressing criticisms uncomfortable to the powerful.

What can be done to reduce SLAPPs?

Court cases take time. Parties have to spend their resources paying fees to lawyers and the court. The losing party has to pay legal costs to the winning party. In an adversarial system, parties have to be confrontational to win their case. Relationships are soured. It is a zero-sum game: usually, one wins and one loses.

As such, SLAPPs should not be a matter of course or action of first resort. This chapter suggests a way to avoid initiating SLAPPs, or reduce the need for them. The aim is to manage the company's human rights risks resulting from its operations while respecting the right to freedom of speech and expression of those who have grievances against the business. It rests on the assumption that cooperation and consultative engagement between the company and the grievance raiser will benefit both sides in the long run. Joint solutions can be found more expeditiously than waiting for a court judgment that may take years.

Companies are encouraged to establish an external grievance mechanism (EGM). The EGM allows parties external to the business to raise issues and concerns about the matters that impact them. Simultaneously, the company can use the mechanism to address and monitor the adverse impacts of its operations.

As a non-judicial mechanism, the EGM must be accessible to the public, inclusive, user-friendly and effective. In consultation with stakeholders, the mechanism should be designed to provide remedies for harm already caused and prevent future harm.¹

It also ought to be seen as a platform where conversations around the grievances can be held with affected parties cordially. Used in this way and not very different from customer satisfaction surveys, the EGM acts as an essential feedback loop for the company to improve its practices.

Managing grievances through the EGM

There is no unique operating system for an EGM. It is a channel or pathway consisting of certain key steps illustrated in the diagram below that should be adopted by the company and thereafter publicised for use.

DIAGRAM 8.1

Steps to address issues and concerns raised by external parties



STEP
01

RECEIVE AND ACKNOWLEDGE CASES OR GRIEVANCES - WHETHER RECEIVED THROUGH DIRECT OR INDIRECT SOURCES.

REVIEW GRIEVANCE RAISER'S ISSUES AND CONCERNS, IDENTIFY ROOT CAUSES, AND ASSESS RISKS AND IMPACTS.

STEP
02



STEP
03

INVITE GRIEVANCE RAISER AND/OR AFFECTED PARTY TO DIALOGUE AND DISCUSS JOINT SOLUTIONS.

WORK TOGETHER WITH GRIEVANCE RAISER AND/OR AFFECTED PARTY TO AGREE ON REMEDIATION (AS APPLICABLE), AND IMPLEMENT THE AGREEMENT.

STEP
04



STEP
05

MONITOR THE IMPLEMENTATION FOR COMPLIANCE.

ADDRESS ANY DISSATISFACTION AND ENABLE APPEALS.

STEP
06



Step 1

An external grievance form may be used for complainants to file their grievances. A template for adoption is provided at the end of this chapter. However, the company should not dismiss cases or reports from unofficial channels, public sources or the media. These should

be dealt with as well.

Grievances received should be acknowledged in writing and the complainant informed about the process that will follow and the expected time frame. There should be a record of all grievances filed against the company.

Step 2

Some general questions to guide the company's assessment are as follows:

- What are the concerns being raised?
- What is the root cause of the concerns?
- Is there evidence of human rights violations or adverse impact caused by the company's operations?
- What are the measures that can be taken to address the concerns?

Step 4

Parties should agree on a time frame for implementation. Ideally, the company should continue collaborating with the complainant and the affected parties to ensure that the issues do not recur.

At all stages of the grievance process, the company should inform the complainant of any outcome in writing. Appeals should be allowed.

The manner or form the EGM takes depends on the company, but the core components should incorporate the above steps. A top-level manager should be appointed to lead the EGM and undertake the required actions.

