

THE IMPACT OF INVESTMENTS AND FREE TRADE AGREEMENTS ON THE RIGHTS AND LIVELIHOODS OF COMMUNITIES IN THAILAND

THEMATIC ASSESSMENT
CHAPTER OF THE
INDEPENDENT CSO NATIONAL
BASELINE ASSESSMENT (NBA)
ON BUSINESS & HUMAN RIGHTS



PRIORITY AREA 4: TRADE AGREEMENTS & THAI OUTBOUND INVESTMENTS

#ThaiBHRNetwork



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Thai BHR Network,
*The Impact of Investments
and Free Trade Agreements
on the Rights and Livelihoods
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About the Thai BHR Network

The Thai Business and Human Rights Network (TBHRN) is an informal, inclusive and intersectional coalition of human rights defenders, community leaders, researchers, academics, and non - governmental organisations from the local, national and regional spheres, who are joining hands to ensure local communities are central to the business and human rights response in Thailand. The Network engages in advocacy, dialogue, and monitoring of business and human rights commitments made by the Royal Thai Government, in particular in engaging in the development and monitoring of the National Action Plan on Business and Human Rights. More information on the TBHRN and its role can be accessed at:

<https://www.manushyafoundation.org/coalition-building-workshop-report>

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Through our Independent CSO National Baseline Assessment (NBA) on Business & Human Rights (BHR) in Thailand, we hope to provide the foundation for a meaningful National Action Plan (NAP) on Business and Human Rights (BHR), which would guarantee that Thai businesses are not committing or involved in human rights abuses wherever they operate. We strongly believe that our NBA on BHR could serve as a starting point to raise awareness on the challenges faced by affected communities on the ground, could help address corporate accountability, and ensure responsible business conduct. We see the Thai NAP on BHR as a critical opportunity for civil society and grassroots communities to engage collectively in order to promote a Thai economy that is sustainable and respectful of human rights, while building an understanding of private actors on the adverse impacts of their activities. It is our aspiration that this independent CSO NBA on BHR would influence the Thai NAP on BHR; a NAP that is inclusive of communities' voices, concerns and solutions. We truly believe that this represents a great opportunity for open, frank, transparent and constructive dialogue among all relevant sectors, so that we can all continue working together to ensure that Thai corporations respect human rights at home and abroad.



Emilie Palamy Pradichit
Founder & Executive Director
Manushya Foundation

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ABBREVIATIONS

ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
AICHR	ASEAN Intergovernmental Commission on Human Rights
AOP	Assembly of the Poor
ARV	Antiretroviral
ASEAN	Association of Southeast Asian Nations
BHR	Business and Human Rights
CAT	Convention Against Torture
CCC	Civil and Commercial Code of Thailand
CCPR	Committee on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
CVD	Cardiovascular Diseases
EGAT	Electricity Generating Authority of Thailand International
EHIA	Environmental and Health Impact Assessment
EHRD	Environmental human rights defender
EIA	Environmental Impact Assessment
EU	European Union
FPIC	Free, Prior, and Informed Consent
FTA	Free Trade Agreement
GMO	Genetically Modified Organism
HRD	Human Rights Defender
HRDD	Human Rights Due Diligence
HRIA	Human Rights Impact Assessment
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRP	Investment & Human Rights Project
ILO	International Labour Organisation
IMF	International Monetary Fund
ISDS	Investor State Dispute Settlement
IWNT	Indigenous Women's Network of Thailand
LGBTI	Lesbian, Gay, Bisexual, Transgender, and Intersex
MoA	Memorandum of Agreement
MoJ	Ministry of Justice
MoPH	Ministry of Public Health
NAP	National Action Plan
NBA	National Baseline Assessment
NCPO	National Council for Peace and Order
NGO	Non-Governmental Organisation



NHRCT	The National Human Rights Commission of Thailand
NLA	National Legislative Assembly
OHCHR	Office of the High Commissioner on Human Rights
PLC	Public Limited Company Act
PPP	Public-Private Partnership
RCEP	Regional Comprehensive Economic Partnership
RIA	Regulatory Impact Assessments
RLPD	Rights and Liberties Protection Department
RTG	Royal Thai Government
SOE	State-owned Enterprise
THB	Thai Baht
TPP	Trans-Pacific Partnership
TRIPS	Trade Related Aspects of Intellectual Property Rights
UCS	Universal Coverage Scheme
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
UNGP	UN Guiding Principles on Business and Human Rights
UPOV	International Convention for the Protection of New Varieties of Plants
UPR	Universal Periodic Review
WTO	World Trade Organisation



INTRODUCTION: Manushya Foundation's Business & Human Rights Strategy

As part of its work in Thailand, the Manushya Foundation (Manushya) aims to further strengthen the capacity of local communities, members of the Thai CSOs Coalition for the Universal Period Review (UPR), of which many are experiencing adverse human rights impacts of corporations, to effectively engage in the UPR implementation phase and to hold the Royal Thai Government (RTG) accountable on its UPR commitments and business and human rights obligations.

After the Thai government received, during its second UPR, a recommendation from Sweden to develop a National Action Plan (NAP) on BHR with the view to implement the United Nations Guiding Principles on Business and Human Rights (UNGPs), Manushya developed a strategy¹ aiming at empowering communities to be at the centre of the business and human rights response in Thailand, by guaranteeing their central role throughout the development, implementation and monitoring of the NAP. To this end, since the beginning of 2017, Manushya has reached out to local communities, national, regional and international experts on business and human rights to:

- Develop a CSO NBA on BHR, with communities' challenges and needs put at the centre of the assessment,
- Empower local communities to conduct evidence-based research and, together with academics, document Business and Human Rights issues they face, and
- Empower grass-root organisations to tip the balance of power between businesses and governments versus CSOs, and encourage more bottom-up approaches which view CSOs as equal partners. For that purpose, in addition to building capacities on BHR knowledge, Manushya also provides sub-grants to establish and sustain a national network on BHR comprising communities, academics and experts, called the "Thai BHR Network".² The Thai BHR Network is an inclusive and intersectional network of grassroots communities, civil society, academics and experts, including representatives from and/or working on the following issues: *rights of migrant workers, labour rights (formal and informal workers), trade unions, indigenous peoples, stateless persons, community rights, land-related rights, environmental rights, people with disabilities, Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) individuals, sexual and reproductive health, drug users, people living with HIV, sex workers, women's rights, the protection of HRDs, and the impact of Thai outbound investments and trade agreements.*

As part of its BHR strategy and in order to inform the development of the independent CSO NBA, Manushya Foundation has supported the formation of the Thai BHR Network and has conducted a series of consultations to identify the key priority areas, as well as community-led recommendations: four Regional NBA Dialogues (January-March 2017),³ the first experts meeting to inform the independent NBA on BHR in Thailand (2-3 September 2017), and the second experts meeting to discuss the findings and recommendations of the independent NBA on BHR in Thailand (28 February-1 March 2018).⁴

In order to guarantee the safety of local communities and HRDs engaging in Manushya's strategy, all these six consultations were co-organised with the Rights and Liberties Protection Department (RLPD) of the Ministry of Justice (MoJ), Thailand.

Throughout the four regional NBA dialogues and the two experts' meetings, Manushya and members of the Thai BHR Network have identified four main areas of focus for the CSO NBA:

- 1) Violations of Labour Rights and Standards;
- 2) Impacts on community rights, indigenous peoples, livelihoods, land-related rights, natural resources and the environment;
- 3) The protection of HRDs;
- 4) Trade agreements and outbound investments.



These four priority areas of focus influenced the content of the Government's NAP on BHR, following our key four priority areas. Thus, this Chapter falls under Priority Area 4 and is part of Manushya Foundation and the Thai BHR Network's Independent NBA on BHR in Thailand.⁵

Manushya Foundation and the Thai BHR Network, an inclusive and intersectional coalition of HRDs, community leaders, researchers, academics, and non-governmental organisations (NGOs) together ensure local communities are central to the BHR response and discourse in Thailand and work together to inform the development of the NAP on BHR, as well as to monitor and support its effective implementation, with communities' voices and solutions at the centre.

Role of Manushya

“Empowering local communities to be at the center of business and human rights discourse and of the NAP on BHR”

At Manushya, we strongly believe in the importance of collaboration and cooperation to further human rights and social justice and recognise the importance of approaching our work in a constructive manner to ensure the greatest positive change for the communities we serve. However, while we work with any and all willing partners to advance these causes, Manushya is a completely independent human rights organisation. Our willingness to work with 'champions' to create a fairer, more equitable world is based solely on the needs of communities, with the singular purpose of ensuring no individual or group is the victim of human rights abuses caused by business conducts. Our approach lies in the empowerment of invisible and marginalised communities, sharing knowledge with them so they can assert for their rights, facilitating their meaningful engagement in the NAP process so they can become 'Agents of Change' providing solutions to improve their livelihoods.

