

BUSINESS AND HUMAN RIGHTS: IMPACTS FROM TRANSBOUNDARY INVESTMENT

An overall assessment of implementation of recommendations from the UPR, 2nd cycle

1. During the presentation of Thailand's report in compliance with the Universal Periodic Review (UPR), Second Cycle to the 25th session of the UPR committee on 11th May 2016 in Geneva, Switzerland, 249 recommendations were received from various countries. The Delegation of Thailand has accepted to further review 68 of them while immediately accepting to review 181 of them. The recommendations focus in part on the development and implementation of Thailand's National Action Plan on Business and Human Rights (NAP), which it developed in compliance with the UN Guiding Principles on Business and Human Rights (UNGPs). The government has since set up a committee to oversee, monitor and evaluate the NAP, led by the Ministry of Justice (Rights and Liberties Protection Department). The National Baseline Assessment (NBA) has been completed while meetings have been held with experts and consultation with the UN Working Group on Business and Human Rights. The NAP (2019-2023) was completed in 2018, covering four themes including (1) labor, (2) community, land, natural resources and the environment, (3) human rights defenders and (4) cross border investment and multinational corporations.

2. Since 2019, our coalition has monitored and assessed the implementation of the NAP. We have found that: (1) the process to develop NBA/NAP was lacking in genuine public participation and the general public and public agencies lack awareness and understanding of business and human rights issues. The government also does not give enough importance to the NAP. (2) The NAP's recommendations are overly broad and cannot be implemented or translated into action. (3) The regulatory mechanism tends to rely on the role of the state and public authorities without an inclusive accountability mechanism for implementation of the NAP and without a mechanism to ensure information disclosure for the sake of monitoring NAP implementation. And (4) the government's implementation is inconsistent regarding the principles. It has led to a breach of the commitments in the NAP along with the restriction of civil and political rights, including the enactment of laws or regulations that contradict the NAP.

3. The ETOs Watch Coalition was established to monitor the environmental and social footprints of Thai investments abroad. Based on our monitoring of complaints regarding human rights impacts from transboundary investment in 7 cases,^[1] we have found various shortcomings and gaps in the Thai government's laws and policies that allow human rights abuses to occur with impunity. We encourage the Human Rights Council to address Thailand's transboundary human rights impacts as part of the UPR and encourage greater accountability for these impacts.

Challenge	Case study, fact and opinion
-----------	------------------------------

Contact Information

ETOs Watch Coalition

Address: No.666, Charoen Nakon Road, Bang Lam Pu Lang Sub-district,

Klong San District, Bangkok, Thailand, 10600

Tel: +6694 234 1615 (Teerachai Charoenkijthavorn) or

+6682 261 6511 (Chaloemsri Prasertsri)

Email: etoswatch@gmail.com and epinkaew@gmail.com

<p>1. A lack of regulatory law on transboundary investment (incoming and outgoing), leading to the exploitation of legal loopholes in neighboring countries that affect human rights</p>	<p>(1) Due to legal loopholes in countries' domestic laws and weak or ineffective domestic judicial systems, it is impossible to hold businesses accountable for human rights abuses, including enforcing punishment and ensuring access to effective remedy.</p> <p>(2) In most cases, existing laws at the national or regional level do not require project developers to assess transboundary impacts or cumulative impacts through the environmental impact assessment process. Where such laws/regulations do exist, project developers generally do not abide by them. Additionally, existing laws do not require government agencies to assess transboundary or cumulative impacts through a strategic environmental assessment process.</p> <p>(3) There is a lack of a joint regional mechanism for monitoring transboundary impacts of cross-border investments.</p> <p>(4) Thailand lacks effective grievance mechanisms to hold companies and financial institutions accountable and provide access to remedies for business-related human rights abuses, including abuses in neighbouring countries.</p> <p>(5) Thailand is not carrying the burden of monitoring the impacts of its transboundary investments; the burden of impact monitoring is being borne by the affected countries.(for exp, Xayaburi dam case, Dawei SEZ case)</p>
<p>2. Access to justice through judicial and non-judicial mechanisms, including Thailand's National Human Rights Commission (NHRC), and regulatory mechanisms on investment or business transaction</p>	<p>Judicial mechanisms:</p> <p>(1) The judiciary lacks awareness and understanding of the review of transboundary complaints/plaints (for example Xayaburi dam and Pak Beng dam cases).</p> <p>(2) Court fees are an obstacle to access to justice in Thailand, particularly in class action lawsuits which require that the plaintiffs must have enough resources to fight until the conclusion of the case and are not allowed a waiver of court fees (for example Oddar Meanchay case).</p> <p>(3) Legal execution of judgments delivered by foreign courts to ensure the payment of transboundary compensation cannot be done automatically. The case has to be filed and tried again in the Thai court in order for the legal execution to proceed, which imposes an undue burden on victims of human rights abuses.(for example Hengda Mining case in Myanmar</p>

Contact Information

ETOs Watch Coalition

Address: No.666, Charoen Nakon Road, Bang Lam Pu Lang Sub-district, Klong San District, Bangkok, Thailand, 10600