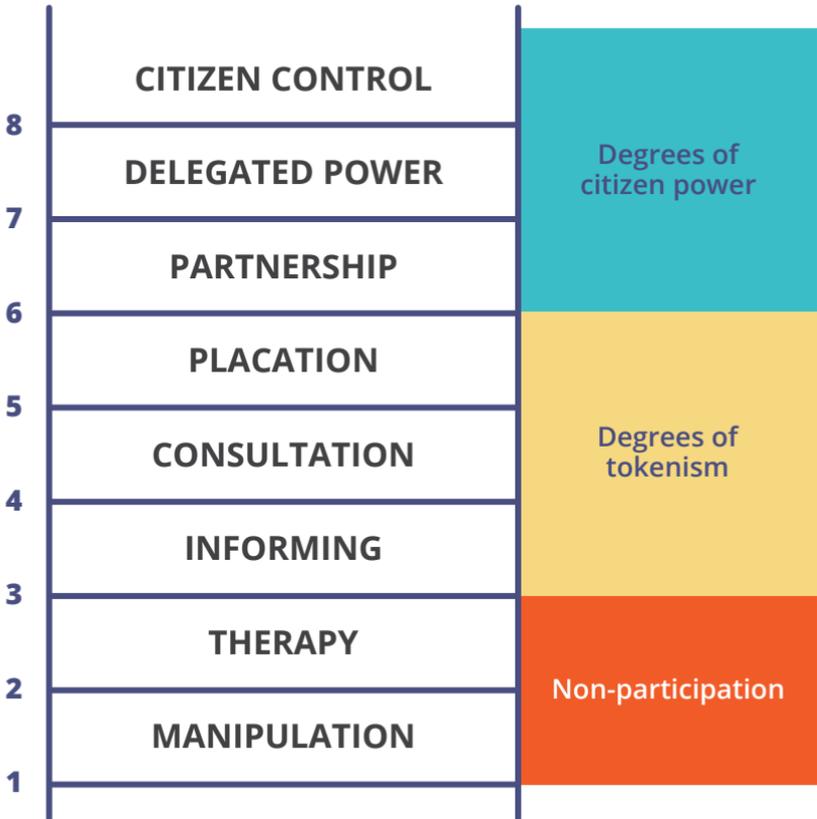
Ensuring effective participation of the complainant and affected parties

Rather than seeing them as a threat, businesses should acknowledge the role of human rights defenders as complementary to the check-and-balance system of the law and the courts. They can act as the bridge between the company and the impacted community.

Recognising the role of defenders as such requires genuine attempts at dialogue and not merely as a tick-the-box exercise.

At step 3 above, dialogue with the complainant and affected parties should proceed in an empowering way.

DIAGRAM 8.2
Eight rungs on a ladder of citizen participation²



Source: Arnstein (2019)

Citizen participation can be viewed through eight rungs on a ladder, in which the lowest rungs are “non-participation”, followed by “tokenism” in the mid-rungs of merely informing citizens and holding consultations. The top rungs represent the gold standard where

there is a true partnership and shared power with the citizens. Companies should aspire to dialogue at this top level.

TEMPLATE: EXTERNAL GRIEVANCE FORM

[Company name]

EXTERNAL GRIEVANCE FORM

Date:

1. Name of complainant:
 2. Organisation (if any):
 3. Address:
 4. Phone number:
 5. Email:
 6. Language of communication:
 7. Request for anonymity: Yes No
 8. Description of grievance:
 9. Evidence in support of grievance:
-

For office use

Date received:

Received by:

Received through:

- Letter
- Phone
- Fax
- Email
- Others

Notes

1. T. D. Olsen, B. Parsells-Johnson, L. B. Bermúdez, M. W. Behaylo and L. A. Payne (2020) Bridging the Data Gap: Exploring Pillar III and Victims' Access to Remedy (https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ARP/Olsen_Bridging_Data_Gap_January2020.pdf; accessed 15 July 2022), White Paper prepared for OHCHR.
2. S. R. Arnstein (2019) "A Ladder of Citizen Participation", Journal of the American Planning Association, 85(1), 24.

CONCLUSION: FUTURE FORWARD AND WHAT TO EXPECT NEXT

EDMUND BON TAI SOON

When I started pupillage in 1997, I recall how pupils, some lawyers and other professionals used to make fun of us who were into human rights work. When we were talking about rights for humans, they laughed. They would say: *Why do human rights? There is no money to be made. You will not be rich. How to bill the client? Does your firm allow you to do it pro bono? Human rights does not bite – it has no teeth. Human rights is useless.* When we spoke about holding companies accountable, there would be an even more disbelieving look.

