

Exploring and Analysing Thailand's Potential New Legislation
on Mandatory Human Rights Due Diligence for Private Sectors



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สำรวจและวิเคราะห์ความเป็นไปได้ของการบังคับใช้กฎหมายในประเด็นธุรกิจและสิทธิมนุษยชน:
กฎหมายที่บังคับให้มีการตรวจสอบอย่างรอบด้านในประเด็นสิทธิมนุษยชนสำหรับภาคเอกชน



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กฤษฎกร มะลี : สำรองและวิเคราะห์ความเป็นไปได้ของการบังคับใช้กฎหมายในประเด็นธุรกิจและสิทธิมนุษยชน : กฎหมายที่บังคับให้มีการตรวจสอบอย่างรอบด้านในประเด็นสิทธิมนุษยชนสำหรับภาคเอกชน . (Exploring and Analysing Thailand’s Potential New Legislation on Mandatory Human Rights Due Diligence for Private Sectors) อ.ที่ปรึกษาหลัก : ภาวรัตน์ ตัญยานุรักษ์

วิทยานิพนธ์เล่มนี้ได้มุ่งเน้นถึงการศึกษาถึงความเป็นไปได้ของ “การบังคับใช้กฎหมายซึ่งบังคับให้มีการตรวจสอบอย่างรอบด้านในประเด็นสิทธิมนุษยชนด้านสำหรับภาคเอกชน” ซึ่งประกอบธุรกิจในประเทศไทย เพื่อคุ้มครองสิทธิมนุษยชนอันได้รับการรับรองในกฎหมายสิทธิมนุษยชนระหว่างประเทศ รวมถึงกฎหมายภายในประเทศ โดยการตรวจสอบอย่างรอบด้านดังกล่าวนี้ ได้ครอบคลุมไปถึงการตรวจสอบตลอดห่วงโซ่แห่งคุณค่าภายใต้การพิจารณาของหลักการชี้แนะเรื่องธุรกิจกับสิทธิมนุษยชนขององค์การสหประชาชาติ และแผนปฏิบัติการระดับชาติว่าด้วยธุรกิจกับสิทธิมนุษยชน ระยะที่ 1 (พ.ศ. 2562 – 2566) ของประเทศไทย ด้วยระบอบการกำกับดูแลกิจการแบบใหม่ภายใต้แนวคิดเกี่ยวกับข้อกำหนดในการตรวจสอบอย่างรอบด้านในประเด็นสิทธิมนุษยชน โดยภาคเอกชนซึ่งอาจตกอยู่ภายใต้การบังคับใช้กฎหมายนี้ย่อมมีหน้าที่ในการคุ้มครองและเคารพสิทธิมนุษยชน ทั้งยังต้องเยียวยาผู้เสียหาย ด้วยเหตุอันเนื่องมาจากการละเมิดสิทธิมนุษยชน โดยภาคเอกชนจะต้องชี้ให้เห็นถึงผลกระทบในเชิงลบต่อสิทธิมนุษยชนอันเนื่องมาจากการละเมิดสิทธิมนุษยชนที่เกิดขึ้นในการดำเนินธุรกิจ พร้อมทั้งจะต้องป้องกันมิให้เกิดผลกระทบดังกล่าวและรับผิดชอบซึ่งเยียวยาการละเมิดสิทธิมนุษยชนนั้นด้วย ด้วยเหตุนี้ วิทยานิพนธ์ฉบับนี้จึงได้แสดงให้เห็นถึงแนวคิดใหม่เกี่ยวกับความรับผิดชอบต่อองค์กรที่เพิ่มขึ้นจากเดิม โดยเฉพาะในความเสี่ยงต่อปัจเจกชนอันเนื่องมาจากกิจกรรมทางธุรกิจ นอกจากนี้ยังได้กล่าวถึงพัฒนาการทางด้านนโยบายและกฎหมายเกี่ยวกับการตรวจสอบอย่างรอบด้านในประเด็นสิทธิมนุษยชน โดยศึกษาและวิเคราะห์กฎหมายในกลุ่มประเทศสมาชิกแห่งสหภาพยุโรป เนื่องจากกลุ่มประเทศสมาชิกสหภาพแห่งยุโรปมีแนวโน้มที่จะมีอิทธิพลต่อการกำหนดมาตรฐานการคุ้มครองและรักษาซึ่งสิทธิมนุษยชน วิทยานิพนธ์นี้ได้วิเคราะห์และนำเสนอโครงสร้างและลักษณะของกฎหมาย ขอบเขตการบังคับใช้ มาตรการการเยียวยาและหน่วยงานกำกับดูแล นอกจากนี้ ยังวิเคราะห์ไปถึงข้อท้าทายในเชิงบทบาทและเชิงสถาบัน รวมถึงผลกระทบต่อผู้มีส่วนได้เสียที่เกี่ยวข้อง ได้แก่ ผู้ทรงสิทธิ ภาคเอกชน รวมถึง องค์กรภาคประชาสังคม ด้วยการมีส่วนร่วมของผู้มีส่วนได้เสียทุกภาคส่วนโดยหวังเป็นอย่างยิ่งว่ากฎหมายนี้จะสามารถช่วยขับเคลื่อนและเสริมสร้างสังคมที่เท่าเทียม แข็งแกร่ง ยั่งยืนได้ และก้าวไปสู่การเติบโตอย่างยั่งยืนไปพร้อมกัน

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Kritsakorn Masee : Exploring and Analysing Thailand's Potential New
Legislation on Mandatory Human Rights Due Diligence for Private
Sectors. Advisor: Pawat Satayanurug, Ph.D.

This Thesis focuses on a study of potential enforcement of the Legislation on mandatory Human Rights Due Diligence (HRDD) for private sectors operating a business in Thailand in order to safeguard human rights, as recognised in the international human rights laws and national laws, in their value chain within the consideration of the United Nations on Guiding Principles on Business and Human Rights (UNGPs) as well as Thailand's National Action Plan on Business and Human Rights Phase I (2019-2022). With new corporate governance regime and under emerging concept of due diligence requirements, private sectors subject to this mandatory HRDD Legislation is expected to Protect, Respect, and Remedy the UNGPs, by identifying, preventing adverse impacts on human rights due to business-related human rights abuse and mitigating and accounting for human rights violation. This Thesis illustrates emerging concepts of increased corporate responsibility to address risk to people along their business activities. Further, it discusses policy and legal developments on this type of Legislation by inspecting and analysing existing and potential law of mandatory human rights due diligence in some of the European Union's Member States as they tend to influence standards of protection and strongly uphold human rights. The Thesis will provide an analysis and a proposal on a body of this law to be enforced in Thailand by identifying characteristics of this law, scope of application, remedial measure, and oversight body. It also extends to analytically address functional and institutional challenges and impacts on relevant stakeholders: rightsholders, private sectors, and Civil Society Organisations (CSOs). With the inclusion of all stakeholders, this potential enforcement of the Legislation could help drive and create an equal, strengthened, and sustainable society, and step forward to sustainable growth altogether.

Field of Study: Business Law

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.....

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Chapter 1

Introduction

1.1 Background and ongoing issues in Thailand's Mandatory Human Rights Due Diligence Legislation

There are many private sectors contributing to economic growth in Asia and the Pacific. Such sectors include but not limited to agri-food, extractive, garments, mining and utilities to construction, financial sectors. In Thailand, Thailand's labour force accounts for 38.21 million, working in service and trade, agriculture, and manufacturing.¹ At the same time, the unemployment rate for the data collected in March 2020 is one per cent, according to Thailand's National Statistics Office.² It is evident that businesses cannot operate without human resources. Along with ordinary supply or value chain,³ business operations require labour skills to generate outputs and at last contribute to productivity. For private sectors to achieve the business goals and more profitability, businesses may ignore the livelihoods and the state beings of those who involve or are impacted by the business operations along their supply or value chain. It can be presumed that private sectors may cause potential violation of rightsholders, including marginalised people, when private sectors with more bargaining power exploit from the rights of the weak, especially those who are not capable of effectively accessing to rights, justice and seeking redress.⁴ In this regard,

¹ Thailand's National Statistical Office, "Summary of the Labour Force Survey in Thailand (Data Collection During 1-12 March 2020)," http://www.nso.go.th/sites/2014en/Survey/social/labour/LaborForce/2020/march_2020.pdf; CP ALL, "Human Rights Due Diligence Manual," (2018).

² Office, "Summary of the Labour Force Survey in Thailand (Data Collection During 1-12 March 2020)".

³ A supply chain in this regard means all parties required to fulfilling or pleasing a customer request, thus leading to customer satisfaction, while a value chain is a set of interrelated activities a company uses to create a competitive advantage for a company - Evan Tarver, "Value Chain Vs. Supply Chain: What's the Difference?," <https://www.investopedia.com/ask/answers/043015/what-difference-between-value-chain-and-supply-chain.asp>.

⁴ Business and Human Rights Resource Centre, "Case: Shell Lawsuit (Re Nigeria - Kiobel & Wiwa)," <https://www.business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa>.

it is crucial to address certain mechanisms for businesses as a preventive, proactive and remedial measure for private sectors to establish and improve accountability of human rights obligations as established through various international legal instruments.

Nonetheless, to identify a clear-cut scope of such existing human rights obligations or another challenging aspect to find the right approach for private sector's risk management, there are ranges of human rights obligations internationally acknowledged in various international human rights laws as well as social norms. However, it does not mean that this lack of clarity and limitation of the scope of obligation will prevent or excuse private sectors not to respect human rights, including to provide remediation in the case where the rightsholders have been violated. To move forward, a mechanism or a method, designed to respond with business feasibility alongside societal expectation, must be put in place where it addresses the protection of human rights and fundamental freedoms as well as sustainably conducting business together.

Since the unanimous endorsement of the United Nations' Guiding Principles on Business and Human Rights (UNGPs) by the United Nations Human Rights Council (UNHRC) in 2011,⁵ the UN Protect, Respect and Remedy Frameworks, known as the Three Pillars, have been introduced for the business and human rights agenda. States have international obligations under ranges of international laws to protect against human rights abuses by a third party, by having appropriate policies and legal mechanisms in place while private sectors have the responsibility to respect human rights by acting with due diligence to avoid violation or potential violation of human rights, as equally as addressing adverse impacts that occur, and accordingly ensuring effective remedy.⁶ In this regard, private sectors can concretely get involved in protecting and promoting human rights due to their exploitative business activities and risks of violation of rightsholders. The UNGPs provided and signified as a

⁵ The United Nations Human Rights Council, "17/4 Human Rights and Transnational Corporations and Other Business Enterprises," (2011).

⁶ Business and Human Rights Resource Centre, "The Un "Protect, Respect and Remedy" Framework for Business and Human Rights," <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>.

globally recognised and authoritative framework for the respective duties and responsibilities of governments and private sectors to prevent and address adverse impacts of human rights violation.⁷ Within these globally endorsed principles, human rights due diligence has been introduced for business enterprise to be responsible and accountable for their business activities. As a new model of exercising due diligence process for businesses, Human Rights Due Diligence (HRDD) is an approach for businesses to address and manage the potential and actual impact of human rights which they are involved on an ongoing basis.⁸ Such human rights due diligence requires four core elements: a) identifying and assessing actual and potential adverse human rights impacts; b) integrating findings from impact assessments across relevant company processes and taking appropriate action; c) tracking the effectiveness of measures and processes to the adverse impacts for effective monitoring and evaluation, and d) communicating on how impacts are being addressed and showing affected stakeholders through established policies and processes.⁹ Ideally, the scope of human rights due diligence should necessarily extend to identify and assess risks by geographic context, sector and business relationships throughout their own activities in both headquarter and subsidiaries along its supply or value chain.¹⁰

At the rise of a paradigm shift in corporate governance with more consideration on the environmental, social, and sustainability aspects across the globe, Human Rights Due Diligence (HRDD) has recently become an emerging issue for private sectors in Thailand.¹¹ Several private sectors operating a business in Thailand voluntarily implemented this HRDD mechanism. However, The UN Working Group on the issue of human rights and transnational corporations and other private sectors

⁷ Office of the High Commissioner for Human Rights, "Corporate Human Rights Due Diligence – Identifying and Leveraging Emerging Practice," <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>.

⁸ Ibid.

⁹ Ibid.

¹⁰ Office of the High Commission for Human Rights, "Guiding Principles on Business and Human Rights - Implementing the United Nations "Protect, Respect and Remedy" Framework," https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹¹ PTT Public Company Limited, "Human Rights Management,"

<https://www.pttplc.com/en/Sustainability/Social/Humanright.aspx>. ALL, "Human Rights Due

Diligence Manual."; Airport of Thailand Public Company Limited, "Human Rights Due Diligence,"

<https://corporate.airportthai.co.th/wp-content/uploads/2018/06/AOT-HRDD-2017-2018.pdf>.

notes that “an apparent gap in current supply chain management is that human rights due diligence tends to be limited to tier-one companies. Efforts to go beyond tier-one tend to happen only when the issue has been brought to light by the media or non-governmental organisations (NGOs). Few companies appear to be asking tier-one suppliers to demonstrate that they — and their suppliers in the tiers below — fulfil the responsibility to respect human rights by requiring assessments of the risks to and impacts on human rights.”¹² In this regard, together with the adoption and implementation of the Sustainable Development Goals in 2016, at the national level, Thailand, the first country in Asia and the Pacific, has launched its National Action Plan on Business and Human Rights (the NAP-BHR)¹³ which is now being implemented for its Phase I during 2019 to 2022.¹⁴ Under this Phase I, it includes and addresses private sectors’ human rights due diligence obligations.¹⁵ Despite this positive movement towards sustainable development,¹⁶ it is upon the voluntary basis for private sectors to bind themselves to these commitments, particularly on corporate responsibility concerning the environment, society, and corporate governance. Besides, it is still problematic on the enforcement of private sector’s obligations despite having voluntary and self-binding transparency and reporting requirements. Private sectors with a limited resource may find themselves challenging, or even fails, to complete corporate risk assessment processes without the inclusion of people to private sectors business model and risks management. Multinational Companies (MNCs) are putting great effort in racing to the top with a transnational application of human rights due diligence requirements from home state to host state. However, there is increasing fragmentation of due diligence requirements across sectors and size

¹² Secretary-General United Nations General Assembly, "The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (a/73/163)," (the Secretary-General to the United Nations General Assembly 2018)., para. 29.

¹³ Ministry of Justice Thailand's Rights and Liberties Protection Department, "Thailand Has Adopted the National Action Plan on Business and Human Rights as “the First Country in Asia”," http://www.rlpd.go.th/rlpdnew/index.php?option=com_content&view=article&id=11235.

¹⁴ Ibid.

¹⁵ Ministry of Justice Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022)," (Thailand's Rights and Liberties Protection Department, Ministry of Justice, 2019).

¹⁶ United Nations Development Programme, "Sustainable Development Goals," <https://www.undp.org/content/undp/en/home/sustainable-development-goals/>.

of private sectors, countries, and area of application.¹⁷ These various methods can, in turn, reflect a lack of legal certainty on human rights due diligence requirements for human rights and environmental impacts.¹⁸ Eventually, the above problems could affect access to remedy for the victims of the adverse human rights and environmental impacts. In this regard, it is time to step forward and close the gap in every dimension to ensure that there is an equal and inclusive society with participation from all stakeholders, especially private sectors by integrating human-rights based approach to foster respect for human rights protection and promotion. As mentioned in the UNGPs, private sectors should conduct human rights due diligence as recommended Respect to human rights as the Second Pillar of the Three Pillars. Nevertheless, it is doubtful whether this HRDD would offer effective enforcement and implementation because of the soft law nature of obligations on business and human rights in bringing businesses to conduct human rights due diligence since there has not been a hard law obligation laid down to the related stakeholders in the jurisdiction of Thailand. With the lack of legal force through a legitimate source of authority under the rule of law, thus accomplishing human rights protection and promotion may seem difficult.

To this end, it may be necessary to have national legislation, imposing mandatory obligations for private sectors to conduct human rights due diligence as a measure required and implemented within enterprises' complex and dynamic, non-transparent supply or value chain enterprises. However, challenges remain in rolling out such policy initiatives and legal frameworks into hard law obligations imposing on businesses, noting the complexity, size and scale, and sectors of the enterprises in their supply or value chain. According to the NAP-BHR, the responsibility of private sectors to respect human rights, the HRDD should be able to apply all private sectors regardless of their size, sector, operational context, ownership and structure,¹⁹ yet noting the implications on the scale and complexity of the means to conducting

¹⁷ Civic Consulting British Institute of International and Comparative Law , Directorate-General for Justice and Consumers (European Commission) , LSE, "Study on Due Diligence Requirements through the Supply Chain, Final Report," (Publications Office of the EU, 2020)., p. 225.

¹⁸ Ibid., p. 227.

¹⁹ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p. 9.

HRDD.²⁰ Accordingly, as there has not been a comprehensive methodology or a total formula to fit all scenarios, such HRDD may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.²¹

Despite, at the time of writing this thesis, no direct obligation under international law relating to human rights for private sectors to comply,²² those private sectors violating human rights obligations have found that social condemnation, as some would consider as reputational risk, can be expected once exposed of such violation.²³ Even if there is a code of conduct for corporate governance being implemented in place for socially responsible private sectors, it may lack accountability when it comes to enforcement to address and invoke effective remedies due to corporate human rights abuses. In this connection, the NAP-BHR, proposed by the Department of Rights and Liberties Protection, Ministry of Justice was built upon the UNGPs. This NAP-BHR will be rolled out from 2019 to 2022 in line with the UNGPs.²⁴ To ensure effective implementation of the NAP-BHR and achieve the goals of the business and human rights agenda, mandatory HRDD Legislation should be advocated and enforced as a legal measure to protecting and promoting human rights by requiring and encouraging private sectors to responsibly conduct business, avoiding exploitative practices which have or may have an adverse impact to the individuals and the public by having a human rights-based approach and de-prioritising risk to a business.

Apart from the UNGPs, there is another authoritative text which provides direct guidance to private sectors (multinational and national) on social policy and

²⁰ Ibid.

²¹ Ibid.

²² However, there have been attempts in the past and currently ongoing initiatives to impose international obligations through business and human rights treaty as equivalent to international law, publicly known as the draft UN Treaty on Business and Human Rights - Business and Human Rights Resource Centre, "The Draft Un Treaty on Business and Human Rights: The Triumph of Realism over Idealism," <https://www.business-humanrights.org/en/blog/the-draft-un-treaty-on-business-and-human-rights-the-triumph-of-realism-over-idealism/>.

²³ Amnesty International, "Human Rights: Is It Any of Your Business?," *Amnesty International and the Princes of Wales Business Leaders Forum.*, p. 23.

²⁴ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022)."

inclusive, responsible and sustainable workplace practice known as the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) - one of the International Labour Organisation (ILO)'s Instruments only directed to private sectors.²⁵ This MNE Declaration provide good practice for private sectors to create a positive contribution on economic and social progress and ensure that the decent work for all can be realised in accordance with the ILO Conventions and Recommendations; while minimising and resolving the difficulties on various business operations may have. One of the Principles specified in the MNE Declaration also addresses that “enterprises, including multinational enterprises, should carry out due diligence to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts that relate to internationally recognised human rights, understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the ILO Declaration on Fundamental Principles and Rights at Work.”²⁶

In terms of conducting business and managing risk to business, the corporate governance framework should recognise the rights of stakeholders involved in businesses either by law or through mutual agreements. Good corporate governance should encourage cooperation between enterprises and stakeholders, who may happen to involve in business operations, to ensure enhanced wealth, job creation, and the sustainability of financially sound enterprises.²⁷

According to the OECD's Principle on Corporate Governance, corporate governance is purported to “help build an environment of trust, transparency and accountability necessary for fostering long-term investment, financial stability and business integrity, thereby supporting stronger growth and more inclusive societies”.²⁸

²⁵ International Labour Organization, "What Is the Ilo Mne Declaration?," https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm.

²⁶ International Labour Organisation, "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Mne Declaration) - 5th Edition (March 2017)," (International Labour Organisation (ILO), 2017)., p.5.

²⁷ OECD, "G20/Oecd Principles of Corporate Governance," OECD Publishing, <http://dx.doi.org/10.1787/9789264236882-en.>, p. 34.

²⁸ Ibid., p.7.

With HRDD, private sectors should manage its business by comprehensively taking into account the interests of employees and other stakeholders, as well as their roles in contributing to the long-term performance of the company or a sustainable manner. Those who concern with corporate governance or at the position of the decision-making process of the company or the company's direction should also consider other non-financial dimension or societal expectation, such as environmental, anti-corruption or ethical concerns. Furthermore, private sectors should be governed to the extent that there is an acceptable degree of transparency and disclosure in place as an evidence-based basis to gain the public trust and to ensure that their business operations comply with all applicable laws.

Parent companies and their subsidiaries can, to some extent, operate their business across the world due to the rise of globalisation and trade liberation; nevertheless, such dynamic movement of business operations across the supply chain may not respect human rights in order to gain a comparative advantage. People and environments involving in the business operations are exploited without shared responsibility or accountability to the companies, who enjoy all the profits, including privileges. Existing legal mechanisms and policies in the country may not provide sufficient remediation to those suffering or being deprived of their fundamental rights while providing man resources to the businesses. Such negative impacts due to the exploitative practices of business include environmental damage as witnessed nowadays and accounts for the cause of global warming and climate change. The international community has been actively discussing how to bring corporate actors to effectively involve in solving problematic issues and finding sustainable solutions in a comprehensive approach. Private sectors in many industries, apart from the push from governments and civil society's organisations, have been discussing how to establish a responsible business. According to the Organisation for Economic Co-operation and Development (OECD), it is suggested that business should have its policy commitment in place to ensure Responsible Business Conduct (RBC) and should operate their business in compliance with laws, specifically human rights,

environmental protection, labour relations, and financial accountability.²⁹ Traditionally, such conduct of business is established upon private voluntary initiatives and are known as Corporate Social Responsibility (CSR).³⁰

In capturing the key concept of corporate governance concerning the role of stakeholders, the traditional concept of corporate governance concerns the readiness and flow of external capital to private sectors in the form of equity and credit.³¹ The success of the private sectors can only come from the result of teamwork which is composed of diverse human resources, ranging from investors, employees, creditors, customers and suppliers, and other stakeholders. Thereby, such success in part results from the contribution of stakeholders as a valuable resource for establishing and enhancing the competitiveness and profitability of the private sectors.

In this connection, corporate governance should focus on building and strengthening long term relationship with stakeholders to foster sustainable wealth and cooperation among stakeholders. Thus, the conduct of business must respect human rights in order to be able to build a sustainable relationship with and for business and stakeholders. In other words, private sectors are recommended to conduct their business activities that take into account the interest of people involving along the supply or value chain. In order to level a playing field, there must have a legal mechanism to incentivise private sectors to be aware and understand how their conducts can impact society as a whole. It is reasonable to state that mandatory HRDD Legislation is urgently needed to shift the corporate governance to help build and enhance an environment of trust, transparency, accountability required for fostering sustainable investment, financial stability as well as business integrity, stronger growth and equally important, more inclusive society, while being able to deliver justice by respecting rightsholders.

²⁹ OECD, "Policy Framework for Investment User's Toolkit - Chapter 7. Promoting Responsible Business Conduct," <https://www.oecd.org/investment/toolkit/policyareas/responsiblebusinessconduct/42267935.pdf>.

³⁰ Ibid.

³¹ OECD, "G20/Oecd Principles of Corporate Governance".

1.2 Purpose of the Study

1.2.1 To examine human rights situation concerns from business perspectives

1.2.2 To investigate the possibility of regulating private sectors to establish the appropriate approach for responsible investment through mandatory human rights due diligence legislation

1.2.3 To construct legal understanding on which approach should be appropriate in bringing private sectors to be more aware of respect for human rights in Thailand

1.3 Hypothesis

Due to the absence of the enforcement of Thailand's legislation on imposing human rights obligations for private sectors, mandatory human rights due diligence legislation should be required to improve the critical human rights situation through the private sector engagement.

1.4 Scope of the Study

The research will focus on analysing current legal frameworks and policy tools, including initiatives in enforcing Thailand's mandatory human rights due diligence legislation imposing human rights obligations for corporate actors within their business operations which may have an adverse impact on human rights, and accordingly assessing the business feasibility within the United Nations Guiding Principles on Business and Human Rights (UNGPs) and other relevant laws and existing policies within the international and regional community. The research will also focus on increased accountability of private sectors through a paradigm shift in corporate governance regime with consideration on existing legal instruments and policy tools on responsible business and human rights protection and promotion to better improve the human rights situation in Thailand with the inclusion of private sectors through the recent development on Thailand's National Action Plan and the potential new legislation on mandatory due diligence in an effective manner.

However, this research will only explore on the substantive aspect of the law and how the potential new law on mandatory human rights legislation, ideally aligned with the United National Guiding Principles on Business and Human Rights, would be appropriate in the Thai context, and may not go beyond the implications on complex law drafting process or political process in Thailand.

1.5 Research Methodology

Documentary research will be applied to this topic. The research will be conducted through the collection of information from international laws, mainly from the UN Guiding Principles on Business and Human Rights, international human rights laws, and other relevant legal instruments relating to business and human rights. The documentary research ranges from law books, academic books, journals, and articles such as Business and Human Rights Journals, including information collected from the online platforms. Such collected information will be analysed within the context of Thailand's existing legal frameworks and policies on business and human rights, especially the rise of human rights due diligence. Such analysis may provide direction and recommendation on mandatory human rights due diligence for private sectors having more increased responsibilities and accountabilities, and above all improving the human rights situation in the country and region with the inclusion of all stakeholders.

1.6. Expected Results and Outcomes

1.6.1 To develop an understanding of the problem of human rights concerns in business operations

1.6.2 To understand theoretical and practical knowledge on challenges on business and human rights with the existing legal instruments and policy tools

1.6.3 To identify, address, and understand the critical problems for private sectors in respecting human and promoting rights, considering the practical perspectives on good corporate governance

1.6.4 To explore potential enforcement of Thailand's effective legislation for mandatory human rights due diligence

1.6.5 To improve the critical situation of human rights in Thailand through the private sector's increased participation and accountability



Chapter 2

Emerging Concepts Relating to Private Sector's Obligations to Safeguard Human Rights

2.1 Imposition of human rights obligations on private sectors

As States are a party to international human rights laws and consent to establish a normative basis for human rights obligations, it could be assumed that the state consent enables imposition of direct human rights obligations. Thus, despite some opposition, private sectors should incur direct human rights obligations which they infringe on a normative basis for human rights obligations, accepted by states.³² In this regard, it is assumable that corporate responsibility on human rights has become emerging practice being established and exercised across many countries.³³

It is known that the UNGPs should not be interpreted as forming new international law obligations for corporate responsibility, or as limiting or undermining any legal obligations that States may have undertaken or be subject to under international law on human rights protection and promotion.³⁴ However, it is of authoritative justification for bringing private sectors to have increased responsibility and accountability for societal expectation.

There are several options for the regulatory intervention for States to increase corporate responsibility to respect human rights, namely by introducing new voluntary guidelines, enforcing new regulation requiring due diligence reporting, or requiring mandatory due diligence.³⁵ Since the UNGPs entails that private sectors should reasonably exercise reasonable human rights due diligence, it is essential to

³² J. Martin, & Bravo, K. (Eds.), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge: Cambridge University Press, 2015)., p. 107.

