

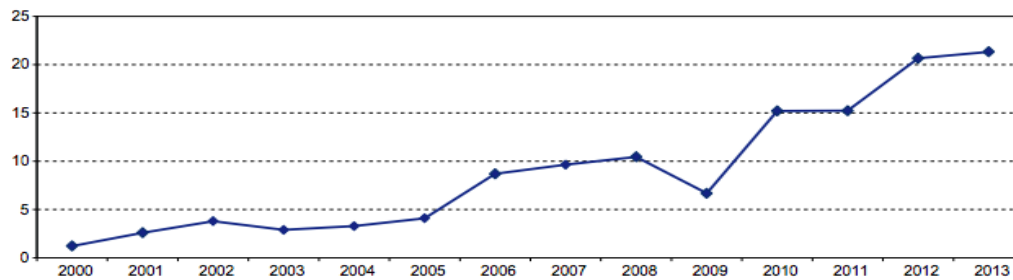


EXTRATERRITORIAL OBLIGATIONS IN THE CONTEXT OF CROSS-BORDER INVESTMENT IN ASEAN: THE ROLE OF HUMAN RIGHTS INSTITUTIONS

This workshop examines the role of National Human Rights Institutions (NHRIs) in Southeast Asia and the ASEAN Inter-governmental Commission on Human Rights (AICHR) in addressing complaints of transboundary human rights violations by government agencies and private and state-owned companies in the context of cross-border investment within ASEAN.

More than a decade ago, at the 13th ASEAN summit in 2003, ASEAN leaders agreed to establish the ‘ASEAN Community’ in an effort to facilitate greater regional integration, specifically around three pillars: political-security, socio-cultural, and economic. The ASEAN Economic Community - often referred to as ‘AEC 2015’ – aims for regional economic integration by 2015. The result since 2003 has been an annual increase in intra-ASEAN investment (*see figure 1*); a trend that is likely to continue.

Figure 1 INTRA-ASEAN INVESTMENT GROWTH



Such intra-regional investments represent a valuable source of capital, resources and technical knowledge for host governments and generate important opportunities to enhance economic development, especially for less developed countries in the region. Nonetheless, cross-border investments often have significant human rights and environmental implications and present considerable risks.

The establishment of the AEC and resulting increase in cross-border investments, often from countries with stronger human rights and environmental safeguards to those lacking in such protections, also brings about important challenges for ensuring accountability and access to justice for affected communities. While development and investment projects offer the potential to benefit large swathes of ASEAN citizens, without proper accountability, all too often the development will not aid but in fact hurt rural farmers, indigenous persons and other marginalized groups and result in uneven and unsustainable development.

Recent developments in international human rights law have recognized the negative consequences of transnational investments and have started to develop and frame obligations and establish international standards for understanding the extra-territorial human rights obligations of businesses and governments.

The United Nations *Guiding Principles on Business and Human Rights (UNGPs)*,¹ endorsed by the UN Human Rights Council in 2011 and also known as the “Protect, Respect, Remedy” framework, have been widely endorsed by governments and companies across the globe. The UNGPs provide a set of 31 guidelines outlining the respective obligations of both businesses and governments in relation to human rights impacts of business enterprises, including in their overseas investment activities. Furthermore, the UN Human Rights Council recently passed a resolution on the development of an international legally binding instrument on business and human rights.²

The *Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011)* are a set of principles developed at an expert meeting convened by the Maastricht Centre of Human Rights and the International Commission of Jurists in September 2011. The normative set of principles aims at defining and clarifying the extraterritorial human rights obligations of states in an era characterized by economic globalization, expanding the scope of human rights obligations of governments beyond their own borders.³

The *ASEAN Human Rights Declaration (2012)*,⁴ which was adopted by ASEAN governments to affirm and complement the Universal Declaration on Human Rights (UDHR) specifically for the ASEAN community, contains specific principles including the right to development⁵ and the right to a ‘safe, clean and sustainable environment’,⁶ identifying these as particularly important in the ASEAN context.

In the absence of effective national mechanisms or laws by host or home states to address the adverse human rights consequences of cross-border investment projects, national human rights institutions (NHRIs) within ASEAN are emerging as a critical mechanism for ensuring accountability and providing access to justice and remediation for affected communities.

¹ Office of the High Commissioner on Human Rights, *UN Guiding Principles on Business and Human Rights (2011)*, available at: www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

² United Nations Human Rights Council, Resolution on the Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, A/HRC/26/L.22/Rev.1, 26 June 2014.

³ Maastricht Centre of Human Rights and the International Commission of Jurists, *Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights (2011)*, available at: www.etoconsortium.org/nc/en/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23.

⁴ Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration*, 18 November 2012, available at: www.asean.org/news/asean-statement-communiques/item/asean-human-rights-declaration.

⁵ Articles 35-37.

⁶ Article 28(f).

The current workshop will examine several case studies of recent complaints submitted by affected local communities to the National Human Rights Commission of Thailand and Malaysian National Human Rights Commission (SUHAKAM).

