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LLM IN: International Human Rights Law
STUDENT'S NAME: Kornkanok Wathanabhoom
SUPERVISORS'S NAME: Dr. Tara Van Ho
DISSERTATION TITLE **Analysis of the implementation of the UN Guiding Principles on Business and Human Rights in terms of extraterritorial obligations framework: case studies from the Greater Mekong Subregion.**

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LLM in International Human Rights Law

2018-2019

Supervisor: Dr. Tara Van Ho

DISSERTATION

Analysis of the implementation of the UN Guiding Principles on Business and Human Rights in terms of extraterritorial obligations framework: case studies from the Greater Mekong Subregion.

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Introduction

The Asian Development Bank (ADB) defines the Greater Mekong Subregion (GMS) as 'a natural economic area bound together by the Mekong River'[1]. The GMS countries consist of the People's Republic of China, Lao People's Democratic Republic (Lao PDR), Myanmar, Thailand, Cambodia and Viet Nam. With assistance from ADB in 1992, these countries entered into a program of sub-regional economic cooperation, which was a scheme to improve economic relations.[2]

Nowadays, there are more transnational corporations investing in these developing and underdeveloped countries in which in there are 'weak governance zones'[3] and a lack of the rule of law. According to the World Bank, the rule of law values countries in the GMS as almost below the world median except in Vietnam and Thailand.[4] Joel Ng's rule of law studies showed that most of the ASEAN countries are in transition with low capacities and legislative reform has not always enforced in the courts and other civic institutions.[5]

The countries policies effect foreign direct investments. From the geography, Laos has a high hydropower potential, so the Mekong River is the essential for Laos to be the "Battery of Southeast Asia" and used as a key national strategy for increasing economic development, reducing poverty, achieving the Millennium Development Goals and being free from the status of least developed country by 2020.[6] The increasing of the country's exports depend on Laos's neighbours' electricity demands because Laos sells power to its neighbours.[7] Thus, 'the hydropower sector was a key component in leading Laos' economic growth'[8]. The number of existing hydropower dams are 46 with

[1] Asian Development Bank, 'Greater Mekong Subregion (GMS)' < https://www.adb.org/countries/gms/main> accessed 26 August 2019.

[2] Greater Mekong Subregion Secretariat, 'About the Greater Mekong Subregion' < https://greatermekong.org/about> accessed 26 August 2019.

[3] See also Penelope Simon and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (Routledge, 2014) 291.

[4] World Bank, 'TCdata360: Rule of Law' < https://tcdata360.worldbank.org/indicators/h02f9cb8c?country=MYS&indicator=370&countries=CHN,KHM,LAO,MMR,THA,VNM&viz=line_chart&years=1996,2017&indicators=944&compareBy=region> accessed 27 August 2019.

[5] Joel Ng, 'Rule of Law as a Framework within the ASEAN Community' (2012) 5 *J E ASIA & INT'L L*, 327.

[6] Gabriele Giovannini, 'Power and Geopolitics along the Mekong: The Laos–Vietnam Negotiation on the Xayaburi Dam' (2018)37(2) *Journal of Current Southeast Asian Affairs*, 63.

[7] Ibid.

[8] Ibid.

a capacity of 6,444 MW, while the under-construction projects are expected to be completed by 2020 are 54.[9] Moreover, there is an energy supply from coal that the Hongsa coal power plant generated and exported to Thailand since 2015, the number of watts so far has reached 1,878 MW.[10] Thailand is the main buyer of electricity from Laos.

Furthermore, foreign policy was also influential to GMS, particularly the EU policy Everything but Arms (EBA). EU gives 49 of the world's poorest countries, including Cambodia and Myanmar duty-free access to EU markets.[11] EBA provides zero tariffs on all exports to the EU except arms and ammunition for those least developed countries to comply with the condition on the core human and labour rights under the principles of 15 UN/ILO conventions.[12] The European Commission identified Cambodia's human rights situation as very poor in three main problems which are labour rights; political repression and Land-grabbing, the latter has been a specific problem for sugar exports.[13]

At the regional level, the ASEAN Economic Community (AEC) has been an essential breakthrough in the ASEAN economic integration agenda which is a crucial achievement and has led to a more open market, reduced trade costs and an attractive investment regime since 31 December 2015.[14] AEC members are welcome to investments and the free flow of labours within ASEAN.

From the business activities in GMS, transnational corporations (TNCs) are not only from developed countries like the EU, the UK, U.S.A. but also from countries in the GMS. Many of the projects lack human rights mitigation, lack of information on resources available, and lack of public participation. The failure of the Mekong River Commission is the Procedures for Notification, Prior Consultation and

[9] Petsamone Phomnuny, 'Laos Expects to Have 100 Hydropower Plants by 2020' (12 July 2017) < https://www.mekongeye.com/2017/07/12/laos-expects-to-have-100-hydropower-plants-by-2020/> accessed 27 August 2019.

[10] Ministry of Energy and Mines, Lao PDR, **Lao PDR Energy Statistics 2018** (Economic Research Institute for ASEAN and East Asia, 2018), 3 < http://www.eria.org/uploads/media/0_Lao_PDR_Energy_Statistics_2018_complete_book.pdf> accessed 27 August 2019.

[11] European Parliament, 'Everything but Arms': The case of Cambodia' <http://www.europarl.europa.eu/RegData/etudes/ATAG/2019/637931/EPRS_ATA(2019)637931_EN.pdf> accessed 25 August 2019.

[12] Ibid.

[13] Ibid.

[14] The ASEAN Secretariat Community Relations Division, 'ASEAN Economic Community (AEC)'(May 2017) < https://asean.org/wp-content/uploads/2012/05/7c.-May-2017-Factsheet-on-AEC.pdf> accessed 27 August 2019.

Agreement (PNPCA)[15] which are steps for the members to support the establishment of the Rules for Water Utilisation and Inter-Basin Diversions that have caused environmental harms and human rights abuses to 60 million people who rely on the Mekong River.

There are transboundary harms, the impacts on environments, biodiversity and human rights violations from business activities. Affected people do not have hope in the host States because the laws and regimes do not offer opportunities for those who want to exercise their rights. Therefore, they are looking for the protection, responsibility and the extraterritorial obligations (ETOs) from home States.

This paper will focus on the home State ETOs, which are developing countries and mostly from the GMS and are part of ASEAN, and they tend to have less human rights protections than developed countries. If TNCs are from developed countries, there are more means to provide ETOs through access to justice in the home States.

The United States, for example, under the Alien Tort Statute, people from overseas can bring a lawsuit before the US court 'because torts are in violation of the law of the nations and would have been recognized within the common law of the time'[16]. *Doe v Unocal*[17], for example, affected people from Myanmar alleging Unocal liabilities for violations of international law.[18] However, from the Arab bank case[19] the judgment found that the ATS cannot be used for foreign corporations, the Court cut the scope of ATS litigations.[20]

While the UK and common law systems apply a duty of care principle for the parent company responsibilities to their subsidiaries abroad. The landmark case of shells' oil spills in Niger delta

[15] Procedures for Notification, Prior Consultation and Agreement (approved 2003) < http://www.mrcmekong.org/assets/Publications/policies/Procedures-Notification-Prior-Consultation-Agreement.pdf> accessed 27 August 2019.

[16] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 444.

[17] *Doe v Unocal* 2002 U.S. App. LEXIS 19263.

[18] Andrew Clapham (n16) 255.

[19] *Jesner v. Arab Bank, PLC* 138 S. Ct. 1386 (2018).

[20] Jesner v. Arab Bank, PLC (2018) 132(1) *Harv. L. Rev,* 397.

resulted in a sue in the UK. It is also worth noting the case of Okpabi v. Royal Dutch Shell Plc,[21] and the case of *Akpan & Anor v Royal Dutch Shell plc & Anor*[22] in the Netherlands in which a civil law system yet apply a duty of care in this case.

However, it seems that there are more challenges if the TNCs come from developing countries, particularly in GMS. This paper will focus on the cases studies in the GMS that home States, mostly from developing countries. There are some factors such as the lack of the rule of law, no domestic nor regional transboundary Environmental Impact Assessments, and no bank Environment Social Government policy that means the realisation of extraterritorial obligation hardly happens in practice. This brings to mind the question of how can they fulfil the realisation of extraterritorial obligations? Are there any factors that make the implementation or/and enforcement more difficult in developing and less developed States in the Mekong subregion?

1.1 Focus of study

This paper will analyse the ETOs in terms of the States responsibilities to the activities of business entities operating abroad that abuse human rights. It will also analyse the challenging factors of the States to uphold ETOs from the case studies in the Mekong subregion. The study will also note what judicial and non-judicial mechanisms can be used or are needed to fulfil the realisation of human rights.

1.2 Aims

This paper aims to review and analyse the extraterritorial obligations of the states regarding the activities of business entities that violate human rights outside their territories. The paper also aims to indicate the unique problems and gaps in the developing States in the GMS.

1.3 Research Methodology

This paper shall rely on the method of doctrine legal analysis through textbooks, journals, articles, judgments, UN documents, online information and case studies in terms of using the evidence-based

[21] *Okpabi and others v. Royal Dutch Shell Plc and another* [2018] EWCA Civ 191.

[22] *A.F. Akpan & Anor v Royal Dutch Shell plc & Anor*, District Court of the Hague, 30 January 2013, LJN BY9854/ HA ZA 09-1580.

approach in chapter 1-3. Moreover, this paper will engage with Third World Approaches to International Law (TWAIL) theory and methodologies[23] to analysis case studies with Third World perspective in chapter 4.

Chapter 1: Case studies in Mekong subregion and analysis.

What are the problems and gaps? Then finding out what the need for extraterritorial obligations is? Many transnational corporations invest in the region and cause various human rights violations. Each case study will represent a different problem or gap in ETOs. This paper will provide a background of the case, a comprehensive explanation of the decision and legal opinion analysis.

Chapter 2: An analysis of Extraterritorial Obligations

Are there ETOs in international laws? Also, how are these implemented into domestic laws?

What are the extraterritorial obligations- ETOs of the state and non-state actors which are specific to the business sector?

Chapter 3: An analysis of the case insights into international laws

What are international laws can be used in the case studies? Moreover, which international and regional mechanisms can be used to uphold human rights.

Chapter 4: A critique of Third World Approaches to International Law (TWAIL) perspectives

Examine the problems by drawing from Third World Approaches to International Law (TWAIL).

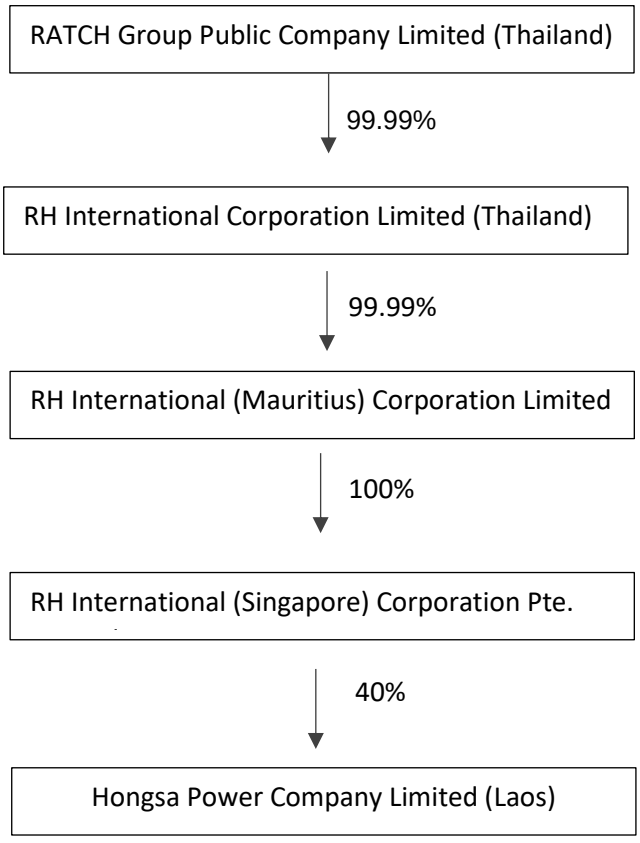
Chapter 5: Conclusion

[23] Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): theory, methodologies or Both?' (2008)10 *International Community Law Review*, 371.