Granted, the journey has not been easy. But I see the worth in the fight, and the fight has been worth it. Strangely, however, at present there are many consultants, auditors, and accountants claiming to be sustainability or ESG “experts” in offering their services. They are monetising on what was essentially a human rights-driven initiative, but without mentioning “human rights”. They charge fees for consulting with companies to draw up nicely-written sustainability reports published in glossy covers for public consumption. When once indifferent or dismissive of human rights, they have taken on the mantle of human rights champions and purveyors of its value. They take benefit from the assumption of companies and regulators that sustainability reporting appeals to consumers and is another way to market the company brand. Many others are still thinking of new ways to jump on the bandwagon to capitalise on the new, burgeoning ecosystem and cash in on it. It is big business. Something becomes a norm when significant numbers socialise and normalise it. It is

mainstreamed. While we take stock of the rather quick progress the BHR movement has made on companies, one should not lose sight of the underlying intention and ultimate goal of “sustainability” measures. Clearly, they are not to enhance profit for businesses but to ensure that people and the planet are not harmed. Minimum human rights standards must be met.

The modern human rights movement, which started in 1945 following the Universal Declaration of Human Rights (UDHR), was borne out of the necessity to stop crimes like the ones inflicted by the Nazis from happening again. It has been 77 years since then, and I have spent 24 years – almost one-third of that time – in the field, practising, living, experiencing human rights on the ground and seeing how it has expanded. There has been a raft of laws, conventions, agreements, treaties, mechanisms and institutions in benevolent attempts to expand the protection of human rights for all from the excesses of state power. Little did we conceive of the move of applying human rights to governments, to also applying human rights to businesses and corporations today.

My three years representing Malaysia on the ASEAN Intergovernmental Commission on Human Rights (AICHR) allowed me to see from an insider’s perspective how and why states are still wary about BHR, and why non-state actors are resistant to greater regulatory compliance. Unfortunately, contrary to what we hear on the outside and in the press, most of them are pushing back against the BHR agenda and are arguing that voluntary measures and self-regulation are the way forward.

So what lies ahead? Here are some thoughts, predictive in nature. They may help us focus on the things that matter, as not all of them will benefit the BHR project.

Predicting tomorrow

Binding BHR treaty

One: Many anticipate that an international legally binding instrument will sooner (rather than later) come into force to regulate the activities of transnational corporations and other business enterprises concerning human rights. It would signal a massive breakthrough in international human rights law.

The current set of guiding principles on BHR will be elevated to become enforceable duties on businesses that are justiciable in the courts. Good practices will turn into normative standards. Affected communities can sue under laws made pursuant to the treaty for adverse human rights impacts they face. It will be harder for multinationals to do business with impunity as they will owe extra-territorial obligations under international law. These obligations can be enforced against them in their home countries even as the damage done is in another jurisdiction.

BHR naming and shaming

Second: With the spread of human rights awareness being further and wider than what the BHR movement could have imagined, there will be an increase in cases regarding human rights violations (by companies) profiled in the media. Because companies are becoming more sensitive to bad publicity, more shareholders and citizens know they can hold businesses accountable for rights abuses and will speak out. Whistleblowers are going to make it their duty to leak information. Civil society organisations that are more adept at condemning egregious acts by corporations will look to support public interest litigation for rightsholders. Targeted campaigns will be run against stubborn companies. More enlightened nations will err on the side of caution and take punitive measures at the hint of violations. Goods are seized when forced labour allegations are made. Some of our region's companies had already borne the brunt of importing countries' customs regulations when their goods were stopped at the borders. BHR naming and shaming will soon be an industry in itself.