Working with the RLPD of the MoJ in Thailand is a crucial element of achieving this. However, we see a key difference between working with and working for. For us, collaboration and critique are inseparable partners, and while we are enthusiastic to cooperate, we do so with our driving force of community empowerment at its core. This means that when we work with others, the working relationship has to be based on mutual respect for each other, ideally safeguarded by applying a bottom-up approach and not a top-down one. Our primary motivation and guiding principles are the needs of communities, not the needs of those we are collaborating with. While we believe the value of strong relationships with those in power cannot be denied as essential tools in the fight for human rights, we will not develop and maintain such relationships based on anything other than achieving the goals of the communities we serve, and we will not and have not ever shied away from being strong, critical voices against those we are working with when necessary to advance the needs of communities. Our independence is crucial to us and is what enables us to effectively tackle rights violations and inequality in Thailand.

METHODOLOGY

The methodology used in the research, analysis and writing for this Chapter on The impact of Investments and Free Trade Agreements on the Rights and Livelihoods of Communities in Thailand in the context of BHR in Thailand relies on primary and secondary data and resources. Firstly, primary sources, including voices, concerns, cases, experiences and recommendations of local communities and experts, were collected directly from Manushya Foundation's BHR activities; including:

- Four Regional NBA Dialogues on BHR conducted from January to March 2017;⁶
- Four regional capacity-building workshops on BHR to demystify corporate accountability to HRDs⁷ held in May-June 2017;
- Two Experts Meetings to get input from national, regional, and international experts to inform its NBA and ultimately provide guidance for the development of the NAP on BHR. The First Experts' Meeting aimed at Informing the CSO NBA on BHR in Thailand in Bangkok (2-3 September 2017) and the Second Experts' Meeting focused on Findings and Recommendations for CSO BHR NBA in Bangkok (28 February to 1 March 2018);⁸ and
- The BHR Coalition Building Workshop held on 18-20 November 2017.⁹

Secondly, this Thematic Chapter is based on desk-research and presents an analysis of the international, regional, and national legal and policy framework pertaining to community rights, the management of natural resources and the environment in Thailand, including the context of business and human rights and the UNGPs. The research included a systematic literature review of United Nations (UN) human rights bodies' and NGOs reports, observations and recommendations; online news articles; expert papers; and other publications.



THE IMPACT OF INVESTMENTS AND FREE TRADE AGREEMENTS ON THE RIGHTS AND LIVELIHOODS OF COMMUNITIES IN THAILAND

CONTEXT

Globally, there are more than 3,000 bilateral or multilateral trade and investment agreements.¹⁰ The Regional Economic Partnership (RCEP) and the Comprehensive, and Progressive Agreement for Trans-Pacific Partnership (CPTPP) are two examples of such agreements that seek to expand the scope of global governance over various economic issues outside of the UN and the World Trade Organisation (WTO) systems.¹¹ Trade agreements claim to ‘reduce barriers to trade’ and ‘level the playing field;’ however, such agreements tend to facilitate the displacement of small local businesses by large multinational corporations.¹² The UN Independent Expert on the promotion of a democratic and equitable international order noted that “[o]ver the past 25 years bilateral international treaties and free trade agreements (FTAs) with investor-state dispute settlement (ISDS) have adversely impacted the international order and undermined fundamental principles of the UN, State sovereignty, democracy, and the rule of law”.¹³ He additionally stated that “[f]ar from contributing to human rights and development, ISDS has compromised the State’s regulatory functions and resulted in growing inequality among States and within them”.¹⁴

With this in mind, trade must be made to work for human rights and development, not against them.¹⁵ Trade agreements tend to discriminate against those less likely to hold large amounts of capital, those engaged in the informal sector, those less likely to have secure land rights, and against those who would benefit most from investments in health, education, water, and energy.¹⁶ The UN Human Rights Council stated that trade agreements “are likely to have a number of retrogressive effects on the protection and promotion of human rights, including lowering the threshold of health protection, food safety, and labour standards, by catering to the business interests of pharmaceutical monopolies and extending intellectual property protection”.¹⁷

Thailand and FTAs

Thailand is party to seven major international human rights mechanisms: Convention on the Rights of the Child (CRC); Convention on the Elimination of All Forms of the Discrimination Against Women (CEDAW); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social, and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention Against Torture (CAT), and Convention on the Rights of Persons with Disabilities (CRPD).¹⁸ Such international obligations have been implemented in Thailand’s domestic legislation, including the 2001 establishment of the National Human Rights Committee of Thailand (NHRCT) to receive complaints of potential human rights violations and conduct strategic studies on BHR violations.¹⁹ Between 2009 and 2012, there were over 1,500 cases involving human rights abuses reports to the NHRCT and/or other human rights bodies (national and international).²⁰ However, Thai law does not contain specific provisions to require or even encourage business enterprises to exercise due diligence in regard to the respect of human rights.²¹

This Assessment Briefer will be looking at the impacts of the following FTAs in the context of Thailand:

a. Regional Comprehensive Economic Partnership

The RCEP has been negotiated since 2012 between the ten Association of Southeast Asian Nations (ASEAN) countries and their six FTA partners including Australia, China, India, Japan, New Zealand, and South Korea.²² The goal is to “boost economic growth and equitable economic development, advance economic cooperation, and broaden and deepen integration in the region”.²³ This proposed agreement covers goods, services, investments, economic and technical cooperation, intellectual property rights, rules of origin, competition, and dispute settlement.²⁴ If the RCEP will be adopted, half of the world’s population will be covered by it, including 420 million small family farms, producing 80% of the region’s food.²⁵ As of December 2018, a roadmap is being

drafted to conclude negotiations on RCEP by 2019.²⁶ In early 2019, Thailand enhanced talks with India in order to conclude the RCEP within the year, focusing the discussions on trade obstacles, the rule of origins, and e-commerce and intellectual trade competition.²⁷

b. Comprehensive and Progressive Agreement for Trans-Pacific Partnership

Following the United States' 2017 exit from the Trans-Pacific Partnership (TPP), a newly formed bloc of eleven Pacific Rim revised the agreement and renamed it the CPTPP, which was signed on 8 March 2018.²⁸ This treaty requires member states to ratify the International Convention for the Protection of New Varieties of Plants 1991 (UPOV) and has provisions for regulatory coherence, which requires signatory governments to engage with 'interested persons' while strengthening public policies, meaning that companies from TPP countries are given the space to provide input to national policy-making in other member states.²⁹ The CPTPP is supposed to lower or remove barriers of trade between the member States; remove tariffs on 95% of the goods traded amongst the signatory countries; and bring 'greater prosperity' to the developing States Parties.³⁰ However, critics expose that it will only be beneficial to the developed countries and multinational corporations, because they will increase their exports, having access to foreign markets. This could have a negative impact on developing countries and increase real income inequality as well as affect labour standards. From the lessons learned of other FTAs, CSOs foresee an exacerbation of existing inequalities in developing countries and an increase in labour rights violations.³¹

As of late 2018, Thailand is still not a signatory member of the CPTPP, though it is in talks to do so in 2019.³² Thailand competes with Malaysia and Vietnam, both CPTPP partners, in electronic devices, seafood, and farm produce, so joining the agreement could carry significant benefits.³³

A series of public hearings were conducted in all regions throughout Thailand between August and September 2018 to gather feedback from stakeholders with outcomes passed on to the CPTPP working committee chaired by Commerce Minister Sontirat Sontijirawong.³⁴ Concerns highlighted by stakeholders included market access for goods, services and investment, intellectual property protection, public health, ISDS mechanisms, and government procurement.³⁵ Thai farmers and CSOs raised concerns about the intellectual property chapter that enforces regulations on seeds, preventing them to use patented plants' seeds.³⁶ However, Auramon Supthaweethum, director-general of the Trade Negotiations Department, responded that farmers could still collect and reuse seeds only for a non-commercial purpose and that the CPTPP does not stipulate mandatory imports of Genetically Modified Organisms (GMOs), another concern from farmers, and Thailand's Plant Quarantine Act bars imports of GMOs.³⁷ Additionally, she said that initial studies have found that Thailand will benefit from the bigger market created from the CPTPP, particularly for rice, seafood, poultry, processed food, sugar, and fruit.³⁸