Chapter 1: Case studies from the Greater Mekong Subregion

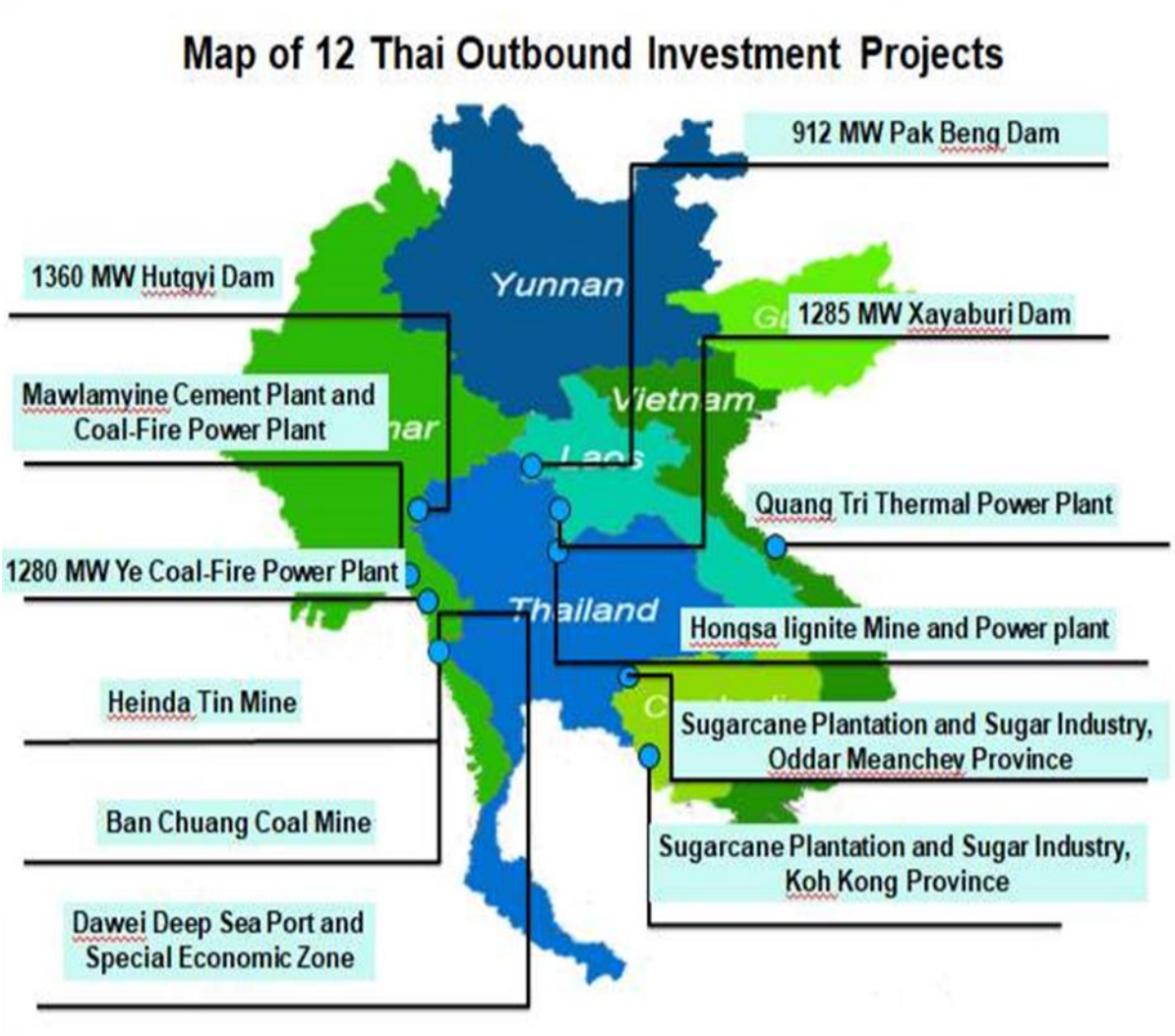
This chapter will analyse the problems and mechanisms with existing laws and provide legal opinions regarding case studies from the GMS. The chapter will go through the cases as an evidence-based approach for fact-finding in the contexts of the sub-region.

The transnational corporations in this region use many levels of subsidiaries before registering a juristic person in the host State which is the global trend, many of the parent companies are from Thailand and sometimes the loans are also from banks based in Thailand. For example, Ratch Group held three subsidiary companies before becoming the shareholder of Hongsa Power Company which is illustrated in the diagram below;[24]



[24] ABOUT US > Subsidiaries & Associated Companies <https://www.ratch.co.th/en/about/subsidiaries/subsidiaries> accessed 25 July 2019.

The map below shows the twelve projects of Thai Outbound Investment in GMS.[25]



Here are examples of cases, problems and mechanisms that were used to access remedies.

Sugar plantation in Oddar Meanchey

I. Background of the case

The case occurred in Samrong district, Oddar Meanchey province in Cambodia which violated many human rights including forced evictions, land grabs, abuses of indigenous people's rights and a lack of

[25] The Mekong Butterfly, *Thai ETO watch executive summary for the report*

"Thailand direct investment in the neighbouring countries: adverse impacts to environment and communities, and human rights violation" <https://earthrights.org/wp-content/uploads/Mekong-Butterfly_Executive-Summary_ETOreport.pdf> accessed 29 August 2019.

compensation and remedies.[26] The parent company is Mitr Phol, the biggest sugar company in Thailand, (Hereinafter sugar case).

28 March 2018, the affected people from Cambodia filed a lawsuit against Mitr Phol, the parent company in their home State in the case of ***Hoy Mai and Smin Tet v Mitr Phol.***[27] Two representatives on behalf of 3000 Cambodian plaintiffs[28] sued under the amended provision of class actions in the Civil Procedure Code.[29] They accused Mitr Phol of human rights and environmental violations which are contrary to Thai and Cambodian domestic laws, moreover Mitr Phol has a responsibility to follow these laws as a principal for its agent, Angkor Sugar Co.Ltd., its subsidiary in Cambodia.[30] In addition, the plaint emphasised that these actions were also contrary to international customary law, international laws and soft laws which are bound to Thailand and Cambodia such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, ASEAN Human Rights Declaration and the UN Guiding Principle on Business and Human Rights.[31]

The plaintiffs brought the case before a Thai court because the members would like access to justice in Thailand, to access remedies, and to get human rights protections. As well as this they wished to highlight important issues for the public and to set a standard for Thai outbound investments on ETOs.[32]

II. Comprehensive explanation of the decision

Recently in July 2019, the court rejected a class action lawsuit and shall continue the procedure as an ordinary case.[33] The causes for the rejection were as follows:

[26] Thailand Extraterritorial Obligations-Watch and Community Resource Centre, 'Thai Outbound Investments in ASEAN: Human Rights Violations, Extra-Territorial Obligations and Accountability' in *Business and Human Rights: learning from Asia*, (FORUM-ASIA Working Paper Series No.3, 2018) 33.

[27] Southern Bangkok Civil Court Case No. por.718/2561 (date 28 March 2018).

[28] Ibid.

[29] Act amending the Civil Procedure Code (No.26), B.E.2558 (2015) [THA].

[30] Southern Bangkok Civil Court Case No. por.718/2561 (n 27).

[31] Ibid.

[32] Ibid.

[33] Southern Bangkok Civil Court's order in Case No. por. 718/2561 (4 July 2019).

1. The sending of communication orders allowing for the class action to the members of the class will be an inconvenience according to section 222/15 of Civil Procedure Code[34] and article 27 of the Presidency of the Supreme Court on class action B.E.2559 (2016).

It should be noted that the court's reasons for denying were to do with the plaintiff's residents being abroad which meant:

1) No road and some addresses did not have a household number,

2) The claimants did not understand Thai nor English,

3) It was not clear that what is well-known in daily newspapers in Cambodia,

4) Promulgations via websites shall be within Thailand and cannot be done in Cambodia because it will impact the international relationship between both countries.[35]

2. There would have been a problem in the court processes because the complainants cannot understand Thai nor English, so they could fully understand the trial process.[36] Moreover, the plaintiff's lawyers do not have a Cambodian lawyer; thus, there will be challenges in finding evidence in Cambodia.[37]

3. The plaintiff did not indicate Cambodia's law in terms of the liabilities of principles and agent on the tort from an agent's act. Furthermore, there would have been a risk to the international relationship between the two countries.[38]

From those reasons, the court ruled that the class action is not more effective than an ordinary action.

III. Legal opinion analysis

This raises up the question of why did they sue a parent company before a home State court? Firstly, there is no more subsidiary company in Cambodia in which affected people can claim for reparations. Thus they brought the case to home State to find justice, although there are many challenging issues

[34] Act amending the Civil Procedure Code (No.26) B.E.2558 (2015) [THA].

[35] Ibid (n33).

[36] Ibid (n33).

[37] Ibid (n33).

[38] Ibid (n33).

in suing a parent company and making it take responsibility of its subsidiary company violations overseas. Secondly, the amended Thai Civil Procedure Code allows class action legal proceedings members of a class to submit a claim on tort cases.[39] This should be the advantage of the Thai legal system which those 3000 affected people as members of a class do not need to travel to Thailand for a court trial. Only the representatives who are the plaintiffs are required to travel and participate in the court's proceedings. This case is a landmark first class action lawsuit filed by foreigners for human rights violations which occurred outside the territory by a subsidiary company. Lastly, the class action proceedings fill a gap in Thai civil procedures, and allow the collective claim for damages, provide more convenience for the plaintiffs and are also cheaper, and therefore should be an effective legal mechanism for a group of damaged people.

However, the court's order was disappointing and far removed from the purpose of the law. Even though the law was created to be a quicker more manageable process and provide convenience for a case with many claimants, the law was interpreted differently to its original aim. The judges raised the issue of language barriers and residences in a rural area abroad stating that makes the case inconvenient for a trial.[40] The latter was challenged by stating that they could send communication orders allowing for a class action by post.[41] Although Article 27 of the Presidency of the Supreme Court noted that the court's order can be sent via registered mail or electronic mail, and Article 29 is open for several methods including via a website, media or among a number of other ways. The court does not take into account the proper channels, yet ruled that if promulgated via a website, it shall be done within Thailand due to the sensitive issue of international relations.[42] In fact by posting on a website, it could accessed anywhere worldwide. These reasons were raised to deny class action proceedings and emphasized that a class action will be inconvenient.

So what is the convenience in an ordinary case in which all 3000 plaintiffs have to attend court proceedings? How long are the proceedings? And what is the cost? Of course, it would be much more costly than the class action proceedings and would take a longer time in the trial.

[39] Act amending the Civil Procedure Code (No.26) B.E.2558 (2015) Section 222/8 [THA].

[40] Ibid (n33).

[41] Ibid (n33).

[42] Ibid (n33).

In summary, from a law perspective, there are proper court proceedings (class action) under the home state's law. The parent company has an ability to pay compensation. In reality, the court does not provide effective access to justice, it also seems like the court does not fully understand business and human rights issues.

Formosa

I. Background of case

On 11 June 2019, communities from Vietnam filed a transnational lawsuit against Formosa Plastics Group (FPG), a Taiwanese corporation, responsible for environmental damages which caused harm via steel mill pollutions located in Ha Tinh in 2016.[43] The pollutants killed fish along a 210-kilometer stretch of coast in the country and harmed livelihoods and fisheries which affected more than 200,000 people.[44] Moreover, at least 70 tonnes of marine wildlife were estimated to be poisoned and died as a result.[45] The Vietnamese government required the steel mill to pay US$500 million to clean it up and provide compensations.[46] However, FPG had not negotiated with the victims regarding compensations and the compensations were not enough because victims could no longer go fishing, which is an essential part of their livelihoods.[47]

The affected communities tried to bring the case before the courts in Vietnam but were rejected, and many activists were arrested and jailed for "making, storing, releasing, and circulating information and

[43] Focus Taiwan news channel, Vietnamese victims sue FPG for harm caused by steel mill pollution <http://m.focustaiwan.tw/news/aSOC/201906110016.aspx> accessed 19 July 2019.

[44] South China Morning Post, Vietnamese fishermen sue Taiwanese steel firm after toxic chemical spill kills sea fish<https://amp.scmp.com/news/china/society/article/2022945/vietnamese-fishermen-sue-taiwanese-steel-firm-after-toxic> accessed 19 July 2019.

[45] Taiwannews, 7,785 Vietnamese citizens file lawsuit against Taiwan's Formosa Plastics Group <https://www.taiwannews.com.tw/en/news/3721871> accessed 19 July 2019.

[46] Ibid.

[47] Ibid.

documents against the state".[48] Taiwan is a home state to transnational corporations, so the 7,875 plaintiffs sought compensation by suing FPG in Taipei for its negligence.[49]

II. Comprehensive explanation of the decision

There is no decision yet.

III. Legal opinion analysis

Prescription is one of the limitations for claimants. The lawyers said that it did not include all of the affected local residents because under Taiwanese law, a case must be filed within three years of the alleged negligence.[50] Thus the complainants have to collect the evidence in time.