Innovation to ensure BHR compliance

Three: The trend to introduce new ways to clamp down on suspected human rights abuses will grow. Mandatory human rights due diligence will be part of states' domestic legal frameworks. National agencies will impose obligations on the reporting aspects of human rights as well as the "doing" aspects of due diligence. Failures are punishable. Unfortunately, the early mistake of well-intentioned sustainability leaders was to focus on the reporting aspects without compelling the substance. We see major businesses issuing impressive reports of their human rights alignment because the regulators require them. But this is

only the “front-end”. Dig deeper and ask about the “back-end” – the actual operationalisation of human rights due diligence and impact assessments – and we will not see much substance, if any. It is easy for resource-loaded corporations to get away with being seen as doing human rights but with little else to show for it otherwise. Perhaps, to enhance accountability, sustainability reports should in future be subject to human rights audits similar to how financial statements are checked? With the advent of more back-end compliance, we will see supply chains being asked to be more transparent and demonstrate that they are “clean” before selling their products. Lending institutions and banks will incorporate more BHR requirements before approving financial instruments and disbursements. Some projects will be off-limits. Non-governmental and business organisations will expand their reach by providing consultancy services and certifications for BHR compliance. Soon, companies can submit themselves for assessment and be issued a “human rights” certification for it.

Standards and guidance to measure BHR compliance

Four: Related to the third point above, there will be a slew of attempts to create new standards and guidance documents on BHR. We know that one difficulty with the successful diffusion of the UNGPs is the challenge of measuring human rights and the “social” component of BHR compliance. Many indicators are qualitative and not quantitative: hence, they are subjective. How do we measure that a local community consultation in the name of stakeholder engagement was “effective”? Reducing indicators into numbers to quantify the impact on people is not the same as giving a figure for emission reduction. How do we compare like with like, one company to another? We have to be a bit more precise. But if we can pass this phase, implementation will be easier. Thus, business organisations and professionals will seek to measure human rights. There will be an increase in standards, metrics, guidance notes, and accreditation initiatives. Some will have a high bar, some low, and some will be inconsistent or contradictory. While commendable as a way to extract practical and realistic results from companies, the danger of these initiatives is to detract and distract us from the real meaning of human rights and the values it brings.

Dealing with remedies and the SLAPP (Strategic Lawsuit Against Public Participation) challenge

Five: Governments will increasingly be pressured to enact laws to enhance judicial and non-judicial grievance mechanisms, including anti-SLAPP legislation. Such legislation is already available, albeit in a limited form, in Thailand, the Philippines, and Indonesia. Alternative modes of thinking are desperately required, particularly on the third pillar (of remedy) of the UNGPs. Chapter-8 in this GuideKit describes a process in the form of a grievance mechanism to encourage companies to attempt dialogue before commencing legal action. Should this be mandatory in the future? The obligation must be on the company to have some form of adequate consultation with the complainant to mitigate the need for court involvement. And if the matter has to go to court, only the narrow, disputed issues are litigated. In the larger picture, we are dealing with power differentials. Even with negotiated solutions, one cannot talk about providing sufficient remediation without addressing the question of power. The phenomena of SLAPP-type cases and having to make good adverse impacts imply an unequal balance of power in the existing state of affairs. Legislation may be the only way to balance that power.

Striking back

Six: Businesses (and governments that own them) will fight back. They will not take things lying down. Human rights will be demonised. BHR activists will be called agents of the West, and campaigners having a hidden agenda. Even as regulatory requirements increase, greenwashing will continue. BHR reporting will be of the highest quality, but without proper human rights assessments or audits, the reports are worth little on paper. There will be even more fanciful stakeholder engagements with the communities but they will continue to be cosmetic. There will be non-governmental groups with questionable credibility emerging to support particular businesses. They are either expressly or tacitly enlisted to “assist” the companies. New BHR laws will be forcefully resisted. Arguments that such laws will drive up costs and reduce productivity will be used to instil fear in the legislators.

Aligning the environment and human rights

Seven: Convergence on the environment and human rights will

emerge. Companies have always treated environmental issues independently from human rights, and they still do. Human rights in business is new to them. As such, there are gaps in how we approach compliance matters on the environment and human rights. The idea that both are integral parts of the BHR landscape found its foundation in the UNGPs. How do we incorporate human rights due diligence into existing environmental impact assessments? Or do we not, as the latter is already adequate? Do the UNGPs require a change to environmental management systems? BHR advocates are challenged to integrate human rights operationalisation into environmental issues. On this score, environmentalists and human rights activists need to speak to each other more often, and together in one voice. There is a mismatch as both disciplines have grown out of different traditions. We see science-based or legally-trained environmental experts who are not versed in human rights. On the other hand, we have human rights experts who are not trained on environmental issues. More environmental human rights experts are sorely needed. To graduate an environmental human rights expert requires the disciplines to find a common approach and to a large extent, both need to integrate and act in concert.

