

Thai Companies in Southeast Asia: Access to Justice for Extraterritorial Human Rights Harms

A Legal Analysis



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LIST OF ACRONYMS USED IN THIS REPORT

| | |
|------------|--|
| AEC | ASEAN Economic Community |
| ASEAN | Association of Southeast Asian Nations |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CLMV | Cambodia, Laos, Myanmar and Vietnam |
| EIA | Environmental Impact Assessments |
| ETOs | Extraterritorial Obligations |
| ETOs-Watch | Thai Extraterritorial Obligation-Watch Working Group |
| GANHRI | Global Alliance of National Institutions |
| HRDD | Human Rights Due Diligence |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| IGWG | Inter-Governmental Working Group |
| IEAT | Industrial Estate Authority of Thailand |
| ILO | International Labour Organization |
| JV | Joint Venture |
| MNC | Multinational Corporation |
| NAP | National Action Plan on Business and Human Rights |
| NHRCT | National Human Rights Commission of Thailand |
| NHRIs | National Human Rights Institutions |
| OECD | Organisation for Economic Co-operation and Development |
| SEC | Securities and Exchange Commission |
| SET | Stock Exchange of Thailand |
| SOEs | State-owned enterprises |
| TNCs | Transnational Companies |
| UNCTAD | United Nations Conference on Trade and Development |
| UNGPs | UN Guiding Principles on Business and Human Rights |

Executive Summary

Contemporary businesses today operate on a global scale, with supply chains, product distribution, corporate operations and inter-corporate relationships weaving interconnections across national borders. Human rights abuses by business enterprises are not limited by the territorial borders of the countries in which they are domiciled or where the abuses occur and victims of such human rights abuses can be of as many nationalities and spread across several nations and legal jurisdictions as the company operations.

Thai companies are major investors in neighbouring countries – particularly in Cambodia, Laos, Myanmar and Vietnam (also known as the “CLMV” countries). Human rights abuses involving Thai companies in these countries that have been documented by human rights organizations include forced displacement from concession areas, unfair compensation to locals for their loss of land and inappropriate resettlement packages, lack of effective remedy for adverse environmental impacts, lack of meaningful participation in decision-making processes, lack of access to information and ineffective environmental impact assessment processes.

From a legal perspective, there are multiple ways in which corporate investors may choose to invest in foreign States, including by investing in or creating a subsidiary company in host countries. These subsidiaries often operate at the behest of their parent companies, which retain ultimate control over them. When an abuse occurs, legal separation of corporate entities allows for parent companies and their representatives to avoid responsibility for human rights abuses committed by them. Officials working in parent companies take advantage of the corporation’s distinct legal personality, and abandon links with its subsidiary, leaving victims with no way to enforce awards of compensation.

When victims are denied access to justice and remedy in a host country where a subsidiary company is based, courts in the home country of the parent company may be an alternative forum where claims for remedy or reparation may be brought. However, many countries, including Thailand, have no specific law to regulate liabilities of Thai corporations operating abroad. This paper explores the options to hold Thai companies accountable for human rights abuses committed in neighbouring countries.

Efforts to hold Thai corporations liable for human rights abuses overseas face at least three significant challenges.

The first challenge involves convincing domestic courts that companies have extra-territorial obligations to prevent human rights abuses – whether within or outside of Thailand - and that access to remedy and reparation should also be extended to communities who live in the vicinity of their overseas operations. The burden is usually placed upon claimants to convince the court that Thailand is the right and proper jurisdiction to address wrongdoing or crime in the context of cross-border business activities of Thai companies. They must prove control of subsidiary companies by parent companies in Thailand, and establish a causal link between the parent company, its subsidiary, the alleged illegal act and resulting damage. Making such showings can be difficult and costly for affected communities and their legal representatives.

The second challenge is that victims of human rights abuses often face considerable barriers to accessing judicial remedies. An affected victim who is a foreign citizen faces greater barriers than a Thai citizen to access justice for a variety of reasons, including language barriers, lack of understanding of the Thai legal system, lack of financial resources, lack of familiarity with local administration of justice mechanisms, short statutes of limitation and unavailability of access to legal aid or local lawyers.

¹ The information in this report is accurate as of 25 January 2021.

The third challenge involves the limitations of justice sector actors and other officials that may prevent affected individuals from accessing justice, including a lack of understanding and training for judicial authorities and lawyers about cross-border litigation, lack of willingness by justice sector actors to litigate a case; and political concerns that such cases will negatively impact Thailand's image on the international stage.

Examining these challenges with an aim to remedy existing regulatory gaps towards ending the current state of corporate impunity, this report provides recommendations for Thailand to amend existing legal and regulatory frameworks to address challenges, improve access to justice and to bring domestic laws in line with Thailand's international obligations. The main recommendations of the report are:

1. Extending the jurisdiction of Thai courts to cover claims against corporations and State enterprises that are domiciled or which principally conduct their business affairs in Thailand, regardless of whether alleged human rights abuses committed by the companies or their subsidiaries occurred in another country;
2. Expanding liability for a rights abuse caused not only by a business' own activities but also by activities conducted by its subsidiaries over which it exerts control;
3. Providing legal and procedural guarantees in domestic law to increase access to information about corporations and their activities, particularly in relation to cross-border enterprise activities;
4. Relaxing the rule governing statutes of limitations to ensure that it will not be unduly restrictive to injured persons seeking to bring claims relating to human rights abuses committed abroad by corporations – by explicitly providing that a statute of limitation shall not be effective against civil or administrative actions brought by victims seeking remedy or reparation for human rights violations;
5. Facilitating access to justice of victims and their representatives in ensuring their agency in choosing the appropriate jurisdiction and justice mechanism before which they can litigate their case or otherwise seek remedy or reparation;
6. Processing class action trials without undue delay and allowing class suit for cases filed in a Thai court by plaintiffs from another country who may not have the resources or capacity to otherwise pursue a claim individually before Thai courts;
7. Ensuring that the division between administrative and civil jurisdiction, particularly for State enterprises, should not be used as a reason to obstruct victims or their representatives in accessing justice;
8. Strengthening the role of the National Human Rights Commission of Thailand (NHRCT) to investigate, document, and expose instances of human rights abuse committed by Thai transnational corporations abroad, even in the absence of express powers;
9. Providing training for members of the legal and judicial professions in handling cases involving corporate human rights abuse, and particularly abuse arising from cross-border business activities; and
10. Providing legal aid and other funding schemes to claimants who are citizens and non-citizens in relation to cases of rights abuses arising from business activities.

1. Background

1.1 Human Rights Abuses Involving Transnational Companies

The primary responsibility to promote, respect, protect and fulfil human rights lies with the State. States must protect persons from human rights abuses by private entities, including business enterprises, within their territory or otherwise under their jurisdiction.²

Under international human rights law, human rights obligations are not confined to conduct occurring within a State's territorial borders. States have obligations for conduct with human rights impact both at home and extraterritorially.³

Businesses, especially transnational companies (TNCs), wield significant political influence and economic power around the world. Relationships among businesses, individuals and their communities and governments are complex. Business operations necessarily have consequential impacts on individuals and communities in the countries in which they invest, including causing or contributing to human rights violations and abuses.⁴

Activities of companies do not stop at their territorial borders. Transnational companies operate across borders, through complex value chains with sometimes thousands of suppliers, and other business partners in the product distribution often with tenuous relationships within and between corporate groups. There are between 70,000 and 80,000 TNCs globally.⁵ According to the International Labour Organization (ILO), one out of seven jobs worldwide is global supply chain-related, not including "informal" and "non-standard" work. According to the United Nations Conference on Trade and Development (UNCTAD), 80 percent of global trade (in terms of gross exports) is linked to the international production networks of TNCs.⁶

In host States with regulatory and legal protection gaps or in jurisdictions which do not have domestic law that meets international standards, TNCs are rarely held accountable for their actions abroad. There are a number of reasons for this including inadequate laws governing the transnational conduct of companies, limited scope of jurisdiction, unclear standards for assessing liability, short statutes of limitation, a lack of capacity of justice sector actors, and inadequate support for claimants. Victims of human rights abuses also

² e.g. Human Rights Committee, 'General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13, 2004, para.3, available at: <https://www.refworld.org/docid/478b26ae2.html>; Human Rights Council, 'Resolution 26/9 Elaboration of an International Legally Binding Instrument on Multinational enterprises and Other Business Enterprises with Respect to Human Rights', A/HRC/RES/26/9, 14 July 2014, p.2, available at: <https://www.ihrb.org/pdf/G1408252.pdf> ('Resolution 26/9'); OHCHR, 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework', 2011, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf; Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, 2011, available at: <https://www.icj.org/protecting-human-rights-beyond-borders/>

³ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (Maastricht Principles), 2011, available at: <https://www.icj.org/protecting-human-rights-beyond-borders/>

⁴ Resolution 26/9, at 2; ICJ, 'Corporate Complicity & Legal Accountability: Vol 1 Facing the Facts and Charting a Legal Path', 2008, available at: <https://www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf>

⁵ Professor John G. Ruggie, 'Comments on the "Zero Draft" Treaty on Business & Human Rights', 20 August 2018, available at: <https://www.business-humanrights.org/en/blog/comments-on-the-zero-draft-treaty-on-business-human-rights/>

⁶ UNCTAD, 'World Investment Report 2013: Global Value Chains: Investment and Trade for Development', 2013, available at: https://unctad.org/en/PublicationsLibrary/wir2013_en.pdf

face considerable legal, financial and procedural barriers in accessing judicial remedies, when trying to bring a case in a foreign State.

This report analyses Thailand's legal framework governing corporate legal accountability for outbound investments. The study begins in section 2 with a survey of human rights treaties to which Thailand is a party, before engaging in an analysis of Thai law and the remedies available and accessible to affected persons in section 3. The following section 4 discusses the principal obstacles to access to justice in Thailand in relation to corporate abuse of human rights, particularly in the context of business activities of a transnational character, and provides law and policy recommendations to help overcome these obstacles.

The study is based upon the ICJ's monitoring and analysis of cases of human rights abuses in the context of cross-border investment that have been brought to the courts in Thailand, as well as a review of related and applicable Thai law and policy. An initial draft of the ICJ's legal and policy analysis was prepared and presented for discussion at a workshop held in Chiang Mai province on 21 July 2019.⁷ The discussion at the workshop and subsequent interviews further contributed to the analysis and recommendations.

A note on terminology: Although the title of the report uses the phrase "company", this report considers all business entities – irrespective of structure, composition, size, whether they are State or privately owned, and whether they are formally incorporated or not. This report also uses the terms "corporate", "corporation", "business enterprise" and "business" as appropriate, and uses the term "transnational" rather than "multinational". In addition, legal liability of companies should be understood to refer to the legal liability of a corporate entity and/or an individual representative of this entity, bearing in mind that whether one or both may be held liable will depend on the jurisdiction and body of law in question.

1.2 Thailand's Cross Border Investment and Transnational Enterprises

Following the establishment of the Association of Southeast Asian Nations' (ASEAN) Economic Community (AEC) in 2015⁸ and strong economic growth in the ASEAN region, Thai investors have expanded their transboundary investment through State-sponsored and private sector projects.

According to a report by the Bank of Thailand, between January 2018 and the end of April 2019, Thai companies invested 821.19 billion Baht (approx. USD 25.13 billion) overseas. Almost half of that amount was directed to ASEAN countries. The top three destinations for Thai investment in Southeast Asia are Singapore, Vietnam and Malaysia.⁹ The Cambodia-Laos-Myanmar-Vietnam (CLMV) group of countries are expected to become the top countries for Thai investors due to a recent Thai government policy to encourage local investors to expand their investment within CLMV countries, as well as policies of CLMV

⁷ ICJ, 'Thailand's Legal Frameworks on Corporate Accountability for Outbound Investments', 21 July 2019, available at: <https://www.icj.org/thailands-legal-frameworks-on-corporate-accountability-for-outbound-investments/>

⁸ To realize the AEC, the AEC blueprint aims to create a free flow of goods, services, investment, capital and skilled labour within the 10-nation region.

⁹ The Nation, 'Thai Companies Splash Out in Bt821bn Overseas Push', 15 July 2019, available at: <https://www.nationthailand.com/premium/30372894>. See also: Bank of Thailand, 'Statistic of Thai Direct Investment Abroad', available at: https://www.bot.or.th/Thai/FinancialMarkets/ThaiDirectInvestment/TDI_3/Pages/TDI_Statistic1.aspx.

governments promoting their countries to foreign investors by offering additional economic incentives.¹⁰

According to the Stock Exchange of Thailand (SET), the number of Thai listed firms undertaking outward foreign direct investment increased to 232 firms from 59 firms between the end of 2006 and the end of 2019. Of these 232 firms, 191 – some 82% – are primarily investing in the ASEAN region. CLMV countries attracted 147 firms (equivalent to 63% of the total number of Thai listed firms undertaking outward foreign direct investment), with 69 Thai listed firms undertaking investment in Myanmar and 67 Thai listed firms undertaking investment in Vietnam.¹¹

Most of Thailand's direct investment in ASEAN countries are in the electricity and energy sectors; oil and gas exploration; steam and domestic air cooling; financial sector, and various forms of industrial production, including sugar and textiles; and mining and extract – especially concrete.¹² Thailand's State enterprises predominantly invest in the energy sector, while private companies invest in the energy sector, mining, infrastructure and industrial estates.¹³

There are multiple ways in which Thai investors invest in foreign States. Affiliates of TNCs are often controlled through complex vertical chains of ownerships involving a multitude of entities in more than two jurisdictions.¹⁴ The simplest and most common structure is a direct investment in a subsidiary directly and fully owned by its parent company, whereby the parent owns 100 per cent of their equity. For example, Mitr Phol Company Limited, a Thai limited company, reportedly owns all of the shares in a sugarcane company in Cambodia, Angkor Sugar Co. Ltd.¹⁵ A parent company may also own a majority stake and fully control an affiliate company, while the remaining equity is held by outside investors.

Another common arrangement is for a parent company to enter into business in the form of a shared ownership or joint venture (JV).¹⁶ For example, Khon Kaen Sugar Industry Public Company Limited (KSL), a public company registered in Thailand, entered into a

¹⁰ The Nation, 'Thai Investors Buoyed by CLMV Investment Climate', 25 March 2018, available at: <http://www.nationthailand.com/Economy/30341707>.

¹¹ Stock Exchange of Thailand, '2019 Outward Foreign Direct Investment of Thai Listed Firms in SET', May 2020, available at: https://www.set.or.th/dat/vdoArticle/attachFile/AttachFile_1589941580256.pdf?fbclid=IwAR3aQ0suQEYdfXNnQjbTewslFcuVWIO3zJ8O6Dc5ZHgn_VDtS-kwFhPkYLE

¹² The Mekong Butterfly, 'Executive Summary: Thailand's Direct Investment in Neighboring Countries: Adverse Impacts to Environment and Communities, and Human Rights Violation', 11 March 2018, available at: <https://themekongbutterfly.com/2018/03/11/executive-summary-thailand-direct-investment-in-the-neighboring-countries-adverse-impacts-to-environment-and-communities-and-human-rights-violation/>

¹³ National Human Rights Commission of Thailand (NHRCT), 'Thailand Direct Investment in CLMV Countries', 8 September 2018, available at: http://www.nhrc.or.th/getattachment/458876b1-391c-498b-830b-127ac527ea3b/DAY2-Period2-8-SEP-2561-Session-2_TDI_ChaingKhong_.aspx

¹⁴ UNCTAD, 'World Investment Report 2016: Investor Nationality: Policy Challenges', 2016, available at: https://unctad.org/en/PublicationsLibrary/wir2016_en.pdf

¹⁵ NHRCT, 'Investigation Report No. 1003/2558: Community Rights: Mitr Phol Sugar Company Limited and its Negative Impacts on People living in Samrong District and Chongkal District, Oddar Meanchey Province, Northeastern Cambodia', 12 October 2015, p.13 and 24, available at: <https://drive.google.com/file/d/0Bx60PIXMazQgMUNNWTNhbDFBaDA/view> (in Thai) ('NHRCT's Investigation Report No. 1003/2558'); and Complaint Submitted to the Bangkok South Civil Court, 'Mrs. Hoy Mai and Mr. Smin Tet v. Mitr Phol Co. Ltd', Black Case No. Por. 718/2561, 28 March 2018, p.6.

¹⁶ UNCTAD, 'World Investment Report 2016: Investor Nationality: Policy Challenges', 2016, available at: https://unctad.org/en/PublicationsLibrary/wir2016_en.pdf

joint venture with a Taiwanese company, in which KSL owned 80 percent of the shares in Koh Kong Sugar Industry Co. Ltd. and Koh Kong Plantation Co. Ltd., sugarcane companies in Cambodia.¹⁷

A foreign investor does not always make a direct investment in a host State, but rather channels it through another intermediary or a chain of intermediaries, which hold links to local companies.¹⁸ For example, Myanmar Pongpipat Company Limited, a Thai-owned company registered in Myanmar, entered into a joint venture with No. 2 Mining Enterprise, a State-owned enterprise affiliated with Myanmar's Ministry of Mines. The joint venture was granted concessions by the Government of Myanmar to operate Heinda mine.¹⁹

1.3 Allegations of Human Rights Abuses Committed by Thai Transnational Enterprises

To date, to the ICJ's knowledge, no Thai corporations or their representatives have been held accountable by Thai courts for human rights abuses alleged to have been committed by Thai corporations or their subsidiaries outside of Thailand.

A number of human rights abuses involving Thai companies abroad have been documented by civil society, the National Human Rights Commission of Thailand (NHRCT), as well as through legal action. These include allegations relating to forced evictions, poorly planned resettlement and relocation, environmental destruction, unsustainable exploitation of natural resources, and threats to indigenous peoples' livelihood, culture and traditions.

The NHRCT²⁰ has received complaints and conducted investigations into at least nine cases relating to Thai outbound investments in neighbouring countries. Of a total of nine cases, four projects are located in Myanmar, three projects in Lao PDR, and two projects in Cambodia.²¹ Thai companies are either the main investor or have committed to buying the

¹⁷ Koh Kong Sugar Industry Co. Ltd. and Koh Kong Plantation Co. Ltd., 'About Us', available at: <https://www.kohkongsugar.com/en/about-us>. Other examples include: China's Datang Overseas Investment Company in Lao PDR, in a joint venture with Thailand's Electricity Generating Public Company Limited (EGCO), holding a 30% stake in the project. EGCO is a subsidiary of the Electricity Generating Authority of Thailand (EGAT). EGAT, a Thai State enterprise, established EGCO in 1992. As of March 2020, EGAT holds 25.41% of EGCO's shares. Hongsa Power Company Limited that operates Hongsa Power Plant in Lao PDR is also a joint venture of mostly Thai companies, including Banpu Power Public Company Limited (a listed company in Thailand) with a 40% share, RH International (Singapore) Corporation Pte. Ltd. (a subsidiary of Thailand's RATCH Group Public Company Limited), and Lao Holding State Enterprise (LHSE). EGAT is also RATCH's major shareholder with 45% equity stake.

¹⁸ Mcllwraith, M. and Savage, J., 'International Arbitration and Mediation: A Practical Guide', 2010, p. 386.

¹⁹ NHRCT, 'The letter of complaint to the National Human Rights Commission of Thailand No. 285/2558, Re: Request for the Investigation on the Human Rights Violations due to the Thai Company Operations at the Heinda Mine in Myanmar (Complaint No. 285/2558)', 22 May 2015. ('NHRCT's Complaint No. 285/2558')

²⁰ According to the NHRCT, between 2001 and 2017, a total of 10,824 cases had been reported to it, of which 2,119 concerned business activities. The Commission had found that 552 of the complaints concerning business activities had merit and 151 cases demonstrated actual business-related human rights impacts. The three most frequent types of impact recorded related to (i) the adverse effects of environmental pollution on human health; (ii) forced evictions of communities with no or inadequate compensation; and (iii) a lack of or inadequate public consultation with communities affected by large-scale development projects. See: OHCHR, 'Statement at the End of Visit to Thailand by the United Nations Working Group on Business and Human Rights', 4 April 2018, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22915&LangID=E>

²¹ See also: Extra-Territorial Obligations: ETO Watch, 'Thailand's Direct Investment in Neighbouring Countries: Impacts to the Environment and Communities, and Violations of Human

majority of products. According to the NHRCT's investigation results (described in greater detail in [Annex 1](#)), the Commission found several instances of human rights abuses and issued recommendations to the government and companies to abide by and follow the UN Guiding Principles on Business and Human Rights.

These recommendations resulted in four Cabinet Resolutions issued on 5 January 2016,²² 16 May 2016²³ and 2 May 2017.²⁴ The Resolutions made reference to the findings of the NHRCT and Ministries' responses to such findings, and set up a procedure to establish a body to oversee Thai investors in foreign countries and their compliance with human rights. That body was not established until after the National Action Plan on Business and Human Rights (NAP) was adopted.

On 29 October 2019, the Thai Cabinet adopted the First National Action Plan on Business and Human Rights (2019-2022), which sets out plans to be followed by public and private stakeholders in order to ensure that businesses respect human rights.²⁵ As will be seen below in [Section 3.2](#), 'cross border investment and multi-national enterprises' was identified as one of four key priority issues in Thailand's NAP.

The NAP Implementation Monitoring Sub-Committee was later established to ensure the effective implementation of the NAP. The Sub-Committee also has the power to provide opinions and recommendations to address allegations of human rights abuses caused or contributed to by businesses in Thailand and Thai TNCs abroad.²⁶ The ICJ has obtained information from a Justice Officer of the Ministry of Justice indicating that since it was set up, the Sub-Committee has convened meetings twice on 25 August 2020 and 25 November 2020.²⁷ No further update has been reported to the public and it has not been possible to make an assessment as to its effectiveness.

Rights', June 2018, at 158-163, available at: <http://www.nhrc.or.th/getattachment/eeb6c10c-8870-4593-98c6-fd670a63ad1e/.aspx>

²² Cabinet, 'Resolution: Summary of Findings, Recommendations and Policy on Community Rights in Connection with the Constructions of Transmission Lines in Thailand's Nan province from Hongsa Power Plant in Lao PDR to', 5 January 2016, available at: http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99317530

²³ Cabinet, 'Resolution regarding Summary of Findings, Recommendations and Policy On Fundamental Rights of Local Community: Dawei Special Economic Zone and Deep-sea Port Project in Myanmar By ITD', 16 May 2016, available at: http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99319369&key_word=&owner_dep=&meet_date_dd=16&meet_date_mm=5&meet_date_yyyy=2559&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2=3; Cabinet, 'Resolution: Summary of Findings, Recommendations and Policy On Fundamental Rights of Local Community in Connection with the Constructions of Transmission Lines from Hongsa Power Plant in Lao PDR to Thailand's Nan province', 16 May 2016, available at: http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99319367&key_word=%CA%D2%C2%CA%E8%A7%E4%BF%BF%E9%D2%E1%C3%A7%CA%D9%A7&owner_dep=&meet_date_dd=&meet_date_mm=&meet_date_yyyy=&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2=

²⁴ Cabinet, 'Resolution regarding Summary of Findings, Recommendations and Policy on Fundamental Rights of Local Community in Connection with the Operation of Mitr Phol Co., Ltd that Affected the Populations in Samrong and Chongkal District, Oddar Meanchey Province, in Northeastern of Cambodia', 2 May 2017, available at: https://cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99324013

²⁵ First National Action Plan on Business and Human Rights (2019-2022) ('NAP'), available at: <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/nap-thailand-en.pdf>

²⁶ RYT9, 'Summary of the Report regarding the Recommendations, Measures or Guidance Proposed to Promote and Protect Human Rights', 29 July 2020, available at: <https://www.ryt9.com/s/cabt/3145558>

²⁷ Ministry of Justice's Rights and Liberties Protection Department, 'The Department's Meeting with the NAP Implementation Monitoring Sub-Committee No. 1/2563 (2020)', 1 September 2020,

Some of the cases investigated by the NHRCT have also been brought before Thai courts. These included cases in which:

- (i) A group of 37 villagers filed a lawsuit as members of the Network of Thai People in Eight Provinces on the Mekong Basin in Thailand's Administrative Court in August 2012 against several Thai agencies, including the Electricity Generating Authority of Thailand (EGAT) – a State enterprise, the National Energy Policy Council, Ministry of Energy, Ministry of Natural Resources and Environment, and the Cabinet, regarding the construction of the Xayaburi Dam in Lao PDR. The villagers argued that the construction would have negative impacts on the ecological system of the Mekong river and transboundary environmental destruction to communities in Thailand (hereinafter referred to as "Xayaburi Dam Lawsuit");
- (ii) Chiang Khong Conservation Group and three individuals filed a lawsuit in Thailand's Administrative Court in June 2017 against the Director-General of the Department of Water Resources (DWR), the DWR, and the Thai National Mekong Committee Secretariat regarding the construction of Pak Beng Dam in Lao PDR and its cross-border impacts on communities in Thailand (hereinafter referred to as "Pak Beng Dam Lawsuit");
- (iii) Hoy Mai and Smin Tet, on behalf of at least 23 out of 700 Cambodian families who were allegedly forcibly evicted from their homes, filed a class action lawsuit in a Thai civil court in March 2018 against Mitr Phol Co. Ltd, accusing it of rights abuses based on Thai tort laws, committed by its alleged subsidiary in Cambodia to make way for plantations.²⁸ (hereinafter referred to as "Sugar Plantation Lawsuit"); and
- (iv) Communities in Nan province filed a lawsuit at Chiangmai Administrative Court in June 2014 against EGAT and Thailand's Energy Regulatory Commission. They claimed that electricity transmission lines, constructed from the Hongsa Power Plant in Lao PDR to Thailand, were built through the Public Domain of State for the Common Use of the People and Community Forest area.

Three of these cases remain under the consideration of Thai courts. In case (iv), Chiangmai Administrative Court ruled that the defendants had violated a Ministerial Regulation by failing to comply with the permission procedure for utilizing public lands, and ordered EGAT to demolish the transmission lines and restore the land to its original condition.²⁹ However, this case differs from cases (i) – (iii) above in that, while it is connected with the power plant in Lao PDR that was invested by a joint venture of mostly Thai companies, the wrongdoing occurred in Thailand and affected the livelihood of communities within the country. In the other cases, the alleged offences were committed outside the territory of Thailand by Thai TNCs and affected communities abroad or caused cross-border impacts on communities in Thailand.

Human rights organizations have also documented rights abuses involving Thai companies abroad. According to a 2018 report by the Thai Extraterritorial Obligation-Watch Working Group (ETO-Watch), a consortium of Thai NGOs, at least 12 mega projects in CLMV

available at: <https://gnews.apps.go.th/news?news=68148>; ICJ Interview, Justice Officer of the Ministry of Justice, Bangkok, November 2020.

²⁸ Complaint Submitted to the Bangkok South Civil Court, 'Mrs. Hoy Mai and Mr. Smin Tet v. Mitr Phol Co. Ltd', Black Case No. Por. 718/2561, Judgment, 28 March 2018.

²⁹ Isranews Agency, 'The Court Ordered EGAT to END the Construction of Electricity Transmission Line on Public Lands in Nan Province', 2 October 2015, available at: https://www.isranews.org/community/comm-news/comm-environment/41749-nan_41749.html

countries run by Thai TNCs reportedly caused adverse human rights impacts to local residents. A pattern of human rights abuses was identified, including forced displacement from concession areas; unfair amounts of compensation to locals for their loss of land and inappropriate resettlement packages; an absence of effective remedy for adverse environmental impacts; a lack of meaningful participation in decision-making processes by affected communities; a lack of access to information, insufficient participation in Environmental Impact Assessments (EIA); insufficient disclosure of EIA studies, inadequate access to EIA studies which were not in the local language, and an absence of monitoring mechanisms to identify instances of non-compliance with laws governing the EIA.³⁰

Regional non-governmental organization Asian Forum for Human Rights and Development (FORUM-ASIA), in its 2013 and 2018 reports, documented four case studies which reveal a range of alleged human rights abuses by businesses operating in Southeast Asia. These include serious violations of labour rights, the deprivation of water and access to education, irreversible damage to the environment, unlawful killings, and other impacts on the local communities' livelihood.³¹

On several occasions, UN Human Rights Council Special Procedures have sent communications to State agencies and other actors in the ASEAN region noting their concerns about alleged negative human rights impacts caused by businesses against local communities. The communications referred to human rights abuses caused by activities of TNCs including in Cambodia³² and Lao PDR.³³

³⁰ Extra-Territorial Obligations: ETO Watch, 'Thailand's Direct Investment in Neighbouring Countries: Impacts to the Environment and Communities, and Violations of Human Rights', June 2018, at 158-163, available at: <http://www.nhrc.or.th/getattachment/eeb6c10c-8870-4593-98c6-fd670a63ad1e/.aspx>

³¹ Forum-Asia, 'Corporate Accountability in ASEAN: A Human Rights-Based Approach', 2013, available at: <https://www.forum-asia.org/uploads/publications/2013/September/Corporate-Accountability-ASEAN-FINAL.pdf>. The report expressed concerns about a lack of accountability of businesses and provided recommendations to governments, business, ASEAN, and National Human Rights Institutions, including recommendations regarding the promotion of access to justice and redress of the victims of human rights abuses by business. See also: Forum-Asia, 'Business and Human Rights: Learning from Asia', 3 March 2018, available at: <https://www.forum-asia.org/uploads/wp/2018/03/FORUM-ASIA-Working-Paper-Series-No.-3-Online.pdf>

³² For example, Joint Communication from Special Procedures, KHM 6/2018, 27 September 2018, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24016>; and Joint Communication from Special Procedures, CHN 18/2018, 27 September 2018, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24017>

The Communications were submitted to, among others, the Governments of Cambodia and China concerning the alleged deprivation and clearance of agricultural and forest lands from at least 946 families in 25 villages of Preah Vihear Province in Cambodia and alleged impact on the source of their drinking water due to concession of their lands to the five Cambodian subsidiaries of a China-based sugarcane enterprise, without consultation with the affected community's members, including indigenous peoples. Cambodian Government did not respond to the Communication. The Chinese Government, in its response dated 10 December 2018, rejected all allegations, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=34450>

³³ For example, Joint Communication from Special Procedures, LAO 1/2016, 16 February 2016, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=20145>; and Joint Communication from Special Procedures, MYS 1/2016, 29 February 2016, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=20612>. The Communications were submitted to, among others, the Governments of Lao PDR and Malaysia concerning alleged human rights abuses associated with the Don Sahong Dam development project of the lower Mekong River in the territory of Lao PDR. The dam construction, operated by a Malaysian developer, allegedly adversely affected approximately 29.7 million people residing both

One notable communication pertained to the human rights impacts caused by the collapse of Saddle Dam D of the Xe-Pian Xe-Namnoy Hydropower project in Attapeu province in Lao PDR. Several mandates of the UN Special Procedures – including the thematic mandates on business, environment, housing, indigenous peoples, internally displaced persons, poverty, and water and sanitation - addressed a letter to the governments of Lao PDR, South Korea and Thailand and public-private companies working on the project.³⁴ The Special Procedures expressed concern and sought clarifications about the human rights situation of those who had been severely impacted by floods instigated by the project and on measures of accountability of involved companies and access to remedy, both judicial and/or non-judicial, for the affected persons. In reply, the Government of Lao PDR asserted that it upheld the principles set out in their relevant laws and regulations and that it was doing its utmost to provide the affected people with every possible assistance.³⁵ For its part, the Government of the Republic of Korea, while noting that it was not a direct party to the project, affirmed that it would continue to assist the Government of Lao PDR in ensuring a fair and objective investigation into the collapse. It also set out the country's internal policies to prevent human rights abuse committed by Korean business enterprises, including through the National Action Plan for the Promotion and Protection of Human Rights and its Standard Guidelines on Business and Human Rights.³⁶ The Government of Thailand apparently has not replied to the Communication.

upstream and downstream from the Mekong dam in Lao PDR, Cambodia, Thailand and Vietnam. It was alleged that the project was proceeding without adequate environmental and human rights impact assessment and in the absence of meaningful consultations. The Government of the Lao PDR, in its response dated 10 May 2016, rejected all allegations, saying that they were "groundless", available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=32832>. The Malaysian Government did not respond to the Communication.