There are more chances to bring a lawsuit against corporations in a home state, the more access to justice for victims and set a higher standard for human rights and environmental protections. Yet it should be an opportunity to bring a case before a court in the host state as well.

Dams on the Mekong River

I. Background of case

The Mekong river passes through China, Myanmar, Laos, Thailand, Cambodia and Vietnam. Sixty million people live in the lower Mekong Basin in which their cultures and livelihoods rely on the river.[51] The dams on the upper Mekong in China have already caused impacts to downstream communities who have suffered from declining fisheries and changing water levels.[52] Nowadays, the existing hydropower dams in the lower Mekong are located in Laos and Cambodia such as Xayaburi, Don

[48] 'The Global Voices Chinese Lingua team' *Global voices* (11 June 2019) <Vietnamese victims of 2016 marine disaster have filed a landmark lawsuit against Formosa Plastics Group in Taiwan<https://globalvoices.org/2019/06/11/vietnamese-victims-of-2016-marine-disaster-have-filed-a-landmark-lawsuit-against-formosa-plastics-group-in-taiwan/> accessed 19 July 2019.

[49] Ibid.

[50] Skylar Lindsay, 'Vietnamese fishing communities seek justice in lawsuit against Taiwanese corporation' *ASEAN Today* (25 June 2019) < https://www.aseantoday.com/2019/06/vietnamese-fishing-communities-seek-justice-in-lawsuit-against-taiwanese-corporation/> accessed 19 July 2019.

[51] International Rivers 'Southeast Asia' *International Rivers* <https://www.internationalrivers.org/es/node/436> accessed 20 July 2019.

[52] International Rivers 'Mekong Mainstream Dams' *International Rivers*

<https://www.internationalrivers.org/es/node/2333> accessed 20 July 2019.

Sahong, Stung Treng and Sambor.[53] These dams are predicted to have negative transboundary impacts on the environment and people.[54]

Xayaburi Dam

The dam project was submitted for approval by the region's governments through the 'Procedures for Notification, Prior Consultation and Agreement' (PNPCA) that was facilitated by the Mekong River Commission (MRC).[55] However, the Lao Government decided to build the Xayaburi Dam, and ignored the recommendations of doing the Strategic Environmental Assessment (SEA).[56]

The developer of Xayaburi dam is Ch.Karnchang Power-CKP, a corporation from Thailand. The loan is also from six Thai commercial banks and they will sell electricity to the Electricity Generating Authority of Thailand (EGAT).

Recently on 18 July 2019, the MRC announced Mekong water levels reached the lowest on record in the wet season.[57]

Xayaburi dam case have used many mechanisms for protect human rights.

Court

In 2012, Thai villagers submitted a complaint to the Thailand Administrative Court[58] stating that 1) the purchase agreement was illegal 2) information was to be disclosed and a proper public hearing must be done and they must do an Environment Impact Assessment (EIA) both in Thailand and Laos before signing the purchase agreement 3) revoking permission of purchase agreement.[59] However, the court denied to accept the case and denied jurisdiction. After appealing, the Supreme Administrative Court ruled that the court had jurisdiction but governing only the plaint No.(2) from the

[53] Ibid.

[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Mekong River Commission For Sustainable Development 'Mekong water levels reach low record' *Mekong River Commission For Sustainable Development* (Vientiane, 18 July 2019) <http://www.mrcmekong.org/news-and-events/news/mekong-water-levels-reach-low-record/> accessed 20 July 2019.

[58] Administrative Court, No. Sor 493/2555(2012).

[59] The Supreme Administrative Court, the order No. Kho Sor.8/2557(2014) page 16.

neglect of official duties required by the law.[60] After the court proceedings for years, the judgment was dismissed,[61] the claimants are now waiting for the final judgment from the Supreme Administrative Court.

OECD complaint

A group of NGOs made a complaint to the Austrian national contact point regarding the acts of Andritz, an Austrian company, which supplies key operating technology to the Xayaburi dam. A Joint Statement between groups of NGOs and Andritz was agreed upon and states:

> "Andritz agreed to develop policies and procedures in relation to the implementation of human rights and environmental standards…discuss and further develop its due diligence procedures, in relation to international standard and for the parties to further apply the OECD Guidelines for MNEs"[62]

National Human Rights Institutions- NHRIs

A complaint regarding Xayaburi dam was submitted to the Thailand National Human Rights Commission (TNHRC) in 2011 and TNHRC investigated the case via various measures such as questioning the developers and relevant government agencies, as well as Thai commercial banks that provided loans to submit written testimonies.[63] Furthermore, the commissioner visited communities and organized a public hearing.

Don Sahong Dam

Meanwhile, the Don Sahong Dam with potential transboundary impacts that may affect the local communities in the Lower Mekong Basin also raised a regional human rights concern.

The project was alleged in Communications report of Special Procedures that proceeding without adequate environmental and human rights impact assessment as well as meaningful consultation

[60] Ibid.

[61] Thailand Administrative Court Judgment No Sor.493/2555 No. Sor.59/2556 (25 Dec 2015).

[62] OECD Watch, 'Finance & Trade Watch Austria et al vs Andritz AG' *OECD Watch* (9 April 2014) <https://www.oecdwatch.org/cases/Case_326> accessed 21 July 2019.

[63] Carl Middleton, 'National Human Rights Institutions, Extraterritorial Obligations, and Hydropower in Southeast Asia: Implications of the Region's Authoritarian Turn' (2018)11(1) Austrian Journal of South-East Asian Studies, 80.

while considerable threat to many human rights issues, particularly in the right to an adequate standard of living, the rights to adequate food and housing, the right to the highest attainable standard of physical and mental health, cultural rights, the rights to information and participation and the rights of indigenous peoples.[64]

The lead developer is Mega First Corporation Berhad (MFCB) from Malaysia. NGOs from Cambodia, Thailand and the United States submitted a complaint about MFCB to the Human Rights Commission of Malaysia (SUHAKAM).[65] However, SUHAKAM decided to do not investigate and stated that 'the Commission's power and mandate are limited to the boundaries of Malaysia'.[66]

However, SUHAKAM also recommended that the Malaysian government should monitor Malaysian corporations operating in oversea countries to comply with UNGPs, principle 3.[67]

II. Comprehensive explanation of the decision

Xayaburi Administrative Court case

The Administrative Court ruled that they do not have jurisdiction regarding cases located outside their territory, but the Supreme Administrative Court overruled this and reaffirmed the court's jurisdiction on transboundary impacts from projects outside the territory.

The judges considered that villagers who live along the Mekong river in Thailand, are likely to be affected directly more than other people, they are likely to be aggrieved or injured or maybe inevitably aggrieved or injured persons under Section 42 of the Act on Establishment of the Administrative Court and Administrative Court Procedure, B.E. 2542 (1999)[68]

[64] Human Rights Council (Thirty-second session), Communications report of Special Procedures (27 May 2016) UN Doc A/HRC/32/53 (P.90).

[65] Middleton (n 63).

[66] Ibid.

[67] Ibid.

[68] Section 42 of the Act on Establishment of the Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) [THA].

Therefore, they have a right to protections, and the promotion and conservation of the quality of the environment. These rights shall be protected by **Community Rights** under Section 66,67 of the Constitution of Thailand B.E.2550[69].

However, the court had jurisdiction and took only the second allegation on the grounds of neglect of official duties on disclosing information, a public hearing and EIA according to Section 9(3) of the Act on Establishment of the Administrative Court and Administrative Court Procedure, B.E. 2542

III. Legal opinion analysis

Xayaburi Administrative Court case

Intertwined issues were arising from the Supreme Court order to accept the case. The first challenge to the court's jurisdiction was considering the case's location abroad which would cause transboundary impacts to people in the country. Secondly, it links to the rights holder as a plaintiff of the Administrative Court which may be inevitably aggrieved or injured from transboundary impacts. Lastly, allegations on the grounds of neglect also provide challenges to judges, administrative officers and affected people which are the interpreters of law, doers and the right holders respectively.

Xayaburi OECD complaint

There was a way to access non-judicial mechanisms through OECD complaint mechanisms although the Austrian company is not a project developer. The OECD Guidelines for Multinational Enterprises[70] require a higher standard of human rights protections from the business sector. Thus the claimants need more attention in terms of human rights from stakeholders. It demonstrated that there are more human rights protection from the OECD countries.

Xayaburi: TNHRI role

During that time under the Act on National Human Rights Commission B.E.2542(1999) section 15(2) the commissioners have a duty to investigate and report acts that violate human rights or contrary to

[69] The Constitution of Thailand B.E.2550 (2007) [THA].

[70] The OECD Guidelines for Multinational Enterprises < http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 21 July 2019.

international human rights laws which are bound to Thailand. It was not clear whether the jurisdiction included acts outside the country, it depends on the commissioners.

TNHRC mandate under the law of that time[71] was to just provide recommendations on measures or guidelines for the promotion and protection of the human rights to the parliament and the cabinet. TNHRC cannot order the defendant to do any actions. However, due to the current NHRCT's law,[72] NHRCT's jurisdiction is not only a geographical state, but a Thai national or a juristic person too.

In addition, the findings and documents from TNHRI were also useful for court evidence and data for the government when drafting a national action plan on business and human rights.

Don Sahong Dam: SUHAKAM role

Although SUHAKAM did not proceed with the case, the effects from the case drew some attention regarding business responsibilities and recommendations for the government to consider developing a national action plan on business and human rights.[73] Malaysia should provide state-based non-judicial grievance mechanisms for the victims to access to remedy.

Heinda mining (Myanmar)

I. Background of the case

There was a defamation case against a journalist in Thailand when a newspaper released an article on scientific testing on the environmental harm from Heinda tin mining in Myanmar. The company's representative sued several courts in Thailand for the same offence that also made the defendants waste time by going to courts in different regions and asking a court to dispose of the case because 'the case is pending trial and in consequence thereof, the plaintiff is not allowed to enter the same plaint in the same Court or in another Court'[74]. Although, finally the plaintiffs and the defendants had a mediation.

[71] National Human Rights Commission Act B.E.2542(1999), Section 15 [THA].

[72] The Organic Act on National Human Rights Commission B.E.2559 (2017) [THA].

[73] Middleton (n 63).

[74] Civil court procedure, Section 173 para2(1) [THA].

II. Comprehensive explanation of the decision

The plaintiff sued the journalist under section 14(4) of Computer-Related Crime Act[75] which have penalty on imprisonment and/or a fine. Section 14(4) is about entering any obscene data into a computer system which could be accessed by the general public. The case was dismissed under a mediation, thus there was not proceedings to examine whether the journalist violated to section 14 or not.

III. Legal opinion analysis

This case is classified as a strategic litigation against public participation (SLAPP). The corporation or sometimes the government sued activist, journalist and communities to stop them from criticising the project. The longer court process, the more limitation of exercising the freedom of expression.

Thailand should revoke the provision in section 14 of Computer-Related Crime Act that have been used as a tool for SLAPP and ensure that people can exercise the freedom of expression.

More cases will be examined in brief in the table below.

Project Name (host state)	**Home State**	**Problem issues**	**Mechanism**	**Recommendation**
Hongsa coal power plant (Laos)	Thailand	Transboundary health and environmental impact[76]	Community Health Impact Assessment[77]	A regional transboundary EIA law[78]
Dawei SEZ and road link (Myanmar)	Thailand Japan	Lack of public participation and access to remedy	A complaint to TNHRC	Provide meaningful consultation

[75] Computer-Related Crime Act B.E. 2550 (2007) [THA].

[76] Darunee Paisanpanichkul et al., *Preparedness of Participatory Community's health impact assessment from development project locating in borderlands : a case study of Hongsa Coal project in Nan province* <http://kb.hsri.or.th/dspace/handle/11228/4928?locale-attribute=th> accessed 25 July 2019 (Thai).

[77] Ibid.

[78] Statement at the end of visit to Thailand by the United Nations Working Group on Business and Human Rights <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22915&LangID=E> accessed 25 July 2019.

Ban Chuang mining (Myanmar)	Thailand	Environmental destruction and health concerns.[79]	A complaint to TNHRC, UNWGs	-Checking villagers' health. -Environmental cleaning up.
Thilawa SEZ (Myanmar)	Japan	Access to remedy	Making a complaint to JICA	Do the Community-Driven Operational Level Grievance Mechanism (CDOGM).[80]
Xe-Pian Xe-Namnoy hydropower dam (Laos)	South Korea Thailand[81]	Dam collapse[82]	??	Provide access to remedy

[79] Human Rights Council (40th Session) 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (5 March 2019) UN Doc A/HRC/40/68, para 4.

