

Global Trade Governance and ASEAN: Studies of Trade-Related Aspects of Labor,  
Environment and Culture in Southeast Asia

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**Abstract**

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This study addresses the social dimensions of trade (sometimes called “non-trade” issues, values, or objectives) in Southeast Asia. It was inspired by two major events: the debacle of the third World Trade Organization (WTO) ministerial meeting in Seattle in 1999, and the visibility of trade liberalization and economic integration in creating a single market and production base in Southeast Asia - the Association of Southeast Asian Nations (ASEAN) Economic Community (AEC) by 2015. Influenced by the school of legal realism and interdisciplinary sociolegal studies, this study seeks to examine the way in which the global trade governance regarding non-trade issues have been institutionalized and addressed in Southeast Asia.

To examine the relationship between the impact of globalization and legal adaptation and development on global trade governance in Southeast Asia, this study investigates three contemporary problems regarding trade-related aspects of labor, environment and culture in Southeast Asia. The three problems to be investigated are: (1) pirate fishing and modern slavery in the Thai fishing industry (trade and labor); (2) illegal Siamese rosewood logging and trade in

the Greater Mekong sub-region (trade and environment); and (3) tourism development and the struggles of Andaman sea gypsies (trade in service and culture).

Based on a problem-based approach and factually-contextual analysis, this study applies doctrinal legal research and qualitative research methods to draw analytic generalizations and a legal normative proposition regarding ASEAN's response to global trade governance. The study contends that ASEAN should respond more effectively to global trade governance in the region by revising the ASEAN social policy, ASEAN Social Charter and other legal instruments in such a way as to address "non-trade" issues in a more responsible manner. In particular, ASEAN should strengthen traceability, transparency, international cooperation, recognition and participation as features of global trade governance in order to protect human rights, the environment and local cultures. By doing so, it will not only enhance democracy, good governance and the rule of law in the region, but also pave the way for ASEAN regional stability and sustainability—the underlying principles and purposes stated in the ASEAN Charter.

**Key Words:** ASEAN, global trade governance, non-trade issues, trade and labor, trade and environment, trade and culture, modern slavery, Siamese rosewood, Andaman sea gypsy

To my parents

who instilled in me the virtues of perseverance and commitment

who did their best to uplift and encourage me to strive for excellence

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Seattle, WA

WJ.

07/18/16

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# Chapter 1 Introduction

## 1.1 RESEARCH QUESTION, METHODOLOGY AND OBJECTIVES

In the late twentieth century, especially after the debacle of the third World Trade Organization (WTO) ministerial meeting in Seattle in 1999, the vision of the WTO, particularly from the perspectives of European and U.S. nongovernmental organizations has shifted from being a rule-oriented institution toward becoming a more social-friendly institution. There is tension between the *free* trade doctrine as opposed to the *fair* trade doctrine, and the concept of fairness is often used in arguments against free trade.<sup>1</sup> More and more debates address how to balance the values of economic growth and social protections, the core issue that labels anti-globalization and trade liberalization and concerns the so-called “global justice movement,” which is understood as a reaction to neoliberal economic globalization.<sup>2</sup>

The term ‘globalization’ is a buzzword used differently in many contexts, however, its embedded fundamental principle is the “progressive integration of economies and societies driven by new technologies, new economic relationships and the national and international

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<sup>1</sup> See Mathias Risse and Gabriel Wollner, “Three Images of Trade: On the Place of Trade in a Theory of Global Justice,” *Moral Philosophy and Politics* 1, no. 2 (2014); Andrew G. Brown and Robert M. Stern, “Fairness In The WTO Trading System,” in *The Oxford Handbook on The World Trade Organization*, ed. Amrita Narlikar, Martin J. Daunton, and Robert M. Stern Oxford Handbooks, (New York: Oxford University Press, USA, 2012); “The International Economics Study Center | Trade Chapter 125: Fairness in International Trade,” accessed March 28, 2016, <http://internationalecon.com/Trade/Tch125/Tch125.php>.

<sup>2</sup> Andrew Lang, *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (Oxford; New York: Oxford University Press, 2011), 61–103. (Chapter 3 discusses the global justice movement by pointing out the transformation that occurred as local political struggles concerned with trade liberalization were internationalized with the emergence of the global justice movement and widespread mobilization against free trade in the 1980s and 1990s). See also Christian Joerges and Ernst-Ulrich Petersmann, *Constitutionalism, Multilevel Trade Governance and International Economic Law*, Rev. ed., vol. 12, Studies in International Trade Law (Oxford; Portland, Or: Hart Pub, 2011); Rorden Wilkinson, *The WTO: Crisis and the Governance of Global Trade* (Abingdon; New York: Routledge, 2006).

policies of a wide range of actors.”<sup>3</sup> The process of globalization covers two aspects. First, there is the notion of a shrinking world in which many factors (for example, trade, investment, technology, flows of information and communication) bring people and societies closer. And second, there are policies and institutions (such as trade and capital market liberalization, international standards for workers and for environmental protection) that support the integration of economies and countries.<sup>4</sup>

It is clear that globalization and trade liberalization bring opportunities for development and wealth creation. Empirical evidence, for example, suggests that economic growth in the East Asian “tigers” (Hong Kong SAR, the Republic of Korea, Singapore, and Taiwan) has been boosted by globalization and the increasing volume of international trade.<sup>5</sup> More specifically, David Dollar and Aart Kraay show that the economic growth (per capital GDP growth) of post-1980 globalizers (24 developing countries that have experienced the effects of trade liberalization) increased from 1.4 percent a year in the 1960s and 2.9 percent in the 1970s to 3.5 percent in the 1980, and 5.0 percent in the 1990s (see Figure 1-1).<sup>6</sup>

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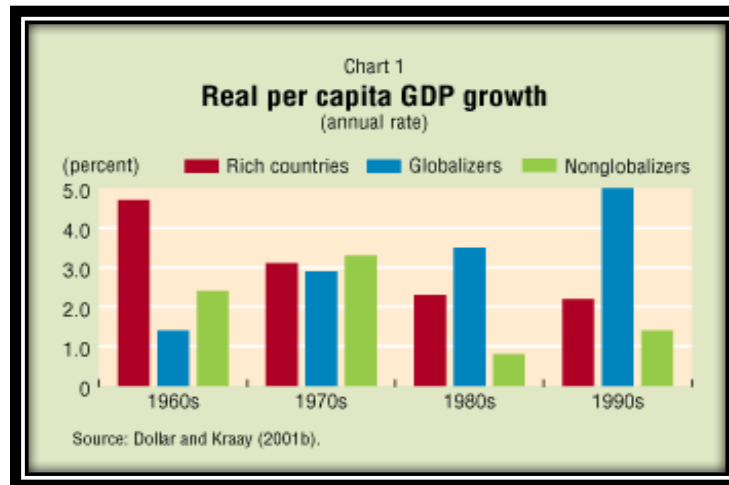
<sup>3</sup> “The Social Dimension of Globalizations,” accessed May 19, 2016, <http://ilo.org/public/english/wcsdg/globali/index.htm>.

<sup>4</sup> Ibid.

<sup>5</sup> Tatyana P. Soubbotina and Katherine Sheram, *Beyond Economic Growth: Meeting the Challenges of Global Development*, WBI Learning Resources Series (Washington, DC: World Bank, 2000), 66. See also David Dollar and Aart Kraay, *Trade, Growth, and Poverty*, Policy Research Working Papers (Online) (Washington, DC: World Bank, Development Research Group, Macroeconomics and Growth, 2001).

<sup>6</sup> See David Dollar and Aart Kraay, “Trade, Growth, and Poverty,” *Finance and Development*, accessed April 2, 2016, <http://www.imf.org/external/pubs/ft/fandd/2001/09/dollar.htm>.

**Figure 1- 1.** Increasing growth rate per capita GDP in the post-1980 globalizers (annual rate)



Source: David Dollar and Aart Kraay, *Trade, Growth, and Poverty*, Policy Research Working Papers (Online); 2615 (Washington, DC: World Bank, Development Research Group, Macroeconomics and Growth, 2001).

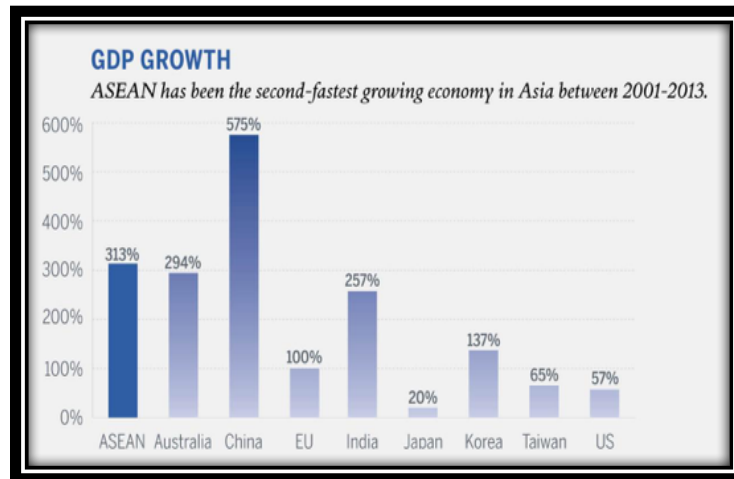
A similar result was also found in Southeast Asia: trade liberalization increased the percentage of GDP growth in Southeast Asia. As the second-fastest growing economy in Asia after China, the GDP growth of the Association of Southeast Asian Nations (ASEAN) has expanded by 300 percent since 2001, which exceeds the global growth average for the past ten years (see Figure 1-2).<sup>7</sup> Nevertheless, ASEAN growth in the ASEAN-5 economies (Indonesia, Malaysia, the Philippines, Singapore, and Thailand) has dropped in the last few years by an average of nearly one percentage point since 2013, due to the lower contribution of investment and private consumption.<sup>8</sup>

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<sup>7</sup> “ASEAN GDP and GDP per Capita | Asia Matters for America by the East-West Center,” accessed April 2, 2016, <http://www.asiamattersforamerica.org/asean/data/gdpper capita>.

<sup>8</sup> IMF, “Asia and Pacific Regional Economic Outlook. Asia and Pacific” (International Monetary Fund, 2014), 30, <https://www.imf.org/external/pubs/ft/reo/2014/apd/eng/areo0414.pdf>.

**Figure 1- 2.** GDP growth in Southeast Asia



*Source:* International Monetary Fund World Economic Outlook 2013 data, “Asia and Pacific Regional Economic Outlook. Asia and Pacific” (International Monetary Fund, 2014), 30, <https://www.imf.org/external/pubs/ft/reo/2014/apd/eng/areo0414.pdf>.

It is obvious that globalization and trade liberalization have positively accelerated GDP and economic growth. However, over the past decade, the negative effects of this growth have also been brought up as an issue for debate. The 2003 International Labour Organization (ILO) study, “The Social Dimension of Globalization,” reveals that globalization has social effects on the life and work of people and their societies, such as employment rates, working conditions, social protections, marginalization, security, culture and identity.<sup>9</sup> In “The Dark Side of Globalization: Why Seattle’s 1999 Protesters Were Right,” Noah Smith argues that, far from being easily dismissible as “silly,” the Seattle protesters were right. Over the past fifteen years, time has shown their concerns to be valid. These concerns have to do with the undesirable social and environmental effects of globalization. He states:

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<sup>9</sup> Bernhard G. Gunter and Rolp van der Hoven, “The Social Dimension of Globalization: A Review of the Literature,” *International Labour Review* 143, no. 1–2 (2004): 17, <http://www.ilo.org/public/english/revue/download/pdf/gunter.pdf>.

The organizers were a hodgepodge of groups—unions worried about competition from cheap foreign labor, environmentalists worried about the outsourcing of polluting activities, consumer protection groups worried about unsafe imports, labor rights groups worried about bad working conditions in other countries, and leftists of various stripes simply venting their anger at capitalism.<sup>10</sup>

For the academic community, the impact of globalization attracts wide scholarly attention and raises new questions and interdisciplinary challenges. Many conceptual and theoretical discussions of globalization are found in several disciplines, but few in laws; albeit law is immensely implicated in the process of globalization.<sup>11</sup> Few scholarly literatures especially interdisciplinary approaches to social dimension of globalization and trade liberalization from a regional view are still surprisingly lacking. Thus, this study seeks to deepen our understanding on this legal domain by focusing on the ‘non-trade’ issues in contemporary Southeast Asia.<sup>12</sup>

The term ‘non-trade,’ as used in legal scholarship, especially international trade law, has a particular meaning. The concept covers issues that “partake of a political, moral, cultural, ideological, environmental, and technical character,” as Qureshi explains:

Considerations which are of a non-trade character, may in international trade be defined as those state actions or omissions which impact or may impact flow of trade, but which are ‘external’ to it. They are external in the sense that they comprise non-economic, non-trade state actions or omissions which may affect other trading partners (whether state or individual), or impact that flow of international trade. Whereas the distinction between trade and trade-related matters is a strained one, the distinction between them and non-trade measures is prima facie apparent. Non-trade considerations partake of a political, moral,

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<sup>10</sup> Noah Smith, “The Dark Side of Globalization: Why Seattle’s 1999 Protesters Were Right,” *The Atlantic*, January 6, 2014, <http://www.theatlantic.com/business/archive/2014/01/the-dark-side-of-globalization-why-seattles-1999-protesters-were-right/282831/>.

<sup>11</sup> Terence C. Halliday and Pavel Osinsky, “Globalization of Law,” *Annual Review of Sociology* 32 (2006): 447.

<sup>12</sup> It is sometimes called ‘non-economics’ values or objectives in international trade and international economic law. See Friedl Weiss, Erik Denters, and P. J. I. M. de Waart, eds., *International Economic Law with a Human Face* (The Hague; Cambridge, MA: Kluwer Law International, 1998); Laurence Boisson de Chazournes, “WTO and Non-Trade Issues: Inside/Outside WTO,” *Journal of International Economic Law*, April 20, 2016, 1–3.

cultural, ideological, environmental and technical character. More specifically, examples of non-trade considerations include human rights and national security interests.<sup>13</sup>

In light of the regulation of international trade, non-trade issues can be understood as the links between trade and other areas of international law. Discourse on non-trade issues deals with globalized ‘trade and...’ topics, for example, trade and labor, trade and human rights, trade and environment, trade and health, etc.<sup>14</sup> In the context of WTO jurisprudence, the WTO Panel and Appellate Body have also addressed several cases regarding non-trade issues under the labels of ‘trade linkage’ or ‘trade and ...,’ which some scholars have called “social trade regulations in the WTO dispute settlement system.”<sup>15</sup> Mostly, several cases have been raised under the GATT Article XX on General Exceptions, which sets out a number of specific instances in which WTO members may be exempted from GATT rules. These cases are considered as landmark cases concerned with the issues of human and animal, health, environmental and culture protections, and social norms and traditions as culture.<sup>16</sup> Examples are *US-Gasoline* (1996),<sup>17</sup> *US-Shrimp*

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<sup>13</sup> Asif H. Qureshi, “International trade and human rights from the perspective of the WTO,” in *International Economic Law with a Human Face*, ed. Weiss, Deters, and Waart, 159; see also Krista Nadakavukaren Schefer, *Social Regulation in the WTO: Trade Policy and International Legal Development* (Cheltenham, UK ; Northampton, MA: Edward Elgar, 2010), 2; Annie Taylor and Caroline Thomas, *Global Trade and Global Social Issues*, Routledge Research Global Environmental Change Series (London; New York: Routledge, 1999).

<sup>14</sup> Daniel L. Bethlehem, *The Oxford Handbook of International Trade Law*, Oxford Handbooks in Law (Oxford; New York: Oxford University Press, 2009), 481–667. (Chapter 17 to 23, Part IV: Trade and ... The New Agenda and Linkages Issues explore the linkages of trade and ... topics and address some conflict, overlap, and interaction between trade law and other rules of international law.); John H. Jackson, *Legal Problems of International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations*, 6th ed., American Casebook Series (St. Paul, MN: Thomson/West, 2013), 1175. (Chapter 21 presents the linkages between international trade policies and non-economic policy objective such as human rights, labor standard and national security.)

<sup>15</sup> Nadakavukaren Schefer, *Social Regulation in the WTO*, 157.

<sup>16</sup> GATT Article XX, “WTO | Legal Texts - Marrakesh Agreement,” accessed May 15, 2016, [https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_02\\_e.htm#articleXX](https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX).

<sup>17</sup> See Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996: I, 3.

(*Shrimp-Turtles*) (1998),<sup>18</sup> *EC-Hormones* (1998),<sup>19</sup> *EC-Asbestos* (2001),<sup>20</sup> *Thailand- Cigarettes* (1990),<sup>21</sup> *Japan-Alcohol* (1995),<sup>22</sup> *Korea-Alcoholic Beverages* (1999),<sup>23</sup> *Japan Leather* (1984),<sup>24</sup> *Canada – Periodicals* (1997),<sup>25</sup> and *EC-Seal Products* (2014).<sup>26</sup> All of these cases entail legal trade norms and principles of governance – a so-called ‘global trade governance’ that are intended to function in the protection of social values and to provide counter-weight in tension with the importance granted to trade or economic values.<sup>27</sup> The study examines this emerged global trade governance by focusing on the various facets of trade-related aspects in Southeast Asia.

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<sup>18</sup> See Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998: VII, 2755.

<sup>19</sup> See Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998: I, 135.

<sup>20</sup> See Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001: VIII, 3305.

<sup>21</sup> See Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011, DSR 2011: IV, 2203.

<sup>22</sup> See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R (EC request), WT/DS10/AB/R (Canada request), WT/DS11/AB/R (US request), adopted 1 November 1996, DSR 1996: I, 97.

<sup>23</sup> See Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999: I, 3.

<sup>24</sup> See Panel on *Japanese Measures on Imports of Leather*, 31S BISD 94 (adopted 15 May 1984).

<sup>25</sup> See Appellate Body Report, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, adopted 30 July 1997, DSR 1997: I, 449.

<sup>26</sup> See Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014: I, 7.

<sup>27</sup> The term ‘global trade governance’ is intended to cover a much wider sphere of social activity. It refers to the way of managing and governing global affairs, either by a set of formal rules or norms of behavior, which generate guidelines and agreements that affect states and international cooperation. It is the twentieth-century trade front that results from the demands for new rules and disciplines in governing the nexus of trade, investment, services, and business mobility formulated outside the World Trade Organization. See John J. Kirton and M. J. Trebilcock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*, Global Environmental Governance Series (Aldershot, Hants, England ; Brookfield, VT, USA: Ashgate, 2004); Jeffrey L. Dunoff and Joel P. Trachtman, *Ruling the World?: Constitutionalism, International Law, and Global Governance* (New York: Cambridge University Press, 2009); Carolyn Deere-Birkbeck, *Making Global Trade Governance Work for Development: Perspectives and Priorities from Developing Countries* (New York: Cambridge University Press, 2011); Risse and Wollner, “Three Images of Trade: On the Place of Trade in a Theory of Global Justice”; “Principles of Governance: A Guide to Developing Proposals for World Governance,” accessed May 21, 2016, <http://www.world-governance.org/article152.html>; Richard Baldwin, “21st Century Trade and Global Trade Governance: The WTO’s Future,” accessed March 3, 2016, [https://www.wto.org/english/forums\\_e/public\\_forum12\\_e/art\\_pf12\\_e/article\\_e.htm?art=2](https://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/article_e.htm?art=2).

*Why Southeast Asia?* In the late twentieth century, the institutional shift of ASEAN from politics to economic integration has resulted in a discussion of social protection in the region. Historically, ASEAN was founded on 8 August 1967 during the Cold War period to build mutual trust and to secure regional peace and stability among the original five founding states: Indonesia, Malaysia, the Philippines, Singapore, and Thailand.<sup>28</sup> Later, its purpose expanded to include the acceleration of economic growth, social progress and cultural development.

From 1967 to 2007, ASEAN changed institutionally and substantially over the time-period that begins with the Bangkok Declaration (officially, the ASEAN Declaration 1967) and ends with the ASEAN Charter in 2007. Obviously, after the end of Cambodian imbroglio in 1991, ASEAN shifted its focus to ASEAN economic cooperation and integration.<sup>29</sup> Two major economic agreements were concluded in 1992: the Framework Agreement of Enhancing ASEAN Economic Cooperation and the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA). Since 1992, ASEAN inevitably deals with the economic sphere.<sup>30</sup> In 2002, ASEAN started to make economic agreements with external partners: with China, Japan, South Korea (ASEAN plus 3), India Australia, and New

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<sup>28</sup> ASEAN today comprised of 10 ASEAN member states. Brunei then joined ASEAN in 1987, followed by Vietnam in 1995, Laos and Myanmar in 1997, and Cambodia in 1999. (The last four new members are commonly referred to by the acronym CLMV.)

<sup>29</sup> See the Singapore Declaration, signed on 28 January 1992 by the Heads of State/Government in Singapore quoted in Walter C.M. Woon, *ASEAN Charter: A Commentary* (Singapore NUS Press, 2016), 7.

<sup>30</sup> *Ibid.*, 7–8.

Zealand (ASEAN plus 6). And, in 2007, the legal personality and institutional framework for ASEAN was established by the ASEAN Charter, which came into force on 15 December 2008.<sup>31</sup>

Certainly, the power of trade regionalism and economic integration has driven ASEAN economic development over the past decades; unfortunately, the non-trade issues or trade-related aspects in Southeast Asia have not received sufficient attention. Despite all ASEAN member states are the members of WTO, and many of them were the parties or complainants in resolving trade disputes under the WTO Dispute Settlement mechanism, ASEAN is still not active in the WTO in addressing the social-trade policy. In addition, the issue of global trade governance, which derives from the governance paradigm and contains some legal elements and characteristics, is not as prominent in the region's scholarly debates as it ought to be, given the glaringly obvious appearance of several non-trade issues and social-trade problems. And, ASEAN itself still possesses some unique characteristics – known under the heading of the “ASEAN Way”—principles such as non-interference, consensus, compromise, and consultation in the informal decision-making process, which that perhaps is a hindrance in mutually tackling with the social-trade discourse in the region.<sup>32</sup>

Thus, there is clearly a pressing need to examine global trade governance in connection with its effect on non-trade issues in the context of Southeast Asia. It is also important that we could better understand the problems by considering the external perspectives of law such as

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<sup>31</sup> See ASEAN, *The ASEAN Charter* (Jakarta: Association of Southeast Asian Nations, 2008); Tommy T. B. Koh, Rosario G. Manalo, and Walter C. M. Woon, *The Making of the ASEAN Charter* (Singapore; Hackensack, NJ: World Scientific PubCo, 2009); Katja Freistein, “‘A Living Document’: Promises of the ASEAN Charter,” *The Pacific Review* 26, no. 4 (2013): 407–29.

<sup>32</sup> See “The ‘ASEAN Way’: The Structural Underpinnings of Constructive Engagement,” *Foreign Policy Journal*, October 15, 2014, <http://www.foreignpolicyjournal.com/2014/10/15/the-asean-way-the-structural-underpinnings-of-constructive-engagement/>.

from a political, a sociological, an anthropological and a historical perspective—an endeavor that has too rarely been attempted in the international trade discipline.<sup>33</sup> To examine this topic, this study poses the question: *how has ASEAN addressed and institutionalized global trade governance regarding non-trade issues or trade-related aspects of labor, environment and culture in the region?*

In attempting to answer this question adequately, the study applies doctrinal legal research based on the real-world problem and qualitative research methods – conducting documentary and Internet research, reviewing archival records, and conducting interviews with purposive sampling or snowball technique. Influenced by the school of legal realism and interdisciplinary sociolegal studies,<sup>34</sup> the study is based on a problem-based approach and factually-contextual analysis by focusing on three contemporary problems that are linked to trade, particularly to trade-related aspects of labor, environment and culture in Southeast Asia. The three problems to be investigated are: (1) pirate fishing and modern slavery in the Thai

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<sup>33</sup> See Lang, *World Trade Law after Neoliberalism*; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge, UK: Cambridge University Press, 2003); Sungjoon Cho, “Global Constitutional Lawmaking,” *University of Pennsylvania Journal of International Economic Law* 31, no. 3 (2010): 621–78; Sungjoon Cho, “Beyond Rationality: A Sociological Construction of the World Trade Organization,” *Virginia Journal of International Law* 52, no. 2 (2012): 321–54; Sungjoon Cho, “How the World Trade Community Operates: Norms and Discourse” 13, no. 4 (2014): 685–711, doi:10.1017/S1474745614000238; Sungjoon Cho, *The Social Foundations of World Trade Norms, Community and Constitution*, Cambridge International Trade and Economic Law (Cambridge, UK: Cambridge University Press, 2015); William J. Davey and John H. Jackson, *The Future of International Economic Law*, International Economic Law Series (Oxford; New York: Oxford University Press, 2008).

<sup>34</sup> The term ‘sociolegal’ studies (used in the US without a hyphen) embraces “disciplines and subjects concerned with law as a social institution, with the social effects of law, legal processes, institutions and services and with the influence of social, political, and economic factors on the law and legal institutions.” See, SLSA (The Socio-Legal Studies Association), Statement of Principles of Ethical Research Practice (2009), para. 1.2.1 in *Exploring the “Legal” in Socio-Legal Studies*, David Cowan and Daniel Wincott, Palgrave Macmillan Socio-Legal Studies (London; New York: Palgrave, 2016), 4. Simply put, it refers to “studying law in its social context,” with the understanding that law both affects and is affected by the society (or societies) in which it is meant to function. See Roscoe Pound, “Law in Books and Law in Action,” *American Law Review* 44 (1910): 12–36; Paddy Hillyard, “Law’s Empire: Socio-legal Empirical Research in the Twenty-first Century,” *Journal of Law and Society* 34, no. 2 (2007): 266–79.

fishing industry (trade and labor); (2) illegal Siamese rosewood logging and trade in the Greater Mekong sub-region (trade and environment); and (3) tourism development and the struggles of Andaman sea gypsies (trade in service and culture).

These three problems of trade-related aspects have been selected not only because of their intrinsic interest, but also because of the advantages they offer to a study of this kind. First, all three are critical practical problems that involve non-trade issues in contemporary Southeast Asia. Second, these problems are information-rich in relation to Thailand, so I could access Thai data sources and conduct interviews with Thai officials to gain insights and triangulate the data that I collected from several sources through documentary and Internet research. Finally, these problems are revealing and thus have been studied by international organizations and by the media. In summary, these three problems concern the realm of non-trade issues, they are controversial real-world problems, and they are still fresh at the time of writing.

I gathered data from relevant documentary sources through documentary and Internet research. The sources include a range of official international governmental organizations such as the International Labour Organization (ILO), the International Organization for Migration (IOM), the WTO; non-governmental organizations, such as the Environmental Justice Foundation (EJF), the Environmental Investigation Agency (EIA), and the Asian Indigenous Peoples Pact (AIPP); research; report; press releases; Internet sites; foreign and local newspapers; brochures; YouTube videos, books and law journals from the data bases of UW Suzzallo and Allen Libraries and Gallagher Law Library. In addition, I conducted interviews with six key Thai informants in August 2015. These are Thai officials who are involved directly with the cases from Ministry of Labour, Ministry of Natural Resources and Environment, and Ministry of Culture of Thailand. The data from interviews is used to triangulate the facts and

supplement the documentary analysis. The external perspectives of law, historical, political and sociological institutional views were largely investigated through archival research. In the analysis of all these data, I apply content and secondary data analyses and draw the analytical generalizations and theoretical proposition regarding ASEAN's response to global trade governance.

The selected problems are non-representative of all non-trade issues and trade-related aspects in Southeast Asia. The findings situated in these three areas are thus particular and not intended to represent all issues as a whole. Other non-trade problems and trade-related aspects in Southeast Asia should be further examined. In addition, this study does not aim to substitute sociology, economic, political science, or other modes of analysis drawn from other social-science disciplines. It aims only to explore the three trade-related aspects of labor, environment and culture through a problem-based approach, through the lens of global-regional-national views, and through some external perspectives on law. My aim has been to capture the most important theoretical innovations and the exemplary social dimensions of trade liberalization and globalization in Southeast Asia, which in turn function as a doorway to other non-trade problems and trade-related aspects in the region.

This study has three main objectives. First, it aims to examine the social dimensions of trade through three problems of the three trade-related aspects in Southeast Asia. Second, it aims to understand the interactions between globalization and legal adaptation and development on global trade governance in Southeast Asia and Thailand and to understand the social, cultural,

political and economic contexts in which law operates in practice on non-trade issues.<sup>35</sup> And, third, it advocates for strengthening the capacity of ASEAN legal institutions and aims to promote awareness of social-trade justice regarding non-trade issues among jurists, legal-policy scholars and practitioners in Southeast Asia. It is hoped that the study may yield new insights for ASEAN legal-policy makers to see how ASEAN should work in addressing and institutionalizing global trade governance.

## **1.2 THE ANALYTIC GENERALIZATIONS AND A THEORETICAL PROPOSITION**

In drawing a legal normative proposition regarding ASEAN's response to global trade governance, I examine the issue through the lens of *global-regional-national* perspectives and some external perspectives of law. At the global level, we will understand how the global trade governance is emerged and made from outside the WTO through the increasing roles of international and non-governmental organizations in creating, regulating and demanding for the global trade governance. At the regional level, we will see how the global trade governance is transmitted and transplanted into Southeast Asia with regard to the protections of labor, the environment and local culture; put differently, how ASEAN addresses and institutionalizes the global trade governance regarding three trade-related aspects. And, at the national level, we will see how Thailand reacts towards the global trade governance through domestic laws, policies and practices. Also, considering the external perspectives of law will help us to better understand the

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<sup>35</sup> See Roger Cotterrell, "Sociological Interpretations of Legal Development," *European Journal of Law and Economics* 2, no. 4 (1995): 347–59. (The author argues the character and value of sociological interpretations of legal change, putting sociological inquiries in legal contexts to help to interpret general processes of legal development.)

contexts that laws operate or should operate in reality and perceive that *laws themselves are products formed and shaped by social forces, interests, and beliefs*.<sup>36</sup>

To make an argument about non-trade issues, global trade governance and ASEAN, I develop three interrelated analytical generalizations: first, the three non-trade issues examined in this study are related to cross-border economic activities that illustrate the social impact or social dimensions of globalization and call for the global trade governance in ASEAN. The global demand for seafood has led to the employment by the Thai fishing industry of pirate fishing, human trafficking, and the abuse of trafficked Cambodian and Burmese laborers at sea; the increasing demand for Hongmu furniture from China has resulted in the skyrocketing price of Siamese rosewood, which in turn contributes to illegal logging and trade, violence and other crimes in Laos, Cambodia and Thailand; the rapid expansion of tourism and development to attract global tourists have affected and changed the nomadic traditional lifestyle of Andaman sea gypsies in Thailand. All these matters are not bound within or contained by one national jurisdiction and still challenge for balancing the trade and non-trade values.

Second, all non-trade issues, as they show up in our three chapters (Chapters 2 to 4), involve several non-state players such as international organizations, non-governmental organizations (NGOs), regional organizations, media and civil society groups. For example, the United Nations, the International Marine Organization, and the International Labor Organization

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<sup>36</sup> See Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*, Law, Justice, and Power (Aldershot, England; Burlington, VT: Ashgate PubCo, 2006). (The author argues for a rethinking of the concept of law to take account of new forms of legal and cultural pluralism and the growing significance of transnational law). See also Richard Nobles and David Schiff, eds., *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* (Farnham: Ashgate Publishing Ltd, 2014) (The book presents the ideas and theories that have been expounded by Roger Cotterrell, showing how laws operate in reality; how social relations, processes and structures condition, shape and influence the making and practices of law, and vice versa).

play significant roles in tackling with the problem of pirate fishing and human; the United Nations and Asia Indigenous Peoples Pact as regional NGO play its role in promoting the cultural rights and supporting the protection of indigenous peoples in Asia.

In governing the issues, these players are sites of power making and promulgating global trade governance, either entirely or partly, outside of the nation-state. Through an international treaty regime, states and international organizations play a role in codifying legal trade governance. Our three problems are not exceptional: international labor standards as well as international environmental and human rights laws are relevant to pirate fishing and modern slavery in the Thai fishing industry; international environmental laws and global trade governance are relevant to the illegal trade of Siamese rosewood; and international human rights are relevant to the cultural rights of indigenous peoples such as the Andaman sea gypsies. In response to the growing demands for global trade governance, it seems to be true, as Mark Tushnet points out, that “Globalization, in one aspect, entails a reduction in the power of existing governments to regulate economic activity.”<sup>37</sup> In other words, this means that the modern state has intensely reconfigured its institutions, its processes of governance and accountability, in response to the growth of a global economy.<sup>38</sup>

Obviously, rather than a state-centered approach, global trade governance gives rise to dynamic legal relations between global, international, regional, and local legal arenas. Under the force of globalization, peoples, places, cultures, ideologies, economies, and political systems are becoming increasingly interrelated. Ugo Mettei and Laura Nader give voice to this phenomenon

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<sup>37</sup> Mark V. Tushnet, “Globalization and Federalism in a Post-Printz World,” *Tulsa Law Journal* 36, no. 1 (2000): 11–41.

<sup>38</sup> Saskia Sassen, *Losing Control?: Sovereignty in an Age of Globalization*, University seminars/Leonard Hastings Schoff Memorial Lectures (New York: Columbia University Press, 1996), xi–xii.

when he notes that, under the Washington and Post-Washington Consensus – neo-liberal economic percepts with free market, privatization, liberalization, *etc.* –most developing countries have been forced to adjust their legal policies and to welcome foreign laws in order to facilitate the influx of global capitalism into their economy.<sup>39</sup> This is a *legal process* that transcends nation-states; as Darian-Smith notes, “laws should all be viewed as elements of an interconnected and unfolding global legal system.”<sup>40</sup> To this point, William Twining also asserts, “It is illuminating to conceive of law as a species of *institutionalised (sic) social practice* that is *oriented to ordering relations between subjects* at one or more *levels* of relations and/or ordering.”<sup>41</sup> Thus, global trade governance cannot be realized unless it instills itself into concrete locales at the regional and domestic/national level.

Third, the relations between global, regional and national are interrelated and complex. In terms of process of legal adaptations and developments, the global trade governance is transmitted or transplanted into ASEAN and Thailand by three ways – the ratification of international agreements by states, the regional needs and the external pressures. As seen in chapters 2 to 4, Thailand ratifies several international agreements, implement international obligations, and develop legal mechanisms and make policies in her jurisdiction to manage cross-border economic activities and problems. ASEAN has also incorporated global trade governance and attempted to deal with problems that transcend into the region through

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<sup>39</sup> Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law Is Illegal* (Malden, Mass: Blackwell Pub, 2008), 23, 25.

<sup>40</sup> Eve Darian-Smith, *Laws and Societies in Global Contexts : Contemporary Approaches* (New York: Cambridge University Press, 2013), 10.

<sup>41</sup> William Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, Law in Context (Cambridge, UK ; New York: Cambridge University Press, 2009), 116., quoted in Darian-Smith, *Laws and Societies in Global Contexts*, 10.

consultation, forums, cooperation and guidelines. In addition, whereas Thailand enacts and revises several domestic laws and policies that conform to its international obligations, there are also external pressures from the EU and the US placed on it to adapt, develop and enhance global trade governance. (see Table 1-1.) Accordingly, in a broad sense, ASEAN and Thailand are not single actors pursuing their self-interest, but are organizations and subjects embedded in a wider social environment of global legal trade norms and governance.

**Table 1- 1.** Summary of aspects regarding three non-trade issues and trade-related matters

<b>Aspects/Problems</b>	<b>Pirate Fishing and Modern Slavery in the Thai Fishing Industry</b>	<b>Illegal Siamese Rosewood Logging and Trade in the Greater Mekong Sub-Region</b>	<b>Tourism Development and the Struggles of Andaman Sea Gypsies</b>
<b>Types of trade-related matters</b>	Trade and Labor (including the aspects of human rights)	Trade and Environment	Trade and Culture (tourism refers to trade-in service)
<b>Major causes of problem</b>	Global demand for cheap seafood; poor fisheries management, systematic disincentives	A high demand of Siamese rosewood for Hongmu furniture, illegal logging trade and smuggling of timber, corruption	Tourism industry and development plans, the establishment of marine national parks, and land encroachment
<b>International organizations and/or non-governmental organizations</b>	The United Nations, The International Marine Organization, and The International Labor Organization	N/A	The United Nations and Asia Indigenous Peoples Pact
<b>International legal instruments and regulations</b>	The IMO Global Record Fishing Vessels and Unique Vessel Identifier; The UN Convention against Transnational Organized Crime and its two Protocols; The ILO Conventions and	CITES and Appendix II	The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

	its revisions, especially the ILO Concerning Work in Fishing Sector (No. 188)		
<b>ASEAN responses</b>	ASEAN Maritime Forum; ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU fishing Activities into the Supply Chain by ASEAN-SEAFDEC; Regional Technical Consultation on Labor Aspects within the Fishing Industry in the ASEAN Region; ASEAN Convention Against Trafficking in Persons, Especially Women and Children	ASEAN Wildlife Enforcement Network (ASEAN-WEN); ASEAN Experts Group on CITES (CITES AEG) Forest and timber certification by creating regional standard for timber legality; the EU Forest Law Enforcement, Governance and Trade (EU-FLEGT and VPA trade agreements	The ASEAN Human Rights Declaration
<b>Thailand's laws and policies</b>	The Command and Centre for Combating Illegal Fishing and its seven working groups; the Amendments to Anti-Human Trafficking Act 2015; the Fisheries Act B.E. 2558 (2015); the New Royal Ordinance on Fisheries, B.E. 2558 (2015); The Anti-Money Laundering Act B.E. 2558 (2015), and the drafted new Human Trafficking Criminal Procedure Act; the Zero Tolerance for Human Trafficking Policy and 5Ps	Six Forest laws and policies, and the NCPO Order No. 106/1557 to amend the Forestry Act B.E. 2484 (1941)	The Draft Act of Indigenous Peoples and Ethnic Groups Assembly of Thailand; the 2010 Cabinet Resolution to restore the traditional livelihood of Chao Lay

	Framework		
<b>External forces</b>	The EU's Yellow Card and the US Trafficking in Persons Reports	External markets, particularly from the EU, Japan, Australia, and the US; EU-FLEGT	N/A, but NGOs play a role in the region and Thailand
<b>The needed features of global trade governance</b>	Tractability and Transparency	International Cooperation	Legal Recognition and Participation

Regarding our three samples, global trade governance poses different problems for the different trade-related aspects. First, in case of pirate fishing and modern slavery in the Thai fishing industry, global trade governance requires the increase of “traceability and transparency” so that it may trace, control and monitor pirate fishing vessels and illegal fishing methods, and lower the incidence of trafficked migrant labor and the exploitation of migrant crews at sea. Second, in dealing with illegal Siamese rosewood logging and trade, Thailand alone cannot solve this problem. “International cooperation” among ASEAN range states (especially from Cambodia, Myanmar, Thailand and China, and various international communities) is essential for the protection of endangered species by the Convention on International Trade in Endangered Species (CITES). Third, in protecting Andaman indigenous sea gypsies from tourism development and land encroachment, legal “recognition and participation” should be established so that the sea gypsies may preserve and enjoy their nomadic traditional lifestyle and claim collective rights under the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which all ASEAN member states have ratified.

In addressing the social dimensions of trade liberalization and globalization in Southeast Asia, this study contends that ASEAN *should respond more effectively to global trade governance in the region with regard to human rights, environmental and cultural protections.*

To increase the features of global trade governance—traceability, transparency, international cooperation, recognition and participation, the ASEAN social policy, ASEAN Social Charter and other legal instruments that incorporate these three trade-related aspects, at minimum, should be further developed.

### **1.3 STRUCTURE OF THE DISSERTATION**

The study contains five chapters. It starts with an introduction that states and explains the analytical generalizations and the dissertation's main argument (Chapter 1). Chapters 2 to 4 present three problems of trade-related aspects in contemporary Southeast Asia. They are self-standing chapters, and it is not necessary to read them in consecutive order. Chapter 5 offers a summary and conclusion. Each chapter also introduces external perspectives on law in addition to the global-regional-national views. The main arguments of the chapters are summarized below.

Chapter 1 provides an overview the project by laying out the theme of globalization and the rise of non-trade issues, the central research question of this study, its methodology and objectives; the analytic generalizations and theoretical proposition; and the structure of the dissertation.

Chapter 2 presents the trade-related aspect of labor through the case of pirate fishing and modern slavery in the Thai fishing industry. In this chapter, we will see how the global demand for cheap seafood has led such practices as overfishing, pirate fishing, human trafficking and exploitation of trafficked migrant crews at sea. The international laws, regional responses, and Thai legal adaptations and developments are analyzed through the lens of global-regional-

national perspectives. Particular attention is devoted to the work of the International Maritime Organization, the United Nations, and the international Labour Organization; the ASEAN maritime Forum's agenda, the ASEAN Guidelines, and the ASEAN Convention Against Trafficking in Persons, Especially Women and Children; and the updated Thai laws, policies and practices regarding this issue. The chapter also addresses some aspects of political pressure from external forces—namely, the EU Yellow card and the US Trafficking in Persons report.

Chapter 3 considers the trade-related aspect of environment through the problem of illegal Siamese rosewood logging and trade in the Greater Mekong sub-region. It examines how Siamese rosewood is in crisis and has approached extinction within a decade. It also narrates a situation of corruption, violence, drugs and crimes along the border of Cambodia and Thailand. In addressing the legal analysis, it focuses on the Convention on International Trade in Endangered Species and its Appendix II, the development of regional forest cooperation and legality of timber through EU-FLEGT, and Thai laws, policies and practices, particularly the Forestry Act B.E. 2484 (1981) and its latest amendment, and Order Number 106/2557 from the National Council for Peace and Order. The historical and socio-cultural context of Hongmu furniture and the protection of Siamese rosewood by the community, Buddhist abbot and monks are also discussed.

Chapter 4 examines the trade-related aspect of culture by exploring the connection between the tourism industry and Andaman sea gypsies. The chapter probes the impacts of the tourism industry, development plans and land encroachment on the traditional nomadic lifestyle of Andaman sea gypsies. The existing international laws, regional responses and domestic Thai laws, policies and practices are analyzed by focusing on the 2007 United Nations Declaration on the Rights of Indigenous Peoples, the ASEAN human rights agreements and its mechanism, the

Draft Act of Indigenous Peoples and Ethnic Groups Assembly of Thailand and the 2010 Cabinet Resolution to restore the traditional livelihood of Chao Lay. To understand the culture of sea gypsies, the chapter also presents the historical, socio-cultural and institutional contexts regarding the case.

Chapter 5 presents the conclusion of this study.

## Chapter 2 Trade and Labor: Pirate Fishing and Modern Slavery in the Thai

### Fishing Industry

#### 2.1 INTRODUCTION

We want to go home. Nothing has changed. We work as slaves. Everyone has debt, I don't even understand how I am in debt. We have been working on the boat for three of four years now. We want to escape from the sea. We are so tired.

EJF, Film *Thailand's Seafood Slaves*, 2015<sup>1</sup>

On 18 April 2016, The Associated Press (AP) won the meritorious Pulitzer Prize for public service because of its global report called “Seafood from Slaves.”<sup>2</sup> By investigating severe labor abuses and slavery in the Thai fishing industry, which is tied to American seafood supermarkets and restaurants, the AP report led to the liberation of 2,000 slaves, brought many perpetrators to justice and inspired reform; it also led to the call for joint action from all stakeholders to ban Thailand's seafood products.<sup>3</sup> In 2013, the International Labour Organization (ILO) revealed that “workers in the fishing industry are especially vulnerable to

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<sup>1</sup> See EJF, *Thailand's Seafood Slaves: Human Trafficking, Slavery and Murder in Kantang's Fishing Industry*, accessed April 28, 2016, <http://ejfoundation.org/video/thailands-seafood-slaves>. (The film exposes slavery, human trafficking, pirate fishing, and other serious crimes against migrant workers in Thailand's fishing industry.) See also a report with the same phrase in its title, EJF, “Thailand's Seafood Slaves: Human Trafficking, Slavery and Murder in Kantang's Fishing Industry,” accessed April 28, 2016, <http://ejfoundation.org/report/thailands-seafood-slaves>. Note that the Environmental Justice Foundation (EJF) is a UK-based organization registered as a non-for-profit organization working internationally to address and protect environment and defend human rights.

<sup>2</sup> “AP Explore: Seafood from Slaves,” accessed April 7, 2016, <http://www.ap.org/explore/seafood-from-slaves/>; “Associated Press,” accessed April 28, 2016, <http://www.pulitzer.org/winners/associated-press>.

<sup>3</sup> Ibid.

abuse.”<sup>4</sup> Similarly, a series of Environmental Justice Foundation (EJF) reports disclosed the problems of pirate fishing, overfishing, human trafficking, exploitation, forced labor, and slavery in the Thai fishing industry.<sup>5</sup>

To shed light on the realities targeted by these reports, this chapter examines the links between trade, human rights and labor standards through a case study of pirate fishing and modern slavery in the Thai fishing industry.<sup>6</sup> The chapter is divided into five sections. Section 1 provides an introduction. Section 2 discusses how pirate fishing has contributed to widespread modern slavery in the Thai fishing industry and how migrant fishing workers are exploited and abused at sea. Section 3 provides an analysis of the relevant existing international laws, regional cooperation and Thai laws, policies and practices. Section 4 examines how the EU and the US have pushed Thailand to revise its laws and policies in order to address the problems of pirate fishing, forced labor and slavery in its fishing industry. Section 5 offers concluding remarks.

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<sup>4</sup> ILO, “Caught at Sea: Forced Labour and Trafficking in Fisheries” (Switzerland: International Labour Office (ILO), 2013), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_214472.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_214472.pdf). (ILO reveals the labor exploitation and abuse in the fisheries sector, particularly among migrant workers, and shows the link between forced labor, human trafficking and fisheries crimes.)

<sup>5</sup> EJF, “All at Sea – The Abuse of Human Rights Aboard Illegal Fishing Vessels” (London: The Environmental Justice Foundation, 2010) (The report shows how IUU fishing vessels abuse and exploit crews, and tells some stories about the brutal exploitation of Cambodian and Burmese migrant workers); EJF, “Sold to the Sea: Human Trafficking in Thailand’s Fishing Industry” (London: The Environmental Justice Foundation, 2013); EJF, “Slavery at Sea: The Continued Plight of Trafficked Migrants in Thailand’s Fishing Industry” (London: The Environmental Justice Foundation, 2014); EJF, “Thailand’s Seafood Slaves. Human Trafficking, Slavery and Murder in Kantang’s Fishing Industry.” (London: The Environmental Justice Foundation, 2015); EJF, “Pirates and Slaves: How Overfishing in Thailand Fuels Human Trafficking and the Plundering of Our Oceans” (London: The Environmental Justice Foundation, 2015)

<sup>6</sup> Note that the term ‘modern slavery’ refers to holding a person in compelled service, including trafficking, forced labor, involuntary servitude, and bonded labor. See Bureau of Public Affairs Department Of State. The Office of Website Management, “What Is Modern Slavery?,” accessed May 1, 2016, <http://www.state.gov/j/tip/what/>; “What Is Modern Slavery?,” World Economic Forum, accessed May 1, 2016, <https://www.weforum.org/agenda/2015/12/what-is-modern-slavery/>.

## **2.2 PIRATE FISHING, FORCED LABOR AND MODERN SLAVERY IN THAILAND’S FISHING INDUSTRY**

This section provides background information and addresses the problems of illegal, unreported and unregulated (IUU) or “pirate” fishing and human trafficking in Thailand’s fishing industry. It shows how pirate fishing causes the abuse and exploitation of migrant crews on pirate fishing vessels and how the trafficked crews have been exploited and abused at sea.

