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AVAILABLE DEFENCES FOR AN OFFENCE UNDER SECTION 17A OF THE MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009

by Tiara Katrina Fuad

Since the coming into force of Section 17A of the Malaysian Anti-Corruption Commission Act 2009, commercial organisations ("**COs**") are now potentially criminally liable for corrupt acts committed by associated persons.

Subsection 17A(3) further stipulates that an offence committed by a CO is deemed to have been committed by its director, controller, officer, partner, or any other person concerned in the management of its affairs at the material time.

There are thus two ways in which this offence creates a form of vicarious criminal liability, namely:

(i) Vicarious liability on the part of the CO for acts done by associated persons; and

(ii) Vicarious liability on the part of the CO's senior management officials for acts done, albeit vicariously, by the CO.

This two-tier importation of liability means that the person who may ultimately be subject to criminal punishment under Section 17A of the MACC Act is twice removed from the act giving rise to that punishment in the first place.

The two statutory defences recognised by Section 17A are aimed at addressing the potential unfairness that may arise from these circumstances. A number of other defences are also available where the prescribed elements of the offence (whether express or implied) cannot be proved beyond a reasonable doubt. An understanding of the nature, scope, and limitations of these defences is thus crucial for all persons vulnerable to the wide-reaching ambit of this new offence.

Legal Framework of the Criminal Offence

The Predicate Offence

At the outset, it is crucial to understand that Section 17A requires proof of two distinct offences, namely, (i) proof of the corrupt act committed by the person associated with the CO (the predicate offence) and (ii) proof of the CO-related elements of the offence required to import vicarious liability under Section 17A of the MACC Act (the 17A offence).

A question that arises when formulating a defence strategy is whether the Public Prosecutor is required to obtain a conviction for the predicate offence before a conviction for the 17A offence can be successfully secured.

There are, at present, no case laws directly addressing this issue within the context of Section 17A.

Nevertheless, a similar structure exists within the context of money laundering offences, with one crucial distinction.

Before a conviction for an offence under Section 4(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activity Act 2001 ("**AMLA**") can be successfully sustained, it is trite law that the Public Prosecutor must prove, beyond a reasonable doubt, the commission of the predicate offence or the existence of circumstances leading to the same. However, a conviction on the predicate offence is **not required** to sustain a conviction for the money laundering offence. This position is expressly codified by subsection 4(4) of AMLA. In other words, the Public Prosecutor is not required to obtain a conviction for the predicate offence so long as it is able to prove, to the requisite standard, the base conditions involving the aforesaid predicate offence in the money laundering trial.

No such provision exists with respect to Section 17A of the MACC Act. The approach adopted by the courts on the issue of proof of a prior conviction for the predicate with respect to money laundering offences may thus be distinguished on this basis.

It is then apposite to consider the approach of other jurisdictions with respect to offences involving, by definition, a predicate offence.

Section 201 of the Malaysian Penal Code is *in pari materia* with Section 201 of the Indian Penal Code. This offence, in essence, criminalises causing the disappearance of evidence of an offence or giving false information touching it to screen the offender. As with Section 17A of the MACC, Section 201 of the Penal Code involves the commission of a predicate offence as well as the commission of a subsequent offence.

The Supreme Court of India in *Palvinder Kaur v State of Punjab* AIR 1952 SC acquitted the accused of the offence under Section 201 of the Indian Penal Code on the basis that the Public Prosecutor had failed to factually prove the predicate offence of murder.

The learned authors of *Ratanlal and Dhirajlal's Indian Penal Code*[1] affirmed the same position when stating that "proof of the commission of an offence (i.e., the predicate offence) is an essential requisite for bringing home the offence under Section 201 of the Indian Penal Code, 1860".

The legal consequence of adopting this approach is that a charge under Section 17A of the MACC Act must fall if the Public Prosecutor fails to prove, beyond a reasonable doubt, the commission of the predicate offence committed by the associated person. Negating proof of the alleged commission of the predicate offence would therefore constitute an implied defence to the Section 17A offence.

If the alternative approach were to be adopted, namely, that proof of a prior conviction for the predicate is required for the purposes of Section 17A, then the absence of the same would result in an acquittal, and proof of the conviction would be determinative on the question of the commission of the predicate offence.

<u>The Relevant Definitions</u>

Pursuant to subsection 17A(6) of the Act, a person is "associated" with a CO if he is a director, partner, employee of the CO, or someone who performs services for or on behalf of the CO. This latter category is not limited to those under the direct employ of the CO and could include third-party agents.

The question of whether or not a person performs services for or on behalf of the CO shall be determined "by reference to all the relevant circumstances and not merely by

[1] Ratanlal and Dhirajlal's Indian Penal Code, 34th Edn at pp. 1160-1161

reference to the nature of the relationship between him and the commercial organisation" (*see subsection 17A(7) of the MACC Act*).

The purpose of the associated person's corrupt act must be to obtain or retain business for, or an advantage in the conduct of, the business of the CO. The word "corrupt" is not defined by the Act but would highly likely include, amongst others, the substantive corruption offences in the MACC Act (i.e., the offences under Sections 16-17, 18-23).".

By virtue of subsection 17A(8) of the Act, a "commercial organisation" refers to the following:

(a) A company incorporated under the Companies Act 2016 that carries on business in Malaysia or elsewhere;

(b) A company, wherever incorporated, that carries on a business or part of a business in Malaysia;

(c) A partnership:

  (i) Under the Partnership Act 1961 that carries on a business in Malaysia or elsewhere; or

  (ii) Which is a limited liability partnership registered under the Limited Liability Partnerships Act 2012 and carries on a business in Malaysia or elsewhere; or

(d) A partnership, wherever formed, that carries on a business or part of a business in Malaysia.

Given that these definitions constitute elements of the offence, an acquittal on a charge under Section 17A ought to follow where the Public Prosecutor fails to prove beyond a reasonable doubt that:

(a) The suspected associated person is not a director, partner, or employee of the CO; and

(b) The suspected associated person does not perform services for or on behalf of the CO; or

(c) The impugned entity is not a "commercial organisation" within the meaning of subsection 17A(8) of the MACC Act.

The Statutory Defences

There are two statutory defences expressly made available by Section 17A of the MACC Act. These are where it is proved that:

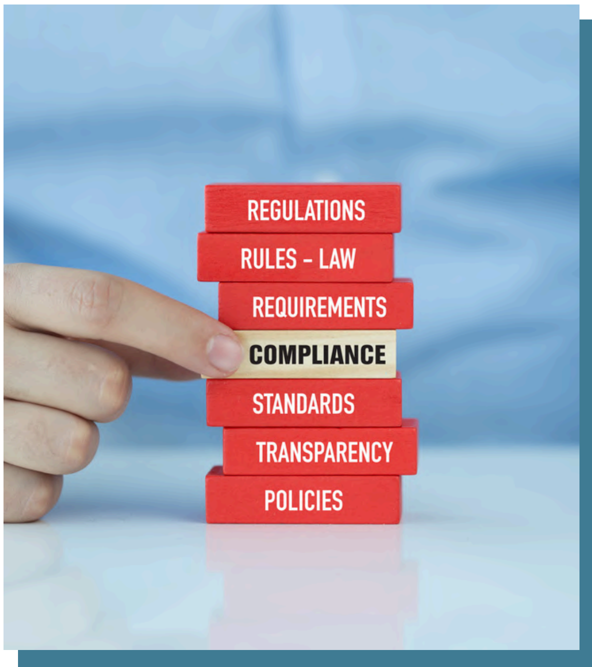
(a) The predicate offence was committed without the consent or connivance of the person facing the charge, and he had exercise due diligence to prevent the commission of the offence; and

  (*see subsection 17A(3) of the MACC Act*)

(b) The CO had in place "adequate procedures" to prevent associated persons from committing the predicate offence.

  (*see subsection 17A(4) of the MACC Act*)

It is highlighted that subsections 17A(3) and (4) of the MACC Act expressly places the burden of proof on the person facing the charge and/or the CO (as the case may be) to prove he and/or it falls within the ambit of the statutory defence. Given the trend of local jurisprudence on reverse onus clauses of a similar nature, it is highly likely that the standard of proof imposed will be



on a balance of probabilities.

The Federal Court case of *Public Prosecutor v Gan Boon Aun* [2017] 3 MLJ 12 is authoritative on this issue. Here, the apex court was tasked with determining, inter alia, whether Section 122(1) of the Securities Industry Act 1983 ("**SI Act**") violated the presumption of innocence under Article 5 of the Federal Constitution insofar as it contained a reverse onus clause shifting the burden of proof on an accused person.

Section 122(1) of the SI Act creates a statutory presumption that any offence committed by a body corporate is committed by a person who was a senior management official of the same, unless it can be proved that the offence was committed "without his consent or connivance" (which bears similarities to subsection 17A(3) of the MACC Act). The Federal Court held that this provision was constitutional and that the burden lay with the accused to prove he fell within the ambit of the statutory defence on a balance of probabilities.

An example of a successful defence under subsection 17A(3) of the MACC Act would be where it can be proved to the applicable standard that the corrupt act was actively and successfully concealed from the person facing the charge.