[80] Jonathan Kaufman and Katherine McDonnell, 'Community-Driven Operational Grievance Mechanisms' (2016) 1(1) BHRJ, 127.

[81] Xe-Pian Xe-Namnoy Power Co Ltd, *Shareholders* <https://www.pnpclaos.com/index.php/en/about-pnpc/shareholders> accessed 25 July 2019.

[82] Shaun Turton and Kim Jaewon, 'One year from Laos dam collapse, insurers urged to help

Rights groups say thousands of affected villagers in need of aid' *Nikkei ASEAN Review* (28 July 2019) < https://asia.nikkei.com/Business/Construction/One-year-from-Laos-dam-collapse-insurers-urged-to-help2> accessed 30 July 2019.

Chapter 2: An analysis of Extraterritorial Obligations

Extraterritorial obligations (ETOs) are States' human rights obligations which go beyond borders and affect people in other countries.[83]

This chapter will explain the development of ETOs via a timeline on the appearance of ETOS in UN documents and/or international human rights laws. The chapter will focus on state ETOs regarding human rights violation from business sectors abroad.

The human rights bodies have developed ETOs standards regarding non-state actors, respecting the human rights in several treaty bodies such as the Committee on Economic, Social and Cultural Rights (ESCR), the Elimination of Racial Discrimination (CERD), and the International Covenant on Civil and Political Rights.

The General Comment of the Committee on Economic, Social and Cultural Rights

In 2000, the Committee suggested in General Comment No.14 that state parties have to prevent human rights violations committed overseas by third parties that are under their jurisdiction.[84] Then in 2003, in General Comment No.15 the Committee stated that 'Steps should be taken by State parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries'.[85] It shows that the Committee reaffirmed that states should influence third parties with respect to human rights overseas.

In 2004, the Human Rights Committee adopted General Comment No.31 about state's positive obligations which stated that:

> [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would

[83] What are ETOs? <https://www.etoconsortium.org/en/main-navigation/our-work/what-are-etos/> accessed 04 August 2019.

[84] UN Committee on Economic, Social and Cultural Rights 'General Comment No.14' in 'The Right to the Highest Attainable Standard of Health (Art.12)' (2000) UN Doc E/C.12/2000/4, para 39.

[85] UN Committee on Economic, Social and Cultural Rights 'General Comment No.15' in 'The Right to Water (Arts. 11 and 12 of the Covenant)' (2003) UN Doc E/C.12/2002/11, para 33.

impair the enjoyment of Covenant rights in so far as they are amenable to applications between private persons or entities.[86]

The General Comment No.31 is about the concept of jurisdiction as well as the fact that state's extraterritorial legal obligations can be established.

Thus, states parties have obligations to ensure that Covenant rights in terms of human rights violations are not committed by Non-State Actors (NSAs) in areas of both civil and political rights and economic, social and cultural rights.

Then ESCR General Comment No.17 also mentions that the business sector should respect the rights of the Covenant and stated that it should '…consider regulating the responsibility resting on the private business sector, private research institutions and other non-state actors to respect the rights recognized in article 15, paragraph 1(c)'.[87] This implies that the direct responsibility is to respect the Covenant not only on States but also NSAs because the actions of NSAs could affect their rights under the Covenant.

The Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, found that 'the Convention and the Committee shed very little light on the issue of extraterritorial jurisdictions'[88] in Article 3. While the General Recommendations in this paragraph refer to States obligations beyond territories.[89] Moreover, in 2007, the CERD Committee's concluding observations of Canada declared that:

[86] Human Rights Committee on International covenant on civil and political rights 'General Comment No.31[80]' in 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (2004) UN Doc CCPR/C/21/Rev.1/Add.13, para8.

[87] UN Committee on Economic, Social and Cultural Rights 'General Comment No.17' in 'The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art.15, Para.1(c) of the Covenant)' (2005) UN Doc E/C.12/GC/17, para 55.

[88] Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises, Mapping State obligations for corporate acts: An examination of the UN Human Rights Treaty System Report No.1: International Convention on the Elimination of All Forms of Racial Discrimination, 18 December 2006, para 91 page22 <https://www.business-humanrights.org/sites/default/files/media/bhr/files/State-Obligations-Corporate-Acts-CERD-18-Dec-2006.pdf> accessed 4 September 2019.

[89] Ibid.

> [T]he Committee encourages the State party 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.[90]

The Committee recommends that the State parties find ways to hold TNCs accountable and request states to report.[91] It therefore would be clearer what are state obligations beyond the borders regarding TNC activities abroad.

Whereas in 2007, the scholars McCorquodale and Simons noted that 'a home state may have an extraterritorial obligation to protect human rights'[92] and advises home states to extend jurisdiction beyond borders to include the extraterritorial activities of foreign subsidiaries.[93] They support the concepts of ETOs and that home States have international responsibilities for the acts of foreign subsidiaries that violate international human rights, the state can regulate national laws to make sure that parent companies are accountable for those violations. It should be noted that this argument happened before the ESCR General Comment No.24 in the state obligations in the context of business activities.

In 2008, ESCR General Comment No.19 on the rights to social security stated that 'State parties should extraterritorially protect the rights to social security by preventing their own citizens and national entities from violating this right in other countries'.[94]

Then in 2012, the CERD Committee noted that Canada enacted a Corporate Responsibility Strategy but has not adopted measures regarding transnational corporations which activities outside countries impact on the rights of indigenous peoples.[95] The Committee also recommended:

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[90] Concluding observations of the Committee on the Elimination of Racial Discrimination, Canada, (2007) UN Doc CERD/C/CAN/CO/18, para 17.

[91] Ibid.

[92] Robert McCorquodale and Penelope Simons, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) *MLR,* 598.

[93] Ibid.

[94] UN Committee on Economic, Social and Cultural Rights 'General Comment No.19' in 'The right to social security (art9)' (2008) UN Doc E/C.12/GC/19, para 54.

[95] Concluding observations of the Committee on the Elimination of Racial Discrimination, Canada, (2012) UN Doc CERD/C/CAN/CO/19-20, para 14.

> [T]he State party take appropriate legislative measures to prevent transnational corporations registered in Canada from carrying out activities that negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada, and hold them accountable.[96]

Therefore, the committee on ESCR and CERD encouraged State parties via the ESCR General Comment and CERD concluding observations to take extraterritorial measures to control the activities overseas of the businesses that registered in state party territories.[97] The measures can be made through domestic or administrative law to prevent human rights abuses by TNCs.

Extraterritorial Obligations in the context of Business and Human Rights

In John Ruggie's report to the Human Rights Council in 2010[98], he mentioned Extraterritorial jurisdictions. He identified a matrix measure of extraterritoriality which uses domestic measures with extraterritorial implications and direct extraterritorial jurisdiction over actors or activities abroad which would be the rows, while the columns would be public policies for companies, regulations, and enforcement actions.[99] The extraterritoriality matrix demonstrates the possible actions for companies and states with regards to extraterritorial issues.

However, **the UN Guiding Principles on Business and Human Rights** (hereinafter the UNGPs) Principle 2 notes that 'States should set out the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations'.[100] Yet, the Commentary points out that 'States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction'.[101] It is worth noting however, 'nor are the generally prohibited from doing so'.[102] This was not a clear

[96] Ibid.

[97] Nadia Bernaz, 'Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?'(2012) 117(3) Journal of Business Ethics, 493.

[98] Human Rights Council 'Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (9 April 2010) UN Doc A/HRC/14/27.

[99] Ibid para 49.

[100] UN Guiding Principles on Business and Human Rights (endorsed 16 June 2011), Principles 2

[101] Ibid.

[102] Ibid.

obligation yet the treaty body encouraged home States to take ETOs to prevent human rights. The ESCR committee also stated that 'State parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing upon the sovereignty or diminishing the obligations of the host States under the Covenant'[103] to emphasize the ETOs issue. Moreover, in 2017 the ESCR committee issued the general comment No.24 stating that State obligations in the context of business activities will be explained in detail later.

Whereas, with regards to state judicial mechanisms as stated in Principle 26, states should ensure the effective domestic judicial mechanisms because it is the core of ensuring access to remedies.

Maastricht Principles on Extraterritorial Obligations in the area of Economic, Social and Cultural Rights (Maastricht Principles)

Maastricht Principles address the gaps in human rights protections regarding ETOs. 'Maastricht Principles clarify extraterritorial obligations of States on the basis of standing international law'[104] and do not establish new elements of human rights law. Maastricht Principles reaffirm that the obligation to respect, protect and fulfil are state obligations both within territories and extra-territorially.[105] The State obligations are not limited to state territories, but also beyond borders, particularly the actions of NSAs abroad, home States have to protect human rights from NSA acts everywhere.

Although, Maastricht Principles is not a law or even a soft law, Maastricht Principles can be used as a guideline for approaching ETOs. Applying Maastricht Principles are an essential part of human rights analysis and policy making because they try to recommend the states' ETOs on a basis of international human rights law.

When it was not clear of a State's ETOs, Augenstein and Kinley opinions were that state's not only use *de jure* authority to exercise extraterritorial jurisdiction to regulate and control business entities,

[103] Committee on Economic, Social and Cultural Rights, Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights (12 July 2011) UN Doc E/C.12/2011/1, para 5.

[104] Maastricht Principles on Extraterritorial Obligations in the area of Economic, Social and Cultural Rights, (adopted 28 September 2011)

[105] Ibid., para1.3

but also establish a *de facto* relationship of the state powers to bring individuals under the state's jurisdiction and institute ETO mechanisms.[106] In other words, the notion to regulate the law to provide ETOs is not enough, it needs to establish actual mechanisms into reality. I do agree with this idea because establishing the laws is essential, but the law enforcement is also important and it is a big problem, particularly in the GMS.

Guidance on National Action Plans on Business and Human Rights (NAPs)

In 2014, the UNWG recommended that Governments take into account ETOs to NAPs which state that:

> While the Governments' legal duty is generally restricted to adverse impacts in the country's territory and/or jurisdiction, States should also take into account extraterritorial implications of business enterprises domiciled in their territory in accordance with the UNGPs.[107]

In 2016, during the ESCR on Canada's Concluding observations, the committee was concerned with corporations which registered or domiciled in the State party and were operating overseas. The committee was also concerned that they were negatively impacting upon the enjoyment of Covenant rights; and the limitation of access to judicial remedies before courts in home states while non-judicial mechanisms have not been effective. The committee is further concerned about the lack of impact assessments.[108]

The committee recommended that Canada should strengthen legislation governing corporations in activities abroad, and conduct human rights impact assessments before making decisions, introduce effective mechanisms and adopt legislative measures to provide access to justice before the home state courts.[109]

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[106] Daniel Augenstein and David Kinley 'When human rights 'responsibilities' become 'duties': the extra-territorial obligations of states that bind corporations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business beyond the corporate Responsibility to Respect?* (CUP 2013), 285-286.

[107] Guidance on National Action Plans on Business and Human Rights, Version 1.0 I December 2014 p12

[108] Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of Canada (2016) UN Doc E/C.12/CAN/CO/6, para 15.

[109] Ibid., para 16.

Before that, the committee was concerned with the impact of Germany's agriculture and trade policies and urges Germany to fully apply a human rights-based approach to its policies.[110] Furthermore, the committee 'calls on the State party to ensure that its policies on investments by German companies abroad serve the economic, social and cultural rights in host countries'.[111] The committee is also concerned with a specific land-titling project in Cambodia that stated that:

> The Committee is concerned that the State party's development cooperation programme has supported projects that have reportedly resulted in the violation of economic, social and cultural rights, such as in the case of the land-titling project in Cambodia (arts. 2.1, 11, 22 and 23).[112]

Not only in those developed countries, but also in developing countries, Vietnam, for example, the committee is concerned with the impacts to ethnic minorities from development, especially sedentarization and land revocation in which laws and regulations fall short of international standards. Affected people have not obtained fair compensation nor been adequately resettled. Resettled people have difficulties in finding alternative livelihoods and last but not least Sedentarization policies have not considered negative impact on ethnic minorities' cultural rights.[113]

The gaps of ETOs in the UNGPs was fulfilled in 2017 by the ESCR committee in General Comment No.24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities.[114] The General Comment seeks to clarify the duties of State parties in situations in which States' fail to ensure human rights are protected from corporate activities under their jurisdiction.[115] Furthermore, business entities are expected to respect Covenant rights and

[110] Committee on Economic, Social and Cultural Rights Forty-sixth session on 'Concluding observations of Germany' (2011) UN Doc E/C.12/DEU/CO/5, para 9.

[111] Ibid., para 10.

[112] Ibid., para11.

