

LEGAL MEASURES TO PREVENT HUMAN RIGHTS INFRINGEMENT IN THE PRODUCT SUPPLY CHAIN: A FOCUS ON THAI FISHERY INDUSTRY*

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ABSTRACT

The risks of trafficking and slavery in production supply chain are significant and widespread. Particularly in the fishing sector as an industry which involves multiple parties from many different sources in its production line, it is highly possible to have labor issues at all levels of the supply chain. The Thai fisheries industry, both fishing and processing sector, is significant to Thailand's economy; however, the human rights infringement is currently being emphasized as a condition of fishery products trading in the international markets, which is an important problem that Thailand is questioned on human rights infringement in the country's business operations.

According to the existing legal measures in Thailand, the preventive measures concerning human right infringement in business, particularly in fishery industry are upon the State. The existing Thai laws and regulations, merely criminal sanctions, are applicable as a legal mechanism to punish who violates law. However, it is clear that the capacities of the State to protect human rights have not kept pace with the expansion of global economic activity¹.

Thus, Thailand should improve the legal mechanisms to monitor and observe the business operation e.g. disclosing the measures companies taken for human rights due diligence, increasing corporate transparency, empowering and educating consumers.

KEYWORDS: human trafficking, forced labor, human rights, human rights infringement, human rights abuse, fishery industry, Thai fishery industry, business transparency, corporate transparency, transparency in supply chain

บทคัดย่อ

ปัจจุบันการค้ามนุษย์ การใช้แรงงานทาส หรือการบังคับใช้แรงงานจัดเป็นปัจจัยเสี่ยงที่มีความสำคัญและส่งผลกระทบต่อในวงกว้าง โดยเฉพาะในธุรกิจประมงและอุตสาหกรรมต่อเนื่อง ทั้งนี้เนื่องมาจากห่วงโซ่การผลิตในธุรกิจประมงมีความเกี่ยวข้องและต่อเนื่องกัน โดยมีผู้ผลิต ผู้จัดจำหน่าย และแรงงานในหลายภาคส่วนเป็นฟันเฟืองที่สำคัญของธุรกิจ และโดยที่ธุรกิจประมงและอุตสาหกรรมต่อเนื่องเป็นธุรกิจที่มีความสำคัญต่อระบบเศรษฐกิจของประเทศไทย ดังนั้น การที่ประเทศไทยถูกกล่าวอ้างว่ามีการละเมิด

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¹ Olivier De Schutter & Anita Ramasastry et al, Human Rights Due Diligence: The Role of States (ICAR, ECCJ & CNCA, 2012).

สิทธิมนุษยชนด้านการบังคับใช้แรงงาน ย่อมส่งผลกระทบต่อประเทศไทยเป็นอย่างมาก ผลักดันให้ประมงซึ่งผลิตในประเทศไทยย่อมถูกตั้งคำถามจากประเทศคู่ค้า เป็นต้นว่า ผลักดันให้เหล่านั้นผลิตจากแรงงานบังคับ หรือแรงงานที่มาจากการค้ามนุษย์ในห่วงโซ่การผลิตหรือไม่

ประเทศไทยได้ให้ความสำคัญในการแก้ปัญหาการค้ามนุษย์และการใช้แรงงานบังคับในภาคธุรกิจประมงและอุตสาหกรรมต่อเนื่อง อย่างไรก็ตาม มาตรการและกฎหมายที่เกี่ยวข้องในการแก้ปัญหาดังกล่าวเป็นมาตรการการกำกับดูแลจากทางภาครัฐ ซึ่งมักปรากฏในรูปแบบของมาตรการและกฎหมายทางอาญาโดยมุ่งลงโทษแก่ผู้กระทำความผิดตามที่กฎหมายได้บัญญัติไว้ แต่เนื่องด้วยข้อจำกัดของทางภาครัฐ ทำให้การป้องกันการละเมิดสิทธิมนุษยชนด้านการบังคับใช้แรงงานบังคับ และการแก้ปัญหาดังกล่าวในภาคธุรกิจนี้ไม่มีประสิทธิภาพเท่าที่ควร

