



FACULTY OF LAW
Lund University

Van Huan Nguyen

The EU mandatory human rights due
diligence legislations and FTA in Vietnam
context – A useful toolbox or a set of
decorative items

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Radu Mares

Term: Spring 2022

Contents

SUMMARY	3
ACKNOWLEDGEMENT	4
ABBREVIATIONS	5
1 INTRODUCTION	7
1.1 BACKGROUND AND RESEARCH PROBLEM	7
1.2 PURPOSE AND RESEARCH QUESTIONS	8
1.3 METHODOLOGY	9
1.4 LIMITATION	9
1.5 OUTLINE	9
2 THE LEGAL FRAMEWORK PROVIDING EXTERNAL FORCES FOR CHANGES	11
2.1 THE EMERGING EU mHRDD LEGISLATIONS	11
2.1.1 <i>The development of HRDD concept: ‘hardening’ process from softlaws to hard laws</i>	11
2.1.1.1 Foundation of the concept of human rights due diligence	11
2.1.1.2 United Nations Guiding Principle on Business and Human Rights	12
2.1.1.3 OECD guidelines and other soft-law instruments	16
2.1.1.4 Three generations HRDD laws	17
2.1.2 <i>The incoming EU mHRDD framework</i>	19
2.1.2.1 EU mHRDD in member states	19
2.1.2.2 The mHRDD legislations in European Union level	26
2.1.3 <i>Comparative assessment of Mandatory human rights due diligence laws in Europe</i>	33
2.1.3.1 Governing scope	33
2.1.3.2 The reach of mHRDD	34
2.1.3.3 mHRDD duties	35
2.1.3.4 Civil liability and access to remedy	35
2.1.4 <i>Key features for the effectiveness of mHRDD’s extraterritorial effects</i>	36
2.1.4.1 Stakeholder engagement	36
2.1.4.2 Corporate governance and director duties	37
2.1.4.3 Corporate civil liability	38
2.1.4.4 Supply chain transparency and traceability	38
2.1.4.5 Smart-mix of measures	39
2.1.5 <i>Concluding remarks on mHRDD</i>	39
2.2 EUROPEAN UNION – VIETNAM FREE TRADE AGREEMENT (EVFTA)	39
2.2.1 <i>Overview of EVFTA</i>	40
2.2.1.1 Background of EU trade policies	40
2.2.1.2 Structure of EVFTA	41
2.2.1.3 EU approach in TSD chapter	43
2.2.2 <i>Challenges and key features for the effectiveness of TSD Chapter</i>	46
2.2.2.1 Challenges for EU promotional approach	46
2.2.2.2 Key features for the effectiveness of TSD Chapter	47
2.2.3 <i>Concluding remarks on EVFTA</i>	48
2.3 THE RELATION BETWEEN mHRDD LEGISLATIONS AND EVFTA IN THE EU POLICIES	49
3 THE HUMAN RIGHTS GOVERNANCE GAP ON BUSINESS-RELATED HUMAN RIGHTS IMPACTS IN VIETNAM	51
3.1 GENERAL MODEL OF HUMAN RIGHTS GOVERNANCE GAPS AND SPECIAL FEATURES IN EXPORT-ORIENTED INDUSTRIES	51
3.1.1 <i>General model for human rights governance gaps</i>	51
3.1.1.1 An illustration of polycentric governance under UNGPs	52
3.1.1.2 Framing the human rights governance gaps in Vietnam	54
3.1.2 <i>Special features of governance gaps in export-oriented industries</i>	55
3.2 HUMAN RIGHTS GOVERNANCE GAPS IN CURRENT REGULATORY FRAMEWORK	57

3.2.1	<i>Civic space</i>	57
3.2.1.1	Freedom of opinion and expression	58
3.2.1.2	Freedom of peaceful assembly	59
3.2.1.3	Freedom of association	59
3.2.2	<i>Labour and independent trade union</i>	61
3.2.2.1	Trade union and representative organizations	62
3.2.2.2	Collective bargaining	63
3.2.2.3	Right to strike	63
3.2.3	<i>Corporate governance laws</i>	64
3.2.3.1	Corporate laws	64
3.2.3.2	Investment law	65
3.2.4	<i>Business in the community</i>	66
3.2.4.1	Law on land	66
3.2.4.2	Environmental protection law	68
3.2.4.3	Consumer protection law	70
3.2.5	<i>Access to remedies</i>	71
3.2.5.1	State-based judicial mechanism – Court	71
3.2.5.2	State-based non-judicial mechanisms	73
3.2.5.3	Private grievance mechanisms	73
3.3	FACTORS THAT EXACERBATE GOVERNANCE GAPS	74
3.3.1	<i>Corruption</i>	74
3.3.2	<i>Informal business</i>	74
3.3.3	<i>Formalism</i>	75
3.3.4	<i>Low level of awareness on human rights</i>	75
3.4	CONCLUSION ON THE GOVERNANCE GAPS IN VIETNAM	75
4	THE RISK OF COSMETIC COMPLIANCE IN EU-VN TRADE RELATIONS	77
4.1	THE RISK OF COSMETIC COMPLIANCE OF MHRDD LEGISLATIONS	78
4.1.1	<i>Business relations with SOEs and enterprises granted special rights or privileges, and designated monopolies</i>	79
4.1.2	<i>Business relations in form of FDI (subsidiaries)</i>	80
4.1.3	<i>Business relations with private companies (suppliers)</i>	82
4.1.4	<i>Concluding remarks on the prospect of cosmetic compliance of mHRDD legislations</i>	83
4.2	THE RISK OF COSMETIC COMPLIANCE IN EVFTA IMPLEMENTATION	84
4.2.1	<i>Current situation of EVFTA implementation</i>	84
4.2.2	<i>Key challenges posed by the governance gaps and the prospect of cosmetic compliance</i>	86
4.2.2.1	Invisible human rights impacts for prioritization and targeting	86
4.2.2.2	Civil society engagement – civil actors or ‘play actors’?	87
4.2.2.3	Concluding remarks on the prospect of cosmetic compliance of TSD chapter	87
5	SYNERGIES BETWEEN MHRDD AND VALUE-BASED TRADE IN VIETNAM CONTEXT	90
5.1	MAPPING THE ISSUES	90
5.2	THE COMPLEMENTARY RELATIONS BETWEEN MHRDD LEGISLATIONS AND EU FTAs	92
5.3	KICK-STARTING THE TRANSFORMATIONS FOR VIETNAM	94
5.3.1	<i>Bridging the participation gaps</i>	95
5.3.2	<i>Bridging the liability gaps</i>	96
5.3.3	<i>Bridging the remediation gaps</i>	97
6	CONCLUSION	101
	BIBLIOGRAPHY	103

Summary

The EU is establishing its leadership in setting global rules and standards for sustainable development over the world through legal instruments with transformational effects on third countries. On the one hand, the EU is the leading region in the development of mHRDD legislations which has been hardened for the last decades and is now evolving to become CSDD, generating extraterritorial effects for human rights enjoyments through global value chains. On the other hand, FTAs are used to implement value-based trade policies to promote democracy, respect for human rights and rule of law. These instruments together creating a legal framework generate external forces for changes in third countries like Vietnam.

The human rights governance gaps with respect to business-related human rights adverse impacts exist persistently, making systematic challenges which will hinder the EU legal framework.

Through examining the development of the EU legal framework, this thesis points out its potential and shortcomings. Then the risk of a prospect of cosmetic compliance of the EU legal framework is predictable when the instruments facing the systematic governance gaps in Vietnam serve as a set of decorative items for relevant actors to make excuses. However, the bright side needs not to be ignored as the EU legal framework, as a useful toolbox, could make systematic responses to bridge the governance gaps and transform the landscape of business-related human rights abuses in Vietnam.

The risk must be seen but the hope must be kept.

Acknowledgement

My sincere gratitude to Dr. Radu Mares – my supervisor – for time, efforts and insightful knowledge that encouraged me to overcome difficulties in researching this thesis.

Thank you to the Swedish Institute for granting me the Swedish Institute Scholarship for Global Professional (SISGP) under which my master-study was sponsored and this thesis was completed.

Thanks to members of the team of Responsible Value Chains program, Department of Human Rights and Business in the Danish Institute for Human Rights for giving me the chance to have the internship in which my knowledge was reinforced and strengthened with all of your help.

I would not forget the helps from professionals in Vietnam: Ha P (UNDP Vietnam), Hang P (KAS) and Ly N (MOJ) without whom I cannot complete this thesis with the insight analysis on the real conditions in Vietnam

My appreciation to all of my dear friends: Azaliah M, Chi T, Long N, Trang T, Mi H, Vu H, Vu N, Wu YH, Yen H and many others who encouraged, empowered and fostered me so I did not feel the loneliness but happiness and togetherness. Without you, I could not be strong.

And finally, to my beloved and family I was struggling, working and contributing my little effort to a better world, every single day, not only because of my own passion but also because of you who deserve it.

Lund, 24 May 2022

Van Huan Nguyen

Abbreviations

AHRI	Adverse Human Rights Impact
BHR	Business and Human Rights
CSDD	Corporate Sustainability Due Diligence
CSOs	Civil Society Organizations
CSR	Corporate Social Responsibility
CSRD	Corporate Sustainability Report Directive
DAG	Domestic Advisory Group
DD	Due Diligence
DIHR	Danish Institute for Human Rights
EC	European Commission
EOE	Employee Organization in Enterprise
EP	European Parliament
ESG	Environmental, Social Governance'
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GCV	Global Value Chain
HR	Human Rights
HRDD	Human Rights Due Diligence
HRIA	Human Rights Impact Assessment
IHRL	International Human Rights Law
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
JSC	Joint Stock Company
LLC	Limited Liability Company
mHRDD	mandatory Human Rights Due Diligence
MNEs	Multinational Enterprises
NCP	National Contacting Point
NFRD	Non-Financial Reporting Directive
NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of High Commissioner for Human Rights
PCA	Partnership and Cooperation Agreement
PRR	Protection Respect Remedy framework
RtR	Corporate Responsibility to Respect Human Rights
SCG	Sustainable Corporate Governance
SMEs	Small and Medium Enterprises
SOEs	State Owned Enterprises
SRSR	Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises
TSD	Trade and Sustainable Development
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN CESCR	United Nations Committee on Economic, Social and Cultural Rights

UN HRC United Nations Human Rights Committee
UNGPs United Nations Guiding Principles on Business and Human Rights
UPR Universal Periodic Review

1 Introduction

1.1 Background and research problem

For the last decades, the European Union (EU) has mainstreamed human rights as a silver thread through all policies with external dimension¹. The EU wants to build a world upon the value of respect for human rights, democracy and rule of law². It reaffirms that it will place human rights at the center of its relation with third countries. The EU is establishing a leadership with an open strategic autonomy to promote such values internally and around the world. Therefore, the EU legislations with extraterritorial effects and international agreements with third countries should be integrated with such values, generating significant external forces for changes in third countries like Vietnam. Vietnam is a single-party country which is in a transition when pro-economic reformers and pro-China conservatives are struggling about the economic and political future³. With a strong economic relation to the EU, Vietnam is also facing the said external forces that demand for the changes toward the EU values.

The emerging EU mandatory human rights due diligence (mHRDD) legislations and the EU-Vietnam Free Trade Agreement (EVFTA) could both be used for human rights protection and sustainability in Vietnam. These EU economic instruments set a comprehensive legal framework to enhance and reform human rights governance, especially business-related adverse human rights impacts. On the one hand, mHRDD legislations are mandatory with a bottom-up approach that deals with businesses in global value chains (GVCs) from the ground level. On the other hand, EVFTA has a promotional strategy in its Trade and Sustainability Development chapter (TSD Chapter) with the top-down approach that deals with the Vietnam Government.

In general, Vietnam – a typical host-state with export-oriented labor-intensive industries - is a good example to analyze the complementation of mHRDD legislations and EU new-generation FTAs which are integrated with TSD chapter.

As mHRDD legislations and EVFTA align with international principles (especially OECD guidelines and UNGPs)⁴, their foundational elements are similar: transparency, engagement and cooperation. The mHRDD legislations require meaningful consultation with stakeholders to detect and handle human rights issues in GVCs as well as the use of leverage in cooperation between businesses while also opening up corporate activities to public scrutiny by requiring public reports. Similarly, EVFTA aims at the collaboration between EU and Vietnam in human rights, labour and environmental issues through a

¹ European Parliament, *Human rights fact sheet*, available at: <https://www.europarl.europa.eu/factsheets/en/sheet/165/human-rights> [last access 19 February 2022]

² The Council of the European Union, the Strategic Framework on Human Rights and Democracy 2012

³ Austrian Foundation for Development Research (OFSE), *The economic and social effect of the EU Free Trade Agreement with Vietnam*, July 2018, p.9, available at: https://www.oefse.at/fileadmin/content/Downloads/Publikationen/Studien/8_Vietnam_Study.pdf [Last access 10 April 2022]

⁴ The mHRDD legislation in both EU regional level and member states all base on the concept of UNGPs and the OECD Guidelines for Multinational Enterprises 2011 while EVFTA was concluded upon the EU Action Plan on Human Rights and Democracy 2015-2019 which stated that all FTAs have to be integrated with internationally recognized principles of the OECD, UNGPs, ILOs in Action 25(d).

promotional, inclusive and cooperative approach in the TSD chapter which has the provisions that allow the involvements and scrutiny of publicity in its implementation and enforcement. Therefore, their effectiveness is complementary to each other.

If being properly used, the framework has potential to make positive changes in Vietnam through its external forces. It can level up social, labour and environmental standards, promote democracy and rule of law in a subtle manner that permits real changes being made gradually without confrontation with internal resisting forces. This could be an opportunity to make improvements toward sustainable developments with economic collaboration, informed decisions based on civil society engagement and transparency.

However, there are human rights governance gaps, for example: deficit of regulatory framework, lack of civic space and other practices in Vietnam, that could hinder the above framework's effectiveness. The governance gaps pose a prospect of cosmetic compliance, meaning that mHRDD and EVFTA create no real changes on the ground level but only the compliance in paper is shown.

Therefore, the thesis works on the problem: Whether mHRDD and EVFTA could be a useful toolbox for bridging the human rights governance gaps and pushing the human rights situation in Vietnam forward, or they will be just decorative items failing to change the *status quo* and granting relevant actors the excuses to hide human rights problems.

1.2 Purpose and research questions

The primary purpose of this thesis is to analyze the legal framework constituted by mHRDD and EVFTA for gauging the potential to promote increased respect for human rights in Vietnam. First, it will analyze the legal framework of economic instruments and its potential to promote systematic changes in human rights protection and sustainability in Vietnam. Second, upon a determination of human rights governance gaps in Vietnam, this thesis will point out the risks of cosmetic compliance with respect to that legal framework. There is a risk of being a set of decorative items but there is still a possibility of being a useful toolbox that has transformational potentials to overcome the governance gaps for better human rights protection.

To achieve the above purposes, this thesis focus on answering the below research questions:

- Does the legal framework created by EVTA and mHRDD have the potential to deal with the human rights situation in Vietnam?
- What are the main constitutive problems of the human rights governance gap in Vietnam, in general and in export oriented industries supplying the EU markets in particular?
- To what extent the human rights governance gaps in Vietnam may affect the effectiveness of the legal framework created by mHRDD and EVFTA? Will there be transformational effects for Vietnam?
- Does the EU's mHRDD and FTA approach in the Vietnam context reveal policy coherence and a 'smart mix' of measures, and if not, what are the main inconsistencies?

1.3 Methodology

To answer the research questions, this thesis uses the combination of three methods: legal dogmatic method, systemic analysis and comparative analysis. While legislations are primarily analyzed with the legal dogmatic method, systemic analysis is to analyse mHRDD legislations against their political background that shows policy coherence in EU as well as in consideration with voluntary measures to show a smart-mix of measures - the key for the success of business and human rights field. Corporative analysis is mainly to highlight the differences amongst mHRDD legislations and proposals with the focus on the Proposal for Directive on Corporate Sustainability Due Diligence (CSDD proposal) on the one hand and the remaining mHRDD instruments in the other hand.

The first question is answered by analyzing the regulatory framework of Vietnam in consideration with practices in reality. For the remaining three questions, this thesis analyzes the mHRDD framework in EU and EVFTA to observe their extraterritorial effects and promotional approach respectively. The outcome of this analysis is applied to the governance gaps in Vietnam in conjunction with the contextual elements to reach the answers for those three questions.

The thesis draws the above answers from two sets of sources: primary and secondary sources. The primary sources include a range of international, regional and national legal instruments, legislative proposals, and other official documents (both binding and non-binding) issued by UN, EU, EU member states and Vietnam. This encompasses the mHRDD legislations of France, German, Netherland and Norway, the Swiss popular initiative on Responsible Business, the CSDD proposal and the reports, legislation-related documents thereof. It also encompasses EVFTA and the official reports, declaration, note thereof.

The secondary source comprises academic sources (books, articles), analytical sources (working documents of EU; research-reports from EU, UN system, NGOs concerning mHRDD and EVFTA), legal practitioners' opinions and other information sources (news, blogs, presentation).

1.4 Limitation

This thesis will mainly cover the period from 2015 to the present, in which the EVFTA was negotiated, concluded and implemented as well as all the mHRDD legislations and legislative proposals were released.

1.5 Outline

The present thesis consists of six chapters. Following the introductory chapter 1, the substantive discussion about the research questions will be hosted from chapter 2 to chapter 5. Chapter 6 presents the remarks and conclusion. The detailed outline is as follows:

Chapter 2 demonstrates the legal framework created by mHRDD legislations in EU and EVFTA that has the external forces to promote changes in the human rights field in Vietnam. It first discusses the development of mHRDD legislation from soft law to hard

laws in both EU regional level and relevant member states, showing the key features for the effectiveness of extraterritorial effects of mHRDD legislations. The chapter then turns to EVFTA with its policy background and structure. The EU approach in TSD chapter is analyzed to highlight the promotional strategy of EVFTA, which is followed by the challenges to and key features for the effectiveness of TSD chapter. Subsequently, the legal framework is depicted by showing the relation between mHRDD legislations and EVFTA in EU policy on human rights and democracy which is aimed to level up social and environmental standards in third countries that is, in this case, Vietnam.

Chapter 3 provides an analysis on the current human rights governance gaps in general and in particular the export-oriented industries that are upstream of supply-chains toward EU markets. A country-model of human rights governance gaps with respect to business-related human rights issues is defined and then the special features of that model in export-oriented industries are shown in the first section of this chapter. Through an analysis on the current regulatory framework in Vietnam, the second section demonstrates the existence of the human rights governance gaps that together create the challenges hindering changes in a systematic scale (*systematic challenges*)– which are exacerbated by practical problems such as formalism, corruption, informal business and low level of awareness.

Chapter 4 shows the risk of cosmetic compliance for both mHRDD and EVFTA in Vietnam because of the human rights governance gaps detected in Chapter 3. Since the trade relation between EU and Vietnam is now very important as shown in the first section of this chapter, the relevant actors in Vietnam cannot just reject the implementation of the legal framework from the EU. The second section uses salient scenarios in which the governance gaps facilitate tick-box implementation to show that HRDD easily results in cosmetic compliance. The current situation of EVFTA implementation and key challenges posed by governance gaps in Vietnam follow in section three of this chapter.

Chapter 5 is dedicated to the complementation and transformational potentials of mHRDD legislations and EVFTA in the Vietnam context. Through showing the complementary relation of these economic instruments, this chapter analyzes how mHRDD and EVFTA have the transformational potentials to make *systematic responses* for bridging the human rights governance gaps as well as to push forward sustainable developments in the Vietnam context.

Chapter 6 concludes this thesis by arguing that: although there is the risk of being “a set of decorative items”, it is equally worthy to see the EU legal framework from a bright side of being “a useful tool box”. Political will is needed and the hope must be still.

2 The legal framework providing external forces for changes

This chapter provides the overview on the EU legal framework created by mHRDD legislations and EVFTA which generates external forces to promote changes in Vietnam.

2.1 The emerging EU mHRDD legislations

The mHRDD legislations are emerging recently in both EU regional levels and member states. This did not just appear from scratch but resulted from over one decade of developing and implementing of soft-law instruments in both international and regional level. Through a historical approach, the concept of HRDD will be demonstrated from soft-law to hard law. Inside the development of hard law, there are different generations of mHRDD legislations in the EU. After determining the mHRDD regimes under EU legislations, the elements necessary for the effectiveness of the extraterritorial effects of mHRDD legislation will be presented.

2.1.1 The development of HRDD concept: ‘hardening’ process from softlaws to hard laws

2.1.1.1 Foundation of the concept of human rights due diligence

The need to address adverse impacts of business on human lives has been long recognized and the focus has been increasingly shifted from states (government) to business to handle this need. Three main movements have evolved for this need: the movement of Corporate Social Responsibility (CSR) from the 1950s-1960s, the New International Economic Order (NIEO) focused on TNCs (70s-80s) and the movement of Business and Human Rights (BHR) from the 1990s.

With the growth of transnational corporations and their powerful impacts on human rights, the UN had launched initiatives to work on the need. After UN’s unsuccessful attempt to employ the concept of “sphere of influence” as the only limitation on corporate responsibilities defined identically to state HR obligations which is very difficult to define in BHR⁵, professor John Ruggie was appointed as Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG) in 2005. The SRSG chose the concept of “due diligence”, which has the familiarity in business practices to build on.

In the 2008 Protect, Respect and Remedy Framework (PRR Framework), SRSG introduced the concept of ‘Due diligence’ (on human rights issues) as “the steps a

⁵ UN Sub-Commission on the Promotion and Protection of Human rights, The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft) E/CN.4/Sub.2/2003/12/Rev.2 2003 para A.1; See also: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (Prof. John Ruggie), Clarifying the Concepts of “Sphere of influence” and “Complicity”, 15 May 2008 (A/HRC/8/16), para. 7-10

company must take to become aware of, prevent and address adverse human rights impacts” in order for companies to discharge their Responsibility to Respect human rights (RtR). Due diligence (on human rights issues) is comparable to other [due diligence] processes that are already applied by business⁶. However, SRSG used ‘due diligence’ not as a “strictly transactional term” but in a broader sense” as “a comprehensive, proactive attempt” which is ongoing in the whole life circle of business to uncover, avoid and mitigate human rights risks⁷.

The foundation of HRDD was completed when SRSG introduced this concept in UNGPs 2011 which, although being a soft-law, was a landmark-development of BHR gaining a unanimous endorsement from the UN Human Rights Council.

2.1.1.2 United Nations Guiding Principle on Business and Human Rights

The result of SRSG’s six-years mandate is the UNGPs on Business and Human Rights endorsed in 2011. UNGPs was developed from the PRR framework, based on three interrelated pillars: the state duty to protect human rights, the corporate responsibility to respect human rights and the access to effective remedies for the victims. Each pillar has its own foundational and operational principles. They were not intended to advocate for new legal standards which could be simply ignored or lead to inconclusive debates amongst the international community. Instead they are the elaboration of existing obligations, standards and practices of states and business⁸. For the purpose of this thesis and to demonstrate the role of HRDD in UNGPs, it is necessary to clarify the following points:

First, the three-pillars structure of UNGPs was embodied by the idea of ‘polycentric governance’ in which there are three distinct governance systems, including public governance (law, public policies or equivalent regulation), civil governance (stakeholder’s impacts, social compliance mechanisms) and business governance, corresponding with Pillar I, II and III respectively. UNGPs is an authoritative basis for these three governance systems to be better aligned, compensating for each other’s shortcomings and playing mutually reinforcing roles⁹.

Second, HRDD in UNGPs may arguably employ two senses of due diligence: (i) due diligence in business context as a procedural process for business to assess the risks for its own interest and (ii) due diligence as a standard of conduct for business to discharge an obligation.¹⁰ The latter sense is correct as the corporate responsibility to respect human rights overlaps with the content of certain corporate legal obligations related to human rights under national laws. The former sense should be observed with

⁶ Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, (A/HRC/8/5), 7 April 2008, para 56

⁷ Business and human rights: Towards operationalizing the ‘protect, respect and remedy’ framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/11/13) 22 April 2009, para 71

⁸ John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W W Norton & Company 2013), p.82; UNGPs, general principles, p.1

⁹ John Gerard Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* (2015), p. 2

¹⁰ Jonathan Bonnitcha and Robert McCorquodale, ‘The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights’, *The European Journal of International Law* Vol. 28 no. 3 (2017)

caution. HRDD is designed to assess human rights risks (i.e. the risks posed by business to human rights) which relate to potential AHRIs that could change to actual adverse AHRIs once the impacts occur¹¹. Human rights risks is separate¹² and seemingly opposite to the sense of the risks posed to business (i.e. business-related risks). However, those two types of risks are increasingly related¹³ as adverse human rights impacts (AHRIs) may result in business-related risks like reputational damages.

Third, enterprises involve in AHRIs in three modes of participation: causation, contribution and direct linkage to enterprises' products, services or operations. For each mode of participation, enterprises may take different actions including: to cease actual AHRIs, to prevent potential AHRIs, to build and use leverage for mitigating AHRIs and to provide remediation for affected people of AHRIs. Two points need to be noticed: First, there is a continuum¹⁴ between 'direct linkage' and 'contribution' when an enterprise knows it has direct linkage to AHRIs but keeps its business over time without taking appropriate measures. Second, enterprises only require to provide remediation in the mode of causation and contribution.

The significance of HRDD in UNGPs can be observed from its role within the corporate RtR (Pillar II) as well as its role in the interaction of three Pillars of UNGPs:

a. HRDD as a core component of corporate responsibility to respect human rights

HRDD has a significant central role within Pillar II which is the most innovative section of UNGPs. Under Pillar II, Corporates have the corporate responsibility to respect human rights (RtR) which RtR were developed upon a corporate-activity-based theory which allows them to operate across national borders and throughout business operations¹⁵. RtR requires companies to refrain from infringing human rights ('do no harm' principle) and to address adverse human rights impacts in which they are involved. The operational principles of Pillar II provide three components for enterprises to fulfill their responsibility to respect human rights: (i) a policy commitment which serves as a basis for guiding the embedment of RtR in enterprises' operation as well as a publicly available commitment for external stakeholder to hold the enterprises accountable, (ii) an HRDD process to identify, prevent, mitigate and account for how enterprises address adverse human rights impacts, and (iii) Processes to enable the remediation for the affected people of AHRIs caused or contributed by enterprises.

The above three components constitute the tripartite structure of Pillar II itself which is a flow of implementation of corporate RtR with the interaction between three tools. In such flow, HRDD has the significant central role. Enterprises can hardly meet their RtR without effective HRDD.

¹¹ UNGPs Principle 17 and OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), p.5 (key concepts)

¹² OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), p.6-7 (key concepts), p.36-37 (Question 35)

¹³ Ibid

¹⁴ OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector, 12 June 2017, p.6, available at: <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf> [last access: 23 February 2022]

¹⁵ Mark B Taylor, 'Human Rights Due Diligence in Theory and Practice' in Surya Deva and David Birchall (eds), Research handbook on human rights and business (Edward Elgar Publishing 2020) 98, p.98-99

HRDD process shares similarities and in alignment with the PDCA model which is familiar with business community as a risk-management process. Four steps of HRDD process are as follows:

Step 1-Assessing potential and actual human rights impacts: In this first step, enterprises identify and assess all their human rights impacts, both positive and adverse, with a focus on any potential and actual AHRIs. This step is primarily for knowing enterprises' human rights but also serves other multiple purposes such as facilitating meaningful stakeholder-dialogue and empowering right-holders in seeking business accountability.¹⁶

Step 2 - Integrating and taking actions upon the findings: Upon the findings from the first step, enterprises need to integrate the findings and also have to take appropriate actions, including: ceasing, preventing, mitigating and remediating their AHRIs. Although prioritization under UNGPs Principle 24 is a cross-cutting feature in HRDD process, it is vital in this stage as it helps enterprises allocating their effort and resources to target salient AHRIs effectively.

Step 3 - Tracking the responses: HRDD process, policies and actions of enterprises could be assessed and improved through tracking the responses. The tracking results shows trends and patterns in enterprises' human rights performance, allowing enterprises to see the “big picture” of their human rights performance, making changes (if necessary)¹⁷.

Step 4 - Communicating how human rights impacts are addressed: This is for showing RtR performance, which requires enterprises' external communications, such as to communicate with affected right-holders and to establish formal public reports. Regardless of its form, external communication must be accessible for its audience, providing sufficient information to evaluate the enterprise's responses and posing no risk to affected stakeholders¹⁸.

The above four steps create a cycle – HRDD process – which is on-going or iterative to deal with the dynamic changes of human right risks that arise from constant changing enterprises' operations and contexts¹⁹. The complexity of HRDD process differs from enterprise to enterprises, depending on the factors like the size of business, the risk of severe AHRIs, business operations and its context.

Within Pillar II – corporate responsibility to respect human rights (RtR), policy commitment paves the normative foundation of RtR, serving as a zero-step. In the opposite direction, HRDD process provides relevant information for enterprises to amend their policy accordingly to meet the reality. Moreover, HRDD process also interacts with enterprises' process for remediation...On the one hand, the process for remediation under Principle 22 separate from Pillar III is a component of RtR, having a twofold function²⁰:

¹⁶ The Danish Institute for Human Rights, Human Rights Impact Assessment: Guidance and Toolbox (2020), p.6, available at: <https://www.humanrights.dk/tools/human-rights-impact-assessment-guidance-toolbox> [last access: 24 February 2022]

¹⁷ UNGPs Principle 20; OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), supra n.12, p.53 (Q. 48)

¹⁸ UNGPs Principle 20, OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), supra n.12, p.59-61 (Q. 57-60)

¹⁹ OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), supra n.12, p.33 (Q. 29)

²⁰ This two functions of operational-level grievance mechanism were stated clearly in UNGPs Principle 29

An input providing information enabling effective HRDD and a measure to provide remedy. On the other hand, HRDD process also provide stakeholders and enterprises the relevant information to engage in remediation.

In brief, the features of HRDD process is the core component of RtR. However, two points concerning HRDD needs to be emphasized: First, although RtR has legal underpinnings, HRDD is not a legal duty of enterprises as UNGPs is a soft-law instrument and RtR itself is a transnational social norm.²¹ Second, HRDD with the nature of risk-management process (procedural approach) could be easily turn to a tick-box exercise or cosmetic compliance i.e. complying in paper without genuine changes, which has been recognized and warned as a prevalent practice.²²

b. HRDD as an enabling measure in the interaction between three Pillars of UNGPs

In the tripartite structure of UNGPs that arose from the idea of “polycentric governance”, each pillar interacts with others to govern business conducts.

Pillar I – the State duty to protect human rights is a synthetic expression of state duty to protect under existing international legal instrument like ICCPR and ICESCR). Under Pillar I, States have to fulfill its duty to protect human rights against business-related human rights abuses as well as to set out a clear expectation that all businesses under their territory/jurisdiction respect human rights. To fulfill the duties under Pillar I, states should place a full range of executive, legislative and adjudicative measures which should be permissive to corporate RtR, preventive to AHRIs and remedial to business-related human rights abuses. These measures should also constitute a setting of smart-mix measures - international and national, mandatory and voluntary – to foster corporate RtR. Furthermore, additional measures are required from states to protect human rights against abuses by business in the State-business nexus and should also support business to respect human rights when they are involved in conflicted areas. Finally, states should ensure a policy coherence in national level, international treaties/agreements and international fora.

Pillar III – Access to remedy elaborates the way for affected right-holders and relevant stakeholders to access effective remedies for business-related human rights abuses. The remedial mechanisms listed by Pillar III include state-based judicial and non-judicial mechanisms as well as non-state-based grievance mechanisms. State-based non-judicial mechanisms and non-state-based grievance mechanisms have to meet effectiveness criteria stipulated in Principle 31. States, as an integrated part of their duty to protect, must take appropriate steps to remove barriers to affected right-holders’ access to remedies as well as facilitate non-state-based remedial mechanisms and processes. Business, in turn, should facilitate and engage with remedial mechanisms. Particularly, operational-level grievance mechanisms established by business can support human rights impacts assessment and prevent escalation of grievance situations.

²¹John Gerard Ruggie, ‘The social construction of UN Guiding Principles on Business and Human Rights’, in Surya Deva and David Birchall (eds), *Research handbook on human rights and business* (Edward Elgar Publishing 2020), p. 75

²²UN Working Group on Business and Human Rights, *Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms (A/73/163)* on 16 July 2018, para. 25; See also Ingrid Landau, “Human Rights Due Diligence and the Risk of Cosmetic Compliance.” *Melbourne Journal of International Law*, vol. 20, no. 1, July 2019, pp. 221–47, [Last access 26 March 2022]

The tripartite structure of UNGPs allows three Pillars to have the interactions which aims at closing the governance gaps that permit business to make adverse human rights impacts without accountability. HRDD plays the role of a linking and enabling measure in such interactions. While States take appropriate measures under Pillar I to enable enterprises to respect human rights (i.e. enabling HRDD as a part of RtR), the fulfillment of RtR with effective HRDD also support States to adopt appropriate policies, legislation, regulations and take relevant measures to implement their duty to protect (the interaction between Pillar I-Pillar II).

To meet RtR, corporations need an effective HRDD that results in inputs for remedial mechanisms in the access to remedy which in turn facilitate RtR through information inputs for human rights impact assessment – an integrated step of HRDD (the interaction between Pillar II – Pillar III). Finally, it is clear from the said two relations, HRDD enables both sides in the interaction between Pillar I and Pillar III where States protect affected people from human rights abuses and affected people may seek remedies from state-based mechanisms.

In sum, HRDD is a core component which is an innovative design playing a central role in UNGPs which is the first-ever instrument that creates a focal point for different actors (State, business, stakeholders) to talk about business-related human rights impacts in a common language. In fact, the concept of HRDD had enormous influence and had been integrated in many important international soft-law instruments of which OECD guideline on Multinational Enterprises is of significance for this thesis.

2.1.1.3 OECD guidelines and other soft-law instruments

The influence of UNGPs did promote many changes over the world. It fueled the European Commission to change its approach to CSR²³ for responding to UNGPs and request all member states to establish national action plans (NAPs) to implement the new changes²⁴. At UN level, the United Nations also established UN Working Group on Business and Human Rights with the mandate to promote, disseminate and implement UNGPs, which latter also recommend all UN members to have NAPs. Importantly, UNGPs impacted many soft-law instruments which are significant for the hardening of mHRDD legislations.

UNGPs has informed many significant soft-law instruments which change their approach to business-related human rights issues by integrating the innovative ideas embodied in UNGPs (corporate responsibility to respect human rights – RtR, polycentric governance and human rights due diligence). Those instruments *inter alia* include: the OECD Guideline on Multinational Enterprises (OECD MNE Guideline), the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (ILO MNE Declaration), the Performance Standards on Environmental and Social Sustainability (2012) of the International Finance Corporation (IFC - World Bank's

²³ Conventional CSR focuses on the voluntary and philanthropic aspects which require corporations to response to social and moral expectation, for example: providing aid where needed, as an ethnic conduct. By recognizing the responsibility of enterprises for their impacts on society, EU changed its definition of CSR. See Florian Wettstein, The history of 'business and human rights' and its relationship with corporate social responsibility, in Surya Deva and David Birchall (eds), Research handbook on human rights and business (Edward Elgar Publishing 2020), p.39

²⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility, (COM/2011/0681), available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52011DC0681> [Last access: 27 February 2022]

sector for private clients), the Guidance on Social Responsibility ISO 26000 of the International Organization for Standardization.

For the purpose of this thesis, OECD MNE Guidelines are further detailed because OECD MNE Guidelines is explicitly referred in the TSD chapter of EVFTA. HRDD process is regulated in chapter 8 of OECD MNE Guideline, OECD in 2018 issued the OECD Due Diligence Guidance for Responsible Business Conduct to provide practical support for enterprises to implement HRDD and associated provisions under OECD MNE Guidelines²⁵. Besides, OECD also adopted sectoral-specific due diligence guidance to guide the due diligence recommendation under OECD MNE Guidelines for garment and footwear sector, minerals, extractives, agriculture, financial sectors as well as for preventing the worst forms of child labour.

In all of the above soft-law instruments, HRDD, as a component of RtR, is a social norm which reinforces moral norms on corporate conduct and therefore is being harden as a legal norm over the world. The following part discusses the development of HRDD laws in three generations in which HRDD is gradually emerging in mandatory legal frameworks.