[113] Committee on Economic, Social and Cultural Rights on Concluding observations on the second to fourth periodic reports of Viet Nam (2014) UN Doc E/C.12/VNM/CO/2-4, para 29.

[114] UN Committee on Economic, Social and Cultural Rights 'General Comment No.24' in 'State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities' (2017) UN Doc E/C.12/GC/24

[115] Ibid., para 1.

the general comments look to assist the business sector achieve human rights obligations and assume responsibilities.[116]

The General Comments section in Part III. C. was dedicated to clarifying States' extraterritorial obligations in the context of business activities. The General Comment indicated that ETOs should respect, protect and fulfil (paragraph 29,30-35,36-37 respectively). The committee explained that the question of States' extraterritorial obligations has arisen because of a notable increase in transnational corporation's activities in the past 30 years.[117] ETOs arise when States Parties may influence the activities of corporations domiciled in their territories or where jurisdiction may affect the enjoyment of ESCR outside their territories.[118] The committee reaffirmed that State Parties' obligations under the Covenant are beyond borders as well.[119] Moreover, the general comment clarifies that state obligations are expressed without any restriction to territory or jurisdiction. Article2 (1) acts as a means of fulfilling the rights and emphasises that the duty is expressed without any territory limitation.[120]

1. ETOs to respect

State Parties are required to refrain from direct or indirect interference in the enjoyment of the rights by persons outside their territories.[121] Furthermore, 'State Parties must ensure that they do not obstruct another State from complying with its obligations'.[122]

2. ETOs to protect

This obligation requires 'State Parties to take steps to prevent and redress infringements of Covenant rights'.[123] The committee emphasises access to remedies through judicial mechanism in home states.[124] Moreover, the obligations extend to any business entities and encourage business entities

[116] Ibid., para 5.
[117] Ibid., para 25.
[118] Ibid., para 28.
[119] Ibid., para 26.
[120] Ibid., para 27.
[121] Ibid., para 29.
[122] Ibid., para 29.
[123] Ibid., para 30.
[124] Ibid., para 30.

to take human rights due diligence mechanisms into account for protecting the Covenant rights at home and host states.[125] The obligation to protect requires business sectors to employ their best efforts to ensure that entities such as subsidiaries and business partners respect the Covenant rights.[126] The committee suggest that monitoring and accountability procedures should ensure effective prevention and enforcement.[127] The committee also advises States to 'take steps using the guidance to improve the effectiveness of cross-border cooperation between State agencies and judicial bodies'[128] as well as improving international cooperation to reduce the pros and cons of conflicts regarding jurisdiction.[129] The duty to cooperate is essential for improving accountability and access to remedies for affected people in transnational cases.[130]

3. ETOs to fulfil

According to the purpose of Article 2.1 State Parties should take collective action through international cooperation to fulfil the Covenant rights of people who live outside states territories.[131] The obligation to fulfil in accordance with the Universal Declaration of Human Rights, Article 28 requires State Parties to create and promote an international environment by taking steps in legislation and policies, diplomacy and foreign relationship measures.[132]

In addition, there are also remedies which provide victims with effective access to justice.[133] While raising up the *forum non conveniens* doctrine as a barrier for a court to accept a case, State Parties have a duty to prevent this for the denial of justice and to ensure the rights to effective remedies and reparation.[134] The *forum non conveniens* principle is applied in common law states as a procedural

[125] Ibid., para 31.
[126] Ibid., para 33.
[127] Ibid., para 33.
[128] Ibid., para 34.
[129] Ibid., para 35.
[130] Ibid., para 35.
[131] Ibid., para 36.
[132] Ibid., para 37.
[133] Ibid., para 40.
[134] Ibid., para 43,44.

method to ensure that the cases are heard with the closest connection.[135] The courts have to consider where is the most appropriate venue for litigation by considering where the claimants caused harm, which location the evidence and the witnesses are from, and therefore it should be the claimants' local court.[136] Thus Meeran's opinion that *forum non conveniens* is 'a means of limiting the exercise of extra-territorial jurisdiction'[137]. Therefore, to prevent the court in the host States from denying a case that happens overseas by claiming the *forum non conveniens*, the General Comment issued this as one of the States' duties to ensure effective remedy and reparation.

Recently, the open-ended intergovernmental working group (OEIGWG) released a revised draft legally binding instrument on business activities and human rights.[138] According to Article 1 and 3, the treaty shall apply to all business activities which means any economic activity of transnational corporations and Article 3.2 explains what transnational characters are. In the past, it was controversial to note what kinds of relationships TNCs have and what the parent companies have to do with responsibility and accountability.

States are obligated under Article 5.1 to regulate domestic legislation which requires all business enterprises within their territories or jurisdiction to respect human rights and prevent human rights violations or abuses. The measures can undertake human rights due diligence and ensure that effective national procedures are in place to ensure compliance with the obligations. Also in Article 5.5 it states about setting and implementing the public policies with respect to the implementation of the Legally Binding Instrument. This demonstrates that the Legally Binding Instrument as a source of international law aims to push forward States to have domestic measures such as human rights and environmental impact assessment, meaningful consultations, and to use human rights due diligence as a tool to protect and prevent human rights, these underline the ETOs of the States. However, the

[135] Richard Meeran 'Access to remedy: the United Kingdom experience of MNC tort litigation for human rights violations' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business beyond the corporate Responsibility to Respect?* (CUP 2013) 382.

[136] Ibid.,383.

[137] Meeran (n 135) 382.

[138] the open-ended intergovernmental working group (OEIGWG) released a revised draft legally binding instrument on business activities and human rights. <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> accessed 3 August 2019.

revised draft of the legally binding instrument are more focused on state duties and obligations rather than business responsibilities.

The role of home States for holding transnational Corporations' (TNCs) accountable

A State has responsibilities under international human rights law. Business entities therefore should be aware of doing any activities that violate international human rights law.[139]

Narula suggest that ETOs under ICESCR emphasise the relationship which involves the jurisdiction and control between States and TNCs and international financial institutions under their jurisdiction that commit extraterritorial violations.[140] Thus, ICESCR can be a source of law for States to implement domestic law on ETOs.

State best practices in a domestic judicial mechanism

The case of *Lungowe v Vedanta*,[141] for example, is a significant judgment from the UK Supreme Court that was determined to consider a case of a duty of the parent company owed to third parties who were affected by a subsidiary's operation abroad.[142]

Moreover, the well-known case from Niger delta, *Akpan & Anor v Royal Dutch Shell plc & Anor*[143]in the Netherlands' court was a case in which affected people from Nigeria sued Royal Dutch Shell company. They also sued parent company and its subsidiary for the tort of negligence, tort of nuisance or tort of trespass.[144] These two landmark cases can be seen as the best practice of the ETOs of home States to provide effective access to remedies for victims from overseas. Moreover,

[139] Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 266.

[140] Smita Narula, 'International Financial Institutions, Transnational Corporations and Duties of States' in Malcolm Langford. et al.(eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (CUP 2013) 148.

[141] *Lungowe v Vedanta* [2019] UKSC 20.

[142] UK parent company liability to parties affected by operations of a UK or foreign subsidiary, < www.allenovery.com/publications/en-gb/Pages/UK-parent-company-liability-to-parties-affected-by-operations-of-a-UK-or-foreign-subsidiary.aspx> accessed 9 April 2019.

[143]*A.F. Akpan & Anor v Royal Dutch Shell plc & Anor*, (n 22).

[144] Ibid para 3.2.

other states can see it as a lesson on how important it is to access home States' judicial mechanism and not to apply *forum non conveniens* as a barrier for victims from abroad.

While there is not a legally binding instrument yet, further questions arise such as what should a legally-binding instrument contain. De Schutter suggested that 'a legally-binding instrument that would clarify the content of the state's duty to protect human rights could be explicit about the extraterritorial reach of this duty, in order to dispel any such confusion as might have been created as a result'.[145] I agree with him wholeheartedly in this regard because the clearer a state duty to ETOs, the more human rights protections are provided to affected people. States can use it as a source of law as well as a guideline for implementing a domestic regulation.

In addition, Ramasastry's opinion is that a treaty would provide justice to victims in which an Administrative fine could be used for supporting state finances and redress for victims, moreover treaties should focus on TNCs and harm preventing mechanisms such as human rights due diligence and transparency.[146] While waiting for a legally binding instrument, according to UNGPs, home States can enact legislation in terms of human rights impacts from TNCs, other states can then see this and duplicate their own laws and orders.[147] This would hopefully close the governance gap in business and human rights.

Conclusion

While, these UN documents are soft law, there are no sources of international law under Article 38(1) of the Statute of the International Court of Justice. However, UNGPs carry the most authoritative statement, and the implementation of the duty to protect, respect and provide remedies. Turning UNGPs into NAPs and/or domestic laws is one of the best ways to establish ETOs of a State especially providing access to remedies via home State judicial and non-judicial mechanisms. States also can enforce and/or encourage TNCs to carry out human rights due diligence to reduce and

[145] Olivier De Schutter, 'Towards a New Treaty on Business and Human Rights' (2015) 1(1) *BHRJ*, 41.

[146] Anita Ramasastry, 'Closing the government gap in the business and human rights arena: lessons from the anti-corruption movement' in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business beyond the corporate Responsibility to Respect?* (CUP 2013), 189.

[147] Ibid.,184.

mitigate human rights violations before doing any business activities. Yet, if ETOs are recognised as a legally binding instrument, it will be better for the international standard of States' ETOs.

The corporate responsibility to respect in UNGPs Pillar II, maybe a soft law is proper for broader participants including non-state actors,[148] while waiting for a development of a legally binding instrument.

[148] Justine Nolan, 'The corporate responsibility to respect human rights: soft law or not law? in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business beyond the corporate Responsibility to Respect?* (CUP 2013), 142.

Chapter 3: Analysis of the case insight of international law

Sugar plantation in Oddar Meanchey

From the case of ***Hoy Mai and Smin Tet v Mitr Phol***, we must consider home State obligations under international laws. It must be considered whether the home state provides effective access to justice or not. According to the International Covenant on Economic, Social and Cultural Rights (ICESCR), established states obligations come in three categories which are obligations to respect, to protect and to fulfil.

1. The judgment denied the class action proceedings and will be carried out of proceedings in an ordinary action.

Even if the Thai Civil Court accepts the case before the court it means that Thailand will carry out state obligations under the International Covenant on Civil and Political Rights[149], Article 14 - that all persons shall be equal before the courts. More proceedings and trials for all plaintiffs in an ordinary action proceeding would cause the poorly affected Cambodian people to suffer and they will have a difficult situation when trying to access justice.

The judges did not take the committee on Economic, Social and Cultural Rights' General Comment No.24[150] into account when considering the states' extraterritorial obligations to protect. As noted in general comment No.24: 'State Parties to take steps to prevent and redress infringement of Covenant rights that occur outside territories due to the activities of business entities'[151]. Also, 'the state should provide victims with effective access to justice'.[152] Although, the case was filed in a Thai Civil Court in the home State which means there is access to justice and access to remedy through judicial mechanisms, it was not an effective access to justice in terms of the proceedings.

[149] International Covenant on Civil and Political Rights (Adopted 16 December 1966, entry into force 23 March 1976).

[150] UN Committee on Economic, Social and Cultural Rights 'General Comment No.24' (n 114)

[151] Ibid para 30.

[152] Ibid para 40.

Moreover, the judges did not consider an obligation to remedies under the UNGPs pillar three[153], principle 26 which notes that States should ensure access to effective remedies through the effectiveness of domestic judicial mechanisms for victims, including considering ways to reduce any barriers that could lead to a denial of access to remedies. In this sense, Thailand did not provide access to effective remedy to victims. There was a barrier which prevented claimants from other countries from taking part in the court proceedings. The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UNWGs) issued in their country visit report that they welcomed a class action in an amendment of the Civil Procedure Code[154], a class action is a better means to access an effective remedy which can achieve the full realisation of rights under article 2.1 of ICESCR.

In addition, the committee on Economic, Social and Cultural Rights was concerned that 'the Covenant has still not been given full effect in the State party's domestic law and therefore not all Covenant rights can be invoked before courts (art. 2)'.[155] The committee also recommended Thailand take all necessary steps to guarantee the full effect of the provisions of the Covenant into the domestic legal system, including the courts.[156]

2. The sensitive issue of international relationships.

While home State (Thailand) was afraid of the risk of international relations between Thailand and Cambodia. Thailand did not take into account their obligation under Article 2.1 of ICESCR in which the State Party undertakes steps through international assistance and co-operation.[157]

[153] UN Guiding Principles on Business and Human Rights (n 100).

[154] Human Rights Council (Forty-first session), 'Visit to Thailand, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (2019) UN Doc A/HRC/41/43/Add.1, para 78.