ดังนั้น เพื่อให้การบังคับใช้กฎหมายที่มีอยู่ในปัจจุบันให้เกิดประสิทธิภาพมากยิ่งขึ้น ประเทศไทยจึงควรพัฒนาเครื่องมือทางกฎหมายเพื่อช่วยสนับสนุนและส่งเสริมการกำกับดูแลภาคธุรกิจ ไม่เฉพาะแต่ธุรกิจประมงและอุตสาหกรรมต่อเนื่องซึ่งถูกจับตามองจากประเทศคู่ค้า แต่ควรรวมถึงภาคธุรกิจอื่นๆ เพื่อส่งเสริมให้ภาคธุรกิจต่างๆที่เกี่ยวข้องนำหลักความรับผิดชอบต่อสังคมและหลักธรรมาภิบาลมา

ปรับใช้ในการดำเนินกิจการ เพื่อให้บริษัทเหล่านั้นมีความโปร่งใสและสามารถตรวจสอบได้ เช่น การเปิดเผยข้อมูลมาตรการและนโยบายซึ่งใช้ในการตรวจสอบการละเมิดสิทธิมนุษยชนในห่วงโซ่การผลิตเข้ามาเป็นส่วนหนึ่งของข้อมูลที่ต้องเปิดเผยต่อสาธารณะ นอกจากนี้จะทำให้ผู้มีส่วนได้เสียในกิจการของตนได้รับรู้ถึงข้อมูลดังกล่าว ยังเป็นการให้ข้อมูลแก่ผู้บริโภคอีกทางหนึ่งด้วย

คำสำคัญ : การค้ามนุษย์, แรงงานบังคับ, บังคับใช้แรงงาน, สิทธิมนุษยชน, ละเมิดสิทธิมนุษยชน, ประมง, ธุรกิจประมงในประเทศไทย, ความโปร่งใส, ห่วงโซ่การผลิต, การเปิดเผยข้อมูล

Introduction

As the concept of business Supply Chain is popularly becoming a major strategy in the world of international production, trade and investments, Multinational Corporations (MNCs) tend to seek competitive advantage based on cheaper labor, and search for access to consumers in emerging markets by outsourcing, offshoring, and other forms of production². However, such practices can possibly be a danger to the first tier of global supply chain in tracking where and how labor abuse occurs in their supply chain.

One of the industries most decayed by this issue is the fishing industry. There are over 58 million people engaged in the fishing and aquaculture sector, which involves multiple parties from many different sources in its production line. As such, it is possible to find labor issues at all levels of the supply chain. As one of the world's leading seafood exporters, in recent years, Thailand has been criticized for its failure to combat labor and human rights abuse in the Thai seafood industry, with many international media publications and partner countries concerned about this issue.

Although Thailand has several laws and regulations controlling the human trafficking and the protection of labor, there are still no specific provisions or legal measures to eliminate trafficking of forced labor. According to the global trends, Thailand should consider whether it should regulate or strengthen human trafficking laws and regulations by requiring the companies to report on actions to eradicate forced labor in their operations or else face difficulties selling their products in certain regions.

²Jimmy Donaghey et al., From Employment Relations to Consumption Relations: Balancing Labor Governance in Global Supply Chains, 53 Human Resource Management 229-252 (2013).

This study has the hypothesis that there are no adequate legal measures for solving the problem of human rights infringement in the existing Thai laws, where merely criminal sanction are applicable as a legal mechanism to punish who violates law, particularly in one of the biggest industries, the fishery business. Raising awareness of entrepreneurs and improving the legal mechanisms to monitor and observe the business operation would be the best way to solve the problem. Therefore, there should be the specific legal mechanisms e.g. disclosing the measures companies taken for human rights due diligence, increasing corporate transparency, empowering and educating consumers.

The purpose of this thesis is to study on the legal concepts and recognized principles concerning human rights infringement-related labor issues in global supply chain, especially labor abuse in Thai fishery supply chain. The methods used in this thesis are based on documentary research, mainly the study and analysis searching, and analyzing Thai and foreign academic texts and relevant documents. In the end, the study is expected to help the reader thoroughly understand the background and problems of human rights infringement related labor issues in Thailand and global economy and to generate the ability to propose appropriate legal measures as a solution and guidance in order to address and prevent human rights infringement related labors issues the in Thai legal system.

1) Infringement of human rights related labor issues in global and Thailand's economy

Before tackling the issues, a general understanding of the corporation issues concerning human rights abuse-related labor issues should be acquired. This includes the understanding of legal concepts of such violations, corporate social responsibility and the severe situation of such abuse in global and national economy.

In estimation of the global human trafficking related economy, it can be stated that the majority of countries around the world today are affected by human trafficking as source, transit and/or destination countries for trafficking victims. The argument may be raised that human trafficking is the third most profitable global business for organized crime. As human trafficking can be present in diverse circumstances and at many levels of supply chain production, it is important for businesses to understand the different risk factors that can contribute to these severe forms of abuse³.

Corporate social responsibilities (CSR), at the most general level, include economic duties, legal and regulatory compliance, responsiveness to ethical norms, and discretionary social welfare contributions⁴. The concept of CSR refers to the general belief held by many that modern businesses have a responsibility to society which extends beyond the stockholders or investors in the firm⁵ such as consumers, employees, the community at large, government, and the natural environment.

Additional concepts to be studied are consumer and corporate relations, and

³ VERITÉ, *Compliance is Not Enough: Best Practices in Responding to The California Transparency in Supply Chains Act*, 8 (2011), http://www.verite.org/sites/default/files/VTE_WhitePaper_California_Bill657FINAL5.pdf (last visited May 29, 2015).

⁴ SAGE Publications, *SAGE Brief Guide to Corporate Social Responsibility* (2012).

⁵ Holly J. Gregory, *Corporate Social Responsibility* (2014), <http://us.practicallaw.com/0-562-1565>.

supplier and worker relations. Consumer-corporate relations are complicated as they influence the behaviors of consumers and corporates. The consumer, corporations, suppliers and workers are associated with each other as a complex network of power relations.

The modern supply chain is very complex, with many parallel physical and information flows occurring in order to ensure that products are delivered in the right quantities, to the right place in a cost effective manner⁶. The emerging global labor market can advance both objectives with a large supply of overseas workers willing to produce goods more cheaply than the domestic labor market⁷. However, global labor and product supply chains, particularly throughout the developing world, where labor laws are non-existent or not enforced, also provide fertile ground for forced labor conditions to arise⁸. Corporations are often immuned from domestic legal accountability given the extraterritorial nature of their supplier relationships and the arm's length nature of supplier contracts and subcontracts⁹. Without transparency and accurate information, it is, at best, challenging to track what occurs in the production of goods¹⁰ and to discover and track instances of forced labor in supply chains¹¹.

Typically, fishery supply chains begin at oceans and end up with consumer markets worldwide. By the nature of the industry, it can be indicated as a risk sector for abusive forced labor and labor rights. Within this flourishing global trade, Thailand is positioned as suppliers to global markets and one of the world's largest exporters of shrimp, canned tuna, and other seafood products. The fisheries sector contributes about 9.9 per cent to the total agricultural GDP of the country¹² with the employment of millions of workers. However, the sector has been in downward trend in terms of returns on investment, and due to economic pressures, employment of migrant workers has been introduced to the industry to cut labor costs. In some cases the demand of forced labor arises. However, not only vulnerable migrant workers, but also Thai workers are forced into labor in both fishing and processing sector¹³.

Nowadays, trafficking for forced labor in the commercial fishing industry is an urgent national issue and broadly recognized as human rights abuse within Thailand. The rates of abuse are high on fishing vessels¹⁴. Labor rights abuse can also take place at the level

⁶ Department for Transport, Local Government and the Regions, *SUPPLY CHAIN VULNERABILITY* 8 (2002), http://www.som.cranfield.ac.uk/som/dinamic-content/research/lscm/downloads/Vulnerability_report.pdf/ (last visited May 29, 2015).

⁷ Debra Cohen Maryanov, *Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labor Standards in the International Supply Chain*, 14 *Lewis & Clark L. Rev.* 397(2010).