1. INTERNATIONAL & NATIONAL LEGAL AND POLICY FRAMEWORK:

Existing Laws and Policies, Gaps and Legal Challenges

1.1. International Legislations

1.1.1. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

The ICCPR and ICESCR provide for the right to self-determination in common Article 1. This includes the right to economic self-determination, which for many local communities equates to the right to public participation, the control of natural resources, as well as social and cultural development.³⁹ The duty of States to consult with indigenous communities is also enshrined in both Covenants. The explicit inclusion of the right in international human rights law meant that the concept of self-determination - as a whole - was given the characteristic of a fundamental right, and an essential pre-requisite of individual human rights, since these rights could not be

properly exercised without the realisation of the collective right of self-determination.⁴⁰ Specifically, Article 1(2) of the ICCPR and ICESCR affirms a particular aspect of the economic content of the right to self-determination, namely the right of peoples, for their own ends, freely to “dispose of their natural wealth and resources without prejudice to any obligation arising out of international economic co-operation based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence”.⁴¹ According to Committee on Civil and Political Rights’ (CCPR) General Comment No. 12 on the right to self-determination, this right entails corresponding duties for all States in the international community. States should indicate factors or difficulties “which prevent the free disposal of their natural wealth and resources” contrary to Article 1(2) and to what extent they affect the enjoyment of rights of ICCPR.⁴²

Additionally, Article 27 of the ICCPR provides that “persons belonging to ethnic, religious or linguistic minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language”.⁴³ The CCPR in its General Comment No. 23 on article 27 has affirmed that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples and thus the right to enjoy culture may include such traditional activities as fishing or hunting and the right to live in reserves protected by law, which may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them”.⁴⁴

In its Concluding Observations on Thailand, the CCPR regrets the “lack of protection for persons belonging to indigenous communities in the Constitution” and “the discrimination they endure, including with regard to citizenship, access to basic services or land rights and, in particular, [...] the eviction of several communities from their lands” as well as “the lack of consultation and participation in decisions affecting them”.⁴⁵

Regarding the ICESCR, the Committee on Economic, Social, and Cultural Rights (CESCR) has integrated the rights of indigenous peoples in a number of its general comments, including in General Comment No. 21 on the right of everyone to take part in cultural life,⁴⁶ and General Comment No. 24 on State Obligations under the ICESCR in the Context of Business Activities.⁴⁷ The latter specifically tackles this issue through its affirmation that States and businesses should respect the principle of free, prior and informed consent (FPIC) of indigenous peoples in relation to all aspects that may affect their rights, including to their traditional lands, territories, and resources.⁴⁸ Further, it necessitates that states specifically incorporate the impact of business activities on indigenous peoples into human rights impact assessments (HRIAs) and for businesses to obtain the FPIC of indigenous peoples while exercising human rights due diligence (HRDD).⁴⁹ Discrimination against indigenous women and girls, sharing of benefits with indigenous peoples, their right to control intellectual property over their cultural heritage and their accessibility to effective remedies, and protection of indigenous leaders at risk are other issues covered in this general comment.⁵⁰ In its Concluding Observations on its visit to Thailand in 2015, the CESCR expressed concerns about the “denial of the traditional rights of ethnic minorities to their ancestral lands and natural resources and the concentration of land ownership in the hands of a very small proportion of the population”.⁵¹

Another core principle in international human rights law is the right to equality and non-discrimination, which all members of the UN have a legal obligation to promote and protect and that is essential to the exercise and enjoyment of the other human rights, including economic rights.⁵² Common Article 2 of the two Covenants provides a non-discrimination provision, requiring state parties to respect and ensure rights without distinction on the basis of enumerated grounds, including ‘property’ or national or social origin or economic status.⁵³

1.1.2. International Convention on the Elimination of All Forms of Racial Discrimination

Article 5 of ICERD provides that everyone has a right to take part in government as well as in the conduct of public affairs at any level.⁵⁴ Similarly to CCPR, in the Committee on the Elimination of Racial Discrimination’s (CERD) General Recommendation No. 21 on the right to self-determination, the CERD affirms peoples’ rights to pursue freely their economic, social, and cultural development without interference and adds that, in these

regards, “there exists a link with the right of every citizen to take part in the conduct of public affairs at any level, as referred to in article 5(c)” of ICERD.⁵⁵ Furthermore, under Article 2 of ICERD, “governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth”.⁵⁶

Additionally, the Committee, in General Recommendation No. 23, calls upon State parties to “recognise and protect the rights of indigenous peoples to own, develop, control, and use their communal lands, territories, and resources” and whenever deprivation of traditional lands and territories occurs, especially if without their FPIC, States have an obligation to take steps to return those lands and territories or to provide just, fair, and prompt compensation when return is factually impossible.⁵⁷

In its Concluding Observations on Thailand, the CERD expressed concern on the lack of FPIC to groups affected by decision-making processes regarding their lands and resources.⁵⁸ It also encouraged the Government to “affirm in its legislation the rights of indigenous peoples” as conforming to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) that Thailand supported in its adoption, and “to consider acceding to International Labour Organisation (ILO) Convention No. 169 (1991) on Indigenous and Tribal Peoples in Independent Countries”.⁵⁹

1.1.3. The United Nations Declaration on the Rights of Indigenous Peoples

The UNDRIP is the most important UN instrument on indigenous peoples and sets out minimum standards for the survival, dignity, and well-being of indigenous peoples in a comprehensive manner. The declaration recognises the collective rights of the indigenous peoples,⁶⁰ including their right to equality and non-discrimination,⁶¹ to self-determination,⁶² to lands, territories and resources,⁶³ and their economic, social, and cultural rights such as those highlighting cultural equality and distinctiveness.⁶⁴ The declaration also calls upon states to ensure FPIC⁶⁵ of indigenous peoples prior to undertaking an act which could have a direct impact on them, such as the adoption and implementation of legislative or administrative measures that may affect them,⁶⁶ and the approval of any project affecting their land, territory or other resources.⁶⁷ Although Thailand voted in favour of the adoption of UNDRIP, it maintains that it does not have indigenous peoples in the country if it follows the commonly used definition of ‘pre-colonial or pre-settler societies’.⁶⁸

1.1.4. The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities, adopted in 1992, provides that States shall “protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories and shall encourage conditions for the promotion of that identity”.⁶⁹ Furthermore, minorities “have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning minorit(y)ies” or “the regions in which they live”.⁷⁰ It thereto states that “national policies and programmes shall be planned and implemented with due regard for the legitimate interests of persons belonging to minorities” and that “programmes of cooperation and assistance among States should be planned and implemented with due regard for the legitimate interests of persons belonging to minorities.”⁷¹

1.1.5. The UN Declaration on the Rights of Peasants and other People Working in Rural Areas

The UN Declaration on the Rights of Peasants and other People Working in Rural Areas was adopted by the Third Committee of the UN General Assembly (UNGA), with Thailand as one of 119 countries that voted in favour of the adoption of this resolution.⁷² The declaration recognises “the special relationship and interaction between peasants and other people working in rural areas, and the land, water, nature, and territory to which they are attached and on which they depend for their livelihood”.⁷³ Furthermore, article 2 sets out the State’s duty to “respect, protect, and fulfil the rights of peasants and other peoples working in rural areas”, and to consult with peasants and other people working in rural areas “before adopting and implementing legislation and policies, international agreements or any other decision-making processes that may affect” their rights.⁷⁴



According to this, the government is mandated to ensure their “active, free, effective, meaningful, and informed participation” in decision-making processes.⁷⁵ States shall also take “all necessary measures to ensure that non-State actors that they are in a position to regulate (...) respect and strengthen the rights of peasants and other people working in rural areas”.⁷⁶

1.1.6. The UN Declaration on the Right to Development

The UN Declaration on the Right to Development, adopted in 1986, declared that everyone is “entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human beings and fundamental freedoms can be fully realised”.⁷⁷ It identifies every person as being the central subject of development and attributes to States the duty to formulate appropriate national development policies which improve “the well-being of the entire population and of all individuals on the basis of their active, free, and meaningful participation in development and in the fair distribution” of the resulting benefits.⁷⁸

1.1.7. The 1992 Rio Declaration on Environment and Development

The 1992 Declaration on Environment and Development establishes the right of the people to be involved in the development of their economies and the responsibility to safeguard the common environment. It emphasises that long-term economic progress is ensured only when linked with the protection of the environment. Principles 4, 10, and 22 entail the protection of the environment, access to information with redressal mechanisms, and participation of communities and indigenous peoples in the development and management of the environment respectively.⁷⁹ Principle 15 of the declaration establishes the precautionary clause, by stating that “in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”⁸⁰ This has facilitated the evolution of the precautionary approach into a guiding legal principle. The precautionary principle’s key aim is to encourage decision-makers to assess and evaluate the possible harmful effects of their activities on the environment.⁸¹ In addition, Principle 17 of the Rio Declaration states that environmental impact assessments (EIAs) should be undertaken for proposed activities likely to have a significant adverse impact on the environment.⁸²