[155] UN Committee on Economic, Social and Cultural Rights 'Concluding observations on the combined initial and second periodic reports of Thailand' (19 June 2015) UN Doc E/C.12/THA/CO/1-2, para 6.

[156] Ibid.

[157] International Covenant on Economic, Social and Cultural Rights, Article2.1.

The principle of Non-interference under the Charter of the United Nations, Article 2.4[158] and the ASEAN Declaration (Bangkok Declaration).[159] The latter stated that 'they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities'[160]. The ASEAN way of non-interference is different from Western countries, ASEAN way use diplomacy interference to resolve problems instead.[161]

In my view, if Thailand carried out an obligation to take steps through international cooperation with Cambodia, the case would not raise concerns regarding a risk to their international relationship and it would get rid of any acts that may violate the principle of non-interference. This also reflected that ASEAN failed to carry out international cooperation under Article 2.1 ICESCR as well.

In addition, for a home state, according to a report of the Special Rapporteur on the situation of human rights in Cambodia in 2018, the Special Rapporteur was concerned regarding land expropriations for sugar concessions, particularly in Koh Kong and Oddar Meanchey province where the situation remains unresolved.[162] The Special Rapporteur notes that 'without a transparent, legitimate, accessible, predictable, equitable and rights-compatible process in the settlement of disputes with sugar companies, there is a risk of continued conflicts and unrest'.[163]

Formosa

Taiwan is not a member State of the United Nations[164] when the United Nations passed a resolution to expel the representative of the President of Republic of China in 1971.[165]

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[158] Charter of the United Nations, Article2.4 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.

[159] ASEAN Declaration (Bangkok Declaration) (adopted 8 August 1967).

[160] Ibid.

[161] Robin Ramcharan, 'ASEAN and Non-interference: A Principle Maintained' (2000)22(1) *Contemporary Southeast Asia*, 60.

[162] Human Rights Council (Thirty-ninth session), 'Report of the Special Rapporteur on the situation of human rights in Cambodia' (2018) UN Doc A/HRC/39/73, para 57.

[163] Ibid.

[164] United Nations, **Member States** < https://www.un.org/en/member-states/> accessed 11 August 2019.

[165] Wen-Chen Chang, 'The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison' (2010) 36(3) *N.C. J. Int'l L. & Com. Reg,* 593.

However, the Legislative Yuan ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on 31 March 2009.[166] Thus Taiwan has obligation under Article 2.1 of ICESCR and maintain the rights to a standard of living adequate for health under Article 12. Taiwan also has a responsibility under Article 25 of the Universal Declaration of Human Rights (UDHR) on the right to a standard of living adequate for the health which is a customary international law.

From the fact that the Taiwanese court accepted a complaint from victims from Vietnam, this demonstrated that Taiwan provide victims equal before the court under Article 14 of the ICCPR and provided access to remedy according to UNGPs principle 26 for those affected people who their human rights were abused from business activities, UNGPs are soft law though. However, it is a guideline for States to provide protections and remedies to victims from business abuse. This case challenges to Taiwan's court to uphold human rights under international laws that binding to Taiwan.

Xayaburi

All mechanisms to access effective remedies in business-related human rights abuses have been used in the Xayaburi case which are; (i) state-based judicial mechanisms; (ii) state-based non-judicial grievance mechanisms; and (iii) non-state-based grievance mechanisms.

(i) state-based judicial mechanisms

The Supreme Administrative Court overruled a judgment that the Administrative Court of Thailand has a jurisdiction over this transboundary case. The court stated that 'the villagers who live along the Mekong river in Thailand, being an interested person or person likely to be affected directly more than other people',[167] had a right to bring a case before the court. In other words, the court insisted on equality before a court in accordance with Article 14 of the ICCPR as well as article 10 of the UDHR. Moreover, if considered with regards to the state obligations to ICESCR, the court must provide

[166] Flora Wang, 'Legislature Ratifies UN Rights Treaties' *TAIPEI TIMES* (Taipei, 1 April 2009)< http://www.taipeitimes.com/News/taiwan/archives/2009/04/01/2003439900> accessed 9 September 2019.
[167] The Supreme Administrative Court, the order No. Kho Sor.8/2557(2014).

effective access to remedies to affected people under the general comment No.24,[168] and principle 26 of UNGPs.

(ii) state-based non-judicial grievance mechanisms

National Human Rights Institutions (NHRIs) are one of the functions in state-based non-judicial mechanisms under Principle 27 of the UNGPs which state that 'States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuses'[169]. The challenges of remedies are on the roles of NHRIs in order to promote Responsible Business and Human Rights. Therefore, NHRIs should be active in providing remedies to victims including victims from abroad.

There are six NHRIs in ASEAN which are the Philippines, Indonesia, Timor Leste, Malaysia, Thailand, and Myanmar[170]. The last three countries are related to case studies of violations from business sectors in GMS. It seems that the National Human Rights Commission of Thailand (NHRCT) is the most active NHRI in terms of human rights abuses from investments abroad.

The NHRCT is holding five principal functions according to **Principles relating to the Status of National Institutions (The Paris Principles)**[171] covering; (1) protection and quasi-judicial functions; (2) advisory function; (3) monitoring function; (4) promotional function; and (5) building relationships with stakeholders and other bodies.[172] Moreover, the NHRCT engages with UN human rights mechanisms both in Charter-based bodies and treaty-based bodies.

The NHRCT investigated human rights violations from Thai outbound investments in the case of Xayaburi(Laos), Dawei SEZ (Myanmar), Sugar plantation in Oddar Meanchey (Cambodia), Koh Kong

[168] UN Committee on Economic, Social and Cultural Rights 'General Comment No.24' (n 114), para 30.

[169] UN Guiding Principles on Business and Human Rights (n 100), Principle 27.

[170] Khoo Ying Hooi, *National Human Rights Institutions in Southeast Asia: Can They Become A Game Changer?* (Working Paper SHAPE SEA Research Project, 2015) 1 < http://shapesea.com/wp-content/uploads/2018/08/Khoo-Ying-Hooi-NHRIs-in-Southeast-Asia-Can-They-Become-A-game-changer.pdf> accessed 7 August 2019.

[171] Principles relating to the Status of National Institutions (The Paris Principles), UNGA Res 48/134 (20 December 1993).

[172] Angkhana Neelapaijit, NHRCT and updates and responses on human rights and business: Cases and practices<http://www.mediafire.com/file/lgr3cpul1bncnc9/Session_2_%255B13_JUNE_2019%255D_ThailandPresentation%255BNHRCT%255D.pdf/file> accessed 7 August 2019.

sugar plantation (Cambodia)[173],Hongsa coal power plant (Laos),Ban Chuang mining (Myanmar) and Heinda mining (Myanmar).[174] NHRCT jurisdiction has been criticised, but the commissioners insisted they have a duty under international law which is bound to Thailand and a duty under the Paris Principles. The highlight of the outcomes were two cabinet resolutions on 16 May 2016 and 2 May 2017[175] which highlighted the ETOs with interpreting the UNGPs on Business and Human Rights including the recommendation of a gap of policy and challenges found of binding obligations especially for remedial measures. The NHRCT is only the human rights institution so far that have prompted policy change regarding ETOs of Thailand.

Furthermore, the Charter-based mechanisms on the Universal Periodic Review (UPR) are also effective mechanisms for Thailand. On 11 May 2016, Sweden recommended the creation of a National Action Plan on Business and Human Rights[176] and Thailand accepted it.

(iii) non-state-based grievance mechanisms

The OECD complaints mechanism is a good soft law practice that has played an important role in preventing, and protecting victims of human rights abuses by corporations. It should be noted that Austria is not a home or host state in this case, but the Austrian national contract point plays an important role for non-state-based grievance mechanisms according to principle 28 of UNGPs[177]. The OECD Guidelines for multinational enterprises[178], are a standard of corporate behaviour. 'The Guidelines establish that firms should respect human rights in every country in which they operate'.[179]

[173] National Human Rights Commission of Thailand (NHRCT) (Sub-Committee on Community Rights), Assessment on Economic, Social and Cultural Rights in Thailand focusing on Business and Human Rights and cases of cross-border human rights (April 2015) <https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/THA/INT_CESCR_NHS_THA_20445_E.pdf> accessed 7 August 2019.

[174] Kornkanok Wathanabhoom, 'Remedy Mechanism from Hopelessness for Transboundary Responsibility' (2019) 12(1) *CMU Journal of Law and Social Sciences*,22 <https://www.tci-thaijo.org/index.php/CMUJLSS/article/view/135566> accessed 7 August 2019 (Thai).

[175] Ibid.

[176] Human Rights Council, Thirty-third session Universal periodic review: Report of the Working Group on the Universal Periodic Review* Thailand (15 July 2016) UN Doc A/HRC/33/16 para158.49.

[177] UN Guiding Principles on Business and Human Rights, Principle 28 States should consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms.

[178] OECD Guidelines for Multinational Enterprises (n 70).

[179] Ibid.

In addition, according to King, he had an argument that the Thai banks' decision to provide loans to the Xayaburi hydropower dam did not comply with the relevant laws and standards, including the Equator Principles which regarded as international best practice for environmental risk management for bank.[180] Thus, Thai banks should set up the environmental risk management for bank to mitigate human rights abuses and provide monitoring system as a part of non-state-based grievance mechanisms. It should be noted that MRC mechanism was failed to protect human rights in this case.

Don Sahong Dam

Although SUHAKAM did not proceed with the case beyond their borders, the case got the attention of the Malaysian Government in terms of the company's responsibility when operating abroad. It also made a point that they should develop a National Action Plan on Business and Human Rights.[181]

It seems that Malaysia did not comply with their obligation under the UNGPs, particularly with regards to accessing remedies in pillar three. There should be access to remedies through judicial, administrative, legislative or other appropriate means under principle 25.[182] According to principle 27, 'States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuses'.[183] SUHAKAM refused to investigate a case because they did not have jurisdiction beyond their territory, so Malaysia failed to provide access to remedies through state-based non-judicial grievance mechanisms under principle 27 of the UNGPs. Malaysia did not carry out a state's obligation to access remedies under the committee on ESCR general comment No.24 because Malaysia did not ratify ICESCR.[184] Therefore, a way to encourage Malaysia to respect international laws should be through UN charters based via Universal Periodic Review. Malaysia just had a Third Cycle in 2018 which (SUHAKAM) recommended Malaysia to ratify many international

[180] Daniel King 'Regulating social and environmental risk in ASEAN financial integration: the Xayaburi dam project in Lao PDR and Thai Banks' in Mahdev Mohan and Cynthia Morel (eds), *Business and Human Rights in Southeast Asia: Risk and the Regulatory Turn* (Routledge, 2015) 99.

[181] Middleton (n 63).

[182] UN Guiding Principles on Business and Human Rights (n 100), Principle 25.

[183] UN Guiding Principles on Business and Human Rights (n 100), Principle 27.

[184] United Nations Human Rights Office of the high commissioner, **Ratification Status for Malaysia** < https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN> accessed 11 August 2019.

human rights treaties including the ICESCR.[185] Yet the country report did not mention the responsibility of business activities abroad.[186]

Hong Sa coal power plant

The case of potential transboundary harms from Laos to Thailand. Both countries as state members of ICESCR have a responsibility to maintain the rights to a standard of living adequate for health under Article 12 as well as Article 25 of the UDHR. Moreover, the scholarly opinion is that according to the Declaration of the United Nation Conference on the Human Environment (Stockholm Declaration) 1972[187] and the Rio Declaration on Environment and Development (1992)[188], both States have responsibilities under the principle on state responsibility, Precautionary approach and the sovereignty.[189] The latter was stated in the Stockholm Declaration, principle21 and was restated in the Rio Declaration, article 2 and stated that '…the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'[190] is an opportunity for States to uphold ETOs.

Heinda mining (Myanmar)

The SLAPP case is contrary to ICCPR Article 19.2 and UDHR, Article19 which guarantees rights to freedom of expression. A journalist has a right to freedom of expression to write an article without interference from anyone.

[185] Human Rights Council, 'Summary of Stakeholders' submissions on Malaysia* Report of the Office of the United Nations High Commissioner for Human Rights' (2018) UN Doc A/HRC/WG.6/31/MYS/3, para 2.

[186] Human Rights Council, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21* Malaysia' (2018) UN Doc A/HRC/WG.6/31/MYS/19.

[187] The United Nations Conference on the Human Environment, Stockholm, (16 June 1972) *Stockholm Declaration on Human Environment*, UN Doc A/CONF.48/14.

[188] The United Nations Conference on Environment and Development, Rio de Janeiro (3 to 14 June 1992) *Rio Declaration on Environment and Development,* UN Doc A/CONF.151/26.

