

Assessment on State's Duty to Protect Human Rights Violations by Business Enterprises within Oil & Gas Industry (O&G)

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ABSTRACT

To date, transnational corporations (TNCs), including oil and gas (O&G) companies, have had no direct human rights obligations under international law. International law and human rights law have principally focused on protecting individuals from violations by the government. In view of the recent development, it is timely to have a look into O&G laws in Malaysia. This article presents a brief summary of basic picture of O&G industry in Malaysia. In the first part, it gives a brief introduction of historical development of O&G industry and introduction of United Nations Guiding Principle (UNGP). It also discusses on the role of PETRONAS as the appointed main regulators of O&G industry in Malaysia. It then attempts to lay down the relationship between existing legal frameworks governing the activities in the value chain of the O&G industry in Malaysia and State responsibility to protect under UNGP principle.

Keywords: Oil and gas, legislation, Malaysia, United Nation Guiding Principle, business and human rights.

INTRODUCTION

The oil and gas industry (O&G) in Malaysia is quickly moving and develop. In this manner, the government is ensuring that the legitimate structure is up to date to bolster the business and situating Malaysia as the main O&G center point in the Asia Pacific region by 2017. The development of O&G in Malaysia began in 1909 when the first discovery was made in Sarawak. Prior to 1975, Malaysia adopted concession system¹ as provided by Petroleum Mining Act 1966, where oil companies have exclusive rights to explore and produce resources.² This state of affairs ceased on 1st April 1975³ as a result of the establishment of Petroleum Development Act 1974 (Act 144) due to oil embargo by the Arab's countries in 1974. Through this Act, Petroliam Nasional Bhd (PETRONAS) was established on 6th September 1974⁴ and appointed as the national oil company (NOC) to safeguard the O&G resources.⁵ O&G companies are powerful forces capable of generating economic growth, thereby contributing to the realization of a broad spectrum of human rights.

To date, transnational corporations (TNCs), including O&G companies, have had no direct human rights obligations under international law. International law and human rights law have essentially centered on shielding people from infringement by the government. The rapid expansion of TNCs activities have prompted renewed international discourse and action over past decades to address the human rights abuses committed by companies.⁶ From the mid 1970's, various endeavours been made to manage corporate exercises as to human rights abuses.⁷ International organization such as the International Labor Organisation (ILO)⁸ and the Organization for Economic Cooperation and Development (OECD) (OECD Guidelines for

Multinational Enterprises) created codes of practice for TNCs amid the 1970s.⁹ However, the ILO and OECD codes generally seen to have fizzled in light of the fact that their prerequisites are neither legitimately tying nor successfully authorized.¹⁰ The UN Commission on Transnational Corporations was established in 1973 to draft a corporate code of conduct, but after many drafts, was dissolved in 1994.¹¹ Further efforts been made to impose obligations on TNCs such as UN Global Compact,¹² and UN Norms 2003.¹³

While trying to conquer the divisive open deliberation in regards to human rights obligations of organizations, UN Secretary General appointed John Ruggie as the UN Special Representative for Business and Human Rights in 2005.¹⁴ Ruggie's work resulted in the UN Guiding Principles on Business and Human Rights (UNGP), which he presented to the Human Rights Council in June 2011.¹⁵ The Human Rights Council unanimously endorsed the Guiding Principles, thereby creating the first global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity.¹⁶ On June 16, 2011, the Human Rights Council set up a working group to concentrate on the worldwide dispersal and execution of the Guiding Principles.¹⁷

Represented by three pillars, the UNGP grounded in recognition of State's obligation to protect and fulfil human rights and fundamental freedoms; the role of business enterprises to respect human rights; and access to remedy.¹⁸ Pillar one layouts the State's current commitments to ensure subjects against corporate human rights infringement. This requires deterrent strategies, regulations and settling. Pillar two envelops the obligations (distinct from commitments) of organizations to regard human rights. Pillar three

incorporates the commitments of States to give more noteworthy access to compelling remedy both legal and non-legal.¹⁹

Even though the UNGP consists of three main pillars, this article will only be discussing on Pillar one that is State's existing obligation to respect human rights. This is to result in an in-depth and focus analysis as whether the principles under Pillar one of the UNGP have already existed within the current legal framework for O&G industry and whether State has met its duty to protect against human rights violations.