With respect to the statutory defence under subsection 17A(4) of the MACC Act, the Prime Minister's Department published in 2018 the "Adequate Procedures Best Practice Handbook", with a view to assisting COs to fulfill the requirements under this provision.

The Handbook identifies five guiding principles when establishing adequate procedures, otherwise known as the TRUST principles, which are:

(a) Top Level Commitment;

(b) Risk Assessment;

(c) Undertake Control Measures;

(d) Systematic Review, Monitoring and Enforcement; and

(e) Training and Communication.

In March 2021, the National Centre for Governance, Integrity and Anti-Corruption also published the "Adequate Procedure Best Practice Handbook", expanding on the five TRUST principles.

Compliance with the recommendations in these handbooks, though not conclusive, would stand as strong evidence that adequate procedures have been put in place for the purposes of Section 17A.

It is important to highlight, however, that these handbooks are not meant to be a one-size-fits-all answer to subsection 17A(4) of the MACC Act. Regard must be had to the factual matrix of the case, which includes, but is not limited to, the nature of the business of the impugned entity as well as the relevant business relationships.

It is recommended that legal advice be obtained in order to ensure any procedures put in place adequately satisfy the criminal standard required to exclude liability.

Conclusion

Section 17A of the MACC Act therefore offers a wider range of defences other than those expressly made available by subsections 17A(3) and (4). Entities vulnerable to criminal liability under the same provision would benefit from adopting a holistic strategy when formulating a defence for this offence.

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FROM BRUSSELS TO KUALA LUMPUR: UNDERSTANDING THE EU'S CORPORATE SUSTAINABILITY DUE DILIGENCE DIRECTIVE

by Joyce Ong Kar Yee & Rona Arissha

After an interesting legislative journey, the European Union ("**EU**") introduced the Corporate Sustainability Due Diligence Directive (hereinafter "**CSDDD**"), which came into effect last July. The CSDDD marks a significant milestone in the EU's broader sustainability agenda by embedding responsible business conduct into corporate due diligence processes. While the CSDDD primarily targets EU-based companies, its ramifications extend globally and is likely to affect non-EU businesses, including those based in Malaysia. The primary objective of the CSDDD is to establish due diligence obligations for companies, requiring them to identify, prevent, mitigate, or bring an end to actual or potential adverse human rights and environmental impacts arising from their operations or those of their business partners within the value chain.

Companies Subject to the CSDDD

The CSDDD targets large companies operating within the EU, as well as non-EU companies with significant operations in the EU market. It could also extend, in certain cases, to parent companies and other companies with franchising or licensing agreements in the EU, provided that these thresholds are met in two consecutive financial years:[1]

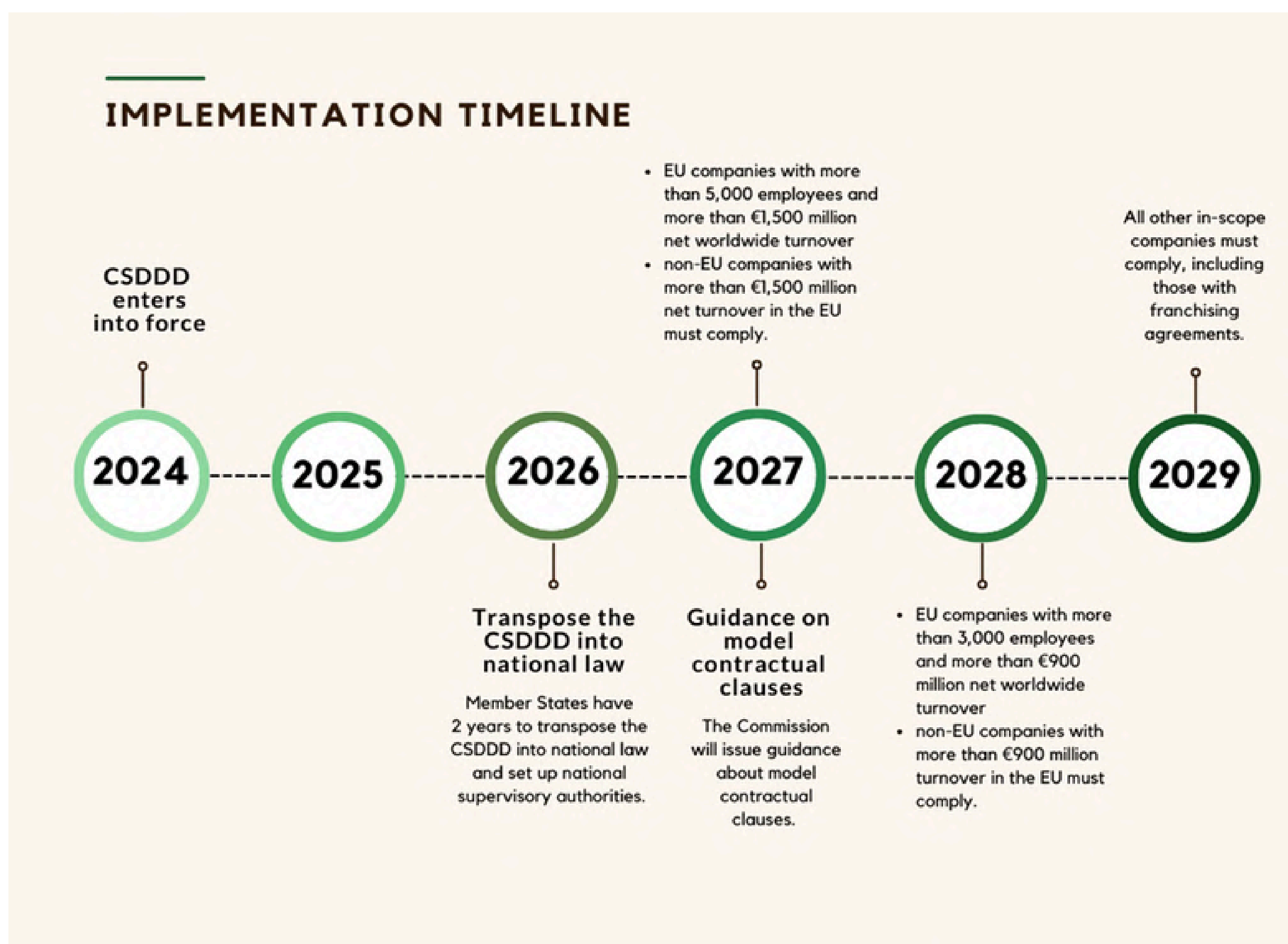
Types of Companies	Employee Threshold	Turnover Threshold
EU Companies[2]	More than 1,000 employees	More than €450 million turnover worldwide
Non-EU Companies[3]	N/A	More than €450 million turnover in the EU
Franchised Companies (EU)[4]	More than 1,000 employees	More than €80 million net turnover in the EU, and generating royalties of more than €22.5 million
Franchised Companies (Non-EU)[5]	N/A	

[1] Article 2(5) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.
[2] Article 2(1) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.
[3] Article 2(2) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.
[4] Article 2(1) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.
[5] Article 2(2) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.

The CSDDD could also extend to non-EU parent companies that, taken together as a group, meet the above thresholds. However, an exemption exists if the parent companies hold shares in their respective operational subsidiaries without engaging in management, operational, or financial decisions affecting the group, provided that one of its EU subsidiaries is designated to fulfil the parent company's obligations under the CSDDD.

CSDDD's Transposition Period

The CSDDD's entry into force on 25 July 2024 kickstarts a two-year transposition period during which EU Member States must integrate the CSDDD obligations into their national laws. The measures will become applicable in stages, based on whether the company is based in the EU, as well as its number of employees and turnover.



The CSDDD establishes minimum harmonisation, meaning Member States cannot lower the level of protection when incorporating the CSDDD into national law.[6] Likewise, national laws that provide a higher level of protection for human, employment, and social rights, as well as for the protection of the environment and climate than the CSDDD, shall prevail. Non-EU countries, such as Malaysia, should view this period as an opportunity to integrate and enhance their corporate due diligence practices and work towards mitigating their adverse human rights and environmental impacts.

Due Diligence Obligations

The CSDDD will require in-scope companies to undertake risk-based human rights and environmental due diligence to identify and assess actual and potential adverse impacts of their business and those of their business partners, including to:

[6] Article 1(2) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.

CSDDD OBLIGATIONS

1. **Article 5** Integrate due diligence into policies & risk management systems
2. **Article 6** Identify & assess actual and potential adverse impacts
3. **Article 7 - 8** Prevent & mitigate actual & potential adverse impacts and bring actual adverse impacts to an end
4. **Article 9** Establish & maintain a notification mechanism and complaints procedure
5. **Article 10** Monitor the effectiveness of company's due diligence policy & measures
6. **Article 11** Publicly communicate on due diligence

Chain of Activities

All in-scope companies are required to actively manage the actual and potential adverse impacts of their activities on human rights and environmental matters arising from:

(i) their own operations;

(ii) the operations of their subsidiaries; and

(iii) the operations of their business partners within their chain of activities.