[189] Paisanpanichkul (n 76) 127.

[190] Rio Declaration on Environment and Development (n 188).

In addition, for those cases from Myanmar, the Special Rapporteur on the situation of human rights in Myanmar issued in her report and ask the home States of TNCs investing and operating in Myanmar should ensure they act in line with UNGPs.[191]

From those case studies, many cases are from Thai outbound investments. The Thai government shall comply with international human rights laws to respect, protect and fulfil human rights from human rights harms from overseas business activities.

The committee on Economic, Social and Cultural Rights was concerned with Article 2.1. on the lacking framework that ensures that corporations under its jurisdiction fully respect economic, social and cultural rights when acting abroad**.[192]** The Committee also recommended that Thailand establish a clear regulatory framework ensuring that companies are legally accountable regarding violations of economic, social and cultural rights in their projects overseas, especially cross-border development projects.[193]

The United Nations Working Group on Business and Human Rights

On 4 April 2018, the UNWGs were concerned about risks of adverse human rights impacts in neighboring countries in which there were weaker regulatory frameworks and safeguards.[194] Furthermore, they encouraged the Thai Government and companies to identify, address, prevent and mitigate the impacts of human rights abuses, particularly in providing access to effective grievance mechanisms.[195] After that, the UNWGs issued it in their report encouraging the Thai Government to improve access to effective remedies in cases of trans-borders cases in ASEAN and other States.[196] It also refers to the recommendations from the study of best practices and how to improve the

[191] Human Rights Council (40th Session) 'Report of the Special Rapporteur on the situation of human rights in Myanmar' (n 79).

[192] UN Committee on Economic, Social and Cultural Rights 'Concluding observations on the combined initial and second periodic reports of Thailand' (n 155), para 12.

[193] Ibid.

[194] Statement at the end of visit to Thailand by the United Nations Working Group on Business and Human Rights (n 78).

[195] Ibid.

[196] Human Rights Council (Forty-first session), 'Visit to Thailand, Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (n 154) para 77.

effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights.[197] Moreover, the UNWGs also recommended business enterprises to establish effective operational-level grievance mechanisms in the early stages to provide for remedies mechanisms.[198] Whereas the UNWGs also recommended that civil society organizations continue to monitor Thai outbound investments involved in mega-projects.[199]

National Action Plan on Business and Human Rights (NAPs)

When waiting for a binding treaty, NAPs is a means to implement UNGPs at a domestic level where States can create plans to provide protections, respect and remedies in terms of their countries' context which should be suitable for those countries to uphold the human rights from business activities.

The free, prior and informed consent (FPIC)

The United Nations Declaration on the Rights of Indigenous Peoples - UNDRIP[200] is the most inclusive international document on indigenous peoples' rights. Particularly Article 10 which demands for the free, prior and informed consent of the indigenous peoples before relocation. FPIC is one of the most important documents for indigenous peoples that ensure that the indigenous people have rights to information, rights to participation and engage in the decision-making process before starting the project. Therefore, host States as well as home States should ensure that the foreign transnational corporations respect FPIC and provide such rights to indigenous people.

In my opinion, while lacking of regional mechanism and treaty-based mechanism for some States, all cases can use the Charter-based mechanism through the special procedures of the Human Rights

[197] Human Rights Council (Thirty-fifth session), 'Best practices and how to improve on the effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights: Study of the Working Group on the issue of human rights and transnational corporations and other business enterprises' (2017) UN Doc A/HRC/35/33.

[198] Ibid, para 100.

[199] Ibid, para 102 (C).

[200] United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007).

Council. Both in thematic and country mandates which are Special Rapporteur on the situation of human rights in Cambodia and Myanmar. A number of the thematic can be considered to use, which are Working Group on the issue of human rights and transnational corporations and other business enterprises, Special Rapporteur on the right to development, Special Rapporteur on human rights and the environment, Special Rapporteur on the right to food, Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 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 situation of human rights defenders, Special Rapporteur on the rights of indigenous peoples, Special Rapporteur on extreme poverty and human rights, Special Rapporteur on the human rights of internally displaced persons.[201]

Conclusion

There are some gaps in international laws regarding the ETOs issue. There is no binding-treaty on ETOs and the existing treaty is not clear on ETOs. Although a legally-binding treaty provides some guidelines like the ESCR General Comment No.24, it is just a comment and/or guideline for States parties. Treaties do not have punitive enforcement, yet the country report system is a chance to encourage States to take steps towards achieving the full realisation of rights as well as Charter-based systems such as UPRs and the Special Procedures of the Human Rights Council. Likewise, only state parties are obliged to those obligations, but those home States maybe cannot observe their obligations. While some home States do not even rarify those treaties, so a soft law diversely may support this governance gap[202]. Whereas the UNGPs as a soft law does not clear state responsibilities on ETOs, these gaps of the international law need to be fulfilled. Moreover, it reflects the lack of an adequate mechanism to address the human rights abuse of transnational corporations in the regional level as well.

[201] United Nations Human Rights office of the high commissioner, **Thematic Mandates** <https://spinternet.ohchr.org/_layouts/15/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM> accessed 30 August 2019

[202] Claire Palmer, 'What can Post-Democracy tell us about TNCs and Extraterritorial Violations of Human Rights?' (2016)87(1) *The Political Quarterly* 76.

Chapter4: A critical from Third World Approaches to International Law (TWAIL) perspective

The case studies are from the Greater Mekong Subregion (GMS) in which most home States are developing. Host States are mostly underdeveloped countries[203] in which there needs to be an increase in gross domestic product (GDP) and economic capacity. Thus home and host states are from the "third world" Chimni points out that this 'reflects a level of unity imagined and constituted in ways which would enable resistance to a range of practices which systematically disadvantage and subordinate an otherwise diverse group of people'[204]. This chapter will examine and critique these problems through a lens of TWAIL.

Part I: What is TWAIL?

TWAIL is the approaches to critical knowledge that addresses concerns from third world peoples' perspectives in which law scholars need to study, identify and change in existing international laws.[205]

Okafor gave the conclusion of TWAIL scholars' approach to be:

> TWAIL scholars (or "TWAILers") are solidly united by a shared ethical commitment to the intellectual and practical struggle to expose, reform or even retrench those features of the intellectual legal system that help create or maintain the generally unequal, unfair, or unjust global order…a commitment to centre the *rest* rather th[a]n merely the *west,* thereby talking the lives and experiences of those who have self-identified as Third World much more seriously than has generally been the case.[206]

Furthermore, from his view, TWAIL is a school of thought in which crucial contributions to international law methodologies are made.[207] He also concluded that TWAIL is a series of theories and methodologies for international law and institutions with a broad perspective and approach.[208] Seck

[203] Underdeveloped Countries Population (29 July 2019) <http://worldpopulationreview.com/countries/underdeveloped-countries/> accessed 26 August 2019.
[204] B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006)8 *International Community Law Review,* 2.
[205] Ibid.
[206] Okafor (n 23).
[207] Ibid.
[208] Ibid.

mentions in response to Okafor's paper that 'TWAIL is an approach to international law by diverse scholar groups who would like to reform the international law system with Third World's states or societies' experiences.[209]'

Seck further notes 'that when identifying and interpreting international laws, TWAIL scholars try to ensure the real voice of people from Third World countries are heard.'[210]

Linking to business and human rights, Seck raised the questions on whether the sovereignty of host States have been committing neo-colonial violations from the home states' law and order, or whether it is allowed to protect the environment and vulnerable peoples.[211]

While the case studies in the GMS of the transnational corporations are mostly from developing countries, abuses of human rights in the host states are classified as underdeveloped or developing countries. This brings the question to mind, how TWAIL helps to analysis the home State obligations under international law?

TWAIL analysis helps to explore the attention and rights of affected communities and suggests that the home States regulate or adjudicate TNCs to ensure that they are in line with international human rights and environmental law.[212] TWAIL calls for dialogue across cultures to establish universally acceptable norms which home States are obliged to regulate and adjudicate TNC harm limits in the first world and uphold third world people's rights.[213]

Part II: Transnational Harm

It should be noted that transnational harms are different from transboundary damage. Transnational harms are harms from foreign direct investments.[214] Whereas Xue Hanqin defined transboundary damage as 'border-crossing damage via land, water or air in dyadic State relations'[215]. Yet in international environmental law, there are four element of the transboundary damage which are 1) the

[209] Sara L Seck 'Conceptualizing the Home State Duty to Protect Human Rights' in K Buhmann et al.(eds), *Corporate Social and Human Rights Responsibilities* (Palgrave Macmillan 2011) 27.
[210] Ibid.
[211] Sara L Seck, 'Transnational Business and Environmental Harm: A TWAIL Analysis of Home State Obligations' (2011)3(1) *Trade, Law and Development*, 164.
[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] Xue Hanqin, *Transboundary Damage in International Law* (CUP, 2003) 3.

physical relationship between the activity and the damage 2) human causation 3) the threshold criterion 4) transboundary movement of harmful effects.[216]

Transnational harms are caused from transnational corporations which invest in another state and where usually there are weaker laws and regulations. Some cases also have had transboundary damage such as Xayabury dam and Hongsa coal power plant. Transnational harms raise a question regarding whether home States have a duty to protect human rights beyond their territories from the abuse of corporate activities abroad or not. Extraterritorial obligations of home States come with transnational harms as well.

PART III: TWAIL analysis on the problem on the implementation of international law and the ASEAN Way

Seck points out that 'TWAIL calls for dialogic manoeuvres across cultures to establish the content of universally acceptable norms'.[217] Seck is also critical about the obligation of home States to regulate and adjudicate TNCs as needed as a floor for Third World peoples, it should not only be a space for First World states.[218] Moreover, the word 'extraterritoriality' is putting pressure on home States to ensure that TNCs under their jurisdiction respect human rights of the Third World people in host States.[219]

Some home States do not even ratify international treaties or although they have ratified them, the states do not respect, protect and fulfil their obligations including the obligations under customary international law. There are some unique factors that cause problems in the implementation of international laws. Firstly, the ASEAN Way of Non-interference, due to the history of Colonial and Cold War experiences, Non-interference stated in the ASEAN declaration and then in the 1976 Treaty of Amity and Cooperation, article 2C[220] for affirming domestic interests over regional interests.[221] It

[216] Ibid, 4.
[217] Seck (n 211).
[218] Ibid.
[219] Seck (n 209) 34.
[220] Treaty of Amity and Cooperation in Southeast Asia Indonesia (24 February 1976).
[221] Lee Leviter, 'The ASEAN Charter: ASEAN Failure or Member Failure?' (2010)43(1) *International Law and Politics,* 159 <http://nyujilp.org/wp-content/uploads/2013/02/43.1-Leviter.pdf> accessed 20 August 2019.

reflects in the failure of the Mekong River Commission in the case of Xayaburi hydropower dam and also the role of the ASEAN Intergovernmental Commission on Human Rights (AICHR) whose responsibility it is for the promotion and protection of human rights in ASEAN[222],but do not have a mandate for investigating human rights abuses. Secondly, corruption and the lack of rule of law. According to Transparency International's Corruption Perception Index 2018, home and host States in GMS are high ranking when it comes to corruption with Cambodia being the worst, ranking at 161, while Myanmar and Laos are the same at 132, follow by Vietnam at 117, then Thailand and China at 99 and 87 respectively.[223] Rule of law in ASEAN, while rule of law in ASEAN is in transition, the region economic growth in world markets required stronger legal system of economic and financial institutional safeguards.[224] As well as, the need of rule of law in legislation and judicial mechanism. Lastly, the increasing country's economic and GDP. Less developed states may incentivise TNCs by reducing tax, labour rights conditions, and environmental standards which cause environmental disasters and human rights violations.[225]

These should be considered as the host States are in a weak governance zone in which 'state that are unable or unwilling to protect the fundamental human rights of some or all of its population over some or all of its territory'[226] and it calls on the governance gap. Simon and Macklin issued the governance gap with respect to the accountability, prevention and redresses of the human rights abuses by the business sector in host States,[227] while the home States can fulfil the host States governance gap. The governance gap is an ongoing controversy of home States' duty to prevent and remedy human rights violations from the TNCs.[228] Seck points out that TWAIL scholars suggest that the Third World States' capacity 'is a direct result of the colonial tendencies of the international legal order'[229].

[222] About AICHR Structure, Work and History of the AICHR < https://aichr.org/about-aichr/> accessed 20 August 2019.
[223] Transparency International, *Corruption Perception Index 2018* < https://www.transparency.org/cpi2018> accessed 20 August 2019.
[224] Ng (n 5).
[225] Palmer (n 202).
[226] Simon and Macklin (n 3).
[227] Ibid 9.
[228] Sara L Seck, 'The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage' (2015)53 Osgoode Hall Law Journal, 369.
[229] Seck (n 209).