³³ Office of the High Commissioner of Human Rights, "Overview of References to Human Rights Due Diligence in Existing State National Action Plans on Business and Human Rights," <https://www.ohchr.org/Documents/Issues/Business/Session18/CompilationNAPReferencesToDi%20ligence.pdf>.

³⁴ *Ibid.*, p.1.

³⁵ British Institute of International and Comparative Law "Study on Due Diligence Requirements through the Supply Chain, Final Report.", p. 19-20.

acknowledge and deeply understand the difference between traditional due diligence process and human rights due diligence process. For the law to be not just a word appearing on a paper, sanctions under any law or regulation are one of the vital elements for the law to govern the society and maintain peace and security effectively. In this regard, due diligence and legal liability are associated to each other because private sector can generally claim a due diligence defence to exempt for legal liability when there is an allegation against the alleged wrongdoing. The same goes with Human Rights Due Diligence (“HRDD”). There is a connection between HRDD and the concepts of legal liability.³⁶ If the HRDD process is properly managed and well implemented, private sectors will receive relevant benefits in terms of effective legal risk management.³⁷ This section will discuss how HRDD is different from the traditional ones, and will accordingly provide rationales behind HRDD. It will later explore the scope of HRDD and how HRDD can be pursued in operational context as suggested by the OECD Due Diligence Guidance for Responsible Business Conduct along with the interpretive guide of the UNGPs.

2.1.1 What is Due Diligence?

Due diligence (DD) is an extensive process before acquiring or conducting business in order to assess another party’s or trading partner’s assets, capability, and financial performance in a comprehensive manner.³⁸ Meanwhile, the Black Law Dictionary defines DD as “a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case”.³⁹

In commercial practice, private sectors may resort to lawyers, and financial advisors to conduct due diligence before executing any agreement in order to identify

³⁶ The United Nations High Commissioner for Human Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through State-Based Non-Judicial Mechanisms," in *Report of the United Nations High Commissioner for Human Rights* (2018).

³⁷ Ibid.

³⁸ Corporate Finance Institute, "What Are the Types of Due Diligence? Corporate Finance Institute,," <https://corporatefinanceinstitute.com/resources/knowledge/deals/types-of-due-diligence>; *ibid*.

³⁹ *Bryan A and Henry Campbell Black West Garner, Black's Law Dictionary, ed. 6th ed (St. Paul, Minnesota 2009).*

and evaluate risks and exposure to the risk of operating business and to the ultimate extent whether such potential agreement can generate profitability. There may be as more than twenty types depending on the subject matter and perspective in conducting due diligence analysis.⁴⁰ Generally, in the commercial world, types of DD ranges from the aspect of administration, finance, assets, intellectual properties, human resources, environmental concerns, tax implications, customers, strategy, and ultimately legal DD. It is undeniable that legal DD can be one of the most crucial DD required before conducting business because in conducting business, there may be a risk of civil, statutory, and criminal liability to the company and the authorised director(s) as business activities may be contrary or violates local laws. Typically, legal DD is conducted to examine and provide a review of corporate documents such as Memorandum and Articles of Association, Minutes of Board Meetings for a certain period, minutes of all meetings or actions of shareholders for the copy of share certificates issued to Key Management Personnel, copy of all guarantees to which the company is a party, all material agreement, including any joint venture or partnership agreements, limitation of liability, or operating agreements, licensing or franchise agreements, copies of all loan agreements, bank financing agreements, including but not limited to, lines of credit to which company is a party.⁴¹ The purpose of conducting DD is to have sufficient information before engaging with business or establishing a business relationship to another party or a trading partner in order to establish best-informed decisions. To address a general overview of due diligence process, corporate enterprises is recommended to analyse the purpose of business, including pre-analysed financial business case, to check all required documents, to complete analysis of business case and plans, to conduct risk analysis, and propose to create a final offering and ongoing monitoring.⁴²

2.1.2 What is Human Rights Due Diligence (HRDD)?

According to the UNGPs, HRDD can be viewed to have normative value in that it gives a primary expectation for any private sector to be more responsible in

⁴⁰ Institute, "What Are the Types of Due Diligence? Corporate Finance Institute,".

⁴¹ Garner, *Black's Law Dictionary*.

⁴² Institute, "What Are the Types of Due Diligence? Corporate Finance Institute,".

their exploitative conduct that it causes, contributes, or it is directly involved. HRDD comprises an ongoing management process, focussing on risk to people, not to business, which a reasonable and prudent person or enterprise needs to undertake. However, such process may be different, depending on different circumstances such as sector of business, operating context, size, and other similar factors. It is then to ensure that such operation of the business will meet its responsibility to respect human rights.

In this regard, as mentioned earlier that HRDD involves the concept of legal liability whether it is civil, administrative or criminal, people suffering the violation of business operation may easily access to justice and remedy with the guideline from HRDD implemented as it is conducted on an ongoing basis according to Principle 17 of the UNGPs.⁴³ Accordingly, the main difference between HRDD and traditional due diligence would be that HRDD focuses on the risk of human rights violation or people-centred approach. In contrast, the traditional DD, also commonly known as transnational due diligence or compliance monitoring focusses risk-related or affected business. Conceptually, HRDD can play a vital role in establishing private sector's visibility and image. It is a question of how to inform the public that private sectors have their business practice in line with human rights obligations by addressing and going beyond the idea of exploitative and harmful conduct.⁴⁴ In terms of risk management, corporate responsibility under the UNGPs has been established in order for private sectors to be proactive, so that preventative measure can be present in the operations of the business; thereby, private sectors are equipped with a well-prepared tool or appropriate guidance to human rights protection, and effective remedial measure when such violation occurs or tends to occur.⁴⁵

2.1.3 Rationales behind Mandatory HRDD

In responding to corporate responsibility to effectively take part in protecting human rights, such responsibility is usually reflected and translated in business code

⁴³ Principle 17 of the UNGPs

⁴⁴ United Nations General Assembly, "The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (a/73/163)."

⁴⁵ Ibid.

of conduct and monitoring systems; nonetheless, due to many adverse impacts occurring across the world, a transnational contractualisation of fundamental rights has been insufficient in providing effective enforcement of corporate responsibility.⁴⁶ It is witnessed that failure to conduct or a lack of HRDD to address comprehensive risks of business operations may have a more significant harmful consequential damage to its business.⁴⁷ Even if there exists business case argument, HRDD should be incorporated in the creation of business along with business operations and with an ongoing basis. Thus, there is a strong need to integrate traditionally clashing fields between human rights and business governance. HRDD can bring about disclosed information required to show specific human rights risks at any specific point in time and any specific operating context. It also reflects the actions in response of the corporate responsibility of human rights under the duty to respect to take to prevent and mitigate human rights risks, as referred in the interpretive guide as “the risks of having an impact on human rights, as against risks to the enterprise itself”.⁴⁸ Thus, it is logical to summarise that human rights risks can increasingly lead to risks to the business.

It is reasonable to view the UNGPs as the results of the merging between the traditional due diligence and human rights-based approach. In terms of legal liability, traditional due diligence can be viewed as defence from liability or may be used as a shield against liability under applicable laws. With this reason, the need to develop a legal mechanism which is practical and feasible for corporates to establish more responsibility and more accountability. States have been putting great efforts to control corporates' behaviours in conducting business by imposing obligations for corporate enterprises to comply with all regulatory laws with the civil and criminal liability approach in order to ensure that corporations meet specified standards of behaviours and act with due diligence in specific areas such as environmental

⁴⁶ Marco Fasciglione, "The Enforcement of Corporate Human Rights Due Diligence: From the Un Guiding Principles on Business and Human Rights to the Legal Systems of Eu Countries," *10 Hum. Rts. & Int'l Legal Discourse* 94 (2016).

⁴⁷ Rachel Davis and Daniel Franks, "Costs of Company-Community Conflict in the Extractive Sector," (2014).

⁴⁸ United Nations Office of the High Commission for Human Rights, "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide," (2012)., p.31.

protection and labour rights⁴⁹; however, to have comprehensive protection without leaving anyone behind, the areas of concerns should be able to comprehensively cover political, economic and social rights as defined in many international human rights law.⁵⁰ Thus, there is an urgent need to call for mandatory HRDD Legislation which is feasible and acceptable within the operational context in the commercial world.

2.1.4 Scope of mandatory HRDD Legislation

According to the OECD Due Diligence Guidance on Responsible Business Conduct, private sectors bearing corporate social responsibility should avoid and be able to address all adverse impacts by bearing obligations on information disclosure to ensure transparency, human rights protection, employment law and industrial relations law, environmental protection, bribery law and consumer protection; however, companies may prioritise the risks and its impacts by considering severity and likelihood of risks of violation on all subject matter.⁵¹ Similarly, the UNGPs lay down General Principles in recognition of “a) States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms; b) The role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights; and c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.”⁵² In the UNGPs, Foundational Principles and Operational Principles have been described with commentary for the Three Pillars, namely state duty to protect, corporate responsibility to respect human rights, and access to remedy. These categories of Principles could help frame the scope of mandatory HRDD Legislation due to the UNGP’s authoritative and legitimate characteristics for states to adopt and implement at the domestic level. With regard to HRDD, the UNGPs accentuate that corporate enterprises must comply with all applicable laws to respect human rights,

⁴⁹ Marco Fasciglione, "The Enforcement of Corporate Human Rights Due Diligence: From the Un Guiding Principles on Business and Human Rights to the Legal Systems of Eu Countries.", p. 96, 10 Hum. Rts. & Int'l Legal Discourse 94 (2016).

⁵⁰ Principle 12 of the UNGPs

⁵¹ Trade Union Advisory Committee to the OECD Commission, "Launch of the Oecd Due Diligence Guidance on Responsible Business Conduct - Tuac Contribution," (2018).

⁵² Rights, "Guiding Principles on Business and Human Rights - Implementing the United Nations "Protect, Respect and Remedy" Framework", p.1.

regardless of their foreign characteristics or status of entity, size, sector, location, ownership, and structure. Principle 16 to Principle 21 of the UNGPs contains operational context as to how private sectors can contribute to corporate responsibility based on the Foundational Principles stipulated in Principle 11 to Principle 15.⁵³ However, it is worth noting that “as a policy commitment, HRDD should address adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships”.⁵⁴ Therefore, the HRDD should be able to show the private sector’s own activities, and to its business relationship. With this disclosure obligation, these activities and business relationships may draw and set the scope of human rights due diligence in terms of relevant targets of the HRDD legislation. According to the Corporate Responsibility to Respect: an Interpretive Guide by the Office of the UN High Commissioner for Human Rights, “business relationships” are referred to the relationships which an enterprise has with “business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services”.⁵⁵ In considering business relationships, the risks to be discussed as a subject matter here are not on those on the business posed by the party, but the risks posed to people as they harm, or may harm, human rights in connection with the private sector’s own operations, products or services.⁵⁶ It is also noted in the Interpretive Guide to the UNGPs that “the human rights due diligence process should uncover risks of non-legal, or perceived, as well as legal complicity and generate appropriate responses”.⁵⁷

On the Foundational Principles of Pillar Two, according to Principle 14, the means of meeting corporate responsibility may vary due to corporate’s size, sector, operational context, ownership and structure.⁵⁸ Thus, there will be differences in corporate responsibility due to the factors indicated in Principle 14. These differences

⁵³ Ibid., p.13-p.16.

⁵⁴ Principle 13 of the UNGPs,

⁵⁵ Rights, "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide."

⁵⁶ Ibid., p.32.

⁵⁷ Ibid., p.5

⁵⁸ UNGPs 14

come into play in relation to corporate human rights due diligence process. However, Principle 15 of the UNGPs stipulates that corporate enterprises must implement a due diligence process, appropriate to their size and circumstances.⁵⁹ The UNGPs' Principle 11 underscores the concept of corporate responsibility to avoid causing or contributing to any violation of human rights by corporate enterprises themselves or by their business relationships.⁶⁰ It is assumable that the HRDD Legislation should include all actors involving and contributing to adverse impact of human rights, not just the corporate enterprises which conduct or implement the HRDD themselves in order to establish a preventive and mitigating measure in a comprehensive manner.

In terms of remediation under the HRDD process, Principle 25 indicates remediation when there is a violation or a potential violation of human rights. Private sectors are encouraged to “take appropriate measures to strengthen the remedies provided to protect people who have been the victims of activities of such business enterprises operating abroad.”⁶¹ It can be assumed that HRDD legislation should address effective remedial measure to victims of human rights violation and also ensure easily accessible access to remedy within the corporate's established mechanism or non-judicial mechanism and within the traditional access to justice or judicial remedy.

In a question of identifying the rights to be guaranteed and protected by corporate enterprises and thus reflected in the HRDD process, as recommended by the UNGPs, the HRDD legislation should incorporate the recognition of rights contained in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and Rights at Work contained in the ILO's Declaration.⁶² However, the mandatory HRDD Legislation should not be limited to certain recommendation. It should comprehensively explore all rights, including address marginalised groups such as women, LGBTs, indigenous group, the disabled, people living with HIV,

⁵⁹ UNGPs 15

⁶⁰ UNGPs 11

⁶¹ Principle 25 of the UNGPs

⁶² International Labour Organisation (ILO)'s Declaration on Fundamental Principles and Rights at Work

migrant workers. With these groups being included in the HRDD legislation, it is logical to assume that quality of life of people in this world may be improved, and economic and social gaps will be reduced and eventually eliminated.

2.2 Theoretical approach

As the UNGPs outline steps for States to foster businesses to respect human rights; provide a blueprint for companies to manage the risk of having an adverse impact on human rights; and offer a set of benchmarks for stakeholders to assess business respect for human rights.⁶³ In order to have mandatory HRDD Legislation enforced and implemented at the national level, it is worth exploring key components of the due diligence process, which incorporates rights recognised under the above mentioned international human rights law. The HRDD Legislation will be elaborated under the Protect, Respect, and Remedy framework (the Three Pillars) together with the guidance of the UNGPs. In this part, to understand how the substantive law on HRDD contains obligations imposed by State to businesses under the competent jurisdiction, it is worth exploring the key characteristics of HRDD. These key characteristics may consist of due diligence as a legal standard of care, due diligence reporting provision, mandatory due diligence provision, disclosure provision, including liability provision due to non-compliance of the Legislation, and remedial measures for damage incurred by companies.

2.2.1 Key Components of HRDD process

In this part, it will explore how HRDD can be conducted. It should be noted from the beginning that there should be a policy commitment to ensure responsible business conduct at the private sector's decision-making level or the top management to conduct HRDD, otherwise this process cannot be succeeded due to the lack of the entry point.

Due to the combination between HRDD and on the traditional DD, HRDD can be a tool for corporates to monitor their day-to-day activities which integrates

⁶³ Interpretive Guide to the Corporate Responsibility to Respect Human Rights, p.2, <https://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>

responsibility to respect human rights. It is a way for the enterprise to proactively manage the potential and actual risks of adverse impacts on the rights and dignity of people. While often referred to as the HRDD process, it involves a bundle of interrelated processes which should include the following four core components, namely assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.⁶⁴ Under the Operational Principles of the UNGPs, Principle 17 lays down that HRDD should be able to:

- “a) cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- b) will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations; and
- c) should be ongoing, recognising that the human rights risks may change over time as the business enterprise’s operations and operating context evolve.”

In this regard, this Part will elaborate how the UNGPs can be translated at the operational level and how HRDD can be conducted in response of the corporate responsibility to identify, prevent, and mitigate risks to human rights violations through more concrete steps as guidance to conduct HRDD. Such steps start from a) identifying and assessing actual or potential violation, b) Integrating findings and taking appropriate action, c) Tracking effectiveness of company response, d) Communicating on how impacts can be addressed.

a) Identifying and assessing actual or potential violation

It is suggested by the UN the Working Group on Business and Human Rights⁶⁵ that private sectors should identify and assess risks by geographic context,

⁶⁴ Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms, UNGA, Working Group on the issue of human rights and transnational corporations and other business enterprises, <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/73/163&Lang=E>

⁶⁵ The Working Group on the issue of human rights and transnational corporations and other business enterprises (known as the Working Group on Business and Human Rights) is mandated by the Human Rights Council to promote worldwide dissemination and implementation of the Guiding Principles on Business and Human Rights (Resolutions 17/4, 26/22, and 35/7). The Working Group is composed of

sector and business relationships throughout own activities, including its subsidiaries and the value chain.⁶⁶ In line with the conceptual framework of HRDD under the Foundational and Operational Principles of the UNGPs to prevent and mitigate risks to and account for human rights violation, this due diligence process must be conducted on an ongoing basis, not a one-time undertaking or how the traditional due diligence is employed. Each potential impact having been identified will have to be assessed for its likelihood and severity, and every identified actual impact will need to be addressed.⁶⁷ The HRDD could help private sectors to identify risks, specifically human rights risks, and reflect that it respects human rights along with their business operations. The exercise of HRDD should be able to include and respond to the prioritised need to protect human rights when there is an operational change within such private sector. Accordingly, HRDD requires an ongoing or iterative process, except it is viewed that the context suggests otherwise due to no significant change of the operation of the business.⁶⁸ In this regard, this means that to be able to identify such impacts, it may shift in corporate governance from risks to business to risk to people. Such positive change may require leadership and direction from the top of management, either from the shareholders of the company, board of directors. Equally important, the change requires attention and action from government, and a potential regulatory body, to turn human rights commitments into reality in that it has legal for the private sector to so act in compliance.

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five independent experts, of balanced geographical representation, and it is part of what is known as the Special Procedures of the Human Rights Council. Special Procedures mandate-holders are independent human rights experts appointed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world. The experts are not UN staff and are independent from any government or organization. They serve in their individual capacity and do not receive a salary for their work. Summary of the report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (A/73/163) - United Nations Human Rights Office of the High Commissioner, "Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises."; United Nations Office of the High Commissioner of Human Rights, "Summary of the Report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (a/73/163)," <https://www.ohchr.org/Documents/Issues/Business/ExecutiveSummaryA73163.pdf>.

⁶⁶ "Summary of the Report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (a/73/163)".

⁶⁷ Ibid.

⁶⁸ Rights, "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide.", p.33.

According to the OECD's Due Diligence Guidance for Responsible Business Conduct, in assessing human rights risks, it must be conducted in a manner that could carry out a broad scope of exercising due diligence to all areas across business operations and relationships, including its supplier or contractors along their supply or value chains where such risks are most likely to be present and most significant.⁶⁹ The OECD further suggests that the HRDD should start with the significant areas of identified risk by conducting iterative and increasingly in-depth assessments of prioritised operations, suppliers, and other business relationships to effectively identify and assess specific actual and potential adverse human rights impacts.⁷⁰

In further assessing the enterprise involvement with the actual or potential adverse impacts of human rights in order to determine the appropriate responses to assess whether the enterprise causes (or would cause) the adverse impact; or contributes or would contribute to the adverse impact; or whether the adverse impact is or would be directly linked to its operations, products or services by a business relationship.⁷¹ Accordingly, the next step is to draw from the information obtained on actual and potential adverse impacts, prioritise the most significant risks and impacts for action, based on severity and likelihood. However, it should be acknowledged that such risk prioritisation will be only relevant as it may not be possible to list all potential and actual adverse impacts immediately. Once the part having most risks and impacts is dealt, enterprises should be able to address less risk and impact.⁷²

b) Integrating findings and taking appropriate action

Once there is an identification of human rights risks, private sectors should be able to lay down a measure to take further action or find a solution to mitigate such risks. However, in the operational context, it should be noted that such action or response must be ensured that it can be tracked in order to demonstrate transparency and accountability. Such action can be discontinuation of business activities that are causing or contributing to adverse impacts on human rights and responsible corporate

⁶⁹ OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct, p.61.

⁷⁰ Id. p.26.

⁷¹ Id. p. 27

⁷² Id. p. 28

governance, based on the private sector's assessment of its involvement with adverse impacts.

Also, using leverage to business to prevent and mitigate the risks could help widen the pervasiveness of responsible business conduct within the private sector's business relationship. Once there is the adverse impact being identified, if private sectors contribute to such impact, they are required to use leverage to mitigate any remaining impacts to the greatest extent possible. Whereas such adverse impact is directly linked to enterprise operations, product or services by a business relationship, enterprises are also required to influence the entity, causing the adverse impact to prevent or mitigate the impact.⁷³ Additionally, such appropriate action can be a development and an implementation of plans that are fit-for-purpose to prevent and mitigate potential adverse impacts.⁷⁴

c) Tracking Effectiveness of Company Response

The purpose of tracking the effectiveness of company response to human rights impact is to demonstrate the feedback through established, effective grievance mechanisms as well as from broader stakeholder engagement within the enterprise.⁷⁵ Such tracking also demonstrates how enterprises identify, prevent mitigate, and support remediation of the adverse impacts, including with business relationships. In terms of operation in practice, monitoring and tracking the implementation and effectiveness of the private sector's internal commitments should be in line with private sector's human rights policy commitments from the beginning. Private sectors should be able to set activities and goals on due diligence such as by carrying out periodic internal, third party reviews, or audits of the outcomes achieved and communicating the results at relevant levels within the enterprise.⁷⁶ Enterprise can also carry out a periodic assessment of business relationship to verify that risk mitigation is being pursued. For tracking human rights impacts that a private sector has, or may cause or contribute to, private sectors may seek to consult with and

⁷³ OECD, "Oecd Due Diligence Guidance for Responsible Business Conduct," (2018)., p. 72.

⁷⁴ Ibid., p.77.

⁷⁵ Rights, "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide.", p.34.

⁷⁶ Ibid.

engage impacted or potentially impacted rightsholders, including workers, workers' representatives and trade union.⁷⁷ Moreover, private sectors are encouraged to conduct a periodic review of relevant multi-stakeholders and industry initiatives that such private sector is a member to by adopting its commitment from particular guidance and recommendation, and their value to the private sector in helping it identify, prevent or mitigate adverse impacts linked to its business, taking into account the independence of these initiatives.⁷⁸ Another necessary action is to identify adverse impact or risks that may have been overlooked in the past DD process and to reduce, or even close the gaps identified, and include these in the future.⁷⁹ Moreover, feedback of lessons is also crucial in order to track the effectiveness of such HRDD in order to improve process and outcomes in the future.⁸⁰

d) Communicating on How Impacts Can Be Addressed.

This step is crucial for private sectors to demonstrate its position as to how such HRDD is being committed and implemented. The public can be informed on how private sectors address human rights risks in general and how they have remedied significant human rights impact.⁸¹ This step is also interrelated to the remediation under the third Pillar to ensure access to remedy where there is adverse impact or violation of human rights across business operations. In terms of practical actions for the private sector to communicate to the public, reporting on relevant information on HRDD can be disclosed through the enterprise's annual, sustainability or corporate responsibility reports or other appropriate forms of disclosure. This disclosed information may include responsible business conduct policies or corporate responsibility to respect human rights policy. The disclosed and reported information should include how private sectors lay down and implement the measures embedded with responsible business conduct into policies and management systems, including the enterprise's identified areas of significant risks, the significant adverse impacts or risks identified, prioritised and assessed, the prioritisation criteria, the actions taken to

⁷⁷ OECD, "Oecd Due Diligence Guidance for Responsible Business Conduct.", p. 32

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Rights, "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide.", p.34.

prevent or mitigate those risks, estimated timelines and benchmarks for improvement and their outcomes, measures to track implementation and results and the private sector's provision of or cooperation in any remediation.⁸² The disclosed information must be easily accessible and readily available such as having an online platform for the public to access this information or at the enterprise's premises and in local languages to ensure effective communication. Equally important, in communicating human rights impacts, it is significant for private sectors to be well prepared to communicate with the affected or potentially affected rightsholders in a timely and sensitised manner in every stage as the information disclosed has affected and is relevant to them, particularly when relevant concerns are raised by them or on their behalf.⁸³ However, from where private sectors stand, it is worth noting the concerns on the sensitivity of commercial confidentiality, business competition information, security concern before disclosing such information.⁸⁴

2.2.2 Key Legal Characteristics of HRDD Legislation

One of the key challenges to protecting and promoting human rights is that there is no ensured accountability to a parent company which contributes to or is directly linked to the adverse impact of human rights or violation of human rights. This lack of clear and comprehensive legal certainty to ensure a private sector's duty to respect human rights as well as its accountability draws international attention to introduce mandatory HRDD Legislation in response of the UNGPS formed as an international norm for countries, including business, to adopt and commit to protecting and promoting human rights. It is acknowledged among academia and scholars, as well as civil society organisations that HRDD has the potential to prevent human rights abuses in global business operations provided that it is sufficiently implemented and the appropriate enforcement mechanisms are established.⁸⁵ In this

⁸² OECD, "Oecd Due Diligence Guidance for Responsible Business Conduct.", p. 33

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ European Coalition for Corporate Justice, "Eccj Position Paper - Key Features of Mandatory Human Rights Due Diligence Legislation," (2018).

ECCJ is the only European coalition bringing together European campaigns and national platforms of NGOs, trade unions, consumer organisations and academics to promote corporate accountability.

regard, it is worth taking an exhaustive consideration on the key characteristics of mandatory HRDD Legislation in order to understand how corporate responsibility can be translated into law and regulatory measures for private sectors to adhere and for governments to function at its legitimate power in the response of the State duty to protect.

The HRDD Legislation is usually composed of scope of human rights protected and the company subject to this Legislation, nature of company's obligations to comply with the applicable laws and legal requirements, contents and scope of the due diligence obligation or due diligence plan, and equally important, liability provision to ensure access to justice and sanction provision to ensure compliance. Exploring and scrutinising the key characteristics of mandatory HRDD Legislation could help incubate legislative reform to fully realise and enforce the HRDD to its full potential while addressing challenges faced by victims of corporate-related human rights abuses when seeking justice and remediation for being deprived of rights.

To address the scope of the application regarding such HRDD Legislation, the Legislation should demonstrate how it wishes to regulate and monitor corporate behaviours. In order to produce the substance of the law and its legal text, law and policymakers should be able to identify the followings, without limitation to companies concerned, the number of employees (nationwide and worldwide), type of violations, rights recognised under the mandatory Legislation, i.e. human rights and fundamental freedoms, activities concerned: direct or indirect involvement in human rights violation, the requirement on mandatorily disclosed documents and/or relevant reports to ensure transparency and accountability, liability due to human rights violation and sanction under this HRDD legislation due to non-compliance, including the burden of proof, and equally important, remedial measure to ensure access to justice. In this sub-Section of Key Legal Characteristics of HRDD legislation, it will discuss the Scope of Human Rights Protected (2.2.2.1), Covered Companies (2.2.2.2), Nature and Contents of HRDD Obligation Imposed on Companies (2.2.2.3), Scope of Exercising Due Diligence Obligations (2.2.2.4) and Liability and Access to Justice (2.2.2.5).

2.2.2.1 Scope of Human Rights Protected

It is suggested that private sectors should bear a responsibility to respect, representing a combination between rights internationally accepted to form part of customary international law as concretely contained in the 1948 Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and rights chosen for their apparent topical relevance such as the International Labour Organisation (ILO)'s Declaration on Fundamental Principles and Rights at Work.⁸⁶ Thus, the HRDD Legislation should be able to recognise minimum standards and treatments as generally acknowledged by international human rights law. For environmental protection, the Legislation should also adhere to the norm recognised by international community such as the Montreal Protocol on Substances that deplete the Ozone Layer⁸⁷ or environmental protection standards introduced by international organisations such as the United Nations Framework Convention on Climate Change (UNFCCC).⁸⁸ In order for the HRDD Legislation to include all stakeholders, the Legislation should contain the rights of vulnerable groups or individuals such as indigenous peoples, migrants, women and other marginalised groups in accordance with the implementation of the 2030 Agenda for Sustainable Development.⁸⁹

2.2.2.2 Covered Private Sectors

The mandatory HRDD Legislation should be able to identify the company subject to fall into established obligations. It is a question of which sort of enterprises will bear the mandatory HRDD obligations and why they should bear such obligations. Existing mandatory HRDD Legislation appears to apply to Multinational Companies (MNCs) or large transnational companies whose corporate seat,

⁸⁶ Principle 13 of the UNGPs.

