

12. Good Regulatory Practice in Malaysia

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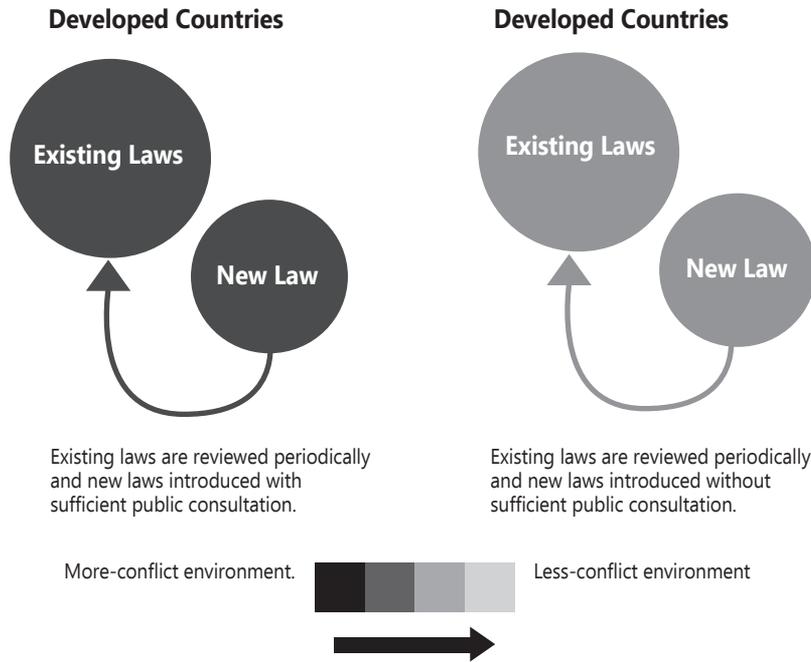
Good Regulatory Practices in Malaysia

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Regulatory divergences generate significant trade and other economic and administrative costs. While regulatory divergences may reflect legitimate differences in preferences across jurisdictions, they may also be the unintentional result of regulators working in silos without considering state and regional requirements. States' interventions in regional economic activities will burden not just businesses but also states' regulatory operations.

Businesses' regulatory concerns are channelled to the Special Taskforce to Facilitate Business (Pasukan Petugas Khas Pemudahcara Perniagaan [PEMUDAH]). Established in 2007, PEMUDAH aims to reduce government bureaucracy in business. PEMUDAH addresses sloppy decisions or unfair treatment resulting from poorly implemented policy or regulation and from inconsistencies in enforcement. PEMUDAH is a platform for consultation between business and government. Figure 1 illustrates how gazetted laws, with public consultation, create a conducive environment for good governance.

Figure 1: Analysis of Gazetted Laws in Developed and Developing Countries



Source: Adapted from *Global Indicators of Regulatory Governance* (World Bank, 2016); *Annual Report on Modernisation of Regulations 2016* (MPC, 2016); *National Policy on the Development and Implementation of Regulations* (Prime Minister's Department, 2013); *APEC-OECD Integrated Checklist on Regulatory Reform* (OECD, 2005).

The Malaysia initiative has moved beyond addressing the inefficiency of domestic regulations to encompassing global connectivity, market competition, and advancements in science and technology that drive businesses, and embracing Industrial Revolution 4.0. The Government of Malaysia needs more strategies to develop a comprehensive, current, sustainable policy and regulatory framework to suit the new business environment.

In 2017, the World Bank surveyed 750 multinational investors and corporations in developing countries to identify key parameters of investment decisions. These were the legal and regulatory environment, low tax rates, and low cost of labour and inputs. The government must ensure a conducive policy and regulatory environment that supports business and civil society, while stakeholders require laws and policies that are transparent, consistent, and current.

With the growing use of regulatory management tools (including regulatory impact assessment [RIA]), ex-post evaluation, and stakeholder engagement promoted by Asia-Pacific Economic Cooperation (APEC), the World Bank, and the Organisation for Economic Co-operation and Development (OECD), Malaysia has established an evidence-based rule-making methodology to strengthen good regulatory practice (GRP).

The latest government guidance documents on GRP are the following:

- i. Strengthening RIA through sufficient Public Consultation,
- ii. Vertical Ex-post Evaluation, and
- iii. Horizontal Ex-post Evaluation.