The "chain of activities" does not include the disposal of products or the activities of a company's downstream business partners related to its services. However, it does cover the activities of a company's:

- Upstream business partners involved in production, including the design, extraction, sourcing, manufacture, transport, storage and supply of raw materials, products or parts of the products, and the development of the product or service;[7] and
- Downstream business partners involved in the distribution, transport, and storage of the product.[8]

Transition Plans

In order to align corporate activities with global climate goals, Article 15 of the CSDDD requires in-scope companies to implement a transition plan for climate change mitigation which aims to ensure, through best efforts, that the company's business model and strategy are compatible with the transition to a sustainable economy and with limiting global warming to 1.5°C, in line with the Paris Agreement.

Specifically, the transition plan shall contain:

(i) time-bound climate targets for 2030 and five-year increments up to 2050 based on scientific evidence;

(ii) a description of decarbonisation levers and key actions planned to reach the aforementioned targets;

(iii) an explanation and quantification of investments and funding supporting the implementation of the transition plan; and

(iv) a description of the role of company management in connection with the plan.

[7] Article 3(1)(g) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.
[8] ibid.

How Can Malaysian Companies Prepare

The CSDDD is expected to have significant impacts on Malaysian companies, with Malaysia being the EU's third-largest trading partner within the ASEAN region. In 2023, the EU imported goods worth €29.1 billion from Malaysia and exported €15.6 billion to the country.[9] Malaysian companies should first assess whether they fall within the scope of the CSDDD, considering the thresholds. Nevertheless, Malaysian companies that do not meet a threshold requiring compliance with the CSDDD are not necessarily in the clear. The CSDDD will have an impact well beyond the subject companies, as those companies impose heightened commercial requirements on their business partners. Hence, an assessment should also be made on where they lie in the chain of activities and how the scope of the CSDDD will impact their business relationships with both EU and non-EU companies that are required to comply with it. Companies should consider a review of existing supply chain arrangements and compare existing practices and disclosures against industry standards and best practices.[10] Next, a detailed gap analysis can be performed to identify discrepancies between current practices and the requirements of the CSDDD.[11] Once gaps are identified, a roadmap for improvement can be developed. Companies should work to establish or enhance grievance mechanisms to allow stakeholders to report concerns in relation to CSDDD compliance. These mechanisms should be accessible, transparent, and effective.[12]

Supply Chain Compliance

Ensuring that a company's entire supply chain has minimal environmental and human rights issues can be challenging for Malaysian companies. Many companies hire foreign workers for primarily unskilled jobs, while Malaysians tend to occupy semi-skilled and skilled positions.[13] Issues such as forced labour among migrant workers, including debt bondage, wage theft, and restrictions of movement, continue to persist in Malaysia. According to the "Skilled to Care, Forced to Work?" report released by the International Labour Organisation ("**ILO**") in June 2023, a survey of 1,201 domestic migrant workers revealed that 29% of migrant domestic workers in Malaysia faced forced labour conditions - a rate significantly higher than those in Singapore (7%) and Thailand (4%).[14]

However, the Government of Malaysia has plans to reduce forced labour incidences and eliminate all forms of forced labour by 2030.[15] The National Action Plan on Forced Labour ("**NAPFL**") 2021-2025, developed with technical assistance from the ILO, was introduced to prevent force labour, protect victims, ensure prosecution, and form partnerships to address this multifaceted and complex issue.[16] With increased scrutiny from the implementation of the NAPFL and the CSDDD, Malaysian companies will face heightened pressure. This will likely lead to more audits, certifications, and reporting requirements as evidence of compliance becomes increasingly necessary.

[9] 'EU trade relations with Malaysia. Facts, figures and latest developments' (European Commission) <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/malaysia_en#:~:text=Trade%20picture,%E2%82%AC11%20billion%20in%202022> accessed 25 August 2024.
[10] Article 7(3) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.
[11] Article 8 of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.
[12] Article 14 of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.
[13] Allen Ng and Tan Kar Man, 'Economic Impact of Foreign Workers in Malaysia: An Objective Review' (Khazanah Research Institute, 9 January 2019) <https://www.krinstitute.org/Views-@-Economic_Impact_of_Foreign_Workers_in_Malaysia-;_An_Objective_Review.aspx> accessed 25 August 2024.
[14] Steven Needham, 'Study highlights forced labour amongst migrant domestic workers in Southeast Asia' (International Labour Organization, 15 June 2023) <https://www.ilo.org/resource/news/study-highlights-forced-labour-amongst-migrant-domestic-workers-southeast#:~:text =Findings%20indicate%20that%2029%20per,4%20per%20cent%20in%20Thailand> accessed 25 August 2024.
[15] Ministry of Human Resources, *The National Action Plan on Forced Labour 2021-2025*, page 47 <https://mohr.gov.my/images/NAPFLFINAL/mobile/index.html> accessed 25 August 2024.
[16] ibid, page 46.

Enforcement and Penalties

EU national authorities are responsible for ensuring compliance with the CSDDD and can impose fines of no less than 5% of a company's net worldwide turnover.[17] Furthermore, the CSDDD provides claimants with the ability to seek civil remedies against companies for alleged breaches of human rights. While a company will not incur civil liability for damage caused solely by a business partner within its chain of activities, the CSDDD does provide for joint and several liability where damage is caused jointly by the company and its subsidiary, direct, or indirect business partner.[18] The CSDDD also allows for a five-year period for such actions to be brought.[19] While this may or may not directly impact Malaysian companies, the presence of monitoring and penalties serves as a deterrent for companies subject to the CSDDD. This pressure may lead companies to adopt stricter requirements to maintain or establish business relationships.

The Bigger Picture

Companies must develop robust mechanisms to trace and monitor their environmental and human rights impacts. While this will incur costs and require significant effort, meeting the obligations of the CSDDD brings its own benefits. The process of evaluating and implementing CSDDD practices ensures greater awareness of a business's negative environmental and human rights impacts. Additionally, it enhances attractiveness to sustainability-oriented investors and public procedures. The CSDDD will also draw more attention to innovation for a greener environment, naturally improving access to green financing.

For developing countries like Malaysia, companies that practice better protection of human rights and implement environmental initiatives will benefit from sustainable investment, ultimately ensuring improved and more comfortable living conditions for people. Lastly, enhanced stakeholder awareness of key sustainability issues will allow organisations to anticipate potential challenges and risks before making decisions.[20]

Closing Thoughts

The CSDDD represents a significant shift toward greater accountability in global supply chains. Malaysian companies must recognise the CSDDD's far-reaching implications, as it sets new standards for corporate activities that could impact international trade dynamics and investment patterns. While the CSDDD presents challenges, particularly in terms of compliance costs and legal risks, it also offers opportunities for Malaysian businesses to enhance their sustainability practices and improve their market positioning. Embracing this shift will not only enhance their own economic resilience but also contribute to a more sustainable future for all.

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[17] Article 27(4) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.
[18] Article 29(5) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.
[19] Article 29(3)(a) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.
[20] Article 10(2) of the Corporate Sustainability Due Diligence, Directive (EU) 2024/1760.

CLIMBING THE WAGE LADDER: UNDERSTANDING MALAYSIA'S PROGRESSIVE WAGE POLICY

by Amardeep Singh Toor & Ashreyna Kaur Bhatia

The **Progressive Wage Policy** ("**PWP**"), piloted by Malaysia in 2024, represents a significant shift in the country's approach to wage management and employee compensation. The PWP aims to address wage stagnation and enhance the living standards of Malaysian workers by introducing multiple wage floors above the minimum wage.

Wage stagnation has long been a challenge in Malaysia, despite various initiatives such as minimum wage regulations, the productivity-linked wage system, collective bargaining, and wage support schemes.[1] Recognising the need for a more impactful approach, the Minister of Economy tabled the White Paper on Progressive Wages in November 2023, estimating an implementation cost of RM2 billion to RM5 billion annually.[2]

The PWP draws inspiration from Singapore's Progressive Wage Model.[3] It sets wage floors corresponding to job specifications, training, and skill development. While Singapore enforces mandatory compliance along with a proportional wage credit scheme, Malaysia's PWP will initially operate on a voluntary basis with fixed wage subsidies.

Key Features of the PWP

The PWP is characterised by three primary features: voluntary participation, incentive support, and productivity linkage.[4]

(a) **Voluntary Participation**

Participation in the PWP pilot is voluntary. Only registered "Progressive Wage Employers" are eligible for incentives, providing flexibility for companies to prepare and adjust to increased labour costs.

(b) **Incentive Support**

Incentives are offered to encourage participation and reduce the burden of increased labour costs. Entry-level employees will receive up to RM200 per month, while non-entry-level employees will receive up to RM300 per month for 12 months. These incentives are contingent upon companies meeting specified criteria, including offering skill enhancement training for employees.