³⁴ On 23 July 2018, the Dam collapsed, affecting 19 villages in Lao PDR, including loss of productive land and property, and causing displacement. The Xe-Pian Xe-Namnoy Hydropower Dam is a Public-Partnership project funded by one Korean bank and four Thai banks. The Company that oversees the construction of the dam is a Lao-registered joint venture comprising South Korea's companies, a listed company in Thailand, in which EGAT is a major shareholder, and a State-owned company of Lao PDR. See: Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises; Special Rapporteur on the Issue of Human Rights Obligations Relating to The Enjoyment of a Safe, Clean, Healthy and Sustainable Environment; Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context; Special Rapporteur on the Rights of Indigenous Peoples; Special Rapporteur on the Human Rights of Internally Displaced Persons; Special Rapporteur on Extreme Poverty and Human Rights; Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation; 'Communications No. AL THA 2/2020, AL LAO 1/2020, and AL KOR 3/2020' 17 April 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25093>; <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25088>; and <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25094>

³⁵ Permanent Mission of the Lao PDR to the United Nations Office and other International Organizations, 'No.102/Lao.PM.GE.20', 16 July 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35426>

³⁶ Permanent Mission of the Republic of Korea to the United Nations and other International Organizations, 'KGV/47/2020', 6 July 2020, available at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35415>

Transboundary EIA

An environmental impact assessment (EIA) is a prior assessment of the possible environmental impacts of a proposed project, generally required by national laws. The assessment should examine the environmental impacts of a project on the enjoyment of all rights, including the rights to life, health, food, water, housing and culture.³⁷

When it comes to cross-border investment, however, a project implemented in one country may also incur significant negative impacts on the environment of other countries. These countries often have different legal systems and EIA procedures. At times, environmental standards in one country are of a lower standard than in another country. Such situations create challenges for the usual EIA procedures and indicate the need for an internationally or regionally accepted standard that provides specific rules for conducting an EIA of activities with potential transboundary impacts.

In 1997, UNECE's Convention on Environmental Impact Assessment in a Transboundary Context (1991), also known as the Espoo Convention, came into force. The Convention sets out specific rules for conducting transboundary EIA. The Convention lays down the obligations of State members to notify and consult each other on all major projects under consideration that are likely to have significant adverse environmental impacts across boundaries.³⁸ Neither Thailand nor any Asian State is a party to the Espoo Convention, which counts primarily European countries as States parties.

In 2018, the Mekong River Commission for Sustainable Development³⁹, of which Thailand is a member State, introduced the Guidelines for Transboundary Environmental Impact Assessment in the Lower Mekong Basin (Working Document) to the public, with the objective "to support national EIA systems in application of environmental impact assessment on projects with potential trans-boundary impacts" by increasing transboundary communication and coordination,⁴⁰ while "respecting the differences among EIA legislations in member countries and specifics of their national EIA systems".⁴¹ These Guidelines, however, do not impose binding legal obligations on States.

Thai national laws also do not require the transboundary EIA to be conducted. Thailand's NAP, however, recognized the need for Thailand to "consider measures to establish the impact analysis report of the cross-border environment (Transboundary EIA) and monitor measures for cross-border impacts on health, agriculture and the environment".⁴²

³⁷ OHCHR, 'Framework Principles on Human Rights and the Environment', 2018, available at: <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>

³⁸ UNECE, 'Espoo (EIA) Convention', available at: <https://www.unece.org/environmental-policy/conventions/environmental-assessment/about-us/espoo-convention/enveiaeia/more.html>

³⁹ The Commission is an inter-governmental body working to facilitate cooperation on the sustainable development and management of the Mekong River Basin. Its members are Cambodia, Lao PDR, Thailand, and Viet Nam.

⁴⁰ UNESCAP, 'Report of the Mekong River Commission', ESCAP/74/INF/2, 13 March 2018, available at: https://www.unescap.org/commission/74/document/E74_INF2E.pdf

⁴¹ MRC, 'Trans-boundary Environmental Impact Assessment in the Mekong River Basin', November 2016, available at: https://www.unece.org/fileadmin/DAM/env/eia/documents/WG2.6_Nov2016/9_MRC_TbEIA_in_the_MRB_-Tien_Truong_Hong.pdf

⁴² NAP, p.124.

2. Overview of the International Human Rights Framework applicable to Thailand

2.1 Treaties

Thailand is a party to seven primary human rights treaties and five Optional Protocols, including the (i) International Covenant on Civil and Political Rights (ICCPR); (ii) International Covenant on Economic, Social and Cultural Rights (ICESCR); (iii) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol (on a communication mechanism);⁴³ (iv) Convention on the Rights of the Child (CRC) and its three Optional Protocols (on the involvement of children in armed conflict; on the sale of children child prostitution and child pornography; and on a communication procedure); (v) International Convention on the Elimination of All Forms of Racial Discrimination (CERD); (vi) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and (vii) Convention on the Rights of Persons with Disabilities (CRPD) and its Optional Protocol (on a communication procedure).⁴⁴

Thailand is also bound by international customary law, which includes many rights also guaranteed in these treaties.

It is a general obligation under international human rights law that States must respect, protect and fulfill human rights of persons under their jurisdiction. The obligation to respect requires States to refrain from interfering with or impairing the enjoyment of human rights. The obligation to protect requires States to protect people from the acts of non-State actors, such as businesses, from such interferences, including from human rights abuses. The obligation to fulfill requires States to take positive measures to facilitate the realization of human rights.

These obligations extend not only within a State's territorial jurisdiction, but also, to some measures, extraterritorially. The extraterritorial obligations come into play and jurisdiction may attach where a State's conduct impacts on the enjoyment of human rights by others outside the State's territory. In addition, States have an obligation to engage in cooperation for the purposes of realizing and promoting rights across borders.

2.1.1 The Maastricht Principles

Extraterritorial obligations have been encapsulated in the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights⁴⁵ and its legal commentary.⁴⁶ These Principles are a synthesis of existing sources and authorities of international human rights law and, while focused explicitly on economic, social and cultural rights, are also broadly applicable to civil and political rights.

⁴³ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

⁴⁴ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict; and Optional Protocol to the Convention on a Communications Procedure.

⁴⁵ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, available at: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23

⁴⁶ Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, and Ian Seiderman, 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights', *Human Rights Quarterly* 34, 2012, pp. 1084–1169, available at: <https://www.icj.org/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf>

In respect of business enterprises and the State's duty to protect, principle 24 affirms that "States must take necessary measures to ensure that which they are in a position to regulate [...] do not nullify or impair the enjoyment of economic, social and cultural rights. These include administrative, legislative, investigative, adjudicatory and other measures."

Principle 25 makes clear that States need to adopt these kinds of measures where:

- "a) the harm or threat of harm originates or occurs on its territory;
- b) where the non-State actor has the nationality of the State concerned;
- c) as regards business enterprises, where the corporation, or its parent or controlling company, has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities, in the State concerned;
- d) where there is a reasonable link between the State concerned and the conduct it seeks to regulate, including where relevant aspects of a non-State actor's activities are carried out in that State's territory;
- e) where any conduct impairing economic, social and cultural rights constitutes a violation of a peremptory norm of international law. Where such a violation also constitutes a crime under international law, States must exercise universal jurisdiction over those bearing responsibility or lawfully transfer them to an appropriate jurisdiction."

States also have extraterritorial obligations in relation to investment and trade. As affirmed in Principle 17 of the Maastricht Principles: "States must elaborate, interpret and apply relevant international agreements and standards in a manner consistent with their human rights obligations. Such obligations include those pertaining to international trade, investment, finance, taxation, environmental protection, development cooperation, and security."⁴⁷

2.1.2 UN Treaties

Extraterritorial obligations are expressly or implicitly provided in UN human rights treaties in relation to businesses, and are well integrated into the jurisprudence of the UN treaty bodies.⁴⁸

Article 2 paragraph 1 of the ICESCR provides an explicit basis for extraterritorial obligations. It reads "each State Party [...] undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

The UN Committee on Economic, Social, and Cultural Rights (CESCR) has also raised the issue of extraterritorial obligations in a number of its General Comments relating to specific

⁴⁷ See also, Ibid, p. 1122.

⁴⁸ See UN Human Rights Committee, 'General Comment 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant', UN Doc CCPR/C/21/Rev.1/Add.13, 2004, paras. 8 and 10; UN Committee on Economic, Social and Cultural Rights, 'General Comment No.24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities', UN Doc E/C.12/GC/24, 2017; UN Committee on the Rights of the Child, 'General Comment No. 16 on State Obligations regarding the Impact of the Business Sector on Children's Rights', CRC/C/GC/16, 2013.

economic, social and cultural (ESC) rights, including the right to water;⁴⁹ the right to social security;⁵⁰ the right to sexual and reproductive health;⁵¹ the right to just and favourable conditions of work;⁵² and of all ESC rights in the context of business activities.⁵³ These General Comments are informed by its commentary and observations from its review of the Periodic Reports of States Parties.

In respect of business activities, the CESCR, reaffirming that States' obligations "(do) not stop at their territorial borders", stressed that State parties are required to "take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction" whether they are "incorporated under their laws, or had their statutory seat, central administration or principal place of business on the national territory".⁵⁴ The Committee highlighted that a State party would be in breach of its obligations under the ICESCR "where the violation reveals a failure by the State to take reasonable measures that could have prevented the occurrence of [a corporate abuse]".⁵⁵ The CESCR affirmed that States' extraterritorial obligations extend to activities of business entities that occur outside their territories over which they can exercise control, "especially

⁴⁹ Regarding the right to water, in its General Comment No. 15, the CESCR stated that steps should be taken by States parties to "prevent their own citizens and companies from violating the right to water of individuals and communities in other countries," including by taking steps to influence non-State actors within their jurisdiction to respect the right, through legal or political means. "[D]epending on the availability of resources", States must "facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required." See: CESCR, 'General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)', 20 January 2003, UN Doc E/C.12/2002/11, paras 33-34, available at: <https://www.refworld.org/pdfid/4538838d11.pdf>

⁵⁰ Regarding the right to social security, in its General Comment No. 19, the ICESCR affirmed that "States parties should extraterritorially protect the right to social security by preventing their own citizens and national entities from violating this right in other countries", including by taking steps to influence non-State actors within their jurisdiction to respect the right, through legal or political means. See: CESCR, 'General Comment No. 19: The Right to Social Security (art. 9)', 4 February 2008, UN Doc E/C.12/GC/19, para 54, available at: <https://www.refworld.org/docid/47b17b5b39c.html>

⁵¹ Regarding the right to sexual and reproductive health, in its General Comment No. 22, the CESCR highlighted that States also have "an extraterritorial obligation to ensure that transnational corporations, such as pharmaceutical companies operating globally, do not violate the right to sexual and reproductive health of people in other countries, for example through non-consensual testing of contraceptives or medical experiments". See: CESCR, 'General Comment No. 22: the right to sexual and reproductive health (article 12)', 2 May 2016, UN Doc E/C.12/GC/22, para 60, available at: <https://bit.ly/33lh0ci>

⁵² Regarding the right to just and favourable conditions of work, in its General Comment No. 23, the CESCR highlighted that State parties should "take measures, including legislative measures, to clarify that their nationals, as well as enterprises domiciled in their territory and/or jurisdiction, are required to respect the right to just and favourable conditions of work throughout their operations extraterritorially". It also calls on State parties to "introduce appropriate measures to ensure that non-State actors domiciled in the State party are accountable for violations of the right to just and favourable conditions of work extraterritorially and that victims have access to remedy". See: CESCR, 'General comment No. 23 on the right to just and favourable conditions of work (article 7)', 7 April 2016, UN Doc E/C.12/GC/23, paras 69-70, available at: <https://www.refworld.org/docid/5550a0b14.html>

⁵³ CESCR, 'General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities', 10 August 2017, E/C.12/GC/24, available at: <https://www.refworld.org/docid/5beaecba4.html>

⁵⁴ Ibid, para 26.

⁵⁵ Ibid, para 32.

in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.”⁵⁶

The UN Human Rights Committee,⁵⁷ the Committee on the Elimination of Discrimination against Women,⁵⁸ the Committee on the Rights of the Child⁵⁹ and the Committee on the Elimination of Racial Discrimination⁶⁰ have all called attention to State obligations under their respective treaties vis-à-vis the activities of companies domiciled or registered under their national laws.

Like the CESCR, the Committee on the Rights of the Child has issued a General Comment particularly on State obligations regarding the impact of the business sector on rights protected under the Convention on the Rights of the Child. The Committee highlighted that the Convention “does not limit a State’s jurisdiction to territory”.⁶¹ The Committee stressed the obligation to “protect the rights of children who may be beyond their territorial borders.”⁶² It reaffirmed States’ obligations to “respect, protect and fulfil children’s rights in the context of businesses’ extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned.”⁶³ The Committee said that States must “enable access to effective judicial and non-judicial mechanisms to

⁵⁶ Ibid, para 30.

⁵⁷ The UN Human Rights Committee has also affirmed in General Comment No. 31 that the obligations of the State under the ICCPR will require them to protect from abuses of rights committed by private persons or entities. See UN Human Rights Committee, ‘General Comment No. 31: The nature of the general legal obligation imposed on States Parties to the Covenant’, 26 May 2004, CCPR/C/21/Rev.1/Add.13, pp. 3-4, available at: <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPrICAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2Bfud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq%2FhW%2FTpKi2tPhZsbEJw%2FGeZRASjdFuuJQRnbJEaUhby31WiQPI2mLFDe6ZSwMMvmQGVHA%3D%3D>

⁵⁸ The Committee on the Elimination of Discrimination against Women has called upon States to regulate the extraterritorial actions of third parties registered in their territory. For example, in 2014, in its Concluding Observations to India, the Committee reaffirmed that a State party “must ensure that the acts of persons under its effective control, including those of national corporations operating extraterritorially, do not result in violations of the Convention and that its extraterritorial obligations extend to actions affecting human rights, regardless of whether the affected persons are located on its territory.” The Committee recommended that India immediately review the impact on women of the housing project in Sri Lanka and the Lakshmanpur dam project in Nepal. See: Committee on the Elimination of Discrimination against Women, ‘Concluding observations on the combined fourth and fifth periodic reports of India’, 24 July 2014, UN Doc CEDAW/C/IND/CO/4-5, paras. 14-15, available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/IND/CO/4-5&Lang=En

⁵⁹ Committee on the Rights of the Child, ‘General comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights’, 17 April 2013, UN Doc CRC/C/GC/16, available at: <https://www.refworld.org/docid/51ef9cd24.html>

⁶⁰ The Committee on the Elimination of Racial Discrimination has called upon States to regulate the extraterritorial actions of third parties registered in their territory. For example, in 2007, it called on Canada to “take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada,” recommending in particular that the State party “explore ways to hold transnational corporations registered in Canada accountable”. See: Committee on the Elimination of Racial Discrimination, ‘Consideration of Reports Submitted by States Parties Under Article 9 of the Convention - Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada’, 24 May 2007, UN Doc CERD/C/CAN/CO/18, para 17, available at: <https://undocs.org/CERD/C/CAN/CO/18>

⁶¹ Committee on the Rights of the Child, General comment No. 16, para. 39.

⁶² Ibid.

⁶³ Ibid, para. 43.

provide remedy for children and their families whose rights have been violated by business enterprises extraterritorially".⁶⁴

2.1.3 The Right to an Effective Remedy and Reparation

States must ensure the enjoyment of the right to prompt, accessible and effective remedy and reparation before an independent authority, including, where necessary, recourse to a judicial authority, for violations of all human rights. The right to an effective remedy and reparation for human rights violations is a general principle of the rule of law and provided for under all of the principal human rights treaties and instruments.⁶⁵ Where the harm resulting from an alleged violation has occurred on the territory of a State other than a State in which the harmful conduct took place, any State concerned must provide access to remedies to the victim.⁶⁶

The CESCR has underlined that "States parties must provide appropriate means of redress to aggrieved individuals or groups and ensure corporate accountability. This should preferably take the form of ensuring access to independent and impartial judicial bodies: the Committee has underlined that "other means [of ensuring accountability] used could be rendered ineffective if they are not reinforced or complemented by judicial remedies"". The CESCR has further stated that:

"It is imperative for the full realization of the Covenant rights that remedies be available, effective and expeditious. This requires that victims seeking redress must have prompt access to an independent public authority, which must have the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress the harm done. Reparation can be in the form of restitution, compensation, rehabilitation, satisfaction, and guarantee of non-repetition, and must take the views of those affected into account. To ensure non-repetition, an effective remedy may require improvements to legislation and policies that have proven ineffective in preventing the abuses".⁶⁷

⁶⁴ Ibid, para. 44.

⁶⁵ See Article 2(3) of the ICCPR; Article 14 of the CAT; Article 6 of the CERD; Articles 12, 17(2)(f) and 20 of the ICPED; Article 6(2) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; Article 6(2) of the Universal Declaration of Human Rights; Articles 9 and 13 of the Declaration on the Protection of All Persons from Enforced Disappearance; Principles 4 and 16 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions; Principles 4 to 7 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Article 27 of the Vienna Declaration and Programme of Action; Articles 13, 160 to 162 and 165 of the Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance; Article 9 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

⁶⁶ Principle 37, Maastricht Principles.

⁶⁷ CESCR, General comment No. 24, paras. 39-42.

2.1.4 Access to Justice

Access to justice is a core element of the rule of law⁶⁸ and an essential prerequisite for the protection and promotion of all other human rights.

Access to justice encompasses the right to a fair trial, equal access to and equality before the courts, as guaranteed in Article 14 of the ICCPR, to which Thailand is a State party. In its General Comment No. 32, the UN Human Rights Committee, the supervisory body of independent experts established by the ICCPR, articulated the State's obligations under Article 14 of the ICCPR to "ensure that no individual is deprived, in procedural terms, of his/her right to claim justice". The Committee further elaborated that the right of access to courts and tribunals is "not limited to citizens of States parties", but must be available to "all individuals", regardless of "nationality or statelessness, or whatever their status".

This is an important principle in the context of Thailand's extraterritorial obligation to protect people outside of its territory from human rights violations, and to ensure that affected populations are able to have their voice heard, exercise their rights, challenge decisions or hold decision-makers accountable.

2.2 Investment and Human Rights

Investment, in addition to being an important component for the sustainable development of countries,⁶⁹ can also contribute to the realization of human rights, especially economic and social rights. But investment alone is not enough. In fact, the interaction between investment and human rights has been a major concern for human rights advocates seeking to protect and promulgate human rights within the context of an interconnected, globalized world market. Human rights interact in various ways with investment law and sustainable development, and over the past decades, there has been growing acknowledgment that in order to ensure sustainable development outcomes, investment should be human rights and rule of law compliant.⁷⁰ Studies have found that increased respect for human rights increases investment flows directly, and also indirectly, by fostering a skilled and healthy labour force, and enhancing a TNC's reputation.⁷¹

2.3 Global and United Nations Initiatives on Business and Human Rights Relevant to the Analysis of Extra-Territorial Obligations

States have typically been slow to respond to diverse challenges in the area of business and human rights. There have therefore been important developments in buttressing the international legal framework, including through efforts underway to elaborate a global treaty on business and human rights.

⁶⁸ General Assembly, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels', A/RES/67/1, Sixty-seventh session, 30 November 2012, para 14 and 16, available at: https://www.un.org/ruleoflaw/files/37839_A-RES-67-1.pdf

⁶⁹ OHCHR, 'Sustainable Development Goals: Connecting the business & human rights and the sustainable development agendas' ('SDGs'), available at: <https://www.ohchr.org/EN/Issues/Business/Pages/SustainableDevelopmentGoals.aspx>

⁷⁰ General Assembly, 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels', A/RES/67/1, Sixty-seventh session, 30 November 2012, available at: https://www.un.org/ruleoflaw/files/37839_A-RES-67-1.pdf; SDGs; Maastricht Principles.

⁷¹ Shannon Lindsey Blanton and Robert G. Blanton, 'What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment', *Journal of Politics*, Vol. 69, 2007.

Draft Treaty to Regulate the Activities of Transnational Corporations and Other Business Enterprises (Revised draft 2020)

The elaboration of an international treaty as a binding legal instrument to regulate business and human rights is currently under negotiation. If it comes into effect, it could have significant consequences for the regulation of extra-territorial investment and the legal liabilities associated with it – including for human rights violations.

In June 2014, the UN Human Rights Council adopted Resolution 29/9 to establish an open-ended inter-governmental working group (IGWG) with a mandate to develop a binding instrument to regulate business activities in line with human rights standards. On 6 August 2020, the second revised draft legally binding instrument on business activities and human rights was released.⁷²

The proposed treaty will create obligations for States to take legislative and other measures to hold businesses legally accountable for rights abuses and to ensure victims have access to effective remedy. As it stands, the proposed treaty applies “to all business enterprises, including but not limited to transnational corporations and other business enterprises that undertake business activities of a transnational character” (Article 3). It also highlights States’ duties to ensure that their domestic legislation provides for the liability of natural or legal persons conducting business activities, including those of transnational character, “for their failure to prevent another legal or natural person with whom it has a business relationship, from causing or contributing to human rights abuses, when the former legally or factually controls or supervises such person or the relevant activity that caused or contributed to the human rights abuse, or should have foreseen risks of human rights abuses in the conduct of their business activities, including those of transnational character, or in their business relationships, but failed to put adequate measures to prevent the abuse” (Article 8).

The fundamental international human rights framework for business and human rights is already in place, however, as there are several relevant global and United Nations’ bodies which have developed standards regarding the obligations of the States to protect individuals from human rights abuses resulting from the extraterritorial activities of businesses and ensure that those affected by human rights abuses have access to justice through effective State-based judicial mechanisms.

2.3.1 UN Guiding Principles on Business and Human Rights

In 2008, UN Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, John Ruggie, presented the final report of his first three-year mandate, setting out the “Protect, Respect and Remedy” framework. The tripartite framework acknowledges that, in line with international human rights law, States have an obligation to protect human rights from the conduct of businesses. Businesses themselves have a responsibility to respect human rights, and both States and businesses have duties to ensure remedies and redress.

This framework was the basis of the UN Guiding Principles on Business and Human Rights (UNGPs), developed during the Special Representative’s second mandate in 2011. The

⁷² OHCHR, ‘Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Multinational enterprises and Other Business Enterprises’, August 2020, available at: https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

UNGPs were endorsed by a Resolution adopted by the UN Human Rights Council on 16 June 2011.⁷³

The UNGPs apply to “all States” – regardless of which international treaties they have signed, adopted or ratified – and “all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”

The “Protect, Respect and Remedy” framework of the UNGP is based on the recognition of States’ obligations under international law to protect human rights (Pillar 1); the corporate responsibility to respect all human rights in their global operations (Pillar 2); and the State and corporate obligation and responsibility to provide effective remedy (Pillar 3).

With regard to Pillar 1, the State duty to protect, the UNGPs indicate that the State obligation to protect individuals from human rights abuses resulting from business activities applies both “within their territory and/or jurisdiction by third parties”, generally by taking “appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication” (Principle 1).

Under Pillar 2, the corporate responsibility entails “business enterprises should respect human rights” (Principle 11). Crucially, the UNGPs encompass all “internationally recognized human rights” (Principle 12). These are defined, “at a minimum”, as those expressed in the “International Bill of Human Rights (consisting of the Universal Declaration of Human Rights (UDHR) and the main instruments through which it has been codified: the ICCPR and the ICESCR), coupled with the rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.”⁷⁴ The UNGPs further provide guidance that businesses should respect other instruments of the United Nations, including those that have elaborated further on the “rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families”.⁷⁵ In order to meet their responsibility to respect, the UNGPs provide guidance on practical measures that businesses should take to ensure that they meet the responsibility to respect, including to enable the remediation of any adverse human rights impacts they cause or to which they contribute (Principle 15).

Lastly, with respect to the provision of remedial processes (Pillar 3), the UNGPs acknowledge the obligation of States to “take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means”, that those affected from human rights abuses have access to effective State-based or non-State-based, judicial or non-judicial grievance mechanisms (Principles 25-28). Businesses should do so through operational level grievance mechanisms (Principle 29) and cooperate with industry-level and State-provided grievance mechanisms (Principle 30).⁷⁶ As discussed below, Thailand may have State-based judicial or non-judicial grievance mechanisms, but they are either not accessible for complainants from other countries or not effective.

⁷³ UN Human Rights Council Resolution 17/4 of 16 June 2011. OHCHR, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework’ (UNGPs), 2011, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

⁷⁴ UNGPs, pp. 13-14.

⁷⁵ Ibid.

⁷⁶ The effectiveness of a grievance mechanism, according to the UNGPs, requires each such mechanism to be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning (Principle 31(a)-(g)). See also: ICJ, ‘Corporate Accountability for Abuses of Economic, Social & Cultural Rights in Conflict and Transition’, February 2020, available at: <https://www.icj.org/wp-content/uploads/2020/02/Universal-ESCR-accountability-guide-Publications-Reports-Thematic-report-2020-ENG.pdf>

The UNGPs create no new legal obligations on either States or business enterprises. The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (also referred to as the Working Group on Business and Human Rights) was established by the Human Rights Council in part to engage States on the implementation of the UNGPs.⁷⁷ Some States have developed National Action Plans with the UNGPs as their governing framework, including Thailand.⁷⁸

2.3.2 ILO Tripartite Declaration of Principles for Multinational Enterprises and Social Policy

Other relevant international instruments are the ILO Tripartite Declaration of Principles for Multinational Enterprises and Social Policy. Founded on principles contained in international labour standards, the Declaration provides direct guidance to multinational and national enterprises, governments of home and host countries, and employers' and workers' organizations on social policy and inclusive, responsible and sustainable workplace practices, including on areas such as employment, training, conditions of work and life, industrial relations as well as general policies.⁷⁹

2.3.3 The United Nations Global Compact (2000)

In 2000, the United Nations launched the UN Global Compact, a non-binding, voluntary policy initiative for businesses that are committed to aligning their operations and strategies with accepted principles in the areas of human rights, labour and the environment.⁸⁰ Since its official launch on 26 July 2000, the initiative has grown to include more than 12,000 participants, including over 8,000 businesses in 145 countries, which must report publicly on steps they take to comply with the principles it sets out.⁸¹

Notably, 52 companies and TNCs based in Thailand are members of the UN Global Compact, including CP ALL Public Company Limited, Charoen Pokphand Foods Public Company Limited, True Corporation Public Company Limited, Mitr Phol Sugar Corporation Limited, PTT Public Company Limited, Banpu Public Company Limited, The Siam Cement Public Company Limited, and Thai Oil Public Company Limited.⁸²

However, because of its voluntary character, the Compact's effectiveness has been limited.⁸³ A number of Thai companies that are members have been linked to human rights

⁷⁷ Human Rights Council, 'Resolution 17/4: Human rights and transnational corporations and other business enterprises', A/HRC/RES/17/4, 6 July 2011, Clause 6, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4. The Council renewed the Working Group's mandate in 2014 (resolution 26/22), 2017 (resolution 35/7) and 2020 (resolution 44/15).

⁷⁸ Thailand's National Action Plan on Business and Human Rights (2019–2022), available at: <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/nap-thailand-en.pdf>

⁷⁹ ILO, 'Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy', 5th Ed., March 2017, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf

⁸⁰ Ibid.

⁸¹ Global Compact Network Thailand, available at: <http://www.globalcompact-th.com/ungc/whatis>

⁸² UN Global Compact, 'Our Participants', available at: <https://www.unglobalcompact.org/what-is-gc/participants/search?search%5Bcountries%5D%5B%5D=196>

⁸³ ICJ, 'Corporate Accountability for Abuses of Economic, Social & Cultural Rights in Conflict and Transition', February 2020, available at: <https://www.icj.org/wp-content/uploads/2020/02/Universal-ESCR-accountability-guide-Publications-Reports-Thematic-report-2020-ENG.pdf>

abuses overseas.⁸⁴ These companies and the alleged abuses had been discussed in section 1.3 and will also be discussed below in Annex 1.

2.3.4 OECD Guidelines for Multinational Enterprises (2011)

The Organisation for Economic Co-operation and Development (OECD) has developed and adopted a set of Guidelines for Multinational Enterprises, revised most recently in 2011. The Guidelines are not legally binding on companies. However, Member States are bound by the commitment to disseminate and promote the Guidelines for companies operating nationally and overseas.⁸⁵ Thailand is not an OECD Member State, but references to the Guidelines do appear in Thailand's National Action Plan (see below at section 3.2).