REGULATORS AND THE INDUSTRY PLAYERS

Under the ambit of Act 144, PETRONAS has the whole possession and the elite rights, forces, freedoms and benefits of investigating, abusing, winning and acquiring petroleum whether inland or seaward of Malaysia.²⁰ The development of all petroleum resources in the country came under the responsibility of PETRONAS as per Act 144, which shall done according to commercial requirements while taking into consideration the socio-needs of the country²¹ PETRONAS is likewise has power for authorizing any outsider contractual workers wishing to partake in upstream petroleum exercises and permitting merchandise and administrations suppliers working in the upstream area.²²

From 1974 until 1978, PETRONAS only supervised its foreign partners' oil activities and did not take any role in the production of oil.²³ However, realizing the importance of oil exploration and production, the government established a subsidiary company, PETRONAS Carigali. It began its work in an oil field off the peninsula. PETRONAS retains its supervisory powers over all oil and gas ventures, particularly on issues of health and safety and environmental control.

TRACING THE UNGP PRINCIPLES WITHIN MALAYSIAN CURRENT LEGAL FRAMEWORK

The UNGP seeks to integrate human rights considerations into business-related policy-making and business operations. It provides an authoritative global framework and according to Ruggie during his presentation of UNGP, the principles underlying normative contribution of UNGP is elaborating existing standards and practices not creating new obligations. UNGP is actually a set of continuing obligations that had been compiled in a single comprehensive template and identifying where the current regime falls short and how it should be improved (U.N.Doc. A/HRC/17/31).

Pillar one of the UNGP consists of 10 guiding principles on State's obligation to protect. However, discussions in this article will be centred on GP 1, 3 and 4 because of their relevancy to the existing O&G legal framework in Malaysia.

Guiding Principle 1:

States has the obligations to protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises by taking relevant steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

Even though State are not directly responsible for any human rights abuse by third parties, failure of State to take relevant steps to prevent, investigate, punish and redress such abuse under appropriate legislations and policies may render State to be responsible for human rights abuse upon its failure to "protect and prevent." Has Malaysia legislate enough regulations to regulate the activities of O&G companies and thus prevent human rights abuse?

To properly regulate O&G industry, on 1st October 1974, Malaysia has enacted Petroleum Development Act 1974 (Act 144). Sections 2(1) and 3A(1) provides that PETRONAS has full ownership and exclusive rights to the O&G resources in Malaysia, as well as powers and privileges on upstream activities. Upstream activities consists production and exploration of oil which includes study and explore composition, structure and other physical aspects of rock formations associated with oil or natural gas deposits through geophysical prospecting and/or exploratory drilling; execute drilling and servicing of oil and gas well; and involves the operation of control system and equipment related to plant and facilities. This includes setting up, taking down, servicing the equipment and general cleanup of both onshore and offshore oil rig areas.²⁴ As such, Act 144 gave PETRONAS full control over the O&G industry. Under Petroleum Regulation 1974 (PR 1974), any business or companies intend to explore and exploit petroleum need to apply for license from PETRONAS.²⁵ Given this wide power under Act 144 and PR 1974, if, Malaysia, through PETRONAS found out that any corporation is violating human rights, it may refuse to collaborate with the said company or retract the license.

Regulation of Environmental Quality Act 1974 (Act 127) has further safeguard environment from any violation by the O&G TNC. This legislation relates to the prevention, reduction and control of pollution; and advancement of the environment.²⁶ Sections 22 to 29 of Act 127 oblige O&G TNC to obtain licenses from the Department of Environment (DOE) if their activities give rise to pollutions, such as emission of noise, emission or disposal of wastes into the atmosphere, water, or land. It is compulsory to conduct an Environmental Impact Assessment (EIA) for these kinds of activities which may give potential impact to the environment. O&G TNC are also required to propose measures to control such impact.²⁷ As such, any activities carried out by the O&G TNC is regulated by the DOE to avoid infringement of human rights by O&G TNC.