⁸ Kevin Coon & Cynthia Jackson et al., *Managing Corporate Supply Chains: Challenges & Successes in the Fight to Combat Forced Labour and Human Trafficking*, 19 (2014), http://www.bakermckenzie.com/files/Publication/d35732d3-3396-4b6d-90aa-000ad3eda2c1/Presentation/PublicationAttachment/f13489e1-8a1d-4814-a21a-25b556ece060/Brochure_CSB37264_AMiller_GSC_11-18_v2.pdf (last visited Apr 29, 2015).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² ILO, *Employment Practices and Working Conditions in Thailand's Fishing Sector* (2014).

¹³ *Id.*

¹⁴ *Id.*

of fishing, processing or canning¹⁵. Burmese and Cambodian workers are also trafficked into working in fish boat and processing plants in Thailand, through the same mechanisms that boat workers are recruited¹⁶.

Currently, with regards to Thailand's Trafficking in Persons 2014 Country Report, there are 595 victims of human trafficking including 46 percent of Thai and 54 percent of foreigners. The majority of sexually exploited victims were Thai; forced labor victims were mostly from Myanmar, whereas most of the forced beggars were from Cambodia¹⁷. Prevention and suppression of human trafficking has been established as a top national priority and emphasized the importance of integrated and concerted efforts among key partners; government, private sectors and civil society. This is a great step forward in tackling labor issues and human trafficking in Thailand.

2) Legal measures concerning the prevention of human rights infringement related labor issues in Thailand

Thailand has several legal measures in place to handle human rights infringement in the fisheries sector. There have been various legal measures concerning fisheries management legislation including the Fisheries Act, B.E. 2558 (2015) and Order of the Head of the National Council for Peace and Order (NCPO) No. 10/2558: Actions against Illegal, Unreported and Unregulated Fishing. There are also extensive legal measures concerning labor protection such as the Labor Protection Act, B.E. 2541 (1998), the Ministerial Regulation concerning Labor Protection in Sea Fishery Work B.E.2557 under The Labor Protection Act, B.E. 2541 (Ministerial Regulation), the Anti-Trafficking in Persons Act, B.E. 2551 (2008) (ATPA), Thai Labor Standard Corporate Social Responsibility of Thai Business 8001-2010 (TLS 8001-2010), and Good Labor Practice (GLP) for Thai fisheries and seafood industry. Finally, regarding legal measures concerning corporate disclosure and transparency, there are several regulations concerning the disclosure of corporate's financial statement in Thailand including Thai Civil and Commercial Code (CCC), and Securities and Exchange Act B.E. 2535 (SEA).

3) International legal and institutional frameworks and national laws of foreign countries regarding the prevention of human rights infringement in businesses

There are several international entities concerned with the prevention of human rights infringement, each one with its own legal and institutional frameworks as follows; International Labor Organization (ILO) and its Protocol of 2014 to the Forced Labor Convention, 1930; United Nations Human Rights Council (UNHRC) and its International Guidelines on Business and Human Rights; Organization for Economic Cooperation and

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Foreign Office, The Government Public Relations Department, Office of the Prime Minister, *Anti-Human Trafficking as Part of Thailand's Reform Agenda* (2015), http://thailand.prd.go.th/ewt_news.php?nid=977&filename=index (last visited Apr 29, 2015).

Development (OECD) and the OECD Guidelines for Multinational Enterprises (MNEs); The Food and Agriculture Organization of the United Nations (FAO) and its Code of Conduct for Responsible Fisheries; and FAO-OECD and the Draft FAO-OECD Guidance for Responsible Agricultural Supply Chains.

National laws of various foreign countries also tackle the issue such as the California Transparency in Supply Chains Act of 2010 (CTA) and Draft of Business Supply Chain Transparency on Trafficking and Slavery Act of 2014 (BTA) as of the United States; Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (EU Directive) as of the European; and Modern Slavery Act 2015 (MSA) as of the United Kingdom.