1.1.8. The UN Guiding Principles on Human Rights Impact Assessments of Economic Reforms

The UN Guiding Principles on Human Rights Impact Assessments of Economic Reforms urge governments to properly take into account their human rights obligations when designing economic reforms, paying particular attention to potential impacts on marginalised persons and groups. The principles also stipulate that international financial institutions, such as the International Monetary Fund (IMF) and the World Bank, ensure that “their loan conditionalities, advice, and proposals for economic reform do not undermine the borrower State’s human rights obligations”.⁸³ The commentary points out that some economic policies may have adverse consequences on the enjoyment of human rights and that the principles should be applied to various economic situations in which reforms are being adopted.⁸⁴

1.1.9. Act of 1991 – International Convention for the Protection of New Varieties of Plants

The UPOV 1991 provides monopoly rights to plant breeders making it illegal for farmers to save seeds of protected varieties.⁸⁵ Typically, farmers save seeds from a harvest in order to plant new crops; however, the RCEP would force farmers to have to purchase such seeds from the Big Three companies (Bayer-Monsanto, Dow DuPont, and ChinaChem-Sygenta).⁸⁶ Additional royalties must be paid on farm-saved seeds if they are not protected under the UPOV.⁸⁷ Currently, Thailand is not a member of UPOV.⁸⁸

1.1.10. The Report of the Special Rapporteur on extreme poverty and human rights

The Report of the Special Rapporteur on extreme poverty and human rights states that privatisation “often involves the systematic elimination of human rights protections and further marginalisation of the interests of low-income earners and those living in poverty”.⁸⁹

1.2. Regional Commitments

1.2.1. The ASEAN Human Rights Declaration

The ASEAN Human Rights Declaration sets out a number of standards similar to those in international treaties that relate to BHR and trade agreements, such as the right to an adequate standard of living and housing that includes the right to a safe, clean, and sustainable environment;⁹⁰ the right to own property;⁹¹ and the right to be free from interference of their home.⁹² It also stipulates that a lack of development may not be used as a tool to violate international human rights; and it is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms.⁹³

1.2.2. ASEAN Intergovernmental Commission on Human Rights (AICHR)

The AICHR, established in 2009, meets at least twice a year and has 14 mandates around the promotion and protection of human rights, capacity building, advice and technical assistance, information gathering, and engagement with national, regional, and international bodies.⁹⁴ However, this body has faced international criticism for not taking any action to safeguard the most basic human rights.⁹⁵ In June 2018, the AICHR met for the Interregional Dialogue: Sharing Good Practices on BHR, to discuss challenges and good practices on the implementation of the UNGPs in the region.⁹⁶

1.2.3. ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC)

The ACWC was established in 2010 with the primary mandate to uphold the rights contained in CEDAW and CRC, which are both ratified by all ten ASEAN Member States.⁹⁷

1.3. National Legislations

1.3.1. The Rights and Liberties Protection Department

The RPLD was established in 2002 with the objective “to promote and to integrate greater human rights protection with innovations toward universality level”. One of its mandated duties is to coordinate on the protection of rights and liberties with both public and private sectors, both domestically and internationally.⁹⁸

1.3.2. The Civil and Commercial Code of Thailand (CCC) and the Public Limited Company Act B.E. 2535 (1992) (PLC)

Business entities are governed by two main laws: the CCC and the PLC. These laws are in place to hold business enterprises and individuals accountable for business-related human rights abuses.⁹⁹

1.3.3. 2017 Constitution

The 2017 Constitution provisions (Sections 41, 42, 43, 57, 58, 59 and 77) guarantee the right of communities to manage, utilise, and preserve traditional practices, natural resources, and the environment to ensure their sustainable livelihood.¹⁰⁰ Section 58 stipulates the rights to access to information and participate in the environmental and health impact assessment (EHIA) of a project that might affect the community.¹⁰¹ Section 41 of the Constitution states that communities and persons shall have the right to “be informed and have access to public data or information in possession of a State agency as provided by law”.¹⁰² Section 59 provides that “[t]he State shall disclose any public data or information in the possession of a State agency, which is not related to the security of the State or government confidentiality [...], and shall ensure that the public can conveniently access such data or information.”¹⁰³



1.3.4. The 1997 Information Act and the 2003 Royal Decree on Guidelines and Procedures on Good Governance

The 1997 Official Information Act allows people wide access to information,¹⁰⁴ and the 2003 Royal Decree on Guidelines and Procedures on Good Governance provides for public hearings to be arranged prior to the operation of any project.¹⁰⁵

1.3.5. Land Development Act 2008

Other laws which contain provisions related to community rights include the Land Development Act 2008, which lays out conditions for development projects related to land, agriculture, economic, and natural resources. Article 15.3.3 of this law provides for consultation of impacted communities.¹⁰⁶

1.3.6. The State Administration Act (1991),¹⁰⁷ the Rule of Office of the Prime Minister on Public Consultation (2005),¹⁰⁸ the Administrative Procedures Act (1996),¹⁰⁹ the Factory Act (1992) and its ancillary laws,¹¹⁰ the Town Planning Act (2015),¹¹¹ and the National Health Act (2007)¹¹²

The above legislations also contain provisions related to public hearings, public participation and disclosure of information in the context of development projects.

2. APPLICATION OF THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS TO PROTECT, RESPECT AND REMEDY

In a seminar on 31 May 2017 (and other subsequent occasions), Prime Minister Prayuth Chan-o-cha made a public commitment to implement the UNGPs.¹¹³ While commendable, the UN has recommended that the government should now work to match this commitment with concrete actions.¹¹⁴

2.1. Pillar I & Pillar III - The duty of the State to protect human rights and to ensure effective access to remedy

Under the Guiding Principles, Thailand has the duty to protect against business-related abuses within its territory or jurisdiction by third parties, including business enterprises. Guiding Principle 3 provides that there is a need to enforce laws conducive to business respect for human rights and to address legislative gaps. States should also guide business enterprises on respecting human rights, advising “on appropriate methods, including HRDD, and how to consider effectively issues of gender, vulnerability and/or marginalisation, recognising the specific challenges that may be faced by indigenous peoples, women, national or ethnic minorities, religious, and linguistic minorities”.¹¹⁵ Within the concept of policy coherence in the Guiding Principles 8-10 between economy and human rights policies, Thailand should ensure that all government departments, agencies, and institutions that shape business practices observe human rights obligations, including through relevant information, training and support. States should also maintain adequate domestic policy space to meet their human rights obligations when pursuing investment treaties or contracts. Specifically, Guiding Principle 9 under Pillar 1, requires States to retain adequate policy and regulatory ability to meet their human rights obligations while concluding economic agreements, including FTAs, with other states or business enterprises. The commentary recommends that states should not compromise their ability to protect human rights while seeking economic opportunities through trade agreements and investment treaties.¹¹⁶ The RTG has instructed the country’s 55 State-owned enterprises (SOEs) to align their practices with the UNGPs.¹¹⁷ While concrete guidance and incentives, such as key performance indicators, are still lacking, this effort to lead by example will likely impact the extent to which the UNGPs are followed by other Thai businesses.¹¹⁸

In addition to domestic business policy, RTG should promote respect for human rights through its public procurement and economic policy, particularly including Thai companies involved in mega-projects in the ASEAN region.¹¹⁹ One such example is the Hatgyi Dam project, one of the five hydropower dams planned by the Joint



Committee on Hydropower Development between the Governments of Thailand and Myanmar on the Salween River. Due to increased militarisation around the dam site, there has been an increase in human rights abuses, including forced labour, illegal taxation, and rape.¹²⁰ Additionally, the Electricity Generating Authority of Thailand (EGAT) signed a Memorandum of Agreement (MoA) with the Department of Hydroelectric Power in Myanmar stating that all project information would be kept strictly confidential and not disseminated without the proper written consent of all involved stakeholders.¹²¹

Large-scale development projects, including those promoted by Thai companies and Thai investments in other countries, have brought about many human rights concerns and risks.¹²² Out of the 2,119 complaints received by the NHRCT since 2001 concerning adverse business-related human rights impacts, the three most common types of impacts were: (1) adverse effects of environmental pollution on human health; (2) forced evictions of communities with no or inadequate compensation, and (3) lack of or inadequate public consultations with communities affected by large-scale development projects.¹²³ Exclusionary practices in the facilitation of EIAs/EHIAs contribute directly to such human rights impacts, in addition to National Council for Peace and Order (NCPO) Order 9/2016 which facilitates faster review processes for certain public works projects by allowing SOEs to seek Cabinet approval prior to completing an EIA/HRIA.¹²⁴ Impact assessments must be restructured to utilise a more holistic approach, including social and human rights dimensions.