2.1.1.4 Three generations HRDD laws

HRDD laws are the legislations that aim at the implementation of HRDD as defined by UNGPs. They vary in terms of their governing scope (the type of companies they address, the protected human rights), HRDD obligations and civil liability that they impose and how far they reach to govern within GVCs. They could be divided, upon the obligations imposed on business, into three generations: first generation – disclosure/transparency/reporting laws, second generation – HRDD laws with administrative sanctions, and third generation – HRDD laws with civil liability.²⁶

The first generation of HRDD law - disclosure/transparency/reporting laws imposes on businesses the obligation to disclose, report and publish the information concerning their human rights situation as well as environmental impacts relating to human right issues²⁷. Although these laws does not explicitly require businesses to implement HRDD process, the required information to be disclosed can generally be obtained as the result of certain tasks in HRDD process. Although these transparency laws serve multiple goals²⁸, the underlying idea is that human rights transparency permits relevant stakeholders and consumers to sanction²⁹ corporates if their human right

²⁵ OECD Due Diligence Guidance for Responsible Business Conduct (2018), available at: <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> [Last access: 28 February 2022]

²⁶ European Coalition for Corporate Justice (ECCJ), ‘Key Features of Mandatory Human Rights Due Diligence Legislation’, available at: <https://corporatejustice.org/publications/key-features-of-mandatory-human-rights-due-diligence-legislation/> [last access: 02 March 2022]; Other ways to classify HRDD laws: Anna Triponel, Business and human rights legislation: an overview, 14 October 2019, <https://triponelconsulting.com/business-and-human-rights-legislation/> [Last access: 02 March 2022], Nicolas Bueno, ‘Mandatory Human Rights Due Diligence Legislation’ (Teaching Business and Human Rights Forum, 22 October 2019), available at: <https://teachbhr.org/resources/teaching-bhr-handbook/mandatory-human-rights-due-diligence/> [Last access 02 March 2022]

²⁷ Nicolas Bueno and Claire Bright, Implementing Human Rights Due Diligence Through Corporate Civil Liability (September 8, 2020). International & Comparative Law Quarterly, p.10, available at SSRN: <https://ssrn.com/abstract=3689241> [Last access 02 March 2022]

²⁸ Radu Mares, ‘Corporate Transparency Laws: A Hollow Victory?’ (2018) 36 Netherlands Quarterly of Human Rights 189, p.191–6

²⁹ Ingrid Landau, supra n.22, 230

performance is poor (for example: product-boycott), or name & shame mode. The laws could arguably reward corporates if they respect human rights (for example: more investment, loan, increased of sale and price-rise of shares)³⁰, or name and reward mode. These results are sorts of non-legal accountability for corporates. The examples for these transparency laws include: the US Dodd-Frank Wall Street Reform and Consumer Protection Act (2010), the Californian Transparency in Supply Chains Act (2012), the EU Non-Financial Reporting Directive (2014), the UK Modern Slavery Act (2015), and the Australian Modern Slavery Act (2018)³¹. However, the mode of “name and shame” under these transparency law is hardly effective and tends to result in cosmetic compliance.³²

The second generation – HRDD laws with sanctions - requires corporates to complete fully HRDD obligations: risks identification, taking action and reporting on taken measures and their outcomes³³. With a limited approach, the second generation usually focuses on human right issues in specific industrial sectors (for example: the 2010 EU Timber Regulation, the 2017 EU Conflict Minerals in Supply Chain Regulation), or specific human right issues (for example: the 2019 Netherland Child Labour Due Diligence Act). Recently, the second generation expands the scope of HRDD obligations. Two examples are: the 2021 Norwegian Transparency Act of which HRDD obligations cover human rights and decent working conditions³⁴ and the 2021 German Supply Chain Law of which HRDD obligations encompass human rights and environment protection³⁵. The implementation of these second generation laws are monitored and enforced by state-based mechanisms that can impose administrative sanctions such as fines and injunctions (sometimes even criminal liability).

Finally, the third generation - HRDD laws with civil liability- has the strongest mandatory effects on corporates. These laws do not only impose a duty to perform HRDD process but also explicitly link this duty to existing civil corporate liability in case of harm³⁶ (the HRDD duty in these laws is a standard of care) or even establish a new type of corporate liability. To date, the 2017 French Duty of Vigilance Law is the first legislation of the third generation, adopted and being in force. The third generation of HRDD laws provide a cause of action for affected right-holders in access to effective remedy by allowing them to bring claims (tort or equivalent) against corporates for failure of HRDD duties. CSDDD also follows the civil liability model.

The overview of the above hard laws shows the trend that HRDD laws are rapidly evolving in a ‘hardening’ process of HRDD concept. The laws incorporated with mandatory human rights due diligence (mHRDD) (second and third generations) are mainstreaming while the advancement of the first generation on reporting which will

³⁰ Ibid

³¹ Ibid; see also European Coalition for Corporate Justice (ECCJ), supra n. 26, p.1

³² Radu Mares, supra n. 28, p.213

³³ European Coalition for Corporate Justice (ECCJ), supra n. 26, p.1

³⁴ 2021 Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act), translated version available at: <https://lovdata.no/dokument/NLE/lov/2021-06-18-99> [Last access 02 March 2022]

³⁵ See German parliament passes mandatory human rights due diligence law in Business and Human Rights Resource Center, available at: <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/> [Last access: 02 March 2022]

³⁶ Nicolas Bueno and Claire Bright, supra n.27; European Coalition for Corporate Justice (ECCJ), supra n. 26, p.2

have supplementary effect to mHRDD legislation is also being developed (like the proposed CSRD). The EU is the leading region for this trend.

2.1.2 The incoming EU mHRDD framework

In the EU area (including EU member state, Switzerland and Norway), multiple legislations and initiatives of BHR are currently under development, the mHRDD initiative in conjunction with others has a potential of game-changer with transformational effects, including the extraterritorial force to third countries. This section outlines the development of the emerging mHRDD/CSDD legal frameworks in the EU region, both at national level and regional level, to highlight the extraterritorial effects to third countries like Vietnam.

Different key parameters³⁷ and key features are used to analyze mHRDD legislation in general and their extraterritorial effects in particular. To establish an overview on EU mHRDD legislations, this part will focus on, *inter alia*, the following key features of them: The governing scope of mHRDD legislation; the nature of HRDD obligations including the reach of HRDD obligations; the liability regime and transparency requirements under mHRDD legislation.

Upon these key features, the following parts first assess the mHRDD legislations in EU member states and then turn the focus on the new European Commission's CSDD directive proposal.

2.1.2.1 EU mHRDD in member states

a. French law of duty of vigilance

Adopted in 2017, the French law of duty of vigilance is applicable to big French companies and imposes the duty of vigilance. This is a suitable translation of HRDD concept under UNGPs into the French legal system where the concept of 'duty of vigilance' is familiar³⁸. Under this duty of vigilance, companies are required to establish, disclose and implement a vigilance plan (*plan de vigilance*) that specifies the measure to identify risks, and prevents human rights and fundamental freedom, risks and serious harms to health, safety and environment³⁹. The vigilance plan is a non-exhaustive list of measures, which follows the main steps of HRDD process envisaged by UNGPs

Captured companies have the duty of vigilance with respect to the risks that derive from their own activities, the activities of their directly/indirectly controlled companies and the activities of their subcontractors and suppliers with which they maintain

³⁷ Danish Institute for Human Rights (DIHR), Human rights due diligence laws: key considerations (2021), p. 11-14, available at: <https://www.humanrights.dk/publications/human-rights-due-diligence-laws-key-considerations> [Last access: 06 March 2022]

³⁸ Chiara Macchi and Claire Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation' in Martina Buscemi and others (eds), *Legal Sources in Business and Human Rights* (Brill | Nijhoff 2020) 219, p. 232-3. Although the concept of 'duty of vigilance' are not perfectly align with the HRDD concept under UNGPs since the French concept refers to 'reasonable vigilance' measures (*mesures de vigilance raisonnable*) with regard to human rights issues, rather than human rights due diligence (*diligence raisonnable*) used by UNGPs. UNGPs employs the concept of 'due diligence' (process) and the concept of 'human rights due diligence' (standard of conduct) which are familiar with common law systems and may create the confusion in French law – a civil law system.

³⁹ Danish Institute for Human Rights (DIHR), *supra* n. 37, p.26

‘established commercial relationship’.⁴⁰ There is no limit on the chain of control covered by the duty of vigilance as the controlled companies could be direct subsidiary, second-tier subsidiaries or third-tier subsidiaries and so on⁴¹. Furthermore, the duty of vigilance also covers the subcontractors and suppliers with ‘established commercial relation’ which is defined as “a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last”⁴². This excludes the ad-hoc business relationships and is a narrower approach in comparison to the concept of business relationship under UNGPs⁴³.

In terms of civil liability regime, the French law of duty of vigilance is the very first law that links HRDD obligations – or duty of vigilance- with civil liability. Initially, non-compliance results in civil fine, periodic penalty payments and a civil liability action⁴⁴. Although the civil fine was declared ‘unconstitutional’⁴⁵, the two remaining accountability measures are potential to ensure the implementation of the law and the remediation for victims of human rights abuses.

Periodic penalty payment will be imposed by a competent court in a process which can be triggered by any party with standing (including victims, NGOs, trade union). When finding a corporate failure of duty of vigilance, such parties will need to send an official notice [*mise en demeure*] to request the corporate perform their duty of vigilance. After three months and the corporate still fails to perform the duty, such parties can ask the competent court to impose the periodic penalty payment. This process is a privileged tool to open up companies for public scrutiny over the duty of vigilance⁴⁶ and is in line with the idea of prevention – the underlying philosophy of the law.

Turning to civil liability action which is more progressive than some of the laws enacted recently in the EU, corporate failing to comply with the law and thereby causing preventable damages will have to encounter civil liability action in accordance with the general French tort-law⁴⁷. The victims can file lawsuits for their damages that occurred because of corporate’s failure of their duty of vigilance and have the burden of proof to prove three elements: a breach, damage and causation between the two. However, these requirements induce hurdles for the victims in access to remedies through civil liability: First, it is difficult to prove the breach as the effective implementation of vigilance duty is a procedural obligation rather than an obligation to guarantee outcomes⁴⁸. Second, proving a causal link is a challenging task since there is a large amount of legal

⁴⁰ Sandra Cossart, Jérôme Chaplier and Tiphaine Beau De Lomenie, ‘The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All’ (2017) 2 Business and Human Rights Journal 317, p.320

⁴¹ Stéphane Brabant, Charlotte Michon and Elsa Savourey, ‘The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance’ (2017), p.2, available at: <https://media.business-humanrights.org/media/documents/ba571b7294311e42b3605af7cc4eeaad149c33b2.pdf> [Last access 06 March 2022]

⁴² Sandra Cossart, Jérôme Chaplier and Tiphaine Beau De Lomenie, supra n.40

⁴³ Nicolas Bueno and Claire Bright, supra n.27, p.12

⁴⁴ Stéphane Brabant and Elsa Savourey, ‘France’s Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies’ (2017), p.1, available at: <https://media.business-humanrights.org/media/documents/d32b6e38d5c199f8912367a5a0a6137f49d21d91.pdf> [Last access 08 March 2022]

⁴⁵ Ibid, p.2

⁴⁶ Ibid, p.4

⁴⁷ Ibid, p.2

⁴⁸ Ibid, p.2-3; Nicolas Bueno and Claire Bright, supra n.27, p.13

uncertainty and complexity when the cases involve controlled companies and ‘established commercial relationship’⁴⁹.

Despite the fact that the Friend law was innovative in comparison with HRDD legislations at the time of its issuance or even with some of the recent mHRDD laws, it was also criticized for its narrow governing scope (only small number of large companies)⁵⁰, limited possibility for victims to file a civil liability actions (especially in the case of human right abuses in third countries)⁵¹. The effectiveness of its extraterritorial effects is questionable since the victims will have to encounter legal obstacles as well as practical hurdles⁵². Furthermore, captured companies tend to comply with it in a tick-box exercise and are wary of transparency and stakeholder engagement⁵³.

In reality, there are only four cases in which victims in third countries sued French companies for their extraterritorial activities⁵⁴. No judgement on the merits has been reached at all. Most of those cases are concerned with jurisdictional issues whether the case should be adjudicated in civil or commercial court. This jurisdictional issue was recently answered by the French Supreme Court in Total case, recognizing the jurisdiction of civil court⁵⁵. Nevertheless, the court, when adjudicating the cases, will still consider the duty of vigilance as a duty of conduct. The captured companies only have to prove that they establish and effectively implement their vigilance plan (taking appropriate measures to prevent harms). In the other side, victims will have to prove the preventability of harms which is a core factor of ‘breach’.

In brief, the French law seems to have little effect in the extraterritorial context (lack of access to remedies, tick-box compliance) and its potentials are still to be seen with the development of its cases law which provide further interpretation on its ambiguity.

b. Swiss popular initiative on responsible business

It is worthy to remind that Switzerland technically is not an EU member state but has a close relationship with EU. The legislative developments in Switzerland usually align and correlate with the EU legislations. The existence of Swiss initiative on responsible business therefore could be seen as a signal for the rise of mHRDD in the EU.

This initiative was the effort of CSOs in Switzerland aiming at adding the provision on corporate human rights responsibility in the Swiss Constitution (RBI Proposal), initiated in 2016. The RBI Proposal went under the legislation process of Switzerland in which the Swiss Parliament introduced a First Counterproposal in 2018 and then the Second Counterproposal was prepared by the Swiss Council of State in 2019. The RBI

⁴⁹ Ibid

⁵⁰ Chiara Macchi and Claire Bright, *supra* n.38

⁵¹ Stéphane Brabant and Elsa Savourey, *supra* n.44

⁵² Elsa Savourey and Stéphane Brabant, ‘The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption’ (2021) 6 Business and Human Rights Journal 141, 151–152

⁵³ Ibid, p.147

⁵⁴ Business and Human Rights Resource Center, France's Duty of Vigilance Law, available at: <https://www.business-humanrights.org/en/latest-news/frances-duty-of-vigilance-law/> [Last access: 09 March 2022]

⁵⁵ Business and Human Rights Resource Center, Total lawsuit (re failure to respect French duty of vigilance law in operations in Uganda), available at: <https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda/> [Last access: 09 March 2022]

Proposal came under vote and was rejected in 2020.⁵⁶ As a result, the Second Counterproposal adopted by the Parliament will enter into force and take effect from 2022. Although being rejected, RBI Proposal did gain much attraction as well as highlighted the experience and challenges in mHRDD legislative process⁵⁷.

Under RBI Proposal, the governing scope is overarching since it applies the corporate responsibility to all companies based in Switzerland, and covers all internationally recognized human rights and international environmental standards⁵⁸. RBI Proposal requires business to carry out appropriate due diligence based on UNGPs⁵⁹ and imposes on Swiss parent company a general human rights obligation to conduct HRDD over their entire value chains.⁶⁰

With respect to the civil liability regime, RBI Proposal formulates a strict-liability regime rather than the fault-based liability regime like the French law. Swiss companies as controlling companies are liable for the harm caused by their controlled companies – the notion of controlled company encompasses both subsidiaries and suppliers that was under ‘economic control’ by controlling companies. This strict liability is applicable unless the controlling companies can prove either: they took all due care to avoid the damages, or the damages would have occurred even if all due care have been taken.⁶¹ This provides a due diligence defense which reverses the burden of proof to the controlling companies and, at the same time, encourages business to perform meaningful HRDD activities. Despite having no transparency requirement, RBI Proposal is innovative, providing the civil liability regime, especially the shift of burden of proof, that strongly facilitates victims’ access to remedies.

The First-Counterproposal is a response from the Swiss National Council, a chamber of the Swiss Parliament to avoid a vote on the RBI Proposal, aiming at modifying the Swiss Code of Obligations⁶², instead of the Swiss Constitution as proposed by RBI Proposal. The mHRDD obligations in this First Counterproposal are only applicable to large companies and the civil liability regime only covers the effectively controlled companies, excluding the harms caused by suppliers. This counterproposal did not only raise the threshold to ‘effective control’ which poses harder obstacles for victims to prove it but also lower the threshold for due diligence defense by regulating that companies are able to escape civil liability with respect to the harm caused by their controlled companies if they applied all required HRDD measures⁶³. Despite this narrower approach, the First Counterproposal was rejected by the other chamber of Swiss Parliament.

⁵⁶ Business and Human Rights Resource Center, Switzerland: Responsible Business Initiative rejected at ballot box despite gaining 50.7% of popular vote, available at <https://www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal/> [Last access 09 March 2022]

⁵⁷ Nicolas Bueno and Christine Kaufmann, “The Swiss Human Rights Due Diligence Legislation: Between Law and Politics.”, 2021, *Business and Human Rights Journal* 6 (3): 548–9

⁵⁸ Danish Institute for Human Rights (DIHR), *supra* n.37, p.26-27

⁵⁹ Nicolas Bueno and Claire Bright, *supra* n.27, p.14

⁶⁰ *Ibid*, Danish Institute for Human Rights (DIHR), *supra* n.37, p.26-27

⁶¹ Nicolas Bueno and Claire Bright, *supra* n.27, p.14

⁶² Nicolas Bueno and Christine Kaufmann, *supra* n.56, p.544

⁶³ Nicolas Bueno, ‘The Swiss Responsible Business Initiative and Its Counter-Proposal: Texts and Current Developments’. Cambridge Core Blog, available at: <https://www.cambridge.org/core/blog/2018/12/07/the-swiss-responsible-business-initiative-and-its-counter-proposal-texts-and-current-developments/> [Last access 10 March 2022]

The Second Counterproposal was prepared by the Swiss Government as main business associations lobbied against the First Counterproposal⁶⁴. This counterproposal was even a lighter alternative in comparison with the First Counterproposal, imposing mHRDD obligations only to certain large companies and focus in two areas: conflict materials and child labour⁶⁵. It does not contain a civil liability regime but only criminal liability.

After the Second Counterproposal, the RBI Proposal still came under vote and was rejected. As a result, under Swiss Law, the Second Proposal gained the automatic adoption and will take effect in 2022. The Swiss RBI Proposals and its counterproposal show how far mHRDD legislation can be innovative and countered to be diluted fundamentally. This leaves precious experience for the legislative procedure in other countries.

c. Netherland Child labour law

Adopted 2019, the Netherland Child labour law is a consumer-protection legislation, ensuring that the companies that provide goods and services for end-uses in Netherland do everything in their power to prevent their products and services from being produced with child-labour uses so the Dutch consumers can buy those products and services with ‘peace in mind’⁶⁶. This law is an example of the second generation of mHRDD legislation and imposes mHRDD obligations in a way that is close to the approach of the first generation, primarily aiming at transparency.

In term of governing scope, this law only governs the companies, Dutch and non-Dutch providing products and services in Dutch market and therefore excludes Dutch-corporate exporters. It has a sectoral approach, covering only the child-labour uses. Under this law, companies are required to perform HRDD obligations that reach their entire supply chains. The HRDD obligations requires companies investigating entire supply chains to determine whether goods and serviced supplied to Dutch market are produced with child-labour. In case of suspicion, companies must adopt and implement an action plan in observance to the ILO-IOE Child Labour Guidance Tool for Business⁶⁷. In addition, companies also have to establish a statement that declares they have performed due diligence to prevent their products and services provided to Dutch markets from being produced by child-labour⁶⁸. This statement is submitted to a public authority (monitoring authority of this law) for just a one-time, not regular basis.

With respect to the accountability regime, no civil liability was imposed, meaning no access to compensation for victims. A third party affected by companies’ failure in their HRDD obligations has to first submit a complaint to such companies. After six months, if the companies do not address such complaint, the third party can submit the complaint to the monitoring authority. Administrative penalty may be imposed by the monitoring authority, in the most severe cases, up to 10% of worldwide annual turnover. The criminal sanction may also be applied if the violation is repeated within five years.

⁶⁴ Nicolas Bueno and Christine Kaufmann, *supra* n.56, p.544

⁶⁵ Nicolas Bueno and Claire Bright, *supra* n.27, p.14

⁶⁶ Claire Bright and others, ‘Options for Mandatory Human Rights Due Diligence in Belgium’, KUL Leuven and Nova School of Law, (2020), p.27, available at <https://www.business-humanrights.org/en/latest-news/report-explores-options-for-mandatory-human-rights-due-diligence-in-belgium/> [Last access 10 March 2022]

⁶⁷ Nicolas Bueno and Claire Bright, *supra* n.27, p.11

⁶⁸ Claire Bright and others, *supra* n.65, p. 29

Importantly, there is no ban or requirement of recall with respect to the products and services linked to child-labour under this law. This makes the Dutch law to be closed to the approach of the first generation – ‘name and shame’.

Currently, an initiative of corporate due diligence legislation is being developed in the Netherlands⁶⁹. It is expected that, upon the political context and the initial proposal of that bill, the new mHRDD legislation of the Netherlands will take a stronger stance than the Child Labour Law.

d. German Act on Corporate Due Diligence on Supply Chain

The mHRDD legislation was adopted in the leading industrial member state of the EU – Germany which has its Act on Corporate Due Diligence on Supply Chain initiated in 2019, adopted in July 2021 and taking effect from 2023⁷⁰. The law is aimed at minimizing human rights risk and ending the violation of [corporate] human rights-related obligations⁷¹, which are political compromises in comparison with its original ambitious goals, shedding a light to explain many shortcomings pointed out by CSOs⁷².

The Law (or LsKG)⁷³ imposes mHRDD obligations on the corporates that have either their central administration, principal place of business, administrative headquarter or statutory seat in Germany, provided that they have at least 3,000 employees in Germany. The threshold of employee number will be lowered to 1,000 employees from 2024 but the number of companies covered by the law is still too small⁷⁴. Its substantive scope covers internationally recognized human rights standards with an open-ended list while the environmental risks are covered in a very limited manner, being restricted to a few conventions and issues stipulated in section 2(3) of the law⁷⁵.

The contents of mHRDD obligations under the law basically follow UNGPs. Companies are required to: integrate human rights as a part of their business DNA, identify, take actions to minimize human rights risks, regularly conduct follow-up, transparently communicate and report their actions to the monitoring authority, and establish a complaint procedure⁷⁶. However, the most controversial issue is the reach of mHRDD obligations which encompasses the company’s own activities, their subsidiaries

⁶⁹ Business and Human Rights Resource Centre, Dutch Bill on Responsible and Sustainable International Business Conduct, available at: <https://www.business-humanrights.org/en/latest-news/dutch-bill-on-responsible-and-sustainable-international-business-conduct/> [Last access 10 March 2022]

⁷⁰ Business and Human Rights Resource Center, German parliament passes mandatory human rights due diligence law, available at: <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/> [Last access: 12 March 2022]

⁷¹ Ruhl, Giesela, Cross-border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act (January 2, 2022). Borg-Barthet, Živković et al (eds), *Gedächtnisschrift in honor of Jonathan Fitcher* (forthcoming 2022), Available at SSRN: <https://ssrn.com/abstract=4024604> [Last access 12 March 2022]

⁷² Initiative Lieferkettengesetz, What the new SUPPLY CHAIN ACT delivers – and what it doesn’t? (2021), p.2, available at: https://lieferkettengesetz.de/wp-content/uploads/2021/06/Initiative-Lieferkettengesetz_Analysis_What-the-new-supply-chain-act-delivers.pdf [Last access 12 March 2022]

⁷³ The abbreviation of the Act on Corporate Supply Chain Due Diligence in German, See the English version of the law provided by the Germany Federal Ministry of Labour and Social Affairs, available at: <https://www.bmas.de/EN/Services/Press/recent-publications/2021/act-on-corporate-due-diligence-in-supply-chains.html> [Last access 12 March 2022]

⁷⁴ Initiative Lieferkettengesetz, supra n. 71, p.5

⁷⁵ Krajewski, Markus and Wohltmann, Franziska and Tonstad, Kristel, Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction? (September 18, 2021). *Business and Human Rights Journal (BHRJ)*, p. 553-4, available at SSRN: <https://ssrn.com/abstract=3926360> [Last access 12 March 2022]

⁷⁶ See Section 3(1) of the law.

to which they have direct influence and their direct suppliers (first tiers)⁷⁷. Especially, when companies have “substantiated knowledge” on the violation occurring in their indirect suppliers, they must perform relevant mHRDD obligations over such indirect suppliers which shall be deemed as direct suppliers, and take appropriate measures. This is quite problematic: how companies can obtain such “substantiated knowledge” when they are not required, at the very first place, to perform risk analysis over indirect suppliers except through the complaint procedure to which victims and NGOs may bring the complaints against suppliers. However, the captured companies only pay passive efforts in the complaint procedure while it is challenging for victims and NGOs to discover the relation between captured companies and their indirect suppliers to access the complaint procedure.

No civil liability arises from the violation of mHRDD obligations but this does not prevent victims of human rights violation seeking civil liability for human rights violation under other regulations of Germany⁷⁸. Besides, companies also have to perform annually transparency requirements: to document, publish their mHRDD performance and submit a report to the monitoring authority - the Federal Office for Economic Affairs and Export Control (BAFA). Any affected party can make claim to BAFA if the failure to comply with mHRDD obligations violates or threatens their rights. BAFA may also impose administrative sanctions including: administrative fines that could be up to 2 percent of worldwide turnover and exclusion from public procurements.

Although the law introduces the representative actions that allow trade unions and NGOs represent victims of human rights violations in civil liability cases, which can reduce practical barriers for foreign victims⁷⁹, the law did not provide a legal basis for victims to sue for damages arising from the failure in complying with mHRDD obligations and therefore offers no additional basis for foreign victims to overcome jurisdictional hurdles. It also does not help foreign victims to choose German law as applicable laws for their human rights damages. In terms of private international law, it did nothing to support victims in cross-border cases⁸⁰, especially the ones from third countries. Moreover, its extraterritorial effects are also limited because the law neglects the importance of stakeholder engagements⁸¹. Nevertheless, there is much to be seen in its future implementation. The development of mHRDD obligations under this law is “not there yet” but “finally at the start”⁸².

e. Norway Transparency Act

Norway is also not an EU member state but, similarly to Switzerland, could impact the development of EU legislations. Therefore, the development of mHRDD legislation in the form of a Transparency Act in Norway is also a push for the development of mHRDD legislation in the EU. The campaign for the development of the act began from 2014 and eventually succeeded in 2021 with the adoption of the act named as ‘Act

⁷⁷ The German Act on Corporate Due Diligence on Supply Chain, Section 2 (5), (6), (7).

⁷⁸ The German Act on Corporate Due Diligence on Supply Chain, Section 3(3); See also: Ruhl, Giesela, supra n.70, p.6

⁷⁹ Initiative Lieferkettengesetz, supra n.71, p.3

⁸⁰ Ruhl, Giesela, supra n. 70, p.11

⁸¹ Krajewski, Markus and Wohltmann, Franziska and Tonstad, Kristel, supra n.74, p.555

⁸² Initiative Lieferkettengesetz, supra n.71

relating to enterprises' transparency and work on fundamental human rights and decent working conditions'(Transparency Act) that will take effect from July 2022⁸³.

The governing scope covers companies, including larger enterprises that are residents in Norway and larger foreign enterprises that offer goods and services in Norway or are liable for tax in Norway⁸⁴. In terms of substantive scope, the act provides due diligence obligations with respect to fundamental human rights, which are in line with UNGPs and OECE MNE Guidelines, and may include right to child rights of indigenous people, as well as decent working conditions defined in sections 3.b⁸⁵.

Companies are required to conduct a full range of mHRDD obligations that follows OECD MNE Guidelines and six steps of HRDD provided in the OECD Due Diligence Guidance for Responsible Business Conduct. Significantly, the mHRDD obligations reach the whole value chain, requiring governed companies to communicate with stakeholders and to provide remediation.

No civil liability was linked with mHRDD obligation. The monitoring authority is the Consumer Authority which can impose administrative penalties on the non-compliance with the law. The law includes two transparency requirements: First, companies must establish and publish annually their account of due diligence, making it available and accessible for the public. Second, companies are obligated to provide information as any person has the right to information concerning their mHRDD performance.

This law uses an approach, similar to the Netherland Child Labour Law (consumer protection) but in a broader manner, emphasizing the transparency element which opens business for public scrutiny, and empowering trade unions, civil society and relevant actors in seeking corporate accountability. This law may be seen as rights-based and stakeholder-centric⁸⁶ with a full range of mHRDD obligations but it is doubtful when it comes to access to remedy, especially in the cross-border cases in which victims face an enormous information asymmetry.

In conclusion for the development of HRDD legislations in national levels, the observed trend is that: Although the approach of each country has its distinction, most of HRDD legislations are in the second generation, except the French Law of Duty of Vigilance. The mHRDD obligations may themselves provide certain extraterritorial effects on third countries but such effects will be significantly strengthened h by linking mHRDD obligation with civil liability regime, in particular from the perspectives of third-country victims. This cautious approach is to establish the building block and seems to wait for the development of mHRDD legislation in the EU regional level.

2.1.2.2 The mHRDD legislations in European Union level

At this time, a number of regulatory initiatives⁸⁷ concerning BHR are under development at the EU level, promising fundamental and transformational changes in

⁸³ Krajewski, Markus and Wohltmann, Franziska and Tonstad, Kristel, supra n.74, p.551-2; The unofficial English version and the effective date of the Act could be found at Lovdata (Law Data) website <https://lovdata.no/dokument/NLE/lov/2021-06-18-99> [Last access 13 March 2022]

⁸⁴ Norway Transparency Act, Article 2.

⁸⁵ Krajewski, Markus and Wohltmann, Franziska and Tonstad, Kristel, supra n.74 p.554

⁸⁶ Ibid, p.558

⁸⁷ Under EU laws, the European Commission (EC) has a near-monopoly to initiate legislative initiatives while the European Parliament (EP) has very limited right of initiative. Normally, the EP will review the proposal under legislative initiatives adopted by the EC. However, the EP may exercise indirect rights of

both external and internal governance of EU companies. These initiatives will establish a set of legislation that aim at ensuring corporate respect to human rights and environment protections, being in line with the general policy framework of the EU. HRDD-related legislations include the one that has been developed in the EU (the non-financial reporting directive 2014/95, the Timber regulation 2010 and the Conflict Minerals in Supply Chain Regulation 2017), and the EC corporate sustainability due diligence (CSDD) proposal. The EU is aware of the need to align all instruments, solving the general puzzle of making sense of such an EU regulatory framework on Business and Human Rights⁸⁸. This section focuses on the HRDD legislations in the EU and especially the new CSDD proposal to highlight the potentials of the incoming CSDD directive.

a. Non-financial reporting directive

The EU Non-Financial Reporting Directive 2014/95 (*NFD Directive*) requires large public-interest companies to report annually on their environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters. It does not technically impose HRDD obligations but requests companies to report on due diligence processes implemented by companies and concerning those issues. The report must cover the whole value chain.

The NFD Directive requires companies to publish their non-financial report annually for all of the stipulated matters. However, it is also embodied with the principle of “comply or explain” which means that companies can choose not to report on certain matters but have to explain that non-reporting. The NFD Directive is a first-generation type of HRDD legislation that offers a ‘prized flexibility’ for companies not inclined towards meaningful reporting and a change of their conducts⁸⁹ as their report tends to be ambiguous, irrelevant and difficult to be assessed by publicity. The empirical study of EU on NFRD confirmed these practices and concluded that most of companies alters their policies and procedures toward sustainability because of other social changes, not NFRD.⁹⁰ It is therefore considered to be strengthened by the Corporate Sustainability Reporting Directive which will play a complementary role for mHRDD legislations⁹¹.

b. Sectoral mHRDD regulations

The EU also has the sectoral approach in mHRDD legislation: The Conflict Minerals Regulation (2017/821) (*Conflict Mineral Regulation*) and the Timber Regulation (2010/995) (*Timber Regulation*). These legislations aim at restricting access to EU single market through export and import control on the basis of human rights and environment impacts. Both of these legislations impose mHRDD and reporting obligations on corporate importers of respective commodities but to different extent.

initiative: the EP can request EC to submit a proposal. The EC is not obliged to do so. See EIPA, The European Parliament and the Right of Initiative: Change Practice, Not Powers, available at: <https://www.eipa.eu/publications/paper/the-european-parliament-and-the-right-of-initiative-change-practice-not-powers/> [Last access 13 March 2023]

⁸⁸ DIHR, HOW DO THE PIECES FIT IN THE PUZZLE? Making sense of EU regulatory initiatives related to business and human rights (2022), available at https://www.humanrights.dk/sites/humanrights.dk/files/media/document/EU_Regulatory_Measures_Explainer_accessible.pdf [Last access 13 March 2022]

⁸⁹ Radu Mares, supra n.28, p.196

⁹⁰ European Commission, Study on Non-Financial Report Directive (November 2020), available at <https://op.europa.eu/en/publication-detail/-/publication/1ef8fe0e-98e1-11eb-b85c-01aa75ed71a1/language-en> [Last access 20 May 2022]

⁹¹ DIHR, supra n.87, p.12

While Conflict Mineral Regulation governs the companies that import “3TG” minerals, (Tin, Tantalum, Tungsten and Gold) which are often sourced from conflicted areas linked with human rights issues, Timber Regulation regulates the obligations of operators who place timbers and timber products in EU market. Under Conflict Minerals Regulation, companies are required to conduct mHRDD obligations in line with the five-step due diligence process in OECD Due Diligence Guidance for Responsible Supply Chains from Conflict-Affected and High-Risk Areas. Timber regulation tackling illegal timbers that link to environment problems with human rights implications requires three key elements of due diligence: Information access, risk assessment and risk mitigation.

One important similarity is that both the mHRDD process under the Conflict Material Regulation which is to ensure corporate RtR and the due diligence elements under Timber regulation are on-going processes. Both require third-party audits of due diligence systems and annual reports. A failure to comply with Conflict material regulation may result in penalties and requires remedial actions by companies. No prohibition of placing materials sourced from conflict-areas is regulated⁹². The failure to comply with Timber regulation may result penalties, trade-suspension and product-seizure. It is prohibited for placing illegal logging products in the EU market⁹³.

Both of these legislations are the second-generation mHRDD laws referred to as vertical HRDD that only focuses on sectoral industries and are without the linkage between mHRDD obligations and civil liability. Their effects for making human rights changes are limited. In the situation that the current mHRDD legislations in the EU level are now of the first and second generation, the development of an overarching mHRDD legislation gains much attentions, especially after the European Parliament’s recommendation to the European Commission for a legislation on mHRDD in 2021⁹⁴.

c. Mandatory Sustainability Due Diligence proposed Directive of EC

Following such EP’s recommendation, the European Commission (EC) developed a Proposal for a Directive on corporate sustainability due diligence that was published in 23 February 2022 (CSDD proposal)⁹⁵ under the Sustainable Corporate Governance Initiative (SCG Initiative) that was initiated upon the policy of ‘An Economy That Works For People’⁹⁶. The CSDD proposal is now under the legislative process of the EU in which the EP may adopt more innovative opinions. However, the current content of CSDD proposal, although having certain limits, has already had innovative provisions.

Governing personal scope: EU CSDD proposal covers EU large companies, EU medium companies in high-impact sectors, non-EU large companies and non-EU

⁹² The Conflict Material Regulation, Art. 16

⁹³ The Timber Regulation, Art. 19

⁹⁴ The European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html [Last access 14 March 2022]

⁹⁵ The European Commission, the Proposal for a Directive on corporate sustainability due diligence and annex, available at: https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en [Last access: 14 March 2022]

⁹⁶ The European Commission, the Sustainable Corporate Governance Initiative, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en [Last access 14 March 2022]; The action on mHRDD and corporate governance was triggered in 2018 by the EC’s Action plan: Financing Sustainable Growth (2018, action 10, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0097> [Last access 20 May 2022]

medium companies in high-impact sectors⁹⁷. The high impact sectors are determined upon a risk-based approach and primarily include the sectors covered by the OECD sectoral due diligence guidance on high risk areas⁹⁸. This scope only captures 13,000 EU companies and 4,000 non-EU companies, excluding small and medium enterprises (SMEs) that make up 99% of companies in the EU⁹⁹. The underlying logic of this approach is that the smaller companies will also be exposed to due diligence obligations with the support from the companies captured by the proposal¹⁰⁰. Indeed, the captured companies have the obligations to support their SME business partners in performing their due diligence and where compliance with due diligence requirements would “jeopardize the viability of SMEs”¹⁰¹. SMEs are also expected to receive support from EU member states to comply with due diligence requirements¹⁰².

Substantive governing scope: Corporate Sustainability Due Diligence (CSDD) – is an innovative concept to cover human rights and environment impacts specified in the Annex of the proposal. However, there are three features of the substantive governing scope that need to be considered in a critical way. First, captured companies have CSDD obligations with respect to human rights and environment impacts listed in the Annex¹⁰³. Regarding human rights impacts, part I of the Annex includes section 1- an open-end list which lists out specific human rights violations and, at the end, refers to section 2 – a list of human rights and fundamental freedom conventions – to catch all other rights. This is confusing as there is no explanation by EC for this distinction, posing a risk that companies will only focus on the violations stipulated in section 1.

Second, CSDD is applicable to “adverse human rights impact” that is defined as results of human rights violation¹⁰⁴. This is a dangerous departure from UNGPs under which AHRIs occur when an action removes or reduces the ability of human rights enjoyment¹⁰⁵. Strictly interpreted, the proposal’s notion has a significantly narrower ambit and may establish a legal barrier in access to remedy because national courts, in holding CSDD-related civil liability, will have to prove that there are human rights violations under international laws at the first place. From this perspective, the access to remedies will be significantly limited. Third, although imposing certain corporate obligations and duties of directors concerning climate change, CSDD does not encompass climate change impacts but may be extended to cover these impacts in the future¹⁰⁶.