⁸⁷ UN Environment Programme, "The Montreal Protocol," <https://www.unenvironment.org/ozonaction/who-we-are/about-montreal-protocol>.

⁸⁸ United Nations Climate Change, "About the Secretariat," <https://unfccc.int/about-us/about-the-secretariat>.

⁸⁹ United Nations, "Transforming Our World: The 2030 Agenda for Sustainable Development (a/Res/70/1)," (2015).

headquarters or place of business is within the respective jurisdiction, regardless of their legal form or entity. For example, under the French Corporate Duty of Vigilance Act 2017, Article 1 specifies “any company at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries, whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad, must establish and implement an effective vigilance plan”, comparable to HRDD.

While Switzerland’s Responsible Business Initiative (RBI), which is under debate in the Swiss parliament, is purported to impose general HRDD and impose liability of the parent company operating a business abroad. According to the counter-proposal by the Swiss Parliament to the citizen initiative “Responsible Business Initiative (RBI)” proposed by the Swiss Legal Affairs Committee of the Swiss National Council in 2018,⁹⁰ the proposed law will apply to “companies which, alone or together with one or more domestic or foreign companies controlled by them, exceed two of the following values in two consecutive financial years: balance sheet total of 40 million Swiss francs (around 43 million US Dollars); sales of 80 million Swiss francs (or around 85 million USD); 500 full-time positions on an annual average”.⁹¹ With these existing laws, and policy and legal developments, it can be seen that mandatory HRDD Legislation needs to establish specific criteria in order to set the scope of application for such Legislation through the enterprise’s size, scale of business activities, severity of its impact to human rights, the amount of labour, as well as turnover received in a particular financial year. As a result, to enforce mandatory HRDD Legislation, law and policy-making body should be able to determine to draw the line where the enterprise will be subject to this Legislation; otherwise, there will be no clear standard of legal requirement and may leave the room for the responsible government authority or the judicial body for interpretation, which would have negative impacts to the business. Therefore, it is challenging for governments to enforce this type of Legislation as it will be faced with the question as

⁹⁰ Business & Human Rights in Law, "Unofficial Translation of the Counter-Proposal by the Swiss Parliament to the Citizen Initiative 'Responsible Business Initiative'," (2018).

⁹¹ Ibid.

to which extent the companies based in respective jurisdiction has the obligations to integrate human rights into their business processes.

In Germany, the German Federal Government is implementing the National Action Plan on Business and Human Rights by inviting 1,800 companies to participate in a survey in 2019 as a party of the Interim Report⁹² on Monitoring of the National Action Plan (NAP) on Business and Human Rights from 2018 to 2020. The purpose of the survey is to see and evaluate whether at least half of all companies in Germany with more than 500 employees will have integrated the core elements⁹³ of human rights due diligence into their business processes in a verifiable manner by 2020 and expect to obtain qualitative statements on progress, challenges and costs for private sectors in Germany. If not adequately implemented, the German government will consider further legislative measures.⁹⁴ Thus, it can be seen the mandatory HRDD Legislation may need to draw a clear line from the beginning to inform which company will be subject to comply with the Legislation. With consideration on the German monitoring on the NAP and its Interim Report, it can be viewed that in drafting HRDD legislation, it needs collaboration from all stakeholders to justify established criteria to gain acceptance and legitimacy of the Legislation from all stakeholders as well as to see how the potential proposed draft legislation would fit in the variety of context while ensuring adherence to the UNGPs.

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⁹² The 2019 Interim Report was published and approved by ministries of the inter-ministerial Committee on Business and Human Rights along with the Business and Human Rights Working Group of the National CSR Forum was involved in the report's drafting phase, This interim report presents the findings of the first exploratory survey phase in 2018 and provides information on the planning of the next steps and the further development of the methodology for the representative survey phases in 2019 and 2020; however, this Interim Report was presented to internal and external quality assurance for review and comments – See German Federal Foreign Office, "Monitoring of the Status of Implementation of the Human Rights Due Diligence of Enterprises Set out in the National Action Plan for Business and Human Rights 2016-2020 - Interim Report Survey Phase 2019," (2019).

⁹³ There are five core elements which are a human-rights policy statement, procedures for the identification of actual and potential adverse impacts on human rights, measures to ward off adverse impacts and review of the effectiveness of these measures, reporting, a grievance mechanism according to the Summary of the Interim Report – Survey Phase 2019.

⁹⁴ Office, "Monitoring of the Status of Implementation of the Human Rights Due Diligence of Enterprises Set out in the National Action Plan for Business and Human Rights 2016-2020 - Interim Report Survey Phase 2019."

2.2.2.3 Nature and Contents of HRDD Obligation Imposed on Private Sectors

Most of the HRDD legislative developments tend to impose corporate responsibility to respect internationally recognised human rights and environmental standards in their business activities by taking adequate measures to ensure that human rights and environmental standards are met along their business operations.⁹⁵ Accordingly, covered companies are required to exercise due diligence on an ongoing basis established by this Legislation. In France's Corporate Duty of Vigilance Law, the exercise of HRDD is called the Vigilance Plan. This substance of due diligence based on the UNGPs and has been elaborated in 2.2.1 Key components of HRDD above, composed of assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed according to Principle 17 of the UNGPs. To simply put, the company must have a plan or mechanism within its business operations to exercise due diligence on human rights, demonstrating its policy commitment to corporate responsibility to identify, prevent, mitigate, and account for adverse human rights and environmental impacts.

Nevertheless, due to existing mandatory HRDD Legislation, the specific content of a company's due diligence obligations will depend on the actual or potential risks to human rights and environment linked to its operations. The due diligence plan that the companies may need to develop may necessarily need to include a human-rights policy statement to communicate to the public, thus unilaterally binding itself to such commitment. Such commitment must demonstrate how it can establish and implement specific measures to identify actual and potential adverse impacts on human rights which such companies have associated. Private sectors are also expected to have certain preventive and mitigating measures on the adverse impacts and a review of the effectiveness of such implemented measures. To demonstrate and justify enhanced transparency and accountability, reporting to the responsible authority or the public, a remediation measure as a grievance mechanism

⁹⁵ Justice, "Eccj Position Paper - Key Features of Mandatory Human Rights Due Diligence Legislation."

must be practical, feasible, equitable, and well-implemented to ensure effective access to remedy through the state-based or non-State based grievance mechanism.

2.2.2.4 Scope of Exercising Due Diligence Obligations

With regard to which extent the covered companies will exercise the HRDD, Principle 13 of the UNGPs stipulates that HRDD “should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.” This Principle suggests the form of the company’s involvement in adverse human rights impact. According to the interpretive guide of the UNGPs,⁹⁶ it is pinpointed that there are three basic ways which an enterprise can be involved in an adverse impact on human rights: (a) It may cause the impact through its own activities; (b) It may contribute to the impact through its own activities either directly or through some outside entity (government, business or others); (c) It may neither cause nor contribute to the impact, but be involved because the impact is caused by an entity with which it has a business relationship and is linked to its own operations, products or services. With this justification on the form of the private sector’s involvement, it can guide how far the exercise of HRDD can reach to satisfy the UNGPs. Accordingly, this Principle suggests the HRDD should be conducted to the extent that it is connected to the company’ own activities and business relationships. In other words, these activities and business relationships set the scope of human rights due diligence.⁹⁷ Business relationship in this regard refers those relationships which a business enterprise has with business partners, entities in its value chain and any other non-State or State entity directly linked to its business operations, products or services.⁹⁸ Indirect business relationships in its value chain, beyond the first tier, and minority, as well as majority shareholding positions in joint ventures, are also included.⁹⁹

⁹⁶ Rights, "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide.", p.15.

⁹⁷ Ibid., p.32.

⁹⁸ Ibid., p.5.

⁹⁹ Ibid.

One of the examples can be adverse human rights impact from companies deemed to cause or have so caused, putting factory workers to be exposed to hazardous working conditions without safety equipment.¹⁰⁰ In the situation where private sectors are accused of contributing to adverse human rights impact, the enterprise desires to change product requirement for suppliers at the last moment without adjusting production deadlines and prices, thus pushing suppliers to breach labour standards in order to deliver.¹⁰¹ For adverse impact directly linked to a company's business operations, or business relationship but where the enterprise itself may not have contributed to it, the company's business partner uses scans by medical institutions to screen for female fetuses, facilitating their abortion in favour of boys.¹⁰²

However, exercising the HRDD process in terms of the scale and complexity will vary and depend on the size of the company, sector, operational context, ownership and structure of the company. However, the most significant factor to consider how extent the HRDD process should reach is the severity of human rights impact. Severity in this regard means severe human rights impacts which are referred to its 'scale', 'scope' and 'irremediable' character. In other words, its gravity and the number of individuals affected or possibly affected will be highly relevant considerations. "Irremediability" in this context means limitation on the ability to restore those affected to a situation at least the same as, or equivalent to, their situation before the adverse impact.¹⁰³ It is acknowledged that financial compensation can be provided only to the extent that restoration can be possibly made.¹⁰⁴ In short, the covered company is required to exercise HRDD in the extent to the entire structure, both parent and subsidiaries, as well as its suppliers or a trading partner relating to the company's supply chain.¹⁰⁵ Accordingly, the measures taken with

¹⁰⁰ Ibid., p. 17.

¹⁰¹ Ibid., p.17.

¹⁰² Ibid.

¹⁰³ Ibid., p.8.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

business relationships will be varied based on the covered company's degree of leverage.

2.2.2.5 Liability and Access to Justice

Since the role of HRDD can have impact in the process of finding legal responsibility since it is a standard of conduct required by law, a standard to evaluate negligence from such conduct leading to the fault-based liability, and a standard for the judicial body to consider some mitigating factors in imposing sanctions or remedies.¹⁰⁶ Once identified, actual impact requires remediation, and potential impact or risks to human requires appropriate action to prevent it from happening or at least mitigating such risk as much as possible.¹⁰⁷ With its regulatory nature, apart from traditional legal liability under the concept of tort law or other applicable laws regarding the legal requirements of a standard of care the company holds. The HRDD Legislation should be able to impose a sanction on to the covered company. To ensure effective sanctions due to damages caused by the company's negligence or non-compliance with the HRDD provision, diverse type of liability should be introduced and established in this HRDD Legislation, which should include civil, administrative, and criminal liability because this Legislation could have a role in setting standards for business operations for finding legal responsibility of business under domestic law.¹⁰⁸ Those sanctions can be enforced through a fine, either a civil or administrative nature, an administrative order, and criminal sanction such as the imprisonment of the director(s) of the private sector or those who have controlled or are deemed to have control over the private sector's business operations which have caused damages to rightsholders.

In order to lay down appropriate liability for the mandatory HRDD Legislation, law and policymakers should be able to observe different aspects of threat of legal liability before imposing liability on this HRDD legislation. Therefore, with the considerations of the HRDD and human rights impact assessment, the threat of liability may result from failure to comply with the HRDD obligation, negligence

¹⁰⁶ Nora Götzmann, *Handbook on Human Rights Impact Assessment*, Nora Götzmann1 (2019)., p. 398

¹⁰⁷ Ibid., p. 8.

¹⁰⁸ Ibid. p. 398

in the law of fault-based civil remedies due to a breach of a legal duty or a duty of care owed the victim of the adverse impact of human rights, and complicity due to a business relationship (known as secondary liability).¹⁰⁹ Moreover, the Legislation should be able to consider the covered company which has exercised HRDD but fails to prevent damages or provides remedies, as mitigating factors in imposing liability.¹¹⁰ However, HRDD should not be used as a positive defence for the company to deny liability despite having adequate procedures by arguing that it has taken steps and measures required under the HRDD obligation. In other words, strict or absolute liability model should be adopted because if the defence is allowed, meaning no liability for the covered company. Without remedies to the victim, the gravity of the damage and the importance of the protected rights or interest to the highly risky operation carried out by a company can be dictated and even compromised.¹¹¹ This model of liability exists in the area of environmental law and product liability law. However, it is acknowledged by the UNHRC that permitting a defence to liability based upon human rights due diligence activities could incentivise companies to engage in such activities meaningfully and have important preventative effects.¹¹²

The European Coalition for Corporate Justice (ECCJ),¹¹³ a European civil society organisation advocating for European laws that guarantee corporate accountability and transparency, and ensure justice for the victim of corporate malpractice, views that this type of law should at a minimum establish “civil liability of companies for damage caused by entities under their direct or indirect control” and “allow persons harmed [...] to bring an action against the parent company.”¹¹⁴ In

¹⁰⁹ United Nations High Commissioner for Human Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability (a/Hrc/38/20/Add.2)," (2018)., p.8.

¹¹⁰ Götzmann, *Handbook on Human Rights Impact Assessment*, Nora Götzmann1 , p. 401.

¹¹¹ Ibid., p. 398.

¹¹² Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability (a/Hrc/38/20/Add.2).", p.8.

¹¹³ ECCJ's 20 member organisations constitute the coalition's General Assembly. General Assembly meetings take place once a year to approve the annual work plan and budget, and make decisions regarding core strategic and political issues - European Coalition for Corporate Justice, "About Eccj," <https://corporatejustice.org/about-us/about-eccj>.

¹¹⁴ "Eccj Position Paper - Key Features of Mandatory Human Rights Due Diligence Legislation."

order for the law to have effective enforcement and implementation, the law should be able to effectively impose sanctions to the target to be incentivised to comply with the law rather than to get away from it. The HRDD should be able to lift the corporate veil or eliminate the shield to get to the parent company to be held accountable. The liability provision in the mandatory HRDD Legislation should impose liability for the parent or controlling or the company deemed to have control due to non-compliance of due diligence provision and for damage caused by its controlled company, both directly and indirectly, as well as by subcontractors and suppliers with established commercial relationships. Therefore, States should adopt and establish interconnectedness between corporate responsibility and liability arising out of mandatory HRDD Legislation within domestic legal regimes. The UNHRC's Concluding Remarks stipulates that there are many ways in which the two concepts can be connected in practice, and such connection, as observed by the UNHRC in its Report included mandating HRDD activities under threat of legal liability; evaluating the standard of care in negligence claims by reference to human rights due diligence standards, while in some circumstance permitting a human rights due diligence defence to certain offences in appropriate cases; considering the extent to which human rights due diligence was conducted when evaluating claims based upon theories of secondary liability; and taking into account a company's exercise of human rights due diligence when determining the type and severity of sanctions and remedies if liability is established.¹¹⁵

Apart from State-based-grievance mechanism, the non-State-based grievance mechanism is necessary and required under Access to Remedy (the Third Pillar). Recently, there is the UN Report, including its Addendum to the OHCHR on "Improving accountability and access to remedy for victims of business-related human rights abuse through non-state based grievance mechanisms" which set out recommended action for State and enterprises to achieve accountability and access to remedy by setting Policy Objectives for States and relevant non-State actors in

¹¹⁵ Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability (a/Hrc/38/20/Add.2).", p. 12.

designing and implementing non-State based grievance mechanisms.¹¹⁶ It is noted in the Report that the effectiveness criteria based in Principle 31 as a benchmark for assessing the effectiveness of non-State-based grievance mechanisms dealing with business-related human rights harms.¹¹⁷ In order to improve the effectiveness of non-State-based grievance mechanisms, under the Policy Objectives contained in the Report's Addendum, such mechanisms should be able to address legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, continuous learning, and operational-level mechanisms based on engagement and dialogue.¹¹⁸



¹¹⁶ United Nations High Commissioner for Human Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through Non-State-Based Grievance Mechanisms (a/Hrc/44/32)" (2020). "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through Non-Statebased Grievance Mechanisms: Explanatory Notes (a/Hrc/44/32/Add.1)," (2020).

¹¹⁷ "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through Non-Statebased Grievance Mechanisms: Explanatory Notes (a/Hrc/44/32/Add.1).", p.9.

¹¹⁸ Id. p.9 - p.15

Chapter 3

Policy and Legal Developments on Mandatory Human Rights Due Diligence

Before exploring the development of mandatory human rights due diligence in and across the region, it is worth noting that there is no single due diligence procedure to satisfy all regulatory challenges. However, these challenges should not deter the steps to move forward to establish common elements in the HRDD process under corporate responsibility. Such challenge, on the other hand, may reflect policy process that States need to undertake, prevent, investigate, punish, and redress such abuses through effective policies, legislation, regulation and adjudication.¹¹⁹ In relation to corporate responsibility and to avoid attribution to state responsibility from state perspectives, HRDD is needed as stipulated in the international human rights legal system because “under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish [...], and for providing compensation.”¹²⁰ It is acknowledged by the Civil Society Organisations (CSOs) in the EU community that a general reliance on voluntary and incentive-driven measures to promote business respect for human rights by the EU decision-making body has proven insufficient.¹²¹

In this regard, it is justifiable why HRDD Legislation should be enforced when considered with the aspect of state responsibility. Since 2011, national action plans have been adopted for the implementation of the UNGPs by some countries, including Thailand (adopted in 2019), purporting to develop domestic policies for

¹¹⁹ For the Inter-American Court on Human Rights - see *Veasquez Rodriguez V. Honduras*, (1998).; For the ECHR system - see *Osman V. The United Kingdom*, (1998).; For the case law of the African Charter on Human Rights - see *Zimbabwe Human Rights Ngo Forum V. Zimbabwe*, (2006).; For the European Social Charter, see *European Roma Rights Center V. Greece*, (2004).

¹²⁰ CEDAW Committee, "General Recommendation No. 19 (Un Doc. A/47/38) Para. 9 " (1992).

¹²¹ Justice, "Eccj Position Paper - Key Features of Mandatory Human Rights Due Diligence Legislation." - ECCJ is the only European coalition bringing together European campaigns and national platforms of NGOs, trade unions, consumer organisations and academics to promote corporate accountability.

implementing the UNGPs.¹²² In the meantime, many corporate enterprises, have published and updated their corporate human rights policies in response to the UNGPs or have incorporated the UNGPs, including the corporate human rights due diligence duty, into their corporate codes of conduct. However, such HRDD exercise is conducted on a voluntary basis. The risk of violation and the impacts are still pervasive assumably due to a lack of mandatory obligations for corporate to conduct HRDD. Accordingly, it is time for states to step forward to have in place a legal mechanism on mandatory HRDD.

This Chapter 3 will demonstrate the examples of the countries having mandatory HRDD legislation, or policy, enforced and implemented in order to identify challenges on such enforcement and implementation. Exploring and analysing the practical aspects experienced by different states on the subject matter may necessarily help and guide law and policymakers to deeply understand how mandatory HRDD legislation would fit in the Thai context. To explore how Thailand's mandatory HRDD Legislation will be drafted and hopefully enforced, the Author decided to select the legal and policy developments from France, Switzerland, the European Union's relating to due diligence requirements, and the Dutch Child Labour Due Diligence Act for further analysis concerning policy and legal developments of mandatory HRDD legislation for Thailand. The Author decides to select to study the European policy and legal developments since Thailand tends to adopt or is influenced by, the European approach and interpretation of the law. The recent legal development in Thailand where it is evident, or at least logical to assume, that the legal interpretation under Thai legal system would, or tend to, adopt the European standard is Thailand's Personal Data Protection Act 2019, which is comparable to the EU's General Data Protection Regulation 2016/676 (GDPR).¹²³ However, it is highly crucial that at the time of writing, policy and legal developments

¹²² The National Action Plan adopted by the UK, Denmark, Italy, Spain, Finland, the Netherlands - OECD, "National Action Plans on Business and Human Rights to Enable Policy Coherence for Responsible Business Conduct," mneguidelines.oecd.org, <https://mneguidelines.oecd.org/NAP-to-enable-policy-coherence-for-RBC.pdf>; Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022)."

¹²³ Concerning the data protection and privacy in the EU and the European Economic Area – see European Commission, "Eu Data Protection Rules " https://ec.europa.eu/info/law/law-topic/data-protection/eu-data-protection-rules_en.

as referred herein is based on the existing challenges under the current situation which is subject to any change thereof from time to time.

3.1 France's Corporate Duty of Vigilance Law¹²⁴

France's Duty of Corporate Vigilance Law enshrines a broad mandatory HRDD regime and general liability principles in case of harm. This Law has entered into force in 2017.¹²⁵ This Law is unprecedented as it requires French companies to establish, publish and effectively implement adapted measures to identify risks and prevent severe abuses to human rights, fundamental freedoms, the health and safety of individuals, and the environment.¹²⁶ According to Article 1 of this Duty of Vigilance Law, it is prescribed that:

“Any company that at the end of two consecutive financial years, employs at least five thousand employees within the company and its direct and indirect subsidiaries whose head office is located on French territory, or that has at least ten thousand employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad, must establish and implement an effective vigilance plan.”¹²⁷

It can be highlighted from Article 1 above those private sectors located in France must satisfy two criteria: corporate form, and the number of employees, including within their direct and indirect subsidiaries with the regulated amount above 5,000 employees in France, or 10,000 worldwide. However, this setting of the thresholds, being low, may not cover sectors with high risks but with the number of employees, not exceeding the threshold. Not voluntary obligations, this Law creates a legally binding obligation for parent and outsourcing companies to identify and prevent human rights abuses and damages to the environment. In terms of the direct

¹²⁴ European Coalition of Corporate Justice, "French Corporate Duty of Vigilance Law (English Translation)," (2017).

¹²⁵ "French Corporate Duty of Vigilance - Faqs " <https://corporatejustice.org/documents/publications/french-corporate-duty-of-vigilance-law-faq.pdf>.

¹²⁶ Duty of vigilance radar, "The Law on the Duty of Vigilance," <https://vigilance-plan.org/the-law/>.

¹²⁷ Article 1, France, "French Corporate Duty of Vigilance Law " (2017).

and indirect violation, the companies with their own activities, including from their trading partners of the companies, directly or indirectly in control. It also purports to include activities of the subcontractors and suppliers with which they have an established commercial relationship both in France and across the globe; thereby, establishing a legal obligation of prudent and diligent conduct.

In particular, the exercise HRDD process under this Law comparably is referred to as the Vigilance Plans. Companies must establish and implement the Vigilance Plans which mandatorily include reasonable measures adequate to identify risks and to prevent severe impacts on human rights and fundamental freedoms, on the health and safety of individuals and on the environment, resulting from the activities of the company, its subsidiaries, suppliers and subcontractors.¹²⁸ The Law requires the subject companies to have such measures, reflected in the Vigilance Plan, in a formalised manner such as material support for vigilance, the annual report of a company in order to ensure transparency to the public.¹²⁹ Such Vigilance Plan or Measures include, without limitation to risk mapping, value chain assessment processing, risk mitigation and preventive actions, alert mechanisms, including monitoring systems on the effective and efficient implementation of measures.¹³⁰

In ensuring transparency and guaranteeing accountability to the public, an annual Vigilance Plan, management report together with a report of the implementation of this Vigilance Plan are required. If the subject company does not comply with the legal requirement under this Law, companies may be faced with civil liability. Such civil liability is purported to be remediation for the victims of human rights violation. Moreover, if the companies do not have the Vigilance Plan established and implemented in their business operations or have not disclosed the required documents to the public or even have not efficiently implemented such plan, financial penalties can be imposed by the court.¹³¹ Nevertheless, considering the text

¹²⁸ radar, "The Law on the Duty of Vigilance".

¹²⁹ Ibid.

¹³⁰ Article 1 of the French Corporate Duty of Vigilance Act, incorporated in Art. L. 225-102-4 of the French Commercial Code - Sherpa, "Vigilance Plans Reference Guidance " First Edition (2019).

¹³¹ Françoise Quairel Juliette Renaud, Swann Bommier, Nayla Ajaltouni, "The Law on Duty of Vigilance – Year 1: Companies Must Do Better," (2019).

of France's Corporate Duty of Vigilance Law 2017, there is an absence of the institutional function as to who or which government organisation or regulatory body is authorised to be responsible to specifically monitor this compliance under this Law.¹³² Besides, there is no specific provision for criminal proceedings.¹³³ This can imply insufficient guarantee on the accountability under the corporate responsibility concept; nevertheless, it can be viewed that the penalties punished here focus on the obligation of means rather than of results. An accusation against the companies can arise from incomplete, inexistence, and ineffective vigilance plan. Moreover, in convicting the companies violating this Law, the burden of proof lays upon the claimant.¹³⁴ This may deter access to justice for the victim as the victim would find it hard to collect the evidence relating to the conduct of corporate's violation. The lack of the fundamental provision on shifting burden may not guarantee corporate responsibility.

As earlier elaborated, there are still some gaps needed to be addressed to ensure the effective enforcement of the HRDD legislation. Nevertheless, France's Corporate Duty of Vigilance Law plays an influential role in other countries to develop and implement this type of legislation. Statistically, only one in three businesses in the EU have undertaken human rights and environmental due diligence on human rights,¹³⁵ But, on the bright side in terms of legal contribution, it can be a guiding tool for the court or any adjudicative body to establish and raise knowledge, interest, awareness, and understanding well beyond the national border, accordingly shifting corporate governance regime and raising the bar in the commercial world to bear human rights obligations.

¹³² Lucie Chatelain Sandra Cossart, "What Lessons Does France's Duty of Vigilance Law Have for Other National Initiatives?," Business and Human Rights Resource Centre <https://www.business-humanrights.org/en/blog/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives/>.

¹³³ Juliette Renaud, "The Law on Duty of Vigilance – Year 1: Companies Must Do Better.", p. 9.

¹³⁴ Ibid.

¹³⁵ EU Reporter Correspondent, "Commission Study Shows the Need for Eu-Level Legislation on Due Diligence Throughout the Supply Chain on #Humanrights and #Environmentalimpacts," <https://www.eureporter.co/frontpage/2020/02/25/commission-study-shows-the-need-for-eu-level-legislation-on-due-diligence-throughout-the-supply-chain-on-humanrights-and-environmentalimpacts/>.

3.2 Switzerland's Responsible Business Initiative

The Swiss Government is proposing the national HRDD legislation, known as Responsible Business Initiative (RBI) launched in 2016¹³⁶ through a constitutional amendment, by introducing of a new article establishing a company's obligation to respect human rights and environmental standards. If the proposal is adopted, lawmakers will have the discretion to implement the appropriate statute in the area of tort and company law. However, there is a Counter-Proposal¹³⁷ opposing this constitutional change but suggesting changes to the Swiss Code of Obligations, the Swiss Civil Code, and Private International Act concerning company law with implications for civil law.¹³⁸

Under the RBI Counter-Proposal, Article 716a^{bis} in the Code of Obligations will be amended by requiring private sectors that

“The board of directors takes measures to ensure that the company complies with the provisions for the protection of human rights and the environment relevant to its areas of activity, including abroad. It identifies potential and actual impacts of the business activities on human rights and the environment and assesses these risks. Taking into account the company's ability to exert influence, it takes effective measures to minimize the identified risks concerning human rights and the environment as well as to ensure effective remedy for violations. It monitors the effectiveness of the measures adopted and reports on them. Impacts of business activities of controlled companies or due to business relationships with a third party are also subject to this due diligence.”¹³⁹

¹³⁶ Corporate Justice, "The Initiative Text with Explanations," *Fact Sheet* (2018), https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf.

¹³⁷ Law, "Unofficial Translation of the Counter-Proposal by the Swiss Parliament to the Citizen Initiative 'Responsible Business Initiative'."

¹³⁸ European Coalition for Corporate Justice, "Eccj Publishes Comparative Legal Analysis of Hrrdd and Corporate Liability Laws in Europe," <https://corporatejustice.org/news/16783-eccj-publishes-comparative-legal-analysis-of-hrrdd-and-corporate-liability-laws-in-europe>.

¹³⁹ Article 716a^{bis} in the Code of Obligations, RBI Counter-Proposal - Law, "Unofficial Translation of the Counter-Proposal by the Swiss Parliament to the Citizen Initiative 'Responsible Business Initiative'."

It can be highlighted that private sectors will need to incorporate respect for human rights and the environment in all their business activities by conducting mandatory due diligence. This obligation will be imposed on Swiss-based companies' activities abroad. This potential instrument is aligned with the UNGPs.¹⁴⁰ The rights protected under this potential legislation, are addressed in general on the protection of human rights and environments. Companies must first review all their business relationships and activities to identify potential risks to people and the environment.¹⁴¹

For the obligations under the potential enforcement of the legislation, companies must then take adequate measures to address the potentially negative impacts identified and report transparently on the risks identified and the measures taken.¹⁴² In the RBI, the duty of care is incorporated in the mandatory HRDD as well as the risk-based approach. Thus, the scope of due diligence will depend on risks to human rights and environment. Whereas the Swiss Parliament's Counter-Proposal also includes remediation and introduces appropriate due diligence which based on the risk-based approach. The term "appropriate" in this regard is to be defined for each circumstance.¹⁴³ In other words, it should depend on a case-by-case basis by inspecting specific circumstance where different risks can be managed differently. The Counter-Proposal views it in this way because it allows judges a margin of appreciation to determine whether due diligence has been conducted by considering the circumstances and risks.¹⁴⁴ Such Counter-Proposal also contains measures to be taken, depending on leverage as well.¹⁴⁵

In relation to the covered companies, the RBI introduced the imposition of obligations on companies with registered office, central administration, principal place of business in Switzerland; whereas, the Counter-Proposal prefers the covered

¹⁴⁰ Swiss Coalition for Corporate Justice, "About the Initiative," <https://corporatejustice.ch/about-the-initiative/>.

¹³⁵ *ibid.*

¹⁴² *Ibid.*

¹⁴³ European Coalition for Corporate Justice, "Comparative Table, Mhrdd with Corporate Liability Laws in Europe, ," (2019), https://corporatejustice.org/documents/publications/eccj/eccj_hrdd_pcl-comparative-table-2019-final.pdf.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

companies which meet 2 of 3 thresholds by having a balance sheet of 40 million CHF/USD, and/or turnover of 80 million CHF/USD, and/or 500 full-time employees.¹⁴⁶ Low-risk SMEs is exempted from this obligation in the RBI. The Counter-Proposal further determined that SMEs in high-risks sector are included while large companies with low risks are excluded; nevertheless, the determination of the level of risk will be later defined by the government decree.¹⁴⁷

To which extent the exercise HRDD reaches, the reach, similar to the French Duty of Vigilance Law, to the full supply chain of the companies either it is direct or indirect subsidiaries, or with other business relations.¹⁴⁸ While the Counter-Proposal to the RBI mentioned reasonable due diligence as well as the measures to use leverage is introduced.¹⁴⁹ However, there are no current obligations guaranteeing transparency requirement in the RBI proposal, unlike the French Corporate Duty of Vigilance Law. However, the Swiss lawmakers will later fulfil this gap in the RBI in details. In terms of enforcement and liability, the RBI suggests a specific liability provision on responsibility for any conducts of controlled companies or subsidiaries. Accordingly, the parent company is liable for damage caused by controlled companies. However, the RBI allows defence against liability by proving that it took all due care or that the violation or damage would have occurred even if all due care had been taken. In the Counter-Proposal, civil liability is specified, and such liability will only limit to damage to life, limb, or property, resulting from a violation of international standards.¹⁵⁰ The RBI proposal and its Counter-Proposal tends to introduce liability for the harm caused by controlled companies, based on the existing concept of employer's liability in the Swiss Code of Obligations.¹⁵¹ The provision of liability tends to adopt vicarious liability as a secondary liability.¹⁵² However, in a strict sense,

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Paula Giliker, "Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective," *Journal of European Tort Law* 2 (2011).

it permits a company to raise a defence only on the basis of its exercise of due diligence to prevent the prohibited event. This strict liability under the Swiss legal regime is different from absolute liability as there is no proof required whether the defendant's act is of intention or negligence. Liability only lays upon the occurrence of the damaged incurred.¹⁵³

For the Swiss legislation on mandatory HRDD, it can be viewed as a direction of what and how the UNGPs will be translated into national laws as it is yet to see the upcoming steps for the government to enforce a legal mechanism with a stronger force to regulate the conduct of business while protecting people at stake. Overall, the Swiss RBI and its Counter-Proposal are promising to better improve human rights situation within across the region within more participation of private sectors, more clear policy and legal certainty and coherence, more concrete accountability.

3.3 The European Union's Policy and Legal Developments Relating to Human Rights Due Diligence

For legal development in the European Union, there are many due diligence standards introduced and established in the EU region. However, as of 2020, there is no comprehensive EU-wide due diligence legislation. However, governments, e.g. Germany, Finland, CSOs, including private sectors such as Heineken, Nestlé in the EU are calling for the legal mechanism on this legislation at the regional level.¹⁵⁴ There is an increasing number of companies in the EU in support of binding HRDD standards set by governments for clarifying the society expectations, thus drawing legal certainty and ensuring a level playing field.¹⁵⁵ One of the primary goals for such support is to have HRDD regulation enforced as the EU law. It is yet challenging to

¹⁵³ United Nations High Commissioner for Human Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance (a/Hrc/32/19/Add.1)," (2016).

¹⁵⁴ Saskia Wilks, "High Hopes for Mandatory Human Rights Due Diligence in 2020," (2019), <https://www.business-humanrights.org/en/blog/high-hopes-for-mandatory-human-rights-due-diligence-in-2020/>.

¹⁵⁵ Business and Human Rights Resource Centre, "List of Large Businesses, Associations & Investors with Public Statements & Endorsements in Support of Mandatory Due Diligence Regulation," (2020).

see how such initiatives will be driven and how the EU responds to this active engagement of stakeholders.

However, a lack of EU-wide HRDD regulation does not mean there is no due diligence standard in the EU. The EU has been introducing standards for decades but in a limited sector. In this regard, the following explanation will inspect diverse due diligence standards and mechanisms to see how such existing policy tools and legal mechanisms can foster and advocate for the expected EU-wide HRDD legislation as well as to have an influential role in other national legal regimes since the EU is comparatively the target market for many countries, especially for Thailand. Presumably, there might be some requirements from the EU if Thailand needs to maintain relationships with the EU's countries in the nearby future, provided that the law on HRDD was enforced. However, there is a recent development in the EU countries, which companies in the EU conduct human rights and environmental due diligence. However, it is statistically found that only one in three businesses in the EU have undertaken human rights and environmental due diligence on human rights.¹⁵⁶ As the Author is writing this research, there is an ongoing initiative to encourage and advocate the EU-wide mandatory due diligence legislation along the supply chain. In April 2020, the European Commission for Justice has announced that the EU is planning to develop a legislative proposal on the EU wide mandatory HRDD by 2021. This proposal requires businesses to conduct human rights due diligence, addressing potential human rights and environmental impacts of their operations and supply chains by putting obligations to cross-sectoral businesses and imposing sanctions for non-compliance of the law if passed.¹⁵⁷

For the EU's legislative developments relating to the existing due diligence obligation, the EU Conflict Minerals Regulation and EU Timber Regulation have laid down due diligence standard in mining sector and timber product sector.

¹⁵⁶ Correspondent, "Commission Study Shows the Need for Eu-Level Legislation on Due Diligence Throughout the Supply Chain on #Humanrights and #Environmentalimpacts".

¹⁵⁷ Currently there is a published study for the European Commission on due diligence requirements through the supply chain conducted by the British Institute of International and Comparative Law (BIICL), leading a research consortium in partnership with Civic Consulting and LSE Consulting, see - British Institute of International and Comparative Law "Study on Due Diligence Requirements through the Supply Chain, Final Report."

3.3.1 EU Timber Regulation Mandatory Due Diligence System

The Timber Regulation mandatory due diligence system, entering into force in 2013,¹⁵⁸ serves as EU administrative law. This purpose of this Regulation is to prohibit imports on illegally harvested timber. In relation to the due diligence standards, imports are required to establish due diligence system and use it to determine the legality of the source of timber. The material scope of such exercise of due diligence is to regulate the illegal commodities due to timber imports to the EU. The contents of the due diligence are to conduct impact assessment and provide mitigation, but there is no direct reporting obligation. Another purpose of this Regulation is to establish traceability of the company's direct suppliers, and when applicable, of clients.¹⁵⁹ This is to ensure that there is no complicity in conducting business with the trading partner. It can be viewed that the scope of due diligence tries to extend to reach out and seek for leverage when considering along with the UNGPs. For the covered companies, the Regulation applies to the EU companies and operators who import timber or timber products into the EU market, and traders which include any person or legal entity who involves over the course of commercial activity buys or sells timbers products on the internal market. Therefore, it can be seen the due diligence system established under this Regulation reaches to operators, supply chain, and traders, in order to ensure that it is capable to trace the origin of the timber in order to determine its legality of such imported goods. For the Regulation's enforcement, Ex-post checks are established to see whether the covered companies have complied with the established due diligence standards required under the regulation. If not, State has authority to determine enforcement mechanisms and penalties, which include fines, seizure of properties, suspension on trade authorisation. However, within the ex-post checks or review by the authority, there is no reporting obligation for the covered companies. This could reflect a lack of ensured transparency to disclose information to the public as well as a lack of stakeholder engagement to investigate due to the absence of the information, not

¹⁵⁸ European Parliament, "Regulation (Eu) No. 995/2010 of the European Parliament and of the Council of 20 October 2010 Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market," ed. European Parliament (Official Journal of the European Union 2010).

¹⁵⁹ bhrinlaw.org, "European Union - Legislative Development," bhrinlaw.org, <http://www.bhrinlaw.org/key-developments/53-europe#eu-conflict-mineral-regulation>.

being disclosed. For the different part as compared to the UNGPs' HRDD standard, the Regulation does not cover human rights issues related to timber or the timber products despite some interrelation with the indigenous, and local communities, who are usually marginalised and at stake due to logging practice. Besides, the term legality in the Regulation draws definitional problem on the applicable legislation in the country of harvest in the case where there is a lower environment standard, not legally acceptable by the EU or international standards, but is being importable to the EU as it is of legality in that country of harvest.

It is apparent that the Timber Regulation might not meet the HRDD standards established by the UNGPs, and it also lacks ensured transparency due to the absence of reporting obligation. Moreover, there is also a definitional problem which would affect the effective enforcement of such Regulation. Most noticeably, with the different standards of the legislation and interpretation of the legality of the timber, human rights protection may not be the primary purpose, but rather the Regulation is to establish a traceable supply chain to justify that those covered companies are not complicit or trading or obtaining with those illegally imported timbers. This exploration on the Timber Regulation can signal how due diligence can be used to show how ineffectively implemented due diligence legislation can create the gaps for exploitative conduct of companies to gain profit from it, thus creating more adverse and far-reaching impacts to human rights.¹⁶⁰

3.3.2 EU Conflict Minerals Regulation

Another exploration for the EU's legislative development is the EU Conflicts Minerals Regulation which lays down supply chain due diligence obligations for the Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.¹⁶¹ This Regulation, function as administrative

¹⁶⁰ Greenpeace European Unit, "Greenpeace Investigation: Eu Imports of Amazon Timber Tainted by Widespread Fraud in Brazil," news release, 2018, <https://www.greenpeace.org/eu-unit/issues/nature-food/1170/greenpeace-investigation-eu-imports-of-amazon-timber-tainted-by-widespread-fraud-in-brazil/>.

¹⁶¹ European Parliament, "Regulation (Eu) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas " *Official Journal of the European Union* L 130/1 (2017).

law in relation to trade of minerals. However, it has not yet entered into force; however, the EU importers will have to comply with the obligations set out by the regulation as from 1 January 2021, but the European Commission encourages all companies which the regulation covers to start carrying out due diligence before 2021.¹⁶² The reason behind this Regulation is that in politically unstable areas, the trade in minerals such as tin, tungsten, tantalum and gold can be used to finance armed groups, lead to forced labour and other human rights abuses, and support corruption and money laundering. These so-called conflict minerals are then used in everyday products, such as mobile phones and cars, or jewellery. The covered companies will be those companies identified as importers of conflict minerals. It is acknowledged by this Regulation that it affects 600 to 1,000 importers of conflict minerals as defined in the Regulation and indirectly affects around 500 smelters and refiners whether they are located in the EU territory or not.¹⁶³

In terms of due diligence requirements, the EU importers are required to ensure that their supply chain policy standards, contracts and agreements are consistent with the OECD Due Diligence Guidance,¹⁶⁴ which sets the international benchmark for supply chain due diligence, and the joint communication Responsible sourcing of minerals originating in conflict-affected and high-risk areas: Towards an integrated EU approach of 2014.¹⁶⁵ There are also risk management obligations for EU importers to identify and assess risks of adverse impacts in their supply chains and implement a strategy to respond to the identified risks. Moreover, third party audit obligations are also required for the EU importers to carry out independent third-party audits and report annually on their supply chain due diligence policies and practices for responsible sourcing to the competent authority. It is evident that there is a

¹⁶² EU Publication Office, "Responsible Trade in Minerals from High-Risk or Conflict Areas " (2017).

¹⁶³European Commission, "The Regulation Explained," European Commission, <https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/>.

¹⁶⁴ OECD, "Oecd Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, Oecd Publishing, Paris.," OECD Publishing, Paris., <http://dx.doi.org/10.1787/9789264252479-en>.

¹⁶⁵ European Parliament, "Joint Communication to the European Parliament and the Council Responsible Sourcing of Minerals Originating in Conflict-Affected and High-Risk Areas Towards an Integrated Eu Approach," (EUR-Lex, 2014).

mechanism ensuring the transparency and accountability of the covered companies. As explained above, this Regulation aims to monitor illegal commodities relating to minerals. Accordingly, covered companies are required to extend the reach of the exercising of due diligence to track full supply chain in conflict-affected and high-risk areas. In relation to enforcement and liability, the Regulation leaves the EU Member States to lay down the rules applicable in cases of infringement. However, when compared with the HRDD standard under the UNGPs, it is not comprehensive as the obligation may not reach to downstream companies, but limit to importers for raw materials. Noticeably, there is no establishment of companies' duty of care or parent company liability. There is also a lack of legal certainty and consistency in terms of enforcement and liability because the EU Member states can apply different level of interpretation of enforcement concerning this Regulation throughout the EU.

3.4 The Dutch Child Labour Due Diligence Act

The Dutch Child Labour Due Diligence Act was published in the Dutch Government Gazette in November 2019. This Act imposes a duty of care for companies to prevent the supply of goods or services which have come into existence using child labour. However, the exact date of the entry into force is not yet known.¹⁶⁶ Under this Act, Companies, either in the Netherlands or not, if they wish to sell goods or services to Dutch end-users, are required to exercise due diligence to assess whether there is "reasonable suspicion" on using child labour for the supply of goods and services.¹⁶⁷ This Act adopts the ILO-IOE Child Labour Guidance Tool for Business which aims to improve global supply chain governance, due diligence and remediation processes to advance the progressive elimination of child labour.¹⁶⁸ In this regard, this Act establishes the legal standard under the duty of care for companies to have a preventive measure of the usage of child labour as a source of

¹⁶⁶ Jones Day - Kornel Olsthoorn, "The Netherlands Adopts Business and Human Rights Legislation to Combat Child Labor," (2020), <https://www.lexology.com/library/detail.aspx?g=c65161b5-1450-405b-9848-1d5612a4954f>

¹⁶⁷ Ibid.

¹⁶⁸ International Labour Organisation, "How to Do Business with Respect for Children' S Right to Be Free from Child Labour: Ilo-Ioe Child Labour Guidance Tool for Business," ed. International Labour Organisation (International Labour Organisation, 2015).

labour to produce goods and services, including online sales, to end-consumers residing in the Netherlands. However, the companies which only transport the goods do not fall into this Act. It is observed that there some sectors may be exempted from the obligations under this Act, pending subordinate legislation. Nevertheless, this Act has not yet entered force, and even not expected so within 2021.¹⁶⁹

In the aspect of due diligence obligation, there are there main obligations imposed on the companies, namely a) a duty to investigate by means of due diligence whether there is a "reasonable suspicion" that goods or services to be supplied have been created using child labour as a primary obligation; b) a duty to develop and execute an action plan when a reasonable suspicion of child labour usage is found, and c) a duty to issue a statement to the supervising authority that it observes the aforementioned due diligence requirements. Upon receipt of the statement of the companies within six months after the Act enters into force,¹⁷⁰ the statement will be published by the supervising authority in a publicly available register.¹⁷¹ According to the ECCJ, this Act is considered as an implicit requirement to conduct due diligence and fall in the scope of consumer law.¹⁷² In terms of scope of rights protected under the Act, such child rights are recognised in the Act in line with the ILO the Minimum Age Convention (C138), and the Worst Forms of Child Labour Convention 1999 (C182).¹⁷³ Any activities of any natural or legal person throughout the supply chain by the companies are subject to conduct this due diligence requirement. In terms of transparency and accountability, such public statements will be published on the website of the competent authority, which is to be established under this Act. The Act also imposes sanctions that if the subject companies fail to comply with the duty to conduct due diligence this Act, they may be exposed to the risk of an administrative

¹⁶⁹ Olsthoorn, "The Netherlands Adopts Business and Human Rights Legislation to Combat Child Labor".

¹⁷⁰ Mvoplatfom, "Update: Frequently Asked Questions About the New Dutch Child Labour Due Diligence Law," <https://www.mvoplatfom.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>.

¹⁷¹ Olsthoorn, "The Netherlands Adopts Business and Human Rights Legislation to Combat Child Labor".

¹⁷² Justice, "Comparative Table, Mhrdd with Corporate Liability Laws in Europe, ".

¹⁷³ Olsthoorn, "The Netherlands Adopts Business and Human Rights Legislation to Combat Child Labor".

fine of up to EUR 870,000 (or around 997,000 US Dollars) or alternatively 10% of its annual turnover, and most importantly.¹⁷⁴ Such imposed sanctions will be issued by the supervising regulator and require the companies in non-compliance to comply with the Act within the specified time-bound. Apart from the administrative sanctions, the Act imposes criminal liability for a company's officer for repetitive violation of the Act provided that within five years of administrative sanctions imposed on such companies, there is a similar transgression committed by the company either by order or supervision of the same director according to Article 9 of the Act. The sanctions will be escalated from administrative fines to a criminal offence, which will impose criminal liability provided that if such non-compliance committed without intent, it is considered a misdemeanour, punishable by a maximum of six months' detention and a 20,500 Euro fine (23,000 USD Dollars), and if with intent, it is considered a crime, punishable by a maximum of two years' imprisonment and a 20,500 Euro fine (23,000 USD Dollars).¹⁷⁵

In terms of access to justice, complaints can be filed by interested third parties such as trade union or NGOs. Upon receipt of such complaint, the competent, yet to be established, will investigate such claim. However, in terms of procedural matter, if a person, being an individual or any entity must first submit the complaint to the company itself which is comparable to the exhaustion of local remedies under international law concerning access to remedy. If there is inadequate remediation taken by the companies according to the complainant, such complainant can escalate the claim to the supervising regulator.¹⁷⁶

Under the Dutch Child Labour Due Diligence Act, it can be viewed that it addresses the rights of certain groups which to some extent can be marginalized and overlooked when operating business and supplying goods and services to end-users.

¹⁷⁴ The Netherlands Adopts Business and Human Rights Legislation to Combat Child Labor, Jones Day - Kornel Olsthoorn, 4 February 2020, access at: <https://www.lexology.com/library/detail.aspx?g=c65161b5-1450-405b-9848-1d5612a4954f>.

¹⁷⁵ See Article 9 of the Dutch Child Labour Due Diligence Act in the Appendix - Ropes and Gray, "Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies," (2019).

¹⁷⁶ Mvoplatfrom, "Update: Frequently Asked Questions About the New Dutch Child Labour Due Diligence Law".

This Act can be a great example as one of the model obligations when addressing the rights of marginalized people by integrating into the mandatory HRDD legislation and resorting to the supervising regulator. However, it is challenging as to the regulator on the workloads they may have as there will be plenty of documents to be submitted under this Act in order to comply with the Act besides the regulatory function. Nevertheless, it is interesting that the submission of the human rights policy commitment or declaration to the supervising body can be one of the incentivising approaches and could level a playing field and shift the norms and attitudes of individuals and private sectors as the affected stakeholders to be more exposed to the right-based society, stepping forward and beyond business integrity.

The policy and legislative developments of HRDD tend to increase as widely seen in the EU countries; however, there are some challenges or gaps in the enforcement of those laws as referred above. The French Duty of Vigilance law does not comprehensively extend to the French subsidiaries where they have not reached the thresholds, while remedy is not directly addressed, but the burden of proof of the victim still adhere to a general principle of tort law. While the Swiss RBI and its Counter-Proposal only addresses civil liability with the limitation that such damage incurred must be a limb, life or property. It may not be comprehensive and cover all rightsholders affected by the covered private sectors under the RBI. The Dutch Child Labour Due Diligence Law, there are some challenges on the regulator for monitoring compliance as it required the subject companies to submit a human right statement to the established regulator. This inflow of information and documents may be challenging for the regulator to manage all paper works, if not well implemented and integrated technological innovations into the compliance monitoring programme. For the EU's due diligence law, the EU Timber Regulation is not able to demonstrate transparency to disclose necessary information to the public on whether the subject private sectors comply with the Regulation as there is no reporting requirement. Furthermore, it also lacks a stakeholder engagement to investigate as a result of the non-disclosure of the information. The EU Conflict Minerals Regulation can demonstrate how limited scope of reach of the HRDD obligations may implicate the enforcement of HRDD, as the exercise of required due diligence may not reach to downstream supply chain and is limited to raw material sourcing.

These challenges identified in each existing laws and proposal at the national level can reflect how the HRDD Legislation may face challenges during the enforcement and implementation. Therefore, it is worth the time to understand the legal implications policy and legislative development addressed as it would draw and flag attention on such identified challenges as experienced by other countries, thus providing an opportunity for lawmakers and policymakers in Thailand to draft and enact the law with the gaps being closed. Therefore, effective enforcing of mandatory HRDD Legislation could be further assured.



Chapter 4

Analysis of the Potential Enforcement: Thailand's Mandatory Human Right Due Diligence Legislation

4.1 Overview of Development on Business and Human Rights in Thailand

Before addressing the substantive characteristics of the potential enforcement of mandatory Human Rights Due Diligence Legislation (the mandatory HRDD Legislation), it would be self-observing to look back in the past and at the ongoing situation, and accordingly consider the present and the way forward by exploring human rights development in Thailand in line with the implementation of the Sustainable Development Goals and the 2030 Agenda while noting the implementation of the National Action Plan on Business and Human Rights. To draw reference on how Thailand needs to comply with international law obligations which relate to the duty of State to protect human rights, it might be necessary to observe and understand the established monitoring mechanisms of State's compliance to international obligations. One of the existing impactful monitoring mechanisms is the Universal Periodic Review (UPR) which is a process of periodically reviewing the human rights records of all 193 UN Member States. The UPR can serve as a platform where all States can declare the implemented actions, progress and development on human rights situations in their countries, as well as to address and overcome challenges to the enjoyment of human rights. It is also a place where best human rights practices can be shared across the globe.¹⁷⁷

Upon Thailand's Submission of the National Reports under the 25th Session of the Universal Periodic Review in 2016, Thailand had received Recommendations and later pledged to the adoption of such Recommendations. One of the Recommendations made by Sweden concern human rights violation which had been increased due to exploitative practices of business.¹⁷⁸ Accordingly, Thailand had

¹⁷⁷ United Nations Human Rights Council, "Basic Facts About the Upr," <https://www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx>.

¹⁷⁸ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p.1.

voluntarily pledged and accepted to adopt the recommendations from Sweden during the 2nd Cycle of the Universal Periodic Review (UPR) process¹⁷⁹. These adopted commitments address the responsibilities of business sectors and state enterprises to respect human rights and a commitment in compliance to the UNGPs. Accordingly, appointed and approved by The Thai Cabinet's Resolution in January 2017, the Department of Rights and Liberties Protection, Ministry of Justice acts as a key focal agency to draft and implement the NAP-BHR.¹⁸⁰

To follow up the progress of the implementation of the adopted Pledge and Recommendation from the Universal Periodic Review, the Second Cycle Mid-term Report (Mid-term Report) under the Second Cycle of the Universal Periodic Review 2016-2018 was submitted to the Office of the High Commissioner for Human Rights (OHCHR) on March 2019.¹⁸¹ This Submission provides an update on the progress for the implementation of the accepted UPR Recommendations.¹⁸² In the Mid-Term Report submitted by Thailand highlights Thailand's implementation and recommendations and voluntary pledges from the 2nd UPR Cycle from 2016 to 2019 by providing updates on relevant recommendations or its voluntary pledges. One of the highlighted updates is business and human rights. In lights of the implementation of the adopted Recommendations from the recent UPR, Thailand's National Human Rights Commission, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Commerce, the Federation of Thai Industries, the Thai Bankers Association, the Thai Chamber of Commerce and the Global Compact Network of Thailand jointly signed the "Memorandum of Cooperation to implement the UN Guiding Principles on Business and Human Rights" in Thailand to start working on the National Action Plan on Business and Human Rights. Later in 2019, The National

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Thai Government, "Highlights of Thailand's Implementation of Recommendations and Voluntary Pledges under the First Cycle of the Universal Periodic Review 2012-2014 (Mid-Term Update)."; "Highlights of Thailand's Implementation of Recommendations and Voluntary Pledges under the Second Cycle of the Universal Periodic Review 2016-2018 (Mid-Term Update)," (2019).

¹⁸² Permanent Mission of Thailand to the United Nations in Geneva, "Upr: Thailand Submits Its Second Cycle Upr Mid-Term Report," <https://permanentmission-geneva.thaiembassy.org/en/content/101262-upr:-thailand-submits-its-second-cycle-upr-mid-term-report?cate=5d81d6a815e39c1a0c005773>.

Action Plan on Business and Human Rights (NAP-BHR) was launched and is now being implemented for its Phase 1 during 2019 to 2022¹⁸³ which have its key prioritised areas covering labour, community, land, natural resources and environment, human rights defenders, cross-border investments and multi-national enterprises.¹⁸⁴

The NAP-BHR mentioned that some of the activities to be rolled under the NAP-BHR will require companies to have human rights due diligence report. The Action Plan on labour mentions human rights due diligence under the issue of operations set for private sectors. Under this issue, one of the activities to be rolled out is to “regulate, supervise and require the large business sectors and companies listed in the stock market that use migrant labour as their primary production resource, prepare a Human Rights Due Diligence report as a measure in deterring labour exploitation”¹⁸⁵ This report must be disclosed to the public to create awareness and be easy to review in order to demonstrate and justify transparency and traceability in accordance with good corporate governance. For the Action Plan on Cross Border Investment and Multinational Enterprises in the NAP-BHR, one of the activities to be rolled out is to require large companies to conduct human rights due diligence. However, the enforcement of mandatory human rights due diligence legislation is not mentioned in the key activities under the NAP-BHR, but merely address that there will be amendments of laws, regulations, policies and related measures, which are in line with the UNGPs and the OECD Guidelines for Multinational Enterprises. Under the issues of investment promotion, there will be a study to assess the risk and human rights impact (human rights due diligence) before the implementation of large-scale projects such as project related to public services, which may be a joint investment between government and private sectors for infrastructure and public services and the project that the government has assigned the private sectors to do the project

¹⁸³ Government, "Highlights of Thailand's Implementation of Recommendations and Voluntary Pledges under the Second Cycle of the Universal Periodic Review 2016-2018 (Mid-Term Update)."

¹⁸⁴ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p.22

¹⁸⁵ Ibid.

instead.¹⁸⁶ Besides, the NAP-BHR address the Action Plan to be taken in line with Pillar Two: Responsibilities of the business sector to respect human rights (Respect). It is recommended that state enterprises and private sectors should assess and conduct human rights due diligence, and prepare the annual reports for public disclosure. They should ensure that there are measures for the affected people or communities to the complaint and to access to remedy due to human rights abuses resulting from business operations.¹⁸⁷ By exploring the NAP-BHR, it can be seen that human rights due diligence is required for every level of engagement of the Action Plan. The presence of the mandatory HRDD Legislation may help accelerate the goal of this NAP-BHR. Nevertheless, challenges may remain for the implementation of the NAP-BHR as well as the potential enforcement of the mandatory human rights due diligence legislation.

In this regard, the latter parts of this Chapter 4 will provide analysis on the potential enforcement of mandatory human rights due diligence (HRDD) Legislation by exploring required characteristics of mandatory human rights due diligence legislation, and illustrate on the remedial measure within the Legislation. Later, institutional and functional challenges will be discussed on the practical aspects of the enforcement and implementation of this Legislation as well as the impact this Legislation may have on the relevant stakeholders.

4.2 Characteristics Required for Thailand's Mandatory Human Rights Due Diligence Legislation

As observed in France's Corporate Duty of Vigilance Law, the Swiss Legislative Proposal and its Counter-Proposal, the EU Timber Regulation, the EU Conflict Minerals Regulation, and the Dutch's Child Labour law in Chapter 3, it can be presumed that there are increasing polices and legislative developments for the concept of HRDD. However, it can be seen there are still some legal challenges in human rights due diligence law as mentioned and observed in the previous Chapter, for example, the lack of oversight body in the French Duty of Vigilance Law, the

¹⁸⁶ Ibid., p.133.

¹⁸⁷ Ibid., p.96.

limited scope of due diligence exercised in the EU Conflict Mineral Regulation, a lack of stakeholder engagement in the EU Timber Regulations, the implications of the oversight body and private sector's reporting obligations of the Dutch Child Labour Due Diligence Law. Nonetheless, these challenges could be beneficial as a lesson-learned to the legislature and policymakers to understand how the mandatory HRDD Legislation can be fostered and successfully and effectively enforced by analysing the existing drawbacks caught in action while admiring and, if preferred, adopting parts of the laws to fit in the Thai legal context. In this regard, Part 4.2 will discuss and analyse a potential body of the mandatory HRDD Legislation by inspecting which area of law this Legislation will fit in the Thai legal system. Later, the legal duty under this Legislation will be discussed and analysed on how the Legislation will lay down obligations on HRDD, the scope of applicable private sectors which will be subject to this Legislation, sanction for non-compliance. The scope of material protection of human rights under this Legislation will be discussed in the last part.

4.2.1 Area of Law

According to the survey conducted for the EU Study on due diligence requirements through the supply chain, it was observed in the market practice that the most frequently used due diligence actions appear in contract clauses, code of conduct and audits. While divestments are the least favourable action.¹⁸⁸ Furthermore, according to this survey, the incentives which would encourage private sectors to conduct due diligence include reputational risks, investor's and consumer's high standard and expectation.¹⁸⁹ This may reflect which area of law this mandatory HRDD Legislation will have on its nature of the legal scheme. In this regard, it may be appropriate to observe how legal actions can be taken for the victim to access to remedy when there is a violation of human rights under the Thai legal system. Apparently, under Thai legal system, the victim of human rights violation can access to justice by bringing the claim to the competent court under The Thai Criminal Code, tort law as contained in The Thai Civil and Commercial Code, and the Consumer

¹⁸⁸ British Institute of International and Comparative Law "Study on Due Diligence Requirements through the Supply Chain, Final Report.", p. 16.

¹⁸⁹ Ibid.

Protection Act B.E. 2522. Therefore, it may be appropriate to know where the mandatory HRDD Legislation should be a good point of triggering the movement of this legal development to the extent of achieving the enforcement of the mandatory HRDD Legislation in Thailand. Moreover, administrative law should also be considered. One of the existing enforcements of this type of Legislation is the Dutch Child Labour Due Diligence Law. There exists a regulatory authority mandated to monitor whether the applicable private sectors under the Dutch Labour Due Diligence Law comply with the submitted their statement and whether there is full compliance of due diligence or not. In this comparative review, we may need to adopt this regulatory method, and thus probably falling into the area of administrative law.

Moreover, mandatory HRDD requirements, if not legislative based, could exist in the Thai company law, and laws relating to financial disclosure. Recently, the Stock Exchange of Thailand (SET) continues to underline its commitment to developing Thai listed firms' quality towards sustainable growth by selecting and assessing the Thai listed companies with part of the considerations that such selected companies must not have a significant negative impact on Environmental, Social and Governance (ESG), which is a new investment decision-making process for responsible and sustainable investment. In addition, the SET has laid down its requirement for listed companies to disclose the information on how listed companies' operations can have impact on environmental, social, and governance aspects or known as ESG Disclosure. This ESG disclosure plays a role as a process of tracking and collecting business performance information on sustainability to help companies to assess and develop an effective method of business operations, as well as reducing risks, increasing opportunities for income generation or expense reduction along their operations.¹⁹⁰ In relation to the due diligence requirement aspects, the ESG Disclosure requirement also has significance on identifying the relevant stakeholders to establish sustainable investment by identifying the impacted stakeholders on the business decision-making process and providing an opportunity for the affected stakeholder participation with the sustainability-oriented approach. The listed companies under the SET must disclose their ESG Disclosure by its annual report as

¹⁹⁰ SET, "Esg Disclosure," <https://www.setsustainability.com/page/esg-disclosure>.

required by the Stock Exchange Committee (SEC), or by a separate, specific sustainability report¹⁹¹ This ESG Disclosure requirement reflects that there is ongoing movement on upholding human rights in the sphere of investment. However, the ESG Disclosure requirement may not be able to address accountability for its adverse human rights impacts in practice as when there is a past, ongoing or potential violation of human rights, and the victim has been impacted. Thus, this ESG Disclosure requirement could be one of the avenues that the law and policymakers may need to consider which legislative-based approach would be more effective in Thailand.

Apart from the change in company law as mentioned above, there is also another area of law which require an assessment of environmental impacts according to Thailand's National Environmental Quality Promotion and Conservation Act. However, there is no general duty for private sectors to undertake due diligence for their human rights and environmental harms. Even there is a law requiring private sectors to assess the impact on environment and health or known as EIA or EHIA, and provide the EIA or EHIA report;¹⁹² however, there is a lack of public participation in practice in conducting the report;¹⁹³ therefore, community rights may be neglected. In addition, this law, which requires private sectors to conduct EIA or EHIA, is applicable only to some state or business projects. The mandatory HRDD Legislation may need to incorporate this environmental matter as well as it is one of the prioritised areas of activities under the National Action Plan on Business and Human Rights (the NAP-BHR) 2019-2022.

After exploring the existing laws which could offer a potential avenue to impose human rights due diligence obligations; however, a stand-alone mandatory HRDD Legislation could also be an impactful legislative proposal as it would draw harmonisation of the law, legal certainty, competitiveness while levelling a playing

¹⁹¹ Also known as ESG Report, Sustainable Development (SD) Report, Corporate Social Responsibility Report.

¹⁹² Section 48 of Thailand's National Environmental Quality Promotion and Conservation Act (No. 2) B.E. 2561 (2018)

¹⁹³ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p.69.

field in the market and other relevant stakeholders. However, either it is stand-alone legislation or an additional requirement made through the amendment of the existing laws, the mandatory HRDD should possess characteristics which is in accordance with the UNGPs, and in line with the implementation of the NAP-BHR to uphold human rights while ensuring policy coherence. Even if there has not been a mandatory HRDD Legislation, human rights abuses should not be neglected. Legal mechanisms should be designed to ensure that victims of human rights violation are promptly provided with effective access to justice, and the private sectors who caused, contributed or are directly linked to such violation of human rights should be liable under applicable laws even if there is an exercise of due diligence.¹⁹⁴

4.2.2 Legal Duty

It should be highly noted from the beginning that a standard of care must be exercised, rather than focussing on a procedural requirement to complete the exercise of due diligence. Many national laws and other regulations which are relevant to human rights due diligence¹⁹⁵ lay down legal duties on private sectors for human rights due diligence. In order to know what legal obligations the mandatory HRDD Legislation should or must contain, addressing key components of HRDD is necessary in order to identify what duty is needed. According to the UNGPs on the Third Pillar (Respect), in order for private sectors to respect human rights, it is recommended that private sectors should be able to “identify and assess actual or potential violation, integrate findings and take appropriate action, tracking effectiveness of the response, and communicating on how impacts can be addressed” (“Key Components”) This means that the Legislation should contain due diligence obligations which the subject of the exercise of such due diligence is people, not business.

Moreover, these HRDD obligations should be prescribed as a duty. Therefore, the mandatory HRDD Legislation should be able to contain a duty to respect human

¹⁹⁴ Principle 17 of the UNGPs

¹⁹⁵ See Chapter 3 France’s Corporate Duty of Vigilance Law, Switzerland’s Initiative on Responsible Business, the Dutch Child Labour Act.

rights, a duty to prevent adverse impact, a duty to meet certain standard, a duty to report, and a duty of care.

The concept of duty of care may be comparable to those existing in Thai legal system as seen in the Thai company law and tort law prescribed in the Thai Civil and Commercial Code,¹⁹⁶ however, such duty of care is not for the best interest of shareholders, but also the best interest of impacted people and planet or external risks. Nevertheless, all the duties to be prescribed in mandatory HRDD Legislation should be able to demonstrate a standard of reasonableness, appropriateness, adequacy, cost-benefit analysis and other relevant logics, which are able to justify proportionality principle.¹⁹⁷ Proportionality in this regard means the measure used is in proportion with the goal pursued.¹⁹⁸ In this regard, the body of the mandatory Legislation should be able to contain key components of HRDD in order to justify that the Legislation is implemented in line with the UNGPs; thereby, deployed as an effective legal mechanism to drive private sectors to respect human rights.

Imposing duties under the mandatory HRDD Legislation must include an obligation to identify, prevent, and mitigate and account for actual or potential human rights and environmental impacts in private sector's business operations or its supply chain in line with the UNGPs, the OECD Guidelines and the ILO MNE declaration. To concretely address what duties should be contained in the mandatory HRDD Legislation, the law and policymakers should impose private sectors to have a human rights due diligence, and such plan must be reasonable in order to comprehensively include the abovementioned Key Components with the approach that the exercise is primarily directed to a duty of care, rather than a process of checklists. In the due diligence plan, the specified legal obligations reflect various dimension in compliance Pillar Two under the UNGPs. Such due diligence plan and its exercises can reflect that private sectors must have a duty of care in general to protect and promote human rights. Still, it should be noted that the standard of care may be varied, depending on

¹⁹⁶ Even if Thailand is a civil law system country, Thai legal interpretation to some extent also adopts the common law doctrine in practice as seen in Thai company law, and tort law.

¹⁹⁷ British Institute of International and Comparative Law "Study on Due Diligence Requirements through the Supply Chain, Final Report.", p. 201.

¹⁹⁸ Ibid.

the complexity with the size of private sectors, the risk of severe human rights impacts, and the nature and context of its operations,¹⁹⁹ the significance of the impact,²⁰⁰ private sector's ownership and structure, resources, standards and practices applicable within the industry, level of leverage which private sectors have, and whether they have exercised such leverage.²⁰¹ In determining whether private sectors should be liable or not, consideration on whether private sectors knew or ought to have known may be relevant under the circumstances.²⁰² This method of determination can demonstrate that if private sectors know or ought to have known all the risks in their business operations, they have a duty under the human rights due diligence obligations to prevent the adverse impact from happening. Failures to prevent the adverse impacts can hold private sectors liable for such adverse impacts to the victims of violation of human rights.

The due diligence plan and the exercise can also reflect a duty to meet certain standard if the due diligence model is designed for a sector or issue-specific as seen in the Dutch Child Labour Act which prevents a sale of goods or services produced by the usage or a likelihood of the abusive use of child labour. Besides, if there is an established authority or a regulatory body, the mandatory HRDD Legislation can impose a duty to report to that there is a reasonable, adequate measure to identify risks and to prevent impacts on human rights. This disclosure requirement can also be seen and would be comparable to the ESG Disclosure of Thailand's SET, as mentioned in the previous part.

Moreover, if the mandatory HRDD Legislation to be enforced in Thailand is to include environmental due diligence, it may need to incorporate precautionary duties as well as it can be an effective measure to sustainably protect the environment

¹⁹⁹ Principle 17(b) of the UNGP

²⁰⁰ "Where enterprises have large numbers of suppliers, they are encouraged to identify general areas where the risk of adverse impacts is most significant and, based on this risk assessment, prioritise suppliers for due diligence."- Chapter II, Commentary, para 16 - OECD, "Guidelines for Multinational Enterprises," ed. OECD (2011).

²⁰¹ British Institute of International and Comparative Law "Study on Due Diligence Requirements through the Supply Chain, Final Report.", p. 251.

²⁰² Ibid.

and prevent environment or human health hazard when scientific evidence on impact to the environment and human is uncertain.²⁰³

Once there is a duty imposed to private sectors, it raises to the question private sectors who exercise human rights due diligence should be exempted from any liability. Due diligence should not be used as a shield against liability if private sectors have contributed to, caused, or are directly linked to the violation of human rights. According to the UNGPs' Commentary concerning HRDD:

“[...] Conducting appropriate human rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human right abuse.

However, business enterprises conducting such due diligence should not assume that, by itself, this will automatically and fully absolve them from liability for causing or contributing to human rights abuses.”²⁰⁴

With this Commentary, it is reasonable to observe that even if there is full compliance of due diligence requirements under the Legislation, it is only a part of consideration whether private sectors have contributed to adverse impact on human rights or not. Sufficient due diligence measures can only guide to decide on private sectors liability between contribution and linkage.²⁰⁵ In this sense, the mandatory HRDD Legislation should instate a position from the beginning for its parts that due diligence exercise cannot be a defence of private sector's liability when it caused, contributed to, or is directly linked to the violation of human rights. On the contrary, the mandatory HRDD Legislation should lay down obligations to require private sectors to the duty of care by demonstrating that there are processes or steps to identify, prevent and mitigate adverse impacts of human rights. Those processes or steps are adequate or reasonable or appropriate in a particular circumstance, considering the relevant context, and the risks. Such processes must be implemented, and private sectors can demonstrate how they are implemented in line with the

²⁰³ Didier Bourguignon, "The Precautionary Principle," (European Parliament, 2015).

²⁰⁴ Principle 17 of the UNGPs

²⁰⁵ British Institute of International and Comparative Law "Study on Due Diligence Requirements through the Supply Chain, Final Report.", p. 111.

UNGPs. If the processes and their implementation can meet a set standard, private sectors should be able to claim due diligence defence to exempt for liability it may have as the Human Rights Council noted that the exercise of human rights due diligence could be a defence of liability.²⁰⁶ The Human Rights Council concluded that a due diligence defence to exempt from liability could incentivise private sectors to actively engage in the exercise of due diligence and have significant preventative effects.²⁰⁷

In terms of the frequency of the exercise of human rights due diligence according to private sector's established human rights due diligence plan, the training should be ongoing, not once-off, to keep the collected information up to date. But in terms of the number of the frequency, the law and policy legislator should be able to draw legal certainty on a minimum requirement of such exercise of human rights due diligence, while ensuring that there is coherence on existing policies and legal frameworks. In a practical aspect on the legal duty for this mandatory HRDD Legislation, the formality should also be addressed in order to have a responsible government agency to effectively monitor the compliance of this potential enforcement of this Legislation.

Once the legal obligations under the mandatory HRDD Legislation are identified and tailored, it is to determine which private sectors will be the target of this Legislation. A similar question is what kind of duty should be directed and contextualised to what type of private sectors, and in order to encourage them by legitimacy to comply with this Legislation. The next part will discuss on which private sectors will be subject to this mandatory HRDD Legislation.

4.2.3 Subject Private Sectors

In order to identify which private sectors will be subject to this mandatory HRDD Legislation, there should be a set of criteria to draw legal certainty and scope

²⁰⁶ Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability (a/Hrc/38/20/Add.2).", para 25.

²⁰⁷ Ibid., para. 29

of reach on the HRDD obligations whether it extends to downstream or upstream value chain or not.

To find where the line is drawn, we may need to first consider as to which type of private sectors the Legislation should apply. As observed in national laws in certain jurisdictions, the criteria to draw the line of the scope of the application may rely on the size of the companies with certain amount of turnover, the number of nation-wide and world-wide employees through their direct or indirect subsidiaries as stipulated in France's Duty of Vigilance Law.²⁰⁸ While the Swiss Counter-proposal sets out the scope of application based on two out of thereof the following requirements: certain amount turnover, balance sheet, and employees, but only applies to SMEs in high-risk sectors, which will be subsequently defined by the government once it becomes the law.²⁰⁹ With these criteria being observed, the mandatory HRDD Legislation may rely on the number of turnovers, a balance sheet, the number employees; however, the specific number is yet to be further determined in detail. Law and policymakers may need to conduct a survey or arrange a consultation to hear opinions and reasonably map possible directions which will be acceptable by relevant multi-stakeholders namely from private sectors, civil society, as well as government agencies.

For Small and Medium Enterprises (SMEs) which should be considered under the Legislation, if this Legislation is to apply with SMEs, the owners of the SMEs may find it challenging to comply with the obligations set out in mandatory HRDD Legislation if to be strictly and equally enforced the same with large companies due to limited resources and expertise when considering the newly emerged model of this human rights due diligence. In France, the Duty of Vigilance Law excludes the application on SMEs but applies only to large companies. In contrast, the Dutch Child Labour Due Diligence Act applies to all companies and even extends to companies which are not based and are supplying goods in the Netherlands.²¹⁰

²⁰⁸ See Chapter 3 - France's Corporate Duty of Vigilance Law

²⁰⁹ Swiss Coalition for Corporate Justice, "How Does the Parliamentary Counter-Proposal Differ from the Popular Initiative (Rbi)?," https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision_RBI_counter-proposal_EN-1.pdf.

²¹⁰ Article 4 of the Dutch Child Labour Due Diligence Act 2019.

Moreover, the Legislation might choose to only apply for sector-specific, if not applying to all sectors. For a sector-specific, the Legislation may focus primarily on private sectors who operate a business in the prioritised areas of activities in rolling out the National Action Plan on Business and Human Rights 2019-2022. Such key priority areas are labour, community, land, natural resources and environment, human rights defenders, cross-border investments and multinational enterprises.²¹¹ With these sectors being prioritised, private sectors who have or may have impacts on the key priority areas may be the first subject of the application of this mandatory HRDD Legislation.

To elaborate human rights due diligence to be exercised with business relationships, the obligations under the mandatory HRDD Legislation may need to extend to other private sectors operating a business in other territories by having a transnational application if the downstream or upstream supply chain is located outside the territory of Thailand. The application at the national level is to apply to private sectors, having its domicile or operating business and may require reporting the business activities outside the territory of Thailand. In this regard, the Legislation should apply to those subsidiaries, suppliers, or contractors, or any other corporate structures outside the territory of Thailand. Specifically, Principle 13 of the UNGPs states that HRDD should be exercised for relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services to include the broader meaning of a company's business relationships.²¹² In addition, Principle 17's Commentary to the UNGPs elaborates the level of due diligence required through the supply chain and value chain, but noting the difficulty on conducting due diligence for adverse human rights impact for all entities due to a large number of entities across the supply chain or value chain; therefore, private sectors should then prioritise the area of risks of adverse human rights impacts where it is most significant according to suppliers' or

²¹¹ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p.22.

²¹² Principle 13 of the UNGPs

clients' operating context or other relevant considerations.²¹³ This transnational application may bring, or at least encourage, private sectors to change their practices in a country where there is no human rights due diligence being enforced. In this regard, the market practice in relevant countries is being shifted to better and sustainable business operations, embracing and upholding human rights. In terms of corporate groups, the obligations under the mandatory HRDD Legislation should be able to extend to any business activities of the business entities which are controlled or are deemed to be controlled by private sectors having the obligations under the Legislation. Such control is established either contractual basis or commercial relation with the applicable private sectors subject to the Legislation.

4.2.4 Scope of Material Protection of Human Rights

Thailand has a duty to protect human rights its territory or its jurisdiction according to its international obligations under international laws according to Pillar One (Protect) of the UNGPs.²¹⁴ Under Pillar Two, private sectors have to respect human rights. In this particular, Principle 12, a foundation principle of the UNGPs, lays down that “the responsibility of business enterprises to respect human rights refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”²¹⁵ In conducting human right due diligence, the rights internationally acknowledged should also be included in the due diligence process as material protection which should cover at a minimum all internationally recognised human rights according to Principle 18 of the UNGPs.²¹⁶ Private sectors can accordingly know which kind of adverse impacts they will be held accountable under the mandatory HRDD Legislation. However, read together with Principle 12 and Principle 18, these statements may be too theoretical to enforce,

²¹³ Commentary to Principle 17 of the UNGPs – See Rights, "Guiding Principles on Business and Human Rights - Implementing the United Nations "Protect, Respect and Remedy" Framework".

²¹⁴ See list of Thailand ratification status, available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=172&Lang=EN

²¹⁵ Principle 12 of the UNGPs

²¹⁶ Commentary to Principle 18 of the UNGPs – See Rights, "Guiding Principles on Business and Human Rights - Implementing the United Nations "Protect, Respect and Remedy" Framework".

especially Thailand, since it is not a party of all existing international human rights laws. In this regard, the Legislation may need to contain the applicable rights, applicable under Thai jurisdiction. Subsequently, those listed rights will be acknowledged under the due diligence plan and being protected under the Legislation. However, this approach may contradict to the UNGPs, which set out that respect for human rights exists over and above compliance with national laws and regulations.²¹⁷ If rightsholders, as contained in the Legislation, is affected by the private sector's business activities which are either accountable under this Legislation or other applicable laws. Listing down the rights to be contained in the Legislation may provide certainty for private sectors to know that which kind of business activities it may have an adverse impact on rightsholders, and which type of impacts private sectors need to prevent them from happening as well as informing legal obligations to create the human rights due diligence plan. However, there should be an open-ended provision in order to guarantee other future protection of human rights due to human rights development and situation in Thailand. Another possible direction would be by mandating the oversight body to prescribe a non-binding guideline, accompanying the mandatory HRDD Legislation. The French Duty of Vigilance Law adopts this approach.

Besides, to achieve the 2030 Agenda and in line with the compliance of the Sustainable Development Goals, which have the concept that leaves no one behind, the HRDD Legislation should establish an affirmative action to protect and promote marginalised group such as Women, the elderly, adolescents, youth, and children, persons with disabilities, indigenous populations, refugees, migrants, minorities, migrant workers, LGBTI people.²¹⁸ These vulnerable groups are people should be given priority to be protected and promoted by private sectors in relation as well as they tend to be more vulnerable in emergencies, risks communication and community engagement.²¹⁹ They are often deprived of or have limited opportunities to influence

²¹⁷ See Principle 11 and Principle 23 of the UNGP

²¹⁸ United Nations Human Rights Office of the High Commissioner, "Gender Dimensions of the Guiding Principles on Business and Human Rights."

²¹⁹ UN Women Asia and the Pacific, "Covid-19: How to Include Marginalized and Vulnerable People in Risk Communication and Community Engagement, Un Women Asia and the Pacific " (2020).

the institution and policies that determine their lives, and thus might be left behind and being more exposed to risks of human rights violation. The inclusion of all rightsholders is in line with the UNGPs as well as Thailand's National Action Plan on Business and Human Rights (the NAP-BHR). The NAP-BHR also addresses that these vulnerable groups are at risk of human rights abuse by businesses.²²⁰

There are also other rights which are related to the context of business practices, for example, freedom of expression, the right to peaceful assembly and association, the rights to public and political participation, labour rights, community rights, the right to access to justice.

Other human rights which related to business practice would be the protection of human rights defenders, the impact of the affected from mega-infrastructure projects or investments including special economic zones, land rights, the right to health, the right to the environment and natural resources, and right to be free from discrimination. This protection of rights has been addressed in the NAP-BHR. In this respect, the mandatory HRDD Legislation should be able to address these rights because respecting these rights could help advance social gaps, create an equal society in terms of economic, social, and political dimension and accelerate the achievement of the 2030 Agenda for Sustainable Development Goals for better improvement of human rights situation, which could result in sustainable development.²²¹ To draw reference and gain political legitimacy, the High-level Political Forum on Sustainable Development, the central UN platform for the follow-up and review of the 2030 Agenda for Sustainable Development, has stated in its adoption on the Sustainable Development Goals in 2015 that

“Private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation. We acknowledge the diversity of the private sector, ranging from micro-enterprises to cooperatives to multinationals. We call on all businesses to apply their creativity and innovation to

²²⁰ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p.13.

²²¹ Nations, "Transforming Our World: The 2030 Agenda for Sustainable Development (a/Res/70/1)."

solving sustainable development challenges. We will foster a dynamic and well-functioning business sector, while protecting labour rights and environmental and health standards in accordance with relevant international standards and agreements and other ongoing initiatives in this regard, such as the Guiding Principles on Business and Human Rights and the labour standards of ILO, the Convention on the Rights of the Child and key multilateral environmental agreements, for parties to those agreements.”²²²

Quoting the above could at least draw attention for private sectors to understand that they are one of the potential driving factors which can help foster human rights and that they should respect social value as expected by society. In this respect, the mandated law and policymakers for this mandatory HRDD Legislation should be able to address all rightsholders by prescribing a provision stipulating that private sector should not merely comply of any applicable laws, but should also be encouraged with its best efforts to protect human rights by having a human rights-based approach embedded in every business activity.

4.2.5 Enforcement

In terms of enforcement of this Legislation, it is a question as to how the compliance with this Legislation can be monitored and provides sanctions in case of non-compliance. In this regard, the Legislation should establish a state-based oversight body in order to monitor compliance and impose sanctions for private sectors in the case of non-compliance. The oversight body, which can also be called an administrative body, can be created from the existing legal frameworks such as from the relevant oversight body under Thai legal system, for example, government agencies who are responsible for the filing of annual reports, i.e. Thailand’s Security Exchange’s Committee, or even the Department of Business Development from the Ministry of Commerce in relation to the audited report.

Another method is to newly establish an oversight body by statute. This is relatively witnessed in the Thai legislations when there is a new special law needed to be enforced in Thailand. The hierarchy of the law under Thai legal system is usually

²²² Ibid.

in the form of the Act as seen in many specific laws in Thailand such as recent Thailand's Personal Data Protection Act B.E. 2562 (PDPA) concerning the protection of personal data collected by a data controller or a data processor.²²³ Other pieces of evidence are Thailand's Consumer Protection Act B.E. 2522,²²⁴ The Gender Equality Act B.E. 2558²²⁵ as well as the newly emerged draft Act on Civil Partnership which allows same-sex marriage in Thailand.²²⁶ In each specific act enforced in Thailand, there is a committee mandated to act as an oversight body and as an expert in the implementation for each particular act. In relation to the oversight body in the aforementioned acts, the PDPA's oversight body, known as the expert committee, is mandated to monitor compliance of private sectors operating the business in Thailand.²²⁷ Other the oversight bodies under the enforced Acts are the Consumer Protection Board (CSB), the Committee for the Promotion of Gender Equality (the Committee for PGE) established under the Gender Equality Act.²²⁸

In this respect, the mandatory HRDD Legislation should identify and address which government agencies or newly established oversight body will be mandated to be responsible for monitoring for compliance. The mandate of the oversight body should be able to impose effective sanctions on applicable private sectors. The sanctions, which will be discussed later in the next part, should contain administrative sanctions due to its regulatory nature, civil sanctions due to its commercial nature or under tort claim, and criminal sanctions due to its criminal intent to commit bodily harm. However, there might pose some challenges on resources, expertise on this holistic knowledge, particularly human right due diligence, as well as the legal mandate of national authorities. The Legislation should be able to address and seek a sustainable solution, assuring that the Legislation can be effectively enforced and well implemented.

²²³ "Thailand's Personal Data Protection Act B.E. 2562," (2019).

²²⁴ Ibid., Section 2.

²²⁵ "Thailand's Gender Equality Act B.E. 2558," (2015).

²²⁶ Bangkok Post and Kydo News, "Cabinet Backs Bill Allowing Same-Sex Unions," <https://www.bangkokpost.com/thailand/general/1947992/cabinet-backs-bill-allowing-same-sex-unions>.

²²⁷ "Thailand's Consumer Protection Act B.E. 2522," (1979).

²²⁸ "Thailand's Gender Equality Act B.E. 2558.", Section 5.

Apart from the state-based oversight body, monitoring obligations can also be done by private actions. The monitoring bodies should not merely rely on state-based mechanisms. Still, they should comprehensively extend to other relevant stakeholders such as by private sectors themselves, i.e. shareholders or investors, or by the public such as civil society. The Legislation may adopt a combination of monitoring bodies between by the state-based oversight body and by the independent body. This combination of monitoring method could encourage the effective enforcement of the Legislation by justifying transparency or accounting for its adverse impact of human rights.

Since the Mandatory HRDD Legislation may have its regulatory by its nature if the oversight body is to be mandated, the sanctions should be prescribed in the Legislation by imposing administrative sanctions, civil sanctions, and criminal sanctions. There are ranges of options the legislature can choose to adopt and include in the Legislations. For administrative sanctions, it can be administrative fines, the appointment of administrative monitors, including withdrawal of license to operate a business, trade concessions, and the dissolution of the company.

In terms of monitoring compliance by the mandated oversight body, law and Policymakers may explore innovative sanction compliance programme. There is a recent development on sanction compliance programme at a national level. The UK's Sanction Regulation with its entry into force on July 2020 introduces a 'Magnitsky-style' sanctions regime against 49 individuals and entities from Saudi Arabia, Russia, Myanmar and North Korea accused of involvement in several high profile human rights violations and abuses.²²⁹ This kind of programme also exists in the jurisdiction of the US and Canada.²³⁰ The goal for this compliance monitoring programme is to deter and establish accountability for human rights violation. The sanctions under the newly emerged UK's Regulation mentioned above imposes an asset freeze, prohibits UK persons from dealing with funds or economic resources owned, held or controlled

²²⁹ Herbert Smith Freehills, "Uk Autofocus Sanctions Underline Importance of Human Rights Due Diligence," Herbert Smith Freehills, (2020), <https://sites-herbertsmithfreehills.vuturevx.com/20/21553/landing-pages/cci-sanctions-briefing.pdf>.

²³⁰ Ibid.

by a designated person, or directly or indirectly making funds or economic resources available to or for the benefit of a designated person. Designated persons are now also prohibited from entering the UK.²³¹ This innovative sanction compliance programme along the supply chain would be a potential tool to compliance monitoring in order to indirectly deter other private sectors from refusing to trade the designated person with the identified lists of private sectors under the sanction compliance programme.

Since this new model of due diligence is comparatively new, private sectors may need to adjust their business practices in order to comply with the Legislation, and require some time to be familiar with. The Legislation should provide a transitional period and thus enforced thereafter as private sectors may need some time to grasp an understanding on the details, plan and manage their resources, and accordingly implement established standards into practice.

4.2.6 Liability

To impose sanctions due to private sector's accountability for its human rights impact, it may be appropriate to consider the proportionality principle on the imposed sanctions and its cause(s). This proportionality issue may need exhaustive analysis on the means which is liability issue under this context in order to achieve legitimate end on fostering protection on human rights. There are available alternatives on type of liability and remedies which this Legislation may adopt in accordance with the nature of the selected legal scheme.

The victim of private sector's human rights abuses should be able to claim private sector's liability and should be equipped with substantive justice and legal remedies. For private sector's liability, the mandatory HRDD Legislation should be able to address private sector's accountability to ensure that the victim is effectively remedied and that selected sanctions can prevent repetitive violation in order to ensure effective enforcement to Article 2 of France's Corporate Duty of Vigilance Act (Article 225-105-5 in the French Commercial Code) stipulates that:

²³¹ Ibid.

“Art. 225-102-5. – According to the conditions laid down in Articles 1240 and 1241 of the Civil Code, the author of any failure to comply with the duties specified in Article L. 225-102-4 of this code shall be liable and obliged to compensate for the harm that due diligence would have permitted to avoid

The action to establish liability shall be filed before the relevant jurisdiction by any person with a legitimate interest to do so.”²³²

Strict liability is one of the choices this Legislation may adopt as this type of liability exists in Thailand as seen in the Consumer Protection Act B.E. 2522, the Liability Arising from Damages from Unsafe Products Act of B.E. 2551. However, strictly liability may include criminal sanctions on managing director(s) of private’s sectors such as imprisonment of the managing directors or any responsible person for the alleged conduct, and may face a constitutional challenge in Thailand as it is contrary to a principle that a person is presumed innocent until otherwise proven guilty by a court of law at its final proceedings.²³³ There is the Amendment to Legal Provisions Related to Criminal Liability of Representatives of Legal Entities B.E. 2560 implemented by the National Legislative Assembly in effect in 2017.²³⁴ This Amendment effectively repealed the strict-liability-presumption clause existing in 76 separate laws,²³⁵ which impose strict criminal liability on directors and management

²³² Article L. 225-102-4, I of the French Commercial Code [Code de commerce], “any company that employs, for a period of two consecutive financial years, at least five thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory, or at least ten thousand employees itself and in its direct or indirect subsidiaries whose registered office is located within French territory or abroad, shall establish and implement a vigilance plan in an effective manner”.

²³³ There is a landmark case in 2012 which was initiated by a complainant who petitioned to the Thai Constitutional Court by challenging Section 54 of the Direct Sales and Marketing Act B.E. 2545 (2002), which he was convicted on the basis that he was a director of a company that committed wrongdoing, in accordance with the strict liability presumption. The case was ruled by the Thai Constitutional Court that it was contrary to the principle of innocence until otherwise proven guilty. Section 54 was unconstitutional and thus void. – see Athistha (Nop) Chitranukroh Napat Siri-armart, “New Law on Criminal Liabilities for Directors: Elimination of Strict Liability Presumption,” (2017), <https://www.tilleke.com/resources/new-law-criminal-liabilities-directors-elimination-strict-liability-presumption>.

²³⁴ “Thailand's Act Amending the Law on the Criminal Liability of Representatives of Juristic Persons B.E. 2560,” (2017).

²³⁵ Such as the Consumer Protection Act, the Telecommunications Act, and the Anti-Money Laundering Act – see Stephen Frost, “Thailand Amends Laws Relating to Criminal Liabilities of Directors, Partners and Managers,” (2017), http://www.bccthai.com/asp/view_doc.asp?DocCID=3053.

of the company, by replacing with a revised concept of non-presumption.²³⁶ The affected laws are, for example, the Consumer Protection Act, the Telecommunications Act, and the Anti-Money Laundering Act, the Employment and Job Seekers Protection Act, the National Environmental Quality Preservation and Promotion Act (1992)²³⁷ In this regard, this legal development on the perception and enforcement of strict liability in Thailand may create legal implications on the burden of proof of a victim or a public prosecutor as the strict liability might not be adopted. With the non-presumption of the liability on director(s) or any responsible person who have management decision in business operations, the burden of proof lays upon the complainant or a public prosecutor who must prove that a director instructs, acts or omits to act, in a manner that results in the applicable offences as guilty by action or omission. However, the complainant can still inspect the private sector's mandatory due diligence obligations whether there is sufficiently or reasonably implemented plan by guiding them on how to gather relevant evidence and establish a valid claim. With this legal regime coordination, ensuring substantive justice and legal remedies seems possible for private sector's exploitative practices in Thailand.

Apart from criminal and civil liability to be considered in the HRDD Legislation, the administrative sanction²³⁸ can also be imposed due to its regulatory nature of the obligations and according to the mandated oversight body to ensure that applicable private sectors behave in compliance with the mandatory HRDD Legislation. The Legislation may adopt to choose escalated sanction from administrative sanction to criminal sanctions as appeared in the Dutch Child Labour Due Diligence Act²³⁹ as it will encourage and incentivise private sectors to comply, otherwise, faced with severely increased sanctions. The escalated sanction can begin with fines on a certain percent of the annual turnover of the private sectors due to non-compliance of an administrative order by the mandated oversight body. If there is a

²³⁶ Napat Siri-armart, "New Law on Criminal Liabilities for Directors: Elimination of Strict Liability Presumption".

²³⁷ Frost, "Thailand Amends Laws Relating to Criminal Liabilities of Directors, Partners and Managers".

²³⁸ See Part 4.2.5 above for the example of possible administrative sanctions

²³⁹ Article 9 of the Dutch Child Labour Due Diligence Act - See Appendix at Gray, "Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies."

respective offence committed, with or without intent, within the number of particular years, the sanctions will be escalated to a criminal sanction imposed on the director(s) of such private sector(s) guilty under the applicable offence.

4.2.7 Remedy

As the UNGPs lays down that the duty of state and private sectors is to remedy the victim of business-related human rights abuses. This remedy is substantially addressed under the Third Pillar: Access to Remedy. Principle 26 to Principle 31 lays down an operational principle for State and private sectors to establish a grievance mechanism for victims of human rights abuses can access to remedies. Under Operation Principles of the UNGPs in the issue of Access to Remedy stipulates that state should have state-based judicial mechanism as well as state-based non-judicial grievance mechanism. Besides, non-state-based grievance mechanisms should be considered to facilitate access to remedy and administered by a business enterprise or with stakeholders. The existence of non-state-based grievance mechanism could offer a speed of access and remediation while reducing the complainant's legal and litigation costs as well as transnational reach to other remedies in different jurisdictions. Overall, as encouraged by the UNGPs, there are two existing legal mechanisms on access to remedy, namely State-based grievance mechanism and non-State based grievance mechanism.

For state-based mechanisms, the victim can be remedies by a judicial body or non-judicial body of State. For a judicial remedy, the victim can generally claim the remedy under Thai applicable laws, e.g. tort law under the Thai Civil and Commercial Code or other law entitling the complainant can request for remediation from a competent court under Thailand's jurisdiction. With these existing legal remedies, the mandatory Legislation should enable the complainant to claim these traditional legal remedies to underline the significance of the rights of victims to access to remedies. At the same time, State-based non-judicial mechanisms are much significant to provide comprehensive State-based grievance system in a more comprehensive way.²⁴⁰ The mandatory HRDD Legislation should include both mechanisms to ensure

²⁴⁰ Commentary to Principle 27 of the UNGPs, Rights, "Guiding Principles on Business and Human Rights - Implementing the United Nations "Protect, Respect and Remedy" Framework".

effective remedies and the comprehensive enforcement of the law, purporting to protection and promotion of human rights. According to the UN Report on “Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms”, State-based non-judicial mechanisms can be broken down into five broad categories namely complaint mechanisms, inspectorates, ombudsman services, mediation or conciliation bodies, arbitration and specialised tribunals.²⁴¹ In this respect, law and policy drafters should inspect which one of the choices should be an appropriate mechanism.

Apart from State-based mechanism, the UNGPs also encourage States and private sectors to establish and facilitate non-State-based grievance mechanisms.²⁴² Non-State based grievance mechanisms can be established and administered by private sectors. It is logical to view that it is coherent to human rights due diligence process as the abuses can be early identified and taken into action by providing prompt and adequate remedies while enabling private sectors to track its remediation whether the suffering victims are satisfied with the remedies under the applicable or valid claim. According to the UN Report on non-state based grievance mechanism, there are three main categories namely company-based grievance mechanisms; grievance mechanisms developed by industry, multi-stakeholder and other collaborative initiatives; and independent accountability mechanisms of development finance institutions.²⁴³ According to the UNGPs on Access to Remedy,²⁴⁴ and as contained in the NAP-BHR, non-judicial grievance mechanisms, either State-based or non-State based, should be “legitimate, accessible, predictable: with clear and known procedure with an indicative time-frame, equitable, transparent, rights-compatible, a source of continuous learning, based on engagement and dialogue.”²⁴⁵ With these

²⁴¹ Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability (a/Hrc/38/20/Add.2).", para. 12.

²⁴² Principle 18 of the UNGPs

²⁴³ United Nations High Commissioner for Human Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through Non-State-Based Grievance Mechanisms (a/Hrc/44/32)," (2020)., para. 121.

²⁴⁴ See Principle 25 to Principle 31 of the UNGPs

²⁴⁵ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p.13.

criteria given to indicate its effectiveness of non-State based mechanisms, the mandatory HRDD Legislation should be able to address private sector's duty to ensure that there is an effective grievance mechanism implemented at the corporate level as a requirement under the human rights due diligence obligation. However, it is challenging on who else can be entitled to accessing to remedies apart from the victims of human rights abuses in all grievance mechanisms addressed therein.

More importantly, it should be highly noted the remedies, either in the forms of breach private sector's obligations in this regard should go to the victims,²⁴⁶ not the oversight body, regulatory body itself or any other government agency. The remedies should also be awarded to the victim in a preventive manner in that such remedies are precautionary or pre-emptive action to mitigate or prevent future harm.²⁴⁷ Since there is a diversity of grievance mechanisms, especially non-State based mechanisms, the legislatures should be able to address the goals of improved accountability and access to remedy by providing the affected stakeholders with a range of options of seeking redress. In this regard, it may be challenging to list down the observed and acknowledged or even standardised mechanisms in the mandatory HRDD Legislation. Before enforcing this Legislation, a working group or a specific task force should also be mandated to study, design, and provide any draft regulation or guideline for the primary mandatory HRDD Legislation in order to ensure effective access to remedy and to improve accountability due to diversity of grievance mechanisms. The regulatory body mandated under this Legislation should be able to issue any sub-regulation or guidelines on the standard of non-state grievance mechanisms as implemented by private sectors as a guiding tool in operational aspect for private sectors to establish, follow, and accordingly implement it.

Besides, the HRDD Legislation should address and reinforce that victims are not deterred from fully exercising their rights in a country where the liable entity is

²⁴⁶ British Institute of International and Comparative Law "Study on Due Diligence Requirements through the Supply Chain, Final Report.", p. 212.; See Commentary to Principle 25 of the UNGPs, Rights, "Guiding Principles on Business and Human Rights - Implementing the United Nations "Protect, Respect and Remedy" Framework".

²⁴⁷ Rights, "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through Non-State-Based Grievance Mechanisms (a/Hrc/44/32).", p. 6.

bound with due diligence obligation under this Legislation.²⁴⁸ However, it is challenging on the topic of the conflict of law between the host state and the home state to access to justice due to different jurisdiction and legal regime. There are still legal barriers which can prevent legitimate cases involve business-related human rights abuses from being addressed. Principle 26 of the UNGPs provide possible scenarios on denial of access to remedy, i.e. attribution of legal responsibility among members of a corporate group, denial of justice in the host State and difficulties in accessing home State courts, exclusion of specific social groups.²⁴⁹ Other barriers to access to legal remedies are also experienced in practical and procedural barriers to accessing judicial remedy. These barriers include the cost of bringing a claim to the host-state, difficulties in securing legal representation and in accessing the information necessary to prove the claim, inadequate options for the aggregating claim, state prosecutors lack adequate resources and expertise to investigate, corruption and political interference, difficulties accessing the information necessary to prove a claim.²⁵⁰ Thus, the mandatory Legislation may need to conduct an in-depth study on the foreign enforcement, accessing remedies to third-country and may further need to study on the impact of the state-to-state international relationship as the home country, say Thailand, may need to establish understanding and cooperation with a host country to provide support and coordination in taking the accountable entity to be in the legal proceeding.

In relation to improving challenge on access to remedy, Thailand has enacted the Dispute Mediation Act B.E. 2562.²⁵¹ The Act is purported to providing benefits through mediation between the parties in dispute and strengthen the effective access to justice. This Act could function as a supplementary mechanism and strengthen people sectors to act in solidarity by establishing Mediation Centres for People Sector

²⁴⁸ Directorate-General for External Policies of the Union (European Parliament), "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries," ed. EU Parliament (Publications Office of the EU, 2019)., p.112, 113.

²⁴⁹ Commentary to Principle 26 of the UNGPs - Rights, "Guiding Principles on Business and Human Rights - Implementing the United Nations "Protect, Respect and Remedy" Framework".

²⁵⁰ Parliament), "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries.", p.14-17.

²⁵¹ "Thailand's Dispute Mediation Act B.E. 2562," (2019).

as an alternative dispute resolution in some civil and criminal upon each party consent to mediate. These Mediation Centres could help reduce the amount of claims being brought to the courts and conflicts between the parties in dispute and in community, therefore fostering for reconciled society and strengthening and maintaining peaceful society.²⁵² On the functional aspects, this enactment of this Dispute Mediation Act could offer the parties for time and cost-saving in remediation as an alternative dispute resolution by establishing a local authority or organization to remediate at no cost, without requiring a lawyer for mediation.²⁵³ According to the Knowledge Document on Operational Guideline for Dispute for People Sector (Mediation Centre (Pilot Programme)) by Thailand's Rights and Liberties Protection Department, Ministry of Justice, dispute mediation could also offer finality, willingness of compliance of the parties in dispute as it is custom made solution. It also provides process control and flexibility for the parties, compared to legal procedure in litigation.²⁵⁴ Besides, the result of the remediation can be enforceable and binds the parties with the valid agreement, concluded during the court's mediation.²⁵⁵ The remediation could preserve and even enhance long-term relationships with the parties as well. In terms of the remediation process, the Act requires a mediation expert, acting as mandated under the Act and in compliance with a code of conduct.²⁵⁶ However, this Act, as a supplementary measure in dispute resolution, does recognise the right to trial for the parties in the court of law if either party wishes to so pursue. One of the attractive characteristics of mediation is that it is less formal compared to litigation or arbitration. With less formality, the parties could be more open in addressing each concern with more truthfulness and openness, thus potentially shortening the time and cost required for the remediation. There are 78 Mediation

²⁵² See Introduction of Thailand's Ministry of Justice, "Knowledge Document on Operational Guideline for Dispute Mediation for People Sector (for Mediation Centre (Pilot Programme))," ed. Department of Rights and Liberties Protection Department.,

²⁵³ Ibid.

²⁵⁴ Ibid., p.5-6.

²⁵⁵ Ibid.

²⁵⁶ Ibid.

Centres for People Sector established under this Act across Thailand.²⁵⁷ This Act could play as a mediation-based, and reflect culturally appropriate and rights-compatible processes with people's participation in community where a conflict takes place. In relation to the consideration of the UNGPs, Thailand can demonstrate state-based non-judicial grievance mechanisms as outlined in Principle 27 of the UNGPs, stating that:

“States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.”²⁵⁸

The Dispute Mediation Act B.E. 2562 could complement access to remedy for the victims of business-related human rights abuse at a local level. However, when considering the severe impacts of human rights abuse, this Act may not be applicable as mediation is permitted to only some civil and criminal cases. Specifically, for a civil claim, Section 20 of this Act is prescribed that:

“The mediation shall not be permissible if it relates to right as regards personality, a family right or ownership in immovable property.

Civil dispute mediation is permissible in the following cases:

- (1) a dispute which is concerned with land other than disputes relating to ownership;
- (2) a dispute between heirs which is concerned with property to be obtained by way of succession;
- (3) other disputes as prescribed in the Royal Decree;
- (4) a dispute, other than those in (1), (2) and (3), of which the amount of claim does not exceed five million Baht or does not exceed such amount as prescribed in the Royal Decree.”

²⁵⁷ "Registrar Announcement on Registration on Mediation Centre for People Sector under Thailand's Dispute Mediation Act B.E 2562, Dated 26 June B.E. 2563. ." (2020).

²⁵⁸ Principle 27 of the UNGPs

For criminal dispute, the mediation under this act can be pursued provided that the committed offence is compoundable under Thai laws, or it is a petty offence under Section 390 to Section 395, Section 397 of Thailand's Penal Code, and other petty offences not affecting the public as prescribed by law.²⁵⁹ For mediation under the inquiry stage, criminal dispute mediation is permissible where it is compoundable offence,²⁶⁰ some petty offences under Thailand's Penal Code,²⁶¹ and offences punishable with maximum imprisonment term not exceeding three years as specified in the Schedule annexed to this Act.²⁶² The offence specified in the Schedule ranges from offence causing death or serious injury due to participating in a chaotic affray, bodily harm offence including an aggravating factor, and theft.²⁶³ This mediation under this Act shall not be applicable to a criminal case falling under the jurisdiction of the Juvenile and Family Courts under the law on Juvenile and Family Courts and juvenile and family procedures pursuant to Section 8 of the Act.²⁶⁴

From the legislative text of the Act, it can be viewed that mediation is limited to some extent where it is appropriate due to its nature of mediation to foster for a reconciled society where people can sustainably live with peace and security. It should be noted for law practitioners as well as the registered mediator that human rights violation with severe, irremediable damage should not be compromised. It should be ultimately noted that victims of human rights violation should be able to seek effective remedies. If such victim does not consent to mediation, access to justice to seek redress must be well facilitated. While concerning business aspect, mediation may reduce harm or potential harms to reputational risk or damage for businesses as the parties in dispute have decided to mediation instead. As this Act aims to facilitate people in community with alternative dispute resolution mechanism, the Act may need to further establish awareness-raising mechanism for businesses, especially

²⁵⁹ Section 35 and Section 41 of Thailand's Dispute Mediation Act B.E. 2562.

²⁶⁰ Section 41(1) of Thailand's Dispute Mediation Act B.E. 2562.

²⁶¹ Section 41(2) of Thailand's Dispute Mediation Act B.E. 2562.

²⁶² Section 41(3) of Thailand's Dispute Mediation Act B.E. 2562.

²⁶³ The Schedule annexed to Thailand's Dispute Mediation Act B.E. 2562

²⁶⁴ Section 8 of Thailand's Dispute Mediation Act.

SMEs, in the community to understand how this Act functions in order to ensure that access to justice is guaranteed at every level. This recent enforcement of the Act is promising to help address challenges on access to justice, especially for people in local community across Thailand.

4.3 Possible Functional and Institutional Challenges

Thailand's National Action Plan on Business and Human Rights (2019-2022) has laid down its Key Priority Areas for the implementation of the NAP-BHR by addressing challenges in the issue of Labour, Community, Land, Natural Resources and Environment, Human Rights Defenders, Cross Border Investment and Multinational Enterprises. These challenges exist in many areas, activities, and problems which involve individual, communities, and society.²⁶⁵ These issues also involve internal and external sectors.²⁶⁶ In this regard, the mandatory HRDD Legislation may face challenges on the enforcement in terms of its functional and institutional aspects. The challenges can be discussed through its functional and institutional challenge in relation to the potential enforcement of the mandatory HRDD Legislation.

4.3.1 Functional Challenges

The Legislation may face with challenges in the aspect of how its enforcement can best serve as a legal mechanism in bringing private sectors to genuinely conduct human rights due diligence, not just a reference point to defend the claim of human rights abuses or exempt from liability. It is a question of how this Legislation incentivises private sectors and public sectors to understand the benefits and impacts of having and complying with the Legislation. In this regard, it may be highly appropriate to draw reference from challenges recognised in the Key Priority Areas in the NAP-BHR to predict the challenges it reasonably may have beforehand. However, it should be presumed from the beginning that there is no one-size-fits-all solution as there are a large number of ongoing concerns needed to be improved at the domestic

²⁶⁵ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p. 22.

²⁶⁶ Ibid.

level.²⁶⁷ Human rights situations in the Key Priority Areas are faced with challenges needed to be solved. The challenges in each Key Priority Area could be solved by closing policy gaps, enacting and amending the existing laws and regulations to fulfil its obligations under existing international laws and recommendations as stated in the NAP-BHR in each Priority Area.²⁶⁸ At the same time, the awareness-raising, and capacity building and enhancing in relation to human rights protection among the affected stakeholders are also important.

4.3.1.1 Labour

Considering the challenges on labour addressed in the NAP-BHR's Key Priority Areas, it can be assumed that the Legislation may also face the challenges present in this Key Priority Area. It could be seen that the enforcement of this Legislation with a lack of protection of labour in the supply chain system may give rise to the ineffective enforcement of the Legislation since at present there is no mandatory preventive mechanism implemented at private sectors level for labour protection in the supply chain. According to the NAP-BHR, several studies and measures are needed for private sectors to have a supply chain management system which meets the Thai Labour Standard (TLS 8001),²⁶⁹ and/or Good Labour Practice (GLP).²⁷⁰ However, the TLS 8001 and the GLP are a voluntary commitment. Once the Legislation is implemented, there may be a need to amend these voluntary standards and practices to ensure coherence on policy and legal frameworks with the mandatory HRDD Legislation. Moreover, the Legislature should be able to mandate the regulatory to have the power to issue subordinate legislation or guidelines to guide or share best practice on supply chain management system in order to comply with the mandatory HRDD Legislation. Besides, the NAP-BHR also addresses human trafficking and forced labour risks in the Key Priority Areas but do not provide which sectors in details will be subject this NAP-BHR's implementation as it addressed that

²⁶⁷ Ibid.

²⁶⁸ Ibid., p.29, p.69, p.107, and p.123.

²⁶⁹ Ministry of Labour, "Thai Labour Standard Tls 8001-2020 ", ed. Department of Labour Protection and Welfare.

²⁷⁰ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p.52.

it will “consider bringing measures or labour laws which are applied to the fishery sector to be used in the supervision of labour conditions in other industrial sectors such as agriculture and construction in which many migrant workers are hired.”²⁷¹ This can be assumed that labour protection laws may not yet be adequate to comprehensively provide the legal protection to labour, including migrant workers, in other sectors where there are risks of human trafficking and forced labour. These legal protection implications may cause legal uncertainty in identifying and assessing human rights impacts as private sectors may be confused with which legal requirements or obligations they need to comply in practice. Moreover, there might be a challenge on labour protection on marginalised people, e.g. migrant workers, sex workers, persons living with HIV, persons with disabilities. It may raise to the question whether that the mandatory HRDD Legislation can practically supersede other existing Thai laws which still have a gap of protection that is may not be accordance with the international human rights laws. The Legislature should be able to underline the urgency and significance of the mandatory HRDD Legislation in safeguarding human rights and able to address the position of the Legislation as an overarching protection mechanism regardless of its hierarchy of the laws in the Thai legal systems.

4.3.1.2 Community, Land, Natural Resources and Environment

For the Key Priority Area for Community, Land, Natural Resources and Environment, existing laws in Thailand require private sectors before business operations, especially mega-projects, to conduct environmental and health impact assessment. Such assessment must include public consultations to ensure a participatory process such as Section 48 the National Environmental Quality Promotion and Conservation Act (No. 2) B.E. 2561 (2018) requiring hearings for the opinions of stakeholders and related communities.²⁷² However, such participatory process as required by applicable law is not conducted in practice.²⁷³ Without solving

²⁷¹ Ibid., p.50.

²⁷² Section 48 para. 3 of "Thailand's National Environmental Quality Promotion and Conservation Act (No. 2) B.E. 2561 ", (2018).

²⁷³ 1st Thailand's National Action Plan on Business and Human Rights (2019-2022), p. 69.

this challenge, the identification and assessment of actual and potential impacts may not be covered and addressed in all risks to people as it lacks a participatory process from the affected stakeholders in practice. With regard to the works on the Special Economic Zones (SEZs) and the Eastern Economic Corridor (EEC), the NAP-BHR lays down its prioritised activities that the Thai government's plan to establish 10 SEZs in 10 provinces and the Eastern Economic Corridor (EEC) should be reviewed by assessing risks and the effects on all sides before making a decision.²⁷⁴ It further addresses that The SEZ and EEC should be determined to be equivalent to state enterprises which must comply with the highest standards of good governance and practices.²⁷⁵ It can be logically presumed that if private sectors operating in the SEZs are to be obligated to comply with the mandatory HRDD Legislation. While the related law governing the operation of SEZs and the EEC may not provide adequate safeguard measure on human rights in such areas, there might be a conflicting interpretation and different standards applied between the mandatory HRDD Legislation and the existing laws and legal frameworks namely SEZ legal frameworks, EEC laws, laws governing the land acquisition and environmental and labour protections. In this regard, the mandatory HRDD Legislation may have a gap of enforcement or conflicting enforcement of the laws in these areas where there are risks of violation, but the Legislation might not cover such areas. Moreover, the legal status of the SEZs and the EEC has also been raised in the Statement at the end of the visit to Thailand by the United Nations Working Group on Business and Human Rights.²⁷⁶ There is a recent report on "the Human Rights Consequences of the Eastern Economic Corridor and Special Economic Zones in Thailand" conducted by the International Commission of Jurist. (ICJ). This ICJ Report calls on the Thai government, legislature and regulatory agencies to take steps to address deficiencies in the legal and regulatory framework governing economic development in the SEZs and the EEC to improve transparency, protect communities and labourers' human rights, and implement safeguards to mitigate the adverse impact of such development

²⁷⁴ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p. 69.

²⁷⁵ Ibid.

²⁷⁶ United Nations Human Rights Office of the High Commissioner, "Statement at the End of Visit to Thailand by the United Nations Working Group on Business and Human Rights," (2018).

on the environment and human rights.²⁷⁷ In this regard, the concerns raised by the UN Working Group, the ICJ, and addressed in the NAP-BHR should be solved prior to the enforcement of the mandatory HRDD Legislation in order to avoid functional challenge when implementing this Legislation.

4.3.1.3 Human Rights Defenders

The issues of the rights of human rights defenders in Thailand have been raised in the international stage as seen in the 2016 Universal Periodic Review, and most recently in the meeting of the UN Committee on Elimination on of All Forms of Discrimination on Against Women in July 2017.²⁷⁸ The human rights issue concerned here for freedom of expression and protection of human rights defenders. Human rights defenders are broadly defined as “a person who work to protect the rights, liberty, and the benefit of the community or the public.”²⁷⁹ If human rights defenders are not able to work to protect the victim of human rights violation due to a lack of legal protection for human rights defenders, the victims who are not capable of seeking redress, thus denied from access justice. Currently, as there is no legal definition of human rights defenders in Thai laws, private sectors may not grasp the significance of protecting human rights defenders. To ensure access to remedy for the victim of human rights violation form business-related activity, the mandatory HRDD Legislation should be able to acknowledge the protection of human rights defenders as they could be one of the key factors in helping to identify human rights impacts in private sectors’ supply chain. However, without legal protection for human rights defenders under Thai laws, it may be challenging for human rights defenders to deliver effective work at comfort as well as private sectors to fully respect human rights. In addition, human rights defenders could be a potential and significant actor in

²⁷⁷ International Commission of Jurists, *The Human Rights Consequences of the Eastern Economic Corridor and Special Economic Zones in Thailand*, (2020), <https://www.icj.org/thailand-laws-governing-development-of-eastern-economic-corridor-and-special-economic-zones-fail-to-adequately-protect-human-rights-icj-report/>.

²⁷⁸ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p.102.

²⁷⁹ "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms Adopted by General Assembly Resolution 53/144 of 9 December 1998," ed. United Nations General Assembly (1998).

speaking up on behalf of the victims of business-related human rights abuses. In this regard, Thailand should amend the relevant laws by providing adequate protection of human rights defenders. This, in turn, could contribute to the effective enforcement of the mandatory HRDD Legislation.

4.3.1.4 Cross Border Investment and Multinational Enterprises

In-bound and out-bound investment can have an economic and social impact in Thailand. The NAP-BHR suggested that there should be an amendment of relevant laws to detect human rights violation outside the territory of Thailand.²⁸⁰ The amended laws should be able to address and provide protection and cross-border responsibility for business-related human rights abuse in order to ensure access to remedy as well as a preventative measure to comply with a standard, or higher, of human rights protection laws, either in the home country or the host country. In this regard, the challenges in enforcing human rights due diligence obligations through business activities abroad could be realised. In terms of investor-oriented approach, The Stock Exchange of Thailand (SET) has implemented the Guideline on the Environmental, Social, and Governance (ESG)²⁸¹ by requiring listed companies to provide a corporate social responsibility report, disclosing corporate social responsibility information. Such report must demonstrate how business activities affect stakeholders. However, it does not mention in the Guideline that the report-making must be conducted with the participation of the affected stakeholders, nor does it requires private sectors to mandatorily conduct human rights due diligence. It is in the EU Study that reporting or disclosure may or may not be undertaken as part of meeting the due diligence standard. Moreover, regulating private sectors alone may not be inclusive. Investors who invest abroad in any form should be governed, supervised and punished as stipulated in the NAP-BHR.²⁸² If such investors cause, contribute to, or is directly link to business-related human rights abuses abroad, they

²⁸⁰ Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p.123.

²⁸¹ Stock of Exchange Thailand, "Esg Disclosure," <https://www.setsustainability.com/page/esg-disclosure>.

²⁸² Thailand's Rights and Liberties Protection Department, "First National Action Plan on Business and Human Rights (2019–2022).", p.124.

should also be accountable. This could ensure comprehensive protection of human rights despite a lack of human rights due diligence legislation or human rights protection in the foreign country. In this regard, the mandatory HRDD Legislation should be able to lay down a binding due diligence obligation along the business relationship in the first-tier and the second-tier of suppliers and/or their trading partners. However, it is yet challenging to enforce this due diligence obligation in a foreign country due to different legal system, coordination between countries, culture, and language, as well as the different perception of due diligence which can be another functional challenge in this regard.

4.3.2 Institutional challenges

Institutional challenges may exist during the implementation of the HRDD Legislation in various aspects. These challenges may exist due to limited resources, and expertise required for the implementation of this Legislation, especially the establishment of the oversight or regulatory body.

4.3.2.1 Legislative Framework

Legislative options to be adopted may require establishing a regulatory body to monitor private sector's business activities. In this regard, The Thai government or responsible agencies need to consider potential challenge or problems it may be faced with when implementing the Legislation and have the regulatory body mandated to monitor compliance of private sector's activities.

In terms of a legal mandate, challenges may remain as to how and to which extent the regulatory should be mandated to act as an oversight body for this Legislation. Primarily, the regulatory body should be able to draft new guidelines, provision of guidance for the virtue of the enforcement of this Legislation, as well as a pilot programme launched under the Legislation to assess what could be a challenge in enforcing this Legislation and further conduct a gap analysis, and accordingly close such gaps as identified. The Legislation should also establish a mandate as one of the responsibilities for the regulatory body to monitor the implementation of the mandatory HRDD Legislation whether the implementation of the regulatory body is in line with its purpose and achieve its goals in accordance with the NAP-BHR and

other relevant national policies such as the 20-Year Strategy B.E. 2561–2580 (2018–2037)²⁸³ or the National Human Rights Plan²⁸⁴

4.3.2.2 Resource

The Legislature and policymakers may need to conduct an in-depth analysis for even a survey with relevant stakeholders prior to the enforcement of Legislation to have a cost estimate and cost impact as well as to inform private sectors that there is a new initiative for private sectors. This may provide opportunities for business to engage in the Legislation drafting process, plan, and prepare the resource required.

Concerning the cost incurred by the government agencies under adopted legislative options, the law and policymaker should consider regulatory cost, administrative cost, human and financial resources from the regulatory body or competent authorities considering public administration. They may need to conduct cost estimates for this cost impact on this Legislation. Apart from the human resources required for the mandated responsibilities of the regulatory body for the enforcement and implementation of the Legislation, other areas of implementation costs should also be considered and included in the cost estimates such as cooperation activities on the implementation and enforcement between government agencies, technical assistance, capacity development and communication activities.

4.3.2.3 Lead Agency

In particularly addressing the oversight body as an institution to act as an oversight body in relation to the structure of the oversight body, the mandatory HRDD Legislation should address how it structures the decision-making body in order to make a decision for enforcement and sanctions. According to the OECD Guidelines for National Contact Points on Structures and Activities, the Nation Contact Points (NCP) follow four decision-making structures namely individualised decision-making, inter-ministerial decision making, expert-based decision making, and multipartite decision-making.²⁸⁵ The legislature may need to decide which option

²⁸³ Ibid., p.22.

²⁸⁴ Ibid., p.24.

²⁸⁵ OECD, "Guide for National Contact Points on Structures and Activities," (2019)., p. 7.

would best serve the goal and ensure effective enforcement of the mandatory HRDD Legislation. It should be noted that human HRDD should be conducted in a way that it involves public engagement and consultation with stakeholders. In this sense, the multipartite decision-making body may be a reasonable option. For multipartite decision-making body for the oversight body under the Legislation, there should be representation from government and stakeholders, especially rightsholders, business, trade unions, civil society.²⁸⁶ This model of decision-making body could provide ranges of expertise and aspects, and can reflect a social dialogue process within the concept of HRDD. The multipartite decision-making body as the oversight body can provide a direct channel to disseminate the oversight body activity to government and stakeholders.²⁸⁷ However, there might be risks associated with representativeness, as well as the large size of inclusive decision-making body and organisational burden, thus taking quite some time to agree upon.²⁸⁸ However, this could be solved by mandating a subcommittee to appoint a representative based on expertise and specific issue.²⁸⁹

In terms of knowledge, expertise and understanding of the resource required to implementing this mandatory HRDD Legislation, the mandated authorities should understand the difference between traditional due diligence and human rights due diligence. Apart from the oversight body, corporate reporting requirement laws should be amended to align with the mandatory HRDD Legislation. The regulators under corporate law should be also be trained to understand the newly shifted perspectives on corporate reporting, which requires not merely material risks to the private's sectors performance, including environmental and social impacts. Regulators overseeing compliance in corporate reporting, either Thailand's Security Exchange Commission (SEC) or Thailand's Department of Business Development, should focus on financial materiality as well as social and environmental materiality. This double materiality is stipulated in the EU Guideline Non-Financial Directive.²⁹⁰ The

²⁸⁶ Ibid., p.14-15.

²⁸⁷ Ibid.

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ EU, "Eu Guidelines on Non-Financial Reporting (Directive 2014/95)," ed. EU Parliament (2014).

Legislation should ensure effective coordination between ministries, government agencies, public authorities in supporting the implementation of the mandatory HRDD Legislation.

In order to amend the laws, regulations, policies, and related measures to provide strong coordination between government agencies at the national level and transnational level to comply with the UNGPs, and the OECD's Guidelines on Multinational Enterprises, The Thai Government may need to assign the Ministry of Foreign Affairs and the Ministry of Justice to initially coordinate and plan on developing laws, policies, and concrete mechanisms as to how to best protect human rights at the domestic level, and have private sectors to take cross-border responsibility at transnational level. Without strong coordination between government agencies, and between the country, exercising due diligence obligation may be incomplete due to a lack of expertise, resource, and enforceability between countries.

4.4 Impact on Stakeholders

4.4.1 Rightsholders

The rightsholders affected or potentially affected by business activities are guaranteed with an established mechanism to address human rights and environmental impacts on their livelihood. The social dialogue process is established as rightsholders represent in every stage from the exercise of due diligence, and engagement of the decision-making at the oversight body.

In relation to due diligence obligations, identifying and assessing actual or potential impacts could be more facilitated by rightsholders as they are the affected stakeholders who have lived experiences and have been faced with challenges. Besides, if properly managed and communicated amongst the affected stakeholders, rightsholders can significantly engage with private sectors to help map and flag a potential risk and impact for the virtue of private sector's exercise of due diligence; thus, it could offer inclusive human rights due diligence, not merely from private sectors.

In case of damage incurred by private sectors, there is a mechanism for the affected rightsholders can seek redress through judicial and non-judicial, either state-based or non-state based, grievance mechanisms. This would guarantee easily accessible access to justice for the victim of business-related human rights abuse.

The mandatory HRDD Legislation could create a level playing field for rightsholders to entitled to address impacts of their livelihood as the mandatory HRDD Legislation can provide legal certainty, harmonisation of human rights protection. As the concerns or impacts raised by rightsholders are non-negotiable standard, leverage with third-parties to behave likewise can be increased. In this regard, the Legislation is likely to increase the condition of living in Thailand, and possibly in the third countries.

In terms of labour aspects, the expected positive social impacts would depend on how the Legislation address human rights in a comprehensive manner or not. It can be expected that enforcing the Legislation could abolish child labour, or eliminate all forms of forced labour, and the create and maintain quality of jobs while guaranteeing freedom of association and effectively recognising the right to collective bargaining.

With the inclusion of marginalised people such as women, children, the elderly, persons with disabilities, ethnic groups, migrant workers and LGBTI people, people living with HIV, these marginalised people and vulnerable groups can be empowered with other stakeholder's promotion of rights without being discriminated, stereotyped, or stigmatised. This would help build a more equal, stronger, and more sustainable society, helping to step forward to the achievement of the Sustainable Development Goals.

Recently, there is a progressive development in protecting community rights. Mitr Phol, a private company, registered under Thai laws is accused of complicity in the forcible displacement of the Cambodian families for the company's land usage in Cambodia during 2008-2009.²⁹¹ In 2018, the allegation was brought to the Thai Civil Court of Bangkok, Thailand where such alleged company is domiciled. The case was brought as a transboundary class action, but the Court of First Instance decided that

²⁹¹ *Hoy Mai & Others Vs. Mitr Phol Co. Ltd. (Black Case No. 718/2561) (2561)*.

the case could not be brought as a class action. However, in July 2020, the Thai Court of Appeals reversed the Court of First Instance's decision by deciding the class action can be brought to the court.²⁹² It is for the first time in Thailand and the region, decided for transboundary cases to protect vulnerable groups in another jurisdiction,²⁹³ and decided that the can be brought with a class status as the Thai laws permit a class action to be brought by foreign plaintiffs for abuses committed by a Thai company overseas.²⁹⁴ The case referred here can provide a good lesson for other private sectors to understand how human rights impact due to their business activities can disrupt their business, including reputation. Yet, it is challenging for the Thai's justice sectors to decide on the case. The decision of the case could be the first precedent case in Thailand to establish legal liability for private sectors in complicity with the human rights violation in another jurisdiction as well as the recognition of human rights protection for rightsholders abroad. In this regard, it is challenging to assume the direction of the legal landscape in Thailand. It reflects progressive development in the justice sector in Thailand where business and human rights agenda is being integrated and mainstreamed in the Thai legal justice system. The decision of the Thai Court of Appeal could have a positive impact in setting a legal landscape of accessing to justice. This can also raise awareness for rightsholders to know that they are protected under Thailand, and their human dignity is recognised under the Thai Constitution and the Thai legal system regardless of their nationality. The case could also raise awareness and understanding for private sectors to be more concerned with their business operations and their impacts to people if not adequately addressing risks to people and their exploitative business practice. Yet, it is worth looking forward to the results of the case to see to what extent the protection of rightsholders will be guaranteed.

²⁹² Amnesty International, "Thailand: Evicted Cambodian Villages Sue Sugar Giant Mitr Phol," (2020).

²⁹³ Inclusive Development International, "Case Brief: Class Action Lawsuit by Cambodian Villagers against Mitr Phol Sugar Corporation," (2018), <http://www.inclusivedevelopment.net/wp-content/uploads/2018/03/Mitr-Phol-Class-Action-Case-Brief.pdf>.

²⁹⁴ Ibid.

4.4.2 Private Sectors

The positive impacts on private sectors were to be enforced are that private sectors could create sustainable growth and better risk management due to the inclusive identification and assessment of risks from people, environment, and business. In terms of risk management, HRDD could help manage reputational risks as there are well-established steps to be taken when there is a complaint and to comprehensively and promptly provide effective remedies to the victim. The Legislation could enable private sectors to build trust with the rightsholders, civil society organisations, and government in conducting responsible business. Moreover, the new Legislation could increase brand and image reputation while having better human resource management. Improved risk management is highly expected, and operational efficiency and innovation are introduced to private sectors, industry, and society. It could, in turn, offer economic benefits in terms of financial and stock performance, and cost of capital

It might be not comprehensive not to address the cost impact to private sectors if this mandatory HRDD Legislation is enforced. To comply with the HRDD obligations, private sectors may need to invest in the establishment of a robust organisational management system to be able to identify and assess risk in the supply chain. Private sectors need to prepare resources for designing and implementing a strategy to respond to the identified risk and accordingly carry out tracking on how the risk is being handled. Finally, the communications system to gather information and summarise the fact and conclusion must be established by providing a report communicated to the public. Apart from the cost for due diligence obligations, training to establish understanding, build and enhance capacity for internal staffs to deeply understand how to conduct HRDD in compliance with the Legislation should also be taken into account.

In terms of quantification of economic impacts, according to the EU's study, the cost shifts substantially from the status quo to mandatory due diligence. The EU Study estimates that the total EU 28 additional company-level cost impact, which includes labour cost, overhead, and cost of outsourced activities, would be substantially increased, with variations upon the company size, and sector upon the

scope of application.²⁹⁵ However, at a corporate level, according to the EU's Study, many interviewees within companies viewed that having mandatory human rights due diligence obligation would not create additional cost as these risks had already been addressed. Nevertheless, the additional cost would be that of regulatory actions at the European level. Law and policymakers mandated to study and draft the mandatory HRDD Legislation should consider the economic impacts which this Legislation may have. Besides, in order to encourage compliance with the Legislation, the cost of implementing this Legislation should be exhaustively studied in order for private sectors to understand their obligations and accordingly prepare resources to implement in the case where they have never been addressing human risks before, especially SMEs if the Legislation also decides to regulate them.

In addition to the impact of the Legislation, it may be challenging for private sectors, especially SMEs, since they may not possess resource and may cause administrative burden to implement the process of due diligence. It is noted that SMEs with limited resources may need to take significantly less due diligence steps than large companies.²⁹⁶ There are the major findings in the EU's Final Report on Study on Due Diligence Requirements through Supply Chain for company-level effects of due diligence and reporting requirements for SMEs.²⁹⁷ Relative administrative burden is generally expected and greater than for larger companies. A lack of human resources in SMEs may cause a competitive disadvantage compared to larger companies. While SMEs, a direct party or the first or second-tier supplier or contractor, may suffer for tighter contractual obligations by business practice and standard imposed by large corporate clients. In terms of leverage, the capacity to gather the necessary information in order to use sufficient leverage is limited when supply chain partners extend to or are located in foreign countries. Thus, mandatory HRDD Legislation should be able to provide a balanced solution to SMEs. It may also

²⁹⁵ British Institute of International and Comparative Law "Study on Due Diligence Requirements through the Supply Chain, Final Report.", p. 20.

²⁹⁶ Francis West for Shift, "Smes and the Corporate Responsibility to Respect Human Rights Busting the Myth That Bigger Is Always Better," (2019), <https://www.shiftproject.org/resources/viewpoints/busting-myth-smes-corporate-responsibility-respect-human-rights/>.

²⁹⁷ British Institute of International and Comparative Law "Study on Due Diligence Requirements through the Supply Chain, Final Report.", p. 318.

appropriate to apply different criteria based on complexity and size, severity, impacts, and operational context as stipulated in the UNGPs.²⁹⁸

4.4.3 Government

As Thailand must protect human rights due to their international obligations and due to the implementation of the NAP-BHR Phase I during 2019 – 2022, enforcing the mandatory HRDD Legislation is highly relevant and would be a potential agenda to be included in next phase of the NAP-BHR. Having the Legislation enforced could have a positive impact on corporate governance to more respect human rights, thus contributing to sustainable growth to business and society. The Legislation can harmonise the fragmentation of human rights due diligence standard voluntarily applied by private sectors. In addition, it will draw legal certainty for business to be informed and able to adjust themselves with a clear roadmap. Moreover, it will also help level playing field to step forward for an equal and sustainable future in society as the rights and the standard contained therein are non-negotiable. In a big picture, the Legislation would provide more access to the market for private sectors who can match investor's or consumer's expectation by demonstrating ethics and integrity through the compliance with the Legislation. At a regional level, Thailand can be a potential leader in ASEAN, or even in Asia, in addressing and solving human rights situation due to business-related human rights abuse through the mandatory HRDD Legislation. This would attract international attention and improve the perception of Thailand for their human rights challenges, as well as help achieve the commitment with the Recommendation adopted in the Universal Periodic Review in 2016, the implementation of the Sustainable Development Goals (SDGs), thus fostering sustainable safeguard and protection for all.

To ensure effective enforcement of the mandatory HRDD Legislation, capacity building and enhancing programme should be available. The Thai Government should ensure there are enabling environments available to translate the business and human rights agenda, specifically this mandatory HRDD Legislation,

²⁹⁸ Principle 17 of the UNGPs

into reality as in line with the implementation of the Sustainable Development Goals (SDGs). However, the Thai Government should be able to identify the capacity gaps prior to developing the capacity development programme. The capacity building programme can range from conducting series of training, training of trainers for establishing understanding on business and human rights especially HRDD, workshops, as well as creating dialogues, and discussion to exchange knowledge and expertise amongst relevant stakeholders in every level. In line with Thailand's implementation of the Sustainable Development Goals, The Thai Government should also consider partnering with international organisations to jointly work to ensure policy coherence, social inclusion, strengthening institutions and supporting integrated inclusive approaches to sustainable development.²⁹⁹ The government should include evidence-based policy in the capacity building programme by improving access to data and building comprehensive statistical inventory, as well as identifying means of implementation in aspect of resource mobilisation.³⁰⁰ With this capacity building and enhancing programme implemented in place, the mandatory HRD Legislation could be effectively implemented and the realization of the Sustainable Development Goals (SDGs) as the global goals can be accelerated since the stakeholders under the Legislation understand how this Legislation could contribute to society without being obstructed with national capacity deficit.

4.4.4 Civil Society Organisations มหาวิทยาลัย

Civil Society Organisations (CSOs), including Non-Governmental Organisations (NGOs), can play a significant role in contributing to the effective enforcement of the mandatory HRDD Legislation. With CSOs' participation in the HRDD process, a more inclusive approach and a check and balance mechanism between the interested parties can be adequately addressed along the due diligence process and the established social dialogue. In this regard, enforcing the Legislation would increase the CSO's participation towards their roles and responsibilities and be able to represent the victim as permitted under the Legislation, rather than social

²⁹⁹ United Nations, "Building Capacity to Realize the Global Goals," (2017).

³⁰⁰ Ibid.

auditing through non-legal mechanisms such as by naming and shaming the aggressor of human rights violation. Moreover, the Legislation would support the works of CSOs to be able to engage with other stakeholders while expanding their networks. CSOs can also reach out for the victims and be able to address and track, monitor and evaluate the private sector's action as well as the implementation of the Legislation.

The Executive Director from the Freedom Story,³⁰¹ an NGO working with a mission to prevent trafficking and exploitation for vulnerable children in Thailand, noted that more understanding should be established to help private sectors understand their obligations to respect human rights, addressing more protection and promotion. At present, Thailand does not have the law for private sectors to mandatorily conduct HRDD; however, the Executive Director further elaborated that a voluntary exercise of HRDD can reflect a positive reinforcement which would contribute to the movement and advocacy of the creation of the mandatory HRDD Legislation. Moreover, the Executive Director views there is a possibility for Thailand to enforce this mandatory HRDD Legislation as it would contribute to more human rights protection. However, without the inclusion and cooperation of private sectors, it is not possible to achieve effectively enforce this Legislation. The Legislation still needs to draw certainty and to be able to set a clear scope, and a roadmap to inform private sectors to understand their responsibilities to respect human rights.

From the interview, it could be assumed that that the enforcement of the Legislation would help build and strengthen CSOs networks as the Legislation requires multi-stakeholder engagement. Moreover, in order to have an impactful social movement and advocacy, the Legislation would help CSOs to be more integrated into the process of HRDD, thus enabling CSOs to work for advocacy for awareness-raising for the business and human rights agenda.

This Chapter provides analysis on the potential enforcement of the Legislation by extracting key or common legal characteristics contained in each the mentioned due diligence law in Chapter 3 and critically address how those identified characteristics would apply in the Thai legal context if Thailand were to enforce this Legislation. In this regard, the legal structure or the substantive part of the Legislation

³⁰¹ The Freedom Story, "Who We Are," <https://thefreedomstory.org/about>.

should contain legal duty as a standard of care in exercising due diligence. Drawing the line as to which private sectors will be subject to this Legislation is challenging, especially for the enforcement with SMEs. Nonetheless, it should be acknowledged that human rights protection should be the top priority of this Legislation to include in a manner which is in line with international human rights laws. However, there might be some challenges in enforcing such recognised rights at the domestic level in practice. Enforcement and liability must be addressed in the Legislation in order to transform soft law obligations from the UNGPs into hard law obligations where there are civil, criminal, and/or administrative liability for private sectors in offence or non-compliance. Besides, the oversight body could be a potential option a regulatory body designated for the compliance monitoring of the Legislation. Equally important, the existence of grievance mechanisms, state-based and non-state based, and both judicial and non-judicial remedy is required in order to ensure access to justice and provide the victim of human rights violation to seek redress.

Overall, there are legal options in which the legislature may explore and decide the direction to adopt in the Legislation; however, it should be noted that there might be some function and institutional challenges during the implementation of this Legislation. It is highly appropriate to analytically address those challenges within the scope of the NAP-BHR's Key Priority Areas in order to identify potential gaps in the Legislation. Institutional challenges are also relevant to be addressed in this analysis as it could deter or delay the effective enforcement and implementation of this Legislation. Prior to the enforcement of this Legislation, it might be appropriate to inspect the impact of stakeholders in order to identify needs and interest for each stakeholder. It should be noted that a human-rights based approach is the golden rule and that human rights violation must not be neglected. Otherwise, this Legislation may not be able to achieve its goal: to protect human rights while altogether creating sustainable growth for private sectors and other relevant stakeholders. The role of government and Civil Society Organisations (CSOs) are essential in incentivising and advocating the enforcement of this Legislation. Without the strong participation from individuals, governments, private sectors, CSOs, including NGOs, the enforcement of this Legislation is nowhere near possible.

Chapter 5

Conclusion and Recommendation

5.1 Conclusion

The United Nations on Guiding Principles on Business and Human Rights (UNGPs), endorsed by the UN Human Rights Council, can signal the importance of how business can operate their business activities to safeguard human rights along their value chain. The UNGPs encourage private sectors to respect human rights by conducting Human Rights Due Diligence (HRDD), a component communication with a wider inclusion of the affected stakeholders on an on-going basis as emerging obligations to identify, prevent, mitigate, and account for their adverse human rights impacts. This Human Rights Due Diligence (HRDD) differs from traditional due diligence as it is an exercise of the standard of care by identifying and assessing human rights impacts, integrating findings and taking actions, as well as tracking and monitoring the results, and lastly, communicating how the impacts are addressed. HRDD in this regard focuses on risks to people, not merely to business. Many studies and various guidelines are showing that good corporate governance could contribute to sustainable growth. This sustainable growth cannot exist without the inclusion of all stakeholders, especially rightsholders. Private sector should build long-term relationships with relevant stakeholders in their business activities. Thus, adopting the new emerging model of HRDD could be a potential option in improving risk management strategy, helping maintain a strengthened and sustainable relationship with stakeholders while building trust with the public, consumers, and investors, as well as acting in response of societal expectations.

However, there are only some countries which have required private sectors to conduct HRDD. The development programme, social movement, and advocacy on HRDD in accordance with the UNGPs have been a challenging issue for countries and private sectors as to how they can find a balanced position where human rights are fully respected in accordance with international human rights law. Thailand, as the first country in Asia, has launched and implemented its National Action Plan on

Business and Human Rights Phase I (2019-2022) to address human rights situation especially in key priority areas namely Community, Land, Natural Resources and Environment, Human Rights Defenders, Cross Border Investment and Multinational Enterprises. Nevertheless, there is a lack of a legal mechanism in Thailand to address private sector's accountability for business-related human rights abuse with direct engagement of private sectors by requiring them to mandatorily conduct HRDD along their business relations and to account for its human rights impacts as well as provide effective remedy to the victim of human rights abuse which private sectors have caused, contributed to, or are directly linked to.

Human Rights Due Diligence has been seen in many legislative and policy developments such as the French Duty of Vigilance Law, the Swiss Responsible Business Initiative (RBI) and its Counter-Proposal, and the Dutch Child Labour Due Diligence Law, the EU Timber Regulation, and the EU Conflict Mineral Regulation. These legislative and policy developments could potentially reflect urgent need to close the gap of a lack of legal mechanisms to hold private sectors accountable for their business activities which have adverse or potential impacts on human rights, as well as to provide effective remediation to the suffered rightsholders by providing access to remedy, with state-based and non-state based, either judicial or non-judicial, mechanisms. As prescribed in the existing due diligence laws, widely discussed amongst legal scholars and practitioners across the business and human rights agenda, there are different legal characteristics in the existing HRDD laws. The substance of the law usually address the private sector's legal duty, covered private sectors, scope of protected human rights, enforcement, liability, remedial measure, and an oversight body. In this regard, to connect the dot for business and human rights agenda, as well as the implementation of Thailand's NAP-BHR, Thailand should encourage and advocate for the creation of the enforcement of mandatory HRDD Legislation. However, exhaustive researches and studies on the potential challenges and impacts, as well as cost-benefit analysis should be conducted in order to ensure effective enforcement and implementation of the Legislation while noting legal implications for private sectors especially Small and Medium Enterprises (SMEs) due to limitation of resources and expertise. It is challenging for Thailand on how the Legislation could

find a way to balance the interest of all stakeholders. However, it should be highly noted that human rights violation cannot be compromised and ignored.

In This regard, this Thesis captures possible legal developments of mandatory HRDD Legislation and how the potential enforcement of the Legislation can fit in the Thai context, noting the functional and institutional challenges faced by Thailand on labour, community, land, natural resources, human rights defenders, as well as cross border investment as these are the key priority areas addressed in the NAP-BHR Phase I (2019-2022). However, it should be highly noted that HRDD Legislation should be able to address all stakeholders, including marginalised groups, and vulnerable groups such as children, women, LGBTI people in order to ensure a more empowered, strengthened, and equal society with participation of all stakeholders, especially private sectors.

Requiring private sectors to conduct due diligence could increase the private sector's participation in respecting human rights along the value chain. Therefore, the risk of human rights violation due to exploitative business activities could be reduced, and ultimately eliminated. Moreover, the Legislation could draw legal certainty, harmonise business and human rights standards, while levelling the playing field, encouraging and facilitating leverage as it is non-negotiable standard, as well as, access to market where human rights protection is the top priority. It also reflects the leadership in fostering human rights projection and promotion in ASEAN and possibly in Asia.

With the private sector's stronger participation, achieving the Sustainable Development Goals as a global goal seems possible. Yet, it is challenging for Thailand to explore and look forward to this legislative development on how Thailand will take the right path to safeguarding and fostering human rights without leaving anyone behind.

5.2 Recommendation

In order to have a legal mechanism by requiring private sectors to conduct human rights due diligence as parts of obligations to respect human rights by private

sectors in line with the UNGPs and the implementation of the NAP-BHR, the Author recommends Thailand adopt the following:

1. Develop policy and legislative frameworks containing initiatives on the enforcement of mandatory Human Rights Due Diligence (HRDD) in continuance to the implementation of the NAP-BHR Phase I (2019-2022) due to a lack of hard law obligations to regulate private sectors' behaviour as well as increasing the corporate social reasonability with increased accountability.

2. Conduct a study on cost-benefit analysis for the enforcement of the Legislation, with private stakeholders and stakeholders including civil society organisations, and design, plan and implement the pilot programme for the enforcement of the mandatory HRDD Legislation.

3. Arrange public consultation with all stakeholders, including marginalised people and vulnerable groups in order to have the Legislation comprehensively cover and protect all rightsholders with a human rights-based approach.

4. Enforcing the mandatory HRDD Legislation by identifying which private sectors will be subject to this Legislation and addressing how private sectors can comply with this Legislation by issuing subordinate legislation, or guidelines to draw legal certainty for private sectors to understand and accordingly comply with the Legislation; however, the Legislation should contain transitional period for private sectors to prepare for resource and expertise for their compliance. Enforcement for SMEs with different criteria should be studied and considered.

5. Identify the area of law which this Legislation will fall upon, and select which legal regime on liability will be adopted for this Legislation, as well as decide on available legal options on enforcements as to whether to require private sectors to report human rights due diligence plan to the public and the oversight body, and to disclose the implementation result of such plan.

6. Establish sanctions due to business-related human rights abuse and non-compliance by prescribing administrative, criminal, and civil sanctions with escalated liability if repetitive violation or non-compliance occurs within a certain amount of time.

7. Improve state-based, and non-state based grievance, both judicial and non-judicial, mechanisms to ensure easily accessible access to justice and effective remediation for the victim of human rights violation due to business-related human rights abuse.

8. Identify legal mandate for the oversight body for this Legislation, as well as, consider compliance monitoring programme.

9. Identify lead government agencies in advocating this enforcement of the mandatory HRDD Legislation. The Ministry of Foreign Affairs and the Ministry of Justice could be potential advocates and government champions for business and human rights agenda as they have involved in the business and human rights agenda at the international and national level.

10. Identify country's capacity gaps, specifically for the implementation of the mandatory Human Rights Due Diligence Legislation; establish a capacity building and enhancing mechanism, including by developing capacity development programme such as tools and guidance on exercising Human Rights Due Diligence as well as conducting series of training, training of trainers, workshops; establishing discussion or dialogue with relevant stakeholders; collaborating with local and international development organisations; especially the significance of human rights due diligence and how it can be effectively executed.


11. Establish awareness-raising measure for relevant government agencies relating to corporate reporting under corporate law to understand the advantage and the importance of HRDD Legislation as well as how government agencies can interact with this Legislation and collaborate with the statutorily established oversight body or the regulatory body to ensure effective and robust coordination between as the Legislation involves ranges of thematic issues. Capacity building mechanism can be pursued through series of training, training of trainers, or finding champions, developing tools or guidance for business and human rights especially for building and enhancing understanding on human rights due diligence.

It can be viewed that there is an urgent need to advocate for the enforcement of the mandatory Human Rights Due Diligence Legislation for private sectors in

Thailand in order to guarantee the rightsholders in the aspect of labour, community, land, natural resources, human rights defenders, cross-border investments by requiring private sectors to conduct due Human Rights Due Diligence. This potential enforcement could foster protection on human rights for private sectors. The enforcement, if appropriately drafted, will be in accordance with the UNGPs and ensure the continuance of the implementation of the NAP-BHR. Therefore, it would help improve the human rights situation and challenges in Thailand to have all stakeholders engage in human rights protection and promotion in every level to step forward for an equal, more strengthened, and sustainable society.



REFERENCES

- ALL, CP. "Human Rights Due Diligence Manual." (2018).
- bhrinlaw.org. "European Union - Legislative Development." bhrinlaw.org, <http://www.bhrinlaw.org/key-developments/53-europe#eu-conflict-mineral-regulation>.
- Bourguignon, Didier. "The Precautionary Principle." European Parliament, 2015.
- British Institute of International and Comparative Law , Civic Consulting , Directorate-General for Justice and Consumers (European Commission) , LSE. "Study on Due Diligence Requirements through the Supply Chain, Final Report." Publications Office of the EU, 2020.
- Centre, Business and Human Rights Resource. "Case: Shell Lawsuit (Re Nigeria - Kiobel & Wiwa)." <https://www.business-humanrights.org/en/shell-lawsuit-re-nigeria-kiobel-wiwa>.
- . "The Draft Un Treaty on Business and Human Rights: The Triumph of Realism over Idealism." <https://www.business-humanrights.org/en/blog/the-draft-un-treaty-on-business-and-human-rights-the-triumph-of-realism-over-idealism/>.
- . "List of Large Businesses, Associations & Investors with Public Statements & Endorsements in Support of Mandatory Due Diligence Regulation." 2020.
- . "The Un "Protect, Respect and Remedy" Framework for Business and Human Rights." <https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf>.
- Change, United Nations Climate. "About the Secretariat." <https://unfccc.int/about-us/about-the-secretariat>.
- Comissioner, United Nations Human Rights Office of the High. "Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises." 
- Commission, European. "Eu Data Protection Rules " https://ec.europa.eu/info/law/law-topic/data-protection/eu-data-protection-rules_en.
- . "The Regulation Explained." European Commission, <https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/>.
- Commission, Trade Union Advisory Committee to the OECD. "Launch of the Oecd Due Diligence Guidance on Responsible Business Conduct - Tuac Contribution." (2018).
- Commissioner, United Nations Human Rights Office of the High. "Gender Dimensions of the Guiding Principles on Business and Human Rights."
- . "Statement at the End of Visit to Thailand by the United Nations Working Group on Business and Human Rights." 2018.
- Committee, CEDAW. "General Recommendation No. 19 (Un Doc. A/47/38) Para. 9 ",

1992.

Correspondent, EU Reporter. "Commission Study Shows the Need for Eu-Level Legislation on Due Diligence Throughout the Supply Chain on #Humanrights and #Environmentalimpacts."

<https://www.eureporter.co/frontpage/2020/02/25/commission-study-shows-the-need-for-eu-level-legislation-on-due-diligence-throughout-the-supply-chain-on-humanrights-and-environmentalimpacts/>.

Council, The United Nations Human Rights. "17/4 Human Rights and Transnational Corporations and Other Business Enterprises." 2011.

Council, United Nations Human Rights. "Basic Facts About the Upr."

<https://www.ohchr.org/en/hrbodies/upr/pages/basicfacts.aspx>.

"Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms Adopted by General Assembly Resolution 53/144 of 9 December 1998." edited by United Nations General Assembly, 1998.

EU. "Eu Guidelines on Non-Financial Reporting (Directive 2014/95)." edited by EU Parliament, 2014.

European Roma Rights Center V. Greece, (2004).

France. "French Corporate Duty of Vigilance Law ", 2017.

Franks, Rachel Davis and Daniel. "Costs of Company-Community Conflict in the Extractive Sector." 2014.

Freehills, Herbert Smith. "Uk Autofocus Sanctions Underline Importance of Human Rights Due Diligence, Herbert Smith Freehills." (2020). <https://sites-herbertsmithfreehills.vuturevx.com/20/21553/landing-pages/cci-sanctions-briefing.pdf>.

Frost, Stephen. "Thailand Amends Laws Relating to Criminal Liabilities of Directors, Partners and Managers." (2017).

http://www.bccthai.com/asp/view_doc.asp?DocCID=3053.

Garner, Bryan A and Henry Campbell Black West. *Black's Law Dictionary*. Edited by 6th ed. St. Paul, Minnesota 2009.

Geneva, Permanent Mission of Thailand to the United Nations in. "Upr: Thailand Submits Its Second Cycle Upr Mid-Term Report." <https://permanentmission-geneva.thaiembassy.org/en/content/101262-upr:-thailand-submits-its-second-cycle-upr-mid-term-report?cate=5d81d6a815e39c1a0c005773>.

Giliker, Paula. "Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective." *Journal of European Tort Law* 2 (01/01 2011).

Götzmann, Nora. *Handbook on Human Rights Impact Assessment, Nora Götzmann* 2019.

Government, Thai. "Highlights of Thailand's Implementation of Recommendations and Voluntary Pledges under the First Cycle of the Universal Periodic Review 2012-2014 (Mid-Term Update)."

- . "Highlights of Thailand's Implementation of Recommendations and Voluntary Pledges under the Second Cycle of the Universal Periodic Review 2016-2018 (Mid-Term Update)." 2019.
- Gray, Ropes and. "Dutch Child Labor Due Diligence Act Approved by Senate – Implications for Global Companies." (2019).
- Hoy Mai & Others Vs. Mitr Phol Co. Ltd. (Black Case No. 718/2561) (2561).*
- Institute, Corporate Finance. "What Are the Types of Due Diligence? Corporate Finance Institute,." <https://corporatefinanceinstitute.com/resources/knowledge/deals/types-of-due-diligence>.
- International, Amnesty. "Human Rights: Is It Any of Your Business?". *Amnesty International and the Princes of Wales Business Leaders Forum*.
- . "Thailand: Evicted Cambodian Villages Sue Sugar Giant Mitr Phol." (2020).
- International, Inclusive Development. "Case Brief: Class Action Lawsuit by Cambodian Villagers against Mitr Phol Sugar Corporation." (2018). <http://www.inclusivedevelopment.net/wp-content/uploads/2018/03/Mitr-Phol-Class-Action-Case-Brief.pdf>.
- Juliette Renaud, Françoise Quairel, Swann Bommier, Nayla Ajaltouni. "The Law on Duty of Vigilance – Year 1: Companies Must Do Better." (2019).
- Jurists, International Commission of. *The Human Rights Consequences of the Eastern Economic Corridor and Special Economic Zones in Thailand*. 2020. <https://www.icj.org/thailand-laws-governing-development-of-eastern-economic-corridor-and-special-economic-zones-fail-to-adequately-protect-human-rights-icj-report/>.
- Justice, Corporate. "The Initiative Text with Explanations." *Fact Sheet* (2018). https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf.
- Justice, European Coalition for Corporate. "About Eccj." <https://corporatejustice.org/about-us/about-eccj>.
- . "Comparative Table, Mhrdd with Corporate Liability Laws in Europe, ." (2019): 1-8. https://corporatejustice.org/documents/publications/eccj/eccj_hrdd_pcl-comparative-table-2019-final.pdf.
- . "Eccj Position Paper - Key Features of Mandatory Human Rights Due Diligence Legislation." (2018): 4.
- . "Eccj Publishes Comparative Legal Analysis of Hrdd and Corporate Liability Laws in Europe." <https://corporatejustice.org/news/16783-eccj-publishes-comparative-legal-analysis-of-hrdd-and-corporate-liability-laws-in-europe>.
- Justice, European Coalition of Corporate. "French Corporate Duty of Vigilance - Faqs " <https://corporatejustice.org/documents/publications/french-corporate-duty-of-vigilance-law-faq.pdf>.

- . "French Corporate Duty of Vigilance Law (English Translation)." 2017. Justice, Swiss Coalition for Corporate. "About the Initiative." <https://corporatejustice.ch/about-the-initiative/>.
- . "How Does the Parliamentary Counter-Proposal Differ from the Popular Initiative (Rbi)?" https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision_RBI_counter-proposal_EN-1.pdf.
- Justice, Thailand's Ministry of. "Knowledge Document on Operational Guideline for Dispute Mediation for People Sector (for Mediation Centre (Pilot Programme))." edited by Department of Rights and Liberties Protection Department.
- Labour, Ministry of. "Thai Labour Standard Tls 8001-2020 ", edited by Department of Labour Protection and Welfare.
- Law, Business & Human Rights in. "Unofficial Translation of the Counter-Proposal by the Swiss Parliament to the Citizen Initiative 'Responsible Business Initiative'." 2018.
- Limited, Airport of Thailand Public Company. "Human Rights Due Diligence." <https://corporate.airportthai.co.th/wp-content/uploads/2018/06/AOT-HRDD-2017-2018.pdf>.
- Limited, PTT Public Company. "Human Rights Management." <https://www.pttplc.com/en/Sustainability/Social/Humanright.aspx>.
- Marco Fasciglione. "The Enforcement of Corporate Human Rights Due Diligence: From the Un Guiding Principles on Business and Human Rights to the Legal Systems of Eu Countries." *10 Hum. Rts. & Int'l Legal Discourse* 94 (2016).
- Martin, J., & Bravo, K. (Eds.). *The Business and Human Rights Landscape: Moving Forward, Looking Back*. Cambridge: Cambridge University Press, 2015. doi:10.1017/CBO9781316155219
- Mvoplatfrom. "Update: Frequently Asked Questions About the New Dutch Child Labour Due Diligence Law." <https://www.mvoplatfrom.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>.
- Napat Siri-armart, Athistha (Nop) Chitranukroh. "New Law on Criminal Liabilities for Directors: Elimination of Strict Liability Presumption." (2017). <https://www.tilleke.com/resources/new-law-criminal-liabilities-directors-elimination-strict-liability-presumption>.
- Nations, United. "Building Capacity to Realize the Global Goals." 2017.
- . "Transforming Our World: The 2030 Agenda for Sustainable Development (a/Res/70/1)." 2015.
- News, Bangkok Post and Kydo. "Cabinet Backs Bill Allowing Same-Sex Unions." <https://www.bangkokpost.com/thailand/general/1947992/cabinet-backs-bill-allowing-same-sex-unions>.
- OECD. "G20/Oecd Principles of Corporate Governance." OECD Publishing,

<http://dx.doi.org/10.1787/9789264236882-en>.

———. "Guide for National Contact Points on Structures and Activities." 2019.

———. "Guidelines for Multinational Enterprises." edited by OECD, 2011.

———. "National Action Plans on Business and Human Rights to Enable Policy Coherence for Responsible Business Conduct." mneguidelines.oecd.org, <https://mneguidelines.oecd.org/NAP-to-enable-policy-coherence-for-RBC.pdf>.

———. "Oecd Due Diligence Guidance for Responsible Business Conduct." (2018).

———. "Oecd Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition, Oecd Publishing, Paris." OECD Publishing, Paris., <http://dx.doi.org/10.1787/9789264252479-en>.

———. "Policy Framework for Investment User's Toolkit - Chapter 7. Promoting Responsible Business Conduct." <https://www.oecd.org/investment/toolkit/policyareas/responsiblebusinessconduct/42267935.pdf>.

Office, EU Publication. "Responsible Trade in Minerals from High-Risk or Conflict Areas ", 2017.

Office, German Federal Foreign. "Monitoring of the Status of Implementation of the Human Rights Due Diligence of Enterprises Set out in the National Action Plan for Business and Human Rights 2016-2020 - Interim Report Survey Phase 2019." 2019.

Office, Thailand's National Statistical. "Summary of the Labour Force Survey in Thailand (Data Collection During 1-12 March 2020)." http://www.nso.go.th/sites/2014en/Survey/social/labour/LaborForce/2020/march_2020.pdf.

Olsthoorn, Jones Day - Kornel. "The Netherlands Adopts Business and Human Rights Legislation to Combat Child Labor." (2020). <https://www.lexology.com/library/detail.aspx?g=c65161b5-1450-405b-9848-1d5612a4954f>

Organisation, International Labour. "How to Do Business with Respect for Children' S Right to Be Free from Child Labour: Ilo-Ioe Child Labour Guidance Tool for Business." edited by International Labour Organisation: International Labour Organisation, 2015.

———. "Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (Mne Declaration) - 5th Edition (March 2017)." International Labour Organisation (ILO), 2017.

Organization, International Labour. "What Is the Ilo Mne Declaration?" https://www.ilo.org/empent/areas/mne-declaration/WCMS_570332/lang--en/index.htm.

Osman V. The United Kingdom, (1998).

- Pacific, UN Women Asia and the. "Covid-19: How to Include Marginalized and Vulnerable People in Risk Communication and Community Engagement, Un Women Asia and the Pacific ". (2020): 12.
- Parliament, European. "Joint Communication to the European Parliament and the Council Responsible Sourcing of Minerals Originating in Conflict-Affected and High-Risk Areas Towards an Integrated Eu Approach." EUR-Lex, 2014.
- . "Regulation (Eu) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas ". *Official Journal of the European Union* L 130/1 (2017).
- . "Regulation (Eu) No. 995/2010 of the European Parliament and of the Council of 20 October 2010 Laying Down the Obligations of Operators Who Place Timber and Timber Products on the Market." edited by European Parliament. *Official Journal of the European Union* 2010.
- Parliament), Directorate-General for External Policies of the Union (European. "Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries." edited by EU Parliament: Publications Office of the EU, 2019.
- Programme, UN Environment. "The Montreal Protocol." <https://www.unenvironment.org/ozonaction/who-we-are/about-montreal-protocol>.
- Programme, United Nations Development. "Sustainable Development Goals." <https://www.undp.org/content/undp/en/home/sustainable-development-goals/>.
- radar, Duty of vigilance. "The Law on the Duty of Vigilance." <https://vigilance-plan.org/the-law/>.
- "Registrar Announcement on Registration on Mediation Centre for People Sector under Thailand's Dispute Mediation Act B.E 2562, Dated 26 June B.E. 2563. ." 2020.
- Rights, Office of the High Commission for Human. "Guiding Principles on Business and Human Rights - Implementing the United Nations "Protect, Respect and Remedy" Framework." https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
- Rights, Office of the High Commissioner for Human. "Corporate Human Rights Due Diligence – Identifying and Leveraging Emerging Practice." <https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx>.
- Rights, Office of the High Commissioner of Human. "Overview of References to Human Rights Due Diligence in Existing State National Action Plans on Business and Human Rights." <https://www.ohchr.org/Documents/Issues/Business/Session18/CompilationNAPReferencesToDi%20ligence.pdf>.
- Rights, The United Nations High Commissioner for Human. "Improving Accountability

and Access to Remedy for Victims of Business-Related Human Rights Abuse through State-Based Non-Judicial Mechanisms." In *Report of the United Nations High Commissioner for Human Rights*, 2018.

Rights, United Nations High Commissioner for Human. "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: The Relevance of Human Rights Due Diligence to Determinations of Corporate Liability (a/Hrc/38/20/Add.2)." 2018.

Rights, United Nations High Commissioner for Human. "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through Non-State-Based Grievance Mechanisms (a/Hrc/44/32) ", 2020.

———. "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through Non-State-Based Grievance Mechanisms (a/Hrc/44/32)." 2020.

———. "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse: Explanatory Notes for Guidance (a/Hrc/32/19/Add.1)." 2016.

———. "Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through Non-Statebased Grievance Mechanisms: Explanatory Notes (a/Hrc/44/32/Add.1)." 2020.

Rights, United Nations Office of the High Commissioner of Human. "Summary of the Report of the Working Group on Business and Human Rights to the General Assembly, October 2018 (a/73/163)." <https://www.ohchr.org/Documents/Issues/Business/ExecutiveSummaryA73163.pdf>.

Rights, United Nations Office of the High Commission for Human. "The Corporate Responsibility to Respect Human Rights: An Interpretive Guide." (2012).

Sandra Cossart, Lucie Chatelain. "What Lessons Does France's Duty of Vigilance Law Have for Other National Initiatives?" Business and Human Rights Resource Centre <https://www.business-humanrights.org/en/blog/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives/>.

SET. "Esg Disclosure." <https://www.setsustainability.com/page/esg-disclosure>.

Sherpa. "Vigilance Plans Reference Guidance ". First Edition (2019).

Shift, Francis West for. "Smes and the Corporate Responsibility to Respect Human Rights Busting the Myth That Bigger Is Always Better." (2019). <https://www.shiftproject.org/resources/viewpoints/busting-myth-smes-corporate-responsibility-respect-human-rights/>.

Story, The Freedom. "Who We Are." <https://thefreedomstory.org/about>.

Tarver, Evan. "Value Chain Vs. Supply Chain: What's the Difference?" <https://www.investopedia.com/ask/answers/043015/what-difference-between-value-chain-and-supply-chain.asp>.

"Thailand's Act Amending the Law on the Criminal Liability of Representatives of

Juristic Persons B.E. 2560." (2017).

Thailand's Rights and Liberties Protection Department, Ministry of Justice. "First National Action Plan on Business and Human Rights (2019–2022)." Thailand's Rights and Liberties Protection Department, Ministry of Justice, 2019.

———. "Thailand Has Adopted the National Action Plan on Business and Human Rights as “the First Country in Asia”." http://www.rlpd.go.th/rlpdnew/index.php?option=com_content&view=article&id=11235.

Thailand, Stock of Exchange. "Esg Disclosure." <https://www.setsustainability.com/page/esg-disclosure>.

"Thailand's Consumer Protection Act B.E. 2522." (1979).

"Thailand's Dispute Mediation Act B.E. 2562." 2019.

"Thailand's Gender Equality Act B.E. 2558." (2015).

"Thailand's National Environmental Quality Promotion and Conservation Act (No. 2) B.E. 2561 ". 2018.

"Thailand's Personal Data Protection Act B.E. 2562." 2019.

Unit, Greenpeace European. "Greenpeace Investigation: Eu Imports of Amazon Timber Tainted by Widespread Fraud in Brazil." news release, 2018, <https://www.greenpeace.org/eu-unit/issues/nature-food/1170/greenpeace-investigation-eu-imports-of-amazon-timber-tainted-by-widespread-fraud-in-brazil/>.

United Nations General Assembly, Secretary-General "The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (a/73/163)." the Secretary-General to the United Nations General Assembly 2018.

Veasquez Rodriguez V. Honduras, (1998).

Wilks, Saskia. "High Hopes for Mandatory Human Rights Due Diligence in 2020." (2019). Published electronically 17 December 2019. <https://www.business-humanrights.org/en/blog/high-hopes-for-mandatory-human-rights-due-diligence-in-2020/>.

Zimbabwe Human Rights Ngo Forum V. Zimbabwe, (2006).



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