These governance gaps have occurred in GMS with both host and home States mostly as the weak governance states. Some host States do not have democracy and people do not have *de facto* rights to participation. If the issue of relocation is looked at for example, the host States government just ordered affected people to move from their land to provide land to a project, those affected communities cannot oppose or cannot sue the government for this act. Likewise, home States like Thailand do not have stable democracies, there have been coup d'etat's many times and junta have ruled the country. Without democracy, the more that human rights violations have occurred. Furthermore, the use of judicial and non-judicial mechanisms in home States have demonstrated that host States in case studies have governance gaps with regards to protecting human rights. Thus, it challenges home States to play a role to protect and provide remedies and ensure that ETOs are utilised to protect the human rights abuses from business activities abroad. In addition, TWAIL should be considered when drafting a new business and human rights treaty for Third World countries perspective to ensure that Third World people engage in this new international law which will greatly impact their lives.

International human rights laws may be the answer for state parties to respect, protect and fulfil human rights. How about those states which are unwilling to sign a treaty? A soft law will play an essential role for states' human rights obligations.

On the one hand, a soft law is a useful instrument to uphold human rights, but it is focuses much on state obligations rather than the business sector. UNGPs, for example, are the most related soft laws in the area of business and human rights which states should implement into domestic laws or policies with their specific contexts through the National Action Plan on business and human rights (NAP). A National action plan is a new hope for victims of human rights abuses that ensure the states duty to protect and provide remedies while reforming corporate responsibilities to respect human rights. Besides the domestic human rights issues in a national action plan, states as a home state should provide ETOs mechanisms for the foreign victims from host states as well. According to the United Nations Human Rights office of the High Commissioner website, there are 22 countries that

have produced a NAP and 23 countries are in the process of developing a national action plan, including some countries from the case studies which are Thailand, Myanmar and Malaysia.[230]

On the other hand, the implementation and enforcement of a soft law is very weak, particularly in developing and less-developed countries. The goal for developing countries is to better their economies via influent investors to invest, these factors reduce the human rights protections and the states are unwilling to carry out the obligation under soft law.

Furthermore, under the UNGPs, the corporations have to respect human rights. The corporations should understand that business and human rights (BHR) are different from corporate social responsibility (CSR) in both concept and context. Business and human rights are for the company to affirm the contributions in realisation of human rights which call for accountability and mitigate the adverse violations of business activity.[231] While CSR focus on voluntarism and how to engage with stakeholders, BHR focus on the needs of the affected people on a corporation's accountability in human rights abuses.[232] Ramasastry argued that BHR can draw from CSR to promote human rights.[233]

From a TWAIL perspective, home States of the Mekong sub-region case studies should include the voice of the affected people in host States into their obligations under the binding treaties, customary international laws, soft laws and other guidelines. The voice of people from the ground is very important for implementing the laws, regulations and policies, it reflects the problems and needs of those affected people. In many cases, the Environmental Impact Assessment (EIA), for example, is one of the problems in the region. While the foreign transnational corporations are required to do EIA under the domestic law, TNCs do it for a rubber stamp which does not respect the concerns of affected communities and thus they do not have a proper information and solutions.

[230] United Nations Human Rights office of the High Commissioner, State national action plan on Business and Human Rights https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx accessed 23 August 2019.
[231] Anita Ramasastry, 'Corporation Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability' (2015)14 *Journal of Human Rights*, 237.
[232] Ibid.
[233] Ibid.

The public participation should not be only a process for a rubber stamp, but it is a legal obligation of the developer before getting permission to develop a mega-project. TWAIL recommends a home State regulation to provide local communities with a voice especially indigenous peoples to protect themselves from environmental harms and human rights violations.[234] Thus, the right to public participation and the right of access to information should not think only about access rights but also to think about the quality of the rights that affected people really need to participate or to get and understand the information. Sometimes the corporations provide documents such as the EIA report, for example, which is only conducted in English, yet the affected communities are local people who do not understand English or perhaps they are indigenous people who have their own languages. It is difficult to see how those affected people can have access to information in practice. When they can understand all information, they can raise issues of concern when they participate in the public participation process for approval of the project which in this sense we can call this a meaningful consultation.

In addition, the way that people with disabilities fight for their rights is an interesting method which can be used with other rights holder groups.

"Nothing About Us Without Us" approach

"Nothing About Us Without Us" was defined as 'resonates with the philosophy and history of the disability rights movement (DRM), a movement that has embarked on a belated mission parallel to other liberation movements'.[235] Nothing about us without us is a slogan about the people with disabilities' self-determination and making their own decisions, it is also about a social movement which is focused on the freedom of people with disabilities from systemic oppression.[236]

Using 'Nothing about us without us' has been used as a motto to demonstrate how to engage the right's holder to understand policy making-decision development and advocacy which includes their opinion. As well as this they can provide input into unique issues to ensure states would address the

[234] Seck (n211).
[235]James I Charlton, *Nothing About Us Without Us: Disability Oppression and Empowerment*. (1st ed, University of California Press, 1998) 3.
[236] Stephanie Brzuzy, 'Nothing About Us Without Us: Disability, Oppression and Empowerment. James I. Charlton, Book Reviewed' (1999) 26(1) *The Journal of Sociology and Social Welfare*, 191.

perspectives and wisdom which are reflected in the regulations and policies. Community Health Workers in Hawaii[237] and the families capacity building and participation on the child health policy[238], for example.

It is interesting to adapt a 'Nothing about us without us' approach when engaging third world people's voices in terms of business and human rights to making-decision process, not only in the state sector but also in the non-state sector, particularly the human rights due diligence (HRDD) under principle 17 of UNGPs.

Foreign Government Law and Policy

Apart from international laws and soft laws, the foreign government laws and policies are essential tools that impact the states duty of protection on human rights in the Mekong sub-region such as the United State's Trafficking in Persons Report (TIP Report)[239] which is a diplomatic tool to engage other states on human trafficking ,and the EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated fishing (IUU).[240] In 2015, these pertained directly to Thailand, when Thailand was ranked in Tier 3 on the TIP Report and EU issued a yellow card[241], the Thai government undertook many actions including an amendment of the Anti-Trafficking in Persons Act[242] and issued the Emergency decree on fishery 2015[243] to demonstrate that they were trying to protect human rights.

Furthermore, as mention in introduction, EBA policy influence investors to Cambodia to export goods to EU with the benefit of zero tariffs. According to European parliament, since 2008, Cambodia's exports to the EU have grown by 630% and now the figure of country's total exports at 39%.[244] Once

[237] Napualani Spock and Ashley Wennerstrom, ' "Nothing About Us Without Us": Best Practices Learned Through Supporting Community Health Workers in Hawai'i Nei and Beyond' (2019)78(6) supplement1, *Hawai'i Journal of Medicine& Public Health*, 33.
[238] Joy S. Kaufman et.al, 'Nothing About Us Without Us: Authentic participation of service recipients in system development' (2019)100 *Children and Youth Services Review*, 422 < https://www.sciencedirect.com/science/article/pii/S0190740918309113?via%3Dihub> accessed 16 August 2019.
[239] US Department of State, 'Trafficking in Persons Report' <https://www.state.gov/trafficking-in-persons-report/> accessed 23 August 2019.
[240] EU Regulation to prevent, deter and eliminate illegal, unreported and unregulated fishing (entered into force 1 January 2010).
[241] European Commission Press release, 'EU acts on illegal fishing: Yellow card issued to Thailand while South Korea & Philippines are cleared' (21 April 2015) <https://europa.eu/rapid/press-release_IP-15-4806_en.htm> accessed 23 August 2019.
[242] Anti-Trafficking in Persons Act (No.2) B.E.2558 (2015) [THA].
[243] Emergency decree on fishery B.E.2558 (2015) [THA].
[244] European Parliament (n 11).

the EU had human rights concerns and the suspending EBA would directly affect to Cambodian people's livelihoods by making the country's exports less competitive.[245]

Conclusion

TWAIL will help not only home States, but also host States to understand more of the needs and concerns of Third World people who have been affected by business activities abroad. The interpretation of international law from a TWAIL perspective will allow the voice of affected people in third world countries in the home States regulations to protect human rights. There are governance gaps in third world countries, including states in the GMS in which host States cannot provide proper human rights protections, the victims have sought protections and/or remedies from home States instead. TWAIL will be an interesting approach to interpret the ASEAN Way which is stuck with Non-interference and integrated local communities' voices including indigenous people into the human rights protections in the regional level.

Presently, the extraterritorial obligations of home States may reach far, yet they need to be fulfilled by these governance gaps which are challenges for not only home States, but also transnational corporations to mitigate human rights abuses and provide accountability and transparency to the victims. Moreover, the host States should weigh the benefits between investments and human right violations and environmental disasters.

[245] Ibid.

Conclusion

"We need peace and freedom, as it is the only way to bring us equality and to ensure our community's rights to natural resources and land are respected," the head of the Eu-Wae-Tta camp said.[246] The voices of affected people express only their needs, but we do not know how and through which mechanisms. It reflects that business and human rights particularly ETOs are new issues in the GMS. The court cases are strategic cases which aim for raising awareness of home State ETOs. The case studies are the area of learning and solving problems, the case studies demonstrated that common issues are lacking adequate sources of law and mechanisms to take extraterritorial obligations into account, provide human rights protections and access to justice from home States of TNCs while pointing out the governance gaps and lack of capacity to protect human rights in host States.

There is not a business and human rights legally binding instrument as of yet. I do agree with the scholars that it needs to be a legally binding instrument as a source of international law which then should be implemented to domestic law. There is an ongoing Zero Draft of a legally binding instrument. Applying an 'Everything about Us without Us' approach is also an interesting way of calling for the engagement of the affected people into the laws and at the policy development level. It should be noted that TWAIL is important for interpreting international laws in this perspective and ensuring that the voices of people from Third World countries or the global South are included.

However, if there is a legally binding treaty for business and human rights, it does not guarantee the States in the GMS will ratify and implement it. Comparing it with the current international treaties we that not all States in the sub-region have ratified them. Moreover, these States are developing and underdeveloped countries which need to develop infrastructure are developing their economies and attracting investors to their States, yet there are governance gaps and challenges for States in the GMS in the perspective of TWAIL. The factor of government capacity is influential in States actions under international law because the idea of ETOs makes the perfect human rights protections, therefore corporations will be afraid of investments if they have to take on the responsibility in home States.

[246] Earthrights International, 'Voices of the Unheard from the Salween' (Earthrights International, 15 March 2018) < https://earthrights.org/blog/voices-unheard-salween/> accessed 30 August 2019.

The existing international laws play an important role in providing the state obligations regarding particularly the ETOs. The ESCR general comment No.24 notes however, that it is just a guideline and some home States do not ratify the ICESCR.

Implementing UNGPs into NAP is voluntary and UNGPs do not provide clear obligations to States in terms of ETOs. While waiting for a legally binding instrument, home States have had to build the proper domestic mechanisms themselves. States can create ETOs into NAP, but the States have to ensure that the process of drafting NAP includes the meaningful consultation of all stakeholders. Moreover, States can apply the notion of 'Everything about Us without Us' to ensure the participation of affected people and that their voices can be heard. Whereas, even though there is less capacity for the governance gap and, the aim is for increasing the GDP in home States. The States should fill the governance gaps by creating the mechanisms to protect human rights as well to reduce and mitigate human rights abuses that will happen in their territory.

Moreover, the UN charter-based mechanisms are useful for GMS cases such as the special procedures of the Human Rights Council and Universal Periodic Review. Whereas the regional mechanisms fail to protect human rights, particularly MRC and the AICHR.

Access to justice through judicial mechanism in home States of case studies is an ongoing process, the strategic cases are a challenge for all stakeholders which are the Government, court, corporations, victims, NGOs, lawyers and academics. As well as the access to justice via state-non judicial mechanisms. The human rights institutions play an important role for business related human rights abuses especially NHRCT which is the most famous mechanism for cases in GMS.

However, when ETOs appear in the form of soft law, they are more flexible and open for Non-state actors to respect human rights by creating corporate policy, code of conduct and so on.

Human rights due diligence should be made under UNGPs principle 17 as well as other monitoring systems, as well as trying to mitigate adverse human rights violations and take responsibility and accountability if there are any human rights abuses. If there is not serious damage and there needs to only be compensation, TNCs can adapt Community-Driven Operational Level Grievance Mechanisms for a process of compensation. The more engaged affected people are the more transparent they are.

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