The reach of CSDD: the approach in delineating the reach of CSDD is similar to the approach of French law of duty of vigilance. Companies are required to perform

⁹⁷ EU Corporate Sustainability Due Diligence (EU CSDD), Article 2

⁹⁸ Ibid, recital 22

⁹⁹ Shift, The European Commission’s proposal for a Corporate Sustainability Due Diligence Directives – Shift’s analysis (2022), p.9, available at: <https://shiftproject.org/resource/eu-csdd-proposal-analysis/> [Last access 16 March 2022]

¹⁰⁰ The European Commission’s Explanatory Memorandum, p.14-15

¹⁰¹ Capture companies are expected to pay the cost when imposing the contract assurance and third-party verification to ensure HRDD in SMEs (Article 7.4; 8.5). When HRDD compliance jeopardize the viability of SMEs, the captured companies also are required to support (Article 7.2, 8.3)

¹⁰² EU Corporate Sustainability Due Diligence (EU CSDD), Article 14

¹⁰³ The European Commission, supra n.94

¹⁰⁴ EU Corporate Sustainability Due Diligence (EU CSDD), Article 3(c)

¹⁰⁵ OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), supra n.12. p.15 (Q. 10)

¹⁰⁶ EU Corporate Sustainability Due Diligence (EU CSDD), Article 29

CSDD to identify and address adverse impacts in their own operation, subsidiaries and “established business relationships” in their value chains¹⁰⁷. The concept of “established commercial relationship” was defined as a direct or indirect business relationship which is or is expected to be lasting, in view of its intensity or duration and which does not represent a negligible or merely ancillary part of the value chain. If the direct business relationship of a company (direct business partner) is established, then all linked indirect business relationships thereof should also be considered as established¹⁰⁸.

Although there is a broad definition of business relationships that captures entire value chain, the concept of “established business relationship” is aimed to delimit the reach of CSDD upon the proximity of business relationship. This approach does not align with UNGPs and OECD MNE Guidelines that use a risk-based approach which requires companies performing HRDD to handle human rights risks in their own operation and business relationships which are prioritized upon the severity of human rights risks on people rather than the closeness of business relations. In this matter, the proposal risks the effectiveness of CSDD as it is not easy to determine the “lasting” of business relationship and companies emphasize business aspects of human rights risks (the risks posed to business) rather than seeing those risks as the risks posed to people.

The CSDD obligations: these obligations are regulated as a due diligence process for companies to identify and address potential and actual AHRIs as well as environmental impacts. Unlike UNGPs, there is no provision on general policy commitment on respect to human rights but a requirement of the due diligence policy which provides the approach, code of conduct and process with respect to CSDD. This shows the underlying idea of CSDD which should be ‘obligations of means’¹⁰⁹, focusing on process rather than achieving respect to human rights which requires the approval from highest level and should be embedded throughout business enterprises. The CSDD process generally aligns with HRDD process under UNGPs.

The first step of CSDD is to identify adverse impacts arising in company’s own operations, subsidiaries and from established business relationships through ‘appropriate measures’. Companies may also, ‘where relevant’, carry out consultation with affected groups. Medium companies in high impact sectors are only required to identify severe adverse impacts relevant to their respective sectors.

The second step is to take ‘appropriate measures’ to prevent/mitigate potential adverse impacts (Article 7) and to bring actual adverse impacts to end (Article 8). The actions required to be taken by companies are listed in these articles in which there are two important interrelated ones: Contractual assurance and supports for SMEs. First, the captured companies are allowed to use contractual assurance to extend CSDD through their business relationships to smaller companies (contractual cascading). When the contractual assurance is applied, third-party verification is required to ensure the compliance. Second, they also have to provide support for SMEs where the compliance with CSDD requirements may jeopardize the viability of SMEs and also have to pay the cost of third-party verification applicable to SMEs. Although this scheme may incentivize SMEs, it may risk cosmetic compliance in which large companies pass CSDD obligations on smaller ones through contractual assurance and insulate themselves from accountabilities.

¹⁰⁷ Ibid, Article 1(a)

¹⁰⁸ Ibid, recital 20

¹⁰⁹ Ibid, Article 5 and recital 15

The third step requires companies monitoring impacts by conducting assessments on the effectiveness of identifying and addressing adverse impacts. This assessment must be performed at least annually or where there are reasonable grounds to believe that significant new risks of the occurrence of adverse impacts. Although this step is in line with the on-going nature of HRDD under UNGPs, no stakeholder engagement is explicitly required.

The fourth step – communicating on impacts – creates no new novel reporting obligation but defers the reporting obligation to Directive 2013/34/EU which was amended by NFD Directive and will be amended by the Corporate Sustainability Reporting Directive (collectively referred to as CSRD).¹¹⁰ The companies that are not governed by CSRD will be required to publish annual statement on CSDD. Again, no specific communication with stakeholders is stipulated.

Additionally, CSDD obligations also require captured companies to establish complaint mechanisms to which affected people and other stakeholders like trade union, CSOs can submit their complaints. Once the complaints are determined to be well-founded, the adverse impacts thereof shall be deemed as to be identified within the meaning of Article 6 (identifying adverse impacts- the first step of CSDD) and therefore will be handled under CSDD process¹¹¹.

There are two major limits in the above CSDD obligations that could undermine its effectiveness: First, companies enjoy a convenient degree of discretion as they are basically required to take ‘appropriate measures’ ‘where relevant’. Second, CSDD obligations fall short in crystalizing the central role of affected-stakeholders in comparison to UNGPs and OECD MNE Guidelines¹¹².

Civil liability regime: Under Article 22.1, companies shall be liable for the damages if they have the failure in complying with the obligation stipulated Article 7 (preventing potential adverse impacts) and Article 8 (bring actual adverse impact to an end) and, as a result of this failure, an adverse impact occurred and led to the damages.

Companies have the ‘safe harbour’ clause to avoid civil liability: Where companies have applied the contractual assurance and complied with all obligations related to the contractual assurance, they will not be liable for the damages caused by indirect business partners with whom they have establish business relationships unless it was unreasonable to expect that the action actually taken by companies would be adequate to prevent, mitigate, bring to an end or minimize the extent of the adverse impact¹¹³. Contractual assurance is obtained by captured companies from the direct business partners (ex. first tiers) who ensure that they will comply with captured companies’ code of conduct and prevention action plan as well as will obtain corresponding contractual assurances from their partners (ex. second tiers) to the extent that such partners are part of captured companies’ value chain. By using this contractual cascading, the captured companies need to have: Contractual assurance, code of conduct and third-party verification with respect to the performance of such contractual assurance. This risks cosmetic compliance as the proposal does not regulate who should have the burden of proof to prove that the company’s actions are reasonably adequate, which will be decided by national law¹¹⁴. If

¹¹⁰ DIHR, supra n.87, p. 12

¹¹¹ EU Corporate Sustainability Due Diligence (EU CSDD), Article 9

¹¹² Shift, supra n.98, p.7-8

¹¹³ EU Corporate Sustainability Due Diligence (EU CSDD), Article 22(2)

¹¹⁴ Ibid, recital 58

there is a shared burden of proof in which once companies show contractual assurance, code of conduct and third-party verification, claimants will therefore have to prove that such taken actions are foreseeably inadequate, it even raises the burden of claimants to a higher level.

Importantly, the civil liability regime under this proposal is a minimum regime that is “without prejudice” to the civil liability of subsidiaries or direct and indirect business partners in value chain as well as to EU law or national law which provides the civil liability related to adverse impacts in the situations that are not covered by the proposal or provide a stricter liability than the proposal. In other words, the proposal provides a minimum set of situations in which the captured companies are liable for damages resulting from their failure in CSDD. The captured companies and their business partners may have to have complementary stricter liability under national tort law and mechanisms. Finally, the civil liability regime under this proposal will be overriding mandatory over national law, even if the applicable law to the claim is not the law of member states.

Director’s duty: It was expected that the sustainability corporate governance initiative (SCG initiative) will result in a directive with two component parts: Corporate governance reforms including the reform on director duties and CSDD with respect to human rights and environment¹¹⁵. As the foundational EY study which was the basis for SCG initiative determines that the current narrow interpretation of director duty is one of reasons that lead to short-termism and shareholder primacy¹¹⁶, SCG initiative employs these two component parts to align better the long-term interests of management, shareholders, stakeholders and society¹¹⁷. Therefore, the proposal includes Article 25 that clarifies the duty of care encompassing sustainability matters and long-term interests, and Article 26 that requires directors to set up and oversee CSDD. This new clarification of director duty is provided in a broad language rather than specific steps and leaves the discretion to member states.

While many authors welcome the new duty of director and even suggest that the duty of director needs to be further specified¹¹⁸, prof. John Ruggie did warn against the approach of combining due diligence obligation and additional director duties in one legal document which may undermine the prospect of EC [SCG] initiative – or the adoption of CSDD directive¹¹⁹. He pointed out that director’s duties are not the cause of short termism and it is not necessary to address the reform of director’s duties which could be significantly changed to the desired direction in order to meet mHRDD requirements. This is a dilemma: On the one hand, imposing long-term duties could lead

¹¹⁵ DHIR, supra n.87,

¹¹⁶ EY, Study on directors’ duties and sustainable corporate governance, European Commission, available at: <https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en> [Last access 21 March 2022]

¹¹⁷ European Commission. Directorate General for Justice and Consumers, ‘Inception Impact Assessment of the Sustainable Corporate Governance Initiative’ (2020), p.3-4, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en [Last access 22 March 2022]

¹¹⁸ For example: Brabant, Stephane, Bright, Claire, Neitzel, Noah; Schönfelder, Daniel: Enforcing Due Diligence Obligations: The Draft Directive on Corporate Sustainability Due Diligence (Part 2), VerfBlog, 2022/3/16, <https://verfassungsblog.de/enforcing-due-diligence-obligations> [Last access 22 March 2022]

¹¹⁹ John Gerard Ruggie, ‘European Commission Initiative on Mandatory Human Rights Due Diligence and Directors’ Duties’ (2021), available at: https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf [Last access 22 March 2022]

to the situation that directors become insulated from market pressures and would be free to follow their own whims. On the other hand, director duties on long-term interests could also strengthen their defense before shareholders who are, as also rightly pointed out by John Ruggie, the greatest litigation risk for directors. Therefore, the general director duties on long-term interests under the proposal may be a good solution. This lets CSDD make changes in corporate governance and legal responsibilities as suggested by John Ruggie. Further specific director duties may provide controversies which could be used against directors by pro-short termism shareholders.

In sum, the proposal on CSDD of the European Commission is innovative in the terms of substantive governing scope but covers a small number of big companies with the expectation that such big companies will make smaller companies, including the ones in third countries, exposed to CSDD. Its civil liability regime may also open a new channel for the victims in third countries to seek remedies in EU home states. However, its extraterritorial effects may be significantly reduced by the limits such as the ambiguity in the reach of CSDD, lack of stakeholder engagement in CSDD process and the risk of cosmetic compliance raised by the safe-habour clause. These extraterritorial effects will be discussed further in the section below.

2.1.3 Comparative assessment of Mandatory human rights due diligence laws in Europe

As legislative instruments, the EU mHRDD legislations impose a mHRDD regime on businesses that link to the EU single market. This regime generates extraterritorial effects on companies, business activities and different stakeholders in third countries. The strength of extraterritorial effects differs from each legislation and also each specific third country. This part will summarize the mHRDD regime under the EU legislations to highlight their extraterritorial effects on third countries.

2.1.3.1 Governing scope

As shown in the previous parts, governing scope of mHRDD legislations include the personal scope and material scope, which itself decide how the issues in the home states and captured companies will affect the extraterritorial effects of mHRDD. In other word, the governing scope is also the decisive source for the scope of extraterritorial effects.

In terms of personal governing scope, the EU mHRDD legislations tend to apply to big companies in national or regional context. With the high thresholds, like French law and the CSDD proposal, mHRDD legislations only capture a small number of businesses. Friend law of duty of vigilance is only applicable to over one hundred companies while the CSDD proposal is expected to impose HRDD obligations on around 13,000 EU companies and 4,000 non-EU companies. Therefore, the extraterritorial effects to third countries depend on how and to what extent the business community in such third countries connect to those captured companies' value chains.

The exceptions, legislations applicable to all business, include the sectoral regulations (timber regulation and conflict material regulation) which aim at export-import control on certain supply chains of goods, and the Netherland Child Labour Law which is a consumer protection law applicable only to importers with regard to a specific human rights issues. These legislations' broader personal governing scope is a trade-off

with their limited substantive governing scope, resulting in very limited extraterritorial effects limited to specific supply chains or certain issues.

In terms of substantive governing scope, through having slight differences the EU mHRDD legislations have the trend of covering both human rights and environmental impacts – increasingly referred to as CSDD. At the national level, the Norwegian Transparency Act only focuses on decent work conditions while French law and German law govern both human rights and environmental issues in general. German law has a more limited environmental approach. At regional level, the CSDD proposal lists out serious human rights and environmental issues, and then uses a ‘catch all’ approach in its annex to cover all other issues under listed conventions. The scope of substantive matters decides the scope of works that both captured companies and especially monitoring authorities have to cover under mHRDD legislation. The broader scope is, the higher capability is required from captured companies and monitoring authorities.

In particular, the governing scope of the EU CSDD proposal affects its extraterritorial effects to third countries to the extent that the business community in such third countries connects to the value chains of the small number of captured companies. The real extraterritorial effects will also depend on the companies’ capacity to implement their CSDD obligations which cover a broad range of impacts and how the monitoring authorities perform their functions to push captured companies toward the compliance with CSDD. The latter will largely depend on member state’s efforts as CSDD legislation has its intended form of a directive.

2.1.3.2 The reach of mHRDD

All mHRDD legislations apply HRDD obligations on their captured companies and subsidiaries thereof. The main difference in the reach of mHRDD regime between legislation lays on the reach in value chains. German law that is the most recent mHRDD legislation adopted in the EU has the most limited reach of mHRDD as its HRDD obligation only basically reaches to the first tier of German companies’ supply chains. Although there is a possibility to expand beyond the first tiers by using the provision of ‘substantiated knowledge’, it is a loophole as captured companies do not have the obligation to identify the risks from indirect business partners in the first place. Norwegian transparency act and Netherland child labour law cover entirely value chains while French law of duty of vigilance reach as far to ‘established commercial relationship’ which needs to be determined from case by case but definitely will go further than the first tier. The EC applies a similar approach in the CSDD proposal which imposes CSDD obligations to ‘established business relationship’ in the entire value chains of captured companies. With a broad definition of ‘business relationship’ and ‘established business relationship’ as well as a hint of automatic expansion of establish business relationship¹²⁰, the CSDD proposal can reach far deep into global supply chains.

The reach of mHRDD obligations decide how far and deep the business communities in third countries are affected and therefore the extraterritorial effects make changes in third countries. CSDD proposal has potential of far reaching to downstream parts in third countries and therefore generate extraterritorial effects therein. It is important to notice that high-impact sectors captured by CSDD, such as garment, textiles, agriculture and extractives, are strongly and deeply linked to business relationships in developing third countries.

¹²⁰ EU Corporate Sustainability Due Diligence (EU CSDD), recital 20

2.1.3.3 mHRDD duties

Once HRDD obligations reach the business communities in third countries, the content of such HRDD obligations determine the activities that captured companies and related business, including business communities in third countries, will have to perform with respect to human rights and environmental issues in third countries. Except Netherland child labour law under which HRDD process is just a one-time-off obligation in order to place products into Netherland market, all other national mHRDD legislations generally requires a full range of HRDD process which should be on-going and iterative, aligning with UNGPs and OECD MNE Guidelines. The CSDD proposal goes further than the existing national legislations by detailing the actions that should be taken during the CSDD process to identify, mitigate and bring adverse impacts to end.

However, national mHRDD legislations seem to emphasize HRDD obligations as the obligation to put in place a process rather than to guarantee the changes for affected people. This approach is very clear in the Netherland child labour law and the Norwegian Transparency Act. This approach risks cosmetic compliance which brings about no changes, especially in the context of third countries. In other words, the extraterritorial effects, if any, are very limited.

Although the CSDD proposal recognizes that CSDD obligations should be ‘obligations of means’, the CSDD duties themselves are regulated in a way guaranteeing that certain results must be obtained, especially from the view of affected people. For example, captured companies have to bring actual adverse impacts to end, neutralizing and minimizing the impacts with payments of damages to affected persons and of financial compensation to affected communities¹²¹. When it is not possible to immediately bring adverse impact to an end, action plans have to be established with clearly identified timeline, qualitative and quantitative indicators for measuring the improvements¹²². Being framed in this way, CSDD obligations potentially result in real changes on the ground level and therefore have stronger extraterritorial effects in third countries.

2.1.3.4 Civil liability and access to remedy

A law without accountability mechanism is a tiger without teeth. Corporate accountability could be in forms of criminal liability, civil liability, administrative liability and reputational damages or equivalent forms. Accountability has a twofold function: It forces companies to comply with the law and also facilitates the access to remedies for affected people. As the captured companies under EU mHRDD legislations are mostly multinational corporations with enormous resources to pay administrative fines and manipulate media, civil liability regime and access to remedy play an important role for the effective implementation of mHRDD legislations and therefore enhance their extraterritorial effects. Transparency requirements are crucially complementary for civil liability and access to remedy as they help to eliminate the information asymmetry between business and stakeholders.

As demonstrated, most of mHRDD laws in EU member states so far are in the second generation that does not establish a civil liability regime linked with HRDD obligations. French law is the only one that establishes a civil liability regime linked with the failure in compliance with duty of vigilance, which is currently in initial tests by

¹²¹ Ibid, Article 8(3)(a)

¹²² Ibid, Article 8(3)(b)

pending lawsuits. All of the national laws have the transparency requirement to publish a certain plan or report, but none of them requires the communication with affected right-holders, which, in certain sense, has little meaning for affected people in third countries.

The civil liability under the CSDD proposal is far more complicating and still contingent on many changes in the proposal. Currently, it slightly departs from normal tort law principles like foreseeability, remoteness and reasonableness, by allowing captured companies to use contractual assurance, code of conduct and third-party certification as their defense¹²³. At least, there is a new channel for victims in third countries seeking remedies in EU home states. Similar to national mHRDD legislations, there is a requirement for CSDD report publication but not for communicating CSDD performance with affected people. The complaint procedures regulated in Article 9 only compensates partially this deficit of transparency.

In sum, the mHRDD regime under EU legislations, especially the CSDD proposal, has extraterritorial effects on third countries. The laws themselves have certain limits to these extraterritorial effects and the efficiency of such effects may depend on many factors. Therefore, the following part determines certain features that facilitate and improve the implementation of EU mHRDD legislation with the focus on CSDD.

2.1.4 Key features for the effectiveness of mHRDD's extraterritorial effects

The potentials of extraterritorial effects of mHRDD legislations, at very first place, is defined by mHRDD legislations themselves and depends on the economic connections between home states and relevant third countries. To optimize those potentials in practices, the following features needs to be upheld:

2.1.4.1 Stakeholder engagement

As HRDD is about people, stakeholder engagement/consultation is the key feature to HRDD in which the central need is to understand the perspective of potentially affected groups¹²⁴. Stakeholder engagement involves the meaningful consultation, interactions and communication to relevant actors relating to human rights impacts, such as business partners, affected individuals and communities, the legitimate representatives of affected people, civil society and experts. UNGPs strongly emphasize the role of stakeholder engagements throughout all of HRDD process, especially in HRIAs¹²⁵. OECD MNE Guidelines also have the same approach under which meaningful stakeholder engagement is the key component of HRDD process and should be on-going, being characterized by the two-way communication with the good faith from both sides¹²⁶. In short, without the voice from relevant stakeholders, companies hardly identify the impacts and take actions which could be seen as appropriate from the perspective of affected people.

¹²³ DIHR, Legislating for impact – Analysis of the Proposal EU Corporate Sustainability Due Diligence (2022), p. 24, available at <https://www.humanrights.dk/publications/legislating-impact-analysis-proposed-eu-corporate-sustainability-due-diligence> [Last access 26 March 2022]

¹²⁴ OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012), supra n.12, p.33 (Q. 30)

¹²⁵ UNGP Principle 18 (a)

¹²⁶ OECD Due Diligence Guidance for Responsible Business Conduct (2018), supra n.25, p.49-50

EU mHRDD legislations mostly neglect the importance of stakeholder engagements. Under the CSDD proposal, there are only two provisions related to stakeholder engagements: First, companies are required, ‘where relevant’, to carry out consultation with affected stakeholders in identifying impacts and in making prevention action plan and corrective action plan¹²⁷. This provisions grant a degree of discretion to captured companies in deciding whether or not to perform stakeholder consultations¹²⁸. Second, companies are also required to engage with stakeholders in their complaint procedures which although refers to a broad range of stakeholders but was regulated in an approach of one-way handling rather than two-way interaction.

While the CSDD proposal only focuses on the conducts of business themselves, it is necessary to emphasize that stakeholder engagement has a core role for CSDD to be effective, especially in third countries where many hurdles obstacle captured companies in complying with CSDD obligations.

2.1.4.2 Corporate governance and director duties

Corporate governance and director duties decide how and to what extent mHRDD obligations are implemented. The results could vary from cosmetic to meaningful compliance. Right-respecting culture is the key for mHRDD obligations to be effectively and meaningfully performed through companies. UNGPs emphasizes on a policy commitment which should be overreaching in internal governance and embedded in companies’ value¹²⁹. This is the foundational expectation before companies carry out HRDD process.

Short-termism and shareholder primacy have long been accused as the sources fostering AHRIs. Corporate governance and director duties should avoid these approaches and shift from toward a certain form of stakeholder governance or stakeholder capitalism with the help from HRDD¹³⁰. Stakeholder capitalism is also determined as a direction to move forward in the next ten years of BHR¹³¹. Therefore, a corporate governance aimed at this direction will also facilitate the effectiveness of HRDD process and its extraterritorial effects.

It is a shortcoming of the CSDD proposal for not requiring a general policy commitment on respect to human rights. Even though it requires a due diligence policy and imposes director duties toward human rights and long term interests as well as to oversee CSDD process ‘with due consideration to relevant input from stakeholders and CSOs¹³², this approach does not fully embrace the spirit of UNGPs¹³³. Bearing such shortcoming of the law in mind, companies should be encouraged to establish a right-

¹²⁷ EU Corporate Sustainability Due Diligence (EU CSDD), Article 6(4), 7(2)(a), 8(3)(b)

¹²⁸ DIHR, *supra* n.122, p.28

¹²⁹ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), *supra* n.12, p.29 (Q. 25)

¹³⁰ John Gerard Ruggie. Caroline Rees & Rachel Davis (2021). Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations. *Business and Human Rights Journal*, 6(2), 179-197, available at: <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/ten-years-after-from-un-guiding-principles-to-multifiduciary-obligations/CCC2D26AFED66E29865B1AB8D2D7219A> [Last access 27 March 2022]

¹³¹ OHCHR, UNGP 10+ the roadmap for the next decade of business and human rights, action area 5, available at: <https://www.ohchr.org/sites/default/files/2021-12/ungps10plusroadmap.pdf> [Last access 27 March 2022]

¹³² EU Corporate Sustainability Due Diligence (EU CSDD), Article 25, 26

¹³³ DIHR, *supra* n.122, p.26

respect culture in their governance and director duties to ensure the effects of CSDD in third countries.

2.1.4.3 Corporate civil liability

Lack of access to remedy for affected people in third countries to hold companies accountable for their AHRIs leaves companies facing no consequence for their non-compliance with HRDD and therefore fails to make changes. One of the reasons leading to such lack of access to remedy is the jurisdictional barrier in which the home state's courts usually do not have extraterritorial jurisdiction toward AHRIs in third countries. A corporate civil liability regime will bridge this jurisdictional gap, facilitating victims in third countries to seek accountability from companies in home states where companies have stable establishment and resources. As a result, companies have the motivations to effectively perform mHRDD obligations in third country context.

As shown, the civil liability regime under the CSDD proposal seems to still contain many hurdles for victims to access remedies, such as the definition of adverse human rights impacts and the allowed defense¹³⁴. It at least provides a channel for extraterritorial jurisdiction at this time. In addition to civil liability regime, the study of the EU Parliament recognized the limit of extraterritorial jurisdiction¹³⁵ in Brussel regulations (procedural private international law regime of EU) and recommended that Brussel regime should also extend to the human rights abuses in third countries conducted by subsidiaries of EU companies upon certain conditions¹³⁶.

2.1.4.4 Supply chain transparency and traceability

Transparency and traceability in supply chains facilitate companies in performing HRDD process with respect to business relations in third countries. On the one hand, companies are able to have a clear overview on their supply chains and therefore easily identify human rights impacts thereof. On the other hand, stakeholders in third countries have a special need to access fruitful and complete information on the supply chains of local companies in order to engage with downstream companies. One study on corporate efforts in addressing forced labour highlighted traceability and transparency in supply chain as an essential element for an effective mHRDD approach¹³⁷.

From the perspective of local stakeholders, the transparency and traceability in supply chains are more important when the CSDD proposal only requires captured companies to publish CSDD reports on their websites and there was no requirement of communicating with stakeholders. Therefore, captured companies should publish as

¹³⁴ Ibid, p.22-24

¹³⁵ This type of jurisdiction should be better referred to as transnational jurisdiction as the extraterritorial term may imply that the act occurs outside but actually the act occurs from both inside and outside EU. See Dong Cassel, 'State jurisdiction over transnational business activities affecting human rights' in Surya Deva and David Birchall (eds), Research handbook on human rights and business (Edward Elgar Publishing 2020) 198, in p.200

¹³⁶ European Parliament (2019), Access to legal remedies for victims of corporate human rights abuses in third countries, Brussels (2019), p.110-112

¹³⁷ Business and Human Rights Resource Center and KnowTheChain, Closing the gap: Evidence for effective human rights due diligence from five years measuring company efforts to address forced labour, p.11-12, available at: <https://www.business-humanrights.org/en/from-us/briefings/closing-the-gap-evidence-for-effective-human-rights-due-diligence-from-five-years-measuring-company-efforts-to-address-forced-labour/> [Last access 27 March 2022]

much as possible the fruitful information on their supply chains so third country stakeholders may themselves proactively start stakeholder engagements.

2.1.4.5 Smart-mix of measures

This is a cross-cutting feature for the effectiveness of extraterritorial effects of mHRDD legislations. Regulating transactional business activities is a challenging task and to certain extent it is impossible to cover all of related matters. John Ruggie rejected the idea of voluntary/mandatory dichotomy and insisted for a smart-mix of measures¹³⁸ - between voluntary and mandatory, national and international¹³⁹ - to foster business respect for human rights in UNGPs. Mandatory legislations usually (but not always) impose disincentives for non-compliance and incentives normally encourage voluntary compliance. Companies should be offered both incentives and disincentives by states and other actors in their performance of HRDD.

In the EU, the CSDD proposal and other mHRDD legislations have their shortcomings which may limit their extraterritorial effects as shown above. Therefore, a smart mix of measures that combines mHRDD legislations and other measures encouraging voluntary compliance from captured companies are crucial to compensate for those shortcomings.

2.1.5 Concluding remarks on mHRDD

Throughout this section, the development of the HRDD concept from soft-law instruments to hard law instruments is summarized with the central role of UNGPs. In the EU, HRDD has been hardened in both national and regional level in the form of first generation and second generation of mHRDD laws with the exception of French law of Duty of Vigilance – a third generation mHRDD legislation which is encountering initial tests in its implementation. The long-awaited CSDD proposal has just been released for being processed in the EU legislative procedure. While national mHRDD legislations seem to have little extraterritorial effects in third countries, a CSDD directive as proposed by the EC already has potentials to create such extraterritorial effects. Certain key features, including stakeholder engagements, corporate governance and director duties, civil liability, supply chain transparency and traceability and a smart mix of measures are necessary to strengthen such extraterritorial effects.

In sum, this section shows that mHRDD legislations in the EU, especially the incoming CSDD directive will provide extraterritorial effects to change human rights situations in third countries through their impacts on local businesses and stakeholders – a bottom-up approach. Particularly, these extraterritorial effects are a part of the external force from the EU to human rights situation in Vietnam.

2.2 European Union – Vietnam Free Trade Agreement (EVFTA)

The other part of the EU legal framework that generates external force on Vietnam is the EU – Vietnam Free Trade Agreement (EVFTA) which was signed in 2019 and

¹³⁸ John Gerard Ruggie, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* (January 23, 2015), p.2

¹³⁹ UNGPs Principle 3 and its commentary

took effect as of August 2020. This section demonstrates the legal framework under EVFTA which provides external forces through the EU's promotional approach aimed at changes in Vietnam by top-down measures. In doing so, this section first provides an overview on EVFTA – a new generation FTA of the EU - with the focus on the chapter 13 -Trade and Sustainable Development (TSD chapter). It then highlights the promotional approach of the TSD chapter. Some conclusions on EVFTA's effects on Vietnam's human rights situation are presented at the end of this section.

2.2.1 Overview of EVFTA

2.2.1.1 Background of EU trade policies

In June 2012, the EU issued the EU Strategic Framework and Action Plan on Human Rights and Democracy which states that “the EU will promote human rights in all areas of its external action without exception”. In the external policy dimension, the EU will place human rights at the center of relation with third countries and use a human rights-based approach to assist third countries in implementing their international human rights obligations, especially through human rights dialogues¹⁴⁰. This strategy set out the foundational basis to mainstream human rights throughout EU policy, international trade and investment agreements, including EVFTA.

In October 2012, the EU and Vietnam concluded the Partnership and Cooperation Agreement (PCA) that set out the holistic and coherent vision of the relationship between EU and Vietnam which should be based on shared interest and principles such as equality, mutual respect, the rule of law, and respect for human rights¹⁴¹. Article 1 of PCA – human rights, democracy and rule of law clause (human rights clause) – is an essential element of PCA. It regulates that both sides are obligated to respect democratic principles and human rights. This clause is a legally binding expression for the promotion and protection of human rights, which gives the EU a legal basis for raising human rights issues and makes it impossible to claim human rights as purely internal issues¹⁴².

PCA establishes the legal framework that serves as a foundation for the negotiation and conclusion of its following trade and investment agreement, including EVFTA which is an integrated part of PCA. Once a party violates the human rights clause, the other party can suspend the entire or a part of PCA, including EVFTA, by using ‘non-execution clause’¹⁴³.

¹⁴⁰ Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy (June 2012), p.2-3, available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/foraff/131181.pdf [Last access 29 March 2022]

¹⁴¹ The European Commission, Commission Staff Working Document, Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement (SWD(2016) 21 final), p.3, available at: https://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154189.pdf [Last access 29 March 2022]

¹⁴² Ibid, p.4

¹⁴³ Ibid, p.5. The term ‘non-execution clause’ was used to refer to the provision in EU agreement that allows EU to use appropriate measures when the other party fails to comply with human rights clauses. In the cases of EU-Vietnam PCA, it is Article 57 of PCA. See the European Parliament, briefing: Human rights in EU trade agreements, p.8-9 available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI\(2019\)637975_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf) [Last access 1 April 2022]

The negotiation of EVFTA also started in 2012 and it was reached in principle in 2015. EVFTA that is the most ambitious and comprehensive FTA concluded by the EU with a developing country lives up and aligns with the Commission's trade and investment strategy – Trade for All¹⁴⁴. Trade for All aims at a more responsible trade and investment policy in which trade is to promote sustainable development, human rights and good governance. EU internal and external trade policies will ensure inclusive growth for developing countries with FTAs having a cooperative process that fosters transparency and civil society involvement. Trade policies through engagement with responsible management of supply chains will involve a range of public, private and civil society actors to make meaningful changes for people on the ground with a mix of soft and innovative tools and legislative changes. Trade will be used as a powerful tool to make advancements of human rights in third countries.¹⁴⁵ Furthermore, the EC also stated that the EU's engagement in PCA and EVFTA would be reinforced to mainstream and prioritize human rights and sustainable development¹⁴⁶ with the reference to the Action Plans on Human Rights and Democracy and the Better Regulation Agenda (2015)¹⁴⁷

In short, PCA and all of the above policies combine to establish a political background for the negotiation, conclusion and currently the implementation of EVFTA. This background facilitates the understanding about EVFTA and its implementation, especially TSD Chapter.

2.2.1.2 Structure of EVFTA

EVFTA was designed in a comprehensive structure that could be observed from substantive content and monitoring institutions and the underlying core element - transparency.

a. Substantive content

With the huge benefits for both parties, EVFTA also contains a detailed content that comprehensively covers most of the factors in the trade relationship between EU and Vietnam with 17 chapters, 18 annexes, four mutual declarations, two protocols and two understandings.

The substantive content encompasses not only trade issues but also trade-related matters to ensure the purpose in alignment with Trade for All: trade liberalization must go hand in hand with EU values including high social and environmental standards, and respect for human rights¹⁴⁸. This comprehensive approach is expected to help to bridge differences between social and environmental standards and conditions in the EU and Vietnam, creating a level playing field between businesses from both sides.

b. Monitoring institutions

¹⁴⁴ "Trade for All: towards an effective and responsible trade and investment policy", Communication from the Commission to the European Parliament, the Council, and European Economic and Social Committee of the Regions (2015), available at: <http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy> [Last access 29 March 2022]

¹⁴⁵ Ibid, p. 25

¹⁴⁶ The European Commission, Commission Staff Working Document, supra n.140, p.15

¹⁴⁷ The European Commission, Better regulation for better results - An EU agenda (2015), (COM(2015) 215 final)

¹⁴⁸ The EC, EVFTA standards and values, available at: https://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157446.pdf [Last access 31 March 2022]

Under chapter 17, the monitoring institutions of EVFTA include the Trade Committee, specialized committees (or sub-committee), and Working Groups. First, the Trade Committee – the highest monitoring body of EVFTA – contains representatives and is co-chaired by high-rank officials from both sides. This Committee will meet once a year, or in urgent cases at the request of one party, to make recommendations or decisions concerning the implementation of EVFTA which must be made upon mutual consent. The Trade Committee has to report the relevant parts of its activities to the Joint Committee – the institution established under PCA. Second, specialized committees or sub-committees are the sub-bodies under the Trade Committee and monitor relevant areas governed by EVFTA. Similarly, those sub-committees include the representative and co-chaired by both sides. They will meet once a year and can make proposals for the decisions of the Trade Committees on relevant issues or make decisions themselves under provisions of EVFTA. Third, working groups are under the auspices of the Committee on Trade in Goods which sometimes can take the decision outside trade issues on the matters in the areas of customs and sanitary and phytosanitary measures. Working groups' establishments (except the two established by EVFTA) and their composition, remit and procedures will be determined by the Trade Committee. They also meet once a year with representatives from and are co-chaired by both sides, and have to report to relevant specialized committees on their activities.

The common characteristic of monitoring institutions of EVFTA is that they are all dialogue-based. Their composition, operation and procedures rely on the dialogues between both sides. All ultimately link to the mutual consent at the level of the Trade Committee. This aligns with the spirit of chapter 15 – dispute settlement procedure that explicitly requires government consultations before an arbitration mechanism.

c. Underlying core element - Transparency

EVFTA is in alignment with the strategy of Trade for All. To understand the promotional approach with respect to human rights, labour rights and environmental protection in EVFTA, it is crucial to detect the underlying core element of EVFTA – transparency - that was envisaged from the fundamental principles set out in Trade for All.

One of the main targets of Trade for All is a more transparent trade and investment policy. Transparency is fundamental for better regulation and the Lack of transparency undermines the legitimacy of EU trade policy and public trust. Policy-making process must be transparent with the debate being fact-based and the feedback from civil society, responding to people's concerns. While the effects of [EU] FTAs on third countries, notably least developing countries, are being increasingly scrutinized, transparency therefore should be an overreaching element embodied in EU FTAs. It is also explicitly affirmed that the engagement with third countries on trade and sustainable development should be a cooperative process that fosters transparency.

In EVFTA, transparency is regulated in chapters and underlying many provisions such as transparency requirement for customs and trade-related information (Article 4.8), transparency on technical barriers to trade (Article 5.7), transparency on SPS measures (Article 6.12), publication of government procurements (Article 9.4.6), transparency in competition policy (Article 10.7), transparency in the information on state-owned and similar enterprises (Article 11.6) and transparency in sustainable development (Article 13.12). Also, there is a whole chapter on transparency – Chapter 14 which requires parties

to ensure a predictable regulatory environment and efficient procedures for economic operators.

Transparency therefore is the cornerstone underlying EVFTA in general and human rights in particular. This explains why the TSD chapter of EVFTA opens up its implementation to the involvement of civil society and public scrutiny in the promotional approach.

2.2.1.3 EU approach in TSD chapter

Before discussing the promotional approach in TSD chapter (Chapter 13), it is necessary to note that the TSD Chapter is not a human rights clause¹⁴⁹ but concerns labour and environmental issues. The EU approach to human rights by EVFTA is that EVFTA will make human rights improvement central in the engagement and dialogue between EU and Vietnam, re-affirm both sides' commitment under international human rights instruments, and ensure transparency and inclusiveness in decision-making¹⁵⁰. EVFTA is linked to the human rights clauses in PCA, making trade and related issues relevant to respect for human rights. In addition, labour rights covered by TSD Chapter is basically human rights and environmental protection has very strong human rights implications in the context of developing countries like Vietnam. One of the ultimate objectives of TSD chapter is to foster real and lasting changes on the ground for the benefits of citizens in third countries like Vietnam through the effective application of enhanced social and environmental standards¹⁵¹.