Dawei Deep Sea Port and Special Economic Zone, Myanmar: proposed to be Southeast Asia's largest industrial complex, with an estimated infrastructural investment of over US\$50 billion that would include a deep seaport, industrial estate (including large petrochemical industrial complex, heavy industry zone, oil and gas industry, as well as medium and light industries) and a road/pipeline/rail link that will extend 350 kilometers to Bangkok via Kanchanaburi Province.

Heinda Mine: involves tin mining in Heinda Village in the Tanintharyi Region of Southern Myanmar. Mining activities initially commenced from 1927 to 1948 (by the British); the mines are currently operated by Myanmar Pongpipat Co. Ltd (MPC), a subsidiary of Thai Mining Company owned by Mr. Kriangkrai Chavaltanpipat since July 1999. Ten villages along Heinda and Heindu streams are affected by the runoff from the mining, which is producing a range of impacts including water pollution and water shortages, damage to villagers' plantations, flooding, soil erosion, ecosystem degradation and other impacts.

Koh Kong, Cambodia: two consecutive economic land concessions (ELCs) were granted to two Cambodian companies – Koh Kong Plantation Company Ltd. (KKPT) and Koh Kong Sugar Industry Company Ltd (KCSI), for a sugarcane plantation and processing factory. Both companies are 70% owned and controlled by Thai company Khon Kaen Sugar Industry Public Co. Ltd. (KSL), with the remaining 30% being owned by Taiwanese company Vewong Corporation. Hundreds of families were forcibly evicted without prior notice to make way for the concessions, and subjected to violence and loss of property and livelihoods. Over 200 families remain uncompensated and continue to struggle for return of the land and compensation for the losses and harm suffered.

Oddar Meanchey, Cambodia: three 70-year economic land concessions (ELCs) totalling 19,700 hectares were given by the Royal Cambodian Government to senior figures in the Thai sugar giant Mitr Phol Sugar Corporation. The ELCs covered areas of private land owned and occupied by Cambodian citizens. The ELCs eventually led to the forced displacement of over 1,000 men, women, and children as well as increased food insecurity, deterioration of livelihoods, and loss of sources of income as a result of lost land and access to natural resources in the area.

Don Sahong, Lao PDR: a proposed USD \$600-700 million, 260MW dam located on the downstream end of the Hou Sahong channel on the Mekong River mainstream less than 2km from the Cambodian border. It will be the *second* mainstream Mekong dam behind Xayaburi. The Malaysian company, Mega First Corporation Berhad, is a majority shareholder, and Chinese, state-owned Sinohydro Group Ltd. (Power Construction Corporation of China, or PowerChina) is the lead contractor.

Xayaburi Dam, Lao PDR: a US\$3.5 billion, 1,285MW hydroelectric dam along the mainstream Mekong; it is the *first* in a series of eleven proposed dams along the lower Mekong, nine of which are located in Lao PDR. The Electrical Generating Authority of Thailand has agreed to purchase 95% of the electricity, Ch. Karnchang Public Company, Thailand's second largest construction company, is lead contractor, and four Thai banks are providing the funding.

Following a look at specific case studies, the discussion will step back to examine the broader role of national and regional human rights institutions, including the AICHR, in holding states and businesses accountable, both in terms of direct human rights violations as well as indirect violations stemming from impacts to the supporting ecosystems, livelihoods, and cultures of ASEAN communities. The panel will address the accountability and rule of law challenges that enable such human rights violations to occur and the experience to date and future potential of NHRIs and the AICHR in providing remediation in such cases in ASEAN countries. In raising these issues, the workshop aims to contribute to the broader discussion of promoting development that is just, fair, and equitable to ASEAN's people and environment.

Workshop Details

Date: Friday, 24 April 2015
Time: 2:00 – 4:00pm
Venue: Dewan Kuliah B-2
UTM Space
Kuala Lumpur

The workshop will include a panel discussion with representatives of national and regional human rights institutions and members of civil society organizations from Cambodia, Myanmar, and Thailand who have represented communities in human rights cases involving cross-border investments. Short presentations by the panel speakers will be followed by questions and discussion from the audience. The panel speakers are:

- Mr. Eang Vuthy, Executive Director, Equitable Cambodia (Cambodia)
- Mr. Ye Lin Myint, Dawei Development Association (Myanmar)
- Ms. Sor. Rattanamanee Polkla, Coordinator, Community Resource Centre, (Thailand)
- Dr. Nirun Phitakwatchara, Commissioner, National Human Rights Commission of Thailand (NHRCT)
- Professor Dato' Dr. Aishah Bidin, Commissioner, National Human Rights Commission of Malaysia (SUHAKAM)
- Dr. Seree Nonthasoot, Representative of Thailand to the ASEAN Intergovernmental Commission on Human Rights (AICHR)

The panel discussion will be facilitated by Ms. Maureen Harris, Mekong Legal Program Director, EarthRights International.

Organised by:

Community Resource Centre (Thailand)

Suaram (Malaysia)

Equitable Cambodia (Cambodia)

Towards Ecological Recovery and Regional Alliance (TERRA)

With support from:

National Human Rights Commission of Thailand

EarthRights International

Dawei Development Association (Myanmar)

Spirit in Education Movement (Thailand)

For further information please contact Sor. Rattanamanee Polkla (sorrattana1@gmail.com) or Maureen Harris (maureen@earthrights.org).