[1] https://www.thestar.com.my/business/insight/2024/06/13/wage-stagnation-and-productivity
[2] https://www.malaymail.com/news/malaysia/2023/11/30/rafizi-tables-white-paper-on-progressive-wage-policy-to-prioritise-smes-workers-paid-below-rm5000-eligible/105040
[3] https://www.mom.gov.sg/employment-practices/progressive-wage-model/what-is-pwm
[4] https://www.gajiprogresif.gov.my/

(c) **Productivity Linkage**

The PWP emphasises the link between wage increases and productivity. Participating employees must complete at least 21 hours of approved training,[5] ensuring that wage hikes are accompanied by skill development and productivity improvements.

PWP Pilot Project

The PWP pilot project will take place from June to September 2024.[6] The PWP pilot project focuses on five sectors: manufacturing, construction, wholesale and retail trade, information and communication, and professional, scientific, and technical activities.[7] Excluded sectors include public administration, defense, compulsory social security activities, and extraterritorial bodies.

The pilot project is slated to involve 1,000 companies with employees earning between RM1,500 and RM4,999. The pilot project is scheduled for evaluation in September 2024 to determine its readiness for broader implementation. There is, however, a possibility that the pilot project could be extended to June 2025.[8]

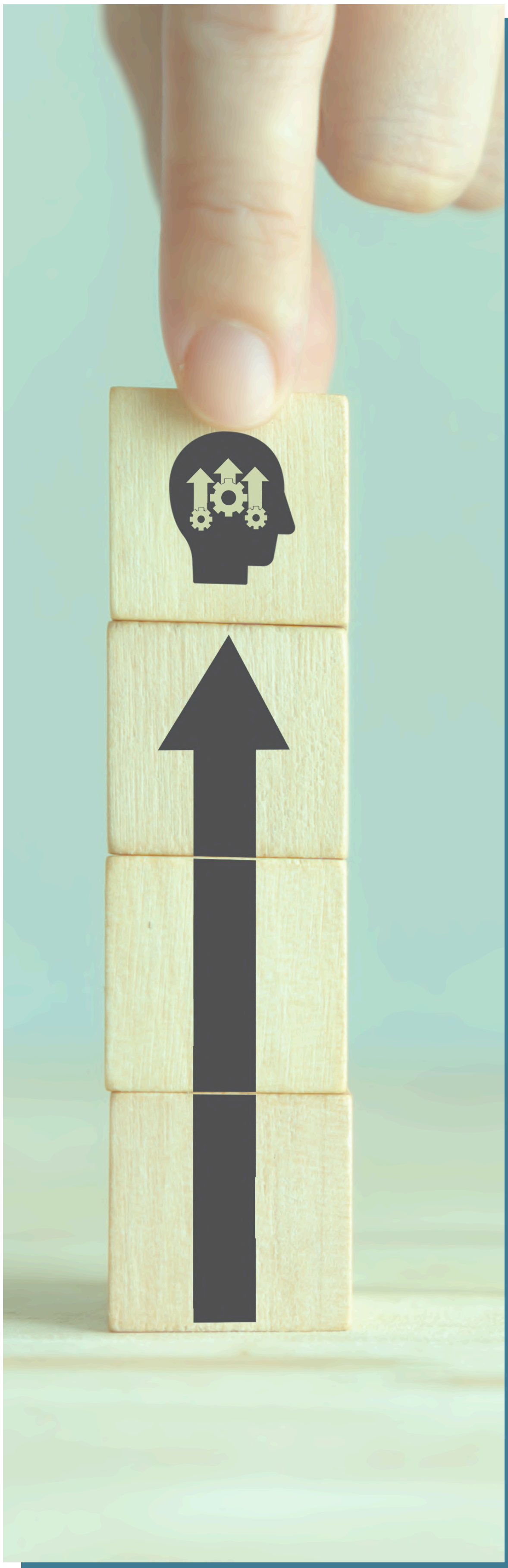
Key Considerations

The PWP aims to uplift wages for both entry-level and non-entry-level employees, aligning them with productivity growth. Employers must navigate increased labour costs, compliance requirements, and the need for continuous training and skill development. Financial planning, strategic workforce management, and leveraging government support programmes will be crucial for successful implementation.

The government's exit strategy for the PWP aims to avoid long-term dependence on incentives, focusing on evaluating the programme's effectiveness and financial sustainability. Should the PWP fail to deliver the anticipated productivity gains and companies struggle to absorb the increased labour costs without corresponding subsidies, significant financial strain may arise. Businesses could be compelled to undertake cost-cutting measures to stay afloat. This could include retrenchment to reduce operational expenses - impacting job security and potentially exacerbating unemployment issues. The success of the PWP is thus crucial in determining whether it will lead to job preservation through enhanced productivity or necessitate retrenchment due to financial challenges.

Companies implementing the PWP may encounter resistance from trade unions. Disputes could arise over the interpretation and implementation of the PWP. The PWP may introduce challenges during collective bargaining and could lead to trade disputes. Companies with unionised workforces will need to navigate the complexities of incorporating PWP provisions into existing collective bargaining agreements. This process could be intricate and contentious, as both parties strive to balance the PWP's requirements with existing terms of employment contracts. Ensuring that the PWP is effectively integrated into these agreements without compromising other negotiated benefits will

[5] https://www.linkedin.com/posts/rafiziramli_the-implementation-of-the-progressive-wages-activity-7199591861160722433-kKUF/
[6] https://www.nst.com.my/news/nation/2024/05/1054287/updated-1000-employers-participate-progressive-wage-policy-pilot
[7] https://www.nst.com.my/news/nation/2024/05/1054287/updated-1000-employers-participate-progressive-wage-policy-pilot#:~:text=He%20said%20companies%20from%20five,participate%20in%20the%20pilot%20project.
[8] https://www.thestar.com.my/news/nation/2024/06/06/progressive-wage-policy-pilot-project-may-be-extended-till-june-next-year-says-hr-minister



require careful negotiation and a collaborative approach to avoid potential conflicts and disruptions in labour relations.

The introduction of the PWP may also lead to claims of constructive dismissal.[9] Constructive dismissal could arise under the PWP if employees perceive that increased productivity demands and mandatory training alter their job roles and responsibilities substantially or drastically, such that the same may amount to fundamental change in the terms of their employment.

Conclusion

Malaysia's PWP represents a bold step toward enhancing employee compensation and productivity. As the pilot project unfolds, continuous evaluation and adaptation will be critical to ensure the policy's long-term success and sustainability. Employers must therefore navigate the implementation of the PWP cautiously, ensuring transparent communication and involving employees throughout the transition process. Providing adequate support, clear explanations of the policy's benefits, and addressing any concerns proactively will help mitigate any legal risk.

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[9] "Constructive dismissal" refers to an act of an employee in terminating his employment due to a breach of contract committed by the employer. The breach committed must have been so severe that it had altered the essential terms of an employee's employment contract, leaving the employee no choice but to resign.

DIFFERENT RATES FOR MAINTENANCE CHARGES IN STRATIFIED MIXED DEVELOPMENT: YES OR NO?

by Ho Ai Ting & Preveena Ravindra Kumar

The Strata Management Act 2013 ("**SMA**") is the key legislation in Malaysia governing the maintenance and management of stratified properties. One of the topical issues that arises in the maintenance and management of stratified mixed developments is whether the SMA allows the imposition of different rates for maintenance charges and contribution to the sinking fund in stratified mixed developments comprising parcels for different purposes, i.e., residential and commercial.

The above question was addressed by the Court of Appeal in *Aikbee Timbers*[1], where it was held, among others, that different rates for maintenance charges and contribution to the sinking fund may be imposed by the property developer during the preliminary management period, and by the management corporation during their management period, in a mixed development that comprises parcels serving significantly different purposes.

Salient Facts

Aikbee Timbers Sdn Bhd ("the **Developer**") is the owner and developer of an integrated development project known as Pearl Suria – Menara Pearl Point 2 ("the **Development**"). The Development includes a mixed development consisting of Pearl Suria Residence, Pearl Suria Shopping Mall owned by the Developer, and a car park block owned by Sit Seng & Sons Realty Sdn Bhd ("**Car Park Owner**").

During the preliminary management period, the Developer had imposed different rates per share unit for the residential and commercial parcels. It was later resolved at the first annual general meeting of the management corporation of Pearl Suria ("**MC**") that the rates for maintenance charges for the residential parcels would be increased, whereas the rates for the commercial parcels would remain unchanged. Yii Sing Chiu, a parcel proprietor in Pearl Suria Residence, who had objected against the resolution but was outvoted, filed an Originating Summons ("**OS**") seeking a court determination on '*whether it was lawful of Aikbee, previously, and the management corporation of Pearl Suria, to require residential parcel owners in the building to pay higher maintenance charges and contributions to the sinking fund than the commercial parcel owners*'.

The High Court, in allowing the OS, ruled that the '*rates must be the same whether it was an apartment parcel or commercial parcel*'. The High Court also ruled that '*on the true*

[1] *Aikbee Timbers Sdn Bhd & Anor v Yii Sing Chiu & Anor and another appeal* [2024] 1 MLJ 948. This Court of Appeal's decision is final as a parcel owner's application for leave to appeal to Federal Court was dismissed on 19.3.2024.

construction of the relevant provisions of the SMA, the Strata Titles Act 1985, the Housing Development (Control and Licensing) Act 1966, the Housing Development (Control and Licensing) Regulations 1989, the imposition of different rates for maintenance charges and contribution to the sinking fund imposed by Aikbee was therefore unlawful, null and void'. Dissatisfied with the said decision, the Developer, the MC, and the Car Park Owner pursued their respective appeal to the Court of Appeal.

Section 60(3) of the SMA & "Significantly Different Purposes" Test

There were two main issues on appeal:

(a) '*Whether the developer could impose different rates of charges for residential parcels as opposed to the commercial parcels for the payments of the maintenance charges and contribution to the sinking fund during the preliminary management period?*'

(b) '*Whether the MC is entitled under the law to fix different rates of maintenance charges and contribution to the sinking fund for parcels which are different in nature or purpose?*'

This article focuses on the second question, which examines the application and parameters of Section 60(3) of the SMA and the "significantly different purposes" test.

The MC is a body corporate with perpetual succession and a common seal[2]. It is settled law that a body corporate created by statute may only exercise the powers conferred on it by statute[3]. The SMA provides a clear framework for the apportionment of maintenance charges and sinking fund contributions in a stratified development.

Sections 50, 52, 60, 61, and 62 of the SMA confer statutory power on the developer or the MC, as the case may be, to impose charges for maintenance and contributions to the sinking fund. In a similar vein, Sections 58(c) and 59(b) of the SMA empower the MC to decide whether to confirm or vary any amount determined as maintenance charges, and to determine and impose such charges.

The answer to the second question lies in Section 60(3) of the SMA, particularly subsection (b), which reads:

> *"60 Maintenance account of the management corporation*
> *(1) ...*
> *(2) ...*
> *(3) Subject to Section 52, for the purpose of establishing and maintaining the maintenance account, the management corporation* ***may at a general meeting****:*
>
> *(a) determine from time to time the amount to be raised for the purposes mentioned in* subsection 50(3)*;*
>
> *(b)* ***raise the amounts so determined by imposing Charges on the proprietors in proportion to the share units or provisional share units*** *of their respective parcels or provisional blocks, and the management corporation* ***may determine different rates of Charges to be paid in respect of parcels which are used for significantly different purposes and in respect of the provisional blocks****; and*

[2] Section 39(2), Strata Titles Act 1985
[3] *Sungei Wang Plaza Management Corp v Leong Soo Nyean* [2019] MLJU 158

> (c) *determine the amount of interest payable by a proprietor in respect of late payments which shall not exceed the rate of ten per cent per annum …"* (emphasis added)

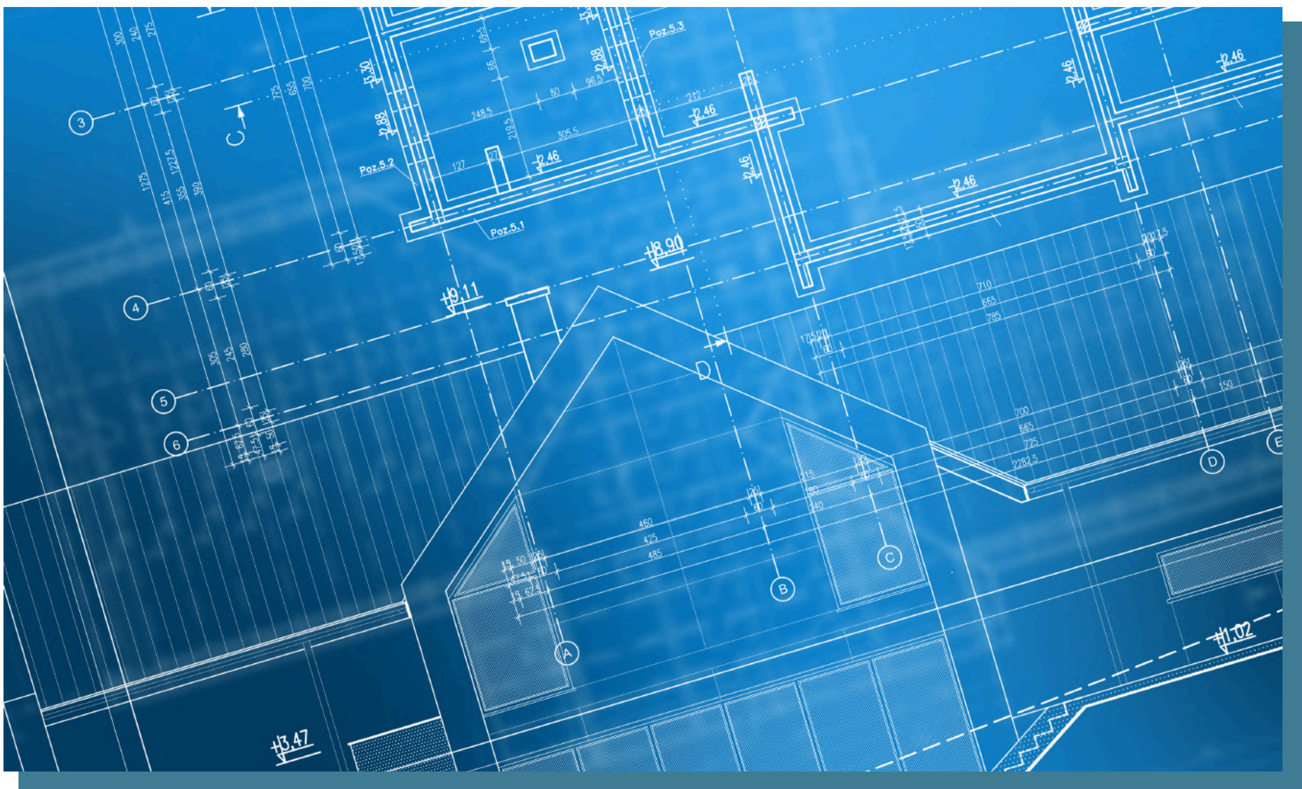
A plain reading of Section 60(3)(b) of the SMA suggests that the MC has the power to determine and impose different rates of maintenance charges for parcels used for significantly different purposes. However, the provision does not explicitly specify the nature or type of "purposes" for consideration thereunder, and it does not explain what satisfies the '***significantly different***' threshold.

The interpretation of Section 60(3) of the SMA was considered by the High Court in *Sodalite Sdn Bhd v 1 Mont' Kiara*[4]. The High Court held at Paragraph [10]:

> "*Based on the plain reading of Section 60(3) of the Strata Management Act 2013, I am of the view that the said provision indicate that the MC has powers to differentiate the different type of charges to be imposed on proprietors subject to the condition that the said power must not exceed the two limitations above. The said charges must be proportional to the share units of each parcel and if any different rates are to be applied it must be shown that these parcels are used for significantly different purposes*."

Also, in SCP Assets v Perbadanan Pengurusan PD2[5], the High Court, at Paragraph [66], examined the phrase "*parcels which are used for significantly different purpose*" in Section 60(3) of the SMA and provided several interpretations, including:

> (a) *"the use for different purpose can mean different category of land use, such as "commercial", "industrial", "residential"*
>
> (b) *the use for different purpose can mean a change in the use of the parcel subsequent to the original use when the parcel was completed and originally used;*
>
> (c) *the different purposes for the use of parcels in a mixed development according to the original intent and purposes of the design in the development, although there is no change in the purpose of use by the parcel owners subsequent to the completion of the development project;*
>
> (d) *the "significantly different purposes" can be interpreted to mean the other parcels being used for significantly different purpose as compared with the provisional block."*



[4] *Sodalite Sdn Bhd & Ors v 1 Mont' Kiara and Kiara 2 Management Corp & Ors* [2021] 12 MLJ 116
[5] *SCP Assets Sdn Bhd v Perbadanan Pengurusan PD2* [2021] MLJU 623

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Key Findings by the Court of Appeal

The Court of Appeal answered the second question in the affirmative. The Court acknowledged the specific powers granted to the MC by the SMA, which include the ability to impose varying maintenance charge rates for different types of parcels.

The Court of Appeal made the following key findings:

(a) Where a building is subdivided into parcels with separate strata titles, and the parcels are used for more than one type of purposes (i.e., parcels for residential purpose and parcels for commercial purpose within a single development), the management corporation is permitted by law to charge different rates for parcels that are used for significantly different purposes.[6] The Court recognised the use of the parcels for residential purpose is significantly different from those used for commercial purposes (mall and car park).[7]

(b) The interpretation by the High Court that the purpose of the parcel concerned must go through a significant change from its original purposes before the MC can impose different rates was erroneous. The SMA makes no mention of the prerequisite for a change in the original purpose.[8]

(c) Different rates are allowed to be imposed for parcels in relation to a subdivided building that are used for significantly different purposes.[9] This is consistent with Section 65 of the SMA 2013, read together with Section 17A of the Strata Titles Act 1985, which anticipates that different chargeable rates can be imposed[10].

(d) The test for determining chargeable rates, or different chargeable rates, as the case may be, is 'just and reasonable'[11]

Our Thoughts

Aikbee Timbers gives certainty that a property developer, during the preliminary management period, and later a management corporation, may impose different rates for maintenance charges in a single stratified mixed development that comprises parcels serving significantly different purposes, as long as the differentiation is "just and reasonable". In our view, this approach is sensible and promotes harmonious strata living as it ensures fair and proportionate allocation of maintenance costs among different types of parcel owners having regard to its understandable varying usage, benefits, and enjoyment.