Tel: +6694 234 1615 (Teerachai Charoenkijthavorn) or

+6682 261 6511 (Chaloemsri Prasertsri)

Email: etoswatch@gmail.com and epinkaew@gmail.com

(4) There is no law to decide jurisdiction over transboundary cases. Therefore, it is subject to the discretion of each judge to decide whether or not to accept to review the case.(for example Xayaburi dam and Pak Beng dam)

Non-judicial mechanisms:

(1) The NHRC lacks clarity on how it accepts and reviews complaints, leaving broad room for interpretation. The NHRC has refused to review or investigate alleged violations committed by natural persons/legal entities abroad.(for example Xepian Xenamnoy dam)

(2) There is no follow-up process to the NHRC's investigation reports and recommendations and as a result, they have not led to actual investigation and punishment of the perpetrating agencies.

Investment or business regulatory mechanisms:

(1) Most companies/business sectors and financial institutions lack regulatory mechanisms, social and environmental policies and safeguards, and company level grievance mechanisms concerning the impacts of their investments. Most of the existing policies and regulatory mechanisms operate on a voluntary basis, and lack effective enforceability.

(2) In addition, we have found that the government and concerned agencies tend to disregard human rights implications when reviewing impacts from cross border investments.

Contact Information

ETOs Watch Coalition

Address: No.666, Charoen Nakon Road, Bang Lam Pu Lang Sub-district,
Klong San District, Bangkok, Thailand, 10600

Tel: +6694 234 1615 (Teerachai Charoenkijthavorn) or

+6682 261 6511 (Chaloemsri Prasertsri)

Email: etoswatch@gmail.com and epinkaew@gmail.com

<p>3. Law enforcement and statute of limitation framework and conflict of laws including the Act on Conflict of Laws B.E. 2481</p>	<p>(1) Statute of limitation clauses on tortious acts vary from country to country. Some countries do not even have such statute limitations. As a result, investors and developers tend to exploit such loopholes and engage in “forum shopping” when responding to complaints about transnational investments.</p> <p>(2) Thailand’s Act on Conflict of Laws’ Section 15 is based on the Double Action-ability, which imposes an excessive burden of proof on the plaintiff (for example, in the case involving a sugar plantation in Cambodia’s Oddar Meanchey). Section 5 authorizes the court to accept to review cases invoking public order or morality, the interpretation of which may compromise protection of human rights and the environment.</p>
<p>4. Strategic Litigation Against Public Participation (SLAPP)</p>	<p>Businesses are weaponizing the judicial system against those who criticize their activities. Thailand’s tort and defamation laws and Computer Crime Act are being used to harass human rights defenders, including activists and journalists, who expose human rights abuses arising in business activities and development projects.</p>
<p>5. Boards of directors or shareholders of companies/businesses cannot be held liable with the companies. Even though foreign courts have delivered judgment, they have no legal binding in Thailand and the case has to be retried in Thailand.</p>	<p>(1) There is a lack of law to regulate liability of affiliated companies or to clarify the relationships between parent companies and subsidiary companies.</p> <p>(2) Companies can evade liability by registering as a new company abroad, making the execution of a judgment from the court in the investor’s country impossible and making such liability complicated (for example, the cases of Oddar Meanchey and Heinda).</p> <p>(3) Laws concerning principal and agency requires the process to establish liability.</p> <p>(4) Business sectors lack knowledge and understanding about legal execution.</p>

Contact Information

ETOs Watch Coalition

Address: No.666, Charoen Nakon Road, Bang Lam Pu Lang Sub-district, Klong San District, Bangkok, Thailand, 10600

Tel: +6694 234 1615 (Teerachai Charoenkijthavorn) or

+6682 261 6511 (Chaloemsri Prasertsri)

Email: etoswatch@gmail.com and epinkaew@gmail.com

6. Access to remedies for human rights abuses

(1) Injured parties face problems and obstacles accessing an effective remedy, especially in seeking damages for mental anguish. Although the Supreme Court has made issued decisions in certain individual cases, the issue has failed to gain public traction.

(2) Although the Thai cabinet adopted the NAP in Phase 1, the plan has no legally binding status and has led to no assertion of the victims' right to remedy for impacts from various development projects by the concerned public agencies and companies.

Recommendations

4. (i) The Government of Thailand should manage foreign investment and development based on the precautionary principle, and should provide a competent and effective system for remedies. This includes ensuring that financial institutions require borrowing companies to set aside a sum of money in trust (or as part of a remedy fund) at a certain percentage of the loans. This will make it possible to provide risk assurance and remedies if human rights abuses arise. Thailand should not provide support to investors or companies that file SLAPP cases against human rights defenders, particularly in cases involving transboundary impacts.

5. (ii) Public agencies involved in human rights work, including NHRC and the Rights and Liberties Protection Department under the Ministry of Justice, should be involved in decisions on whether to confer licenses, permits and contracts to companies and in assuring that full-fledged human rights due diligence has been conducted. In addition, a watchlist of businesses which affect human rights should be developed.

