



RIGHTS OF INDIGENOUS PEOPLES IN BUSINESS CONTEXTS IN THAILAND

WORKING PAPER

**MARCH
2019**



MANUSHYA
Empowering Communities | Advancing Social Justice

RIGHTS OF INDIGENOUS PEOPLES IN BUSINESS CONTEXTS IN THAILAND



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ACKNOWLEDGEMENTS

As part of its work in Thailand, the Manushya Foundation aims to strengthen the capacity of local communities, members of the Thai CSOs Coalition for the UPR, of which many are experiencing adverse human rights impacts of corporations, to effectively engage in the Universal Periodic Review (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 Universal Periodic Review (UPR), a recommendation from Sweden to develop a National Action Plan (NAP) on Business and Human Rights (BHR) with the view to implement the UN Guiding Principles on Business and Human Rights (UNGPs), Manushya Foundation developed a strategy 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 Foundation has reached out to local communities, national, regional and international experts on business and human rights to:

- Develop a CSO national baseline assessment (NBA) on Business and Human Rights, 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".

As part of its Business and human rights strategy and in order to inform the development of the independent CSO National Baseline Assessment, Manushya Foundation has supported the formation of the Thai Business and Human Rights Network and has conducted a series of consultations to identify the key priority areas, as well as community-led recommendations. To do so, Manushya Foundation has conducted 4 regional NBA dialogues: 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). Manushya Foundation has also 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 to Inform the CSO NBA on BHR in Thailand in Bangkok (2-3 September 2017) and the Second Experts' Meeting on Findings and Recommendations for CSO BHR NBA in Bangkok (28 February to 1 March 2018). In order to guarantee safety of local communities and human rights defenders engaging in Manushya's strategy, all these six consultations were co-organised with the Rights and Liberties Protection Department of the Ministry of Justice, 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 human rights defenders, 4. Trade agreements and outbound investments. These four priority areas of focus influenced the content of the Government National Action Plan on Business and Human Rights, following our key four priority areas. However, the current draft NAP is not inclusive of all the human rights issues identified by local communities throughout the six consultations. Indeed, indigenous peoples and sex workers have been left out from the content of the three consecutive draft NAPs issued between June-August 2018.

As a result, it was critical for Manushya Foundation to develop a working paper pertaining to the **Rights of Indigenous Peoples in Business Contexts in Thailand** to further inform and influence the National Action Plan on Business and Human Rights, being finalised by the Rights and Liberties Protection Department, MoJ, and to be issued by the end of December 2018.

The Manushya Foundation would like to sincerely thank all those who contributed to the development of this Working Paper, in particular all the indigenous peoples who have shared their invaluable input, stories and evidence

throughout the implementation of Manushya Foundation's Business & Human Rights strategy in 2017-2018, and whose voices are captured in this working paper.

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Thanks also to Manushya's volunteer and intern for their assistance in finalising the working paper: **Mr. Michael Nedbal**, Human Rights Research Volunteer, and **Ms. Priska Babuin**, Human Rights Research Intern.

ABBREVIATIONS

AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
BHR	Business & Human Rights
CCPR	Human Rights Committee
CEDAW	Committee on the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CERD	Committee on the Elimination of Racial Discrimination
CIPT	Council of Indigenous Peoples in Thailand
CSO	Civil Society Organisations
FIO	Forest Industry Organization
FPIC	Free, Prior and Informed Consent
HRD	Human Rights Defenders
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
IFC	International Finance Corporation
ILO	International Labour Organisation
IPs	Indigenous Peoples
MoJ	Ministry of Justice
NAP	National Action Plan
NBA	National Baseline Assessment
NCPO	National Council for Peace and Order
NGO	Non-Governmental Organisation
NHRCT	National Human Rights Commission of Thailand
NIPT	Network of Indigenous Peoples of Thailand
OECD	Organisation for Economic Co-operation and Development
RCEP	Regional Comprehensive Economic Partnership
RFD	Royal Forest Department
RLPD	Rights and Liberties Protection Department
RTG	Royal Thai Government
SDGs	Sustainable Development Goals
UN	United Nations
UNGPs	UN Guiding Principles on Business & Human Rights
UPR	Universal Periodic Review



Manushya's Role in Business and Human Rights process in Thailand

"Empowering local communities to be at the center of business and human rights discourse and of the NAP on Business and Human Rights"

At Manushya, we strongly believe in the importance of collaboration and cooperation to further human rights and social justice and recognize 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 organization. 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 on the empowerment of invisible and marginalized 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 Rights and Liberties Protection Department of the Ministry of Justice 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.

Introduction

On May 11, 2016, Thailand's second Universal Periodic Review took place, when the Royal Thai Government's (RTG) human rights record was reviewed by 99 UN member states at the UN Human Rights Council and 249 recommendations were received. Following the review, the Royal Thai Government accepted a recommendation made by the Government of Sweden to develop, enact and implement a National Action Plan (NAP) on Business and Human Rights (BHR) in order to implement the UN Guiding Principles on Business and Human Rights. This National Action Plan on Business and Human Rights comes under the responsibility of Rights and Liberties Protection Department of the Ministry of Justice. Furthermore, the Royal Thai Government has made voluntary pledges to incorporate human rights principles and practices in the business sector.

However, the Government's draft NAP is not inclusive of all the human rights issues identified by local communities and for three consecutive NAP drafts, issued between June and August 2018, the Thai Government failed to include indigenous peoples in the text. The latest draft NAP issued on 15 February 2019 and opened for public comments until 15 March 2019, does not recognize 'indigenous peoples', but does refer to the importance to comply with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in relation to community rights and the management of natural resources. Therefore, this working paper come as a result of the lack of inclusiveness of indigenous peoples in the NAP and as a mean to highlight the impact that businesses have towards their rights and the importance of the recognition of the human rights of indigenous peoples in Thailand. Indigenous peoples are among the most at-risk communities in business contexts and it is therefore necessary to illustrate their human rights concerns for the NAP.

Hence, the aim of this working paper is to inform the National Action Plan on Business and Human Rights of Thailand, that the RTG is finalizing, on the rights of indigenous peoples in business contexts and to influence the final NAP version towards the recognition of their rights.

Additional concerns are raised since, as of today, indigenous peoples are not recognized under the Thai laws and will most likely be left out of the NAP. Thus, it is crucial that indigenous peoples are included in an analysis of the risks and challenges they face within business contexts. To do so, indigenous peoples have been heavily involved in the drafts of this paper, and their voices are reflected in this work, underlining the particular needs of these communities.

The paper is primarily based on the valuable information received from the representatives of indigenous communities, community-based and non-governmental organizations, who attended the business and human rights trainings organized by the Manushya Foundation, four regional dialogues co-organized by Manushya Foundation and the Ministry of Justice of Thailand, and the Global Compact Network Thailand in early 2017 for the national baseline assessment on Business and Human Rights. Further, the information has been discussed and analysed during two expert meetings organized by the Manushya Foundation during end 2017 and early 2018 to receive input from national, regional and international experts on the Independent CSO NBA conducted as part of Manushya Foundation's BHR strategy. The indigenous communities and organizations also provided information of documented violations of the rights of indigenous peoples in business contexts, including during the field visits (co-) organized by the Foundation, which is taken into account for the paper. Furthermore, desk review of national and international legal framework and relevant reports of the government and non-governmental organizations supported the analysis of the information to present the recommendations for consideration in the drafting of the NAP of Thailand.

This working paper will first cover the concept of indigenous peoples and the international human rights framework regarding the rights of indigenous peoples. The paper will then provide the background of indigenous peoples in Thailand, including the lack of legal recognition of these peoples, followed by the relevant national legal and policy framework and international human rights obligations of Thailand. It will further cover a detailed account of the situation of the rights of indigenous peoples in business contexts in Thailand, including impacts on the ground of business conduct on their lives. An assessment of the legal and policy framework and practices in Thailand vis-à-vis the UNGPs and the rights of indigenous peoples as well as a gender analysis will then be presented in the paper. Through the presentation of this information, the paper will conclude with recommendations to ensure that the NAP addresses the human rights challenges of indigenous peoples.

Methodology

The methodology used in the research, analysis and writing for this working paper included both primary sources and secondary sources. Amongst the primary sources, information was collected directly from interviews; meetings; four regional National Baseline Assessment (NBA) dialogues conducted in 2017;¹ expert meetings with national, regional and international experts in 2017 and 2018;² Thai BHR coalition building workshop; EU delegation visits to the Indigenous Women's Network of Thailand on 16 January 2018 at the Inter Mountain Peoples' Education and Culture in Thailand Association (IMPECT) offices³ and EU Field visit to Huay Hoi Karen Indigenous Village on 15 March 2018.⁴ The research also included desk review of secondary sources, such as UN human rights bodies' observations and comments, NGOs' reports and submissions and news articles.

The research was written by indigenous peoples' rights and business and human rights experts and activists working closely with indigenous peoples: Mr. Prabindra Shakya, Indigenous Peoples Rights' Expert and Senior Advisor at Manushya Foundation, and Ms. Emilie Pradichit, Founder & Director at Manushya Foundation; and it was peer-reviewed by Mr. Kittisak Rattanakrajangsri, Chair of the Asia Indigenous Peoples Pact (AIPP) and Director of the Indigenous Peoples Foundation for Education and Environment (IPF).

The authors of the paper express their high appreciation for the representatives of indigenous communities and non-governmental organizations that provided the information and the experts who made time for the meetings. Feedback on the content of the paper can be submitted through Manushya Foundation, which will be duly taken into account in further use of the paper.

Throughout the paper, coloured boxes are used to present different kinds of information as follows:



1

INDIGENOUS PEOPLES AND INTERNATIONAL HUMAN RIGHTS FRAMEWORK

1.1. Who are indigenous peoples?

There is no singularly authoritative definition of ‘indigenous peoples’ in international law but the most common is the “working definition” formulated by Jose Martinez Cobo, former Special-Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights, in his study of the problem of discrimination against indigenous populations (1986):

“Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.”

The working definition lists a number of factors such as occupation of ancestral lands, culture and language for determining their historical continuity. Self-identification as indigenous – on an individual basis and through group consciousness – is regarded as a fundamental element in the definition.

The definition of indigenous peoples can also be drawn from the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (ILO), which states that the Convention applies to:

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

(b) peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present states boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.⁵

The Convention also states that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which its provisions apply. It provides the same rights to “indigenous” and “tribal” peoples – the terms are used interchangeably in international human rights discourse.

Indigenous peoples number around 370 million (as of 2010) across 90 countries worldwide, which make up around 5% of the global population. They represent around 5,000 distinct cultures and occupy around 20% of the earth’s territory, which hold 80% of the remaining biodiversity. On the other hand, they account for 15% of the world’s poorest people. There is growing recognition of their rights at national and international levels.

1.2. International human rights framework

1.2.1. United Nations Declaration on the Rights of Indigenous Peoples

The Declaration adopted by the UN General Assembly in September 2007 establishes the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world. It is the most comprehensive international instrument on the rights of indigenous peoples, which elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of indigenous peoples. 144 States voted in favour of the Declaration with only 4 States voting against (which have reversed their positions by 2010) and 11 abstaining. Although the Declaration is not legally binding, it contains rights of indigenous peoples, which are already set out in binding international human rights law – of which some may be considered customary international law.

The Declaration recognizes the rights of indigenous peoples, which are by definition collective rights – meaning they are vested in indigenous individuals that organize themselves as peoples.⁶ While also recognizing the rights of individuals, those rights include *inter alia*:

i. Right to equality and non-discrimination: Indigenous peoples have the right to full enjoyment, as a collective or as individuals, to all human rights and fundamental freedoms in international law. They are thus free and equal to all peoples and individuals and have the right to be free from any kind of discrimination to exercise their rights – in particular that based on their indigenous origin or identity.⁷

ii. Right to self-determination: Indigenous peoples have the right to self-determination by virtue of which, they freely determine their political status and pursue their economic, social and cultural development. To exercise the right to self-determination, they have the right to autonomy or self-government in matters relating to their internal and local affairs.⁸

iii. Rights to lands, territories and resources: Indigenous peoples have the rights to the lands, territories and resources, which they traditionally owned, occupied or otherwise used or acquired.⁹ States should give legal recognition and protection to these lands, territories and resources¹⁰, and establish and implement processes recognising and adjudicating indigenous peoples' rights in relation to their lands, territories and resources¹¹.

iv. Economic, social and cultural rights: Emphasising indigenous peoples' cultural equality and distinctiveness, the UNDRIP contains several provisions to protect against discriminatory treatment on cultural grounds as well as positive measures to support indigenous peoples' cultures. These include their right not to be subjected to destruction of their culture; the right to practice and revitalise their cultural traditions and customs, to teach their cultural mores, and to the repatriation of human remains; and the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions.¹²

Further, the Declaration obliges States to obtain **free, prior and informed consent (FPIC)**¹³ of indigenous peoples prior to:

- removal of indigenous peoples from their lands and territories (art. 10);
- adopting and implementing legislative or administrative measures that may affect them (art. 19);
- any military activities on their territories (art. 30).
- storage or disposal of hazardous materials on lands and territories of indigenous peoples (art. 29.2); and
- approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water and other resources (art. 32).

The right of indigenous peoples to FPIC is grounded on the broader framework of indigenous peoples' rights as expressed in the Declaration, including the right to self-determination. The jurisprudence of international and regional human rights monitoring bodies as well as human rights courts has repeatedly identified FPIC as the standard that States must oblige corporations to adhere to.¹⁴

While all the rights in the Declaration apply to men and women equally, it also calls for particular attention to be paid to the rights and special needs of **indigenous elders, women, youth, children and persons with disabilities** to ensure improving their economic and social conditions as well as in the overall implementation of the Declaration. It also obliges States to take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy full protection and guarantees against all forms of violence and discrimination.¹⁵

1.2.2. Indigenous and Tribal Peoples Convention (No. 169) of the International Labour Organization

The Convention¹⁶, which replaced the ILO Indigenous and Tribal Populations Convention No. 107, is the only legally binding document dealing specifically with the rights of indigenous peoples. The forerunner to the UN Declaration on the Rights of Indigenous Peoples covers a wide range of issues, including consultation and participation, rights to land, employment and vocational training, education, health and social security, customary law, traditional institutions and cross-border cooperation, with provisions for similar rights as in the Declaration. 23 States across the world have ratified the Convention to date.

1.2.3. UN Human Rights Treaties

Although existing human rights treaties do not specifically provide for the rights of indigenous peoples, the treaty bodies have elaborated on those rights in their general comments and recommendations.

International Covenant on Civil and Political Rights (ICCPR)

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. The Human Rights Committee (CCPR) in its General Comment No. 23 on the article 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.”¹⁷

International Covenant on Economic, Social and Cultural Rights (ICESCR)

The Committee on Economic, Social and Cultural Rights (CESCR) that monitors the implementation of the ICESCR has affirmed the rights of indigenous peoples in number of its General Comments, including No. 21 on the right of everyone to take part in cultural life¹⁸ and No. 24 on State Obligations under the ICESCR in the Context of Business Activities¹⁹. The latter particularly affirms that States and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including to their lands, territories and resources. Further, it necessitates States to specifically incorporate impacts of business activities on indigenous peoples into human rights impact assessments and businesses to obtain the free, prior and informed consent of indigenous peoples in exercising human rights due diligence. 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 the general comment.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The Committee on the Elimination of Racial Discrimination has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention. In its General Recommendation No. 23 on the rights of indigenous peoples, the Committee especially called upon States to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.”²⁰

1.2.4. 2030 Agenda for Sustainable Development²¹

The 2030 Agenda is a broad and universal policy agenda, with 17 **Sustainable Development Goals** and 169 associated targets, which are described as integrated and indivisible. The UN General Assembly adopted the Agenda in September 2015, which came into effect on 1 January 2016 and will carry through the next 15 years.

With the promise to leave no one behind and reach the furthest behind first, the 2030 Agenda includes six references to indigenous peoples: three times in the political declaration; two in the targets under Goal 2 on zero hunger (target 2.3) and Goal 4 on education (target 4.5), and on in the section on follow up and review, which calls for indigenous peoples’ participation.

Moreover, the overarching framework of the 2030 Agenda contains several elements that can go towards articulating the development concerns of indigenous peoples. Of significance is the fact that human rights principles and standards are strongly reflected in the 2030 Agenda. The overall focus on reducing inequalities is also relevant to the protection of indigenous peoples, who are almost universally in situations of disadvantage vis-à-vis other segments of the world population. Further, indigenous peoples are also referred to in the global indicator framework²², which also includes indicators on land rights relevant to indigenous peoples.

1.2.5. Other standards relevant to the rights of indigenous peoples

i. Convention on Biological Diversity, 1993: Article 8 of the Convention provides that States shall respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities and promote their wider application with the approval and involvement of the holders of such knowledge, and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

ii. UNESCO Universal Declaration on Cultural Diversity (2001): Article 4 of the Declaration provides that defense of cultural diversity is an ethical imperative, inseparable from respect for human dignity, which implies a commitment

to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. States, in the Declaration, committed themselves to achieve, among others, respect and protection of traditional knowledge, particularly that of indigenous peoples.

iii. The Paris Agreement (2016) under the United Nations Framework Convention on Climate Change: Article 7 of the Agreement acknowledges the role of indigenous peoples' traditional knowledge in addressing climate change and reminds States to respect, promote and consider their human rights obligations when taking action to address climate change (preamble). States, party to the Agreement, also acknowledge that climate change adaptation should be based on and guided by knowledge of indigenous peoples, as appropriate.

1.3. Indigenous rights mechanisms at the UN

The UN has established three mechanisms mandated to deal specifically with the rights and issues of indigenous peoples, which are as follows:

1.3.1. Permanent Forum on Indigenous Peoples (PFII)

The Permanent Forum is a high-level advisory body to the UN Economic and Social Council established in 2000 with the mandate²³ to deal with indigenous issues related to economic and social development, culture, the environment, health and human rights. It provides expert advice and recommendations on indigenous issues to the Council as well as UN programmes, funds and agencies through the Council; raises awareness and promotes the integration and coordination of activities related to indigenous issues within the UN system and prepare and disseminate information on indigenous issues. It is composed of sixteen members – half of them nominated by governments and other half by indigenous peoples, and holds annual two-week sessions, which was first held in 2002.²⁴

1.3.2. Special Rapporteur on the Rights of Indigenous Peoples

The UN Commission on Human Rights (replaced now by the Human Rights Council) appointed a Special Rapporteur on the rights of Indigenous Peoples in 2001, as part of the system of thematic Special Procedures. In fulfillment of her mandate²⁵, the Special Rapporteur (a) promotes good practices to implement international standards concerning the rights of indigenous peoples; (b) reports on the overall human rights situations of indigenous peoples in selected countries; (c) receives information on specific cases of alleged violations of the rights of indigenous peoples and addresses them through communications with Governments and others, and (d) conducts or contributes to thematic studies on topics of special importance regarding the promotion and protection of the rights of indigenous peoples.²⁶

1.3.3. Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)

The Expert Mechanism was established by the Human Rights Council in 2007 with the mandate²⁷ to provide the Council with expertise and advice on the rights of indigenous peoples as set out in the United Nations Declaration on the Rights of Indigenous Peoples, and assist Member States, upon request, in achieving the ends of the Declaration through the promotion, protection and fulfillment of the rights of indigenous peoples. It is composed of seven indigenous experts and holds an annual session.²⁸

1.4. Regional human rights framework in Southeast Asia

The **Association of the Southeast Asian Nations (ASEAN)** is a regional grouping that promotes economic, political-security and socio-cultural cooperation among its ten Member States – Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Established in 1967, the intergovernmental organization gets its institutional framework based on the **ASEAN Charter**, which entered into force in 2008. The Charter sets out the principles for the ASEAN and its Member States, which include respect for fundamental freedoms, promotion and protection of human rights and promotion of social justice as well as upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States.

Despite the fact that all ASEAN Member States voted in favour of the adoption of the UNDRIP and a number of



ASEAN States, such as Cambodia, Malaysia and the Philippines, recognize indigenous peoples in the countries and their rights within their constitutional and legal framework, indigenous peoples are not mentioned in any of the ASEAN human rights documents. Neither the **ASEAN Human Rights Declaration (2012)**, which has been subject to heavy criticisms for failure to include several key basic rights, nor any other human rights related declarations of the ASEAN recognize indigenous peoples as per international human rights framework. Nonetheless, in the **ASEAN Declaration on Cultural Heritage (2000)**, ASEAN affirms to cooperate for the enactment of international laws on intellectual property to recognize indigenous populations and traditional groups as the legitimate owners of their own cultural heritage.²⁹

In line with the ASEAN Charter, the **ASEAN Intergovernmental Commission on Human Rights (AICHR)** was established in 2009 as an inter-governmental consultative overarching human rights body of the organization with responsibility for the promotion and protection of human rights in the region. However, the AICHR, which drafted the ASEAN Human Rights Declaration amidst criticisms of lack of transparency and consultations with civil society, has not been able to effectively consider the issues of indigenous peoples in the region. There have been similar challenges with the **ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC)**, which is mandated to promote and protect the rights of women and children in the region. Both bodies function on the basis of consensus among the State nominated representatives.