### **2.2.1 Global Demand for Cheap Seafood and Thailand’s Poor Fisheries Management Cause Pirate Fishing, Overfishing and Modern Slavery in the Thai Fishing Industry**

Thailand’s fishing industry is one of the most profitable in the world, with the third largest export of fish and fishery products valued at \$7.3 billion in 2011.<sup>7</sup> The Thai fishing and seafood business is also globally notorious as “one of the most abusive and destructive economic sectors in the world,” due to the exploitation and abuse of migrant workers on fishing vessels.<sup>8</sup> Since the late 1980s, a gap in the labor market was created when Thai workers shunned working in commercial fishing, since many considered the job “3D” work – dirty, dangerous, and difficult. To fill this gap, migrants from Cambodia, Lao People’s Democratic Republic and Myanmar have increasingly stepped in.<sup>9</sup> A 2014 International Organization of Migration (IOM) study estimated that “there are between 3.5 million and 4.0 million foreigners living in Thailand,

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<sup>7</sup> EJF, “Slavery at Sea,” 5.

<sup>8</sup> EJF, “Thailand’s Seafood Slaves,” 5; *see also* ILO, “Caught at Sea: Forced Labour and Trafficking in Fisheries.”

<sup>9</sup> In 2009, it is estimated that about 116,000 workers would be needed to address the labor-market imbalance. *See* Ministry of Labor, Thailand, Study report of labor demand projection in Thailand from 2010-2014, (2009), quoted in EJF, “Sold to the Sea,” 3; *see also* ILO, “Employment Practices and Working Conditions in Thailand’s Fishing Sector,” 2013, <http://www.ilo.org/dyn/migpractice/docs/184/Fishing.pdf>.

of whom approximately 3.25 million are working. About 2.7 millions of those working are from the three neighboring countries of Cambodia, Lao People’s Democratic Republic and Myanmar.”<sup>10</sup>

The rapid extension of fishing efforts has pushed Thai boat operators to minimize their operating costs. To meet global demands and gain maximum profits, pirate fishing vessels cut costs by using a Flag of Convenience (FoC), by adopting illegal, unreported and unregulated (IUU) fishing methods, and by exploiting their trafficked migrant crews.<sup>11</sup> Since most FoC States lack the will to enforce fishery and labor laws on vessels flying their flag, they enable the practices of the pirate fishing operators. By re-flagging a FoC and by changing names several times in a season, the pirate fishing vessels avoid detection and punishment.<sup>12</sup> Yet, Thailand’s fisheries management program is still weak and the Thai government has failed to amend obsolete laws, control the fleets and enforce regulations. Given this constellation of factors, fleets have exploited the gap by overfishing, and this in turn is leading to the collapse of fish stocks and marine ecosystems.<sup>13</sup>

IUU or pirate fishing is the main method employed by pirate vessels to minimize costs.<sup>14</sup> The term refers to any fishing activity that violates national and international law such as using banned fishing equipment; fishing protected species; operating in preservation areas; or

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<sup>10</sup> See IOM, “Thailand Migration Report 2014,” 2014, [http://th.iom.int/images/report/TMR\\_2014.pdf](http://th.iom.int/images/report/TMR_2014.pdf).

<sup>11</sup> EJF, “Pirates and Slaves,” 11; EJF, “Sold to the Sea,” 3.

<sup>12</sup> EJF, “All at Sea,” 4; EJF, “All at Sea,” 4.

<sup>13</sup> EJF, “Pirates and Slaves,” 5, 8–12.

<sup>14</sup> It is estimated that the widespread pirate fishing occurring in the Asia-Pacific region is at 3.4-8.1 million tons per year. See Asian-Pacific Economic Cooperation Fisheries Working Group, “Assessment of Impacts of Illegal, Unreported and Unregulated (IUU) Fishing in the Asia-Pacific,” November 2008, iii, [http://www.imcsnet.org/imcs/docs/apec\\_2008\\_iuu\\_fishing\\_assessmt\\_se\\_asia.pdf](http://www.imcsnet.org/imcs/docs/apec_2008_iuu_fishing_assessmt_se_asia.pdf).

operating without the appropriate licenses. The Food and Agriculture Organization (FAO) defines IUU fishing as follows:

Illegal Fishing refers to fishing activities:

- (1) conducted by national or foreign vessels in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations;
- (2) conducted by vessels flying the flag of states that are parties to a relevant Regional Fisheries Management Organization but operate in contravention of the conservation and management measures adopted by that organization and by which the states are bound, or relevant provisions of the applicable international law; or
- (3) conducted in violation of national laws or international obligations, including those undertaken by states that are party to a relevant regional fisheries management organization.

Unreported Fishing refers to fishing activities:

- (1) which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or
- (2) undertaken in the area of competence of a Regional Fisheries Management Organization which have not been misreported, in contravention of the reporting procedures of that organization

Unregulated Fishing refers to fishing activities:

in the area of application of a relevant Regional Fisheries Management Organization that are conducted by vessels without nationality, or by those flying the flag of a state not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization; or

in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with state responsibilities for the conservation of living marine resources under international law.<sup>15</sup>

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<sup>15</sup> FAO, “International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing” (Rome: FAO, 2001), Section 3, <http://www.fao.org/docrep/003/y1224e/y1224e00.htm>.

IUU or pirate fishing has impacts on the marine environment and on economic and social conditions; it leads to industrial overfishing, several forms of exploitation and illegal treatment of crew workers, and to modern slavery. The practice threatens world fisheries and destabilizes global efforts to maintain and preserve fish stocks.<sup>16</sup> Agnew, et alia point out that “illegal and unreported fishing contributes to overexploitation of fish stocks and is a hindrance to the recovery of fish populations and ecosystems.”<sup>17</sup> Similarly, EJF also asserts that “the international demand for cheap seafood is perpetuating a brutal trade in vulnerable humans and the collapse of entire marine ecosystems.”<sup>18</sup> Moreover, Lagon testified before the Senate Foreign Relations Committee about the relationships between pirate fishing and labor abuses aboard fishing vessels, as well as the links between illegal fishing, transnational organized crime, and drug trafficking.<sup>19</sup>

Thailand’s fish stocks and marine ecology are in crisis because of overfishing. About 47 percent of Thai uncontrolled fishing fleets use trawling equipment and fine-mesh nets that catch many fish of a small size—the so-called “demersal species” – species of fish that have their

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<sup>16</sup> EJF, “All at Sea,” 4, 7.

<sup>17</sup> David J. Agnew et al., “Estimating the Worldwide Extent of Illegal Fishing,” *PLOS ONE* 4, no. 2 (February 25, 2009): e4570, <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0004570>.

<sup>18</sup> EJF, “Pirates and Slaves,” 5.

<sup>19</sup> Mark P. Lagon, “Netting People: Treaties Reducing Illicit Fishing and Human Trafficking,” *Council on Foreign Relations*, 2014, <http://www.cfr.org/global/netting-people-treaties-reducing-illicit-fishing-human-trafficking/p32372>. In his testimony before the Senate Foreign Relations Committee, Lagon confirmed the relationship between IUU fishing and labor abuses aboard fishing vessels, as well as the links between illegal fishing, transnational organized crime, and drug trafficking. *See also* United Nations Office on Drugs and Crime (UNODC), “Transnational Organized Crime in the Fishing Industry: Focus on Trafficking in Persons, Smuggling of Migrants, Illicit Drugs Trafficking” (Vienna: United Nations, 2011).

niche on or near the bottom of the sea.<sup>20</sup> The use of destructive and unsustainable fishing methods to catch fish causes the depletion of fish stocks. In response to this condition, and in search of other sources of revenue, many Thai-flagged fishing vessels have targeted and trawled “trash fish”—species of fish used to feed animals and farmed shrimp. These practices are linked to supply chains of shrimp and seafood destined for export to the international market—and in particular to satisfy the demand for cheap seafood in the EU and US (see Figure 3-1).<sup>21</sup> Recently, it has been estimated that “as much as 60 per cent of total catches are comprised of trash fish” in the Gulf of Thailand.<sup>22</sup>



**Figure 2- 1.** Trash fish unloaded from Thai trawler at the port of Khura Buri, Phangnga Province, Southern Thailand

*Source:* “Sold to the Sea: Human Trafficking in Thailand’s Fishing Industry” (London: The Environmental Justice Foundation, 2013), 12.

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<sup>20</sup> Ibid. Lagon. *See also* EJF, “Sold to the Sea,” 7.

<sup>21</sup> The term ‘trash fish’ has several meanings. According to EJF, the term is given to “fish of commercial species that are unsaleable because they are damaged or degraded by poor post-capture handling, and the mashed-up detritus of fish, crustaceans and other marine biota that coats the back of the cod-end of the net after a prolonged trawl.” *See* Achavanuntakul, S. et al., “Mapping Shrimp Feed Supply Chain in Songkhla Province to Facilitate Feed Dialogue,” Oxfam & Sal Farest (2014), quoted in EJF, “Pirates and Slaves,” 5, 19-21.

<sup>22</sup> Ibid., 11.

The practice of overfishing is linked with modern slavery on Thai pirate fishing vessels. Due to the depleted fish stocks, the vessels have to sail further and stay longer at sea to compensate for the diminished returns.<sup>23</sup> In an interview conducted by the EJF, Mr. Thongkam, the owner and operator of more than 20 vessels operating out of Trang province, says: “The boats used to go out for five or seven days before returning to shore. Nowadays, we are talking about at least 15 days before the boats return to shore. When they do get back, there is not even much fish.”<sup>24</sup>

Since the fuel and operating costs have increased, the need to spend more time at sea is inevitable; this in turn leads to overfishing and pushes operators to make savings in other areas.<sup>25</sup> Labor costs and working conditions have been identified as areas where cuts can be made. The use of trafficked migrant workers helps to cut costs, so they are forced to work for little or no pay for several years or even decades at a time. The 2011 International Organization of Migration (IOM) report revealed several cases in which trafficked migrants working on Thai fishing vessels remained at sea for several years. The crews were not paid, were forced to work day and night, 18 to 20 hours a day for seven days a week, and were physically and emotionally abused.<sup>26</sup> Debt bondage, the exploitation and trafficking of forced labor, the use of violence and even murder to control crewmembers—all of these practices are employed in order to keep cheap seafood on the

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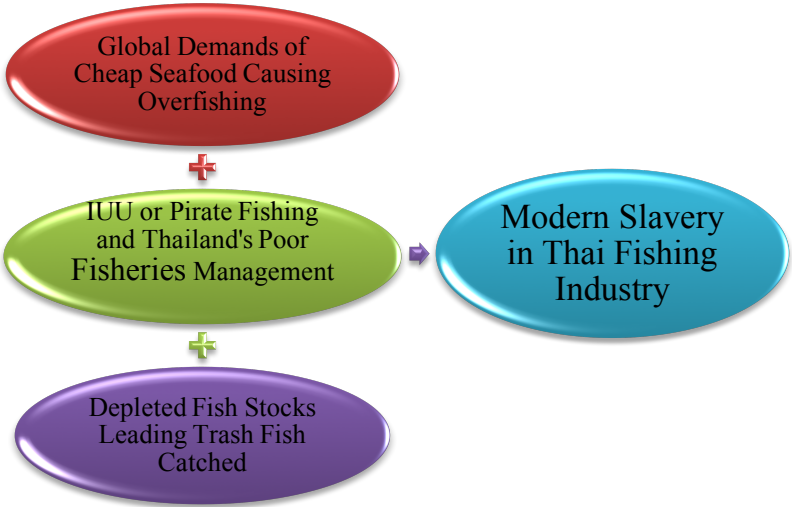
<sup>23</sup> Ibid., 5.

<sup>24</sup> EJF, “Slavery at Sea,” 12.

<sup>25</sup> Ibid. See also ILO, “Employment Practices and Working Conditions in Thailand’s Fishing Sector.”

<sup>26</sup> See IOM, “Trafficking of Fishermen Thailand” (International Organization for Migration (IOM), January 14, 2011), <https://www.iom.int/jahia/webdav/shared/shared/mainsite/activities/countries/docs/thailand/Trafficking-of-Fishermen-Thailand.pdf>; International Centre for Trade Union, “Exploitation of Cambodian Men at Sea: Facts about the Trafficking of Cambodian Men onto Thai Fishing Boats,” Brochure, (May 1, 2009), [http://www.ilo.org/global/topics/forced-labour/WCMS\\_143251/lang--en/index.htm](http://www.ilo.org/global/topics/forced-labour/WCMS_143251/lang--en/index.htm). (A study reveals that 59 percent of interviewed migrants working on Thai fishing boats reported witnessing the murder of a fellow worker.)

market. Despite the fact that already in 2001, the United Nations adopted the Food Agriculture Organization (FAO) International Plan of Action (IPAO) to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, pirate fishing remains problematic since there has been at best a slow response from the international community.<sup>27</sup>



**Figure 2- 2.** Causes of modern slavery in Thai fishing industry

*Source:* figure adapted from EJF, “Slavery at Sea: The Continued Plight of Trafficked Migrants in Thailand’s Fishing Industry” (London: The Environmental Justice Foundation, 2014), 10.

**3.2.2 The Business of Thai Fisheries Involves a System of Forced Labor, Trafficking in Persons, Debt Bondage, Exploitation and Human Rights Abuses**

For over two decades, migrant workers have played key roles in the Thai fishing industry, fueling Thailand’s developing economy. The presence of job opportunities attracts more migrant workers coming from neighboring countries to fill the labor shortage in the industry. To maintain

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<sup>27</sup> EJF, “All at Sea,” 7.

a supply of cheap labor, boat owners and fishing vessel operators employ trafficked migrants by engaging in human trafficking networks.<sup>28</sup> By using coercive means, labor brokers lure men to fishing vessels, turning them into victims of forced labor.<sup>29</sup> In 2012, the EJF revealed that, “it is apparent that human trafficking onto fishing vessels has, on occasion, been facilitated by corruption and an unwillingness to prosecute those individuals and companies that procure trafficked persons.”<sup>30</sup> This section explores how migrant workers on Thai fishing vessels are trafficked, exploited, and abused, and how Thailand has failed to address the presence of what the US Department of State calls “systematic disincentives”—that is, a system that discourages trafficking victims from pursuing legal action.

### ***Definition of Forced Labor, Trafficking in Persons and Debt Bondage***

The fisheries industry in Thailand has been identified as a particularly vulnerable industry, with undocumented migrants from Myanmar forming a large part of the workforce. Research conducted by the International Organization for Migration (IOM) shows that 16.9 percent of those working on Thai fishing vessels met the ILO definition of forced labor, and approximately 82 percent of those working on short-haul boats faced exploitative working conditions.<sup>31</sup> Since 2011, an increasing number of migrant workers have faced exploitation, human rights abuses, forced labor and human trafficking in Thai fishing vessels.<sup>32</sup> The terms

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<sup>28</sup> EJF, “Sold to the Sea,” 26.

<sup>29</sup> ILO, “Caught at Sea: Forced Labour and Trafficking in Fisheries.”

<sup>30</sup> EJF, “Sold to the Sea,” 12.

<sup>31</sup> IOM, “Thailand Migration Report 2014,” 152.

<sup>32</sup> Jerrold W. Hugué and Aphichat Chamratrithirong, “Thailand Migration Report 2011” (Bangkok: International Organization for Migration (IOM), 2011), [http://publications.iom.int/system/files/pdf/tmr\\_2011.pdf](http://publications.iom.int/system/files/pdf/tmr_2011.pdf).

‘forced labor’ and ‘human trafficking’ may, in ordinary speech, mean much the same thing, but as legal terms they have distinct definitions.

*Forced labor* violates the human rights and dignity of people. It is any work or service that people are forced to do against their will under the threat of some form of violence or punishment, such as accumulated debt, retention of identity papers or threats of denunciation to immigration authorities. By the ILO's definition, most slavery practices, including trafficking in persons and debt bondage (also known as “debt slavery” or “bonded labor”), all contain some elements of forced labor. Article 2 of the Convention Concerning Forced and Compulsory Labour, 1930 (No.29) defines ‘**forced labor**’ as: “All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>33</sup> The convention’s definition allows for many exceptions, such as: any work or service required by compulsory military service, normal civil obligations, in cases of emergency in the event of war or a calamity or threatened calamity such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases and in general any circumstance that would endanger the well-being of the population, and for minor communal services by the members of a community in the direct interest of the community.<sup>34</sup>

*Trafficking in persons* (also known as “human trafficking” or “modern slavery”) is a crime involving the exploitation of peoples for the purposes of compelled labor or a commercial

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<sup>33</sup> Article 2, ILO Convention (No. 29) Concerning Forced or Compulsory Labour, June 28, 1930, 39 UNTS 55 [hereinafter Forced Labour Convention]. 172 countries ratify this Convention. Thailand is a party to this Convention since 1969.

<sup>34</sup> *Ibid.*, Article 2.2.

sex act through the use of force, fraud, or coercion.<sup>35</sup> Unlike migrant smuggling (a crime that necessarily involves a person being moved across an international border), ‘human trafficking,’ as legally defined, does not require any such movement, although it may be understood to do so in common speech. The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons defines ‘**trafficking in persons**’ as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour [sic] or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>36</sup>

Moreover, of specific relevance in the context of human trafficking in fishing vessels is *debt bondage* – a complex system of contractors and sub-contractors who all take a cut from the wages of the indebted workers, some of whom work for years before receiving any income.<sup>37</sup> Generally, it is the employment of a person’s labor in the repayment of a debt. As a form of modern slavery, the United Nations’ 1956 Supplementary Convention on the Abolition of Slavery defined ‘**debt bondage**’ as “The status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value

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<sup>35</sup> “Human Trafficking & Migrant Smuggling: Understanding the Difference,” accessed May 3, 2016, <http://www.state.gov/j/tip/rls/fs/2015/245175.htm>.

<sup>36</sup> See “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime,” G.A. Res. 55/25, Annex I, U.N. Doc. A/55/383 (Nov. 15, 2000), Article 3.

<sup>37</sup> Beate Andrees, “Forced Labour and Human Trafficking: A Handbook for Labour Inspectors” (International Labour Office (ILO), 2008), 8, [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_097835.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_097835.pdf).

of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.”<sup>38</sup> In a 2015 Trafficking In Persons (TIP) report, the US Department of State revealed that some Thai men and migrant workers are deceived into incurring exorbitant debts to obtain employment and are sometimes subjected to debt bondage and conditions of forced labor on Thai fishing boats that travel throughout Southeast Asia and beyond.<sup>39</sup>

***Exploitation and Violence at Sea: Double Bookkeeping and Widespread Violence and Abuse on Thai Fishing Vessels***

Most Myanmar migrant workers working on Thai pirate fishing vessels are recruited by agencies that often target vulnerable and powerless individuals.<sup>40</sup> Many of them are human trafficking victims, being sold, exploited and abused; and some of them work for several years without receiving any income, since they have to pay the agencies.<sup>41</sup> Workers may be tricked to sign a contract, according to which their wages will be deducted for agency fees, leave pay,

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<sup>38</sup> Article 1 (a), “Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,” Apr. 30, 1957, 266 U.N.T.S. 40, adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608(XXI) of 30 April 1956 and done at Geneva on 7 September 1956, accessed May 3, 2016,

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>.

<sup>39</sup> United States Department of State, “Thailand Tier 3,” Report, (July 27, 2015),

<http://www.state.gov/j/tip/rls/tiprpt/countries/2015/243547.htm>.

<sup>40</sup> EJF, “All at Sea,” 12; Ian Urbina, “‘Sea Slaves’: The Human Misery That Feeds Pets and Livestock,” The New York Times, July 27, 2015, <http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html>.

<sup>41</sup> EJF, “All at Sea,” 12; Margie Mason, “Myanmar Fisherman Goes Home after 22 Years as a Slave,” AP Explore: Seafood from Slaves, July 1, 2015, <http://www.ap.org/explore/seafood-from-slaves/myanmar-fisherman-goes-home-after-22-years-as-a-slave.html>; “Exploitation of Cambodian Men at Sea.”; IOM, “Trafficking of Fishermen Thailand.”; United Nations Office on Drugs and Crime (UNODC), “Transnational Organized Crime in the Fishing Industry: Focus on Trafficking in Persons, Smuggling of Migrants, Illicit Drugs Trafficking” (Vienna: United Nations, 2011), 25–35.

subsistence and cash advances—a practice known as “double bookkeeping.”<sup>42</sup> An anonymous former broker, interviewed by the AP, reported that, “In recent years, agents have become more desperate and ruthless, recruiting children and the disabled, lying about wages and even drugging and kidnapping migrants.”<sup>43</sup>

A 2013 ILO study found that more than 16 percent of Myanmar fishers had been severely beaten while on the job.<sup>44</sup> In March 2013, an EJF investigation also revealed evidence of violence, exploitation, human rights trafficking and abuse. One victim escaped from a boat and reported a routine of severe beatings against himself and fellow crewmembers by the Thai pirate fishing captain.<sup>45</sup> When six Myanmar human trafficking victims were rescued by local police in the Southern port of Kantang,<sup>46</sup> the EJF report uncovered that:

All six interviewees had been trafficked and forced to endure excessive working hours of up to 20 hours per day, bonded labor, forced detention, little or no pay, physical abuse and threats of violence on the boats and in port. All had been at sea for at least five months and had been badly beaten by senior crewmembers. Two witnessed the torture and murder of a fellow crewmember and the murder of at least five other individuals. . . . Another witnessed three murders and the victims’ bodies being thrown into the sea.<sup>47</sup>

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<sup>42</sup> Ibid., EJF. *See also* International Transport Workers’ Federation, “Out of Sight, out of Mind: Seafarers, Fishers & Human Rights” (London: ITF, 2006), 25.

<sup>43</sup> Robin McDowell, Margie Mason, and Martha Mendoza, “AP Investigation: Slaves May Have Caught the Fish You Bought,” AP Explore: Seafood from Slaves, March 22, 2015, <http://www.ap.org/explore/seafood-from-slaves/ap-investigation-slaves-may-have-caught-the-fish-you-bought.html>.

<sup>44</sup> ILO, “Employment Practices and Working Conditions in Thailand’s Fishing Sector.” *See also* EJF, “Slavery at Sea,” 13.

<sup>45</sup> EJF, “Slavery at Sea,” 13.

<sup>46</sup> EJF, “Sold to the Sea,” 9.

<sup>47</sup> Ibid.



**Figure 2- 3.** Trafficked workers end up on vessels catching trash fish, which eventually ends up in Thailand’s export-oriented shrimp supply chain

*Source:* EJF, “Pirates and Slaves: How Overfishing in Thailand Fuels Human Trafficking and the Plundering of Our Oceans” (London: The Environmental Justice Foundation, 2015), 22.

***Systematic Disincentives: Slow Court Processes and the Government’s Failure to Facilitate an Effective Judicial Process against Perpetrators of Trafficking***

In 2014, the EJF followed the story of 14 Myanmar human trafficking victims who were rescued in 2013 from the port of Kantang. The report presents the frustration of trafficking victims in the Thai system due to the slow court process and the Thai government’s failure to prosecute the criminals, to support victims, or to facilitate an effective judicial process against perpetrators of trafficking.<sup>48</sup> A court interpreter with ten years of experience told the EJF that,

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<sup>48</sup> EJF, “EJF Releases Report on the Continued Abuse of Trafficked Migrants in Thailand’s Fishing Industry,” March 4, 2014, <http://ejfoundation.org/news/ejf-releases-report-continued-abuse-trafficked-migrants-thailands-fishing-industry>.

“Several business owners, the police, shelter staff, court officials and even judges routinely pressure victims of human trafficking to drop their cases and return home.”<sup>49</sup>

After eleven months in a shelter, the trafficking victims felt frustrated by the slow legal process; they asked why the owner of the boats had not been prosecuted; and one of them gave up, abandoning his case and intending to return home.<sup>50</sup> The US Department of State has labeled such obstacles to successful trafficking prosecution as “systematic disincentives” – characteristics of a system that discourages victims from pursuing legal action.<sup>51</sup> Below are some examples of testimonies in the words of the victims.

San Htike Win says:

I’ve been in this shelter for 11 months, but I’ve only been to court twice. The criminals that were arrested have admitted their crimes but the Thai authorities are taking much longer to process our case than is necessary.<sup>52</sup>

Khin Zaw Win says:

We don’t expect much anymore. [...] We just want to go home as soon as possible. [...] We feel very disappointed and hopeless.<sup>53</sup> [...] They told us that we were due to attend court the next day and asked us not to mention the boat owner’s name before the court, ... not to mention any information about the boat owner, such as a boat’s serial number and the name of the fish processing facility. We were told that the boat owner was prepared to give us ‘hush money’ on our return [to Myanmar].<sup>54</sup> [...] They told us: “accept this amount or you will lose every penny and your case will go on for one or two years.”<sup>55</sup>

Kyaw Lin Oo, interpreter for victims of human trafficking says:

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<sup>49</sup> Ibid.

<sup>50</sup> EJF, “Slavery at Sea,” 8, 24.

<sup>51</sup> EJF, “Sold to the Sea,” 12; United States Department of State, “Trafficking in Persons Report 2012 - Country Narrative T-Z,” June 2012, 339, <http://www.state.gov/documents/organization/192598.pdf>.

<sup>52</sup> EJF, “Slavery at Sea,” 24.

<sup>53</sup> Ibid., 25.

<sup>54</sup> Ibid., 31.

<sup>55</sup> Ibid., 21.

In the many cases that I've seen, sometimes it's the Labour Court, sometimes lawyers for the business owners, sometimes police officers working on the case, sometimes judges who are the ones who force victims to take money and go home. They say: "You don't have to stay, you don't have to wait, just take the money, get home quickly and it's over."<sup>56</sup>

## **2.3 ANALYSIS OF EXISTING INTERNATIONAL LAWS, REGIONAL COOPERATION AND DOMESTIC LAWS, POLICIES AND PRACTICES**

International communities, ASEAN and Thailand have attempted to address these problems. International instruments have been launched to increase transparency in the fishing industry and to combat human trafficking. This section analyzes international laws, regional cooperation, and Thai laws, policies and practices in dealing with cases of pirate fishing and human trafficking in the Thai fishing industry.

### **2.3.1 The UN, IMO, and ILO Tackle Pirate Fishing, Trafficking in Persons and Slavery at Sea**

Two United Nations bodies are primarily responsible for developing the international legal instruments and regulations governing pirate fishing as well as labor and safety conditions on board fishing vessels: The International Maritime Organization (IMO) and the International Labour Organization (ILO). Despite their efforts, failure and international legal loopholes persist. These organizations have been slow to produce adequate conventions and have been struggling to get states to ratify the conventions. Furthermore, the states themselves in many cases fail to

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<sup>56</sup> Ibid.

enact or enforce appropriate domestic laws. And so the problems remain.<sup>57</sup> This section highlights and analyzes some key international instruments and the efforts they have made to address these problems.

### ***The IMO Global Record of Fishing Vessels and UVI Number to Combat Pirate Fishing***

By overfishing and depleting fish stocks, IUU fishing threatens marine biodiversity, and also hinders the recovery of fish populations and ecosystems. Theoretically, under international law, every state is responsible for overseeing the activities of any vessel flying its flag; however, several states operate practically “open registers,” allow any vessel, regardless of nationality, to fly their flag, and ignore any offences that people on those vessels may commit.<sup>58</sup> Several international organizations have called for a Global Record of fishing vessels: the 2001 Food and Agriculture Organization of the United Nations (FAO) International plan of Action on IUU Fishing, the 2005 Ministerial-led Task Force on IUU Fishing on the High Seas and the Rome Declaration on IUU Fishing for a fishing vessel information scheme (FishVIS). But unfortunately, the success of such calls to action is limited.<sup>59</sup>

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<sup>57</sup> EJF, “All at Sea,” 14.

<sup>58</sup> *Ibid.*, 18.

<sup>59</sup> EJF, “Bringing Fishing Vessels Out of The Shadows: The Urgent Need for a Global Record of Fishing Vessels and A Unique Vessel Identifier,” 3, accessed May 4, 2016, [https://www.fishwise.org/images/pdfs/out\\_of\\_the\\_shadows\\_ejf\\_fishwise.pdf](https://www.fishwise.org/images/pdfs/out_of_the_shadows_ejf_fishwise.pdf).

On December 2013, International Maritime Organization<sup>60</sup> launched a new scheme for registering vessels—an IMO unique vessel identifier (UVI)—in order to combat pirate fishing operations. The idea of a UVI is not new; it is already used for large-scale seagoing vessels. Resolution A.600 (15) requires vessels over 100 Gross Tonnes (GT) to have a seven digit IMO number, but excludes the vessels “used exclusively for fishing.”<sup>61</sup> The new scheme lifts this exemption and requires that all fishing vessels over 100 GT have a UVI number. Since pirate fishing vessels change their flags, names and radio signals to avoid detection and sanctions, the database of IMO numbers will provide a crucial tool by enabling all stakeholders to track pirate fishing vessels and thus maintain greater transparency and traceability in global seafood supply chains.<sup>62</sup> However, the practice today remains voluntary. The expectation is that the US, the EU and other IMO Member States will require their vessels to have an IMO number, and two major Regional Fisheries Management Organizations have already acknowledged it.<sup>63</sup>

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<sup>60</sup> As of 2015, IMO currently has 171 Member States and three Associate Members (Faroe Islands, Hong Kong and Macao). Thailand has been a member since 1973. *See* International Maritime Organization (IMO), “Member States,” accessed May 5, 2016, <http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx>.

<sup>61</sup> IMO, “IMO Ship Identification Number Scheme (Resolution A.600 (15), Adopted on 19 November 1987),” 600, accessed May 5, 2016, [http://www.imo.org/blast/blastDataHelper.asp?data\\_id=22376&filename=A600\(15\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=22376&filename=A600(15).pdf). The number stays with the vessel during its lifetime, irrespective of any name, flag or ownership changes; IMO, “IMO Identification Number Scheme, quoted in EJF, EJF, “Bringing Fishing Vessels Out of The Shadows: The Urgent Need for a Global Record of Fishing Vessels and A Unique Vessel Identifier,” 3.

<sup>62</sup> World Fishing & Aquaculture, “IMO Tackles Pirate Fishing,” December 6, 2013, <http://www.worldfishing.net/news101/industry-news/imo-tackles-pirate-fishing>; EJF, “EJF Welcomes UN Decision to Combat Pirate Fishing and Spanish Industry Call for Fishing Vessels to Obtain IMO Numbers,” December 5, 2013, <http://ejfoundation.org/news/ejf-welcomes-un-decision-combat-pirate-fishing-and-spanish-industry-call-fishing-vessels-obtain>.

<sup>63</sup> World Fishing & Aquaculture, “IMO Tackles Pirate Fishing.” The Spanish industry requires all of its large-scale fishing vessels to obtain UVI numbers; and the International Commission for the Conservation of Atlantic Tunas (ICCAT) as well as the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) have also voted to have identification numbers mandatory for vessels in their managed areas.



**Figure 2- 4.** A comparison between Kummyeong 2 and Conosu, proving that it is the same vessel

*Source:* EJF, “Bringing Fishing Vessels Out of the Shadows: The Urgent Need for a Global Record of Fishing Vessels and A Unique Vessel Identifier,” 4.

### ***The UN Attempts to Eradicate Trafficking in Persons***

Under international law, the most recent and powerful instruments for combating human trafficking are the United Nations Convention against Transnational Organized Crime (adopted by General Assembly resolution 55/25 of 15 November 2000)<sup>64</sup> and its two related protocols: the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,<sup>65</sup> and the United Nations Protocol against the Smuggling of Migrants by

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<sup>64</sup> *United Nations Convention Against Transnational Organized Crime*, G.A. Res. 55/25, Annex I, U.N. Doc. A/RES/55/383 (Nov. 15, 2000), entered into force on 29 September 2003. [the UNTOC Convention]

<sup>65</sup> *See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, G.A. Res. 55/25, Annex II, U.N. Doc. A/55/383 (Nov. 15, 2000), entered into force on 25 December 2003. [the Trafficking in Persons Protocol]

Land, Sea, and Air.<sup>66</sup> States must become parties to the Convention before they can become parties to the Protocols.<sup>67</sup>

The Trafficking in Persons Protocol is the one relevant to the present case. It is the first global legally binding instrument, making it unique as “a law enforcement instrument.”<sup>68</sup> It is more than a merely aspirational agreement and deals with all aspects of human trafficking.<sup>69</sup> The objectives of the Protocol are to prevent and combat trafficking in persons, especially women and children; to protect and assist the victims of trafficking in persons with full respect for their human rights; and to promote cooperation among State Parties.<sup>70</sup> Parties are obliged to enable and implement the law at the domestic level: to take action to penalize trafficking, protect victims of trafficking, and grant victims temporary or permanent residence in the countries of destination.<sup>71</sup>

On the basis of the definition given in Article 3 of Protocol, “Trafficking in Persons” has three constituent elements: the act, the means, and the purpose. The *act* refers to the “recruitment, transportation, transfer, harbouring or receipt of persons”; the *means* refers to the “threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim”; and the *purpose* is for

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<sup>66</sup> See Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Crime (adopted on 15 November 2000 and entered into force on 28 January 2004) 40 ILM 384, entered into force 28 January 2004. (the Migrant Smuggling Protocol).

<sup>67</sup> See United Nations Office on Drugs and Crime, “Convention on Transnational Organized Crime,” accessed May 5, 2016, <https://www.unodc.org/unodc/treaties/CTOC/>.

<sup>68</sup> Ibid.

<sup>69</sup> Lindsey King, “International Law and Human Trafficking,” 88, accessed May 5, 2016, <http://www.du.edu/korbel/hrhw/researchdigest/trafficking/InternationalLaw.pdf>.

<sup>70</sup> The Trafficking in Persons Protocol, Article 2.

<sup>71</sup> King, “International Law and Human Trafficking,” 88.

“exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labor, slavery or similar practices and the removal of organs.”<sup>72</sup>

An important feature of the Protocol is that persons do not have the right to choose to be trafficked; in other words, the “consent of a victim of trafficking in persons to the intended exploitation” shall be irrelevant to “any means” included in the definition.<sup>73</sup> In addition, to comply with a broad definition of trafficking in persons, a person does not have to be directly forced or threatened into being trafficked. If a victim can prove he or she had no alternative means other than to comply, it falls within the provisions of Protocol.<sup>74</sup>

In practice, enforcing the Trafficking in Persons Protocol is problematic for several reasons. Victims may hesitate to identify traffickers because of fear of repercussion.<sup>75</sup> Enforcing the anti-human trafficking law is difficult and expensive since the crime transcends national borders, and thus requires more time, resources and energy.<sup>76</sup> Most importantly, there are language barriers between enforcement officers and the victims, and there are few programs that properly train local enforcement officers.<sup>77</sup> Instead of treating trafficked persons as victims, enforcement officers often treat them as criminals or illegal immigrants, and either arrest or deport them.<sup>78</sup> In 2007, in support of effective enforcement of the laws, the United Nations Office on Drugs and Crime (UNDOC) established the United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), which provides supplemental funds and encourages regional

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<sup>72</sup> The Trafficking in Persons Protocol, Article 3 (a).

<sup>73</sup> The Trafficking in Persons Protocol, Article 3 (b)

<sup>74</sup> King, “International Law and Human Trafficking,” 89.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid., 90.

<sup>78</sup> Ibid.

efforts to eradicate human trafficking practices.

### ***The ILO Work in Fishing Convention (No. 188) to Protect All Fishers***

The ILO is the UN agency responsible for developing international labor standards, social protection, and work opportunities for all workers. The ILO has identified eight fundamental conventions, which are binding on every ILO member, covering subjects that are considered as fundamental principles and rights at work (the prohibition of forced labor and child labor, the right to organize in a trade union, and suffer no discrimination).<sup>79</sup> Aiming to prevent poor conditions on fishing vessels, several conventions have been designed, but the latest and most important one is the Convention Concerning Work in Fishing Sector (No. 188), which revises five of the seven existing ILO Conventions concerning the fishing sector, and its Recommendation (No. 199).<sup>80</sup>

Since fishing is one of the world's oldest industries and about 40 million men and women working in the industry worldwide are facing a highly dangerous and mostly unregulated profession, international standards of working and living condition for fishers are necessary. Convention No. 188 is accordingly established to fulfill that purpose by providing decent work,

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<sup>79</sup> ILO, "ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up, Adopted by the International Labour Conference at Its Eighty-Sixth Session, Geneva, 18 June 1998 (Annex Revised 15 June 2010)," 1998, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_467653.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_467653.pdf). Eight fundamental Conventions are: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Forced Labour Convention, 1930 (No. 29); Abolition of Forced Labour Convention, 1957 (No. 105); Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 11).

<sup>80</sup> ILO, "Convention C188 - Work in Fishing Convention, 2007 (No. 188)," accessed May 5, 2016, [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C188](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C188).

justice and protection for all fishers, specified by the convention as “every person employed or engaged in any capacity or carrying out an occupation on board any fishing vessel, including persons working on board who are paid on the basis of a share of the catch.”<sup>81</sup>

To ensure that all fishers, regardless of the scale of the fishing operation, have decent conditions of work on board fishing vessels, Convention No. 188 sets out minimum requirements for work on board and applies them to all fishers and all fishing vessels engaged in commercial fishing operations.<sup>82</sup> Those requirements are, for example, minimum age of 16 for working on board fishing boats,<sup>83</sup> medical examination of fishers,<sup>84</sup> minimum hours of rest,<sup>85</sup> crew list and fisher’s work agreement,<sup>86</sup> repatriation,<sup>87</sup> recruitment and placement,<sup>88</sup> a monthly or other regular payment of fishers,<sup>89</sup> accommodation and food,<sup>90</sup> medical care on board,<sup>91</sup> occupational safety and health and accident prevention,<sup>92</sup> social security<sup>93</sup> and protection for work-related sickness, injury or death.<sup>94</sup> However, some exclusions and exemptions are possible, and some progressive implementation is allowed, for example, medical examination, crew list, a written fisher’s work agreement.

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<sup>81</sup> Work in Fishing Sector Convention, Article 1, Definitions.

<sup>82</sup> Work in Fishing Sector Convention, Article 2, Scope.

<sup>83</sup> Work in Fishing Sector Convention, Article 9

<sup>84</sup> Work in Fishing Sector Convention, Article 10 -12

<sup>85</sup> Work in Fishing Sector Convention, Article 14. The Convention suggests ten hours in any 24-hour period and 77 hours in any seven-day period.

<sup>86</sup> Work in Fishing Sector Convention, Articles 15-20, and Annex II.

<sup>87</sup> Work in Fishing Sector Convention, Article 21

<sup>88</sup> Work in Fishing Sector Convention, Article 22

<sup>89</sup> Work in Fishing Sector Convention, Article 23-24

<sup>90</sup> Work in Fishing Sector Convention, Article 25-28, and Annex III.

<sup>91</sup> Work in Fishing Sector Convention, Article 29-30

<sup>92</sup> Work in Fishing Sector Convention, Article 31

<sup>93</sup> Work in Fishing Sector Convention, Article 38-39

<sup>94</sup> Work in Fishing Sector Convention, Article 34

Thailand has not yet ratified Convention No. 188, since it would require considerable changes to the Labor Protection Act and Ministerial Regulation No. 10, and because it increases the rigor and scope of regulation in the fishing sector, such as standards on rest hours, medical examinations and training prior to employment, and standards for accommodation and food.<sup>95</sup> Based on interviews that I conducted, however, it seems that the recent practices in Thailand do comply with some of the convention's requirements—for example, maintaining a crew list, a written fishing contract and a list of crewmembers.

### **2.3.2 The Role of the Association of Southeast Asian Nations in Implementing Fishing Management Measures and Anti-Human Trafficking Laws**

This section examines how the Association of Southeast Asian Nations (ASEAN) deals with IUU fishing and human trafficking problems through the establishment of regional cooperation and legal frameworks. It focuses on the ASEAN Maritime Forum's agenda and on regional cooperation regarding IUU Fishing and labor, in particular: the ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain; the ASEAN Guidelines on Implementation of Labor Standards for the Fisheries Sector; and the ASEAN Convention Against Trafficking in Persons, Especially Women and Children.

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<sup>95</sup> ILO, "Employment Practices and Working Conditions in Thailand's Fishing Sector," 19.

## *The ASEAN Maritime Forum Sets an Agenda to Fight Pirate Fishing*

The ASEAN Maritime Forum (AMF) was established as a forum among ASEAN Member States to exchange ideas on maritime security, for example, sea piracy, armed robberies against ships, overlapping claims and territorial disputes, terrorism, and other broad cross-cutting issues such as marine environmental protection, IUU fishing, smuggling and maritime transportation.<sup>96</sup> To promote awareness and concrete regional cooperation on maritime security, the ASEAN Regional Forum (ARF) Inter-Sessional Meeting on Maritime Security (ISM-MS) was established in July 2008, and it developed an ARF Work Plan on Maritime Security, which was adopted by the Ministers in 2011.<sup>97</sup> Based on the trend of cooperative efforts in ARF, the topic of IUU fishing was selected as the theme for guiding the development of the ISM-MS agenda during the years 2015-2017.<sup>98</sup>

In October 2012, at the 3rd ASEAN Maritime Forum, the ASEAN Member States discussed and exchanged views on the following topics: (a) maritime security and cooperation in the ASEAN; (b) maintaining freedom and safety of navigation and addressing sea piracy; (c) protecting the marine environment and promoting eco-tourism and fishery regulations in East Asia; and (d) future work of the ASEAN Maritime Forum.<sup>99</sup> In their agreement, the member states declared that: “maritime security and cooperation should contribute to the three pillars of

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<sup>96</sup> ASEAN Secretariat, “ASEAN and ARF Maritime Security Dialogue and Cooperation,” October 4, 2007, [http://www.un.org/depts/los/consultative\\_process/mar\\_sec\\_submissions/asean.pdf](http://www.un.org/depts/los/consultative_process/mar_sec_submissions/asean.pdf).

<sup>97</sup> “ASEAN Regional Forum Work Plan on Maritime Security 2015-2017,” June 8, 2015, <http://aseanregionalforum.asean.org/files/library/Plan%20of%20Action%20and%20Work%20Plans/ARF%20Work%20Plan%20on%20Maritime%20Security%202015-2017.pdf>.

<sup>98</sup> *Ibid.*, Annex A.

<sup>99</sup> ASEAN, “Chairman’s Statement, 3rd ASEAN Maritime Forum,” ASEAN | ONE VISION ONE IDENTITY ONE COMMUNITY, October 9, 2012, <http://www.asean.org/chairman-s-statement-3rd-asean-maritime-forum/>.

ASEAN community building, namely, the ASEAN Political Security Community, the ASEAN Economic Community, and the ASEAN Socio-Cultural Community.”<sup>100</sup>

Nevertheless, a KM coordinator of the People's Coalition for Fisheries Justice (Kaolisi Rakyat Untuk Keadilan Perikanan-KIARA) said that in her opinion no real progress has been made on the issue, since the discussion did not produce anything concrete.<sup>101</sup> In her words, she says: “We also found that at the ASEAN level, the discourse of handling illegal fishing has not advanced from the manufacture of a special forum in it (the ASEAN Maritime Forum) ... Its achievements are nothing more than the manufacture of trade agreements.”<sup>102</sup>

### ***ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain***

In accordance with the principles articulated in international and regional instruments (such as the FAO Code of Conduct for Responsible Fisheries; the International Plan of Action to Prevent, Deter and Eliminate IUU Fishing (IPOA-IUU); the ASEAN-SEAFDEC Resolution and Plan of Action on Sustainable Fisheries for Food Security for the ASEAN Region towards 2020), the Southeast Asian Fisheries Development Center (SEAFDEC) has developed the *ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities*

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<sup>100</sup> Ibid.

<sup>101</sup> KIARA is a non-governmental organization, established in 2003 and located in Jakarta, to strengthen fisher's groups and to help people living in coastal regions and small islands to obtain protection and welfare for their communities.

<sup>102</sup> “Illegal Fishing Costs Indonesia 3 Billion Dollars A Year,” ASEAN News – Reporting ASEAN, November 26, 2012, <http://www.aseannews.net/illegal-fishing-costs-indonesia-3-billion-dollars-a-year/>.

*into the Supply Chain* for the ASEAN Member States [the ASEAN-GPIUU].<sup>103</sup> The aim of these Guidelines is to enhance the credibility of the region's fish and fishery products by ensuring that fish and fishery products from the region entering the global supply chain are NOT derived from pirate fishing.<sup>104</sup> Through a participatory and consultative process, experts from all ASEAN Member States (AMSs) adopted these Guidelines in 2014, at Kota Kinabalu, Malaysia.<sup>105</sup>

To ensure that fish and fishery products are not derived from pirate fishing, the Guidelines recommend that all Member States take actions such as: controlling fishing access through a registration and licensing system for fishing vessels,<sup>106</sup> implementing a Vessel Monitoring System (VMS) for all commercial fishing,<sup>107</sup> regulating transshipment and landing fish/catch across borders,<sup>108</sup> and strengthening the management of fishing in the high seas and Regional Fisheries Managing Organization (RFMO) areas.<sup>109</sup> Since these recommendations are only guidelines, they have no legally binding force on the Member States. To comply with these

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<sup>103</sup> "ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain," Southeast Asian Fisheries Development Center, accessed May 6, 2016, <http://www.seafdec.org/download/asean-guidelines-for-preventing-the-entry-of-fish-and-fishery-products-from-iuu-fishing-activities-into-the-supply-chain/>. The SEAFDEC is an autonomous inter-governmental body established as a regional treaty organization in 1967. The mandate of SEAFDEC is to promote fisheries development in Southeast Asia. Currently, SEAFDEC comprises 11 members: all 10 ASEAN countries and Japan. The Center operates through the Secretariat located in Thailand and has five Technical Departments, namely: the Training Department (TD); the Marine Fisheries Research Department (MFRD); the Aquaculture Department (AQD); the Marine Fishery Resources Development and Management Department (MFRDMD); and the Inland Fishery Resources Development and Management Department (IFRDMD). See "About SEAFDEC," Southeast Asian Fisheries Development Center, accessed May 6, 2016, <http://www.seafdec.org/about/>.

<sup>104</sup> The ASEAN-GPIUU, *Goals and Objectives*, 8.

<sup>105</sup> The ASEAN-GPIUU, 7.

<sup>106</sup> The ASEAN-GPIUU, 14.

<sup>107</sup> The ASEAN-GPIUU, 15.

<sup>108</sup> *Ibid.*

<sup>109</sup> The ASEAN-GPIUU, 16. Examples of RMO are the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), Indian Ocean Tuna Commission (IOTC), and Western and Central Pacific Fisheries Commission (WCPFC).

Guidelines, the Member States must enact their own laws or regulations at the domestic level.