The Guidelines' treatment of human rights draws on the UNGPs, directly using their "protect, respect and remedy" framework. It recognizes that business enterprises should respect human rights by: avoiding causing or contributing to adverse human rights impacts through their own activities; addressing such impacts when they occur;⁸⁶ seeking ways to prevent or mitigate (such) adverse human rights impacts;⁸⁷ expressing their commitment to respect human rights through a statement of policy;⁸⁸ carrying out human rights due diligence;⁸⁹ and having processes in place to enable remediation, which, in some situations, might "require cooperation with judicial or State-based non-judicial mechanisms".⁹⁰ Enforcement of these guidelines takes place primarily through National Contact Points (NCP) mechanisms⁹¹ and relies on "reputational checks to influence corporate behavior".⁹²

⁸⁴ For example, Inclusive Development International, 'Class Action Lawsuit by Cambodian Villagers Against Mitr Phol Sugar Corporation', 2 April 2018, available at: <https://www.inclusivedevelopment.net/wp-content/uploads/2018/03/Mitr-Phol-Class-Action-Case-Brief.pdf>; Ashijya Otwong & Tanapon Phenrat, 'Comparative analysis of public participation in the EIA process for Thai overseas investment projects: Krabi coal terminal, Hongsa coal power plant, and Dawei special economic zone', Impact Assessment and Project Appraisal, 2017, available at: <https://www.tandfonline.com/doi/pdf/10.1080/14615517.2017.1354641>; Bangkok Post, 'Banpu ordered to pay B1.5bn to former partner', 6 March 2018, available at: <https://www.bangkokpost.com/business/1423331/banpu-ordered-to-pay-b1-5bn-to-former-partner>.

⁸⁵ Flora Saraiva Rebello Arduini, 'Financial Institutions and the International Frameworks on Business and Human Rights: Challenges in Implementation Procedures', Amsterdam Law Forum, 2018, available at: <http://amsterdamlawforum.org/article/download/370/524>

⁸⁶ OECD, 'OECD Guidelines for Multinational Enterprises', 2011, paras. 2, 37 and 42, available at: <http://www.oecd.org/daf/inv/mne/48004323.pdf>

⁸⁷ Ibid, paras. 3 and 43

⁸⁸ Ibid, paras. 4 and 44

⁸⁹ Ibid, paras. 5 and 45

⁹⁰ Ibid, para 46

⁹¹ Ibid, at 71-74

⁹² Cassidy Bolt, 'Leveraging Reputation in Implicit Regulation of MNEs: An Analysis of the OECD Guidelines for Multinational Enterprises' Capacity to Influence Corporate Behavior', 20 January 2018, available at: <https://sites.duke.edu/corporations/2018/01/20/leveraging-reputation-in-implicitregulation-of-mnes-an-analysis-of-the-oecd-guidelines-for-multinational-enterprises-capacity-toinfluence-corporate-behavior/>

Human Rights Due Diligence

Human rights due diligence (HRDD), as enunciated by the UNGPs, is an ongoing process for business enterprises to proactively manage potential and actual adverse human rights impacts.⁹³

Pursuant to Principle 17 of the UNGPs, “in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.”

Principle 18 of the UNGPs establishes that in order to “identify” any actual or potential adverse human rights impact prior to or during a business activity, HRDD should: (i) draw on internal and/or independent external human rights expertise and identify who may be affected; catalogue relevant human rights standards and issues; and project how the proposed activity and associated business relationships could have adverse human rights impacts on those identified; and (ii) involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate, to enable business enterprises to assess their human rights impacts accurately.

HRDD is not yet a legal obligation for companies in Thailand.⁹⁴ However, the Securities and Exchange Commission (SEC) of Thailand reportedly announced that, from the end of the 2021 fiscal year, all listed companies in Thailand are required to report on human rights issues in the annual report (One Report).⁹⁵ Beginning in 2022, human rights are expected to be incorporated in the application form for all new listed companies in advance of their initial public offering (IPO).⁹⁶ Whether this will take the form of full-fledged HRDD as provided under the UNGPs remains uncertain.

The concept has, however, appeared in Thailand’s NAP. The NAP recommends that Thai corporations investing in foreign countries “conduct a risk assessment and surveillance of human rights due diligence, including disclosure of information to the public”.⁹⁷ It also requires relevant authorities to “study to assess risks and human rights impacts (human rights due diligence) before the implementation of large-scale projects”.⁹⁸

Notably, the National Human Rights Commission of Thailand has produced a HRDD Handbook and Checklist for Hotel Businesses.⁹⁹ The Handbook, along with the UNGPs and certain research papers, were suggested by the SEC as tools that listed companies could adopt to illustrate the compliance with human rights responsibilities in their business activities.¹⁰⁰

⁹³ OHCHR has defined human rights due diligence as: “an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights”. See: OHCHR, ‘The Corporate Responsibility to Respect Human Rights: An Interpretive Guide’, 2012, p.6, available at:

https://www.ohchr.org/Documents/publications/hr.puB.12.2_en.pdf

⁹⁴ The NHRCT also issued a report regarding the conducting of HRDD for Thai corporations, which outlined processes which had been implemented in other countries and challenges in different jurisdictions. See: <http://www.nhrc.or.th/getattachment/5b8db0f0-ee83-4987-9fe8-583160dc8005/>.aspx

⁹⁵ Regulation of the SEC No. Tor.Jor. 55/2563 (No. 20), dated 18 August 2020, available at: <https://capital.sec.or.th/webapp/nrs/data/8615s.pdf>; One Report Form, available at: <https://capital.sec.or.th/webapp/nrs/data/8617s.pdf>

3. Overview of Legal Liability and Judicial Remedies for Abuses by Business Enterprises under National Law

As outlined above, under international human rights law victims of corporate human rights abuse must have access to an effective remedy and reparations, particularly through a judicial or other independent public authority.

3.1 Thailand as a Jurisdiction for Claims

There is a variety of basis for jurisdiction in respect of conduct by companies that has extraterritorial affects. The State in which a violation or abuse occurs (the host State) is the presumptive jurisdiction for legal proceedings, particularly civil claims for damages. This will ordinarily be appropriate for prudential reasons, particularly in consideration of the location of the victims and witnesses, and the capacity to gather evidence, assess alleged damage and identify those responsible. The courts in the host country are also in the best position to interpret and apply domestic laws which would be engaged in such proceedings.

However, the host State is not the only possible venue for jurisdiction. As noted above, jurisdiction may also be appropriate in a State where a corporation or its parent or controlling company has its centre of activity, is registered or domiciled, or has its main place of business or substantial business activities.¹⁰¹ Where non-Thai victims may be denied access to justice in their home countries, Thai courts may be an alternative forum where claims may be brought. Bringing a claim within Thailand may also be necessary when a Thai TNC attempts to evade liability for human rights abuses by hiding behind their separate juridical personality in the form of their local subsidiaries.

This section examines the legal framework governing civil, criminal and administrative liability and judicial remedies under Thai law for victims of human rights abuses for which Thai corporations acting abroad may bear responsibility. The analysis also identifies obstacles that victims may face when seeking a remedy in the Thai justice system.

3.2 Thailand's National Action Plan on Business and Human Rights

Thailand has no law specifically regulating or otherwise directly addressing human rights and businesses involved in transnational development and investment. However, several steps have been taken by the Thai government towards such regulation, including undertaking political commitments to implement the UNGPs,¹⁰² the adoption of the National Action Plan on Business and Human Rights (NAP) and several Cabinet Resolutions.

⁹⁶ Voice Online, 'SEC forces Listed Companies in the Stock Exchange of Thailand to Report about Human Rights', 18 February 2020, available at: <https://www.voicetv.co.th/read/pOSUI903u> (in Thai); ICJ Telephone Interview, Official of the SEC, August 2020, Bangkok.

⁹⁷ NAP, p. 139.

⁹⁸ NAP, p. 133.

⁹⁹ NHRCT, HRDD Handbook and Checklist for Hotel Businesses, March 2018, available at: <http://www.nhrc.or.th/getattachment/6a2f238a-346a-4889-abbb-3480ecadcac2/.aspx> (in Thai)

¹⁰⁰ SEC, 'Resources about the UNGPs', 3 September 2019, available at: <https://capital.sec.or.th/webapp/nrs/data/8258s.pdf> (in Thai)

¹⁰¹ Principle 25, Maastricht Principles.

¹⁰² For example, Prime Minister General Prayut Chan-o-cha officially announced the Royal Thai Government's Policy on Business and Human Rights and reaffirmed the Thai government's commitment to implement the UNGPs through a NAP. The Prime Minister further presided over the signing of a "Memorandum of Cooperation to implement the UNGPs in Thailand". It was signed by the National Human Rights Commission, the Ministries of Justice, Foreign Affairs and Commerce,

Thailand's First National Action Plan on Business and Human Rights (2019-2022), adopted on 29 October 2019,¹⁰³ sets out plans to be implemented by public and private stakeholders to ensure that businesses respect human rights, and that there is access to an effective remedy and reparation in cases of business-related human rights abuses. However, the NAP, adopted in the form of a Cabinet Resolution,¹⁰⁴ does not have the status of a law or regulation that has legally binding force. This means that its provisions are difficult to enforce juridically.

With respect to cross-border investment and TNCs, the NAP states that "concrete laws or policies should be enacted as well as mechanisms to detect human rights abuses outside the territory should be established in order to provide protection, remedy and cross-border responsibility."¹⁰⁵ It also requires "clear guide\lines to control businesses and corporations in foreign countries."¹⁰⁶

The NAP follows the framework of the UNGPs, classifying its elements under the "protect/respect/remedy" categories. It sets out eight action points for Thai governmental agencies to undertake in order for the government to fulfill its obligation to *protect* human rights in the context of cross-border investment.¹⁰⁷ It also provides three action points that companies should follow in order to fulfil corporate responsibility to *respect* all human rights in their cross-border investment.¹⁰⁸ It further contains four action points aimed at fulfilment of both the State and corporate responsibilities to provide effective *remedy*.¹⁰⁹

The NAP includes a commitment to "create awareness, promote and facilitate business for Thai investors going to foreign countries to respect the principles of human rights." It also contains a commitment to "consider guidelines for developing laws, policies or concrete mechanisms to investigate human rights abuses outside the territory to provide protection and remedy and take cross-border responsibility that complies with international standards such as the OECD Guidelines for Multinational Enterprises".¹¹⁰

the Federation of Thai Industries, the Thai Bankers Association, the Thai Chamber of Commerce and the Global Compact Network of Thailand on 31 May 2017. See: National Action Plan on Business and Human Rights, 'Thailand', available at: <https://globalnaps.org/country/thailand/>]

¹⁰³ First National Action Plan on Business and Human Rights (2019–2022), available at: <https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/nap-thailand-en.pdf>

¹⁰⁴ A Cabinet Resolution is considered a "by-law" in accordance with section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999) (Decisions of the Supreme Administrative Court No. For.26/2546 and 501/2548). Section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedure provides that "by-law" means a Royal Decree, a Ministerial Regulation, a Notification of a Ministry, an ordinance of a local administration, a rule, a regulation or any other provision which is of general application and not intended to be addressed to any specific case or person".

¹⁰⁵ NAP, pp. 123-124.

¹⁰⁶ NAP, p. 124.

¹⁰⁷ These include: (i) Amendments of laws, regulations, policies and related measures; (ii) Creating investor awareness; (iii) Promotion of Investment; (iv) Preventing human rights violations abroad; (v) Development of government operations; (vi) State enterprises; (vii) Business operations; and (viii) Promoting cooperation in driving business issues and human rights at regional and international levels.

¹⁰⁸ Namely: (i) Compliance with laws, standards and principles of human rights relating to cross border investment and multinational enterprises; (ii) Promoting awareness of international principles and standards regarding human rights and business conduct; and (ii) Complaint and remedy mechanism.

¹⁰⁹ Namely: (i) Complaint mechanism; (ii) Negotiation and mediation; (iii) Financial assistance and remedies; and (iv) Impact prevention

¹¹⁰ NAP, pp. 127 and 132.

Monitoring and reporting mechanisms for the implementation of the NAP include the NAP Implementation Monitoring Sub-Committee, chaired by the Director General of the Ministry of Justice's Rights and Liberties Protection Department, which has the mandate to implement the action plan and to monitor and evaluate human rights abuses. The Ministry of Justice will also procure external experts to evaluate the results of the first NAP.¹¹¹

3.3 Civil Liability

Civil remedies "play an important role in ensuring access to justice" for victims of violations and abuses of human rights.¹¹² In Thailand, there are at least two potential legal avenues that victims of human rights abuses might pursue against Thai companies for activities abroad to recover financial losses. These include actions brought pursuant to (i) the Civil and Commercial Code; and (ii) the Enhancement and Conservation of National Environmental Quality Act.

3.3.1 Civil and Commercial Code – The Use of Tort Law

Under the Thai Civil and Commercial Code, companies can attract civil liabilities under both contract law and tort law. However, regarding cases involving corporate human rights abuses in Thailand, tort litigation is most often used to enforce the rights of victims and provide compensation,¹¹³ since it provides an avenue by which affected people and communities can hold companies who willfully or negligently caused damage to them accountable. This section below will set out some considerations involved in bringing a tort case in a human rights context.

Civil Damages. Under tort law, remedies can be sought for civil damages. Section 420 of the Civil and Commercial Code provides that "a person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore". Section 425 of the Civil and Commercial Code further provides that "an employer can be jointly liable¹¹⁴ with an employee for the consequences of a wrongful act committed by such an employee in the course of his/her employment."

Damages available in Thailand for tortious injury are compensatory and aimed at restoring injured parties to the state that they would have been at had the injury not occurred. Traditional claims for monetary damages generally result only in recovery of actual and foreseeable damages, such as the costs of actual and future medical expenses,¹¹⁵ the loss

¹¹¹ NAP, p. 144.

¹¹² CESC, General Comment No. 24, para 51.

¹¹³ Sor. Rattanamane Polkla, 'Legal remedies do not only mean compensation - they mean prevention', available at: <https://www.business-humanrights.org/en/legal-remedies-do-not-only-mean-compensation-they-mean-prevention>

¹¹⁴ Joint liability means that more than one defendant is liable for the plaintiff's injury. With joint liability, each defendant is fully liable for the total amount of damages. However, subject to section 426 of the Civil and Commercial Code, the employer who has made compensation to a third person for a wrongful act committed by his employee "is entitled to reimbursement from such employee".

¹¹⁵ Section 443 para 2 and section 444 of the Civil and Commercial Code.

of total or partial ability to work both at present and in the future,¹¹⁶ the loss of the injured party's ability to provide services to eligible third parties¹¹⁷ and non-pecuniary loss.¹¹⁸

There is no recognized remedy under Thai law in general for mental distress.¹¹⁹ However, in consumer cases¹²⁰ and in at least one civil tort case between a quarry firm and local villagers on environmental impacts of quarry operations (Supreme Court Decision No. 516/2555),¹²¹ courts have found that compensation for psychological damage, including mental distress, may be awarded.

This decision of the Supreme Court in the civil tort case has since been followed in a case relating to villagers who were affected by operations of a gold mining company. In that case, six villagers filed a tort suit against a company after a Thai court had acquitted the villagers of defamation charges which the company lodged against them arising from a sign they erected saying the company was not welcome in their community. In addition to other types of compensation, the six villagers sought compensation for mental distress due to the depression and stress of litigation brought by the company. The Loei Provincial Court granted them compensation for mental distress, categorizing it as a non-pecuniary loss in accordance with section 446 of the Civil and Commercial Code.¹²² This illustrates how courts can play a significant role in ensuring effective remedies for persons whose human rights have been violated.

In the context of Thai TNCs, tort law was used in the Sugar Plantation Lawsuit where Hoy Mai and Smin Tet, on behalf of at least 23 out of 700 families from Cambodia, filed a class action suit in Thailand in 2018 against a Thai sugar cane company, accusing it of rights abuses based on Thai tort laws (section 420 of the Civil and Commercial Code). The plaintiffs claimed that the Thai company, through at least one Cambodian company that was its alleged subsidiary,¹²³ had colluded with the Cambodian Armed Forces to commit

¹¹⁶ Section 444 of the Civil and Commercial Code.

¹¹⁷ Section 445 of the Civil and Commercial Code.

¹¹⁸ Section 446 para 1 of the Civil and Commercial Code.

¹¹⁹ Tilleke & Gibbins, 'Product Liability: in 33 jurisdictions worldwide', 2012, available at: https://www.tilleke.com/sites/default/files/2012_Aug_GTDT_Thailand_PL.pdf

¹²⁰ For product liability claims as a result of damage to the body, health or sanitation of the injured party based on the Consumer Case Procedure Act in August 2008 and the Product Liability Act in February 2009.

¹²¹ Narached Khunthongphet and Narit Doungsuwan, 'Community Rights and the Protection of Khao Khuha', *Hatyai Journal* 14(1): 63-77, 8 April 2016, available at: <https://bit.ly/3fNyHVB>

¹²² ICJ Interview, Lawyer of Community Resource Center (CRC) who had experience litigating a number of cross-border cases, Bangkok, 17 March 2020. Judgment of the case between Mr. Suraphan Rujichaiwat et al v. Thung Kam Co Ltd., Loei Provincial Court (Court of the First Instance), 25 December 2018, Red Case No. 1305/2561, p.19.

¹²³ According to the Written Testimony submitted by Mitr Phol to the NHRCT, Mitr Phol Group directly invested in one company – namely Angkor Sugar Co. Ltd - and is partnered with other companies in two other companies – namely Tonle Sugar Cane Co. Ltd and Cane and Sugar Valley Co. Ltd. There has been no Cambodian shareholding in any of these companies. NHRCT, 'Investigation Report No. 1003/2558: Community Rights: Mitr Phol Sugar Company Limited negative impacts on people living in Samrong District and Chongkal District, Oddar Meanchey Province, Northeastern Cambodia', 12 October 2015; Complaint Submitted to Bangkok South Civil Court, 'Mrs. Hoy Mai and Mr. Smin Tet v. Mitr Phol Co. Ltd', Black Case No. Por. 718/2561, 28 March 2018, p.6.¹²⁴ However, the Company claimed that it received temporary concessions in compliance with all local and national laws and with assurances from authorities that "all temporary concession areas had been processed legally and transparently." See: Reuters, 'Cambodian farmers sue Thai sugar group Mitr Phol over alleged land grab', 2 April 2018, available at: <https://www.reuters.com/article/us-cambodia-thailand-sugar/cambodian-farmers-sue-thai-sugar-group-mitr-phol-over-alleged-land-grab-idUSKCN1H90P6>; Equitable Cambodia, Licadho and

human rights abuses against villagers in Cambodia by destroying local people's houses, killing their livestock, torching villages and destroying crops to make way for plantations in their concession area.¹²⁴ The case is now pending consideration by Thailand's Bangkok South Civil Court.¹²⁵

Burden of Proof. A key constraint in the application of tort law is that an action can only be taken after the harm has already occurred. In such cases, the plaintiff has the burden of proving harm, meaning that the alleged victim must prove that harm is the result of a wilful or negligent act of the defendant.¹²⁶ This burden may be difficult to meet for victims with limited access to information, expertise and financial resources, given the typical complexity in establishing whether or not there is a sufficient link between conduct and harm suffered for the purpose of civil liability.

For example, in a case involving the Hongsa Project, a coal plant and mining project in Xayabury Province, Lao PDR, located about 30 kilometres from Thailand's Nan Province, community members in Nan Province alleged that the project risked causing transboundary impacts by releasing air pollution, which may put local communities at risk of developing respiratory problems and may affect their food chain and agricultural production.¹²⁷ In order for the tort action to succeed, the plaintiffs needed to establish a causal relationship between defendant company's actions and the harm suffered by villagers. This can be a difficult task without support from environmental and health experts to analyse the link between the actions and harms. In the Hongsa case, the villagers were trained, under a project initiated by a group of academics, to collect baseline data on environmental and health impacts. The group conducting research about this project recommended that a community-led monitoring system be put in place so the communities could observe environmental and health conditions, collect evidence, and bring the case to court if there is enough evidence.¹²⁸ Unfortunately, the ICJ has been informed that the project was recently discontinued due to insufficient budget.¹²⁹

Inclusive Development International, 'Joint Statement On The Ninth Session of the United Nations Forum on Business and Human Rights', 17 November 2020, available at: <https://media.business-humanrights.org/media/documents/UNBHR-Joint-Statement-on-Mitr-Phol-Nov-17-2020.pdf>

¹²⁴ However, the Company claimed that it received temporary concessions in compliance with all local and national laws and with assurances from authorities that "all temporary concession areas had been processed legally and transparently." See: Reuters, 'Cambodian farmers sue Thai sugar group Mitr Phol over alleged land grab', 2 April 2018, available at: <https://www.reuters.com/article/us-cambodia-thailand-sugar/cambodian-farmers-sue-thai-sugar-group-mitr-phol-over-alleged-land-grab-idUSKCN1H90P6>; Equitable Cambodia, Licadho and Inclusive Development International, 'Joint Statement On The Ninth Session of the United Nations Forum on Business and Human Rights', 17 November 2020, available at: <https://media.business-humanrights.org/media/documents/UNBHR-Joint-Statement-on-Mitr-Phol-Nov-17-2020.pdf>

¹²⁵ Bangkok Post, 'Cambodians to appeal ruling in Mitr Phol case', 5 July 2019, available at: <https://www.bangkokpost.com/thailand/general/1707662/cambodians-continue-battle-with-mitr-phol>

¹²⁶ Supreme Court Decision No. 909/2497. Sor. Rattanamanee Polkla, 'Legal remedies do not only mean compensation - they mean prevention', available at: <https://www.business-humanrights.org/en/legal-remedies-do-not-only-mean-compensation-they-mean-prevention>; ICJ Interview, Lawyer of Community Resource Center (CRC) who had experience litigating a number of cross-border cases, Bangkok, 17 March 2020.

¹²⁷ EarthRights International, 'Hongsa Power Plant and Mining Project', available at: <https://earthrights.org/what-we-do/extractive-industries/hongsa-power-plant-and-mining-project/>

¹²⁸ Legal Research and Development Center, Faculty of Law, Chiang Mai University, 'Research on Preparedness of Participatory Community's Health Impact Assessment from Developments Project Locating in Borderlands: A Case Study of Hongsa Coal Project in Nan Province', August 2018.

¹²⁹ ICJ Interview, environmental lawyer with Foundation for Environment and Natural Resources (FENR), Chiang Mai, November 2020.

3.3.2 Enhancement and Conservation of National Environmental Quality Act – The Use of Strict Liability

The Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992)¹³⁰ (National Environmental Quality Act) provides another basis for pursuing actions against corporate entities¹³¹ alleged to be involved in human rights abuses. It imposes strict civil liability on the owner or other possessor, such as a lessee, of a source of pollution if leakage or dispersal of pollutants is the cause of death, bodily harm, injury, or ill health of a person or has caused damage to property, regardless of whether such leakage or dispersion is the result of a wilful or negligent act of the owner or possessor.¹³² Strict liability is a legal term of art which means that a defendant is legally responsible for the consequences of an unlawful activity, regardless of the defendant's intent or whether or not the defendant may have been negligent. Nevertheless, the plaintiff still has to prove that there is a link between the defendant's conduct and harm suffered.¹³³

Notably, the National Environmental Quality Act was referred to in the NAP as a tool for "the abused" to seek "protection and remedy" under the Thai justice system, including human rights abuses in the context of any business activities of a transnational character.¹³⁴

Cases have been brought by affected individuals and communities in Thailand under this Act to claim compensation. Examples include compensation claimed for alleged cadmium contamination in a zinc mine operated in Mae Sot District, Tak Province;¹³⁵ alleged lead contamination of Klity Creek in Kanchanaburi Province;¹³⁶ alleged contamination of heavy metals in lands and waters from a gold mining business in Loei Province;¹³⁷ and alleged illegal disposal of industrial wastes and chemical-contaminated water in Nong Nae District,

¹³⁰ The National Environmental Quality Act was amended in 2018, but only with respect to the part regulating environmental impact assessments. Amendment of other provisions is now under consideration by the Council of State.

¹³¹ In addition, Section 6 of the National Environmental Quality Act also guarantees the right of individual persons "[t]o be remedied or compensated by the State in case damage or injury is sustained as a consequence of dangers arisen from contamination by pollutants or spread of pollution, and such incident is caused by any activity or project initiated, supported or undertaken by government agency or state enterprise."

¹³² Section 96, National Environmental Quality Act.

¹³³ Kwanticha Mesil and Suraphon Srivithaya, 'Civil Liability on Noise Pollution from Construction Site', RSU National Research Conference 2016, 29 April 2016, at 958-959, available at: <https://rsucon.rsu.ac.th/files/proceedings/nation2016/G4-09.pdf>

¹³⁴ NAP, pp. 123-124.

¹³⁵ Isranews, 'Pha Daeng PCL lost the case, paid 1.8 million to villagers in the cadmium contamination case in Mae Sot district', 10 June 2019, available at: <https://www.isranews.org/thaireform/thaireform-news/77375-pdi77375.html>

¹³⁶ Bangkok Post, 'Klity Creek villagers win 19-year legal battle', 11 September 2017, available at: <https://www.bangkokpost.com/thailand/general/1322371/klity-creek-villagers-win-19-year-legal-battle#targetText=The%20lead%20contamination%20of%20Klity,factory%20owned%20by%20the%20company.>

¹³⁷ Isaan Record, 'Gold Mining Case in Loei, a Victory of Communities with more Cases Against them', 27 January 2019, available at: <https://isaanrecord.com/2019/01/27/loei-gold-mining-community-rights/>; Bangkok Post, 'Court fines mining firm B15m', 14 December 2018, available at: <https://www.bangkokpost.com/thailand/general/1593478/court-fines-mining-firm-b15m>

Chachongsao Province.¹³⁸ In most of the above noted cases, the court granted financial compensation and/or orders to the defendant to rehabilitate damaged areas.¹³⁹ Several victims in these cases reportedly have not received the full amount of compensation prescribed by the courts,¹⁴⁰ and some cases are in the process of enforcing unpaid judgments against assets of the dissolved corporations.¹⁴¹

While these are not cases of strict liability involving extraterritorial obligations, they are nonetheless important to illustrate the potential application of this law to such situations. In reaching decisions in these cases, the courts applied the strict liability provisions of the National Environmental Quality Act. Therefore, the plaintiff did not have to prove that the act had been the result of a wilful or negligent act of the defendant. So long as the damages had been caused by a source of pollution owned or possessed by the defendant, compensation could be awarded to the plaintiff, including compensation for mental distress.¹⁴²

3.4 Criminal Liability

In addition to civil remedies, provisions of the Thai Criminal Code, the National Environmental Quality Act and other laws might also be used to pursue litigation in Thai courts. Criminal liability for human rights violations often only applies to individuals, and therefore only individual representatives of companies can be prosecuted for criminal acts perpetrated with the involvement of corporations. The different degrees of liability of individual company officials under Thai law will be further described in section 3.6.

Nevertheless, under certain laws, it is also possible for companies to be criminally liable in their corporate capacity for a criminal offence. This includes, for example, the Act Prescribing Offences Related to Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations B.E. 2499 (1956), where a fine is the primary sanction.¹⁴³ In this regard, Thailand's Supreme Court rendered a judgment indicating that

¹³⁸ The case was filed with the Administrative Court regarding the allegedly delayed action of relevant authorities to rehabilitate the area. See: EnLaw, 'Court Dismissed Case that Villagers in Nong Nae, Chachong sao Province, saying the Factory Department and Pollution Control Department did not delay in rehabilitating the area that was damaged from industrial wastes ', 13 June 2019, available at: <https://enlawfoundation.org/newweb/?p=4577>

¹³⁹ Even if one is successful in obtaining a favourable judgment, having that judgment enforced in practice in a satisfactory manner often remains elusive. For example, in the Klity Creek case, environmental restoration has been reportedly slow and obscure, and affected people have still not received compensation for years after the verdict. See for example, Nation, 'Lead-contaminated villages await justice two decades after verdict', 11 April 2018, available at: <https://www.nationthailand.com/national/30343011>

¹⁴⁰ ICJ, 'The Human Rights Consequences of the Eastern Economic Corridor and Special Economic Zones in Thailand', July 2020, p.82.

¹⁴¹ These include, for example, cases involving the lead contamination of Klity Creek in Kanchanaburi Province (progress updates are available at: <https://www.pcd.go.th/kity/%E0%B8%84%E0%B8%A3%E0%B8%B1%E0%B9%89%E0%B8%87%E0%B8%97%E0%B8%B5%E0%B9%881-63-2/> (in Thai)) and the contamination of heavy metals in lands and waters from a gold mining business in Loei Province. ICJ Telephone Interview, Secretary General of Enlaw Foundation, October 2020.

¹⁴² Judgment of the case between Mr. Wiron Rujichaiwat et al v. Thung Kam Co Ltd., Loei Provincial Court (Court of the First Instance), 13 December 2018, Red Case No. Sor.Wor.(Por)1/2561, pp. 49-50.

¹⁴³ For example, sections 3-24 of the Act. The Act provides for criminal liability of limited companies for offences such as their failure to keep a register of shareholders, their failure to prepare and deliver to each shareholder certificates for shares, or their failure to acts in accordance with several provisions of the Civil and Commercial Code. Available at: https://www.dbd.go.th/dbdweb_en/download/pdf_law/ACT_PRESCRIBING_OFFENCES_RELATED_T

a legal person – in other words, a company- may be criminally liable if the alleged criminal act had been committed within the scope of the companies’ objectives that were registered with the Ministry of Commerce and the company benefited from the criminal act.¹⁴⁴

Under Thai law, injured persons may file a criminal case to the investigator (public prosecution) or directly file a criminal case in a court (private prosecution). Notably, for an offence punishable under Thai law that has been committed outside of the Kingdom of Thailand, if a victim of a human rights abuse abroad pursues criminal action through the investigator reporting route, they would have to file a complaint with the responsible investigative or prosecutorial body. This would be the Attorney-General or the person serving *ad interim* as the Attorney-General, who, according to section 20 of the Criminal Procedure Code, can entrust any public prosecutor or inquirer to exercise the power of inquiry on their behalf.¹⁴⁵

For private prosecutions involving persons alleging injury who directly file a criminal case in a court pursuant to section 162(1) of the Criminal Procedure Code, complainants typically face challenges in pursuing the action. As they do not report the case to the responsible domestic investigator, they face challenges in resource capacity in gathering evidence. Seeking witness testimony in the absence of the investigative power vested with the responsible investigators under relevant domestic criminal law and the lack of expertise in evaluating such evidence are also other evident challenges.

Under international standards, the criminal prosecution of business enterprises or individuals (in their capacity as officers or employees of companies) should be provided for, particularly in situations of gross human rights abuses.¹⁴⁶ The CESCR has affirmed that “the most serious violations” of the ICESCR “should give rise to criminal liability of corporations and/or of the individuals responsible”. The Committee has recommended that prosecuting authorities “be made aware of their role in upholding Covenant rights”.¹⁴⁷

3.4.1 Criminal Code

At least three provisions of the Criminal Code may be used to hold representatives of companies accountable for human rights abuses if they have direct knowledge of such harmful activities.¹⁴⁸

Section 228 of the Criminal Code provides for criminal liability for those who “cause inundation or obstruction to the supply of water, which is a public utility”, if such act is “likely to endanger” or “causes danger” to “the other person or a thing belonging to the

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¹⁴⁴ Supreme Court Decisions No. 1669/2506 and 584/2508. See also, Assistant of Judges at the Supreme Court, ‘Summary of Judgments’, available at: <https://deka.in.th/view-42305.html>

¹⁴⁵ In contrast, in other cases, cases must be reported with the investigators under the Criminal Procedure Code – i.e. police investigators.