Strengthening Regulatory Impact Assessment through Sufficient Public Consultation

To facilitate the adoption of GRP, the government introduced the National Policy on the Development and Implementation of Regulations (NPDIR) on 15 July 2013 for federal ministries and agencies. The administrative circular was issued by the Chief Secretary to the government together with the Best Practice Regulatory Handbook, which requires all federal ministries and agencies to undertake GRP and RIA in developing new regulations and amending existing ones. The intended scope covers the principal legislation, subsidiary regulations, and quasi-regulations. The circular identifies the National Development and Planning Committee as the gatekeeping authority to endorse regulatory impact statements (RISs) prepared by regulators. The Malaysia Productivity Corporation (MPC) evaluates the adequacy of RISs and collaborates with the National Institute of Public Administration to provide training to all agencies.

The reality is that there are large variations and inconsistencies in the application of RIA, and GRP principles are not religiously followed. For example, few policymakers carry out proper public consultation, which is mostly lacking in transparency, inclusiveness, and accountability. Feedback from stakeholders is often lacking or ignored. The NPDIR document and guidance handbook provide for standardisation, which has not been widely implemented.

The RIA elements listed in the NPDIR are as follows:

- i. defining a clear problem statement;
- ii. stating clear objectives to solve the problem;
- iii. providing a range of options;
- iv. assessing each option to weigh the cost and benefit;
- v. engaging sufficient public consultation with affected parties, including regulators;
- vi. identifying recommended options and a conclusion; and
- vii. describing a comprehensive implementation strategy on the preferred options.

These elements are not always adopted, frequently due to implementers' lack of competency and many other shortcomings

Box 1: Improvement of Public Consultation

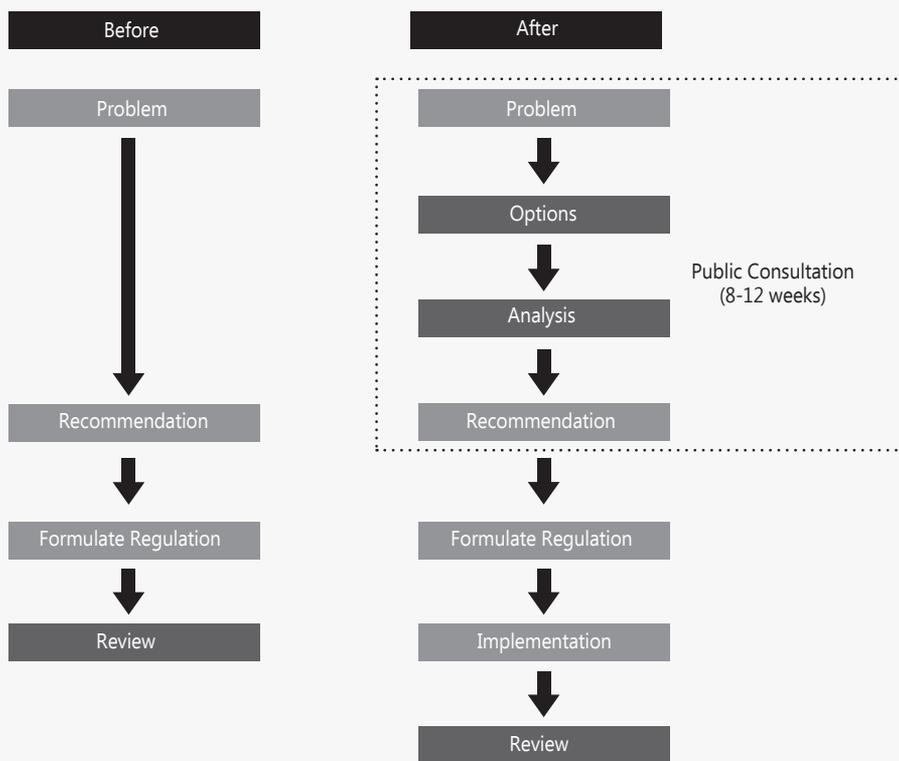
Public consultation has been conducted for a year. How sufficient is it? The National Policy on the Development and Implementation of Regulations does not specify how long or how extensive public consultation should be. Submission of regulatory impact statements to the Malaysia Productivity Corporation (MPC) in the first year of regulatory impact assessment implementation also varies.

Based on MPC's analysis, public consultation was not extensive. This observation is supported by a request from the Working Group on Institutional Legislative Framework (renamed Working Group Governance Reform in 2014) for MPC to establish public consultation guidelines for regulators. Before the new public consultation guidelines, all government agencies referred to the 2012 Online Public Engagement Circular. It stressed that any regulatory proposal should be announced online for at least 14 days but did not require public consultation if there was a clear mandate to skip it.

In October 2014, the Guidelines for Standardization of Public Consultation Procedures replaced the Online Public Engagement Circular. The new

guidelines advise regulators involved in developing new or amending existing regulations to interact with all stakeholders at all stages to ensure timely dissemination of full information, improved transparency, inclusivity, and a realistic regulatory environment (Figure 2). The ideal time to engage with stakeholders is 8 to 12 weeks, depending on the complexity and magnitude of the problem.

Figure 2: Comparison of Rule-making Process after Regulatory Impact



Source: Malaysia Productivity Corporation.

Box 2: Review of the Mechanism of the National Policy on the Development and Implementation of Regulations

On 5 April 2017, the House of Representatives passed the Tourism Tax Act 2017. Many parties question its rationale. Tourism legislation comes under the Federal List, whilst accommodation legislation comes under the State List, with hotels and motels, for example, requiring a licence from the local government.

The main stakeholders – the state governments and accommodation-industry players – disagreed with the act. The Sarawak government raised a fundamental concern to the federal government: that the Ministry of Tourism introduced the bill without consulting the Sarawak government, which believed that the bill was against the spirit of the Malaysia Agreement 1963 (The Malaymail Online, 2017). Licensed accommodation players, through the Hotel Association of Malaysia, were also disappointed with the arrangement, which they thought made them the government's tax collector. They were not sure whether the new regime applied to unlicensed accommodation service entities managed by third-party agents such as Airbnb (NST, 2017). The ministry reviewed the law and changed the tax revenue distribution formula, but the Sarawak government remained unhappy and objected to it (The Sunday Daily, 2017). The law had been formulated in a rush and tabled in Parliament at the last minute (The Utusan Borneo Online, 2017). The Attorney-General's Chamber listed the final version of the act and its subsidiary regulation on 1 August 2017 (Attorney General's Chamber, 2017) but the federal government and states continue to disagree.

The situation shows the uncertainties and concerns that can arise when a new policy is introduced without or with insufficient consultation. The bill's introduction did not conform with the National Policy on the Development and Implementation of Regulations circular. The ministry did not submit regulatory impact statements to the Malaysia Productivity Corporation but only notified the state of its intention to table the bill in Parliament (Ministry of Finance, 2017). Many actors claimed that they were not consulted and that the regulator, when formulating a new law, should identify the actors to be consulted and inform them of its intention, to avoid miscommunication.

Source: Malaysia Productivity Corporation.

After 5 years, MPC is reviewing the NPDIR document and the guidance handbook to improve regulatory management and the scope of implementation at all government levels. Malaysia is working closely with the World Bank to develop the Unified Public Consultation Portal, and with APEC to improve the implementation of public consultation strategy. The portal is a web-based tool to support and improve public participation in rule-making.

Vertical Ex-Post Evaluation

Vertical ex-post evaluation assesses impacts of regulations within a ministry or agency. Suggestions to review certain business licences usually come from business associations. This approach has become a yearly routine activity by certain ministries to capture inefficiency in government delivery. Only from 2010 onwards was a holistic approach adopted to review all business licences as a full-scale exercise as required in the 10th Malaysia Plan.

Box 3: Modernising Business Licencing

In June 2010, to improve regulatory delivery systems, the Malaysia Productivity Corporation (MPC) reviewed licence issuances by 23 ministries and 2 departments under the Prime Minister's Department. A comprehensive scanning and stocktake of business licences were conducted to reduce irrelevant ones.

MPC reviewed the licences using business process re-engineering to understand the logical flow of the licencing process and delivery. Of 767 reviewed licences, 454 were consolidated and 29 abolished. The initiative resulted in estimated compliance cost savings of RM 729 million.

BPR Project Implementation

Stage 1

Review of licenses, formation of working teams and action plan.

Stage 2

Presentation of results to the FGBPR Review Panel, conduct public consultation and implementation of the new framework.

Stage 3

Formulating operation modules for online applications, determining standards of services and finalising online licensing

Stage 4

Raising public awareness on the changes in regulatory matters and impact analysis on the regulatory initiative.