***Regional Technical Consultation on Labor Aspects within the Fishing Industry in the ASEAN Region***

To enhance the competitiveness of ASEAN fish and fishery products, the SEAFDEC Council during its 47th Meeting in 2015 requested Members to discuss labor issues in the fisheries sector at the regional level. With regards to the emerging international agreements and recommendations, the Council convened the Regional Technical Consultation (RTC) to discuss the current legal provisions and implementation guidelines, especially those covering labor issues (e.g., recruitment and treatment of migrant labor) within the fishing industry in the region.<sup>110</sup> With support from the SEAFDEC-Sweden Project, the RTC organized the “First Regional Technical Consultation (RTC) on Labor Aspects within the Fishing Industry in the ASEAN Region” on 25-27 February 2016 in Bangkok, Thailand.<sup>111</sup>

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<sup>110</sup> “SEAFDEC Holds Regional Forum to Discuss Issues on Labor in Fisheries,” Southeast Asian Fisheries Development Center, March 1, 2016, <http://www.seafdec.org/seafdec-holds-regional-forum-to-discuss-issues-on-labor-in-fisheries/>. The RTC was officiated by the Director-General of the Department of Fisheries of Thailand Dr. Wimol Jantrarotai, who is also the current Chairperson of the SEAFDEC Council, as the Guest of Honor together with the Deputy Secretary-General of SEAFDEC Mr. Hajime Kawamura. Several fisheries experts and representatives from agencies responsible for fishers of the ASEAN-SEAFDEC Member Countries attended the conference; representatives from Departments of Labor (of some countries); resource persons and representatives from international and regional organizations such as the International Labour Organization (ILO), Food and Agriculture Organization/Regional Office for Asia and the Pacific (FAO/RAP), USAID-Oceans, International Collective on Support of Fishworkers (ICSF), United Nations Action for Cooperation against Trafficking in Persons (UN-ACT), EU delegation to Thailand; representatives from trade unions; private sector and civil society organizations such as the Sustainable Development Foundation (SDF); SEA Fish for Justice; the Nexus Institute; the Cambodian Confederation of Unions; the Indonesia Seafarers’ Union; the Labour Rights Promotion Network; the Thai Frozen Foods Associations; the National Fisheries Association of Thailand; and the Thai Overseas Fisheries Association, among others.

<sup>111</sup> Ibid.

To secure decent working and living conditions of all fishers and fish workers in the ASEAN region, the RTC has identified four key issues: (1) employment practices and working conditions at sea and in processing plants; (2) the need to combat pirate fishing by improving the registration-licensing process of vessels, gear and people; and by improving the recording of catches; (3) the need to monitor the migration policies of the sending and receiving countries by establishing an MOU or bilateral agreements; and (4) the need to combat human trafficking by reinforcing policies, the strengthening of inter-ministerial coordination and surveillance with the involvement of relevant stakeholders.<sup>112</sup> The RTC also suggested that ASEAN Member States should improve regulations or policies on labor in the fisheries sector based on the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, as well as by incorporating international instruments, especially ILO Convention 188 and other relevant instruments.<sup>113</sup>

In response to these requirements and recommendations, the ASEAN Guidelines on Implementation of Labor Standards for Fisheries Sector was developed in line with international standards and was proposed at the 48th Meeting of the SEAFDC in 2016.<sup>114</sup> Table 2-1 shows the ongoing process of addressing labor issues in the fisheries sector in the Southeast Asian region.

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<sup>112</sup> Ibid. *See also* SEAFDC, “Combating IUU Fishing in the Southeast Asian Region Through Application of Catch Certification for International Trade in Fish and Fishery Products, Forty-Eight Meeting of the Council Southeast Asian Fisheries Development Center, Sheraton Nha Trang Hotel & Spa, Viet Nam, 4-8 April 2016,” April 2016, [http://www.seafdec.org/documents/48cm\\_wp05-1a.pdf](http://www.seafdec.org/documents/48cm_wp05-1a.pdf).

<sup>113</sup> *See* SEAFDC, “Regional Cooperation on Labor Aspects within the Fishing Industry in the ASEAN Region, Forty-Eight Meeting of the Council Southeast Asian Fisheries Development Center, Sheraton Nha Trang Hotel & Spa, Viet Nam, 4-8 April 2016,” accessed May 6, 2016, [http://www.seafdec.org/documents/48cm\\_wp05-2b.pdf](http://www.seafdec.org/documents/48cm_wp05-2b.pdf).

<sup>114</sup> Ibid. *See also* “The Forty-Eighth Meeting of SEAFDEC Council,” Southeast Asian Fisheries Development Center, February 23, 2016, <http://www.seafdec.org/48cm/>.

**Table 2- 1.** Process of addressing labor issues in the fisheries sector in the Southeast Asian region

<b>Activities</b>	<b>Date</b>
1 <sup>st</sup> RTC on Labor Aspects within the Fishing Industry in the ASEAN Region	25-27 February 2016
Stakeholders Consultation on Combating IUU Fishing and Enhancing the Competitiveness of ASEAN Fish and Fishery Products	1-2 March 2016
Drafting of Joint Declaration on Combating IUU Fishing and Enhancing the Competitiveness of ASEAN Fish and Fishery Products	3-4 March 2016
Endorsement processes by SEAFDEC Council and the ASEAN at ASEAN Sectoral Working Group on Fisheries (ASWGFI)	June 2016
High-level Consultation for Adopting the Joint Declaration	3 August 2016
Regional Program implementation by SEAFDEC and AMS	2017

*Source:* SEAFDC, “Regional Cooperation on Labor Aspects within the Fishing Industry in the ASEAN Region, 5.

Below is a table summarizing the discussions and recommendations of the RTC.

**Table 2- 2.** Summary of the discussions and recommendations made at the 48th Meeting of the SEAFDEC Council, 2016

<b>Inputs</b>	<b>Interventions/Recommendations</b>	
	<b>National agencies</b>	<b>Regional cooperation</b>
<b>International instruments (ILO, FAO, IMO)</b>	<p>Strengthen inter-ministerial cooperation and apply an integrated and comprehensive approach in implementing international instruments</p> <p>Competent authorities to be defined and with focal point identified to enhance cooperation and dialogue</p> <p>Seek “high level” support on measures to ensure good</p>	<p>Promote the application of standards of labor/working conditions in the fisheries sector based on the C188 and other relevant and applicable ILO conventions and international instruments</p> <p>Increase awareness on the relevance (and implications) of international instruments (ILO, IMO, etc.) as reference to standards applicable to the</p>

	<p>working conditions</p> <p>Raise the application of standards of labor/working conditions in the fisheries sector based on the C188 and other relevant and applicable ILO conventions and international instruments</p> <p>Build upon/relate to the ILO and FAO initiative on “Decent Work”, recognizing the four pillars; 1) Employment, 2) Social security, 3) Status and Rights of workers, and 4) Governance and Social dialogue</p>	<p>improvement of working conditions (including contracts, wages, etc.) for domestic and migrant workers</p> <p>AMSs to adopt an inclusive approach to decent work (employment, working conditions, social protection, social dialogue of men and women fishers and fish workers, and of migrant fishers and fish workers)</p>
<p><b>Regional instruments (ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers)</b></p>	<p>AMSs to develop regulations or policies on labor in the fisheries sector based on the ASEAN Declaration</p> <p>Consider and strengthen the roles and obligations of the “receiving” countries, the “sending” countries and commitments by “ASEAN” as indicated in the “ASEAN Declaration”</p>	<p>Coordinate dialogue or consultations to develop the ASEAN Guidelines on Implementation of Labor Standards for the Fisheries Sector</p>
<p><b>NGOs/CSOs</b></p>	<p>Build awareness of agencies on the importance and context of labor related laws and measures—aim for a “broader social dialogue” while building upon a “human rights based approach”</p>	<p>Involve NGOs/CSOs in the development of the ASEAN Guidelines on Implementation of Labor Standards for the Fisheries Sector</p>
<p><b>Best practices (national regulations)</b></p>	<p>Maintain close collaboration between fisheries-related agencies, labor departments and other responsible agencies to</p>	<p>Establish MOU or multilateral or bilateral labor agreement to address the</p>

	<p>ensure that the rights of fisheries labor are protected under respective countries' national labor laws</p> <p>Ensure the development, enhancement and implementation of national laws and regulations</p> <p>Support the implementation and maintenance of good working conditions including steps to secure rights of workers (in accordance with national laws)</p> <p>Support the formulation of labor unions/associations at national and regional levels (in accordance with national laws)</p> <p>For domestic fishers, adopt labor standards including occupational safety and health standards (OSHS)</p> <p>For migrant workers, develop standards for recruitment, good working conditions, re-integration approach</p>	<p>concerns of migrant workers</p> <p>For domestic fishers, promote the adoption of labor standards including occupational safety and health standards (OSHS)</p> <p>Support the formulation of labor unions/associations at national and regional levels (in accordance with national laws)</p>
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Source: SEAFDC, "Regional Cooperation on Labor Aspects within the Fishing Industry in the ASEAN Region, 3-4.

***ASEAN Convention Against Trafficking in Persons, Especially Women and Children***

The issue of human trafficking first appeared on the ASEAN agenda in the 1990s, most notably in the adoption of ASEAN Vision 2020 and the ASEAN Declaration on Transnational

Crime in 1997.<sup>115</sup> In ASEAN Vision 2020, ASEAN Member States agreed that human trafficking is one of the problems, among other transnational crimes, that “can be met only on regional scale.”<sup>116</sup> In conjunction with the 27th ASEAN Summit and Related Summits under Malaysia's 2015 chairmanship of the regional grouping, ASEAN leaders signed the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) on 21 November 2015.<sup>117</sup>

By recognizing that trafficking in persons constitutes a violation of human rights and an offence to the dignity of human beings, and by reaffirming that ASEAN has to honor its own internal agreements and comply with other international instruments (for example, the ASEAN Charter, the ASEAN Declaration Against Trafficking in Persons Particularly Women and Children adopted in 2014, the ASEAN Declaration adopted in 2012, and the UN Convention against Transnational Organized Crime and its Protocol), the ACTIP establishes a clear and precise regional legal framework for preventing and combating trafficking in persons. The three principal objectives of the ACTIP are: to prevent and combat trafficking in persons, especially women and children; to protect and assist human trafficking victims with full respect for their human rights; and promote cooperation among the relevant parties.<sup>118</sup>

At the present, in response to the ACTIP, Singapore is among the first ASMs to ratify the Convention in January 2016, after acceding to the United Nations Protocol to Prevent,

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<sup>115</sup> Kelsey Lee and Sau Lim, “The Effect of ASEAN on Human Trafficking in Southeast Asia” 2013, 22.

<sup>116</sup> ASEAN, “ASEAN Vision 2020,” ASEAN | ONE VISION ONE IDENTITY ONE COMMUNITY, accessed May 6, 2016, [http://www.asean.org/?static\\_post=asean-vision-2020](http://www.asean.org/?static_post=asean-vision-2020).

<sup>117</sup> “ASEAN Convention Against Trafficking in Persons, Especially Women and Children,” [the ACTIP], accessed May 5, 2016, <http://www.asean.org/storage/images/2015/November/actip/ACTIP.PDF>.

<sup>118</sup> The ACTIP, Article 1

Suppress and Punish Trafficking in Persons, Especially Women and Children and by enacting the domestic law: the Prevention of Human Trafficking Act in 2015.<sup>119</sup>

### **2.3.3 Thailand's Efforts to Combat Pirate Fishing, Trafficking in Persons, and Slavery at Sea**

This section examines Thailand's efforts to address the problems of IUU or pirate fishing, human trafficking and forced labor in the fisheries sector. It highlights some key updated law and policy efforts and practices designed to address these problems.

#### ***Efforts of the Command Center for Combating Illegal Fishing and the Seven Working Groups***

Pirate fishing in Thailand remains widespread, although Thailand has ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS) as well as the 1995 FAO Code of Conduct for Responsible Fisheries.<sup>120</sup> The European Union (EU) issued a "yellow card" to Thailand on 21 April 2015 (see a discussion in section 3.4), which bans the import of seafood labeled as the product of IUU fishing. At the same time, with a view toward assisting Thailand to address its structural problems, the EU identified the following three challenges: a legal framework has not yet been designed to combat IUU fishing; monitoring, control and

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<sup>119</sup> Prashanth Parameswaran, "Singapore Ratifies ASEAN Anti-Trafficking Pact," *The Diplomat*, accessed May 6, 2016, <http://thediplomat.com/2016/01/singapore-ratifies-asean-anti-trafficking-pact/>.

<sup>120</sup> "CCCIF Press Release: Thailand's Progress in Combating IUU Fishing," accessed May 3, 2016, <http://www2.thaiembassy.be/press-release-thailands-progress-in-combating-iuu-fishing/>.

surveillance (MCS) and traceability systems were poor; and law enforcement was weak and lacked harmonization.<sup>121</sup>

In response to the EU yellow card, the Head of the National Council for Peace and Order (the Thai junta government), by virtue of section 44 of the Constitution of the Kingdom of Thailand (Interim), B.E. 2557 (2014), which grants the power to the Prime Minister to issue orders if deemed necessary for national stability, has an order to establish the Command Centre for Combating Illegal Fishing (CCCIF), located and operated at the Royal Thai Navy Command Center, on May 1, 2015.<sup>122</sup> Specifically assigned as a special task force responsible directly to the prime Minister, the CCCIF consists of (1) the CCCIF Committee, which acts as a national policy and regulatory unit; (2) the Royal Thai Navy and the National Maritime Benefit Protection Coordination Centre, which acts mainly as a coastal and off-shore operation unit of the CCCIF and cooperates with other related agencies; and (3) the Port In-Port Out Controlling Centre (PIPO) and Fishing One Stop Service Centre.<sup>123</sup> The CCCIF mandates are primarily aimed at combating human trafficking; establishing inspections to enforce the mandatory registration of fishing boats; compliance with fisheries regulations on fishing gear; and compliance with labor regulations.

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<sup>121</sup> Ibid.

<sup>122</sup> Melissa Marschke and Peter Vandergeest, “Slavery Scandals: Unpacking Labour Challenges and Policy Responses within the off-Shore Fisheries Sector,” *Marine Policy* 68 (June 2016): 39–46, <http://www.sciencedirect.com/science/article/pii/S0308597X16000622>. See also “คำสั่งหัวหน้าคณะรักษาความสงบแห่งชาติที่ ๑๐/๒๕๕๘ เรื่อง การแก้ไขปัญหาการทำการประมงผิดกฎหมาย ขาดการรายงาน และไร้การควบคุม, ราชกิจจานุเบกษา เล่ม ๑๓๒ ตอนพิเศษ ๙๙ ง, ๒๙ เมษายน ๒๕๕๘,” accessed May 3, 2016, [http://www.thaistopiufishing.com/images/PDF/govtorder\\_10-2558.PDF](http://www.thaistopiufishing.com/images/PDF/govtorder_10-2558.PDF). (Appendix A)

<sup>123</sup> “คำสั่งหัวหน้าคณะรักษาความสงบแห่งชาติที่ ๑๐/๒๕๕๘ เรื่อง การแก้ไขปัญหาการทำการประมงผิดกฎหมาย ขาดการรายงาน และไร้การควบคุม,” ข้อ ๒.

To formulate and implement measures in line with the observations and recommendations made by the EU, the CCCIF established seven working groups. These are: (1) Thailand’s national Plan of Action to Prevent, Deter and Eliminate IUU Fishing (NPOA-IUU); (2) Thailand’s Marine Fisheries Management Policy; (3) the Monitor Control and Surveillance Center (MCS); (4) the Traceability System; (5) the Vessel Monitoring System (VMS); (6) Law Enforcement regarding Labor on Fishing Vessels, and (7) the Registration System of Fishing Workers and Vessels.<sup>124</sup> As of January 2016, after the Thai government initiated comprehensive fisheries reform to tackle deep-seated problems in the fisheries sector, the CCCIF and its working groups have made some progress in ensuring compliance, as shown in Table 2-3.

**Table 2- 3.** Compliance progress made by the Command Center for Combating Illegal Fishing in its efforts to combat pirate fishing, trafficking in persons, and slavery at sea

<b>Legal Framework</b>
<ol style="list-style-type: none"> <li>1. Enact a new fisheries law - the Royal Ordinance on Fisheries, B.E. 2558 (2015), entered into force on November 14, 2015. <ul style="list-style-type: none"> <li>• The law is a fundamental and comprehensive reform of the legal framework governing Thai fisheries in line with international standards. It empowers competent authorities to combat IUU fishing and unlawful labor practices, driving fisheries policy and implementing fisheries regulations.</li> </ul> </li> <li>2. Pass subordinate laws, 52 of which are top priority, to ensure full enforcement of the Royal Ordinance on Fisheries <ul style="list-style-type: none"> <li>• All 52 of the high-priority subordinate laws have been drafted; 35 of the 52 laws have been published in the Royal Gazette; 12 of the 52 laws are being reviewed by the Council of State; 5 of the 52 laws are awaiting the</li> </ul> </li> </ol>

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<sup>124</sup> Ibid.

establishment of the people's committee (by February 2016). These laws are implemented by 28 PIPO Centers and officers from the Department of Fisheries, the Ministry of Labour, the Marine Department and by Mobile Team units. A fishermen's legal handbook has also been made.

### **Development of Key Systems**

1. MCS system has been established at the Customs Department and the Department of Fisheries. The system is being further developed to link with local centers.
  - Formulate the National Plan of Control and Inspection (NPCI) to enhance MCS of fishing activities and improve the tractability system
  - Set up a Fisheries Monitoring Operation Center (FMOC), equipped with Vessel monitoring system (VMS) technology to prevent the importation and transit of IUU fish
  - VMS has been installed in 2,076 out of 2,216 fishing vessels of 60 gross tonnage or more (93.7 percent). There is concrete, empirical results in terms of monitoring and detecting vessels that engage in illegal fishing.
  - Automatic alarms to detect suspicious illegal activities for vessels of 60 gross tonnage or more are being developed.
  - 28 Port In- Port Out (PIPO) Control Centers in 22 coastal provinces national wide operated since May 6, 2015
2. Improve Traceability System
  - E-License system will be operational by 30 March 2016. Real-time and online vessel registration and licensing system has been developed and operational since December 2015, and is being extended to local centers.
  - Upgrade the catch certification scheme and strengthening the tractability documentation requirements, such as marine catch purchasing documents (MCPD), marine catch transshipment documents (MCTD) and processing statements.
  - Capacity building is expedited for officers. Training course and operational manuals have been created. The first batch of observers on board fishing

vessels operating outside Thai waters have finished their training on 4 December 2015, and is ready for deployment in January 2016.

## **Law Enforcement**

### 1. Law enforcement in fishing vessels

- Special task force units comprising several agencies were set up to inspect vessels and enforce the law.
- A temporary ban on transshipment at sea has been imposed for a period of 180 days starting from 25 December 2015.
- Inspection has been carried out on 474 fishing vessels of 60 gross tonnage or more operating in Thai waters (215 percent of the EU's recommendation). The inspection uncovered 78 cases of infringements, including 57 violations of the fisheries law, 20 violations of the labor laws, and 1 case of suspected trafficking in persons.
- Undertake a reform of the fishing license regime, starting in April 2016. The number of fishing licenses granted will not exceed the level of catch permitted by the maximum sustainable yield (MSY) – a level of catch that ensures the long-term existence of the fish species and prevents their depletion. This emphasized the science-based approach to fisheries management, eliminating overcapacity of the fishing fleet and overfishing, and preventing the degradation of fishery resources. Fishing without a valid license is considered as “serious infringement” under the Royal Ordinance, and carries a maximum fine of 30 million baht (760,000 euros).

### 2. Law enforcement in factories engaging in aquatic animal

- Inspection has been carried out on 145 factories engaging in aquatic animals. Out of 115 factories inspected, violations were found in 52 factories and in 11 of 30 inspected shrimp peeling sheds.
- The results shown that illegal labors were found in 63 factories. 5 of the factories were ordered to temporary suspension for 10 days (one case was subjected to being close down). According to the report of the Office of the Attorney General concerning 41 cases of the prosecution process of forced

labor and human trafficking from 1 October-29 December 2015, 8 cases were involved in forced labor in fishery sector.

3. Additional measures

- Thai Cabinet approved in principle on 12 January 2016 as follows: A Draft Ministerial Regulation on Prohibition on hiring of labor ages less than 18 years old B.E.... and a Bill on Human Trafficking Case Procedure B.E. ....
- Regularization of illegal migrant workers on fishing vessels and seafood processing sectors.
- Open registration for illegal migrant workers to be permitted to work in fishing vessels and in fish processing industries for 1 year with the guarantee of no deportation. During 2 November 2015-30 January 2016 (3 months) 12,606 migrant labors were registered for working in fishing vessels. From 25 November 2015-22 February 2016, 22,443 migrant labors were registered for working in fish processing industries. And, Labors are permitted to change their employers.

**National and International Cooperation**

1. National cooperation: MOUs between government agencies and fishery businesspersons including NGOs and international organizations such as Green Peace, EJF (Environmental Justice Foundation) and ILO (International Labor Organization) have been signed in order to tackle illegal fishing and illegal workers as a whole.
2. International cooperation: The Thai government has enhanced international cooperation, through MOUs, with several countries, for example, with Cambodia, Viet Nam, Fiji, Malaysia, Myanmar, Indonesia, the Philippines, Papua New Guinea, South Korea, Pacific islands countries (Kiribati, Solomon Island, Marshall Islands and Micronesia), Taiwan, Laos, and China.

**Assistance for Affected Fishermen and Fisheries Workers**

1. 228-million-baht budget is allocated for assisting fishermen who have submitted their requests (873 fishing vessels). 70 percent of them have been granted assistance, and the

remaining is being expedited.

2. 215-million-baht budget is set aside for a buy-back scheme for fishermen who wish to sell their vessels, in accordance with the Cabinet's resolution made on 29 December 2015. The program is being implemented.
3. For owners of 8,024 fishing vessels whose registration was cancelled, they may request their fishing rights back by January 2016, but only for those vessels which were not initially found by the survey.
4. Assistance has been extended to Thai fishing seamen working overseas. 1,398 of them have returned to Thailand, among whom 54 are victims of trafficking.
5. Assistance is made to artisanal fishermen. The Department of Fisheries will issue a Notification identifying clear fishing areas for artisanal and commercial fishing vessels, and will organize public hearing from different groups of fishermen and fishing operators.

*Source:* "CCCIF Press Release: Thailand's Progress in Combating IUU Fishing," accessed May 3, 2016, <http://www2.thaiembassy.be/press-release-thailands-progress-in-combating-iuu-fishing/>. and "Thailand's Fisheries Reform: Progress and Way Forward in the Fight Against IUU Fishing and Forced Labor," accessed May 2, 2016, <http://www.thaiembassy.se/minmapp/IUU/DOC000.pdf>.

### ***Efforts in the Prevention and Suppression of Human Trafficking in the Fishery Industry***

The Thai government's approach and effectiveness in combating human trafficking has progressively changed since 2014. In August 2014, the Royal Thai government, through rights-based and transparent policies, declared a policy of "Zero Tolerance for Human Trafficking" (ZTHF). The aim of this policy is not only to end labor exploitation and human trafficking in the

country, but also to ensure the rights of migrant workers, decent working conditions, work safety, social protection and welfare.<sup>125</sup>

According to Thailand's Trafficking in Persons Report 2015 (which Thailand submitted to the US Department of State on January 19, 2016), the ZTHF focuses on nine key objectives: (1) Rule of law; (2) Anti-complicity and corruption; (3) Expedition of human trafficking cases; (4) Effectiveness of frontline operations; (5) Reduction of risks for vulnerable groups; (6) Improved victim and witness protection; (7) Integrated efforts against child exploitation; (8) Enhanced partnership; and (9) Public awareness and outreach.<sup>126</sup> Furthermore, the so-called "5 Ps Framework" establishes strategies to combat labor exploitation and human trafficking: Policy, Prosecution, Protection, Prevention and Partnership.<sup>127</sup>

*Policy Implementation.* After the ZTHF policy was clearly established in 2014, the government efforts have been primarily geared towards reforming legal frameworks. The National Legislative Assembly has passed a number of pieces of legislation and amended ministerial orders with more severe penalties for convicted offenders and better protection victims, for example, the amended Anti-Human Trafficking Act 2015, the new Royal Ordinance on Fisheries B.E. 2558 (2015), and the Anti-Money Laundering Act B.E. 2558 (2015). Significantly, Amendments to Anti-Human Trafficking Act 2015 empowered authorities to immediately shut down work places or suspend operating licenses of factories where evidence of

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<sup>125</sup> Ministry of Foreign Affairs of the Kingdom of Thailand, "Press Releases : Progress on Combating Human Trafficking in Thailand," December 1, 2015, <http://www.mfa.go.th/main/en/media-center/14/62675-Progress-on-Combating-Human-Trafficking-in-Thailan.html>.

<sup>126</sup> Ministry of Foreign Affairs of the Kingdom of Thailand, "Press Releases : Thailand's Trafficking in Persons Report 2015," accessed May 2, 2016, <http://www.mfa.go.th/main/en/media-center/14/63881-Thailand's-Trafficking-in-Persons-Report-2015.html>.

<sup>127</sup> Ibid.

trafficking are found. The punishment has been increased to 8-20 years' imprisonment and up to 400,000 baht fines. Additionally, the recently amended Fisheries Act B.E. 2558 (2015) provides for enhanced monitoring, control and surveillance of all commercial fishing vessels, and prohibits employment of illegal workers in seafood-processing factories, attaching severe punishment of up to 800,000 baht fines for each illegal worker employed or the closure of any factory that violates the law. Moreover, a drafted new "Human Trafficking Criminal Procedure Act" will constitute a number of key procedural measures to make the adjudication process less burdensome for human trafficking victims.<sup>128</sup>

*Prosecution.* The government focuses on strong law enforcement and increases the efficiency of the criminal justice system by shifting its approach to a proactive, intelligence-led enforcement model and greater coordination with domestic and international partners.<sup>129</sup> As a result, as of October 2015, a total number of 212 human trafficking cases are being instigated, with 450 suspects having been arrested and charged, and 702 trafficking victims having been identified.<sup>130</sup> In addition, a Special Human Trafficking Unit within the Criminal Court has been established, and since then 16 cases have been filed, with 4 judgments rendered in less than 4 months. More importantly, the Regulation of the Office of the Prime Minister on Measures to Prevent Public Officials' Involvement in Human Trafficking (2015) also ensures that involvement and ignorance by public officials to labor abuses and trafficking will not be

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<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ministry of Foreign Affairs of the Kingdom of Thailand, "Press Releases : Progress on Combating Human Trafficking in Thailand."

tolerated.<sup>131</sup> As a result, criminal and disciplinary actions taken against government officials involved in human trafficking has significantly increased: 29 officials were under investigation, including 5 military officers, 5 police officers and 7 local politicians, among others.<sup>132</sup>

*Protection.* In adherence to the Labor Relations Act of 1975 and the Labor Protection Act of 1998, all migrant workers are entitled to equal protection. To protect and assist migrant workers, several instruments have been created, for example, the 1300 hotline providing 24-hour service with interpreters in 7 languages and with over 100 new interpreters being trained to ensure adequate assistance. The government has also strengthened its capacity for labor inspection and is developing capacity building programs for migrant workers in cooperation with the ILO. The victim identification process has been improved through the use of better interview questionnaires and clearer guidelines for implementation. In addition, the quality of victim care and services in the shelter has been improved with more interpreters, specialized care for women and child victims, and effective remedies for the victims. Moreover, the Action Plan to Address Human Trafficking in Women and Children has also been set up to systemize screening for potential victims at borders and to monitor establishments involved in human trafficking.<sup>133</sup>

*Prevention.* The government has regularized undocumented migrant workers through systematic registration so that they are entitled to legal protection. As of 2015, 2.5 million workers, including those in the fishery sector, were registered. In order to reduce vulnerability to human trafficking, the Government has also encouraged employment of migrant workers through

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<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

MOUs with Laos, Myanmar, and Cambodia.<sup>134</sup> Labor inspection has also played a key role in implementing labor migration policies to minimize the risk of trafficking. To date, 772 at-risk establishments with over 64,000 employees have been inspected along with 1,800 fishing vessels with over 22,000 employees.<sup>135</sup>

*Partnership.* The government has enhanced its cooperation with all stakeholders including neighboring countries, foreign governments, the private sector, a number of international organizations (especially, ILO, and IOM) and civil society organizations both in and outside Thailand. Internally, all relevant public agencies have signed MOUs to enhance efficiency on trafficking in person cases, to enhance the capability of officers in the victim identification process, and to promote awareness and knowledge in high-risk provinces. Internationally, the Thai government continues to work closely together with all stakeholders, both on a bilateral level such as MOUs on Anti-Trafficking in Person with Myanmar, Lao PDR, Cambodia, and Malaysia, and within multilateral frameworks such as the ASEAN Convention on Trafficking in Persons and the Bali Process, which Thailand is looking to host in February 2016.<sup>136</sup>

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid.

<sup>136</sup> Ibid.

## **2.4 INTERNATIONAL PRESSURE ON THAILAND TO COMBAT PIRATE FISHING, HUMAN TRAFFICKING AND MODERN SLAVERY IN THE FISHING SECTOR**

A series of articles and reports by civil society organizations, international organizations and investigative journalists from the popular media regarding the problems of IUU fishing, forced labor and slavery in the Thai fishing industry has brought significant pressure on Thai authorities to reinforce regulations in the industry.<sup>137</sup> This section examines how international political and economic pressure, especially from the EU and the US, could play a role in pushing Thailand to strengthen its stance against pirate fishing, forced labor, and human trafficking in its fishery industry. Particular attention is given to the EU yellow card and the US Trafficking in Persons Report.

### **2.4.1 The EU Issues Thailand A Yellow Card Because Thailand Does Not Take Sufficient Measures in Fighting Against IUU Fishing**

In April 2015, after a thorough analysis and a series of discussions with Thai authorities since 2011, the EU Commission made a decision to put Thailand on formal notice for “not taking sufficient measures in the international fight against illegal fishing.”<sup>138</sup> The European Commissioner for Environment, Maritime Affairs and Fisheries, Karmenu Vella, stated: “Our EU rigorous policy on a harmful practice such as illegal fishing, together with our genuine

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<sup>137</sup> EJF, “Slavery at Sea,” 32–33.

<sup>138</sup> “MARE Newsroom - EU Acts on Illegal Fishing: Yellow Card Issued to Thailand While South Korea & Philippines Are Cleared,” accessed May 3, 2016, [http://ec.europa.eu/newsroom/mare/itemdetail.cfm?item\\_id=22708&newsletter\\_id=114&lang=en](http://ec.europa.eu/newsroom/mare/itemdetail.cfm?item_id=22708&newsletter_id=114&lang=en).

capacity to act, is paying off. I urge Thailand to join the European Union in the fight for sustainable fisheries. Failure to take strong action against illegal fishing will carry consequences.”<sup>139</sup>

At least 15% of world catches are caught illegally every year, and the EU, the world’s largest market, does not want to be complicit by allowing products caught by IUU fishing into its markets.<sup>140</sup> In other words, the EU applies market-based restrictions against the trade of seafood caught by IUU fishing, as well as seafood caught under conditions of forced labor. To ensure that no illegally caught fisheries products end up on the EU market, the 2010 EU regulation to prevent, deter and eliminate illegal, unreported and unregulated fishing (the IUU Regulation) allows fisheries access to the market only if their products have been certified as legal by the flag state concerned.<sup>141</sup> This regulation applies to “all landings and transshipments of EU and third-country fishing vessels in EU ports, and all trade of marine fishery products to and from the EU.”<sup>142</sup>

To achieve its objective, the IUU Regulation requires flag states to certify the origin and legality of their fishery products, thereby ensuring the full traceability of all marine fishery

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<sup>139</sup> “European Commission - Press Release - EU Acts on Illegal Fishing: Yellow Card Issued to Thailand While South Korea & Philippines Are Cleared,” accessed May 4, 2016, [http://europa.eu/rapid/press-release\\_IP-15-4806\\_en.htm](http://europa.eu/rapid/press-release_IP-15-4806_en.htm). Previously, the EU Commission granted the “yellow card” to Korea in November 2013 and the Philippines in June 2014, requiring them to improve their fisheries governance and reform their legal systems to tackle illegal fishing. In 2015, the Commission decided to withdraw the warning since they made significant structural reforms, with the help of the Commission.

<sup>140</sup> Ibid.

<sup>141</sup> “Council Regulation (EC) No 1005/2008 Establishing a Community System to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing,” accessed May 8, 2016, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:286:0001:0032:EN:PDF>.

<sup>142</sup> “European Commission - Press Release - Question and Answers on the EU’s Fight against Illegal, Unreported and Unregulated (IUU) Fishing,” accessed May 2, 2016, [http://europa.eu/rapid/press-release\\_MEMO-15-4807\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4807_en.htm).

products traded from and into the EU.<sup>143</sup> This measure pushes flag states to comply with international laws and regulations, in the hope that this in turn will prevent unsustainable exploitation of living aquatic resources. The Commission will cooperate and assist flag states to improve their legal framework and practices to meet international rules. The milestones of the process are the yellow card for warning, the green card if the issues are solved, and the red card if regulatory efforts have failed, which leads to a trade ban.<sup>144</sup>

In case of Thailand, the EU Commission issued an official warning, a yellow card, since Thailand had not been doing enough to tackle IUU fishing. As a result, Thailand is under pressure to reform its regulation of fishing operations and its use of marine resources, to ensure that they comply with international laws, to certify the origin and legality of its fishery exports, and to ensure that no forced labor is involved in the process. Failure to resolve the IUU fishing problem could result in a serious trade ban, which could cost the Thai seafood industry between USD 200 million and USD 500 million.<sup>145</sup>

#### **2.4.2 The US 2014 TIP Report Downgrades Thailand to Tier 3 Because Thailand Does Not Fully Comply with the Minimum Standards for the Elimination of Trafficking**

Thailand is well known as a source, destination, and transit country for human trafficking. The US Department of State has warned Thailand for at least four years that Thailand

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid.

<sup>145</sup> “The EU Yellow Card Is a Wake-up Call before Trade Sanctions / Note / EIC Analysis,” *SCBEIC*, accessed May 2, 2016, <https://www.scbeic.com/en/detail/product/1437>.

hasn't been doing enough to combat human trafficking. In 2012 and 2013, Thailand received waivers to be ranked at Tier 3, the lowest and worst category, due to a plan to comply with minimum standards for eliminating trafficking (Figure 3-5).<sup>146</sup> However, in the 2014 TIP report, it automatically downgraded Thailand to the lowest ranking since it reached its limit of waivers and the Thai government still demonstrated insufficient efforts to address trafficking.<sup>147</sup> The US Department of States' 2014 TIP report says,

The Government of Thailand does not fully comply with the minimum standards for the elimination of trafficking. In the 2012 and 2013 TIP Reports, Thailand was granted consecutive waivers from an otherwise required downgrade to Tier 3 on the basis of a written plan to bring itself into compliance with the minimum standards for the elimination of trafficking. The Trafficking Victims Protection Act (TVPA) authorizes a maximum of two consecutive waivers. A waiver is no longer available to Thailand, which is therefore deemed not to be making significant efforts to comply with the minimum standards and is placed on Tier 3.<sup>148</sup>



**Figure 2- 5.** Thailand tier ranking by year

<sup>146</sup> Sophie Brown, "Tackling Thailand's Human Trafficking Problem," June 21, 2014, <http://www.cnn.com/2014/06/20/world/asia/thailand-trafficking-report/>; United States Department of State, "Trafficking in Persons Report 2012 - Country Narrative T-Z," and United States Department of State, "Trafficking in Persons Report 2013 - Country Narrative T-Z," June 2013, <http://www.state.gov/documents/organization/210742.pdf>.

<sup>147</sup> Ibid.

<sup>148</sup> United States Department of State, "Trafficking in Persons Report 2014 - Country Narrative T-Z," June 2014, 373, <http://www.state.gov/documents/organization/226849.pdf>.

Source: United States Department of State, “Trafficking in Persons Report 2015 - Country Narrative T-Z,” June 2015, 331, <http://www.state.gov/documents/organization/243562.pdf>.

According to the United States Department of State’s official website, it gives a defining of Tier as follows:

**Table 2- 4.** Tier placement and its meanings

<b>Tier</b>	<b>Meaning</b>
<b>Tier 1</b>	Countries whose governments fully comply with the Trafficking Victims Protection Act’s (TVPA) minimum standards.
<b>Tier 2</b>	Countries whose governments do not fully comply with the TVPA’s minimum standards, but are making significant efforts to bring themselves into compliance with those standards.
<b>Tier 2 Watch List</b>	<p>Countries whose governments do not fully comply with the TVPA’s minimum standards, but are making significant efforts to bring themselves into compliance with those standards AND:</p> <ul style="list-style-type: none"> <li>a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing;</li> <li>b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or</li> <li>c) The determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.</li> </ul>
<b>Tier 3</b>	<p>Countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.</p> <p>Penalties for Tier 3 Countries: Pursuant to the TVPA, governments of countries on Tier 3 may be subject to certain sanctions, whereby the U.S. government may withhold or withdraw non-humanitarian, non-trade-related foreign assistance.</p>

Source: “Tier Placements,” Report (Department Of State. The Office of Website Management, Bureau of Public Affairs., July 27, 2015), <http://www.state.gov/j/tip/rls/tiprpt/2015/243366.htm>.

Despite growing international pressure, the Thai government's efforts and action plans for tackling human trafficking remain insufficient. Thailand has still failed to act on the recommendations made in the report; albeit Thailand was placed in the US TIP's Tier 2 Watchlist for four consecutive years (2010-2013) and was downgraded to Tier 3 in 2014. EJF reported that "forced, bonded and slave labor remain commonplace across the country; particularly in the seafood industry and abroad Thailand's fishing boats."<sup>149</sup> Therefore, Thailand remains at Tier 3 in 2015, though several improvements were made: for example, registering and offering work permits to 1.6 million migrant workers; amending the 2008 trafficking law to increase penalties for traffickers and protecting whistleblowers; passing new labor laws to guarantee minimum wage, ensure decent working conditions, and require an employment contract. Nevertheless, it still has not done enough to meet the minimum standards for the elimination of trafficking. Probably, this failure may be because some government officials are complicit in trafficking crimes and because corruption continues to undermine anti-trafficking efforts. The US TIP 2015 report states: "The Government of Thailand does not fully comply with the minimum standards for the elimination of trafficking, and is not making significant efforts to do so. Thailand investigated and prosecuted some cases against corrupt officials involved in trafficking but trafficking-related corruption continued to impede progress in combating trafficking."<sup>150</sup>

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<sup>149</sup> EJF, "Slavery at Sea," 8; EJF, "Thailand's Seafood Slaves"; EJF, "Broken Promises: Why Thailand Should Stay on Tier 3 in the 2015 US Trafficking in Persons Report," February 17, 2015, [http://ejfoundation.org/sites/default/files/public/EJF\\_Thailand\\_TIP\\_Briefing.pdf](http://ejfoundation.org/sites/default/files/public/EJF_Thailand_TIP_Briefing.pdf).

<sup>150</sup> United States Department of State, "Trafficking in Persons Report 2015 - Country Narrative T-Z," June 2015, <http://www.state.gov/documents/organization/243562.pdf>.

## 2.5 CONCLUDING REMARKS

The Thai fishing industry has been heavily reliant on IUU or pirate fishing, forced labor and the exploitation of migrant workers. Several international organizations, NGO and journalism investigations reveal that the Thai fishery business has involved pirate fishing, forced labor and human trafficking. In response to the global demand for cheap seafood, pirate fishing vessels use Flag of Convenience and pirate fishing methods to catch fish stocks, cutting costs to gain maximum profits, which eventually has resulted in overfishing, degrading marine ecology and the exploitation of trafficked migrant crews. It is plain to see that these problems persist, partly because of Thailand's poor fisheries management and weak law enforcement.

Several international organizations have designed international instruments in order to address these problems. Unfortunately, failure and international legal loopholes remain because international cooperation, and member states' ratification, is required. In Southeast Asia, ASEAN Member States are also concerned about these problems and have initiated several tools and forums to promote regional cooperation and implement international laws, for example the ASEAN Maritime Forum, the ASEAN Guidelines for Preventing the Entry of Fish and Fishery Products from IUU Fishing Activities into the Supply Chain, and the ASEAN Convention Against Trafficking in Persons, Especially Women and Children. Nevertheless, further steps are required from ASEAN Member States to enact and implement effective laws at the domestic level. Thailand has directly received international political pressure from the EU Yellow Card and being downgraded to Tier 3 by the US Department of State, due to the 2015 US Trafficking in Persons report. To avoid trade bans and sanctions, it is essential for Thailand to enhance

traceability and transparency and to combat pirate fishing, forced labor and human trafficking in the fishing sector. It remains to be seen how effective Thailand's current efforts will be.

## **Chapter 3 Trade and Environment: Illegal Siamese Rosewood Logging and Trade in the Greater Mekong Subregion**

### **3.1 INTRODUCTION**

In March 2013, the Environmental Investigation Agency (EIA) reported the tragic story of illegal Siamese rosewood trade in the Greater Mekong sub-region.<sup>1</sup> To investigate the case, Roger Arnold, a journalist and photographer, traveled to Thailand to explore the areas where Siamese rosewood trees are guarded twenty-four hours a day by the Thai Army and armed forest rangers from Thailand's Department of National Parks (DNP). The rosewood population is today threatened and at risk for extinction, and Thailand harbors the largest remaining population of Siamese rosewood trees. Among the Mekong countries, however, Thailand is not the sole victim; the rosewood trees in Cambodia, Laos, and Vietnam are also in danger. Despite the fact that all these states have domestic laws to ban the harvesting and sale of Siamese rosewood, the problem persists and in fact is getting worse. The Siamese rosewood trade now involves violence, corruption, and regional crime syndicates that jeopardize the rule of law, forest governance, and regional stability.

This chapter examines the link between economic and environmental policies in the case of illegal Siamese rosewood logging and trade in the Greater Mekong. The discussion considers the role of law in relation to global, regional, and local perspectives. It also reviews the development of a legal framework for the protection of Siamese rosewood and examines how

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<sup>1</sup> See EIA, "Routes of Extinction: The Corruption and Violence Destroying Siamese Rosewood in the Mekong" (Emmerson Press, May 2014), <https://eia-international.org/wp-content/uploads/Routes-of-Extinction-FINAL-iores.pdf>.

legal and socio-cultural factors interact to influence ASEAN forest law and governance. Section 2 defines the problems. Section 3 discusses and analyzes current laws, policies, and practices for seeking robust rosewood protection. It focuses on the Convention on International Trade in Endangered Species (CITES), the CITES Conference of the Parties 16 (CoP16), regional forest cooperation, domestic Thai laws and policies. Particular attention is devoted to the Forestry Act B.E. 2484 (1941) and its latest amendment, Order Number 106/2557 from the National Council for Peace and Order (the NCPO). Section 4 considers the case in the context of its history and the relevant socio-cultural institutions. Section 5 offers concluding remarks.

### **3.2 THE CRISIS OF SIAMESE ROSEWOOD: CORRUPTION AND VIOLENCE**

#### **3.2.1 Siamese Rosewood is Vulnerable**

Siamese rosewood (*Dalbergia cochinchinensis*, or Phayung/Payoong, “พะยุง” in Thai) is a tropical evergreen species that is at high risk for global extinction and listed as “vulnerable” on the International Union for the Conservation of Nature (IUCN) Red List of endangered Species (see Table 3-1).<sup>2</sup> The population of this hardwood tree is distributed sparsely throughout Southeast Asia and particularly in four Mekong countries, namely, Cambodia, Lao PDR,

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<sup>2</sup> See “Amazing Species: Siamese Rosewood,” accessed December 17, 2015, [http://cmsdata.iucn.org/downloads/dalbergia\\_cochinchinensis.pdf](http://cmsdata.iucn.org/downloads/dalbergia_cochinchinensis.pdf).

Thailand, and Vietnam. The size of the Siamese rosewood population cannot be precisely measured, since it has never been systemically surveyed.<sup>3</sup>

**Table 3- 1.** Summary of common and scientific names, and the ecological and geographical distributions of Siamese rosewood in Mekong countries

<b>Common and Scientific Names</b>	<b>Distribution</b>	<b>Local/Trade Names</b>	<b>Conservation Status</b>
<b>Thailand Rosewood, or Siamese Rosewood / <i>Dalbergia cochinchinensis</i> Pierre</b>	Thailand: Nationally, except Southern and North-western regions; Cambodia: Nationally; Laos: Central/southern Provinces; Vietnam: Central/southern Provinces	Thailand: Mai Payoong, or Phayung; Cambodia: Kra Nhoung; Laos: Mai Khanhoung; Vietnam: Trac (tracewood); China: Hongsuanzhi (紅酸枝)	IUCN Red-List: Vulnerable. Critically endangered in Cambodia, vulnerable in Vietnam, and a high priority species for conservation in Thailand and Laos. (APFORGEM)

Source: EIA, “Rosewood Robbery: The Case for Thailand to List Rosewood on CITES.” (London: Environmental Investigation Agency, December 17, 2012), 2. (This article describes how Siamese rosewood is being stolen from Thailand’s forests.)

The natural Siamese rosewood trees grow in protected areas in Thailand’s lower northeast provinces, including Ubon Ratchathani on the eastern border, close to Cambodia.<sup>4</sup> From 2011 to 2014, the Forest Research Bureau and the Department of Forest Biology at Kasetsart University examined herbarium specimens and conducted fieldwork. The findings

<sup>3</sup> CITES, “Consideration of Proposals for Amendment of Appendices I and II (CoP16 Prop.60), Sixteenth Meeting of the Conference of the Parties, Bangkok (Thailand), 3-14 March 2013,” 4, accessed December 17, 2015, <https://www.cites.org/eng/cop/16/prop/E-CoP16-Prop-60.pdf>.