Regarding the duty of the State to ensure effective access to remedy, Guiding Principle 25 of Pillar 3 states that effective judicial or other remedies to business-related human rights abuses are part of the State's duty to protect. It also defines a grievance as "a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice or general notions of fairness of aggrieved communities".¹²⁵

In Thailand, State-based judicial remedies include four types of courts: the Constitutional Court, the Courts of Justice, the Administrative Courts and the Military Courts. Regarding non-judicial grievance mechanisms, which play an important complementary role in access to remedy, the NHRCT is the key non-judicial grievance mechanism for business-related human rights challenges in Thailand. The NHRCT is mandated to investigate and report on the act or omission amounting to violations of human rights and to propose appropriate solutions. The NHRCT is composed of 24 sub-committees and 17 ad-hoc sub-committees. Each sub-committee is mandated to review complaints on designated issues.¹²⁶

In Thailand, obstacles in effective remedies include: low awareness about rights, linguistic barriers, high cost of litigation, limited civic space to organise protests collectively, and the fear of intimidation.¹²⁷ A positive step is the creation of the Justice Fund, which allows victims more access to effective remedies; however, requests to access this fund need to be dealt with in an impartial and expeditious manner.¹²⁸

2.2. Pillar II & Pillar III - The corporate responsibility to respect human rights and to ensure effective access to remedy

Guiding Principle 11 and 12 urge business enterprises to respect human rights established in all international instruments and take adequate measures to prevent, mitigate, and remedy adverse human rights impact throughout their operations.¹²⁹ Principle 13 requests business enterprises to avoid, and if already caused, to address and mitigate human rights impacts caused by their activities.¹³⁰ Principle 18 requires business enterprises to engage in meaningful consultation with potentially affected groups, and other relevant stakeholders, including for identifying risks and tracking company performance in context to their operations' impact on human rights. This is a foundational element of HRDD and requires identifying the rights of the affected populations with regard to the affected area and the way in which these rights are likely to be affected.¹³¹ The commentary under Principle 18 states that "[t]o enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential



barriers to effective engagement”. Furthermore, in the event that such consultation is not feasible, there should be reasonable alternatives, including consulting experts, HRDs, and civil society.¹³²

Thus, as per the Guiding Principles 11-21, business enterprises have an independent responsibility to respect human rights, distinct from obligations of States. That responsibility requires business enterprises to avoid infringing on human rights of others, and addressing the human rights impacts they are involved with. The NHRCTT has proposed for Thai corporations to also ensure observance of human rights through various measures that are to be integrated into the NAP.¹³³ Such efforts differ from corporate social responsibility (CSR), as CSR is voluntary and implemented by the corporation itself whereas the implementation of the UNGPs and NAP will be state-driven and mandatory.¹³⁴

According to UNGPs, under Pillar 3, business enterprises should also establish their grievance mechanisms for individuals or communities that may be affected by their operations, and ensure such mechanisms are effective and available.¹³⁵ To mitigate human rights risks, the RTG and Thai companies should work to identify, address, and prevent any abuses linked to Thai investments abroad and must work to ensure access to effective grievance mechanisms rather than relying on the legislation of host countries, which may be weak or insufficient.¹³⁶ Additionally, domestic government policies should not constrain civic space nor should they promote the use of defamation cases by businesses as a tool to shut down legitimate criticism.¹³⁷ While this issue is being addressed through the amendment of Section 161/1 of the Criminal Procedure Code and the Witness Protection Act, and the initiative to develop Guidelines to Protect Human Rights Defenders, such efforts should be made in participation with the intended beneficiaries.¹³⁸

3. PRACTICES ON THE GROUND: CHALLENGES, IMPACTS & SIGNIFICANT CASES

Challenge 1: The drafting and negotiation process of the RCEP lacks transparency and has purposefully excluded public participation

Impact

The drafting and negotiation process of the RCEP has been conducted in a secretive manner without an open and transparent consultative process. The public, as both the collective owner of the resources at stake and as catalysts of the proposed economic boom, has been purposefully left out from engagement. Particularly affected groups such as women, farmers, patients, workers, and indigenous peoples have been excluded. The text of the agreement has not been made available for consideration and assessment of the civil society and parliament officials.

Regional CSOs have urged negotiating governments that economic cooperation and multilateralism should be based on equitable, fair, and sustainable development, further considering the adverse impacts of such FTAs. They have also pushed for ending the RCEP on the basis that it will only increase the power and protection of multinational corporations.¹³⁹

Challenge 2: Decent Work: RCEP will have a negative impact on jobs and may serve to reduce wages, as states compete to attract investments

Impact

RCEP could possibly have the same diminishing impact on jobs as was predicted from the TPP, leading to employment losses rather than job creation. Further, States are likely to push down wages to compete for cheaper exports, failing to provide for an adequate standard of living and development. RCEP will limit the RTG’s



ability to impose regulations on foreign investors, including on domestic industrial policy, labour laws, and wage policies.

Additionally, the RCEP facilitates lowering tariffs, which denies governments an important source of revenue.¹⁴⁰ Tariffs make up an important percentage of income; especially in economies with underdeveloped tax systems or where tax incentives aim at foreign direct investment.¹⁴¹ Any reduction in revenue, then, will have to be replaced by regressive taxes or reduced expenditure on public services, both of which have been found to have discriminatory effects.¹⁴²

Challenge 3: Women's Rights: RCEP will have a disproportionately negative impact on the rights of women

Impact

Women will be greatly affected due to their low status in the region's economy. Women as small-scale farmers and workers of the informal economy will face huge challenges to their livelihoods under the RCEP regime. As women comprise an increasing percentage of workers in export industries, they are most likely to experience the downward pressure on wages, conditions, and rights. Furthermore, RCEP is expected to cut public services due to a reduction in tariffs and private competition. This could have a significant and disproportionately negative impact on women who rely on these services for their daily activities.

Livelihoods dependent upon production in sectors such as dairy, meat, and other agricultural products will be threatened due to the proposed allowance of duty-free imports of subsidised products from Japan, New Zealand, and Australia.¹⁴³ Expanding on this threat, the RCEP may usher in an era of ICT farming (the use of computers and communication technologies to manage farm operations) and e-commerce, utilising farming facilities that are independent of seasons and local markets, posing a threat to small traders and retailers.¹⁴⁴ This corporate concentration limits real choice and raises prices for consumers, in addition to increasing health and environmental concerns, particularly from the excessive use of pesticides and chemicals.¹⁴⁵

Challenge 4: Food Security: RCEP will promote the exploitation of resources and biodiversity of ASEAN countries

Impact

The RCEP allows multinational corporations to claim ownership over the rich biodiversity in Thailand and other countries in Asia, leading to exploitation and damages to small scale farmers. Under the RCEP, states may be required to sign UPOV 1991, which provides intellectual property protection for seeds and plants and prohibits farmers from saving and sharing protected seeds, including seeds that they had been freely using prior to the protection being granted.

Thailand has recently drafted laws to comply with UPOV 91, which exposes farmers to criminal liability for saving and sharing seeds that they have been freely using. The Intellectual Property Chapter draft includes data exclusivity provisions that may extend patent protection periods of agrochemical products, consequently increasing food prices.¹⁴⁶ Additionally, copyright protection standards may stifle creativity and free speech.¹⁴⁷ The drafts of the Investment and Services Chapters stipulate that RCEP members cannot discriminate against foreign corporations that want to buy local farmland, potentially resulting in increased land grabbing.¹⁴⁸ In many member countries this practice is currently illegal; therefore, legalising such practice could have serious impacts on regional agrarian reform.¹⁴⁹

Thailand's Division of Rice Research and Development has documented over 5,900 varieties of rice in Thailand since 1937, but 80% of the rice planted today comprises only five varieties due to increased monopolisation of seeds.¹⁵⁰ According to Nengnoi Saeseng, Chairwoman of the Indigenous Women's Network of Thailand (IWNT), the exchange of seeds is very common in order to ensure food security and the survival of their seeds, also



allowing for experimentation and adaptation.¹⁵¹ However, the UPOV 1991 would criminalise such activity with a fine of up to 400,000 Thai Baht (THB) (\$12,700) and/or up to two years in jail, in addition to having their crops destroyed.¹⁵² Currently, Thailand is ASEAN’s first seed exporter, and fourth exporter in the Pacific Region, which was made possible through the 1999 Plant Varieties Protection Act, aiming at balancing communities’ rights and the interests of corporations.¹⁵³

Case of Indigenous Women

Women play a central role in ensuring food security by saving, preserving, and diversifying seeds, and by feeding their family and community. When farmers’ saved seeds will be replaced by corporation seeds, farmers will be forced to buy the seeds from the corporations, pushing them into debt. Whenever the price of farmers’ produce drops further, due to free trade policies, farmers become trapped even further in debt, which eventually becomes unbearable, leading farmers to commit suicide. Each suicide often leaves behind women and children to pick up the pieces.¹⁵⁴

Usually, community and farmer-led seed prices are cheaper than certified seeds from corporations.¹⁵⁵ Additionally, corporation-led seed breeding systems often focus on cash crops and other major food crops, which makes corporations’ seeds even less relevant to women farmers, working in low-input farming systems and subsistence farming. For farmers in developing countries, community and farmer-led systems are fundamental to maintain freedom and to achieve food security and food sovereignty.¹⁵⁶

Voices from Experts

“Seeds are our food security, our identities and our lives. We indigenous peoples have our own seeds and our own ways to preserve the seeds for the next planting seasons, so we should be consulted if laws relating to seeds are going to be drafted and enforced in our country”.