BUSINESS & HUMAN RIGHTS STANDARDS AND INDIGENOUS PEOPLES

2.1. UN Guiding Principles on Business and Human Rights

The Guiding Principles, unanimously adopted by the UN Human Rights Council in 2011, establishes a global normative framework for preventing and addressing the risks of human rights impacts of business activities. The Guiding Principles built on the “Protect, Respect and Remedy” Framework is grounded on the recognition of three inter-related pillars:

1. **State duty to protect human rights** against abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication.
2. **Corporate responsibility to respect human rights**, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.
3. Need for greater **access to effective remedy** for victims, both judicial and non-judicial.

The Guiding Principles apply to all States and all business enterprises with distinct but complementary responsibility between States and businesses. They do not put any new legal obligation but elaborate on implications of existing implications and practices for States and businesses.

The Guiding Principles should be considered as a coherent whole and implemented in a non-discriminatory manner with particular attention to the rights of, as well as the challenges faced by, individuals from groups and populations that may be at heightened risk of becoming vulnerable or marginalized.³⁰ In the commentary of the Guiding Principles, challenges and rights of indigenous peoples are thus explicitly referred to as follows:

- In meeting their duty to protect, States should provide guidance to business enterprises on respecting human rights, advising on how to consider effectively issues of gender, vulnerability and/or marginalisation, “recognising the specific challenges that may be faced by indigenous peoples (among others.)”.³¹
- Within the corporate responsibility to respect internationally recognized human rights, business enterprises, depending on circumstances, might need to consider additional human rights standards. They should, for instance, respect rights of individuals belonging to specific groups or populations that require particular attention, for which UN instruments have elaborated on the rights of indigenous peoples.
- Under access to remedy through State-based judicial mechanisms, State should take appropriate steps to ensure effectiveness of those mechanisms in addressing business-related human rights abuses, including to reduce legal barriers that can arise where certain groups such as indigenous peoples are excluded from the same level of legal protection of their rights that applies to the wider population.

Consideration of the rights of indigenous peoples by the UN Working Group on Business and Human Rights

The UN Working Group, which is a special procedure established by the Human Rights Council to inter alia promote effective and comprehensive dissemination and implementation of the Guiding Principles, has elaborated on the challenges faced in addressing the adverse impacts of business-related activities on the rights of indigenous peoples through the lens of the Guiding Principles.

The Working Group has concluded that “particular attention should be paid throughout [the Guiding Principles] to the rights, needs and challenges faced by those at heightened risk of becoming vulnerable or marginalised. This is crucial for indigenous peoples, who are often disproportionately adversely affected by business activities. States and business enterprises should therefore address the rights of indigenous peoples when meeting their respective State duty to protect against human rights abuses and the corporate responsibility to respect human rights”.³²

Noting that the primary obligations of Governments cannot be ignored, the Working Group has affirmed that “Business-related human rights abuse is often exacerbated by a lack of rule of law, legislation and enforcement in support of the rights of communities. If Governments in production countries were actually ensuring and protecting the rights of indigenous peoples and other communities to their land under international human rights

law, land acquisitions would not result in the scale of harm seen today”.³³

In relation to Asia, the Working Group has specifically underlined that “Government and business good practice when it comes to ensuring indigenous peoples’ rights is the exception not the rule in Asia. Discrimination against indigenous communities and certain members, including women, is a challenge. Representation and empowerment of indigenous peoples requires careful thought. The meaning of FPIC is still being debated, and in some Asia countries “consent” is substituted for “consultation””.³⁴

The Working Group has further expanded on FPIC and viewed it as a key principle for indigenous peoples, but recognised it was often misunderstood or implemented inadequately. It explained that “most consultations that do take place are carried out after the project has already been approved or after the business operations have already started. Given the lack of consultation, there is no management plan to prevent or mitigate harm, leading to conflicts and rising costs for all stakeholders including business”. The Working Group noted that speakers of the Asia Forum on Business and Human Rights noted that to ensure meaningful consultations, businesses must dedicate enough staff and resources and invest in this process early on. Consultations must also include all groups within a community, in particular women.³⁵

Moreover, the Working Group reasons that “Indigenous peoples have a special relationship with three natural resources that are of key business interest: forests, water and minerals. In this regard, there are three common issues: (i) a lack of understanding of what land means for indigenous peoples versus an understanding of land as mere property; (ii) a lack of understanding of what indigenous peoples’ rights, and in particular their collective aspects, are. FPIC is also widely misunderstood and (iii) indigenous women are particularly affected by the loss of land as they are often responsible for the community’s livelihoods. In addition, land grabbing is often accompanied by or takes place in a context of militarization (or the use of private military companies) whereby violence against women increases”.³⁶

2.2. Relevant standards and policies of investor

2.2.1. International Finance Corporation (IFC) Performance Standards on Environmental and Social Sustainability (2012)³⁷

The IFC Performance Standard 7 is specific to indigenous peoples. It includes guidance on avoidance of adverse impacts, participation and consent, relocation, mitigation and development benefits. It was recently updated to require Free, Prior and Informed Consent (FPIC) in certain situations.

The stated objectives of Performance Standard 7 as it applies to private sector projects are to:

- ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture and natural resource-based livelihoods of indigenous peoples;
- anticipate and avoid adverse impacts of projects on communities of indigenous peoples, or when avoidance is not possible, minimize and/or compensate for such impacts;
- promote sustainable development benefits and opportunities for indigenous peoples in a culturally-appropriate manner;
- establish and maintain an ongoing relationship based on Informed Consultation and Participation with the indigenous peoples affected by a project throughout the project’s life cycle;
- ensure that the right of affected communities of indigenous peoples to Free, Prior and Informed Consent (FPIC) is upheld when the circumstances described in the Performance Standard are present;
- respect and preserve the culture, knowledge, and practices of indigenous peoples.

2.2.2. The World Bank Operational Directives 4.10 on Indigenous Peoples (2005)³⁸

This standard, which is part of the World Bank’s social safeguard policies, applies to public sector projects, which have the Bank funding. Similar to the IFC Performance Standard 7, this standard stresses the need for borrowers to identify indigenous peoples, consult with them, promote their participation in, and benefit from, bank-funded operations in a culturally appropriate way, and ensure that adverse impacts on them are avoided, or where avoidance is not feasible, minimised or mitigated.

2.2.3. Asian Development Bank Safeguard Policy Statement (2009)³⁹

The Safeguard Policy Statement aims to avoid, minimise or mitigate harmful environmental impacts and social costs, and to help borrowers/clients strengthen their safeguard systems. The statement builds upon the Asian Development Bank's previous safeguard policies on the environment, involuntary resettlement and indigenous peoples, and brings them into one single policy. The policy statement applies to all Asian Development Bank-financed projects. The Bank's Safeguard Requirement 3 specifically focuses on indigenous peoples and recognises their rights to maintain, sustain, and preserve their cultural identities, practices, and habitats.⁴⁰

2.2.4. Equator Principles (2006)⁴¹

These principles are a financial industry benchmark for determining, assessing and managing social and environmental risk in project financing. They were endorsed by more than 20 commercial banks (known as the Equator Banks) that provide more than 75% of all development project financing around the world. The principles refer back to the IFC Performance Standards for all oil and gas projects. The Equator Principle 5 requires FPIC and disclosure for all oil and gas projects and, as appropriate, projects in other sectors.⁴²

2.2.5. OECD Guidelines for Multinational Enterprises and Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector (2017)⁴³

In 2017, the OECD released guidance to clarify how to apply due diligence for responsible business conduct for institutional investors. The guidance establishes investors' responsibility to extend effective due diligence systems with regard to minority ownership stakes and addresses passive investment strategies and index funds. More specifically, its Annex B addresses the engagement of indigenous peoples.⁴⁴

Although OECD's Guidelines for Multinational Enterprises do not specifically address indigenous peoples, Chapter IV, on human rights, reaffirms States' duty to protect human rights and enterprises responsibility to respect internationally recognised human rights.

3

BACKGROUND ON INDIGENOUS PEOPLES IN THAILAND

In Thailand, according to the National Statistical Office in its 2010 nationwide census of the population, the country had a population of 65.5 million, of which 62.3 million (95.1%) were Thai citizens and 3.2 million were non-Thai citizens (4.9%).⁴⁵ On 24 January 2018, the Department of Provincial Administration of the Ministry of Interior, announced that in 2017, Thailand had a population of 66.2 million, of which 65.3 million are Thai citizens, whereas 875.8 thousand are non-Thai citizens.⁴⁶

Since indigenous peoples are not recognised under the Thai Constitution, no official census has been conducted to determine the number of indigenous peoples living within Thai territories. The Royal Thai Government recognises solely the existence of ethnic groups/minorities. According to the Master Plan for Development of Ethnic Groups in Thailand (2015-2017), Thai ethnic groups comprise a majority of the population, and there are fifty-six ethnic groups additionally recognized in sixty-seven provinces.⁴⁷ These ethnic groups continue to manifest their traditional practices and pass their folk wisdoms from generation to generation.⁴⁸ They number around 6.1 million, more than 9% of the total population. According to the Network of Indigenous Peoples of Thailand⁴⁹, these ethnic groups are categorized into four groups based on their residential areas: those living in the highland areas⁵⁰; those in the plain areas⁵¹; those in the coastal areas⁵²; and those in the forests⁵³.

Geographically, the indigenous groups in Thailand are mainly concentrated in three regions of the country: fishing groups ("seafarer communities" referred to as "Chao Lay") and small populations of hunter-gatherers (Mani people) in the south; small groups in the Korat plateau of north-east and east; and highland peoples in the north and north-west ("hill tribes" called "Chao Khao" in Thai). Started in the early 2000s by leaders of the ten "hill tribes", the indigenous movement in Thailand has expanded to include representatives of an additional 30 ethnic groups from across Thailand and thus has the potential to include all the fifty-six ethnic groups mentioned above.⁵⁴

3.1. History of the Indigenous Peoples' Movement in Thailand

The indigenous movement officially came into being in 2007 when a Network of Indigenous Peoples of Thailand (NIPT) was established to campaign for State and public recognition of indigenous peoples and their rights. The NIPT has since worked to establish the Council of Indigenous Peoples in Thailand (CIPT) as a space within the State structure to represent and promote indigenous rights. However, despite significant lobbying with relevant State agencies, the NIPT has not yet been successful to achieve legal recognition for indigenous peoples and the CIPT in legislative or new constitutional framework of Thailand. As a result, it has moved forward independently of the State to establish the CIPT with its First National Assembly held in 2014⁵⁵. 190 members representing 38 indigenous groups attended the Second Assembly in 2015 of the CIPT, which has grown to 40 indigenous groups and three sub-national councils by 2016.⁵⁶

The movement has tried to get the Thai translation of the term 'indigenous peoples' used as "chon phao phuen mueang" which is defined as:

Communities, peoples and nations which, by way of historical and social continuity from the time of the establishment of contemporary state boundaries, consider themselves to have a cultural identity that is different from that of the mainstream society. They are a non-dominant group and are determined to preserve, develop and transmit to future generations their ancestral territories and ethnic identity, inclusive of their own language, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems, while peacefully and happily coexisting with other members of the nation state.

3.1. History of the Indigenous Peoples' Movement in Thailand

The Thai government has continued to deny recognition of indigenous peoples. It claims that they are "not considered to be indigenous peoples but as Thais, who are able to enjoy fundamental rights and are protected by the laws of the Kingdom as any other Thai citizens."⁵⁷ The government refers to them as ethnic groups/communities and/or "hill tribes". Nine "hill-tribes" – Hmong, Karen, Lisu, Mien, Akha, Lahu, Lua, Thin and Khamu – are officially recognized⁵⁸ with a total population of more than 0.9 million⁵⁹.

Difference between “Ethnic Minority” and “Indigenous Peoples” ⁶⁰

While there exists no internationally agreed definition of “ethnic minority” and “indigenous peoples” there are distinctions between the two.

An “ethnic minority” is generally defined as an ethnic or racial group within a country that is not in a dominant position vis-à-vis the majority. Besides being numerically smaller than the rest of the population of the country, ethnic minorities may have a distinct culture, language, religion or race compared to the majority and have a will to preserve these characteristics. In fact, members of an ethnic group usually share a common sense of identity and other common characteristics such as language, religion, tribe, race, nationality or a combination of these elements. Some ethnic minorities are comprised of descendants of migrants in the country or groups that were brought to a country by force.

While indigenous peoples become minorities due to settlements and colonization of their native territories and as such are entitled of minority rights; they also own distinct social, political, economic systems as well as cultures, languages and beliefs and are driven to maintain and develop their identity. Furthermore, there are international legal instruments, standards, mandates and mechanisms that specifically protect indigenous peoples’ rights - both collective and individual. These rights are of crucial importance when pertaining to business and human rights, especially with regards to land rights and the issue of self-management of indigenous peoples’ natural resources. The legal distinction exists between “ethnic minority” and “indigenous peoples” because of the distinct legal rights reserved under international law for indigenous peoples. Thus, the legal identification of indigenous peoples as such, rather than only as “minorities”, is fundamental for the recognition of their specific rights as well as guaranteeing their protection against discrimination and abuses.

A widespread misconception that indigenous peoples are engaged in drug trade and pose threat to national security and environment dominates the modern history of Thai policies in relation to indigenous peoples in the northern highlands. Those policies are rooted in the non-recognition of indigenous peoples while several human rights reports indicate that the indigenous peoples are facing two main problems – denial of nationality and rights to lands, territories and resources.

Since the 1980s, the Thai government has been pushing the establishment of national parks and other protected areas to promote sustainable forest management. Yet, reports suggest that State officials have themselves conducted illegal logging and timber trading. For example, the Forest Industry Organization (FIO), a Thai state enterprise, sells confiscated illegal logs.⁶¹ Between 1990 and 1999, the FIO benefited of \$65 million from the sale of confiscated timber.⁶² The company was exposed a few times during that decade and, in February 1998, Thai Senator Meechai Ruchupan even declared that the “FIO was partly to blame for the destruction of forests in the Salween area”.⁶³ Furthermore, the FIO is the only company allowed to harvest and sell timber from forest land permitted for conversion;⁶⁴ however, its harvesting activities had been questioned more than once by local communities: in 2007, villagers in Surin Province filed a complaint that the FIO had illegally logged conservation plantation forest⁶⁵ and in 2016, its partner illegally cut down 37 teak trees from a villager’s plantation.⁶⁶ Also, in north-east Thailand, local people were evicted to make way for FIO’s teak and eucalypt plantations.⁶⁷ This has particularly affected indigenous communities living in forest areas, and contributed to loss of their livelihoods. Logging has led to natural resource degradation, taking the sources of sustenance and places of cultural significance away from those communities.

Further, in northern Thailand, state forest regulations, including a ban on shifting cultivation in many areas designated as national parks and wildlife sanctuaries, have led to a dramatic reduction of traditional rotational cultivation practices. Many communities have also experienced forced evictions and relocation imposed by the Thai government. The problems of restrictive forest conservation approach have exacerbated more recently after the army coup in 2014 and the country has since been ruled under the junta called National Council for Peace and Order (NCPO).

At the same time, indigenous peoples in the southern coastal areas have faced large number of, often violent, disputes with luxury resorts and other tourism establishments. Besides such direct impacts, indigenous communities across the country are facing challenges with exploitative tourism practices while getting little benefits. Indigenous peoples have also faced human rights abuses, including those to lands and resources,

livelihoods and health, due to agribusiness and extractive industries. While indigenous communities often face limited protections due to non-recognition of their rights very often compounded by their lack of nationality, the indigenous leaders, human rights defenders and community members, who have challenged the abuses, have usually been subjected to harassments and reprisals, including even disappearance and killing.

4

NATIONAL LEGAL & POLICY FRAMEWORK OF THAILAND RELEVANT TO INDIGENOUS PEOPLES

The current **Constitution of the Kingdom of Thailand 2017**, as mentioned above, does not recognize indigenous peoples in the country despite notable lobbying by indigenous peoples during the constitution drafting process. Proposals submitted for recognition of indigenous peoples and the CIPT were eventually rejected though it was included in the first draft of the constitution.

The Constitution, under the Directive Principles of State Policies, provides that “The State should promote and provide for different ethnic groups to have the right to live in the society according to the traditional culture, custom, and ways of life on a voluntary basis, peacefully and without interference, insofar as it is not contrary to public order or good morals or does not endanger the security of the State, health or sanitation.”⁶⁸

While the Constitution places duty on the State to promote and provide the right of ethnic groups to live as per their cultures, it is unclear how ethnic groups are defined and places ambiguous restrictions in the exercise of the right in the name of “public order” and “security of the State”. At the same time, the Constitution did away with the provision of the earlier 2007 and 1997 Constitutions for the right of persons assembling as a traditional community to conserve or restore their customs, local knowledge, arts or good culture of their community and of the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment [including biological diversity] in a balanced [sustainable] manner [and persistently as provided by law].⁶⁹

The 2017 Constitution nonetheless continues provisions for collective rights of community, along with individual rights of persons, to conserve, revive or promote wisdom, arts, culture, tradition and good customs at both local and national levels; and manage, maintain and utilize natural resources, environment and biodiversity in a balanced and sustainable manner, in accordance with the procedures as provided by law.⁷⁰ It also affirms the rights of community to be informed and have access to public information and the State duty to undertake environment and health impact assessment through public hearings of communities in advance of any undertaking that might affect them and lays down the requirements for permitting such undertaking.⁷¹ The provisions however fall short of international standards for the rights of indigenous peoples.

One of the most fundamental challenges faced by indigenous peoples of Thailand, particularly in the northern highlands, lies in the fact that many of them do not have Thai citizenship. That is linked to their non-recognition as indigenous peoples and denial of rights. According to estimates, over 100,000 indigenous people are without citizenship and have been categorised as illegal aliens. Without citizenship, indigenous people cannot secure their rights to land, education and freedom of movement.⁷² Moreover, because of this status, they have been suffering arbitrary arrest, discrimination and denial of basic rights and social services, such as education and healthcare.⁷³ The existing policy regarding the nationality verification process has repeatedly failed because of a lack of understanding of both indigenous peoples and officials concerning registration and verifications systems. The current program to register people living in remote areas as citizens requires proof that at least one of the parents was born in Thailand or has been awarded temporary legal status. Various mechanisms to grant temporary residential status have also been set up by the government, but although it is estimated that at least 50% of the indigenous people have a legitimate claim for citizenship, many of them lack the relevant paperwork and proof is thus complicated to obtain. Without citizenship, moving to a city is illegal, which is problematic because many indigenous peoples face forced evictions from their homelands. Consequently, fear of arrest is omnipresent.⁷⁴ Indigenous women are also at high risk of becoming victims of abuse, violence and human trafficking because of this lack of citizenship.⁷⁵

Some positive amendments⁷⁶ have been made in 2008 to the **Nationality Act (1965)**⁷⁷, which provides that children of ethnic groups born before 1992 should be granted Thai nationality and measures be adopted to offer them birth certificate where there are without one. However, the NIPT has pointed out that the right to obtain nationality still affirms “jus sanguinis” (right of blood principle) and denies “jus solis” (right of soil or birthright citizenship principle). Consequently, children born in Thailand to indigenous peoples can still be considered as having entered the country illegally and be denied access to all social security systems.⁷⁸

With reference to the rights to lands, territories and resources, as most indigenous peoples of Thailand live in or around forest areas of the country, the forest-related laws are particularly relevant to their rights. Below is an overview of key forest and land related laws of Thailand.

The **Forests Act (1941)** defines a forest as any land which has not been acquired by an individual under the Land Code and defines forest products as products which naturally originate from or were found in forests, such as timber, plants, bird nests, honey, stones and charcoal. As per the Act, logging of timber and the collection of natural forests products are regulated by a system of licensing and royalty payment. The Act prohibits the use of forestland unless the land has previously been declared as an agricultural area by the authorities.⁷⁹ Regarding penalties, any individual found in illegal possession of restricted timber can face up to 5 years in prison and/or a fine of 50,000 baht. For illegal possession of restricted forest products, the prescribed penalty is up to one year in prison and/or a fine of 10,000 baht. Moreover, any product made out of restricted forest produce can be seized.