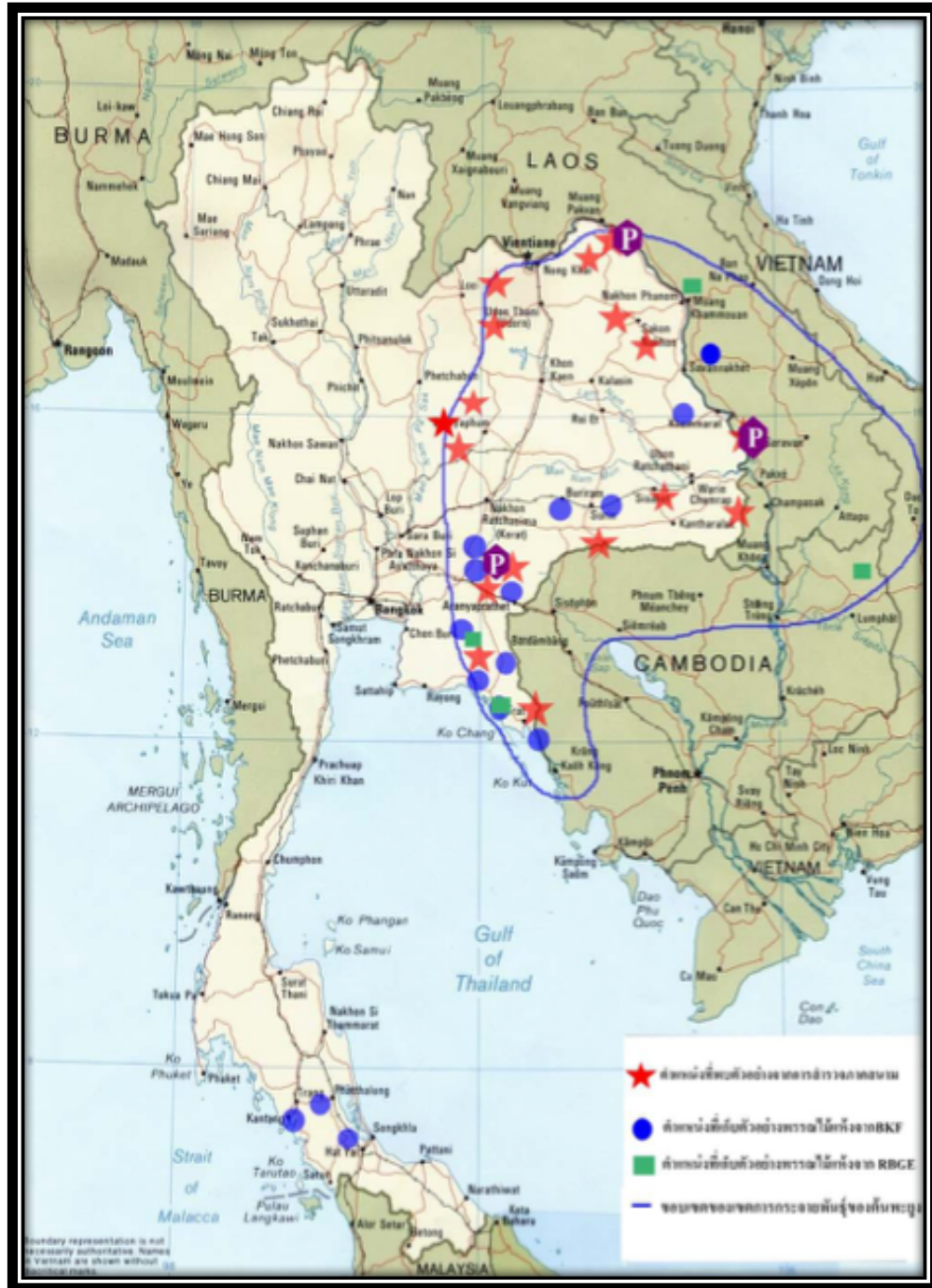
<sup>4</sup> EIA, “Routes of Extinction,” 3. Note that Thap Lan includes the protected areas that are close to the Cambodian border. It is one of five contiguous national parks that form the Dong Phrayayen-Khao Yai Forest Complex, a UNESCO World Heritage Site in Northeastern Thailand.

showed that Siamese rosewood is found in the northeastern region of Thailand and that illegal logging is threatening its population at all field sites (see Figure 3-1).<sup>5</sup> It is estimated that the natural stands of the species in Thailand are only distributed in 30 protected areas (covering a total of 560 square kilometers), and nearly 70% of the trees were destroyed. The population decreased from around 300,000, in 2005, to 80,000 – 100,000 trees (about 63.5 cubic meters) in 2011.<sup>6</sup>

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<sup>5</sup> Eiadthong Wichan and Suwan Tangmitcharoen, “Ecological and Geographical Distributions and Its Demographic Status of Siamese Rosewood (*Dalbergia Cochinchinensis* Pierre Ex Laness) in Thailand,” December 17, 2015, 1–3.

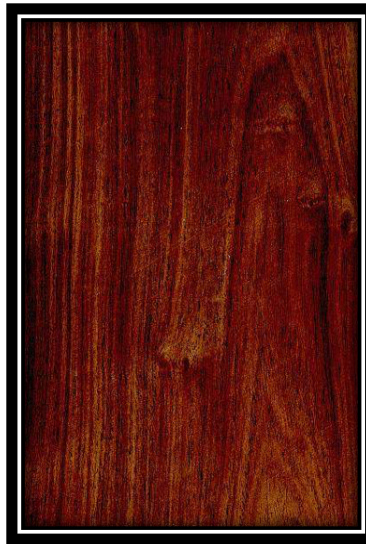
<sup>6</sup> CITES, “Consideration of Proposals for Amendment of Appendices I and II (CoP16 Prop.60),” 2–3.



**Figure 3- 1.** The geographic natural distribution range of Siamese rosewood in Northeast Thailand

Source: Eiadthong Wichan and Suwan Tangmitcharoen, “Ecological and Geographical Distributions and Its Demographic Status of Siamese Rosewood (*Dalbergia Cochinchinensis* Pierre Ex Laness.) in Thailand,” December 17, 2015, 6.

Since Siamese rosewood is valued for its hardness, density, and durability (resistance to heat and cold), and it is considered “first class prime timber” and “one of the most expensive woods in the world” (see Figure 3-2).<sup>7</sup> Because of its unique characteristics, rosewood exported to China, where it is in high demand for furniture manufacturing—especially for *Hongmu* furniture, musical instruments, certain ornaments, and artwork.<sup>8</sup>



**Figure 3- 2.** The attractive appearance of Siamese rosewood

*Source:* “Classical Chinese Furniture: Hongmu,” accessed December 9, 2015, [http://www.chinese-furniture.com/c\\_furniture/m\\_hongmu.html](http://www.chinese-furniture.com/c_furniture/m_hongmu.html).

In March of 2013, the Environmental Investigation Agency revealed that the Siamese rosewood population is rapidly decreasing and that it may well become extinct if not robustly protected. The population is threatened by booming demands for, and feverish speculation on,

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<sup>7</sup> *Ibid.*, 5.

<sup>8</sup> Chris Lang, “Demand for Luxury Furniture in China Pushes Siamese Rosewood to the Brink of Extinction,” REED Monitor, May 16, 2014, <http://www.redd-monitor.org/2014/05/16/demand-for-luxury-furniture-in-china-pushes-siamese-rosewood-to-the-brink-of-extinction/>. (Lang reports how corruption and violent crime are involved in Siamese rosewood trade in Pakse, Laos; in Dongky near Hanoi, Vietnam; in Shenzhen China; in Thailand and in Cambodia.)

the wood these trees yield, due to its rarity.<sup>9</sup> Within a decade, the rosewood price has skyrocketed, resulting in a lucrative logging business, poaching gangs, illicit international trade, and trans-boundary crimes. The major threat to the remaining Siamese rosewood in Thailand is illegal logging due to the unprecedented demands of the rapidly booming market for *Hongmu* furniture in China.<sup>10</sup> In Chinese culture, this type of furniture represents the wealth and elegant taste of its possessor. According to an EIA report, illegal rosewood logging and trade in Thailand have grown rampant since demand surged in China in 2007.<sup>11</sup> The demand for rosewood soared further during the 2008 Beijing Olympics, which caused an increase in timber smuggling and illegal logging and trade in Southeast Asia.

### **3.2.2 The Skyrocketing Price Rosewood Exacerbates Illegal Logging and Trade**

The demand for *Hongmu* furniture in China has rapidly increased since 2008. Since there is high demand for rosewood and supplies are scarce, the price has risen. The EIA reveals that almost 70% of China's global *Hongmu* trade imports came from Mekong countries from 2000 to

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<sup>9</sup> EIA, "Routes of Extinction," 1–3.

<sup>10</sup> EIA, "Rosewood Robbery: The Case for Thailand to List Rosewood on CITES." (London: Environmental Investigation Agency, December 17, 2012), 1–2; Lang, "Demand for Luxury Furniture in China Pushes Siamese Rosewood to the Brink of Extinction."; Chris Lang, "Leaked WWF Report on Illegal Logging in Laos: 'A Worst-Case Scenario,'" REED Monitor, December 19, 2015. (The World Wildlife Fund and EIA report on the illegal logging and forest degradation in the border area of southern Laos, showing that China imported 1 billion US dollars' worth of timber from Laos in 2014, up from \$45 million in 2008.); EIA, "Crossroads: The Illicit Timber Trade between Laos and Vietnam," December 19, 2011. (This article investigates the illegal timber trade between Laos and Vietnam; trade in both countries has serious implications for REDD programs to strengthen environmental governance.)

<sup>11</sup> EIA, "Crossroads: The Illicit Timber Trade Between Laos and Vietnam." (This article describes how Lao PDR experiences a shortage of wood.)

2009.<sup>12</sup> As a result, the number of companies trading in rosewood grew by 40% percent, and the price continued to rise steeply.<sup>13</sup>



**Figure 3- 3.** Illegally harvested rosewood logs destined for China

Source: EIA, “Rosewood Robbery: The Case for Thailand to List Rosewood on CITES.,” 2.

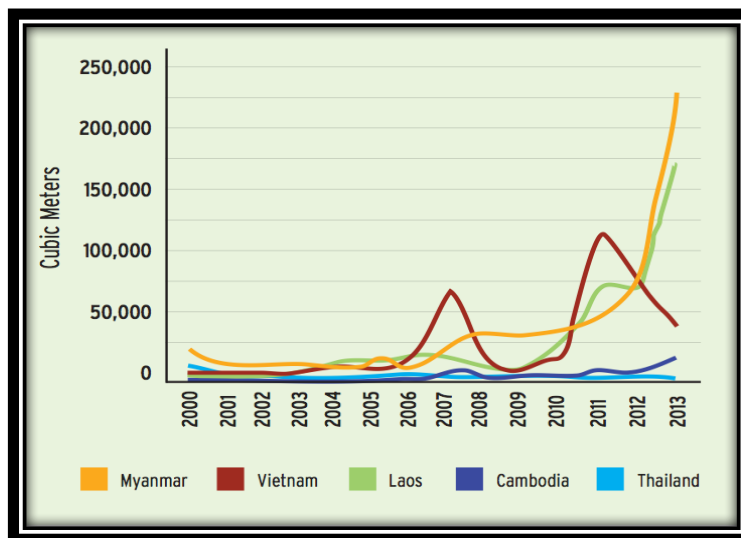
The varying rates of demand for *Hongmu* furniture (and thus the price of rosewood) can be grouped into three periods: from 2001 to 2007, from the beginning to the end of 2008, and from 2008 to the present (see Figure 3-4). During the first period, the demand for *Hongmu* emerged and grew steadily. Then in 2008, the demand rose steeply and has increased until the present time. The reality behind these numbers may be understood as follows. Chinese furniture makers have been importing a variety of redwoods from around the world and, at the same time, the number of suppliers was declining, and the higher-grade *Hongmu* species (primarily *Huanghuali*) had become nearly extinct. Of the Mekong countries, Vietnam was the main supplier of *Hongmu* in 2007 and 2011 (see Figure 3-4). Today, Laos is the largest supplier of

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<sup>12</sup> EIA, “Routes of Extinction,” 2.

<sup>13</sup> Global Trade Atlas, China Imports 2000-13 by Hongmu Hs Code in EIA, “Routes of Extinction,” 2.

*Hongmu* timber. Thus, in just a few years, Laos, Cambodia, and Vietnam have been stripped of their rosewood, and now the logging is turning to Thailand.<sup>14</sup>



**Figure 3- 4.** Chinese imports of *Hongmu* logs from the Mekong countries have dramatically increased within a decade

Source: EIA, “Routes of Extinction: The Corruption and Violence Destroying Siamese Rosewood in the Mekong” (Emmerson Press, May 2014), 3, <https://eia-international.org/wp-content/uploads/Routes-of-Extinction-FINAL-10-res.pdf>

The question now arises: Why has Chinese demand for Siamese rosewood risen so sharply over the past decade? To answer this question, one must examine both economic and socio-cultural factors. First, since *Huanghuali* (the yellowish-brown flowering pear tree, acknowledged as the king of hardwoods) has become rare in China, Siamese rosewood has become the new target as an acceptable replacement. Second, in connection with modern China’s economic boom, especially after the 2008 Beijing Olympics, there is a burgeoning upper class of

<sup>14</sup> Global Witness, “The Cost of Luxury: Cambodia’s Illegal Trade in Precious Wood With China,” February 2015, (This article tells the story of how the Cambodian tycoon, Oknha Try Pheap, previously a personal advisor to Prime Minister Hun Sen, traded and gutted the Siamese rosewood in Cambodia for export to China under the guise of land clearance for industrial agriculture, or a so-called “economic land concessions” project.)

people who value and seek to acquire *Hongmu* rosewood furniture as a symbol of their wealth and high status (see Section 3.4). Undoubtedly, to satisfy this market, Siamese rosewood and other substitute species, such as woods from Myanmar and Madagascar, have been exploited and imported into the Chinese market. Julian Newman, Campaigns Director at the EIA, states:

The declining forests of the Mekong countries have borne the brunt of growing rosewood demand, with the region supplying 1.6 million cubic meters to China between 2000 and 2013, worth \$2.4 billion. ... [It] represent[s] a huge escalation over the last few years. Such astronomical prices are attracting criminal enterprises, and the scramble for the last remaining Siamese rosewood trees is leaving a trail of violence and corruption.<sup>15</sup>

By the law of supply and demand, the increasing rarity of Siamese rosewood affects its price. In just one year, the *Hongmu* price dramatically shifted from a hundred dollars per cubic meter to over fifty thousand dollars. The EIA says that, “Since 2010, the Yuzhu Timber Index prices have grown by 56 percent, and Siamese rosewood, by March 2014, was retailing for RMB 109,500 (\$ 7,633) per tonne, a 37 percent price increase compared to exactly a year earlier” (see Table 3-2).<sup>16</sup>

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<sup>15</sup> Julian Newman, “Money Does Grow on Trees: Siamese Rosewood Smuggling and the Criminal Exploitation of Forest Resources,” The Global Initiative against Transnational Organized Crime, accessed December 19, 2015, <http://www.globalinitiative.net/rosewood-smuggling/>. (Newman gives a brief explanation of how the exploitation of Siamese rosewood is symptomatic of the problem of illegal trade and the role of organized crime in driving deforestation in the Mekong region.)

<sup>16</sup> Yuzhu Timber Index, for *Dalbergia cochinchinensis* per ton of 1.8-3 metres x 15-25 cm, cited by EIA, “Routes of Extinction: The Corruption and Violence Destroying Siamese Rosewood in the Mekong” (Emmerson Press, May 2014), 3, <https://eia-international.org/wp-content/uploads/Routes-of-Extinction-FINAL-lo-res.pdf>

**Table 3- 2.** The rising price of Hongmu timber from 2001 to 2013

Hongmu Logs	2001	2008	2013
<b>Hainan rosewood</b>	300,000 Yuan/t	Over 2 mil. Yuan/t	15-30 mil. Yuan/t High price but without the market demand
<b>Yellow rosewood</b>	30,000 Yuan/t	Over 2 mil. Yuan/t	3-5 mil. Yuan/t
<b>Red sandalwood</b>	60,000 Yuan/t	800,000 Yuan/t	0.8-2 mil. Yuan/t
<b>Padauk</b>	10,000 Yuan/t	50,000-80,000 Yuan/t	0.16-0.25 mil. Yuan/t
<b>Siamese rosewood</b>	15,000 Yuan/t (~US\$2281)	20,000-30,000 Yuan/t (~US\$3042 – US\$4563)	0.1-0.5 mil. Yuan/t (~ US\$15,211- US\$76,056)

Source: Man Wang, ed., “Hongmu Market in China: Development State and Future Trend,” December 19, 2015.<sup>17</sup>

### 3.2.3 Illicit Rosewood Trade Involves Corruption, Violence, Drug Trafficking, and Other Crimes

While *Hongmu* has become highly valued and fashionable, the story behind its surging price involves corruption, violence, drug trafficking, and other crimes.<sup>18</sup> These serious social problems call for local and global attention and for renewed international efforts to stop illicit

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<sup>17</sup> Note the currency exchange rate in January 2016: one US dollar is approximately equal to 6.67 Chinese Yuan.

<sup>18</sup> Samean Yun, “Chinese Demand Fueling Rosewood Extinction in Mekong Region,” Radio Free Asia, December 17, 2014. Written in English by Joshua Lipes (Yun gives an overview of the EIA report, showing how rosewood is approaching extinction.)

logging, timber smuggling, and illegal rosewood trade. Faith Doherty, an EIA Forest Campaign Team reader, says:

The soaring value of Siamese rosewood has spurred a dramatic rise in illegal logging in an international criminal trade increasingly characterized by obscene profits, violence, fatal shootings and widespread corruption at every level.... As outlined in the report, the consequences for Thailand – both environmental and social – are very serious. Unless swift and decisive action is taken to stem this bloody trade, we could well be looking at the extinction of Siamese rosewood in a matter of a very few years.<sup>19</sup>

The ongoing illegal rosewood trade leads to violence and even death, especially between Thais and Cambodians. Both Thai forest rangers and Cambodian poachers risk their lives daily. What drives them to take part in illicit rosewood trade, despite such terrible risks? The fighting between them is based on different roles and duties. On the one hand, each day, as many as one hundred poachers, known as “human-caravans,” walk across the border to poach and smuggle rosewood in order to earn a living. On the other hand, Thai Rangers work to preserve and protect rosewood trees. In other words, poverty impels some people to take part in the poaching and smuggling of rosewood, while public policy and a sense of duty impels others to protect rosewood trees. Unfortunately, both groups are victims. Dealers and corrupt officials manipulate impoverished poachers and make hundreds of thousands of dollars each year on the international black market. One ranger says that “They [those poor Cambodian poachers] are just “*the hired*

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<sup>19</sup> EIA, “China’s Furniture Craze Drives Siam Rosewood to Extinction,” Protecting the Environment with Intelligence, December 18, 2014.

hand”...[while] the people who hire them, the financiers, are Thai.”<sup>20</sup> The 101 East depicts the struggle between rangers and poachers as follows:

Every time he enters the jungle on patrol, ‘Jog’ Sornpui, a Thai forest ranger, risks his life. Dressed in camouflage fatigues and carrying an automatic rifle, he looks more like a soldier ready for combat [...] while his enemy, in this sense, the rosewood poachers, are always armed with AK47’s and bombs (see Figure 4-5).<sup>21</sup>



**Figure 3- 5.** Armed forest rangers patrol a Thai national park in 2013, seeking Siamese rosewood poachers

*Source:* EIA, “Routes of Extinction: The Corruption and Violence Destroying Siamese Rosewood in the Mekong” (Emmerson Press, May 2014), 4, <https://eia-international.org/wp-content/uploads/Routes-of-Extinction-FINAL-lo-res.pdf>

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<sup>20</sup> For further details, see Michael Peel, “China and the Rosewood Carve-Up,” FT Magazine, December 19, 2015, <http://on.ft.com/1BHHVwa>. (Peel depicts a group of anti-logging rangers as keepers of the forest who work and risk their lives to protect Siamese rosewood in Thap Lan National Park, Thailand.)

<sup>21</sup> 101 East, “Thailand’s Blood Timber,” Aljazeera, December 9, 2014, <http://www.aljazeera.com/programmes/101east/2014/12/thailand-blood-timber-201412314382992578.html>.

In the past few years, both sides have suffered a high number of injuries and deaths. At least 45 Cambodians were shot in 2012;<sup>22</sup> the Director of the Cambodian Natural Resource Protection Group was murdered in his car in April of 2012;<sup>23</sup> over 40 Thai officers were killed, 23 were severely wounded, and 26 suffered minor injuries in the period between 2009 and 2013.<sup>24</sup>

Partially because of the minor penalties given to lawbreakers, some official have been corrupted, and some villages have been plagued by drugs, violence, and timber mafia syndicates. Some communities are opposed to the Rangers and their efforts in protecting rosewood. The rosewood mafia syndicate have in some cases rewarded the villagers and poachers with methamphetamines or “*yaba*” in Thai, so that the addicted poachers would continue working, cutting more rosewood and hauling the timber out at night with high energy.<sup>25</sup> The high demand for Siamese rosewood has increased illegal business deals and raised serious concerns in Thailand. The evidence shows that from 2007 to 2012, more than 10,000 pieces of rosewood were confiscated by enforcement authorities, valued at thousands of dollars (see Table 3-3). 1,619 seizures, amounting to 1,116 cubic meters of Siamese rosewood timber, were confiscated

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<sup>22</sup> Note that the real death toll is still doubtful, as it is more likely higher than the number reported to the Ministry of Interior of Cambodia due to the loss counted only in Oddar Meanchey Province. *See* Vong Sokheng, “Blood on the Border,” *The Phnom Penh Post*, February 20, 2014, <http://www.phnompenhpost.com/national/blood-border>. (The news portrays the blood being spilled on the border between Cambodian and Thailand in the illegal rosewood trade.)

<sup>23</sup> “Logging, Corruption in Cambodia,” *The Diplomat*, May 2, 2012. (reporting on the death of a Cambodian environmental activist, who was killed in his car after refusing to hand over his camera’s memory card to a policeman.)

<sup>24</sup> *Ibid.* *See also* Arnold Roger, “Corruption, Bloodshed and Death – the Curse of Rosewood,” *Protecting the Environment with Intelligence*, December 17, 2013.

<sup>25</sup> *Terre Sauvage*, “Exclusive: Saving Thailand’s Blood Wood,” IUCN, International Union for Conservation of Nature, December 19, 2014; Roger, “Corruption, Bloodshed and Death – The Curse of Rosewood.”

between October 2012 and September 2013, and a further 1,421 seizures, totaling 952 cubic meters, occurred between October 2013 and May 2014.<sup>26</sup>

**Table 3- 3.** The major illegal rosewood cases in Thailand from 2007 to 2012

<b>Year</b>	<b>Case</b>
<b>January 2012</b>	Department of Special Investigation seizes 193 rosewood logs worth US\$ 630,000.
<b>September to November 2011</b>	14 Cambodian loggers shot dead during Thai enforcement operations in November of 2011. Twelve Thai police were implicated in rosewood logging in just a single province in September.
<b>July 2011</b>	Leam Chabang customs seizes 1,800 rosewood logs destined for Hong Kong, worth US\$409,000.
<b>April 2011</b>	More than 1,100 pieces of rosewood seized in Chiang Rai Province.
<b>August 2010</b>	Customs seized 500 rosewood logs in Trang Province, worth US\$1.5 million in China.
<b>September 2009</b>	400 logs from the Laem Chabang port seized in Surin Province, en route to Hong Kong
<b>December 2008</b>	US\$110,000 of rosewood destined for Hong Kong seized in the Laem Chabang port

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<sup>26</sup> EIA, “Rosewood Robbery: The Case for Thailand to List Rosewood on CITES.” (London: Environmental Investigation Agency, December 17, 2012), 3. (Thailand issues a notification to the CITES’ secretariat requesting assistance from all CITES Parties to regulate the illegal Siamese rosewood trade.)

<b>August 2008</b>	Customs and the Forest Department seized 113,600 units of rosewood at ports nationwide.
<b>January 2007</b>	50,000 rosewood logs seized and 527 people arrested in nationwide police operations.

Source: Phak Seangly, “Thai Border Shooting Wounds Man: Officials,” The Phnom Penh Post, December 18, 2014.

In addition to a large number of violent incidents, rosewood exploitation has led to the development of corruption, which is found in every step from the border to the jungle, the ports, and the end market in Nanning, China (see Figure 4-6). The evidence shows that Cambodian poachers, mostly poor villagers who live along the border and some who have migrated from other villages, secretly cross the borders into Thai territory, often paying off the border officials, and being led into the park by local Thais. The Deputy Commune Chief says that “[V]illagers bribe border officers so that they are allowed to cross the border to log. I saw a truck waiting to transport rosewood from the loggers. They are *involved in corruption*.”<sup>27</sup>

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<sup>27</sup> Bruno Cammert, ed., “Regional Review of Illegal Trading of Siamese Rosewood in ‘Regional Dialogue on Preventing Illegal Logging and Trading of Siamese Rosewood’” (Bangkok, Thailand, January 10, 2014). (This article reports that a 21-year-old Cambodian man was shot in the thigh. He survived because the villagers helped him and sent him back.)



**Figure 3- 6.** Routes of international illegal Siamese rosewood logging and trade

*Source:* The Department of National Parks, Wildlife and Plant Conservation, cited by May Titthara, “Border Police Add to Illegal Logging: Gov’t,” The Phnom Penh Post, December 9, 2013.

Many other investigations show similar results. Some officials say the rosewood business is tied to the government and to the “police officers and soldiers along the border.”<sup>28</sup> Some reports suggest that seized illegal rosewood has been found in the official mansion. The Commander of the Stung Treng Provincial Military Police released a statement saying that, “Our authorities seized luxury rosewood from the house of the Chief of Cults and Religion.”<sup>29</sup> Since the powerful and rich financial individuals encourage and manipulate the poor to travel illegally across the border to log, Am Sam Ath, a senior official at Licadho (a rights group in

<sup>28</sup> But Reaksmey Kongkea, “Provincial Official in Hot Water after Raid,” The Phnom Penh Post, December 18, 2013.

<sup>29</sup> Vong Sokheng, “Border Patrol Plan Targets Shooting Toll,” The Phnom Penh Post, 2013. (Sokheng reports that military police and forestry officials seized more than 1.3 tonnes of illegal rosewood from the house of the Chief of the Stung Treng Provincial Department of Cults and Religion.)

Cambodia) suggests that “to protect the lives of the people, the government must scrutinize its officials and take legal action against any official involved.”<sup>30</sup>

After many losses and deaths, both Cambodia and Thailand have agreed to create fifteen new patrol teams along their borders (see Figure 3-7). By networking and sharing information, this cross-border cooperation is intended to ward off the losses and lower the shooting deaths on both sides.<sup>31</sup> Long Visalo, the Cambodian Secretary of State at the Ministry of Foreign Affairs commented that “Each team will patrol the border inside their sovereignty but will need to keep communicating. ... If Thai teams find Cambodian people crossing illegally, [they need] to be arrested and sent back... We have to avoid shooting them dead.”<sup>32</sup>

Despite the risks and international law enforcement efforts, the poachers persist because of their poverty. Many young Cambodian villagers, age 20-25, risk their lives to cross the border illegally and log in Thailand because they have no other way to gain a higher income. Khien Sopheak, the Ministry of Interior spokesperson for Cambodia, says that “officials often tried to educate citizens about the dangers and illegality of crossing the border, but many didn’t listen.”<sup>33</sup>

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<sup>30</sup> Ibid.

<sup>31</sup> Seangly, “Thai Border Shooting Wounds Man: Officials.” (Seangly reports that Cambodia and Thailand have agreed to create 15 new border patrol teams to share information and prevent losses on both sides.) *See also* Vong Sokheng, “Border Patrol Plan Targets Shooting Toll,” *The Phnom Penh Post*, 2013.

<sup>32</sup> Sokheng, “Border Patrol Plan Targets Shooting Toll.”

<sup>33</sup> Roger, “Corruption, Bloodshed, and Death – The Curse of Rosewood.”



**Figure 3- 7.** The stumps of Siamese rosewood and an anti-poaching patrol in Thap Lan National Park

*Source:* photo by Ann and Steve Toon in Terre Sauvage, “Exclusive: Saving Thailand’s Blood Wood,” *IUCN, International Union for Conservation of Nature*, December 19, 2014. (Sauvage tells the story of how Ann and Steve Toon, two award- winning wildlife journalists, documented the FREELAND Foundation’s anti-poaching gangs and other experiences during their visit to the Dong Phrayayen-Khao Yai Forest Complex, a UNESCO World Heritage Site in Thailand.)

Similarly, in Thailand, the news reports indicate that Thai government officials are involved in illegal rosewood logging and business deals. In June of 2012, Thai wildlife officials, including a national park chief, were accused of “helping Cambodian gangs to fell Phayung trees in protected forests for export to China.”<sup>34</sup> Furthermore, in July of 2013, a Thai rosewood smuggler claimed he was paid 5,000 baht to deliver goods to an unnamed military Chief of Staff in Bangkok.<sup>35</sup> Then in February 2015, a former head of the Central Investigation Bureau was convicted by a Thai court for possessing illegal rosewood and jailed him for nine months.<sup>36</sup>

In addition, corruption has been found in the labeling process for timber exports. An EIA investigation indicates that “rosewood smuggling from Thailand is complex, although common

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<sup>34</sup> Roger, “Corruption, Bloodshed, and Death – the Curse of Rosewood.”; Titthara, “Border Police Add to Illegal Logging: Gov’t.”

<sup>35</sup> Titthara, “Border Police Add to Illegal Logging: Gov’t.”

<sup>36</sup> Peel, “China and the Rosewood Carve-Up.”

patterns exist.”<sup>37</sup> After being cut in Thailand, the rosewood is “often smuggled into Laos and Cambodia and transported on to Vietnam, from where it can be shipped to the key end-user markets in China.”<sup>38</sup> The process involves fraudulent CITES permits, which were forged to enable passage of the illegal rosewood containers through shipping ports.<sup>39</sup>

### **3.3 ANALYSIS OF EXISTING LAWS, POLICIES, AND COOPERATIVE EFFORTS TO CONTROL ILLEGAL SIAMESE ROSEWOOD LOGGING AND TRADE**

This section analyzes the current regulations, laws, and policies that aim to protect Siamese rosewood trees. Much attention will be given to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), one of the major international environmental agreements (IEAs).<sup>40</sup>

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<sup>37</sup> EIA, “Rosewood Robbery: The Case for Thailand to List Rosewood on CITES,” 1.

<sup>38</sup> Sokheng, “Border Patrol Plan Targets Shooting Toll.”

<sup>39</sup> EIA, “Checkpoints: How Powerful Interest Groups Continue to Undermine Forest Governance in Laos.” (Environmental Investigation Agency, 2012). (This article provides an overview of how contacts in the government and military are used to secure rosewood from official auctions of seized timber, using fraudulent CITES permits from Laos to smooth onward transportation and mask illicit materials.) Cited by Roger, “Corruption, Bloodshed, and Death – the Curse of Rosewood.”

<sup>40</sup> Note that IEAs comprise several conventions that concern international trade and environmental protection, for example, the Convention Relative to the Preservation of Fauna and Flora in their Natural State (1993), the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (1940), the International Convention for the Protection of Birds (1950), the African Convention for the Conservation of Nature and Natural Resources (1970), Agreement on the Conservation of Polar Bears (1973), Convention for the Conservation and Management of the Vicuna (1980), Convention on Conservation of North Pacific Fur Seals (1957), the Montreal Protocol on Substances That Deplete the Ozone Layer (1987), European Convention for the Protection of Animals During International Transport (1968), the International Plant Protection Agreement (1951), the Plant Protection Agreement for the South East Asia and Pacific Region (1956), the Phyto-sanitary Convention for Africa (1967), Agreement Concerning the Cooperation in the Quarantine of Plants and Their Protection Against Pests and Diseases (1959), the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (1989), and the ASEAN Agreement on the Conservation of Nature and Natural Resources (1985).

### 3.3.1 The Relevance of CITES and Appendix II

#### *What is CITES?*

Entered into force on 1 July 1975, CITES is an international agreement that was originally conceived in 1963 according to a resolution adopted at a meeting of the members of the World Conservation Union (ICUN).<sup>41</sup> Currently, there are 181 parties, and all ASEAN countries are Contracting Parties to the Convention.<sup>42</sup> To ensure that international trade in specimens of wild animals and plants does not jeopardize their survival, the CITES Preamble clearly states that “*international cooperation*” is essential.<sup>43</sup> With regard to the trade of plants and animals across state borders, international cooperation is the core spirit of CITES. Today, more than 35,000 species of animals and plants, including their components and derivatives (which are frequently used in medicines, food, construction, materials, cosmetics, clothes, furniture and many other commodities) are listed and protected to varying degrees by CITES.<sup>44</sup>

CITES regulates international trade through a permit system with self-enacting provisions to preserve threatened and endangered species.<sup>45</sup> It should be noted that domestic businesses that deal in CITES-listed animal and plant species are excluded from its scope.<sup>46</sup> The term ‘self-enacting provisions’ indicates that the members must enact domestic laws to implement the

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<sup>41</sup> “What Is CITES?” December 16, 2015.

<sup>42</sup> “List of Contracting Parties,” December 16, 2015.

<sup>43</sup> Preamble, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 27 U.S.T. 1087, 993 U.N.T.S. 243, 1973.

<sup>44</sup> “What Is CITES?”

<sup>45</sup> CITES, Appendices I and II.

<sup>46</sup> James B Murphy, “Alternative Approaches to the CITES ‘Non-Detriment’ Finding for Appendix II Species,” 2006, 536; Chris Wold, “Multilateral Environmental Agreements and the Gatt: Conflict and Resolution?,” 1996, 876. (“CITES only mandates restrictions on international trade and no restrictions on domestic trade or consumption.”).

convention's obligations fully. That is, states that are parties to the convention are required (1) to refrain from trade involving listed species unless it conforms to the rules of the convention; (2) to take appropriate measures to enforce the convention; and (3) to prohibit trade that is in violation of the convention's regulations and to penalize such trade.<sup>47</sup> Most importantly, each party of CITES is obliged to assign "one or more Management Authorities that are competent to grant permits or certificates and one or more Scientific Authority" to monitor wildlife and plant trade.<sup>48</sup> Both the licensing system and the verified scientific evidence are critical mechanisms for CITES.

To subject international trade of selected species to certain controls, CITES categorizes the species, according to their degree of protection, in three Appendices.<sup>49</sup> Appendix I lists specimens threatened with extinction, for example, elephant ivory, rhinoceros horn, great apes, marine turtles, and tigers, for which any trade must be subject to particularly strict regulation, authorized only in exceptional circumstances, and allowed only for non-commercial trade.<sup>50</sup>

The trade in Appendix II species, for example, crocodile, polar bear, hippopotamus, python skins, the great white shark, and the meat of the queen conch, are controlled by the granting of an export permit or a re-export certificate. This document prohibits any utilization incompatible with the survival of the species and requires that any trade be legal, sustainable,

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<sup>47</sup> CITES, Article II and VII.

<sup>48</sup> CITES, Section IX (1)(a)(b).

<sup>49</sup> See "CITES Appendices I, II, and III. Appendices," Appendices, December 17, 2015; "How CITES Works," December 17, 2015.

<sup>50</sup> CITES, Article II.1, III; Appendix I of the Convention, which lists species currently threatened with extinction; John E Scanlon, "Corruption and Illegal Trade in Wildlife - Presentation by John E. Scanlon, 6th Session of the Conference of the Parties to the UN Convention Against Corruption," December 19, 2015.

and traceable.<sup>51</sup> However, no import permit is necessary for a species that falls under CITES Appendix II. Nevertheless, CITES members may adopt stricter measures than CITES requires.<sup>52</sup> Moreover, Appendix II covers so-called “look-alike” species, which are controlled because of their similarity in appearance to other regulated species.<sup>53</sup> Finally, a listed Appendix-III species may be traded, imported into or exported from (or re-exported) “only if the appropriate document has been obtained and presented for clearance at the port of entry or exit.”<sup>54</sup> Issued by the Management Authority of each member state, this required document may be embodied and may operate in various ways. For example, an export permit is required for trade from a state that included the species in Appendix III, or a certificate of origin in the event of export from any other State, and a re-export certificate in the event of re-export. All these documents are needed to prevent or restrict exploitation of the selected species, to ensure cooperation among the parties and thus to protect these species in an effective manner.

### ***The Conferences of the Parties: Protection status under CITES Appendix II***

According to its official website, CITES has a supreme decision-making body that embraces all its member States. It is called “the Conference of the Parties” (CoPs).<sup>55</sup> Held by one of the parties, the CoPs are required to meet every two to three years in order to review the

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<sup>51</sup> CITES, Article II.2. *See also* Appendix II of the convention, which lists species that are not threatened with extinction, but may become so unless trade is strictly regulated and controlled.

<sup>52</sup> “CITES Appendices I, II, and III. Appendices.”

<sup>53</sup> CITES, Article II.2 (b).

<sup>54</sup> CITES, Article II.3. *See also* Appendix III of the convention lists the specimens that are subject to regulation within the jurisdiction of a party and for which the cooperation of other parties is needed to control such trade; “How CITES Works.”

<sup>55</sup> “Conference of the Parties,” December 20, 2015.

implementation of the Convention and to assess the effectiveness of efforts made to protect species listed under CITES Appendices I, II and III.<sup>56</sup> CoPs also consider and adopt proposals to amend the lists of species, recommend measures to improve the effectiveness of the convention, and make any provisions necessary to enable the Secretariat to conduct his duties.<sup>57</sup>

Outside, third-party observers—that is, representatives of entities that are not party to CITES, such United Nations agencies, and non-governmental organizations involved in conservation or trade, may attend the CoPs, but they are unable to vote. Members of the general public may also attend the CoPs as visitors. However, they are not permitted to participate in discussion at the meetings.<sup>58</sup> From 1976 to the present, there have been sixteen CoPs. The CoP17 will be held from 24 September to 5 October 2016 in Johannesburg, South Africa.<sup>59</sup>

In 2013, Thailand and Vietnam together successfully proposed Siamese rosewood for listing in CITES Appendix II.<sup>60</sup> The proposal was made because “regulation of trade in the species is necessary to keep it from becoming eligible for inclusion in Appendix I in the near

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<sup>56</sup> CITES, Article XI.3; “Resolution Conf. 9.24 (Rev. CoP16),” Criteria for Amendment of Appendices I and II, December 20, 2015. (This document regulates the biological and trade criteria for determining whether a species should be included in Appendices I or II.)

<sup>57</sup> *Ibid.*

<sup>58</sup> CITES, Article XI. *See also* “Conference of the Parties.”

<sup>59</sup> “Conference of the Parties.”

<sup>60</sup> Thailand and Vietnam failed in their proposal in 2008, since they lacked support from other range states. Only parties to the convention may submit proposals, and any suggestion to amend Appendix I or II requires a two-thirds majority of the voting parties in order to be adopted. *See* CITES, Article XV.1(b); CITES, “Consideration of Proposals for Amendment of Appendices I and II (CoP16 Prop.60).”; “Proposals for Possible Consideration at CoP17, Amendment of the Annotation to the Listing of *Dalbergia cochinchinensis* Included in Appendix II, PC22 Doc. 22.3, Submitted by Thailand to the Twenty-Second Meeting of the Plants Committee, Tbilisi (Georgia), 19-23 October 2015, Interpretation and Implementation of the Convention Species Trade and Conservation Proposals for Possible Consideration at CoP17,” accessed January 10, 2016, <https://cites.org/sites/default/files/eng/com/pc/22/E-PC22-22-03.pdf>; EIA, “Briefing Report: 16th Meeting of the Conference of Parties (COP16) to the UN Convention on International Trade in Endangered Species of Wild Fauna and Flora,” December 17, 2015.

future.”<sup>61</sup> The unanimous adoption by 177 member countries demonstrated the willingness of all states that are parties to the Regional Dialogue to establish international protection and a law enforcement mandate for the protection of Siamese rosewood. Thus, rosewood is today legally protected in all its range states.

As of June 2013, CITES requires all source countries to export only controlled quantities of Siamese rosewood with close monitoring and documentation (export permits or re-export certificates are needed if particular conditions are satisfied) to guarantee that international trade is not detrimental to the survival of this species. Faith Doherty, the head of EIA’s Forests Campaign, says:

This is a significant step forward for this desperately threatened species. With this listing, the customer markets will need to work with Thailand and the range of states of Cambodia, Vietnam, and Laos to ensure Siam Rosewood is actually protected, especially as there is a logging ban in Thailand. [...] Finally, we have a legal tool to use in China, the main destination and where rosewood prices on the black market are spurring a flood of smuggling and associated violence.<sup>62</sup>

By formal protection, CITES requires all Mekong source countries and range states, especially China, which is the biggest market, to create cooperative actions and policies for protecting Siamese rosewood. Despite the listing of Siamese rosewood in Appendix II, some legal loopholes and spillover effects occur in practical efforts to protect the species due to

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<sup>61</sup> EIA, “Briefing Report: 16th Meeting of the Conference of Parties (COP16) to the UN Convention on International Trade in Endangered Species of Wild Fauna and Flora.” The proposal was made in accordance with Res. Conf.9.24 (Rev.COP15) Annex 2 (2) para. A; CITES, Article II.

<sup>62</sup> “CITES Lists Endangered Wood In Bid to Halt Booming Illegal Trade,” CITES Protection Will Help to End Rosewood Wars, December 22, 2013.

Annotation 5, as discussed in the following section.

### **3.3.2 The Thai Government Has New Legal Framework and Policy**

#### ***Several Forest Laws and Policies Play a Key Role in Thailand***

Thailand became a Party to CITES in 1983 and fully implemented the Convention by legislating domestic laws and designating both Management Authorities and Scientific Authorities. As Management Authorities and Scientific Authorities, the Department of National Parks, Wildlife and Plant Conservation (Division of Wild Fauna and Flora Protection), the Department of Agriculture (Plant Varieties Protection Division), and the Department of Fisheries (Fisheries Licensing and Management Measures Section, Fisheries Administration and Management Bureau) were set up to grant permits and certificates and monitor wildlife and plant trade in the country.<sup>63</sup>

The Thai forest laws and policy that govern the illegal harvesting and trade of Siamese rosewood mainly consist of six laws. These are: (1) Forest Act B.E. 2484 (1941)<sup>64</sup> and (2) its amendment: the Complete Ban Order number 106/2557 by the National Council for Peace and

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<sup>63</sup> “National Contacts,” Thailand, December 22, 2015; “Biennial Reports 2013-2014, Notification No. 2005/035, Submitted by Thailand to CITES.” Note that the Department of Marine and Coastal Resources is designated as another Scientific Authority. Note also that the Royal Forest Department was established in 1896 and that it was restructured in 2002. The Department of National Parks, Wildlife and Plant Conservation (DNP) was separated from it to conserve national parks through research and by promoting community-driven initiatives to protect and restore local flora and fauna under a set of various laws. Both organizations fall under the Ministry of Natural Resources and Environment of Thailand.

<sup>64</sup> Forest Act B.E. 2484 (1941), n.d. or พระราชบัญญัติป่าไม้ พุทธศักราช ๒๔๘๔, (in Thai)

Order (NCPO);<sup>65</sup> (3) the National Parks Act B.E. 2504 (1961); (4) the National Reserve Forest Act B.E. 2507 (1964); (5) the Wildlife Reservation and Protection Act B.E. 2535 (1992); and (6) the 1989 National Logging Ban Policy.<sup>66</sup> (1) Forest Act B.E. 2484 (1941) repealed several previous pieces of legislation and provided legal definitions of timber, logging, forest products, and transport.<sup>67</sup> To meet its objectives, this Forest Act divides restricted timber into two types: Category A and B. Category-A rules are General Restriction rules, and they govern the harvesting of certain types of timber for which a competent officer must grant a permit. Category-B rules are Strict Restriction rules, and they govern the harvesting of rare or reserved types of timber for which special permission from the Minister is required.<sup>68</sup> In July of 2014, Siamese rosewood was listed in Category B, as a result of Order Number 106/2557 from the NCPO.

For many years, Thailand imported wood from neighboring countries and was criticized for causing destruction and deforestation. On 17 January 1989, Thailand imposed a complete prohibition on harvesting in natural forests by establishing a comprehensive logging ban policy. The impetus for this policy decision was the disastrous flooding and resulting mudslides in Southern Thailand. It is generally agreed that the severity of the mudslides was due to deforestation and forest encroachment.<sup>69</sup> At that time, however, the logging ban policy was criticized as “futile, fruitless, and even counter-productive,” because it offered no practical plan

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<sup>65</sup> “The NCPO Declaration no.106/2557, Amended the Forest Act B.E. 2484 (1941),” December 23, 2015. (See Appendix B)

<sup>66</sup> Cabinet Resolution, the Order Number 32/2532

<sup>67</sup> Forest Act B.E. 2484 (1941), Section 3 and 4.

<sup>68</sup> Forest Act B.E. 2484 (1941), Section 6

<sup>69</sup> Claudia W. Sadoff, *Natural Resource Accounting for the Forestry Sector: Valuation Techniques And Policy Implications in Thailand* (Washington, D.C.: National Academies Press, 1994), <http://www.nap.edu/catalog/4844>.

for implementation.<sup>70</sup> When the national logging ban was introduced, no detailed studies were made of the illegal logging business and its impact; and no strategy was developed for subordinate legislation, for funding, or for technical training to assist in monitoring and evaluating the program.<sup>71</sup> As a result, Thailand imported timber from neighboring countries to satisfy domestic demands. Most of the wood was imported from Malaysia, Lao PDR, and Myanmar. Thailand was thus blamed for the destruction and deforestation of their national forests.<sup>72</sup>

The Thai government has made several efforts to protect Siamese rosewood through both domestic and international policies. At the domestic level, both inside and outside the targeted forests, the government has deployed several patrol units; it has established checkpoints; and it has developed procedures for verifying the legality of timber possession. By drawing on public interest in the conservation of forests and endangered species, the government also funds research and has developed a plantation plan.<sup>73</sup> All these measures have been implemented; however, illegal logging and trading persist. Statistically, the Department of National Parks has revealed that, in 2013, there were 149 illegal logging cases, 90 defendants, 57 offenders, and 1,781 pieces of timber were confiscated in the protected areas of the northeastern region.<sup>74</sup> From

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<sup>70</sup> Sureeratana Lakanavichian, "Impacts and Effectiveness of Logging Bans in Natural Forests: Thailand in FAO, Forests Out of Bounds: Impacts and Effectiveness of Logging Bans in Natural Forests in Asia-Pacific" (FAO, Bangkok, Thailand 2001), 180, [http://coin.fao.org/coin-static/cms/media/9/13171037773780/2001\\_08\\_high.pdf](http://coin.fao.org/coin-static/cms/media/9/13171037773780/2001_08_high.pdf).

<sup>71</sup> Ibid., 173.

<sup>72</sup> Ibid.

<sup>73</sup> Prasert Sornsathapornkul, "Current Status and Measures to Combat Illegal Logging and Trading of Siamese Rosewood (*Dalbergia Cochinchinensis* Pierre) in Thailand, Thailand Country Report Presentation in 'Regional Dialogue on Preventing Illegal Logging and Trading of Siamese Rosewood'" (Bangkok, Thailand, December 18, 2014), 6, [http://www2.dnp.go.th/dnpii/index.php?option=com\\_flexicontent&view=item&cid=25:preventing-illegal-logging-and-trading-of-rosewood&id=89:rosewood-04&Itemid=251](http://www2.dnp.go.th/dnpii/index.php?option=com_flexicontent&view=item&cid=25:preventing-illegal-logging-and-trading-of-rosewood&id=89:rosewood-04&Itemid=251).

<sup>74</sup> Ibid.

1 December 2013 to 30 September 2014, there were 282 cases, 113 defendants, and offenders, and 1,668 pieces of timbers were seized.<sup>75</sup>

### ***The NCPO Issues Order No. 106/1557 and Intensifies Punishment for Violations***

In July 2014, to control Siamese rosewood trade more strictly, the National Council for Peace and Order (NCPO) imposed Order No. 106/2557, which prohibits all Siamese rosewood harvesting, processing, and possession.<sup>76</sup> The Order amended Forestry Act B.E. 2484 (1941), previously revised by Forestry Act (No.5) B.E. 2518 (1965) and shields Siamese rosewood on a list of type Kor (I).<sup>77</sup> Order No. 106/2557 classifies Siamese rosewood as a restricted wood, meaning that all harvesting, possession, and processing of it are forbidden unless an authorized official grants a permit.<sup>78</sup> Furthermore, even when such a permit has been granted, the grantees must still adhere to the conditions specified in the Decree and by the authority granting the permit.<sup>79</sup>

Order No. 106/2557 also increases the fines and prison sentences for those convicted of possessing Siamese rosewood (Phayung). Prison sentences range from one to twenty years, and fines ranges from five thousand to two million baht (approximately US\$ 1,419 to US\$ 56,789).<sup>80</sup> Moreover, punishment increases if the total number of possessions of Phayung is greater than

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<sup>75</sup> Ibid.

<sup>76</sup> “The NCPO Order no.106/2557, Amended the Forest Act B.E. 2484 (1941).” Note that the term used in Thai is called “Mai-Phayung.”

<sup>77</sup> The NCPO order no.106/2557, no.1

<sup>78</sup> The NCPO order no.106/2557, no.2

<sup>79</sup> Ibid.