Noraeri Thungmueangthong, Vice Chairwomen of IWNT

“The exchange of seeds is very common among indigenous people. We exchange and share the seeds for our food security and for the survival of our seeds. It is also a way to test and experiment what is best for us. For example, before we decide to grow rice, we will exchange seeds with others and try to find the one that is most appropriate for our climate as well as the one that tastes the best. The exchange of seeds is not only a way to continue our way of life and our culture, but it is also a way to sustain and maintain our food diversity, food security, and food sovereignty. We are very concerned about passing of the new seed policy by our government”.

Nengnoi Seaseng, Chairwomen of IWNT¹⁵⁷

Challenge 5: Right to Health

5.1. Threats of bilateral and regional trade agreements, in particular RCEP, will cost lives as it would affect access to lifesaving medicines at affordable prices and would have a negative impact on healthcare by increasing the costs of medicines

Impact

These agreements are threatening as they fundamentally and permanently undermine access to affordable medicines for millions of people. The draft text of intellectual property rights may go beyond the rules agreed to at the WTO, known as the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement.¹⁵⁸ The proposed provisions seek to extend pharmaceutical corporations’ patent terms beyond the usual 20 years and require data exclusivity, which would limit competition.¹⁵⁹ If TRIPS plus provisions are accepted in the trade agreements, the prices of lifesaving medicines will increase drastically and people in developing countries will lack access to treatment. In particular, RCEP provisions could have the impact of obstructing access to affordable generic medicines including those for treating HIV, cancers, and heart diseases. As Thailand relies heavily on



generic medicines, particularly for high-cost diseases, Thailand’s insurance system will not be able to cope with the increase in the costs of drugs, despite government subsidies.¹⁶⁰ Research patent term extensions in Thailand alone could create additional costs of \$822.1 million over five years or more than \$6 billion over 20 years.¹⁶¹

Voice from Expert

“We have grave concerns over TRIPS plus provisions in the RCEP negotiation currently being pushed by South Korea and Japan. Like other countries in the region, Thailand heavily relies on generic medicines, especially for high-cost diseases like HIV & AIDS, cancers, hypertension, and heart-diseases. Thailand’s health insurance systems, which are fully and partially subsidised by the government, will be under threat if the lifesaving medicines’ costs become more expensive due to abuse of the patent system”.

Chalermsak Kittirakul, Access to Medicines Campaign Officer at the AIDS Access Foundation¹⁶²

5.2. Limitations to the use of public health safeguards to address health challenges

Context

Thailand was globally recognised and admired for its use of the flexibility measures under the TRIPS Agreement and Doha Declaration to address a lack of affordable medicines to treat AIDS, cardiovascular diseases, and cancers. Since 1999, people living with HIV have advocated with NGOs and the Thai Ministry of Public Health (MoPH). As a result, in 2006 and 2007, the RTG agreed to enforce public health safeguards, known as compulsory licensing, which complied with its Patent Act and the WTO’s TRIPS Agreement. Prices of anti-retroviral medicines, due to compulsory licensing, were reduced to between 82–94% and over 90% in medicines for cardiovascular diseases (CVDs) and cancers. The government was able to save approximately 6,000 million THB (\$191.1 million) from 2008 to 2011, and expand the health benefit package to cover other diseases. The impact of Thailand’s compulsory licensing also resulted in the global price reduction of a number of original anti-retroviral drugs. Other developing countries like India and Indonesia followed Thailand’s footsteps in issuing compulsory licensing on HIV/AIDS and cancer drugs.

Impact

Public health safeguards, such as the flexibility measures in the TRIPS agreement, will no longer be enforced if a trade agreement with TRIPS plus provisions is agreed upon. Additionally, the lack of awareness among state agencies of the rights and needs of persons with disabilities results in poor access to social services and public spaces.

5.3. The developing world’s access to lifesaving medicines is at risk

Impact

As a negotiating party of the RCEP, India’s informal recognition as the “Pharmacy of the Developing World” with 70% of generic anti-retroviral drugs supplied to developing countries is under threat due to TRIPS plus provisions in the RCEP, pushed for by the European Union (EU), Japan, and South Korea. This will limit access to generic lifesaving medicines at affordable prices for patients in other countries.

5.4. The ISDS in trade agreement negotiations limits the use of public policies to promote the right to health

Impact

Many FTA and regional trade agreement negotiations include an arbitration clause for ISDS that can be invoked only by private investors against host States for alleged violation of the investor’s benefits, even when the States have laws and policies promoting health and public interest. The inclusion of ISDS would limit policy space and the ability of the State to protect and fulfill its own peoples’ right to health, as the investors can file lawsuits against the State to an arbitrator outside the country which would require its government to revoke policies and/or pay enormous compensation.



Example: A multinational pharmaceutical corporation, Eli Lilly, is suing the Canadian government for \$500 million as the Canadian court applied strict patentability criteria and overturned two patents on atomoxetine (ADHD) and olanzapine (schizophrenia and bi-polar).

5.5. Thailand's Universal Coverage Scheme (UCS) is being threatened

Impact

Trade agreements with TRIPS plus provisions and ISDS are threatening Thailand's UCS, which is a fruitful outcome of the National Health Security Act and has been globally recognised as a best practice that can provide quality healthcare services to over 80% of its citizens at no cost. However, the UCS will become unsustainable if the prices of essential medicines are exorbitant due to the implications as a result of the TRIPS plus provisions.

Thousands of people living with HIV have accessed treatment with anti-retroviral drugs at no cost due to the UCS and the compulsory licensing policy. It is estimated that every 300 million THB (\$9.5 million) increased accessibility to 10,000 antiretroviral (ARV) patients. Without the UCS, it would not be possible for thousands of people living with HIV to access treatment at no cost, and more people living with HIV would die if they did not have access to lifesaving medicines under the UCS.

Challenge 6: Public-Private Partnerships (PPPs) currently lack explicit human rights provisions

Impact

Control over the economy, as well as public goods and services, are transferred from the government to a handful of private firms via PPPs, which violates the right to development through "systematic elimination of human rights protections and further marginalisation of the interest of low-income earners and those living in poverty".¹⁶³ Neoliberal economic practices "undermine the right to development by prioritising the unhindered flow of global capital over securing even the most basic rights of the most vulnerable".¹⁶⁴

PPPs facilitate the private sector to participate in the supply of assets and services, which are traditionally provided by the government.¹⁶⁵ As such, they involve areas that affect the basic human rights of citizens.¹⁶⁶ PPPs often create infrastructure or services with user fees, effectively excluding the poorer.¹⁶⁷ An active call for increased use of PPPs in developing countries is observed in the Addis Ababa Action Agenda, and PPPs are promoted as a 'means of implementation' of the 2030 Agenda for Sustainable Development.¹⁶⁸ In Thailand, there are 44 existing PPP Projects across 16 agencies.¹⁶⁹ These projects are primarily in the sectors of transportation and logistics, utilities, telecommunications, and property development.¹⁷⁰

Challenge 7: Access to remedy and the ISDS mechanism that favours investors and restricts governments from protecting public interests

Impact

The RCEP will implement the ISDS Mechanism, which favours investors over States and their civilians. The ISDS discourages governments from enacting laws and policies in the public interest if it could potentially harm investor expectations of profits. ISDS mechanism will operate as a secret tribunal where investors could sue governments for protecting their interests at the cost of human rights and the environment. UN experts have recognised that ISDS awards have a "chilling effect", when States are penalised for adopting regulations, for example, to protect the environment, food security, and access to generic and essential medicines.

ISDS mechanism prevents governments from protecting the needs of their populations by setting a foundation of impunity for corporations and elites at the expense of people, the environment, and societal well-being.¹⁷¹ RCEP poses a grave threat to the public interest by prioritising the interests of corporations over the livelihoods of peoples.¹⁷² ISDS gives corporations the power to sue governments if they pass any laws, policies or



regulations that infringe on the corporations' capacity to profit.¹⁷³ Recent ISDS cases show that corporations have used this mechanism to avoid paying taxes, to challenge public interest laws and policies, and to prevent the municipalisation of public services; thus, national consumer laws, environmental protection laws and climate policies, labour laws, public health laws, and food labelling laws can all be regarded as infringing upon 'investor rights'.¹⁷⁴

Voice from Expert

“By prioritising the interests of corporations over the well-being of peoples, RCEP poses grave threats to the public interest. The ISDS mechanism will prevent governments from protecting the needs of their populations. The entire raft of new generation trade-investment agreements builds an architecture of impunity for corporations and elites, at the expense of people, the environment, and societal well-being”.