¹⁴⁶ ICJ, ‘Corporate Accountability for Abuses of Economic, Social & Cultural Rights in Conflict and Transition’, February 2020, pp. 84-85 (‘ICJ report on corporate accountability, February 2020’) available at: <https://www.icj.org/wp-content/uploads/2020/02/Universal-ESCR-accountability-guide-Publications-Reports-Thematic-report-2020-ENG.pdf>

¹⁴⁷ CESCR, General Comment No. 24, para 49.

¹⁴⁸ Section 59 of the Criminal Code provides that “a person shall be criminally liable only when such person commits an act intentionally, except in case of the law provides that such person must be liable when such person commits an act by negligence, or except in case of the law clearly provides that such person must be liable even though such person commits an act unintentionally.”

other person.” Section 237 makes liable those who “introduce a poisonous substance or any other substance likely to cause injury to health into food or water in any well, pond or reservoir, or any such food or water to be provided for public consumption.” Section 380 makes liable those who “cause water in wells, ponds or reservoirs provided for public use to become filthy”.

None of the company officials of Thai companies that have been accused by local communities of the host States to have committed a criminal offence, including violations causing transboundary impacts, have been brought to justice in Thai criminal courts. According to Thai lawyers interviewed by the ICJ, the reason for this is that in comparison with civil and administrative liabilities, the standard of proof of liability in criminal cases is higher and judges must be satisfied beyond reasonable doubt that corporate representatives are guilty.¹⁴⁹

3.4.2 Enhancement and Conservation of National Environmental Quality Act

Sections 98 to 110 of the National Environmental Quality Act impose criminal liability for environmental violations, including on company officials.

The law makes criminally liable, for example, those who illegally encroach upon, occupy, or enter public land to act in any manner which results in destruction, loss or damages to natural resources or other resources deemed under conservation by law.¹⁵⁰ It also provides liability for those who own or possess the point source of pollution but do not treat or dispose their waste water or other waste from their sources of pollution according to the law,¹⁵¹ or refrain from collecting data or reporting to authorities on their use of resources as required by law.¹⁵² The ICJ is not aware of any cases to date under this provision. If the conflict of laws and other jurisdictional hurdles can be overcome, the criminal provisions of the National Environmental Quality Act could be a viable option for pursuing a remedy.

3.5 Administrative Liability

In addition to civil and criminal provisions of the law, another legal avenue to pursue accountability is through administrative action in the Thai administrative court system.

Administrative sanctions and penalties by administrative and quasi-judicial mechanisms may be part of an effective remedy under international human rights law.¹⁵³ The CESCR has recommended that public contracts not be awarded to companies that have not provided information on the social or environmental impacts of their activities or that have not put in place measures to ensure that they act with due diligence to avoid or mitigate

¹⁴⁹ Section 227 of the Criminal Procedure Code provides that “the Court shall exercise its discretion in considering and weighing all the evidence taken. No judgment of conviction shall be delivered unless and until the Court is fully satisfied that an offence has actually been perpetrated and that the accused has committed that offence. Where any reasonable doubt exists as to whether or not the accused has committed the offence, the benefit of doubt shall be given to him.” See also: Sor.Rattanamanee Polkla, ‘Legal remedies do not only mean compensation - they mean prevention’, available at: <https://www.business-humanrights.org/en/legal-remedies-do-not-only-mean-compensation-they-mean-prevention>

¹⁵⁰ Section 98, National Environmental Quality Act.

¹⁵¹ Section 104, National Environmental Quality Act.

¹⁵² Section 106, National Environmental Quality Act.

¹⁵³ ICJ report on corporate accountability, February 2020, pp. 84-85.

any negative impacts on rights under the ICESCR.¹⁵⁴ While this would not address harm for human rights abuses after they have occurred, it can serve to prevent abuses.

In Thailand, the administrative court system is separate from the main judicial system (criminal and civil courts). The administrative courts have jurisdiction over any act by an official or agency that exercises administrative power.

Jurisdiction of Administrative Courts. Under section 9 of the Act on Establishment of Administrative Courts and Administrative Court Procedure B.E. 2542 (1999) (Act on Establishment of Administrative Courts), the courts have the jurisdiction to try and adjudicate issues in relation to an administrative agency or a State official relating to the exercise of their powers or a dispute in relation to an administrative contract.

From the plain language of the above provision, even if the violations of administrative law are committed outside Thailand, human rights abuses associated with or related to the exercise of powers of an administrative agency or a State official, or which relate to an administrative contract, could attract administrative liability for any agency or official involved. This is because its jurisdiction is defined by the type of offence and the identity of the defendant, not the location where the violations were committed.¹⁵⁵ This possibility will be further explored in [section 4.2.3](#).

Administrative Remedies. In terms of administrative remedies, subject to section 72 of the Act on Establishment of Administrative Courts, Thai administrative courts have the power to: (i) order revocation of a by-law or order or restrain an act of an administrative agency or State official; (ii) order an administrative agency or State official to perform a specific duty; (iii) order an administrative agency or State official to pay monetary compensation, deliver property or perform or omit an act with or without prescribing the time and other conditions; (iv) order a remedy towards the right or duty of the person concerned; and (v) order a person to act or refrain from any act in accordance with the law.

There are several instances in which an administrative court may grant affected individuals administrative remedies. For example, when projects receive a license or permission from administrative agency or State official for development and a company commits a human rights abuse, the administrative courts have the power to order such license and permission to be terminated. The court may also order the administrative agency or government official to pay money or deliver a particular service or product in compensation, or perform or omit from performing an act in accordance with the law.

State-owned enterprises (SOEs)

State-owned enterprises (SOEs) are companies that are wholly owned by the State, or in which the State owns more than fifty per cent of the company's capital.¹⁵⁶ SOEs often provide economic infrastructure for communications, power generation and distribution, transportation, water management, and financial institutions in Thailand.

Importantly for this report, SoEs are engaged in transnational business activity, and some operate in joint venture relationships with private sector companies in host countries.

¹⁵⁴ CESCR, General Comment No. 24, para 50.

¹⁵⁵ This is in line with the opinion of an academic from Chiang Mai University. ICJ Telephone Interview, Legal Academic from Chiang Mai University, October 2020.

¹⁵⁶ National Economic and Social Development Act B.E. 2521 (1978), Budget Procedure Act B.E. 2502 (1959), and State Enterprise Labour Relations Act B.E. 2543 (2000).

According to section 3 of the Act on Establishment of Administrative Courts, “administrative agency” also includes SOEs established by an Act or Royal Decree.¹⁵⁷ For example, the Electricity Generating Authority of Thailand (EGAT) that was established by the Electricity Generating Authority of Thailand Act¹⁵⁸ was found by the Supreme Administrative Court to be an administrative agency.¹⁵⁹ EGAT is a key company which is both directly involved in the energy generation business, and in other jointly run businesses in a limited company or joint venture, including in foreign countries.¹⁶⁰

The exercise of their powers as administrative agencies can therefore expose them to administrative liability. Those affected by wrongful or tortious action by SOEs can therefore – at least in principle – bring the case to the Thai Administrative Court seeking administrative remedies. There are some legal complexities to bringing such an action, including confusion depending on the nature of the contract, the contractual position of both parties, the origin of the SOEs, and other related factors. This will be further explored in section 4.7.

In at least one case, the administrative liabilities of a Thai TNC and governmental agencies which had allegedly committed human rights abuses outside Thailand, were examined. In the Xayaburi Dam Lawsuit, Thailand’s Central Administrative Court considered the liabilities of the defendants (EGAT, the National Energy Policy Council, Ministry of Energy, Ministry of Natural Resources and Environment, and the Cabinet) for failing to carry out a number of duties. These included failure to ensure proper public disclosure, information dissemination, sufficient and effective public hearings, and make an assessment of impacts on the environment, health, and society when concluding a Power Purchase Agreement (PPA) with a company operating the Xayaburi Dam in Lao PDR.

In this case, the plaintiffs, 37 Thai villagers who reside in Thailand, instead of pursuing criminal or civil damages, sought administrative remedies. They requested the Court to order the PPA, Cabinet Resolution dated 11 January 2011 and Resolution the National Energy Policy Council Resolution No. 4/2553 of the defendants, which approved the above noted draft PAA,¹⁶¹ to be terminated or repealed. They further requested the Court to order the defendants to carry out certain procedural safeguards as required under Thai law prior to the initiation of the PPA.

In the end, the Central Administrative Court dismissed the case on the basis that “the defendants did not neglect their duty.” The Court concluded that the PPA had fulfilled the required notification and consultation procedures because information related to the

¹⁵⁷ At least 25 organizations were established by Acts or Emergency Decrees, another 25 organizations were established by Royal Decrees or by virtue of the Establishment of Government Organizations Acts B.E. 2496, and at least two organizations were established by Announcements of the Coup. For example, State Railway of Thailand (SRT) that was established by the State Railway of Thailand Act B.E.2494; Bangkok Mass Transit Authority (BMTA) that was established by the BMTA Royal Decree B.E. 2519; and Expressway Authority of Thailand that was established by Coup Announcement No. 290 B.E. 2515.

¹⁵⁸ Electricity Generating Authority of Thailand Act, available at: <https://www.egat.co.th/en/images/about-egat/EGAT-Act-BE-2511.pdf>

¹⁵⁹ Supreme Administrative Court Decision No. 582/2554, Kor.Sor.8/2556. See also: Administrative Court, ‘Administrative Court Decision’, Vol 4, March 2013, available at: http://www.admincourt.go.th/admincourt/upload/webcms/Academic/Academic_140219_154052.pdf

¹⁶⁰ EGAT, ‘Overview’, 2020, available at: <https://www.egat.co.th/en/images/publication/EGAT-Overview-2020/EGAT-Overview-2020.pdf>

¹⁶¹ Cabinet Resolution dated 11 January 2011, available at: http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99226213.

project had been published on the websites of the Ministry of Energy, and the Office of the Permanent Secretary in the Prime Minister's Office. The Court also noted that the project did not entail a requirement for an environmental impact assessment under Thai law because the defendants were just a purchaser with no obligation to conduct any assessments.¹⁶² At the time of this report, the case is under review at the Supreme Administrative Court.¹⁶³

While the outcome was not positive for the plaintiffs, this example suggests that administrative sanctions could in principle be used to scrutinize the conduct of and hold accountable governments or State-owned enterprises abroad, at least in circumstances where it could result in transboundary impacts to communities in Thailand.

3.6 Liabilities of Company Officials

Liabilities of companies, their shareholders, directors and partners are regulated by the Civil and Commercial Code for private limited companies, and the Public Company Act for public limited companies. For SOEs, liability is regulated by statutes setting up the SOEs and other relevant laws.

As noted in sections 3.3 to 3.5, under the Thai Civil and Commercial Code and the National Environmental Quality Act, companies and their officials can attract civil liabilities, including under contract law and tort law. In criminal cases, it is also possible for companies and their officials to be held criminally liable for a criminal offence under Thai laws, including the Criminal Code, National Environmental Quality Act, and the Act Prescribing Offences Related to Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations. An administrative agency, a State official or SOE that exercises administrative power may also attract administrative liabilities subject to the Act on Establishment of Administrative Courts and Administrative Court Procedure.

As indicated above, individual company officials can also be held personally liable. Depending on the type of business entity for which they work, they will have different duties and are therefore subject to different degrees of liability under Thai laws, which will be further described in this section.

3.6.1 Limited Companies

Shareholders, directors and executives of limited companies are subject to different degrees of liability under Thai law. This is important for an analysis of ETOs because these distinctions can serve to shield individual actors involved in the abuses from liability that may arise from a company's illegal actions.

Shareholders

In both private and public limited companies, shareholders enjoy limited liability to the amount, if any, unpaid on shares held by them.¹⁶⁴ This means their financial liability is limited to a fixed sum, which is the value of their unpaid shares.

¹⁶² Administrative Court, 'Black Case No. Sor.493/2555 and Red Case no. Sor.59/2556', Judgment, 25 December 2015, pp. 16-17 and 26-27.

¹⁶³ Thai PBS, 'Villagers Along Mekong River submitted Appeal on Xayaburi Case, saying the Case is an Example of Impacts in AEC Era', 25 January 2016, available at: <https://news.thaipbs.or.th/content/7540> (in Thai)

¹⁶⁴ Section 1096, Civil and Commercial Code; Section 15, Public Company Act.

This results in a legal separation between the company and its shareholders. Shareholders are liable for violations in only very limited circumstances, and in those circumstances, their liability is to the company itself, and not a third-party individual.¹⁶⁵

The limitations on liabilities of shareholders can serve as a shield to liability on companies. Companies may do this by setting up a limited company or joint venture,¹⁶⁶ positioning the company as a shareholder with limited liability. When a violation occurs and results in liability, a limited company with insufficient assets may be forced to liquidate, even be made bankrupt. Under such a circumstance, shareholders will enjoy immunity from liability. Only the directors or employees of these limited liability companies may still be subject to certain levels of liability as will be further explained below.

Directors, Executives and other Company Employees

In certain circumstances, corporate directors, executive management and other company employees may be held personally liable in civil lawsuits and criminal prosecutions if they have engaged in certain prohibited behaviour. Indeed, in Thailand, there are instances where a third party may sue the directors as additional defendants at the same time as suing the company.

Under Thai law, in civil cases, directors are not liable to third persons as they are considered “agents” of the company, which is the “principal”.¹⁶⁷

According to the Civil Procedure Code, a director (agent) will only be personally liable for any injury resulting from negligence, omission, or from an act done without, or in excess of, his or her authority (as set out in the Articles of Association).¹⁶⁸ In such cases, the burden of proof lies with the plaintiff. While Thai courts have the power to issue an order directing the party to the case to produce evidence to the Courts, including those in the possession of the opposing party,¹⁶⁹ this can be difficult partly due to limited access and knowledge about the existence of corporate held information. (see further, [section 4.1.2](#)).¹⁷⁰ In the case of ETOs, this difficulty is compounded by the fact that such information might be located in several different jurisdictions.

In contrast, an executive of a private or public limited company who is not a director of the company but directs the affairs of a company is not considered an “agent”. Similar to other employees, executives who are actively involved in the abuses may be personally liable under tort law for any wrongful act committed in the course of their employment, for which the company can also be held jointly liable.

¹⁶⁵ For example, pursuant to section 30 of the Act Prescribing Offences Related to Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations, B.E. 2499 (1956), shareholders will be liable to a fine not exceeding ten thousand Baht if he/she accepts or agrees to accept any special benefit for himself or any other person in return for voting or refraining from voting at a general meeting of a limited company.

¹⁶⁶ Under Thai law, there are two types of joint ventures: (i) joint ventures which take the form of a partnership established by contract between the parties, which are as ordinary unregistered partnerships where all parties will have unlimited civil and criminal liabilities similar to partners in an ordinary unregistered partnership under the Civil and Commercial Code; and (ii) joint ventures registered as a legal entity, that is, as a limited company.

¹⁶⁷ Sections 77 and 1167 of the Civil and Commercial Code; Section 97 of the Public Company Act.

¹⁶⁸ Sections 799, 807 and 812 of the Civil and Commercial Code; Supreme Court Judgment No. 4193/2528.

¹⁶⁹ Section 92 of the Civil Procedure Code.

¹⁷⁰ ICJ Interview, Lawyer of Community Resource Center (CRC) who had experience litigating a number of cross-border cases, Bangkok, 17 March 2020.

In criminal cases, under certain laws, directors of private limited companies can be subject to criminal liability if the companies committed offences, including pursuant to the Act Amending Provisions of Laws Relating to Criminal Liability of Juristic Person Representatives B.E. 2560 (2017).¹⁷¹ “Directors” and “managers or persons responsible for the business operations” can be held liable if a criminal act is derived from their “order or action” or “where the person has a duty to issue an order or to take action but failed to do so thereby causing the juristic person to have committed the offence”.¹⁷² These include certain criminal offences under the Building Control Act, National Environmental Quality Preservation and Promotion Act, Factories Act, Immigration Act, Revenue Code, Consumer Protection Act, Social Security Act, and Energy Business Operation Act, laws that are particularly engaged in respect of ETOs as they govern the protection of the environment and human rights in investment policies.

As for public limited companies, directors and, for certain offences, managers or persons responsible for the business operations, may also be exposed to criminal liabilities, including for offences under the Public Company Act¹⁷³ and the Securities and Exchange Act,¹⁷⁴ among other laws. Similar to civil liability, such liability can be difficult to prove due to limited access to corporate held information, particularly if it is held abroad.

3.6.2 Liability of Company Officials in Environmental Cases

Thai law makes it easier to hold a company’s officials accountable for wrongful conduct in cases involving destruction of the environment. According to Section 111 of the National Environmental Quality Act, directors or managers who are “responsible for the business operation” of a company are liable for the acts of the company.

While this law has yet to be used to hold officials of Thai TNCs accountable for alleged human rights abuses committed by companies outside of Thailand, it has been used against directors and managers of Thai companies involved in abuses committed within Thailand. For example, in a case between villagers and a company accused of lead contamination of Klity Creek (Supreme Court Decision No. 15219/2558), the Supreme Court ruled that a “director who is authorized to sign on behalf of the company” must be jointly liable with the company because he “is a director who had responsibilities to run the company, [and] possessed lead which was the source of pollution jointly with [the Company], which owned such sources of pollution”. In that case, the Director, jointly with the Company, was ordered to compensate eight plaintiffs, in amounts ranging from 2,150,000 to 3,150,000 Baht per person (approx. USD 68,800 to USD 100,800), and to restore the creek to its uncontaminated state at their own expense.¹⁷⁵

¹⁷¹ Act Amending Provisions of Laws Relating to Criminal Liability of Juristic Person Representatives, available at: https://www.dbd.go.th/download/PDF_law/law_respons_juristic_600210.PDF

¹⁷² As set out in 76 laws, including the Act Prescribing Offenses Relating to Registered Partnerships, Limited Partnerships, Limited Companies, Associations and Foundations; the Immigration Act; the Consumer Protection Act; Anti-Money Laundering Act; Promotion and Conservation of National Environmental Quality Act; Hazard Substances Act; and Factory Act.

¹⁷³ For example, sections 191 to 222 of the Public Company Act, including offences for failing to comply with several provisions of the Act (sections 195,196,197,202, 207), acts in conflict of the interests of the company (sections 203 and 204) and dishonest acts (sections 214, 215 and 216). Importantly, a director can be held jointly liable with the Company: “[i]n the case where a company had committed an offence and was punished under this Act, the director who sided with of the offence commission or did not make reasonable effect to prevent such offence commission shall also be liable to punishment provided for such offence.” (section 222)

¹⁷⁴ For example, sections 268 to 281, 296, 298 and 313, Securities and Exchange Act.

¹⁷⁵ Supreme Court, Decision No.15219/2558, 30 December 2015, pp. 27 and 42, available at: <http://enlawfoundation.org/newweb/wp-content/uploads/Decision-Klity8-SupremeCourt.pdf>

3.6.3 Liability of Officials of State-Owned Enterprises

Thai SOEs are established by different laws which can roughly be categorized into public laws and private laws.¹⁷⁶ SOEs and their officials are thereby subject to varying types of liabilities. Given the prominence of SOEs in investments abroad, these provisions will be of particular interest to lawyers exploring legal avenues to hold companies accountable in the Thai justice system.

Directors, executives and employees of SOEs formed under private laws¹⁷⁷ can be held liable for a tortious act in accordance with the Civil and Commercial Code (see section 3.6.1 above). If an SOE has been formed under public laws,¹⁷⁸ the relationship between its directors and officials and the SOE is governed by the Tortious Liability of Officials Act B.E. 2539.¹⁷⁹ In such a case the injured person must directly sue the State agency for a remedy, and cannot sue an individual official.¹⁸⁰ SOEs that are formed under public law will be responsible for any consequence resulting from tortious acts committed by their officials during the course of their duty or employment.¹⁸¹ For example, in the above noted Xayaburi Dam case, action was brought only against EGAT, but not their directors and officials, for failing to carry out their duties.

In certain cases, officials of SOEs may also have duties and incur liabilities as an “official” as set out in the Criminal Code, and can be exposed to criminal liability, including in accordance with sections 147 to 166 of the Criminal Code.¹⁸² These provisions criminalize actions of malfeasance in office, such as using official powers to coerce another, acceptance of a bribe, and wrongful exercise of duties. They cover, for example, officials of the State Railway of Thailand¹⁸³ and the Industrial Estate Authority of Thailand.¹⁸⁴

In addition, a “chairperson, vice chairperson or board member” or “any person obliged to render any duty” in a SOE where the total capital or more than fifty percent of the capital belongs to the State can be held criminally liable for offences stipulated in the Act on

¹⁷⁶ Boonkiat Karawagphan et al, ‘State Enterprises’, available at:

<http://wiki.kpi.ac.th/index.php?title=%E0%B8%A3%E0%B8%B1%E0%B8%90%E0%B8%A7%E0%B8%B4%E0%B8%AA%E0%B8%B2%E0%B8%AB%E0%B8%81%E0%B8%B4%E0%B8%88>]

¹⁷⁷ These include the PTT Public Company Limited, Airports of Thailand Public Company Limited, Thailand Post Private Company Limited, and TOT Public Company Limited. At least 13 organizations were registered as private limited companies under the Civil and Commercial Code or public limited companies under the Public Company Act.

¹⁷⁸ These include, for example, the Electricity Generating Authority of Thailand (EGAT) that was established by the Electricity Generating Authority of Thailand Act B.E. 2511; State Railway of Thailand (SRT) that was established by the State Railway of Thailand Act B.E.2494; Bangkok Mass Transit Authority (BMTA) that was established by the BMTA Royal Decree B.E. 2519; and Expressway Authority of Thailand that was established by Coup Announcement No. 290 B.E. 2515.

¹⁷⁹ Section 4, Tortious Liability of Officials Act.

¹⁸⁰ Section 5 of the Tortious Liability of Officials Act states that “a State agency shall be held liable to an injured person for the consequence of a tortious act committed by its official in the course of his or her performance of duty. In this case, the injured person may directly sue the State agency but cannot sue the official”.

¹⁸¹ Subject to Section 8 of the Tortious Liability of Officials Act, if an SOE has to pay compensatory damages to the injured person, it has the right to claim payment from damage from the officials if such person committed such act with intent or with gross negligence.

¹⁸² State Enterprise Policy Office, ‘Liability’, available at: <http://www.sepo.go.th/mof/contents/31>

¹⁸³ Section 18 of the State Railway of Thailand Act B.E. 2494, and Supreme Court Decision No. 148/2530.

¹⁸⁴ Section 61 of the Industrial Estate Authority of Thailand Act B.E. 2522.

Offence of State Organization or State Agency Official B.E. 2502 (1959).¹⁸⁵ These offences include the following crimes, for example: "an official who, in abuse of his or her official authority, coerces or encourages another to provide or obtain any property or benefit" (section 5); "unlawfully solicits, accepts or promises to accept any property or benefit in exchange for the performance of or refrain from any act in his official capacity" (section 6); "dishonestly exercises his official authority if he or she is in charge of the purchase, creation, administration or safekeeping of any property" (section 8); or "unlawfully or dishonestly performs or refrains from his official duty so as to impair another" (section 11). Such SOEs include EGAT, which has the Ministries of Energy and Finance as major shareholders. This means that EGAT officials can be sued via this route.

¹⁸⁵ Section 3 of the Act on Offence of State Organization or State Agency Official B.E. 2502.

4. Obstacles to Accessing Justice

Having set out the main aspects of the legal framework as a foundation, the section below discusses the practical and legal challenges to securing access to justice of victims for the conduct of business enterprises and their officials. These challenges include a number of jurisdictional and procedural barriers in judicial processes. They also encompass difficulties in relation to the status of companies as legal persons as opposed to natural persons, limitations on judicial authorities and lawyers, and the legal nature of corporations as distinct juridical entities.

As discussed above, States have an obligation to ensure access to justice for human rights abuses committed by non-State actors including private companies, as well as State owned enterprises. States have a duty to take necessary steps to address challenges and barriers in accessing justice to “prevent a denial of justice and ensure the right to effective remedy and reparation”.¹⁸⁶ They have an obligation to “remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes, providing legal aid and other funding schemes to claimants, enabling human rights-related class actions and public interest litigation, facilitating access to relevant information and the collection of evidence abroad, including witness testimony, and allowing such evidence to be presented in judicial proceedings”.¹⁸⁷

Principle 26 of the UNGPs reinforces the duty of States to “reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy”, including “the way in which legal responsibility is attributed among members of a corporate group under domestic... civil laws which facilitate the avoidance of appropriate accountability”.

4.1 Corporate Personality: Complex Corporate Structures and “Piercing the Corporate Veil”

A significant legal hurdle for bringing human rights cases is navigating complex structures of companies that are constituted subject to corporate law. These structures effectively serve to shield companies, shareholders and directors from liability.

4.1.1 Complex Corporate Structures

Companies that are affiliated to TNCs are often controlled through complex vertical chains of ownership involving multiple entities and jurisdictions. Ownership structures tend to be made up of a parent entity and affiliate companies, in a home State or in one or more host States in different jurisdictions with varying levels of equity ownership or the value of ownership interest in a business (such as shares of stock held) that determine the degree of control that the parent entity can exercise over an affiliate.¹⁸⁸

Given the complexities of different corporate arrangements and jurisdictions, ascertaining corporate liability can be complicated. In many cases of corporations investing abroad, the companies create “secondary establishments” such as subsidiary companies¹⁸⁹ in host

¹⁸⁶ CESCR, General Comment No. 24, para 44.

¹⁸⁷ Ibid.

¹⁸⁸ UNCTAD, ‘World Investment Report 2016: Investor Nationality: Policy Challenges’, 2016, available at: https://unctad.org/en/PublicationsLibrary/wir2016_en.pdf

¹⁸⁹ For private limited companies, no clear definition is provided under Thai law for subsidiaries. For a public limited company, section 89/1 of the Securities and Exchange Act states that “subsidiary” of a publicly traded company is: (i) a limited company or a public limited company over which the company has control; (ii) a limited company or a public limited company over which the subsidiary under (i) has control; or (iii) a limited company or a public limited company under the chain of control beginning with that under control of the subsidiary under (ii). The

countries. For taxation and regulatory purposes, a subsidiary company is a legal entity distinct from its parent company and, where they exist, from the parent company's shareholders. The parent company retains a degree of control over its subsidiary, either through holding a majority or all of its shares, or, where a parent holds less than 50 percent of the shares, through specific legal arrangements giving some or full de facto control and authority to intervene in the subsidiary's activities. This is important for identifying how to establish liability for human rights abuses by a parent company. Liability may often require a determination as to whether a subsidiary has acted with full knowledge or approval of or even direction from its parent company.

4.1.2 Separate Legal Personality and "Piercing the Corporate Veil"

In many jurisdictions, there is a legal presumption that the conduct of a subsidiary is not associated with its parent for the purpose of assigning legal responsibility, given that the two are separate legal entities (the separate legal personality doctrine). Under this doctrine, a parent company will generally not be held liable for its subsidiary's conduct, even where it may hold 100 percent of its subsidiary's shares.¹⁹⁰ This principle generally applies in Thailand. Several issues arise within this context, namely in relation to: (i) limited shareholder liability; (ii) lack of mechanisms to enforce awards of compensation; (iii) establishment of liability of a parent company; and (iv) evidentiary challenges including barriers to access corporate documentation.

Limited Shareholder Liability

In Thailand, when wrongful conduct occurs giving rise to liability, shareholders with limited liability can evade responsibility for the human rights abuse. For example, in a case where an affiliate company that abuses the rights of people in local communities in Thailand or abroad by releasing toxic heavy metals into their water supply causing harm to health, according to Thai law, a parent company, which is a shareholder of the affiliated company, cannot be held liable for any damage caused by that company. This is because it is deemed to be a distinct company from the entity directly causing the harm. And even if it were to be found responsible, shareholder liability would be limited to the amount unpaid on the shares of the company held by that shareholder, as stipulated in section 1096 of the Civil and Commercial Code and section 15 of the Public Company Act.

Lack of Mechanisms to Enforce Awards of Compensation

Claimants are often limited in their avenues to enforce awards of reparation, particularly monetary compensation, if shareholders and managers abandon a company, remove valuable property or assets from its ownership, force the company to close, or leave it susceptible to liquidation and bankruptcy by leaving it with insufficient assets.¹⁹¹ As a consequence, the affiliated company may simply not have enough funds at its disposal to offer meaningful compensation to the victims in the event of a court order.

Ministerial Regulation No. 4 (B.E. 2535) also clarifies that the "affiliated companies" (subsidiaries) of a public limited company referred to in section 114(1) of the PCA are those entities where the company: (i) has power to control the nomination and removal of directors; and (ii) holds more than 50% of the aggregated shares. Ministerial Regulation No. 4 (B.E. 2535), available at: https://www.dbd.go.th/news_view.php?id=1012 (in Thai)

¹⁹⁰ This will not be the case with other in-company relationships, such as between branches or subordinate agencies to parent companies whose conduct can be associated with its parent and thus liability of the company may arise.

¹⁹¹ This was raised and discussed by participants at a workshop held by the ICJ and Foundation for Environment and Natural Resources (FENR) on 21 July 2019 in Chiang Mai.

Such limitation of shareholder liability may act as a barrier to ensuring that victims can obtain effective remedy and reparation and as a disincentive to companies to ensure a culture of good governance and reduce the risk of involvement in human rights abuses.¹⁹²

Establishing Parent Company Liability

As stated above, liability of a parent company can be limited if they position themselves as shareholders. However, there is a well-established body of international and domestic standards which indicate that a responsible parent company should exercise due diligence in monitoring and, where necessary, regulating the activities of its subsidiaries in order to prevent or mitigate the risk of adverse impacts on human rights and the environment.¹⁹³ If they fail in these due diligence obligations, they may be held liable for impacts caused by their subsidiaries.

This duty of due diligence is well established. The CESCR has asserted in relation to State obligations under the ICESCR that:

“the extraterritorial obligation to protect requires States Parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control, especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.”¹⁹⁴ [...]