Related to the Forests Act, the **Land Code Act (1954)**⁸⁰ is the primary land legislation and repeals earlier land-related laws and regulations. It applies to all land surface, including mountains, hills, streams, ponds, canals, swamps, marshes, waterways, lakes, islands and sea coast. It provides for various tenure types, including ownership and use rights, and established a Committee for allocation and reallocation of State and private land. It governs land surveys, titling and registration. It allowed a period of 180 days from the promulgation of the Act for submission of claim by people occupying land to prove their claims over the land and any land not vested by a person was established as State property.⁸¹

Through above laws, the State asserts control over all land and natural resources and provides that land can be either State owned or privately owned. In the process, much of the traditional lands and resources of indigenous peoples is classified as state forestlands while the State disregards the rights of indigenous peoples that have been living in these forests for generation even before the creation of the modern State, and whose livelihood has traditionally been intricately connected to resources from the forests. Since indigenous peoples never had any title deed, occupation of their ancestral land was deemed illegal and they were prohibited from using forest produce. Although the Forests Act provides for the granting of licenses for logging and collection of forest produce, indigenous peoples traditionally did not have the organisational capacity to rival commercial enterprises to obtain such licenses. In fact, most indigenous peoples were not recognised as citizens of Thailand, and could thus not legally apply for a license.⁸²

The **National Park Act (1961)**⁸³ provides for the declaration of certain land areas as “National Park” land by royal decree, if the Thai government deems that such land possess features that should be maintained and preserved for the benefit of public education and leisure. It also provides for protection and maintenance of national parks by establishing rules and banning certain activities, such as prohibition to: possess land within the park, engage in slash and burn agricultural practices, collect natural forest produce and allow cattle to enter the park. Additionally, it prohibits actions that may endanger wildlife or deteriorate/alter natural resources. Activity for profit can only be carried out if written permission has been granted from the relevant authority. An individual who is found to have violated provisions of the Act may be evicted from the national park, and if changes have altered the national park, authorities can order the offender to restore the park to its earlier condition. Any expenses incurred by the authorities to restore the condition of the park may be attributed to the offender. If an offender is found guilty of occupying national park land, he or she may face imprisonment up to five year and/or a fine not exceeding 20,000 baht. Allowing cattle to enter the park is punished with imprisonment of up to one month and/or a fine not exceeding 1000 baht.⁸⁴ As section 6 below will demonstrate, this Act, coupled with other laws, has had a significant negative impact on indigenous peoples.

The **National Reserved Forest Act (1964)**⁸⁵ was established for the preservation of forests, and defines forest as land that has not been acquired by anyone, including mountain, rivulet, marsh, canal, swamp, waterway, lagoon, islands and sea shore. Under the Act, the Ministry of Natural Resources and Environment can declare any forest to be national reserved forest by issuing a regulation to that effect. It provides for anyone to claim rights over land in a national reserved forest area by submitting an application to the relevant authority within 90 days of the issued regulation.⁸⁶ Past that period, claimed rights or benefits over that land are deemed renounced. The Act mandates the National Reserved Forest Committee to investigate petitions filed. If the Committee finds that the claimant's rights have been affected, appropriate compensation is to be paid. Under certain circumstances, permission can be granted to live in a reserved forest area.⁸⁷ The Act prohibits activities such as cultivation, logging or collection of

forest produce within the reserved forest area, although such activity can be permitted upon granting of a license from the authorities.⁸⁸

This Act further erodes indigenous peoples' rights to their land and natural resources. The fact that only monetary compensation is offered in exchange of land is problematic since money cannot compensate for loss of livelihoods. Because of the traditional lifestyle of indigenous peoples, it becomes challenging for them to change how they earn a living. Moreover, it often happens that they do not receive the information that their land has been declared national reserved forest until it is too late to make a claim. Once again, the issue of the lack of citizenship amongst indigenous peoples is also problematic when the time comes to make such claim, and even with a citizenship, complying with all the necessary requirements to apply for a license is arduous. If they manage to submit an application, indigenous peoples traditionally have a very low success rate in obtaining license because the authorities typically have strong biases against them.⁸⁹

The **Wild Animal Preservation and Protection Act (1992)**⁹⁰ empowers the Ministry of Agriculture and Cooperatives to declare any area it deems appropriate as "Wild Animal Reserved Area" to safeguard the preservation of wild animals. The Act prohibits any activity that may destroy or endanger wildlife and their habitat. Section 37 and 38 prescribe that no one (except a competent officer) can enter, possess or occupy Wild Animal Sanctuaries. This Act has often drawn criticism for implying that the life of animals is more valuable than the life of indigenous peoples.⁹¹

Very recently, in February 2019, the National Legislative Assembly (NLA) approved the **Community Forest Bill**, which was first drafted 30 years ago to ensure that those who are residing locally in forests can work together with the State in the management and the usage of natural resources in a manner that is sustainable for the environment.⁹² Once enforced as law, it sets out a process whereby the local communities have to develop a five-year plan on the use and conservation of the forest within their community and this blueprint will undergo a process of assessment once every five years.⁹³ The bill has been justified based on the fact that it is believed that management of community forests is essential to ensure cooperation, food security, prevent global warming and protect people's basic rights, but while making such a claim the bill also undermines the rights of people residing in the forest to participate and make decisions on the management of the local environment.⁹⁴

While it is significant that the bill provides, for the first time, legal recognition of the right of local communities to manage their forests, it also has several limitations in its scope and application, which in turn can result in the further marginalization of those living in forests for the following reasons:⁹⁵ (1) Community forests have been identified by the bill as those that are outside the conservation area managed by the State, thus excluding communities that are dependent on the forest and living in conservation areas designated as national parks. (2) The bill does not address the customary rights of ownership to land of hundreds of communities, predominantly indigenous peoples, residing in conservation areas, and thus can result in charges of trespassing or their evictions, particularly on the rise since the forest reclamation order issued by the NCPO. (3) Communities that depend on and help sustain forests are disqualified from protection and discriminated against in the bill. (4) With the forest department controlling the use of resources, the bill further exacerbates the failure to protect land tenure, livelihoods or food security for the local communities. (5) The bill does not ensure the engagement of the forest department with communities with both as equal partners.

Further, in March 2019, the NLA adopted **amendment to the National Park Act (1961) and the Wildlife Conservation Bill**⁹⁶ with overwhelming votes in favour despite widespread opposition from community groups and CSOs. They claim that the amendment further restricts the rights of forest-dwelling communities to access the forest and resources therein and does not address the concerns of the communities that have lived in the forests before their designation as national park or conservation areas and thus have overlapping claims with the State. Under the amendment, conditions are due to be introduced to resolve overlapping claims, but with some limitations set, including a limited residency of 20 years. Some penalties to be imposed under the new bills are also too harsh and further threaten communities. However, their concerns were dismissed as the government claimed that those residing in the forest will still have access to forest resources but only with new conditions set. In addition, they were not allowed to participate in the deliberations or any other decision-making process, which would affect and have an adverse impact on their rights.

Earlier, the Cabinet Resolutions dated 17, 22 and 29 April 1997 had provided some recognition for people living in committees at the provincial level to examine petitions and consider revoking declarations of forest land or national parks for certain areas. However, another Cabinet Resolution dated 30 June 1998 revoked the resolutions. It went

even further to explicitly provide for relocation of people living in protected areas and specified that any action deemed forest encroachment was to be strictly dealt under the law. Under the restrictive framework of this resolution, 85% of the people living in the forests would be considered to be in violation of the law. This led to important demonstrations and protests, which in turn led the Cabinet to adopt a positive **Resolution on 11 May 1999**. This resolution set up a registration process for communities living in forests and stipulated that people under the verification process could not be evicted or charged with forest encroachment. At the time, local communities and NGOs largely deemed the resolution fair.

In 2014, **National Council for Peace and Order (NCPO) Order No. 64/2014 (64/2557), Order No. 66/2014 (66/2557)** ('Return Forest Policy') and a reforestation '**Master Plan to Prevent Encroaching on Conserved Forest Land**' (forest plan to suppress illegal logging and deforestation) were issued, which seek to end deforestation and encroachment of reserves, and rearrange the management of forest territories towards the government's goal to increase forest cover in Thailand to 40% within ten years. However, since implementation of the plan, it became apparent that the government's goal is to monopolise natural resources.⁹⁷ Order 64/2014 enables government agencies to put an end to deforestation by removing any encroachers on national reserve lands. Two months after the Order, the Master Plan was issued and detailed the implementation of the Order, which was described as a measure to stop deforestation caused by commercial investors' exploitation of Thailand's natural resources. With the implementation of Order 66/2014, the NCPO declared that its operations would only affect wealthy investors. The Order states that government operations must not impact the poor and landless people, who had lived on the land before the enforcement of Order 64/2014. However, during its implementation of the Master Plan, the government has persistently targeted impoverished villagers and indigenous peoples, resulting in a complete disregard of the protection measures set out by Order 66/2014. Details of the impacts of these conservation laws on indigenous peoples are discussed in the sections below.

On the other hand, the government had adopted the **Regulation of the Prime Minister's Office on the Issuance of Community Land Title Deeds 2010**, which could be considered somewhat positive for collective rights to land. However, it still does not cover legal recognition of indigenous peoples' traditional land tenure and resource management systems. It only provides for communities to collectively manage and benefit from State-owned land for their livelihood; the State retains ownership of these lands. As of 2012, more than 400 local communities were in the process of waiting to be granted community title deeds, and only 55 community land titles approved.⁹⁸

The **Cabinet Resolutions on the Restoration of the Traditional Practices and Livelihoods of Karen and Chao Lay in Thailand (2010)** is a more positive measure in the sense that it recognises the rights of these two indigenous groups (although the term "indigenous peoples" is not used), their intangible heritages and their ethnic identity and culture. It advocates to grant them natural resource management, legal recognition and indigenous-based education with cultural pluralism undertaking. Unfortunately, the resolution has been poorly implemented.⁹⁹ Progress is slow and ineffective due to bureaucratic obstacles, political instability, lack of understanding amongst State departments and the low budget allocated for activities to meaningfully implement the resolutions' objectives.

Also relevant to the rights of indigenous peoples is Thailand's recent **Minerals Act (2017)**¹⁰⁰, which governs the exploration, exploitation and trade in minerals other than petroleum but fails to include provisions ensuring respect for the traditional ownership rights of the communities. Further, in 2018, Thailand's NLA voted unanimously to approve a **20-year National Strategy** with binding effect over the next 20 years and penalties for non-compliance, which also includes provisions related to the rights to land, environment and natural resources.¹⁰¹ The Strategy is drafted as a national development plan that sets out a framework based on which all governments, present and elected, will have to design their policies and allocate their budget.¹⁰² It recognizes the rights of communities to use and benefit from their land and provides for the distribution of land possession and the access to natural resources, by fixing the conflicts on forest land that is believed to intersect with community land. It further sets out measures for land use with existing titles in a fair manner and to ensure distribution of land possession in appropriate sizes for equality in land possession. It also provides for the adjustment of the land titles for people with less income and those without land, so they can use it as evidence for financial purposes. It allows for the amendment of rules on the usage of public land for people to work and access the land, particularly with respect to those with a lower income. It focuses on environmental aspects, pointing to the importance of public participation in decision making on these aspects.

The Strategy also particularly targets businesses and encourages them to create a favourable attitude and a likable culture, by motivating them to have a good governance style and effective management. It particularly urges businesses to develop social corporate responsibility, extending to both employees and clients by changing the attitude of profit and highlighting social costs. However, the problem remains that the Strategy contains broad provisions, thus leaving its application up to the interpretation of the National Strategy Committee (NSC) set up under the Strategy. The Committee consists of 34 members, 17 ex-officio and 17 qualified members that have been appointed to this post by the Cabinet, which would mean it is made up of NCPO members and its allies.¹⁰³ This reinforces continuity in their maintenance of control for the next 20 years over the governance and legislations of the country, even if a new democratic government were to be elected.¹⁰⁴ In addition, in direct conflict with above provisions, the Strategy highlights the importance of development and the governments' plan to push for increased economic growth in this manner. During implementation, this can ultimately prove to be an aspect that will overshadow land-related rights, and those related to the environment and public participation in the Strategy.

5

THAILAND'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS AND RESPONSES IN RELATION TO INDIGENOUS PEOPLES

Thailand voted in favor of the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) at the UN General Assembly in 2007. However, the Thai government maintains that it does not have indigenous peoples in the country “according to the commonly used definition which implies pre-colonial or pre-settler societies”.¹⁰⁵

As such, the government refers to them as ethnic groups/communities or “hill-tribes” in its communications with the UN. In its report to the UN Committee on the Elimination of Racial Discrimination, it considered classification of ethnicities into four groups by geographical characteristics of locality, way of living, culture and the condition of problems as persons on the highlands, Chao Lay, ethnic groups in the northeast (Esan) as well as Malayu descended Thais; displaced Thais [from neighbouring countries]; unsurveyed persons, [stateless] persons with status problems, rootless persons; and alien population in its classification of ethnicities into four groups.¹⁰⁶ At the same time, in its communication with the Special Rapporteur on the rights of indigenous peoples, the government has stated that “hill tribes” are “migrants...who by nature and historical background are not indigenous to the country”.¹⁰⁷

Indigenous representatives of Thailand argue against such claim of the government and assert that many indigenous groups have lived in their homelands hundreds of years even before the creation of the modern nation State. According to studies, the highland border regions in the north and northwest, where many indigenous groups have long resided, were only directly incorporated into the central Thai State as recently as the 1980s, and as a result, the indigenous groups were largely excluded from the State's earlier administrative efforts to identify, document and regulate its national population. Further, there are numerous and complex reasons why the Thai State has long viewed indigenous groups in the highland areas as illegal migrants. While the State, during the Cold War, came to view those groups as prime suspects of divided loyalties as a result of their cross-border movements and ties of ethnic kinship, their disenfranchisement in terms of legal citizenship and land tenure has long served the intertwined political and economic interests of the State and Bangkok elite in promoting the capitalist accumulation of indigenous lands and natural resources by way of their State enforced legal dispossession.¹⁰⁸

Consideration of allegations from Thailand by the UN Special Rapporteur on the rights of indigenous peoples

The UN Special Rapporteur on the rights of indigenous peoples has to date made three communications with the Thailand government. In 2007, the Special Rapporteur communicated about the alleged seizure of lands used by Akha indigenous people in Chiang Rai for a royal project in 2003 without consultation and with the use of force.¹⁰⁹ In its response in 2008, the government categorically denied all those allegations, stating that it does not recognize the existence of indigenous peoples in Thailand and that the hill tribes are migrants to the country, who by nature and historical background are not indigenous. It stressed that the authorities consulted and signed an agreement with the Akha communities, which were benefitting from the project activities while only eight villagers were arrested and convicted of forest crimes before the establishment of the project.¹¹⁰

Similarly, there were two communications in 2010 and 2011 regarding alleged violations of rights of Hmong people due to non-return of exhumed bodies from graves at Wat Tham Krabok.¹¹¹ To which, the government has responded that Thailand does not have any indigenous people and does not consider “Laotian Hmongs” who migrated to Thailand only from 2003 as indigenous people. It claimed that the deceased Hmongs were buried without permission at the monastery and some bodies were reclaimed after notice by the monastery while there was an unofficial ongoing dialogue about other graves.

The Special Rapporteur has requested a country visit to Thailand, which has not been responded by the government.¹¹²

5.1. Responses of the Royal Thai Government to UN Mechanisms on Issues related to Indigenous Peoples in Thailand

Thailand has ratified seven of the nine international human rights treaties of the UN. The recent information submitted by the Thai government for its review under the treaty monitoring bodies, particularly the CERD (2012), the CESCR (2015), the CEDAW (2017) and the CCPR (2017), along with its national report for the Universal Periodic Review (UPR 2016) give an overview of the latest responses of Thailand related to indigenous peoples.

On the issue of the legal status of indigenous peoples and their access to basic services, the government has reported that it “attaches great importance to solving the problems ... through universal birth registration, population survey and issuance of identity cards” and “frequently considers granting legal status or nationality to ethnic group members according to relevant regulations to improve their access to basic rights and social welfare”¹¹³. It also informed that of a survey of 1.2 million (of them 590,000 women) in 2002, 950,000 were granted Thai nationality. A registration was made for the remaining population with a view to granting them nationality to ensure their rights to residence, education, employment and health although they were considered illegal migrants.¹¹⁴ Similarly, it has admitted “the allocation of the per head subsidy budget to educational institutions that admit students with no civil registration proof is not extensive yet, and budgets for some educational institutions have not been allocated for this purpose” while it provides “scholarships to hill tribe students with good academic performance for higher education”¹¹⁵

With regard to indigenous peoples’ rights to lands and natural resources, the government has said that Thailand recognizes and protects the rights of peoples to ownership of the lands as well as the rights of peoples belonging to different ethnic groups residing in Thailand to maintain their cultural identities, lifestyles, and languages. Further, on land disputes of indigenous peoples in forestland, rules and regulations to “allow ethnic communities who can prove the trace of the past long-term land utilisation to continue living in forest lands” are reportedly in place and the government “provides assistances such as housing and occupational training, taking into consideration their culture and way of life”¹¹⁶ to ethnic communities that “must be relocated, particularly the ones with limited means”.¹¹⁷

The government also said that it “now invites community members to take part in negotiations to reach mutual resolution, instead of forcing the encroachers to leave.”¹¹⁸ It affirmed that the “Forestry Officers and the community members in the area will jointly determine the demarcation of land for living, and not to cross over the demarcation line”¹¹⁹ and that “villagers have to help watch out for any encroachment, conserve and develop the forest land area to fertility.”¹²⁰ According to the government, “the incidents of deforestation and mobile farming by hill tribes people have significantly decreased.”¹²¹

Furthermore, a National Park Advisory Committee has also been created and is present at the provincial level with a total number of 147 committees across the country where “the rights of ethnic community and the authority’s attempt to preserve natural resources are often disputed”.¹²² The Committee is expected to serve as a forum for “local relevant authorities, civil societies and local communities to meet and discuss about the management of the land in the area.”¹²³

In relation to land rights, the government has reportedly set up a Committee on Dispute Settlement on Farming Land Rights and has implemented a policy to “[i]ssue community land titles to poor farmers, including hill tribe communities under the community land deeds system which makes arrangement in providing pieces of unused/vacant land to communities instead of to individuals.”¹²⁴ It indicated that “[a]llocation of land to any person in a community is done by the decision of the Committee of that community” and that once the land is allocated, it cannot be sold to “outside property investors, except to sell it back to the community through the Community Fund for Land Repurchase which will allocate the repurchased land to other persons in the community who are interested.”¹²⁵

The Ministry of Social Development and Human Security (MSDHS) has also formulated National Plan for Development of Ethnic Groups in Thailand (2015–2017) as a “mechanism to assist ethnic groups in various aspects, such as access to farmland, legal status including enhancing the balance and security while able to adjust to external changes.”¹²⁶ The MSDHS has also “initiated the Highland Career Development Project aiming at supporting and developing careers for low-income people living in 20 highland provinces to earn sufficient income for a decent living and better quality of life.”¹²⁷

In relation to the right to participate in decision-making on matters affecting them, the government has simply reported that this right was guaranteed in “legislations on specific issues such as environmental law, through the public participation in Environmental Impact Assessment.”¹²⁸

At the same time, the government has informed on various measures implemented for the rights to culture of “various groups of tribal people”.¹²⁹ Those include a) support for data collection on culture, local wisdom and art of “hill tribes” people and various ethnic groups, b) promotion of integration of their cultural features into development of eco-tourism to enhance their economic and social rights, c) support for their cultural endeavours/activities, d) support for conservation and revitalization of natural resources and environments of local communities, and e) promotion of cooperation between public, private and civil society sectors for development of “hill tribes” products and conservation of traditional art and culture and transformation of those groups into Thai power. Further, Thailand has reported on different actions such as multilingual education in number of schools to preserve cultural heritage of ethnic communities through formal education.¹³⁰

5.2. Recommendations of the UN Mechanisms to Thailand regarding the Rights of Indigenous Peoples

In consideration of the information submitted by Thailand, the treaty-monitoring bodies have raised various concerns in relation to the rights of indigenous peoples and made key recommendations as follows:

- The CESCR and the CCPR have expressed concern at the lack of recognition of indigenous peoples by Thailand, denial of their rights to their ancestral lands and natural resources and impacts on them, including destruction of crops and forced evictions resulting from the implementation of forest conservation policy, in particular NCPO Orders 64/2014 and 66/2014.¹³¹ The CCPR is also concerned about the lack of consultation and participation in decisions affecting them.”¹³²
- The CESCR has recommended Thailand to reconsider its position and give legal and political recognition to indigenous peoples based on self-identification and in particular guarantee their right to own, use, control and develop the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. The CERD, the CESCR and the CEDAW have also encouraged Thailand to consider ratifying ILO Convention No. 169 while the CERD also urged to affirm the rights of indigenous peoples in Thailand’s legislation in line with the UN Declaration on the Rights of Indigenous Peoples, given its support for the Declaration.¹³³ The CCPR has recommended to ensure prior consultations are held for obtaining free, prior and informed consent of indigenous peoples regarding decisions that affect them, particularly land rights.
- Further, the CCPR has expressed concern about the stereotypes and bias indigenous peoples suffer and the discrimination they endure, including with regard to citizenship, access to basic services and recommended Thailand to guarantee full enjoyment of rights of indigenous peoples, including protection against their discrimination.¹³⁴ It acknowledged progress made in Thailand for civil registration since adoption of the 2008 Act and its commitment to eliminate statelessness by 2024. However, it still expressed concern about high number of statelessness, particularly among indigenous peoples and ethnic minorities.¹³⁵ The CEDAW is also concerned that men are reportedly given priority to register for nationality among indigenous peoples and ethnic minorities leaving disproportionate number of indigenous and ethnic women without nationality and limited access to services and protection.
- The CEDAW has remained concerned about the persistence of multiple barriers impeding women and girls from obtaining access to justice and effective remedies for violations of their rights, in particular for women belonging to indigenous and ethnic groups (among others) and recommended simplifying procedures for them to access the Justice Fund, increasing information dissemination on legal remedies, etc.¹³⁶ While taking note of significant efforts undertaken by Thailand to address trafficking and forced labor, it is also concerned about reports on exploitation of vulnerable groups, such as indigenous peoples.¹³⁷ The CEDAW remains concerned that rural women, including women from indigenous and ethnic groups, continue to be disproportionately affected by poverty and limited economic opportunities, which increases their vulnerability to trafficking and exploitation.