<sup>80</sup> The NCPO order no.106/2557, No.3. Note that the currency exchange rate on January 2016 is one U.S. dollar equals approximately 35.22 Thai Baht.

that allowed by the Order. So if a person possesses more than five tons of Phayung, either alone or with other restricted woods on a list Khor (for example, teak [*Tectona grandis*] or Tamalin [*Dalbergia oliveri* or Black-Rosewood]), imprisonment will range from two to fifteen years, and the fine will range from ten thousand to one million and fifty thousand baht (or about US\$2,839 to US\$42,519).<sup>81</sup> These increases in punishment signify that the Thai government, in accorded with the National Council for Peace and Order, takes the protection of Phayung seriously.

### **3.3.3 The ASEAN Range States Call for Imperative Regional Cooperation**

#### ***Initiating the ASEAN Policy Framework for Forestry Cooperation and Siamese Rosewood Protection***

Subject to ASEAN cooperation in forestry, ASEAN has contributed the ASEAN Socio-Cultural Community Blueprint in order to formulate a comprehensive objective for promoting sustainable forest management (SFM).<sup>82</sup> Combating illegal logging and its associated trade is one of its objectives.<sup>83</sup> Guided by the ASEAN Ministers on Agriculture and Forestry (AMAF), the main institution involved in policy coordination and decision-making for the forest sector is

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<sup>81</sup> The NCPO order no.106/2557, no.4

<sup>82</sup> In line with the United Nations Conference on Environment and Development (UNCED) 1992: Rio Declaration and Forest Principles (Earth Summit), sustainable forest management (SFM) means that the current generation may consume the products and social, cultural, and environmental services provided by forests, but must maintain their availability for the development needs of future generations. *See* “ASEAN Forest » Sustainable Forest Management (SFM),” accessed January 14, 2016, <http://www.aseanforest-chm.org/sustainable-forest-management-sfm/>.

<sup>83</sup> “ASEAN Policy Framework for Forestry Cooperation,” ASEAN Forest, January 11, 2016; ASEAN Key element D11 of the ASEAN Economic Community (AEC) and ASEAN Socio-Cultural Community (ASCC) Blueprints. Note that ASEAN Charter, which was ratified in December 2008, and the ASEAN Community Blueprints both place the overall policy framework of forestry as the key component of ASEAN’s objective. The AEC Blueprint targets and timelines a regional reference framework for a phased approach to forest certification by 2015, when an Ad-Hoc Working Group on a Pan-ASEAN Timber Certification Initiative (AWG-C) took charge of this issue.

the ASEAN Senior Officials on Forestry (ASOF), together with the ASEAN Forest Clearing House Mechanism (CHM), a regional learning platform that facilitates and enhances communication and interaction on forest policy.<sup>84</sup> Based on the 11th Meeting of the ASOF, the ASEAN Regional Knowledge Network (ARKN) on Forest and Climate Change was created as a forum where ASEAN member states can share their knowledge and experiences on the issues of forest management and climate change, for example, Reducing Emissions from Deforestation and Forest Degradation (REED).<sup>85</sup>

To address concerns about illegal logging and tropical deforestation, ASEAN has received pressure from external markets (particularly from the EU, Japan, Australia, and the United States) to ensure the legality of timber and wood products.<sup>86</sup> To ensure that all timber and wood products are derived from legal and sustainable sources, those countries have instituted policies and roadmaps in collaboration with ASEAN concerning legality issues, a sustainability and certification program, and the protection of endangered species.<sup>87</sup> Due to this policy, a number of agreements have been signed for the purpose of regional forestry cooperation.

In 2005, ASEAN created the ASEAN Wildlife Enforcement Network (ASEAN-WEN) to combat illegal cross-border trade of endangered flora and fauna as a regional, inter-governmental

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<sup>84</sup> Ibid., ASEAN Policy Framework for Forestry Cooperation.

<sup>85</sup> “ASEAN Regional Knowledge Network on Forests and Climate Change (FCC),” ASEAN Forest, accessed January 11, 2016, <http://www.aseanforest-chm.org/asean-regional-knowledge-network-on-forests-and-climate-change-fcc/>.

<sup>86</sup> United States International Trade Commission, ASEAN Regional Trends in Economic Integration, Export Competitiveness, and Inbound Investment for Selected Industries: Investigation No. 332-511, No. 332-511. (DC: US. International Trade Commission: USITC Publication, 2010).

<sup>87</sup> Ibid.

law enforcement network.<sup>88</sup> The network also fosters further engagement with other countries and organizations. These include the United States, China, Japan, Korea, Australia, the South Asian Association for Regional Cooperation, several African states, and the EU. The main partners in ASEAN-WEN are the Government of Thailand, the FREELAND Foundation, TRAFFIC, ASEAN, the U.S. State Department, the U.S. Fish and Wildlife Service, the U.S. Justice Department, the U.S. Forest Service, and CITES.<sup>89</sup> However, it seems that ASEAN-WEN is not properly enforcing timber trade, because it lacks timber legality assurance systems, since it works on “the received reports” and “does not undertake monitoring actions on regional enforcement.”<sup>90</sup>

To protect Siamese rosewood, Thailand has also cooperated with CITES Parties and other ASEAN members. In July of 2014, Thailand issued Notification No. 2014/032 to the CITES secretariat to request that all Parties assist Thailand in checking shipments of timber.<sup>91</sup> By this request, Parties that seize illegal shipments of Siamese rosewood timber are requested to report the seizures to the Management Authority of Thailand and the Secretariat. Moreover, the issue was classified as an emergency, was discussed at the Regional Dialogue on Siamese Rosewood and illegal logging in Bangkok on December 2014, and was noted at the 11th meeting of the Association of the Southeast Asian Nations Experts Group on CITES (AEG on CITES) in

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<sup>88</sup> “What Is ASEAN-WEN?,” accessed December 28, 2015, <http://www.asean-wen.org/index.php/about-us/what-is-asean-wen>.

<sup>89</sup> EUFLEGT, “ASEAN Timber Trade, Customs and Timber Legality: Scoping Study” (European Forest Institute, 2014), 26.

<sup>90</sup> *Ibid.*, 11, 60.

<sup>91</sup> “Notification to the Parties, Trade in Siamese Rosewood (*Dalbergia Cochinchinensis*) from Thailand (No. 2014/031).”

Brunei in May of 2015.<sup>92</sup>

### ***Developing Regional Standards for Timber Legality and Certification***

Having recognized the need for forest and timber certification, in July 2002, the 5th meeting of the ASOF agreed to set up an Ad-Hoc Working Group for a Pan-ASEAN Timber Certification Initiative (AWG-C).<sup>93</sup> Its primary task is to coordinate a regional approach to the marketability of ASEAN timber products by developing regional standards and indicators for legality that each ASEAN member can apply.<sup>94</sup> In 2006, the AWG agreed on rules for the Phased Approach to Forest Certification, listing six elements that were to be included in 2008 in the standards for regional timber legality. These six elements are: (1) Payment of all statutory charges; (2) CITES compliance; (3) Implementation of a system that allows for the tracking of logs to the forest of origin; (4) Compliance with all relevant laws and regulations; (5) Compliance with the laws governing social and environmental aspects, such as workers' safety and health, and an environmental impact assessment; and (6) Approval of the designated forest area based on an approved cut.<sup>95</sup>

Although these six elements were introduced, some ASEAN countries created their own national forest certification scheme in order to achieve more responsible and sustainable trade in forest products. For example, Malaysia designed a Timber Certification Council (MTCC) that

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<sup>92</sup> Section 6 of “Amendment of the Annotation to the Listing of *Dalbergia Cochinchinensis* Included in Appendix II,” 1.

<sup>93</sup> Note that the Pan-ASEAN Timber Certification Initiative is sponsored by ASEAN and the International Tropical Timber Organization (ITTO). *See also* “Forest and Timber Certification,” ASEAN Forest, January 11, 2016.

<sup>94</sup> *Ibid.*

<sup>95</sup> EUFLEGT, “ASEAN Timber Trade, Customs, and Timber Legality: Scoping Study,” 13–14.

was endorsed by the Program for the Endorsement of Forest Certification (PEFC), and Indonesia launched Lembaga Ekolabel Indonesia (LEI), which was recognized by the Forest Stewardship Council (FSC). Furthermore, and perhaps most importantly, several ASEAN states worked on extra measures for a timber legality assurance system by jointly processing and negotiating with EU Forest Law Enforcement, Governance, and Trade (EU-FLEGT) in order to meet all requirements for the legality of timber products being exported to the EU market.<sup>96</sup>

The EU-FLEGT Action Plan, the EU's Timber Regulation, and the U.S. Lacey Act are the key initiatives used to prevent the trade of illegal timber products. To minimize the risk of illegal timber trade, the EU's Timber Regulation, the so-called 2013 Due Diligence Regulation, requires that traders who place timber on the EU market do so with due diligence. In practical terms, this requirement means: (1) tracking timber flows, (2) conducting risk assessments, (3) identifying the country and region of harvest, (4) describing the products, and (5) having access to documentation as support for legal compliance.

Similarly, the U.S. Lacey Act (16 U.S.C. §§ 3371–3378) is a conservation law in the United States aimed at banning the import of illegally harvested products such as fish and plants, etc. The 2008 amendment made it unlawful to import, export, transport, sell, receive, acquire, or purchase any plants or plant products harvested or traded in violation of an “underlying law” in any foreign country or in the U.S. Importers have to complete a declaration form, with information on the country of origin, genus, species, value, and volume. Failures to file a form or

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<sup>96</sup> Ibid.

making a false declaration on a form are in violation of the Lacey Act. Penalties cover civil administrative penalties, forfeiture of the trafficked goods, criminal fines, and imprisonment.<sup>97</sup>

### ***Engaging EU-FLEGT and VPA Trade Agreements***

In 2003, the European Union (EU) adopted the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan to reduce illegal logging and trade in items produced from protected trees.<sup>98</sup> The same principle underlies the EU-FLEGT Action Plan, the bilaterally negotiated Voluntary Partnership Agreements (VPA) and the trade agreement on a Timber Legality Assurance System (TLAS) between timber-producing countries and the EU.<sup>99</sup> The VPA has four phrases and five key elements. The four phrases are preparation, negotiation, development and full implementation; the five key elements are (1) a clear definition of legal timber; (2) a controlling mechanism; (3) a government-endorsed institution; (4) a licensing authority for exports; and (5) an independent institution to monitor the functioning of the whole system.<sup>100</sup> Simply put, the VPA, through both control and licensing procedures, seeks to ensure the legality of timber products imported into the EU market from the partner countries.

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<sup>97</sup> Ton Quten Nguyen and Huu Nghi Tran, “How Vietnam Is Prepared to Meet Legal Requirements of Timber Export Markets” (Tropenbos International Viet Nam, Hue City, Viet Nam, 2011). (This report analyzes both the positive and negative impacts of FLEGT VPA, EU Timber Regulation and the Lacey Act on the timber industry.) *See also* Gregg R. Juge, “Amendment to the U.S. Lacey Act: Implications for Exporters of Thailand’s Forest Products” (Forest Trends and Sidley Austin LLP, January 2010), [http://www.forest-trends.org/documents/files/doc\\_2386.pdf](http://www.forest-trends.org/documents/files/doc_2386.pdf).

<sup>98</sup> “What Is FLEGT? | EU FLEGT Facility,” accessed January 11, 2016, <http://www.euflegt.efi.int/about-flegt>.

<sup>99</sup> “VPAs | EU FLEGT Facility,” accessed January 11, 2016, <http://www.euflegt.efi.int/vpa>.

<sup>100</sup> *Ibid.* *See also* “Joint Communication to the European Parliament and the Council, The EU and ASEAN: A Partnership With a Strategic Purpose,” 2015, 9, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=JOIN:2015:22:FIN&from=EN>; “The EU and ASEAN: A Partnership with a Strategic Purpose.”

In 2010, the EU-FLEGT Facility of the European Forest Institute (EFI) created the FLEGT Asia Regional Program to set up control and licensing systems and provide technical and institutional support for improving forest governance in Asia.<sup>101</sup> Through this program, the EU has engaged in formal dialogues on VPAs with several ASEAN members. To date, all ASEAN timber-exporting countries are exploring how best to react to the new market requirements for legal timber.

Of all the ASEAN members, Indonesia is the most advanced country in terms of negotiating with the EU-FLEGT. In 2013, Indonesia was the first ASEAN state member to successfully sign a VPA with the EU. Laos, Malaysia, Thailand, and Vietnam are in the process of FLEGT VPA negotiation, while another three ASEAN countries (Myanmar, Cambodia, and the Philippines) are still exploring the issue.<sup>102</sup> On the condition that they all comply with this timber legality program, the ASEAN members will receive financial and technical support to improve the national and regional timber legality assurance system and thus minimize the illegal use of timber in Southeast Asia.<sup>103</sup>

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<sup>101</sup> “Asia - Association for South East Asian Nations (ASEAN) - International Cooperation and Development - European Commission,” International Cooperation and Development, accessed January 11, 2016, [https://ec.europa.eu/europeaid/regions/asia/association-south-east-asian-nations-asean\\_en](https://ec.europa.eu/europeaid/regions/asia/association-south-east-asian-nations-asean_en).

<sup>102</sup> Ibid. See also EUFLEGT, “ASEAN Timber Trade, Customs and Timber Legality: Scoping Study.” In Indonesia, the timber legality assurance system is called Sistem Verifikasi Legalitas Kayu (SVLK), which verifies timber legality through independent third-party auditing and licensing.

<sup>103</sup> “Policy Brief on the Impact of EU FLEGT Action Plan on ASEAN Member States Intra- and International Timber Trade Flow to EU,” *Document Center | ASEAN Forest CHM*, accessed January 11, 2016, [http://forest-chm.asean.org/document\\_center/knowledge\\_networks/arkn\\_fleg/arkn\\_products/policy\\_brief\\_on\\_the\\_impact\\_of\\_eu\\_flegt\\_action\\_plan\\_on\\_asean\\_member\\_states\\_intra\\_and\\_international\\_timber\\_trade\\_flow\\_to\\_eu.html](http://forest-chm.asean.org/document_center/knowledge_networks/arkn_fleg/arkn_products/policy_brief_on_the_impact_of_eu_flegt_action_plan_on_asean_member_states_intra_and_international_timber_trade_flow_to_eu.html).

### 3.3.4 Analysis of Existing Forest Management and Governance

#### *The Lack of Appropriate Non-Detriment Findings to Support CITES Permits*

CITES requires that trade in specimens of Appendix-II species must be compatible with sustainable harvesting, which means that the exporting countries must restrict trade in Appendix-II species to levels that do not threaten that species' survival or its role within the ecosystem in which it is found.<sup>104</sup> This requirement is known as the “non-detriment finding,” whereby a party's Scientific Authority is authorized to make a non-detriment finding and its Management Authority is authorized to issue permits. The determination of a “non-detriment finding” is a critical check to ensure that any Appendix-II trade does not jeopardize the survival of the species. Information that is both accurate and sufficient is hence necessary for a proper assessment to be made.<sup>105</sup>

In specifying a non-detriment finding for Siamese rosewood trade, ASEAN members have not yet created a uniform standard; as a result, ASEAN members must cooperate to work on this issue further. Generally, CITES provides guidance documents to assist the member states when making a non-detriment finding.<sup>106</sup> In addition, CITES also suggests that the Scientific

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<sup>104</sup> A.R. Rosser and Haywood M., “Guidance for CITES Scientific Authorities: Checklist to Assist in Making Non-Detriment Findings for Appendix II Exports” (IUCN, Gland, Switzerland and Cambridge, UK, 2002), 3, <https://portals.iucn.org/library/efiles/edocs/SSC-OP-027.pdf>. (Rosser and Haywood clarify the roles played by Scientific Authorities in making non-detriment findings conform to the language of Articles III and IV of CITES and in any subsequent resolution for the survival of a particular species.)

<sup>105</sup> CITES, Article IV. 29 (a); Murphy, “Alternative Approaches to the CITES ‘Non-Detriment’ Finding for Appendix II Species,” 536. (Murphy suggests that, in the cases of toothfish and mahogany, cooperation does not result in more accurate non-detriment findings. The regional organizations and any certification organization beyond the national Scientific Authorities may strengthen the conservation efforts of CITES by providing accurate, scientifically based information for any non-detriment findings.)

<sup>106</sup> Rosser Rosser and M., “Guidance for CITES Scientific Authorities: Checklist to Assist in Making Non-Detriment Findings for Appendix II Exports.”

Authorities should base their findings on “the scientific review of available information based on the population status, distribution, population trend, harvest and other biological and ecological factors, as appropriate, and trade information relating to the species concerned.”<sup>107</sup>

Following the guidance of CITES will assist in monitoring both the levels of harvest and the status of the rosewood population; it will also assist in increasing international cooperation, which is vital to any effective implementation of CITES by exporting and importing countries and thus to the protection Siamese rosewood. International cooperation will also produce better understanding of the risks of ongoing Siamese rosewood trade among the range states. However, in order to improve CITES implementation, both financial support and technical training are necessary, as well as strong political will on the part of all ASEAN members. ASEAN members and other range states still need to make improvements in this regard.

### ***Loophole and Spillover Effects of CITES Annotation 5***

Although the CITES Appendix II listing offers Siamese rosewood strong protection, traders are exploiting Annotation 5, which says that restrictions and controls apply only to “logs, sawn wood and veneer sheets.”<sup>108</sup> One official, in a discussion with the author, indicated that “Practically, Annotation 5 produces gaps and difficulties for border officials to determine how to

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<sup>107</sup> CITES, Conference Resolution 10.3, in the Proceedings of the Tenth Meeting of the Conference of the Parties (1997).

<sup>108</sup> See Nos. 2 and 4 of “Amendment of the Annotation to the Listing of *Dalbergia Cochinchinensis* Included in Appendix II,” 1.

interpret it.”<sup>109</sup> In short, the question arises whether the meaning of “logs, sawn wood and veneer sheets” includes parts and derivatives, and even the roots of Siamese rosewood trees, which also bear a market value and are thus being illegally harvested for export to regional markets. Recently, the exporting ASEAN countries have observed that trade in rosewood species is inclining toward the use of “secondary processed products, particularly furniture.”<sup>110</sup> Thus superficially processed wood and semi-finished products are increasingly traded in high volumes and undermine the intent of the CITES listing. Hence, all CITES members, particularly Siamese rosewood range states, must help close this legal loophole if the species is to be effectively protected in the long term.<sup>111</sup>

Additionally, the EIA report shows that banning Siamese rosewood causes spillover effects onto two other types of rosewood, that is, *Dalbergia bariensis* (tamalan or Burmese rosewood) and *Pterocarpus macrocarpus* (Padauk or Burmese Padauk). Traders are intensely targeting them as replacement species for Siamese rosewood.<sup>112</sup> To circumvent the law, traders falsely claim that illegal Siamese rosewood is one of the unlisted species and rely on the inadequate inspection procedures of customs agencies.<sup>113</sup> As a result, to boost regional forestry and timber trade reform, EIA has urged all the parties to the Regional Dialogue to protect these

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<sup>109</sup> The official of the Forest Certification Office, in discussion with the author, August 2015; “Management of Timber Listed in National Laws and CITES Appendixes, Vietnam Country Report Presentation” (Regional Dialogue on Preventing illegal logging and trading of Siamese Rosewood, Bangkok, Thailand, December 18, 2014), [http://www2.dnp.go.th/dnp/ii/index.php?option=com\\_flexicontent&view=item&cid=25:preventing-illegal-logging-and-trading-of-rosewood&id=90:rosewood-05&Itemid=251](http://www2.dnp.go.th/dnp/ii/index.php?option=com_flexicontent&view=item&cid=25:preventing-illegal-logging-and-trading-of-rosewood&id=90:rosewood-05&Itemid=251).

<sup>110</sup> See No. 5 of the “Amendment of the Annotation to the Listing of *Dalbergia Cochinchinensis* Included in Appendix II,” 1.

<sup>111</sup> EIA, “Briefing on the Regional Dialogue on Siamese Rosewood and Illegal Logging, Bangkok, Thailand,” January 10, 2014, 2.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

two lookalike species as potential replacements for Siamese rosewood.<sup>114</sup>

***Next Steps: Deleting Annotation 5, Listing Replacement Species, and Building Stronger Regional Enforcement***

At the 11th Meeting of the ASEAN Experts Group on CITES (CITES AEG), the AEG parties made an urgent call for action by proposing the deletion of Annotation 5 from the Siamese rosewood CITES Appendix II listing and by proposing that both Padauk and Burmese rosewood be included in Appendix II of CITES.<sup>115</sup> There is a strong belief that these actions will stop the exploitation of any legal loopholes. Most importantly, it will ensure that all range states more carefully monitor trade, that they enforce the laws on any future trade of Siamese rosewood and eliminate the use of false declaration to undermine regional customs enforcement and taxation processes.<sup>116</sup>

Additionally, by supporting regional cooperation among the parties to the Regional Dialogue, which the ASEAN Siamese rosewood range states and China attended, they have

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<sup>114</sup> Ibid.

<sup>115</sup> EIA, “Addressing ASEAN’s Regional Rosewood Crisis: An Urgent Call to Action, A Briefing for the 11th ASEAN Experts Group on CITES (CITES AEG) and 10th Meeting of the ASEAN Wildlife Enforcement Network (ASEAN-WEN), May 5-8, 2015, Brunei,” EIA International, January 10, 2015. (EIA makes policy recommendations for ASEAN members to remove a loophole in the CITES Appendix II listing - Annotation 5, and further listing two substituted species in CITES Appendix II in the CITES CoP17 in 2016.); EIA, “Time for ASEAN to Act to End Illegal, Violent Rosewood Trade,” EIA International, January 10, 2015; “Trees and Proposals for Possible Consideration at CoP17, Information on Most-Traded Rosewood Species - Pterocarpus Macrocarpus (Padauk) and Dalbergia Oliveri (Tamalan), PC22 Inf.12, Submitted by EIA's Twenty-Second Meeting of the Plants Committee, Tbilisi (Georgia), 19-23 October 2015, Interpretation and Implementation of the Convention Species Trade and Conservation Proposals for Possible Consideration at CoP17.”

<sup>116</sup> Ibid., EIA; “Addressing ASEAN’s Regional Rosewood Crisis,” 2. Note that without any objections within the 60-day comment period, the proposal to the CITES Secretariat to amend and remove Annotation 5 from the Appendix II listing will be automatically valid and be adopted 30 days afterwards. See “Amendment of the Annotation to the Listing of Dalbergia Cochinchinensis Included in Appendix II.”

recognized the increasing seriousness of the rosewood crisis. The parties recognize that “*concerted and coordinated regional action*” is crucial to halting the devastating effects of illicit trade.<sup>117</sup> However, Chinese officials believe that law enforcement should be stricter in timber source countries.<sup>118</sup> In addition, EIA recommends that all Siamese rosewood range states undertake and publish scientific non-detriment findings to justify all CITES permits and further examine the fraudulent issuance of CITES export permits.<sup>119</sup> EIA also suggests several strategies for building stronger enforcement of the laws that govern logging and trade in the region. Since today in China no laws prohibit non-compliant timber imports, one solution is to “engender respect for sovereign forestry and trade laws of ASEAN member nations.”<sup>120</sup> Some believe that establishing a regional network and special investigative methods, such as financial investigation, will help countries share information promptly and identify and prosecute any criminal networks.<sup>121</sup>

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<sup>117</sup> Ibid., “Addressing ASEAN’s Regional Rosewood Crisis,” 3.

<sup>118</sup> Peel, “China and the Rosewood Carve-Up.”

<sup>119</sup> EIA, “Briefing on the Regional Dialogue on Siamese Rosewood and Illegal Logging, Bangkok, Thailand,” 4.

<sup>120</sup> EIA, “Time for ASEAN to Act to End Illegal, Violent Rosewood Trade.”

<sup>121</sup> EIA, “Briefing on the Regional Dialogue on Siamese Rosewood and Illegal Logging, Bangkok, Thailand,” 4. For example, the Anti-Money Laundering Office (AMLO) of Thailand used financial investigative techniques to disband the Kampanart “Sia Tang” Chaiyamart’s wildlife trafficking syndicate and confiscate that gang’s financial assets. Also, in the Vietnam Bac Ninh Province case, these techniques cut criminal financing and disrupted the criminal syndicate. For further details, see ASEAN Secretariat, “ASEAN Inputs to the Eleventh Session of the United Nations Forum on Forest (UNFF), Forest: Progress, Challenges and the Way Forward on the International Arrangement on Forests (IAF),” September 2014, <http://www.un.org/esa/forests/wp-content/uploads/2014/11/ASEAN.pdf>.

### 3.4 THE HISTORICAL AND SOCIOCULTURAL CONTEXTS OF SIAMESE ROSEWOOD TRADE

#### 3.4.1 Hongmu Has Special Meaning as A Cultural Symbol

Chinese furniture was found in the ancient kingdom of Chu (CA. 500 BC), but no early references to *Hongmu* have yet been identified.<sup>122</sup> Nevertheless, it is commonly assumed that most of the dark heavy furniture made from *Hongmu* (also called “blackwood”) has its origin in the Middle Qing dynasty, since the equivalent Southern Chinese term “*Suanzhi*” (which means “sourwood”) has been found.<sup>123</sup> Since China opened up in recent decades to welcome tourism and foreign enterprise, interest in the traditional elegance and the artistry of Chinese *Hongmu* furniture has increased among Westerners.<sup>124</sup>

The material used for making Chinese furniture can be classified into two types, namely, softwood and hardwood. Softwood is subdivided into eleven types, and hardwood is subdivided into four types (see Table 3-4). Each type is used for different purposes, largely depending on the region, the function and type of furniture, the intended receiver, the availability of the wood and its suitability for such products in terms of flexibility, durability, color, and grain. For example, luxurious woods like *Zitan* and *Huanghuali* were used in the production of fine furniture for the ruling classes.

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<sup>122</sup> “Classical Chinese Furniture: Hongmu,” accessed December 9, 2015, [http://www.chinese-furniture.com/c\\_furniture/m\\_Hongmu.html](http://www.chinese-furniture.com/c_furniture/m_Hongmu.html).

<sup>123</sup> Ibid. The monarchs of the Qing Dynasty and, in particular, the emperor Qianlong (1735-95), venerated ancient knowledge and were fascinated by the precious tropical rosewood called *Zitan*. *Zitan* is an incredibly dark and dense wood; but because of the scarcity of *Zitan*, *Hongmu*, which is a similar, but much more readily available dark wood, is sometimes used as a substitution. See *Joanna Banham and Leanda Shrimpton, Encyclopedia of Interior Design* (London; Chicago: Fitzroy Dearborn Publishers, 1997), 257.

<sup>124</sup> Types of Wood in “Chinese Furniture, Centuries of Beautiful Design,” accessed February 10, 2016, <http://www.chinesefurniture.co.uk/wood.html>.

**Table 3- 4.** The most common woods used for making Chinese furniture

<p>Softwood</p>	<ul style="list-style-type: none"> <li>• Northern Elm (<i>Yumu</i>): the most common wood used for furniture making in the Northern parts of China due to its medium density, quite resistant to decay and has an attractive, wave-like grain.</li> <li>• Southern Elm (<i>Jumu</i>): It is widely used in the Suzho region especially in Jiangsu, Zhejiang and Anhui Provinces. It has a slightly darker hardwood than sapwood has, varying in color from a yellowish-brown to a coffee brown.</li> <li>• Cypress (<i>Baimu</i>, or cedar wood): It is found in several parts of China, especially Sichuan. Its color is yellowish brown in tone, but becomes deeper over time.</li> <li>• Laurel (<i>Nanmu</i>): A type of evergreen tree found in the Southwest. It is similar in appearance to walnut, but a softer wood. It is popular for making cabinets, as it is highly resistant to decay.</li> <li>• Walnut (<i>Hetao</i>): Walnut has a more open grain and more golden-brown or reddish-brown in color. In Northern and Northwestern provinces, such as Shanzi and Gansu, it is popular for furniture making.</li> <li>• Camphor (<i>Xiangzhang</i> or <i>Changmu</i>): It is commonly used for making cabinets and chests for storing clothes, bedding and fabrics. It is distributed across Southern China, especially in Hainan Island, Taiwan, Jiangxi, and Fujian. This reddish-brown heartwood and its grain make it very attractive.</li> <li>• Pear (<i>Li</i>): This wood is mostly found in the north and east. It is used for making musical instruments as well as carved panels on furniture.</li> <li>• Catalpa (<i>Qiu</i>): The second choice for wood when making furniture and musical instruments. It is mainly found in the Southern provinces, i.e., Sichuan, Hubei, and Yunan.</li> <li>• Poplar (<i>Yang</i>): A secondary wood used for decorative panels and</li> </ul>
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	<p>other carved areas on a piece, such as the aprons or spandrels found in Shanxi Province. This wood mostly grows in the northern provinces. It has little resistance to moisture or to insects.</p> <ul style="list-style-type: none"> <li>• Fir (<i>Shanmu</i>): Mainly used for construction due to its hard and dense nature. The grain is straight and even, and the color ranges from a pale cream to a pale brown. It is particularly used for furniture-making in Fujian Province, where it grows in abundance.</li> <li>• Pine (<i>Pinus</i>): Found in northern and western regions, such as Mongolia, Gansu, and Tibet. The wood is yellowish in color. The texture of pine, however, is considered inferior to that found in other woods.</li> </ul>
Hardwood	<ul style="list-style-type: none"> <li>• <i>Huanghuali</i>: It is considered the king of hardwoods. The wood was first imported into China in 1572, from the island of Hainan, but primarily it came from Thailand and Southern Vietnam. It was popularly used during the Ming and early Qing dynasties, and seldom used after the mid- Qing period. The term “<i>huali</i>” literally means “flowering pear,” while the prefix “<i>huang</i>” means <i>yellowish brown</i>. Huanghuali has a golden sheen when polished and almost a translucent quality, and it is resistant to insects.</li> <li>• <i>Zitan</i>: This is the heaviest wood, found in the southern provinces of Guangdong and Jianxi. It was imported from India and the South Pacific Islands. The wood ranges from a dark purple brown to a reddish brown. It was used for small luxury items and musical instruments, then later for furnishing the Emperor’s palaces. It was nearly exhausted by the end of the Qing Dynasty. Today very few examples of Ming furniture made from <i>Zitan</i> still exist.</li> </ul>

	<ul style="list-style-type: none"> <li>• <i>Hongmu</i>: A variety of Southeast Asian rosewood, a so-called blackwood that resembles <i>Zitan</i>. <i>Hongmu</i> was used for making furniture, particularly during the second half of the Qing Dynasty. There is no reference to <i>Hongmu</i> before the eighteenth century, which means that it was not a material commonly used before this time.</li> <li>• <i>Jichimu</i>, or “chicken-wing wood”. This wood is not as dense as Huanghuali or <i>Hongmu</i>. It has a fine tangential grain with purplish-brown and yellow lines. It is found in Southeast Asia and grows on Hainan Island and in Fujian Province.</li> </ul>
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Source: Types of Wood in “Chinese Furniture, Centuries of Beautiful Design,” accessed February 10, 2016, <http://www.chinesefurniture.co.uk/wood.html>.

Historically, high-quality *Hongmu* furniture and artwork elaborately carved with symbols were owned by the Emperor’s family. The Emperor sometimes gave *Hongmu* products as gifts when he visited foreign countries. After the ban on imports was imposed in 1567, *Hongmu* furniture spread and became increasingly popular, especially among the class of official scholars and the rising *nouveau-riche* merchant class.<sup>125</sup> In China today, people perceive *Hongmu* furniture as a symbol of “comfort, dignity, and prestige,” reflecting truly elegant tastes (see Figure 3-8, and Figure 3-9).<sup>126</sup>

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<sup>125</sup> “Chinese Furniture: Shelves,” accessed July 13, 2015, <http://www.chinesefurniture.tripod.com/chinese-style-shelf.html>.

<sup>126</sup> “China Timber & Wood Products Market Prices - 16-30 April 2014,” accessed July 12, 2015, [http://www.globalwood.org/market/timber\\_prices\\_2014/aaw20140402d.htm](http://www.globalwood.org/market/timber_prices_2014/aaw20140402d.htm).



**Figure 3- 8.** Hongmu interior tables at Guanlan rosewood market in Guangdong, China

*Source:* Environmental Investigation Agency, London, quoted in “China Demand for Luxury Furniture ‘Decimating Rosewood,’” AsiaOne, accessed February 13, 2016, <http://news.asiaone.com/news/asia/china-demand-luxury-furniture-decimating-rosewood>.



**Figure 3- 9.** An antique Chinese hardwood *hongmu* bench inlaid with mother-of- pearl

*Source:* “China Demand for Luxury Furniture ‘Decimating Rosewood,’” AsiaOne, accessed February 13, 2016, <http://news.asiaone.com/news/asia/china-demand-luxury-furniture-decimating-rosewood>.

From the institutional logics perspective, the rapidly increasing demand for *Hongmu* furniture in China reflects the mindset, interests, values, and beliefs that some Chinese people hold regarding *Hongmu*.<sup>127</sup> Since *Hongmu* represents luxury, dignity, and refined taste, it reflects cultural beliefs, norms, and practices of different institutional orders in Chinese society. The *Hongmu* market, as an institution, has contributed to the increasing demand for (and thus the price of) Siamese rosewood and illicit trade in the Mekong region. Yet, taking a different viewpoint, Taywin Meesap, a Thaplan Park Superintendent, says:

Many Chinese believe Siam rosewood is a holy tree. That's why they want to have furniture made from it in their house, because they believe it will bring luck to them. I want to tell them this rosewood is not holy; it will not bring luck to their life because this rosewood is obtained through the lives of rangers and criminals. It is wood that is stained through with blood.<sup>128</sup>

### **3.4.2 Community Aid: The Toll on Monks and Villagers**

In Thailand, monks and villagers play roles in protecting the centuries-old Siamese rosewood trees found in their village. After illegal logging gangs targeted over 300 Siamese rosewood trees located in Sa Bua Temple, Ban Nongphue, in Ubon Ratchathani Province, the monks and villagers have teamed together to save them.<sup>129</sup> A leader in Nongphue Village says, "We have been offered 500,000 [baht] by merchants to buy a single Siamese rosewood tree, but

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<sup>127</sup> The institutional logics perspective is a meta-theoretical framework for analyzing the interrelationships between institutions, individuals, and organizations in a social system. See Patricia H. Thornton, William Ocasio, and Michael Lounsbury, *The Institutional Logics Perspective: A New Approach to Culture, Structure, and Process* (Oxford: Oxford University Press, 2012).

<sup>128</sup> Sauvage, "Exclusive: Saving Thailand's Blood Wood."

<sup>129</sup> Pongphon Sarnsamak, "Temples Lead Fight to Save Last Siamese Rosewood Reserve," *The Nation*, March 24, 2014, <http://www.nationmultimedia.com/national/Temples-lead-fight-to-save-last-Siamese-rosewood-r-30229886.html>.

we did not sell it because these trees should belong to the temple and the village."<sup>130</sup> Believing that every tree has "*spiritual power*" that supports their lives, the villagers cherish these trees. To protect the trees from poaching gangs entering the temple at night, the abbot has commanded the monks to close the doors and guard the trees.<sup>131</sup>

Moreover, according to the Royal Forest Department Director, these illegal logging gangs marked other temples in the northeast. He reports, "The Nong Kan temple in Yasothon's Kham Khuan Kaeo district was also approached by gangs and offered 5 million [baht] for a Siamese rosewood tree in the temple."<sup>132</sup> Moreover, he pointed out that "The illegal logging gangs had offered bribes to temple committees to influence them to approve cutting the trees in many temples in the northeast."<sup>133</sup>

Nevertheless, the monks in some provinces also work with Thai rangers to patrol the forest and guard Siamese rosewood trees. Since he has become involved in these efforts, it has been reported that Monk Yeun, the Abbot of Kao Solar Temple in Surin Province "was wanted and has received death threats. Once, he was poisoned in alms-food; poacher also attempted to kill him with a bomb. Lucky for him, he was not hurt (my translation from Thai)."<sup>134</sup>

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<sup>130</sup> Ibid.

<sup>131</sup> Sarnsamak, "Temples Lead Fight to Save Last Siamese Rosewood Reserve."

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> Aththapol Pokha, พระพิทักษ์ผืนป่าพะยุงหมื่นล้าน 1, 2012, <https://www.youtube.com/watch?v=9ZsJlv4uSg8>.



**Figure 3- 10.** A Siamese rosewood tree blessed by a Buddhist monk and guarded by an armed forest ranger in Thailand’s Thap Lan National Park

*Source:* Ann and Steve Toon, “On the Frontlines of Thailand’s ‘Blood Wood,’” *Earth Island Journal*, March 25, 2015, [http://www.earthisland.org/journal/index.php/elist/eListRead/on\\_the\\_frontlines\\_of\\_thailands\\_blood\\_wood\\_war/](http://www.earthisland.org/journal/index.php/elist/eListRead/on_the_frontlines_of_thailands_blood_wood_war/).

### 3.5 CONCLUDING REMARKS

In this chapter, we have discussed the legal developments regarding Siamese rosewood logging and trade in Southeast Asia. We have examined the role of social institutions (market forces, socio-cultural factors, and laws) in shaping the protection of Siamese rosewood and the expansion of ASEAN forest law, management, and governance. Illegal Siamese rosewood logging and trade has produced a troubling wave of crime and has undermined the rule of law, forest governance, and regional stability in Southeast Asia, particularly in the Mekong countries. Taking an historical and sociocultural view, we can understand how Chinese attitudes and beliefs toward *Hongmu* furniture symbolize good fortune and wealth, and how these cultural factors have increased the demand for Siamese rosewood, leading to its exploitation and to illegal logging and trade.

Indeed, a steady increase in the demand for Siamese rosewood has caused it to be exploited and illegally traded in the Mekong resource countries. Several factors, such as poverty, corruption, and attractive high prices, have drawn poachers and some state officers to become involved in illegal deals. In order to protect Siamese rosewood, several Thai Rangers have died combating Cambodian poachers who illegally cross the border to smuggle rosewood timber. These poachers, in turn, have been exploited and manipulated by higher-level dealers.

By increasing networking and the exchange of information, Cambodia and Thailand have established border cooperation to minimize the losses on both sides. Despite Thailand's recent legal decrees, which have increased fines and prison sentences to punish those who are harvesting, possessing, and processing Siamese rosewood, illegal logging and trade unfortunately persist. Although the CITES Appendix II listing has protected Siamese rosewood since 2013, its Annotation 5 opens a legal loophole and creates a spillover effect on two other replacement species. Further efforts and increased cooperation are urgently needed to fill these gaps.

On a positive note, the EU-FLEGT VPA trade agreement offers some clear benefits. Several ASEAN rosewood range states have entered into a negotiation process with the EU and have gradually revised the legality verification process to meet EU market requirements. This program promises to monitor illegally harvested wood and decrease the amount of illicit trade, and it also strengthens ASEAN's objectives for achieving sustainable forest governance and responsible timber trade in the future. Furthermore, in the Regional Dialogue, we can see promising signs of cooperation between CITES AEG and China in determining better methods of protecting Siamese rosewood. Nonetheless, several measures (i.e., increased cooperation,

financial assistance, and technical training), backed by strong political will from CITES members, ASEAN Siamese rosewood range states, and China, are still needed to reinforce attitude changes and establish lasting proactive cooperation.

## Chapter 4 Trade in Service and Culture: Tourism Development and The Struggles of Andaman Sea Gypsies

### 4.1 INTRODUCTION

In December 2004, Thailand's indigenous sea gypsies or sea nomads attracted the spotlight of the media when many of them were able to survive the disastrous tsunami because of their traditional awareness of the sea and their ability to notice the signs of the approaching *laboon*—a big wave that eats people. Presently, they are being threatened by a new wave, a wave that is gradually swallowing them, a wave that a reporter from *The Guardian* called “tourism and the encroaching modern world.”<sup>1</sup>

This chapter examines the connection between the service industry and traditional culture—in particular, the tensions between tourism and the indigenous sea gypsies of the Andaman Sea, off the southwestern shore of Thailand. We shall consider the impact of the new national marine park, the tourism industry, and various development projects on the traditional nomadic lifestyle of Andaman sea gypsies, as well as legal and policy efforts to protect them. Section 1 provides an overview of the subject matter. Section 2 examines the most pressing problems. Section 3 analyzes the underlying premises of current international law, regional practices, and domestic Thai laws and policies. It focuses on the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the ASEAN human rights act, the

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<sup>1</sup> See Susan Smillie, “Tsunami, 10 Years on: The Sea Nomads Who Survived the Devastation,” *The Guardian*, December 10, 2014, sec. Global development, <http://www.theguardian.com/global-development/2014/dec/10/indian-ocean-tsunami-moken-sea-nomads-thailand>. (Smillie tells the story of sea nomads' struggles, particularly the Moken tribe, after the tsunami in 2004.)

Draft Act of Indigenous Peoples and Ethnic Groups Assembly of Thailand, and the 2010 Thai Cabinet Resolution to restore the traditional livelihood of Chao Lay. Section 4 discusses the sea gypsies in their historical, socio-cultural, and institutional contexts. Section 5 offers a summary and concluding remarks.

#### **4.2 THE THREAT OF THE TOURISM INDUSTRY AND LAND ENCROACHMENT: THE STRUGGLES OF ANDAMAN SEA GYPSIES**

The current population of Thailand, based on the latest United Nations estimate, is nearly 68 million,<sup>2</sup> around one percent of which are indigenous peoples.<sup>3</sup> Despite the fact that, in 2007, Thailand voted in favor of the UN Declaration on the Rights of Indigenous People, indigenous peoples in Thailand still face discrimination and cannot fully enjoy the collective rights conferred on them by the Thai constitution. In particular, Andaman sea gypsies in Thailand are at present being threatened by national tourism development plans and by land confiscation and encroachment. The struggles that the Andaman sea gypsies in Thailand are now facing will be presented and analyzed in the following sections.

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<sup>2</sup> “Thailand Population (2016) - Worldometers,” accessed February 19, 2016, <http://www.worldometers.info/world-population/thailand-population/>.

<sup>3</sup> “Observations on the State of Human Rights of Indigenous Peoples in Thailand in Light of the UN Declaration on the Rights of Indigenous Peoples,” September 2015, [https://www.culturalsurvival.org/sites/default/files/media/thailandupr-sep2015-final\\_0.pdf](https://www.culturalsurvival.org/sites/default/files/media/thailandupr-sep2015-final_0.pdf).

## 4.2.1 Overview of Indigenous Peoples in Asia and Thailand

### *Two Thirds of the World's Indigenous Peoples Live in Asia*

The basic meaning of the term ‘indigenous’ is *born in or originating from a locality*. However, it has come to mean “peoples who conserve a collective identity through association with specific territories.”<sup>4</sup> Several different terms with similar meanings are used to label indigenous peoples, depending on the dominant group that sets the boundaries for them: for example, ‘tribal,’ ‘ethnic minority,’ ‘hunter-gatherer,’ etc.<sup>5</sup> As the most culturally diverse region, Asia is home to two thirds of the world’s 300 million indigenous peoples.<sup>6</sup> Several groups of Asian indigenous peoples are often referred to as “tribal peoples, hill tribes, secluded tribes, *Jana Jati*, *Orang Asli*, *Masyarakat Adat*, *Adivasis*, ethnic minorities or nationalities.”<sup>7</sup>

These diverse groups of people have fallen into deplorable conditions.<sup>8</sup> Virtually all Asian indigenous peoples suffer discrimination and marginalization. Since they maintain traditional practices and belief-systems that have been handed down for generations, indigenous peoples show social, cultural, economic and political characteristics that are distinct from the

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<sup>4</sup> “Are there Indigenous Peoples in Asia?,” Text, Cultural Survival, (April 2, 2010), <https://www.culturalsurvival.org/ourpublications/csq/article/are-there-indigenous-peoples-asia>.

<sup>5</sup> Ibid.

<sup>6</sup> “Asia,” International Work Group for Indigenous Affairs, accessed February 20, 2016, <http://www.iwgia.org/regions/asia>. But, some estimated that there are more than 370 million indigenous people spread across 70 countries worldwide. See also “Indigenous Peoples Indigenous Voice,” accessed January 11, 2016, [http://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf).

<sup>7</sup> “Indigenous Peoples in the Asian Region, Thirteenth Session of the UN Permanent Forum on Indigenous Issues,” 1, accessed February 20, 2016, <http://www.un.org/esa/socdev/unpfii/documents/2014/press/asia.pdf>.

<sup>8</sup> “Are there Indigenous Peoples in Asia?”; see also Christian Erni, ed., *The Concept of Indigenous Peoples in Asia: A Resource Book*, IWGIA Document 123 (Copenhagen: International Work Group for Indigenous Affairs, 2008).

dominant societies.<sup>9</sup> In part precisely because they have different cultural norms, they face several forms of injustice, for example, the denial of self-determination, the loss of control over their ancestral land and natural resources, and massive cultural assimilation.<sup>10</sup> Although some Asian countries have enacted legislation to protect indigenous peoples' rights, those rights are regularly undermined and are often simply disregarded and overruled.<sup>11</sup>

Specifically, in the context of Southeast Asia, some ASEAN states recognize the rights of indigenous peoples, but national censuses ignore them.<sup>12</sup> As a result, it is not possible even to provide a rough estimate of the number of ASEAN indigenous people.<sup>13</sup> Figure 4-1 presents an overview of the various groups of indigenous people in Southeast Asia. Like other indigenous peoples in other parts of the world, ASEAN indigenous peoples have also experienced displacement, the dispossession of their lands and resources, and marginalization. In Cambodia, for example, the government agency for Economic Land Concessions (ELCs) takes control of land inhabited by indigenous people and hands it over to commercial plantations that produce commodities such as rubber and corn for bio-fuel. Similarly, in Indonesia and Malaysia, government agencies seize the lands of indigenous peoples for oil palm plantations without obtaining their informed consent and without granting them due compensation.<sup>14</sup>

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<sup>9</sup> "Indigenous Peoples Indigenous Voice."

<sup>10</sup> "Asia."

<sup>11</sup> Ibid.

<sup>12</sup> AIPP, "ASEAN's Indigenous Peoples," 2010, 4 (in the table),

[http://www.iwgia.org/iwgia\\_files\\_publications\\_files/0511\\_ASEAN\\_BRIEFING\\_PAPER\\_eb.pdf](http://www.iwgia.org/iwgia_files_publications_files/0511_ASEAN_BRIEFING_PAPER_eb.pdf).

<sup>13</sup> Ibid.

<sup>14</sup> Ibid., 6–8.



**Figure 4- 1.** Various groups of indigenous peoples in Southeast Asia

Source: map by Christian Erni, Cao Phan Viet, and AIPP archive, published by AIPP, “ASEAN’s Indigenous Peoples,” 2010, [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/0511\\_ASEAN\\_BRIEFING\\_PAPER\\_eb.pdf](http://www.iwgia.org/iwgia_files_publications_files/0511_ASEAN_BRIEFING_PAPER_eb.pdf).

### *The Indigenous Groups of Thailand Reside in Three Geographic Regions*

The indigenous groups of Thailand are to be found in three geographic regions.<sup>15</sup> First, indigenous fisher communities (the *Chao Ley*, *Chao Lay*, *Chao Leh*, or *Chao-nam*, literally meaning “people of the sea”) and a group of hunter-gatherers (*Sakai*, literally meaning “slaves,” but later known as “Mani people”) live in the southern part of Thailand near the Malaysian border. Second, small groups are to be found on the Korat plateau of the northeast and east, along the border with Laos and Cambodia. And third, there are the highland peoples in the northern and northwestern parts of the country (the *Chao-Khao* or “hill tribes”). Figure 4-2 shows some examples of indigenous hill tribes and sea gypsies in Thailand.