Besides, in order to safeguard the safety, health and welfare of the person at work, Malaysia has introduced Occupational Safety and Health Act 1994 (Act 514). Act 514 required the employer to secure the safety, health and welfare of persons at work, and provide protection against risks to safety or health in connection with the activities of persons at work.²⁸ The Act is applicable to all industries specified in the first schedule which includes but not limited to manufacturing; mining and quarrying; construction; agriculture, forestry and fishing; utilities: (a) electricity; (b) gas; (c) water; and (d) sanitary services; transport, storage and communication; and wholesale and retail trades.²⁹ The O&G industry that includes the petrochemical manufacturing falls under the category.³⁰ Under OSHA, companies particularly within O&G industry are required to provide safe place to work for the workers. Failure to do so may render them to be liable for violation of human rights. As such, Malaysia had successfully met its obligation under GP 1 by providing this legislation.

Labor law concerning O&G industry includes Employment Act and Workmen Compensation Act. The Employment Act 1955 provides statutory protections for workers that are enforceable in court, such as entitlements to annual and sick leave and minimum working hours and wages. Among the protections provided under this legislation are minimum days of work per month;³¹ maternity protection;³² hours of work; days off;³³ termination;³⁴ and overtime pay. This Act provides minimum protection for O&G workers. Failure of the companies to provide such protection may render them liable for violation of human rights. Therefore, obligation of States under GP 1 had been fulfilled by Malaysia by providing protection under Employment Act 1955.

Meanwhile, Workmen Compensation Act 1952 compelled the employer to insure every employee. Any employee who suffered injuries or accidents during the course of employment will be paid compensation.³⁵ Through this Act, Foreign Workers' Compensation Scheme (Insurance) Order 2005 was issued to insure foreign workers with medical insurance and to effect payment of compensation for injuries sustained from accidents during and outside working hours. Therefore, it is mandatory for the O&G companies to provide for health insurance and compensation for workers. Thus, after analyzing legislations above, it could be argued that the requirement of state's responsibility to protect under GP 1 has been met by Malaysia.

Guiding Principle 3:

Guiding Principle 3 required the State to enforce laws, regulations, and policies that required business enterprises to respect human right. In addition, State should invoke any gaps and assess sufficiency of such laws. Further, State should provide guidance for the business enterprises to carry out their activities that will not violate human rights and require business enterprises to communicate how they address their human right

impact. Having the law set down yet neglected to uphold it is regularly a huge legitimate crevice in State hone. Along these lines, it is imperative for States to consider whether the applicable laws are presently being upheld adequately, and if not, analyze why this is the situation and what measures may be received to address the issue.³⁶

Section 27 (1) of Act 127 gives that no individual might, unless authorized, release or spill any oil or blend containing oil into Malaysian waters in repudiation of the worthy conditions determined under section 21. Whoever contradicts subsection (1) might be blameworthy of an offense and should be obligated to a fine not surpassing five hundred thousand ringgit or to detainment for a period not surpassing five years or to both.³⁷ Through Section 34A of the Act 127, Malaysia obliges business to present a report containing an evaluation of the effect such movement will have or is liable to have on the environment and the proposed measures that might be embraced to avert, decrease or control the adverse effect on the environment.³⁸

In the event that the Director General favors the report, the person carrying out the prescribed activity, might give adequate confirmation that the conditions joined to the report (if any) are being agreed to and that the proposed measures to be taken to counteract, decrease or control the antagonistic effect on environment are being consolidated into the configuration, development and operation of the endorsed action.³⁹ Correspondence by business on how they address their human rights effect is imperative. A necessity to convey can be especially suitable where the way of business posture poses danger to human risk especially in O&G organizations where human rights can be abused at any phases of exercises. State consolation by putting the necessity to report under enactment are essential in cultivating admiration for human rights by business. Arguably through Section 34A Malaysia has fulfill its obligation under GP 3(d) by requiring business enterprises to "communicate" with the authorities.