In contrast to the conditional approach of the US in the Trans-Pacific Partnership (TPP) which requires parties to meet certain standards before such an agreement comes into force, the EU applies a promotional approach in EVFTA¹⁵². The promotional approach focuses on the improvement of labour and environmental standards and emphasizes social dialogues, cooperation and monitoring provisions. The EU's promotional approach could be observed from three pillars of the TSD chapter including: binding commitment between parties, institutional structures to implement those commitments and dispute settlement mechanism¹⁵³.

a. Binding commitments of parties

On the one hand, the parties made substantive commitments on labour and environment-related standards. With regard to labour standards, the parties reaffirm their commitments under International Labour Organization (ILO) and ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (ILO Fundamental Rights declaration 1998) to *respect, promote and effectively implement* the principles concerning the fundamental rights at work¹⁵⁴. This encompasses the basic international labour

¹⁴⁹ EVFTA is an agreement that focuses mainly on trade and related issues, which serves as a part of PCA. There are other types of agreement that include a specific human rights clauses like comprehensive agreement (include FTA provisions) and comprehensive agreement (include trade cooperation but without FTA provisions). See the European Parliament, briefing: Human rights in EU trade agreements, supra n. 142

¹⁵⁰ The EC, EVFTA standards and values, supra n.147, p.2

¹⁵¹ DG Trade, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreement (15 points of action) (2018), available at: https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf [Last access 01 April 2022]

¹⁵² OFSE, supra n.3, p15-16

¹⁵³ DG Trade, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreement (15 points of action) (2018), p.1

¹⁵⁴ EVFTA, Article 13.4.2

standards that are integrated in Sustainable development goals. Similarly, the commitments to effectively implement in its domestic law and practice the multilateral environmental agreements to which the respective party are a member are reaffirmed in Article 13.5. Furthermore, the parties also make commitments to cooperate and promote other environment-related standards on climate changes, biodiversity, forestry, living marine resources and aquaculture products.

On the other hand, the parties also make procedural commitments to sustainable developments. With the discipline of avoiding a “race to the bottom”, the parties committed not to derogate from, and not to fail to effectively enforce, any of its domestic labour and environmental laws in order to attract trade or investment¹⁵⁵. These commitments were reflected in Article 13.3 on upholding level of protection, which does not prevent the right of parties to upgrade their labour and environmental standards beyond ILO standards and conventions as well as multilateral environment agreements¹⁵⁶. Such improvements should not be used for protectionism or unfairly affect the other party¹⁵⁷.

Importantly, there are two procedural commitments which clearly have the promotional nature: First, the parties commit to make continued and sustained effort to ratify the fundamental ILO conventions and consider to ratify other ILO conventions. This is particularly important for Vietnam’s human rights situation as Vietnam just ratified Convention No.98 (Right to organize and collective bargaining Convention) a few days after the signing of EVFTA and has not yet ratified Convention No. 87 (Freedom of Association and Protection of the Right to Organise Convention). Second, both parties shall promote trade and investment favouring sustainable development, which includes trade and investment inconsistent with EVFTA, positive to climate changes, voluntary initiatives for the high level of labour and environmental standards as well as corporate social responsibility¹⁵⁸. However, parties only agree to promote CSR “in accordance with their domestic laws’ and it only requires that each party takes into account relevant internationally agreed instruments that have been endorsed or are supported by that Party.

b. Institutional structure¹⁵⁹

To implement the above commitments for sustainable developments, the TSD chapter establishes a monitoring structure that is dialogue-based with the involvements of civil society. The TSD institutional structure consists of the Sub-committee on Trade and Sustainable Development (Sub-committee on TSD), domestic advisory groups (DAGs) and Civil Society Dialogue Forum.

- The Sub-Committee on Trade and Sustainable Development: As a sub-committee under the Trade Committee, this committee reviews the implementation of the TSD chapter through dialogue and cooperation, issuing conclusions (joint statement and follow-up) upon *mutual agreement*.
- Domestic Advisory Groups (DAGs): Each party shall decide the domestic procedure for the establishment of DAGs which should contain independent

¹⁵⁵ The European Commission, Commission Staff Working Document, supra n.140, p.9

¹⁵⁶ Ibid

¹⁵⁷ EVFTA, Article 13.4.5 and 13.5.4

¹⁵⁸ EVFTA, Article 13.10

¹⁵⁹ EVFTA, Article 13.15

representative groups with the balanced representation from business, social and environmental stakeholders which include employers' and workers' organizations, business groups, and environmental organizations. Each DAGs in one side may on its own initiative provide opinions, recommendations to its side on the implementation of the TSD Chapter.

- Civil Society Dialogue Forums (CSDFs): DGAs from both sides will meet at least one a year in this joint forum, which occurs in conjunction with the meeting of the Sub-Committee on TSD, to discuss the sustainable aspects in the trade relations between EU and Vietnam. This forum has the presence of parties and of other stakeholders that must be agreed upon a joint agreement of DAGs from both sides. The report of this forum is submitted to the Sub-committee on TSD.

Generally, the EU and Vietnam have the obligations to implement the TSD chapter and also the obligation to work together in certain areas for sustainable development. Each party will be facilitated with various information sources in which DAGs play a significant role for the understanding of the effectiveness of TSD chapter, not only in its side but also in the other side since DAGs can exchange information through CSDFs. Upon such input, parties may work together through the Sub-committee on TSD with dialogue and cooperation to reach joint statement and follow-up. If there is any action needed to be taken by the Trade Committee, the issues will be referred upward.

This TSD monitoring mechanism largely depends on both sides' efforts to have meaningful dialogues and cooperation which should be informed by civil society through DAGs and CSDFs.

c. Dispute settlement mechanism

The disputes between parties on the issues covered by the TSD chapter will be settled through a tailored-dispute settlement mechanism which are dedicated specifically for the TSD chapter. If there is any disagreement on TSD matters, one party has to perform the procedure of government consultation which basically consists of information exchange, discussion with the other parties. In such consultation, both sides, upon mutual agreement, may seek the advice from appropriate bodies, or a party may also refer the issue to the Sub-Committee on TSD that may seek the advice from DAGs and other expert-assistance. If parties fail to obtain a resolution, a Panel of Experts will assess the dispute. The final report of the Panel of Experts will be published and its enforcement will be monitored by the Sub-committee on TSD as well as scrutinized by DAGs.

Again, this dispute settlement signifies the cooperation between parties and is largely based on dialogues. DAGs from both sides have a significant role here as they supervise the implementation of recommendations made in the final report of the Panel of Expert. This opens up the dispute settlement mechanism for the involvement and scrutiny of civil society through DAGs.

Through the above explanation about the TSD chapter, the promotional approach of the EU appears clearly: All binding commitments, monitoring institutions and dispute settlement mechanism are based on dialogues and cooperation in which DAGs and civil society are at the heart to support and scrutinize the implementation from both sides.

There is no regulation on trade sanctions as an enforcement tool which is a central feature of the US's conditional approach¹⁶⁰.

2.2.2 Challenges and key features for the effectiveness of TSD Chapter

To assess the effects of EVFTA to Vietnam, it is important to understand the key challenges to the effectiveness of the EU's promotional approach and therefore highlight key features necessary for the effectiveness of the TSD chapter in EVFTA.

2.2.2.1 Challenges for EU promotional approach

Challenges in implementation: Promotional approach requires continuous efforts from involving actors, in particular the EU and trade partners which is Vietnam in this case. OFSE pointed out three key problems for the implementation of the TSD chapter: different priorities, weak civil society capacity, insufficient targeting¹⁶¹. First, different parties have different priorities in their political agenda to handle issues covered by the TSD chapter. In terms of substantive matters, labour and environmental protection are usually ranked low in parties' political agenda. While officials in EC prioritize commercial dimension in trade agreement, focusing only on the procedural obligations of the TSD chapter, the trading partners do not appear to see TSD chapter as their responsibility. In some cases, the trading partners even show their resistance to TSD obligations. Furthermore, parties also have different priorities in terms of country-relations. Big and important trading partners could enjoy more effort in implementing TSD obligation than small ones. As a result, especially from the EU side who seems to be more proactive in implementation of TSD chapter, the effectiveness of TSD chapter depends on the prioritization of the respective trade relation.

Second, weak civil society capacity also limits the implementation of TSD chapter. Weak civil society has restricted capacity to participate and inform state-led committees about the need in reality, in particular the need of raising labour standards that is the main burden assigned to CSOs under TSD chapter. Without the voice from the ground, no improvement could be identified and promoted. Third, the EU builds on their promotional approach as a model applied to all FTAs, which may be insufficient in targeting contextual problems in a particular country. As a result, the legal obligations with such specific problems are not strengthened sufficiently in TSD chapter, requiring further efforts in implementation.

Challenges in enforcement: Enforcement is common problems in both the conditional approach (usually applied by US) that are usually sanction-based, and the promotional approach of the EU that does not have sanction. However, it is more challenging in the case of the EU promotional approach. After the dispute settlement process under TSD chapter which already involves some kind of dialogue through government consultations and comments on interim reports, the result is just a final report with recommendations that should be enforced under the monitoring of the Subcommittee on TSD and DAGs. This again relies upon dialogue and cooperation. The EC seem to offer no particular solution for this challenge in their 15 points to improve

¹⁶⁰ The London School of Economics and Political Science (LSE), Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements, p.16, available at https://trade.ec.europa.eu/doclib/docs/2022/february/tradoc_160043.pdf [Last access 22 May 2022]

¹⁶¹ OFSE, supra n.3, p.16

implementation and enforcement of TSD chapters in FTAs¹⁶² except expressing their assertive effort.

Challenges in ex-post evaluation: Ex-post evaluation is important for TSD chapter as it will provide the information input to determine the follow-up and direction for the implementation of TSD chapter. Except for certain TSD obligations that can be observed in clear indicators, for example: the ratification of the core ILO conventions, it is generally difficult to evaluate the result of promotional efforts from the EU to make changes in labour and environmental conditions of third countries. When it comes to human rights in general, the question of how fast the human rights situation is improved is challenging to answer. This could be exacerbated by weak local civil society that are unable to raise their voice.

These challenges make the EU's promotional approach look questionable for its effectiveness and less attractive than the US conditional approach at the first glance. However, the conditional approach also faces the same challenges: While the conditional approach may strengthen domestic laws in developing countries through ex-ant ratification, the implementation and enforcement of such laws could be weak and ineffective. This again turns to the same challenges as explained above for TSD Chapter but this time, no social dialogue mechanism is expressly regulated.

2.2.2.2 Key features for the effectiveness of TSD Chapter

Through the challenges for the promotional approach, the key features to overcome those challenges and ensure the effectiveness of TSD chapter appear to be the appropriate priorities and targeting, and the enhanced capacity of civil society, which articulate the two components of the EU promotional approach (cooperation and social dialogue) respectively

a. The appropriate priorities and targeting

Priority and targeting are keys for the parties to allocate their efforts and resources for promoting significant issues. The promotional approach requires the political will and efforts from both sides for cooperation, especially the EU who proactively formulates and applies TSD Chapter in FTAs. Such political will depends on many factors such as the importance of trade relationship between the EU and trading partners, the complexity and sensitivity of local situations. The political will from the EU is more important when the other side shows no political will for cooperation and even in some cases, resistance for the advancement of human rights-related issues.

When existing, such political will from the EU and its trading partners (if any) needs to be spent on appropriate priorities and targets. As the TSD chapter covers a broad range of labour and environmental standards different from country to country, the appropriate priorities and targeting enable parties to make appropriate efforts. From an EU perspective, identification of priorities for each FTA country will facilitate the implementation of commitment under FTAs, creating more focused and tailored EU actions¹⁶³. It means the EU can have appropriate actions to promote salient problems of

¹⁶² The EC, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements (the 15 points action plan to improve implementation and enforcement of TSD chapters in FTAs) (2018), p.8, available at: https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf [Last access 03 April 2022]

¹⁶³ Ibid, p.7

the trading partners, step up determinatively toward dispute settlement mechanisms if no progress is made and make ex-post evaluation more focused on problematic areas.

b. The enhanced capacity of civil society

Civil society is the key to make the dialogue-based mechanism in TSD chapter effective and therefore facilitate the effectiveness of TSD chapter. Civil society with strong capacity will be able to inform state-led committees through dialogues of DAGs and CSDFs about the need on the ground level. Because of such an important role, the EC asserts the efforts to enable civil society playing their role in TSD implementation, including promoting best practices, rules, recommendations and guidance for the establishment and functioning of DAGs and CSDFs¹⁶⁴.

At the time of concluding EVFTA, the EC also identified the flanking measures in six clusters of needs of which three clusters concern the role of civil society¹⁶⁵. For the implementation of EVFTA, the EC would provide further support for civil society in Vietnam in general and also promote awareness-raising for civil society about their potential positive impacts on human rights and sustainable development under EVFTA. Support for the participation of civil society (both EU and in Vietnam) in the implementation of EVFTA was also planned to be performed through financial supports for participation of civil society representatives as well as the global project for improving the functioning of the DAGs and other mechanisms of civil society participation. These support were expected to facilitate the participation of civil society in EVFTA mechanisms, resulting in meaningful recommendations, increasing transparency and accountability. Furthermore, the EC's approach to ex-post evaluation of EVFTA would also have to be formed upon an extensive stakeholder consultation in which civil society plays a significant role.

In short, the appropriate priorities and targeting as well as the enhanced capacity of civil society are the key features to facilitate effective cooperation and dialogue under TSD chapter, assisting parties to overcome the challenges in implementation, enforcement and ex-post evaluation. They thus are key features for the effectiveness of EVFTA.

2.2.3 Concluding remarks on EVFTA

As an ambitious and comprehensive FTA, EVFTA aims at promoting the trade relation between the EU and Vietnam and also, in accordance with the EU policies, uses trade to promote the EU values in Vietnam, promoting human rights and labour rights and protecting the environment. To archive the changes in Vietnam, including fundamental rights and environment-related rights, EVFTA was designed as a part of PCA and has a TSD chapter that employs the promotional approach. Upon this interface, two remarks on EVFTA should be presented:

First, the potentials for the EU to improve human rights situation in Vietnam through promoting legal reforms and better policies. The TSD chapter requires Vietnam to uphold the current level of protection, to effectively enforce existing domestic laws

¹⁶⁴ Ibid, p.5

¹⁶⁵ Flanking measures are meant to include any programme/project/exchange/technical assistance provided to public authorities and/or stakeholders in Vietnam in order to maximize possible positive impacts of the FTA and minimize potential negative impacts on them. See the European Commission, Commission Staff Working Document, supra n.140, p.20-22

and also to make improvements. Although each party still enjoys the right to regulate the levels of protection, parties also have to endeavor to ensure and improve their law and policies for high level of protection in the environmental and social areas¹⁶⁶. This allows the cooperation between EU and Vietnam to upgrade labour and environmental standards in Vietnam, which opens the chance for EU engagement to promote the advancement of these standards through supporting Vietnam to have new legal reforms and better policies that should include both new progressive policies and the policies ensuring effective enforcement of existing domestic law. Such legal reforms and better policies could relate to mHRDD which also aims at ensuring human rights in the environmental and social areas.

In addition to the TSD chapter, the EC pointed out that Chapter 16 (Co-operation and Capacity-building) lays out the chance for both sides to cooperate in the activities promoting human rights-related issues to obtain sustainability in all of its dimensions¹⁶⁷. This is particularly significant as it arguably provides a legal ground for the cooperation between EU and Vietnam to promote trade-related human rights issues, including mHRDD. In other words, this creates a channel for the EU to use EVFTA to promote the awareness and implementation of mHRDD legislations in Vietnam.

In brief, EU at least has TSD chapter (on labour and environmental standards), PCA (on human rights issues as general) and trade relation (as the leverage) to promote legal reforms and better policies in Vietnam, ensuring the positive changes in the human rights situation, including labour rights and environment-related rights in particular.

Second, the promotional approach relies on civil society involvement to ensure transparency and improvements of human rights situation. The human rights clauses and non-execution clause in PCA could play a role as a sanction-like final resort. However, the EU approach to human rights under the TSD chapter is a promotional one which is ‘persuasion’ rather than ‘coercion’, therefore relying on soft mechanisms of enforcement¹⁶⁸ that requires much effort before the final resort could be triggered. The mechanisms under the TSD chapter allow the involvement of civil society, creating the chance for public scrutiny and transparency on the implementation of the TSD chapter.

To be effective, the implementation of the TSD chapter needs the appropriate priority and targeting from the EU on significant issues in Vietnam. It is also vital for facilitating the involvement of civil society in the implementation of the TSD chapter through DAGs and CSDFs.

2.3 The relation between mHRDD legislations and EVFTA in the EU policies

Although they are different instruments dealing with different subjects, it is necessary to observe, especially the CSDD Directive and EVFTA, from the perspective of EU policies to see them as a comprehensive legal framework that promotes changes in third countries like Vietnam.

On the one hand, the CSDD Directive proposal is prepared through the Sustainably Corporate Governance initiative (SCG) which falls under the policy of ‘An Economy

¹⁶⁶ EVFTA, Article 13.2

¹⁶⁷ The European Commission, Commission Staff Working Document, *supra* n.140, p. 11

¹⁶⁸ OFSE, *supra* n.3, p.12

that Works for People’ and also relates to the EU Green Deal¹⁶⁹. While the policy of ‘An Economy that Works for People’ more focuses on the internal market and people across EU region¹⁷⁰, the SCG explicitly was expected to help companies to better manage sustainability-related matters in their own operations and value chains as regard to social and human rights, climate change, environment¹⁷¹. Sustainability corporate governance allows the EU to achieve an economy that is both resilient and sustainable, to enhance the level playing field on which EU companies’ international competitiveness is maintained and boosted as well as workers and EU business are protected from unfair competitions from third countries. As a result, corporate sustainability governance can benefit EU trade and investment policy¹⁷². In addition, CSDD is also a part of the law-package to realize the EU Green Deal by which the EU can obtain a sustainable decarbonized economy while still maintain its competitiveness. From that policy-background, CSDD legislations are first aimed at enhancing sustainable corporate governance in an internal dimension and CSDD’s extraterritorial effects are to ensure a level playing field for EU businesses.

On the other hand, EVFTA is in line with the policy ‘Trade for All’ in which trade policy is used to promote the EU values (high social and environmental standards, and respect for human rights) to enhance sustainability and make changes on the ground as explained above. Apart from that, the TSD chapter in EVFTA (or other similar FTAs) is also aimed at a level-playing field between the EU and Vietnam (or other trading partners)¹⁷³. FTAs are therefore primarily in the external dimension of EU policy with the primary effects aimed at changes in third countries.

The meeting point between an internal-oriented instrument (CSDD directive proposal) and an external-oriented instrument (EVFTA) is that both bear on international trade and have the same expected effects which are to promote sustainability and standards, including human rights protection, on the ground in third countries for ensuring level playing field between the EU and third countries. They are all aligned with the EU trade policies in ‘Trade for All’ which states that “responsible management of global supply chains is essential to align trade policy with European values” and that EC will encourage trading partners to comply with UNGPs, UN Global Compacts, ILO Tripartite Declaration and in particular OECD MNE Guidelines. Those principles are the foundation of CSDD and are expressly referred in EVFTA. Therefore, CSDD and EVFTA should be seen as a legal framework in which the CSDD proposal has extraterritorial effects to make changes with a bottom-up approach and EVFTA has the effects with a top-down approach. They all aligned with EU policies and serve for the same purposes.

¹⁶⁹ DIHR, *supra* n.87, p.8

¹⁷⁰ The EC, An Economy that Works for People, available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people_en [Last access 4 April 2022]

¹⁷¹ The EC, Sustainable Governance Initiative, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en [Last access 4 April 2022]

¹⁷² The EC, Sustainability Corporate Governance – Text adopted, para.4, p.6, available at https://www.europarl.europa.eu/doceo/document/TA-9-2020-0372_EN.html [Last access 4 April 2022]

¹⁷³ Madelaine Tuininga, Trade and Sustainable Development Chapters in EU trade agreements, p.12, available at: https://www.amfori.org/sites/default/files/TSD%20Chapters%20in%20FTA_discussion%20enforcement%20FTA%2011%20sep.pdf [Last access 4 April 2022]

3 The human rights governance gap on business-related human rights impacts in Vietnam

By analyzing both the EU mHRDD legislations and EVFTA, their potential impacts by design was illustrated. How far those potential impacts are materialized will significantly depend on the contextual reality. This chapter will demonstrate that there are human rights governance gaps in Vietnam which could prevent the effectiveness of EU legal framework and also could potentially be overcome by such EU legal framework.

To demonstrate those gaps, this chapter first frames a model of human rights governance gaps which bases on the idea of polycentric governance embodied in UNGPs. Certain features of such governance gaps with respect to export-oriented industries in Vietnam will also be pointed out. Then, the current regulatory framework in Vietnam that creates and facilitates those governance gaps will be shown in the second section of this chapter. The third section presents some practical troubles that worsens the governance gaps, which is followed by some concluding remarks in the fourth section.

3.1 General model of human rights governance gaps and special features in export-oriented industries

3.1.1 General model for human rights governance gaps

The notion of governance gap was defined by SRSJ John Ruggie in the Protect, Respect and Remedy framework as below:

The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge¹⁷⁴.

In other words, governance gaps occur when the societies do not have sufficient capacity to manage adverse impacts of businesses which are increasingly more powerful. Upon the idea of polycentric governance, the governance of society consists of public governance, civil governance and business governance. When these components fail to manage business-related AHRIs, the governance gaps occur, allowing companies to escape from their accountability. There are possibly two ways to illustrate such governance gaps: supply-chain model and country-model.

¹⁷⁴ Protect, Respect and Remedy: A framework for Business and Human Rights, supra n.6, para. 3

In the supply-chain model, public governance includes both home state and host state while civil governance also includes civil society from both home and host state. There are *inter alia* two governance gaps that could be visualized clearly: The first one is the gap between the home state and suppliers/contractors in the host state where subsidiaries of transnational enterprises purchase from such local suppliers/contractors. The second one is the gap between transnational enterprises and affected people who suffer from adverse human rights impacts. No legal relationship governs these gaps at all¹⁷⁵.

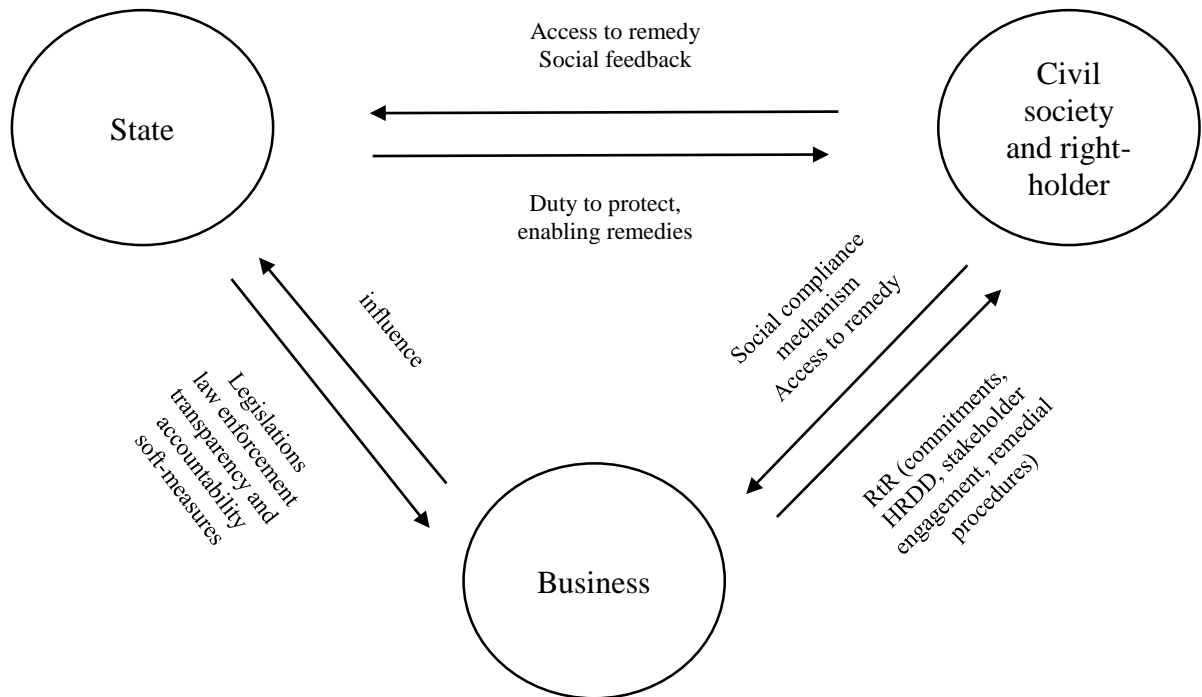
In a country-model, public governance is conducted by the State (Government) and civil governance is the task of civil society and right-holders. The governance gaps therefore occur when state, civil society and business do not complement each other to manage business-related AHRIs as proposed by UNGPs. This model could be extended to include three blocks of governance in both home and host states. However, for the purpose of this thesis, this model only includes the blocks in the host state.

For the purpose of this thesis, the country-model will be used to demonstrate the governance gaps in the country context of Vietnam. It is necessary to first illustrate the polycentric governance idea under UNGPs in a country-model and then frame governance gaps upon such model.

3.1.1.1 An illustration of polycentric governance under UNGPs

Section 2.1.1.2 introduced the UNGPs with the significant role of HRDD (as a core component of RtR and as an enabling measure between three pillars) and then section 2.1.4 presented the key features for the effectiveness of mHRDD. Upon such foundation, this part will use, amongst other things, some of the key features of UNGPs to illustrate the idea of polycentric governance in a country-model which consists of (i) state (public governance), (ii) civil society, right-holders (civil governance) and businesses (corporate governance). The polycentric governance under UNGPs could be illustrated as below:

¹⁷⁵ For example: Nguyen, Trang (Mae), Co-Constructing Business Governance (July 29, 2019). 31 Stan. L. & Pol'y Rev. 143 (2020), p.151-152, available at SSRN: <https://ssrn.com/abstract=3428636> [Last access 05 April 2022]



(With the reference from the presentation of Prof. John Ruggie¹⁷⁶)

In Pillar I, State has the duty to protect under international human rights law which requires State to protect individuals from human rights violations conducted by third parties, including businesses. To fulfill its duty, States use legislations (including mHRDD legislations), law enforcement, transparency and accountability requirements as well as soft measures to make businesses refrain from adversely impacting on human rights enjoyment. Right-holders with the support from civil society obtain necessary information and are able to seek remedies through state-based mechanisms. Civil society and right-holders can seek from State various forms of effective remedies which are not necessarily monetary compensations¹⁷⁷. They should enjoy the right to effective remedies, having “equal and effective access to justice”, “adequate, effective and prompt reparation for harm suffered” and “access to relevant information concerning violation and reparation mechanism”¹⁷⁸. Apart from the duty to protect, states should also use soft-measures to encourage business to respect human rights.

In Pillar II, business respects human rights by HRDD, stakeholder engagements, and remedial procedures (for example: grievance mechanism). Amnesty International had pointed out that companies may use their negative influences to undermine human

¹⁷⁶ John Ruggie, CEL Annual Lecture in Centre for Ethics and Law, University College London (25 February 201xxx), available at: https://media.business-humanrights.org/media/documents/files/documents/Ruggie_UCL_lecture_Final_Read-Only.pdf [Last access 06 April 2022]

¹⁷⁷ UN General Assembly, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147), 21 March 2006, para. 18

¹⁷⁸ Ibid, para. 11

rights enjoyment¹⁷⁹. In the opposite direction, they also use their influence and support to assist State in its own human rights obligations in line with UNGP Principle 11.

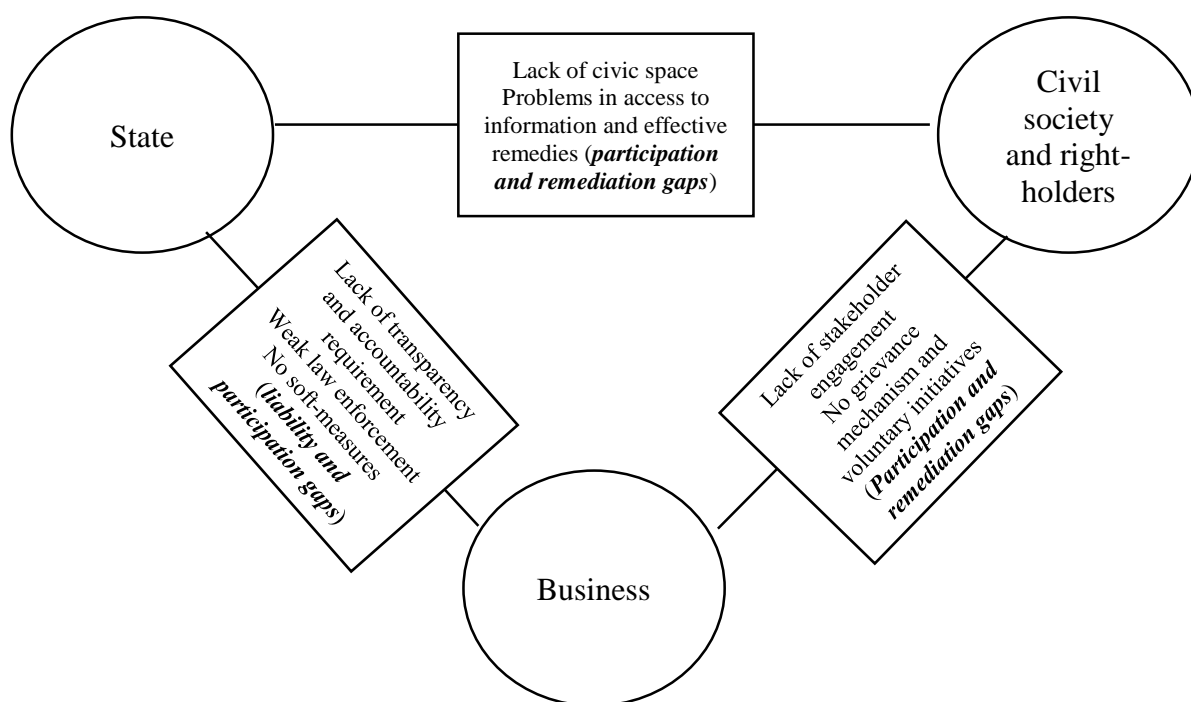
In Pillar III, civil society and right-holders (including workers) should have access to relevant information which they could obtain from business’s compliance with statutory transparency requirements or the information held by states. This will help them to engage in civil compliance mechanisms like campaigns, lawsuits, whistleblowing or other forms that pressure companies to respect human rights, or partnering with businesses. They should be able to seek remedies from businesses or state and should be protected in doing so. Through these activities, civil society, stakeholders and right-holders may help and support corporate governance to respect human rights. Besides, civil governance also provides social feedback for State to shape better legal framework and policies with respect to business-related human rights impacts.

By those connections between three pillars, the polycentric governance model provides a holistic governance in which each pillar supports and complements to others.

3.1.1.2 Framing the human rights governance gaps in Vietnam

When the blocks of governance complement and strengthen each other within an effective regulatory framework and voluntary collaborations, business-related AHRIs will be well managed. In other words, the connections between three blocks should exist within a smart mix of measures. The governance gaps exist when there are no or weak connections between three blocks of governance, providing a permissive for business-related AHRIs to occur without adequate sanctions or reparation.

By considering the connections between those blocks of governance sectors, this part will demonstrate the constitutive parts of governance gaps in Vietnam which could be illustrated as below:



¹⁷⁹ Amnesty International, *Injustice Incorporated: Corporate abuses and the human right to remedy*, London 2014, p.183-188

The gaps between three block of governance¹⁸⁰ in Vietnam context exist, preventing the connections between them in managing business-related AHRI:

- In the relation between **State-corporate**: there is a lack of statutory requirements for transparency and accountability from companies in doing businesses. Companies therefore lack of motivation to respect to human rights (*liability gaps*) and civil governance also has to deal with an information asymmetry which is one of the main hurdles to prevent right-holders from accessing effective remedies. This gap is exacerbated by weak enforcement of existing laws which could result from many factors, including lack of resources, institutional limits or corruption. In addition, State seems not to have policy measures, such as incentive policies, export credits or equivalent facilitation, to encourage business's respect to human rights while companies also have no reason to engage with State in promoting human rights enjoyment (*participation gaps*)

- In the relation between **State-civil society**: the current regulatory framework does not sufficiently protect and facilitate civic space, both online and offline, which is the necessary environment for civil society, stakeholders and right-holders to operate and exercise their functions in order to engage/support State in managing business-related human rights problems as well as to collaborate, monitor and criticize businesses (*participation gaps*). Moreover, there are problems for right-holder to access effective remedies in state-based mechanism, for example: lack of regulation on cause of action with respect to certain type of human rights violations, legal standings of NGOs, collective redress/action, the requirements for state-based mechanisms to report human rights problems and lengthy statutory proceedings (*remediation gaps*).

- In the relation between **Civil society – corporate**: As there are limited statutory requirements for stakeholder engagement and the lack of civic space, civil governance hardly conducts social compliance mechanisms (campaigns, lawsuits, other forms of pressures and also partnering) with respect to companies and provides social feedback to State (*participation gaps*). As a consequence, companies rarely engage with stakeholders or offer remedial mechanisms (in particular grievance mechanisms). There are also very few practical voluntary initiatives from companies to manage AHRI (*remediation gaps*).

In short, the above model illustrates that the governance gaps existing between three blocks of governance in the context of Vietnam interplay and exacerbate each other, leaving three blocks of governance to operate separately without connection. This allows business-related AHRI to occur in the absence of polycentric governance envisaged by UNGPs. Before applying this model by the contextual elements in Vietnam, the following part will present special features of governance gaps in export-oriented industries supplying to the EU from Vietnam.

3.1.2 Special features of governance gaps in export-

¹⁸⁰ The governance gaps were inspired by the ideas of Dr. Radu Mares presented in 'The United Nations Draft Treaty on Business and Human Rights' forthcoming in Marx, Van Calster & Wouters (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar, 2022), p.4-9, available at <https://www.researchgate.net/publication/356264576> *The United Nations Draft Treaty on Business and Human Rights* [Last access 24 April 2022]

oriented industries

The Vietnamese export-oriented industries supplying to the EU need a particular focus for the purpose of this thesis because they are the primary actors affected by the EU legal framework (mHRDD legislations and EVFTA). They are the actors that connect global value chains to Vietnam industries and also the actors, alongside with EU exporters, form the trade-relation between EU and Vietnam. Therefore, the external force of the EU legal framework to improve the human rights situation in Vietnam would be largely exercised through these industries.

In Vietnam, the export-oriented industries supplying to the EU mainly include telephone sets, electronic products, footwear, textiles and clothing, coffee, rice, seafood, and wood-products and furniture¹⁸¹. Most of these export-oriented industries are in global value chains that are *buyer-driven and labor-intensive* ones. Therefore, civil governance, in particular from consumers and workers, play an important role in preventing business-related AHRIs in Vietnam.

Upon such nature of the Vietnam export-oriented industries and the general model of governance gaps developed in section 3.1.1, there are a number of special features of the governance gaps in export-oriented industries:

- Lack of traceability and supply-chain transparency that may help civil society and consumers in the EU to pressure Vietnamese companies to comply with human rights standards.
- The shortcoming of the regulatory framework on trade union, collective bargaining and strike as well as the lack of awareness of workers on their rights prevent workers from stepping up to protect their rights.
- Low effectiveness of law implementation, especially labor-inspectorates.
- Lack of engagement of NGOs and civil society, which do not enjoy sufficient civic space, to pressure the good practices and voluntary initiatives.
- Workers and other right-holders have to encounter many difficulties in access to effective remedies from State.

In brief, this section 3.1 develops a general model of governance gaps in Vietnam upon a country-model in which the gaps allow business-related AHRIs to occur without adequate accountability. Some of the special features of export-oriented industries are also briefly presented. These gaps exist primarily due to the shortcomings of the current regulatory framework which is exacerbated by other political and practical factors in Vietnam. Through assessing the current legal framework of Vietnam, the below section will prove the general model and special features presented.

¹⁸¹ EU delegation in Vietnam, EU Vietnam relation, available at: https://www.eeas.europa.eu/vietnam/v%E1%BB%81-ph%C3%A1i-%C4%91o%C3%A0n-eu-t%E1%BA%A1i-vi%E1%BB%87t-nam_vi?s=184&page_lang=en [Last access 10 April 2022];

3.2 Human rights governance gaps in current regulatory framework

Through the assessment on the current regulatory framework in Vietnam, this section will highlight the primary causes of *the above general model of governance gaps* and the special features of governance gaps in export-oriented industries in Vietnam. Before assessing the regulatory framework in Vietnam, it is necessary to establish a brief overview on certain features of such regulatory framework. Amongst other things, there are four main types of regulatory instruments: the institution, law and legislative code, decree and circular. As a single-party country with centralized-government, Vietnam has one institution which has the supreme effect. Below the institution, there are around 251 laws and legislative codes adopted by the National Assembly (Parliament) which usually have principle-based regulations with the popular clause of “the Government shall provide detailed instructions on this matter”. To guide those law and legislative codes, the Government has currently around 1834 effective decrees which are mostly prepared by appropriate ministries and then adopted collectively by the Government. However, the decrees still need further guiding instruments which are circulars promulgated by relevant ministries. There are 5172 effective circulars¹⁸². As a result, the regulatory framework in Vietnam has long been recognized as ‘fragmented’ and sometimes, if not prevalently, “incoherent”. This leads to different understandings and therefore different implementations amongst authorities.

For the purpose of this section, the current regulatory framework is divided into five areas: (i) civic space, (ii) labour and trade union, (iii) corporate and investment laws, (iv) business in the community and (v) access to remedies. Each area is assessed to highlight the elements of human rights governance gaps illustrated in the country-model.