Akha or Ichor, Ikor

Daraang or Palong

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<sup>15</sup> Thailand officially recognized nine hill tribes, that is, Hmong, Karen, Lisu, Mien, Akha, Lahu, Lua, Thin and Khamu; however, some official document included the Palong. (see Figure 5-2) According to the Department of Social Development and Welfare of 2002, the directory of ethnic communities included the Mlabri (Phi Tong Luang, or “spirits of the yellow leaves”), Padong (the Longneck people) and a total of about one million hill tribe people living in 3,429 hill tribe villages; this excluded the south and northeastern indigenous peoples. See Asia Indigenous Peoples’ Pact (AIPP), the International Work Group for Indigenous Affairs (IWGIA) and Asian Forum for Human Rights and Development (FORUM-ASIA), “ASEAN’s Indigenous Peoples,” 2010, 4, [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/0511\\_ASEAN\\_BRIEFING\\_PAPER\\_eb.pdf](http://www.iwgia.org/iwgia_files_publications_files/0511_ASEAN_BRIEFING_PAPER_eb.pdf). Nevertheless, if we were to categorize them by their linguistic families, there are five groups of indigenous peoples of Thailand, that is, Tai-Kadai, Tibeto-Burman, Mon-Khmer, Hmong-Mien, and Malayo-Polynesian. See “Indigenous Peoples of Thailand | ヒューライツ大阪,” *Asia-Pacific Human Rights Information Center*, 2010, <http://www.hurights.or.jp/archives/focus/section2/2010/12/indigenous-peoples-of-thailand.html>.



Hmong



Kachin or Jinghpaw



Karen, or Kariang, or *Pwa Ka Nyaw*



Mlabri, known locally as *Phi Tong Luang*



Kui, or Kuai, or Soui



Moken

**Figure 4- 2.** Images of indigenous hill tribes and sea gypsies in Thailand

Source: “ชาวเขาเผ่าต่างๆ ในประเทศไทย โดยสวัสดีดอทคอม,” accessed February 11, 2016, <http://www.sawadee.co.th/thailand/hilltribes/>.

In contrast to the terms commonly used in English, there are several different terms in the Thai language that are used interchangeably to refer to indigenous people, namely, *Klum Chat Tiphon* (ethnic groups) or *Chon Klum Noy* (ethnic minorities).<sup>16</sup> Because they do not use the term “Indigenous Peoples” (in Thai, *Chon Phao Phuen Mueang* or ชนเผ่าพื้นเมือง), the Thai government has rejected the efforts of indigenous rights groups. The government argues that they are “not considered to be minorities or Indigenous Peoples, but as Thais who can enjoy fundamental rights and are protected by the laws of the Kingdom as any other Thai citizens.”<sup>17</sup> Nevertheless, the indigenous peoples of Thailand still suffer from “historical stereotyping and discrimination.”<sup>18</sup>

Nonetheless, the government’s refusal to recognize their cultural identity and status has resulted in several mechanisms for safeguarding the rights of indigenous people and supporting their participation in current reforms in Thailand.<sup>19</sup> Like indigenous people elsewhere in the world, the three major issues threatening indigenous peoples in Thailand are land rights, citizenship, and discrimination. These injustices persist because negative stereotypes still influence the attitudes and actions of government officials.<sup>20</sup> In particular, indigenous peoples are often considered to be threats to national security, drug cultivators, or forest destroyers due to the common stereotypes of the general public with regard to their appearance and traditional

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<sup>16</sup> “Indigenous Peoples of Thailand.”

<sup>17</sup> United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities. WGIP 10th session. E/CN.4/Sub.2/AC.4/1992/4; Erni, *The Concept of Indigenous Peoples in Asia*, 444.

<sup>18</sup> “Indigenous Peoples of Thailand.”

<sup>19</sup> *Ibid.* See also “Observations on the State of Human Rights of Indigenous Peoples in Thailand,” 1.

<sup>20</sup> “Observations on the State of Human Rights of Indigenous Peoples in Thailand,” 1.

lifestyles.<sup>21</sup> These problems will be examined in the following sections as they manifest themselves in the particular case of Andaman sea gypsies.

#### 4.2.2 Three Ethnic Groups of Sea Gypsies Along the Andaman Sea

For hundreds of years, if not thousands, the seas of Southeast Asia have been home to several unique groups of people, often euphemistically called *Chao Lay* (“Sea Gypsies” or “Sea Nomads”).<sup>22</sup> Their nomadic lifestyles, cultures, and languages are unique and differ from the rest of Thai society. Sea gypsies live in boats, wander throughout the region, and make temporary settlements along the coasts of southern Thailand, the Philippines, Indonesia, Malaysia, and in the Mergui Archipelago of Myanmar.<sup>23</sup> In Thailand, almost 10,000 sea gypsies, consisting of three different communities (known as *Moken*, *Moklen*, and *Urak-Lawoi*) reside along the Andaman Sea, on the southwestern coast of the country, where each group maintains their unique cultural traditions and languages.<sup>24</sup>

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<sup>21</sup> *Ibid.*, 2; *see also* “The 2015 Yearbook Article on Indigenous Peoples in Thailand.”

<sup>22</sup> Narumon Arunotai, Supin Wongbusarakum, and Derek Elias, “Bridging the Gap between the Rights and Needs of Indigenous Communities and the Management of Protected Areas: Case Studies from Thailand” (Bangkok: UNESCO Bangkok: UNESCO, 2007), foreward, <http://unesdoc.unesco.org/images/0015/001557/155745e.pdf>.

<sup>23</sup> *Ibid.* Note that the term Sama-Bajau (the Thai term for Austronesian ethnic groups) has sometimes been used to refer to unrelated ethnic groups with similar traditional lifestyles, such as the Moken of the Burmese-Thai Mergui Archipelago, and the Orang Laut of southeastern Sumatra and the Riau Islands of Indonesia.

<sup>24</sup> *Ibid.*

## ***The Mergui Archipelago is Home to the Moken and Moklen***

The *Moken* (a word sometimes spelled “Mawken” or “Morgan” or, in Thai, มอแกน) are traditionally a semi-nomadic Austronesian ethnic group, with about 3,000 members living in the Andaman Sea and coastal regions along the Mergui Archipelago (see Figure 5-3).<sup>25</sup> The group includes the *Moken* proper, the *Moklen*, the *Orang Sireh* (“Betel-leaf People”), and the *Orang Lanta*.<sup>26</sup> People in Thailand and Myanmar refer to the *Moken* with different terms: *Selung*, or *Salone* or *Chalome* in Burmese, but *Chao Lay* or *Chao-nam* in Thai. The latter term is used loosely to include the *Urak Lawoi* and the *Orang Laut* (*Orang* means “people,” and *Laut* means “sea”). The *Moken* in Thailand are generally called *Thai Mai*, which means “new Thais.”<sup>27</sup> Several decades ago, the *Moken* decided to live in permanent settlements in Myanmar and Thailand.<sup>28</sup> Specifically, a group of Thai *Moken* decided to settle on the Surin islands, although they still maintain a semi-nomadic way of life by gathering resources found on the land and in

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<sup>25</sup> Survival International, “The Ocean Is Our Universe,” accessed February 19, 2016, <http://www.survivalinternational.org/galleries/moken-sea-gypsies>. The Mergui Archipelago, sometimes also called Myeik Archipelago or Myeik Kyunzu, consists of more than 800 islands, located in the Andaman Sea off the western shore of the Malay Peninsula, claimed both by Myanmar and Thailand. See “The Moken,” accessed January 23, 2016, <http://www.projectmoken.com/the-moken/>; Dominique Chambless, *Stateless at Sea: The Moken of Burma and Thailand* (New York, NY: Human Rights Watch, 2015); Jacques Ivanoff, *Rings of Coral : Moken Folktales*, Mergui Archipelago Project 2 (Bangkok, Thailand: White Lotus Press, 2001).; Walter Grainge White and Jacques Ivanoff, *The Sea Gypsies of Malaya : An Account of the Nomadic Mawken People of the Mergui Archipelago with a Description of Their Ways of Living, Customs, Habits, Boats, Occupations* (Bangkok, Thailand; Cheney: White Lotus Press, 1997).

<sup>26</sup> “The Moken.”; “Moken People,” Wikipedia, the Free Encyclopedia, February 13, 2016, [https://en.wikipedia.org/w/index.php?title=Moken\\_people&oldid=704693570](https://en.wikipedia.org/w/index.php?title=Moken_people&oldid=704693570).

<sup>27</sup> Chambless, *Stateless at Sea*, Introduction.

<sup>28</sup> *Ibid.*, 4, 11.

the sea, and trading sea products such as sea cucumbers and shells for rice and other necessities.<sup>29</sup>



**Figure 4- 3.** The Mergui Archipelago in the Andaman Sea, off the western shore of Myanmar and southwestern Thailand

Source: Susan Smillie, “Tsunami, 10 Years on: The Sea Nomads Who Survived the Devastation,” *The Guardian*, December 10, 2014.

The *Moken* may be divided into two groups: (1) the *Moken Pula* in the territory of the Burmese islands of the Andaman Sea, and (2) the *Moken Tamub* in the Surin Islands and Ko

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<sup>29</sup> UNESCO, *Indigenous People and Parks: The Surin Islands Project*, Coastal Region and Small Island Papers 8 (Paris: the United Nations Educational, Scientific and Cultural Organization, 2001), 9, <http://www.unesco.org/csi/pub/papers2/surin.htm>.

Phra Thong of Kuraburi District in Phang-nga Province, as well as in the Ko Sin Hai and Ko Lao of Ranong Province.<sup>30</sup> Traditionally living on *kabang* (handmade wooden boats) for seven or eight months of the year, the *Moken* traveled freely for centuries as fishermen and divers between the small islands, reefs and shoals, except during the windy season (from May to October), when they find shelter on land in temporary stilt houses (see Figure 4-4).<sup>31</sup> For them, the *kabang* represents their sea-faring nomadic culture, which this Moken proverb nicely represents: “If your young man is able to build a boat, make oars or sails, if he knows how to use the pole to harpoon the turtles, then I will give my daughter to him. If not, I will never allow her to leave (courtesy of Jacques Ivanoff).”<sup>32</sup>

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<sup>30</sup> Supin Wongbusarakum, “Urak Lawoi’ of the Adang Archipelago” (Bangkok: UNESCO Bangkok, March 2007), 12, <http://unesdoc.unesco.org/images/0015/001523/152346e.pdf>, “ชนชาติมอแกน,” accessed January 23, 2016, [http://thaiworldmission.com/index.php?option=com\\_content&view=article&id=62&Itemid=96](http://thaiworldmission.com/index.php?option=com_content&view=article&id=62&Itemid=96), and “กลุ่มชาติพันธุ์ ‘ชาวเล’ ในประเทศไทย,” accessed January 23, 2016, [http://www.seub.or.th/index.php?option=com\\_content&view=article&id=187:libery&catid=61:2009-11-12-08-41-17&Itemid=76](http://www.seub.or.th/index.php?option=com_content&view=article&id=187:libery&catid=61:2009-11-12-08-41-17&Itemid=76).

<sup>31</sup> International, “The Ocean Is Our Universe.”; Jeffrey Hays, “Moken: Sea Nomads of Southeast Asia,” *Facts and Details*, accessed January 24, 2016, [http://factsanddetails.com/southeast-asia/Myanmar/sub5\\_5d/entry-3934.html](http://factsanddetails.com/southeast-asia/Myanmar/sub5_5d/entry-3934.html).

<sup>32</sup> International, “The Ocean Is Our Universe.”



**Figure 4- 4.** A *Moken* man named Pe Tat uses palm leaves to make a new roof for his family’s *kabang*

*Source:* photo by Cat Vinton, from Survival International, “The Ocean Is Our Universe,” accessed February 19, 2016, <http://www.survivalinternational.org/galleries/moken-sea-gypsies>; *see also* Jeffrey Hays, “Moken: Sea Nomads of Southeast Asia,” *Facts and Details*, accessed January 24, 2016, [http://factsanddetails.com/southeast-asia/Myanmar/sub5\\_5d/entry-3934.html](http://factsanddetails.com/southeast-asia/Myanmar/sub5_5d/entry-3934.html).

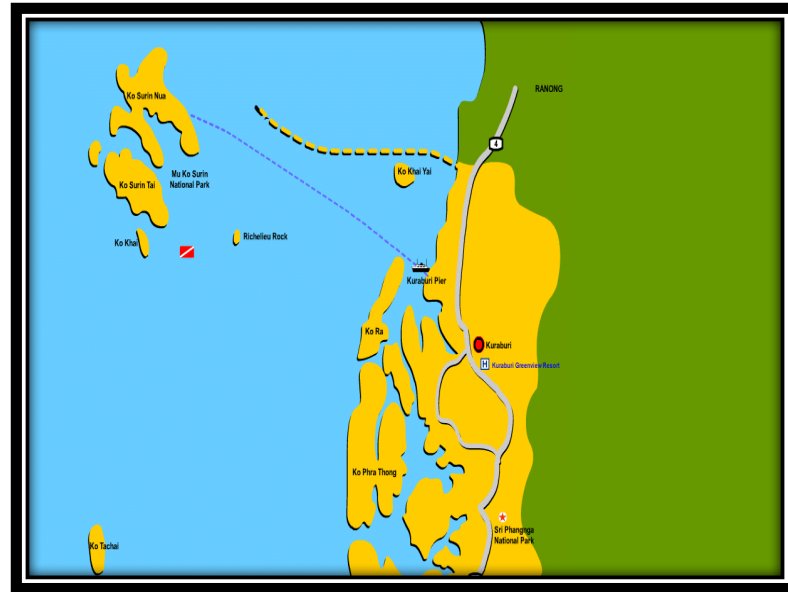
### ***Are the Moken Tamub and the Moklen Distinct Groups?***

Some anthropologists claim that the *Moken Tamub* are not distinct from the *Moklen*; however, they may be distinguished by their region, dialect, and slightly distinctive culture.<sup>33</sup> The *Moken Tamub* are semi-nomadic sea people, whereas the *Moklen* are land-based, living on the coast of Ko Phra Thong in the Kuraburi District (a region they share with the *Moken*); in Ban Toong Nam Dam in the Takua Pa District; in Ban Lum Pee in the Tai Muang District (these three areas are all in Phang-nga Province), and in Ban Lam Lah in the Mai Kao sub-district of Talang in Phuket Province (see Figure 4-5). In *Who are the Moken and Moklen on the Islands and Coasts of the Andaman Sea?* Michael Larish notes:

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<sup>33</sup> “ชนชาติมอแกน.” “กลุ่มชาติพันธุ์ ‘ชาวเล’ ในประเทศไทย.”

The Moken and Moklen are two closely related groups of people. The Moken are semi-nomadic sea people, but the Moklen are land-based. Both groups share many linguistic and cultural characteristics, but enough linguistic and cultural differentiation has occurred to support the conclusion that they not only speak separate languages, but should be considered culturally distinct as well.<sup>34</sup>



**Figure 4- 5.** Map of the Surin Islands or Mu Ko Surin National Park, Kuraburi District and Ko Phra Thong in Phang-nga Province

*Source:* photo adapted from “Map of Phang-Nga, Surin and Similan Islands and Surroundings,” January 11, 2016, [http://phangnga.sawadee.com/map\\_large.html](http://phangnga.sawadee.com/map_large.html).

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<sup>34</sup> Michael Larish, *Who Are the Moken and Moklen on the Islands and Coasts of the Andaman Sea?* (Doctoral Dissertation, University of Hawaii at Manoa), accessed January 23, 2016, <http://sealang.net/sala/archives/pdf8/larish1992who.pdf>. In my view, the two groups speak in distinct dialects, but not different languages.

However, the *Moken* themselves view matters differently. In *Construction of Moken Identity in Thailand: A Case Study in Kuraburi*, Lee Sun Mee interviewed two *Moken* from Surin Island, and one from Pakjok village in Ko Phra Thong.<sup>35</sup> They shared their views as follows:

The *Moken* and the *Moklen* are the same people. Some people cannot pronounce ‘*Moken*’ properly. These people say “*Moklen*.” I am originally *Moken* (Yai from Surin Island).

I am one of the Island People (Chao Koh). *Moken* and *Moklen*— same, same. Just some words of language are different (Taley from Pakjok village on Phrathong Island).

I am *Moken*. I know *Moken* and *Moklen*. They are the same. The languages are a little bit different, but it is because the area where people live is different. It is like a dialect (Da from Surin Island).

### ***The Adang Archipelago is home to the Urak Lawoi***

For hundreds of years, or perhaps thousands, the Adang Archipelago has been home to the *Urak Lawoi* (in Malay, *Oran Laut*; in Thai, อรัญญะ, known as well as “sea gypsies,” *chao nam* or *chao lay*), an aboriginal Malay people living on the coasts and islands of the Andaman Sea: on Phuket, Phi Phi, Jum, Lanta, Bulon, and on Lipe and Adang, in the Adang Archipelago,

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<sup>35</sup> Sun Mee Lee, “Construction of Moken Identity in Thailand: A Case Study in Kuraburi” (Master Thesis, Lund University, 2009), 11, <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOid=1433484&fileOid=1433485>. (Lee investigated Moken identity after the 2004 tsunami in Kuraburi village, Phang-nga, Thailand by employing unstructured interviews, that is, open-ended questions, participatory and non-participatory observations, and a survey.)

along the western coast of Thailand.<sup>36</sup> In their language, the word *Urak* means “people,” while *Lawoi* means “the sea.” Thus, *Urak Lawoi* means “people of the sea.”<sup>37</sup>

According to local legend, To Kiri, a Muslim adventurer from Aceh in Indonesia, and his two brothers traveled by rowboat in the early 1900s to search for a place rich in natural resources.<sup>38</sup> After trying out the islands of Gunung Jerai, Langkawi, Lidi, and Bulon, together with his daughter, Teh, and his friend, Jaebeenac, To Kiri continued roaming north into the Andaman Sea of Thailand, whereas his brothers decided to settle down in Gunung Jerai and Bulon.<sup>39</sup> On Lanta Island, To Kiri made an agreement with Praya Poomnardpakdee, chief of Satun (tenure 1099-1914), to bring the *Urak Lawoi* to settle there.<sup>40</sup> Figure 4-6 shows the route that To Kiri and the migrating *Urak Lawoi* traveled to reach the Adang Archipelago.

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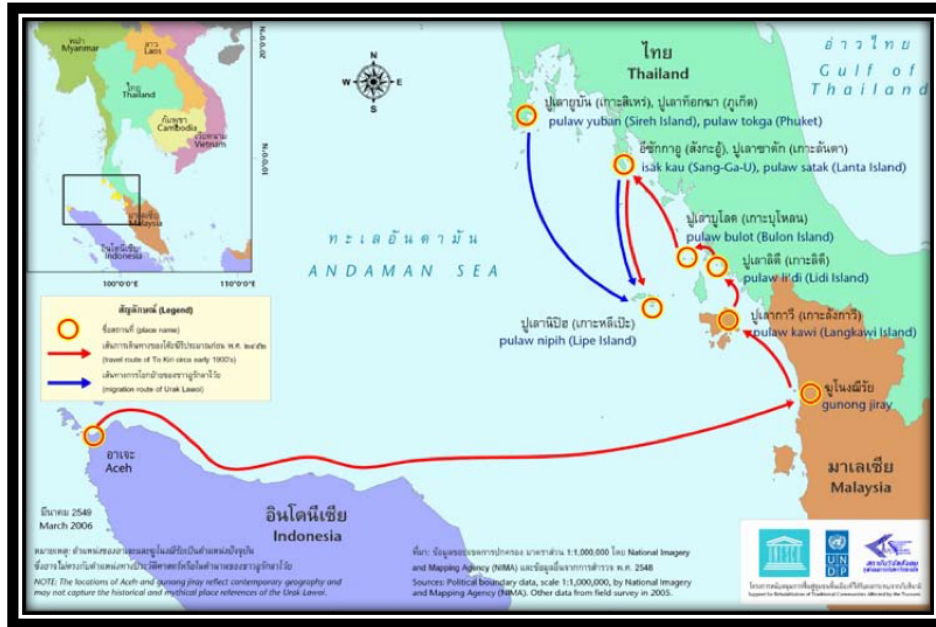
<sup>36</sup> Supin Wongbusarakum, “Urak Lawoi’ of the Adang Archipelago” (Bangkok: UNESCO Bangkok, March 2007), 8, <http://unesdoc.unesco.org/images/0015/001523/152346e.pdf>; Ann Charlotte Granbom, “Urak Lawoi-A Field Study of an Indigenous People in Thailand and Their Problems with Rapid Tourist Development” (Sociologiska institutionen, Lunds universitet, 2005), [https://www.academia.edu/1626157/Urak\\_Lawoi-A\\_Field\\_Study\\_of\\_an\\_Indigenous\\_People\\_in\\_Thailand\\_and\\_their\\_Problems\\_with\\_Rapid\\_Tourist\\_Development](https://www.academia.edu/1626157/Urak_Lawoi-A_Field_Study_of_an_Indigenous_People_in_Thailand_and_their_Problems_with_Rapid_Tourist_Development).

<sup>37</sup> Wongbusarakum, “Urak Lawoi’ of the Adang Archipelago,” 12. Note that sea gypsies do not have a written language. Their knowledge is handed down from one generation to the next by practical learning and spoken language.

<sup>38</sup> *Ibid.*, 10.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.* Note that before the arrival of To Kiri, To Manad lived on Lipe Island. (in “footnote 15”)



**Figure 4- 6.** The route of To Kiri and the migrating Urak Lawoi took to reach the Adang Archipelago

Source: Supin Wongbusarakum, “Urak Lawoi’ of the Adang Archipelago” (Bangkok: UNESCO Bangkok, March 2007), 12, <http://unesdoc.unesco.org/images/0015/001523/152346e.pdf>.

In Thailand, the *Urak Lawoi* are to be found in several areas, mainly on the coasts and islands of the Andaman Sea along the Adang Archipelago. According to the *Urak Lawoi* informant and anthropologist Arporn Ukrit, the *Urak Lawoi* live in the Satun Province (Ko Bulon, Ko Li-Pe and Ko Adang), Phuket Province (Sihre Island, Sapum, Ban Nua, Laem La, and Rawi Beach), and in Krabi Province (Ko Chum [Jum], Phi Phi Don, and Ko Lanta).<sup>41</sup> The region where a person lives can often be inferred from surname. For example, a person named

<sup>41</sup> Granbom, “Urak Lawoi-A Field Study of an Indigenous People in Thailand and Their Problems with Rapid Tourist Development,” 38–39. Moreover, they reside in Libon (Talibon) and Mook islands in Trade Province. See also Wongbusarakum, “Urak Lawoi’ of the Adang Archipelago,” 9–10. Evidence suggests that the Urak Lawoi settled in the area of Koh Lipe and the Butang Archipelago in the 1910s, mostly coming from Phuket and Koh Lanta. Around 500 years ago, the Urak Lawoi left Taiwan. By way of Palawan and Borneo, they reached Sumatra and most likely settled there for a long time. See “Project Urak Lawoi - Koh Lipe’s Heritage,” Project Urak Lawoi - Koh Lipe’s Heritage, accessed January 24, 2016, <http://www.projecturaklawoi.org/>.

Hantalee (meaning “brave sea”) will usually live in the Adang Archipelago,<sup>42</sup> mostly in Satun Province; a person named Pramongkit (meaning “fishery”) will usually live in Phuket Province; and a person named Taleeluk (meaning “deep sea”) or Changnam (meaning “water elephant”) will most likely be found on Lanta Island, in Krabi Province.<sup>43</sup>

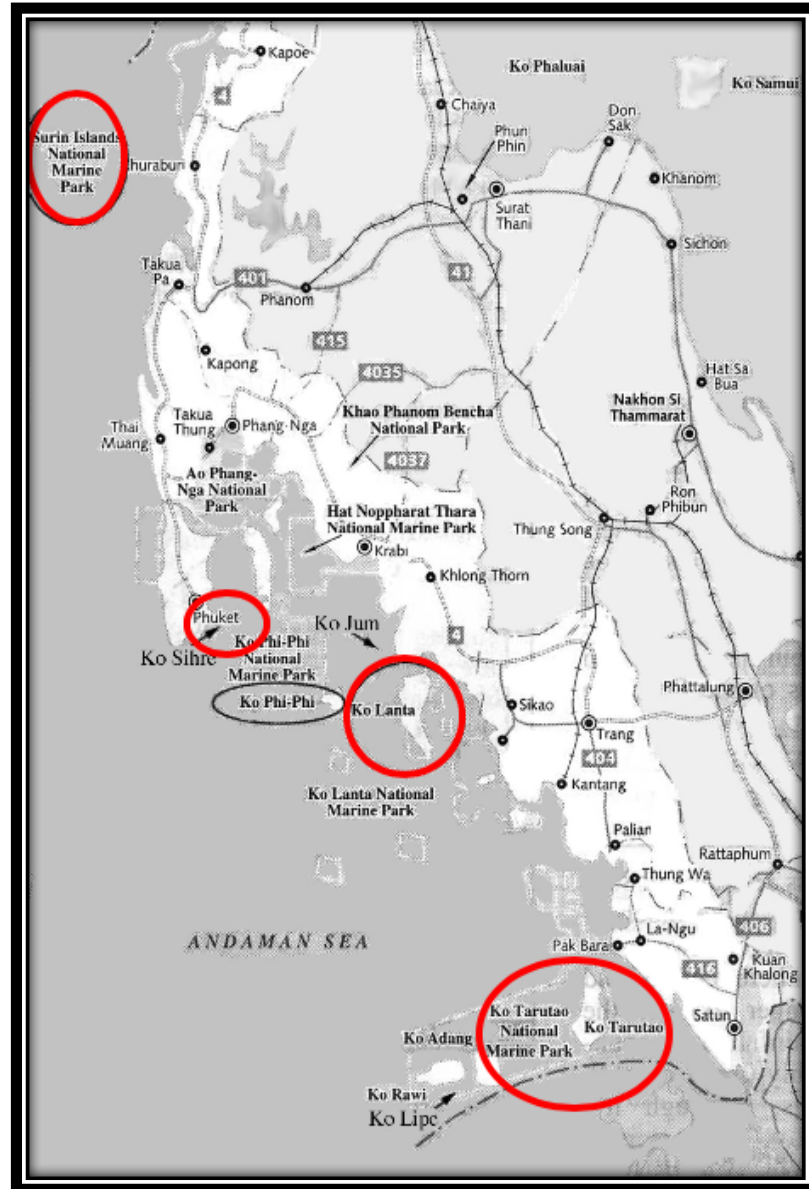
Similar to the *Moken*, the *Urak Lawoi* are adapting their way of life to meet the challenges they face because of national tourism development and policy. The development of the tourism industry and the policies that govern it have resulted in encroachment on the sea gypsies’ land and, in some cases, confiscation. They have been pushed into marginal areas and forced to abandon their nomadic lifestyle, identity, and culture. The issues involved in these changes will be examined in four case studies from four different areas: (1) the *Moken* on the Surin Islands (Mu Ko Surin Marine National Park) in Phang-nga Province; (2) the *Urak Lawoi* at Ko Li-Pe (the Tarutao National Marine Park) in Satun Province; (3) the *Urak Lawoi* at Ko Lanta in Krabi Province; and (4) the *Urak Lawoi* at Rawi Beach in Phuket Province (see Figures 4-7 and 4-8).

Although the *Moken* and the *Urak Lawoi* are both indigenous sea gypsies, they are linguistically and ethnologically distinct, having been influenced by the countries and the locations in which they live. The language of the *Urak Lawoi* stems from Malay-Polynesian and is considered a dialect of Malay; accordingly, they are quite closely related to the Malay people.

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<sup>42</sup> The Adang Archipelago is part of Tarutao Marine National Park in Satun Province, Thailand. *See also* Wongbusarakum, “Urak Lawoi’ of the Adang Archipelago,” 14.

<sup>43</sup> *Ibid.*, 9–10. The Urak Lawoi communities in Phuket are believed to be more than 200 years old. *See* Historic Preservation,” <http://www.projecturaklawoi.org/#!/blank/c1clt>



**Figure 4- 7.** The locations inhabited by the sea gypsy communities studied here

*Source:* photo adapted from Ann Charlotte Granbom, “Urak Lawoi-A Field Study of an Indigenous People in Thailand and Their Problems with Rapid Tourist Development” (Sociologiska institutionen, Lunds universitet, 2005), 12, [https://www.academia.edu/1626157/Urak\\_Lawoi-A\\_Field\\_Study\\_of\\_an\\_Indigenous\\_People\\_in\\_Thailand\\_and\\_their\\_Problems\\_with\\_Rapid\\_Tourist\\_Development](https://www.academia.edu/1626157/Urak_Lawoi-A_Field_Study_of_an_Indigenous_People_in_Thailand_and_their_Problems_with_Rapid_Tourist_Development).



**Figure 4- 8.** Surin Islands Marine National Park (home to the *Moken*) and Tarutao National Marine Park (home to the *Urak Lawoi*) in the Adang Archipelago

*Source:* Narumon Arunotai, Supin Wongbusarakum, and Derek Elias, “Bridging the Gap between the Rights and Needs of Indigenous Communities and the Management of Protected Areas: Case Studies from Thailand” (Bangkok: UNESCO Bangkok: UNESCO, 2007), <http://unesdoc.unesco.org/images/0015/001557/155745e.pdf>.

### **4.2.3 The Double-edged Sword of Tourism Development Plans: How the Traditional Nomadic Lifestyle of Sea Gypsies is Changing**

According to a UNESCO report, the rapid development of tourism has had a serious impact on the nomadic lifestyles of the indigenous sea gypsies on the islands and coastal sites of Surin, Rawai, Tukay, Lanta, and Adang.<sup>44</sup> Most importantly, under Thai law, their official status and their right to own land and other property remain ambiguous due to their status as minorities.<sup>45</sup> This section presents the injustices that Andaman sea gypsies in Thailand have suffered and the negative impact the tourism industry has had on them.

#### ***The Moken in the Surin Islands and the Urak Lawoi at Ko Lipe Have Been Assimilated into the Marine National Park and Tourism Development Plan***

In 1981, large areas of the Andaman Sea coast and territorial water were placed under the environmental protection of the Royal Thai Forest Department (Marine Park Division) when the Thai government declared the Surin Islands a protected area and established a marine national park. In the wake of this policy decision, development and commerce in the area has grown at a rapid pace. Pressure from park regulations and natural-resource protection have given rise to the question whether and to what extent did the *Moken* residing on the Surin Islands have rights to live harmoniously within the park and maintain the practices of gathering and harvesting marine

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<sup>44</sup> UNESCO, *Indigenous People and Parks: The Surin Islands Project*, 14.

<sup>45</sup> *Ibid.*

resources as part of their traditional lifestyle.<sup>46</sup> After five phrases of a tourism development plan, the Surin Islands have gradually become a popular tourist attraction, filled with infrastructures, bungalows, guest accommodations, public toilets and showers, and facilities for service.<sup>47</sup> In 1997, with the support of UNESCO, a study was undertaken to explore sustainable development options for incorporating *Moken* communities in order to maintain their socioeconomic and cultural integrity as well as the islands' ecosystem.<sup>48</sup>

The development of tourism may appropriately be conceived as a “double-edged sword.” One edge of this sword is the protection of natural and cultural resources; the other is the expansion of tourism and the resulting commercial benefits.<sup>49</sup> After the Surin Islands were declared a national park, the traditional nomadic lifestyle of the *Moken* began to change. For example, restrictions were placed on their fishing and foraging activities, and schooling was provided to *Moken* children about the importance of marine conservation.<sup>50</sup> The *Moken* have also begun using their language and handicraft skills to reap some economic benefit from tourist activities and promote their cultural heritage.<sup>51</sup> In these and other ways, the changing world in which they find themselves has had profound effects on their nomadic lifestyle and traditional practices.

The establishment of Tarutao National Park has had similar effects on the *Urak Lawoi* nomadic way of life on Ko Lipe. In 1974, the Thai government established Tarutao National

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<sup>46</sup> Ibid., 9.

<sup>47</sup> Arunotai, Wongbusarakum, and Elias, “Bridging the Gap between the Rights and Needs of Indigenous Communities and the Management of Protected Areas: Case Studies from Thailand,” 10.

<sup>48</sup> UNESCO, *Indigenous People and Parks: The Surin Islands Project*, 9.

<sup>49</sup> Ibid., 14.

<sup>50</sup> Ibid., 23.

<sup>51</sup> Ibid., 32.

Park in the southernmost part of Thailand off the coast of Satun Province. It is the largest national marine park in Thailand; it is located in the Adang Archipelago and contains fifty-one islands that are divided into two groups: the Tarutao Group and the Adang-Rawai Group (see Figure 4-9).



**Figure 4- 9.** The Tarutao National Marine Park of Thailand in the Adang Archipelago

Source: “Ko Tarutao Travel Guide - Getting to Ko Yao, about Ko Yao, Best Traveling Time,” accessed January 28, 2016, <http://www.ko-tarutao.de/html/ko-tarutao-info.html>.

For centuries, the *Urak Lawoi* led a semi-nomadic lifestyle, traveling among the islands of the Adang Archipelago to forage a wide variety of marine life, such as mollusks and sea cucumbers.<sup>52</sup> They freely made use of the region’s natural resources until 1954, when land ownership documents became active.<sup>53</sup> With the development of tourism, the value of real estate

<sup>52</sup> Arunotai, Wongbusarakum, and Elias, “Bridging the Gap between the Rights and Needs of Indigenous Communities and the Management of Protected Areas: Case Studies from Thailand,” 31.

<sup>53</sup> *Ibid.*, 32.

has risen sharply. In 1998, nearly 40 percent of the land on Lipe Island was privately owned, despite the fact that, for centuries, all of it had been freely used by the *Urak Lawoi*, and despite the national park's establishment in 1974.<sup>54</sup>

Through their long history of sea-related activities, particularly diving and fishing, the *Urak Lawoi* have accumulated a vast body of knowledge about local geography, tides, the lunar cycle, local wind and wave patterns, and animal behaviors.<sup>55</sup> But with the rise of tourism, they have been changing their lifestyle and gradually losing their traditional skills. To generate income from tourism, they have begun to harvest large numbers of sea cucumbers for sale to outside markets and have begun to employ illegal drive-in-net fishing methods.<sup>56</sup> Some work as boat taxi drivers for tourist services. During the dry season, some are employed in the construction and grounds maintenance of resorts; others repair boats or work for the national park.<sup>57</sup> The *Urak Lawoi* way of life and the *Moken* way of life are both undergoing dramatic changes.<sup>58</sup>

### ***The Urak Lawoi on Ko Lanta are faced with tourist development and the loss of their territory***

The term 'Ko Lanta' is used as an abbreviated way to designate Mu Ko Lanta National Park, which was established in 1990 as a marine park and is situated in the southern part of Krabi

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<sup>54</sup> Ibid., 33.

<sup>55</sup> Ibid., 34. See also Nantaka Khua-in, "Reading the Sea, Memorizing the Winds: Reading the Sky, Memorizing the Stars: Marine Local Wisdom of the Urak Lawoi - Depreciated Forms of Natural Resource Management," *Journal of Social Research, The Urak Lawoi Issue*, 34, no. 2 (2554): 93–120. (in Thai)

<sup>56</sup> Arunotai, Wongbusarakum, and Elias, "Bridging the Gap between the Rights and Needs of Indigenous Communities and the Management of Protected Areas: Case Studies from Thailand," 37.

<sup>57</sup> Ibid., 38.

<sup>58</sup> Ibid., 39.

Province.<sup>59</sup> Ko Lanta Noi and Ko Lanta Yai are the two biggest islands in the park (see Figure 5-10). The region covered by this new national park is home to the *Urak Lawoi*. After its establishment as a marine national park, Ko Lanta has rapidly changed, as has the traditional lifestyle of the *Urak Lawoi*.



**Figure 4- 10.** A Map of Mu Ko Lanta in the Krabi Province of Thailand

Source: “Ko Lanta Map,” accessed January 26, 2016, <http://thailandholiday.org.uk/images/map-koh-lanta.jpg>.

Using the theoretical basis set out in John Bodley’s *Victims of Progress*, Grandbom has claimed that the *Urak Lawoi* on Ko Lanta are “the main victims of tourist development.”<sup>60</sup> This

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<sup>59</sup> “Mu Ko Lanta National Park,” Thai National Parks, accessed January 25, 2016, <http://www.thainationalparks.com/mu-ko-lanta-national-park>. Mu in Thai designates a group of something, and Ko means “island;” so Mu Ko means “group of islands.”

<sup>60</sup> Granbom, “Urak Lawoi-A Field Study of an Indigenous People in Thailand and Their Problems with Rapid Tourist Development,” 20; John H. Bodley, *Victims of Progress*, 6th ed. (Lanham: Rowman & Littlefield, 2015). Several other anthropological studies of tourism are also providing support for the claim that tourist development has had a strong impact on indigenous peoples.

remark is similar to the UNESCO report *Indigenous People and Parks*, which says, “For two decades, rapid tourism development has impacted significantly on the nomadic lifestyle of the indigenous Chao Lay in the Andaman Sea.”<sup>61</sup> After Ko Lanta was established as a marine national park in 1990, many changes have taken place. For example, about 150-170 resorts were built on Ko Lanta in 2004, a sharp rise from only seven in 1997.<sup>62</sup> Moreover, road and ferry connections from the mainland, as well as electrical and telephone networks, have been established to attract and facilitate tourism.<sup>63</sup>

The development of tourism has brought about changes that affect the traditional *Urak Lawoi* lifestyle. They in turn have had to assimilate and accommodate themselves to the changes. Granbom has shown that, although many tourist businesses have been established on the islands, they do not belong to local investors, but outsiders: Westerners, Thai-Chinese, or small investors from the mainland.<sup>64</sup> Most importantly, the *Urak Lawoi* themselves have adopted a “dualistic view.”<sup>65</sup> They are willing to integrate themselves into the dominant culture since they “feel ashamed to belong to the poor, uneducated minority, and prefer to be called Thai Mai,” but at the

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<sup>61</sup> UNESCO, *Indigenous People and Parks: The Surin Islands Project*, 11; Valene L. Smith, *Hosts and Guests: The Anthropology of Tourism* (Philadelphia: University of Pennsylvania Press, 1977); Michel Picard and Robert Everett Wood, *Tourism, Ethnicity, and the State in Asian and Pacific Societies* (Honolulu, Hawaii: University of Hawai'i Press, 1997); Michael Hitchcock, Victor T. King, and Mike Parnwell, *Tourism in Southeast Asia: Challenges and New Directions* (Honolulu: University of Hawaii Press, 2009). Parnwell says tourism has become the main source of foreign exchange in Thailand. “The priority is economic growth rather than the pursuit of social and distributive justice” for the Thai development strategies of tourism. See M. J. G. Parnwell and M. Hitchcock, “Environmental Issues and Tourism in Thailand,” *Tourism in South-East Asia*, 1993, 286–302. n Granbom, “Urak Lawoi-A Field Study of an Indigenous People in Thailand and Their Problems with Rapid Tourist Development,” 17.

<sup>62</sup> Granbom, “Urak Lawoi-A Field Study of an Indigenous People in Thailand and Their Problems with Rapid Tourist Development,” 55.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

same time they are proud of their heritage and are concerned about the future integrity of their community.<sup>66</sup>

After the establishment of the marine national park, the Lanta *Urak Lawoi* have had to relocate. Some have moved from Kong Dau Beach to Nai Rai, on land far from the beach and previously used for rice cultivation; and some have moved to the mountains.<sup>67</sup> Since traditionally they have always lived together as a group, when one person sells their land and moves, others will follow. The others are “frightened to be left behind.”<sup>68</sup> Not understanding the importance of land and property law, when the *Urak Lawoi* sold their lands and moved away from the beach to other areas, some were cheated by developers.<sup>69</sup>

Similar things have happened to the *Urak Lawoi* on Ko Li-Pe. As Wongbusarakum says, “Their relatives on other islands sold their land to capitalizes for a lump sum of money. Not knowing how to save the money, these relatives soon spent it all and were chased out by capitalists who now own the land.”<sup>70</sup> Their lands are now surrounded by tourist bungalows and other developments, and some of them have had to sign lease agreements to build on what previously had been their own property.<sup>71</sup> Granbom also pointed out that the *Urak Lawoi* even do “not know or understand what kinds of paper they were signing before moving because they

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<sup>66</sup> Ibid., 55–56.

<sup>67</sup> Ibid., 57.

<sup>68</sup> Ibid., 59.

<sup>69</sup> Ibid., 60.

<sup>70</sup> Supin Wongbusarakum, “The Urak Lawoi and the Complexity of Sustainable Resource Use: The Political Ecology of Change in the Adang Archipelago, Andaman Sea, Thailand” (Ph.D. thesis, ProQuest Dissertations Publishing, 2002), 187 cited by Granbom, “Urak Lawoi-A Field Study of an Indigenous People in Thailand and Their Problems with Rapid Tourist Development,” 59.

<sup>71</sup> Granbom, “Urak Lawoi-A Field Study of an Indigenous People in Thailand and Their Problems with Rapid Tourist Development,” 60.

could not read. They did not understand the purpose of selling land. But they were attracted to the money they would get, which allow them to buy alcohol, a car or motorbike and even build a concrete house.”<sup>72</sup>

One might ask: Why do the *Urak Lawoi* fail to claim their rights? At least part of the answer may be found in the character traits they have traditionally valued. They have been described as “an unwarlike people, timid and disheartened, obedient to authorities and anxious to avoid any kind of trouble.”<sup>73</sup> Because they are shy and peaceful and try as much as possible to avoid conflicts, they are easily victimized, marginalized, and exploited by others. If they encounter any conflict, they will pack all their belongings into their boats and readily move away.<sup>74</sup> Wongbusarakum describes the *Urak Lawoi* as follows: “They are tolerant and forgiving, managing to live peacefully side by side with people they have had trouble with, inducing those who violently forced them off their property, or those who make their livelihood difficult.”<sup>75</sup>

***Developer’ claims and land encroachment: The Moken and Urak Lawoi of Rawai beach dispute the legality of land claims***

The *Moken* and *Urak Lawoi* of Rawai beach in Phuket Province constitute another significant population of sea gypsies. For decades, they have been suffering from tourism expansion, and recently they are facing eviction from their ancestral land by encroaching

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid., 38.

<sup>74</sup> Ibid., 41.

<sup>75</sup> Wongbusarakum, “The Urak Lawoi and the Complexity of Sustainable Resource Use,” 78.

development and real-estate investors.<sup>76</sup> Private firms have filed cases against the *Urak Lawoi* for trespassing. 101 cases are in primary court, 14 in appeals and two others have already lost their appeals.<sup>77</sup> The legal question is: who should have the ownership over the lands, the sea gypsies or the private developers? In other words, these legal disputes reveal the conflict between the *cultural* rights of indigenous peoples (which may be supported by their long history of living on the land and using its natural resources) and the *legal* ownership rights of the private developers (which are supported by land title deeds and by current positive law). According to a news report, one of the *Urak Lawoi* defendants said:

When some of the lawsuits led to (the) villagers' losing, the *Urak Lawoi* and *Moken* people at Rawai beach realised that the place we want to remain for the rest of our lives may no longer be so. For us, the sea and Rawai beach is our home. We never thought that this land that our ancestors have lived on for generations. for almost 100 years, will be gone because of a piece of paper (the land title deed).<sup>78</sup>

After attracting the attention of the general public, the Rawai Beach case is now being investigated by the Department of Special Investigation (DSI). DNA tests and archeological evidence have been introduced to support the claim that sea gypsies have been living on Rawai Beach for generations, and thus long before the land title deeds were issued.<sup>79</sup> For the purpose of

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<sup>76</sup> Chularat Saengpassa, "Development Casts a Shadow over the Urak Lawoi," ASIA NEWS NETWORK, accessed January 18, 2016, <http://www.asianewsnet.net/tsunami/39.html>; "Thailand: Investigate Attack on 'Sea Gypsies,'" Human Rights Watch, February 13, 2016, <https://www.hrw.org/news/2016/02/13/thailand-investigate-attack-sea-gypsies>; "Thailand Sea Gypsies under Threat from Tourism," NewsComAu, June 6, 2013, <http://www.news.com.au/travel/world-travel/thailand-sea-gypsies-under-threat-from-tourism/story-e6frfq9-1226658619693>.

<sup>77</sup> Saengpassa, "Development Casts a Shadow over the Urak Lawoi."

<sup>78</sup> Ibid.

<sup>79</sup> "'ดีเอสไอ' พิสูจน์ชาวเลเราไว้อยู่ก่อน 100 ปี พบ ส.ค.1 ออกไม่ชอบ กม.ครอบที่ดินชาวเล," Prachachat Online, accessed January 30, 2016, [http://www.prachachat.net/news\\_detail.php?newsid=1454067693](http://www.prachachat.net/news_detail.php?newsid=1454067693).

DNA testing, bones were dug up from tombs to prove the ancestral match with some elderly villagers.<sup>80</sup> The archeological evidence includes seashells used in sea gypsy funerals as symbols of their belief that the souls of the dead may rest in peace and in harmony with the sea.<sup>81</sup> The *Urak Lawoi* hope the court will accept their claims and recognize the significance of the archaeological evidence.

In addition to these land disputes, the *Urak Lawoi* of Rawai Beach also confront two other problems: the uncertainty of their rights to sacred sites and the fishing ban that affects their nomadic lifestyle. Since most sea gypsies still believe in animism, conducting ancestral worship rituals on sacred sites is an important part of their culture and sense of identity. (This issue is explored further in section 4.4.) Since several sacred sites are now privately owned, even though they are currently still allowed to enter these sites, the practice may be prohibited in the future if a hotel or resort were to be built. Moreover, as in the case of the *Moken* on the Surin Islands and the *Urak Lawoi* on Ko Lipe and Ko Lanta, the *Urak Lawoi* of Rawai Beach are banned from fishing in some areas they have traditionally used because of national marine park regulations. Thus, their rights to pursue their traditional nomadic way of life are being challenged on several fronts. One of them says: “We used to fish from Ranong to Satun’s Koh Adang-Rawi. Now we

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<sup>80</sup> Saengpassa, “Development Casts a Shadow over the Urak Lawoi”; The Phuket News, “Sea Gypsies Hold Major Assembly in Phuket,” The Phuket News Com, November 23, 2012, <http://www.thephuketnews.com/sea-gypsies-hold-major-assembly-in-phuket-34838.php>; นุตโรโคตรขลิพร, “ทางคืน’สสานอุรักลาโว้ย’ในรีสอร์ทเกาะเฮ นายทุนสั่งคนยิงไล่-ห้ามไปไหว้บรรพบุรุษ ชี้’ภูเก็ต’ที่ดินแพง-โกงออกโฉนดอันดับ1,” *ศูนย์ข้อมูลและข่าวสืบสวนเพื่อสิทธิพลเมือง Thai Civil Rights and Investigative Journalism*, accessed January 18, 2016, <http://www.tcijthai.com/tcijthainews/view.php?ids=966>.

<sup>81</sup> “The Sea Gypsies’ Ever-Shrinking Shoreline - The Nation,” accessed February 29, 2016, <http://www.nationmultimedia.com/opinion/The-sea-gypsies-ever-shrinking-shoreline-30279100.html>; The Nation, “Sea Gypsies Reject Proposals on Land,” February 19, 2016, <http://www.nationmultimedia.com/webmobile/national/Sea-gypsies-reject-proposals-on-land-30279668.html>.

can only fish at Rawai Beach and Koh Racha Yai. Some of us have been arrested and had our boats seized while trying to fish.”<sup>82</sup>

In summary, the Andaman sea gypsies in Thailand have been struggling to adapt to modernization and to the development of tourism. They cannot reside and are unable to fish and hunt in the places they used to, due to the establishment of the marine national park, the tourism industry, and private development projects. The question of land rights is at the heart of legal disputes that concern the interests of indigenous sea gypsies in various regions. The next section will discuss and analyze current laws, policies and practices regarding the protection of indigenous peoples and their rights.