Further, as had been specified above, Act 514 accommodates the security of laborer at the working environment. Where a body corporate negates any procurement of this Act or any regulation made thereunder, every individual who at the season of the commission of the offense is a chief, administrator, secretary or other like officer of the body corporate might be considered to have repudiated the procurement and may be charged mutually in the same procedures with the body corporate or severally, and each such executive, director, secretary or other like officer of the body corporate should be regarded to be blameworthy of the offense.⁴⁰ GP 3 (a) requires State to enforce law that protects human rights from abuse by business enterprise. In this regards, Section 52 Act 514 states that failure to provide protection of worker at workplace is an offence and shall be deemed guilty. Since this

legislation provides penalty for breach of the law, that empower State to enforce the law taking TNCs to court upon breaches of the Act in order to fulfill state's obligation to protect.

Guiding Principle 4:

States ought to find a way to ensure against human rights violations by business enterprises that are possessed or controlled by the State, or that get significant support and services from State agencies including, where suitable, by requiring human rights due diligence. Arguably, States-claimed or controlled business undertakings have more noteworthy intends to guarantee consistence with pertinent strategies, enactment and regulations in regards to regard for human rights.⁴¹ States ought to support and, where proper, require human rights due determination by those business endeavors. A necessity for human rights due diligence is well on the way to be suitable where the way of business operations or working connections posture huge danger to human rights.⁴²

PETRONAS has built up a Human Rights team, headed by the Group Health, Safety and Environment (GHSE) to survey existing practices and propose upgrades to important policies and procedures. A Social Performance Risk Assessment on Human Rights had been led in 2014 concentrating on a few recognized high-hazard bunches with an end goal to screen and control potential consistence dangers in their particular organizations.⁴³ As a company that is owned by the State, PETRONAS also set standards for other companies in Malaysia to follow. PETRONAS can demonstrate leadership in respecting human rights through the measures they take to address their human rights risks and impact for instance by implementing human rights due diligence or participating in multi-stakeholder activities that aim to promote corporate respect for human rights. For instance, in 2014, PETRONAS got a recompense for the Best Corporate Social Responsibility Award (CSR) Initiative at the Abu Dhabi International Petroleum Exhibition and Conference (ADIPEC) 2014 Gala Awards Dinner. This honor recognizes PETRONAS' impactful commitments towards advancing sustainable quality of life for the communities in Garraf.⁴⁴ Thus, with the establishment of PETRONAS with power to control the operation of all O&G companies in Malaysia, it is concluded that Malaysia has fulfilled its obligation under GP 4.

CONCLUSION

States have commitments to regard, secure and satisfy human rights under international human rights law. Failure by States to do as such makes extra difficulties for organizations attempting to meet their obligation to respect human rights. This article addresses a fundamental question: has Malaysian State successfully met its obligation under UNGP to protect human rights violation by O&G companies? The principal legislation

towards the development of natural gas in Malaysia is Act 144. There are other laws and regulations that make up the general framework governing O&G exploration and production. Under GP 1, State has obligation to protect human rights by regulating legislations. By examining Act 144, Petroleum Regulation 1974, Act 127, OSHA 1994, Employment Act 1955 and Workmen Compensation Act 1952, it is to be said that Malaysia has met its obligation under GP 1. GP 3 provides that State must enforce law for business to respect human rights. This article demonstrates that by enacting Act 12 and Act 514, Malaysia has fulfilled requirement under GP 3. Lastly, GP 4 obliged State to find a way to secure human rights abuse by business enterprises possessed by government. With the establishment of PETRONAS as NOC, Malaysia can control the operation of O&G companies in Malaysia by imposing relevant conditions for the O&G companies to respect human rights in order for them to obtain licenses. As such, generally Malaysia has fulfilled its obligation under Pillar one of the UNGP.

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NOTES

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