Language use

Eight: The term “human rights” will come out of the shadow of the “social” in ESG. BHR advocates have been careful to use the social category in ESG to demystify human rights in business. It is thought better to let human rights fall under the social to avoid frightening corporations. If BHR means anything to companies, it is said, we need to focus on “ESG risk” and call it as such. One sticking point is whether we should keep at this. Human rights is cross-cutting across all sustainability issues. The problem we face is that human rights is then seen as a sub-category, not a subject matter of its own accord. For example, when asked what is needed for human rights compliance, we are often told: Do the same for ESG and only add on “stakeholder engagement”. It is time that BHR advocates no longer be afraid of using “human rights” more explicitly and clarify its standalone requirements. Great strides for BHR will be made if we go this way. It may have been the case some time ago that people feared the words, but less today.

It is in the micro, not the macro

Though far from perfect, this GuideKit attempts to fill the void in the SMEs' literature regarding BHR compliance. It is only one of the many pathways to institutionalise human rights in business operations by making compliance a little less chunky for smaller businesses. Some of the tools are adapted from those available in the market, while others are new. Companies are always looking for consistency and convergence regarding matters alien to them. They want to take the most direct route due to capacity and resource issues. This necessitates BHR advocates to deliberate more about how companies are thinking. Having webinars to talk about the macro only introduces the subject. Implementers need the micro.

We should not return to the way things were before. We have pivoted towards the acceptance of human rights by non-state actors. Things have also changed so much. Technology has made communications faster and requires us to think of new strategies and tactics. While businesses did not previously feature as much as states did in human rights conversations, BHR has forced us to revisit the norms, institutions, and forms of participation to include and to impact corporations. Yet, many of them still operate outside the bounds of human rights. While the business sector needs to make major changes, we must consider how we approach them. What changes are needed? How do we redesign the advocacy?

We cannot soften our strive for human rights. Many naysayers have gotten human rights wrong. There will also be people who will be two-faced about the movement when the time is convenient for them. Do not lose hope. We must better equip the new generation. Who knows what the next 77 years will bring for human rights? Will the answer reveal amazement, disdain or bewilderment?

For further reading

1. (2012) My Business and Human Rights: A Guide to Human Rights for Small and Medium-sized Enterprises (<https://media.business-humanrights.org/media/documents/files/documents/SME-BHR-guide-EU.pdf>; accessed 3 March 2022), European Commission.
2. (2019) SMEs and the Responsibility to Respect Human Rights: A Summary of a Workshop with SMEs and IOE members on the UN Guiding Principles on Business and Human Rights (<https://shiftproject.org/wp-content/uploads/2020/01/index.pdf>; accessed 3 March 2022), International Organisation of Employers (IOE) and Shift.

There are now high expectations for businesses to take active steps to respect and protect human rights, while remedying any adverse impacts resulting from their operations. The United Nations Guiding Principles on Business and Human Rights (UNGPs) provides the minimum standards expected of companies, such as making human rights policy commitments, conducting human rights due diligence and impact assessments, and providing effective grievance mechanisms and remedies to redress wrongs.

However, many small and medium-sized companies (SMEs) still face difficulties in meeting these expectations. They lack the resources, practical tools and capabilities to translate and operationalise the UNGPs in their daily activities. Their legal obligations remain unclear, particularly when certain

international human rights standards have not been incorporated into domestic law.

This GuideKit contains key texts, tools and case studies focused on the environment and labour. Topics covered include human rights due diligence, environmental risk management, assessment of recruitment agencies, operational-level grievance mechanisms and engagement with human rights defenders. It aims to provide SMEs with a ready-to-use reference publication that takes a practical approach to human rights compliance. Given this, sustainability actors, corporate counsel and human resource managers in SMEs can quickly turn to the relevant chapters to adopt the steps and methods proposed as their companies continue in the journey to implement their business and human rights commitments.

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