#### **4.3 ANALYSIS OF EXISTING LAWS, POLICIES, AND PRACTICES TO PROTECT AND REALIZE THE RIGHTS OF INDIGENOUS PEOPLES**

This section examines and analyzes current laws, policies, and practices regarding the protection of indigenous peoples, their rights and traditional way of life. The relevant policies and institutions are increasingly focusing on the normative claims, and thus they tend to draw on moral precepts informed by the values of cultural diversity. Indigenous peoples today seek to improve their conditions and legal status after having suffered from the historical injustice of colonization, the dispossession of their lands, territories and resources, and attempts at assimilation. The analysis offered here focuses on the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); ASEAN human rights and legal mechanisms; and Thai

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<sup>82</sup> Saengpassa, “Development Casts a Shadow over the Urak Lawoi.”

law and policy, in particular the Draft Act of Indigenous Peoples and Ethnic Groups Assembly of Thailand and the 2010 Cabinet Resolution to restore the traditional livelihood of Chao Lay.

Over the past century, the rights of indigenous peoples have been discussed in a variety of forums: the Deskaheh at the League of Nations, 1922-1924 (which featured President Wilson's promise of self-determination for nations and the rights of minorities to protection), the International Labour Organization (ILO), the World Bank, and the United Nations.<sup>83</sup> However, after discussions ranging over the last thirty years, the 2007 UNDRIP is the most remarkable development to date as a remedial instrument for indigenous peoples.

#### **4.3.1 From the View of International Law: The 2007 UNDRIP**

##### ***No definition of indigenous peoples***

On September 13, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples, stipulating the right of indigenous peoples to self-determination and their basic human rights. Although the Declaration recognizes the principle of equality and the right to self-determination, it does not define the term 'indigenous peoples.'<sup>84</sup> However, a working definition developed by UN Special Rapporteur José R Martínez-Cobo is

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<sup>83</sup> S. James Anaya, *International Human Rights and Indigenous Peoples*, Aspen Elective Series (New York, NY: Aspen Publishers, 2009), 4–7. *See also* The U.N. Special Rapporteur: Indigenous Peoples' Rights: Experiences and Challenges, IWGIA Document; 118 (Copenhagen: IWGIA; Baguio City, Philippines, 2007); The International Labour Organization (ILO) Convention No. 107 Concerning the Protection and Integration of Indigenous Peoples and Other Tribal and Semi-Tribal Populations in Independent Countries; the ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (1989), adopted June 27, 1989, by the General Conference of the International Labor Organization at its 76th meeting, entered into force on September 5, 1991; the United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

<sup>84</sup> UNDRIP, Preamble, the fourth and sixth paragraph, and Article 2 and 3.

commonly used. In his work, *Study of the Problem of Discrimination against Indigenous Populations*, he says:

Indigenous communities, peoples and nations are those which, having 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 system.

This historical continuity may consist of the continuation, for an extended period reaching into the present, of one of more of the following factors:

- (a) occupation of ancestral lands, or at least of part of them;
- (b) common ancestry with the original occupants of these lands;
- (c) culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- (d) language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language);
- (e) residence in certain parts of the country, or in certain regions of the world;
- (f) other relevant factors.<sup>85</sup>

Martínez-Cobo's definition has been criticized as "under-inclusive"<sup>86</sup> and as "taking a potentially limited, controversial view of indigenous peoples," based on the notion of Western

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<sup>85</sup> José R. Martínez Cobo, *Study of the Problem of Discrimination against Indigenous Populations* (New York: United Nations, 1987), 379–380.

<sup>86</sup> Siegfried Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis," *Harvard Human Rights Journal* 12 (1999): 111.

colonization, which is unlikely to apply to the tribes, minorities, and ethnic groups in many Asian countries.<sup>87</sup> To meet the diverse social circumstances and institutional requirements, Benedict Kingsbury proposed a constructivist approach by using essential requirements and relevant indicia.<sup>88</sup> Kingsbury sets out four essential requirements: “(1) self-identification as a distinct ethnic group, (2) historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation, (3) long connection with the region, and (4) the wish to retain a distinct identity.”<sup>89</sup>

The relevant indicia are divided into two classes: strong indicia and other relevant indicia. The strong indicia include “non-dominance in the national (or regional) society, close cultural affinity with a particular area of land or territories, and historical continuity (especially by descent) with prior occupants of land in the region;” the other relevant indicia refer to “socioeconomic and sociocultural differences from the ambient population, distinct objective characteristics such as language, race, and material or spiritual culture, and [being] regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements.”<sup>90</sup> As summarized by Anya, certain peoples ought to be considered indigenous

...because their ancestral roots are embedded in the lands on which they love, or would like to live on the same lands or in close proximity. And, they are ‘peoples’ in that they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.<sup>91</sup>

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<sup>87</sup> B. Kingsbury, “‘Indigenous Peoples’ in International Law: A Constructivist Approach to the Asian Controversy,” *American Journal Of International Law* 92, no. 3 (1998): 345.

<sup>88</sup> *Ibid.*, 453–455.

<sup>89</sup> *Ibid.*, 455.

<sup>90</sup> *Ibid.*

<sup>91</sup> Anya, *International Human Rights and Indigenous Peoples*, 1.

## *Indigenous peoples' collective rights under the UNDRIP*

As the longest human rights instruments from the UN, the UNDRIP is a comprehensive instrument containing 23 preambular paragraphs and 46 articles. The purpose of the UNDRIP is the recognition of indigenous collective rights, which are described in the preamble as “indispensable for their existence, well-being, and integral development as peoples.”<sup>92</sup> As defined by the UNDRIP, the collective rights of indigenous peoples include the right to self-determination,<sup>93</sup> to maintain and develop their cultural knowledge and expressions,<sup>94</sup> to a nationality,<sup>95</sup> not to be subject to forced assimilation or destruction of their culture,<sup>96</sup> to live in freedom, peace and security as distinct peoples,<sup>97</sup> to the dignity and diversity of their cultures, traditions, histories, and aspirations,<sup>98</sup> to be consulted when legislative and administrative measures affecting them are devised and implemented, etc.<sup>99</sup> These rights are widely accepted as being critical to indigenous spirituality and to the protection of their cultural integrity and ways of life.

Regarding the case of Andaman sea gypsies, some core collective rights will be examined: the right to self-determination, the right to protect and preserve their lands, territories and resources, and the right to development, consultation, and consent.

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<sup>92</sup> UNDRIP, Preamble

<sup>93</sup> UNDRIP, Article 3, 4

<sup>94</sup> UNDRIP, Article 5

<sup>95</sup> UNDRIP, Article 6

<sup>96</sup> UNDRIP, Article 8 para. 1

<sup>97</sup> UNDRIP, Article 7

<sup>98</sup> UNDRIP, Article 15

<sup>99</sup> UNDRIP, Article 19

*The right to self-determination.* Although self-determination is an ambiguous and complex concept in international law, it is recognized by several international and regional instruments and the International Court of Justice (ICJ). The right to self-determination is recognized by: the Charter of the United Nations,<sup>100</sup> the International Covenant on Civil and Political Rights (ICCPR),<sup>101</sup> the International Convention on Economic, Social and Cultural Rights (ICESCR),<sup>102</sup> the 1981 African Charter of Human and Peoples' Rights,<sup>103</sup> and finally, the ICJ's rulings in the *Namibia* case (1971),<sup>104</sup> the *Western Sahara* case (1995),<sup>105</sup> and the *East Timor* case (1995).<sup>106</sup>

In short, the self-determination of a people is their freedom to control their own destiny without undue interference from others. Preambular paragraph 13 clearly recognizes “that indigenous peoples have the right to freely determine their relationship with States in a spirit of coexistence, mutual benefit and full respect.” Also, paragraph 16 acknowledges that the UN Charter and ICESCR affirms the fundamental importance of the right of self-determination of all

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<sup>100</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html> [accessed 2 March 2016]

<sup>101</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171. In its General Comment on Article 27 of the ICCPR, the Human Rights Committee expressly linked states' duty to guarantee indigenous peoples' right to enjoy their culture, to the protection of their ways of life, and to territory and resource use. General Comment No. 23 (1994): Article 27 (rights of minorities), p 7, CCPR/C/21/rev.1/Add.5 (1994).

<sup>102</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16., 1966, 993 U.N.T.S. 3

<sup>103</sup> “African Charter on Human and Peoples' Rights / Legal Instruments / ACHPR,” accessed March 2, 2016, <http://www.achpr.org/instruments/achpr/>.

<sup>104</sup> See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution*, [1971] I.C.J. 16 (The case advises the Security Council in responsibilities regarding decolonization of South West Africa); U.N. General Assembly Resolution 2372 (XXII) of June 12, 1968, changing the name of South West Africa to Namibia and recommending measures to secure the withdrawal of South African administration from Namibia (7:890, Jul 68); Michla Pomerance, “Case Analysis: The ICJ and South West Africa (Namibia): A Retrospective Legal/Political Assessment,” *Leiden Journal of International Law* 12, no. 2 (June 1999): 425–36, [http://www.journals.cambridge.org/abstract\\_S0922156599000199](http://www.journals.cambridge.org/abstract_S0922156599000199).

<sup>105</sup> See *Western Sahara Advisory Opinion*, [1975] I.C.J. 12

<sup>106</sup> See *Case Concerning East Timor* (Port. v. Austl.), [1995] I.C.J. 90

peoples, “by virtue of which they freely determine their political status and freely pursue their economic, social, and cultural development,” and the next paragraph affirms that “nothing in this Declaration can be used to deny any peoples the right of self-determination exercised in conformity with international law.”

Although the right to self-determination is widely recognized, in practice it is often opposed by the attitude of governments. Although the Declaration was adopted by an overwhelming majority of 143 votes in favor, four countries initially cast negative votes: Canada, Australia, New Zealand, and the United States. Since 2007, however, only the United States has withheld a positive vote, and this is because the Declaration does not provide a definition ‘indigenous peoples.’ One may conjecture that states fear that indigenous peoples or communities will declare their independence. In any case, the right to self-determination in international law is more likely to be acknowledged as a right of a process, not of outcome, belonging to peoples and not to states or governments.

*The right to protect and preserve their lands, territories and resources.*<sup>107</sup> For indigenous peoples, land is life because their identity and spirituality are linked to their lands and territories. Indigenous peoples are connected to their lands through the deep roots of history and culture. In the words of UN Special Rapporteur Martinez-Cobo:

It is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture... For such people, the land is not merely a possession and a means of production... Their land is not a

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<sup>107</sup> UNDRIP art 32.1

commodity which can be acquired, but a material element to be enjoyed freely.<sup>108</sup>

With beliefs and bodies of knowledge that have developed through many generations, indigenous peoples have highly specialized sustainable land-use practices and livelihood strategies. Thus, the UNDRIP fully recognizes the importance of rights to land, territories and resources for indigenous peoples. Securing this right is critical for indigenous peoples so that they can maintain their existence as distinct peoples and maintain their livelihood.<sup>109</sup> The preamble of UNDRIP clearly states that “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures, and traditions, and to promote their development in accordance with their aspirations and needs.”<sup>110</sup> It is important to understand the right to land in the broader context of indigenous peoples’ collective rights to self-determination, non-discrimination, cultural integrity and development. Recognizing this right entails recognizing the broader set of rights related to self-management and the rights to determine their own priorities for development.<sup>111</sup>

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<sup>108</sup> See Jose R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities: Study on the Problem of Discrimination Against Indigenous Populations. UN Document No. E/CN.4/Sub.2/1986/7/Add.1, paras, 196 and 197.

<sup>109</sup> Birgitte Feiring, “Indigenous Peoples’ Rights to Lands, Territories and Resources,” 2013, 17, <http://forestcompass.org/how/resources/indigenous-peoples%E2%80%99-rights-lands-territories-and-resources>.

<sup>110</sup> UNDRIP, Preamble

<sup>111</sup> Feiring, “Indigenous Peoples’ Rights to Lands, Territories and Resources,” 17; UNDRIP art. 26

It is also important to note that indigenous peoples do not aim to own their lands exclusively. The right of an indigenous people to land is consistent with the use of this land by other communities or population groups.<sup>112</sup> The ILO elaborates as follows:

This is especially the case with grazing lands, hunting, fishing and gathering areas and forests, which may be used by nomadic pastoralists, hunters or shifting cultivators or rotational or seasonal basis. In other cases, certain communities may have rights to certain types of resources within a shared territory, as they have developed complementary livelihood strategies. Also such non-exclusive land rights are established on the basis of traditional occupation.<sup>113</sup>

***The right to development, to consultation and consent.*** In connection with land rights, the UNDRUP also stipulates that “indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”<sup>114</sup> To secure this right, states have a “duty” to consult and cooperate with the indigenous peoples “to obtain free, prior, and informed consent prior to the approval of any project affecting their lands or territories and other resources.”<sup>115</sup>

To meet the objective of this right, the ILO sets a number of minimum requirements, according to which consultation must be: (1) formal, full and exercised in good faith, having appropriate procedure mechanisms and in a form appropriate to the circumstances, (2) being undertaken through indigenous and tribal peoples’ representative institutions as regards

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<sup>112</sup> Ibid., 19.

<sup>113</sup> International Labour Organization, “Indigenous and Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169, International Labour Standards Department. Geneva,” 2009, 95; Section 3 ILO, “Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Handbook for ILO Tripartite Constituents,” 2013, 21, [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_205225.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_205225.pdf).

<sup>114</sup> UNDRIP art. 32

<sup>115</sup> UNDRIP art. 29, 32.2

legislative and administrative measures, and (3) with the objective of reaching agreement or consent to the proposed measures.<sup>116</sup> In addition, states also have a duty to undertake *impact assessments* of any proposed development project in order to determine the social, spiritual, cultural, and environmental impact of the proposed project on indigenous peoples.<sup>117</sup>

Yet, despite the fact that UNDRIP recognizes several indigenous collective rights, it is only on paper. In practice, several states fail to fulfill the Convention though they have pledged to do so. As Kumlicka says: “Indigenous peoples may get moral victories from international law, but the real power remains vested in the hands of sovereign States, who can do and ignore international norms.”<sup>118</sup> On a similar note, in his 2007 report, James Anya, the UN Special Rapporteur on the situation of human rights and the fundamental freedoms of indigenous peoples, states:

Although in recent years many countries have adopted laws recognizing the indigenous communities’ collective and inalienable right to ownership of their lands, land-titling procedures have been slow and complex and, in many cases, the titles awarded to the communities are not respected in practice.<sup>119</sup>

#### **4.3.2 From the regional point of view: ASEAN**

On 13 September 2007, all ASEAN Member States voted in favor of the UNDRIP, pledging themselves to moral obligations in the protection of indigenous peoples in the region. In

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<sup>116</sup> ILO, “Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Handbook for ILO Tripartite Constituents,” 13.

<sup>117</sup> Feiring, “Indigenous Peoples’ Rights to Lands, Territories and Resources,” 22.

<sup>118</sup> Will Kymlicka, “Theorizing Indigenous Rights,” *University of Toronto Law Journal* 49 (1999): 293.

<sup>119</sup> “UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples. Report to the Fourth Session of the UN Human Rights Council,” February 27, 2007,

[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47_en.pdf).

addition, they reiterated their commitment to achieve the goals of the UNDRIP when they adopted the Outcome Document of the high-level plenary meeting of the UN General Assembly, known as the World Conference on Indigenous Peoples (WCIP) on 22 September 2014.<sup>120</sup> This means that all ASEAN Member States reaffirmed their commitment to recognize the rights of indigenous peoples and are legally bound to live up to their promises to respect, protect and fulfill the rights of indigenous peoples (see Table 4-1).<sup>121</sup>

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<sup>120</sup> Jade Tessier and Luchie Maranan, *Indigenous Peoples and ASEAN Integration* (Asia Indigenous Peoples Pact (AIPP) Foundation, 2015), 7, [http://iva.aippnet.org/wp-content/uploads/2015/12/Ips-and-ASEAN-Integration\\_Final-Small.pdf](http://iva.aippnet.org/wp-content/uploads/2015/12/Ips-and-ASEAN-Integration_Final-Small.pdf).

<sup>121</sup> Ibid.

No.	Treaty/ State	CAMBODIA	INDONESIA	LAOS	PHILIPPINES	THAILAND	VIETNAM	MALAYSIA	MYANMAR	BRUNEI	SINGAPORE
1	<u>ICERD</u> <sup>18</sup>	Ratification 28 Nov 1983	Accession 25 Jun 1999	Accession 22 Feb 1974	Ratification 15 Sep 1967	Accession 28 Jan 2003	Accession 09 Jan 1982				
2	<u>ICCPR</u> <sup>19</sup>	Ratification 26 May 1992	Accession 23 Feb 2006	Ratification 25 Sep 2009	Ratification 23 Oct 1986	Accession 29 Oct 1996	Accession 24 Sep 1982				
3	<u>ICESCR</u> <sup>20</sup>	Ratification 26 May 1992	Accession 23 Feb 2006	Ratification 13 Feb 2007	Ratification 07 Jan 1974	Accession 05 Sep 1999	Accession 24 Sep 1982				
4	<u>CEDAW</u> <sup>21</sup>	Ratification 15 Oct 1992	Ratification 13 Sep 1984	Ratification 14 Aug 1981	Ratification 5 Aug 1981	Accession 9 Aug 1985	Ratification 17 Feb 1982	Accession 5 Jul 1995	Accession 22 Jul 1997	Accession 24 May 2006	Accession 5 Oct 1995
5	<u>CAH</u> <sup>22</sup>	Accession 15 Oct 1992	Ratification 23 Oct 1998	Ratification 26 Sep 2012	Accession 18 Jun 1986	Accession 2 Oct 2007	Ratification 5 Feb 2015				
6	<u>CRC</u> <sup>23</sup>	Accession 15 Oct 1992	Ratification 5 Sep 1990	Accession 8 May 1991	Ratification 21 Aug 1990	Accession 27 Mar 1992	Ratification 28 Feb 1990	Accession 17 Feb 1995	Accession 15 Jul 1991	Accession 27 Dec 1995	Accession 5 Oct 1995
7	<u>ICRMW</u> <sup>24</sup>		Ratification 31 May 2012		Ratification 05 Jul 1995		Accession 01 May 2004				
8	<u>ICPPED</u> <sup>25</sup>	Accession 27 Jun 2013									
9	<u>ICRPD</u> <sup>26</sup>	Ratification 20 Dec 2012	Ratification 30 Nov 2011	Ratification 25 Sep 2009	Ratification 15 Apr 2008	Ratification 29 Jul 2008	Ratification 5 Feb 2015	Ratification 19 Jul 2010	Accession 7 Dec 2011		Ratification 18 Jul 2013
10	<u>ICCPR- OP1</u> <sup>27</sup>				Ratification 22 Aug 1989						
11	<u>ICCPR- OP2</u> <sup>28</sup>				Ratification 20 Nov 2007						
12	<u>OP- CEDAW</u> <sup>29</sup>				Ratification 12 Nov 2003	Ratification 14 Jun 2000					
13	<u>OP-CRC- AC</u> <sup>30</sup>	Ratification 16 Jul 2004	Ratification 24 Sep 2012	Accession 20 Sep 2006	Ratification 26 Aug 2003	Accession 27 Feb 2006	Ratification 20 Dec 2001	Accession 12 Apr 2012			Ratification 11 Dec 2008
14	<u>OP-CRC- SC</u> <sup>31</sup>	Ratification 30 May 2002	Ratification 24 Sept 2012	Accession 20 Sep 2006	Ratification 28 May 2002	Accession 11 Jan 2006	Ratification 20 Dec 2001	Accession 12 Apr 2012	Accession 16 Jan 2012	Accession 21 Nov 2006	
15	<u>OP-CAH</u> <sup>32</sup>	Ratification 30 Mar 2007			Accession 17 Apr 2012						

18 International Convention on the Elimination of All Forms of Racial Discrimination.  
19 International Convention on Civil and Political Rights.  
20 International Convention on Economic, Social and Cultural Rights.  
21 Convention on the Elimination of All Forms of Discrimination against Women.  
22 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.  
23 Convention on the Rights of the Child.  
24 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.  
25 Convention for the Protection of All Persons from Enforced Disappearance.  
26 Convention on the Rights of Persons with Disabilities.  
27 First Optional Protocol to the International Covenant on Civil and Political Rights.  
28 Second Optional Protocol to the International Covenant on Civil and Political Rights.  
29 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.  
30 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.  
31 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.  
32 Optional Protocol of the Convention Against Torture.

**Table 4- 1.** ASEAN member states are legally bound to enforce the treaties and principles that underpin the UNDRIP

Source: Jade Tessier and Luchie Maranan, *Indigenous Peoples and ASEAN Integration* (Asia Indigenous Peoples Pact (AIPP) Foundation, 2015), 7, [http://iva.aippnet.org/wp-content/uploads/2015/12/Ips-and-ASEAN-Integration\\_Final-Small.pdf](http://iva.aippnet.org/wp-content/uploads/2015/12/Ips-and-ASEAN-Integration_Final-Small.pdf).

As shown in Table 4-1, all ASEAN Member States are parties to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). The CRC incorporates a full range of human rights – including civil, political, economic, social and cultural rights – articulated in other human rights instruments, as well as General Recommendations No. 11 (2009) on Indigenous Children.<sup>122</sup> Note that the majority of ASEAN Member States are parties to the ICCPR, IESCR, and ICERD. Only Brunei, Malaysia, Myanmar and Singapore at the present have not ratified these Conventions; however, they have agreed to the conditions of the CRC, which covers these rights.<sup>123</sup>

Despite the fact that all ASEAN states have adopted the UNDRIP, ASEAN indigenous peoples still suffer. Their collective rights (especially the right to self-determination and their rights to their lands, territories, and resources) are being violated on a daily basis because many states fail to respect and implement the commitments they have made.<sup>124</sup> One reason is that several Asian states have legal systems that they inherited from colonial times, and these legal systems do not recognize the historical and customary use of lands and resources nurtured and managed for centuries by indigenous peoples.<sup>125</sup> However, indigenous communities and organizations in Asia have continued to gain strength in recent years.

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<sup>122</sup> Ibid., 9.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> John Carling, Robeliza Halip, and Jade Tessier, “Victims of Development Aggression: Indigenous Peoples in ASEAN” (Asia Indigenous Peoples Pact (AIPP), 2011).

### ***Problems persists with the ASEAN human rights agreement and its mechanisms***

The ASEAN Charter promotes a people-oriented ASEAN and encourages all sectors of society to participate in, and benefit from, the process of ASEAN integration and community building; however, it does not clearly establish any mechanisms for the full and effective participation of ASEAN peoples.<sup>126</sup> The absence of criteria for representation in the ASEAN organs and the lack of participation by ASEAN citizens also make it problematic for ASEAN indigenous peoples to represent themselves. So the political agenda and personal interests of the appointing bodies dominate the functioning of ASEAN bodies today.<sup>127</sup>

Furthermore, the Charter's overarching principle (non-interference in the internal affairs of ASEAN Member States) has contributed the inadequacy of ASEAN disciplinary and dispute mechanisms. Thus, it is difficult in practice to hold the member states accountable to the agreements they have made on paper.<sup>128</sup> For decades, therefore, ASEAN has not been able to impose sanctions on any its members even in cases where they have violated their international human rights obligations.<sup>129</sup> Nevertheless, the ASEAN Human Rights Declaration (AHRD), which was established in November 2012, excluded the non-interference principle.<sup>130</sup> Though it

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<sup>126</sup> Tessier and Maranan, *Indigenous Peoples and ASEAN Integration*, 11; *see also* the ASEAN Charter, Preamble and Article 1 (13)

<sup>127</sup> *Ibid.*

<sup>128</sup> ASEAN Charter, Preamble, Article 2 (e).

<sup>129</sup> Tessier and Maranan, *Indigenous Peoples and ASEAN Integration*, 11.

<sup>130</sup> The ASEAN Human Rights Declaration (AHRD) was adopted at the 21st ASEAN Summit in Phnom Penh, Cambodia. The ASEAN Heads of State reaffirmed that the AHRD would be implemented in accordance with the commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Program of Action, and other international human rights instruments to which ASEAN Member States are parties.

is a good first step toward better regional human rights protection, it is only a first step; and it will have real value only if several further steps are taken.<sup>131</sup>

### ***The Manner in which ASEAN Member States Have Granted Legal Recognition and Status to Indigenous Peoples Varies from Country to Country***

The legal recognition of indigenous peoples in ASEAN member states varies from country to country. In some countries, the status of indigenous peoples is recognized by the Constitution; in other countries, indigenous peoples are effectively invisible in the fundamental law of the land. The use of the term ‘indigenous peoples’ is contentious, and in many cases, it is limited, conditional, or is not properly implemented.<sup>132</sup> For example, the constitutions of Indonesia and the Philippines recognize traditional communities,<sup>133</sup> whereas Cambodia and Laos

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<sup>131</sup> Tessier and Maranan, *Indigenous Peoples and ASEAN Integration*, 12.

<sup>132</sup> Asia Indigenous Peoples Pact, “Overview of the State of Indigenous Peoples in Asia,” May 2014, 3, <http://www.gapeinternational.org/wp-content/uploads/2011/08/asia-ip-overview-final.pdf>. The Asia Indigenous Peoples Pact (AIPP) is a regional non-profit and non-government organization founded in 1988 by indigenous peoples’ movements and established its Secretariat in 1992. The objectives of AIPP are to promote and defend indigenous peoples’ rights and human rights as a whole, and to strengthen the movements’ of indigenous peoples of Asia for recognition of their collective rights and protection of traditional knowledge, bio-diversity and environment for sustainable and self-determined development. See “About Us,” *Asia Indigenous Peoples Pact*, accessed April 4, 2016, <http://aippnet.org/about-us/>.

<sup>133</sup> The 1945 Constitution of the Republic of Indonesia, Article 18 B-2 says, “The State recognizes and respects traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be regulated by law.” And, the 1987 Constitution of the Republic of the Philippines, Article 2, Section 22, which says, “The State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development.” See also The Philippines’s Republic Act 8372 or the Indigenous Peoples’ Rights Act, which recognizes indigenous people’s cultural integrity and the right to own and develop their ancestral lands or domains. Cited in “Overview of the State of Indigenous Peoples in Asia,” Asia Indigenous Peoples Pact, “Overview of the State of Indigenous Peoples in Asia,” 55.

use a different term.<sup>134</sup> Once again, it should be noted that legal recognition does not assure the full enjoyment of individual and collective rights. Nevertheless, the absence of formal legal recognition often contributes to a denial of basic rights and services, including the collective rights recognized by national and international human rights law.<sup>135</sup>

### ***The ASEAN Indigenous Peoples' Advocacy***

ASEAN indigenous peoples have been taking part in the ASEAN process since the establishment of the Indigenous Peoples Task Force (IPTF) by the Asia Indigenous Peoples Pact (AIPP) of 2009. For the inclusion of indigenous peoples in their work, the advocacy agenda focused on the legal recognition of indigenous peoples as distinct peoples with collective rights so that it would support the participation of indigenous peoples in the work of ASEAN and its relevant bodies, and to serve as a platform for solidarity and unity for indigenous peoples.<sup>136</sup>

However, attempting to include indigenous peoples in the ASEAN process is an ongoing struggle due to several ASEAN Member States, especially the Mekong sub-region countries, being sensitive to the term 'indigenous people,' which they consider divisive.<sup>137</sup> The term is therefore rarely used or accepted in official documents of those Mekong countries, even though

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<sup>134</sup> The 2009 National Policy of Indigenous Peoples of Cambodia uses the term "*chuncheat doaem phék tec*," which literally means "minority original ethnicity," to refer to peoples who are not Khmers, Chams, Chinese, Laos, Thais or Kinh (Vietnamese), whereas the 1991 Constitution of Lao People's Democratic Republic (rev.2003), Article 8 says, "The State pursues the policy of promoting unity and equality among all ethnic groups. All ethnic groups have the right to protect, preserve and promote the fine customs and cultures of their own tribes and of the nation. All acts creating division and discrimination among ethnic groups are prohibited."

<sup>135</sup> Ibid.

<sup>136</sup> Asia Indigenous Peoples Pact, "Overview of the State of Indigenous Peoples in Asia," 58.

<sup>137</sup> Ibid., 59.

their constitutions define them as multi-ethnic states, and despite the fact that cultural diversity is promoted and celebrated in their tourism advertisements.<sup>138</sup>

### **4.3.3 Efforts and Problems of Thai Law, Policy and Practices in Protecting Indigenous Peoples and Ethnic Groups**

Thailand has ratified several international conventions regarding human rights and the protection of indigenous peoples, for example, the CRC, ICCRC, CERD, and UNDRIP; however, in practice, Thailand does not officially recognize the existence of indigenous peoples in the country.<sup>139</sup> As a result, their status remains questionable. In 1992, the Thai government communicated to the United Nations its view that hill tribes are ethnic groups, and that therefore they “are not considered to be minorities nor indigenous peoples but as Thais who are able to enjoy fundamental rights...as any other Thai citizen.”<sup>140</sup> For decades, this position has provided the basis for Thai policy towards indigenous peoples. In contrast, the government has consistently claimed that it grants indigenous people citizenship, legal recognition, and collective rights. The reality is that most of the indigenous peoples in Thailand today are still rural-based and lack equal opportunities and suffer income inequalities.

In addition to the UNDRIP, Thailand is obligated under the 2014 Interim Constitution to guarantee the equality principle and to comply with international law in the protection of human

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<sup>138</sup> Ibid.

<sup>139</sup> คณะกรรมการปฏิรูปกฎหมาย, “บันทึกความเห็นและข้อเสนอแนะ เรื่อง แผนการให้มีกฎหมายว่าด้วยสภาชนเผ่าพื้นเมืองแห่งประเทศไทย, กม.คปก.(ก) ที่ 29/2558,” accessed February 21, 2016, [http://www.lrct.go.th/th/?wpfb\\_dl=1840](http://www.lrct.go.th/th/?wpfb_dl=1840).

<sup>140</sup> Thailand government statement, Hill-Tribe Welfare and Development, UN Doc. E/CN.4/AC.2/1992/4.

rights and indigenous peoples. Section Four of the Interim Constitution, which replaced the 2007 Constitution, says “...all human dignity, rights, liberties, and equality of the people protected by the constitutional convention under a democratic regime of government with the King as the Head of State, and by international obligations bound by Thailand, shall be protected and upheld by this Constitution.”<sup>141</sup> However, this principle is only written on paper and not yet fully implemented in practice. More importantly, it does not clearly recognize the concept of “traditional community” as the 2007 Constitution did.

### ***The Citizenship of Indigenous Peoples in Thailand is Doubtful***

Thailand recognized “traditional communities” under the 2007 Constitution but not the term ‘indigenous peoples.’ Section 66 says,

Persons so assembling as to be a community, local community or traditional community shall have the right to conserve or restore their customs, local traditional knowledge, arts and products of their community and of the nation and to participate in the management, maintenance, preservation and exploitation of natural resources and environment, provided that biological diversity is treated in a balanced and sustainable manner.<sup>142</sup>

Community rights were recognized under the 2007 Constitution, but it was silent on citizenship rights. Today, almost half of the stateless peoples in Thailand are indigenous peoples whose legal status remains unclear and who are not recognized as citizens. Lacking citizenship,

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<sup>141</sup> The Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014), Section 4.

<sup>142</sup> The Constitution of the Kingdom of Thailand B.E. 2550 (2007), Part 12, Community Right, Section 66.

the indigenous peoples are considered as “illegal aliens” in their own lands; they are vulnerable to human rights violations, arbitrary arrest, discrimination, and denial of basic rights; and they have difficulty gaining access to healthcare and other public services, and are unable to enjoy freedom of movement or land ownership.<sup>143</sup>

### ***Cabinet Resolutions: Restoring the Traditional Livelihoods of Karen and Chao Lay***

In 2010, two Cabinet Resolutions restored the traditional livelihoods of *Karen* and *Chao Lay*. On August 3, 2010, as proposed by the Ministry of Culture, the Cabinet Resolution approved the principles and guidelines of a policy “Recovering the *Karen* Livelihood in Thailand.” Its purpose is to recover the *Karen* livelihood in the country through policies and principles of implementation, for example, by giving support to the biodiversity of highland communities and by supporting the *Karen* people’s ethnic identity and culture.<sup>144</sup> And, on June 2, 2010, another resolution was passed to protect the way of life of the *Chao Lay*.

The Policy Guideline for the Restoration of the Way of Life of the *Chao Lay* provided short-term restorative measures to *Chao Lay* people, for example: creating housing security by providing community title-deeds to mark special social and cultural boundaries; offering them the chance to fish in maritime park areas and other conserved zones; and providing assistance in

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<sup>143</sup> Asia Indigenous Peoples Pact, “Overview of the State of Indigenous Peoples in Asia,” 5, 46, 53.

<sup>144</sup> คณะกรรมการปฏิรูปกฎหมาย, “บันทึกความเห็นและข้อเสนอแนะ เรื่อง แผนการให้มีกฎหมายว่าด้วยสภาชนเผ่าพื้นเมืองแห่งประเทศไทย, กม.คปก.(ก) ที่ 29/2558.”

public health and solutions to problems related to nationality.<sup>145</sup> More importantly, this policy guideline initiated a discussion concerning the creation of “a special cultural zone” in order to rehabilitate the *Chao Lay*.<sup>146</sup> Despite Thailand’s Constitution and cabinet resolutions, which recognize the existence of indigenous peoples and set out a policy to protect their ways of life and their rights to lands, territories and resources, domestic laws and policies are not yet fully implemented; the sea gypsies say that “in reality it has made little difference.”<sup>147</sup> Hence, the sea gypsies today still struggle and have to fight for their rights to lands since almost their lands and territories have been converted into national parks and privatized as tourist-related businesses.<sup>148</sup>

### *Awaiting a Future Bright: The Draft Act of Indigenous Peoples and Ethnic Groups Assembly of Thailand*

In recognition of the marginalization of indigenous peoples and ethnic groups, Thailand has attempted to enact a new Act, called “the Draft Act of Indigenous Peoples and Ethnic Groups

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<sup>145</sup> “Policy Guidelines for the Restoration of the Way of Life of the Chao Lay with the Consent of the Cabinet on June 2nd, 2010,” *ฐานข้อมูลงานวิจัยทางชาติพันธุ์* (Thailand and Southeast Asia Ethnic Groups Research Database), accessed February 9, 2016, [http://www.sac.or.th/databases/ethnicedb/policy\\_detail.php?id=1804](http://www.sac.or.th/databases/ethnicedb/policy_detail.php?id=1804); “ลำดับเหตุการณ์การดำเนินงานตามแนวนโยบายฟื้นฟูวิถีชีวิตชาวเล ของคณะกรรมการอำนวยการบูรณาการเพื่อฟื้นฟูวิถีชีวิตชาวเล และคณะอนุกรรมการอำนวยการเพื่อติดตามงานฟื้นฟูวิถีชีวิตชาวเล ตามมติคณะรัฐมนตรี 2 มิถุนายน 2553,” *ฐานข้อมูลงานวิจัยทางชาติพันธุ์* (Thailand and Southeast Asia Ethnic Groups Research Database), accessed March 10, 2016, [http://www.sac.or.th/databases/ethnicedb/seaman\\_detail.php?id=1151](http://www.sac.or.th/databases/ethnicedb/seaman_detail.php?id=1151).

<sup>146</sup> Long-term restorative measures, to be implemented within 1 to 3 years, 2.1 Considering locating special cultural zones appropriate to ethnic groups that have specific social and cultural characteristics “Policy Guidelines for the Restoration of the Way of Life of the Chao Lay with the Consent of the Cabinet on June 2nd, 2010.”

<sup>147</sup> “Indigenous People and the Threat of Tourism,” June 6, 2013, <http://www.eturboneews.com/35296/indigenous-people-and-threat-tourism>.

<sup>148</sup> จีระวรรณ บรรเทาทุกข์, “บทความพิเศษ: มติกรมฟื้นฟูวิถีชีวิตชาวเล สิ่งทำลายบทเสียดายแห่งความเข้าใจ,” *วารสารวิจัยสังคม* 34, no. 2 (2554): 196–236. (in Thai)

Assembly of Thailand (the Draft Act),” to protect them.<sup>149</sup> The idea is not new, however. Chayan Wattanaputi, the Director of the Center for Ethnic Studies and Development at Chiangmai University, says:

Since 1998 (B.E. 2541), there have been several attempts to call for the recognition of citizenship and local resource management [for indigenous peoples and ethnic groups]. Nevertheless, the Office of the National Security Council of Thailand opposed the idea on the ground of national security and believes that Thailand is not ready yet. [...] However, the Thai government has ratified several international conventions regarding human rights, for example, International Covenant on Civil and Political Rights, which could be used to benefit and protect them. [...] A special cultural zone should be applied, but the most important thing is that we have to define clearly who are the indigenous peoples and ethnic groups in the country, and we have to protect those who do not have Thai citizenship (my translation from Thai).<sup>150</sup>

The Draft Act covers several topics, for instance, citizenship, rights to lands and resource management, rights to development, and rights to culture.<sup>151</sup> These issues are considered as structure and policy problems that the Thai government has not yet successfully addressed. In agreement with the Indigenous Peoples and Ethnic Groups Assembly, it will function as the main policy-making center for encouraging all indigenous peoples, communities and ethnic groups to participate and protect their own culture, identity, and interests by recognizing their rights to lands, to resource management and their rights to culture.<sup>152</sup> It is noteworthy that the principles and mechanisms of the Draft Act are consistent with the spirit and principles of the 2014 Interim

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149 “บันทึกหลักการและเหตุผลประกอบ (ร่าง) พระราชบัญญัติสภาชนชาติพันธุ์และชนเผ่าพื้นเมืองแห่งประเทศไทย พ.ศ. ....” accessed March 20, 2016, [http://www.thai-ips.org/Documents/Draft\\_IP\\_law.pdf](http://www.thai-ips.org/Documents/Draft_IP_law.pdf).

150 “ต้นกฎหมายจัดตั้งสภาชนชาติพันธุ์และชนเผ่า หวันวิถีวัฒนธรรมดั้งเดิมถูกทำลายสิ้น ‘ชาวเล’ วิกฤตหนัก-ไม่มีแผ่นดินจะอยู่ | โครงการพัฒนาสถานภาพและคุ้มครองสิทธิเด็กไร้รัฐและ เด็กไร้สัญชาติในประเทศไทย,” *To Be Thai ไร้รัฐ ไร้สัญชาติ ไร้สิทธิ*, October 6, 2015, <http://www.tobethai.org/newsite/content/ต้นกฎหมายจัดตั้งสภาชนชาติพันธุ์และชนเผ่า-หวันวิถีวัฒนธรรมดั้งเดิมถูกทำลายสิ้น-ชาวเล>.

151 “บันทึกหลักการและเหตุผลประกอบ (ร่าง) พระราชบัญญัติสภาชนชาติพันธุ์และชนเผ่าพื้นเมืองแห่งประเทศไทย พ.ศ. ....”

152 The Draft Act of Indigenous Peoples and Ethnic Groups Assembly of Thailand, Article 5 and 9.

Constitution, and the United Nations Declaration on the Rights of Indigenous Peoples, which Thailand has already ratified and promised to implement.<sup>153</sup>

#### **4.4 SEA GYPSIES IN THEIR HISTORICAL AND SOCIOCULTURAL CONTEXT: FROM THE URAK-LAWOI POINT OF VIEW**

This section provides an historical anecdote and sheds light on the socio-cultural context of *Urak Lawoi* sea gypsies. By considering the *Loy Rua* festival – a ritual that illustrates their animistic belief and the cultural authenticity of shamanism - we will better understand their dignity and identity.

##### **4.4.1 Historical Anecdote: The Royal Grandmother Granted the Sea Gypsies Family Names**

In contrast to the *Moken*, the *Urak Lawoi* today have abandoned their semi-nomadic way of life to settle permanently on the land. According to an historical anecdote, the *Urak Lawoi* in Thailand have been recognized as Thai citizens since the 1960s. His Majesty King Rama IX (the King Bhumibol Adulyadej) visited the *Urak Lawoi* at Lawai Beach and made remarks about their quality of life on March 10, 1959 (B.E. 2502) (see Figure 4-11).<sup>154</sup> Later, the Royal Grandmother (*Somdet Phra Srinagarindra Boromarajajonani*, or so-called “*Somdet Ya*”) visited

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<sup>153</sup> คณะกรรมการปฏิรูปกฎหมาย, “บันทึกความเห็นและข้อเสนอแนะ เรื่อง แผนการให้มีกฎหมายว่าด้วยสภาชนเผ่าพื้นเมืองแห่งประเทศไทย, กม.คปก.(ก) ที่ 29/2558.”

<sup>154</sup> “พระมหากษัตริย์คุณต่อชาติพันธุ์ชาวไทยใหม่,” accessed March 16, 2016, <http://123.242.171.10/pokpong/thaimai.htm>.

Laem Tukay and Ko Sile and acknowledged their need for identification cards. As a result, the Royal Grandmother granted them five family names: *Hantalee*, *Pramongkit*, *Taleeluk*, *Changnam*, and *Chaonam*, and also *Klatalee* for the *Moken* on Ko Surin in Phang-nga Province. The royal act of granting these family names symbolically recognize their existence in Thailand, and these family names carry particular meanings about living in close relationship to the sea. In contrast to other indigenous peoples in Thailand, mainly the hill-tribes, most Rawai *Urak Lawoi* have fewer difficulties with their citizenship status, but still they suffer from tourism development and land encroachment by development projects for the construction of resorts and hotels on their ancestral lands. Mr. Pramongkit, a leader of the *Urak Lawoi* at Laem Tukay, says:

The *Urak Lawoi* at Laem Tukay in Phuket Province have been granted family names by King Rama VI (King Vajiravudh- the author) as Pramongkit (*ประมอญ กิจ*). Later, in B.E. 2510 (1967), Somdej Ya changed it to be Pramongkit (*ประมง กิจ*). [Author's comment: note that the second vowel (long-short) and spelling are different.] Not only at Laem Tukay, but she granted family names to other *Urak Lawoi* in other places too. At Lawai Beach, there are several family names, for example, Bangjak, Lakkoh, Taleerungroj, Raknawa, Rakpakarang, and Hantalee. In addition, there are Changnam and Chanonam for the *Urak Lawoi* at Phi Phi Island, and Taleeluk for those on the Lanta Islands (my translation from Thai).<sup>155</sup>

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<sup>155</sup> “ชาวเลแหลมตึกแก วันนี้อย่างหวาดผวา,” คมชัดลึก, August 9, 2015, <http://www.komchadluek.net/detail/20150809/211225.html>.



**Figure 4- 11.** His Majesty King Bhumibol Adulyadej visited the Chaoley village at Lawai Beach on March, 10, 1959

Source: “พระมหากษัตริย์คุณต่อชาติพันธุ์ชาวไทยใหม่,” accessed March 16, 2016, <http://123.242.171.10/pokpong/thaimai.htm>. accessed March 16, 2016, <http://123.242.171.10/pokpong/thaimai.htm>.

#### 4.4.2 The Loy Rua and Pla Jak Festivals: Worship of the Ancestors and Gods of the Sea

Apart from their unique language and traditional lifestyle, all sea gypsy communities have an important tradition that has been passed down through many generations called *Loy Rua* – a floating boat festival.<sup>156</sup> Celebrated for three days and nights twice a year, this festival occurs during the full moon on the sixth and eleventh months of the lunar calendar. The main purpose of this festival is to gather all sea gypsies in order to pay respect to their ancestors and to ask for forgiveness from the Gods of the Sea if they have committed any offenses against the sea.

In the belief that taking part in this festival will bring happiness into their lives, all sea gypsies have their responsibilities. During the midday, a group of male *Urak Lawoi* will

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<sup>156</sup> Note that the Loy Rua festival may be called and performed differently depending on the local context. For example, the Chaolay community at Laem Tukay (Ko Sile in Phuket Province) will have a Loy Rua festival similar to that of the Urak Lawoi community on Ko Lipe in Satun Province, whereas the Urak Lawoi community at Rawai Beach in Phuket Province celebrate Pla Jak, during which they will build a Balai – altar- instead of a floating boat. Nevertheless, the main goal of this festival, however it is called and however it is performed, is to respect to their ancestors and request forgiveness from the Gods of the Sea.

voluntarily build a symbolic boat made from silica palms and blackboard trees, and the female *Urak Lawoi* will decorate the boat with flowers at night (see Figure 4-12). The boat will be adorned with three main sculptures. First, a carved bird at the head of the boat, which symbolizes *Toh Burong*, their ancestor who had the power to stop rain and storms; second, a serrated pattern along the boat symbolizing *Toh Bigong*, their ancestor who was a shark; and, third, a snake pattern symbolizing *Toh Ako Berantai*, their ancestor who was a snake (see Figure 4-13).<sup>157</sup>



**Figure 4- 12.** A group of male Urak lawoi make a model boat, *Aree Plajak*, and the female Urak Lawoi decorates it, at Ko Lanta in Krabi Province (the Toh Balew Community)

Source: “ลอยเรืออารีปาจัก วัฒนธรรมที่สืบทอดของชาวเล,” *Manager Online*, October 20, 2013, <http://manager.co.th/Travel/ViewNews.aspx?NewsID=9560000131477>.

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<sup>157</sup> “ลอยเรืออารีปาจัก วัฒนธรรมที่สืบทอดของชาวเล,” *Manager Online*, October 20, 2013, <http://manager.co.th/Travel/ViewNews.aspx?NewsID=9560000131477>.



**Figure 4- 13.** Ceremonial boats made by sea gypsies in Ko Lanta

*Source:* “Urak Lawoi Sea Gypsies Festival,” Asia Backpackers, May 5, 2015, <http://asia-backpackers.com/urak-lawoi-sea-ypsies-festival/>

Furthermore, several things that represent themselves and the wealth they hope for (for example, wooden statues, nail parings, hairs, popped rice, and food) will be placed in the vessel. These symbols are employed in the belief that the boat will carry evil and misfortune out of the village when it floats away.<sup>158</sup> This festival for sea gypsies is not only a way of worshiping their ancestors and the Gods of the Sea; it also represents their personal dignity and communal identity. Currently, the Loy Rua festival is promoted and preserved as part of sea gypsies’ culture and identity, and it has attracted many tourists from around the world, including the local Thais. In this respect, the festival in Ko Lanta in Krabi Province is especially popular.