Further, during the most recent cycle of UPR of Thailand in 2016, Sierra Leone also recommended Thailand to ratify the ILO Convention No. 169,¹³⁸ which was noted by Thailand.¹³⁹



Consideration of the rights of indigenous peoples in the UN Working Group on Business and Human Rights' visit to Thailand¹⁴⁰

The Working Group conducted a visit to Thailand in 2018, during which the Working Group members met with representatives of indigenous peoples, among other stakeholders. In its statement at the end of visit, the Working Group, under section on "Ethnic minorities" has noted that Thailand does consider ethnic minorities as indigenous peoples.

Given limited economic benefits for ethnic minorities and majority of them with lower socio-economic standards than other Thais, for example in the northeastern region, the Working Group recommended the government to ensure that they are prioritized in development policies and programs. They also reportedly learnt that the ethnic minorities are being disproportionately impacted by large-scale development projects with negative environmental and social impacts on environment, along with a serious concern, including by "hill tribes", on lack of meaningful consultation before approving the projects and criminalization, harassment and intimidation of members of ethnic minorities using land for generations through rotational farming. Since the life of ethnic communities is intrinsically linked to land and natural resources, the Working group recommended that the government's land and forest policies should be rooted in meaningful consultation and participation of ethnic communities in decision making processes as per the UN Declaration on the Rights of Indigenous Peoples.

Further, the Working Group also encouraged the government to safeguard the collective rights to land and natural resources of ethnic groups. It also welcomed the government's decision to grant legal status and citizenship to around 110,000 stateless children of "hill tribe" descent and noting that statelessness within ethnic community continues to be a problem with estimated 485,556 stateless individuals, which negatively restricted their movement and access to justice.

6

SITUATION OF THE RIGHTS OF INDIGENOUS PEOPLES IN BUSINESS CONTEXTS IN THAILAND – PRACTICES AND IMPACTS OF BUSINESS CONDUCT ON INDIGENOUS PEOPLES

Number of reported cases of negative impacts on the rights of indigenous peoples due to businesses in Thailand featured in this section presents a worrying situation of the rights of indigenous peoples in business contexts in the country. Such situation can be understood under the sectors or issues discussed below with specific accounts of violations discussed under each.

However, this section only offers an overview of prominent cases, focusing on the recent ones, which have been featured in English language publications and few first-hand testimonies of accounts of violations. Consequently, the information presented here only represents a fraction of the actual scale of violations of the rights of indigenous peoples in business contexts.

Besides the sectors or issues below, human rights impacts or risks related to **energy and infrastructure development** projects and businesses linked to them as well as their disproportionate impacts/risks on indigenous peoples were also raised. However, particular accounts of such projects could not be available in documentation or through online research and thus could be topics of further study.

6.1. Indigenous Peoples & Tourism

6.1.1. Land Grabbing caused by Tourism

Rawai beach in Phuket, a popular spot in the south of Thailand, made news headlines in January 2016 when Baron World Trade Co. Ltd., a property developer that held the legal title deed to over 33-rai (5 hectares) of land in the public beachfront, tried to forcefully evict the indigenous Chao Lay villagers. The company sought to build a luxury villa project in the land, but the Chao Lay villagers had refused to leave the land, which they had occupied and used for generations and included their ritual sites.

On 27 January, about 100 men, allegedly hired by the company, blocked access of the Rawai community to the land, which affected some 250 households of more than 2,000 people. That culminated in a violent encounter between the two sides and left at least 30 Chao Lay injured – 10 of them seriously hurt. In June, as members of the community tried to block access for the construction work, they were kicked, punched and beaten with sticks and their fishing equipment was destroyed. A further altercation took place when builders placed a wall of boulders to block access to a sacred ceremonial ground.

The Chao Lay petitioned provincial and national authorities for settlement of the land dispute. Investigations of the Department of Special Investigation under the Ministry of Justice as well as the National Human Rights Commission of Thailand (NHRCT) into the case confirmed that the Chao Lay have used the lands for hundreds of years. In January 2017, the Provincial Court dismissed the lawsuit filed by the company against the community despite title deed of the company. It reasoned that the community's settlement on the land predates the time when the land department issued the title deed in 1965 based on various evidence that supported the community's claim to the land, including historical records from Thai King's visit to the community and student records of local school.¹⁴¹

Though, in Rawai, the indigenous community was able to win their land back, the struggles of Chao Lay peoples have been long ongoing and not always successful. There are other reports of protracted land disputes of the Chao Lay peoples involving cases of multiple claims or ownerships over lands from across southern Thailand in Sireh Island of Phuket, Lipe Island in Satun and Phang Nga. Those disputes are generally with hotel investors and often local and national politicians but also with the Department of National Parks such as in Lipe, Adang and Rawee islands. Besides, many communities also lost their lands due to language barriers when they were manipulated or forced by non-indigenous village headmen and local authorities to give up their land tenure. The disputes have particularly increased after the 2004 tsunami until when the Chao Lay were virtually unknown to the public and when many previously unknown islands were also opened up for tourism.¹⁴²

As a result of the disputes, many families, for examples in Sireh Island, were forced to leave their land and relocate away from beachfront when proximity to sea is essential for the way of life of indigenous Chao Lay – not only for their livelihoods but also for their beliefs, traditions and identity. On Lipe Island, indigenous communities were

restricted access to all the beaches through which they previously accessed the sea. They were also barred from entering their sacred site and cemetery, which was occupied by a hotel and forced to carry their deceased to neighboring islands for burial. Also, on the island, until a dispute was settled, private security forces and local police reportedly threatened some Chao Lay families on a daily basis.¹⁴³

6.1.2. Threats and Intimidations

Several cases of forced evictions of indigenous Chao Lay have been reported year after year where the businesses have allegedly used threats and intimidations to forcibly relocate families.¹⁴⁴ For example, very recently, in July 2016, a group of unidentified men threatened two indigenous Chao Lay with a gun and assaulted them. One of them was ordered to demolish his house and move by the men who claimed they were staff of a company who owns the land of the house.¹⁴⁵ Further, the indigenous Chao Lay communities have faced little benefits in the form of menial jobs and harder life conditions due to rise in costs of living due to tourism.¹⁴⁶

6.1.3. Indigenous Peoples as Tourist Attractions

At the same time, while the government promotes indigenous peoples and their traditional arts and cultures as tourist attractions, those representations do not fully reflect how the peoples are currently faring in the society. For example, the Kayan people (also known as Padaung), who fled from Myanmar due to civil war there to Thailand, were granted temporary stay under 'conflict refugee status'. Around 500 Kayans live in guarded villages in northern Thai border where some Kayan women wear rings to create the appearance of a long neck as part of their traditions (thus also called "Long neck Karen". Many companies operate tours to these villages and lots take picture with the long-necked women. While that has helped the Kayan women to earn a living, who have become a tourism symbol for Thailand, they still have not been granted Thai citizenship despite great efforts. As a result, they have limited access to social services and they are also not allowed to resettle outside the tourist villages.¹⁴⁷

The Kayan women are also brought to tourist areas such as Maerim and Pattaya¹⁴⁸ while there are also government set-up ethnic villages, where Kayan and other indigenous community members are posted practicing their traditional arts and cultural practices for "exhibit" to tourists. It is not clear how effectively, if at all, the government and tourism authorities consult with the communities and make agreement with them for such tourism practices, including on sharing benefits. There are also similar concerns about commodification of indigenous cultures and arts, including their crafts and other products.

Voices from the Ground – Community Expert Voice

"The people who know the problem best is us, the people living with the problem, not the government. So, the people who have to live with the impact of business conducts should have a chance to participate".

Katima Leeja, Indigenous Women Network of Thailand (IWNT),
during Mansuhya's Second Experts Meeting on CSO National Baseline Assessment,
28 February – 1 March 2018

Research studies in Akha and Karen communities have shown that they have stronger perception of issues such as citizenship, land rights and agricultural problems despite whatsoever benefits of tourism and modernization. In the context of their longstanding plights since being caught between wars and conflicts among countries and relocated forcibly in the name of conservation or other purposes, tourism has not been able to supplant poverty in the communities or the loss of their way of life while there have also been problems of excessive out-migration and other negative consequences.¹⁴⁹

Voices from the Ground – Community Expert Voice

"It is hugely exploitative practice of indigenous communities being used as a tourist attraction, with no benefit for them. Indigenous peoples are not against tourism but should be able to benefit from it economically themselves, as opposed to businesses using stateless indigenous groups as a way to make money while falsely promising to help them with their Thai citizenship applications."

Noraeri Thungmueangthong, Indigenous Women's Network of Thailand (IWNT)¹⁵⁰

A recent report suggests that over 12 million indigenous peoples have been removed from their land to make way for tourism projects globally.¹⁵¹ There is growing recognition across the world that indigenous peoples should be given meaningful engagement in the processes of planning and developing tourism which affects them, including allowing them to say no. Further, evaluation of tourism potential development should recognize the rights of indigenous peoples and seek to ensure sharing of benefits fairly.¹⁵²

In Thailand, while tourism development has not been accompanied with full recognition and respect of rights, even worse, there have been reprisals against indigenous leaders and individuals when they have tried to call attention to the human rights challenges of the communities such as statelessness. For example, in 2016, police tried to illegally arrest an ethnic Mani man, who was attending a human rights forum, accusing him of being a stateless person travelling without permission while local officials allegedly often bring Mani nomads outside their local area to promote tourism.¹⁵³

6.2. Human Rights Impacts of “Reforestation” and Wildlife Conservation on Indigenous Peoples

Forest conservation has long been a contentious issue in Thailand for the impacts of conservation policies and practices of the government on the rights of indigenous peoples. More recently, such impacts have only become worse with the implementation of new laws and plans within the context of climate change and tourism.

6.2.1. Climate Change Mitigation and the Forestry Master Plan resulting in Forced Evictions of Indigenous Peoples

Thailand is one of the developing countries participating in the Forest Carbon Partnership Facility (FCPF), which is a global partnership of governments, businesses, civil society and indigenous peoples focused on reducing emissions from deforestations and forest degradation, forest carbon stock conservation, sustainable management of forests, and enhancement of forest carbon stocks in developing countries (activities commonly referred to as REDD+)¹⁵⁴. The FCPF hosted by the World Bank has created a framework and processes for REDD+ readiness, which helps participating countries get ready for future systems of financial incentives for REDD+.

Thus, forest conservation for **climate change mitigation**, albeit might not be simply understood as a business context, can now also be implicitly considered part of a market system, whereby forests are considered carbon stocks for trading. Thailand was selected as one of the REDD participant country in 2009. Its REDD+ readiness preparation proposal was approved in 2013 with a condition to undertake additional consultations with the concerned stakeholders, in particular indigenous peoples and local communities that have been monitoring the REDD+ implementation in the country. Subsequently, in 2014, the Forestry Master Plan was issued based on NCPO Orders 64/2014.¹⁵⁵

The Master Plan was around the discourse that commercial investors’ exploitation of Thailand’s natural resources is responsible for deforestation and must be stopped. The government appeared sincere in its intentions to target only wealthy investors after it released Order 66/2014, a supplemental directive which states that government operations must not impact the poor and landless who had lived on the land before the enforcement of Order 64/2014.¹⁵⁶ However, implementation of the Master Plan has overwhelmingly targeted impoverished villagers and indigenous peoples who lived on their lands for decades as “investors” or alleged that local communities were being funded by wealthy investors, resulting in a complete disregard of the protection measures set out by Order 66/2014.

Human Rights Lawyer Expert Voice

“Much deforestation in Thailand occurred between 1975 and 1982. It is widely reported that deforestation occurred due to indigenous groups, but even the reports of the Forestry Department indicate that forests were cut for 20 years for wholesale commercial use. Now the government’s position is that forests should be increased by 40%, which has led to increased conservation and protection through the Forest Act, National Park Laws and Wildlife Conservation Areas. The enactment of these laws has led to military arrests of persons who dwell in designated reforest areas. Thailand should implement the international laws related to indigenous rights in order to protect indigenous groups from land-grabbing, forced evictions, and charges of encroachment.”¹⁵⁷



**Ms. Napaporn Songprang, Vice-Chair of Manushya Foundation,
Human Rights Attorney & (former) Deputy-Director at the Center for Protection and Revival of Local
Community Rights (CPCR),**
during Manushya's First Experts Meeting on CSO National Baseline Assessment (NBA),
2-3 September 2017

Under the Master Plan, the government has set the goal to increase forest cover up to 40% by 2020, which was 31% in 2017 – estimated at 128 million rai¹⁵⁸. That means around 26 million rai has to be added, of which around 4.5 million rai overlaps with areas of indigenous peoples and local communities. It is estimated that about 10 million people live in protected areas in Thailand.¹⁵⁹ The Government does not recognize ethnic minorities as indigenous peoples and although the life, livelihood and culture of these communities depends on the land and natural resources, no meaningful consultation and participation in decision-making processes had been undertaken in the land management and forest conservation towards indigenous peoples as mandated by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).¹⁶⁰

As a result, many indigenous communities in the north, northwest and in the south have been evicted with removal and demolition of houses and properties, cutting-down of rubber trees and all cultivated plants and faced with arrest and judicial harassment.¹⁶¹ The authorities, including military, forest and national park officials, have reportedly used five strategies, namely – stopping “illegal logging”, stopping forest “encroachment”, seizing “encroached” areas, destroying villagers’ produce while filing lawsuits, and conducting area surveys, which have had effect of the incredibly harsh and discriminatory practices against the communities that have been well documented.¹⁶²

By December 2015, Order No. 64/2014 had impacted nearly 1,800 families, mostly in the north and northeast, home to large indigenous populations. At that date, 681 cases filed against exercise of powers under Order No. 64/2014 towards local and indigenous communities were recorded, and 168 of these cases amounted to judicial harassment.¹⁶³ A report of the Thai military stated that more than 1,000 people were arrested and prosecuted for illegal logging and encroachment between June 2014 and February 2015 only. Although it was not clear how many of those were large-scale landlords or big corporations, majority of those arrested were reportedly poor farmers, marginalized and landless people.¹⁶⁴ Only in the northern region, at least 173 communities in 9 provinces have been reportedly affected by the joint operations of military, police and forest and national park officials, who have threatened to take strict legal action against communities living in restricted forest areas.¹⁶⁵

Case study: Confiscation of land of Sab Wai villagers due to the Forestry Master Plan¹⁶⁶

After a logging company moved out, in 1972 a forest community started to settle in Sab Wai village in Sai Thong National Park in Chaiyaphum province, building their homes on free land. However, they started to farm cassava in an area that was part of the Sai Thong National Park and did so for more than 40 years, without knowing they were ‘trespassing’ nor being asked to leave. Since the 2014 Forestry Master Plan, Sab Wai villagers claim that, to reach the master plan’s 26-million-rai goal, the government uses scare tactics, such as armed officers intruding into villagers’ houses, to force them to give up their land titles and sign away their land rights, believing that they have no other options. The cassava farms, located on government’s land which has been confiscated, are the primary source of their income; thus, the villagers continue to farm on the land, even if they have no legal rights anymore. As a consequence, 19 Sab Wai villagers have been sued for trespassing on the national park property, with possible sentences of 18 months’ imprisonment and 600,000 baht fine. Unfortunately, on 27 September 2018, all villagers were found guilty of the charges but they all have lodged appeals before the Supreme Court.

The Isaan Land Reform Network (ILRN), a local NGO network, has been supporting the 19 villagers in fighting the charges and finding solutions to the land issue, providing them with free legal counsel and financial support as well as free information workshops on the Thai judicial system and preparation to the trial. The ILRN is aiming to make the government understand the need and the relationship of the villagers with the land and to propose a solution such as community land titles, for the villagers to be allowed to use the land and, at the same time, preserve and manage the forest legally.

This case also showed discrepancies in the application of Order 66/2014 – the Royal Forest Department (RFD) said that Order 64/2014 is meant to target investors and Order 66/2014 is meant to exclude poor people from

Order 64/2014 and protect them from being sued by the government. The definition of poor, according to the RFD, is anyone who owns less than 25 rai of land; while an investor is anyone who owns more. Most of the villagers owned more than 25 rai of land and they find themselves unfairly targeted because they consider to be only small-scale farmers. Nevertheless, even a villager that owned less than 25 rai of land, and thus meeting the requirement to be excluded, was sued for trespassing and got the land confiscated. This highlights the unequal application of the Order 66/2014, considering that those who were supposed to be protected, not only lost their land but also were found guilty of the charges of trespassing, having to pay a fine of 600,000 baht.

As of April 2016, the National Human Rights Commission of Thailand (NHRCT) revealed that they received 50 complaints covering 30 provinces, which were related to Order 64/2014. These complaints alleging land seizure for reforestation amounted to an area of 8,340 hectares (50,000 rai). One case of land confiscation of 363.67 hectares (2,182 rai) under Order 64/2014 targeted a Mae Sot district, affecting 100 families who had been earning from agricultural practices for generations since 1936.¹⁶⁷

Some representative cases of Land Evictions

In July 2014, the Royal Forest Department in Thung Pa Ka village, northern Mae Hong Son province, claimed the lands of three indigenous Pakayaw Karen families. Before that, in May 2014, the military arrested 39 Pakayaw Karens for cutting down trees in the surrounding forest to use the timber to build their homes, in flagrant violation of its own NCPO Order 66/2014.¹⁶⁸ Three of them are currently serving jail sentences of 4-7 years, other were condemned to 1-3 years in jail and were bailed out, ten were fined between 10,000-20,000 baht and two died before the verdict.¹⁶⁹

In October 2014, two indigenous Lisu communities had their land confiscated by forest officials and military officers, who destroyed the communities' agricultural crops. After negotiations, land was returned to one community, but the other community was only allocated small plots of land for each household, which was not sufficient to sustain their basic needs, resulting in further poverty and marginalization.¹⁷⁰

On 27 December 2017, a group of combined forces forestry, military and police officers went to Ban Wang Kho in Ratchaburi province as part of an ongoing operation started in November 2017. The Karen villagers were informed about a forced eviction plan and were given until 31 January 2018 to relocate from the land that belongs to their ancestors. At the time, the authorities had not yet provided information on a relocation site that can accommodate up to 200 people. The villagers have submitted a complaint to the NHRCT.¹⁷¹

Further, Thailand's forest conservation policies and actions are also part of its tourism industry. The government seeks to promote ecotourism, which has gradually grown, particularly in the protected areas. While the government and tourism enterprises seek to attract more tourists with attractions of **national parks and wildlife sanctuaries**, the indigenous and other forest-dependent communities pay a heavy price for those protected areas. A case in point is the forced evictions of indigenous Karen villagers from the Kaeng Krachan National Park, a well-known tourism site in western Thailand, which have been incorporated into Kaeng Krachan Forest Complex proposed for nomination as a World Heritage Site.¹⁷²

Case Study: Forced evictions of indigenous Karen villagers from the Kaeng Krachan National Park

In May 2011, the National Park officials assisted by military officials had evicted, burned down and removed dozen houses of Karen communities in Ban Bang Kloy Bon and Ban Jai Paen Din within the Park in Petchaburi province to forcibly move them to a resettlement village. The resettlement lands provided by the authorities consisted of soil mixed with gravel and was not suitable to grow food, the Karen villagers filed a case before the Administrative Court and submitted a complaint to the NHRCT.¹⁷³

As part of these evictions, armed park officers forcibly had detained a 105-year old Karen spiritual leader named Ko-i Meemi while his grandson and an indigenous leader assisting the villagers to file a lawsuit against the forced evictions, Porlajee Rakchongcharoen "Billy" has been disappeared since 2014 (see more on the disappearance in the section below).

Ko-i Meemi, along with five other Karen villagers, had taken the case of the forced evictions against the Department of National Parks, Wildlife and Plant Conservation and the Ministry of Natural Resources and Environment in 2012 for their right to live in their ancestral land. However, due to indigenous persons' lack of legal recognition in Thailand, his life testimony was not regarded as credible proof.¹⁷⁴

Ko-i Meemi, a 105-year-old spiritual leader of a Karen community in Pong Luk Bang Kloy of Phetchaburi Province at the Administrative Court on 7 September 2016



Wasawat Lukharang / BBCThai

I swear on all sacred spirits that I have lived on that land all my life. When I first remembered the taste of my mother's milk, I was there. That is my ancestors' land.