3.2.1 Civic space

Civic space (or civil society space) is the enabling environment in which people and groups – or “civic space actors” – are able to participate meaningfully in the political, economic, social and cultural life of their societies¹⁸³. When it is open, people and civil organizations are able to exercise their rights and influence the political and social structures around them¹⁸⁴ through civil activities. The vehicles for civil society to conduct civil activities include inter alia freedom of opinion and expression, freedom of peaceful assembly and freedom of association. A comprehensive legal framework that protects those freedoms is a prerequisite to creating and maintaining an open civic space¹⁸⁵. Nowadays, the notion of civic space is not only limited to the physical life (offline space)

¹⁸² Thuvienphapluat (the Law Library – a private Vietnamese law database), effective instruments, <https://thuvienphapluat.vn/page/searchfast.aspx?effect=1&fields=0&type=0&bdate=11/04/1942&edate=12/04/2022&lan=1&sort=0&fasttype=1> [Last access 12 April 2022]

¹⁸³ UN Guidance Note – Protection and Promotion of Civic Space (2020), p.3, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/CivicSpace/UN_Guidance_Note.pdf [Last access 13 April 2022]

¹⁸⁴ CIVICUS, ‘What is civic space?’, available at: <https://monitor.civicus.org/whatis-civicspace/> [Last access 13 April 2022]

¹⁸⁵ Ibid; also see the report of the UN High Commissioner for Human Rights, ‘Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned’ (2016) (A/HRC/32/20), para. 12-13, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/073/52/PDF/G1607352.pdf?OpenElement> [Last access 13 April 2022]

but also extend to the internet and cyber environment (online space). The legal framework should therefore protect fundamental freedoms of people and CSOs in both online and offline space.

These key freedoms are stipulated in ICCPR to which Vietnam has ratified for almost forty years. However, the regulatory framework seems to still have shortcomings in comparison to international standards, not effectively guaranteeing an open civic space in Vietnam – a single-party country led by communism ideology. At the highest level, article 25 of the Constitution (2013) provides that:

“Citizens have the right to freedom of speech and freedom of the press, and have the right of access to information, the right to assembly, the right to association, and the right to demonstrate. *The exercise of those rights shall be prescribed by law*”.

Although the key freedoms are basically guaranteed in this article, the exercise and enjoyment of such freedoms must be in accordance with law (including legislations, decrees and circulars) which contain many shortcomings.

3.2.1.1 Freedom of opinion and expression

Noticeably, no freedom of opinion is explicitly guaranteed in the Constitution. There are many severe restrictions on freedom of opinion and expression in law that appear not to comply with the principles of legal certainty, necessity and proportionality¹⁸⁶. Amongst other things, two legislations that have significant impacts on freedom of expression are the law on press and the law on cybersecurity. First, the law on the press 2016 provides State’s control over media with restrictions aimed at ensuring strict adherence to and promotion of government policy and prohibit any criticism of the Government which include policies and decisions on businesses. Medias and presses can only be operated by state, state-affiliated organizations. No private-run press is allowed. Technically, individuals and groups can only express their opinion in those media and presses which easily fall under some kinds of censorship.

Second, the law on cybersecurity 2018 and other related regulations contain many restrictions curtailing the freedom of expression in cyberspace. Article 8 of the law has vague prohibitions on spreading information opposing or criticizing the State¹⁸⁷, including the state policy on ‘order of economic management’. The law renders a level of arbitrary for law enforcement force in controlling internet users’ opinions and expressions, and also deter people expressing their dissent or disagreement with the fear of punishment. Third, although Vietnam has had the law on access to information from 2016, the ambiguity of that law and procedures thereof seems not to facilitate the effective implementation in reality. Some of the provisions are not yet compatible with international standards¹⁸⁸ like not having an independent supervising authority, and even State authorities cannot implement the law due to lack of understanding¹⁸⁹.

¹⁸⁶ Human Rights Committee, Concluding observations on the third periodic report of Viet Nam, CCPR/C/VNM/CO/3 (CCPR 2019), para. 45-46, available at: <https://uhri.ohchr.org/en/document/07477f9f-db88-4be7-9277-ceb344a24356> [Last access 14 April 2022]

¹⁸⁷ Ibid

¹⁸⁸ CARE, The Law on Access to Information: A quick review, available at: <https://www.care.org.vn/the-law-on-access-to-information-a-quick-review/> [Last access 14 April 2022]

¹⁸⁹ Oxfam in Vietnam, Report: Assessment on Implementation of Access to Information Law (2nd Round) (2020), p. 25-35, available at: https://oi-files-cng-prod.s3.amazonaws.com/vietnam.oxfam.org/s3fs-public/file_attachments/BaoCaoLuatTCTT-2020.pdf [Last access 18 April 2022]

Forth, the formulated offences in articles 109 (Activities against the people's government), 116 (Sabotaging implementation of solidarity policies), 117 (Making, possessing, spreading information, materials, items for the purpose of opposing the State of Socialist Republic of Vietnam) and 331 (Abusing democratic freedoms to infringe upon the interests of the State, lawful rights and interests of organizations and/or citizens) of the Penal Code 2015 are very vague, and are used curtail freedom of opinion and expression¹⁹⁰.

Apart from the laws themselves, there are problematic practices, such as suppressions on people who criticize State and establishing the Force 47 cyber unit to control the internet, which was pointed out by the Human Rights Committee (UN HRC) and other countries in UPR. UN HRC recommended that Vietnam, as a matter of urgency, revises legislations to end violations on freedom of expression and to ensure that restrictions do not go beyond limitations set in ICCPR¹⁹¹.

3.2.1.2 Freedom of peaceful assembly

Although the freedom of peaceful assembly is guaranteed as “prescribed by law”, there is no law at all to instruct Vietnamese citizens how to exercise their rights. This problem has been recognized by the UN HRC and other countries in UPR for a long time¹⁹² but no progress was made. The bill of law on assembly and demonstration has been prepared for being adopted by the National Assembly but postponed for many times. The bill, although containing many restrictions, encounters disagreement from both state authorities and civil societies, facing a prospect of extremely restricted legislation.

Besides having no law, people and groups also have to face with serious criminal penalties if their public assembly and demonstration could be seen as crimes of national security which was regulated vaguely and broadly under Penal Code 2015, for example the crime of ‘Disruption of security’ stipulated in Article 118:

“Any person who, for the purpose of opposing the people's government, incites, persuades, gathers other people to disrupt security, resists law enforcement officers in the performance of their duties, obstruct the operation of agencies or organizations shall face a penalty of 05 - 15 years' imprisonment”

Amid the vacuum of regulatory framework and the fear of criminal liability, it is very difficult for civil society to exercise their freedom of peaceful assembly as stipulated in Article 21 of ICCPR.

3.2.1.3 Freedom of association

Similarly, there is also no legislation on the freedom association in Vietnam. Currently, a number of decrees fragmentally regulate this matter, for example: Decree No. 45/2010/ND-CP on the organization, operation and management of association, Decree No. 12/2012/ND-CP on registration and management of activities of foreign NGOs in Vietnam. These regulations normally restrict the operation of CSOs in a narrow scope and pose excessive obstacles in registration processes. UN HRC did raise the concerns about these undue restrictions and also particularly concerned about the

¹⁹⁰ Human Rights Committee, *supra*. n,185, para. 45

¹⁹¹ *Ibid*, para. 46

¹⁹² *Ibid*, para. 47; See also see also Report of the Working Group on the Universal Periodic Review – Vietnam A/HRC/41/7 (UPR 2019) and A/HRC/26/6 (UPR 2014)

restrictive regulations on foreign funding, which can be used to tighten control over associations and limit their ability to receive such funds¹⁹³.

Without a clear legal framework that enables the establishment, management and operation of public associations, including independent trade unions which will be further discussed in the next part, it is very difficult for citizens to exercise their right to freedom of association with the aim of establishing CSOs to perform civil activities.

A cross-cutting deterrent to the enjoyments of the above fundamental freedoms is the lack of legal certainty of certain offences in the Penal Code (2015). Some of the crimes related to national security were formulated broadly and vaguely (like Article 109, 116, 117 and 118), encompassing legitimate activities permissible under international standards but being in the legal vacuum of the regulatory framework. An extremely controversial crime that may be used to punish any exercise of fundamental freedoms because of its definition's uncertainty is Article 331. Article 331 laid out in the chapter on offences against administrative management order punishes the abusing of democratic freedoms to infringe upon the interests of the State, lawful rights and interests of organizations and/or citizens:

“Any person who abuses the freedom of speech, freedom of the press, freedom of religion, freedom of association and other democratic freedoms to infringe upon the interests of the State, lawful rights and interests of organizations and/or citizens shall receive a [criminal] warning or face a penalty of up to 03 years' community sentence or 06 - 36 months' imprisonment.

If the offence has a negative impact on social security, order or safety, the offender shall face a penalty of 02 - 07 years' imprisonment”.

‘Abuse’ or ‘not abuse’ has naturally a sentimental characteristic which hardly fits with the principle of legal certainty, necessity and proportionality. The ambiguity of this article has long been flagged by international bodies and other countries in UPR, it however still survives in the Penal Code 2015 (previously it is Article 258 under the Penal Code 1999), despite those concerns and recommendations.

Upon the above regulatory framework, the civic space in Vietnam appears to be suffocated, failing to enable fundamental freedoms. People and groups are facing difficulties in establishing CSOs and conducting civil activities. It does not fully guarantee accessing information, engaging in dialogue, expressing dissent or disagreement, and joining together to express civil views on social, economic, environmental and other issues affected by business, especially when such issues, to certain extent, have the involvement of State's decision and policies. Due to the tightened civic space, civil society also does not have the chances to exercise the right to participate in public affairs including managing business adverse impacts. Particularly, the voice of civil society (or social feedback) on the development of policies and decisions concerning businesses will be hardly effective. In the other dimension, companies do not have to encounter much social pressure and do not have many choices in engaging with CSOs and NGOs because those organizations do not, at the first place, find the way to exist and operate in relevant areas.

¹⁹³ Ibid, para. 49

3.2.2 Labour and independent trade union

Although labour and independent trade union closely relate to and, to certain extent, are subsets of civil society, the regulatory framework on labour and trade union needs to be assessed in a separate section because they are key societal sectors for the implementation of EU legal framework (the meeting point of both CSDD and EVFTA) and there are special features covered under sophisticated layers of this regulatory framework.

At a minimum, the regulatory framework on labour must protect the ILO's Declaration on Fundamental Principles and Rights at Work, which regulate fundamental labour rights being as human rights, and other international labour standards of key instruments of IHRL. Amongst those labour rights, two ILO hardcore rights, including the Freedom of Association and Protection of the Right to Organize under Convention No. 87 and the Right to Organize and Collective Bargaining Convention No. 98, are significant as they provide tools for workers to safeguard their other legitimate rights and interests. In IHRL, Article 8 of ICESCR requires States to ensure the right to freely form and join trade unions at one's choice, right to strike and other trade-union related rights while Article 22 of ICCPR also protects the right to form and join trade unions. The enjoyment of these rights are decisive for the business-worker engagement as well as necessary to facilitate and promote voluntary initiatives to prevent business-related AHRIs within industrial relations.

Vietnam has ratified seven out of eight ILO core conventions of which the Convention No.98 (the Right to Organize and Collective Bargaining) was ratified just right before the signing of EVFTA in 2019. So far the Convention No. 87 (the Freedom of Association and Protection of the Right to Organize) has not been ratified despite the recommendations from international bodies and other countries in UPR¹⁹⁴.

In term of substantive standards on working conditions, forced labour and child labour, the regulatory framework of Vietnam are mostly aligned with international standards¹⁹⁵. The implementation of regulation on substantive standards depends on the regulatory framework of procedural rights which contain severe shortcomings. Three areas in this regulatory framework that should be focused are the regulations on: Trade union and representative organizations of workers, collective bargaining and right to strike.

¹⁹⁴ Ibid; See also A/HRC/41/7 (UPR 2019), para. 38.236 (recommendation of Canada); Committee on Economic, Social and Cultural Rights in E/C.12/VNM/CO/2-4 (CESCR 2014), para.21

¹⁹⁵ A study conducted by United Nation Development Program (UNDP) Vietnam has found that: Although still having some misalignments and problems in comparison to international standards under ILO conventions and IHRL, most of regulations in Vietnam are compatible with those international standards. The majority of recommendations made by UNGP in the study is for Vietnam to ratify further ILO conventions and ensure the effectiveness of implementation of regulatory framework in reality which points to the problems presented in this section. See UNDP Vietnam, Preliminary Assessment of Regulatory Framework on Responsible Business Practice in Vietnam (2020), section 32., 3.3 and 3.4, available at https://www.vn.undp.org/content/vietnam/en/home/library/democratic_governance/preliminary-assessment-of-the-regulatory-framework-on-responsible-business-practice-in-viet-nam.html [Last access 15 April 2022]

3.2.2.1 Trade union and representative organizations

The Labour Code 2019 of Vietnam was issued after the negotiation of EVFTA, having significant changes of which a new form of representative organization at the grassroots level is called “*employee organization in enterprise*’ (EOE)¹⁹⁶. As a result, there are possibly two types of employee representative organizations in one enterprises: trade union (state-affiliate organization established and operating under the Law on Trade union) and EOE (voluntarily established by employees under Article 172 of Labour Code 2019), which are collectively referred to as ‘grassroots employee representative organization’. Some may think that EOE could serve as an independent trade union because the Labour Code prohibits any kind of discriminations against and between members of EOE and trade unions. But it is not.

There are three shortcomings of the regulatory framework on EOE that do not align with international standards: First, in its nature EOE is established by employees in one specific enterprise and can only operate with respect to the labour-related matters inside such specific enterprise¹⁹⁷. EOE cannot together establish federation or confederation to protect employees’ rights in higher levels, for example industrial zones, regional, provincial or nationwide scale. EOE is only permissible to join the Trade union system, not other systems. In contrast, trade union is a part of Vietnam General Confederation of Labour (VGCL)– a State-affiliate entity which has the official status of a politic-social organization and is able to operate in politic system of Vietnam¹⁹⁸. For example, VGCL can even propose a bill to the National Assembly¹⁹⁹ - a power that only few politic organizations and state authorities may have. As a result, the stands of EOE which has locally strict functions and trade unions may be different from business perspective. The effectiveness of trade unions, especially in private sectors, has long been questionable while EOE are not backed by the collective powers of federation.

Second, financial inequality is another aspect that has chilling effects on EOE. While the employees as members of EOE must contribute a membership fee to maintain the operation of EOE, trade unions enjoy a compulsory funding resource. Under the law on Trade union, companies have to contribute an amount of 2% of their salary-budget to the trade union system, regardless of whether there is trade union in their companies or not as well as the number of employees who are members of trade union. From the business perspective, there is no reason for companies to encourage the establishment of EOE which may entail voluntary financial aids. From the view of employees, those 2% which is actually deduced from their salary and partially transferred to higher-levels of trade unions, leaving around 78% (of such 2%) used for grassroots trade-union operation. As a result, establishing another employee representative organization – EOE and paying more fee is not tentative for employees. Unless this financial regime is changed, there is an inequality between EOE and trade union.

Third, the controls over registration and operation of EOE seem to be excessive. To be registered, EOE must satisfy the conditions laid out by the Government including:

¹⁹⁶ The name in Vietnam is “Tổ chức của người lao động tại doanh nghiệp” which literally can be translated as “employee’s organization in enterprise’. Some translate this term as ‘internal employee organization’ to highlight its nature of being intra-enterprise. Together with trade union in the enterprise, they are referred as “grassroots employee representative organization’.

¹⁹⁷ Vietnam’s Labour Code 2019, Article 172 (2) and 174 (1)

¹⁹⁸ Vietnam’s Law on Trade Union 2012, Article 1

¹⁹⁹ Ibid, Article 12

minimum number of members, the leading member not having criminal records of offences, *inter alia*, against human rights freedom and democratic freedoms of citizens (obviously this includes Article 331 of Penal Code)²⁰⁰. The details and conditions for EOE registration will be stipulated by a decree of Government which, to date – after almost three years of Labour Code 2019, has not been issued. In addition, the charter of EOE will also be guided in details by such decree which must follow the strict layout in Labour Code, ensuring that EOE operation sticks within enterprise and its existence depends on the existence of enterprise²⁰¹. A detailed and strict decree is expected.

3.2.2.2 Collective bargaining

Besides other recommendations on practical implementation of collective bargaining regulations, ILO also pointed out a number of shortcomings: insufficiently dissuasive fine on the violation of companies to the right of collective bargaining, no explicit regulation on collective bargaining in national level, minimum threshold of representativity for collective bargaining, lack of independence in mechanism for collective dispute settlement²⁰². The regulation on minimum threshold is of significance as it determines which representative organization – trade union or EOE- is able to initiate and lead the collective bargaining process.

Article 68 of the Labour Code requires grassroots employee representative organizations (EOE and trade union) to meet a certain minimum threshold, which will be stipulated by the Government, in order to initiate the collective bargaining process. When multiple organizations meet that threshold, the largest organization will obtain the right of collective bargaining and other eligible organizations need the consent of such largest organization to participate in collective bargaining. With all unfavorable conditions for EOE as explained above, this may potentially constitute an indirect discrimination to EOE and its members.

3.2.2.3 Right to strike

The regulation on strike is notorious for its lengthy procedure. Under the previous Labour Code 2012, no strike complies with procedural requirements under the law²⁰³. Although Labour Code 2019 has simplified the procedure²⁰⁴ for strike, it is still very lengthy and excessive for organizing a strike. Most of, if not all of, strikes occurring under Labour Code 2019 are spontaneous with the faint role of state-affiliate trade unions²⁰⁵. Besides, the Committee on Economic, Social and Cultural Rights (UN

²⁰⁰ Vietnam's Labour Code 2019, Article 173

²⁰¹ Ibid, Article 174

²⁰² Direct Request (CEACR) - adopted 2021, published 110th ILC session (2022), Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Viet Nam, available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:4122278:NO [Last access 15 April 2022]

²⁰³ VGCL statistic shows that no strike in 1000 strikes occurring between 2013 and 2016 complies with statutory procedures under Labour Code 2012, source: <http://www.congdoan.vn/tin-tuc/quan-he-lao-dong-505/de-dinh-cong-dung-luat-125532.tld> [Last access 15 April 2022]

²⁰⁴ Under labour code 2012, a collective dispute on labour interests must be undergone through mediation, then labour arbitration council before being processed in the procedure for strike. Labour Code 2019 still require mediation in the first place and then representative organizations could choose labour arbitration council or the procedure for strike.

²⁰⁵ There are plenty of media on this: see BBC, constant strikes of worker and the faint role of state-trade-union, available at <https://www.bbc.com/vietnamese/forum-60343718> [Last access 15 April 2022]; DanViet (official press in Vietnam), increase of strikes and work-stops, what is the reason?, available at: <https://danviet.vn/gia-tang-cac-cuoc-dinh-cong-ngung-viec-tap-the-do-dau-20220216111913043.htm>

CESCR) did raise its concern in 2014 on the regulation that participation in illegal strikes can lead to employee's compulsory payment of compensation to employers²⁰⁶, which provide dissuasive effects on the enjoyment of right to strike. This provision still exists in Labour Code 2019.

In sum, EOE under the Labour code in Vietnam is not an independent trade union and is in a position that is not favourable as a state-affiliate trade union of which effectiveness is questionable. Without an effective representative organization, employees are having difficulties in exercising relevant rights to protect their interests and companies also have no considerable pressure to engage with their workers or to initiate voluntary initiatives. In other words, the current regulatory framework on labour and independent trade union in Vietnam has many shortcomings, not facilitating stakeholder engagement (especially between workers and employers) or promoting voluntary initiatives.

3.2.3 Corporate governance laws

In the relation between State and business, regulatory framework on corporate and investment matters is the primary tool-box to ensure business's respect to human rights. In such toolbox, mHRDD legislation is the direct tool to fill in the liability and participation gaps between State and business, and it has not existed in developing countries including Vietnam. Through analyzing corporate and investment laws in Vietnam, those gaps appear clearly with the lack of transparency and accountability requirements that allows businesses escaping from public scrutiny (from both State and civil society) and therefore respecting human rights (if any) at their choices.

3.2.3.1 Corporate laws

The latest law on enterprises came into force from 2021, regulating the enterprise forms in Vietnam which include sole proprietorship, partnership company, limited liability company (LLC), joint stock company (JSC), State owned enterprise (SOE) and social enterprise. It is noticeable that the first two forms do not have 'corporate veil' and SOEs was defined in consistency with Chapter 11 of EVFTA (State-owned enterprises, enterprises granted special rights or privileges, and designated monopolies). Most private companies in Vietnam are under the form of LLC or JSC.

SOE is a special form in which, as presented in UNGP Principle 4, State has to discharge its duty to protect human rights. Although the law on enterprise and other laws concerning the management of SOEs requires that the investment, management and utilization of State's capital in SOE must comply with Vietnam's international agreements (including relevant human rights instruments), these laws do not place any specific duty to society on SOEs and its management mechanism²⁰⁷. SOEs' directors have the responsibility to best protect the interests of SOEs and State. No specific reference to duty to protect human rights was regulated. The law on enterprise, although requiring SOEs to periodically report on certain types of information, does not impose a

[Last access 15 April 2022]; Vnexpress (official press in Vietnam), behind the strikes in the middle region, available at <https://vnexpress.net/phia-sau-nhung-cuoc-dinh-cong-o-mien-trung-4428821.html> [Last access 15 April 2022]

²⁰⁶ Committee on Economic, Social and Cultural Rights, *supra* n.193, para.20

²⁰⁷ UNDP Vietnam, *supra* n.194, p.22

disclosure obligation with respect to their environmental and social impacts (ESG information).

Limited Liability Companies (LLCs) are also not imposed any specific duty to society and the obligation to disclose their ESG information. The responsibility of directors thereof is to discharge their obligation in an honest, prudent and best manner in order to best protect the lawful interests of LLCs without any reference to long-term environment and social interests²⁰⁸.

Similar principles apply to Joint Stock Companies (JSCs) with the exception of JSCs that are public listed companies which fall into the scope of the Law on Securities and have to publish annual reports with the disclosure of the impacts on the environment and society as well as other ESG-related information. The disclosed information include: the management of raw materials, energy consumption, water consumption, compliance with the law on environmental protection, policies related to employees, and report on responsibility toward local communities, sustainability objectives, assessment related to environmental and social responsibilities, and few other related information²⁰⁹.

Social enterprise is a progressive institution which will dedicate at least 51% of its annual post-tax profit to re-invest for the purpose of implementing its registered objectives - resolving specific social or environmental issues in the interest of the community. They are obligated to register their social and environmental objectives at the time of establishment or changes. Social enterprises can also receive aids and funds for securing its social and environmental objectives and may be eligible for incentives from authorities.²¹⁰ However, there is only the requirement of reporting to competent authorities in cases of granted incentives, no requirement for disclosing their social and environmental impacts.

In short, with the exception of public listed companies the corporate law of Vietnam does not impose on enterprises the duty to society, transparency requirements on their environment and social impacts²¹¹. Enterprises therefore do not have to disclose such ESG information and encounter potential accountabilities thereof. Without being required to even disclose the impacts of their own operation, enterprises do not have to publish the impacts in their supply chains, which entails the lack of traceability and transparency of the supply-chain parts in Vietnam.

3.2.3.2 Investment law

The law on investment in Vietnam (the current effective one being the law on investment 2020) is applicable to all projects in Vietnam with the focus on the foreign investments and large-scale domestic investments in Vietnam. The law regulates registration, execution, reporting and related matters of business projects which are normally operated by economic companies. Some of the business investment areas which are harmful for environment and society are prohibited while the law also provides a list of prioritized investment sectors which generate positive impacts on the environment and society²¹².

²⁰⁸ Ibid, p.23-24

²⁰⁹ Ibid, p.23-25. Notice: Circular 155/2015/TT-BTC referred by the UNGP Vietnam's study has been superseded by Circular 96/2020/TT-BTC of the Ministry of Finance in which Appendix 4 is same as the previous circular.

²¹⁰ Law on Enterprises 2020, Article 10.

²¹¹ UNDP Vietnam, supra n.194, p.23-25

²¹² Law on investment 2020, Article 7, 16; Decree 31/2021/ND-CP, Appendix II

At the time of project registration, investors must submit a project proposal which, amongst other things, requires the land-use plan, the estimation of socio-economic impacts and the preliminary environmental impact assessment (EIA)²¹³. No particular indicators/standards about human rights impacts are required as the law and its guiding instruments only contain one general line on social impacts. The language used for these requirements focus on positive impacts rather than adverse ones.²¹⁴ During their operation, projects also have to submit quarter and annual reports which do not contain ESG information²¹⁵. Again, no obligation of disclosing ESG information are stipulated in this law.

Upon the above corporate and investment regulatory framework, the adverse impacts on human rights and environment of businesses and their supply chains are hardly exposed to public scrutiny. Businesses therefore are without the fears of accountabilities as well as the motivation to make genuine compliances with the activities incentivized by State (like prioritized investment, soft-measures) and to perform other voluntary initiatives.

3.2.4 Business in the community

Through analyzing the essential principles and regulations, a glimpse on the regulatory framework on the areas in which business may generate adverse impacts on the community with human rights implications will be presented herein. These areas include land, environment and consumer-protection. The regulatory framework in Vietnam on these areas seems to not only lack requirements for businesses to engage with stakeholders but also facilitate them to conduct abuses on human rights and environment.

3.2.4.1 Law on land

The source of land-related conflicts are often businesses' development projects that usually result in land-disputes and local community displacement. The majority of citizen's complaints are land-related disputes which also are also the leading causes of civil and administrative disputes²¹⁶. This situation is the result of a complex land management regime under the law on land which often has very short-life and lengthy guiding instruments²¹⁷. Under the constitution of Vietnam, Land is collectively owned by the people, governed by the Government on their behalf. The right to land is limited to the right to use. Individuals, households and organizations only own the use-right to

²¹³ Ibid, Article 33

²¹⁴ Ibid; Decree 31/2021/ND-CP, Article 35-36, Circular No. 03/2021/TT-BKHĐT of the Ministry of Planning and Investment dated on 09 April 2021, Appendix A, template form A. I.3-4; The language used to guiding the initial assessment of socio-economic impacts can be literally translated as "*the most important impact that the project brings about for the development of local, sectoral socio-economic situation (job-creation, contribution to state budget, export, technology-transfer...)*" – section 5 of the template forms.

²¹⁵ Circular No. 03/2021/TT-BKHĐT, Appendix A, template form A.III.1-2

²¹⁶ In 2010, it was 90% according to World Bank, See UNDP Vietnam, supra n.194, p. 64; The official number in 2020 was 64% according to "Mat Tran To Quoc Viet Nam" (Vietnam Fatherland Front – official politic authority), see <http://mattran.org.vn/giam-sat-phan-bien-xa-hoi/so-don-thu-khieu-nai-to-cao-giam-ro-ret-so-voi-nam-2020-39755.html> [Last access 17 April 2020]

²¹⁷ Law on land 1988, 1993, 2003, 2013. The new law is projected in 2022 but then postponed without a specific schedule. Currently, there are 27 regulatory instruments in the Central level, including the law, decrees and circulars on land.

their land which basically must be subject to the land-use plan decided by the competent authority and could be seized for projects of other users (like businesses) in accordance with the law. The land compensations in such seizure are state-prices which are often complained as too low in comparison to market prices.

This complex regulatory framework gives businesses lucrative opportunities which usually involve many conflicts and AHRIs. It is quite popular that businesses, through complex procedures, obtain land with low cost and perform real-estate projects (resident areas, industrial zones or resorts) that can bring enormous instant profits for them because of the land-price difference. The real-estate business in Vietnam is extremely lucrative because people consider land as a saving and investing channel due to the fears of economic precarious conditions. Although the State has struggled to tighten the relevant regulation and procedures, this business model is technically popular, entailing conflicts and disputes.

As the State has the central role in the land management regime, the current regulatory framework does not require businesses to conduct stakeholder engagement with land-users and local communities. First, in the land planning process the State establishes a land-use plan with the collected opinions from people²¹⁸. Companies also can propose their projects which could be integrated into the new or even revised land-use plans. When the planning process is not transparent or the plan is produced unclear, conflicts between land-users, businesses and State may occur. And it is usually the case, especially when the State seizes land for a certain public purpose but then converts it for other purposes of business projects of private investors.

Second, when the State conducts a land-seizure process for businesses' project, State seizes land from local users with state-fixed price and conducts land-clearance, which usually involve forceful measures, before handing over to new business investors. The current law allows businesses to engage in land-compensation and clearance processes by providing advance budget which could encompass additional supportive aids for displaced land-users²¹⁹. Businesses do this at their own choice. Normally, if businesses wish to accelerate their projects, they will through this option provide additional payments to comfort affected land-users.

Third and most importantly, land price is the key problem. State determines land price used for land-compensation annually but the price does often not reflect the market. Businesses can obtain land through land allocation and bidding with the price lower than market through many tactics. No direct negotiation for compensation between land-users and investors.

The situation is more problematic when business projects displace vulnerable groups like ethnic minority communities to whom UN HRC expressed concerns on insufficient consultation and adverse impacts on the communities' culture, lifestyle, use of land and resources, and livelihoods, resulting in the exacerbation of socioeconomic inequalities²²⁰.

State, as a central powerful actor, plans, manages, seizes and allocates land between users, including land-users and business investors. Although there is a general regulation that citizens can conduct supervision on land management and use, including land

²¹⁸ Law on Land 2013, Article 43

²¹⁹ Decree 47/2014/ND-CP, Article 30, 32

²²⁰ Human Rights Committee, *supra* n.185, para. 55

planning, seizure, compensation, allocation, leasing and conversion²²¹, there is no guiding decree or circular in this matter. Standing behind the State, businesses may avoid accountability in respect of affected land-users. With no requirement of stakeholder engagement and support from powerful State, businesses do not have the pressure to perform voluntary initiatives. The pressures, if any, usually come from fierce reactions from land users, which involve conflicts, violence and AHRIs.

3.2.4.2 Environmental protection law

In 2016, the environmental disaster caused by Formosa Ha Tinh – a steel mill factory that is a subsidiary of the world’s fifth-largest chemical manufacturer, Taiwan-based Formosa Plastics Corporation – polluting at least 200 km of coastline in the middle region of Vietnam²²² revealed. A number of widespread protests and arrests of activists followed the disaster, and serious long term effects on the environment are expected to last for a decade²²³. The law on environment protection 2020 was issued with the lessons from such disaster and strengthened regulation on state-supervision over business’s responsibility of environment protection. At the first glance, it contains many progressive regulations but, when being placed under a closer look, some problems appear and may undermine such progressive regulations.

The law has a detailed system of *ex-ante* evaluation with respect to business investment projects, in which the Environment Impact Assessment Report (EIAR) is the key tool to control projects that potentially have considerable impacts on the environment²²⁴. In establishing EIAR, the project investor must conduct compulsory consultation with affected communities through direct meetings and must have reflections on the opinions raised by the communities²²⁵. After EIAR being approved, project investors have to publish EIAR except the information of state secrets and companies’ secrets (trade secrets, business secrets) in their website and in the local communal authority office²²⁶. EIAR provides a systematic explanation on environmental impacts of the project which may be undermined by this regulation. Instead of regulating that the approving authority and businesses must mutually agree on the published EIAR, this regulation provides a leeway for businesses to hide certain types of information. This is a setback in comparison to the previous law which allows the approving companies to

²²¹ Law on Land 2014, Article 199

²²² BBC New, Vietnam protest over mystery fish deaths, available at: <https://perma.cc/E8MV-E3YK> [Last access 17 April 2022]; See also: Business and Human Rights Resource Center, Vietnam: Fish deaths blamed on Formosa Plastics, available at: <https://www.business-humanrights.org/en/latest-news/vietnam-fish-deaths-blamed-on-formosa-plastics-taiwan-court-dismisses-vietnamese-farmers-lawsuit-over-environmental-damage/> [Last access 17 April 2022]

²²³ Reuter, Vietnam says recovery from Formosa industrial disaster could take a decade, available at: <https://www.reuters.com/article/us-vietnam-environment-formosa-plastics-idUSKBN14C1F5> [Last access 18 April 2022]

²²⁴ The law divides business investment projects into four groups (I, II, III and IV) in intensity order. Four tools for ex-ante evaluation include: (i) Preliminary environment impact assessment (applicable to group I, used for the decision on investment master-policy of high competent authorities), (ii) Environment impact assessment report (applicable to group I and a part of group II that are in sensitive businesses, used for starting project implementation like construction), (iii) Environment license (applicable to group I, III and group III which generate sewages, dust or air-pollution to the environment, or hazardous wastes; issued before project operation) and (iv) environment commitment registration (applicable to remaining projects). Therefore, EIAR has the central role in the ex-ante evaluation system because it is applicable to the projects that may considerably affect the environment. See Chapter IV of Law on Environment Protection 2020.

²²⁵ Law on Environment protection 2020, Article 33; Decree 08/2022/ND-CP, Article 26

²²⁶ Law on Environment protection 2020, Article 37(5); Decree 08/2022/ND-CP, Article 102(1)

publish approved EIAR. In addition, there is no administrative punishment for not publishing EIAR²²⁷.

During project operation, investors must conduct several transparency requirements. The project must conduct environmental observation regularly, and individuals and organizations are encouraged to engage in environmental observation and publish information on environmental quality to the community²²⁸. Certain projects with high potentials of causing pollution have to install and operate ‘automatic observing systems’ that have connections to transfer data to competent authorities as well as display the results in appropriate public places for the communities. Although there are punishments for failure in transferring data or maintaining conditions for checks from competent authorities, no consequence was specifically regulated for the failure to display or maintain the published results for the communities²²⁹.

The law also has the regulation for State to establish a ‘national environmental information, database system’ to which project investors must update relevant information on their environmental impacts such as polluting sources, wastes and brief information related to decision of EIAR approval as well as EIAR²³⁰. Third parties are entitled to access this information database system through the procedures stipulated by the Law on access to information 2016²³¹, which again points to the problems of this law as explained before.

With respect to environmental incidents, the law requires businesses to notify the potentials and contingency plan for handling environmental incidents toward affected communities for their supervision. During environmental incidents, businesses also have to ensure the disclosure of appropriate information²³². Again, no specific penalty for the failure of these obligations could be found in the law’s decrees guiding administrative fines²³³.

Importantly, there is a progressive regulation on compulsory stakeholder engagements²³⁴ in which project investors are obligated to engage with ‘the representative of affected community’ through direct meetings or document exchanges about their environmental protection information. The representatives of affected community also can investigate the environmental protection works of the projects and notify the results to competent authorities. They also have the right to request the competent authorities providing information on environmental inspections with respect to the projects in question. There are two problems which could undermine this progressive regulation: First, it is not clear how the term of ‘the representatives of affected community’ would be interpreted and applied. Whether it would also include

²²⁷ No regulation to punish the failure to publish EIAR but only punish the failure to publish the decision of EIRA approval (which is not EIRA itself). The penalty in such case is only VND 5-10 million (USD 230 – 460) which is too low. See Decree 55/2021/ND-CP, Article 1(8)

²²⁸ Law on Environment protection 2020, Article 106 (2), (3)

²²⁹ Ibid, Article 111, 112; Decree 08/2022/ND-CP, Article 97, 98; Decree 55/2021/ND-CP, Article 1(11)(c). Note: there is a general clause punishing the failure to publish environmental information in accordance with the law (Decree 155/2016/ND-CP, Article 36) which imposes the fine of VND 5-10 million (equivalent to USD 230-460).

²³⁰ Ibid, Article 114

²³¹ Ibid, Article 114-115; Decree 08/2022/ND-CP, Article 101

²³² Ibid, Article 129

²³³ No specific regulation on the failure to notify the community was found except the general clause as explained in supra n.228

²³⁴ Law on Environment protection 2020, Article 159

NGOs or CSOs from other parts of country, who are willing to support the local communities, or it only aims at localizing the troubles by limiting the term to people who actually live in that community. Upon the general atmosphere and the record of legislative process²³⁵ of this law, the latter case is highly likely. Second, no further guiding instrument has been promulgated yet. The guiding decree of the law contains no guidance on this matter. If there is no further guidance on how to ensure the implementation of this regulation in reality, it would exist only in paper.

The law on environment protection 2020 and its related instruments are a complex system which is still relatively new and on the way of development. Although the State introduces regulations to encourage business's voluntary compliance (like green credit, green bond), there is a need to improve the shortcomings and legal vacuums in the current regulatory framework for ensuring transparency and meaningful stakeholder engagement.

3.2.4.3 Consumer protection law

The protection of consumers has human rights implications cross-cutting a range of human rights like the right to adequate food, clothing and housing, and to the continuous improvement of living conditions, the right to health, and the right to education stipulated in ICESCR. Therefore, the regulatory framework on consumer protection plays an important role in ensuring human rights enjoyments. The current regulatory framework, in which the law on consumer protection 2010 is the primary instrument, contains comprehensive provisions to protect consumers, including the recognition of various consumer rights and the principles under which businesses must comply with transparency requirements and protect rights of consumers²³⁶. Once the business-consumer engagements could be conducted through negotiation, mediation, arbitration and litigation²³⁷.