6. (iii) The state or independent organizations should incentivize state enterprises, financial institutions, corporations or companies to conduct their business throughout their supply chains based on good governance while taking into account impacts on human rights, community rights and the environment through the evaluation of Fair Cross Border Business. Thailand's NAP should be used as a benchmark, and those which pass this benchmark should be offered incentives such as tax benefits. Financial institutions should be required to prepare a human rights due diligence assessment based on the precautionary principle before offering financing for a company or cross-border investment.

7. (iv) Thailand should consider joining the Organisation for Economic Co-operation and Development (OECD) or should develop a mechanism similar to the National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises to receive and investigate complaints from affected people. The NCP's composition should include civil society organizations and community organizations to ensure its accessibility with regard to complaints from the public.

8. (v) Public agencies, state enterprises, corporations and other businesses must publicly disclose business contracts on various projects that might affect public interest, in order to

Contact Information

ETOs Watch Coalition

Address: No.666, Charoen Nakon Road, Bang Lam Pu Lang Sub-district,

Klong San District, Bangkok, Thailand, 10600

Tel: +6694 234 1615 (Teerachai Charoenkijthavorn) or

+6682 261 6511 (Chaloemsri Prasertsri)

Email: etoswatch@gmail.com and epinkaew@gmail.com

ensure full accountability.

9. (vi) The state should enact laws to require state enterprises and businesses to disclose information about their supply chains, including their funding sources, revenue payments to the government, and subsidiaries or affiliated companies in all projects.

10. (vii) The state should require that state enterprises, corporations and companies assess the cumulative impacts and transboundary impacts of their investments through the environmental impact assessment process. The state should also require relevant government agencies to assess cumulative and transboundary impacts through Strategic Environmental Assessment where appropriate. These assessments must be conducted by impartial and independent organizations that do not face a conflict of interest or other improper incentives for downplaying the risks of investments or plans.

11. (viii) The state must prescribe a clear and concrete punitive framework through both criminal and civil proceedings against state enterprises, corporations or companies, in order to provide effective access to remedies and accountability for violations of human rights and community rights. For less serious impacts, project developers should be required to establish grievance mechanisms where communities can raise concerns without fear of retaliation. Company-controlled grievance mechanisms should not prevent communities from accessing justice through other judicial or non-judicial mechanisms.

12. (ix) The state must halt or suspend any investments or financial assistance should it be established that gross human rights violations – such as war crimes, crimes against humanity, genocide, forced labor, torture, extrajudicial killings, sexual assault, and enforced disappearances – have occurred. The right of the state to halt or suspend investments should be written into project contracts.

13. (x) If Thailand’s transboundary investment is found to cause gross human rights violations, the statute of limitations shall not apply to criminal or civil cases brought against such investors.

14. (xi) The state should reform domestic laws to ensure the statute of limitations does not restrict the right of injured parties to file cases concerning the violation of human rights, community rights and the environment which take place abroad as a result of the operation of state enterprises or companies from Thailand.

15. (xii) The state should provide civil society with opportunities to participate in the review and investigation of the situation of business and human rights (by seeking input during early planning stages, making available funding support, and offering other facilitation).

16. (xiii) The state should repeal the Double Action-ability principle pursuant to Section 15 of the Act on Conflict of Laws. Only the *lex loci delicti* principle pursuant to Section 15 should remain in use.

17. (xiv) The state should adopt a “duty of care” principle and integrate the “piercing the corporate veil” principle into Thailand’s domestic law to ensure access to effective remedies.

Contact Information

ETOs Watch Coalition

Address: No.666, Charoen Nakon Road, Bang Lam Pu Lang Sub-district,

Klong San District, Bangkok, Thailand, 10600

Tel: +6694 234 1615 (Teerachai Charoenkijthavorn) or

+6682 261 6511 (Chaloemsri Prasertsri)

Email: etoswatch@gmail.com and epinkaew@gmail.com

In addition, the court's review authority should be expanded to include damages for mental anguish in any tortious legal action.

18. (xv) Thailand should repeal any orders which have been unlawfully issued (i.e., by invoking Section 44 of the 2014 Interim Constitution) and restore trust in the justice process genuinely based on the rule of law.

[¹] Including (1) the Hongsa coal-fired plant in the Lao People's Democratic Republic; (2) the The Pak Beng Hydropower Dam on the Mekong mainstream in the Lao People's Democratic Republic; (3) investment of Thai sugar plantation in the Kingdom of Cambodia (Oddar Meanchey and Koh Kong); (4) the construction and development of the Dawei Special Economic Zone in Republic of the Union of Myanmar; (5) the Ban Chaung mine in the Republic of the Union of Myanmar; and (6) the Xepian Xenamnoy dam in the Lao People's Democratic Republic.

Contact Information

ETOs Watch Coalition

Address: No.666, Charoen Nakon Road, Bang Lam Pu Lang Sub-district,
Klong San District, Bangkok, Thailand, 10600

Tel: +6694 234 1615 (Teerachai Charoenkijthavorn) or

+6682 261 6511 (Chaloemsri Prasertsri)

Email: etoswatch@gmail.com and epinkaew@gmail.com