Shaimali Guttal, Focus on the Global South¹⁷⁵

4. EXAMPLES OF GOOD PRACTICES AND GUIDELINES TO GUARANTEE COMPLIANCE WITH THE UN GUIDING PRINCIPLES ON BUSINESS & HUMAN RIGHTS AND IN THE IMPLEMENTATION OF LAW AND POLICY

4.1. Government-led Good Practices & Legislations

4.1.1. Thailand: HRIA of an international trade agreement

In 2006, the NHRCT drafted a report considering the human rights implications of the FTA Thailand was negotiating with the United States. This was considered the first HRIA of an international trade agreement, covering four substantive areas: agriculture, environment, intellectual property, and services and investment. It also analysed the negotiation processes and the related lack of public participation and dissemination of information. As an *ex ante* assessment, it considered the potential future impacts of the Thailand-United States bilateral trade agreement.¹⁷⁶

4.1.2. Philippines: 2009 Magna Carta of Women

Regarding the protection of traditional knowledge, the Government of the Philippines implemented the 2009 Magna Carta of Women to provide equal rights to men and women in land titling, and in use and management of land, water, and other natural resources. This legislation also recognises special rights of indigenous women to the “enjoyment, use, and management of land, water, and other natural resources within their communities or ancestral domains” and seeks to ensure the protection of their “knowledge systems and practices, traditional livelihoods, and other manifestations of their cultures and ways of life”.¹⁷⁷

4.1.3. Peru: 2002 Law No. 27811

In Peru, the 2002 Law No. 27811 aims at promoting the fair and equitable distribution of the benefits derived from the collective knowledge, further acknowledging customary laws and protocols related to benefit sharing.¹⁷⁸

4.1.4. Brasil: 1997 Brazilian Intellectual Property Law

The Brazilian government established the 1997 Brazilian Intellectual Property Law, which grants power to a government authority to issue “a compulsory license where a patent holder exercises patent rights in an abusive manner, or by means of an abuse of economic power proven by an administrative or court decision”, which proved useful to the government in negotiations with companies, resulting in lower prices of patent medicines.¹⁷⁹



4.1.5. South Africa: Treatment Action Campaign and the 1997 Medicines and Related Substances Control Amendment Act

The South African social movement, Treatment Action Campaign, has been campaigning since 1998 to secure access to HIV/AIDS treatments through the public health system.¹⁸⁰ Additionally, the South African government implemented the Medicines and Related Substances Control Amendment Act in 1997 to allow “for the substitution of brand-name medicines with generic medicines once a patent has expired”. This Act also facilitates the importation of such generic medications and a transparent pricing mechanism, but was institutionally limited by the Pharmaceutical Manufacturer’s Association and the United States’ government.¹⁸¹ However, with the support of the Treatment Action Campaign, which worked with the Congress of South African Trade Unions, organising communities against transnational corporations’ actions, and of Medecins sans Frontières, in 2001, the South African Government and United States Food and Drug Administration agreed on the issue that TRIPS flexibility would apply to emergency situations, such as the HIV/AIDS epidemic. Finally, also the Pharmaceutical Manufacturers’ Association dropped its lawsuit.¹⁸²

4.1.6. Bangladesh: 1982 Drugs Control Ordinance

As a ‘least developed country’, Bangladesh has access to a WTO waiver, which allowed the government to enact its 1982 Drugs Control Ordinance.¹⁸³ This law permits the government to regulate the price of drugs and limit the imports of medicines if the drug is domestically produced. Additionally, the 2005 National Drug Policy includes the provision of basic services and facilities to local generic drug manufacturing industries.¹⁸⁴

4.1.7. Malawi: Agricultural support for seeds and input

In 2005, Malawi introduced agricultural support for seeds and input, resulting in the country’s advancement in agricultural development for small-scale producers.¹⁸⁵

4.1.8. Canada: Human rights reporting mechanism

Canada implemented a new human rights reporting mechanism in its FTA with Colombia.¹⁸⁶

4.1.9. European Union: Sustainability Impact Assessments

In the EU, Sustainability Impact Assessments are conducted systematically for all major multilateral and bilateral trade agreements and include economic, social, and environmental impact assessments.¹⁸⁷

4.1.10. UN Working Group on BHR

Since 2015, the UN Working Group on BHR has organised sessions at the annual UN Forum on BHR to enhance discussion on challenges and emerging good practices related to International Investment Agreements and Human Rights.¹⁸⁸

4.2. Community-led good practices

4.2.1. Thailand’s Assembly of the Poor

Thailand’s Assembly of the Poor (AOP) serves as a political voice for villagers and marginalised members of society and is allied with other NGOs in country. Regarding the RCEP, the AOP released the following demands in July 2018:

1. Negotiations must stop;
2. All countries involved in the RCEP negotiations must disclose information to the public;
3. Before and after any trade negotiation, all countries must get consent from their people through parliamentary processes;
4. The NCPO has not been elected and, therefore, does not hold any legitimacy in negotiating on behalf of Thai people. As such, it needs to withdraw from negotiations.¹⁸⁹

4.2.2. Collaboration of the Food First Information Action Network and other CSOs

The Food First Information and Action Network collaborates with CSOs in analysing human rights impact of trade on the right to food of agricultural producers in different countries, as an *ex post* assessment.¹⁹⁰

4.2.3. Colombia: Investment & Human Rights Project (IHRP)

In order to issue recommendations to the government of Colombia on investment policy in its NAP on BHR, the IHRP organised workshops with 40 government officials, covering investment policy, human rights, and the State's duty to protect. Workshops also offered opportunities for the participants to address challenges related to human rights and investment in Colombia. Dialogues with the private sector, foreign governments, civil society, academia, and international organisations based in Colombia and were also held and their views were gathered. It then submitted its recommendations, highlighting stakeholders' issues as priorities.¹⁹¹

5. RECOMMENDATIONS AND ACTION PLAN FOR THE STATE: PILLAR I AND PILLAR III

5.1. PILLAR I: STATE DUTY TO PROTECT

Priority Area 1	Review and amendment of legislation policy and agreements		
Recommendations (Goal to be achieved)	Action	Lead Agency/ Jurisdiction	Performance Indicators/ Timeline
Reconsider the draft provisions of the amendment to the Plant Variety Protection Act (1999), to protect farming communities in Thailand.	Reconsider the draft legislation that seeks to amend the Plant Variety Protection Act (1999) in order to comply with UPOV because of the draft's adverse impact on farming and indigenous communities.	Department of Agriculture	These steps must be taken in consultation with the NHRCT, local civilian agencies, and with the participation of indigenous peoples in these decisions that directly affect them and their rights through prior consultation utilising participatory approaches. Timeline 1 year – 2019
Ensure that bilateral and regional trade agreements do not contain TRIPS plus and ISDS provisions, and that they support the right to health.	Make efforts to ensure such agreements do not have a negative impact on the right to health, in line with the 2006 concluding observations on the Committee on the Rights of the Child to Thailand.	Trade Negotiation Department, NCPO, The National Legislative Assembly (NLA)	Agreements should be in line with the 2006 observations of the Committee on the Rights of the Child to Thailand, and should also include WTO's TRIPS Agreement and the



	Use public health safeguards under the WTO’s TRIPS Agreement and the Doha Declaration to promote access to affordable medicines and rights to health. Also withdraw TRIPS plus provisions and ISDS from the trade agreement negotiations.		Doha Declaration. Timeline 2 years: 2019-2020
Priority Area 2	Inclusive and participatory policymaking		
Recommendations (Goal to be achieved)	Action	Lead Agency/ Jurisdiction	Performance Indicators/ Timeline
Improve mechanisms for inclusivity and participation in policymaking and engage all stakeholders that are either directly involved or affected by partnerships or agreements.	<p>Incorporate mechanisms stated in Article 190 in the 2007 Constitution into the new Constitution in order to ensure transparency and participation of people in bilateral and regional trade agreement negotiations.</p> <p>Conduct impact assessments on marginalised groups and SMEs for the frameworks and negotiations of FTA and other trade and investment related agreements, in line with the 2012 concluding observations on the Committee on the Rights of the Child to Thailand.</p> <p>Commit to periodical submission or revelation of negotiating text of bilateral and regional trade agreements and other trade and investment related agreements to the Parliament and civil society,</p>	NCPO, NLA, Negotiating parties of FTAs	<p>Impact assessments for the frameworks and negotiations of FTA and trade and investment related agreements should be in line with the 2012 concluding observations on the Committee on the Rights of the Child to Thailand.</p> <p>Periodical submissions of trade agreements should be handed over to CSOs and the public, and they have to be allowed to observe negotiations.</p> <p>Timeline 3 years 2019-2021</p>