However, the law on consumer protection 2010 is quite broad and regulated at a principle level, especially chapter 5 on the responsibility of social organization in consumer protections. Consumers need to be able to associate and form the associations that protect their rights and interests. The chapter 5 only contains general provisions that the 'social organizations established in accordance with the law' can engage in consumer protection and eligible social organizations could be assigned consumer protection tasks by the State. There is no specific guidance on how consumers can together form an independent social organization to protect their rights, which is actually a shortcoming, given the tightened civic space. As a result, the primary, if not sole, social organization referred to in the law is the Vietnam Consumers Protection Association (VICOPRO) and its local subsidiary organizations²³⁸ – which is a State-affiliated association and

²³⁵ In the final draft of the Bill this regulation even directly designates the Fatherland Front (state-affiliate organization) as the representative of affected communities. If the affected communities choose to elect a representative themselves, such representative must be approved by the local authorities. See the 5th draft of Bill on Environmental protection 2020, Article 169 (1) (b), available at the official website of the National Assembly: <http://duthaonline.quochoi.vn/Pages/dsduthao/chitietduthao.aspx?id=1792> [Last access 18 April 2022]

²³⁶ UNDP Vietnam, *supra* n.194, p. 77

²³⁷ Law on consumer protection 2010, Article 30

²³⁸ Pham Cong Thiem Dinh, *Journal of Trade and Industry Vietnam*, 'The role of social organizations of consumer protection in handling consumer-disputes', available at: <https://tapchicongthuong.vn/bai-viet/vai-tro-cua-to-chuc-xa-hoi-bao-ve-nguoi-tieu-dung-trong-viec-giai-quyet-tranh-chap-tieu-dung-82761.htm> [Last access 18 April 2022]

network²³⁹. The effectiveness of this mechanism has long been questioned. The state-affiliate nature seems to not fit in performing the functions of civil governance and stakeholder engagement.

Throughout the above regulatory framework on business in the communities, it appears that most of the laws and their guiding instruments do not include sufficient transparency requirements and strong stakeholder engagement regulations as well as the sanctions for the failures to perform compulsory engagements. Particularly, there is no specific provision on securing free, prior, and informed consents (FPICs) from local communities²⁴⁰. In some parts, especially in the law on land, this framework even facilitates the occurrence of business-related AHRIs. This legal environment does not pave the foundation for stakeholder engagements and voluntary initiatives. To a certain extent, this thesis has touched the lack of accountability requirements in the regulatory framework. The shortcomings in accountability requirements will be further demonstrated in the following part, alongside analyzing the regulatory framework on access to remedies.

3.2.5 Access to remedies

Holding businesses accountable for their violations is vital for governing AHRIs as it provides dissuasive effects on businesses that have to mitigate actual impacts and prevent potential ones for the fears of accountabilities. The right to access to effective remedies itself is widely recognized in international human rights treaties²⁴¹. Without access to remedy, right-holders cannot protect their rights and dignity. Effective remedies could be in the forms of restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition²⁴², which differs from case to case and depend on the victims' desire. This part analyzes the current regulatory framework concerning the access to remedies for the victims of business-related AHRIs in state-based judicial mechanisms (courts), state-based non-judicial mechanism and private-grievance mechanism.

3.2.5.1 State-based judicial mechanism – Court

The victims of business-related human rights abuses may seek business' criminal and civil liability through the people's court system in Vietnam which, under the Constitution, has the responsibility for the protection of *inter alia* human rights, civil rights, legal rights and interests of organizations and individuals²⁴³:

- ***Criminal liability***: The Penal Code 2015 regulates criminal liability of legal persons (economic companies) for certain crimes including prohibited business activities, intellectual property crime, financial crimes, environmental crimes. The applicable punishments could be fine, temporary or permanent closure of business,

²³⁹ Throughout its history, VICOPRO is a state-back organizations, see VICOPRO website, introduction on VICOPRO, available at: <https://nguoiitieudung.org.vn/dai-hoi-dai-bieu-toan-quoc-lan-thu-vi-vinastas/> [Last access 18 April 2022]; Most of VICOPRO's local subsidiaries have their office in the provincial authorities of trade and industry and most of their managing officers are state-officials, see The State Department of Competition and Consumer Protection, the List of Consumer Protection Associations, available at: <http://www.vcca.gov.vn/?page=consumer&do=detail&id=833514eb-9dcc-4e47-be5f-01028cc4a74e> [Last access 18 April 2022]

²⁴⁰ UNDP Vietnam, supra n.194, p. 84

²⁴¹ Danish Institute for Human Rights (DIHR), supra n.37, p. 7

²⁴² UN General Assembly, supra n.176

²⁴³ The Constitution, Article 102

prevention from raising capital, prevention from participating in specific lines of businesses. Companies also could be imposed remedial measures like restitution, restoring and preventing damages²⁴⁴. This corporate criminal liability does not prevent the personal criminal liability of companies' staffs but it is worthy to notice that it could be used in a way of abusing corporate veil. Another problem is that there is no explicit provision on secondary liability that could be used for piercing the corporate veil between parent companies and their subsidiaries. Most problems for seeking criminal liability lay in practical hurdles.

- Civil liability: the victims could seek corporate civil liability through both civil litigation and criminal proceedings in which civil damages is subject to the Civil Code 2015. Under the Civil Code, companies have both contractual and non-contractual civil liability including a strict liability regime in case of owning 'source of extreme dangers' that causes damages to other people²⁴⁵. The damages available for victims include 'physical damages' which are the "actual physical losses, comprising loss of property, reasonable expenses to prevent, mitigate or restore damage, and the actual loss or reduction of income" and 'spiritual damages' which are "losses related to life, health, honor, dignity or reputation and other personal benefits". However, there are few problems in this regulatory framework: First, the claimable damages are interpreted strictly around actual damages suffered by victims. No aggravated or punitive damages which prevents further adverse impacts is available.

Second, procedural civil regulations have a limited approach to the standing of CSOs and class actions. In the labour area, representative organizations of employees have the standing to protect collective interests or where being authorized by employees²⁴⁶. In the environment protection area, the law allows initiating lawsuits against the damages of the environment (pollution and environmental depletion) and compensation thereof will be used for public environmental purposes. However, competent state authorities exclusively have this legal standing²⁴⁷. In the case of consumer protection area, social organization of consumer protection may initiate lawsuits to protect consumers or public interests in accordance with the law on consumer protections. This again turns the problems in the law on consumer protections as explained above. There is no explicit regulation permitting CSOs' standing in those areas as well as no regulation on the mechanisms for class action, especially in the field of environment protection. Although CSOs may technically act as the authorized representatives for victims, this approach for CSOs' standing is quite limited.

Third, the general principle of civil litigation in Vietnam is that victims have the burden of proof to prove their claims including damages and causal link. One exception is for the claims of the damages of the environment and personal damages thereof. In this exceptional case, there is a shared or reversed burden of proof as the violators must prove the [non-] existence of causal link²⁴⁸. Given the lack of transparency requirements in Vietnam regulatory framework, victims have to encounter a huge information-asymmetry in challenging businesses that have complex legal and managerial structures. Shared or reversed burden of proof is needed for certain cases in labour and environment protection areas.

²⁴⁴ Penal Code 2015, Article 76-82

²⁴⁵ UNDP Vietnam, supra n.194, p. 113

²⁴⁶ Civil Proceeding Code 2015, Article 187(2)

²⁴⁷ Law on Environment protection 2020, Article 131

²⁴⁸ Ibid, Article 133(2)

And fourth, similar to criminal liability, there is no regulation on secondary liability for parent or controlling companies. This is useful for preventing the abuse of corporate veil.

Apart from the above problems in regulatory framework, court proceedings in Vietnam also have practical troubles, for example their well-known lengthy process with undue delays as well as their independence and impartiality²⁴⁹.

3.2.5.2 State-based non-judicial mechanisms

These mechanisms could be in various forms through which victims may seek remedies as corporate administrative liability from state-authorities and other remedial measures from state-based quasi-judicial mechanisms like mediators, national human rights institutes (NHRIs) or national contacting points (NCPs). Under Vietnam's regulatory framework, people can make complaints on business's administrative violations to the competent authorities which would handle the complaints in accordance with the Law on Handling Administrative Violation 2012. If found as violators, companies would be punished by administrative sanctions including warnings, fines, temporary removal of licenses/certificates, temporary suspension of operation and confiscation of means used for violations. They also have to perform remedial measures with respect to resulted consequences including returning illegal interests and restoring the initial conditions²⁵⁰.

The maximum fines for companies' administrative violations are restricted to certain amounts stipulated by law²⁵¹, which are VND 300 million for labour violation and VND 2 billion for environmental violations (USD 13,000 and USD 87,000 respectively). This could be insufficient accountability to prevent businesses from further violations and also possibly seen as ineffective remedies from victims' perspective. Low accountability could encourage businesses to choose pay-to-go strategy because of lucrative benefits.

In addition, Vietnam has not yet issued the regulatory framework for the establishment of a national human rights institution which has the quasi-judicial function to hear individual complaints in line with Paris principles. Besides, Vietnam also has the Law on Grassroots Conciliation 2013 under which the local state-back mediators help to resolve disputes between individuals and organizations in at the communal level. However, the effectiveness of this law is unclear.

3.2.5.3 Private grievance mechanisms

OHCHR provided recommendations for improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms²⁵². The first one of those recommendations is that states should establish and maintain an enabling legal and policy environment for non-State-based grievance mechanisms dealing with business-related human rights harms²⁵³. In Vietnam, there are only a few operational grievance mechanisms or industrial grievance

²⁴⁹ Human Rights Committee, *supra* n.185, para. 33-34

²⁵⁰ Law on Handling Administrative Violation 2012, Article 21, 28 (revised by the legislative amendment 2020)

²⁵¹ *Ibid*, Article 24 (revised by the legislative amendment 2020)

²⁵² OHCHR, *Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms* (2020), (A/HRC/44/32)

²⁵³ *Ibid*, Annex I, p.8

initiatives²⁵⁴. This could be due to many reasons but it is hard to say that the regulatory framework and policies in Vietnam did provide an enabling environment as recommended by OHCHR.

In conclusion, section 3.2 has shown the shortcomings and problems in Vietnam regulatory framework concerning civic space, labour and independent trade union, corporate and investment, business in the community and access to remedy. These shortcomings and problems intertwine and interplay to constitute the human rights governance gaps in Vietnam as presented in the general model. This situation is further exacerbated by other contextual troubles.

3.3 Factors that exacerbate governance gaps

As a developing country which has just opened its door to the world since 1986 – the year of “Doi Moi” (or Renovation era), an economic reform to escape from the centralized plan economy – and rapidly attract a huge flow of FDI capital, Vietnam has many problematic internal factors affecting human rights enjoyments. Amongst those factors, four following factors facilitate the abuse of regulatory framework’s shortcomings, worsening the governance gaps with respect to business-related human rights impacts in Vietnam.

3.3.1 Corruption

Corruption undermines the functioning and legitimacy of state authorities, generating devastating impacts on human rights enjoyments. It also facilitates businesses to abuse regulatory framework, making adverse impacts on people and the communities. This even worsens when such regulatory framework itself contains gaps and shortcomings. For example, the effectiveness of law enforcement forces like inspectorates/ombudsmen could be invalidated due to bribes offered by businesses in order for labour troubles or pollutions to be ignored. Besides the corruption between state and business, corruption within private sectors may also violate human rights in many ways. The embezzlements of managing staffs or the bribes offered by contractors, for instance, may result in unsafe working conditions and the use of substances harmful to the environment. According to Transparency International, Vietnam was 87th/180 in the list of corruption perception index with the score of 39 out of 100²⁵⁵.

3.3.2 Informal business

Informal business makes up approximately 20 percent of Vietnam’s GDP with around²⁵⁶ 18 million workers working without contract in 2016, being a critical part of Vietnam’s economy. Most informal businesses are small unregistered households, craft-villages or individual-owned businesses. Workers in these sectors are extremely vulnerable as they are working outside the reach of the regulatory framework, and the news on environmental troubles caused by these sectors are also prevalent in Vietnam.

²⁵⁴ UNDP Vietnam could only find two examples of private grievance mechanisms. See UNDP Vietnam, supra n.194, p. 119-120

²⁵⁵ Transparency International, Corruption Perception Index (CPI) 2021, available at <https://www.transparency.org/en/cpi/2021/index/vnm> [Last access 22 April 2022]

²⁵⁶ UNDP Vietnam, supra n.194, p.86

They are still operating and connect to formal businesses including export-oriented industries due to many reasons of which the regulation on tax and invoices are primary. Vietnam recently has incentive policies to encourage the transformation from informal to formal businesses like tax incentives for SMEs but informal businesses, especially in food and agriculture supply chains, are still prevalent.

3.3.3 Formalism

Due to the political and socio-economic environment, formalism is popular, becoming a type of ‘culture’ that is embodied in every life-aspect in Vietnam. The result of law implementation and compliance looks good on paper but it does not necessarily mean the effective in reality. Both public and private sectors have their own reasons to lie in their reports for good-looking results. This practice is extremely harmful as it does not help to prevent potential adverse impacts. Instead, the problems are only noticed when they are actual impacts at large scales. The Formosa environmental disaster is a good example for this practice.

3.3.4 Low level of awareness on human rights

The awareness on human rights is low in Vietnam and, in fact, human rights is still considered as a ‘sensitive’ topic. Both the Human Rights Committee (UN HRC) and the Committee on Economic, Social and Cultural Rights (UN CESCR) had the concern and called for awareness-raising on human rights for public authorities, in particular the law enforcement forces. With respect to the private sectors like workers, CSOs, NGOs and other parts of civil society, the awareness about human rights is also low as they operate in a restricted environment. Both committees recommended the dissemination of human right enshrined in the Covenants to private parties, in particular women-related issues, labour safety and hygiene, and informal workers²⁵⁷.

3.4 Conclusion on the governance gaps in Vietnam

Upon the idea of polycentric governance, this chapter develops a country-model of governance gaps which allows business-related AHRIs occurring without sufficient accountability. The human rights governance gaps exist when the three blocks of governance have weak or no connections, which is resulted primarily from the shortcomings and problems in the regulatory framework. In other words, the human rights governance gaps are **systematic**. These governance gaps include:

- **Participation gaps:** State, business and civil liability do not have sufficient engagements to manage and handle business-related AHRIs. The regulatory shortcomings with respect to civic spaces limits the operation of civil society that could hardly provide social feedback to the State. This could be seen clearly in the field of land law where the room for negotiation on land compensation and clearance are small, and the voice of weak civil society does not make changes. Both land and environment laws have the tendency of localizing the engagements without the involvement of CSOs.

²⁵⁷ Human Rights Committee, supra n.185, para. 5, 6, 22, 57; See also: Committee on Economic, Social and Cultural Rights, supra n.193, para. 7, 9, 16, and 18.

Business finds no motivation to engage with civil society and right-holders because of the shortcomings such as labour and independent trade union regulations. There is also a lack of policies, soft-measures and mechanisms from the State to engage and encourage businesses on human rights issues. The participation gaps exist in all three relations.

- **Liability gaps:** There is a legal vacuum in regulating business-related human rights impacts. In addition, the problems on transparency requirements in corporate and investment laws as well as law on environment allows businesses to avoid public scrutiny and therefore accountability. The accountability regime itself is also weak to prevent human rights abuses, for example the maximum administrative penalty is too low and does not bring dissuasive effects. The liability gaps therefore exist in the relation between State and business.

- **Remediation gaps:** The victims find difficulties in seeking remedies from both State and businesses as they do not enjoy the support of CSOs, NGOs who rarely have standings under the current regulatory framework. While there are legal challenges in seeking remedies from the State, the regulatory framework does not promote the development of private grievance mechanisms.

These gaps and their underlying elements intersect, interplay and worsen each other, and therefore permitting business wrongdoings in a sophisticating system. AHRIs happen under multiple layers of regulatory framework. This is exacerbated by practical troubles such as corruption, informal business, formalism and low awareness on human rights. This creates *systematic challenges* for improving human rights governance and enjoyment.

4 The risk of cosmetic compliance in EU-VN trade relations

The human rights governance gaps pose a prospect of cosmetic compliance for both EU mHRDD legislation and EVFTA because they create systematic challenges for the key features necessary for the effectiveness of mHRDD and EVFTA. Cosmetic compliance is the situation in which relevant actors show their compliance with the legal instruments but no changes actually happens on the ground level. This situation will lead to the chronic human rights problems which are very difficult to be detected and improved. EVFTA and mHRDD will be therefore just a set of decorative items that provide excuses for involving actors. This chapter first begins with the overall view on the trade relation between the EU and Vietnam, which practically affects the implementation of the EU legal instruments. The risks of cosmetic compliance will then be demonstrated in the next two sections which is followed by the section of concluding remarks.

The implementation of mHRDD legislations, in particular the incoming CSDD Directive and EVFTA depends on the nature of the trade relation between two sides. If two sides are connected in a large scale with strong connections in high-impacts sectors, there will be the political wills to ensure the compliance with such legal instruments. Otherwise, the legal instruments will just be ignored, leaving non-compliance occurring without any effort of correction or even resistance. Therefore, an overall view on the significance of trade relation between EU and Vietnam is necessary to assess the prospect of mHRDD legislations and EVFTA, particularly the willingness from Vietnam. The EU-Vietnam trade relation is assessed in its scale and nature of connection.

In terms of the scale, from the EU side Vietnam is the 15th trade partner in goods with total export value from the EU to Vietnam being over 16.51 billion USD²⁵⁸. From the Vietnam side, EU is the third largest market for export from Vietnam with total turnover is almost 40 billion USD and also one of the largest FDI sources for Vietnam²⁵⁹.

In terms of the nature of connection, the main products exported from Vietnam include telephone sets, electronic products, footwear, textiles, other machinery and equipment, coffee, fishery products, rice and agriculture products. Amongst EU countries, Netherland, Germany and France make up almost a half of Vietnam's export to the EU²⁶⁰. Although the electronic products and computers contribute a significant portion of export value, they all were produced by FDI enterprises²⁶¹ which are giant tech companies like Intel, Samsung, Canon and LG. In the opposite direction, the primary EU exporters are Ireland, Germany and France – accounting for 60% of EU's export to

²⁵⁸ The EC, EU trade relations with Vietnam. Facts, figures and latest developments, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam_en [Last access 25 April 2022]

²⁵⁹ Vietnam Institute for Economic and Policy Research (VEFR), One year implementation of EVFTA – impacts on Vietnamese economy and policy formation (2021), p.33 available at: <https://www.kas.de/de/web/vietnam/publikationen/einzeltitel/-/content/one-year-implementation-of-european-union-vietnam-free-trade-agreement-evfta> [Last access 25 April 2022]

²⁶⁰ Ibid, p. 30-35

²⁶¹ Ibid, p.30

Vietnam. Vietnam imports from EU primarily high tech products, including electrical machinery and equipment, aircraft, vehicles, and pharmaceutical products²⁶².

Upon the above trade relation between the EU and Vietnam, three key points could be inferred: First, the trade relation between EU and Vietnam is quite significant for both sides, especially Vietnam. As a result, the EU has leverage and relevant actors in Vietnam have motivation to implement mHRDD legislation and EVFTA. Both sides cannot just ignore those instruments, especially Vietnam. This leads to the risk of cosmetic compliance rather than outright resistance.

Second, Vietnam has strong trade relations with Germany and France – the two countries of which their mHRDD laws have stronger extraterritorial effects. Netherland is the biggest export-market of Vietnam but the extraterritorial effects of its child labour act is almost nothing. Norway does not have a considerable trade relation with Vietnam and therefore its transparency act will also have little extraterritorial effects on Vietnam. Third, the CSDD Directive will be applicable to most business activities between EU and Vietnam. This is because the supply chains from Vietnam to the EU consist of high-risk sectors (garment, textiles, footwear) and giant tech-companies (computers and electronic products). Therefore, the remaining part of this thesis, when analyzing mHRDD legislations, will mainly focus on the French Law of duty of vigilance, the German Act on Corporate Due Diligence on Supply Chain and the proposal of CSDD Directive. Coincidentally, these three legal instruments have the same nature – imposing the due diligence obligations on businesses with respect to human rights and environment issues – or Corporate Sustainability Due Diligence (CSDD).

Another important aspect needed to be pointed out is that Vietnam has the authoritarian legality:

“That is a system designed to benefit from formal law and legal institutions while minimizing risk to political stability and social control”²⁶³

This aspect facilitates cosmetic compliance to any kind of legal instruments as it prefers gaining benefits that usually link with adverse impacts while is not favorable for changes in political stability and social control that usually link with human rights issues.

From the above noticeable key points, the next two sections of this chapter will demonstrate how the human rights governance gaps in Vietnam risk the prospect of cosmetic compliance of both mHRDD legislations and EVFTA respectively.

4.1 The risk of cosmetic compliance of mHRDD legislations

As indicated earlier in section 2.1.4, the key features for mHRDD legislations to have effective extraterritorial effects include meaningful stakeholder engagement, corporate governance and director duties aimed at right-respect culture, corporate civil liability, supply chain transparency and traceability, and smart-mix of measures. These key features are not facilitated, if not prevented, by the systematic challenges, in particular the governance gaps in Vietnam. The prospect of cosmetic compliance is imminent as the AHRIs on the ground level are invisible while the key features are

²⁶² Ibid, p.37

²⁶³ Nguyen, Trang (Mae), supari 174, p. 1

challenged. Through analyzing all types of business relations connecting the Vietnam business community and the EU market, the formula (the invisible problems and the challenges to key features) appears clearly in the Vietnam context.

4.1.1 Business relations with SOEs and enterprises granted special rights or privileges, and designated monopolies

Through global value chains, EU companies captured by mHRDD legislations may connect with state-owned enterprises (SOEs) and enterprises granted special rights or privileges, and designated monopolies. These State-affiliated companies are the backbone of Vietnam's economy as SOEs make up around 40% of GDP²⁶⁴. This part excludes public procurements by the Vietnam government, which are not covered by mHRDD legislations. EU companies or their subsidiaries could collaborate with these state-affiliated companies in development projects like infrastructure development and operations. They also could be connected through supply chains as many exporters are State-affiliated, for example some considerable companies in the textile and apparel industry²⁶⁵. Generally, these companies have complex ownership and managerial structures²⁶⁶, which, without the legal requirements of transparency, are totally closed to public scrutiny.

In terms of labour rights issues, representative organizations in these companies are state-affiliated trade unions and it is unlikely for independent EOE's to be established. The management of trade unions in particular and these companies in general are closely oriented by the communist party's discretion as each of the enterprises will have communist party units. The employees and workers in these companies are usually members of one of State-affiliated organizations: Trade unions, communist party units and communist-youth organizations. In other words, the labour standards in these companies are governed by a closed circle of State-affiliated organizations, which provides little room for stakeholder engagements both internally and externally as well as remedial procedures.

With regard to land-related issues, these State-affiliated companies usually benefit from the land-management system by being granted cheap land-lots through land-clearance processes as described in section 3.2.4.1. This creates business advantages for the companies in question but also the long-term AHRIs on local communities. The projects that have 'State-element' are fully supported by competent authorities in land-planning, forced evictions and resettlement. This often results in disputes and local communities may end up in temporary-residence areas which affect their right to health, food, water, education and culture. The lack of civic space also prevents affected-right holders from expressing and claiming their land-related rights while no engagement between companies and affected right-holders is required. The situation entails three main challenges: First, the victims, in the middle of power imbalance and without help from CSOs, are not able to show their damages and seek remedies. They may even

²⁶⁴ World Bank, Deepening international integration and implementing the EVFTA (2020), p.47, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/33787/Vietnam-Deepening-International-Integration-and-Implementing-the-EVFTA.pdf?sequence=1> [Last access 01 May 2022]

²⁶⁵ OFSE, supra n.3, p.40-41

²⁶⁶ UNDP Vietnam, supra n.194, p.22

encounter suppression when exercising their rights. Second, as the process seems to be ‘legal’, the State-affiliated companies are unwilling to handle human rights impacts. Third, EU companies in this type of business relation encounter systematic human rights-related problems which could be seen distant from their operation as the State is the one that deals with land-clearance, not their partners as well as themselves.

Turning to environmental protection, the activities of State-affiliated companies are aligned with State policies and therefore facilitated by state authorities. Due to the shortcomings of transparency requirements, light-accountability for environmental violation and weak stakeholder engagement regime under the Law on environment protection 2020, affected right-holders will have many challenges to bring the environmental problems into public light as well as to seek remedies from State-affiliated companies. In fact, Vietnam has witnessed many chronic environmental pollutions in the projects of these companies, adversely impacting local communities’ rights for the long term.

The problems are more serious when State-affiliated companies and their EU business partners are involved in the privatized services, such as education, healthcare, housing and social services (residential and personal care service for elderly and children) as well as essential utilities (water, energy and telecommunications). These businesses potentially affect a large scale of people who are vulnerable and unable to go against state-backed businesses meanwhile weak civil society like CSOs, consumer protection associations) cannot provide adequate protections.

It is also noticeable to point out that victims are likely facing more challenges in seeking remedies from state-based grievance mechanisms with respect to the adverse impacts caused by State-affiliated companies. The remedial gaps would be wider.

Against this background, EU companies or their subsidiaries in the business relations with State-affiliated companies will find difficulties in implementation of mHRDD legislations. Although the existence of business links (‘established commercial relationship’ under the French law, ‘established business relationship’ under CSDD and first tier under German law) is quite clear in business with State-affiliated companies, the leverage of EU companies to these partners is unclear. Even if they want to effectively detect AHRIs and make real changes, the closure and powerfulness of their business partners – State-affiliated companies – pose systematic challenges. This also facilitates the cosmetic compliance where EU companies and their subsidiaries can simply report no adverse impacts while all claims and challenging actions could be handled by their powerful state-affiliated partners.

4.1.2 Business relations in form of FDI (subsidiaries)

Through investment activities like development projects, joint-venture, share-purchases or M&A, EU companies can operate and control their subsidiaries in Vietnam. The official statistics show the EU as the 5th largest FDI partner of Vietnam with 2,249 projects and the total cumulative value of 22.27 billion USD (accounting for 5.12% of total FDI capital in Vietnam)²⁶⁷. However, this is just the tip of the iceberg as many EU

²⁶⁷ Eurocham Vietnam, EVFTA report: perspectives from Vietnam, p.17, available at <https://www.eurochamvn.org/The-EVFTA-Report> [Last access 02 May 2022]; See also the Vietnam Institute for Economic and Policy Research (VEPR), The Report "One-year Implementation of European

companies invest and control their indirect subsidiaries through shell-entities established in tax-havens like the British Virgin Islands, Hong Kong or Singapore. There is no statistic on the scales of this type of EU FDI but it is more difficult to detect business linkages and accountability. Generally, FDI companies are not required to publish ESG information except public listed companies. Only 8 FDI companies are public listed and most of them are clearly not from the EU²⁶⁸. Therefore, EU FDI companies in Vietnam are generally not required to disclose their human rights and environment impacts.

Since the regulation on EOE has not been issued, it is not clear how EOE will be facilitated inside EU FDI companies to ensure the compliance with labour standards. Even if the framework for EOE is issued, these companies could still fail to conduct meaningful engagement with workers who face restrictions in exercising their collective rights (bargaining and strike) and access to remedies. The violation of labour rights in Vietnam was confirmed as being systematic²⁶⁹. This situation will not encourage corporate governance and director duties shaping right-respecting cultures.

EU FDI companies in manufacturing areas are leasing land for their factories either directly from the State if it is outside industrial zones, or the investors of industrial zones. In the former case, EU companies may involve voluntarily in land-clearance procedures to mitigate adverse impacts while in the latter case, they only receive ‘clear land lot’ from the investors of industrial zones. As a result, EU companies may insulate themselves from human rights impacts while enjoying the unjust advantages resulting from those impacts like low land price and cheap labours from displaced communities. Without the possibility of being held accountable, these companies are unlikely to identify and take actions on AHRIs related to their land lots.

Although there is no record of serious environment pollution caused by EU FDI companies, the shortcomings of the regulatory framework on environment protection still provide the chance for them to cause environmental damages without being scrutinized by stakeholders and sufficiently accountable to victims thereof. Especially in the case that they are located inside industrial zones of which the investors manage environment protections and provide sewage disposing services. These industrial zone investors are causing many environmental pollutions. In this case, a contract assurance under CSDD proposal, which is difficult to be verified due to geographic distance and lack of visible complaints, would exercise as an excuse and facilitate cosmetic compliance rather than ensuring protections.

In Vietnam, FDI sectors are important for the economy and the FDI companies have conditions to have considerable power²⁷⁰. Therefore, their AHRIs could be tolerated in the name of economic developments. One of the very famous examples for this is the statement of a Formosa CEO who dared to require people to “choose fishes or choose steel” in response to public angers in the initial stage of environment disaster²⁷¹. The

Union-Vietnam Free Trade Agreement (EVFTA): Impacts on the Vietnamese Economy and Policy Formation", p.4

²⁶⁸ VnEconomy, ‘Only 8 FDI enterprises listed’, available at <https://vneconomy.vn/chi-co-8-doanh-nghiep-fdi-niem-yet.htm> [Last access 02 May 2022]

²⁶⁹ International Trade Union Confederation (ITUC), Global Rights Index 2021, available at <https://www.globalrightsindex.org/en/2021> [Last access 03 May 2022]

²⁷⁰ Amnesty International pointed out that corporate may obtain powers in host states because of the need of FDI, lack of transparency and their influence. See Amnesty International, *supra* n.178, p.175-188

²⁷¹ Thanhnien news (official newspaper in Vietnam), Taiwanese firm exec makes shocking remarks over Vietnam's environmental disaster, available at <http://www.thanhniennews.com/society/taiwanese-firm->

trade-off between environment and economic development as well as the need of FDI give these companies such confidence to even blatantly defy the law. Facing systematic challenges to make changes, on the one hand, and being more powerful in comparison to victims who have restricted civic space and hurdles in access to remedies (remedial gaps), on the other hand, FDI companies easily fall into cosmetic compliance.

4.1.3 Business relations with private companies (suppliers)

In GVCs, EU companies and their subsidiaries (including the subsidiaries inside and outside Vietnam territory) may connect with business partners located in Vietnam through business relationships, in particular supply-contracts. The export-oriented industries in Vietnam providing goods and services for EU companies and their subsidiaries includes (i) FDI companies that are dominant in the industry of electronics, computers, textiles, garment, footwear and machinery and equipment, and (ii) local-owned companies which produce fishery products, food and agriculture products. Only a few of these companies are public listed companies which have the obligation to publish ESG information. Even in such cases, it is hard to say that ESG information has impacts on those public companies²⁷².

In these business relations, the implementation of mHRDD legislations encounters the same problems with respect to labour, land and environment issues but the adverse impacts are now in further distance. Amid the context in which their partners are not required to conduct stakeholder engagement, transparency requirements and the civil society is weak, the task of identifying human rights and environment adverse impacts from their business partners is now more challenging for EU companies captured by mHRDD legislations.

FDI business partners are often from the home states like South Korea, Japan, Taiwan, China and Singapore which still do not impose mHRDD obligations. These business partners may themselves enjoy cosmetic compliance, similarly to the EU FDI companies as explained above. The challenges are more intensive in the case of local Vietnamese business partners who have closer relationships with Vietnam authorities and whose businesses (garment, textile, foods, agricultures, fishery products) are more connected with the informal economy. This situation leads to lack of transparency and traceability in the supply chains to which those Vietnamese partners participate, increasing the risk of cosmetic compliance. Without the pressures from civil liability due to the remedial gaps presented in Chapter 3, these business are unlikely to have a right-respecting culture and avoid cosmetic compliance once being required to perform HRDD process.

[exec-makes-shocking-remarks-over-vietnams-environmental-disaster-61560.html](#) [Last access 02 May 2022]

²⁷² It has been pointed out that the impacts of ESG information on public companies and regulators are constrained because Vietnam lacks strong law and institutional investors to bring pressure for strong ESG practices into the public and private sectors. Apart from general lack of awareness, what holding the adoption of stronger ESG requirements back is the fact that the regulatory framework focus on requiring public companies to do ex-ante evaluation on environment and social impacts which are often perfunctory. See Funds Global Asia, ‘What’s holding Vietnam’s adoption of ESG back?’, available at <https://www.fundsglobalasia.com/news/what-s-holding-vietnam-s-adoption-of-esg-back>

In dealing with these business partners who already shows their ‘compliance’, EU companies captured by mHRDD legislations will have an excuse about the legality within their supply chains, leading them to an easier option - to put in place perfunctory means that cover these business partners – rather than trying to use HRDD process to make real changes on the ground level.

4.1.4 Concluding remarks on the prospect of cosmetic compliance of mHRDD legislations

Inside Vietnam, through the above business relations two important points need to be noticed: First, the governance gaps (lack of transparency and accountability requirements, civic space, stakeholder engagements and access to remedies) make business-related AHRI in Vietnam ‘invisible’ to public and EU companies. Second, the governance gaps interplay to challenge the key features necessary for the effectiveness of HRDD process in Vietnam. As the regulatory framework provides loopholes for local businesses to avoid accountability, they find no pressure to engage in voluntary initiatives to identify and take actions on their impacts. Even if they wish to do so, finding reliable social partners/organizations is not easy, if not impossible. These problems are *the systematic challenges* for the implementation of mHRDD legislations on the ground level.

These local systematic challenges in combination with the problems in mHRDD legislations push EU companies toward cosmetic compliance. First, the legal uncertainty in critical terms in conjunction with the lack of transparency requirements in Vietnam create difficulties in identifying adverse impacts. Under the French law and CSDD proposal, EU companies have to do HRDD over their ‘established commercial relationship’ and ‘established business relationship’ respectively. This is a difficult task in the supply chains that lack transparency and traceability. How to determine and flag business partners as ‘established’ is challenging, especially when the supply chains connect to the informal economy which is popular in Vietnam. The German supply chain act (LsKG) is restricted to first tiers and may be expanded beyond that if there is ‘substantiated knowledge’ which is not easy to obtain in Vietnam.

Second, the weak requirements on stakeholder engagement in mHRDD legislation and the participation gaps in Vietnam leave adverse impacts invisible and affected right-holders not being able to access information necessary to access remedies. While the French law and the German LsKG do not explicitly require stakeholder engagement in performing HRDD obligations, the CSDD proposal only requires it ‘where relevant’ and ‘where necessary’. Without flagged issues from local suppliers raised by local civil society and right-holders and local businesses all showing their ‘compliance’, EU companies cannot determine where they should focus.

Third, all French laws, LsKG and the CSDD proposal apply the HRDD obligations of means, which in combination with the local systematic challenges in Vietnam, make it difficult, if not impossible, for victims to hold EU companies accountable for their suppliers’ adverse impacts in Vietnam. Local victims, without the help from local civil society and in a restricted civic space, have to face many hurdles, such as lack of information and practical barriers, in access to remedies which are possible civil liability and administrative liability under the French law and CSDD but only administrative liability under LsKG. However, the dissuasive fact is that EU companies just need to put in place their vigilance plans under the French law or conduct procedural steps under

LsKG and CSDD proposal is enough to challenge all the complaints from the ground level. Especially, the companies captured by the CSDD proposal just need to use the contractual assurance to pass on CSDD obligations to their local business partners who always show ‘compliance’. Without the fear of accountability from the ground, EU companies can just focus on the process rather than outcomes and cosmetic compliance is therefore expected.

In short, the inside-Vietnam systematic challenges to mHRDD process offer EU companies for having cosmetic compliance with their HRDD obligations and not identifying and taking appropriate actions on AHRIs on the ground level. Even if they want to have meaningful compliance to make real changes, it is difficult for them to encounter the challenges with systematic scale and nature.

4.2 The risk of cosmetic compliance in EVFTA implementation

As presented in section 2.2, the promotional approach of EVFTA needs political wills from both EU and Vietnam and the key features for effectiveness include appropriate priorities and targeting as well as the enhanced capacity of civil society. This section first reviews the current situation of EVFTA implementation, highlighting the fact that the FTA was implemented with little progress and already contains signs of cosmetic compliance. The next part demonstrates how the human rights governance gaps in Vietnam prevent the key features necessary for the effectiveness of EVFTA and therefore create the risk of cosmetic compliance.

4.2.1 Current situation of EVFTA implementation

Taking effect from August 2020, EVFTA already brought economic benefits for Vietnam despite the occurrence of the pandemic. The trade relation between EU and Vietnam continues to grow and Vietnam enjoys the reduction of tariffs²⁷³. However, human rights issues and the implementation of the TSD chapter have not experienced a similar progress.

Generally, EVFTA, as an integrated part of PCA, is expected to gradually make human rights improvements in Vietnam. This seemingly has not occurred as there is no remarkable legal reform to enhance fundamental rights while human rights experts expressed concerns on “intensified repression”²⁷⁴. The first human rights dialogue held after EVFTA comes into force was also postponed with the date to be determined and it is therefore unclear how EVFTA will play a role in this mechanism.

On TSD chapter’s implementation, both sides have performed the initial steps in the first round of monitoring mechanism. The first meeting of the Trade Committee occurred in July 2021 while the first meeting of the TSD Committee, with a delay, took

²⁷³ The European Commission, the state-of-play on the first anniversary, available at https://trade.ec.europa.eu/doclib/docs/2021/august/tradoc_159773.pdf [Last access 04 May 2022]; See also VEFR, supra n.2, p.1-4

²⁷⁴ Human Rights Watch, EU: Press Vietnam to Improve Rights Record, available at <https://www.hrw.org/news/2022/04/04/eu-press-vietnam-improve-rights-record> [Last access 04 May 2022]

place in November 2021. The Domestic Advisory Groups (DAGs) were also established and accompanied the meeting of TSD Committee.

In the EU promotional approach, the monitoring mechanism of the TSD chapter plays an important role to keep the momentum of progresses and improvements. In such monitoring mechanism, civil society engagement through DAGs are the core feature to make this mechanism reflecting the needs and driving real changes on the ground level. However, it seems to be not the case of the current implementation situation of EVFTA's TSD Chapter.

