

# REMEDYING UNETHICAL RECRUITMENT IN MALAYSIA'S TRANSNATIONAL LABOUR MIGRATION GOVERNANCE

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## Abstract

Although state actors in labour-receiving and sending countries developed ethical recruitment initiatives, such initiatives did not function as intended without full compliance from industry stakeholders. The complexity in the global supply chain undermined various ethical recruitment initiatives undertaken in Malaysia, such as the zero-cost recruitment policy of Malaysian companies, the Nepal-Malaysia zero-cost migration Memorandum of Understanding, and Nepal's Free Visa, Free Ticket policy. However, the U.S. Customs and Border Protection (CBP) intervention overcame the hurdles faced by these unilateral and bilateral efforts. In response to the imposed trade sanctions imposed by the CBP, business enterprises in Malaysia developed remediation plans to reimburse recruitment fees previously paid by their foreign workers. Such remediation programs were unprecedented in Malaysia's labour recruitment industry. This paper suggests that the remediation of recruitment fees by business enterprises is important in realising ethical recruitment because it addresses the adverse effect of fraudulent recruitment practices, enhances corporate responsibility, protects foreign workers from debt bondage, and supports the principle of zero-cost migration.

*Keywords: business-related human rights, fair recruitment, labour migration, remediation of recruitment fee, SGDs 8 and 10*

## Introduction

A few factors undermine international labour recruitment governance; the lack of transparency in the supply chain, hurdles to extraterritorial enforcement of labour standards, and contradictory interests between various stakeholders (Pittman,

2016, p. 271). Many of the challenges associated with high transaction costs arise at the earliest phases of recruiting in Asia and the Pacific. Too often, migratory workers and their families fall into debt to cover the costs imposed, which seriously impedes migration revenues spent on long-term developmental activities. This is exacerbated by the fact that a myriad of agents, subagents, intermediaries, travel providers, and bureaucrats participate in the recruiting process and impose charges. One apparent objective of labour migration governance is to lower transaction costs (Hugo, 2009, p. 45). Piper, Rosewarne, and Withers (2016) called for a rights-based approach to labour migration governance to address institutional gaps in the protection of migrant rights in the countries of origin and destination (p. 1). Instead of boosting developmental growth in migrants' home countries, international recruiting is used to boost economic growth in destination nations. According to Jones (2022), a rights-based and socially equitable approach to global worker migration regulation necessitate dismantling the structural role of agents. In defining and promoting fair recruitment as a 'coordinated governance tools', the International Labour Organization (ILO) introduced the Fair Recruitment Initiative. Fair recruitment is being recognised as a part of global migration governance (Jones, 2022, p. 317).

Unethical recruitment practices, especially those that require migrants to pay high recruitment costs, contribute to risks of debt bondage, forced labour, migrant smuggling, and human trafficking. Excessive debts are generated by the dependence of migrant workers on complex international recruitment supply chains and multilevel actors in both the labour sending and receiving countries. Trapped in debt bondage, migrants become highly dependent on their jobs, vulnerable to abusive conditions in the workplace, and less likely to abscond from their employers. Making potential workers bear the financial burden of recruitment and placement costs traps them in a continuous cycle of poverty, with some being forced to take out huge loans, sell property, or borrow money from relatives (Earthworm Foundation, 2019, p. 7; Ethical Trading Initiative, 2019, pp. 13, 17). This results in heavy indebtedness, leading to irregular migration when migrant workers avoid legal channels or leave their legal low-paid jobs to find illegal jobs in shadow economies. Heavy indebtedness is also detrimental to the families and economies of the labour sending country, which relies on remittances. Thus, high recruitment costs reduce the impact of migration on development and lead to the uneven distribution of benefits from the same (Institute for Human Rights and Business [IHRB], 2017, pp. 16–17; Wickramasekara & Baruah, 2017, p.23).

This research seeks to answer three questions: How does the state implement ethical recruitment initiatives for migrant workers? What are the

challenges of labour diplomacy between Malaysia and Nepal in implementing a zero-cost migration MoU? What are the implications of trade sanctions on ethical recruitment and corporate responsibility in Malaysia? This research investigates the importance of remediation of recruitment fees in realising ethical recruitment in Malaysia's labour migration. This paper is framed within ethical recruitment (fair recruitment). Ethical recruitment is defined as a 'process for hiring workers lawfully and fairly and transparently that respects their dignity and human rights' (Verité, 2021, pp. 2–3). The promotion of ethical recruitment contributes to the attainment of the Sustainable Development Goals (SDGs), particularly Goal 8 (specifically, Targets 8.7 and 8.8) and Goal 10 (specifically, Target 10.7), which will be discussed in the next section. It suggests that remedy at the company level is an effective approach to the governance of fair recruitment to ensure that business enterprises perform their corporate responsibility, including implementing the Employer Pays Principle.

Fair recruitment principles, especially the Employer Pays model, are increasingly acknowledged by the Malaysian government due to possible trade sanctions, civil society advocacy, and pressure from the migrants' countries of origin. In 2018, Bangladesh refused to send workers, Nepal banned sending workers, and Indonesia considered a moratorium on sending domestic workers to Malaysia. Malaysia renegotiated its bilateral agreements with a few countries of origin to revamp the broken recruitment mechanism following episodes of labour crises with Nepal, Bangladesh, and Indonesia (Low, 2020, pp.143–44). Prompted by the Nepali government's initiative, a new Memorandum of Understanding (MoU) on workers' recruitment, employment, and repatriation was signed on 29 October 2018. Under this Nepal-Malaysia agreement, all recruitment costs are to be borne by Malaysian employers. This is a positive step towards zero-cost migration for workers, wherein employers would cover visa fees, medical screening, security screening, airfare, accommodations, levy charges, recruitment charges, and repatriation costs. This MoU is significant for fair migration because it is based on International Labour Organization (ILO) standards, especially the Employer Pays Principle (Poudal, 2018).

In Nepal, free jobs for Nepali workers, as assured by the MoU, were far from reality. The *Kathmandu Post* reported that workers seeking free employment opportunities through recruitment agencies were turned away. These agencies could not send the workers to Malaysia for free because they had already invested money to secure demand for workers in the highly competitive Malaysian work environment (Mandal, 2019). Labour supply companies based in the destination countries often asked recruitment agencies in Nepal to pay commissions or bribes prior to the conclusion of the business deal. Due to the intense labour market

competition in the Gulf and Southeast Asia, as well as the failure of the government to create an ethical business environment, the agencies were compelled to pay the commissions and, consequently, passed on the operating costs to the workers. Otherwise, the agencies had to 'leave the business' (Amnesty International, 2017, p. 10).

A positive turn of events took place only in 2020 due to import sanctions implemented by the U.S. Customs and Border Protection (CBP) on a few Malaysian glove manufacturing companies. International pressure from the U.S. led to the remediation of recruitment fees for workers as the companies were obliged to improve their ethical standards to get the sanctions lifted (Khadka, 2020a). Subsequently, foreign workers employed by Malaysian companies received the recruitment fees they had previously paid to the recruitment agencies. For example, WRP Asia Pacific reimbursed MYR 21.4 million (USD 5 million) in recruitment fees, Top Glove initially announced an MYR 53 million (USD 12.65 million) remediation package, and Hartalega allocated MYR 40 million (USD 9.5 million) for their repayment package (Bengali, 2020a; *The Edge Markets*, 2020; Thomas, 2020). Although the Malaysian government had introduced the Employer Pays Principle and the rubber glove companies developed a zero-cost recruitment policy before the trade sanctions, migrant workers have continued to be charged huge amounts by agents in their home countries, such as Nepal. The zero-cost recruitment policy could only be actualised through the remediation of recruitment fees after a series of ethical recruitment initiatives that were introduced without much progress. These included the Nepal-Malaysia zero-cost migration MoU, Nepal's Free Visa, Free Ticket (FVFT) policy, and the zero-cost recruitment policy of Malaysian companies (Adam, 2020; Amnesty International, 2017; Bengali, 2020b).

The first part of this study discusses the global, regional and national frameworks on ethical recruitment. Next, the challenges of bilateral labour diplomacy are discussed by looking at the complications faced by the Nepal-Malaysia zero-cost migration MoU and Nepal's FVFT policy. Then, the article evaluates how trade sanctions overcame national and bilateral challenges in pushing business enterprises to adopt remedial actions in cases of human rights violations. Finally, the concluding section highlights the impacts of the remedy on Malaysia's labour migration governance.

### **Frameworks on Ethical Recruitment and Remedy in Labour Migration**

The importance of fair migration in preventing debt bondage, exploitation, and forced labour is recognised through various global initiatives undertaken by the United Nations. The 2030 Agenda for Sustainable Development is significant for

managing global migration. The SDGs strengthen migrant workers' rights as some migration-related goals promote universal human rights instruments, social protection, and decent work (Likić-Brborić, 2018, p. 774). SDG 8 promotes inclusive and sustainable economic growth, including complete and decent work. In particular, while Target 8.7 seeks the abolition of forced labour, modern slavery, human trafficking, and child labour, Target 8.8 demands the protection of labour rights and the promotion of safe working environments. Further, SDG 10 focuses on reducing inequalities within and among countries, and Target 10.7 specifically addresses orderly, safe, and responsible migration. Notably, one of the indicators of safe migration is the bearing of recruitment cost by employers rather than workers (Indicator 10.7.1) (Rotaèche, 2019, pp. 33–35; United Nations, 2015; Wickramasekara, 2020, p. 9).

In 2018, the United Nations General Assembly adopted a Global Compact for Safe, Orderly and Regular Migration (GCM) to improve migration governance, international cooperation, and migrant rights. The GCM is the first global migration agreement, containing twenty-three objectives (McAdam, 2019, p. 160). The GCM, or the 'architecture of global migration governance' has two goals: one is to facilitate movement and empower migrants, and the other is to track their mobility (Pécoud, 2021, pp. 29–30). According to Solomon and Sheldon (2018), the GCM is very significant as it is the first inter-governmentally negotiated agreement on various migration issues. States acknowledge the importance of transnational cooperation in addressing the causes and consequences of irregular migration. Significant commitments are to save lives, decrease vulnerabilities, promote ethical recruitment, and encourage decent work for migrants (p.588). Objective 6 aims to make fair and ethical recruitment methods easier to implement and promote decent work. It recognises that eliminating underground employment in destination countries (the main cause of irregular migration) could be addressed by facilitating the mobility of migrant workers from their countries of origin (Crépeau, 2018, p. 656). Among the action plans aimed at protecting migrant workers from all sorts of exploitation are regulating public and private recruitment agencies while also prohibiting recruiters and employers from charging migration costs from migrant workers. Objective 5 of the GCM, in particular, intends to improve the availability and flexibility of regular migration routes. Developing human rights-based and gender-responsive labour mobility agreements is also one of its action strategies (McAdam, 2019, pp. 173–75).

A growing body of literature recognises the importance of a remedy for business-related human-rights violations and recruitment malpractices. Individual companies are one of the key focuses of reforms directed towards fair recruitment since companies in the supply chain's highest ranks can leverage

compliance from labour recruiters and subcontractors. Companies have the leverage to transform the recruitment market by regulating redressal mechanisms in the recruitment process (Farbenblum & Nolan, 2017, p. 17). In contrast to the traditional state-centric control measures on regulating activities of recruitment agencies, corporate responsibility of the private sector plays an increasingly important role. Notably, there are a few global initiatives that emphasise corporate responsibility, such as the United Nations Guiding Principles on Business and Human Rights (2011), the OECD Guidelines for Multinational Enterprises (1976), and the Dhaka Principles for Migration with Dignity (2011). The U.N. Guiding Principles (also known as UNGPs or the Ruggie Principles) are the most prominent global standards for corporate conduct (Farbenblum & Nolan, 2017, pp. 13–14; Ruggie & Nelson, 2015, p. 6).

The UNGPs were endorsed by the United Nations Human Rights Council in 2011. The document denotes a significant development in the global governance of human rights standards for transnational firms. The Ruggie Principles encourage firms to take positive steps by righting businesses in the case of human rights violations and allowing the evaluation of human rights performance in corporations (Aaronson & Higham, 2013, p. 333). These Guiding Principles are grounded on Protect, Respect, and Remedy. The principles are complimentary: 1) the state has a responsibility to protect against third-party human rights violations, 2) corporations have a responsibility to respect human rights, and 3) there is a need for more effective access to remedies (Ruggie, 2008, pp. 190–91). This document establishes a corporate duty to respect human rights, requiring businesses to prevent, alleviate, and redress human rights violations related to their operations (Office of the High Commissioner for Human Rights [OHCHR], 2011a). Furthermore, Principle 15 of the UNGP states that in order to fulfil their corporate responsibility, businesses should have policies and processes—such as policy commitments, human rights due diligence procedures, and mediation procedures—in place. The operational idea of corporate responsibility to provide remediation is articulated in Principle 22 (Office of the High Commissioner for Human Rights [OHCHR], 2011b, pp. 15, 24).

The OECD Guidelines for Multinational Enterprises, adopted in 1976, represent another significant global initiative. These guidelines consist of government recommendations to enterprises for responsible business conduct. They are the only multilaterally endorsed business codes of conduct, representing international consensus committed upon by the adhering governments (Organisation for Economic Co-operation and Development [OECD], 2001). In response to the changing landscape of international investment, the guidelines were revised in 2011 to incorporate a new human rights chapter and a novel due

diligence approach (OECD, 2011, pp. 3–4). The human rights chapter draws upon the U.N.'s Protect, Respect, and Remedy Framework and acknowledges that respect for human rights is the expected global obligation for enterprises. The failure of a state to implement international human rights does not diminish the human rights obligations expected from enterprises (OECD, 2011, pp. 31–32). With the addition of corporate responsibility to protect human rights under the new human rights chapter and the development of a novel due diligence duty under the General Policies chapter, the revised OECD Guidelines are also linked with the U.N. Guiding Principles (Ruggie & Nelson, 2015, p. 6).

The Dhaka Principles for Migration with Dignity were introduced in 2011 as a roadmap for companies in all industry sectors to meet their corporate responsibility in protecting migrant worker rights (Institute for Human Rights and Business [IHRB], 2017, pp. 4, 10). The Dhaka Principles contain two core principles and ten more principles based on human rights for employers and labour recruiters for each stage in the migration process. The core principles emphasise equal treatment without discrimination in the workplace and the protection of employment rights in the destination country (Institute for Human Rights and Business [IHRB], 2017, p. 5). Principle 1 acknowledges that recruitment fees should not be charged to migrant workers, while Principle 9 recognises the need for access to remedy. Excessive recruitment costs have resulted in debt slavery, forced labour, and human trafficking. Further, migrant workers may be subjected to non-transparent salary deductions if they are made to bear the recruitment costs (Institute for Human Rights and Business [IHRB], 2017, pp. 17, 28).

At the ASEAN level, corporate responsibility is highlighted through the 'ASEAN Guidelines for Corporate Social Responsibility (CSR) on Labour'. Forced and child labour are among the identified priority topics here: employment and employment relationships, human resource development and training, working and living circumstances, industrial relations, migratory workers, and sustainable development (ASEAN, 2017, para 10). The rules propose the following guidelines that enterprises should adopt regarding migrant workers. First, treat migrant workers with dignity and respect, free of discrimination, exploitation, abuse, and violence. Second, preserve and promote their essential human rights, such as job stability, wage payment, social security, workplace safety and health, decent working and living conditions, and access to information and training (ASEAN, 2017, para 16).

In policy formulation and implementation, national governance systems are far more prominent than global governance. National governance determines the functioning of a country's migration management systems. Cohesive

institutional frameworks supported by national governments are required for good international labour migration governance. These frameworks must be focused on creating competitive and fair labour migration that benefits receiving countries, destination countries and migrants (Hamada, 2012, p. 50). The 'migration-development nexus' is a 'triple win' situation for host and source nations and the migrants themselves (Piper, Rosewarne, & Withers, 2016, p. 2). Low-skilled migrants often pay much of the recruitment fee component of migration costs due to the large supply of workers and their lack of knowledge. The costs are higher if labour supply companies mediate the migration. Though recruitment costs are regulated by bilateral agreements, in practice, recruitment fees are higher than the legal limits. In the 2010s, migration costs paid by migrants to secure a job in Malaysia varied across source countries: Bangladesh (USD 4,000), Pakistan (USD 2,328), Vietnam (USD 1,374), Nepal (USD 1,260), Sri Lanka (USD 1,094), Cambodia (USD 880), Indonesia (USD 674) and Myanmar (USD 256) (World Bank, 2017, p. 164). It is sometimes difficult for workers in Malaysia to take legal action against employers and recruiting agents because outsourcing agents would deny accusations regarding inconsistencies in contracts. Hiring employers would avoid accountability by claiming that the nominal employer was the outsourcing agency. For migrants, it may not be a good idea to report abuse to Malaysian authorities. This demonstrates how the state may absolve itself of responsibility for working conditions by contracting out recruitment to private agencies (Franck, Arellano, & Anderson, 2018, p. 11). Nepali migrant workers abroad lack sufficient means to obtain legal assistance and resolve their complaints due to a gap in the policy and execution of complaint processes. There are no efficient mechanisms for addressing transnational labour conflicts, including contract replacement, payment delays, compensation claims, migrant grievances, and mistreatment by employers (Khatiwada & Basyal, 2022, p. 167).

## **Methodology**

The research, based on the Malaysian-Nepal migration corridor, seeks to understand national, bilateral, and global efforts in promoting safe migration and fair recruitment. The case study was chosen because both countries initiated bilateral efforts towards zero-cost migration, setting the precedence for other labour MoUs with Malaysia. The development of zero-cost migration is significant as it adheres to the Employers Pay Principle, which addresses labour rights violations caused by unethical recruitment. Various migration-related initiatives call for ethical recruitment, such as the 2030 Agenda for Sustainable Development, the Global Compact for Safe, Orderly and Regular Migration (2018), the United Nations Guiding Principles on Business and Human Rights (2011), the

OECD Guidelines for Multinational Enterprises (1976), and the Dhaka Principles for Migration with Dignity (2011). In this article, the author explores the role of various actors, including market actors, private actors, and state actors, in protecting migrant rights and realising zero-cost migration. This article is based on analysing reports by intergovernmental organisations, acts and regulations, official documents, press statements by civil society actors, media statements by employers' associations, online newspapers, and secondary literature. The data are examined and interpreted using an analytical process called document analysis. Identifying, locating, selecting, analysing, and synthesising primary data from the documents are all parts of the analytical process.

### **Bilateral Labour Diplomacy and Nepal-Malaysia Zero-Cost Migration MOU**

In May 2018, Malaysia's labour cooperation with Nepal went sour when the latter banned its citizens from seeking employment in Malaysia. Migrant workers had to go through a series of immigration requirements conducted by different private companies, which entailed various layers of costs. The high financial burden placed on Nepali workers prompted the country to urge the Malaysian government to better treatment of Nepali workers (New Straits Times, 2018). Between September 2013 and April 2018, private companies and corrupt officials in both countries profited USD 450 million from the recruitment industry involving over 6,00,000 Nepali workers. A joint-working committee was then established to negotiate the new employment terms prioritising safeguarding workers' welfare. The changes in labour recruitment and, subsequently, the signing of the MoU were possible due to the regime change in both countries. The bilateral talks aimed to ensure reduced fees, decent pay, and fair workplace treatment. Nepal's Minister for Labour, Employment and Social Security, Gokarna Bista, also wanted the recruitment process to be more convenient for Nepali migrant workers as they faced several difficulties and were asked to pay for the necessary tests and preparation of documents (Nepali Times, 2019). The system's unfairness was brought up during the bilateral talks: Nepali workers worked under two-year contracts and spent up to eight months of their salary to pay off the migration fees. The Nepali representative insisted that migration governance must reduce the 'unnecessary burden on migrant workers' (Dixit, 2019).

Both countries agreed that workers should not have to bear the recruitment costs. They further decided that employers would pay Nepali recruiters a small fee of up to half a month's salary. In an interview with *Nepali Times*, Bista acknowledged that the negotiations faced tough political pressure in Nepal because the lucrative labour recruitment industry allowed intermediaries

in both countries to earn money by overcharging migrants. The exploitation under the intermediary system 'made the poor poorer and the rich richer' (Dixit, 2019). For example, a study on the Nepal-Malaysia migration corridor indicated the prevalence of such intermediaries in recruiting Nepali workers in the palm oil industry, which was outsourced to a Malaysian labour agency and a labour agent in their country of origin. Employers generally lacked a defined policy commitment, due diligence procedure, and agent monitoring. The labour agents charged workers for recruitment expenses that the Malaysian companies had already covered, such as airfare, visa, and work permit. The workers paid a higher recruitment cost (USD 1,660) as compared to the Malaysian employers (USD 1,130) (Wahab, 2020, pp. 24, 33).

Labour migration of Nepali workers to Malaysia resumed in October 2018 with the signing of a new bilateral agreement in Kathmandu. In the same month, Nepal's Labour Minister, Gokarna Bista, and Malaysia's Minister for Human Resources, M. Kulasegaran, signed the MoU, which exempted Nepali migrant workers from paying any fees. Under the new agreement, Malaysian employers would pay for the airfare, visa, levies, medical check-up, and transportation of workers from Kuala Lumpur Airport. The workers would also be allowed to change jobs in case of physical or mental abuse. Additionally, their monthly salary would be deposited in the bank account by the 7<sup>th</sup> of every month (Sapkota, 2018). In response to the successful conclusion of the MoU, Bista revealed that both governments were committed to promoting safe and dignified migration. The MoU reflected both countries' common interests and benefitted Nepali migrant workers and Malaysian employers. Before the MoU, neither country had a written agreement or policy framework on hiring Nepali migrant workers, resulting in issues such as minimum salary, lack of social security, and low workplace safety. The new MoU protects Nepali migrants while facilitating Malaysian employers' management of foreign workers. In addition to these changes, Malaysia also agreed to ensure that employers take responsibility for injured or disabled workers rather than leaving them to their family members (*Nepali Times*, 2018).

Malaysian employers protested the zero-cost policy established under the Government-to-Government (G2G) arrangement between Malaysia and Nepal. In October 2018, industry organisations led by the Malaysian Employers Federation submitted a joint memorandum to the Prime Minister, Mahathir Mohamad, opposing the ratification of the one-sided policy without consultation with industry stakeholders. Employers, who were made to bear all the costs, were concerned about possible cases of foreign workers absconding without any safety net as compensation in such cases. There were also concerns that the zero-cost policy might increase cases of abscondment. In response to these concerns, the

joint memorandum proposed the establishment of a safety net in the form of a security deposit paid by foreign workers to protect employers against economic losses (Malaysian Employers Federation [MEF], 2018, pp. 20–21). Malaysian employers were reluctant to pay all the hiring costs, including the charges of recruitment agencies. The payment totalled between MYR 6,300 and MYR 7,900 for each Nepali worker, including the attestation fee of the Nepal embassy (MYR 1,000), security screening (MYR 105), medical screening (MYR 260), registration to the Foreign Workers Management System (MYR 640–MYR 1,850), compensation scheme (MYR 72), and others. The Association of Employment Agencies, Malaysia, lobbied with the government for cost reduction, citing the huge financial burden due to the MoU implementation. The association asked the government to allow the import of foreign workers from more source countries. Although the employers agreed with the ethical standards of the MoU, they were not ready to invest a huge amount in hiring Nepali workers, who would now cost higher (Rahim, 2019).

An Amnesty International report titled *Turning People into Profits* stated that Nepali recruitment agencies paid between USD 359 and USD 900 for each migrant worker as a commission to companies or labour supply consultants in the destination countries to secure recruitment contracts. According to the agencies, the commissions were unavoidable costs in the recruitment industry, which were subsequently shifted onto the migrants through recruitment fees. These agencies attributed the inflated recruitment fees and unethical business environment to overseas agents, employers, and multinational companies. The employing companies failed to audit their supply chains. Some preferred cheaper labour from other recruitment agencies in other countries (Bangladesh, Myanmar, and Cambodia).

Moreover, the high fees charged by the agencies served as a safety net as employers sought to compensate for any absconding worker (Amnesty International, 2017, p. 26). A news media article in *Nepali Times* indicated that zero-cost migration remained only a principle for Nepali workers. This was due to a few realities. First, there was a lack of monitoring by Nepal during the implementation process. Recruitment agencies randomly charged Nepali workers in Malaysia despite both countries signing the zero-cost MoU. Second, not all bilateral labour agreements between Nepal and labour-receiving countries, such as Korea and Japan, adopted the Employer Pays Principle. Nepali workers in these countries had to bear costs similar to those from other labour-sending countries. Hence, despite the successful conclusion of zero-cost migration MoUs with Malaysia and the Gulf countries, only a small category of workers enjoyed the FVFT policy. Third, a zero-cost policy did not imply higher returns from overseas

employment. Other labour-receiving countries, such as Japan, South Korea, and Israel, offered a more attractive salary despite charging some fees from Nepali workers. In contrast, the salary offered in Malaysia and the Gulf countries was only sufficient to make ends meet. Thus, zero-cost recruitment should not be taken at its face value (Khadka, 2020c).

Fourth, there was difficulty in finding a common voice among labour-sending countries through international platforms, such as the Colombo Process. It was difficult to implement the zero-cost migration approach unilaterally when other labour-sending countries were not adopting a similar approach, making Nepali workers less competitive in the labour market. According to the Ethics Practitioners Association of Nepal (EPAN), the main problem was the lack of support and trust among the workers and employers. EPAN could neither mobilise any worker nor attract a single ethical employer. The workers were willing to pay high recruitment fees if that would guarantee them quality and promising jobs (Khadka, 2020b). Finally, government agencies in Nepal are not seen as leaders in the migration industry due to the fragmentation between the various stakeholders. The government is ineffective in policy formulation and implementation as the business sector heavily influences it. The state actor could not effectively regulate the policies of temporary labour migration because of the influential involvement of the private sector. As a result, the labour migration industry is governed by market dynamics rather than governmental policies. This explains why the government could not effectively implement the 'zero cost migration policy' (Shivakoti, 2022, pp. 3922–3923). Foreign-employment recruitment agencies form an integral part of Nepal's migration infrastructure. They play an important role in providing 'desirable livelihood alternatives' (Shrestha, 2018, p. 692).

Before the aforementioned Nepal-Malaysia MoU, Nepal had initiated a Free Visa, Free Ticket (FVFT) policy in 2015, which agencies also strongly protested against. Under the policy, foreign companies were required to cover the visa processing fees and round-trip flight tickets for migrants. The agencies were only allowed to collect service fees from workers, capped at USD 96 (NPR 10,000), provided that employers did not cover the service charge (Amnesty International, 2017, p. 40). The policy was applicable to workers in the following destination countries: Malaysia, Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates (Sijapati, Ayub, & Kharel, 2017). Regardless of the state's policy, there were recruitment agencies in Nepal which charged exorbitant costs to migrant workers primarily from rural regions (Khatiwada & Basyal, 2022, p. 162). Nepal implemented this policy to end the exploitation of migrant workers in Malaysia and the Gulf countries. At the time, there were around two million

Nepali workers in Malaysia. Consecutively, the Nepali embassy in Malaysia stopped approving applications for migrant workers if the prospective company was reluctant to cover their air ticket and visa fees. Nepal's Department of Foreign Labour Employment issued labour permits to only those applications with supporting documentation showing that Malaysian employers were willing to pay these fees (Parajuli, 2015). In response, labour recruiters in Nepal went on strikes, strongly protesting the new FVFT ruling. After all, the policy would only be feasible if Malaysian employers were ready to cover the costs, and only big employers could do so. For the labour recruiters, the new ruling would only benefit big recruitment companies. Small companies, which could not afford to operate under the zero-cost policy, demanded that the government withdraw the policy. Despite the objection, Nepal's Ministry of Labour, Employment and Social Security persisted with the policy to protect poor migrant workers, who often mortgaged their land, borrowed from loan sharks, or spent most of their savings (Rai, 2015).