“In discharging their duty to protect, States Parties should also require corporations to deploy their best efforts to ensure that entities whose conduct those corporations may influence, such as subsidiaries (including all business entities in which they have invested, whether registered under the State party’s laws or under the laws of another State) or business partners (including suppliers, franchisees and subcontractors), respect Covenant rights. Corporations domiciled in the territory and/or jurisdiction of States Parties should be required to act with due diligence to identify, prevent and address abuses to Covenant rights by such subsidiaries and business partners, wherever they may be located.”¹⁹⁵

In this regard, the CESCR acknowledged that:

“because of how corporate groups are organized, business entities routinely escape liability by hiding behind the so-called corporate veil, as the parent company seeks

¹⁹² ICJ, ‘Corporate Complicity & Legal Accountability. Volume 3: Civil Remedies’, 2008, p. 46, available at: <https://www.icj.org/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol3-publication-2009-eng.pdf>

¹⁹³ For example, Guiding Principles 13, 17 and 22 of the UNGPs. Among others, subject to Guiding Principle 13 of the UNGPs, the responsibility to avoid causing or contributing to adverse human rights impacts and to address those impacts encompasses impacts caused or contributed to by both the parent itself and its subsidiary, including adverse impacts to which the enterprise’s own operations do not contribute directly. Likewise, the principles on which the UN Global Compact operate assume the responsibility of a parent company for its subsidiaries. The Compact’s website explains: “The UN Global Compact applies the leadership principle. If the CEO of a company’s global parent (holding, group, etc.) embraces the Ten Principles of the UN Global Compact by sending a letter to the UN Secretary-General, the UN Global Compact will post only the name of the parent company on the global list assuming that all subsidiaries participate as well.” Available at: <https://www.unglobalcompact.org/about/faq>

¹⁹⁴ CESCR, General Comment No. 24, para 30.

¹⁹⁵ Ibid, para 33.

to avoid liability for the acts of the subsidiary even when it would have been in a position to influence its conduct”.¹⁹⁶

The CESCR emphasized that States should take measures in this respect including through “establishing parent company or group liability regimes” in their legal systems.¹⁹⁷

The Committee on the Rights of the Child similarly highlights the obligation of States to require that companies undertake child rights due diligence.¹⁹⁸

Principle 26 of the UNGPs suggests that States should address barriers that result from “the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability.”¹⁹⁹

There have also been a number of cases before national courts – in both common law and civil law jurisdictions – that have sought to identify the appropriate circumstances in which courts may set aside parent companies’ limited liability and hold them accountable for damage caused by their subsidiaries. These cases recognize that parent companies may owe a duty to exercise reasonable care in monitoring and controlling their subsidiaries in relation to human rights and environmental protection.²⁰⁰ While the jurisprudence comes from a variety of national jurisdictions not binding on Thailand, the reasoning may be persuasive as justice sector actors consider similar cases.

In 2019, in the landmark judgment of *Vedanta Resources Public Limited Company and another (Appellants) v Lungowe and others (Respondents)*,²⁰¹ the Supreme Court of the United Kingdom allowed a complaint brought by 1,826 Zambian villagers²⁰² against UK-based Vedanta PCL and its Zambian subsidiary Konkola Copper Mines (KCM) to proceed to trial. The Supreme Court held that the claimants could bring their case in the UK, despite the fact that the alleged tort and harm caused by the Nchanga Mine operated by KCM had occurred in Zambia.

Although KCM was not a wholly owned subsidiary of Vedanta PCL, the Court found that “materials published by Vedanta state that its ultimate control of KCM (was not) to be regarded as any less than it would be if wholly owned”.²⁰³ This was ascertained by

¹⁹⁶ Ibid, para 42.

¹⁹⁷ Ibid, para 44.

¹⁹⁸ CESCR, General Comment No. 16, paras 62-65.

¹⁹⁹ OHCHR, ‘UNGPs: Implementing the United Nations “Protect, Respect and Remedy” Framework’, 2011, at 29, available at:

https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

²⁰⁰ See also: ICJ, ‘Written Submissions of the International Commission of Jurists and the Corporate Responsibility (Core) Coalition Limited’, June 2020, paras 27-33, available at:

<https://www.icj.org/wp-content/uploads/2020/06/Nigeri-Okpabi-Advocacy-Legal-submission-2020-ENG.pdf>

²⁰¹ UK Supreme Court, ‘Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)’, Judgement, 10 April 2019, available at: <https://www.icj.org/wp-content/uploads/2019/04/uksc-2017-0185-judgment.pdf>

²⁰² The claimant claimed that the discharge of toxic waste from the Nchanga Mine operated by KCM had polluted the local waterways, causing serious harm to health and livelihood of the local communities.

²⁰³ UK Supreme Court, ‘Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)’, Judgement, 10 April 2019, p. 2, available at: <https://www.icj.org/wp-content/uploads/2019/04/uksc-2017-0185-judgment.pdf>

examining how the relationship between the two companies operated in practices, irrespective of their formal relationship as distance entities.²⁰⁴

The Vedanta ruling illustrates how a parent company like Vedanta would owe a “duty of care”²⁰⁵ to supervise and ensure persons under its care such as KCM do not cause harm to people living in the vicinity of their subsidiaries. Importantly, the Court also asserted jurisdiction over KCM even though the company is based in Zambia on the basis that the claimants are at the risk of being denied access to justice in Zambia.²⁰⁶

Cases in other jurisdictions have shown where similar duty of care may apply.

Recherches Internationales Québec v Cambior Inc

In 1988, the Superior Court of Quebec determined that it had jurisdiction to hear claims against the Canadian parent of a Guyanese mining company, holding that the parent company could in principle be liable in respect of damage caused by its subsidiary’s activities. In reaching this conclusion, the Court noted that there was some evidence of the parent company having involved itself in the subsidiary’s activities, for example, by financing a feasibility study for the mining project in issue.²⁰⁷

Choc v Hudbay Minerals Inc

In 2013, the Superior Court of Ontario dismissed an application to strike out claims against a Canadian mining company in respect of violence said to have been perpetrated by security personnel working for one of its subsidiaries in Guatemala. The Court held that a duty of care could arise from an examination of its relations and conduct, including that it had made public statements about its adoption of international standards applicable to the use of private security forces at resource extraction projects.²⁰⁸

²⁰⁴ Norton Rose Fulbright, ‘UK Supreme Court clarifies issues on parent company liability in Lungowe v Vedanta’, April 2019, available at: <https://www.nortonrosefulbright.com/en/knowledge/publications/70fc8211/uk-supreme-court-clarifies-issues-on-parent-company-liability-in-lungowe-v-vedanta>. The Court ruled that Vedanta had exercised sufficient influence of the management of the mine. Vedanta had, for example, published a sustainability report which emphasized how the Board of the parent company had oversight of its subsidiaries; had entered into a management and shareholders agreement under which it was obligated to provide various services to KCM, including employee training, provided health, safety and environmental training across its group companies; had provided financial support to KCM; had released various public statements emphasizing its commitment to address environmental risks and technical shortcomings in KCM’s mining infrastructure; and exercised control over KCM, as evidenced by a former employee.

²⁰⁵ The principle of duty of care is a common law principle which imposes a legal obligation on individuals, including directors and officers of a corporation, to avoid acts or omissions which can be reasonably foreseen to injure or harm other people. Courts will generally adjudicate on cases brought against directors and officers who have failed to meet their duty of care. This principle does not exist in Thai law.

²⁰⁶ ICJ, ‘Vedanta Resources and subsidiary to face justice in the UK over human rights harms in Zambia’, 10 April 2019, available at: <https://www.icj.org/vedanta-resources-and-subsiary-to-face-justice-in-the-uk-over-human-rights-harms-in-zambia/>

²⁰⁷ Superior Court of Quebec, ‘Recherches Internationales Québec v Cambior Inc’, 1988, QJ No 2554, paras 20-27. Having concluded that it had jurisdiction, however, the Court declined to exercise it, on the grounds that Guyana was the appropriate forum on the facts of the case.

²⁰⁸ Superior Court of Ontario, ‘Choc v Hudbay Minerals Inc’, 2013, ONSC 1414, paras 50-75.

James Hardie Industries plc v White

In 2018, the Court of Appeal of New Zealand upheld a first instance judge's refusal to strike out claims founded on the alleged duty of care of three parent companies, noting that the ultimate parent company's annual reports indicated a degree of oversight and direction of the operations of subsidiary companies. The Court also indicated that marketing websites had presented the corporate group as a single entity, with an international reputation and resources. These factors and publicly available material were sufficient to raise a serious issue as to whether the parent companies had acted in such a way as to give rise to a duty of care.²⁰⁹

Establishing control in order to pierce the corporate veil and extend liability to its individual directors or shareholders, particularly in the case of TNCs, may pose serious challenges. Even ownership by a single stockholder of all of the capital stocks of a corporation is not in itself a sufficient ground to disregard a corporation's separate corporate personality.²¹⁰

If some level of influence or control of the parent company can be established, such as in *Vedanta Resources*, and a subsidiary's business policies are set or approved by its parent company and the harm has been caused by conduct undertaken in the course of implementing such policies, it may be presumed that a parent company should have been able to exercise influence on this course of conduct. On the other hand, if the harm has been caused by a course of conduct undertaken outside of company policy, it will be less likely that the parent company will be considered to have had the ability to prevent or limit the harm through preventive measures.²¹¹

Evidentiary Challenge of Access to Corporate Documentation

In Thailand, it is reportedly difficult to identify and procure documents or information that would go to establishing the nature of the links between a parent company and its subsidiaries. Such material is normally contained in confidential documents concerning a business to which outsiders may not have access.²¹² This testimony of the Thai lawyer is consistent with the CESCR's indication that a barrier to access to effective remedies for victims of human rights abuses by business entities includes "the difficulty of accessing information and evidence to substantiate claims, much of which is often in the hands of the corporate defendant".²¹³

Under Thai law, a court may allow or even order confidential documents or business documents obtained by a defendant to be presented in judicial proceedings. However, under section 92 of the Civil Procedure Code, a party to the litigation or a person who is required to give testimony or produce any evidence may refuse to produce confidential official documents, information involving any intervention, design or other work protected

²⁰⁹ Court of Appeal of New Zealand, 'James Hardie Industries plc v White', 2018, NZCA 580, paras. 84-89, 92-93 and 117-26.

²¹⁰ ICJ, 'Access to Justice: Human Rights Abuses Involving Corporations: Philippines', 2010, available at: <https://www.icj.org/access-to-justice-human-rights-abuses-involving-corporations-in-philippines/>

²¹¹ ICJ, 'Corporate Complicity & Legal Accountability. Volume 3: Civil Remedies', 2008, pp. 48-49, available at: <https://www.icj.org/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol3-publication-2009-eng.pdf>

²¹² ICJ Interview, Lawyer of Community Resource Center (CRC), who had experience litigating a number of cross-border cases, Bangkok, 17 March 2020. This was raised and discussed by participants at a workshop held by the ICJ and Foundation for Environment and Natural Resources (FENR) on 21 July 2019 in Chiang Mai.

²¹³ CESCR, General Comment No. 24, para 42.

from publicity by law, such as information involving intellectual property or trade secrets.²¹⁴ However, a court has the power to summon the person concerned to appear before the court and give an explanation for not producing the requested evidence. If the court finds the explanation is not well-grounded, the court may order production of the evidence.²¹⁵

The CESCR has stressed the obligation of States to take measures to ensure the facilitation “of access to relevant information and the collection of evidence abroad, including witness testimony, and allowing such evidence to be presented in judicial proceedings”,²¹⁶ including by introducing “mandatory disclosure laws” and “procedural rules allowing victims to obtain the disclosure of evidence detained by the defendant (business enterprise)”. Such measures should include: (i) shifting the burden of proof if information relating to a claim lies “wholly or in part within the exclusive knowledge of the corporate defendant”; (ii) defining disclosure refusal restrictively to unnecessary or unwarranted “trade secrets” and privacy or confidentiality related refusals; and (iii) ensuring cooperation between different States and judicial and enforcement agencies “in order to promote information sharing and transparency and prevent the denial of justice”.²¹⁷

In the context of cross-border investment, in the Xayaburi Dam Lawsuit, the plaintiffs stated that their request to EGAT and the Department of Water Resource and others to disclose the Feasibility Study of the Project as well the Environmental and Social Impact Assessment Reports were rejected. The two agencies explained that such documents belonged to the defendant company, which was registered under the law of Lao PDR. The above noted reports were also developed to fulfil the requirements as set out in the laws of Lao PDR and constituted a part of the Concession Agreement between the Lao Government and the company, and subject to the “confidentiality” clause of the Agreement. Accordingly, it was asserted that the defendants could not share the documents to the plaintiffs or the public. This justification was essentially accepted by the Central Administrative Court in December 2015, citing that the defendants “can disclose the information of the project only as much as they were allowed by the Lao Government”.²¹⁸ Such reasons do not seem to comply with the ICESCR, as interpreted by the CESCR.

4.1.3 Establishing Parent Company Liability under Thai Law: International Law and Standards

The “piercing the corporate veil” principle has not been codified expressly under Thai law.²¹⁹ However, certain provisions of Thai law may be invoked to establish parent

²¹⁴ Subject to section 3 of Thailand’s Trade Secrets Act B.E. 2545, trade secret means “trade information not yet publicly known or not yet accessible by persons who are normally connected with the information. The commercial values of which derive from its secrecy and that the controller of the trade secrets has taken appropriate measures to maintain the secrecy.” Under the Act, the disclosure of or the deprivation or usage of trade secrets without the consent of the owner in a manner contrary to honest trade practices may infringe upon the trade secret rights under this Act unless it falls within the scope of the exemption clauses provided in section 7 of the Act. Available at: https://www.ipthailand.go.th/images/781/2_1.pdf

²¹⁵ Section 92, para 3, of the Civil Procedure Code.

²¹⁶ CESCR, General Comment No. 24, para 44.

²¹⁷ CESCR, General Comment No. 24, paras 44-45.

²¹⁸ Administrative Court, ‘Black Case No. Sor.493/2555 and Red Case no. Sor.59/2556’, Judgment, 25 December 2015, pp. 16-17 and 28.

²¹⁹ Thatda Weerawut, ‘Shareholder and the Joint-Accountability with the Corporate’, available at: <http://libdoc.dpu.ac.th/mtext/article/508511.pdf>. It was also suggested that Thai courts may also apply the piercing the corporate veil doctrine by using section 5 of the Civil and Commercial Code

company liability. Three provisions of Thai law are relevant in this regard: Section 44 of the Consumer Case Procedure Act and sections 5 and 821 of the Civil and Commercial Code.

Consumer Protection Act

Section 44 of the Consumer Protection Act provides that shareholders or any person with the power to control the operations of a company may be jointly liable for obligations owed to a consumer if it appears that such a business operator acts in bad faith and the business operator's property is insufficient to satisfy obligations under the complaint.²²⁰ Thailand's Supreme Court has held that a second defendant (a public company) was a parent of the first defendant (a private company) and jointly liable for the debt of its subsidiary for breaching a real estate sale contract in accordance with the Consumer Case Procedure Act. The Court stated that such parent-subsidiary relationship could be established because the estates' advertising leaflets clearly represented that the disputed project had been one of the second defendant's projects, that both defendants are engaged in essentially the same business, and the subsidiary was undercapitalized.²²¹

There are some limitations in using this precedent. The Act only applies to civil disputes relating to a claim from a consumer against a business operator regarding the use of goods or services, and will not apply in all cases of corporate-related human rights abuse.

Civil and Commercial Code

Prior to the coming into force of the Consumer Protection Act, Thai courts had also applied section 5 of the Civil and Commercial Code to effectively "pierce the corporate veil". Section 5 provides that "everyone must, in the exercise of his rights and the performance of his obligations, act in good faith". The courts applied this section to cases where parent companies were shareholders of their subsidiaries which were set up to provide loan to purchase stock of the parent companies. The Court ruled that where the parent companies' shares were pledged with the subsidiaries, the separate legal personality doctrine could not be used by the parent companies to request the pledgor to pay the unpaid shares. This was because the parent and its subsidiary were deemed to be one and the same entity, and this was in violation of section 1143 of the Civil and Commercial Code, which states that a limited company may not own its own shares or take them in pledge.²²²

which states that "everyone must, in the exercise of his rights and the performance of his obligations, act in good faith."

²²⁰ Section 44 of Consumer Case Procedure Act B.E. 2551 (2008) provides that "partners, shareholders, or person having the power to control the operation of the juristic person, or the person receiving property from such juristic person" can be summoned as a joint defendant and may be jointly liable for the obligation a corporate owed to the Consumer. However, the case must fall within the following requirements: (i) if it appears that business operator against whom the legal action is brought is incorporated or acts in bad faith, or has a deceitful behavior against Consumers; (ii) there is an embezzlement of the juristic person's property to become beneficial to any person; or (iii) such business operator's property is insufficient to satisfy the obligation as per the complaint, unless such person proves his or her innocence in such act, or in case of person receiving property from such business operator, proves that he or she acquires the property in good faith and for value. See also: Supreme Court Judgment 2637-2638/2553.

²²¹ Supreme Court, 'Decision No. 2637/2553', Judgment, 12 October 2011, available at: <https://deka.in.th/view-504664.html>.

²²² For example, Supreme Court Decision No. 3119/2526 and 1560/2527. See: Nitinantana Bruranajaroenraksa, 'Piercing the Corporate Veil to the shareholder liability', Ramkhamhaeng Journal, 2013, pp. 124-146, available at: <https://tcj-thaijo.org/index.php/lawjournal/article/download/76377/61389>.

Section 821 of the Civil Procedure Code may also be applicable. In the *Sugar Plantation* case, for example, plaintiffs from Cambodia filed a lawsuit in a Thai Civil Court against a Thai company, claiming that a limited company registered in Cambodia and an alleged subsidiary of such Thai national company had, in order to make way for a sugarcane plantation, colluded with the Cambodian Armed Forces to forcibly seize the land of local people. They had allegedly destroyed local people's houses, killed their livestock, torched villages, destroyed crops, threatened and arrested villagers.²²³ It claimed that the Thai company, as the "principal" company, should be held liable for acts committed by its Cambodian "agent". The complaint cited section 821 of the Civil and Commercial Code to support their claim.²²⁴ Section 821 of the Civil and Procedure Code provides that "a person who holds out another person as his agent or knowingly allows another person to hold himself out as his agent, is liable to third persons in good faith in the same way as such person was his agent."

The plaintiffs alleged that there were causal links which proved control of its Cambodian subsidiary by the Thai parent company, including that the directors of the subsidiary in Cambodia were senior executive staff and directors of the Thai company.²²⁵ It also noted that a representative of the parent company had testified to the National Human Rights Commission of Thailand that the company would provide a remedy to individuals and communities in Cambodia affected by the actions of its local subsidiary.²²⁶ This fact was cited as evidence in the complaint submitted to the court. This reasoning is similar to that of the UK Court in *Vedanta* above at section 4.1.2.

The question as to whether section 821 is applicable to the circumstance in the *Sugar Plantation* Lawsuit is expected to be examined in trial at Bangkok South Civil Court, which is under way at the time of writing. It is yet to be seen whether the court will rule that the Thai company had enough control and had sufficiently intervened in the management of its Cambodian subsidiary to prevent abuses from occurring.

In sum, Thai laws, while they may be invoked to some positive effect, as currently shaped have proven to be insufficient to ensure that business enterprises can be held liable for human rights abuses committed in the course of their business operations abroad. Accordingly, Thai laws should be amended to include clearer provisions to hold businesses accountable for their involvement in activities conducted by its subsidiaries or business partners within the transnational supply chains over which it exerts control and caused

²²³ NHRCT, 'Investigation Report No. 1003/2558: Community Rights: Mitr Phol Sugar Company Limited negative impacts on people living in Samrong District and Chongkal District, Oddar Meanchey Province, Northeastern Cambodia', 12 October 2015; Equitable Cambodia, Licadho and Inclusive Development International, 'Joint Statement On The Ninth Session of the United Nations Forum on Business and Human Rights', 17 November 2020, available at: <https://media.business-humanrights.org/media/documents/UNBHR-Joint-Statement-on-Mitr-Phol-Nov-17-2020.pdf>

²²⁴ ICJ Interview, Acting Sub Lt. Somchai Armeen, president of the Legal Rights and Environmental Protection Association (LEPA), who had experience litigating class action suits, Bangkok, 6 March 2020

²²⁵ Complaint Submitted to the Bangkok South Civil Court, 'Mrs. Hoy Mai and Mr. Smin Tet v. Mitr Phol Co. Ltd', Black Case No. Por. 718/2561, Judgment, 28 March 2018.

²²⁶ According to the verbal testimony that a representative of the Thai company gave to the NHRCT, "the company has acknowledged that the villagers were affected, thus it hired the International Environment Management company, a Switzerland national company to survey the damages in the area the company had been granted the concession. The company affirmed that it will be responsible to any damage under the International Finance Company Framework. The survey requires 3-4 months to collect data, including the number of affected households and household income." See: NHRCT, 'Investigation Report No. 1003/2558: Community Rights: Mitr Phol Sugar Company Limited negative impacts on people living in Samrong District and Chongkal District, Oddar Meanchey Province, Northeastern Cambodia', 12 October 2015.

harm to third persons, with a view to ensuring these aggrieved persons have access to effective reparation.

Recommendation(s)

The ICJ offers the following recommendations for changes to Thai law and policy:

1. The piercing of the corporate veil doctrine should be explicitly recognized under Thai law where proof of control by corporate officers and a causal link between the parent company, subsidiary, illegal act and resulting damage can be established, to ensure protection of human rights. This can be done through amendment of section 1096 of the Civil and Commercial Code and section 15 of the Public Company Act – governing shareholder’s liability - to allow a shareholder/parent company to be held personally liable for its actions or for the losses incurred by the company if the link can be established and if the business operator’s property is insufficient to satisfy obligations under the complaint. This can also be done along with recognizing that parent companies may owe a duty to exercise reasonable care in monitoring and controlling their subsidiaries in relation to human rights and environmental protection.
2. Legislation should be adopted providing for mandatory disclosure which could take the form of an amendment to the Civil and Criminal Procedure Code shifting the burden of proof if information relating to a claim lies “wholly or in part within the exclusive knowledge of the corporate defendant”. Alternatively, the amendment could define disclosure refusal restrictively to unnecessary or unwarranted trade secrets and privacy or confidentiality related refusals. Courts should be encouraged to actively exercise their power under section 92 of the Civil Procedure Code to require a party who refuses to produce confidential official documents to justify this refusal, and order production of the evidence if the explanation is unreasonable.

4.2 Jurisdiction

Any person seeking to bring a complaint against a Thai company which has conducted business activities abroad before Thai courts may have to establish that they have jurisdiction over the company. Questions of jurisdiction in respect of litigation involving companies may be governed by principles of private international law which are beyond the scope of this report. But in respect of international human rights law, there is ample basis for establishing jurisdiction by the State, including its courts, in a variety of situations, particularly those highlighted under Principle 9 of the Maastricht Principles.²²⁷ As shown above, it is well established, including by the International Court of Justice,²²⁸ UN treaty bodies, and regional courts, that obligations of the State regarding the protection of human rights, including from abuses by businesses, do not stop at their territorial

²²⁷ Principle 9 of the Maastricht Principles states that “a State has obligations to respect, protect and fulfil economic, social and cultural rights in any of the following: (i) situations over which it exercises authority or effective control, whether or not such control is exercised in accordance with international law; (ii) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory; and (iii) situations in which the State, acting separately or jointly, whether through its executive, legislative or judicial branches, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.”

²²⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I. C. J. 136, 109 (9 July); Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 26 (19 Dec); Application of the International Convention on the Elimination of all Forms of Racial Discrimination Georgia v. Russian Federation, Provisional Measures, 2008, No. 35/2008, I.C.J. at 353, 109, 149 (15 Oct)

borders. Under the CESCR, for example, State parties must “take the steps necessary to prevent human rights violations abroad by corporations domiciled in their territory and/or jurisdiction” whether they are “incorporated under their laws, or have their statutory seat, central administration or principal place of business on the national territory”.²²⁹

The Maastricht Principles indicate the basis for jurisdiction in Principle 9, while Principles 25 (a), 25(b), and 25(c) of the Maastricht Principles similarly stress that a State should regulate the conduct of its nationals abroad where such conduct results in an offence that originates or occurs within a foreign territory. This principle applies to non-State actors such as companies registered or domiciled in the territory of the State concerned, or which have their base of operations and substantial business activities in the territory.

Interestingly, the present draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (2020) provides guidance on the main indicators of domicile, including: (i) place of incorporation; (ii) statutory seat; (iii) central administration; and/or (iv) principal place of business.²³⁰

4.2.1 Jurisdiction in Civil Cases

Thai law provides that where an alleged civil tort caused by a Thai company or its subsidiary occurs in a foreign country, the company may be subject to a legal cause of action in Thailand if the company (i) “is domiciled” in Thailand; (ii) “was ever domiciled at any place of Thailand within the prescription of two years before the date of submission of complaint”, or (iii) “continues to conduct, or previously conducted, the whole or some part of its business within Thailand”. The Civil Procedure Code also allows for the jurisdiction of the court over a defendant that is not domiciled in Thailand’s territorial jurisdiction and for a cause of action does not arise in Thailand, if the plaintiff is of Thai nationality or is domiciled in Thailand.²³¹

Under Thai law, “domiciled” means “the place where [a company] has its principal office or establishment, or which has been selected as a special domicile in its regulation or constitutive.”²³²

In the context of overseas operations of companies, the fact that a Thai TNC is domiciled within Thailand or conducts its business in Thailand, in whole or in part, as a general

²²⁹ CESCR, ‘General comment no. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities’, 10 August 2017, E/C.12/GC/24, para 26, available at: <https://www.refworld.org/docid/5beaecba4.html>

²³⁰ Article 9, draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, available at: <https://www.business-humanrights.org/en/latest-news/legally-binding-instrument-to-regulate-in-international-human-rights-law-the-activities-of-transnational-corporations-and-other-business-enterprises/>

²³¹ According to section 3, 4 and 4(ter) of the Civil and Commercial Code, Thai courts can also have territorial jurisdiction over cases where (i) the defendant is domiciled within Thailand; (ii) the cause of action arose within Thailand; or (iii) if the plaintiff is of Thai nationality or is domiciled in Thailand, where the defendant is not domiciled in Thailand and the cause of action does not arise in Thailand.

²³² Section 68 of the Civil and Commercial Code. Section 3 of the Civil and Commercial Code provides that it shall be deemed that the defendants are domiciled within Thailand if: (i) offence was committed in any Thai vessel or airplane; (ii) if the defendant is ever domiciled at any place of Thailand within the prescription of two years before the date of submitting the complaint; and (iii) if the defendant carries on or ever carried on the whole or some part of transaction within Thailand, irrespective of himself or agent or by having any person to continue such transaction within Thailand.

principle, establishes the jurisdiction of Thai courts over such cases. Due to this low jurisdictional threshold, a number of human rights lawyers have preferred to bring civil claims rather than criminal claims, which require a higher jurisdictional threshold to be satisfied. A few of these cases will be described below.

4.2.2 Jurisdiction in Criminal Cases

Under international law, perpetrators of serious human rights violations and abuses abroad may be subject to criminal proceedings in various jurisdictions. These include the location where the crime occurred but also in the home country where a perpetrator or victim may reside, or in some circumstances, anywhere in the world under principles of universal jurisdiction.²³³ Note that the term “jurisdiction” in respect of when courts may have competency to consider cases is different from “jurisdiction” in the sense of where a State’s more general human rights obligations come into play.

Jurisdiction for Crimes Outside the Territorial State

When a State exercises jurisdiction for crimes committed outside of its territory, this amounts to its exercise of extraterritorial jurisdiction. Under general international law, such jurisdiction may be exercised (i) if the crimes are committed abroad by its nationals (jurisdiction on active personality grounds); (ii) when the crimes are committed against its nationals (jurisdiction on passive personality grounds); or (iii) the crimes are committed against or threaten its national interest (jurisdiction on protective grounds).²³⁴ For certain kinds of violations, including for serious crimes under international law, universal jurisdiction will apply. Jurisdiction on active personality grounds is particularly important for the purposes of this report because the report focuses on human rights abuses allegedly committed by Thai corporations abroad.

Under Thai law, in criminal cases, Thai courts may hold a Thai TNC accountable for abuses alleged to have been committed by the company beyond their national borders on active personality grounds in limited circumstances.²³⁵ The plaintiff must show that an unlawful act by a Thai company either 1) partially occurred within the Kingdom; 2) “as intended by the offender” occurred “within the Kingdom”; or 3) the consequence of commission of the criminal act resulted, or could have been reasonably foreseen to result, in unlawful acts occurring within the Kingdom.²³⁶

While these possibilities could provide for an expansive exercise of jurisdiction, invoking them in practice presents a challenge, particularly where the plaintiff lacks financial resources or technical expertise to prove intent and causation beyond reasonable doubt. An example where there were efforts to address such gaps was in a case involving the Hongsa Project, a coal plant and mining project in Xayabury Province, Lao PDR, as noted in section 3.3.1. There, communities in Thailand were financially and technically supported by the Ministry of Health and several environmental and health experts to conduct a

²³³ Amnesty International, ‘Universal Jurisdiction: Strengthening This Essential Tool of International Justice’, October 2012, available at: <https://www.amnesty.org/download/Documents/24000/ior530202012en.pdf>; See also International Law Commission (ILC), Second Report on the Obligation of Extradite or Prosecute (Au Dedere au Judicare) United Nations A/CN.4/585 General Assembly, 11 June 2007, p. 78, para 97; ICJ, ‘Corporate Complicity & Legal Accountability. Volume 2: Criminal Law and International Crimes’, 2008, pp. 52-53, available at: <https://www.icij.org/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol2-publication-2009-eng.pdf>

²³⁴ Ibid.

²³⁵ Sections 4 to 5 and 7 to 10 of the Criminal Code govern Thailand’s jurisdiction over offences that were committed fully, or partially, out of the Kingdom.