Before the meeting of the Trade Committee, Vietnam arrested, upon the charge of 'tax evasion', two journalists and lawyers who acted as independent observers of EVFTA and whose the NGOs reportedly applied to join Vietnam DAGs²⁷⁵. Vietnam claimed in the meeting of the Trade Committee that these arrests have no link with the establishment of Vietnam DAGs²⁷⁶.

Vietnam then established its DAGs including three initial members of which two organizations are very close to the State and the remaining one is an NGO that has the membership in another state-back network. Four other organizations with limited scope of operation focusing on economic dimension were recently added to Vietnam DAGs²⁷⁷. Therefore, it is questionable whether these DAGs can provide a meaningful civil society engagement or if it is just a perfunctory compliance. In the first Civil Society Dialogue Forum between EU and Vietnam DAGs, Vietnam sides (including three initial members) took a cautious position by claiming DAG mechanism is new for Vietnam so it need more time to understand and explore how the system work²⁷⁸. Vietnam DAGs also appreciated the promotion of due diligence for better conditions of workers in Vietnam and proposed more collaborations on this²⁷⁹.

In the meeting of TSD Committee, Vietnam presented the state of play of the implementation of Vietnam Labour Workplan, including *inter alia* the ratification of ILO Convention No.87 (freedom of association) expected in 2023, the preparation of new Law on trade union (regulating State-affiliated trade union only) which is scheduled to

²⁷⁵ Business and Human Rights Resource Center, EU: Commission criticized for ignoring Domestic Advisory Groups aimed to engage civil society in trade agreements negotiations, available at <https://www.business-humanrights.org/en/latest-news/eu-commission-criticized-for-ignoring-domestic-advisory-groups-aimed-to-engage-civil-society-in-trade-agreements-negotiations/> [Last access 04 May 2022]

²⁷⁶ European Commission, Agreed minutes of the 1st meeting of Trade Committee (EVFTA), p.4, available at <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/583225c8-e6aa-43af-b7ca-db7110460a11/details> [Last access 04 May 2022]

²⁷⁷ Vietnam plus (official newspaper), Domestic advisory groups set up under EVFTA, available at <https://en.vietnamplus.vn/domestic-advisory-group-set-up-under-evfta/206644.vnp> [Last access 04 May 2022]. The Vietnam Chamber of Commerce and Industry (VCCI) is an organization of employers which has a close link to State while the Institute for Workers and Trade Unions is under the Vietnam General Confederation of Labour (VGCL) – that has the legal status under Vietnam constitution. The Centre for Sustainable Rural Development (SDR) is a member of the Vietnam Union of Science and Technology Associations (VUSTA) – a state-back network. The newly added member of DAGs is Vietnam Elevator Association (VNEA), the Vietnam Association of Seafood Exporters and Producers (VASEP), the Vietnam Fisheries Society (VINAFIS), and the Education for Nature Vietnam (ENV).

²⁷⁸ European Economic and Social Committee, Joint report of the EU DAG and the Vietnam DAG under the EU-Vietnam FTA, para. 5, available at https://www.eesc.europa.eu/sites/default/files/files/1st_eu-vietnam_dag-to-dag_meeting_9_november_2021_joint_report_final_29.11.2021_final.pdf [Last access 4 May 2022]

²⁷⁹ Ibid, para. 8

be submitted to National Assembly in 2023-2024, the preparation of delayed Decree on EOE and other working plan concerning child-labour and enhancing capacity of labour-inspectorates. EU side asked for the enacting of the delayed decree on EOE, further information on how Vietnam meet its commitment to eliminate child labour by 2025 and further information on forced labour as well as expressed concern on freedom of association. Also the EU called for effective implementation of labour rights and for an update on the Vietnam Workplan in consultation with EU²⁸⁰. In other words, certain papers have been served but the actual improvements still need to be seen in the future.

In brief, the impacts of the EU promotional approach on human rights situations in Vietnam so far has not been clear. Whether a closer tier could bring human rights improvements on the ground needs to be seen. In the initial stage, only paper compliance was served by Vietnam with certain signs of delays and perfunctory implementation. This could be due to the fact that EVFTA implementation is in its initial stage but could also be due to the resistance from certain actors. With this beginning, it is highly likely that the prospect of implementation of TSD Chapter will be cosmetic compliance as presented in the following section.

4.2.2 Key challenges posed by the governance gaps and the prospect of cosmetic compliance

As presented in chapter 2, there are challenges in the implementation, enforcement and ex-post evaluation of TSD Chapter. For implementation in particular, the challenges include different priorities from both sides, weak civil society and insufficient targeting with respect to salient human rights problems. Therefore, the key features necessary for the effectiveness of the TSD chapter are the appropriate priorities and targeting, and the enhanced capacity of civil society. However, the human rights governance gaps pose challenges for the key features, risking the cosmetic compliance of the TSD chapter, at least, with respect to business-related human rights impacts.

4.2.2.1 Invisible human rights impacts for prioritization and targeting

One of the main challenges is that both the EU and Vietnam have different priorities in EVFTA and even amongst those priorities, the shared priorities may be at different levels. However, the prioritization for human rights issues may be significantly decreased because the governance gaps, as demonstrated in section 4.2, making AHRIs in Vietnam invisible from public scrutiny

On the EU side, although human rights protection is a priority in the value-based trade policies with the aim to create a level playing field, there is a tendency that relevant EU actors prioritize economic development over human rights issues. When the local AHRIs in trading-partner are invisible like the case of Vietnam, such relevant actors will have excuses to just implement the TSD chapter superficially rather than spending efforts on human rights problems. On Vietnam side, many actors signify the political and social stability and social control while focusing on economic development. The changes in

²⁸⁰ European Commission, Joint Report of the first EU–Viet Nam Trade and Sustainable Development (TSD) Committee Meeting to the TSD Public Forum, available at <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/84ff4c1b-dde0-4c40-ac8d-52ffeae3bf0/details> [Last access 04 May 2022]

human rights conditions may be seen as not-fitting to the local particularities or challenging the political *status quo*. Invisible AHRIs under current legal framework may accelerate this tendency, distracting Vietnam from making real changes.

The governance gaps also create difficulties for both sides to target salient human rights impacts. While the EU and Vietnam should focus on the changes to protect fundamental rights and major issues, the invisibility of human rights impacts may lead to the situation that one party works too much on minor issues and trivial problems, distracting attention from core problems. The efforts and resources from other party which has certain limits may also be distracted accordingly.

4.2.2.2 Civil society engagement – civil actors or ‘play actors’?

The key role of civil society actors who may serve as DAGs or participants in CSDF mechanisms depends on their capacity. The local civil society should enjoy an enabling civic space, has experience in engagement with businesses and states and may access effective remedies when their rights are breached. These conditions will help civil society to build their knowledge, experience and capacity on human rights issues, upon which relevant CSOs and DAGs may contribute useful advice for the States and be helpful actors to the TSD chapter’s monitoring mechanism.

However, the current governance gaps in Vietnam seem to not guarantee those necessary conditions. Due to the lack of civic space and the shortcomings in stakeholder engagement regulation, independent CSOs and NGOs have restricted room to establish legally, and gain sufficient knowledge and experience. Even when they successfully make legal registration, to join DAGs is a real challenge as all members of DAGs must be appointed by the Ministry of Trade and Industry²⁸¹. So far, no procedure for application was specified and no human-right related CSOs or NGOs is a member. The decision of Vietnam DAGs must be based on consensus or majority that include the vote of DAGs’ president²⁸². This mechanism may be problematic for human rights members if DAGs consist of State-affiliated organizations which are dominant to other members that are in turn not totally independent. DAGs could therefore become not civil society actors but ‘actors’ in the ‘play’ of CSDFs.

Particularly on the regulatory framework on trade union, Vietnam has made commitments to ratify the Convention No.87 and to revise the legal framework on trade union. However, it is unthinkable that EOE will have the same status as the state-affiliated trade union which was established under the Vietnam Constitution. As a part of political system, the State-affiliated trade unions could be expected to enjoy certain preferential treatments. The regulatory framework therefore could be adjusted to meet certain requirements but, under its sophisticated layers, the real changes could be so little. As signifying the politic stability and society control, the regulatory framework of Vietnam generally has the tendency of localizing the social affairs rather than allowing them to spread out of the control and to involve civil society engagements. The EOE legal framework is a clear example of this tendency which should not be expected for being changed in a short-term vision.

4.2.2.3 Concluding remarks on the prospect of cosmetic

²⁸¹ The Vietnam Ministry of Trade and Industry, Decision No.1972/QD-BCT dated on 17 August 2021 on establishment of domestic advisory groups, Article 3.3

²⁸² Ibid, Article 5.1

compliance of TSD chapter

EVFTA is the initial stage of implementation which is very important to create momentum for the effective implementation in the next years. However, the systematic challenges created by governance gaps impeding the key features necessary for the effectiveness of the TSD chapter pose a real risk of cosmetic compliance. As a result, economic development focus may obscure human rights problems that are already invisible because of the governance gaps. In fact, there are signs of such cosmetic compliance risk in the current implementation situation of EVFTA TSD chapter, such as delays, obstacles, focusing of paper work and the problems in DAGs composition.

The EU should learn from the lesson of EU-Korea Free Trade Agreement (EUKFTA) that is the first FTA in the new FTA generation to which EVFTA belongs. EUKFTA and EVFTA share the same structure as being a part of PCA and having a TSD chapter. South Korea and Vietnam also have many similarities that explains why the South Korea is the biggest FDI investor in Vietnam and the two countries have a strong connection. In the implementation of EUKFTA, there were similar signs of cosmetic compliance and resistance forces from the South Korea side. For example, there were many systematic troubles with respect to fundamental freedoms and trade union. Korea made commitment but persistently delayed the ratification of fundamental ILO conventions²⁸³. And the DAGs of Korea are also composed of state-affiliated organizations and academic-background organizations, instead of human rights CSOs²⁸⁴.

In fact, both the EU and Korea enjoyed the development of the trade relation but not human rights improvements in Korea. Commitments were made, monitoring mechanism was deployed but the EU seems to fail in its promotional approach with Korea. After 7 years of implementation, the *ex-post* evaluation report in 2018 pointed out that EUKFTA failed to change the *status quo* of the human rights situation in Korea²⁸⁵. The situation only changed when the EU used, for the first time, the dispute settlement mechanism under the TSD chapter that declared the violation of Korea with respect to their obligation under the TSD chapter on freedom of association²⁸⁶. Korea then ratified three core ILO conventions in a row in 2021²⁸⁷ but the real changes on the ground level need to be observed and assessed in further evaluations.

From the systematic challenges to EVFTA in Vietnam, the signs of such prospect in EVFTA initial implementation and the example of EUKFTA together, two important points could be inferred: First, EVFTA is facing a real risk of cosmetic compliance unless the EU deploys its promotional approach in a manner that are more effective than the one applied to EUKFTA. Second, the EU promotional approach alone may not be sufficient

²⁸³ The European Commission, Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea (final report 2018), p. 354-356, available at https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157716.pdf [Last access 05 May 2022]

²⁸⁴ Ibid, p. 350, 353

²⁸⁵ Ibid, p. 244

²⁸⁶ The European Commission, Panel of experts confirms the Republic of Korea is in breach of labour commitments under our trade agreement (25 January 2021), available at [file:///C:/Users/Huan/Downloads/Panel of experts confirms the Republic of Korea is in breach of labour commitments under our trade agreement .pdf](file:///C:/Users/Huan/Downloads/Panel%20of%20experts%20confirms%20the%20Republic%20of%20Korea%20is%20in%20breach%20of%20labour%20commitments%20under%20our%20trade%20agreement_.pdf) [Last access 05 May 2021]

²⁸⁷ ILO Normlex, Ratifications for Republic of Korea, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103123 [Last access 05 May 2022]

to handle the situation in which the improvement of human rights situation is impeded by *systematic challenges*.

5 Synergies between mHRDD and value-based trade in Vietnam context

In any circumstance, hope needs to be kept and solutions must be reached. So far, this thesis has presented many problems and the not-very-bright prospects of mHRDD legislations and EVFTA in Vietnam due to the human rights governance gaps – systematic challenges. However, this chapter will look at the positive side when those instruments are combined together, creating a legal framework with transformational potentials. The first section demonstrates a mapping of the issues that have been presented so far, showing the holistic picture of the instruments in the Vietnam context. The complementary relation between mHRDD legislation and EU FTA is analyzed in the second section while the third section presents the transformational potentials that may create systematic changes in the landscape of business-related AHRI in Vietnam.

5.1 Mapping the issues

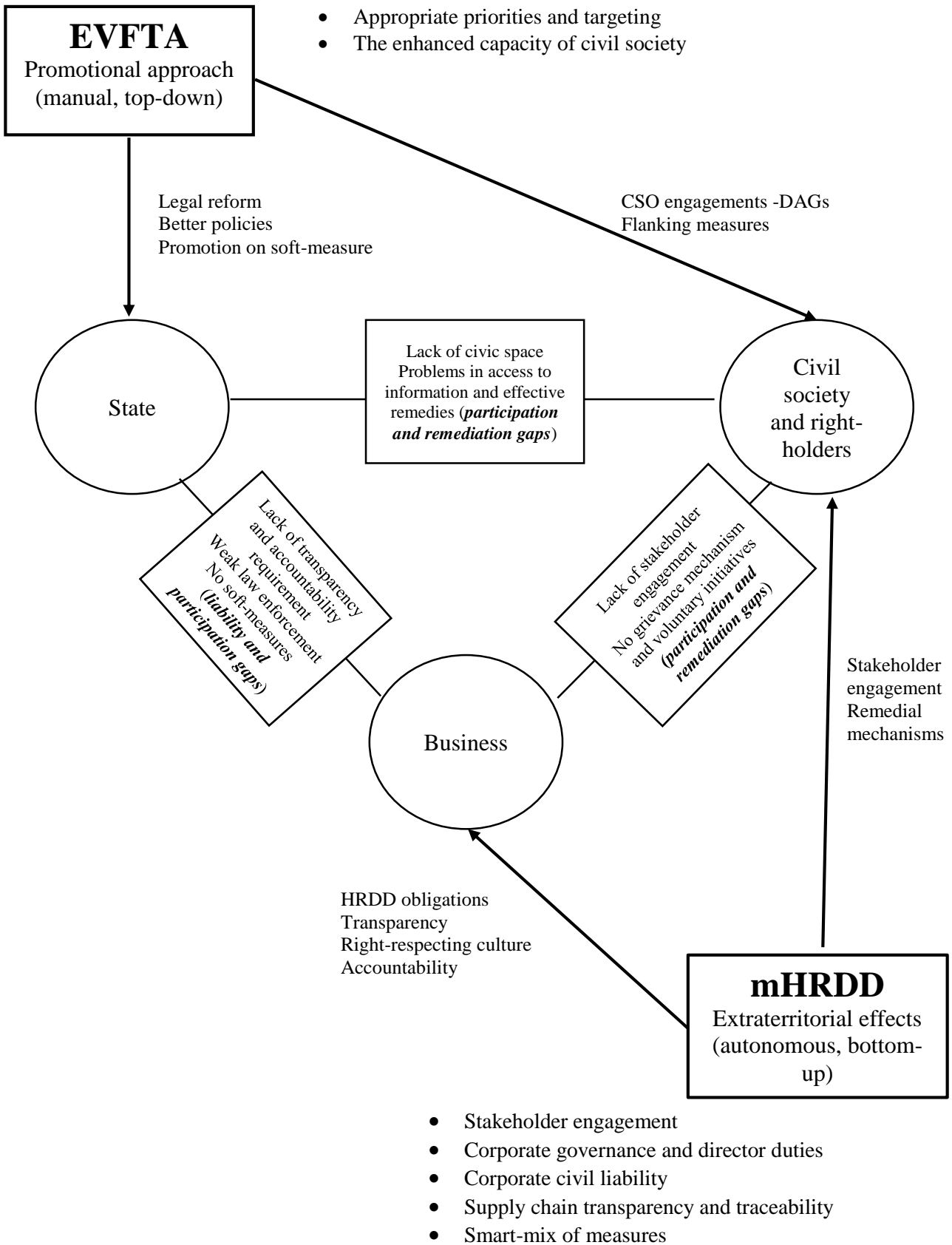
Before analyzing the complementary relation between the instruments, it is necessary to illustrate the issues that have been presented so far to demonstrate the picture of landscape in which those instruments will be implemented and to which how they may have effects. On the one hand, the mHRDD legislations, in particular the CSDD Directive, have the bottom-up approach that generates extraterritorial effects on businesses and civil society, right-holders. They are autonomous as they should be implemented without tailoring efforts from the regulators (EU and its member states). For having strong extraterritorial effects, they need few key features, including stakeholder engagement, corporate governance and director duties, corporate civil liability, supply chain transparency and traceability, and a smart mix of measures.

On the other hand, EVFTA has the top-down approach that has promotional effects on the Vietnam Government, local civil society and right-holders. It requires manual efforts from regulators (EU and Vietnam) to tailor its implementation, responding to the socio-economic, political situations in reality. The key features necessary for its effectiveness include appropriate priorities and targeting, and the enhanced capacity of civil society.

Both of EVFTA and mHRDD legislations face the prospect of cosmetic compliance, as depicted in Chapter 4, due to the human rights governance gaps in Vietnam which pose systematic challenges for their effectiveness. Neither EVFTA nor mHRDD legislations alone could guarantee the improvements in human rights situations because of the systematic challenges that are mainly resulted from the shortcomings of Vietnam regulatory framework. This is due to *inter alia* the resistance forces from local actors to prevent or postpone the reform of regulatory framework in Vietnam.

However, the risk of cosmetic compliance could possibly be avoided when EVFTA and mHRDD legislations are implemented in a systematic way that allows them to complement and accelerate each other's effectiveness. In short, *systematic challenges need systematic responses*.

Mapping the issues



5.2 The complementary relations between mHRDD legislations and EU FTAs

As presented in section 2.3, both CSDD and EU's FTAs aim at sustainable development, which should not harm EU companies' competitiveness. These instruments must create a level playing field not only amongst EU companies but also between EU companies and non-EU companies. Therefore, they have to aim at upgrading social and environmental standards on the ground level of trading-partners. The EU is establishing its strategic leadership in sustainability in general and particularly in setting up standards applicable over the world. CSDD and FTAs are the tools for the EU to achieve these purposes.

The EU has projected to certain extent the relation between CSDD and FTAs to achieve the medium-term objective of shaping global rules for a more sustainable and fairer globalization²⁸⁸. The EU will be promoting responsible business conduct and the respect of environmental, human rights and labour standards by using multilateral frameworks, bilateral trade agreements (FTAs) and autonomous measures (including CSDD). In particular, the implementation of TSD chapters in FTA will be strengthened and CSDD will be supportive for ensuring responsible and sustainable supply chains connected to the EU market²⁸⁹.

The recital No.49 of CSDD proposal clarifies that the European Commission and member states will continue to work in partnership with third countries, through international cooperation instruments, to support upstream economic operators in addressing their adverse impacts and in compliance with CSDD. This could include working with all actors in third countries in addressing the root causes of human rights and environment adverse impacts.

In short, FTAs may provide an enabling environment in which CSDD could be effectively implemented²⁹⁰ while CSDD can be supportive for FTAs in archiving the trade-policy objectives that include sustainability and human rights protection. One important aspect is that the objectives of trade policy are medium-term. In other words, FTAs and CSDD are expected to make significant changes in third countries in a medium term but not immediately. This is quite important for third countries where the resistance forces are strong and demanding significant changes in a short term could be seen as threats. This aligns with the fact that the promotional approach in FTAs should gradually change the policy environment in third countries while CSDD, although expected to effectively prevent and mitigate adverse impacts, considers the business termination as the last resort.

Similarly, the existing national mHRDD legislations as well as the one enacted by member states in transposing the CSDD Directive could support FTAs in the same way.

²⁸⁸ This is one of three objectives of EU's trade policy for the medium term. See the European Commission, Trade Policy Review – An open, sustainable and assertive trade policy (2021), p.13, available at https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159541.0270_EN_05.pdf [Last access 8 May 2022]

²⁸⁹ Ibid, p.16-17

²⁹⁰ Radu Mares, The new EU Directive on Corporate Sustainability Due Diligence: origins, compliance effects and global significance, available at <https://rwi.lu.se/blog/the-new-eu-directive-on-corporate-sustainability-due-diligence-origins-compliance-effects-and-global-significance/> [Last access 08 May 2022]

Although the EU did project this complementary relation in principle, revealing a policy-coherence, the complementation between mHRDD and EU FTAs still need to be detailed in order to observe their transformational potentials to third countries.

On the one hand, EU FTAs will facilitate an enabling environment for the implementation of mHRDD legislations. First, through the implementation of FTAs the EU can promote the legal reforms and better policies (including a smart-mix of measures) in third countries toward its values (democracy, respect to human rights and rule of law). Upon these improvements in the legal and policy environment, businesses have clear guidance and motivation to implement mHRDD provisions to respect human rights while civil society may have stronger standings in engaging with business-related adverse impacts to support HRDD processes.

Second, EU FTAs also provide the chances for civil society engagements in the monitoring mechanisms of TSD Chapters (DAGs, CSDFs) as well as in the transparency-mechanism (chapter 14 of EVFTA) in which any interested person can make enquiries on a measure of general application (law, regulation and bylaws) issued by one side under FTAs. In addition, the EU will also deploy flanking measures, for example: funding and supporting for CSOs and awareness-raising programs on access to remedies²⁹¹, which will facilitate CSOs and right-holders to engage with relevant stakeholders and exercise their rights. These mechanisms and measures will support CSOs and right-holders in Vietnam to obtain relevant information from the EU sides, enhance their capacity and obtain operational experience, which facilitates their relevant engagements related to HRDD processes.

On the other hand, mHRDD legislations also play a supportive role for the effectiveness of FTAs by providing the needed transparency element. Under mHRDD legislations, businesses have HRDD obligations and certain types of accountability. They are opened up for public scrutiny with more transparency and have to have better governance for right-respecting culture. Stakeholders will be provided additional chances for seeking engagements and remedies from relevant actors, including home state, businesses, monitoring authorities of mHRDD legislations and competent courts in host states. These effects from mHRDD will benefit the implementation of FTAs: First, they will provide relevant information on adverse impacts on the ground level for the EU and its trading partners to make appropriate priority and targeting. The information could be provided through many channel, such as: business reports of EU companies under non-financial report directive (NFRD) that will be replaced by Corporate Sustainability Reporting Directive (CSRD), engagement of stakeholders in CSDF and other relevant mechanism under FTAs (like Single Entry Point), and remedial mechanisms. Second, the capacity of civil society and right-holders will also be enhanced through stakeholder engagement in HRDD process, which in turn will increase the civil society engagement under FTAs. In essence, mHRDD legislations play a linking and enabling role within three blocks of governance— similarly to the role of HRDD in UNGP - and also enable FTA mechanisms.

The above complementation between mHRDD and FTAs is of significance because it can help these instruments to compensate for each other's weaknesses and reinforce their effectiveness. This is the key point for them to create systematic responses which may overcome the systematic challenges of human rights governance systems like the ones that exist in Vietnam.

²⁹¹ The European Commission, Commission Staff Working Document, *supra* n.140, p.20-21

A smart mix of measures (between international and national, voluntary and mandatory or ‘soft’ and hard’) is vital for managing business-related adverse impacts because there is no single instrument that could be a ‘silver bullet’ to solve all the problems of business dynamics. EU FTAs and mHRDD legislations could be combined to lay out the foundation for such a smart mix of measures in the context of third country trading partners.

EU FTAs have the provision to promote voluntary initiatives for high levels of labour and environment standards, including sustainable assurance schemes like fair and ethical trade schemes and eco-label. FTAs also promote CSR, which fundamentally bases on corporate voluntarism, and refers to CSR documents, including OECD MNE guidelines²⁹². Trading partners have the obligations to promote, facilitate and encourage these voluntary measures, which could compensate for the limited extraterritorial effects of mHRDD legislations and facilitate the implementation of HRDD obligations on the ground level. The EU may push forward the implementation of these obligations of trading partners through the TSD monitoring mechanism and other provisions on capacity building in FTAs. In the opposite direction, the existence of mHRDD legislations and its extraterritorial effects also creates pressures for businesses in trading partner countries to adopt and join voluntary schemes that support the implementation of the TSD chapter.

However, there is a potential incoherence that should be aware of. FTAs promote CSR while mHRDD legislations are BHR instruments. Fundamentally, BHR should be considered as a critique of CSR: First, CSR is practiced by companies in a voluntary way, focusing on companies’ own activities rather than the needs of and effects on people which are the main focus of BHR. Second, CSR privatizes human rights (i.e. getting companies involved to public affairs – human rights issues) while BHR politicalizes the corporate responsibility (i.e. bringing political consideration – human rights issues – into business model)²⁹³. CSR also could hinder BHR in both practices and policy-making level if BHR is confused as an extension of CSR²⁹⁴. It will be troublesome if local actors see mHRDD legislations from the perspective of CSR, which undermines the effectiveness of mHRDD legislations. Two fields and the instruments thereof should be seen as separate in nature but could be collaborated to ensure corporates’ respect to human rights.

5.3 Kick-starting the transformations for Vietnam

Upon the analysis of the complementary relation between mHRDD legislations and EU FTAs, the transformational potentials of the combination between mHRDD legislations and EVFTA appears in the context of Vietnam. This combination could potentially facilitate the instruments to not only reinforce each other but also to provide systematic responses with transformational effects to Vietnam’s systematic challenges, bridging the human rights governance gaps.

²⁹² These provisions could be found in Article 13.10 (2) (d) and (e)

²⁹³ Florian Wettstein, *supra* n.23, p. 34, 39

²⁹⁴ *Ibid*, p.40-3

5.3.1 Bridging the participation gaps

As an integrated part of PCA, EVFTA could be used in a way that promotes not only labour rights but also fundamental rights in general. Human rights are now seen as trade-related issues and ensuring human rights conditions is also to ensure the level playing field. Therefore, the EU could either through the institutional mechanism under EVFTA or use trade as leverage in PCA to promote legal reforms and better policies which create an open civic space for civil society and rights-holders to exercise their rights as well as enhance the quality of stakeholder engagements. Under EVFTA, the EU and Vietnam could ‘work together’ and engage in capacity-building activities to promote sustainable developments, including human rights issues. In addition, the flanking measures to support and enhance CSOs’ capacity will also facilitate closing the participation gaps.

The mHRDD legislations, especially CSDD laws, play a supportive role for the above activities primarily by providing concrete evidence/ information on the human rights situation on the ground level, which enable relevant actors to make better prioritization and targeting. The facilitated activities under EVFTA will in turn create an enabling environment for the implementation of mHRDD legislations. The transformational potentials could be observed by taking closer looks at the participation gaps in each relation:

- ***On the participation gaps in the State-civil society relation:*** PCA and EVFTA could promote the legal reform and better policies on fundamental rights concerning laws on freedom of opinion and expression, peaceful assembly and association. The input from HRDD report of businesses could illustrate salient problems on the ground level, serving these efforts for legal reforms and better policies. Once civic space is more open, the chance for independent CSOs to join DAGs and CSDFs will also increase and this will inform the EU and Vietnam about the problems in the implementation of mHRDD legislations from the ground level. Importantly, CSOs and right-holders will have chances to provide social feedback concerning business-related AHRIs to the State. In addition, flanking measures enhance the capacity of civil society and right-holders to make relevant engagements with the State in both EVFTA and mHRDD implementations.

- ***On the participation gaps in the business - civil society relation:*** The engagements between business and civil society, right-holders are necessary for the effectiveness of both EVFTA and mHRDD legislations. They are facilitated from both top-down by EVFTA (civil involvements and flanking measures) and bottom-up by mHRDD legislations (stakeholder consultation, engagement in HRDD and CSDD, and better practices of businesses). In this sense, EVFTA and mHRDD legislations reinforce the effectiveness of each other.

The above reinforcement would also support, through EVFTA mechanisms, the legal reform and better policies to close these participation gaps. It will inform the EU to work further with Vietnam to ensure the fundamental rights at work, in particular the legal reform on independent trade unions, collective bargaining and right to strike. Similarly, Vietnam law on land, environment protection and consumer protection should also be reformed for requiring the engagements of CSOs and right-holders with businesses. These legal reforms and better policies on the engagement of businesses and

civil society will, in return, support the implementation of both EVFTA and mHRDD legislations in dealing with business-related AHRIs.

As presented, EVFTA and mHRDD legislation could together promote voluntary initiatives and CSR practices which increase the engagement between business and civil society, right-holders. This is an important aspect before the legal reforms concerning fundamental rights are conducted, especially in the field of industrial relation between businesses and workers because export-oriented industries are all labour - intensive. Voluntary initiatives and CSR practices could bring about quicker improvement in terms of engagement.

- **On the participation gaps in the State - business relation:** State and local businesses should collaborate and engage to prevent AHRIs. On the one hand, EVFTA obligates the State to promote and facilitate voluntary initiatives and CSR through TSD mechanisms and capacity building activities. As a result of such mechanisms and activities, State may develop incentive-based schemes or equivalent policies to encourage businesses to respect human rights. The incentive-based schemes could be export/import credits, guidance, advisory supports and other supportive schemes. State have to also facilitate, or at least respect, the voluntary initiative aiming at corporate respect to human rights like fair and ethical trade and CSR practices. On the other hand, mHRDD legislations provide motivation/pressures for businesses to engage in such voluntary initiatives and incentive-based schemes. A smart mix of measures created by EVFTA and mHRDD legislations will perfectly close this participation gaps and boost the effectiveness of those instruments. This smart mix of measures also paves the foundation for closing these liability gaps, which will be explained in the following part.

5.3.2 Bridging the liability gaps

Businesses in Vietnam are now enjoying the legal vacuum of liability with respect to human rights as they have no obligation to respect human rights or to conduct HRDD processes. Due to weak transparency and accountability requirements and law enforcements, businesses avoid public scrutiny and accountability for their adverse impacts.

In the future, there must be a law on mHRDD or CSDD as well as sustainability reporting in Vietnam in order to ensure the level playing field and fair competitiveness between EU companies and Vietnam companies. The EU through EVFTA mechanisms has to definitely work for this end and the facts that local businesses, in compliance with EU mHRDD legislations, get understanding and experience on HRDD will also facilitate the formation of these laws in Vietnam. However, a considerable period of time should be expected before Vietnam reaches to this point.

In the meantime, mHRDD legislations and EVFTA could collaborate to gradually close the liability gaps in Vietnam. On one side, EVFTA may produce three types of effect. First, the gaps could be gradually bridged by applying the ‘hardening’ process of HRDD to which the EU has successful experience. Through EVFTA, the EU can work together with Vietnam in order for the State to endorse/issue CSR instruments/initiative, soft-law on HRDD, sectoral regulations and eventually mHRDD law. For example, the EU could work with Vietnam through capacity building so Vietnam will become an adhering country of OECD MNE Guidelines and then develop further instruments in the HRDD ‘hardening’ process.

Second, EVFTA could promote legal reforms and policies to strengthen the transparency and accountability requirements in Vietnam's regulatory framework. For example, there should be requirements of ESG information publications with respect to big and high risk companies, not just the public listed ones. The law on investment, land, environment and consumer protection have to require companies to be transparent and engage with CSOs. The administrative accountability will also have to be reformed for providing higher and more appropriate dissuasive effects rather than using blanket-maximum thresholds. Third, capacity building activities under TSD chapters and chapter 16 of EVFTA could boost the effectiveness of law enforcement on human rights-related issues in Vietnam.

On the other side, mHRDD legislations, through its extraterritorial effects, may contribute to closing these liability gaps in three ways. First, they directly close the gaps by requiring businesses to conduct HRDD and CSDD to respect human rights. Second, they make businesses involved in the shaping of legal reform and better policies. In compliance with mHRDD legislations, businesses will gain experience and awareness about HRDD and then hopefully turn their supports for a HRDD 'hardening' process as what happened in EU. Through implementing mHRDD legislations, businesses will also encounter the problems/shortcomings in regulatory framework, policies and law enforcements that obstacle them to comply with mHRDD. This will foster the engagement between State and businesses in improving those problems/shortcomings. And third, mHRDD provides the EU and Vietnam with information on human rights problems on the ground level, facilitating the HRDD 'hardening' process, the shaping of legal reform and better policies and the improvement of law enforcements. Through HRDD/CSDD reports, the contacts from stakeholders involved in HRDD (for example through the Single Entry Point – SEP) and the HRDD-informed civil society engagement under TSD chapter, EU would have better knowledge on human rights issues in Vietnam and therefore better prioritization and targeting in working with Vietnam for these matters.

Bridging liability gaps is the vital task for preventing business-related AHRIs in Vietnam. While EVFTA has top-down effects to promote State to bridge these gaps, mHRDD legislations prepare the foundation for and facilitate these bridging activities.

5.3.3 Bridging the remediation gaps

The remediation gaps exist in the State-civil society relation and the business-civil society relation. Although mHRDD legislations and EVFTA could reinforce each other in closing these gaps, their roles with respect to the gaps in the two relations seem to be reversed:

- **On the remediation gaps in the State - civil society/right-holder relation:** EVFTA plays a primary role in bridging these gaps. In Vietnam, EVFTA could promote legal reforms in litigation, better law enforcement in order for affected right-holders to access remedies with the assistance of CSOs. The EU may also support Vietnam to become an adhering country of OECD MNE guidelines (setting up the mechanism of NCPs for victims) or to deepen Vietnam's performance with respect to the dispute-settlement mechanisms under ILO MNE Tripartite Declaration (establishing a national focal point). On civil society and right-holders, EVFTA provides flanking measures and information to support them in seeking remedies. The mHRDD legislations have a supportive role in this relation as they provide awareness and information for

CSOs and affected right-holders involved in HRDD process to seek relevant remedies from the State.

- **On the remediation gaps in the business – civil society/right holder relation:** the mHRDD legislations play the primary role in closing these gaps. They provide additional opportunities for victims to access remedies: First, businesses will engage in voluntary initiatives establishing grievance mechanisms and especially have to establish ‘remedial procedure’ under CSDD. Second, affected right-holders will have the chance to hold businesses accountable in the monitoring authorities of mHRDD legislations or in home-state courts. EVFTA plays a supportive role here as it provides assistance, such as awareness raising, connections and relevant information through DAGs, CSDFs, for CSOs and affected right-holders.

Importantly, the combination of EVFTA and mHRDD legislations could bridge the governance gaps systematically. Since the governance gaps intersect, interplay and worsen each other, creating systematic challenges, the improvement in certain governance gaps need and also benefit the improvement in other gaps. In other words, the progresses in bridging a certain gap also interdepend, interplay and accelerate the progresses in bridging other gaps. For example, the closing of participation gaps between State and civil society will also accelerate the bridging of the liability gaps. Civil society when enjoying open civic space will push the HRDD ‘hardening’ process moving faster. Another example is that: When the remediation gaps between state and civil society/right-holders is closed, companies have more pressure to engage with CSOs and right-holders, and so on. The interdependence, interplay and acceleration between the bridging activities mean that EVFTA and mHRDD legislations could be a useful toolbox to create comprehensive external forces that generate systematic responses overcoming resistant forces to improve the human rights governance system.

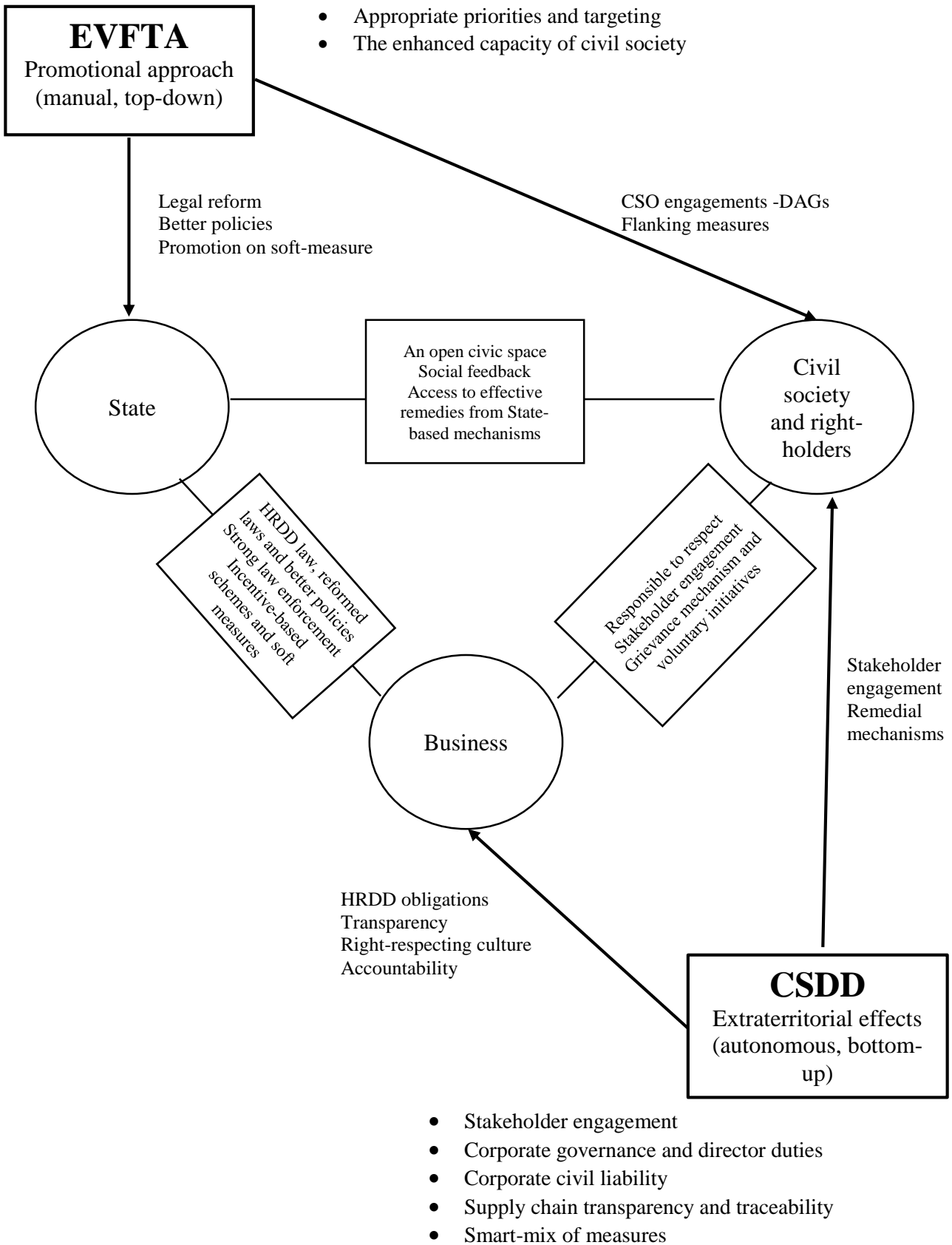
However, how to use the toolbox appropriately to make the Vietnam human rights governance system running is very challenging: how fast the tools should be used, to what extent the tools try to adjust the system, what is the appropriate response in a certain time to maximize effectiveness. If the tools are used to demand too much, too fundamental changes from the system at a short period of time, the resisting forces may become stronger and even ruin the tools, and *vice versa* (i.e. the tools take too much time to make little progress). To handle this challenge, the EU and member states primarily need to determine how to manually use the external force of EVFTA in Vietnam with the consideration on the complementary effects of mHRDD legislation and CSDD.