As a result, the Administrative Court in 2016 ruled that the Park's officials did not violate the Karen's rights as they had encroached into primary forest in the National Park area to open up new land for expanding their community and farmland. As per the Court verdict, the area cleared by the Karen forest dwellers is in a dense jungle, so they could not claim their rights over the forest area. Instead, they were considered forest encroachers. Consequently, the Park officials were allowed to burn down the bamboo huts and rice barns to stop the forest dwellers from living there and to clear more forest. The Court ruled that the Park officials had the right to force the forest encroachers away, according to the National Park Act. However, the Court stated that, as the officers did not move the villagers' belongings from their houses before burning them down, this action was a violation of their rights. Accordingly, the Court ordered the National Park Department to compensate the villagers with THB 10,000 each for the loss of their belongings and dismissed the Karen's demand that they be allowed to live on the disputed land.¹⁷⁵

In 2018, in an appeal against the verdict, the Supreme Administrative Court, despite ruling in favor of the Karen villagers, merely ordered higher compensation of THB 50,000 each. Though the court recognized the Karens as living in the forest before the establishment of the National Park and ordered the State officials to comply with the 2010 Cabinet resolution on restoring traditional livelihoods of Karen people, it did not allow them to return to their ancestral lands because they had no proof of land ownership. The Karens have expressed dismay at the verdict.¹⁷⁶

The evictions in the Kaeng Krachan National Park brought significant attention to the land disputes in Thailand's national parks and the underlying problem, which lies in the National Park Act. The Act gives officials ultimate authority to make decisions on the demarcation of preserved areas while excluding indigenous communities that play a key role in conserving the forests from the process. The Act also denies indigenous communities living in the parks before it was demarcated rights to live and use their ancestral lands.

BHR Expert Voice

"The forest is the life and livelihood of indigenous peoples. If we don't want to be stopped from going to the supermarket to buy food, then we shouldn't stop indigenous peoples from going to the forest."

Debbie Stothard, Coordinator, ALTSEAN- BURMA and Secretary General, FIDH,
during Mansuhya's Second Experts Meeting on CSO National Baseline Assessment,
28 February – 1 March 2018

Good practice***Collaborative mapping and management in Ob Luang National Park***

There are singular experiences of successful collaborative management approach between indigenous communities and park authorities. For example, a pilot project in the Ob Luang National Park, organized by the Thai and Danish government under the Joint Management of Protect Areas (JoMPA) project, involving Karen and Hmong communities, resulted in mapping of the area with final maps accepted by both the communities and the Park's authorities and demarcation of community farmland and participatory management of the Park continued even after the project. Unfortunately, such approach has not been adopted as a national policy.¹⁷⁷

6.2.2. Criminalization of Traditional Livelihoods

Further, disputes between indigenous peoples and protected forest areas relate to **criminalization of traditional livelihoods** of indigenous peoples, which is another key area of concern. Despite government regulation to restore traditional livelihoods of indigenous peoples namely of Chao Lay and Karen, indigenous peoples continue to face restrictions to and negative consequences for practicing their livelihoods. A recent case in point is the arrest of six Chao Lay in January 2018 on charges of encroachment in Sirinart Marine National Park in Phuket while there have been more than 10 cases over the past few years.

Due to creation of marine national parks, Chao Lay, who traditionally fish around different islands in the Andaman Sea, are no longer allowed to fish in those areas. As a result, they have to fish far away in the deep-sea areas where they do not have the necessary skills, particularly deep-sea diving and how to cope with decompression sickness. This has consequently caused death and paralysis among some of them.

In this context, the six arrested in Sirinart National Park had stopped there to treat one of them, who fell sick from decompression after coming back from fishing in Phang-Nga province area despite they were trained by Navy on dealing with decompression sickness. Such arrests affect daily lives and work of Chao Lay who also have to find money for bail.

Criminalization of traditional livelihoods of indigenous peoples has also resulted in arrests and various negative impacts for other indigenous communities across Thailand. While a number of villages of indigenous communities in northern forest areas practicing their traditional way of shifting cultivation (rotational farming) have been resettled, members of the communities have been arrested, jailed and fined year after year for clearing fallow fields and even for contributing to global warming. That is despite various studies showing that shifting cultivation increases carbon sequestration as well as biodiversity in forests.¹⁷⁸

In early 2008, for example, two indigenous Karen villagers (a man and a woman) in Tak province were arrested and charged with slashing, clearing and burning forest, using land in a forest reserve and causing degradation, and damaging a watershed area without permission while they were clearing fallow fields in their traditional shifting cultivation area. A court subsequently were sentenced them to 2-2.5 years in prison and penalized them with hefty compensation for damage caused, including for "causing deforestation and rise in temperature".¹⁷⁹

Following an appeal, it was decided that the trial would be redone, as the two did not have access to lawyers or interpreters. As a result, though the Court of First Instance acquitted the two of all charges in 2010, the Court of Appeal in 2012 ruled acquitted the Karen woman but found the man guilty though both of them argued they did not know about the protected forest area and relied upon the Cabinet resolution on restoring Karen livelihoods for their defense. In the latter decision, the Court ruled that the resolution was not a law and ignorance was not an excuse.

Both of them were also required to relocate from the protected area. Such relocations have resulted in decrease in the amount of land available for Karen livelihoods and decrease in agricultural yields.¹⁸⁰

Further, restrictions against shifting cultivation have caused loss of livelihoods and food security, deterioration in quality of land and nutrition, loss of domestic and natural plant diversity, and challenges of migration and community governance, among other impacts on indigenous peoples and the environment.¹⁸¹

Good Practice

Community mobilization and sustainable land and forest management to resist evictions

In 1966, Karen people settled in Huay Hin Lad Nai, a small village of 20 households in northern Thailand surrounded by the National Forest Reservation Area, and the Khun Jae National Park. In 1968, the Thai government allowed the Chian Rai Tha Mai logging company to operate in the area which led to the destruction of sacred forest areas and water sources. In 1984, the government annulled the forest concession, and eight year later declared the Khun Kae National Park a protected area and ordered the community to move out of the territory. While the villagers did not have appropriate structures and institutions in place to protect their community's land and livelihoods, the government did not recognize their customary land rights.

To challenge the government's actions and order, the community adopted a sustainable land and forest-use planning system to organize in resistance against logging and evictions. They also collaborated with neighbouring Lisu and Hmong communities that faced the same problems. In 1994, they formed the Northern Farmer's Network (NFN) which aims "(i) to promote and support the community on natural resources management and conservation; (ii) to carry out advocacy work for the state to recognize the community's land-related right and (iii) to promote and support a model of sustainable agriculture by using the community's traditional knowledge and rotational farming". The network actively participated in actions and protests, and collaborated with other stakeholders such as the Northern Development Foundation (NDF) and the National Assembly of the Poor.

The NDF, together with Huay Hin Lad Nai community, conducted research highlighting the positive impact of indigenous peoples' sustainable natural resource management systems, particularly how rotational farming sequesters more carbon than it emits and is key to food security. The community also established their rules and regulations for restoring and managing the forest and resources sustainably with participation of women and youth. They also devised innovative income generation methods to sustain their struggle and implement their plans.

Accordingly, in 2003, the village was officially recognized under Chiang Rai province. It occupies an area of around 3,700 hectares – 85% kept as forest cover and only 1% used for rotational farming under the present land use pattern. The villagers generate income from wild tea, honey and bamboo, among others, of which certain amount is set aside for community forest management fund. They also revived their traditional practices and culture with curricula developed for knowledge transfer from elders to young ones on language, traditional clothing, sword dancing and handicraft. The community has been in the process of getting their collective land rights recognised by the State.¹⁸²

6.2.3. Impacts of Royal Projects

On the other hand, forest areas have also been claimed under different **royal projects** for the purpose of reforestation and preservation. Thereby, some land is given to villagers for housing and various farming activities are carried out under the projects. Benefits received by local people are dependent on the budgets allocated for the projects.¹⁸³

While the royal and other government supported projects have been noted to replace opium plantations of the past, it has also been noted that they have promoted mono cropping, which reportedly encourage spread of forest fires, while the myth of indigenous peoples' practice of shifting cultivation causing deforestation are propagated.¹⁸⁴ At the same time, there has been one documented case of alleged seizure of about 1,600 hectares of land used by Akha indigenous people in Chiang Rai for a royal project in 2003. The Thai government allegedly seized the land within a national forest reserve without consulting them for construction of a research facility under Highland

Development Station project while police and armed forest officials moved more than 1000 people and destroyed standing crops.¹⁸⁵

In 2008, the government, in response to the allegations submitted by the UN Special Rapporteur on the rights of indigenous peoples in 2007, categorically denied all those allegations. It stressed that the authorities consulted and signed an agreement in 2005 with the Akha communities, which were benefitting from the project activities while only eight villagers were arrested and convicted of forest crimes before the establishment of the project.¹⁸⁶ It appears that no further action was taken in relation to the allegation though the NGO continued their criticism in the case.¹⁸⁷

Further research is required on potential negative impacts of such projects and other contract farming operations in lands used by indigenous peoples as indicated in the testimony below.

Voices from the ground – Community Expert Voice

"Indigenous communities share the impact of contract farming and the royal projects on their livelihoods. Before, indigenous peoples were able to use their traditional knowledge to recycle seeds and cultivate their ancestral lands. Since the introduction of the royal projects, indigenous peoples don't own the lands but are provided with community land titles to use the land to live, cultivate and produce. Indigenous communities are forced to buy specific seeds to produce according to the standards of the project, forcing them into debt and increasing the precariousness of their situation. While the intention behind the royal projects might be good, the impacts demonstrate the need for indigenous voices to be the driving force behind any initiative involving their community."

Indigenous Karen woman voicing her concerns during the Field visit of EU Counsellors at Huay Hoi Karen Indigenous Village on 15 March 2018.¹⁸⁸

6.3. Reprisals and Insecurity faced by Indigenous Defenders

Indigenous community representatives, activists and leaders, as mentioned above, who have called attention to their human rights issues or challenged the authorities and businesses for their rights have faced various reprisals ranging from arrests, imprisonment and other reprisals to even enforced disappearances and killings. While the legal and administrative systems of Thailand have failed the indigenous communities in general, insecurity in the communities has grown particularly due to reprisals and intimidations against their activists. Those cases have highlighted critical gaps in legal protections in the country.

Case Study: The Disappearance of 'Billy'



Porlajee Rakchongcharoen "Billy"

In one instance, the widely reported case of prominent indigenous Karen activist Porlajee Rakchongcharoen "Billy" is testimony to the failure of Thailand's legal response to cases of enforced disappearances. At the time of his "disappearance", Billy had been working with Karen villagers and activists on legal proceedings concerning the destruction of villagers' homes and property in the Kaeng Krachan National Park in Petchaburi in 2010 and 2011 (see above). He was arrested on 17 April 2014 on charges of "illegal possession of wild honey". Chaiwat Limlikhitaksorn, then head of Kaeng Krachan National Park was the last person to see him. Mr Chaiwat and park authorities claim he was released the same day but he has not been seen since.¹⁸⁹

On 24 April 2014, Billy's wife, Phinnapha Phrueksaphan, filed a habeas corpus petition at the Petchaburi Provincial Court seeking an inquiry into the lawfulness of her husband's detention. In July 2014, following a six-day habeas corpus inquiry, the Court concluded that it could not be established that Billy was still in detention when he had disappeared. Subsequent

appeal of this decision to the Appeal Court also failed to shed any light on Billy's fate or whereabouts. Local police investigation officers in September 2014 filed malfeasance charges under article 157 of the Penal Code against then head of the Park, Chaiwat Limlikitsorn and four other park officers for unlawfully detaining Billy. They found no record of Billy's release from custody. However, in September 2015, the Supreme Court upheld the decisions of both the Administrative Court and the Appeals Court, dismissing allegations against Mr. Chaiwat and his associates due to insufficient evidence.

In response to the request of Phinnapha in August 2015, the Department of Special Investigation (DSI) under the Ministry of Justice had also reportedly collected witness testimonies, examined evidence and announced 100,000 THB as a reward for clues to his disappearance. However, in January 2017, the DSI refused investigation into the disappearance as a special case due to insufficient evidence or witness testimony to prosecute people suspected of involvement in the case.¹⁹⁰ It recently, in July 2018, announced probe into the disappearance to re-examine all evidence.¹⁹¹

Similarly, the NHRCT held a review progress meeting on the case attended by the concerned officials of the Royal Thai Police, the DSI and the Office of Public Sector Anti-Corruption Commission (PACC) in January 2016. As per the meeting briefing, the Police found the testimonies of the Park officials involved in Billy's detention were 'inconsistent'. The Police had also put 100,000 THB cash reward to persons for providing useful information on the case. Further, the PACC gathered witness testimonies on the case after it accepted the case file for consideration and had been investigating evidence. However, further information on their investigation is not available. The NHRCT, in the briefing, indicated inadequacy of legal framework for accountability in cases of enforced disappearances in Thailand.¹⁹²

To date, the investigation of Billy's disappearance has not resulted in adequate remedy to the victims while the case has also reinforced the lack of adequate legal protections against disappearances in Thailand. On the other hand, despite a long list of allegations against Chaiwat for serious abuses and misconduct while he was in charge of the Park, the Government promoted him to lead Thailand's influential "Tiger Corps" forest and wildlife protection unit in May 2016. At the same time, the Government has proposed listing the Kaeng Krachan Forest Complex, including the Park, as a World Heritage Site, which the Karen communities have opposed with the condition that their land and natural resources rights in the Park should be ensured before such listing (see the case study in page 50).¹⁹³

Billy's disappearance is only a representative case. In September 2011, Billy's associate and another activist Tassanakamol Aobaom was also killed, which is believed in relation to his activism.¹⁹⁴

Case Study: Extrajudicial Killing of Chaiyaphum Pasae

Most recently, in March 2017, Chaiyaphum Pasae, a 17-year old indigenous Lahu activist working for the rights of his community to Thai nationality, healthcare and education, was shot dead by Thai military officers in Chiang Dao. The military was trying to arrest him as an alleged drug suspect when they claim he tried to resist and even "attempted to throw a grenade at the soldiers" – one of whom shot in self-defense.¹⁹⁵ While the relatives and community members of Chaiyaphum, who himself was involved in campaign against drug use, claim the allegations against him as false, his relatives and associates have also been intimidated. In May 2017, Lahu activist, Nawa Chaoue, was arrested allegedly for supplying drugs to Chaiyaphum.¹⁹⁶ Investigation and court process have yet to make any significant progress due to non-cooperation of the military to provide evidence of the crime scene.¹⁹⁷



Chaiyaphum Pasae

The above cases of disappearance and killing are only the tip of the iceberg while many reprisals against community activists and leaders even go unreported and unaccounted. Nonetheless, such cases have significantly increased insecurity among community members to defend or assert their rights. It is not only forest, military or

other State authorities that the indigenous communities have been insecure from, but also businesses and their hired men as reported above for threats and violence against Chao Lay. At the same time, they also face intimidations and disputes with other communities that they often find themselves in conflict with for their lands and limited resources in their territories or resettled areas. Such insecurity and conflict is exacerbated in a situation where indigenous community members do not have citizenship or official identification papers or land titles (see the case below).

Voices from the ground – Community Expert Voice

"My father was shot to death after he was accused of encroaching community forest and allegedly fought with the officers and thus ended his life in an armed fight. Being his daughter, I tried hard to bring justice to his death, but failed.

I was brought up in Ban San Pa Hiang where the majority of people are Northern Thai and Lisu. Except for a few members, most Lisu people have not obtained citizenship. With no ID cards, members of my community, who are non-citizens, are more easily exposed to ill treatment at the hands of other people. There were times, for example, when the lowlanders' cattle were encroaching on our farmlands. The Thai owners responded to our demand for compensation with their challenge that we better report to the police. We did not know the law provides that even without ID cards, we have our rights to receive compensation from the cattle owners.

A person having no citizenship does not mean that his/her rights can be violated by anyone. However, the Lisu villagers are afraid of getting arrested, so they dare not go to the police station to report the cattle encroachment into their farmlands.

In addition, without ID cards we cannot receive free health care. Many of our villages are located either in the National Park, or in the forest reserves. Lack of land titles becomes one of the chronic problems, which forces our people to be encroachers of the protected forests. This subjects us, indigenous people, to expulsion from our homeland by the authorities at any time. And with no ID cards, some government agencies even claim that we do not belong to the country.

Furthermore, conflict between lowlanders and Lisu people often takes place out of prejudice. It so happened that a lowland leader, in order to increase the forest areas, launched his reforest campaign into our farmlands. Thus, Lisu farmers cannot make use of their farmlands anymore, and when they went back to their farms, the lowland leader intimidated them. Some families had cleared their fields, but these were later confiscated back by the authorities. Lisu villagers feared going back to their farms again. However, the local Thai leader granted permission to his relatives to cultivate the former Lisu's lands. Such incidences take place every now and then.¹⁹⁸

Katima Leeja, Member of the Indigenous Women's Network of Thailand (IWNT)

6.4. Human Rights & Environmental Impacts of Agribusiness and Extractive Projects

Globally, extractives, agribusiness, energy and infrastructure are considered among the leading sectors that very often result in violations of human rights as well as environmental destruction, particularly for projects of large-scale. Extractives and agribusiness have also been associated with the highest proportion of killings of environmental and land defenders every year, including indigenous leaders that are disproportionately affected.

Though Thailand carries a reputation as a cross-border investor rather than country with large-scale mining or agribusiness activities, there are a number of mining and agribusiness operations linked with negative impacts on human rights, including killings and harassment of communities and defenders. The protracted land conflict between a palm oil company Jiew Kang Jue Pattana Co Ltd and villagers of Klong Sai Pattana in Surat Thani in southern Thailand, whereby at least four villagers (two of them women) have been killed¹⁹⁹; and the long struggle of a community environmental group against health and environment impacts of a gold mine operated by Tungsum company in northeastern Loei province, where activists, mainly women, have frequently faced lawsuits by the company and local authorities²⁰⁰ are a couple of representative cases.

At the same time, many Thai businesses are also linked with human rights violations abroad, particularly in its immediate neighboring countries of Cambodia, Myanmar and Laos, including of indigenous peoples in those countries.²⁰¹

Compared to tourism and forest conservation related impacts, agribusiness and extractives did not feature as the sectors of serious human rights concern for indigenous peoples in Thailand. Although large number of extractive industries is in northeastern Thailand with significant indigenous population, the reports of indigenous rights violations, or identification of affected communities as belonging to indigenous ethnic groups, are rare. Nonetheless, there are a few reported cases of abuses of the rights of indigenous peoples in agribusiness and extractive operations.