²³⁶ Sections 4-5, Criminal Code.

community-led monitoring project to observe environmental and health conditions and collect evidence in Thailand. Unfortunately, the project was discontinued due to insufficient budget resources.²³⁷

The jurisdiction of Thai courts is even more restricted where a crime has been committed wholly outside of Thailand. Section 8 of the Criminal Code is only applicable to a limited number of offences. These include, for example, offences causing public danger, sexual offences, offences against life, offences against the body, offences against liberty, and offences of extortion, blackmail, and robbery.²³⁸ In addition, jurisdiction may attach if there is a request for a Thai corporation to be prosecuted by an injured person or by the government of a State where the offence has occurred.²³⁹

Singapore's Transboundary Haze Pollution Act

On 5 August 2014, Singapore's Parliament passed the Transboundary Haze Pollution Act which establishes a basis for jurisdiction and criminal liability for entities which: (i) engage in conduct, or (ii) engage in conduct that condones any conduct by another entity or individual which causes or contributes to any haze pollution in Singapore, even when done by entities with no geographical or other connection to Singapore (sections 4 and 5). Under its provisions, which entered into effect in September 2014, a convicted business may face a fine not exceeding S\$100,000 (approx. US\$75,230) for every day or part thereof that there is haze pollution in Singapore. If the entity has failed to comply with any preventive measures notice, there can be an additional fine not exceeding S\$50,000 (approx. US\$37,615) for every day or part thereof that the entity fails to comply with the preventive measures notice. The maximum aggregate fine that can be imposed under this provision is capped at S\$2 million (approx. US\$1.5 million) (section 5).²⁴⁰

In 2015, Singapore's National Environment Agency reportedly took legal action against four Indonesian companies, PT Bumi Andalas Permai, PT Bumi Mekar Hijau, PT Sebangun Bumi Andalas Woods Industries and PT Rimba Hutani Mas which had allegedly contributed to haze pollution. It further demanded that pulpwood company, Asia Pulp and Paper (APP), hand over information on its subsidiaries that operated in Indonesia and Singapore in relation to the case. However, while the investigation remains open,²⁴¹ to date it appears that no further action against the companies or their suppliers have been taken under the Transboundary Haze Pollution Act.²⁴² Nevertheless, in 2015, the

²³⁷ ICJ Interview, environmental lawyer with Foundation for Environment and Natural Resources (FENR), Chiang Mai, November 2020.

²³⁸ Including cases stipulated in sections 8(1)-(13), Criminal Code.

²³⁹ Thai criminal courts may also adjudicate offences wholly committed outside of Thailand if they are committed by the officials of SOEs who are categorized as an "official" under the Criminal Code and are criminally liable for offences set out in sections 147 to 166 of the Criminal Code.

²⁴⁰ Transboundary Haze Pollution Act 2014 (No. 24 Of 2014), available at: <https://sso.agc.gov.sg/Act/THPA2014#pr14->; Permanent Mission of the Republic of Singapore to the United Nations, 'Protection of the Atmosphere – Information on Domestic Legislation of Singapore – Transboundary Haze Pollution Act 2014', 29 January 2015, available at: https://legal.un.org/ilc/sessions/67/pdfs/english/poa_singapore.pdf

²⁴¹ David Fogarty and Audrey Tan, '3 firms in NEA probe top NGOs' fire alert list', 19 November 2019, The Straits Times, available at: <https://www.straitstimes.com/asia/se-asia/3-firms-in-nea-probe-top-ngos-fire-alert-list>

²⁴² A. Muh. Ibnu Aqil, 'Indonesia draws the line on Singapore's 2015 haze investigation', Jakarta Post, 1 July 2020, available at: <https://www.thejakartapost.com/news/2020/07/01/indonesia-draws-the-line-on-singapores-2015-haze-investigation.html>; Audrey Tan, 'Three companies with Offices in Singapore Linked to Forest Fires Causing Haze', 24 September 2019, available at:

Singapore Environment Council temporarily suspended the Singapore Green Labelling Scheme certification (SGLS+) of APP's exclusive distributor in Singapore, Universal Sovereign Trading. The SGLS+ certification was given back to APP in May 2019.²⁴³

The Act has been characterized by some activists as “toothless”,²⁴⁴ because its enforcement has been lax and ineffective. For instance, while the Act provides for the power to obtain information and the power to examine and secure the attendance of any person who appears to be acquainted with matters related to the offence (sections 10 and 11), Singapore’s enforcement officers can only gather evidence in neighbouring countries when express permission is granted, owing to the purported limits of “territorial sovereignty”. Also, although an arrest warrant may be issued (section 17), this action would be rendered ineffective if the subject individuals are not within Singapore or do not reside a country which does not have an extradition treaty with Singapore.²⁴⁵

Universal Jurisdiction

Universal jurisdiction means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.²⁴⁶ In some cases, States may have an obligation to assert jurisdiction over certain crimes on a universal basis when the accused person falls under their territorial jurisdiction, giving rise to an obligation to prosecute or extradite to another jurisdiction for prosecution (such as with torture); in other cases such jurisdiction may be exercised on a permissive basis. According to research by Amnesty International, presently some 163 States can exercise universal jurisdiction over at least one crime under international law.²⁴⁷

The UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity establish in Principle 21 that:

“States should undertake effective measures, including the adoption or amendment of internal legislation, that are necessary to enable their courts to exercise universal jurisdiction over serious crimes under international law in accordance with applicable principles of customary and treaty law. States must ensure that they fully implement any legal obligations they have assumed to institute criminal proceedings against persons with respect to whom there is credible evidence of individual responsibility for serious crimes

<https://www.straitstimes.com/singapore/environment/three-companies-with-offices-in-singapore-fingered-for-involvement-in-haze>

²⁴³ Audrey Tan, ‘Three companies with offices in Singapore linked to forest fires causing haze’, 25 September 2019, The Straits Times, available at:

<https://www.straitstimes.com/singapore/environment/three-companies-with-offices-in-singapore-fingered-for-involvement-in-haze>

²⁴⁴ Online Citizen, ‘Is the Transboundary Haze Pollution Act, a Toothless Act?’, 9 November 2017, available at: <https://www.onlinecitizenasia.com/2017/11/09/is-the-transboundary-haze-pollution-act-a-toothless-act/>

²⁴⁵ Ryan Nicholas Hong, ‘Singapore’s Transboundary Haze Pollution Act and the Shield of Sovereignty in Southeast Asia’, Singapore Law Review, 2016, 34 Sing L Rev, pp. 114-115.

²⁴⁶ Institute of International Law, ‘Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes’, 26 August 2005, para 3(a), available at: https://www.idi-iil.org/app/uploads/2017/06/2005_kra_03_en.pdf

²⁴⁷ Amnesty International, ‘International Justice’, available at: <https://www.amnesty.org/en/what-we-do/international-justice/>

under international law if they do not extradite the suspects or transfer them for prosecution before an international or internationalized tribunal.”²⁴⁸

According to the Principles, “serious crimes under international law” encompass grave breaches of the Geneva Convention of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery.²⁴⁹ Such jurisdiction should in principle be exercised where attribution of responsibility engages a company or, for jurisdictions where criminal corporate liability is not recognized, its officers or responsible employees.

Thailand has jurisdiction over certain cases, including: offences relating to the security of the Kingdom (sections 107 - 129); offences relating to terrorism (sections 135/1 - 135/4); offences relating to counterfeiting and forgery (sections 240 - 249, sections 254, 256, 257 and 266 (3) and (4)); sexual offences (sections 282-283); offences relating to robbery committed on the high seas (section 339); and offences relating to gang-robbery committed on the high seas (section 340).²⁵⁰ However, there is no Thai law that allows for the courts to take jurisdiction over complaints brought alleging serious crimes under international law entailing gross violations of international human rights law. Indeed, such crimes are not even defined under Thai law.

Since Thailand does not have a universal jurisdiction law or criminal law framework that provides adequate ways to extend criminal jurisdiction over several forms of violations committed abroad, human rights lawyers need to be creative and pursue other legal avenues.

4.2.3 Jurisdiction in Administrative Cases

For administrative cases, pursuant to section 9 of the Act on Establishment of Administrative Courts, Thai courts have the competency to adjudicate issues in relation to an administrative agency or a State official relating to the exercise of their powers or a dispute in relation to an administrative contract.²⁵¹ A plain reading of section 9 makes it evident that the scope of the court’s jurisdiction is based on the nature of the offence not limited by geographic territory. Therefore, if an offence is related to an administrative agency or a State official arising from the exercise of their powers or a dispute in relation to an administrative contract, even if it is committed wholly outside Thailand, the Administrative Court should, in principle, have jurisdiction to try the case.

However, there is no consistent practice or uniform jurisprudence in this respect, as the approaches of various administrative courts in this matter are in conflict with each other. Presently, two cases involving Thai administrative agencies with alleged involvement in human rights abuses in Thailand’s neighbouring countries have been brought to Thailand’s Administrative Court. In both cases, Thai citizens brought claims against the Thai authorities for administrative offences committed outside of Thailand, which were foreseen to negatively impact on communities within Thailand. In both cases, the jurisdiction of

²⁴⁸ UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity, UN DOC E/CN.4/2005/102/Add.1 (2005), recommended by the UN Human Rights Commission, Resolution 2005/81.

²⁴⁹ Ibid, p.6.

²⁵⁰ Section 7, Criminal Code.

²⁵¹ Act on Establishment of Administrative Courts, available at: http://web.krisdika.go.th/data/outside/outside21/file/ACT_ON_ESTABLISHMENT_OF_ADMINISTRATIVE_COURTS_AND_ADMINISTRATIVE_COURT_PROCEDURE, B.E. 2542.pdf

Thailand's Administrative Court was challenged, and the court had to consider whether the plaintiff should be categorized as an injured person with standing to bring the charge to the Court.

In the Xayaburi Dam Lawsuit in Lao PDR, the Supreme Administrative Court accepted that the plaintiffs had standing to submit the case, as it considered that plaintiffs who are Thai citizens living and working in eight Mekong riparian provinces were "directly and significantly... affected more than the general public" by the defendant SOEs and State agencies. The court characterized them as State agencies that failed to carry out their duties as required by law to ensure protection against negative impacts on the environment, health, and society during the process of finalizing the Power Purchase Agreement.²⁵²

A jurisdictional challenge was unsuccessful, however, in the Pak Beng Dam Lawsuit, concerning the Department of Water Resources' responsibilities in relation to alleged inadequate prior consultation processes in Thailand in relation to the construction of Pak Beng Dam in Lao PDR. The Central Administrative Court in this case found that the plaintiffs, Thai citizens living and working in Mekong riparian provinces, did not have standing to bring the case because they could not be considered injured persons. In this respect, the court noted that "the project was to be implemented in Lao PDR not in Thailand", and "the defendants were not required to conduct environmental impact assessments or public hearings in accordance with Thai laws". The court further found that a public hearing is "a process by local authorities" which cannot render anyone an injured person. This case is now pending before the Supreme Administrative Court.²⁵³

Due Diligence Act, France

On 21 February 2017, France adopted the Due Diligence Act (*Loi sur le devoir de vigilance*). The law covers: (i) companies headquartered in France, with a workforce greater than 5,000 within the company and its direct and indirect subsidiaries; and (ii) corporations with their head office located in French territory or abroad that employ more than 10,000 workers in its service and in its direct or indirect subsidiaries. Since 2018, such enterprises have been obliged to draw up and publish a due diligence plan that contains measures they will put in place to prevent human rights abuses and damage to the environment from taking place along their production chains. The process also encompasses the systematic identification and appraisal of the impacts a company and its suppliers can have on affected third parties.²⁵⁴ Any failure to comply with such duties "shall be liable and obliged to compensate for the harm that due diligence would have permitted to avoid".²⁵⁵ However, full compliance with the law to date has been lacking. To be effective, there will need to be greater enforcement efforts by the authorities.²⁵⁶

²⁵² Supreme Administrative Court, 'Decision No. Kor.Sor. 8/2557', Judgment, 17 April 2014, p. 27.

²⁵³ Central Administrative Court, Black Case No. Sor. 19/2560 and Red Case No. Sor. 193/2560, 15 September 2017, p. 15-16.

²⁵⁴ Article 1, Due Diligence Act, available at: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/>

²⁵⁵ Article 2, Due Diligence Act.

²⁵⁶ See Cécile Barbière, 'France's 'Rana Plaza' law delivers few results', 25 February 2019, available at: <https://www.euractiv.com/section/development-policy/news/french-law-on-multinationals-responsibility-for-workers-abroad-achieves-few-results/>; Daniel Maier, 'France's Due Diligence Law – Loi sur le devoir de vigilance', 21 November 2018, available at: <https://www.ipoint-systems.com/blog/loi-sur-le-devoir-de-vigilance-due-diligence-law-in-france/>

4.2.4 Choice of Jurisdiction

In many instances, victims of gross human rights abuses have to look for the most appropriate forum that offers them the best chance of adequate remedy and reparation. This can be the jurisdiction of the country where the abuse occurred, or the jurisdiction where the transnational company is domiciled or has major business activities, thereby providing greater assurance of access to information and discovery as well as compliance with any judgment issued.²⁵⁷

In general, the choice of the most appropriate jurisdiction to file a claim depends on careful consideration of the available options and the design of a litigation strategy where the type and gravity of the human rights abuse abroad needs to be taken into consideration. If a Thai court has jurisdiction to adjudicate the case, as specified in sections 4.2.1 to 4.2.3, it may be brought before a Thai court. Under international law and standards, as noted above, jurisdictional opportunities should extend beyond the territorial State “especially in cases where the remedies available to victims before the domestic courts of the State where the harm occurs are unavailable or ineffective.”²⁵⁸

Accordingly, victims of human rights abuses may in principle be able to avail themselves of more than one jurisdictional venue to access justice, though in practice the choice may be limited. In some countries, even when a court determines that it has jurisdiction in principle to hear a claim, it may decide that another forum is better placed to deal with the case and refuse to exercise its jurisdiction pursuant to the doctrine of *forum non conveniens*, predominantly applied in common law jurisdictions. This doctrine is not explicitly reflected in Thai laws and is not used in practice. The CESCR has expressed concern at the manner in which courts may exercise such discretion and stressed that “the extent to which an effective remedy is available and realistic in the alternative jurisdiction should be an overriding consideration in judicial decisions relying on *forum non conveniens* considerations”.²⁵⁹

Regardless of the jurisdictional provisions, in Thailand, the choice is not so straightforward. The following options are available in practice:

- A Thai TNC and/or its subsidiary could be sued in the host State if the Thai company has agreed to submit to the jurisdiction of the courts of the host State;

²⁵⁷ ICJ, ‘Corporate Complicity & Legal Accountability. Volume 3: Civil Remedies’, 2008, p. 50, available at: <https://www.icj.org/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol3-publication-2009-eng.pdf>

²⁵⁸ CESCR, General Comment No. 24, para 30; Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon, and Ian Seiderman, ‘Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights’, *Human Rights Quarterly* 34, 2012, pp. 1084–1169, available at: <https://www.icj.org/wp-content/uploads/2012/12/HRQMaastricht-Maastricht-Principles-on-ETO.pdf>

²⁵⁹ The doctrine of *forum non-conveniens* means that if a court decides that another forum is better placed to deal with the case, such decision must be rendered only when there is a reasonably accessible alternative and such refusal does not present a fundamental obstacle to remedy and reparation of victims. See also UK Supreme Court, ‘Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)’, Judgement, 10 April 2019, available at: <https://www.icj.org/wp-content/uploads/2019/04/uksc-2017-0185-judgment.pdf>. In Vedanta, the court was of the view that the claimants were at a real risk of not obtaining access to substantial justice in Zambia because the claimants were living in poverty and could not obtain legal aid and would be prohibited from entering into conditional fee agreements under Zambian law. Also, the claimants would not be able to procure the services of a legal team in Zambia with sufficient experience to effectively manage litigation of this scale and complexity.

- A Thai TNC in Thailand and/or its subsidiary could be sued in their home State in parallel proceedings, recognizing a risk of irreconcilable judgments; or
- A Thai TNC and its subsidiary could be sued in Thailand given the similarity of facts and legal principles at issue, where claimants are at risk of not obtaining access to justice in the host country.

Recommendation(s)

The ICJ offers the following recommendations for changes to Thai law and policy:

1. The jurisdiction of Thai criminal courts should be extended to cover claims against Thai companies, irrespective of whether the human rights abuses allegedly committed by the companies or their subsidiaries were committed partly or wholly outside the territory of Thailand. To this end, amendments to sections 4 to 8 of the Criminal Code should be considered.
2. In order to avoid inconsistent judgments, Thailand's Administrative Court should explicitly expand its jurisdiction to cover disputes caused by an unlawful act or omission by a Thai SOE, administrative agency or State official in another country, including when such act or omission causes transboundary impacts to individuals and communities in Thailand; and
3. Thailand should amend the Criminal Code to provide for universal jurisdiction for human rights abuses which constitute crimes under international law, regardless of where the violation occurred and regardless of the nationality of either the offender or the victim. Such crimes at a minimum should include war crimes, crimes against humanity, genocide, slavery, torture, enforced disappearances and extrajudicial killings.

4.3 Conflict of Laws

In certain circumstances, a conflict may arise between the applicable laws of different jurisdictions. As two or more jurisdictions are typically engaged with cross-border investments, the laws in each jurisdiction may be divergent and access to justice of affected individuals may be obstructed when an unfavourable law is chosen by the court to apply in a particular case.

Historically, the general rule in cases of tort law and non-contractual liability is: *lex loci delicti*. This means that the law applicable is the law of the country in which the harm occurred. In many jurisdictions around the world, various exceptions have been recognized.²⁶⁰ Some US jurisdictions provide for flexibility, while for courts within Member States of the European Union, EU regulations hold that the law applicable shall be the law of the country in which the damage occurred, rather than the law of the country in which the decisions giving rise to those abuses were taken. This approach may serve to reduce the time and costs spent in litigation and allow the parties and the court to concentrate on the merits of the case. However, it may also adversely affect the ability of victims to gain effective access to justice.²⁶¹

In Thailand, for cases involving cross-border tortious acts, section 15 of Thailand's Conflict of Laws Act provides that "an obligation arising out of a wrongful act (tortious act) is governed by the law of the place where the facts constituting such wrongful act have taken

²⁶⁰ See, for example, ICJ, 'Corporate Complicity & Legal Accountability. Volume 3: Civil Remedies', 2008, p. 52.

²⁶¹ Ibid, p. 53.

place". Furthermore, a Thai court will not have jurisdiction over a case in a foreign country if the underlying conduct is not wrongful according to the Thai law, and any remedy and reparation must be those prescribed under Thai law. Therefore, for conduct by Thai businesses overseas, tortious liability will arise only if it is illegal both under Thai law and the law of the host State. This can be a high bar to reach, especially when the legal framework in one or both jurisdictions is weak from a human rights and accountability perspective, or if both States do not recognize conduct amounting to human rights abuses as offences under their domestic laws. This also means that victims will require expertise or assistance from legal advocates in both Thailand and the foreign jurisdiction, particularly where they require guidance in ascertaining which courts to bring their claims, and under which laws to do so.

By way of example, in the Sugar Plantation Lawsuit, the judgment of Bangkok South Civil Court regarding class action referred to section 15 of Thailand's Conflict of Laws Act and reaffirmed that the law of the place where the facts constituting such wrongful act had taken place, that is the laws of Cambodia, must also be considered.²⁶²

Recommendation(s)

The ICJ offers the following recommendations for changes to Thai law and policy:

1. Thailand's Conflict of Laws Act should be reviewed with a view to lift all existing obstacles in accessing to justice. With regard to section 15 of Thailand's Conflict of Laws Act, this provision should be amended to allow the victim of a business-related human rights abuse or his or her representatives to determine the appropriate law relevant to claims before the most competent court, either in accordance with laws in the host country where alleged human rights abuses have occurred or the country of domicile of companies alleged to have committed the acts or omissions resulting in abuses of human rights.

4.4 Statutes of Limitations

4.4.1 Limitation Periods under Thai Law

Statutes of limitations, or "prescription", are procedural laws which restrict the possibility of bringing claims to courts to a specific period of time following the commission of an offence, after which a plaintiff or injured person is barred from bringing legal action to seek remedy or compensation or, in the case of criminal offences, the authorities are barred from prosecuting the criminal offence. A statute of limitations essentially dictates the deadline for filing a lawsuit. They can apply in criminal, civil or administrative proceedings.

Limitation periods can pose difficulties with respect to cases of human rights violations or abuses committed abroad. With respect to alleged abuses caused by business activities outside of Thailand, for example, an affected victim who is a non-national typically faces greater barriers than a Thai citizen to access justice and other judicial and non-judicial remedies in Thailand for a variety of reasons. These may include language barriers, lack of understanding of the Thai legal system, lack of financial resources, lack of familiarity with local administration of justice mechanisms, and unavailability of access to legal aid or local lawyers.

International law and standards have much to say about permissible statutes of limitations in cases of serious crimes under international law. The UN Updated Set of principles for the protection and promotion of human rights through action to combat impunity, which

²⁶² Bangkok South Civil Court, 'Mrs. Hoy Mai and Mr. Smin Tet v. Mitr Phol Co. Ltd', Judgment, Black Case No. Por.718/2561, 4 July 2019, pp. 8.

were recommended by the UN Human Rights Commission in 2005 and constitute the leading international standards on questions of accountability and impunity in relation to serious crimes under international law, provide that “prescription... in criminal cases shall not run for such period as no effective remedy is available”; “shall not apply to crimes under international law that are by their nature imprescriptible”; and “when it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries”.²⁶³ This reflects more generally the customary international law prohibiting statutes of limitations for war crimes, crimes against humanity, and genocide,²⁶⁴ and the emerging trend to extend prohibition to other gross human rights violations,²⁶⁵ torture²⁶⁶ and enforced disappearance.²⁶⁷

Statutes of limitations nonetheless in practice may constitute obstacles effectively barring victims from their right to justice and for reparation claims in cases of gross human rights violations and abuses. In criminal cases, they can similarly constitute an obstacle to the prosecution of perpetrators of gross human rights violations and abuses when the offence lies too far back in time.

Under Thai laws, pursuant to section 448 of the Thai Civil and Commercial Code, civil claims for damages arising from a wrongful or tortious act is barred by prescription after “one year from the day the wrongful act and the person bound to make compensation becomes known to the injured person,” or “ten years from the day the wrongful act was committed.” Pursuant to the Thai Criminal Code, the limitation period typically begins to run from the date of the commission of the offence from one to 20 years depending on the severity of the offence. The short period of one year in which an injured person must bring their complaint for tort before a Thai court is a significant challenge to accessing justice within Thailand by non-nationals. There is no exception for serious crimes under international law.

On the other hand, the procedure for filing complaints to obtain remedies under the National Environmental Quality Act is more flexible than Thai tort law, because the Act provides no limitation period. Therefore, the generic statute of limitations of ten years as set out in section 193/30 of the Civil and Commercial Code applies.²⁶⁸

The administrative courts are subject to a different statute of limitations regime. The Act on Establishment of the Administrative Courts provides that a claim of wrongful or tortious conduct by an administrative agency or a State official must be filed “within one year”. Any case involving a dispute in relation to an administrative contract must be filed “within five years” from the date on which the cause of action is known or should have been known, but “no later than ten years” from this date. However, the law provides for an

²⁶³ Commission on Human Rights, ‘Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’, UN Doc E/CN.4/2005/102/Add.1 (2005), Principle 23, p. 14.

²⁶⁴ ICJ, ‘Practitioners’ Guide N°2: The Right to a Remedy and Reparation for Gross Human Rights Violations’, revised edition 2018 (‘Practitioners’ Guide N°2’), p. 272, available at: <https://www.icj.org/the-right-to-a-remedy-and-reparation-for-gross-human-rights-violations-2018-update-to-practitioners-guide-no-2/>

²⁶⁵ ICJ Practitioners’ Guide N°2, pp. 273-274.

²⁶⁶ It is clear from more recent observations by the UN Committee against Torture that it rejects the applicability of statutes of limitations to the crime of torture. Similarly, the Special Rapporteur on torture criticized statutes of limitations which lead to the exemption of perpetrators from legal responsibility. Practitioners’ Guide N°2, p. 275.

²⁶⁷ Practitioners’ Guide N°2, pp. 275-276.

²⁶⁸ Supreme Court Judgment No. 11437/2556

exception for cases concerning “the protection of public interest”, “public benefit,” or “other necessary cause”, which may be filed “at any time”.²⁶⁹

Public Interest Exception to Limitation Period

Thailand’s administrative courts have in various decisions regarding the period of prescription, categorized certain circumstances as “of public benefit or interest” which may be filed at any time. These include disputes regarding the construction of a public road (Supreme Administrative Court Decision No. 459/2552) and the Government’s delay in responses in the context of a land dispute in a forest reserved area (Supreme Administrative Court Decision No. 476/2552). Certain tortious disputes with State officials who failed to perform their duties effectively in accordance with the relevant laws have also been categorized as “[an]other necessary cause” which may be filed at any time (Supreme Administrative Court Decision No. 626-638/2552).²⁷⁰

In an administrative lawsuit related to the construction and operation of Xayaburi Dam in Lao PDR, the Administrative Court found that the potential of the dam to cause irreparable damage to the ecological system of the Mekong river and transboundary environmental destruction to communities in Thailand made the case before it “an act in the public interest.” Accordingly, the court ruled that the submission of the lawsuit had been “for the maintenance and preservation of environmental quality” and could be filed “at any time” (Supreme Administrative Court Decision No. Kor.Sor.8/2557).²⁷¹

In contrast, in a case concerning 389 villagers who alleged harm arising from the use of cadmium in mining activities in Tak province, Thailand v. Prime Minister, Ministry of Finance, and Department of Primary Industry and Mines (DPIM), the Supreme Administrative Court went in a different direction. The Court ruled that the action seeking compensation from Padaeng Industry Public Company Limited,²⁷² which had been established by the Ministry of Finance and operated in Mae Sot district following a policy imposed by the Prime Minister and his Cabinet at that time, was not “an act in the public interest or of public benefit” even if the business activity had subsequently caused cadmium contamination in a way that had negatively affected local villagers and polluted Mae Sot district. The court was of the view that the objective of the plaintiffs was to seek compensation for their own benefit, which did not constitute an act in the public interest, and there were no other reasons which obstructed the plaintiff from submitting the case to the court during the period of prescription. Thus, the case for compensation must have been filed within one year from the date on which the cause of action was known.²⁷³

²⁶⁹ Sections 51 and 52, Act on Establishment of the Administrative Courts.

²⁷⁰ Administrative Court, ‘Administrative Court Decision’, Vol 2, March 2011, pp. 268-272, available at: http://www.admncourt.go.th/admncourt/upload/webcms/Academic/Academic_140219_152933.pdf

²⁷¹ Supreme Administrative Court, ‘Complaint No. Kor.Sor. 11/2556, Decision No.Kor.Sor.8/2557’, Judgment, 17 April 2557, p. 28.

²⁷² Padaeng Industry Public Company Limited had the status of an SOE when the crime was committed.

²⁷³ Supreme Administrative Court, ‘389 villagers v. Prime Minister, Ministry of Finance, and Department of Primary Industry and Mines (DPIM)’, Decision No. Kor.Sor.22/2560, 30 October 2017, p. 28, available at: <http://admncourt.go.th/ADMINCOURT/upload/admcase/Document/judgement/PDF/2560/02013-600006-2F-601130-0000610862.pdf>

4.4.2 Inconsistency Between Limitation Periods in Different Jurisdictions

The statute of limitations may differ according to the jurisdiction within which an offence occurs, and the kind of lawsuit filed. When varying limitation periods apply to the same case being adjudicated in different jurisdictions, it can pose a challenge in respect of cases of human rights abuses emerging from cross-border investment projects.

In this regard, section 5 of Thailand's Conflict of Laws Act provides that "whenever a law of a foreign country is to govern, it shall apply in so far as it is not contrary to the public order or good morals of Thailand." In Supreme Court Judgments No. 8738/2550 and No. 7191/2558, it was established that the statute of limitations element is not inherently related to "public order or good morals". The court further ruled that if both parties do not raise the issue of limitation period to the court's attention, the court will not by itself look into and consider the question.

In short, in cases involving human rights abuses which occur outside Thai territory brought before Thai courts, the parties to the dispute may ask the Court to apply the limitation period provided in the law of a foreign country where the alleged wrongful conduct occurred. However, if such a law of a foreign country is not brought to the court's attention, Thai law shall apply.²⁷⁴

In the context of an extraterritorial civil tort case, under Thai law, prescription in submitting claims for damages arising from a tortious act is "one year" from the day the wrongful act became known to the injured person, or "ten years" from the day when the wrongful act was committed. But in the foreign country where the wrongful conduct is alleged to have occurred, the limitation period may vary. For example, if a foreign statute of limitations were to extend three years from the day the wrongful act became known to the injured person, if the claim is submitted to court in the second year from the day the wrongful act became known to the injured person because of the barriers that a non-national faces, the court would dismiss the case because the period of limitations has expired. However, subject to the Conflict of Laws Act, if the plaintiff seeks the court to apply the limitation period provided in the law of a foreign country where the abuse occurred and such law is clearly put forth before the court, the foreign limitation period might be accepted by the court. Where the law governing the limitation period in a foreign country is however more restrictive than Thai laws, the defendant could request a Thai court to dismiss a case based on a statute of limitations defence.

Recommendation(s)

The ICJ offers the following recommendations for changes to Thai law and policy:

1. Thai domestic law should be amended to ensure that statutes of limitations will not be unduly restrictive to injured persons seeking to bring claims relating to human rights abuses committed abroad by Thai companies. This could be achieved in part through amendment to the Conflict of Laws Act and other relevant civil and administrative procedural laws to explicitly provide that when a statute of limitations does apply, such limitation shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries resulting from conduct constituting gross human rights abuses or crimes under international law; and
2. Statutes of limitations should not apply generally to the prosecution of violations of international human rights law which constitute the most serious crimes or gross

²⁷⁴ Section 8, Conflict of Laws Act; see also Supreme Court Decisions No. 3537/2546 and 4027/2545.

human rights abuses under international law, including offences such as war crimes, crimes against humanity, genocide, slavery, torture, extrajudicial killings, and enforced disappearances.²⁷⁵

4.5 Collective Legal Actions

Legal costs and other related procedural and financial hurdles usually hamper the ability of individual victims to seek justice in the appropriate forum. One means of addressing this issue and ensuring that access of justice can benefit the broadest range of affected people is to adopt a collective redress approach, for example, through a “class action” claim. The CESCR has, in this regard, called on States to take measures to allow for collective redress including “enabling human rights-related class actions and public interest litigation”.²⁷⁶

Thailand’s Civil Procedure Code allows “class action suits”²⁷⁷ where: (i) a claim is based on the same right arising out of the same common facts and the same principle of law; (ii) a group of affected people is clearly defined; (iii) a normal lawsuit would be inconvenient; (iv) a class action lawsuit would be fair and effective; and (v) the plaintiff is able to demonstrate that the group of people is a party of interest in the case.²⁷⁸

Such class action suits allow one or more plaintiffs to file a lawsuit on behalf of a larger group who have common claims against one or more defendants. A class action lawsuit enables plaintiffs who may not have been able to pursue a claim individually to assert their rights in court and can be useful in cases where the affected victims are foreign citizens who may not find it economically feasible to file a lawsuit on their own in Thailand.

Thai law does not specify the number of people required to file a class action claim.