For completeness, it is worth noting that, with regard to the power of a joint management body, the Court of Appeal's decision in *Muhamad Nazri bin Muhamad v JMB Menara Rajawali*[12] remains good law to-date, that the joint management body, as an interim body, can only determine 'one uniform maintenance charge' applicable to all parcel types based on the relevant provisions of the SMA.

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[6] Para [67]
[7] Para [79]
[8] Para [76]
[9] Para [65]
[10] Para [80]
[11] Para [84]
[12] *Muhamad Nazri bin Muhamad v JMB Menara Rajawali & Anor* [2019] 10 CLJ 547

ADMISSIBILITY OF DOCUMENTS CLASSIFIED UNDER THE OFFICIAL SECRETS ACT 1972

by Mong Chung Seng & Medha Ong Ann Ting

In Malaysia, the use and dissemination of secret official information relating to the affairs of the state, national security, or diplomatic relations is governed by the Official Secrets Act 1972 ("**OSA**"). Generally, under the OSA, any document, information, or material deemed by the government to be an official secret is protected from public disclosure.

However, there are instances when parties may have to rely on a document which is classified as an official secret under the OSA in court proceedings.

In this article, we will discuss the court's approach in dealing with admissibility of classified documents as evidence in legal proceedings.

What is an Official Secret?

An official secret[1] is defined as:

(a) Any document specified in the Schedule of the OSA, namely:

> *"Cabinet documents, records of decisions and deliberations including those of Cabinet committees;*
>
> *State Executive Council documents, records of decisions and deliberations including those of State Executive Council committees;*
>
> *Documents concerning national security, defence and international relations."*

(b) Any information classified as "Top Secret", "Secret", "Confidential", or "Restricted" by a Minister, the Menteri Besar, or the Chief Minister of a State, or by any public officer appointed under Section 2B of the OSA.

Offences under the OSA

Section 8(1) of the OSA[2] provides that it is an offence for any person who has in their possession or control any official secret to:

(a) Communicate, directly or indirectly, any such information to any foreign country without authority;

(b) Uses any such official secret for the benefit of any foreign country without authority, or in any other manner prejudicial to the safety or interests of Malaysia;

(c) Unlawfully retain possession or control of any such information; or

[1] Section 2(1) of the OSA
[2] Section 8(1) of the OSA

(d) Fail to take reasonable care of, or conduct themselves in a way that endangers the safety or secrecy of, any such official secret.

A person who commits an offence under the OSA may be liable to imprisonment and/or a fine, depending on the nature and circumstances of the offence.

Court's Power to Determine the Admissibility of a Document Classified under the OSA

There is no absolute bar to the production of a document classified under the OSA as evidence in court. The court has the power to determine the admissibility of such document. In *BA Rao & Ors v Sapuran Kaur & Anor*[3], the Federal Court held that it is the court, not the executive, that ultimately determines whether there is a real basis to claim that the affairs of the state are involved before preventing its disclosure.

A similar approach was taken by the High Court in *Takong Tabari (Suing in her personal capacity and as the Administratrix of the Estate of Jeffery Satuk Gabar-Deceased) v Government of Sarawak & 3 Ors*[4]:

> *"… it must be recognised that the **issue of admissibility of any piece of evidence in a Court of law in this country comes mainly within the purview of the Evidence Act 1950**. I find nothing expressed or implied that the Act ("**OSA**") should be taken as a statute governing admissibility of evidence.*
>
> ***In my view the Act ("OSA") deals mainly with the prevention of unauthorised disclosure of official secrets and thus created offences for any such infringement. I do not think it is intended to be used to avoid any liability or to defeat any claim** regardless of the culpability of the party relying on it. It is obvious that the primary goal of the Act is to protect classified documents or information which by such disclosure would be detrimental to the national security or public interest."*
>
> *[Emphasis added]*

In short, even if a document has been classified as an official secret, it does not mean that the document will be automatically or completely excluded from being produced as evidence in court. This approach was also adopted by the High Court in *Rotta Research Laboratorium SPA & Anor v Ho Tack Sian & Ors*[5].

Factors Considered by the Court

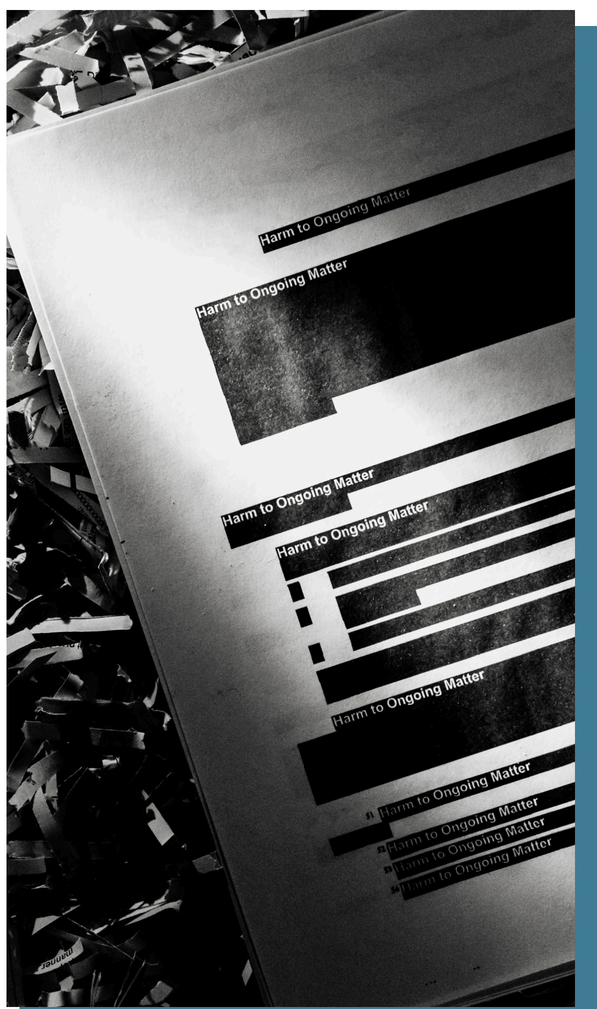
When an objection to the admissibility of a classified document is raised, the court would consider whether there is a real basis to contend that the document concerns the affairs of the state or national security. In determining the admissibility of such document, the court will have to strike a balance between the public and private interests. While the protection of national security and public interest is paramount, the principles of justice and transparency must also be upheld.

Therefore, the party objecting to the production of a classified document will need to demonstrate that the classified information or document falls within the ambit of the types of information or documents specified in the Schedule of the OSA, namely the affairs of the state, Cabinet documents or deliberation, or documents concerning national security, defence, and international relations.

[3] [1978] 2 MLJ 146
[4] [1995] 1 CLJ 403
[5] [2015] 4 MLJ 223

The court would typically consider the reasons for classifying the information or document as an official secret. For instance, in the case of *Norhayati Mohd Ariffin v Mohd Russaini Idrus*[6], the High Court found that in classifying the special task force report as an official secret, the officer did not provide any basis for arriving at his decision. The High Court held that any explanation subsequently given by the officer in affidavit to oppose the production of the report in court was "merely elucidatory".

Recently, in *Federal Land Development Authority & Anor v Tan Sri Haji Mohd Isa Bin Dato' Haji Abd Samad & 20 Ors*[7], the High Court ordered the production and use in court of a report prepared at the instruction of the Prime Minister's Department in relation to a land development project, which had been classified as an official secret under the OSA. In ordering the production of the report, the court held that the classification of the report under the OSA does not ipso facto preclude its production in court, and that the report should be produced as it was relevant and necessary to assist the court in determining the issues at trial.



Ancillary Orders

In allowing a classified document to be produced and admitted as evidence, the court may issue protective or ancillary orders to restrict access to it, limiting its availability only to authorised parties and ensuring that it is not disclosed to the public. In appropriate cases, there may be a need to protect the confidentiality of these documents. Examples of the ancillary orders include:

(a) An order that the classified document be sealed and kept in the chambers of the judge, with only the judge having access to and being allowed to view the document;

(b) An order limiting disclosure of the classified document only to the parties involved in the proceedings;

(c) An order allowing the classified document to be used only for the purposes of the proceedings;

(d) An order for the redaction of sensitive information in the classified document before the production of the document in court.

Conclusion

In conclusion, earlier decisions of the court show that there is no absolute bar to the production of a classified document as evidence in court. Whether such document can be produced will have to be considered on a case-to-case basis.

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[6] [2023] 9 CLJ 304
[7] Grounds of Judgment dated 22.8.2024 in KLHC Suit No.: WA-22NCvC-843-11/2019

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ESG LITIGATION: A PRIMER

by Hoi Jack S'ng & Tiffany Low Jia Qi

Environmental, Social, and Governance ("**ESG**") considerations have gained substantial traction in recent years, influencing corporate strategies and investment decisions. Alongside this surge is the emergence of ESG litigation as a significant area of legal development. This article explores recent trends in ESG litigation, beginning with the notable *Woodpecker* case in South Korea, followed by an examination of other international cases and an analysis of their implications for Malaysia's evolving legal landscape.