Expansion of small and medium scale commercial plantations has reportedly caused negative impacts on indigenous peoples. For example, increasing rubber plantations in southern Phang-Nga, Phatthalung and Satun provinces of Thailand have reduced the forest areas, which are the main areas of food and livelihoods for indigenous Mani people. As a result, some of them have had to change their livelihoods or migrate to near lowland communities for food and engage in tourism industry, where exploitation has been alleged such as low remuneration, etc. CSOs have recommended establishing special mechanism such as cultural zone to protect the livelihoods of Mani people and expediting the process of granting them citizenship.²⁰²

Case Study: Human Rights & Environmental Impacts at the Klity Creek

In a representative case demonstrating human rights impacts of extractive industries, hundreds of indigenous Karen families were reportedly exposed to serious and irreversible health problems due to failure of the Thai government to clean up toxic lead in a Klity Creek stream in western province of Kanchanaburi following closure of a lead-processing factory upstream. The factory, Lead Concentrate (Thailand) Co. Ltd., began operations in the mid-1960s and was ordered to close in 1998 due to its pollution. However, Thailand's Pollution Control Department had no emergency plan to clean up the contamination of the factory. Worse, it even failed to implement the Supreme Court order in 2013 to take necessary immediate steps to compensate those affected and clean up the toxic site, as per a report in 2014. Further, while the Karens were continuously exposed to high levels of lead in their water, soil, vegetables and fish, with more severe impacts among farmers and children, the Ministry of Natural Resources and Environment was commissioning an assessment to decide whether to reopen the province for lead mining.²⁰³

In 2017, the Supreme Court's Environmental Division rendered a judgement and ordered a compensation of 36 million baht to 151 villagers and to rehabilitate the polluted creek.²⁰⁴ In February 2018, the Pollution Control Department started the restoration process;²⁰⁵ however, the removal of the lead does not cover all the affected territories,²⁰⁶ keeping causing harm to villagers and the environment.²⁰⁷ Additionally, effects can be encountered also by other areas, since the water from the Creek flow to Mae Klong river that is used to produce water supply and food resources for other parts of Thailand.²⁰⁸ Nevertheless, the process should be completed by August 2020 and will include the suction of the lead from the upper and lower Klity villages.²⁰⁹ Moreover, a trilateral meeting, between the government authority, community leaders and the Company appointed for the restoration, was held in April 2018 to follow up the restoration process.²¹⁰ As of December 2018, the compensation has not been paid yet.²¹¹

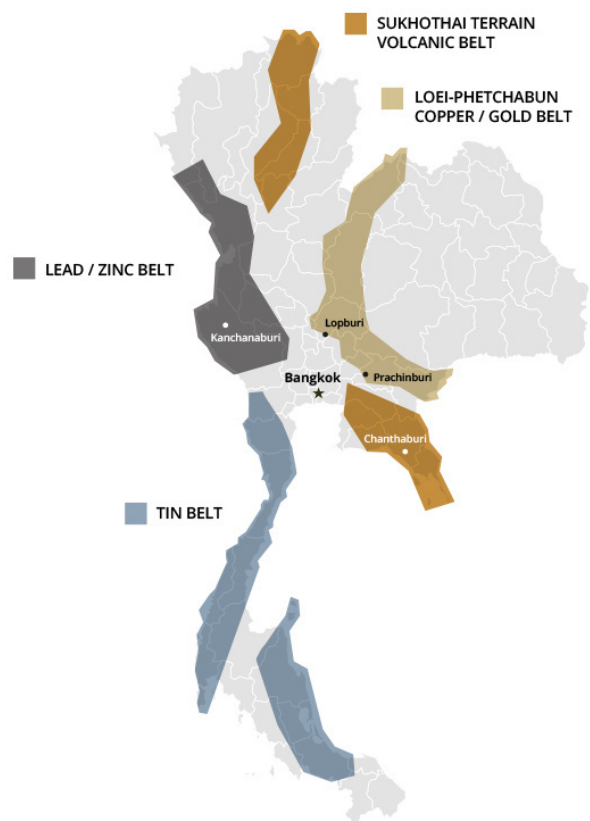
Lack of effective public participation in and other weak procedures of the Environmental or Environmental and Health Impact Assessments (EIA/EHIA) for infrastructure, mining and energy projects conducted through private consultants was a main problem consistently raised with the UN Working Group on Business and Human Rights during its visit to Thailand.²¹² There were also concerns about how the push to attract investment could undermine effective impact assessments, including by providing waivers and fast-tracking project approvals such as under the NCPO Order 9/2016 (9/2559) that allows state-owned enterprises to seek project approvals before completing an impact assessment. While the Working Group noted that the Strategic Environmental Assessment (SEA) mechanism announced for a coal-fired power plant in Songkhla, which would involve independent experts agreed by communities and government, as way to improve impact assessments, it also encouraged a more holistic approach of sustainability impact assessments, including social and human rights dimensions.²¹³

Thailand's new Minerals Act 2017 is expected to facilitate future exploitation in doubling the amount of land available for each surface mining permit to 600 rai (96 ha), and aligning the decision-making process for permits closer to industry stakeholders.²¹⁴ While the law is expected to benefit companies, activists and mining affected communities have expressed strong concerns about the potential negative impacts of the law due to 1) restriction

of public participation with the creating of national and provincial level mining committees and 2) lack of detailed regulations on restoration of mining affected areas.²¹⁵

Most of Thailand's mineral reserves are found in regions with significant indigenous populations (see the map on the side of mineral occurrence in Thailand²¹⁶). Thus, indigenous groups will likely face disproportionate negative impacts of the new law and resource extraction operations.

Image 1 - Thai Metallogenic Belt © Metal Tiger



Good practice

Thailand shuts down its last gold mine over environmental concerns

In 2016, Thailand's ruling junta closed the country's only active gold mine and suspended all gold mining operations "due to impacts on locals and the environment". The government also said it would not issue new licenses for mining. The move was widely welcomed by environmental and human rights groups.²¹⁷

However, the affected communities of the Chatree mine run by Akara Resources Public Co. Ltd., a subsidiary of Australia's Kingsgate Consolidated Ltd. continue to bear the environmental and health impacts of the mine due to water and soil contamination, which the company has consistently denied.²¹⁸ While the Thai authorities had also fined the mining operation for violating environmental, factory and other related laws prior to suspension, the Australian parent company has sued the Thai government of violating the Thai-Australia Free Trade Agreement for failing to follow proper procedures when it shut down the mine before a proposed international arbitration committee.²¹⁹

Such investor-State dispute settlement mechanism, which often causes loss of public funds in legal process, is a significant feature of investment and free trade agreements that significant human rights implications²²⁰, including on indigenous peoples (see below).

6.5. Free Trade Agreements

While negative consequences on the rights of indigenous peoples in business contexts in Thailand are already perceptible and well reported in the forms discussed above, there are also strong concerns about actual and potential impacts of free trade agreements on their rights, particularly expressed by indigenous women and their organizations.

The UN Special Rapporteur on the rights of indigenous peoples has contended that as they are currently conceptualized and implemented, international investment agreements, including bilateral, regional and multilateral investment treaties and free trade agreements, cause direct adverse impacts on the rights of indigenous peoples, particularly their rights to self-determination; lands, territories and resources; participation and free, prior and informed consent, with documented cases of violations. She has also pointed to systemic impacts of such

investment and free trade regime, including asymmetry between States and private actors, constriction of policy and legislative space of States, loss of public funds, democratic deficit and weakened rule of law and permutation of international power imbalances.²²¹

Thailand, for its part, has made numerous international investment agreements, including bilateral and multilateral investment and free trade agreements, which have reportedly made the country attractive to investors and trade.²²² Currently, there have been particular concerns regarding the impacts on food security and traditional knowledge of indigenous peoples in the context of ongoing negotiations of the Regional Comprehensive Economic Partnership (RCEP) – a free trade agreement involving ten ASEAN countries and its six free trade partners – Australia, China, India, Japan, South Korea and New Zealand. The negotiations have been criticized for non-transparency and lack of independent socio-economic and environmental assessments, being plagued by vested interests of corporate entities and devoid of public participation or effective representation of elected officials.²²³

Amidst the RCEP negotiations, Thailand has recently introduced amendment to its 1999 Plant Varieties Protection Act, which threatens control over seeds of women, farmers and indigenous peoples, according to the Indigenous Women's Network of Thailand. The Act provides a balance between communities' rights and interests of corporations, which has enabled Thailand to be the largest seed exporter in the ASEAN and the fourth in the Asia-Pacific region. The Network has claimed that the so-called Big Six corporations (BASF, Bayer, Dow, DuPont, Monsanto and Syngenta, which have merged to become Big Three – Bayer-Monsanto, Dow DuPont, ChinaChem-Syngenta), opposes such balance in the Act.²²⁴

Thus, the amendment to the Act, if adopted, can result in criminalization of the practice of indigenous peoples, particularly women, of preserving, sharing and diversifying seeds, which will be subjected to fine and jail, as well as destruction of their crops if found to be in violation of a corporation's intellectual property rights to the seeds. The concept of intellectual property remains alien to many indigenous peoples, farmers and other communities in many developing countries, including Thailand while it has been globally imposed through the World Trade Organization (WTO) agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).²²⁵

Further, concern has been raised about potential increase in restrictions to use and develop their traditional knowledge of local herbs, which corporations have already begun patenting for profit, under the RCEP trade agreement. Example has been given of the patent rights acquired by a company over *Pueraria mirifica*, a plant that local women in Thailand have used for decades but now can no longer in risk of violating patent rights punishable by jail and fine.²²⁶ Similarly, potential impacts of large-scale land investments under RCEP on women's subsistence farming and land rights, privatization of health services and intellectual property rights on medicines on health rights as well as overall possible consequences of investor-State dispute mechanisms on public expenditure have also been issues of concern, among others.²²⁷

The Special Rapporteur has recommended exception clauses to protect human rights, constitutional reforms to prohibit waiving State jurisdiction in arbitrating disputes with investors as well as multilateral efforts to increase transparency in trade agreements as some of the good practices to ensure human rights in free trade agreements.²²⁸

7

UN GUIDING PRINCIPLES AND THE RIGHTS OF INDIGENOUS PEOPLES IN THAILAND: ARE THAI LEGAL & POLICY FRAMEWORK AND PRACTICES IN COMPLIANCE?

The chapter above, with reported or documented cases of violations of the rights of indigenous peoples, shows that there are significant gaps in the implementation of the UN Guiding Principles on Business and Human Rights in Thailand. While the State has been unsuccessful to protect human rights in business contexts and even caused human rights impacts through its agencies, the corporate responsibility of business enterprises to responsibility to respect human rights have also been unmet. Most often, the affected communities are denied access to effective remedy, for which both the State and the business enterprises share complementary roles.

Below is an analysis of key challenges for implementing the Guiding Principles for the rights of indigenous peoples in Thailand, with focus on access to effective remedy for affected communities.

7.1. Pillar I – State Duty to Protect

Under the Guiding Principles, Thailand has the duty to protect against business-related abuses within its territory/jurisdiction. The State must prevent, mitigate and address such abuses through policies, legislation, regulation and adjudication. There are some laws and regulations that protect the rights of indigenous peoples in Thailand such as the constitutional provisions whereby the State should promote and provide for “traditional, culture, custom and ways of life” of different ethnic groups and the community has rights to manage, maintain and utilize natural resources, environment and biodiversity, among others. Regulation on issuance of community land title deeds 2010 and cabinet resolutions on restoration of the traditional practices and livelihoods of Karen and Chao Lay in Thailand 2010 are also positive for indigenous peoples. The implementation of the limited protections available is generally poor or non-existent, including in the face of conflicting laws and policies. At the same time, the existing legal protections fall far short of international human rights standards of indigenous peoples. Thus, Thailand should adopt and implement additional laws, policies and regulations providing greater protections for the rights of indigenous ethnic groups.

National parks and protected areas, particularly those aimed to facilitate carbon trading and attract tourists, should be considered equivalent to state-owned enterprises. Thus, as provided in the Guiding Principles, Thailand should take additional steps to protect against human rights abuses by the national parks and other protected areas under control of the State or receiving substantial support from it, including by requiring human rights due diligence, where appropriate. Further, it should ensure that the policies and processes related to environmental impact assessments include assessing actual and potential human rights impacts, particularly as the new Minerals Act places greater responsibility on the government agencies or formed committees.²²⁹

Within the concept of policy coherence in the Guiding Principles, Thailand should ensure that all government departments, agencies and institutions that shape business practices observe human rights obligation, 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. However, the Thai government, particularly its ministries and departments related to natural resources, environment and land as well as tourism, has failed to balance their human rights obligations to indigenous peoples when shaping business aspirations and practices related to tourism and conservation, among others. At the same time, the government also appears to have been unable to ensure that free trade agreements, such as the RCEP, do not impact the rights of indigenous peoples.

7.2. Pillar II – Corporate Responsibility to Respect

As per the Guiding Principles, 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 responsibility refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work.

Thus, while in most cases, respecting human rights follows from complying with national laws, depending on circumstances, business enterprises may need to consider additional standards, for instance, in relation to groups that require particular attention such as indigenous peoples, whereby UN instruments have elaborated further on their rights.²³⁰ This is particularly relevant in the case of Thailand as the national laws do effectively protect the rights of indigenous peoples.

In order to meet their responsibility, business enterprises should have in place policies and processes appropriate to their size and circumstances, including

- 1) A policy commitment to respect human rights,
- 2) A human rights due diligence process to identify, prevent, mitigate and address their human rights impacts, and
- 3) Remediation processes for any adverse human rights impacts.

The UN Special Rapporteur on the rights of indigenous peoples has provided guidance in relation to the identification of indigenous peoples and has recommended that businesses make use of the characteristics outlined in ILO Convention 169 as the basis for their due diligence processes.²³¹

However, the cases discussed in the previous chapter clearly show that business enterprises in Thailand, particularly those related to tourism, agribusiness and extractives, have not been able to meet their responsibility to respect the rights of indigenous peoples, including human rights due diligence and remediation processes. As noted in the Guiding Principles, the business enterprises in Thailand should, among others, draw on internal and/or independent external human rights expertise and involve meaningful consultation with potentially affected groups to assess their human rights risks; integrate findings from their impact assessments across their operation and take appropriate action to prevent and adverse human rights impacts; and provide for or cooperate in remediation of their adverse impacts through legitimate processes.

7.3. Pillar III – Access to Remedy

A range of judicial and non-judicial mechanisms exist in Thailand's State structure for victims of human rights abuses to make complaints and seek redress. Those include the courts, the NHRCT, provincial Damrongdharma Centres. However, non-recognition of indigenous peoples and their rights in Thai legal framework in line with the UN Declaration on the Rights of Indigenous Peoples, as indicated in the cases discussed in the previous chapter, remains at the root of many violations against indigenous peoples in Thailand as well as the key challenge for their access to effective remedy for human rights abuses, including in business contexts. That is also confirmed in an analysis of case studies on indigenous women, development and access to justice in Southeast Asia.²³²

7.3.1. State-based judicial mechanisms

Effective judicial remedies are at the core of access to remedy. The Thai constitution provides for four types of courts: the Constitutional Court, the Courts of Justice, the Administrative Courts and the Military Courts. The Courts of Justice consist of various specialized courts as the Courts of First Instance streams, including the Labour Courts and the Intellectual Property Court. Administrative courts of Thailand, which have jurisdiction on cases between a government entity or official and a private entity or another government entity or official, are the judicial mechanisms that indigenous peoples most often engage with for the land disputes.

Based on the cases in the previous chapter, while there have some cases of effective remedy from the courts in relation to the land disputes of Chao Lay, the experiences in cases against government entities or officials at the Administrative Courts have been mostly negative for indigenous peoples. Further, as confirmed in an analysis of case studies from the region, there are following barriers to access effective remedy for indigenous peoples:

- 1 Weak enforcement of positive laws and policies as well as conflicting laws and policies.** Large number of legal disputes related to lands, forest "encroachment" and livelihoods of indigenous peoples with businesses and government agencies clearly show that despite constitutional provisions for State duty to protect of their traditional cultures and community rights to manage natural resources, those legal protections are weakly enforced or the conflicting laws and policies such as those related to forest conservation take precedence. This is particularly the case with regards to Karen and Chao Lay communities for which there are specific cabinet resolutions to restore their traditional practices and livelihoods.

- 2 Biases and discrimination in the laws and justice system.** The legal framework and adjudication process in Thailand is criticized for biases and discrimination against indigenous peoples, which stem from persistent misconception that they pose national security threats, destroy forests and engage in drug-related issues. That creates a challenging environment for their just and fair access to justice.²³³ Such bias can be seen in the Administrative Court ruling against six Karen villagers, who were forcibly evicted from Kaeng Krachan National Park, whereby the Court ordered meagre compensation for the burning of their properties while tagged the Karen as encroachers. The Supreme Administrative Court later recognized the Karens living in the forest before the establishment of the Park though it did not allow them to return.
- 3** Limitations to existing remedies. The judicial system often fails to consider the practical barriers faced by indigenous peoples, which include high illiteracy and poverty, language challenges, lack of knowledge of their rights and access to legal assistance. Indigenous communities are not adequately informed about laws that directly affect them as they are rarely consulted about those laws and their consequences, for instance, demarcation of protected areas. Further, they also lack knowledge about remedy mechanisms, including court systems. This is particularly evident in the case discussed above of two Karens in Tak province, who were sentenced in trial while they did not have access to lawyers or interpreters; they later confessed of not knowing about the forest was protected area.²³⁴ Similar experiences have also been reported in other cases involving Lisu and Akha peoples in Chiang Rai province.²³⁵ Similarly, Chao Lay generally do not try to assert land ownership rights because most believe that land and water should not be owned or controlled by one person, but rather shared by many.²³⁶

Strategic Litigation for Indigenous Peoples' Land Rights²³⁷

A study conducted by the Open Society Foundation focusing on judicial grievance mechanisms to address land rights issues in Kenya, Malaysia and Paraguay identified various obstacles faced by indigenous communities, such as courts' limited knowledge of relevant legal norms, the bias in favour of formal law and land title and disregarding indigenous customs and land usage. Additionally, from a political and economic standpoint, land possession is usually dictated by formal, individualistic, and commercial interests. Further challenges are of material nature, such as the general lack of affordable legal aid, language barriers, corruption and physical remoteness.

On the positive side, the study also highlighted that legal action had a particularly empowering effect for communities, strengthening their sense of being agents of change and their awareness of rights. Additionally, strategic litigations forged the attitudes and behaviours of external stakeholders, such as civil society organisations and donors, towards land-related rights and indigenous peoples' rights. Politically speaking, legal proceedings instigated by indigenous communities had a limited effect on government policies. Likewise, legal proceedings did not have an influence on the general public's negative and discriminatory attitudes towards indigenous communities. Most lawsuits were filed after the failure of other litigation efforts such as mediation. Communities reported that legal proceedings became a central part of their struggle.

Besides the barriers listed above, the situation that many indigenous communities still do not possess citizenship also poses significant challenge to those communities' access to remedy. At the same time, indigenous peoples seeking redress are often met with reprisals and violence leading to physical injuries, social disruption, psychological suffering and in some cases, disappearances and killings representing a systematic denial and violation of basic social and economic rights. Such reprisals against indigenous leaders and human rights defenders and the resulting insecurity in the communities also hinder access to remedy of indigenous peoples.

The Guiding Principles require that States take judicial, administrative, legislative or other appropriate steps to protect business-related human rights abuse and ensure effectiveness of domestic judicial mechanisms by reducing legal, practical and other relevant barriers.

In this context, the Justice Fund under Thailand's Ministry of Justice established in 2006 with the objective of helping the poorest and most vulnerable with legal assistance in order to have access to justice offers a good example of reducing barriers to seeking remedies. Indigenous communities, such as the Chao Lay in the case of Rawai beach, have also sought and received assistance under the project. However, there are recommendations that the requests for assistance under the Fund are dealt with in an impartial and expeditious manner.²³⁸

A positive case of the Justice Fund's assistance to indigenous peoples is the one of Nawa Choue, a Lahu indigenous woman and indigenous human rights defender, caretaker of Chaiphum Pasae (see the case study under section 6.3 above). She was arrested in May 2017, after a police raid in the house of her brother-in-law, Maitree Chamroensuksakul, also a human rights defender. Nawa was indicted for drug possession and accused of complicity in the drug-related offences committed by Chaiphum. She was then incarcerated with a bail amounting to 2 million Baht. The family could appeal to the Justice Fund in order to be able to pay the amount, which was granted by the Fund in November 2017. Nevertheless, the request for bail was denied by the Court and she was kept in detention for 331 days, until her acquittal in April 2018. Despite the bail denial, community leaders and civil society organisations considered an achievement that an indigenous woman, facing such charges, could access the amount of 2 million Baht from the Justice Fund.²³⁹

7.3.2. State-based non-judicial grievance mechanisms

Non-judicial grievance mechanisms play important complementary roles to for access to remedy. The National Human Rights Commission of Thailand (NHRCT) is the key non-judicial grievance mechanism for indigenous peoples facing human rights challenges in Thailand, like for other victims of human rights abuses in the country.

The National Human Rights Commission of Thailand (NHRCT)

The NHRCT is mandated to investigate and report on the act or omission amounting to violations of human rights and propose appropriate solutions. It may also forward issues and opinions to relevant judicial institutions. It may provide recommendations on the amendment of laws to the parliament or cabinet for the promotion of human rights, which should also be achieved by promoting the study, research, and knowledge-sharing on human rights. The NHRCT is composed of 24 sub committees and 17 ad-hoc sub committees, of which seven pertain to civil, political and community rights, ten for economic, social, and cultural rights, nine for law and rights to justice and eleven for other matters. Each sub-committee is headed by a specific Commissioner and mandated to review complaints on the designated issues. The Sub-Committees on Community Rights and Natural Resources and on the Status of Ethnic Groups and Indigenous Tribes handle complaints related to violations of IPs' rights.²⁴⁰

Complaints can be filed by victims of human rights abuses, human rights related private organisations or the NHRCT itself. These may be done via phone, post, email in person, through human rights organisations or directly to the NHRCT. The procedure requires a preliminary consideration to assess the situation and determine whether it amounts to a human rights violation and falls under the mandate of the NHRCT. If it does, the NHRCT then recommends the parties to undergo a reconciliation process and produce a memorandum of agreement between them. Should the reconciliation process not be possible for any given reason, the NHRCT shall consider the case and produce a report recommending the relevant authorities or persons to comply with its recommendations. In the event of non-compliance, the NHRCT may report directly to the Prime Minister for further action or to the Parliament if deemed necessary. However, it must be noted that the NHRCT does not have the power to enforce its recommendations, or to punish a company.

Between 2010 and 2015, the NHRCT complaint mechanism received a total of 3,907 cases of petition, issued 4,755 investigation reports and coordinated 1495 cases of human rights protection.²⁴¹ The "cases of petition" are cases concerning human rights abuses, unfair treatment, or those which the NHRCT consider amounting to an investigation for human rights abuses. Thus, investigation reports are conducted when evidence of human rights abuse is found. At the end of the investigation, the NHRCT makes policy recommendations to relevant agencies or persons and propose measures to resolve the case. Lastly, the NHRCT's involvement in the coordination of human rights protection allows it to consult government agencies, the private sector, individuals, and relevant agencies to achieve fair resolutions to complaints.

Further, with over 2,100 complaints on business-related human rights abuses received since 2001, the NHRCT is also noted to have good potential for non-judicial remedy for such abuses, including in relation to Thai investments abroad. However, while the 2017 NHRCT law seeks to strengthen its status, powers and formation as per the Paris Principles, there are also concerns that the law deprives the NHRCT of some its existing powers such as referring cases to court, among other issues.