Due to the ineffective execution of the FVFT policy and zero-cost migration MoU with Malaysia (and also the Gulf countries), the Employer Pays Principle could not be fully enforced. Despite the reform efforts, Nepali migrant workers continued to pay high recruitment fees. Recruiters offered jobs to workers who were willing to pay since many desperate workers were willing to do so. Alternatively, private banks in Nepal provided collateral-free loans to prospective migrants to help them avoid loan sharks (Khadka, 2020a). During the COVID-19 pandemic, protests by labour recruiters in Nepal became stronger. They pressured the government to scrap the FVFT policy as it affected their competitiveness in the international labour market during the economic downturn. Recruiters from Nepal competed with one another in bidding for job offers, and some even paid employers during their bidding. Nepal-based recruiters were now also competing for similar jobs with recruiters from other countries. In reality, the unilateral implementation of the FVFT policy encouraged workers and recruiters to engage in 'under-the-table activities' (Khadka, 2020b).

Similarly, Malaysian employers objected to the increased cost of employing new foreign workers during the COVID-19 pandemic. According to the Federation of Malaysian Manufacturers, several industries struggled to sustain their businesses. Employers were undergoing tough times during the pandemic with the imposition of new requirements, such as medical examinations and screening tests. As a result of the zero-cost policy imposed by the source countries, employers were obligated to cover the mobilisation cost at the source country, together with other expenses. Making the zero-cost policy mandatory would push up the cost by MYR 11,000 for each worker, which was unsustainable for

companies in terms of cost effectiveness (Federation of Malaysian Manufacturers [FMM], 2020). The pandemic also worsened debt bondage among migrant workers because many businesses offered loans to desperate workers. Migrant rights groups, such as Tenaganita and Migrant Care, criticised the glove industry, which had made huge profits from the pandemic's increased global demand for gloves without sufficiently protecting its foreign workers. The groups called on the industry to address debt bondage and prioritise workers' welfare (Beh, 2020). In 2020, the global market for medical gloves was valued at USD 30.9 billion. Malaysia's medical gloves industry generated a revenue of MYR 35.3 billion (USD 8.6 billion), witnessing a 103 per cent increase in 2020. The pandemic has aggravated forced labour issues in the sector. Partly due to the direct safety risks of COVID-19 and partly due to the pressures of increased production for gloves, some forced labour issues (according to ILO forced labour indicators), such as isolation, restriction on movement, and substandard working and living conditions, were exacerbated by the pandemic. However, the indicator of debt bondage showed an improvement during the pandemic because the industry undertook measures to remedy the issue by reimbursing the recruitment fees paid by migrant workers (Hughes et al., 2022, pp. 10–11).

### **Trade Sanctions and Recruitment Fees Remediation Program**

In 2020, the United States' CBP agency imposed a series of trade sanctions, in the form of import bans called Withhold Release Orders (WRO), against a few companies in Malaysia's rubber glove business. In order to lift the import ban, business enterprises resorted to developing remediation plans and committed to adopting the zero-cost recruitment policy in their business operations (*The Edge Markets*, 2020; Thomas, 2020). In 2019, the United States was Malaysia's leading importer of rubber gloves, with a total value of USD 1.6 billion. The sanction functioned as a tool to leverage human rights. The imposed trade sanctions signalled that the U.S. supply chains would not tolerate failing to meet labour standards (Bengali, 2020b). The U.S. has long used unilateral trade sanctions to combat human rights abuses, raise labour standards, and encourage compliance with international norms. In order to prevent unfair trade practices and punish human rights violations, governments have resorted to trade sanctions directed at goods produced using forced labour. Imposing trade sanctions has a high potential for enforcing relevant human rights norms and prohibiting behaviours which infringe those norms (Cleveland, 2001, pp. 4–5; Vázquez, 2003, p. 802).

The global pressure on businesses to address fraudulent recruitment practices has a potential impact on Malaysia's international trade as well. Reports such as the U.S. Trafficking in Persons (TIP) Report and the 'List of Goods

Produced by Child Labour or Forced Labour' also have trade implications for Malaysian exports (Malaysian Employers Federation [MEF] & International Labour Organization [ILO], 2019, Chapter 2). The U.S. Department of Labor (USDOL), in its report called '2020 List of Goods Produced by Child Labour or Forced Labour', listed four items produced by forced labour in Malaysia: electronics, garments, palm oil, and rubber gloves (U.S. Department of Labor, 2020, pp. 22, 31). The rubber gloves industry was newly added to the USDOL list in 2020 (U.S. Department of Labor, 2020, p. 26). The ILO has identified eleven indicators of forced labour: abuse of vulnerability, deception, movement restrictions, isolation, physical and sexual violence, intimidation and threats, retention of identity documents, wage withholding, debt bondage, abusive working and living conditions, and excessive overtime. In certain circumstances, a single indicator may signify the presence of forced labour; in others, multiple such indicators may also be present (International Labour Organization [ILO], 2012, p. 3). In 2021, Malaysia was downgraded to Tier 3 in the TIP ranking, the lowest level, for failing to comply with the minimum standards for combating human trafficking. Malaysia's TIP ranking since 2014 is as follows: 2014 (Tier 3); 2015 and 2016 (Tier 2 Watch List); 2017 (Tier 2); 2018, 2019, and 2020 (Tier 2 Watch List); 2021 (Tier 3). The report indicates that the government did not adequately address allegations of labour trafficking (U.S. Department of State, 2021, p. 369). The U.S. import ban is a pragmatic approach that has brought about real change compared to the initiatives taken by the labour-sending and receiving countries, non-binding commitments, and ethical agreements on zero-cost migration (Khadka, 2020c).