	<p>especially human rights organisations, and allow representatives from the general public and civil society to observe the negotiations.</p>		
<p>Publish the text of the RCEP agreement for scrutiny and review of the parliament and the civil society, to enable a transparent negotiation process that involves the public.</p>	<p>Ensure that dialogue with communities and individuals affected by RCEP are efficiently included in the negotiations and that their views and needs are taken into considerations.</p> <p>Commit to ensure public participation, including public consultations and public hearings, on trade agreements and allow the frameworks for bilateral and regional trade agreement negotiations to be scrutinised and approved by the Parliament, in line with the 2013 Report of the Special Rapporteur on the human right to safe drinking water and sanitation.</p> <p>Ensure the active, free, informed, and meaningful participation of persons at all stages of the design, implementation, monitoring and evaluation of decisions and policies affecting them.</p>	<p>NCPO, The NLA</p>	<p>Trade agreement negotiations should be in line with the 2013 Report of the Special Rapporteur on the human right to safe drinking water and sanitation.</p> <p>Timeline 1 year - 2019</p>
<p>Priority Area 3</p>	<p>Guaranteeing human rights protections in trade and investment agreements</p>		
<p>Recommendations (Goal to be achieved)</p>	<p>Action</p>	<p>Lead Agency/ Jurisdiction</p>	<p>Performance Indicators/ Timeline</p>



Balance human rights obligations with trade and investment agreements	Refrain from initiating or re-opening any FTA negotiations until the country returns to democracy and has an elected government, and refrain from introducing or enacting legislation to comply with TRIPS plus provisions and ISDS.	(NCPO, The NLA, MoJ	These steps must be taken in consultation with the NHRCT and the negotiating countries of the RCEP with the participation of business organisations and potential investors. Timeline: 2 years – 2019-2020
	Insist that arrangements for the privatisation of public goods specifically address the human rights implications.		
	Enact necessary human rights legislations and policies including right to health, food and water, safe environment, development, privacy, and labour rights as against investor interests.		
	Conduct and produce reports on Environmental, Social, and Health Impact Assessments, and Regulatory Impact Assessments (RIAs) for the framework and negotiation of trade agreements and other trade and investment related agreements.		
	Commit to holding a deliberative referendum, in the case of sensitive issues or for actions that will have severe impacts on human rights, especially on issues related to Intellectual Property Rights, Investment and ISDS.		
Negotiate, through a transparent and consultative process, an agreement that promotes regional economic co-operation and is based on equitable, fair, and sustainable	Ensure high levels of environment and labour protections, which must not be lowered in order to encourage investment.	Trade Negotiation Department, NCPO, e NLA	The agreement includes labour and environment standards, which are aligned with international standards such as the UNGPs.



development.	Include provisions for investors to adopt standards of responsible business conduct, including the UNGPs.		Timeline: 2 years – 2019-2020
Ensure effective HRIAs of investments under the RCEP.	Ensure that data on human rights impacts are collected and published, and that confidentiality carve-outs are strictly limited.	NCPO, NLA	Local CSOs and communities are included in the impact assessments; their voices have to be represented in the data on human rights impacts. Timeline 1 year - 2019
	Include meaningful and effective participation of the local communities and CSOs to express their views and concerns on the impacts of investments.		

5.2. PILLAR III: ACCESS TO REMEDY

Recommendations (Goal to be achieved)	Action	Lead Agency/ Jurisdiction	Performance Indicators/ Timeline
Negotiate for effective remedies for people and communities, where their rights are harmed by investments under RCEP.	The included dispute settlement mechanism, in deciding claims against a government, must take into account the investor’s non-compliance with the UNGPs.	MoJ, NLA	Dispute settlements enable victims to bring claims in courts of the home states of investors and should include investors’ non-compliance with UNGPs. Timeline 2 years – 2019-2020
	Enable victims to bring claims in the courts of the home states of the investors.		

6. RECOMMENDATIONS AND ACTION PLAN FOR BUSINESSES: PILLAR II AND PILLAR III

6.1. PILLAR II: CORPORATE RESPONSIBILITY TO RESPECT

Recommendations (Goal to be achieved)	Action	Lead Agency/ Jurisdiction	Performance Indicators/ Timeline
Investors under the RCEP should enforce their CSR fulfill their obligations under Pillar 2 of the UNGPs, to respect human rights in their investments and operations in Thailand.	Incorporate their duties under Pillar II of the UN Guiding Principles on Business and Human Rights in their investments and related operations in Thailand under the RCEP, as an independent obligation unrelated to any	Investors under the RCEP	Investors align their duties with Pillar 2 of the UNGPs in their investments. Local communities and CSOs participate and are presented in human rights impact assessments. Timeline 2 years – 2019-2020



	state-imposed regulations.		
	Undertake independent human rights impact assessments of their investments under the RCEP, including through meaningful and effective participation of the local communities and CSOs.		
6.2. PILLAR III: ACCESS TO REMEDY			
Priority Area 1			
Recommendations (Goal to be achieved)	Action	Lead Agency/ Jurisdiction	Performance Indicators/ Timeline
Provide remedies and grievance redress mechanisms to victims affected by adverse human rights impact of their operations in Thailand.	Remedies need to be effective, accessible, and available for all persons affected, without discrimination.	Investors and businesses	Remedies are distributed without discrimination and are fair and compensate the full damage faced by the victims.
	Restitution, remuneration, and compensation shall be provided.		Timeline 1 year - 2019



ENDNOTES

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<https://www.manushyafoundation.org/business-human-rights>
- 2 Manushya Foundation, *Meeting Report: Coalition Building Workshop on Business & Human Rights – Towards a ‘Thai BHR Network’*, (18-20 November 2018), available at: <https://www.manushyafoundation.org/coalition-building-workshop-report>
- 3 The four regional NBA dialogues were conducted by Manushya Foundation as follows: The Northern Regional NBA Dialogue in Chiang Mai (29 - 30 January 2017), The Northeastern Regional NBA Dialogue in Khon Kaen (23 - 24 February 2017), The Southern Regional NBA Dialogue in Hat Yai (20 - 21 March 2017) and The Eastern and Central Regional NBA Dialogue in Rayong (30 - 31 March 2017). Please access the NBA Regional Dialogues Report here: Manushya Foundation, *Meeting Report: Regional Dialogues for the CSO National Baseline Assessment (NBA) on Business and Human Rights*, (2017), available at: <https://www.manushyafoundation.org/nba-dialogues-report>
- 4 Manushya Foundation conducted two Experts Meetings to get input from national, regional and international experts to inform its NBA and ultimately provide guidance for the development of the National Action Plan on Business and Human Rights. The First Experts’ Meeting aimed at Informing the CSO NBA on BHR in Thailand in Bangkok (2-3 September 2017) and the Second Experts’ Meeting focused on Findings and Recommendations for CSO BHR NBA in Bangkok (28 February to 1 March 2018). Please see: Manushya Foundation, *Executive Summary: First Experts Meeting to inform the independent national baseline assessment on business and human rights in Thailand, 2-3 September 2017*, (2017), available at: <https://www.manushyafoundation.org/single-post/RELEASE-OF-FIRST-BHR-NBA-EXPERTS-MEETING>; and Manushya Foundation, *Executive Summary: Second Experts Meeting to discuss the findings and recommendations of the independent national baseline assessment on business and human rights in Thailand, 28 February-1 March 2018*, (2018), available at: <https://www.manushyafoundation.org/single-post/2018/07/31/RELEASE-OF-SECOND-BHR-NBA-EXPERTS-MEETING>
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- 8 Manushya Foundation, *Executive Summary: First Experts Meeting to inform the independent national baseline assessment on business and human rights in Thailand, 2-3 September 2017*, (2017), available at: <https://www.manushyafoundation.org/first-experts-meeting-report>; and Manushya Foundation, *Executive Summary: Second Experts Meeting to discuss the findings and recommendations of the independent national baseline assessment on business and human rights in Thailand, 28 February-1 March 2018*, (2018), available at: <https://www.manushyafoundation.org/second-experts-meeting-report>
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- 11 Kate Lappin, *Free Trade or Women’s Rights?*, World PSI, (12 January 2018), available at: <http://www.world-psi.org/en/free-trade-or-womens-rights>; Bilaterals.org, *RCEP*, available at: <https://www.bilaterals.org/rcep#articles>
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NOTES



MANUSHYA

Empowering Communities | Advancing Social Justice

Founded in 2017, Manushya Foundation serves as a bridge to engage, mobilise, and empower agents of change by: connecting humans through inclusive coalition building and; by developing strategies focused at placing local communities' voices in the centre of human rights advocacy and domestic implementation of international human rights obligations and standards.

Manushya Foundation strengthens the solidarity and capacity of communities and grassroots to ensure they can constructively raise their own concerns and provide solutions in order to improve their livelihoods and the human rights situation on the ground.