Cases that are eligible for class action include cases involving: (i) tortious harms, (ii) breach of contract; and (iii) rights claims derived from other laws, including environmental law, consumer protection law, labour law, securities and exchange law, and trade competition law.²⁷⁹

In a recent environmental case, a Thai court allowed a class action suit to be brought against a corporation. It was a case filed against a gold-mining company by residents from 12 villages in Pichit and Petchabun provinces, who claimed compensation for health, environmental and natural resource impacts stemming from the company’s gold-mining operations in those provinces. In this case, the court granted class certification and specified that while the sources of pollution were located in different provinces, they were owned by the same defendant and caused impacts against the same group of affected people.²⁸⁰

²⁷⁵ Commission on Human Rights, ‘Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity’, UN Doc E/CN.4/2005/102/Add.1 (2005), Principle 23; ICJ, ‘Practitioners Guide No 7: International Law and the Fight Against Impunity’, January 2015, available at: <https://www.icj.org/international-law-and-the-fight-against-impunity-icj-practitioners-guide-no-7-now-available-in-english/>

²⁷⁶ CESCR, General Comment No. 24, para 44

²⁷⁷ Thailand’s Act Amending the Civil Procedure Code of Thailand (No. 26) B.E. 2558, effective as of December 2015.

²⁷⁸ Section 222/12, Civil Procedure Code.

²⁷⁹ Section 222/8, Civil Procedure Code.

²⁸⁰ Appeal Court, ‘Suekanya/ or Thanyarat Teerachartdamrong/or Sinthornthammatat v. Akara Resources Public Company Limited’, Red Case No. 12364/2562, 6 September 2019, pp. 17-18.

Class Action Suit Relating to Alleged Abuses Caused by Business Activities of a Transnational Character

In the Sugar Plantation Lawsuit, the plaintiffs requested that their case proceed on a class action basis to ensure that 700 affected families in Cambodia were included in their case against a Thai sugarcane company. This case is the first class-action lawsuit filed in a Thai court by plaintiffs from another country.

On 4 July 2019, the Bangkok South Civil Court rejected the request, concluding that “fighting this case as a class action suit would not make it more efficient than bringing it as a normal civil case”. This decision was made for the reason that the plaintiffs could not understand Thai and English, did not reside in Thailand and there would be difficulties in notifying all the plaintiffs in a class action suit and for the court to fulfill requirements as set out in section 222/15 of the Civil Procedure Code.²⁸¹ The court was also of the view that because the plaintiffs’ lawyers were Thai, evidence collection would be difficult as the alleged abuses took place in another country, and because of their limited expertise in Cambodian law.²⁸²

The lawyers for the plaintiffs filed an appeal against the decision.²⁸³ On 16 March 2020, Thailand’s Appeal Court overturned the decision made by the lower court and granted the case class action status. The court ruled that the claim was based on the same right arising out of the same common facts and the same principle of law. The court held that a class action lawsuit would be more convenient, less expensive and less complicated than a normal lawsuit.²⁸⁴ The class action decision was final²⁸⁵ and the case is now pending consideration by Thailand’s Bangkok South Civil Court.

According to a lawyer who has experience litigating a number of class action suits, Thai courts often take one to two years to consider whether a lawsuit can proceed as a class suit, a considerably long time compared to the average length of a full trial.²⁸⁶

Recommendation(s)

The ICJ offers the following recommendations for changes to Thai law and policy:

1. Human rights-related class action suits and other forms of collective complaint should be expressly allowed on a non-discriminatory basis, including in cases where

²⁸¹ Under this provision of the Civil Procedure Code, the court has the responsibility to notify the certification of the class action to all class members in detail, and must publish the notification on the widespread daily newspaper or any other communication medium, as considered proper by the court for three consecutive days.

²⁸² Bangkok South Civil Court, ‘Mrs. Hoy Mai and Mr. Smin Tet v. Mitr Phol Co. Ltd’, Judgment, Black Case No. Por.718/2561, 4 July 2019, p.1-11.

²⁸³ Bangkok Post, ‘Cambodians to appeal ruling in Mitr Phol case’, 5 July 2019, available at: <https://www.bangkokpost.com/thailand/general/1707662/cambodians-continue-battle-with-mitr-phol>

²⁸⁴ Appeal Court, ‘Mrs. Hoy Mai and Mr. Smin Tet v. Mitr Phol Co. Ltd’, Judgment, Black Case No. Por.293/2563 and Red Case No. 3606/2563, 16 March 2020.

²⁸⁵ Announcement of the Bangkok South Civil Court regarding Permission for Class Action Lawsuit, dated 15 October 2020, available at: <https://civilbsc.coj.go.th/th/content/category/detail/id/10/cid/2583/iid/228078>

²⁸⁶ ICJ Interview, Acting Sub Lt. Somchai Armeen, president of the Legal Rights and Environmental Protection Association (LEPA), who had experience litigating class action suits, Bangkok, 6 March 2020

plaintiffs are non-Thai nationals. The barring of affected victims from filing a class action suit should not be on the basis of language, national origin or level of knowledge. The difficulties of a court in meeting administrative requirements such as service of papers or notification of plaintiffs outside its jurisdiction should not be a bar to such litigation.

4.6 State-Owned Enterprises (SOEs): Complexity of Civil Liability and Administrative Liability

While certain cases may be eligible for claims under both administrative and civil law, there are instances where a plaintiff may unwittingly file a claim in the wrong court, particularly with respect to cases relating to SOEs.

The question as to whether an SOE's contractual or tortious wrongful actions are subject to administrative or civil liability is not well settled. The complication arises particularly where SOEs are established by an Act or a Royal Decree and categorized as an "administrative agency" under the Act on Establishment of Administrative Courts, where both civil and administrative courts may have jurisdiction over their activities.

The general rule based on jurisprudence of Thai courts is that if an SOE enters into a contractual agreement, the contract will generally be defined as a civil contract within the jurisdiction of civil courts.²⁸⁷ However, there may be an exception if the objective of the contract is to provide public services, deliver infrastructure services, access and exploit natural resources, or is a contract that provides privileges to SOEs more than its private party to the contract, including the right to unilaterally terminate the contract. In such cases the contract is deemed to be an administrative contract within the jurisdiction of administrative courts.²⁸⁸

In tort cases, when a tortious act is committed by an SOE official, if the SOE was created pursuant to an Act or Royal Decree, the SOE will be liable for the act in accordance with the Tortious Liability of Officials Act and be tried by administrative courts. If the SOE was created by virtue of Civil and Commercial Code or Public Limited Companies Act, however, a tortious act will be governed by tort provisions in the Civil Code and be tried by civil courts.²⁸⁹

There are a number of court judgments which provide elucidation to this confusion, including in cases that involve an SOE's activities abroad. In an administrative lawsuit concerning the operation of Xayaburi Dam in Lao PDR where EGAT (a Thai SOE) entered into a Power Purchase Agreement (PPA) with Xayaburi Power Company Limited, the court had to make a decision as to whether the entering into such a contractual agreement by EGAT constituted an administrative act where the Administrative Court would have the competency to consider the case. On 15 February 2013, the Administrative Court of Thailand declined to hear the case because, among other reasons, the court did not deem

²⁸⁷ Pongsanart Laohapichartchai, 'Courts that have Jurisdiction over Disputes of SOEs', 2015, pp. 89-90, available at:

http://ethesisarchive.library.tu.ac.th/thesis/2015/TU_2015_5501032089_3122_1936.pdf. Where a conflict arose between SoEs and service consumers and such contracts were about the provision of fundamental infrastructure services such as communications, power generation and distribution or water, the court was of the view that SOEs did not exercise administrative powers. It determined that the contract was a civil contract that exposed SoEs to civil liability because the contractual parties entered into agreement from an equal position and services that were provided were private and not public services. (See Supreme Court Decisions No. 174/2545, 319/2545, 571/2546, 62/2550.)

²⁸⁸ Ibid, pp. 103-105. Decisions of the Committee on Jurisdiction of Courts No. 42/2548, 17/2550 and 33/2551; Supreme Administrative Court Decision No. Aor. 314/2554.

²⁸⁹ Ibid, pp. 108-110.

the conclusion of the PPA to be an administrative act, but a civil act within the jurisdiction of civil courts. However, on 17 April 2014, Thai Supreme Administrative Court overturned the decision of the Administrative Court and accepted hearing of the case. It also ruled that the signing of the PPA with the aim to procure power which would be used to provide a public service rendered the PPA an administrative contract.²⁹⁰

For affected individuals and communities, this complexity can be an obstacle to obtaining justice as the sheer length of litigation resulting from the confusion about the applicability of administrative or civil law in one court can increase legal costs substantially. For example, in one case, the plaintiffs submitted a ten-year statute of limitations case under the National Environmental Quality Act to a civil court. The plaintiffs only discovered after several years into the litigation that the Administrative Court to which their case had to be transferred could not handle the tortious lawsuit because it has a limitation period of one year, which had ended before the case had been submitted to the Administrative Court.²⁹¹

Recommendation(s)

The ICJ offers the following recommendations for changes to Thai law and policy:

1. The division between administrative and civil jurisdiction, particularly for SOEs, should not obstruct victims in accessing justice. In this regard, the jurisdictional roles should be clearly defined in law in a manner that does not disadvantage potential plaintiffs, and affected individuals and communities should have access to sufficient information with a view to ensure their equal and effective access to justice, avoid wasting time and resources in litigation and prevent the potential expiration of limitation period.

4.7 The Role of Justice Sector Actors

Judges, magistrates, prosecutors and lawyers who serve in the administration of justice are not always equipped to address cross-border litigation involving business and human rights.²⁹² Such litigation requires specific and targeted guidance on international human rights law and sometimes how to access and invoke laws, regulations and practices of different legal systems. Some lawyers have advised the ICJ of their difficulties in establishing standing in Thai domestic courts in the context of cross-border business activities where the burden is placed on them to establish that they fall within the jurisdiction of a Thai court. They have noted scarcity of known jurisprudence in the area and difficulties in finding information about the application of relevant domestic laws for cross-border litigation, particularly Thailand's Conflict of Laws Act, and in relation to class action suits before Thai courts.²⁹³

²⁹⁰ Supreme Administrative Court, 'Decision No. Kor.Sor. 8/2557', Judgment, 17 April 2014, pp.18-20.

²⁹¹ Supreme Administrative Court, '389 villagers v. Prime Minister, Ministry of Finance, and Department of Primary Industry and Mines (DPIM)', Decision No. Kor.Sor.22/2560, 30 October 2017, available at: <http://admincourt.go.th/ADMINCOURT/upload/admcase/Document/judgement/PDF/2560/02013-600006-2F-601130-0000610862.pdf>

²⁹² ICJ Interview, a senior Thai authority at the Ministry of Justice, Bangkok, 10 July 2020; ICJ Interview, a Thai Lawyer who has experience litigating a number of cross-border cases, Bangkok, 17 March 2020.

²⁹³ ICJ Interview, Acting Sub Lt. Somchai Armeen, president of the Legal Rights and Environmental Protection Association (LEPA), who had experience litigating class action suits, Bangkok, 6 March 2020

Lawyers whom the ICJ consulted also expressed concern about the lack of willingness of members of the Thai judiciary to try cases with a transnational character in Thai courts. The ICJ was informed that lawyers noted some courts were concerned about “international relations” and the negative impact of such cases on Thailand’s image in the international arena.

For example, in a decision of Thailand’s Bangkok South Civil Court regarding a class action suit between a Thai sugarcane company and two Cambodian citizens, the court rejected the class suit and deemed the process of dispatching the court’s decision to other class members in Cambodia to be excessively difficult. These difficulties included inability to post at the court’s venue, websites or through other media in Cambodia because “it is a sensitive issue, which might effect international relations”.²⁹⁴ To support its decision, the court further noted that relevant evidence was located in Cambodia and retrieving some of the evidence required approval from the Cambodian government, which may “risk effect(ing) international relations”.²⁹⁵

Recommendation(s)

The ICJ offers the following recommendations:

1. Specialized and continuing education of members of the legal profession and the judiciary in handling cases involving corporate human rights abuse – including abuses of transnational character – is required and should be provided for. This is particularly important in cases involving corporate action that negatively impacts on the environment or health, which often requires legal and judicial professionals to have adequate scientific knowledge and analytical skills;
2. Trainings on handling and managing cases which need to be brought outside of Thailand is also necessary and should be provided for, including, for example, cases relating to foreign-domiciled corporations where Thai courts are required to hear and decide cases arising from their acts. Such trainings should involve professionals from different jurisdictions and preferably encourage and strengthen cross-border sharing of expertise between members of the legal profession and judiciaries of different countries; and
3. Courts should encourage the engagement of expert resource persons to provide insight and advice in specific cases, including through accepting *amicus curiae* submissions from such persons, which, though currently allowed in general, only occurs in some cases.

4.8 The Role of Human Rights Commissions

National Human Rights Institutions (NHRIs) have a particularly important role to play as a State-based non-judicial remedial mechanism²⁹⁶ which can, as a compliment to judicial mechanisms, provide for redress for human rights abuses from business activities. NHRIs will only be suited to adequately perform this role if they comply with the Principles relating to the Status of National Institutions (Paris Principles), endorsed by the UN General

²⁹⁴ Bangkok South Civil Court, ‘Mrs. Hoy Mai and Mr. Smin Tet v. Mitr Phol Co. Ltd’, Judgment, Black Case No. Por.718/2561, 4 July 2019, pp. 4-5.

²⁹⁵ Ibid, p. 8.

²⁹⁶ Principle 27, UNGPs. To ensure their effectiveness, they should meet the criteria set out in Principle 31 of the UNGPs, where such non-judicial grievance mechanisms should be: (i) legitimate; (ii) accessible; (iii) predictable; (iv) equitable; (v) transparent; (vi) compatible with rights; and (vii) a source of continuous learning.

Assembly in 1993.²⁹⁷ Compliance with the Paris Principles by the NHRIs is assessed by the Global Alliance of National Human Rights Institutions (GANHRI) (formerly called the Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights), for the purpose of accrediting legitimate NHRIs. An “A” rating signifies full compliance with the Paris Principles, while a “B” rating signifies only partial compliance. The National Human Rights Commission of Thailand (NHRCT) is a non-judicial mechanism, tasked with promoting and protecting human rights in Thailand. Unfortunately, while previously the NHRCT had been given an A rating, in 2015, it was downgraded to a “B” rating²⁹⁸ which means it is only partly compliant with the Paris Principles.²⁹⁹ This happened after a one-year period during which the NHRCT could have addressed concerns that GANHRI had highlighted to it in 2014. In this respect, serious concerns have been raised regarding its independence and effectiveness in addressing human rights violations.

Pursuant to section 247 of the 2017 Constitution, the NHRCT is responsible for recommending suitable measures or providing guidelines in order to prevent or redress human rights violations, and to render recommendations regarding the promotion and protection of human rights to relevant agencies.³⁰⁰ The mandate is of limited effectiveness, since the NHRCT lacks sufficient powers to enforce its recommendations.³⁰¹ Furthermore, following the coming into force of Thailand’s 2017 Constitution, the authority of the NHRCT to refer cases and provide opinions to the Constitutional Court and the Administrative Court, including the filing of a lawsuit before the Court of Justice on behalf of a complainant, was removed.³⁰²

Nevertheless, the NHRCT has made efforts to investigate human rights abuses by TNCs. The NHRCT has received complaints and conducted investigations into at least nine cases relating to outbound investments by Thai companies in neighbouring countries. Their recommendations have resulted in significant Cabinet resolutions which recommended that Thailand endorse national standards in compliance with the UNGPs. For instance, in 2011, in response to a complaint submitted by communities in Nan province regarding the transboundary impacts of Hongsa Power Plant in Lao PDR and its transmission lines, the

²⁹⁷ Adopted by General Assembly resolution 48/134 (A/RES/48/134) of 20 December 1993, available at: <https://www.ohchr.org/en/professionalinterest/pages/statusofnationalinstitutions.aspx#:~:text=A%20adopted%20by%20General%20Assembly%20resolution%2048%2F134%20of%2020%20December%201993&text=1.,promote%20and%20protect%20human%20rights>

²⁹⁸ See International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights, ‘Report of the Sub-Committee on Accreditation (SCA)’, November 2015, pp. 39-41, available at: <https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/SCA%20FINAL%20REPORT%20-%20NOVEMBER%202015-English.pdf>

²⁹⁹ Global Alliance of National Human Rights Institutions (GANRHRI), ‘Chart of Status of National Human Rights Institutions’, as of 27 November 2019, available at: [https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/Status%20Accreditation%20-%20Chart%20\(%2027%20November%202019\).pdf](https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Documents/Status%20Accreditation%20-%20Chart%20(%2027%20November%202019).pdf)

³⁰⁰ The NHRCT is governed by three domestic laws: the Constitution of the Kingdom of Thailand (2017), the Organic Law on NHRCT (2017) and the National Human Rights Commission Act 1999 (B.E. 2542). According to Section 247 of the 2017 Constitution, the NHRCT has, among other competencies, the power “to examine and report the correct facts on violation of human rights”; “to suggest suitable measures or guidelines in order to prevent or redress human rights violations including the provision of remedy;” and “to render recommendations on measures or guidelines for the promotion and protection of the human rights to the National Assembly, the Council of Ministers and relevant agencies.”

³⁰¹ HRW, ‘Thailand: Don’t Weaken Rights Commission’, 23 August 2017, available at: <https://www.hrw.org/news/2017/08/23/thailand-dont-weaken-rights-commission>

³⁰² This power was provided for in Thailand’s 2007 Constitution.

NHRCT issued a few policy recommendations to the Cabinet, including that the Cabinet set up a mechanism to oversee Thai investors abroad to ensure that they respect the UNGPs. The finding has led to two Cabinet Resolutions that noted such recommendation of the NHRCT.³⁰³

Additionally, in 2015, the NHRCT found that the construction of infrastructure facilities in Dawei Special Economic Zone Project by a Thai construction company had caused human rights abuses of people in Myanmar, without providing fair and just compensation or remedy.³⁰⁴ The finding has led to a Cabinet Resolution that noted the NHRCT report and allocate tasks to relevant Ministries to take steps to ensure that Thai outbound investors do not abuse human rights.³⁰⁵

In the same year, NHRCT issued another report and found that a Thai sugarcane company was directly responsible for human rights abuses committed in conjunction with its business partners in Cambodia and opined that it should provide appropriate and fair compensation and reparation to all affected parties.³⁰⁶ The finding has led to another Cabinet Resolution that noted the NHRCT report and reinstated the need to have a mechanism to monitor Thai investors abroad to ensure that they respect the UNGPs.³⁰⁷

This mechanism was established in 2020, as part of the NAP Implementation Monitoring Sub-Committee. It has the power to provide opinions and recommendations to address

³⁰³ Cabinet, 'Resolution: Summary of Findings, Recommendations and Policy On Fundamental Rights of Local Community in Connection with the Constructions of Transmission Lines from Hongsa Power Plant in Lao PDR to Thailand's Nan province', 16 May 2016, available at: http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99319367&key_word=%CA%D2%C2%CA%E8%A7%E4%BF%BF%E9%D2%E1%C3%A7%CA%D9%A7&owner_dep=&meet_date_dd=&meet_date_mm=&meet_date_yyyy=&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2=; Cabinet, 'Resolution: Summary of Findings, Recommendations and Policy on Community Rights in Connection with the Constructions of Transmission Lines in Thailand's Nan province from Hongsa Power Plant in Lao PDR to', 5 January 2016, available at: http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99317530

³⁰⁴ NHRCT, 'Report No. 1220/2558', available at: <http://www.nhrc.or.th/getattachment/4b56b227-3afe-406f-b1a1-7d06d61d1992/.aspx>

³⁰⁵ Cabinet, 'Resolution regarding Summary of Findings, Recommendations and Policy On Fundamental Rights of Local Community: Dawei Special Economic Zone and Deep-sea Port Project in Myanmar By ITD', 16 May 2016, available at: http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99319369&key_word=&owner_dep=&meet_date_dd=16&meet_date_mm=5&meet_date_yyyy=2559&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2=

³⁰⁶ NHRCT, 'Investigation Report No: 1003/2558: Community Rights: Mitr Phol Sugar Company Limited negative impacts on people living in Samrong District and Chongkal District, Oddar Meanchey Province, Northeastern Cambodia', 12 October 2015, available at: http://equitablecambodia.org/website/data/Our-Case/Sugar_Case/thai%20human%20rights%20commission%20investigation%20report.docx; NHRCT, 'Report No. 1220/2558: Community Rights: Deep Sea Port Project and Tavay Economic Zone in Myanmar: A project of Italian-Thai Development Public Company. Thailand had signed an MOU with Myanmar on this project development which caused the violation of human rights', available at: <http://www.nhrc.or.th/getattachment/4b56b227-3afe-406f-b1a1-7d06d61d1992/.aspx>

³⁰⁷ Cabinet, 'Resolution regarding Summary of Findings, Recommendations and Policy on Fundamental Rights of Local Community in Connection with the Operation of Mitr Phol Co., Ltd that Affected the Populations in Samrong and Chongkal District, Oddar Meanchey Province, in Northeastern Cambodia', 2 May 2017, available at: https://cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99324013

allegations of human rights abuses caused or contributed to by businesses in Thailand or by Thai TNCs abroad.³⁰⁸

For a summary of the nine complaints submitted to the NHRCT and the NHRCT's findings, see [Annex 1](#). Four cases were submitted to Thai courts, while the rest were not brought to Thailand's legal system, which makes the NHRCT the main venue for these cases. Significant challenges remain regarding implementation of the NHRCT's recommendations in the above-noted cases and the limited power of the NHRCT in providing adequate and timely responses to human rights abuses of TNCs.

Recommendation(s)

The ICJ offers the following recommendations:

1. Measures should be implemented to ensure the NHRCT's compliance with the Paris Principles, in line with the recommendations of the GANHRI, including on the NHRCT's functional immunity and independence, its selection and appointment process, perceived neutrality of the NHRCT Commissioners and staff members, and its ability to respond to urgent human rights issues;
2. The NHRCT, even in the absence of express powers, should: (i) refer cases and submit opinions to the Constitutional Court and the Administrative Court, and to file a lawsuit to the Court of Justice on behalf of a victim; (ii) jointly investigate and cooperate with other NHRIs in cross-border investigations of human rights abuses; (iii) engage in international cooperation and assistance, including assisting victims of human rights abuse in other countries to access judicial and non-judicial remedies in Thailand, and, if necessary and in cooperation with other NHRIs or relevant authorities, to access these remedies in other countries;
3. Within the scope of its mandate under existing legal frameworks, the NHRCT should also take an active role in making recommendations to governmental agencies and justice sector actors on how to address and overcome barriers to access judicial remedies. This is particularly pertinent with respect to extra-territorial application of laws relating to human rights abuses committed in the context of business activities; and
4. The NHRCT should develop guidance for business enterprises on the development and implementation of project-level operational grievance mechanisms.

³⁰⁸ RYT9, 'Summary of the Report regarding the Recommendations, Measures or Guidance Proposed to Promote and Protect Human Rights', 29 July 2020, available at: <https://www.ryt9.com/s/cabt/3145558>

5. Conclusion and Recommendations

Litigation before courts remains the central remedial avenue available to persons to seek and obtain redress for human rights violations and abuses committed with the involvement of Thai TNCs abroad. Where victims are denied access to justice and redress in their host country, courts in Thailand should be an alternative effective forum. It is not yet fit for this task.

No Thai companies or their representatives have been held accountable by Thai courts for human rights abuses alleged to have been committed by Thai corporations or their subsidiaries outside of Thailand. Access to justice and redress is obstructed by the absence of an effective legal framework governing corporate legal accountability for human rights abuses caused or contributed to by their outbound investments, restricted access to the judiciary in Thailand for victims from a foreign State, procedural barriers, and other limitations on judicial authorities and lawyers.

To ensure alignment with Thailand's obligations under international law and international human rights standards, laws, policies and practices in Thailand must be reviewed and amended to address challenges which exist in holding Thai companies accountable.

The Government of Thailand, the Parliament of Thailand and justice sector actors should:

1. Ensure that access to justice, effective remedy and reparation should be extended beyond its national borders to communities who live in the vicinity of the operations of liable Thai companies who have suffered harm due to such business operations;
2. Take steps to draft a specific law and/or ensure the effective implementation of NAP to regulate and provide guidance for business activities of Thai enterprises operating abroad in order to ensure their compliance with international human rights laws and standards;
3. Ensure cooperation with other States and judicial and enforcement agencies in order to promote cross-border information sharing and transparency and prevent the denial of justice for victims of human rights violations and abuses;
4. Provide legal aid and other funding schemes to claimants who are citizens and non-citizens, including by supporting community-led monitoring systems which facilitate communities in observing environmental and health conditions, collecting evidence, and bringing cases to court where there is enough evidence for the case to go to trial;
5. Take necessary steps to ensure that the laws of civil, criminal and administrative remedies are enforced, and that the authorities are able to respond in an effective manner when called upon to address claims for remedy in respect of human rights abuses by business activities of transnational character. Changes in Thai law and regulations that should be introduced include:

5.1 Corporate Personality

- Piercing of the corporate veil doctrine should be explicitly allowed under Thai law where proof of control by corporate officers and a causal link between the parent company, subsidiary, illegal act and resulting damage can be established, to ensure protection and promulgation of human rights. This can be done through amendment of section 1096 of the Civil and Commercial Code and section 15 of the Public Company Act – governing shareholder's liability - to allow a shareholder or parent company to be held liable for its actions or for the losses incurred by the

company if the above noted link can be established and if the business operator's property is insufficient to satisfy obligations under the complaint. This can also be done along with recognizing that parent companies may owe a duty to exercise reasonable care in monitoring and controlling their subsidiaries in relation to human rights and environmental protection; and

- Legislation should be adopted providing for mandatory disclosure which could take the form of an amendment to the Civil and Criminal Procedure Code shifting the burden of proof if information relating to a claim lies "wholly or in part within the exclusive knowledge of the corporate defendant", or defining disclosure refusal restrictively to unnecessary or unwarranted trade secrets and privacy or confidentiality related refusals. Courts should be encouraged to actively exercise their power under section 92 of the Civil Procedure Code to require a party who refuses to produce confidential official documents to justify this refusal, and order production of the evidence if the explanation is unreasonable.

5.2 Jurisdiction

- The jurisdiction of Thai criminal courts should be extended to cover claims against Thai companies, irrespective of whether the alleged human rights abuses committed by the companies or its subsidiaries were committed partly or wholly outside the territory of Thailand. To this end, an amendment to sections 4 to 8 of the Criminal Code should be considered.
- In order to avoid inconsistent judgments, Thailand's Administrative Court should explicitly expand its jurisdiction to cover disputes caused by an unlawful act or omission by a Thai SOE, administrative agency or State official in another country, including when such act or omission causes transboundary impacts to individuals and communities in Thailand; and
- Thailand should amend the Criminal Code to provide for universal jurisdiction for human rights abuses which constitute crimes under international law, regardless of where the violation occurred and regardless of the nationality of either the offender or the victim, including war crimes, crimes against humanity, genocide, slavery, torture, enforced disappearances and extrajudicial killings.

5.3 Conflict of Laws

- Thailand's Conflict of Laws Act should be reviewed with a view to lifting all existing obstacles in access to justice. With regard to section 15 of Thailand's Conflict of Laws Act, this provision should be amended to allow the victim of a business-related human rights abuse or his or her representatives to determine the most appropriate and relevant law before the most competent court - whether these may be laws in the host country where alleged human rights abuses occurred or the country of domicile of companies alleged to have committed the acts or omissions resulting in abuses of human rights.

5.4 Statutes of Limitations

- Thai domestic law should be amended to ensure that statutes of limitations will not be unduly restrictive to injured persons seeking to

bring claims relating to human rights abuses committed abroad by Thai companies. This could be achieved in part through amendment of the Conflict of Laws Act and other relevant civil and administrative procedural laws to explicitly provide that when a statute of limitations does apply, such limitation shall not be effective against civil or administrative actions brought by victims seeking reparation for their injuries resulting from conduct constituting gross human rights abuses or crimes under international law; and

- Statutes of limitations should not apply generally to the prosecution of violations of international human rights law which constitute the most serious crimes or gross human rights abuses under international law, including offences such as war crimes, crimes against humanity, genocide, slavery, torture, extrajudicial killings, and enforced disappearances.

5.5 Collective Legal Actions

- Human rights-related class actions and other forms of collective complaint should be allowed on a non-discriminatory basis, including in cases where plaintiffs are non-Thai nationals. The barring of affected victims from filing a class action suit should not be on the basis of language or national origin or level of knowledge. Difficulties of a court in meeting administrative requirements such as service of papers or notification of plaintiffs outside its jurisdiction should also not be a bar to such litigation.

5.6 Complexity of Civil Liability and Administrative Liability of SOEs

- The division between administrative and civil jurisdiction, particularly for SOEs, should not obstruct victims seeking to access justice and should be clearly defined in law. Affected individuals and communities should have access to sufficient information in this regard with a view to ensure their equal and effective access to justice, avoid the wasting of time and resources in litigation and prevent potential expiration of limitation periods.

5.7 The Role of Justice Sector Actors

- Specialized and continuing education of members of the legal profession and the judiciary in handling cases involving corporate human rights abuse – including abuses of a transnational character – is required. This is particularly important in cases involving corporate action that negatively impacts on the environment or health, which often require legal and judicial professionals to have adequate scientific knowledge and analytical skills;
- Trainings on handling and managing cases which need to be brought outside Thailand is also necessary, including, for example, cases relating to foreign-domiciled corporations where Thai courts are required to hear and decide cases arising from their acts. Such trainings should involve professionals from different jurisdictions and preferably encourage and strengthen cross-border sharing of expertise between members of the legal profession and judiciaries of different countries; and
- Courts should encourage the engagement of expert resource persons to provide insight and expertise in specific cases, including through

accepting amicus curiae submissions from such persons, which, though currently allowed in general, only occurs in some cases.

5.8 The Role of Human Rights Commissions

- Measures should be implemented to ensure the NHRCT's compliance with the Paris Principles, in line with the recommendations of the GANHRI, including on the NHRCT's functional immunity and independence, its selection and appointment process, perceived neutrality of the NHRCT Commissioners and staff members, and its ability to respond to urgent human rights issues;
- The NHRCT, even in the absence of express powers, should: (i) refer cases and submit opinions to the Constitutional Court and the Administrative Court, and file a lawsuit to the Court of Justice on behalf of a victim; (ii) jointly investigate and cooperate with other NHRIs in cross-border investigations of human rights abuses; (iii) engage in international cooperation and assistance, including assisting victims of human rights abuse in other countries to access judicial and non-judicial remedies in Thailand, and, if necessary and in cooperation with other NHRIs or relevant authorities, accessing these remedies in other countries;
- Within the scope of its mandate under existing legal frameworks, the NHRCT should take an active role in making recommendations to governmental agencies and justice sector actors on how to address and overcome barriers to access judicial remedies. This is particularly pertinent with respect to extra-territorial application of laws relating to human rights abuses committed in the context of business activities; and
- The NHRCT should develop guidance for business enterprises on the development and implementation of project-level operational grievance mechanisms.