BPR = Business Process Reengineering, FGBPR = Focus Group Business Process Reengineering.

Source: Malaysia Productivity Corporation.

The Eleventh Malaysia Plan (2016–2020) focuses on logistics, with trade facilitation amongst the key initiatives that will contribute to Malaysia’s economic success. The plan is complemented by the Malaysia Productivity Blueprint (Thrust No. 13 – Review non-tariff measures to accelerate movement of goods and raw materials to double production for export). Many disruptive technologies are emerging globally that require the government to review and overhaul regulations to become more competitive.

Box 4: Steps to Measure Non-Tariff Measures in Logistics Across Ministries

The Malaysia Productivity Corporation (MPC) and ministries recently agreed to conduct a baseline study to identify options for improving non-tariff measures (NTMs) using the Business licensing reform: a toolkit for development practitioners (World Bank, 2003) introduced by the World Bank. The study started in June 2017 and was completed in August 2018 in two stages:

Stage 1 (completed)

1. MPC and regulators scan and develop the profiling report with reference to the Integrated Trade Intelligence Portal (I-TIP) database (ERIA and UNCTAD, 2016) and Customs Prohibition Orders 2017.
2. Ministries and agencies verify the legitimacy of each NTM by answering two questions:
 - a. Is it legal?
 - b. Is it necessary?

Stage 2

3. Once the profile of NTMs is established, businesses and other stakeholders assess government delivery systems’ efficiency and compliance cost.

Sectoral Ex-Post Evaluation Initiatives

Sectoral ex-post evaluation is a comprehensive horizontal review of existing regulations to create a conducive business environment. Each ex-post project using this approach is guided by the sector value chain and information from businesses. The value chain is, as suggested by Porter and Kramer (2011), to capture valuable and important activities – from-farm-to-plate or from-start-to-closing-a-business. The sectoral ex-post evaluation details will depend on the complexity of businesses and the agreement between MPC and stakeholders. The study will deliver recommendations that consider issues and concerns of regulators and businesses.

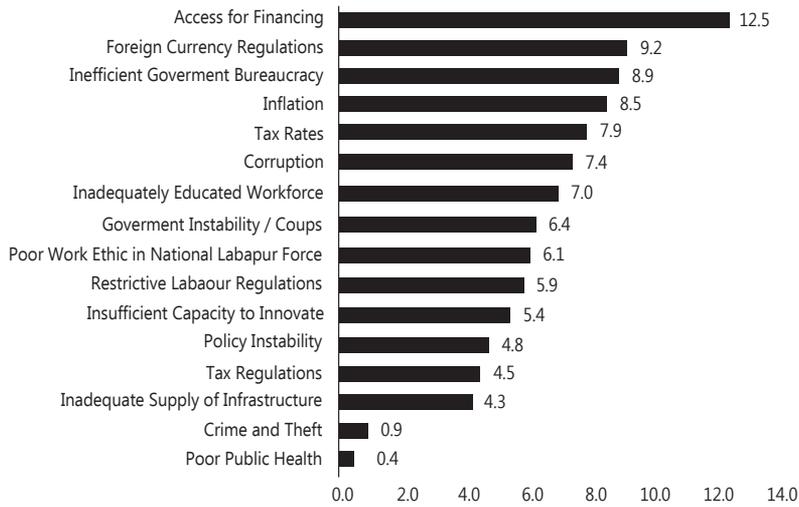
Reducing Unnecessary Regulatory Burdens

MPC, with assistance from the Government of Australia's Productivity Commission, has developed a methodology for reducing unnecessary regulatory burdens (RURB) across the business value chain. Unnecessary burdens arise from poor regulations and from poor implementation of regulations. Many regulations and regulatory regimes have become obsolete due to disruptive technology but are still being enforced. Many other regulations are under review that need to be repealed, especially by state and local governments.

Before GRP was introduced in 2013, Malaysia had many inefficient or ineffective regulations. For example, the Telemedicine Act 1997 has not been implemented. The rush to gazette new legislation to implement new policies without following GRP continues to be the bane of the country's economy.

Figure 3 in *The Global Competitiveness Report 2017–2018* shows that inefficient government bureaucracy is still amongst the top-10 problems facing business.