The Ministry of Human Resources (MOHR) established a 'Task Force on Compliance on Labour Laws and Policy for Rubber Manufacturing Sector' to ensure industries' compliance with the recruitment policy of foreign workers. This task force was established on 21 July 2020 in response to the inclusion of Malaysia in the '2020 List of Goods Produced with Child Labour and Forced Labour'. Malaysia's Department of Labour conducted several meetings with industry players, such as the Malaysian Rubber Glove Manufacturers Association (MARGMA), to discuss the implementation of an Independent Social Audit Compliance. According to the media statement by MOHR, in 2019, the Department of Labour conducted a total of 10,513 statutory inspections in the manufacturing sector under the Employment Act of 1955. The MOHR continued to monitor compliance and take action against errant companies. The government amended the 'Workers' Minimum Standards of Housing, Accommodation and Amenities Act' of 1990, which took effect on 1 June 2020 (Ministry of Human Resources [MOHR], 2021). The rubber industry, represented by the MARGMA,

strengthened its social compliance initiatives to improve workers' welfare. The MARGMA members pledged to implement the zero-cost recruitment policy, ensure that new foreign workers are free of debt, pay all the costs for recruitment, provide lockers for foreign workers to store their passports, and allow workers to terminate their employment at any time. MARGMA consists of 90 per cent of the local glove manufacturers, most registered with the Supplier Ethical Data Exchange (SEDEX). The SEDEX assessment includes four elements: Labour Standards, Health and Safety, Environment, and Business Ethics (Ooi, 2019). The Malaysian government is taking social compliance seriously. Following the U.S. ban on disposable rubber gloves, the MOHR warned employers of the repercussions of forced labour in their operations. Employers were pushed to conduct a full social compliance audit following international norms. The social compliance audit came into force on 1 January 2021. Thereafter, it became a prerequisite for each company to have its independent social compliance audit report approved by the government before applying for foreign workers. The MOHR pushed the industry players to ensure social compliance even before 2021, as forced labour was a pressing issue (*Malay Mail*, 2019). The audit includes issues relating to foreign workers, such as forced labour and forced overtime. Failure to conduct social compliance audit would result in enforcement operations by the MOHR (Shasitiran, 2019).

Individual companies undertook their remediation programs to improve foreign workers' welfare. Since July 2020, migrant workers (including Nepali workers) were reimbursed by a few Malaysian glove maker companies. The first precedent was set by WRP Asia Pacific, which reimbursed the recruitment fees to its 1,600 foreign workers, including 600 Nepali workers. Every Nepali worker received a similar amount of MYR 4,547, regardless of the number of recruitment fees incurred in their states of origin or their employment status (those who had already left the company were also entitled to this reimbursement) (Mandal, 2020). In September 2019, WRP's export to the U.S. was placed on a Withhold Release Order (WRO) due to allegations of forced labour. As part of the company's efforts to have its WRO revoked, WRP launched a remediation program worth MYR 21.4 million (USD 5 million) in July 2020. The remediation payment would compensate for the debt incurred by foreign workers in their home country to secure a job in Malaysia. Workers could then pay off their recruitment fees, thus preventing them from being trapped in debt bondage and working under forced labour conditions. The ban against WRP was lifted in March 2020 as the company remediated the indicators of forced labour (Thomas, 2020).

Facing similar international pressure, Top Glove provided remediation payments to its migrant workers from August 2020. In July 2020, CBP placed a

WRO on disposable gloves that two of its subsidiaries produced. Top Glove took remedial actions to secure the revocation of the ban and started to reimburse the recruitment fees to its migrant workers within a month. The company estimated a payment of MYR 53 million (USD 12.65 million) in remediation. Approximately 10,000 employed migrant workers from Indonesia, Bangladesh, Nepal, Myanmar, and Cambodia will be getting their recruitment fees back (Lee, 2020). Following an independent consultant's recommendation, the company raised its remediation payment to MYR 136 million (USD 32.77 million) to sufficiently compensate its migrant workers. The new compensation quantum reflected its commitment to eliminate the practice of workers paying for their recruitment fees (Lim, 2020). The measures included launching a remediation program totalling MYR 136 million, blacklisting unethical recruitment agents, improving workers' living conditions, and renewing its pledge to zero-cost recruitment. The company initiated its zero-cost recruitment policy on 1 January 2019; however, the agents in the source country continued to charge recruitment fees. The policy involves pre-departure briefings in the country of origin, post-arrival briefings in Malaysia, and monthly interviews with foreign workers to ensure no hidden fees are paid to the recruiters. Thus, migrant workers who were previously obliged to pay recruitment costs were compensated under the company's remediation program. Those joining the company prior to 1 January 2019 were also compensated (Adam, 2020; Lam, 2020; Top Glove Corporation Bhd., 2020).

Similarly, Hartalega Holdings Bhd announced its remediation program in August 2020 for the reimbursement of recruitment fees and its commitment to enhancing its social compliance to be consistent with international standards. The company allocated MYR 40 million (USD 9.5 million) for the repayment package, targeting completion within 24 months. Recognising that recruitment fees paid by migrant workers are a complex global issue, the company engaged with multiple stakeholders to solve the issue. Prior to the U.S. ban, the company had instituted its zero-cost recruitment policy' on 1 April 2019. Foreign workers joining the company prior to April 2019 were also eligible for the recruitment fee remediation program. A third-party organisation was appointed to interview affected workers in early 2020 (*The Edge Markets*, 2020). Due diligence practices were carried out in selecting recruitment agencies in the source country. Multiple checkpoints were established to ensure that the prospective workers in the source country did not pay any fees during recruitment interviews, pre-departure, on arrival, and post-arrival. If it was discovered after the investigations that workers had paid any fees, Hartalega claimed it would hold the recruitment agency accountable (Hartalega, 2021). Despite having multiple such checkpoints in place, some workers may not report any payments made and thus, Hartalega continued to

engage with its workers. Within eight months of the remediation program's commencement in November 2020, Hartalega completed its remediation at a slightly higher amount of MYR 41 million (USD 9.96 million) (Idris, 2021).