ANNEX

Annex 1: Complaints submitted to the NHRCT and the NHRCT's Findings

| No. | Case | Allegation(s) of Human Rights Abuse | NHRCT's Finding(s) |
|-----|----------------------------|--|---|
| 1 | Hatgyi Dam, Myanmar | <p>The Hatgyi Dam is one of seven proposed hydropower projects on the Salween River in Myanmar, located in an area where many ethnic conflicts have taken place. The Hatgyi hydropower project has been developed by four shareholders, including a subsidiary firm of a Thai State-owned enterprise.³⁰⁹</p> <p>Clashes broke out in Karen State between the Myanmar military and Karen forces several times, close to the site of the proposed dam. This has led to numerous deaths and the forced displacement of thousands of Karen villagers. The conflict was seen as a move by the military to secure the area in preparation for construction of the dam.³¹⁰ Myanmar government allegedly developed Hatgyi Dam without any consultation with the local ethnic people.³¹¹</p> | <p>Complaint was submitted by several civil society groups in Myanmar to the NHRCT in 2006 (Complaint No. 191/2549). In 2007, the NHRCT found that the construction of Hatgyi Dam might be a key factor leading to "human rights abuses against ethnic groups", and "damage (of) natural resources, its surrounding environments, and ecosystem" of Salween River.</p> <p>As it is located in an ongoing conflict area, the NHRCT was of the view that construction of the dam would lead to the displacement and migration of Karen villagers to Thailand. The construction would also transform several areas to permanently flooded areas and would affect the river-dependent population.³¹²</p> |

³⁰⁹ NHRCT, 'Investigation Report No: 526/2550', 27 December 2007.

³¹⁰ For example, Montri Chanwong, 'Hatgyi dam...A Next Time Bomb of Refugees', Bangkok Biz News, 5 March 2009, available at: http://www.livingriversiam.org/4river-tran/4sw/swd_a37.html; Bangkok Post, 'The power struggle at Salween River', 30 November 2014, available at: <https://www.bangkokpost.com/thailand/special-reports/446181/the-power-struggle-at-salween-river>; International Rivers, 'Thailand's Responsibility to the People of the Salween River', 29 September 2016, available at: <https://www.internationalrivers.org/blogs/254/thailand%E2%80%99s-responsibility-to-the-people-of-the-salween-river> The Nation, 'Petition to claim rights violated over Salween dams', 21 November 2014, available at: <https://www.nationthailand.com/national/30248318>

³¹¹ NHRCT, 'Investigation Report No: 526/2550', 27 December 2007.

³¹² NHRCT, 'Investigation Report No: 526/2550', 27 December 2007; Prachatai, 'Met with the NHRCT and asked the NHRCT to help end the Construction of Hatgyi Dam, 25 November 2009, available at: <https://prachatai.com/journal/2009/11/26755> (in Thai)³¹³ Prachatai, 'Met with the NHRCT and asked the NHRCT to help end the Construction of Hatgyi Dam, 25 November 2009, available at: <https://prachatai.com/journal/2009/11/26755> (in Thai)³¹⁴

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| | | | The report was submitted to Thailand's Prime Minister on 28 April 2009. ³¹³ No further update was reported to the public. |
| 2 | Sugar Plantation in Koh Kong Province, Cambodia | <p>In 2006, the Cambodian Cabinet approved the granting of an Economic Land Concession for a sugar plantation to two Cambodian companies, who have 70 percent of their shares owned by a sugarcane company registered in Thailand.³¹⁴</p> <p>According to the complaint that was submitted to the NHRCT in 2010 by the Foundation for Ecological Recovery and Community Legal Education Centre (CLEC) (Complaint No. 58/2553), before the signing of the land concession agreement, forced eviction of local villagers was allegedly conducted by government officials to make way for the plantation. The eviction destroyed homes, farmland, livestock grazing areas, and other valuable possessions causing residents to flee from their villages in Chhouk, Chikhor and Trapheng Kandal villages in Sre</p> | <p>In 2015, the NHRCT found that land concessions given to the sugar industry resulted in serious human rights abuses, including the use of violence to evict villagers from their place of residence, and impediments against the use of natural resources fundamental to community subsistence.</p> <p>The NHRCT was of the view that the Thai sugarcane company was "in part directly responsible for the impact of these human rights abuses, even though it did not directly commit the act of human rights violations", due to "the company's decision to receive and benefit from the land concessions which caused these human rights abuses".³¹⁶</p> |

NHRCT, 'Investigation Report No. 115/2558' 10 March 2015, available at: https://earthrights.org/wp-content/uploads/unofficial_english_translation_-_tnhrc_report_on_findings_-_koh_kong_land_concession_cambodia.pdf

³¹³ Prachatai, 'Met with the NHRCT and asked the NHRCT to help end the Construction of Hatgyi Dam, 25 November 2009, available at: <https://prachatai.com/journal/2009/11/26755> (in Thai)³¹⁴ NHRCT, 'Investigation Report No. 115/2558' 10 March 2015, available at: https://earthrights.org/wp-content/uploads/unofficial_english_translation_-_tnhrc_report_on_findings_-_koh_kong_land_concession_cambodia.pdf

³¹⁴ NHRCT, 'Investigation Report No. 115/2558' 10 March 2015, available at: https://earthrights.org/wp-content/uploads/unofficial_english_translation_-_tnhrc_report_on_findings_-_koh_kong_land_concession_cambodia.pdf

³¹⁶ NHRCT, 'Investigation Report No. 115/2558' 10 March 2015; Transborder News, 'Opinion of the NHRCT on Xayaburi Dam', 6 May 2012, available at: <https://transbordernews.in.th/home/?p=930>.³¹⁷ Transborder News, 'Opinion of the NHRCT on Xayaburi Dam', 6 May 2012, available at: <https://transbordernews.in.th/home/?p=930>; Watcharachai Jirajindakul, 'A Tale of Xayaburi Hydroelectric Dam: The Unenforceable Concept of Corporate Social Responsibility and "ASEAN Way" on Financial Institutions', 2018, CMU Journal of Law and Social Sciences, Vol.12 No. 1, available at: <https://so01.tci-thaijo.org/index.php/CMUJLSS/article/view/147863/138987>

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| | | <p>Ambel district. Five residents were reportedly injured and at least two residents were shot.</p> <p>In addition, the land concessions were allegedly granted without prior public hearings. It was alleged that no environmental impact assessment was conducted, and no plan for relocation was issued.³¹⁵</p> | No further update was reported to the public. |
| 3 | Xayaburi Dam, Lao PDR | <p>In 2010, the construction of the Xayaburi Hydropower Dam on the Mekong River's mainstream was initiated by a Thai-listed construction company with the cooperation of Thai and Lao PDR governments. The construction received financial support from six Thai commercial banks. A Thai State-owned enterprise also agreed to purchase 95% of the electricity generated by Xayaburi Dam.³¹⁷</p> <p>According to a complaint that was submitted to the NHRCT in 2011 by local residents in Mekong riparian provinces, it was alleged that the construction of this dam would potentially cause damage to the ecological system of the Mekong river and negatively impact on people living across the river basin in Thailand.</p> <p>The construction process was reportedly carried out without effective consultation with affected communities in Thailand. Transboundary environmental and health</p> | <p>The NHRCT discontinued its investigation into the case because the case was submitted to an Administrative Court by a group of Thai villagers against several Thai governmental agencies, including the State-owned enterprise that had agreed to purchase the electricity generated by the dam.</p> <p>The case was admitted by the Central Administrative Court.³¹⁹ However, on 25 December 2015, the court dismissed the case on the basis that the power purchase agreement fulfilled the required notification and consultation procedures. The court further ruled that the case before it had not required an EIA to be conducted under Thai</p> |

³¹⁵ NHRCT, 'Investigation Report No. 115/2558' 10 March 2015.

³¹⁷ Transborder News, 'Opinion of the NHRCT on Xayaburi Dam', 6 May 2012, available at: <https://transbordernews.in.th/home/?p=930>; Watcharachai Jirajindakul, 'A Tale of Xayaburi Hydroelectric Dam: The Unenforceable Concept of Corporate Social Responsibility and "ASEAN Way" on Financial Institutions', 2018, CMU Journal of Law and Social Sciences, Vol.12 No. 1, available at: <https://so01.tci-thaijo.org/index.php/CMUJLSS/article/view/147863/138987>

³¹⁹ ETO Watch, 'Thailand's Direct Investment in Neighbouring Countries: Impacts to the Environment and Communities, and Violations of Human Rights', June 2018, p. 38, available at: <http://www.nhrc.or.th/getattachment/eeb6c10c-8870-4593-98c6-fd670a63ad1e/.aspx>

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| | | impacts assessments in Thailand were allegedly not undertaken. ³¹⁸ | law, and that relevant authorities therefore did not neglect their duty. ³²⁰ The plaintiffs appealed the decision on 25 January 2016. Currently, the case is under the consideration of the Supreme Administrative Court. ³²¹ |
| 4 | Transmission Lines from Hongsa Power Plant, Lao PDR | <p>The Hongsa project is a coal plant and mining project in Xayaboury Province, Lao PDR. It is operated by Hongsa Power Company Limited - which was founded as a joint venture of mostly Thai companies. Nine Thai banks financed the project.³²² As most of the plant's electricity will be sold to a Thai State-owned enterprise, a set of transmission lines were constructed from Hongsa Power Plant to Thailand's Mae Moh Power Plant in Lampang Province, passing through Nan province.</p> <p>Communities in Nan province claimed that the project risked causing transboundary impacts by creating air pollution. Transmission lines were allegedly built through reserved forest areas, damaging the areas upon which local communities relied for their food and livelihood.</p> | <p>A complaint was submitted to the NHRCT in 2011 by local residents from Nan province (Complaint No. 163/2554). The NHRCT discontinued its investigation into the case because the case was admitted to Chiang Mai Administrative Court. It, however, issued a few policy recommendations to the Cabinet.³²⁴</p> <p>On 30 September 2015, in relation to a case brought by 17 local residents against a Thai listed company and Energy Regulatory Commission, Chiang Mai Administrative Court ruled that the defendants had violated a relevant regulation regulating the procedure for utilizing public lands. The court</p> |

³¹⁸ Transborder News, 'Opinion of the NHRCT on Xayaburi Dam', 6 May 2012, available at: <https://transbordernews.in.th/home/?p=930>; Watcharachai Jirajindakul, 'A Tale of Xayaburi Hydroelectric Dam: The Unenforceable Concept of Corporate Social Responsibility and "ASEAN Way" on Financial Institutions', 2018, CMU Journal of Law and Social Sciences, Vol.12 No. 1, available at: <https://so01.tci-thaijo.org/index.php/CMUJLSS/article/view/147863/138987>

³²⁰ Administrative Court, 'Black Case No. Sor.493/2555 and Red Case no. Sor.59/2556', Judgment, 25 December 2015.

³²¹ Thai PBS, 'Villagers Along Mekong River submitted Appeal on Xayaburi Case, saying the Case is an Example of Impacts in AEC Era', 25 January 2016, available at: <https://news.thaipbs.or.th/content/7540> (in Thai)

³²² Hongsa Power Company Limited, 'Shareholder and Board of Directors', available at: <http://www.hongsapower.com/index.php?model=cms&view=item&layout=page&id=12>

³²⁴ NHRCT, 'Report No. 1100/2558', available at: <https://bit.ly/322WfBn> (in Thai)

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| | | The environmental impact assessment for the project had reportedly failed to ensure that meaningful consultation with the affected communities was carried out. ³²³ | then ordered the defendant demolish the transmission lines and restore the land to its original condition. ³²⁵ In 2016, Thai Cabinet passed two resolutions. It made reference to the findings of the NHRCT and Ministries' responses to such findings, and set up a procedure to establish a body to oversee Thai investors in foreign countries and their compliance with human rights. ³²⁶ This procedure was created in 2020 as part of the NAP Monitoring Sub-Committee (See section 1.3). |
| 5 | Dawei Special Economic Zone, Myanmar | The Dawei Special Economic Zone Project is located in the north of Dawei, the capital city of Tanintharyi Region in Myanmar. ³²⁷ Human rights abuses have been reported from construction in the Special Economic Zone implemented by a Thai-listed construction company. According to a | In 2015, the NHRCT found that the construction of infrastructure facilities within the Special Economic Zone had abused the rights of people in Myanmar, without providing fair and just compensation or remedy. Local villagers were found to have lost their houses and farmlands, and their |

³²³ EarthRights International, 'Hongsa Power Plant and Mining Project', available at: <https://earthrights.org/what-we-do/extractive-industries/hongsa-power-plant-and-mining-project/>

³²⁵ Isranews Agency, 'The Court Ordered EGAT to END the Construction of Electricity Transmission Line on Public Lands in Nan Province', 2 October 2015, available at: https://www.isranews.org/community/comm-news/comm-environment/41749-nan_41749.html

³²⁶ Cabinet, 'Resolution: Summary of Findings, Recommendations and Policy on Community Rights in Connection with the Constructions of Transmission Lines in Thailand's Nan province from Hongsa Power Plant in Lao PDR to', 5 January 2016, available at: http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99317530; Cabinet, 'Resolution: Summary of Findings, Recommendations and Policy On Fundamental Rights of Local Community in Connection with the Constructions of Transmission Lines from Hongsa Power Plant in Lao PDR to Thailand's Nan province', 16 May 2016, available at: http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99319367&key_word=%CA%D2%C2%CA%E8%A7%E4%BF%BF%E9%D2%E1%C3%A7%CA%D9%A7&owner_dep=&meet_date_dd=&meet_date_mm=&meet_date_yyyy=&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2=³²⁷ NHRCT, 'Investigation Report No. 1220/2558', 23 November 2015, available at: http://mekongwatch.org/PDF/daweiNHRCT_ReportFull_ENG.pdf

³²⁷ NHRCT, 'Investigation Report No. 1220/2558', 23 November 2015, available at: http://mekongwatch.org/PDF/daweiNHRCT_ReportFull_ENG.pdf

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| | | <p>complaint submitted to the NHRCT in 2013 by people in Myanmar who were affected by the Project (Complaint No. 107/2556), construction had allegedly affected the livelihood and violated the rights of indigenous people and other communities in their areas through land grabbing and forced evictions.</p> <p>All the agreements and plans made between the Thai company and the Myanmar government were reportedly signed without any consultation with local indigenous and ethnic people. The environmental impact assessment was also allegedly conducted after the construction had already begun.³²⁸</p> <p>On 30 December 2020, the above Thai-listed construction company announced that it received a notification of termination of its agreement to develop the initial phase of the SEZ from the Dawei Special Economic Zone Management Committee. The notification claimed the Company had failed to make concession fee payments and had not complied with certain conditions precedent prior to commencing operations under its concession agreements.³²⁹</p> | <p>livelihood adversely impacted. The NHRCT believed that no environmental impact assessment had been conducted in line with regulatory standards, and that the company had conducted the assessment after the construction had begun.³³⁰</p> <p>On 16 May 2016, the Thai Cabinet passed a resolution, making reference to the findings of the NHRCT, and allocated tasks to Ministries to ensure that Thai outbound investors will not violate human rights.³³¹ No further update was reported to the public.</p> |
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³²⁸ NHRCT, 'Investigation Report No. 1220/2558', 23 November 2015, available at: http://mekongwatch.org/PDF/daweiNHRCT_ReportFull_ENG.pdf.

³²⁹ Nan Lwin, 'Myanmar Terminates Thai-Led Consortium's Involvement in Dawei Mega Project', 14 January 2021, The Irrawaddy, available at: <https://www.irrawaddy.com/factiva/myanmar-terminates-thai-led-consortiums-involvement-dawei-mega-project.html>

³³⁰ NHRCT, 'Investigation Report No. 1220/2558', 23 November 2015.

³³¹ Cabinet, 'Resolution regarding Summary of Findings, Recommendations and Policy On Fundamental Rights of Local Community: Dawei Special Economic Zone and Deep-sea Port Project in Myanmar By Italian-Thai Development Public Company Limited', 16 May 2016, available at: http://www.cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99319369&key_word=&owner_dep=&meet_date_dd=16&meet_date_mm=5&meet_date_yyyy=2559&doc_id1=&doc_id2=&meet_date_dd2=&meet_date_mm2=&meet_date_yyyy2= ³³² NHRCT, 'Investigation Report No: 1003/2558', 12 October 2015, available at: http://equitablecambodia.org/website/data/Our-Case/Sugar_Case/thai%20human%20rights%20commission%20investigation%20report.docx

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| 6 | Sugar Plantation in Oddar Meanchey Province, Cambodia | <p>In January 2008, the Ministry of Forestry and Fishery granted an Economic Land Concession to three sugarcane companies registered in Cambodia to operate a sugar industrial plant in Oddar Meanchey Province in the northeast of Cambodia. The three companies were subsidiaries of a Thai sugarcane company, Mitr Phol Sugar Company Limited. According to verbal testimony of Mitr Phol Sugar Company Limited given to the NHRCT, it owned one company and partnered with other companies in investing in the other two companies.³³²</p> <p>According to a complaint submitted to the NHRCT in 2013 by the Foundation for Ecological Recovery, Equitable Cambodia and the Cambodian League for the Promotion and Defense of Human Rights (LICADHO) (Complaint No. 259/2556), after the concession was granted, it was alleged that the company had colluded with the Cambodian Armed Forces to forcibly seize the land of local people by destroying local people's houses, killing their livestock, torching villages, destroying crops, and threatening and arresting villagers.³³³</p> <p>The defendants claimed that the company had gotten temporary concessions in compliance with all local and national laws and with assurances from Cambodian</p> | <p>In 2015, the NHRCT and its Sub-Committee found the Mitr Phol Sugar Company Limited directly responsible for human rights abuses committed in conjunction with its business partners in Cambodia and was "liable to correct and provide remedy for the damages, as stipulated in the UNGPs."³³⁵</p> <p>On 2 May 2017, the Thai Cabinet passed a resolution making reference to the findings of the NHRCT and reinstating the need to set up a procedure to establish a body to oversee Thai investors in foreign countries and their compliance with human rights.³³⁶ This procedure was created in 2020 as part of the NAP Monitoring Sub-Committee (See section 1.3).</p> |
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³³² NHRCT, 'Investigation Report No: 1003/2558', 12 October 2015, available at: http://equitablecambodia.org/website/data/Our-Case/Sugar_Case/thai%20human%20rights%20commission%20investigation%20report.docx

³³³ NHRCT, 'Investigation Report No: 1003/2558', 12 October 2015.

³³⁵ NHRCT, 'Investigation Report No: 1003/2558', 12 October 2015, available at: http://equitablecambodia.org/website/data/Our-Case/Sugar_Case/thai%20human%20rights%20commission%20investigation%20report.docx

³³⁶ Cabinet, 'Resolution regarding Summary of Findings, Recommendations and Policy on Fundamental Rights of Local Community in Connection with the Operation of Mitr Phol Co., Ltd that Affected the Populations in Samrong and Chongkal District, Oddar Meanchey Province, in Northeastern of Cambodia', 2 May 2017, available at: https://cabinet.soc.go.th/soc/Program2-3.jsp?top_serl=99324013 ³³⁷ Complaint to NHRCT, 'Human Rights Violations Due to Thai Company Operations at the Heinda Mine in Myanmar', 22 May 2015.

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| | | authorities that “all temporary concession areas had been processed legally and transparently.” ³³⁴ | |
| 7 | Heinda Mine, Myanmar | <p>Heinda Mine is a tin mine in the northern part of the Great Tenasserim River Basin in Myanmar. It is operated by a joint venture between a Thai-owned company registered in Myanmar and a State-owned enterprise affiliated with Myanmar’s Ministry of Mines.³³⁷</p> <p>At the time that the concession for its construction was granted, Myanmar laws did not require the company to conduct EIA/EHIA. Since that time, however, wastewater discharge and flooding from the mine have reportedly damaged agricultural plantations, houses in nearby villages and surrounding creeks.</p> <p>In July 2012, flooding in Myaung Pyo village was more severe than other years and toxic sludge covered the plantations and land of many households, contaminating water sources. Villagers have since reportedly been</p> | <p>A complaint was submitted to the NHRCT in 2015 by the Myaung Pyo community (Complaint No. 285/2558). The NHRCT’s investigation is still ongoing.³³⁹ No further update was reported to the public.</p> <p>Notably, in Myanmar, on 7 January 2020, Saw Dah Shwe, a villager from Kin Baung Chaung in Dawei District, won a case against the Thai-owned company, and was compensated 114,800,000 kyats (\$76,533) for his losses. He took the case to the Dawei District Court in 2015, demanding compensation after flooding as a result from the mine’s operations.³⁴⁰</p> |

³³⁴ Reuters, ‘Cambodian farmers sue Thai sugar group Mitr Phol over alleged land grab’, 2 April 2018, available at: <https://www.reuters.com/article/us-cambodia-thailand-sugar/cambodian-farmers-sue-thai-sugar-group-mitr-phol-over-alleged-land-grab-idUSKCN1H90P6>

³³⁷ Complaint to NHRCT, ‘Human Rights Violations Due to Thai Company Operations at the Heinda Mine in Myanmar’, 22 May 2015.

³³⁹ The Mekong Butterfly, ‘Heinda Tin Mine: Hidden Behind Thai Business Investor’, available at: <https://themekongbutterfly.com/2017/12/26/heinda-tin-mine-hidden-behind-thai-business-investor/>

³⁴⁰ Dawei Watch, ‘PRESS RELEASE: Kin Baung Chaung Villager Wins Landmark Case Against Thai Mining Company in Dawei District’, 9 January 2020, available at: <https://www.latest.facebook.com/DaweiWatchThailand/posts/1694740234000335> ³⁴¹ Bangkok Post, ‘Green group targets Laos hydro project’, 9 June 2017, available at: <https://www.bangkokpost.com/thailand/general/1265099/green-group-targets-laos-hydro-project>

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| | | unable to continue farming on this land. Water sources were allegedly rendered unsafe to drink. ³³⁸ | |
| 8 | Pak Beng Hydropower Dam, Lao PDR | <p>Pak Beng Hydropower Dam is operated by China Datang Overseas Investment Company. A subsidiary of a Thai State-owned enterprise reportedly holds a 30% stake in this project.³⁴¹</p> <p>In 2016, the Thai National Mekong Committee expressed concerns regarding several potential transboundary impacts of the project to Thailand. The construction was expected to block fish migration routes and change biological conditions and the ecosystem of the Mekong, causing many fishing families to lose income and some endangered species to be extinct. It risked causing water levels in the Mekong region to rise and lead to flooding in some areas in Thailand. These were projected to lead to negative consequences on people who relied on Mekong</p> | <p>A complaint was submitted to the NHRCT in 2016 by members of Mekong communities in Thailand.³⁴⁴ The NHRCT discontinued its investigation into the case.³⁴⁵</p> <p>The case was brought to the Thai Administrative Court by members of Mekong communities in Thailand against Thai officials and governmental agencies, challenging the inadequacy of the prior consultation process in Thailand. On 18 September 2017, the Central Administrative Court denied jurisdiction to hear the case because the plaintiffs could be categorized as an injured person with standing to bring the charge to the Court.³⁴⁶ An appeal motion has been submitted. The lawsuit is now pending for</p> |

³³⁸ EarthRights International, 'Thai Investors Can't Violate Human Rights in Myanmar, 9 March 2017, available at: <https://earthrights.org/blog/thai-investors-cant-violate-human-rights-in-myanmar/>

³⁴¹ Bangkok Post, 'Green group targets Laos hydro project', 9 June 2017, available at: <https://www.bangkokpost.com/thailand/general/1265099/green-group-targets-laos-hydro-project>

³⁴⁴ ETOs Watch, 'Monitoring Report on the Thai Direct Investment Abroad: Impacts on Community, Environment and Human Rights Violations', June 2018, p. 45, available at: <http://www.nhrc.or.th/getattachment/eeb6c10c-8870-4593-98c6-fd670a63ad1e/.aspx>³⁴⁵ ICJ Interview, Representative of the NHRCT, Bangkok, January 2021.

³⁴⁵ ICJ Interview, Representative of the NHRCT, Bangkok, January 2021.

³⁴⁶ Central Administrative Court, 'Black Case No. Sor. 19/2560 and Red Case No. Sor. 193/2560', Judgment, 15 September 2017; International Rivers, 'Briefing on Pak Beng Dam Lawsuit', 8 June 2017, available at: <https://archive.internationalrivers.org/resources/briefing-on-pak-beng-dam-lawsuit-16498>

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| | | <p>river for food and income, and who were expected to be forced to relocate or be resettled as result.³⁴²</p> <p>The consultation process with local communities was reportedly not carried out effectively due to a lack of adequate information from all relevant authorities on transboundary impacts. It was also alleged that the consultation process did not cover all potentially affected areas.³⁴³</p> | <p>consideration before the Supreme Administrative Court.</p> |
| 9 | Ban Chaung Coal Mine in Tanintharyi Region, Myanmar | <p>The Ban Chaung Coal Mine is an open pit coal mine located in the Dawei Township of Tanintharyi region, Myanmar. The mine is in a former war zone, in which a ceasefire agreement was signed in 2012.</p> <p>According to a complaint that was submitted to the NHRCT in 2017, the mine and associated infrastructure projects are believed to be developed and operated by a consortium of four companies, three of which are Thai companies.³⁴⁷ The complainants claimed that the mine has impacted, or will impact upon, the livelihood, health and way of life of people living in 22 villages in Myanmar. Among other harmful impacts, the mine has allegedly</p> | <p>A complaint was submitted to the NHRCT in 2017 by local residents of Khon Chaung Kyi, Pya Tha Chaung, Cin Swe Chaung, Hnin Nga Pik, Paung Daw, Ka Taung Ni, Thabyu Chaung, and Kyauk Htoo regions from Myanmar (Complaint No. 361/2560).</p> <p>The NHRCT's investigation is still ongoing. No further update was reported to the public.</p> |

³⁴² The Mekong Butterfly, 'Circumventing State's Responsibility in Transboundary Investment: the case of Pak Beng Hydropower Project in Laos PDR', 22 December 2017, available at: <https://themekongbutterfly.com/2017/12/22/circumventing-states-responsibility-in-transboundary-investment-the-case-of-pak-beng-hydropower-project-in-laos-pdr/>; EarthRights International, 'We Will Never Stop Raising Our Voices: Facing the Pak Beng Dam', 4 October 2018, available at: <https://earthrights.org/blog/we-will-never-stop-raising-our-voices-facing-the-pak-beng-dam/>

³⁴³ The Mekong Butterfly, 'Circumventing State's Responsibility in Transboundary Investment: the case of Pak Beng Hydropower Project in Laos PDR', 22 December 2017, available at: <https://themekongbutterfly.com/2017/12/22/circumventing-states-responsibility-in-transboundary-investment-the-case-of-pak-beng-hydropower-project-in-laos-pdr/>; EarthRights International, 'We Will Never Stop Raising Our Voices: Facing the Pak Beng Dam', 4 October 2018, available at: <https://earthrights.org/blog/we-will-never-stop-raising-our-voices-facing-the-pak-beng-dam/>.

³⁴⁷ Inclusive Development International, 'Human rights violations connected to Thai companies' operations at the Ban Chaung coal mine in Thanintharyi Region, Myanmar', 9 June 2017, available at: <https://www.inclusivedevelopment.net/wp-content/uploads/2017/09/2017.06.09-NHRCT-Ban-Chaung-coal-mine-complaint-for-upload.pdf>

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| | | polluted air and water, harmed the livelihood of local people, and led to illegal seizure of agricultural lands. ³⁴⁸ | |
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³⁴⁸ Inclusive Development International, 'Human rights violations connected to Thai companies' operations at the Ban Chaung coal mine in Thanintharyi Region, Myanmar', 9 June 2017, available at: <https://www.inclusivedevelopment.net/wp-content/uploads/2017/09/2017.06.09-NHRCT-Ban-Chaung-coal-mine-complaint-for-upload.pdf>

Annex 2: List of Interviews and Workshop Participants

Cambodia

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| Huon Chundy | Community Legal Education Centre (CLEC) |
| Leng Sarorn | Equitable Cambodia Development Watch Program |
| Tep Neth | Vishnu Law Group |

Lao PDR

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| Two representatives | civil society organizations based in Lao PDR |
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Myanmar

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| Dr. Tin May Htun | Myanmar National Human Rights Commission |
| Hnin Wut Yee | Myanmar Centre for Responsible Business |
| Ko Aung Lwin | Dawei Watch Foundation |

Thailand

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| Representative | National Human Rights Commission of Thailand (NHRC) |
| Sor.Rattanamanee Polkla and two lawyers | Community Resources Centre Foundation (CRC) |
| Two Representatives | Enlaw Foundation Thailand |
| Acting Sub Lt. Somchai Armeen | Legal Rights and Environmental Protection Association (LEPA) |
| Four Representatives | Ministry of Justice |
| Asst. Prof. Dr. Darunee Paisanpanichkul | Faculty of Law, Chiang Mai University |
| Songkran Pongboonjun | Faculty of Law, Chiang Mai University |
| Arisara Lekham | School of Law, Mae Fah Luang University |
| Areewan Sombunwatthanakun | Samsikalai Foundation |
| Phairin Sohsai | International River |
| Teerachai Sanjaroenkijthaworn | The Mekong Butterfly |
| Five Representatives | Foundation for Environment and Natural Resources (FENR) |
| Matthew Baird | Environmental Lawyer |
| Andaman Limsakul | Student |
| Representatives | Securities and Exchange Commission |
| Legal Official | Administrative Court |
| Kornkanok Wattanaboom | ETOs Watch Coalition |

Vietnam

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| Representative | A civil society organization based in Vietnam |
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January 2021 (for an updated list, please visit www.icj.org/commission)

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Prof. Robert Goldman, United States

Vice-Presidents:

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

Justice Sir Nicolas Bratza, UK

Dame Silvia Cartwright, New Zealand

(Chair) Ms Roberta Clarke, Barbados-Canada

Mr. Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Chinara Aidarbekova, Kyrgyzstan

Justice Adolfo Azcuna, Philippines

Ms Hadeel Abdel Aziz, Jordan

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Ms Nahla Haidar El Addal, Lebanon

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Víctor Rodríguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia

