



From Local to Global: Building a strategic litigation ecosystem to address modern slavery in supply chains

Scoping study, May 2021



The Remedy Project is a Hong Kong-based social enterprise that works to combat exploitation in global supply chains. We aim to revolutionise how migrant workers access remedies within global supply chains. We help workers and businesses prevent and rectify human rights issues in supply chains with a goal to raise standards, meet business needs, and support lasting change for better work environments. Our remediation mechanisms help workers and businesses redress labour grievances for fair, effective and enduring positive outcomes. We work with government bodies, law enforcement agencies, worker groups and worker representatives, trade unions, international organisations, and civil society organisations to provide policy advice, conduct research, and build capacity to combat forced labour, human trafficking, and other forms of exploitation

The Freedom Fund is a leader in the global movement to end modern slavery. We identify and invest in the most effective frontline efforts to eradicate modern slavery in the countries and sectors where it is most prevalent. Partnering with visionary investors, governments, anti-slavery organisations and those at risk of exploitation, we tackle the systems that allow slavery to persist and thrive. Working together, we protect vulnerable populations, liberate and reintegrate those enslaved and prosecute those responsible.

Executive summary

Over the past decade, there has been an increase in the use of litigation to hold companies accountable for human rights and environmental abuses in their operations and supply chains. Although strategic litigation against corporations remains nascent in the modern slavery space, recent landmark cases such as *Nevsun Resources Ltd v Araya*¹ have demonstrated the potential of using the law to compel businesses to redress and prevent forced labour and human trafficking.

Anti-slavery strategic litigation is being pioneered by a small group of dedicated lawyers and activists committed to advancing corporate accountability. Most of this work is transnational, pursued through cases filed in the U.S. and Europe on behalf of workers in the Global South that have been impacted by the actions of multinational corporate defendants. What is not clearly recognised or understood is the crucial role of local² NGOs and lawyers in identifying, investigating and pursuing transnational litigation.

In 2020, the Freedom Fund commissioned a scoping study to understand how to support and strengthen the role of local groups in the Global South in corporate accountability legal actions. As a funder of anti-slavery strategic litigation, we have a long-term goal of supporting efforts to develop a global ecosystem wherein NGOs, lawyers and advocates can collaborate to identify and build corporate accountability cases. We chose to focus the study on South East Asia - specifically Thailand, Malaysia and the Philippines. All three countries have a well-documented record of modern slavery issues³, are well-integrated into global supply and labour chains, and have relatively well-developed judicial and quasi-judicial institutions that may provide a basis for future strategic litigation efforts.

This briefing summarises the outcomes of the scoping research conducted by The Remedy Project, offering an insight into the existing corporate accountability legal landscape in South East Asia, and the barriers preventing local groups from engaging in transnational litigation on forced labour and human trafficking. It also provides recommendations on approaches to build a stronger strategic litigation ecosystem, including strengthening connections and capacity among global and local organisations.

As we begin to incorporate the findings and recommendations of the study into our own programming, we hope that they will also contribute to the work of other actors engaging in or supporting efforts to advance corporate accountability in global supply chains.

Methodology

The scoping study was conducted by The Remedy Project between November 2020 - February 2021. The researchers adopted a mixed-method qualitative research approach to assess the strategic litigation ecosystem and influencing factors and understand the needs of stakeholders in the selected jurisdictions of Thailand, Malaysia and the Philippines. This approach comprised a contextual desk-based literature review, and interviews with key local stakeholders, as well as selected international actors from outside the selected jurisdictions. A total of 36 interviews were conducted remotely with stakeholders in each of the selected jurisdictions.

Key findings

Local lawyers and NGOs do not feel equipped to pursue local-global corporate accountability legal actions

Lawyers and legal NGOs in the jurisdictions surveyed felt that they would benefit from an improved understanding of how to identify and build transnational corporate accountability legal actions, including how to identify fact patterns, and the jurisdictional bases and causes of action to ground corporate accountability legal actions under foreign laws. Many also felt that they did not have the necessary skills, resources, and/or experience to independently conduct supply chain investigations to identify upstream entities with supply chain links or other relationships connecting them to instances of exploitation on the ground. Compounding these challenges is the fact that most local lawyers and NGOs interviewed felt they did not have sufficient knowledge of, or connections to, Global North NGOs who might be able to support them with these matters. These challenges in conducting supply chain investigations pose a substantial barrier to the pursuit of corporate accountability legal actions. Such investigations are a crucial means of gathering evidence to identify potentially liable upstream corporate entities, and formulating potential causes of action.

Despite some examples of legal actions having been taken, there are no firmly established pathways to pursue local-global corporate accountability legal actions for modern slavery in South East Asia.

Where they have occurred, local-global corporate accountability legal actions for modern slavery in the region have taken different forms. For example, in Thailand, the *Ratha* case used what is becoming an established model for pursuing a corporate accountability legal action, where an upstream purchaser of seafood products was sued in the United States for profiting from the sale of goods knowingly manufactured using forced labour.⁴ In Malaysia, trade remedies under the US Tariff Act 1930 have been used to impose sanctions on manufacturers of palm oil products⁵ and latex gloves⁶ due to instances of modern slavery in Malaysia. In the Philippines, migrant workers

who return to the Philippines frequently file damages or compensation claims against local recruitment agencies for damages caused by foreign employers – an alternative model that reflects the labour dynamics in the Philippines as a source country for migrant labour.⁷

No firmly established pathways for the pursuit of local-global corporate accountability legal actions were identified within the countries surveyed. Global North lawyers interviewed had very few, if any, connections to actors in South East Asia engaged in the pursuit of corporate accountability legal actions. Attempts by Global North actors to conduct outreach with local lawyers and NGOs or develop legal actions in the region had been less effective than anticipated due to a lack of resources to pursue sustained engagement and follow-up after outreach sessions. Security concerns on the ground also pose a substantial barrier.

Likewise, actors in the countries surveyed indicated that they would benefit from greater awareness of the landscape of potential Global North partners that could assist with pursuing corporate accountability legal actions. Local lawyers and NGOs felt they lacked dedicated resources to identify, develop, and maintain relationships with these Global North actors. This lack of connection contributed to a perception among some NGOs that to pursue these cases they needed to develop in-house expertise in foreign laws and jurisdictional rules and how to trace supply chain links, rather than rely on partnerships with international actors that may be able to support the efforts of local NGOs in these areas.



Ratha et al. v Phathana Seafood Co., Ltd., et al

This case concerned seven Cambodian workers who had been trafficked to Thailand to work in shrimp and seafood factories. Recruited under false pretences, once in Thailand (among other things) the workers' passports were confiscated, they were paid less than promised, subjected to harsh working conditions and kept in crowded accommodation with inadequate sanitation. In 2016, the plaintiffs filed proceedings in the District Court of the Central District of California against the seafood and shrimp factories in Thailand where they were exploited as well as U.S. companies alleged to be responsible for importing, marketing, and distributing these products. The plaintiffs sought damages against the defendant companies under the Trafficking Victims Protection Reauthorisation Act and the Alien Tort Statute on the grounds that the defendant companies were either responsible for, or had knowingly benefitted, from the trafficking and exploitation of the plaintiffs.

In February 2018, the District Court of the Central District of California ruled against the Plaintiffs, finding that they had "failed to demonstrate that Rubicon or Wales knew or should have known that human trafficking existed at Phathana's Songkla factory". An appeal has been filed to the US 9th Circuit Court of Appeals.⁹

The perceived value of local-global corporate accountability legal actions among local actors - particularly in terms of its ability to deliver tangible benefits for beneficiary communities - is low.

There is widespread recognition among groups in the countries surveyed of the importance of transnational litigation as a means of addressing the root causes of modern slavery and changing corporate behaviour. On the other hand, there is a general perception that such actions are not an efficient means of achieving tangible and immediate benefits for beneficiary groups - migrant workers and victims of trafficking or forced labour. Local lawyers and NGOs tend to view pathways to remedy through the prism of local laws and procedures where they have proven knowledge, expertise, and a history of success, and did not consider that overseas legal actions could deliver similar tangible remedies for beneficiary groups (or considered that local legal pathways offered more time and resource-efficient pathways to securing tangible remedies for beneficiaries).

The pursuit of lengthy, complex, international legal actions with potentially highly uncertain outcomes, is deemed to be unlikely to be aligned with clients' best interests and objectives -to achieve restitution/compensation for any immediate harm suffered (e.g., recovery of unpaid wages, payment of recruitment fees, assistance with repatriation, securing compensation through the criminal justice process), and to avoid protracted legal proceedings with uncertain outcomes. In this regard, informal mediation and settlement tend to be the preferred methods of dispute resolution across the countries surveyed.

Providing examples of where transnational litigation has had impact at the local level may change these perceptions. For example, in Malaysia there was an awareness among some NGO interviewees that the implementation of withhold release orders against entities like Sime Darby and Top Glove following petitions made to Customs and Border Protection by a number of international NGOs had led to increased domestic and international scrutiny of these companies' employment practices, and had prompted them to publicly commit to improving standards.¹⁰

Legal resources and capacity are extremely limited. As a result, these scarce resources are directed towards pursuing more immediate pathways to remedy using well-established processes under local laws.

A lack of legal aid and legal resources to assist victims of trafficking and modern slavery to seek access to justice was common across all three jurisdictions. Almost all of the local lawyers and NGOs surveyed indicated they would need additional investment in legal capacity - especially in terms of more specialised lawyers - to consider the possibility of engaging in global corporate accountability legal actions.

In this environment, limited legal resources are understandably directed towards pursuing remedies using established pathways under local legal systems, where lawyers and NGOs in each of the countries surveyed have proven knowledge and expertise. These courses of action (whether for systemic reasons connected with the substantive and procedural laws and available legal mechanisms in the local jurisdiction, or due to resource constraints) tend to focus on the pursuit of accountability against the most proximate/immediate employers or those directly responsible for perpetrating harm, rather than corporate suppliers or buyers further up the supply chain or outside of the jurisdiction. In addition, once remedies have been secured through local pathways, local NGOs often lose contact with workers/beneficiaries, which makes it challenging to subsequently relocate and re-establish contact with them if a future international legal action is contemplated.



Hoy Mai and Others v Mitr Phol Co. Ltd¹²

The case arose out of a large-scale land concession granted by the Cambodian government to a subsidiary of Mitr Phol Sugar – a Thai sugar company – for the development of an industrial sugarcane plantation. Between 2008 and 2009 villagers were forced to give up their land for the sugar concession in a series of land clearance actions, which included forced evictions, village demolitions, and the destruction of crops and forests.

In May 2013, Cambodian NGOs Equitable Cambodia and LICADHO submitted a complaint on behalf of 602 affected families to the National Human Rights Commission of Thailand. The Commission of Thailand concluded that Mitr Phol had been responsible for the forced evictions and associated human rights violations, but the finding was not legally binding on Mitr Phol.

In 2018, two plaintiffs – representing a class of 600 affected families – filed a class-action lawsuit in Thailand against Mitr Phol in the South Bangkok Civil Court seeking damages for the losses allegedly caused by Mitr Phol's actions. In 2019, the Court of First Instance denied certifying the class action. In July 2020, the appellate division of the South Bangkok Civil Court overturned the decision and recognised the class status of the plaintiffs – allowing the class action to proceed. The proceedings are ongoing.

Lessons can be learned from the environmental law and community rights movement in South East Asia, where there is a strong community of lawyers and NGOs engaged in cross-border corporate accountability legal actions.

In the three jurisdictions surveyed, corporate accountability legal actions have been pursued more extensively in the areas of environmental and community rights. These actions have produced interesting models – including cross-border legal actions within the region against parent companies for torts committed by their subsidiaries (such as the Mitr Phol Case), and a novel transnational investigation by the Philippines Commission on Human Rights into human rights violations by 47 different global oil and mining companies.¹¹

Environmental and community rights lawyers in the region have developed experience in pursuing class actions and other claims against corporate defendants, identifying ownership structures, and pursuing various pathways to accountability. However, there is limited evidence of crossover with those engaged in the field of modern slavery. This is notable as there are likely to be many opportunities where complementary labour and environmental law actions could be taken (e.g., in actions for damages for industrial pollution).

Security and risk concerns pose a major barrier to the pursuit of local-global corporate accountability legal actions, and shape relationships between local and Global North NGOs

Threats, intimidation, and violence against workers, communities, lawyers, and NGOs seeking to pursue corporate accountability for modern slavery are prevalent across the jurisdictions surveyed. Large employers and landowners can exert significant influence over local communities and officials that deter, or stifle attempts to hold companies accountable. The risks faced range from extrajudicial killings, violence, intimidation, retaliatory dismissals and deportation of workers, through to legal harassment such as the filing of criminal or civil defamation complaints.

These risks pose a substantial barrier to the pursuit of corporate accountability. Local actors may simply not feel comfortable being associated with potentially

high-profile legal actions against companies that may attract significant negative attention from a corporate defendant or its agents. Workers or potential claimants may be pressured into not participating in legal proceedings or accepting smaller settlements in exchange for discontinuing claims. Retaliatory dismissals resulting in a termination of workers' visas may also be used by corporates as a tool to remove dissenting employees. SLAPP lawsuits¹³ can give rise to devastating financial costs for local NGOs or individual workers and activists, and create a substantial drain on resources, and is a powerful disincentive to the pursuit of more high profile or aggressive legal actions against corporations.¹⁴ In Thailand, SLAPP suits may even give rise to the risk of imprisonment for NGO staff, workers, and activists due to the existence of criminal defamation laws.

These risks shape the relationships between local and Global North actors, and can create barriers to effective collaboration. Further, a significant investment of time and resources to is required to establish and maintain mutual relationships of trust and confidence. In light of these concerns, Global North NGOs must act with appropriate sensitivity towards local cultural norms, understand the local legal context in which they intend to operate, and pay due regard to security concerns.

There are limited connections between local lawyers and NGOs and Global North actors engaged in corporate accountability legal actions

Generally speaking, lawyers and NGOs in the jurisdictions surveyed lack well-established connections to Global North actors engaged in the pursuit of corporate accountability legal actions, or with expertise in conducting supply chain investigations. Although some local lawyers and NGOs have participated in outreach sessions conducted by Global North actors in South East Asia, there had been little follow-up further to those outreach activities.

Domestic and regional networks such as Migrant Forum in Asia often provide a basis for collaboration among different lawyers and NGOs on local and cross-border legal actions, but have not yet been leveraged in the pursuit of transnational corporate accountability legal actions against international corporations based in the Global North with supply chain links to exploitation

in South East Asia. Local lawyers and NGOs tend to use networks to identify potential trusted partners to collaborate on individual cases with, rather than as formal case referral platforms.

The roles and responsibilities of local and Global North actors engaged in collaborations are not always clearly defined, creating a source of tension within relationships.

Informal collaborations are commonplace and provide a fertile ground for exchange and support between local and Global North NGOs. However, local NGOs interviewed cited misalignments between expectations around resource and information sharing, decision-making, and the allocation of responsibility between partners, as sources of tension when collaborating with Global North Partners. Local NGOs also expressed a desire to be treated as equal partners in relationships with Global North NGOs, have their own in-depth knowledge and expertise recognised, and not simply serve as a source of information or a conduit to connect Global North NGOs with local workers and other communities.

Recommendations

Build understanding among local lawyers and NGOs about global supply chain relationships, and supply chain research techniques.

Local NGOs and lawyers could benefit from capacity building to establish a common foundational level of knowledge on international supply chains, the nature of supply chain relationships, and the principles and methodologies of conducting supply chain research to gather evidence to support corporate accountability legal actions. Such capacity building would serve to equip local lawyers and NGOs with the skills to initiate and engage in supply chain-based legal actions, and to understand the landscape of local and international actors that can assist with conducting in-depth supply chain investigations where necessary.

Develop capacity among local lawyers and NGOs and lawyers to identify fact patterns from which local-global corporate accountability legal actions can be evolved, the legal mechanisms that may be engaged, and the different models of corporate accountability that may be pursued.

Capacity building would support local lawyers and NGOs to build a greater understanding of different models of corporate accountability that might be pursued both within the laws of their own jurisdiction, but also in favourable overseas jurisdictions. It should have a broad scope, looking at trafficking and labour laws as well as causes of action that can arise under contractual, tort, consumer, and trade laws, and regulatory rules (e.g., those relating to public disclosures for listed companies).

The focus should be to equip local lawyers and NGOs with the skills needed to identify fact patterns arising from cases they come into contact with during their day-to-day work, and refer to overseas lawyers for advice where needed. It is important that capacity building highlights how corporate accountability can deliver tangible benefits for workers and other communities – including the broader disruptive and deterrent effects to abusive corporate behaviour. Resources should also be allocated to support continued follow-up and

engagement after any outreach or capacity building sessions.

Build a network of actors to support the development of pathways to pursue local-global corporate accountability legal actions.

Support is needed to develop effective and lasting pathways for referrals between local and Global North NGOs that specialise in strategic litigation and conducting supply chain investigations. Efforts should be made to build a network of actors - including community groups and worker representatives, supply chain investigators/researchers, local and foreign lawyers, security experts, and medical and social workers - with the support of allies in the environmental and community rights, and business and human rights space.

The objective of this network would be to serve as a common platform for members to connect to organisations that can offer the various specialist skills necessary to effectively pursue legal actions, share experiences and best practices, and refer and collaborate on cases. The network should be seen as a resource that can be drawn on where necessary to support the development of cases, and not a drain on individual organisational capacity and resources.

Collaborations between local and Global North NGOs in corporate accountability legal actions should be more clearly defined, with a more inclusive role for local NGOs reflective of their capacity.