Case Study: Karen communities seek remedy for their forced evictions from Kaeng Krachan Forest Complex proposed as a World Heritage Site

The Kaeng Krachan Forest Complex (KKFC) proposed for inscription as a World Heritage Site in 2011, is composed of Kaeng Krachan National Park, Kuiburi National Park, Thairachan National Park and Maenamphachi Wildlife Sanctuary. It is spread over with a total area of 482,225 ha. along the Tanaosri mountain range in the west of Thailand, bordering Myanmar. The areas have been ancestral homes and farmlands of the indigenous Karen communities for hundreds of years. They depend on the forests and natural resources for their living, such as gathering forest products, hunting and practising rotational farming, etc. – practices based on self-sufficiency.

Since the 1960s, four to five Karen communities have been relocated from the Forest Complex areas to the lowlands in the name of forest conservation and threat to national security. For example, in Kuiburi (Prachuabkirikhan province), Karen from Suan Tu Rian were relocated to Pamak, Huasaphan, Paektrakaw and Padang and in Kaeng Krachan (Phetchaburi province), Karen living at Bangkloy-Bon and Jai Paen Din were relocated to Phurakam (in Suan Pheung district in 1996) and Bangkloy-Lang (in 1996 and 2011). According to the government policy, there are still further plans to relocate more communities residing in the forest areas to lowlands even though the existing problems have not yet been resolved.

Up until now, many affected families in Bangkloy-Lang have not received land for farming as promised by the park authorities. Consequently, some of them returned to their traditional homeland to farm and were later arrested by the park officers. They were forcibly evicted with their huts and properties burned in 2011. Meanwhile, the Department of National Parks (DNP) initiated process to get the KKFC inscribed as a World Heritage Site to the UNESCO World Heritage Committee (WHC) the same year.

To seek remedy for the Karen villagers, a complaint was filed²⁴² with the UN Committee on the Elimination of Racial Discrimination (CERD) alleging violent evictions and harassment against the Karen people violated their rights to live in the forest areas, among others. In 2012, the CERD wrote to the Thai government expressing its concern about the allegation and requesting further information on the situation of indigenous peoples in the Kaeng Krachan National Park, including measures taken to improve the situation.²⁴³

At the same time, six Karen villagers, in 2014, also filed a petition against their forced relocation at the Central Administrative Court of Thailand against the DNP and other concerned officials. In 2016, the Court ruled that the Karens had “encroached” forest area and the DNP had rightfully burned their properties but ordered meagre for the damages done to their properties. In response to an appeal by the Karens, the Supreme Administrative Court, despite recognizing that they had been living in the forest before the establishment of the Park, did not allow them to return to their lands as they did not have ownership documents to much dismay of the Karen villagers. The court however ordered higher compensation in 2018 (see section 6.2.1).

Voices from the ground

“On that day, the Forest Rangers [special task force of the National Parks Department] seized a nearby resort, and some border control officers witnessed me planting mango trees here. They said nothing, but today I was arrested on the grounds of encroaching on 5.75 rai [0.92 hectare] of and; the local police station is now preparing the documentation... the land I was working was passed down to me from my parents and I have farmed it for many years. How can this be considered new encroachment? I even don’t know where my 5.75 rai of land is officially located.”

Interview with Karen woman on 25 May 2017 in Kaeng Krachan National Park²⁴⁴

Meanwhile, in absence of a government response to its communication, the Committee, in 2016, reminded the government to address the allegation of violations of the rights of indigenous Karen people in the Kaeng Krachan National Park. It also expressed concerns about the Central Administrative Court judgement and lack of consultation and consent of the Karen communities for the proposed inscription of the KKFC as a World Heritage Site.²⁴⁵

Indigenous peoples’ organizations have also lobbied with the World Heritage Committee (WHC) directly.²⁴⁶ Thus, although the KKFC was adopted as a tentative listing for nomination in 2013 and the DNP nominated for

inscription in 2015, the WHC referred the nomination stating there were many outstanding problems that had not yet been resolved in the KKFC, in particular the case of the Karen in Bangkloy.

As a result, the DNP prepared a roadmap and conducted a total of five consultations with involved stakeholders by the end of 2015. It then once more put forward the nomination to the WHC for consideration in 2016. The WHC upheld their decision to refer the nomination again for another three years to ensure that there would be enough time for the DNP to resolve the said problems on the basis of recommendations made by the UN Office of the High Commissioner for Human Rights and the National Human Rights Commission of Thailand, which were also monitoring the case.

The Government, in the meantime, have also responded to the CERD in 2017 informing of the consultations undertaken with the Karen communities and its intention to adopt a Community Forests Act, which would involve forest communities in decision-making. The CERD has nonetheless reiterated its previous concerns and requested the Government to provide information, among others, on steps for wider consultation with Karen peoples to address remaining concerns regarding nomination of the KKFC as a World Heritage Site.²⁴⁷

Nonetheless, problems continue to exist between the communities and the DNP in forest areas. An estimated 10 Karen families have been arrested on charges of “forest encroachment” in various villages in the Forest Complex area. While some cases have been resolved, six cases are under investigation before sending to the court. There are concerns that conflicts might increase and could intensify into violence in future.²⁴⁸

7.3.3. Non-State-based grievance mechanisms

The Guiding Principles provide that Thailand should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms. More importantly, business enterprises should establish or participate in effective operational-level grievance mechanisms to address grievances early and remediate directly while industry, multi-stakeholder and other collaborative initiatives should also ensure that effective grievance mechanisms are available.

Such grievance mechanisms are rare in Thailand, as also noted by the UN Working Group on Business and Human Rights. There are a few recent initiatives for grievance mechanisms, particularly of large conglomerates²⁴⁹ and industries such as seafood processing. However, such grievance mechanisms dealing specifically with the human rights concerns of indigenous peoples in business contexts are unheard of.

An example of non-State-based grievance mechanism

In the early 1990s, Hamersley Iron Pty Limited planned to develop an iron ore mine and railway at Yandicoogina in the Pilbara region of Australia, where several aboriginal groups lived. In 1994, Hamersley conducted initial consultations with community elders to ensure that the railroad connecting the mine to the seaport had minimal impact on Aboriginal communities. Accordingly, the company decided to negotiate a Land Use Agreement with communities near the site, which coincided with the project’s environmental and social assessment process. To better understand the communities and their concerns, Hamersley spent four months conducting a social mapping exercise. Based on this information, negotiations were held with local communities for a duration of six months. The stakeholders appointed an independent mediator, and three aboriginal groups decided to work together. They appointed an independent legal advisor, funded by Hamersley, and established the Gumala Aboriginal Corporation, which conducted negotiations on behalf of the communities and had the legal capacity to bind its members. By June 1996, the parties had agreed to a Negotiation Protocol and a method for reporting back to the communities on the status of negotiations—including having the elders of the Aboriginal groups observe the negotiations.

In November 1996, Hamersley and the Gumala Aboriginal Corporation agreed on a Memorandum of Understanding. The Corporation then obtained the consent of the Aboriginal parties it had represented by: (1) discussing the Memorandum at a large community meeting; and (2) meeting with each individual to explain the terms of the agreement and obtain that individual’s consent. The result was the Yandicoogina Land Use Agreement, which provided the basis for a long-term collaborative framework between Hamersley and the



Aboriginal parties. Hamersley, in turn, reduced permitting time, completed construction under budget by US\$100 million, and commenced production six months early.²⁵⁰

An in-depth study of indigenous peoples' experiences with access to remedy in business contexts from countries around the world show that ensuring respect for their rights and access to effective remedy have yet to be adequately implemented in State and corporate practice. The first key finding that emerges from the study is that the operational-level grievance mechanisms, that should be the fundamental component of the corporate responsibility to ensure the right to remedy as established in the UN Guiding Principles, are absent on the ground or very inadequate and inefficient in remedying violations. Hence, it is not possible for indigenous peoples to ask redress for the abuses they are confronted with. Secondly, the study highlights the importance of ensuring indigenous participation in the development of the mechanism in order to gain trust and legitimacy. In fact, in some cases, communities were not aware of the mechanism or they were perceiving it as irrelevant to their concerns. Additionally, three lessons could be extracted from the cases of the study and can be summarized as such:

1. The stronger the community structures are, the more likely it is that the community affected can "capitalize on the available redress mechanisms" because investment risk is reduced and it enables the negotiations "from a position of greater unity and power";
2. Due to the range of different issues and rights violations that indigenous peoples face, communities need to have access to a broad range of remedies and grievance mechanisms, respectful also of local level traditional dispute resolution processes;
3. The availability of and the access to independent legal assistance and expert advice is fundamental for indigenous peoples in the context of remedies.²⁵¹

8

GENDER ANALYSIS

Although the challenges to the rights of indigenous women as well as impacts on those rights in business contexts in Thailand have been discussed under various chapters above in this paper, it is critical to re-emphasize the gendered impacts of businesses on human rights of indigenous peoples and need for particular attention and actions to address those impacts. Thus, provided below is an overall gender analysis to promote and protect the rights of indigenous peoples, including women, in business contexts in Thailand.

Indigenous women experience multiple layers and forms of discrimination in Thailand based on identity and gender and often further on the grounds of economic status and regional origin. They are more vulnerable than their male counterparts to human rights abuses as they usually lack access to education and other social services and legal protections. Such vulnerability is elevated particularly due to lack of nationality of a large number of indigenous persons in the country. In fact, the condition of lack of citizenship deprives indigenous women from appropriate access to education, health care services, access to livelihoods and to State's social protection schemes to alleviate poverty, increasing the vulnerability of indigenous women and girls to trafficking and other forms of exploitation.²⁵² As the CEDAW has noted, significant proportion of those without nationality and thus with limited access to services and protection are women as men are reportedly given priority to register for nationality among indigenous peoples. Indigenous women in Thailand have faced similar impacts due to dispossession of lands and resources and forced relocation or displacement of indigenous communities for establishment of national parks or other protected forest areas in the name of conservation or tourism.²⁵³ As described under various cases above, they have been arrested, jailed or faced other penalties on charges of "forest encroachment or degradation" along with their male counterparts.

Not only because belonging to an already marginalized group, but also because of their gender, indigenous women face multiple oppression and are affected by gender stereotypes and negative sex roles, coming from both their communities and the broader Thai society. Furthermore, indigenous women do not benefit equally from government policies and programs, which are not sensitive to the situation of indigenous women and girls.²⁵⁴

While they suffer from restrictions to their resources and livelihoods, they have faced increased violence within households and vulnerability to trafficking and other abuse.²⁵⁵ Despite legislative and protective steps taken by the government, Thailand has long been known as a source, destination and transit country for persons subjected to forced labor and sex trafficking, whereby members of indigenous ethnic groups have experienced trafficking in various forms, particularly indigenous women.²⁵⁶

Drug trafficking is another mean for indigenous women to overcome the lack of appropriate means of economic livelihood. As a matter of fact, 90 percent of female inmates of Chiangrai are facing drug-related charges and one-fourth of them is composed of indigenous women, while in Terng district, more than half of female inmates facing drug-related charges are indigenous women.²⁵⁷

Further, when the male heads of the families are arrested, subjected to judicial harassment, jailed or worse disappeared or killed, indigenous women have to take on additional roles in their families and communities as well as find resources to fight for justice. Thus, it makes a double-edged sword that they lose their resources while they have to fulfill double roles and look for support.

Although there is need for more research to further understand the particular impacts on indigenous women in Thailand in the contexts of business projects in the tourism, agribusiness and mining sectors, those business operations have been documented to impact indigenous women's vulnerability to gender-based human rights violations, thus affecting their ability to manage their lands and resources.²⁵⁸ Thus, one of the primary ways to address human rights impacts on indigenous women due to business contexts should be by ensuring their rights to their lands and resources with their indigenous communities as per their free, prior and informed consent based on meaningful consultations.



8.1. Indigenous Women's Rights to their Land, Territories & Resources

A key issue with regards to indigenous women's rights pertains to their land and resources. Indigenous women are often excluded from the decision-making process with regards to land rights and are vulnerable to land grabbing and discriminatory practices. Indigenous women in Thailand live under the threat of relocation, especially those women who live in protected forest areas namely in the North. Moreover, there exists a lack of resource security in these highland areas out of fear of arrest or detention by authorities.²⁵⁹

Although there have been some cases in which land rights and resource usage has been addressed, the non-implementation of these decisions further exacerbates the issues facing indigenous women. An example of this practice is the 2010 Thai Cabinet resolution on the restoration of livelihood practices of Karen, which states that the Karen have the right to stay on their ancestral lands and continue their traditional agricultural systems.²⁶⁰ While this resolution has been made, it is yet to be implemented. Non-implementation of such decisions can be due to: highly bureaucratic processes which slow the implementation of any progressive measures, discriminatory attitudes and lack of political will on the part of the authorities, or contradictory legal provisions and distortion of operational guidelines such as the approval of economic land concessions, mining licenses and infrastructure projects in indigenous peoples' lands and territories which disregard their rights to lands, territories and resources, free, prior and informed consent (FPIC), and traditional occupations.²⁶¹

8.2. Guardians of Natural Resources & Biodiversity

Indigenous women are regarded as guardians of natural resources and biodiversity and holders of traditional knowledge in the distinctive relationship of indigenous peoples with their lands and resources. Traditionally, indigenous women had equal access to and control over collective land and natural resources while men and women had defined and complementary roles rather than hierarchical. In some matriarchal indigenous communities, including in Thailand, women even held, or continue to hold, higher social status than men – at least in private spheres. However, with gradual loss of collective ownership of lands and resources and domination of outsider culture of private property, indigenous women have felt multiple impacts. Those impacts include loss of traditional livelihoods and knowledge, negative changes in social roles, increase in vulnerability to domestic, socio-economic and cultural as well as sexual violence.²⁶²

8.3. Indigenous Women and Sustainable Forests

Indigenous women play a key role in the sustainability of the forests in which they live. Women are often the key source of information for crops, traditional medicines, wild crops, and harvest seasons. They also serve as important actors in seasonal crop rotation which helps to sustainably manage healthy forests. However, women are acutely affected by climate change and deforestation and are often marginalized in the development and decision-making processes surrounding the forest areas.²⁶³

8.4. RCEP: Threat to Food Security

It is usually the case that indigenous women are the first ones and disproportionately impacted due to business related harms as seen in relation to hindering the use of traditional seeds in the context of free trade agreements such as the RCEP. Such restrictions would primarily affect indigenous women as they are traditionally responsible in exchanging and storing seeds and cultivating lands with those. However, as seen in the opposition of restrictions to traditional seeds, indigenous women are also in the frontline of defending their rights. In Thailand, women have been at the frontlines of environmental activism, including in the face of challenging business operations and as a result they have also faced increasing reprisals.²⁶⁴

As the Indigenous Women Network of Thailand illustrates, a key threat to food security lies in the criminalization of practice of preserving, sharing and diversifying seeds. An amendment to the 1999 Plant Varieties Protection Act, which had previously aimed to achieve a balance between community rights and business interests, could, if passed impose high fines and jail time for farmers who engage in the traditional practice of exchanging, preserving and sharing seeds. This amendment would subject farmers in Thailand to International Union for the Protection of New Varieties of Plants (UPOV) Convention of 1991 thus placing seeds as "intellectual property" of corporations. The criminalization of the traditional practice of sharing seeds would force farmers to purchase corporate seeds as well as fertilizers, pesticides and other equipment, which would drive the farmers into debt. In countries already under the UPOV, farmers have been fined, sent to jail or have committed suicide under massive debt. As of now this

amendment has not been passed, nevertheless if passed it will have dire consequences for farmers, in particular indigenous women.²⁶⁵

8.5. Tourism Attractions

At the same time, indigenous women also have greater vulnerability to exploitation in business operations and other business-related harms. As described above, use of Palaung (“long-neck Karen”) women as tourist attractions while their socio-economic challenges, such as statelessness and restrictions in movement, are left unaddressed is a strong case in point. Nonetheless, even those with citizenship are often able to benefit little from tourism while their lands and resources are taken over and cultures and manifestations thereof are exhibited for tourism projects without effective consultation with them. Within indigenous communities, women are widely recognized as the ones playing greater role than men in maintaining and developing their cultures.²⁶⁶

8.6. Indigenous Women and Human Trafficking

According to the United States Department of State, Thailand is considered a Tier 3 country and is the “source, transit and destination” for trafficking of indigenous women.²⁶⁷ Often, conditions within indigenous communities as well as “push factors” such as forest degradation, denial of citizenship, conflict, poverty and economic or political instability, compel women to migrate, thus making them vulnerable to trafficking. Compounding the problematic situation, indigenous women often face discrimination based on their ethnicity and gender from both their own community and within the context of being a trafficked person. While there exist anti-trafficking laws and policies among the countries in the Mekong region, these policies often fail to meet the needs of indigenous women whose citizenship is not recognized. Furthermore, in addition to the lack of action taken by governments, indigenous women also face customary practices which hinder their empowerment, and societal expectations, such as being able to bring in family income at a young age, which drive women to migrate or exacerbate their vulnerability to trafficking.²⁶⁸

8.7. Gender-based Violence

Problematic is also gender-based violence within indigenous communities. Indigenous women are not likely to report sexual violence and abuses due to lack of knowledge of their rights, lack of means of transportation to report it to the town police and fear of the perpetrator’s retaliation. For these reasons, it is common that the violent act is redressed by local leaders with “amicable settlement” with the perpetrators, unless they are powerful or influential members of the community, in which case women would not be able to gain any protection or remedy. Domestic violence is still prevalent in some communities, leading some women to commit suicide.²⁶⁹

Other traditional practices and cultural norms are harmful to women and girls: early marriage, which interferes with education of indigenous girls; wife kidnapping; stigmatization of widows, which are subjected to sexual violence by men of some communities, such as the Hmong ethnic group.²⁷⁰

Despite the government’s progress in addressing violence against women, such as developing the National Plan to End Violence against Women and protection mechanisms and measures to assist aggrieved women and girls, women from ethnic groups and indigenous communities are excluded from such services and mechanisms and, thus, cannot get access to legal assistance and protection. In fact, in Thailand there are no special measures in place to provide adequate, appropriate and prompt support services and legal assistance to indigenous women affected by gender-based violence. Furthermore, government’s women shelters are not secure enough for indigenous women affected by violence.²⁷¹

8.8. Lack of Gender Mainstreaming and Inclusiveness of Indigenous Women in State policies

A major problem, which enforces gender inequality in Thailand, is that the Department of Women’s Affairs and Family Development (DWAFFD), the national women’s rights machinery, has never carried out and coordinated gender mainstreaming efforts across all government agencies, resulting in Chief Gender Equality Officers and focal points not having adequate knowledge and skills to create and implement gender responsive policies and programs for women, and in particular for indigenous women, which are subsequently left out of such policies and programs.²⁷²

Not only the DWAFFD has proven to be inefficient in including gender perspectives in programming, excluding indigenous women from government development projects, but also it has not applied the CEDAW framework in implementing SDGs yet, especially in regards of SDG 5 on gender equality.²⁷³ To date, there is still no existing

government agency that focuses on the needs and rights of indigenous peoples, especially indigenous women.²⁷⁴

In order to address the particular human rights challenges of indigenous women in business contexts, the Guiding Principles should be implemented in a non-discriminatory manner with particular attention to their rights and needs with due regard to different risks that may be faced by women and men. The States should, as per the Guiding Principles, advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization recognizing the specific challenges faced by indigenous peoples and women. Business enterprises need to consider additional standards on the rights of indigenous women such as those elaborate by various UN instruments.

9

RECOMMENDATIONS FOR THE NATIONAL ACTION PLAN

Based on the international human rights standards and national legal framework and situation of human rights of indigenous peoples in business contexts in Thailand as described above, some key recommendations for immediate and longer term actions of the Thai government are listed below. These actions can be included as commitments in its National Action Plan on Business and Human Rights for further implementation.

