|  |
| --- |
| **Thailand’s response to IIAs Questionnaire of the Working Group on the issue of human rights and transnational corporations and other business enterprises** |

**State duty to protect human rights**

1. **Does your State’s Constitution, laws or national action plan on business and human rights require the integration of human rights provisions in IIA concluded by your Government?**

* No. However, the Framework for Bilateral Investment Treaty (BIT) Negotiations approved by the Cabinet in 2018 encourages foreign investors to pursue corporate social responsibility (CSR) in their invested countries which covers human rights related issues such as labour, the environment, community relations, and anti-corruption. Furthermore, Thailand’s existing IIAs oblige foreign investors to comply with domestic laws and regulations, which would normally provide protection for human rights.
* Additionally, the 1st National Action Plan on Business and Human Rights (2019 - 2022) provides an Action Plan on Cross Border Investment and Multinational Enterprises as one of its key elements.

1. **Are there any mechanisms or processes (e.g., inter-ministerial committee,   
   ex-ante human rights impact assessment) to assess and ensure that IIAs are compatible with international human rights obligations of your country?**

* Thailand has recently established the Committee on the Protection of International Investment under the Regulation of the Office of the Prime Minister on Work Relating to the Protection of International Investments B.E. 2562 (2019) to serve as a mechanism to formulate Thailand’s policies on protection and management of international investments in the country. It aims to ensure adequate policy space on the part of the State to regulate in pursuance of public welfare objectives such as the protection of human rights, the environment and public health. Therefore, Thailand now has a mechanism through which its international human rights obligations can be taken into account during the treaty-making process.

1. **How does your Government ensure that IIAs do not impact negatively on the realisation of other important policy objectives such as achieving gender equality, protection of the environment, mitigation of climate change and implementation of the Sustainable Development Goals?**

* Thailand does recognise the need to strike the right balance between attracting foreign direct investment, which contributes to raising living standards, reducing poverty and promoting sustainable growth, and the policy space needed on the part of the State to regulate for public welfare objectives. Safeguards provisions or exceptions are generally included in Thailand’s IIAs to ensure the right balance.

1. **How does your Government ensure that IIAs provide adequate human rights safeguards in cases where investments may take place in special economic zones or in conflict and post-conflict settings?**

* The safeguards provisions and exceptions included in Thailand’s IIAs should provide the necessary policy space to ensure adequate human rights safeguards via-a-vis obligations under IIAs. It should be noted that the context of conflict and post-conflict settings may not be directly applicable in the case of Thailand.

1. **Is your Government considering to reform or replace the Investor-State Dispute Settlement (ISDS) mechanism in your old or new IIAs? If so, please provide details about the proposed alternatives.**

* Thailand is in the final stages of considering a new BIT Model which aims to improve clarity on ISDS procedures and to ensure adequate right on part of the state to regulate in pursuance of public welfare objectives. This should make Thailand’s future IIAs more balanced.

1. **Has the COVID-19 pandemic affected your Government’s approach to IIAs and/or ISDS?**

* The COVID-19 pandemic highlights the need for clarity on the right to regulate, especially with regard to public health. The Government is cautious with measures it has to implement to contain the COVID-19 pandemic. Given that the new BIT Model provides more policy space on the part of the State, it is hoped that such measures will not violate Thailand’s obligations under new IIAs to be concluded in the future.

1. **Do IIAs concluded by your Government (including your Model Bilateral Investment Treaty) include human rights provisions addressed directly to investors and their investments? Are these provisions soft law recommendations or legally binding?**

* **Existing IIAs**: Not specifically. However, Thailand’s existing IIAs oblige foreign investors to comply with domestic laws and regulations, which would normally provide protection for human rights.
* **Future IIAs**: The Framework for Bilateral Investment Treaty (BIT) Negotiations approved by the Cabinet in 2018 encourages foreign investors to pursue corporate social responsibility (CSR) which can cover human rights related issues such as labour, the environment, community relations, and anti-corruption. However, investors are not “obliged” to do so.

1. **Does IIAs concluded by your Government expressly require foreign investors to comply with domestic laws relating to human rights, labour rights, and the environment?**

* Yes, Thailand’s IIAs generally require foreign investors to comply with domestic laws and regulations, including those that concern human rights, labour rights and the environment. Some IIAs have a provision to that effect, such as (1) Thailand – Sri Lanka BIT(2) BIT Thailand - Philippines[[1]](#footnote-1). This concept is also highlighted in the new BIT Model.

1. **Does your Government require – under IIAs or otherwise – investor to conduct human rights due diligence (HRDD) or environmental and human rights impact assessment prior to their investment? If so, what mechanisms exist to ensure that investors comply with this obligation?**

* Under IIAs, no. However, under domestic laws and regulations, investors are generally required to conduct impact assessments prior to starting an investment project.