Figure 3: Most Problematic Factors in Doing Business



Box 5: Development Approvals Require Permits from 15 Regulators

The Focus Group on Dealing with Construction Permits, under the ambit of the Special Taskforce to Facilitate Business (Pasukan Petugas Khas Pemudahcara Perniagaan [PEMUDAH]), has managed to improve the Dealing with Construction Permits ranking in the Ease of Doing Business Report from 137 in 2007 to 11 in 2018. Three initiatives to reduce unnecessary regulatory burdens were conducted and some of the recommendations were well received by regulators and executed. Unfortunately, only a few construction projects were successful out of thousands. The construction industry complains that it continues to face many regulatory hurdles.

The following are examples of the additional cost of doing business that can be attributed to poor implementation of regulations:

- **Strata regulation.** An architect is required to endorse a surveyor’s plan, for a fee. Developers and house buyers find this regulation unnecessary and believe that architects do not have the tools and expertise to verify plans.

- Housing Development Act. An architect is required to certify every stage of construction of every parcel of development, for a fee. Since each parcel of development requires 14 certifications, 10,000 parcels of development require 140,000 different certifications, documentations, and inspection visits.

Imposing regulations without thorough analysis results in rent-seeking and adds to the cost of doing business. A local university study found that the construction industry loses millions every day because of unnecessary regulations and regulatory regimes.

Source: Malaysian Institute of Architects (Pertubuhan Arkitek Malaysia); Malaysia Productivity Corporation.

Lesson Learnt

Based on the APEC GRP Leaders' Declaration in 2011, Malaysia has established all three crucial GRP categories (Table 1). The first category includes internal government coordination of rule-making to ensure that all regulators conduct regulatory review and make reforms based on empirical evidence. Gazetting of new regulations occasionally bypassed National Development and Planning Committee scrutiny after 2 years of NPDIR implementation. Many stakeholders questioned the quality of regulations.

The second category includes regulatory impact assessment (RIA) by NPDIR. Implementation, however, is limited to federal regulators. State governments should develop and endorse a similar circular, which must accommodate state-level gatekeeping to safeguard RIA adequacy and, at the same time, ensure a proper public consultation timeframe so that the state government can deal with geographical and technical competency barriers.

The third category includes a public consultation mechanism, which still has many shortcomings. Public consultation aims to gather adequate feedback from businesses and citizens. In most cases, this has not been achieved. Regulators provide opportunities but not enough time

for feedback, for example, or ask only certain stakeholders. Public consultation documents related to existing or proposed regulation are shared with citizens and businesses but the draft regulation to be tabled is not.

Table 1: Rule-Making Process According to Good Regulatory Process

Good Rule-Making Good Regulatory Process Categories	Implementation Status
<p>Internal government coordination of rule making</p> <ul style="list-style-type: none"> • Manage regulatory review • Regulatory reform • Coordinate with trade and competition officials 	<p>Yes – Regulators and third-party research</p> <p>Yes – Plenty of vertical reform but less horizontal reform</p> <p>Yes – Need more collaboration with trade and competition agencies</p>
<p>Regulatory impact assessment</p> <ul style="list-style-type: none"> • Institutionalise systematic procedure 	<p>Yes – Begins with federal government’s regulators</p>
<p>Public consultation mechanism</p> <ul style="list-style-type: none"> • Transparency • Sufficient time 	<p>Yes – Certain focus groups have better access. Final draft regulation is not open for public view or feedback</p> <p>Yes – Public consultations’ timeframe varies. Implementation depends on issues and regulators’ internal practice</p>

Source: Adapted from Malaysia Productivity Corporation data.

Embarking on Regional Regulatory Cooperation

Malaysia measures impacts of a regulatory proposal at the domestic level and is restricted to a certain scope within a ministry or agency, without looking at the issue from a value-chain dimension (horizontal perspective). Regulators rarely assess impacts across borders and, in many cases, do not assess regulatory proposals against similar regulations in other jurisdictions. Domestic RIAs are unlikely to capture the impacts of international regulatory divergences and global supply chains. Is it possible to implement regional regulatory cooperation? Yes, but the following should be done:

1. Develop Association of Southeast Asian Nations (ASEAN) Member States' capacity to conduct ex-post evaluation to help regulators question the logic of regulatory requirements.
2. Set up a proper database of regulations in every state to enable investors to identify and assess transaction opportunities and risks. The stocktake should include all levels of regulation, including licences.
3. Develop a methodology to consider plurilateral and multilateral requirements to capture impact on business and trade. This initiative will help strengthen the ability of the private sector to create more opportunities in ASEAN.

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