Recommendations to the Thai State in relation to the UNGPs Pillar I: State Duty to Protect

Ensure Compliance with International Human Rights Standards & Provide Human Rights Education

- 1** Affirm the rights of indigenous peoples in Thailand's legislation as per the UN Declaration on the Rights of Indigenous Peoples and accede to the ILO Convention No. 169 in line with the recommendations of the CERD and/or CESCR and CEDAW
- 2** Include indigenous peoples and their rights in the National Human Rights Plan of 2019-2023
 - a. *The provisions in the Human Rights Plan must recognize, support and protect IPs and their rights*
- 3** Reconsider the position of denial of existence of indigenous peoples in the country and give legal and political recognition for indigenous peoples based on self-identification as per the recommendation of the CESCR.
 - a. *Ensure the recognition of indigenous peoples as peoples with their own distinct groups, cultures and collective rights, particularly over their lands, territories and natural resources*
 - b. *Review and amend the provisions of the Constitution of 2017, in line with the concluding observation of the UN Human Rights Committee and UNDRIP – particularly Sections 43 and 57 of the 2017 Constitution to define, specify and recognize indigenous peoples. Include a constitutional right and corresponding state duty, for the protection of their traditional cultures and community rights.*
 - c. *Adopt the United Nations Declaration on the Rights of Indigenous Peoples as a binding national legislation and implemented, particularly on the legal definition of "Indigenous people".*
 - d. *Expedite the process of granting Thai citizenship to indigenous persons with necessary reforms in the laws, policies and processes for registration of nationality in order to ensure their access to social services and legal protections.*
- 4** Improve access to education with interventions targeted towards understanding and overcoming specific barriers faced by indigenous peoples, including women, and children in line with the 2015 report of the Special Rapporteur on the Rights of Indigenous Peoples
 - a. *Adopt necessary laws and policies to provide adequate resources for the implementation of mother-tongue based/multilingual education (MTB/MLE) and for the enforcement of the Community Schools Regulation*
- 5** Take concrete steps and comprehensive measures to combat human trafficking of indigenous peoples, especially women
 - a. *Provide services to victims, ensuring that rights of Indigenous women and girls are respected, protected, and fulfilled.*
- 6** Provide trainings on human rights, including the rights of indigenous peoples, as well as other support to the government ministries, departments and agencies (such as those related to tourism, natural resources and environment) responsible for developing and implementing business-related laws and policies so as to ensure human rights obligations are respected in those laws and policies
 - a. *Gender Lens: provide trainings also on women's rights and gender mainstreaming, in order to prevent further discrimination against indigenous women in government policies and programs.*

Ensure Mandatory Policy Commitments and Human Rights Due Diligence for Companies

- 7** Require business enterprises, through necessary legal reforms and regulatory or reporting requirements such as annual audits and renewals, to i) adopt and adhere to policy commitments for respecting human rights; ii) undertake a human rights due diligence process to identify, prevent, mitigate and address their human rights impacts; and iii) remediation processes for adverse human rights
- a. Such requirements on business enterprises should include guidance to i) consider additional human rights standards for groups requiring particular attention such as indigenous peoples and women beyond national laws; ii) draw on independent external experts and involve meaningful consultations with the affected communities to assess their human rights risks and agree on appropriate actions to prevent or remedy adverse impacts; and iii) establish criminal liability for business enterprises operating in Thailand or Thai investments abroad causing human rights violations, particularly in lack of due diligence.*
- 8** Adopt legislation that creates mandatory due diligence obligations for companies, and the public disclosure of relevant information
- a. This must disclose information on corporate structure and governance, contracts, license concessions, business relationships, scientific information about company operations, and company filings*

Ensure Respect and Protection of Ancestral and Traditional Lands of Indigenous Peoples

- 9** Conduct, without delay, a survey in the provinces of southern Thailand where the Chao Lay communities live to determine the land disputes as well as other impacts on the communities due to tourism establishments and protected areas.
- a. Such survey should be undertaken with effective participation of the concerned communities and take into account the archaeological and historical evidence, including through involvement of the NHRCT, to establish the ownership and control of the Chao Lay communities over their lands and resources.*
- 10** Immediately halt the implementation of the existing forest-related laws and policies, particularly the NCPO Order No. 64/2014 and the Forestry Master Plan to, address the harms caused and avoid further harms on the indigenous and other forest-dependent communities.
- a. The concerned authorities should (re)undertake fair investigation, in collaboration with the concerned communities and the NHRCT, on those charged, arrested or prosecuted so far for illegal logging and encroachment or impacted in other ways under the Order No. 64/2014 or other laws in order to redress the harms caused.*
- 11** Reform existing land and forest related laws, cabinet resolutions, regulations, orders and plans to recognize the rights of indigenous peoples to their traditional lands and resources, including forests and waters, in line with the UN Declaration on the Rights of Indigenous Peoples.
- a. Such legal reforms should begin with immediately with revision or suspension of NCPO Order No. 64/2014 and the Forestry Master Plan and be undertaken based on meaningful consultations with the indigenous communities through their own decision making processes in order to obtain free, prior and informed consent of the communities in line with the recommendation of the CCPR and CERD to Thailand.*
- b. In the context of ongoing process of review of forest-related laws, the concerned authorities should ensure full and effective participation of indigenous peoples and their organizations to provide inputs in the revision of the National Park Act, Wildlife Sanctuary Act and draft Community Forest Act.²⁷⁵*
- 12** Amend the provisions of the Minerals Act, in line with CERD General Recommendation No.23
- a. Amend section 7 to include provisions ensuring respect for the traditional ownership rights of indigenous peoples.*

13 Review and amend the National Park Act, in line with the concluding observations of the UN Human Rights Committee.

- a. *Amend the law to enable IPs who has been living there to continue to do so and to set clear guidelines in section 6 to standardized the governments interpretation of what can be claimed as a national park.*
- b. *Review the excessive penalty and the offence in the Act, which states that 'If an offender is found guilty of occupying national park land, he or she may face imprisonment up to five years and/or a fine not exceeding 20,000 baht. Allowing cattle to enter the park is punishable with imprisonment of up to one month and/or a fine not exceeding 1000 baht.*

14 Design and implement necessary administrative programmes, such as land and resource demarcation, mapping and titling, for issuance of community titles to indigenous peoples with full and secure ownership and/or user rights over their lands and resources.

- a. *Adequate financial and technical resources should be allocated for the effective implementation of such programmes with formation of independent and fair dispute resolution mechanisms as needed.*
- b. *Arrangements such as special cultural zones for indigenous and ethnic communities should be considered to ensure restoration and promotion of traditional livelihoods of communities.²⁷⁶*

15 Protect EHRDs and IPs from SLAPP cases

- a. *Guidelines should be developed to prevent businesses from filing SLAPP lawsuits against EHRDs and IPs. Any anti-SLAPP legislation implemented should ensure that the burden of proof remains on the business/prosecution*

Royal Projects

16 Ensure that ongoing and future royal projects and agribusiness operations such as contract farming undertaken in the lands of indigenous peoples recognize and respect their land ownership rights as well as obtain their free, prior and informed consent for the operations, including for demarcation of lands from protected areas where appropriate.

Guarantee Human Rights and Environmental Impact Assessments inclusive of Indigenous Peoples

17 Ensure the laws, policies and processes related to environmental impact assessments, particularly for large-scale agribusiness, extractive, energy and development projects, include assessing actual and potential human rights impacts.

- a. *Independent experts agreed with the affected communities should be involved in the conduct of the assessments, which should involve meaningful consultation with the communities to obtain their free, prior and informed consent.*
- b. *Gender lens: ensure that Indigenous women are not excluded from consultations related to environmental impact assessments and duly consider the specific impacts of development projects on them.*
- c. *Gender lens: Ensure laws that permit indigenous women to use their traditional knowledge in natural resource management and protection of environment, strengthen their roles in seeking effective control and preventing the destruction and pollution of land, air, water, sea, ice, wildlife, forests, pastures and other natural resources.²⁷⁷*

Ensure Tourism Industry and Tourism Activities Respect Indigenous Peoples Rights

18 Review existing tourism plans and programs involving indigenous peoples and/or implement new community-based tourism initiatives with their meaningful engagement in developing those plans, programs and initiatives, including the option for them say no.

- a. *Evaluation of tourism development should also address the challenges and advance the rights of indigenous peoples concerned and benefits should be shared fairly with the communities*

- 19** Require national parks and protected areas aimed at carbon trading and tourism to undertake human rights due diligence considering them equivalent to state-owned enterprises
- Collaborative approach should be implemented for participatory demarcation and management of national parks and protected areas with the concerned communities based on the positive experience in Ob Luang National Park.*
 - Necessary trainings and assistance should be provided for the officials of national parks and protected areas on sustainable conservation and natural resource management strategies respectful of the rights of indigenous communities.*
 - Full and effective participation of indigenous peoples should also be ensured in the climate change mitigation processes of Thailand, including preparation and implementation of REDD+, to guarantee respect for their rights in those processes.*
 - Gender Lens: Include indigenous women in the decision-making processes related to tourism activities*

Address the Negative Impacts of Free Trade Agreements on Indigenous Peoples

- 20** Undertake extensive and meaningful consultations with indigenous and civil society representatives on the ongoing and future investment treaties and free trade agreements to ensure respect for human rights in those treaties and agreements
- Such treaties and agreements, if agreed, should include clauses on human rights to ensure that internationally recognized human rights are protected at the same level as business interests of the State and companies.*

Recommendations to Businesses in relation to the UNGPs Pillar II: Corporate Responsibility to Respect Human Rights

Fulfilment of International Obligations, including those under the UNGPs and SDGs

- 1** Partner with Indigenous Peoples, who can assist them towards the realisation of their UNGP and SDG commitments
 - IPs can help companies implement policies and measures that are in line with and that would help them achieve goals under the UNGP and SDG*
- 2** Conduct assessments and due diligence processes to determine the impact of business activities on indigenous peoples, with respect to individual and community rights
 - Regulated, periodic and frequent visits to indigenous peoples should be made by business representatives to collect information on the detrimental effects of their business, on their rights and the environment*
 - Carry out a need assessment study to create a project plans, without adverse impacts*
 - Carry out periodic reviews of the project and share the report with indigenous peoples or with their representatives, to ensure transparency in the report*
 - Gender Lense: Include indigenous women in the assessment, ensure their participation to express concerns on business activities effects*

Abstain from policies and actions that violate human rights

- 3** Take all necessary and lawful measures to ensure that business practices do not cause, contribute or remain complicit in violations, with respect to the rights of indigenous peoples
 - Avoid contributing to any actions amounting to land grabbing and forced evictions; structure arrangements with corporate partners to ensure all parties uphold responsibilities with respect to these rights; and build leverage in pre-existing business relations to prevent or mitigate adverse impacts of development projects or other business activities.*
 - Gender Lense: ensure the protection of indigenous women's rights and that business practices do not harm them*

- 4 Abstain from advocating for legislations that restrict rights of indigenous peoples, in contravention of the duty to respect set out for businesses in the UNGPs through corporate capture of the legislature
 - a. *Companies should understand and promote the rights of indigenous peoples, which are beneficial to them and their economic well-being as well*
- 5 Investors should ensure that they consider environmental and social risks as mitigating factors while investing in projects, within the country and abroad
 - a. *Internal policy should mandate the requirement of investment projects to address any negative impacts that projects may have on the environment and at the social level*

Recommendations to the State and Businesses in relation to the UNGPs Pillar III: Access to Effective Remedy

How Can the State and Businesses enhance Redress Mechanisms?

For the State:

- 1 Expedite the process of granting Thai citizenship to indigenous persons with necessary reforms in the laws, policies and processes for registration of nationality in order to ensure their access to social services, access to justice and legal protections.
 - a. *Gender Lens: Special attention should be paid to indigenous women in granting nationality and ensuring access to services, access to justice and legal protections.*
- 2 Adopt a national action plan on the implementation of UNDRIP, and in accordance with its provisions, in line with recommendations from the Statement by the United Nations Working Group on Business and Human Rights at the end of their visit to Thailand
 - a. *This must provide guidelines that legitimize and guarantee ensure effective and politically meaningful participation in the decision-making process and equal representation in the governance of the country*
- 3 Remove barriers to access effective judicial remedies for indigenous peoples through courts, including by i) enforcing implementation of existing positive laws and policies effectively through priority over conflicting laws and policies; ii) eliminating biases and discrimination in the laws and justice system through sensitization and awareness-raising of security and judicial personnel; and iii) addressing practical limitations of language challenges and need for legal assistance through provision of effective interpretation and free legal aid services
 - a. *Support mechanisms such as the Justice Fund should be strengthened by providing more resources and independence while setting up separate dedicated mechanisms should be considered for groups requiring particular attention such as indigenous peoples and women. Judicial remedies should also take into account the customary laws and practices of indigenous peoples where they are in line with human rights standards.*
- 4 Ensure prompt investigation through an impartial, independent and an autonomous team of experts, when a complaint is filed against state authorities and law enforcement officials
 - a. *Strengthen the Ombudsman, the Administrative Courts and the National Human Rights Commission of Thailand (NHRCT) at the national and local level through capacity, resource and knowledge building on business and human rights.*
- 5 Ensure that security forces perform their duties strictly in accordance with the law
 - a. *Eradicate the concept of impunity by bringing security personnel guilty of wrongdoings to justice and providing prompt and sufficient remedies to victims of human rights violations.*
- 6 Undertake fair and effective investigation into the disappearance, killing and other reprisals against indigenous leaders, human rights defenders and community members and take steps to ensure access to justice for such reprisals in order to guarantee end of impunity and insecurity in the indigenous

communities from the government authorities, businesses or other community members

- a. *An independent, dedicated and well-resourced mechanism should be developed to protect and support human rights defenders against ongoing and future reprisals, which are on the rise, including in business contexts. The NHRCT could be considered as an option for such mechanism.*

7

Strengthen the powers, mandate and independence of the NHRCT for enhancing its role as an effective non-judicial grievance mechanism as part of a comprehensive State-based system for remedy of business-related human rights abuse, including for Thai investments abroad.

- a. *Greater powers and mandate for the NHRCT should also be accompanied by greater resources to undertake its works. Further, setting up new mechanisms such as parliamentary committees could also be considered. However, those non-judicial mechanisms should take into account the customary laws and practices of indigenous peoples where they are in line with human rights standards.*

8

End all land related legal proceedings against IPs facing investigation, charges, or prosecution initiated by State authorities for engaging in legitimate activities protected by international human rights law or for addressing violations.

- a. *Any processes and proceedings must be withdrawn or refrained from. Compensation must be provided for the actual loss to livelihood, the loss caused by unintended deficiencies and the cost incurred as a result of legal proceedings.*
- b. *Gender Lens: Introduce special measures to allow the indigenous women, to live, do subsistence farming and constructively preserve national forest, including ecological tourism, and cease legal action on land dispute.²⁷⁸*

9

Increase the capacity and budget of as well as access to the Justice Fund.

- a. *Support mechanisms such as the Justice Fund should be strengthened by providing more resources and independence, while setting up of separate dedicated mechanisms should be considered for groups requiring particular attention such as indigenous peoples and women.*

10

Encourage business enterprises and associations or multi-stakeholder bodies to establish and participate in effective non-State-based grievance mechanisms, including at operational levels.

- a. *Requirements for such mechanisms can be included in granting or renewing licences and/or agreements with business enterprises or in the statutes of business associations with consideration to the size, operation and experiences or potential of harms of the business/sector. Those mechanisms should be culturally appropriate to indigenous peoples when engaging with them.*

For Businesses:

Drop Legal Actions and force eviction against IPs initiated by Businesses

11

End all legal proceedings against individuals facing investigation, charges, or prosecution initiated by businesses for engaging in legitimate activities protected by international human rights law or for addressing violations

- a. *Any processes and proceedings must be withdrawn or refrained from. Compensation must be provided for the actual loss to livelihood, the loss caused by intended deficiencies and the cost incurred as a result of legal proceedings*

12

End all forms of forced eviction against the IPs from their habitual place, in line with the CERD General Recommendation No.23

- a. *Any processes and proceedings must be withdrawn or refrained from. Compensation must be provided for the actual loss to livelihood, the loss caused by intended deficiencies and the cost incurred as a result of eviction*



Grievance Mechanisms processes of Businesses

13

Business enterprises and associations or multi-stakeholder bodies should establish and participate in effective non-State-based grievance mechanisms, including at operational levels.

- a. *Requirements for such mechanisms can be included in the granting or renewal of licences and/or agreements with business enterprises or in the statutes of business associations with consideration to the size, operation and experiences or potential of harms of the business/sector.*



ENDNOTES

- ¹ 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>
- ² 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>
- ³ EU Delegation to Thailand Field visit to Indigenous Peoples groups in Chiang Mai, Thailand, on 16 January 2018, co-organised by Manushya Foundation, Indigenous Women Network of Thailand (IWNT), Inter Mountain Peoples' Education and Culture in Thailand Association (IMPECT) and the EU Delegation to Thailand, (January 2018), available at: <https://www.facebook.com/ManushyaFdn/posts/2052961731652933>
- ⁴ Field Visit of EU Political Counsellors at Huay Hoi Karen Village on 15 March 2018, co-organised by Manushya Foundation, Network of Indigenous Peoples of Thailand (NIPT), Indigenous Women Network of Thailand (IWNT), Inter Mountain Peoples' Education and Culture in Thailand Association (IMPECT) and the EU Delegation to Thailand, (March 2018), available at: https://www.facebook.com/pg/ManushyaFdn/photos/?tab=album&album_id=2065331197082653
- ⁵ International Labor Organization, *Indigenous and Tribal Peoples Convention (No. 169)*, 1989, Art. 1, available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:C169
- ⁶ OHCHR, *Indigenous Peoples and the United Nations Human Rights System*, Factsheet No. 9 Rev.2, 2013, available at: <http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf>
- ⁷ United Nations General Assembly, *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*, 13 September 2007, Art. 1 and 2, available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
- ⁸ United Nations General Assembly, *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*, 13 September 2007, Art. 3 and 4, available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
- ⁹ United Nations General Assembly, *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*, 13 September 2007, Art. 26, available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
- ¹⁰ United Nations General Assembly, *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*, 13 September 2007, Art. 26(3), available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
- ¹¹ United Nations General Assembly, *UN Declaration on the Rights of Indigenous Peoples (UNDRIP)*, 13 September 2007, Art. 27, available at: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
- ¹² OHCHR, *Indigenous Peoples and the United Nations Human Rights System*, Factsheet No.9 Rev. 2, 2013, available at: <http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf>
- ¹³ "Free" implies no coercion, intimidation or manipulation. Prior implies consent is sought far enough in advance of any authorization or commencement of activities, and the time requirements of indigenous consultation and consensus processes are respected. Informed implies that all information relating to the activity is provided to indigenous peoples and that the information is objective, accurate and presented in a manner or form that is understandable to indigenous peoples. Consent implies that indigenous peoples have agreed to the activity that is the subject of the consultation while indigenous peoples also have the prerogative to withhold consent or to offer it with conditions.

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Consultation is required to be "free" (free of external manipulation, interference or coercion, and intimidation), "prior" (timely disclosure of information) and "informed" (relevant, understandable and accessible information), and apply to the entire project process and not to the early stages of the project alone. The borrower will tailor its consultation process to the language preferences of the affected communities, their decision-making processes, and the needs of disadvantaged or vulnerable groups. Consultation with Indigenous Peoples must conform to specific and detailed requirements as found in Performance Standard 7. Furthermore, the special rights of Indigenous Peoples as recognized by host-country legislation will need to be addressed."

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[expires=1510541901&id=id&accname=guest&checksum=ED909BF5BF5F1E6C40449DCB73FAF14](http://www.oecd-ilibrary.org/docserver/download/2016031e.pdf?expires=1510541901&id=id&accname=guest&checksum=ED909BF5BF5F1E6C40449DCB73FAF14)

OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector's: Annex B Engaging with indigenous peoples asserts that "In many respects the same steps and principles for meaningful stakeholder engagement and due diligence outlined in the core of this Guidance will apply in the context of engagement with indigenous peoples. However certain characteristics of indigenous peoples will require special consideration including: their governance institutions, practices and any associated right to self-determination; their relationship with land; their spiritual and cultural heritage; historical discrimination they have suffered; their unique and at times vulnerable position in society; their recognition under international law, as well as at times special legal status under national legislation and policy. Extractive activities that affect indigenous peoples should be aware of these unique considerations."

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These cover 9 hill tribes: Karen; Hmong or Maew; Mien or Yao; Akha or Ikor; Lahu or Muser; Lisu or Lisor; Lua or Thin; Kamu; and Mlabi or Thong Luang residing in the north and western of Thailand.

These cover 38 ethnic groups: Mon; Tai Lue; Tai Song Dam; Tai Yai; Tai Khoen; Tai Yong; Tai Hya; Tai Yuen; Phu Tai; Lao Krang; Lao Ngaw; Lao Kar; Lao Tee; Lao Wieng; Sak; Sere; Prang; Brue (Soe); Song; Sotawing; Iempeekong; Kula; Sauot (Saung); Kui (Saew); Yakul (Chao Bon); Yao; Yaew; Tai Kamer. Vietnam (Yuan), Yermesor (Besu); Chong; Kasong; Malayukaleang and Lao Song (Tai Dam).

These cover 3 chao lay groups: Mokaen; Moklean; and Urakrawoew.

These cover 2 hunter-gatherer groups known as Mlabi (Tong Luang) in the north and Mani in the south.

The ten so-called "hill tribes" from the North that initiated the IP movement are the Akha, Dara'ang, Hmong, lu-Mien, Kachin, Karen (Pgakenyaw and Pholong), Lahu, Lisu, Lua (Lawa), and Shan (Tai-Yai). The additional 30 ethnic groups that have since joined the IP movement are the Bisu, Bru, Chong, H'tin, Kaloeng, Kayong, Khamu, Kui, Laokang, Lao-song, Lao-wiang, Mlabri, Moken, Moklen, Mon, Phalang, Phu-Thai, Saek, Sawng, So, Sothawueng, Tai-ya, Thai-koen, Thai-song-dam, Thai-yong, Thai-yuan, Urak Lawoi', Yahakun, Yaw, and Yo. With the exception of the H'tin, Khamu, and Mlabri, all of these latter groups are considered lowland ethnic groups. See ISEAS Issue 2016:

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About Manushya Foundation

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.

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