1. **What measures exist to ensure that HRDD or impact assessments conducted by investors are gender-responsive and involve a meaningful participation of impacted communities, particularly marginalized groups and individuals?**

* The Memorandum of Agreement on Sustainable Banking Guidelines-Responsible Lending between the Bank of Thailand and the Association of International Banks, concluded in February 2020, serves as guidelines for Thai banks and other financial institutions to incorporate Environmental, Social and Coporate Governance (ESG) aspects into investment analysis and decision-making processes. Additionally, the Neighbouring Countries Economic Development Cooperation Agency under the Ministry of Finance of Thailand has developed the Environmental and Social Safeguards Guidelines (ESS), which set preconditions for the investment - recipient countries to provide evidence that measures are or will be taken to reduce and address adverse social and environmental impacts.

**Access to remedy**

1. **Do IIAs concluded by your Government include processes or mechanisms to allow affected individuals or communities to seek remedies, in host or home countries, against investors for human rights abuses linked to investment-related projects?**

* Not specifically. However, affected individuals or communities may seek remedies through channels provided under domestic laws and regulations.

1. **Has your Government pursued counterclaims against investors for human rights abuses linked to their investments? If yes, please provide details.**

* No.

1. **Do IIAs concluded by your Government allow affected individuals or communities to file amicus brief before ISDS or another dispute settlement process?**

* Thailand’s IIAs do not explicitly allow affected individuals or communities to file amicus brief before ISDS tribunal but this concept may be available through UNCITRAL Arbitration Rules[[2]](#footnote-2), which Thailand generally has included as one of the fora for dispute settlement with investors. Under UNCITRAL Arbitration Rules 1976, an ISDS tribunal could consider allowing a person that is not a disputing Party to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.[[3]](#footnote-3)

1. **Does your Government require – under IIAs or otherwise – investor to establish in meaningful consultation with affected communities, operational level grievance mechanisms that are effective in terms of process and remedial outcomes? If so, please provide details.**

* Not under IIAs. However, meaningful consultation is stipulated in laws and regulations on investments, including the Consitution of the Kingdom of Thailand, B.E. 2560 (2017)[[4]](#footnote-4), and the Proclamation of the Ministry of Natural Resources and Environment of Thailand on Identification of Project, Operation or Activity Requiring Environmental Impact Assessment (EIA) and Requirements of the EIA. In this connection, affected individuals or communities may seek remedies through channels provided under related domestic laws and regulations.

**Good Practices**

1. **Are there any good practices regarding the integration of human rights issues in IIAs that you would like to share with the Working Group? Any other comments or suggestion are also welcome.**

* The recently established Committee on the Protection of International Investment should serve as a mechanism that ensures that Thailand’s policies on the protection of foreign direct investment are up to date with international trends and practices, and provides a forum for government agencies to discuss and be informed of obligations under IIAs.

\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*\*

1. **BIT Thailand – Sri Lanka 1996 (Article 9)** All investments shall, subject to this Agreement, be governed by the laws in force in the territory of the contracting Party in which such investments are made and in accordance with such rules of International law as may be applicable.

   **BIT Thailand – Philippines 1995 (Article 3 paragrpah 1)** “…All investments to which this Agreement relates shall, subject to this Agreement, be govemed by the laws and regulations of the host country, induding rules of registration and valuation of such investment” [↑](#footnote-ref-1)
2. **UNCITRAL Arbitration Rules 1976 Article 15.1** Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case. [↑](#footnote-ref-2)
3. **Glamis Gold, Ltd. v. The United States of America, UNCITRAL**[Source: <https://www.italaw.com/cases/487>]

   **Resolute Forest Products Inc. v Government of Canada, PCA Case No. 2016-13**

   [Source: <https://www.italaw.com/cases/4369>] [↑](#footnote-ref-3)
4. **Section 58**. In regard to any undertaking by the State or which the State will permit any person to carry out, if such undertaking may severely affect the natural resources,environmental quality, health, sanitation, quality of life or any other essential interests of the people or community or environment, the State shall undertake to study and assess the impact on environmental quality and health of the people or communities and shall arrange

   a public hearing of relevant stakeholders, people and communities in advance in order to take them into consideration for the implementation or granting of permission as provided by the law.

   A person and a community shall have the right to receive information, explanation and reasons from a State agency prior to the implementation or granting of permission under paragraph one.

   In the implementationor granting of permission under paragraph one, the State shall take precautions to minimise the impact on people, community, environment, and biodiversity and shall undertake to remedy the grievance or damage for the affected people or community in a fair manner without delay. [↑](#footnote-ref-4)