Unlike EVFTA, mHRDD legislations and CSDD playing a supportive role must always be implemented strictly. Although these legal instruments are autonomous, the efforts from the EU and member states in maintaining the monitoring authorities and facilitating access to remedies for victims from third-countries are needed for guaranteeing the effectiveness.

From the Vietnam side, this toolbox should be considered as a chance for deepening cooperation and improving the human rights situation. Business-related AHRIs are the source of internal disputes, inequality and instability amongst society. While mHRDD legislations directly handle these adverse impacts, it also informs Vietnam the reality of problems. Upon such knowledge, Vietnam may work together with the EU in transforming toward sustainable development and gradually increase the human rights situation under EVFTA and PCA while still enjoying political stability.

In brief, the regulatory toolbox could be useful and create transformational effects if the EU and member states have strong political will to use it in a subtle manner. ***Systematic responses may generate systematic changes*** but this needs time and effort.

Working together



6 Conclusion

The EU is establishing its leadership in shaping global rules and standards for sustainable development as well as disseminating its values, including human rights, over the world. This is to ensure the level playing field and competitiveness between the EU and other parts of the world. In doing so, the EU and its member states are enacting mHRDD/CSDD legislations and using the new generation of EU FTAs to create external forces on third countries.

Such instruments create a legal framework that may generate external forces to change the human rights situation in Vietnam. On the one hand, mHRDD/CSDD legislations provide extraterritorial effects on the human rights situation in third countries. In the last decade, the concept of HRDD was developed and has been hardened in mHRDD legislations. The development of mHRDD legislations tends to cover on both human rights and environment adverse impact - or CSDD. Once the CSDD Directive is enacted by the EU, member states will have to transpose it and therefore all mHRDD legislations will become CSDD legislations. On the other hand, FTAs are used to implement value-based trade policies with the TSD chapter for upholding and enhancing social and environment. The TSD chapter is embodied with the promotional approach that is dialogue-based for cooperation between the EU and trading partners. This approach provides external forces on trading partners to make legal reforms and better policies with respect to labour and environment standards. EVFTA belonging to the new generation of EU FTA has the TSD chapter with this promotional approach on Vietnam. Furthermore, EVFTA, as a part of PCA, could be used to create pressure on Vietnam to make improvements in fundamental human rights.

Vietnam is a typical developing country – the host state where no gross human rights violations could be found but the problems are covered under multilayers. Businesses which are the export-oriented industries - the upstream actors in global supply chain - are making AHRIs without being adequately held accountable for their wrongdoings because of the human rights governance gaps. Through analyzing Vietnam's regulatory framework, the human rights governance gaps that exist where three blocks of governance have insufficient connections to deal with business-related AHRIs appear clearly: Participation gaps (State, business and civil society, rights holders do not engage with each other), liability gaps (lack of law on HRDD, transparency and accountability requirements) and remediation gaps (civil society and right-holders could not access effective remedies from State and businesses). These governance gaps and their underlying constitutive elements intersect, interplay and worsen each other, creating *systematic challenges* and therefore permitting business wrongdoings in a sophisticating system. These systematic challenges are exacerbated by contextual trouble such as corruption, informal business, formalism and low awareness on human rights.

Therefore, the external forces are needed to catalyze changes in the governance system on business-related AHRIs. However, the external force generated by mHRDD/CSDD legislations and EVFTA will have to encounter the systematic challenges in Vietnam. Since the EU and Vietnam are closely connected in terms of economic relation, the relevant actors in Vietnam cannot just ignore or outright resist the EU instruments. Instead, the systematic challenges will risk the prospect of cosmetic compliance for these instruments because they make business-related adverse impacts

invisible from supply chains and public scrutiny. When EVFTA and CSDD legislations are implemented individually, the key features necessary for their effectiveness are prevented by the governance gaps and these instruments therefore will show good compliance on paper without real changes on the ground level. The risk of cosmetic compliance is highly likely and, in fact, EVFTA already has the signs of that prospect in its initial stage of implementation. If the prospect of cosmetic compliance is realized, the EU legal framework will be just a set of decorative items that provide excuses for involving actors to maintain the human rights *status quo* in Vietnam.

Systematic challenges need to be handled by *systematic responses*. The mHRDD/CSDD legislations and EVFTA should be together seen as a comprehensive EU legal framework which could provide such systematic responses with transformational effects. In such EU legal framework, these instruments have a complementary relation: They can compensate for the other's weaknesses and reinforce each other when dealing with the systematic challenges. EVFTA provides an enabling environment for the implementation of mHRDD/CSDD legislations which in turn play a supportive role for EVFTA by providing information, input and other enabling effects. They can also together promote a smart-mix of measures in managing business-related adverse impacts. As a result, the comprehensive EU legal framework may create systematic responses for bridging the governance gaps and changing the landscape of business-related adverse impacts in Vietnam. In this way, this EU legal framework could be a useful toolbox with transformational effects to make *systematic changes*, at least for business-related human rights issues.

The EU has projected the complementation between CSDD and FTAs through the coherence in internal and external dimensions of its trade policies. This also reveals a smart mix of measures between hard (CSDD) and soft (FTA promotional approach) measures. However, in the Vietnam context, it is still to be seen how the EU will use this useful toolbox to optimize the effectiveness thereof. At this time, this regulatory toolbox is largely under designing stage: CSDD Directive is in its legislative procedure with much or less changes while EVFTA is in initial implementation which is a very important time to create a progressive momentum for its implementation. Therefore, it is necessary for involving actors from both EU and Vietnam to take a consideration on the transformational potentials of the combination between CSDD legislations and EVFTA. The potential incoherence like the confusion about CSR promoting provisions should be avoided.

Given the risk of cosmetic compliance and the potential of transformational effects of the EU legal framework, it remains to be seen whether there will be chronic issues or transformational progresses in Vietnam's human rights situation. However, the toolbox should be seen as the opportunity for relevant actors from both top and ground level, EU and Vietnam sides to work together and gradually make subtle moves, overcoming resistant forces and improving the situation on the ground level. The challenges are huge but the changes could be transformational.

To sum up, the EU legal framework created by mHRDD/CSDD legislations and EVFTA could be either a useful toolbox with transformational effects or just a set of decorative items. It depends on how the toolbox will be used. The risk is imminent but the hope must be kept.

Bibliography

Primary sources

UN

UN General Assembly, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (A/RES/60/147), 21 March 2006

UN Sub-Commission on the Promotion and Protection of Human rights, The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Draft) E/CN.4/Sub.2/2003/12/Rev.2 2003

UN Guidance Note – Protection and Promotion of Civic Space (2020), p.3, available at: https://www.ohchr.org/sites/default/files/Documents/Issues/CivicSpace/UN_Guidance_Note.pdf [Last access 13 April 2022]

OHCHR briefing paper: The Global Compact and human rights: understanding Sphere of influence and complicity in Embedding Human rights into Business Practices I (2004), available at: https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/embedding.pdf (last access 20 February 2022).

OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretive Guide (2012)

OHRHC, Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practices and lessons learned (2016) (A/HRC/32/20), para. 12-13, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/073/52/PDF/G1607352.pdf?OpenElement> [Last access 13 April 2022]

OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector, 12 June 2017, p.6, available at: <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf> [last access: 23 February 2022]

UN OHCHR, Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms (2020), (A/HRC/44/32)

OHCHR, UNGP 10+ the roadmap for the next decade of business and human rights (2021), available at: <https://www.ohchr.org/sites/default/files/2021-12/ungps10plusroadmap.pdf> [Last access 27 March 2022]

UN Working Group on Business and Human Rights, Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms (A/73/163)

Protect, Respect and Remedy: A framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, (A/HRC/8/5), 7 April 2008

Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises (Prof. John Ruggie), Clarifying the Concepts of “Sphere of influence” and “Complicity”, 15 May 2008 (A/HRC/8/16),

Business and human rights: Towards operationalizing the ‘protect, respect and remedy’ framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (A/HRC/11/13) 22 April 2009

EU

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility, (COM/2011/0681), available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52011DC0681> [Last access: 27 February 2022]

European Commission, ‘Corporate Social Responsibility, Responsible Business Conduct, and Business & Human Rights. Overview of Progress’ (2019), available at: <https://ec.europa.eu/docsroom/documents/34963> [last access 20 February 2022]

The Council of the European Union, the Strategic Framework on Human Rights and Democracy 2012

European Parliament (2019), Access to legal remedies for victims of corporate human rights abuses in third countries, Brussels (2019)

European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html [Last access 14 March 2022]

European Commission, Commission Staff Working Document, Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement (SWD(2016) 21 final), available at: https://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154189.pdf [Last access 29 March 2022]

European Commission, the Proposal for a Directive on corporate sustainability due diligence and annex (2022), available at: https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en [Last access: 14 March 2022]

European Commission, Trade for All: towards an effective and responsible trade and investment policy, Communication from the Commission to the European Parliament, the Council, and European Economic and Social Committee of the Regions (2015), available at: <http://ec.europa.eu/trade/policy/in-focus/new-trade-strategy> [Last access 29 March 2022]

European Commission, Better regulation for better results - An EU agenda (2015), (COM(2015) 215 final)

European Commission, An Economy that Works for People, available at: https://ec.europa.eu/info/strategy/priorities-2019-2024/economy-works-people_en [Last access 4 April 2022]

European Commission, Sustainability Corporate Governance – Text adopted (2020), available at: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0372_EN.html [Last access 4 April 2022]

European Commission, Agreed minutes of the 1st meeting of Trade Committee (EVFTA) (2021), available at <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/583225c8-e6aa-43af-b7ca-db7110460a11/details> [Last access 04 May 2022]

The Delegation of EU in Vietnam, Guide to the EU-Vietnam trade and investment agreements, p.26, available at: https://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154622.pdf [Last access 30 March 2022]

The joint communication of the EU Parliament and the Council, EU Action Plan on Human Rights and Democracy 2020-2024, p.4, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020JC0005> [Last access 30 March 2022]

DG Trade, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreement (15 points of action) (2018), available at: https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_156618.pdf [Last access 01 April 2022]

2021 Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act), translated version available at: <https://lovdata.no/dokument/NLE/lov/2021-06-18-99> [Last access 02 March 2022]

The Act on Corporate Supply Chain Due Diligence in German, See the English version of the law provided by the Germany Federal Ministry of Labour and Social Affairs, available at: <https://www.bmas.de/EN/Services/Press/recent-publications/2021/act-on-corporate-due-diligence-in-supply-chains.html> [Last access 12 March 2022]

OECD

OECD Guidelines on Multinational Enterprises (2011),

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2016)

OECD-FAO Guidance for Responsible Agricultural Supply Chains (2016)
OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (2017)
OECD Due Diligence Guidance for Responsible Supply Chains in the Garment & Footwear Sector (2017)
OECD Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises (2017)
OECD (2017), Practical actions for companies to identify and address the worst forms of child labour in mineral supply chains (2017)
OECD Due Diligence Guidance for Responsible Business Conduct (2018), available at: <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> [Last access: 28 February 2022]

Vietnam

The Constitution 2013
Law on consumer protection 2010
Law on Trade Union 2012
Law on Handling Administrative Violation 2012
Labour Code 2012
Law on Land 2013
Penal Code 2015
Civil Proceeding Code 2015
Labour Code 2019
Law on Enterprises 2020
Law on investment 2020
Law on Environment protection 2020
Decree 47/2014/ND-CP
Decree 155/2016/ND-CP
Decree 31/2021/ND-CP
Decree 55/2021/ND-CP
Decree 08/2022/ND-CP
Circular 03/2021/TT-BKHDT
Circular 155/2015/TT-BTC
Circular 96/2020/TT-BTC
Decision No.1972/QD-BCT issued by the Ministry of Industry and Trade, dated on 17 August 2021 on establishment of domestic advisory groups

Others

ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office 2017
Direct Request (CEACR) - adopted 2021, published 110th ILC session (2022),
Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Viet Nam,

available

at:

https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENTS_ID:4122278:NO [Last access 15 April 2022]

IFC, the Performance Standards on Environmental and Social Sustainability (2012)

Secondary sources

Books

Deva S and Birchall D (eds), *Research handbook on human rights and business* (Edward Elgar Publishing 2020)

Ruggie JG, *Just Business: Multinational Corporations and Human Rights* (W W Norton & Company 2013)

Book chapters

Mares R, *The United Nations Draft Treaty on Business and Human Rights*, forthcoming in Marx, Van Calster & Wouters (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar, 2022), available at https://www.researchgate.net/publication/356264576_The_United_Nations_Draft_Treaty_on_Business_and_Human_Rights [Last access 24 April 2022]

Journal articles

Bonnitcha J and McCorquodale R, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights', *The European Journal of International Law* Vol. 28 no. 3 (2017)

Bueno N and Bright C, *Implementing Human Rights Due Diligence Through Corporate Civil Liability* (September 8, 2020). *International & Comparative Law Quarterly*, p.10

Bueno N, and Kaufmann C, "The Swiss Human Rights Due Diligence Legislation: Between Law and Politics.", 2021, *Business and Human Rights Journal* 6 (3):

Cossart S, Chaplier J and De Lomenie, TB 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317

Krajewski M and Wohltmann F and Tonstad K, *Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?* (September 18, 2021). *Business and Human Rights Journal (BHRJ)*, p. 553-4

O'Brien CM, *Business and Human Rights. A Handbook for Legal Practitioners* (Strasbourg: Council of Europe (Non-peer-reviewed) 2019)

Houry S and Whyte D, *Sidelining corporate human rights violations: The failure of the OECD's regulatory consensus*, *Journal of Human Rights*, 18:4, 363-381, (2019)

Landau I, "Human Rights Due Diligence and the Risk of Cosmetic Compliance." *Melbourne Journal of International Law*, vol. 20, no. 1, July 2019

Macchi C and Bright C, ‘Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation’ in Martina Buscemi and others (eds), *Legal Sources in Business and Human Rights* (Brill | Nijhoff 2020) 219

Mares R, ‘Corporate Transparency Laws: A Hollow Victory?’ (2018) 36 *Netherlands Quarterly of Human Rights* 189,

Mares R, *Regulating transnational corporations at the United Nations – the negotiations of a treaty on business and human rights*, *The International Journal of Human Rights*, (DOI: 10.1080/13642987.2022.2036133), 2022, available at: <https://www.tandfonline.com/doi/full/10.1080/13642987.2022.2036133> [Last access 26 March 2022]

Nguyen T (Mae), *Co-Constructing Business Governance* (July 29, 2019). 31 *Stan. L. & Pol’y Rev.* 143 (2020), p.151-152, available at SSRN: <https://ssrn.com/abstract=3428636> [Last access 05 April 2022]

Ramasastri A, ‘Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability’ (2015) 14 *Journal of Human Rights* 237

Ruggie JG, *Life in the Global Public Domain: Response to Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights* (2015)

Ruggie JG., Rees C., & Davis R, *Ten Years After: From UN Guiding Principles to Multi-Fiduciary Obligations*. *Business and Human Rights Journal*, 6(2), 179-197 (2021), available at: <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/ten-years-after-from-un-guiding-principles-to-multifiduciary-obligations/CCC2D26AFED66E29865B1AB8D2D7219A> [Last access 27 March 2022]

Santoro, AM. *Business and Human Rights in Historical Perspective*, *Journal of Human Rights*, (2015)

Ruhl G, *Cross-border Protection of Human Rights: The 2021 German Supply Chain Due Diligence Act* (January 2, 2022). Borg-Barthet, Živković et al (eds), *Gedächtnisschrift in honor of Jonathan Fitchen* (forthcoming 2022), Available at SSRN: <https://ssrn.com/abstract=4024604> [Last access 12 March 2022]

Savourey E and Brabant S, ‘The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption’ (2021) 6 *Business and Human Rights Journal* 141

Blog post

Business and Human Rights Resource Centre (BHRRC), *German parliament passes mandatory human rights due diligence law in Business and Human Rights Resource Center*, available at: <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/> [Last access: 02 March 2022]

BBC, *constant strikes of worker and the faint role of state-trade-union*, available at <https://www.bbc.com/vietnamese/forum-60343718> [Last access 15 April 2022];

BBC, *Vietnam protest over mystery fish deaths*, available at: <https://perma.cc/E8MV-E3YK> [Last access 17 April 2022]

BHRRRC, Vietnam: Fish deaths blamed on Formosa Plastics, available at: <https://www.business-humanrights.org/en/latest-news/vietnam-fish-deaths-blamed-on-formosa-plastics-taiwan-court-dismisses-vietnamese-farmers-lawsuit-over-environmental-damage/> [Last access 17 April 2022]

BHRRRC, France's Duty of Vigilance Law, available at: <https://www.business-humanrights.org/en/latest-news/frances-duty-of-vigilance-law/> [Last access: 09 March 2022]

BHRRRC, Total lawsuit (re failure to respect French duty of vigilance law in operations in Uganda), available at: <https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda/> [Last access: 09 March 2022]

BHRRRC, Switzerland: Responsible Business Initiative rejected at ballot box despite gaining 50.7% of popular vote, available at <https://www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal/> [Last access 9 March 2022]

BHRRRC, Dutch Bill on Responsible and Sustainable International Business Conduct, available at: <https://www.business-humanrights.org/en/latest-news/dutch-bill-on-responsible-and-sustainable-international-business-conduct/> [Last access 10 March 2022]

BHRRRC, Netherlands: Government publishes non-paper outlining Dutch position on EU mandatory due diligence incl. administrative enforcement & duty of care with civil liability, available at: <https://www.business-humanrights.org/en/latest-news/netherlands-government-publishes-non-paper-outlining-dutch-position-on-eu-mandatory-due-diligence/> [Last access 10 March 2022]

BHRRRC, German parliament passes mandatory human rights due diligence law, available at: <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/> [Last access: 12 March 2022]

Bueno N, 'The Swiss Responsible Business Initiative and Its Counter-Proposal: Texts and Current Developments'. Cambridge Core Blog, available at: <https://www.cambridge.org/core/blog/2018/12/07/the-swiss-responsible-business-initiative-and-its-counter-proposal-texts-and-current-developments/> [Last access 10 March 2022]

Brabant S, Michon C and Savourey E, 'The Vigilance Plan: Cornerstone of the Law on the Corporate Duty of Vigilance' (2017), p.2, available at: <https://media.business-humanrights.org/media/documents/ba571b7294311e42b3605af7cc4eeaad149c33b2.pdf> [Last access 06 March 2022]

Brabant S and Savourey E, 'France's Corporate Duty of Vigilance Law: A Closer Look at the Penalties Faced by Companies' (2017), p.1, available at: <https://media.business-humanrights.org/media/documents/d32b6e38d5c199f8912367a5a0a6137f49d21d91.pdf> [Last access 08 March 2022]

Bright C and others, ‘Report explores options for Mandatory Human Rights Due Diligence in Belgium’, KUL Leuven and Nova School of Law, (2020), p.27, available at <https://www.business-humanrights.org/en/latest-news/report-explores-options-for-mandatory-human-rights-due-diligence-in-belgium/> [Last access 10 March 2022]

Brabant S, Bright C, Neitzel N; Schönfelder D, Enforcing Due Diligence Obligations: The Draft Directive on Corporate Sustainability Due Diligence (Part 2), VerfBlog, 2022/3/16, <https://verfassungsblog.de/enforcing-due-diligence-obligations> [Last access 22 March 2022]

CARE, The Law on Access to Information: A quick review, available at: <https://www.care.org.vn/the-law-on-access-to-information-a-quick-review/> [Last access 14 April 2022]

CIVICUS, ‘What is civic space?’, available at: <https://monitor.civicus.org/whatiscivicspace/> [Last access 13 April 2022]

DanViet (official press in Vietnam), increase of strikes and work-stops, what is the reason?, available at: <https://danviet.vn/gia-tang-cac-cuoc-dinh-cong-ngung-viec-tap-the-do-dau-20220216111913043.htm> [Last access 15 April 2022]

Dutch minister announces national corporate due diligence legislation, available at: <https://corporatejustice.org/news/dutch-minister-announces-national-corporate-due-diligence-legislation/> [last access 2 March 2022]

Blog Worldfavor, Everything you need to know about Germany's new supply chain due diligence Law (LkSG), available at: <https://blog.worldfavor.com/everything-you-need-to-know-about-germanys-new-supply-chain-due-diligence-law#:~:text=What%20is%20the%20LkSG%3F,meaningful%20supply%20chain%20due%20diligence> [Last access 12 March 2022]

See Funds Global Asia, ‘What’s holding Vietnam’s adoption of ESG back?’, available at <https://www.fundsglobalasia.com/news/what-s-holding-vietnam-s-adoption-of-esg-back> [Last access 22 May 2022]

MVO Platform, ‘Dutch Bill on Responsible and Sustainable International Business Conduct a Major Step towards Protecting Human Rights and the Environment Worldwide’, available at: <https://www.mvoplatform.nl/en/dutch-bill-on-responsible-and-sustainable-international-business-conduct-a-major-step-towards-protecting-human-rights-and-the-environment-worldwide/> [Last access 10 March 2022]

Savourey E and Brabant S, ‘Scope of the Law on the Corporate Duty of Vigilance: Companies Subject to the Vigilance Obligations’ (2017), available at <https://media.business-humanrights.org/media/documents/cc551474b8206d6a7b9c6a92c2a3fb280c881139.pdf> [Last access: 06 March 2022]

Pham Cong Thiem Dinh, Journal of Trade and Industry Vietnam, ‘The role of social organizations of consumer protection in handling consumer-disputes’, available at: <https://tapchicongthuong.vn/bai-viet/vai-tro-cua-to-chuc-xa-hoi-bao-ve-nguoi-tieu-dung-trong-viec-giai-quyet-tranh-chap-tieu-dung-82761.htm> [Last access 18 April 2022]

Pham Son, TheLeader (official newspaper), The entire country below the average level in Environmental Governance, available at: <https://theleader.vn/papi-2021-ca->

nuoc-duoi-muc-trung-binh-ve-quan-tri-moi-truong-1652329997323.htm [Last access 15 May 2022]

Mares R, The new EU Directive on Corporate Sustainability Due Diligence: origins, compliance effects and global significance, available at <https://rwi.lu.se/blog/the-new-eu-directive-on-corporate-sustainability-due-diligence-origins-compliance-effects-and-global-significance/> [Last access 08 May 2022]

Reuter, Vietnam says recovery from Formosa industrial disaster could take a decade, available at: <https://www.reuters.com/article/us-vietnam-environment-formosa-plastics-idUSKBN14C1F5> [Last access 18 April 2022]

TriponeL A, Business and human rights legislation: an overview, 14 October 2019, <https://triponelconsulting.com/business-and-human-rights-legislation/> [Last access: 02 March 2022]

The official number in 2020 was 64% according to “Mat Tran To Quoc Viet Nam” (Vietnam Fatherland Front – official politic authority), see <http://mattran.org.vn/giam-sat-phan-bien-xa-hoi/so-don-thu-khieu-nai-to-cao-giam-ro-ret-so-voi-nam-2020-39755.html> [Last access 17 April 2020]

ThanhNien news (official newspaper in Vietnam), Taiwanese firm exec makes shocking remarks over Vietnam's environmental disaster, available at <http://www.thanhniennews.com/society/taiwanese-firm-exec-makes-shocking-remarks-over-vietnams-environmental-disaster-61560.html> [Last access 02 May 2022]

VGCL statistic shows that no strike in 1000 strikes occurring between 2013 and 2016 complies with statutory procedures under Labour Code 2012, source: <http://www.congdoan.vn/tin-tuc/quan-he-lao-dong-505/de-dinh-cong-dung-luat-125532.tld> [Last access 15 April 2022]

Vnexpress (official press in Vietnam), behind the strikes in the middle region, available at <https://vnexpress.net/phia-sau-nhung-cuoc-dinh-cong-o-mien-trung-4428821.html> [Last access 15 April 2022]

VnEconomy, ‘Only 8 FDI enterprises listed’, available at <https://vneconomy.vn/chi-co-8-doanh-nghiep-fdi-niem-yet.htm> [Last access 02 May 2022]

Vietnam plus (official newspaper), Domestic advisory groups set up under EVFTA, available at <https://en.vietnamplus.vn/domestic-advisory-group-set-up-under-evfta/206644.vnp> [Last access 04 May 2022].

Reports

Amnesty International, Injustice Incorporated: Corporate abuses and the human right to remedy, London (2014)

Austrian Foundation for Development Research (OFSE), The economic and social effect of the EU Free Trade Agreement with Vietnam, July 2018, p.9, available at: https://www.oefse.at/fileadmin/content/Downloads/Publikationen/Studien/8_Vietnam_Study.pdf [Last access 10 February 2022]

BHRRRC, Closing the gap: Evidence for effective human rights due diligence from five years measuring company efforts to address forced labour, available at:

<https://www.business-humanrights.org/en/from-us/briefings/closing-the-gap-evidence-for-effective-human-rights-due-diligence-from-five-years-measuring-company-efforts-to-address-forced-labour/> [Last access 27 March 2022]

BHRC, EU: Commission criticized for ignoring Domestic Advisory Groups aimed to engage civil society in trade agreements negotiations, available at <https://www.business-humanrights.org/en/latest-news/eu-commission-criticized-for-ignoring-domestic-advisory-groups-aimed-to-engage-civil-society-in-trade-agreements-negotiations/> [Last access 04 May 2022]

Committee on Economic, Social and Cultural Rights, E/C.12/VNM/CO/2-4 (CESCR 2014),

DIHR, Human Rights Impact Assessment: Guidance and Toolbox (2020), p.6, available at: <https://www.humanrights.dk/tools/human-rights-impact-assessment-guidance-toolbox> [last access: 24 February 2022]

DIHR, Human rights due diligence laws: key considerations (2021), p. 11-14, available at: <https://www.humanrights.dk/publications/human-rights-due-diligence-laws-key-considerations> [Last access: 06 March 2022]

DIHR, HOW DO THE PIECES FIT IN THE PUZZLE? Making sense of EU regulatory initiatives related to business and human rights (2022), available at https://www.humanrights.dk/sites/humanrights.dk/files/media/document/EU_Regulatory_Measures_Explainer_accessible.pdf [Last access 13 March 2022]

DIHR, Legislating for impact – Analysis of the Proposal EU Corporate Sustainability Due Diligence (2022), available at <https://www.humanrights.dk/publications/legislating-impact-analysis-proposed-eu-corporate-sustainability-due-diligence> [Last access 26 March 2022]

European Parliament, briefing: Human rights in EU trade agreements (2019), available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI\(2019\)637975_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf) [Last access 1 April 2022]

European Commission, Joint Report of the first EU–Viet Nam Trade and Sustainable Development (TSD) Committee Meeting to the TSD Public Forum, available at <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/84ff4c1b-dde0-4c40-ac8d-52ffeaeb3bf0/details> [Last access 04 May 2022]

European Commission, Evaluation of the Implementation of the Free Trade Agreement between the EU and its Member States and the Republic of Korea (final report 2018), available at https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157716.pdf [Last access 05 May 2022]

European Commission, Trade Policy Review – An open, sustainable and assertive trade policy (2021), available at https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159541.0270_EN_05.pdf [Last access 8 May 2022]

European Economic and Social Committee, Joint report of the EU DAG and the Vietnam DAG under the EU-Vietnam FTA available at https://www.eesc.europa.eu/sites/default/files/files/1st_eu-vietnam_dag-to-dag_meeting_9_november_2021_joint_report_final_29.11.2021_final.pdf [Last access 4 May 2022]

Eurocham Vietnam, EVFTA report: perspectives from Vietnam (2019) available at <https://www.eurochamvn.org/The-EVFTA-Report> [Last access 02 May 2022]

European Coalition for Corporate Justice (ECCJ), 'Key Features of Mandatory Human Rights Due Diligence Legislation', available at: <https://corporatejustice.org/publications/key-features-of-mandatory-human-rights-due-diligence-legislation/> [last access: 02 March 2022]

EY, Study on directors' duties and sustainable corporate governance, European Commission, available at: <https://op.europa.eu/en/publication-detail/-/publication/e47928a2-d20b-11ea-adf7-01aa75ed71a1/language-en> [Last access 21 March 2022]

Initiative Lieferkettengesetz, What the new SUPPLY CHAIN ACT delivers – and what it doesn't? (2021), p.2, available at: https://lieferkettengesetz.de/wp-content/uploads/2021/06/Initiative-Lieferkettengesetz_Analysis_What-the-new-supply-chain-act-delivers.pdf [Last access 12 March 2022]

The London School of Economics and Political Science (LSE), Comparative Analysis of Trade and Sustainable Development Provisions in Free Trade Agreements (2022)

Oxfam in Vietnam, Report: Assessment on Implementation of Access to Information Law (2nd Round) (2020), p. 25-35, available at: https://oi-files-cng-prod.s3.amazonaws.com/vietnam.oxfam.org/s3fs-public/file_attachments/BaoCaoLuatTCTT-2020.pdf [Last access 18 April 2022]

Shift, The European Commission's proposal for a Corporate Sustainability Due Diligence Directives – Shift's analysis (2022), p.9, available at: <https://shiftproject.org/resource/eu-csdd-proposal-analysis/> [Last access 16 March 2022]

Report of the Working Group on the Universal Periodic Review – Vietnam A/HRC/41/7 (UPR 2019) and A/HRC/26/6 (UPR 2014)

Human Rights Committee, Concluding observations on the third periodic report of Viet Nam, CCPR/C/VNM/CO/3 (CCPR 2019), available at: <https://uhri.ohchr.org/en/document/07477f9f-db88-4be7-9277-ceb344a24356> [Last access 14 April 2022]

UNDP Vietnam, Preliminary Assessment of Regulatory Framework on Responsible Business Practice in Vietnam (2020), available at https://www.vn.undp.org/content/vietnam/en/home/library/democratic_governance/preliminary-assessment-of-the-regulatory-framework-on-responsible-business-practice-in-viet-nam.html [Last access 15 April 2022]

Vietnam Institute for Economic and Policy Research (VEPR), The Report "One-year Implementation of European Union-Vietnam Free Trade Agreement (EVFTA): Impacts on the Vietnamese Economy and Policy Formation"(2021), available at:

<https://www.kas.de/en/web/vietnam/single-title/-/content/one-year-implementation-of-european-union-vietnam-free-trade-agreement-evfta> [Last access 10 April 2022]

World Bank, Deepening international integration and implementing the EVFTA (2020), available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/33787/Vietnam-Deepening-International-Integration-and-Implementing-the-EVFTA.pdf?sequence=1> [Last access 01 May 2022]

Electronics resources

“Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises”, available at: <https://www.ohchr.org/en/issues/business/pages/srsgranscorpindex.aspx> [Last access 20 February 2022];

European Parliament, *Human rights fact sheet*, available at: <https://www.europarl.europa.eu/factsheets/en/sheet/165/human-rights> [last access 19 February 2022]

EIPA, The European Parliament and the Right of Initiative: Change Practice, Not Powers, available at: <https://www.eipa.eu/publications/paper/the-european-parliament-and-the-right-of-initiative-change-practice-not-powers/> [Last access 13 March 2022]

European Commission, the Sustainable Corporate Governance Initiative, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en [Last access 14 March 2022]

European Commission. Directorate General for Justice and Consumers, ‘Inception Impact Assessment of the Sustainable Corporate Governance Initiative’ (2020), available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en [Last access 22 March 2022]

European Commission, EVFTA standards and values, available at: https://trade.ec.europa.eu/doclib/docs/2018/october/tradoc_157446.pdf [Last access 31 March 2022]

European Commission, Sustainable Governance Initiative, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en [Last access 4 April 2022]

European Commission, the state-of-play on the first anniversary, available at https://trade.ec.europa.eu/doclib/docs/2021/august/tradoc_159773.pdf [Last access 04 May 2022];

European Commission, Panel of experts confirms the Republic of Korea is in breach of labour commitments under our trade agreement (25 January 2021), available at https://ec.europa.eu/commission/presscorner/detail/en/ip_21_203 [Last access 05 May 2021]

EU delegation in Vietnam, EU Vietnam relation, available at: https://www.eeas.europa.eu/vietnam/v%E1%BB%81-ph%C3%A1i-%C4%91o%C3%A0n-eu-t%E1%BA%A1i-vi%E1%BB%87t-nam_vi?s=184&page_lang=en [Last access 10 April 2022]

General Customs Department of Vietnam, export-import statistics, available in Vietnamese only at <https://tongcuc.customs.gov.vn/index.jsp?pageId=2&aid=158631&cid=25> [Last access 10 April 2022].

Human Rights Watch, EU: Press Vietnam to Improve Rights Record, available at <https://www.hrw.org/news/2022/04/04/eu-press-vietnam-improve-rights-record> [Last access 04 May 2022]

International Trade Union Confederation (ITUC), Global Rights Index 2021, available at <https://www.globalrightsindex.org/en/202> [Last access 03 May 2022]

ILO national profile website: <https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm> [Last access 01 April 2022]

ILO Normlex, Ratifications for Republic of Korea, available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:10312 [Last access 05 May 2022]

The Working Group on the issue of human rights and transnational corporations and other business enterprises, website: <https://www.ohchr.org/en/issues/business/pages/wgrandtransnationalcorporationsandotherbusiness.aspx> [last access: 27 February 2022]

Thuvienphapluat (the Law Library – a private Vietnamese law database), effective instruments, <https://thuvienphapluat.vn/page/searchfast.aspx?effect=1&fields=0&type=0&bdate=11/04/1942&edate=12/04/2022&lan=1&sort=0&fasttype=1> [Last access 12 April 2022]

VICOPRO website, introduction on VICOPRO, available at: <https://nguoitieudung.org.vn/dai-hoi-dai-bieu-toan-quoc-lan-thu-vi-vinastas/> [Last access 18 April 2022];

The State Department of Competition and Consumer Protection, the List of Consumer Protection Associations, available at: <http://www.vcca.gov.vn/?page=consumer&do=detail&id=833514eb-9dcc-4e47-be5f-01028cc4a74e> [Last access 18 April 2022]

Transparency International, Corruption Perception Index (CPI) 2021, available at <https://www.transparency.org/en/cpi/2021/index/vnm> [Last access 22 April 2022]

Others

Bueno N, ‘Mandatory Human Rights Due Diligence Legislation’ (Teaching Business and Human Rights Forum, 22 October 2019), available at: <https://teachbhr.org/resources/teaching-bhr-handbook/mandatory-human-rights-due-diligence/> [Last access 02 March 2022]

Ruggie JG, ‘European Commission Initiative on Mandatory Human Rights Due Diligence and Directors’ Duties’ (2021), available at: https://media.business-humanrights.org/media/documents/EU_mHRDD_paper_John_Ruggie.pdf [Last access 22 March 2022]

Ruggie JG, CEL Annual Lecture in Centre for Ethics and Law, University College London (25 February 201), available at: <https://media.business->

[humanrights.org/media/documents/files/documents/Ruggie_UCL_lecture_Final_Read-Only.pdf](https://www.humanrights.org/media/documents/files/documents/Ruggie_UCL_lecture_Final_Read-Only.pdf) [Last access 06 April 2022]

Tuininga M, Trade and Sustainable Development Chapters in EU trade agreements, p.12, available at:

https://www.amfori.org/sites/default/files/TSD%20Chapters%20in%20FTA_discussion%20enforcement%20FTA%2011%20sep.pdf [Last access 4 April 2022]

The 5th draft of Bill on Environmental protection 2020, Article 169 (1) (b), available at the official website of the National Assembly: <http://duthaonline.quochoi.vn/Pages/dsduthao/chitietduthao.aspx?id=1792> [Last access 18 April 2022]