4) Analysis on Thai, international legal and institutional framework and national laws of foreign countries concerning the prevention of human rights infringement in product supply chain

An analysis on the Thai legal frameworks and laws concerning the prevention of human rights infringement in the Thai fishery industry can be categorized as follows;

- Fisheries management legislation: In order to effectively address the issues and enforce the law, currently the highest levels of government are empowered to command and lay down strategy and measures; however, currently preventive measures and solutions are not clearly stated. Considering that Thailand is one of the biggest fishing and fish processing nations, it is important to implement not only the principles to ensure sustainable marine yield but also the principles to eliminate the human rights violation occurred in the industry.

- Labor Protection Frameworks: While human rights have been recognized by the Thai Constitution and ATP, corporations should be an important player to prevent and strengthen the protection of human rights and elimination of human rights-related labor issues. The State should also regulate the preventive measures concerning corporate accountability and responsibly to respect human rights and to prevent trafficking for labor exploitation.

- Corporate legislation concerning Business Transparency of Human rights-Related Labor Issues: The idea of supply chain transparency is to require companies to disclose information regarding their supply chain, which is essential, but more importantly companies need to establish internal and external social responsibility programs, codes of conduct, and corporate governance.

Institutional frameworks and national laws of foreign countries concerning the prevention of human rights infringement in business entities may also be analyzed. States

should make expanded use of well-established legal tools to require business due diligence for human rights, and to encourage due diligence through transparency and disclosure mechanisms¹⁸ while also implementing rules that require business enterprises to disclose due diligence, attempt to constrain any identified harm, and ensure that businesses respect human rights in the most effective way¹⁹. Methods which could be suggested as solutions for such issues include: establishing a human rights policy; assessing actual and potential human rights impacts; integration of human rights assessment findings; tracking or auditing how impacts are addressed; and communicating regarding how the impacts are addressed.

Conclusions and recommendations

Based on the finding of the study, there are several legal and intuitional frameworks requiring the supply chain, and companies need to be ready to disclose information about their sources and supply chain practices. The recommendations to improve the preventive measures of human rights infringement in the supply chain would be as follows:

- Requirement on listed company under the Securities and Exchange Act B.E.2535 Section 56 should be extended to cover the policy statement regarding the human rights due diligence and the prevention of human rights infringement in supply chain.
- The information necessary for regulators, investors and consumers and other stakeholders to assess business respect for human rights should be required to be disclosed in order to stimulate the effectiveness and legitimacy of the overall due diligence regime.
- The rules, conditions and procedures on prevention of human rights infringement in supply chain should be specified in the notification of the Capital Market Supervisory Board later on. Related companies shall be required to disclose the policies to identify and eliminate risks of all forms of human rights infringement.
- With the purpose of tracking the issues occurred in the deep down supply chain, the company should require suppliers to prove that the manufacture of products and the recruitment of labor is carried out in compliance with applicable laws regarding avoidance of all forms of human rights infringement. The company should ensure that audits of suppliers are strictly conducted, and disclosures should be regularly submitted.
- The State should consider an appropriate mix of incentives and penalties in light of the human rights violation at issue and the national regulatory framework applicable to a particular business sector for preventive measures to be more effective.

¹⁸ *Id.*

¹⁹ *Id.*

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Other Materials

- Anti-Trafficking in Persons Act, B.E. 2551
- California Transparency in Supply Chains Act of 2010
- Code of Conduct for Responsible Fisheries
- Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (EU Directive)
- Draft of Business Supply Chain Transparency on Trafficking and Slavery Act of 2014
- FAO-OECD Guidance for Responsible Agricultural Supply Chains 2015
- Fisheries Act, B.E. 2558
- Good Labor Practice (GLP) for Thai fisheries and seafood industry
- International Guidelines on Business and Human rights
- Labor Protection Act, B.E. 2541
- Modern Slavery Act 2015 (MSA)
- OECD Guidelines for Multinational Enterprises
- Order of the Head of the National Council for Peace and Order (NCPO) No. 10/2558: Actions against Illegal, Unreported and Unregulated Fishing
- Ministerial Regulation concerning Labor Protection in Sea Fishery Work B.E. 2557
- Protocol of 2014 to the Forced Labor Convention, 1930
- Thai Labor Standard Corporate Social Responsibility of Thai Business 8001-2010 (TLS 8001-2010)
- Securities and Exchange Act B.E. 2535