Global Rise of ESG Litigation

ESG litigation is on the rise globally, targeting both corporations and governments. A significant portion of these cases stems from legal activism, often driven by charitable organisations aiming to scrutinise a company's ESG performance and compliance with regulations. As consumers, regulators, and investors seek to hold companies accountable for their claims about environmental and social impact, there has been a surge in corresponding litigation and enforcement actions, due to the increased awareness and heightened scrutiny of ESG-related issues and the third-party litigation funding.[1]

At its core, ESG litigation refers to legal actions against corporations based on their environmental impact, social practices, and governance structures. ESG litigation can arise from a wide array of disputes, including:

- **Environmental Issues**:

  Violations of emissions standards, deforestation, pollution, and failure to meet climate commitments.

- **Social Concerns**:

  Human rights abuses, labour law violations, or discriminatory practices in the workplace.

- **Governance Failures**:

  Failure to meet transparency requirements, engagement in corruption or false reporting, or violations of fiduciary duties to shareholders.[2]

In 2023, over 230 new climate-related lawsuits were initiated. Many of these cases aimed to hold both companies and governments accountable for their climate commitments. However, the growth in the number of new cases slowed compared to previous years, possibly indicating a strategic shift toward concentrating litigation efforts on areas expected to yield a more significant impact.[3]

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[1] https://www.reuters.com/legal/legalindustry/how-litigation-funding-drives-progress-esg-agenda-2023-06-30/#:~:text=Litigation%20funding%20%E2%80%94%20the%20payment%20by,increase%20access%20is%20to%20justice.
[2] https://www.ibm.com/topics/environmental-social-and-governance
[3] https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2024-snapshot/

The *Woodpecker* Case: A Landmark Decision

In 2022, the *Woodpecker* case, being the first of its kind in Asia, became a pivotal moment in ESG litigation. The claim, brought by 62 babies and young children as plaintiffs, named an embryo as the lead plaintiff. They argued that South Korea's legally binding climate commitments were insufficient and unmet, violating their constitutionally guaranteed human rights.

Background

In 2021, South Korea made a legally binding commitment to reduce carbon emissions by 290 million tons by 2030 and to achieve net-zero carbon emissions by 2050. To meet this goal, the country needs to reduce emissions by 5.4%each year starting in 2023; however, they have so far failed to meet this target.

The claim is partially based on the Enforcement Decree of the Carbon Neutrality Act ("**Enforcement Decree**"), which requires South Korea's Nationally Determined Contribution ("**NDC**") to be set at 40% by 2030, compared to levels measured in 2018, as stated in Article 3, Paragraph 1 of the Enforcement Decree. The plaintiffs argue that Article 3(1) of the Enforcement Decree violates their constitutional rights.According to the plaintiffs, this target is insufficient to protect their lives and safety from climate disasters and is not aligned with the Paris Agreement. Consequently, the plaintiffs requested a constitutional review of the target set under the Enforcement Decree.

This case was merged with two other cases that went against the current NDC and its implementation plan.

Court's Decision

On 29 August 2024, South Korea's Constitutional Court ruled that much of the country's climate goals were unconstitutional, marking a landmark victory for young environmental activists. The court ruled that the government's limited climate targets violated the constitution, as they did "not sufficiently protect the basic rights of the people".

As a result, the National Assembly and the government of the Republic of Korea must now revise regulations related to the Framework Act on Carbon Neutrality and set new greenhouse gas reduction goals that consider the rights of future generations.

Implications of the *Woodpecker* Case

The trailblazing *Woodpecker* case may inspire similar litigation across the region. Other countries may look to this case as a precedent for holding governments accountable for environmental failures. This could lead to a wave of climate-related lawsuits in Asia, fostering a more robust legal framework for environmental protection.

The case also had the effect of heightening public awareness about the intersection of climate policy and constitutional rights. It has galvanised young activists and civil society organisations, encouraging them to advocate more vigorously for climate justice. This increased engagement could potentially lead to a more informed citizenry that demands accountability from both corporations and governments regarding their environmental practices.

While the primary focus of the case was on governmental obligations, it is foreseeable that it would also have implications for corporate accountability. Companies operating in South Korea, and across Asia, will likely face increasing scrutiny regarding their contributions to carbon emissions and their alignment with national targets. This could result in more robust ESG reporting and a greater emphasis on sustainability practices in the corporate sector.

As the global community grapples with the urgent need for climate action, the legal principles established in this case could inspire a new wave of advocacy and reform, prioritising the protection of future generations and the planet.

Indonesian Youths and Others v Indonesia

Of note in the region is an ongoing case filed in 2022 by 13 children, youth, and members of vulnerable groups from different parts of Indonesia, all of whom allege that they are affected by the Indonesian Government's response to climate change.[4]

Other Examples or Categories of ESG Litigation

1. Royal Dutch Shell (2021): A Climate Accountability Case

In a landmark ruling in 2021, the Hague District Court in the Netherlands ordered Royal Dutch Shell to reduce its carbon emissions by 45% by 2030, compared to 2019 levels. This decision stemmed from a lawsuit filed by the environmental group Milieudefensie, which argued that Shell's emissions were contributing significantly to climate change.[5]

This decision establishes a significant precedent for climate-related litigation globally and highlights the growing legal demands placed on corporations to match their business models with global climate goals.

The case is pending appeal.

2. ClientEarth (2023): A Derivative Action Case

Following the Royal Dutch Shell ruling, ClientEarth, which held shares in Shell Plc and was therefore a member of Shell, applied for permission to bring a derivative claim against Shell's directors under Section 260 of the Companies Act 2006. The claim concerned Shell's climate change risk management strategy and its response to the Royal Dutch Shell ruling.

In 2023, the United Kingdom High Court dismissed ClientEarth's application for permission on the grounds that it does not show a prima facie case for granting permission.[6]

The dismissal highlights the difficulty in holding corporate boards accountable for ESG-related risks. It shows that plaintiffs face challenges in meeting the high legal standards required to prove breaches of fiduciary duty in ESG cases. However, this does not deter future ESG litigation, rather it emphasises the need for stronger legal strategies. The case may also prompt regulators to clarify corporate directors' responsibilities regarding climate and ESG risk management.

[4] https://climatecasechart.com/non-us-case/indonesian-youths-and-others-v-indonesia/#:~:text=The%20complaint%20alleges%20that%20Indonesia,the%20right%20to%20food%20and
[5] https://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/ / https://www.vizibl.co/blog/shell-faces-new-round-of-esg-litigation
[6] https://climatecasechart.com/non-us-case/clientearth-v-shells-board-of-directors/

3. TotalEnergies (2022): A Human Rrights Case

In March 2022, Greenpeace France, Friends of the Earth France, and Notre Affaire à Tous, supported by ClientEarth, filed a lawsuit against TotalEnergies, arguing that the company's 'reinvention' ad campaign violates European consumer law as it misleads the public on the implications of its plans on the climate crisis.[7] The plaintiffs argued that these projects violated human rights and environmental standards, claiming that TotalEnergies had a legal obligation to prevent harm. The environmental groups make four different complaints against TotalEnergies: failing to fight a disaster, involuntary homicide, unintentional injury to persons and destruction or damage of property belonging to a person likely to pose a danger to others.[8]

The ongoing litigation highlights the intersection of environmental accountability and social justice, emphasising the responsibility corporations have to uphold human rights in their operations.

4. Facebook (Meta) (2023): A Shareholders' Case

In 2023, shareholders of Meta Platforms, Inc. filed a lawsuit alleging that the company's management had failed to adequately address the social impacts of its algorithms, particularly concerning misinformation and hate speech. The shareholders argued that this negligence could lead to reputational damage and financial losses. The Delaware Court of Chancery dismissed the suit, rejecting the novel claim that directors' fiduciary duties extend to the corporation and its stockholders as diversified equity investors.[9]

This case reflects a growing trend in which stakeholders are increasingly scrutinising the social dimensions of corporate governance, signalling a broader understanding of ESG factors.

Malaysia's Legal and Regulatory Context

Malaysia has several key legal instruments, policies, and guidelines already in place that align with international ESG standards:

1. **Environmental Protection Legislation**

   Malaysia's *Environmental Quality Act 1974* serves as the primary legal framework for environmental protection in the country. This law, along with other regulations such as the *National Forestry Act 1984* and the *Wildlife Conservation Act 2010*, provides avenues for addressing environmental harm. However, environmental lawsuits have been relatively limited, and enforcement has historically been inconsistent.

2. **Human Rights and Labour Law**

   Malaysia is a signatory to several international human rights conventions, including those of the International Labour Organisation ("**ILO**"). This has influenced domestic labour laws, such as the *Employment Act 1955*, which addresses worker rights, including those concerning forced labour, child labour, and fair wages. Allegations of labour rights abuses in industries such as palm oil and manufacturing have been significant concerns for the country, leading to

[7] https://www.clientearth.org/latest/press-office/press/totalenergies-fails-to-stop-historic-net-zero-greenwashing-case-from-proceeding/
[8] https://climatecasechart.com/non-us-case/greenpeace-france-and-others-v-totalenergies-se-and-totalenergies-electricite-et-gaz-france/
https://www.reuters.com/sustainability/environmental-groups-file-complaint-against-frances-totalenergies-over-climate-2023-10-02/
[9] https://www.kramerlevin.com/en/perspectives-search/court-dismisses-stockholder-suit-against-meta-affirms-a-firm-specific-model-of-corporate-management.html#:~:text=Plaintiff%20brought%20suit%20against%20Meta,the%20interests%20of%20diversified%20investors. /
https://finance.yahoo.com/news/judge-dismisses-meta-shareholder-lawsuit-225812058.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAMPKLncHDojlx7yUDTkB6Oj_IHqaqeBJQogQ6xCzADreqzXicEFFDdZrG3wQQ-afNTJz0RBZil4y_Vzdn6wcbpHP2iPdNirF3_I5xTj5bp9g1P1XCIFwtayNBjJta3Ul4INXedyYvS8Tc2b0KUXrL53LfpUUKbIJ7shNs2SDdzzb

increased scrutiny from both domestic and international actors.

3. **Corporate Governance Codes**

   The *Malaysian Code on Corporate Governance* ("**MCCG**"), updated in 2021, explicitly emphasises the need for companies to incorporate sustainability into their operations. The MCCG encourages listed companies to adopt ESG principles and requires greater transparency in reporting sustainability-related risks and opportunities. This provides a foundation for shareholders and stakeholders to challenge companies that fail to live up to these standards.

4. **i-ESG Framework**

   In 2023, the Ministry of Investment, Trade, and Industry ("**MITI**") published the *i-ESG Framework (Phase 1.0)* ("**Framework**"), which offers guidelines to support Malaysia's manufacturing sector in achieving its ESG goals. The launch of the Framework signifies the start of the first phase of MITI's plan (known as "Just Transition", scheduled from 2024 to 2026) to encourage the adoption of ESG requirements and goals. It lays the groundwork for manufacturers to embark on their ESG journey, ensuring their readiness to shift towards and embrace the second phase, "Accelerating ESG Practices", scheduled from 2027 to 2030.[10]

Ties to Global ESG Litigation Trends

Following Bursa Malaysia's announcement of enhanced sustainability reporting requirements in the Main Market[11] and ACE Market Listing Requirements[12], along with the launch of the Bursa Malaysia ESG Reporting Platform, Malaysia's exposure to ESG litigation is likely to increase as the global focus on corporate sustainability and accountability intensifies.

Several industries that are key to the Malaysian economy – such as palm oil production, manufacturing, and energy – are highly susceptible to ESG-related risks. These industries often involve significant environmental impacts, as well as labour and human rights challenges. As seen in global cases like *Milieudefensie v Shell*, industries that operate in or impact developing countries are increasingly facing litigation based on their environmental and social practices. These trends raise the question of how Malaysia might face similar legal challenges, especially in industries central to its economy.

Environmental Concerns: The Palm Oil Industry

Malaysia is one of the world's largest producers and exporters of palm oil, an industry frequently associated with deforestation, habitat destruction, and social issues, including poor working conditions and the displacement of indigenous communities.[13] International pressure has mounted against the palm oil industry, with NGOs, governments, and investors demanding stricter adherence to sustainability standards. The *Woodpecker* case in South Korea highlights how environmental harm linked to ecological degradation can lead to significant litigation, not only in the country where the harm occurs but also in the home jurisdictions of the companies involved.

[10] https://lh-ag.com/energy-projects-infrastructure-special-alert-miti-i-esg-framework-phase-1-0-whats-new/
[11]https://www.bursamalaysia.com/sites/5bb54be15f36ca0af339077a/content_entry5ce3b5005b711a1764454c1a/63311b5d39fba20e04ba8e13/files/App_1_-_Main_LR_Sustainability_Amendments.pdf?1664168038
[12]https://www.bursamalaysia.com/sites/5bb54be15f36ca0af339077a/content_entry5ce3b5005b711a1764454c1a/63311db15b711a4de4c53410/files/App_1_-_ACE_LR_Sustainability_Amendments.pdf?1664169294
[13] https://bursasustain.bursamalaysia.com/droplet-details/sustainability/practicing-human-rights-due-diligence-in-the-palm-oil-industry#:~:text=Category%3A%20Sustainability-,Concerns%20over%20labour%20rights%20abuse%20in%20Malaysia's%20palm%20oil%20sector,were%20subjected%20to%20forced%20labour.

Malaysia's palm oil industry faces similar ESG risks. While the Roundtable on Sustainable Palm Oil ("**RSPO**") has been established to promote sustainability, enforcement of its standards remains a challenge.[14] Should Malaysia fail to address environmental and social violations within its palm oil sector, it may become a target for litigation, either domestically or internationally. For example, local communities affected by deforestation or human rights abuses could initiate lawsuits similar to those seen in Nigeria, where affected communities sued multinational corporations for environmental degradation.[15]

Human Rights and Labour Issues in Malaysia

Labour rights remain a pressing ESG concern in Malaysia, particularly in industries such as manufacturing, agriculture, and construction. The country has faced scrutiny from international organisations and investors due to reports of forced labour, poor working conditions, and wage exploitation, particularly of migrant workers.[16] ESG litigation, as seen in the Nevsun Resources v Araya[17] case, has demonstrated that companies can be held accountable for human rights violations within their supply chains, even if these violations occur abroad.

In Malaysia, the rubber glove industry, a major player in the country's export economy, has faced allegations of forced labour and exploitation of migrant workers.[18] Such allegations have already resulted in significant financial and reputational damage, with companies being subjected to import bans by countries like the United States.[19] If these issues persist, Malaysia's labour-intensive industries could be subject to further lawsuits, particularly if investors or foreign governments perceive these abuses as violations of international labour standards. Domestic courts may also start to play a larger role in holding companies accountable, as seen in other jurisdictions globally.

Corporate Governance: Increased Shareholder Activism

As Malaysian companies become increasingly exposed to international markets and foreign investments, they are also subject to the rising trend of shareholder activism that drives ESG litigation. Shareholders in Malaysia, particularly institutional investors, are beginning to emphasise ESG factors in their investment decisions.[20] The updated Malaysian Code on Corporate Governance requires greater transparency regarding ESG risks,[21] and companies may face lawsuits if they fail to disclose these risks adequately, as seen in climate-related disclosure cases worldwide.

In the global context, cases like *Milieudefensie v Shell* demonstrate how shareholders and environmental groups can successfully hold corporations accountable for their failure to act on climate change or disclose climate-related risks. Malaysian corporations that fail to comply

[14] To obtain a Mareva Injunction, the applicant must demonstrate:
[15] To obtain a Mareva Injunction, the applicant must demonstrate:
[16] https://www.iseas.edu.sg/wp-content/uploads/2022/11/TRS2_23.pdf
[17] https://www.escr-net.org/caselaw/2020/nevsun-resources-ltd-v-araya/
[18] https://www.voanews.com/a/east-asia-pacific_forced-labor-rising-malaysias-rubber-glove-factories-study-shows/6207942.html
[19] https://www.theguardian.com/global-development/2021/mar/30/us-bars-rubber-gloves-malaysian-firm-top-glove-evidence-forced-labour#:~:text=Top%20Glove%2C%20the%20world's%20largest,using%20forced%20and%20indentured%20labour.
[20] https://www.ecgi.global/sites/default/files/working_papers/documents/esgfinal_1.pdf
[21] https://www.sc.com.my/api/documentms/download.ashx?id=239e5ea1-a258-4db8-a9e2-41c215bdb776

with increasing demands for transparency and sustainability reporting could face similar actions, especially if they are listed on international stock exchanges or have foreign investors with stringent ESG expectations.

Future of ESG Litigation in Malaysia

Malaysia is at a critical juncture in its journey towards ESG compliance. As environmental awareness grows among the public and legal frameworks continue to evolve, the country's businesses may increasingly find themselves facing ESG-related litigation. However, this also presents an opportunity for Malaysian corporations to proactively adopt stronger ESG policies, thereby improving their environmental and social footprints and reducing the risk of future lawsuits.

The country could also see its regulatory environment shift in response to international legal trends. As ESG litigation becomes more common globally, it is likely that Malaysia's legal system will follow suit, either through the introduction of new environmental and human rights laws or through judicial decisions that establish stronger precedents for corporate accountability. The *Woodpecker* case in South Korea serves as a reminder that courts in Asia are beginning to take a more active role in enforcing ESG standards, and Malaysia may follow a similar trajectory.

In conclusion, ESG litigation is not just a Western or European phenomenon but a global trend that will inevitably impact Malaysia. As Malaysian businesses and courts continue to integrate ESG principles into their operations and rulings, the country's approach to corporate responsibility will evolve. By learning from global examples and taking a proactive stance, Malaysia can navigate the challenges of ESG litigation while fostering sustainable economic growth.

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