Relationships between local and Global North NGOs would benefit from more clearly defined terms of engagement at the outset – setting expectations around roles and responsibilities, decision-making, resource sharing, publicity and communications, and risk mitigation. This can help reduce tensions that arise during the course of relationships where mutual expectations are not clearly established at the outset.

Funding for corporate accountability legal actions should encompass more than just legal fees and litigation costs.

Funding should be made available to support all stages of litigation, including pre-action investigations, consultations with foreign legal experts, and evidence gathering. These steps are often necessary to determine whether a viable legal action can be brought at all, and if so in what jurisdiction and under what cause of action. However, until the cause of action, the legal process that will be used, and jurisdictional basis for the claim have been identified, funders may be reluctant to provide support. This creates a lacuna where actors who might be able to evolve causes of actions from fact patterns lack the resources to do so, without which funding to pursue litigation cannot be obtained from other sources. Such pre-action funding may also need to be available on short notice given that there may be challenges in securing evidence, maintaining contact with potential claimants, or satisfying limitation periods that may require urgent action before longer-term funding applications can be processed.

Funding should also be allocated to provide support, protection, and welfare services to claimants throughout the litigation process. Programmes designed to support local-global corporate accountability should include elements to ensure that the outcomes of global legal actions will be embedded at the local level - whether that be through complementary local level legal actions, advocacy campaigns, or public policy engagement. This is an area where collaboration between local and Global North NGOs can help translate the impact of global corporate accountability legal actions locally, and where local NGOs can be better leveraged.

Global NGOs must be mindful of risks to workers and security concerns.

Global North actors must be extremely sensitive to the risks that workers and local NGOs/human rights defenders face in deciding to pursue high profile corporate accountability legal actions, such as SLAPP suits, threats, violence, intimidation, and other forms of pressure. Programmes designed to support this work must consider how security concerns will be addressed and provide resources to manage those risks. Global North NGOs must also be mindful that any action taken in a case - even if outside of the local jurisdiction - can have severe repercussions for local actors. Key decisions and public actions must therefore always be taken in prior consultation with local partners. Demonstrating an awareness and sensitivity to these risks can help encourage local NGOs to engage with Global North NGOs with greater confidence.

Endnotes

¹ Nevsun Resources Ltd. v. Araya, 2020 SCC 5. The Canadian Supreme Court ruled that a claim for alleged forced labour at an Eritrean mine could proceed against a Canadian parent company.

² I.e., actors based in the jurisdictions in which acts of exploitation occur, rather than in the jurisdiction in which a transnational legal action arising out of that exploitation may be being pursued.

³ Malaysia, the Philippines, and Thailand rank 42nd, 30th, and 23rd respectively on Walk Free's Global Slavery Prevalence Index. See: <https://www.globalslaveryindex.org/2018/data/maps/#prevalence>

⁴ Ratha et al. v Phatthana Seafood Co., Ltd, et al. See <https://www.cohenmilstein.com/case-study/ratha-v-phatthana-seafood>

⁵ US Customs and Border Protection (30 December 2020) [*CBP Issues Withhold Release Order on Palm Oil Produced by Forced Labor In Malaysia*](#)

⁶ Reuters (16 July 2020) [*Amid virus crisis, US bars imports of Malaysia's top glove over labour issues*](#)

⁷ Section 10 of the Migrant Workers and Overseas Filipinos Act 1995 renders a foreign employer and a local recruitment agency jointly and severally liable for damages and unpaid wages claims filed by overseas Filipino workers in the Philippines.

⁸ Voice of America Cambodia (2 February 2018) [*US Court Rules Against Alleged Victims in Seafood Slavery Case*](#)

⁹ Courthouse News Service (13 September 2019) [*Cambodian Seafood Workers Ask Ninth Circuit to Revive Trafficking Suit*](#)

¹⁰ Reuters (26 April 2021) [*Malaysia's Top Glove says it resolved all indicators of forced labour*](#)

¹¹ Open Global Rights (15 July 2020) [*Toppling modern-day Goliaths in the fight against climate polluters*](#)

¹² See Inclusive Development International, [*Cambodia: Challenging Mitr Pho land grab and Bonsucro greenwashing*](#)

¹³ A 'strategic lawsuit against public participation' – a term used to describe lawsuits filed by a corporation or well-resourced party against their opponents or critics with the intention of intimidating or silencing them by burdening them with the cost of litigation until they give up their criticism. Often, these are framed as defamation lawsuits.

¹⁴ See Business and Human Rights Resource Centre (2020), [*Strategic Lawsuits Against Public Participation: Southeast Asia cases and recommendations for governments, businesses & civil society*](#)

¹⁵ Subject to any applicable laws regulating litigation funding.



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