After the trade sanctions, companies also issued their policy commitments, indicating their social compliance with national labour laws and international standards. Governance gaps in company policy and practices are the principal challenges that hinder the implementation of ethical recruitment in Malaysia. A report by Earthworm Foundation (2019) indicated that even though the employers adhered to recruitment regulations, they did not have any written policies and procedures for managing recruitment. The companies' social policies did not strongly emphasise labour rights and ethical hiring. Moreover, the employers did not provide any grievance mechanism for new workers to share their recruitment experiences, which was necessary for any remediation action (Earthworm Foundation, 2019, pp. 42–43). Employers or business enterprises must take leadership roles in ensuring due diligence practices and monitoring labour intermediaries in their supply chain (Earthworm Foundation, 2019, p. 9). Research piloted by the Malaysian Employers Federation (MEF) (2014) among 101 member companies found that only half of the respondent companies had written policies on employment, recruitment, and repatriation of foreign workers. Around 77 per cent of the respondents had a department to manage the company's policy on foreign workers. Though 84 per cent of them had grievance mechanisms in place, foreign workers' access to these was hampered by a lack of understanding of the local system, an inability to communicate in the local language, and the fear of reprisal (Malaysian Employers Federation [MEF], 2014, pp. 67–69).

Regarding policy commitment, the companies reiterated their pledge to ensure corporate compliance with Malaysian labour laws and ILO labour standards. The living quarters and facilities were improved to meet the requirements of the 'Workers' Minimum Standards of Housing and Amenities Act'. In its press statement, Top Glove acknowledged an investment of MYR 70 million (USD 17.5 million) in acquiring additional houses, apartments, and hostels while improving existing accommodation. Regarding workers' safety, the company initiated the 'Zero-Harm and Safety Health Emergency Preparedness Programme' and the 'Workers' Health Protection Programme'. The former included setting up a designated First Aid Room with a 24-hour emergency response team in factories and providing ambulances with trained paramedics. Foreign workers could take recourse to a multilingual helpline as well as a whistleblower channel (Top Glove Corporation Bhd., 2020). Similarly, Hartalega affirmed its commitment to business ethics, social compliance, welfare, and quality of life. In order to improve living conditions, Hartalega invested around MYR 95 million

to provide accommodation to its workers in compliance with the housing recommendations of the ILO. In terms of health and safety prevention standards, compliance with the guidelines of Malaysia's Department of Occupational Safety and Health was assured. In August 2020, the company launched a health management program for its workers. Further, worker representation, whistleblowing, and grievance handling systems were continuously improved. Additionally, foreign workers could voice their grievances through multiple channels (Hartalega, 2021). With commitments on policies and processes and access to remedy, the companies began adopting the U.N. Guiding Principles for Business and Human Rights, which are Principle 15 and Principle 22, respectively. These efforts were in line with the Malaysian government's efforts to strengthen ethical recruitment and ensure that companies are held accountable for their employees' well-being. The Eleventh Malaysia Plan (2016–20) called for all-inclusive migration reform that takes both the welfare of migrants and the requirements of industries into consideration. Employers were subjected to a strict liability principle which made them personally responsible for the recruitment and well-being of their workers (Economic Planning Unit, 2015, Chapter 5).

## **Conclusion and recommendations**

The remediation of recruitment fees to foreign workers has aided the implementation of the Employer Pays Principle, where other fair recruitment initiatives have failed. Due to the complexities of the global supply chain, initiatives such as zero-cost MoU, Nepal's FVFT policy, and the zero-cost recruitment policy of Malaysian companies have made little headway. Moreover, the regulations governing sanctions on employers in Malaysia could not be enforced effectively since the competition to lower production costs was paramount to them. This race to the bottom competition has resulted in the abuse of foreign workers, with some being hired illegally. As described in the above discussions, the US CBP overcame the stagnation of bilateral labour diplomacy by intervening in the global supply chain. The intervention, which took the form of trade sanctions, produced the much-awaited effect of pushing business enterprises to perform their social compliance audits and engage in remediation. The industry players issued their guidelines on social compliance, hired independent consultants for audits, and improved measures to ensure their compliance with the eleven forced labour indicators of the ILO. Under the influence of market consequences, the rubber glove industry strictly enforced the zero-recruitment cost and Employer Pays principles. In the future, they would be more vigilant in sourcing prospective foreign workers from the labour supply chain. The 2020 episode of the remediation of worker-paid recruitment fees witnessed a positive

turn of events—it prevented unfair competition in recruitment, reinforced the Employer Pays Principle in recruitment, encouraged due diligence practices in selecting recruitment agencies, and enhanced corporate responsibility. The remediation of recruitment costs at the company level can be considered the key to implementing ethical recruitment standards because it addresses the issues that emerged after fraudulent recruitment practices. The successful enforcement of the Employer Pays Principle may have several implications. It may signal the gradual phasing-out of some redundant layers of intermediaries and the elimination of unethical agencies.

This research concludes with three recommendations. First, business enterprises play an important role in preventing debt bondage through remediation programs. Implementing zero-cost migration requires private actors to fulfil their corporate responsibility in addressing business-related human rights violations. Second, a national-level policy is important to ensure the implementation of fair recruitment practices, especially the Employer Pays Principle. Compliance with the global norm could only be achieved with a clear policy on labour standards and corporate responsibility, followed up by a social compliance audit. Third, the digitalisation of recruitment can potentially reduce the hiring cost, which remains a major concern of business enterprises. The recruitment industry could soon move to a digital platform, and employers, too, may prefer digital platforms to save costs.

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