Most sea gypsies are still having an animistic worldview, and the *Loy Rua* festival reveals the norms and practices of their animistic beliefs, their cultural authenticity, and the role of shamanism in their community. For them, the festival has deep symbolic meaning and is not

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<sup>158</sup> “Urak Lawoi Sea Gypsies Festival,” Asia Backpackers, May 5, 2015, <http://asia-backpackers.com/urak-lawoi-sea-ypsies-festival/>; Granbom, “Urak Lawoi-A Field Study of an Indigenous People in Thailand and Their Problems with Rapid Tourist Development,” 52.

merely a social gathering. Since sea gypsies believe in life after death, their identification cards say their religion is Buddhism; but their core beliefs and practices are concerned with the spirits of their ancestors and angels, who they believe protect them from bad luck.<sup>159</sup> One of the members of the Rawai *Urak Lawoi* community, who has lived in the village his entire life, says, “There are many important ceremonies for us and we are taught to keep them sternly. Mainly, the ceremonies are about paying respect to ancestors, spiritual teachers, and other respectful spirits.”<sup>160</sup>

### ***The Role of the Shaman in Loy Rua Festival***

In the course of the *Loy Rua* festival and ceremony, the shaman of the village, or so-called *Da Toh*, or *Toh*, or *Tohmor*, will play his role in connecting the human world and the world of the dead by leading a ritual that invites the spirits of the ancestors to join the place of worship (see Figure 4-14). Before paying respect to the ancestors, he will lead villagers in paying respect to the guardian goddess of boats or *Mae Ya Nang*, and then he leads everyone to the village graveyard.<sup>161</sup> Also, music and the Rong Ngeng dances will be performed throughout the three days and nights of the ceremony. The Asian rammana drum, gong, and violin are the main instruments used to play European folk songs, mixed with local songs and Muslim lullabies, with lyrics in the Maylay language that are preserved in memory and passed from one generation to

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<sup>159</sup> Nattha Thepbamrung, “Phuket Community: Culture : Changing Tides for Phuket’s Sea People,” The Phuket News Com, April 11, 2014, <http://www.thephuketnews.com/culture-changing-tides-for-phuket-sea-people-49429.php>.

<sup>160</sup> Ibid.

<sup>161</sup> Nattha Thepbamrung, “Phuket Community.”

the next.<sup>162</sup>



**Figure 4- 14.** A place of worship (a traditional spirit house) at the village graveyard (upper left). *Datoh* or *Toh*, a local shaman who can connect two worlds and who leads the rite (upper right). A worship place with three statues that represent three important ancestors of the sea gypsies (below).

Source: “ลอยเรืออาร์ปจัก วัฒนธรรมที่สืบทอดของชาวเล,” Manager Online, October 20, 2013, <http://manager.co.th/Travel/ViewNews.aspx?NewsID=9560000131477>.

In an interview with Thepbamrung, a Rawai *Urak Lawoi* informant, a reporter depicts a role of *Toh* in leading a rite of the Pla Jak festival as follows:

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<sup>162</sup> “Urak Lawoi Sea Gypsies Festival.”; ผู้พิทักษ์เกาะ, *พิธีลอยเรือชาวเล สังก้าว* 1.mpg, 2012, [https://www.youtube.com/watch?v=n5h4Rltp\\_l8](https://www.youtube.com/watch?v=n5h4Rltp_l8). (in Thai); CitizenThaiPBS, *ประเพณีปลากัง ภูเก็ต* (2-21-2012), accessed February 17, 2016, <https://www.youtube.com/watch?v=w6dAYPHSkDU>. (in Thai)

The shaman will prepare everything on the table, to worship the ancestors while praying at the same time in an ancient sea gypsy language, which he learned from his teacher. [...] The villagers have to prepare rice mixed with turmeric and grilled chicken while the shaman has to prepare candles, popped rice, white chicken, betel, dried leaves of the nipa palm and clea[n] water. ... [*Toh*] will start the ceremony at around 2 a.m. He will prepare coconut flowers, betel flowers, silver and gold (artificial) leaves, raw rice, gum benzoin, candles and a knife, while the villagers have to prepare three lemons, three kaffir lime, two betel leaves, seven different colors of string, a candle and a B1 coin, which used to just be a copper coin with a hole in the middle. ... They [villagers] each have a water jar. After the ceremony they will take a shower in the water [holy water], to expel all bad things from themselves, then they must turn the jar upside down before the ceremony ends. Afterwards, the villagers will get white flags and rice from Balai. They must keep the white flag at home and scatter rice around the house for three days for good fortune.<sup>163</sup>

Having experienced the integration policy, national schooling system, and a wave of modernization, sea gypsies today are worried about their future and about whether they can preserve their identity and avoid assimilation to the modern world. Lacking equal opportunities to access their collective rights and their rights to preserve their culture, they do not want to be perceived by outsiders as poor and uneducated Thai people, but as authentic indigenous peoples. Grandbom writes: “If they chose not to be *Urak Lawoi*, the rapid tourist development would soon acclimatize them into Thai people and outsiders would look upon them as poor Thai people.”<sup>164</sup> Not wanting to be invisible in their own land, they are fighting for their freedom of choice, their rights to land and the preservation of their culture. In order to achieve these goals, they need to be recognized as citizens who can take part in the democratic system of government.

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<sup>163</sup> Nattha Thepbamrung, “Phuket Community.”

<sup>164</sup> Grandbom, “Urak Lawoi-A Field Study of an Indigenous People in Thailand and Their Problems with Rapid Tourist Development,” 33, 70–71.

#### **4.5. Concluding Remarks**

This chapter presents the relationship between modern commerce and traditional culture. It examines how tourism has changed the lives of indigenous Andaman sea gypsies in Thailand. In the name national development and modernization, sea gypsies are faced with the impact of protected marine national parks, the privatization and industrialization of land ownership, and tourism infrastructure projects. Since they live in areas rich in natural resources, which have become targets of resource extraction and tourism development by the government and businesses, their lands, territories, and resources are exploited. Most importantly, they are in danger of losing their traditional livelihood, culture and identity.

Globally, the United Nations General Assembly adopted the UNDRIP, which aims at protecting indigenous peoples and their rights to self-determination, their collective rights, and their basic human rights. Thus, indigenous peoples in ASEAN member states have acquired legal protections, since all ASEAN member states are parties to the UNDRIP. However, in practice, several ASEAN states still fail to fully implement the principles they have pledged to follow.

In light of domestic Thai law and policy, the Draft Act of Indigenous Peoples and Ethnic Groups Assembly of Thailand, which reinforces the spirit and principles of the Interim Constitution and the UNDRIP, and two cabinet resolutions that restore the traditional livelihood of Karen and Chao Lay in 2010, one might say that the indigenous sea gypsies are receiving more effective protection. But although their rights have been recognized in all these various ways, effective implementation remains problematic, and sea gypsies remain vulnerable to dispossession and land grabbing, as evidenced by their having several cases under court reviews, such as the Rawai Beach case.

Indigenous peoples remain part of the most marginalized sector in the country. Although Thailand has committed herself to several international human rights laws and to principles of social justice, it is time to make these principles truly effective by enabling indigenous people to participate fully in the democratic system of government.

## Chapter 5 Conclusion

The social impacts of trade liberalization and globalization have characterized the latter half of the twentieth century. Global trade governance, used in a broad sense to include legal rules and trade norms, has emerged with regard to the protection of labor, human rights, environment and culture. In order to examine the social dimensions of trade in Southeast Asia, this study has presented three contemporary problems that illustrate non-trade issues and the three trade-related aspects of labor, the environment, and culture through the lens of global-regional-national perspectives. The selected problems cover: (1) pirate fishing and modern slavery in the Thai fishing industry as an illustration of trade-related aspect of labor; (2) illegal Siamese rosewood logging and trade in the Greater Mekong sub-region as an illustration of the trade-related aspect of the environment; and (3) tourism development and the struggles of Andaman sea gypsies as an illustration of the trade-related aspect of culture. All these problems and trade-related aspects involve the idea that laws themselves are products formed and shaped by social forces, interests, and beliefs.

Each aspect poses its own problems, and involves various international/global laws, regional responses, domestic laws, policies and practices, and features of global trade governance. Pirate fishing and modern slavery in the Thai fishing industry are practices that have arisen in response to the high global demand for cheap seafood, IUU fishing methods, inadequate Thai fisheries management and systematic disincentives. The UN, IMO and ILO have developed several international instruments and legal mechanisms to increase the traceability and transparency of fishing practices. ASEAN and Thailand have also responded to this global problem through several cooperative efforts, legal actions and policies.

In a case of illegal Siamese rosewood logging and trade, international cooperation is the key feature of global trade governance. CITES has played a key role in encouraging regional cooperation and governing the case. At the same time, the EU has aided ASEAN in developing regional standards for timber legality and certification through EU-FLEGT and VPA trade agreements. Although Thailand and Vietnam have successfully placed Siamese rosewood in CITES-Appendix II for protection, some legal loopholes still remain in practice. This problem requires further steps, strong political will and cooperation among ASEAN range states.

With regard to the trade-related aspect of culture, the tourism industry and land encroachment have brought severe stressors upon Andaman sea gypsies. The Andaman sea gypsies are assimilating slowly to the mainstream culture and losing their traditional nomadic lifestyle. Despite the fact that all ASEAN states are parties to the 2007 UNDRIP, and the Thai Cabinet Resolution has restored the sea gypsies' traditional livelihood, the problem persists due to the lack of legal status recognition and participation. At this stage, these two features of trade governance are the most crucial to halt the disintegration of the sea gypsies' way of life and culture.

This study has also addressed and discussed the external perspectives of law to better understand the interactions between the impact of globalization and legal adaptations and developments in each area. We have seen how external political pressure from the EU and the US have influenced and shaped Thai laws, policies and practices in tackling the problem of pirate fishing and modern slavery in the Thai fishing industry; how the belief of Chinese consumers toward *Hongmu* furniture could drive the timber market and leads to the illegal logging and trade of Siamese rosewood; and how the historical and institutional contexts of

Andaman sea gypsies have constructed their culture and traditional nomadic life style, which deserve to be preserved and protected. Thus, we cannot understand clearly how ASEAN and Thai laws, policies and practices are formed if we ignore the external factors, such as how the EU Yellow card and the US TIP report play their roles. We cannot understand why Siamese rosewood is in such high demand and why its price has skyrocketed within a decade if we disregard the institutional and historical context of *Hongmu* furniture. And we cannot understand why certain lands are significant to indigenous sea gypsies and communities if we pay no attention to their identity, norms and culture. Considering all these aspects broadens our understanding of the social, cultural, political and economic contexts in which law can and should operate in practice in order to strengthen global trade governance regarding these trade-related issues in Southeast Asia.

To understand the social dimensions of trade through global-regional-national-local views, this study examines the topic by applying qualitative research methods to draw an analytic generalization as well as a legal normative proposition regarding ASEAN's response to global trade governance. To increase the awareness of social-trade justice in the three trade-related aspects of labor, the environment, and culture among jurists, legal-policy scholars and practitioners in Southeast Asia, this study contends that ASEAN should address and institutionalize global trade governance by developing the capacity of ASEAN legal institutions and improving the ASEAN social policy, ASEAN Social Charter and other similar instruments with regard to the protections of labor, the environment and culture. This will not only enhance democracy, good governance and the rule of law in the region, but also pave the way for ASEAN regional stability and sustainability, which are the underlying principles and purposes stated in the ASEAN Charter.

Since this study is based on a problem-based approach and factually-contextual analysis of three particular problems and the three trade-related aspects of labor, the environment and culture, it does not cover other problems and areas of trade linkages. Thus, each problem is a non-representative sample selected from the full range of non-trade issues and trade-related aspects in Southeast Asia. The findings cannot represent all non-trade issues as a whole. Other pressing problems, for example, the problems of child labor and migrant workers in construction and household businesses, the illegal trade of ivory, shark, tiger, snake, and tropical herbs, and other trade-related aspects in Southeast Asia such as trade and corruption, trade and health, trade and intellectual property, trade and public procurement, to name a few, should be further discussed and examined.

As stated previously, this study takes its orientation from the legal realism school of thought and sociolegal studies, which focuses on how law operates in practice and in reality. Thus, this study aims to lend support to the idea that law is not and should not be autonomous. Simply put, law does not stand on its own and cannot be understood in abstraction from the society in which it operates. So this study may help and guide other legal scholars or legal-policy makers who are interested in law and society and law in action, and who are studying other legal topics regarding non-trade issues or other areas of legal studies. Approaching this topic, among others, by drawing on sociology, economics, cultural studies and other modes of analysis drawn from the social-science disciplines could render further work in this area more challenging and more effective in promoting the reforms that are needed to address many pressing problems more adequately.

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**Appendix A คำสั่งหัวหน้าคณะรักษาความสงบแห่งชาติที่ ๑๐/๒๕๕๘ เรื่อง  
การแก้ไขปัญหาการทำประมงผิดกฎหมาย ขาดการรายงาน และไร้การ  
ควบคุม (The National Council for Peace and Order, Order No. 10/2558:  
Solutions of Illegal, Unreported and Unregulated (IUU) Fishing)**

## คำสั่งหัวหน้าคณะรักษาความสงบแห่งชาติ

ที่ ๑๐/๒๕๕๘

เรื่อง การแก้ไขปัญหาการทำการประมงผิดกฎหมาย ขาดการรายงาน และไร้การควบคุม

จากการที่ประเทศไทยได้รับการประกาศเตือนจากสหภาพยุโรปถึงการจับให้มีมาตรการในการป้องกัน ยับยั้ง และจัดการทำการประมงผิดกฎหมาย ขาดการรายงาน และไร้การควบคุม (Illegal, Unreported and Unregulated Fishing : IUU Fishing) ซึ่งหากไม่มีการแก้ไขปัญหาอย่างจริงจังโดยเร่งด่วนภายในหกเดือน อาจมีผลกระทบต่อ การส่งออกสินค้าสัตว์น้ำของประเทศไทยในอนาคตและความมั่นคงของประเทศไทย ในภาพรวม ดังนั้น เพื่อให้สามารถเร่งดำเนินการแก้ไขปัญหาให้การทำการประมงสามารถดำเนินการ ได้อย่างยั่งยืนและเป็นระบบ และยกระดับมาตรฐานการประมงของประเทศไทยให้สอดคล้องกับ มาตรฐานสากล รวมทั้งเพื่อบรรเทาความเดือดร้อนของผู้ประกอบการประมง อุตสาหกรรมต่อเนื่อง และผู้มีส่วนได้ส่วนเสีย หากมีได้มีการป้องกันและแก้ไขโดยเร่งด่วน จะมีผลกระทบต่อความมั่นคง ทางเศรษฐกิจของประเทศได้ เพื่อดำเนินการป้องกันและแก้ไขปัญหาดังกล่าว อาศัยอำนาจตามความใน มาตรา ๔๔ ของรัฐธรรมนูญแห่งราชอาณาจักรไทย (ฉบับชั่วคราว) พุทธศักราช ๒๕๕๗ หัวหน้าคณะรักษา ความสงบแห่งชาติ โดยความเห็นชอบของคณะรักษาความสงบแห่งชาติจึงมีคำสั่ง ดังต่อไปนี้

ข้อ ๑ ให้จัดตั้ง “ศูนย์บัญชาการแก้ไขปัญหาการทำการประมงผิดกฎหมาย” (Command Center for Combating Illegal Fishing) เรียกโดยย่อว่า ศปมผ. (CCCIF) เป็นศูนย์เฉพาะกิจ ขึ้นตรงกับนายกรัฐมนตรี โดยมีผู้บัญชาการทหารเรือเป็นผู้บัญชาการศูนย์บัญชาการแก้ไขปัญหาการทำการประมงผิดกฎหมาย (ผบ.ศปมผ.) และทั้งนี้ ให้ ศปมผ. เริ่มปฏิบัติการตามคำสั่งนี้ ตั้งแต่วันที่ ๑ พฤษภาคม พ.ศ. ๒๕๕๘

ข้อ ๒ ศปมผ. มีโครงสร้างการปฏิบัติการดังต่อไปนี้

(๑) ให้คณะกรรมการนโยบายแก้ไขปัญหาการค้ามนุษย์และการทำประมงผิดกฎหมาย ซึ่งจัดตั้งขึ้นตามคำสั่งสำนักนายกรัฐมนตรี ที่ ๕๒/๒๕๕๘ ลงวันที่ ๑๗ กุมภาพันธ์ พุทธศักราช ๒๕๕๘ ทำหน้าที่กำหนดนโยบายและแนวทางปฏิบัติในระดับรัฐบาล

(๒) ให้กองทัพเรือ และศูนย์ประสานการปฏิบัติในการรักษาผลประโยชน์ของชาติทางทะเล (ศรชล.) ซึ่งจัดตั้งโดยมติสภาความมั่นคงแห่งชาติ เมื่อวันที่ ๑๐ มกราคม พ.ศ. ๒๕๕๐ และมติคณะรัฐมนตรี เมื่อวันที่ ๑๗ เมษายน พ.ศ. ๒๕๕๐ และวันที่ ๙ มกราคม พ.ศ. ๒๕๕๑ ทำหน้าที่เป็นหน่วยงานหลักของ ศปมผ. ในการปฏิบัติการทางทะเลและชายฝั่ง และปฏิบัติงานร่วมกับหน่วยงานอื่นที่เกี่ยวข้อง

(๓) ให้มีศูนย์ควบคุมการแจ้งเรือเข้า - ออก (Port In - Port Out Controlling Center) และศูนย์ให้บริการและอำนวยความสะดวกแก่เรือประมงแบบเบ็ดเสร็จ (Fishing One Stop Service) ประจำในแต่ละจังหวัดชายทะเล ทั้งนี้ ตามที่ ศปมผ. ประกาศกำหนด

ข้อ ๓ ให้ ศปมผ. มีอำนาจหน้าที่ดังต่อไปนี้

(๑) กำหนดแนวทางของไทยและจัดทำแผนปฏิบัติการแห่งชาติในการแก้ไขปัญหาการทำการประมงผิดกฎหมาย ขาดการรายงาน และไร้การควบคุม (Thailand's National Plan of Action to Prevent, Deter and Eliminate IUU Fishing, NPOA - IUU) ตลอดจนกำกับดูแลการปฏิบัติให้เป็นไปตามแผนนั้น รวมถึงดำเนินงานทำความเข้าใจกับสหภาพยุโรป

(๒) ควบคุม สั่งการ กำกับดูแล และประสานการปฏิบัติการทั้งปวงของกระทรวงเกษตรและสหกรณ์ กระทรวงคมนาคม กระทรวงมหาดไทย กระทรวงแรงงาน สำนักงานตำรวจแห่งชาติ และส่วนราชการอื่นที่เกี่ยวข้องกับการแก้ไขปัญหาการทำการประมงผิดกฎหมาย ขาดการรายงาน และไร้การควบคุม

(๓) พิจารณาเสนอแนะ ปรับปรุง แก้ไขเพิ่มเติม รวมทั้งพัฒนากฎหมาย กฎ ระเบียบ ที่เกี่ยวข้องกับการแก้ไขปัญหาการทำการประมงผิดกฎหมายให้เป็นมาตรฐานสากล โดยเฉพาะอย่างยิ่งการป้องกันการทำประมงผิดกฎหมายและบทลงโทษที่เหมาะสม

(๔) กำหนดโครงสร้างและอัตรากำลังของ ศปมผ. โดยในโครงสร้างนี้ต้องกำหนดให้มีศูนย์ควบคุมการแจ้งเรือเข้า - ออก รวมถึงศูนย์ให้บริการและอำนวยความสะดวกแก่เรือประมงแบบเบ็ดเสร็จประจำในแต่ละจังหวัดชายทะเล

(๕) แต่งตั้งเจ้าหน้าที่ที่จะปฏิบัติงานใน ศปมผ. จากข้าราชการหรือผู้ปฏิบัติงานในส่วนราชการต่าง ๆ ได้ตามความเหมาะสม

(๖) แต่งตั้งคณะกรรมการ คณะอนุกรรมการ และคณะทำงาน เพื่อดูแลรับผิดชอบเรื่องใดเรื่องหนึ่ง โดยเฉพาะได้ตามความเหมาะสม

(๗) เชิญผู้ทรงคุณวุฒิ ข้าราชการ เจ้าหน้าที่หน่วยงานของรัฐ หรือภาคเอกชน รวมทั้งหน่วยงานอื่น ๆ ที่เกี่ยวข้อง และผู้มีส่วนได้ส่วนเสีย เพื่อร่วมประชุมแนวทางการดำเนินงาน ประสานการปฏิบัติ และติดตามผลการดำเนินงานตามความเหมาะสม

(๘) ประสานกับหน่วยงานที่เกี่ยวข้องเพื่อเร่งยกระดับความร่วมมือกับประเทศที่สาม โดยเฉพาะประเทศที่เรือที่ซัดธงไทยเข้าไปทำการจับปลาในน่านน้ำของประเทศนั้น เพื่อให้สอดคล้องกับพันธกรณีระหว่างประเทศ

(๙) รายงานผลการปฏิบัติให้หัวหน้าคณะรักษาความสงบแห่งชาติทราบอย่างต่อเนื่อง จนกว่าสหภาพยุโรปได้ยกเลิกประกาศเตือนประเทศไทยว่าเป็นประเทศที่ไม่มีมาตรการอย่างเพียงพอ ในการป้องกัน ยับยั้ง และจัดการทำประมงผิดกฎหมาย ขาดการรายงาน และไร้การควบคุม

(๑๐) ปฏิบัติการอื่นตามที่นายกรัฐมนตรีมอบหมาย

ข้อ ๔ ให้ ศรชล. มีอำนาจหน้าที่ดังต่อไปนี้

(๑) จัดตั้งหน่วยเฉพาะกิจขึ้นใน ศรชล. ประกอบด้วยกำลังทั้งเรือ อากาศยาน และเจ้าหน้าที่ที่เกี่ยวข้องจากหน่วยงานต่าง ๆ ใน ศรชล. ปฏิบัติงานในแต่ละพื้นที่เพื่อบังคับใช้กฎหมายในทะเล และควบคุมการปฏิบัติต่าง ๆ ให้เป็นไปตามที่ ศปมผ. ประกาศกำหนดโดยเร็วที่สุด

(๒) ควบคุมและสั่งการหน่วยงานที่มาปฏิบัติการภายใต้ ศรชล.

(๓) บูรณาการข้อมูลข่าวสารทางทะเลที่เกี่ยวข้อง โดยให้หน่วยงานที่เกี่ยวข้องเชื่อมต่อข้อมูลผ่านระบบสารสนเทศ เพื่อให้เกิดการตระหนักรู้ภาพสถานการณ์ทางทะเล

(๔) จัดเจ้าหน้าที่ปฏิบัติหน้าที่ประจำในศูนย์แลกเปลี่ยนข้อมูลข่าวสารทางทะเล (ศขท.) จากหน่วยงานต่าง ๆ ใน ศรชล. ปฏิบัติหน้าที่เฝ้าติดตาม พิสูจน์ทราบ และตรวจสอบพฤติกรรมการทำประมงผิดกฎหมายของเรือประมง โดยปฏิบัติหน้าที่เป็นศูนย์ติดตาม ควบคุม และเฝ้าระวัง (Monitoring Control and Surveillance Center : MCS) ด้วย เพื่อให้ระบบการตรวจสอบย้อนกลับ (Traceability System) มีความครบถ้วนสมบูรณ์โดยเร็วที่สุด

(๕) ปฏิบัติการอื่นตามที่ ศปมผ. มอบหมาย

ข้อ ๕ ให้สำนักงบประมาณพิจารณาจัดสรรงบประมาณให้กับ ศปมผ. และ ศรชล. เพื่อสนับสนุนการปฏิบัติงาน โดยเบิกค่าใช้จ่ายตามระเบียบของทางราชการ

ข้อ ๖ ให้เจ้าของหรือผู้ประกอบการเรือประมง เรือบรรทุกสินค้าประมงห้องเย็น ตลอดจนยานพาหนะทางน้ำทุกชนิดที่ใช้ทำการประมง ขนถ่ายหรือเก็บรักษาสัตว์น้ำที่ได้จากยานพาหนะทางน้ำทุกชนิดที่ใช้ทำการประมง ที่มีขนาดตั้งแต่ ๓๐ ตันกรอสส์ขึ้นไป หรือตามขนาดที่ ศปมผ. ประกาศกำหนด ต้องดำเนินการดังต่อไปนี้

(๑) จัดทำสมุดบันทึกการทำการประมง ตามรูปแบบ ระยะเวลา และวิธีการที่ ศปมผ. ประกาศกำหนด

(๒) ติดตั้งระบบติดตามเรือประมง (Vessel Monitoring System : VMS) ซึ่งมีมาตรฐานสมรรถนะของอุปกรณ์และข้อกำหนดเชิงหน้าที่ (Performance Standards and Functional Requirements) ตามที่ ศปมผ. ประกาศกำหนด โดยจะต้องติดตั้งให้เสร็จสิ้นภายในระยะเวลาตามที่ ศปมผ. ประกาศกำหนด

(๓) แจ้งการเข้า-ออก ท่าเทียบเรือทุกครั้ง ณ ศูนย์ควบคุมการแจ้งเรือเข้า-ออก ตามหลักเกณฑ์และวิธีการที่ ศปมผ. ประกาศกำหนด

เมื่อได้ดำเนินการติดตั้ง VMS แล้ว ให้เจ้าของเรือหรือผู้ประกอบการตามวรรคหนึ่ง แจ้งรหัสการเข้าถึงระบบการติดตามเรือ (Access Code) ให้ ศปมผ. ทราบ และต้องเปิดเครื่องไว้ตลอดเวลาขณะอยู่ในทะเล เพื่อให้เจ้าหน้าที่สามารถติดตามตำแหน่งที่เรือได้ ในกรณีที่อุปกรณ์ดังกล่าวขัดข้องหรือไม่สามารถส่งตำแหน่งที่เรือได้ด้วยประการใด ๆ ให้ปฏิบัติตามแนวทางที่ ศปมผ. ประกาศกำหนด

เจ้าของหรือผู้ประกอบการตามวรรคหนึ่ง ต้องเป็นผู้รับผิดชอบค่าใช้จ่ายในการเข้าระบบเพื่อตรวจสอบจุดพิกัดของเรือ

ข้อ ๗ ให้นำทะเบียนเรือตามกฎหมายว่าด้วยเรือไทยมีค่าสิ่งเพิกถอนทะเบียนเรือไทยสำหรับการประมงหรือเรืออื่นตามที่ ศปมผ. ประกาศกำหนด และจำหน่ายทะเบียนเรือออกจากสมุดทะเบียนในกรณีดังต่อไปนี้

(๑) เมื่อมีเหตุใดเหตุหนึ่งตามที่ระบุไว้ในมาตรา ๒๒ แห่งพระราชบัญญัติเรือไทย พุทธศักราช ๒๕๘๑

(๒) เจ้าของเรือแสดงความประสงค์เป็นหนังสือขอเลิกใช้ทะเบียนเรือไทยต่อนายทะเบียนเรือ

(๓) เรือไทยที่ได้จดทะเบียนแล้วแต่ไม่ได้รับใบอนุญาตใช้เรือ หรือใบอนุญาตใช้เรือสิ้นอายุ เป็นเวลาต่อเนื่องกันตั้งแต่สามปีขึ้นไป

เมื่อได้มีคำสั่งตามวรรคหนึ่ง ให้นายทะเบียนเรือแจ้งเป็นหนังสือให้เจ้าของเรือส่งคืนใบทะเบียนเรือ ภายในสามสิบวันนับแต่วันที่ได้รับแจ้งเป็นหนังสือจากนายทะเบียนเรือ

ข้อ ๘ เพื่อประโยชน์ในการแก้ปัญหาการทำประมงผิดกฎหมาย ขาดการรายงาน และไร้การควบคุม ห้ามมิให้เจ้าของเรือหรือผู้ประกอบการเรือประมงยินยอมให้บุคคลใด ๆ กระทำการ ดังต่อไปนี้ในเรือประมงของตน

(๑) ครอบครองเครื่องมือทำการประมงที่ไม่ได้รับอนุญาตในเรือประมง

(๒) นำเรือประมงซึ่งมีเครื่องมือทำการประมงที่ไม่ถูกต้องตรงกับเครื่องมือที่ได้รับอนุญาต หรือไม่ได้รับอนุญาตหรือเครื่องมือทำการประมง ออกจากท่าเทียบเรือไปทำการประมง

(๓) นำเรือประมงซึ่งปฏิบัติไม่ครบถ้วนตามกฎหมายว่าด้วยการเดินเรือในน่านน้ำไทย กฎหมายว่าด้วยเรือไทย กฎหมายว่าด้วยการคุ้มครองแรงงาน และกฎหมายว่าด้วยคนเข้าเมืองออกจากท่าเทียบเรือจนกว่าจะปฏิบัติตามกฎหมายเหล่านั้นให้ครบถ้วน

ข้อ ๙ ห้ามมิให้ผู้ใดใช้เรือประมงออกไปทำการประมงในน่านน้ำของรัฐต่างประเทศ และในทะเลหลวง หรือนำเรือบรรทุกสินค้าประมงห้องเย็น ออกไปน่านน้ำต่างประเทศ เว้นแต่จะได้รับอนุญาตจาก ศปมผ. ตามหลักเกณฑ์ วิธีการ และเงื่อนไขที่ ศปมผ. ประกาศกำหนด

การอนุญาตตามวรรคหนึ่ง ศปมผ. อาจมอบหมายให้หน่วยงานที่เกี่ยวข้องเป็นผู้อนุญาตแทนได้

ข้อ ๑๐ ห้ามมิให้ผู้ใดใช้เรือประมงออกไปทำการประมงในน่านน้ำของรัฐต่างประเทศ และในทะเลหลวงโดยฝ่าฝืนกฎข้อบังคับด้านการประมงของรัฐชายฝั่งที่เข้าไปทำการประมงหรือขององค์กรจัดการประมงระดับภูมิภาค

ข้อ ๑๑ ผู้ใดประสงค์จะนำเรือประมง เรือบรรทุกสินค้าประมงห้องเย็น ตลอดจน ยานพาหนะทางน้ำทุกชนิดทุกขนาดที่ใช้ทำการประมง ขนถ่ายหรือเก็บรักษาสัตว์น้ำที่ได้จากยานพาหนะ ทางน้ำทุกชนิดที่ใช้ทำการประมง ออกนอกน่านน้ำไทยหรือเดินทางมาจากน่านน้ำต่างประเทศหรือทะเลหลวง เข้ามาในราชอาณาจักร ต้องออกจากท่าเรือหรือเข้าจอดเรือ ณ ท่าเรือหรือแพปลาที่ ศปมผ. ประกาศกำหนด

ข้อ ๑๒ ห้ามมิให้ผู้ใดนำเรือประมงต่างประเทศ หรือเรือบรรทุกสินค้าประมงห้องเย็นที่อยู่ใบบัญชีเรือที่ห้ามเข้ามาในราชอาณาจักรตามที่ ศปมผ. ประกาศกำหนด เข้ามาเทียบท่าในราชอาณาจักร

ข้อ ๑๓ เจ้าของท่าเรือและเจ้าของแพปลาในทุกจังหวัดชายทะเล รวมถึงตามเกาะแก่งต่าง ๆ ต้องจัดบันทึกข้อมูลเกี่ยวกับเรือประมง เรือบรรทุกสินค้าประมงห้องเย็น ตลอดจนยานพาหนะทางน้ำทุกชนิดทุกขนาดที่ใช้ทำการประมง ขนถ่ายหรือเก็บรักษาสัตว์น้ำที่ได้จากยานพาหนะทางน้ำทุกชนิดที่ใช้ทำการประมงทุกลำที่ใช้ให้บริการจอดเรือหรือขนถ่ายสินค้าสัตว์น้ำเก็บไว้เพื่อการตรวจสอบ

ในกรณีเรือตามวรรคหนึ่ง เป็นเรือที่ต้องปฏิบัติตามข้อ ๑๑ เจ้าของเรือและเจ้าของแพปลาต้องดำเนินการรวบรวมและจัดส่งรายงานการเข้า - ออกเรือ มาที่ศูนย์ควบคุมการแจ้งเรือเข้า - ออกตามหลักเกณฑ์ วิธีการ ที่ สปมผ. ประกาศกำหนด

รายงานตามวรรคหนึ่งต้องกำหนดให้ครอบคลุมกรณีที่เจ้าของหรือผู้ครอบครองเรือปฏิเสธแจ้งการเข้า - ออก ซึ่งเจ้าของท่าเทียบเรือหรือเจ้าของแพปลาจะต้องทำหน้าที่รายงานฝ่ายเดียว

ข้อ ๑๔ ให้ สปมผ. และ ศรชล. แต่งตั้งพนักงานเจ้าหน้าที่เพื่อปฏิบัติการตามคำสั่งนี้

ให้พนักงานเจ้าหน้าที่ซึ่งได้รับการแต่งตั้งตามวรรคหนึ่งมีอำนาจขึ้นตรวจสอบเรือ หรือกักเรือทุกลำที่กระทำความผิดตามที่กำหนดไว้ในคำสั่งนี้ กฎหมายว่าด้วยการเดินเรือในน่านน้ำไทย กฎหมายว่าด้วยเรือไทย กฎหมายว่าด้วยการประมง กฎหมายว่าด้วยสิทธิการประมงในเขตการประมงไทย กฎหมายว่าด้วยการคุ้มครองแรงงาน และกฎหมายอื่นที่เกี่ยวข้องกับการประมงและการเดินเรือ

ในการขึ้นตรวจสอบเรือตามข้อ ๑๒ หากมีเหตุสงสัยว่าเรือดังกล่าวเกี่ยวข้องกับการทำการประมงผิดกฎหมาย ขาดการรายงาน และไร้การควบคุม ให้พนักงานเจ้าหน้าที่มีอำนาจสั่งห้ามการขนถ่ายสัตว์น้ำหรือผลิตภัณฑ์สัตว์น้ำขึ้นจากเรือ และในกรณีที่เรือประมงต่างประเทศจะสั่งให้นำเรือออกไปจากราชอาณาจักรก็ได้ และให้ สปมผ. แจ้งให้รัฐเจ้าของธงและองค์กรจัดการประมงระดับภูมิภาคเพื่อดำเนินการต่อไป

ข้อ ๑๕ พนักงานเจ้าหน้าที่และเจ้าหน้าที่ สปมผ. และ ศรชล. ที่กระทำการไปตามอำนาจหน้าที่โดยสุจริต ไม่เลือกปฏิบัติ และไม่เกินสมควรแก่เหตุ หรือไม่เกินกว่ากรณีจำเป็น ไม่ต้องรับผิดชอบทางแพ่ง ทางอาญา หรือทางวินัย เนื่องจากการปฏิบัติหน้าที่ในการระงับหรือป้องกันการกระทำความผิดกฎหมาย แต่ไม่ตัดสิทธิผู้ได้รับความเสียหายที่จะเรียกร้องค่าเสียหายจากทางราชการ ตามกฎหมายว่าด้วยความรับผิดทางละเมิดของเจ้าหน้าที่

ข้อ ๑๖ ให้ทุกส่วนราชการและหน่วยงานของรัฐที่เกี่ยวข้องบังคับใช้กฎหมายอย่างเคร่งครัด ในการป้องกันปราบปรามผู้กระทำความผิดด้านการทำประมงผิดกฎหมาย ขาดการรายงาน และไร้การควบคุม และปฏิบัติตามแผน NPOA - IUU อย่างมีประสิทธิภาพ และต้องเร่งดำเนินการในเรื่องการจดทะเบียน เรือประมง การออกใบอนุญาตใช้เรือ การต่อใบอนุญาตใช้เรือ การออกอาชญาบัตรและใบอนุญาต ทำการประมงและเอกสารทางราชการอื่น ๆ ที่เกี่ยวข้อง ให้มีประสิทธิภาพเพื่อป้องกันไม่ให้เกิด การกระทำผิด

ข้อ ๑๗ เพื่อให้การปฏิบัติตามคำสั่งนี้เป็นไปอย่างมีประสิทธิภาพ ในกรณีที่เจ้าหน้าที่ ศปมผ. และเจ้าหน้าที่ ศรชล. ได้สั่งการให้ส่วนราชการหรือเจ้าหน้าที่ของรัฐผู้ใดกระทำการหรืองดเว้นกระทำการ อย่างใดอย่างหนึ่งในการปฏิบัติตามคำสั่งนี้ แต่ส่วนราชการหรือเจ้าหน้าที่ของรัฐผู้นั้นเพิกเฉยหรือละเลย ไม่กระทำการหรืองดเว้นกระทำการตามคำสั่งของเจ้าหน้าที่ตามคำสั่งนี้ ให้เจ้าหน้าที่ ศปมผ. หรือเจ้าหน้าที่ ศรชล. รายงานพฤติกรรมดังกล่าวไปยัง ผบ.ศปมผ. และ ผบ.ศรชล. มีอำนาจสั่งย้าย หัวหน้าส่วนราชการแห่งนั้นหรือเจ้าหน้าที่ของรัฐผู้นั้นออกจากพื้นที่รับผิดชอบได้ทันที และให้แจ้ง รัฐมนตรีหรือหน่วยงานของรัฐที่หัวหน้าส่วนราชการหรือเจ้าหน้าที่ของรัฐผู้นั้นสังกัดทราบพร้อมด้วยเหตุผล ในการนี้ ให้รัฐมนตรีหรือหัวหน้าส่วนราชการดำเนินการเพื่อให้หัวหน้าส่วนราชการหรือเจ้าหน้าที่ของรัฐ ผู้นั้นพ้นจากตำแหน่งหน้าที่ หรือพ้นจากการปฏิบัติหน้าที่โดยเร็ว และในกรณีที่มีมูลความผิดทางวินัย ให้ผู้บังคับบัญชาซึ่งมีอำนาจสั่งบรรจุของหัวหน้าส่วนราชการหรือเจ้าหน้าที่ของรัฐผู้นั้นพิจารณาดำเนินการ ตามกฎหมายว่าด้วยการนั้นต่อไป

คำสั่งของ ผบ.ศปมผ. ตามวรรคหนึ่งไม่อยู่ภายใต้บังคับพระราชบัญญัติวิธีปฏิบัติราชการ ทางปกครอง พ.ศ. ๒๕๓๙ และพระราชบัญญัติจัดตั้งศาลปกครองและวิธีพิจารณาคดีปกครอง พ.ศ. ๒๕๕๒

ข้อ ๑๘ ผู้ใดฝ่าฝืนหรือไม่ปฏิบัติตามข้อ ๖ ข้อ ๘ ข้อ ๙ ข้อ ๑๐ และข้อ ๑๑ ต้องระวางโทษจำคุกไม่เกินหนึ่งปี หรือปรับไม่เกินหนึ่งแสนบาท หรือทั้งจำทั้งปรับ

ข้อ ๑๙ ผู้ใดฝ่าฝืนข้อ ๑๒ ต้องระวางโทษปรับไม่เกินสามสิบล้านบาท

ข้อ ๒๐ ผู้ใดฝ่าฝืนหรือไม่ปฏิบัติตามข้อ ๗ วรรคสอง และข้อ ๑๓ ต้องระวางโทษปรับไม่เกิน หนึ่งหมื่นบาท

ข้อ ๒๑ ผู้ใดกระทำความผิดตามที่กำหนดไว้ในคำสั่งนี้ ถ้าได้กระทำความผิดนั้นซ้ำอีก ต้องระวางโทษเป็นทวิคูณ

ข้อ ๒๒ ในกรณีที่เจ้าของหรือผู้ประกอบการเรือประมง เรือบรรทุกสินค้าประมงห้องเย็น ตลอดจนยานพาหนะทางน้ำทุกชนิดที่ใช้ทำการประมง ขนถ่าย หรือเก็บรักษาสัตว์น้ำที่ได้จาก ยานพาหนะทางน้ำทุกชนิด ผ่าฝืนหรือไม่ปฏิบัติตามคำสั่งนี้ นอกจากจะต้องรับโทษตามที่บัญญัติไว้ ตามคำสั่งนี้ ให้ ศปมผ. มีอำนาจสั่งให้มีการยกเลิกเอกสารทางราชการหรือใบอนุญาตที่เกี่ยวข้องกับ กิจกรรมต่าง ๆ ตามที่กำหนดไว้ในคำสั่งนี้ด้วย โดยห้ามมิให้หน่วยงานที่มีอำนาจออกใบอนุญาต ออกเอกสารทางราชการหรือใบอนุญาตให้ใหม่เป็นเวลาหนึ่งปี หรือตามระยะเวลาที่ ศปมผ. ประกาศกำหนด

ข้อ ๒๓ ประกาศของ ศปมผ. ที่ออกตามคำสั่งนี้ เมื่อได้ประกาศในราชกิจจานุเบกษาแล้ว ให้ใช้บังคับได้

ทั้งนี้ นับแต่วันประกาศในราชกิจจานุเบกษาเป็นต้นไป

สั่ง ณ วันที่ ๒๙ เมษายน พ.ศ. ๒๕๕๘

พลเอก ประยุทธ์ จันทร์โอชา

หัวหน้าคณะรักษาความสงบแห่งชาติ

**Appendix B ประกาศคณะรักษาความสงบแห่งชาติ ฉบับที่ ๑๐๖/๒๕๕๗ เรื่อง  
แก้ไขเพิ่มเติมกฎหมายว่าด้วยป่าไม้ (The National Council for Peace and  
Order, Declaration No. 106/2557, Amended the Forest Act B.E. 2484 (1941))**

## ประกาศคณะกรรมการรักษาความสงบแห่งชาติ

ฉบับที่ ๑๐๖/๒๕๕๗

เรื่อง แก้ไขเพิ่มเติมกฎหมายว่าด้วยป่าไม้

โดยที่เป็นการสมควรแก้ไขเพิ่มเติมกฎหมายว่าด้วยป่าไม้ เพื่อปรับปรุงให้เหมาะสมกับสถานการณ์ปัจจุบัน คณะรักษาความสงบแห่งชาติจึงมีประกาศ ดังต่อไปนี้

ข้อ ๑ ให้ยกเลิกความในวรรคหนึ่งของมาตรา ๗ แห่งพระราชบัญญัติป่าไม้ พุทธศักราช ๒๔๘๔ ซึ่งแก้ไขเพิ่มเติมโดยพระราชบัญญัติป่าไม้ (ฉบับที่ ๕) พ.ศ. ๒๕๑๘ และให้ใช้ความต่อไปนี้แทน

“มาตรา ๗ ไม้สัก ไม้ยาง ไม้ชิงชัน ไม้เก็ดแดง ไม้โอเม็ง ไม้พะยุงเกลบ ไม้กระพี้ ไม้แดงจีน ไม้ชะยุง ไม้ซิก ไม้กระซิก ไม้กระซิบ ไม้พะยุง ไม้หมากพลูดักแตน ไม้กระพี้เขาควาย ไม้เก็ดดำ ไม้โอเฒ่า และไม้เก็ดเขาควาย ไม่ว่าจะขึ้นอยู่ที่ใดในราชอาณาจักร เป็นไม้หวงห้ามประเภท ก. ไม้ชนิดอื่นในป่า จะให้เป็นไม้หวงห้ามประเภทใด ให้กำหนดโดยพระราชกฤษฎีกา”

ข้อ ๒ ให้ยกเลิกความในวรรคหนึ่งของมาตรา ๔๘ แห่งพระราชบัญญัติป่าไม้ พุทธศักราช ๒๔๘๔ ซึ่งแก้ไขเพิ่มเติมโดยพระราชบัญญัติป่าไม้ (ฉบับที่ ๕) พ.ศ. ๒๕๑๘ และให้ใช้ความต่อไปนี้แทน

“มาตรา ๔๘ ภายในเขตควบคุมการแปรรูปไม้ ห้ามมิให้ผู้ใดแปรรูปไม้ ตั้งโรงงาน แปรรูปไม้ ตั้งโรงค้ำไม้แปรรูป มีไม้สัก ไม้ยาง ไม้ชิงชัน ไม้เก็ดแดง ไม้โอเม็ง ไม้พะยุงเกลบ ไม้กระพี้ ไม้แดงจีน ไม้ชะยุง ไม้ซิก ไม้กระซิก ไม้กระซิบ ไม้พะยุง ไม้หมากพลูดักแตน ไม้กระพี้เขาควาย ไม้เก็ดดำ ไม้โอเฒ่า และไม้เก็ดเขาควาย แปรรูป ไม่ว่าจำนวนเท่าใดไว้ในครอบครอง หรือมีไม้แปรรูปชนิดอื่นเป็นจำนวนเกิน ๐.๒๐ ลูกบาศก์เมตร ไว้ในครอบครอง เว้นแต่ได้รับอนุญาตจากพนักงานเจ้าหน้าที่ และต้องปฏิบัติตามข้อกำหนดในกฎกระทรวงและในการอนุญาต”

ข้อ ๓ ให้ยกเลิกความในวรรคสองของมาตรา ๖๔ แห่งพระราชบัญญัติป่าไม้ พุทธศักราช ๒๔๘๔ ซึ่งแก้ไขเพิ่มเติมโดยพระราชบัญญัติป่าไม้ (ฉบับที่ ๗) พ.ศ. ๒๕๒๕ และให้ใช้ความต่อไปนี้แทน

“ในกรณีความผิดตามมาตรา ๖๔ นี้ ถ้าไม้ที่มีไว้ในครอบครองเป็น

(๑) ไม้สัก ไม้ยาง ไม้ชิงชัน ไม้เก็ดแดง ไม้โอเม็ง ไม้พะยุงเกลบ ไม้กระพี้ ไม้แดงจีน ไม้ชะยุง ไม้ซิก ไม้กระซิก ไม้กระซิบ ไม้พะยุง ไม้หมากพลูดักแตน ไม้กระพี้เขาควาย ไม้เก็ดดำ ไม้โอเฒ่า ไม้เก็ดเขาควาย หรือไม้หวงห้ามประเภท ข. หรือ

(๒) ไม้อื่นเป็นต้นหรือเป็นท่อนอย่างใดอย่างหนึ่ง หรือทั้งสองอย่างรวมกันเกินยี่สิบตันหรือก่อนหรือรวมปริมาตรไม้เกินสี่ลูกบาศก์เมตร

ผู้กระทำความผิดต้องระวางโทษจำคุกตั้งแต่หนึ่งปีถึงยี่สิบปี และปรับตั้งแต่ห้าหมื่นบาทถึงสองล้านบาท”

ข้อ ๔ ให้ยกเลิกความในวรรคสองของมาตรา ๗๒ ทวิ แห่งพระราชบัญญัติป่าไม้ พุทธศักราช ๒๔๘๔ ซึ่งแก้ไขเพิ่มเติมโดยพระราชบัญญัติป่าไม้ (ฉบับที่ ๖) พ.ศ. ๒๕๒๒ และให้ใช้ความต่อไปนี้แทน

“ในกรณีความผิดตามมาตรา นี้ ถ้าไม้ที่มีไว้ในครอบครองเป็น

(๑) ไม้สัก ไม้ยาง ไม้ชิงชัน ไม้เก็ดแดง ไม้โอเม็ง ไม้พะยุงกลบ ไม้กระพี้ ไม้แดงจีน ไม้ชะยุง ไม้ซิก ไม้กระซิก ไม้กระซิบ ไม้พะยุง ไม้หมากพลูดักแตน ไม้กระพี้เขาควาย ไม้เก็ดดำ ไม้โอเฒ่า ไม้เก็ดเขาควาย หรือไม้หวงห้ามประเภท ข. หรือ

(๒) ไม้อื่นเป็นต้นหรือเป็นท่อนอย่างใดอย่างหนึ่ง หรือทั้งสองอย่างรวมกันเกินห้าตันหรือท่อนหรือรวมปริมาตรไม้ที่ครอบครองเกินหนึ่งลูกบาศก์เมตรหรือไม้ที่ได้แปรรูปแล้วรวมปริมาตรไม้เกินหนึ่งลูกบาศก์เมตร

ผู้กระทำความผิดต้องระวางโทษจำคุกตั้งแต่สองปีถึงสิบห้าปี และปรับตั้งแต่หนึ่งแสนบาทถึงหนึ่งล้านห้าแสนบาท”

ข้อ ๕ ให้ยกเลิกความในวรรคสองของมาตรา ๗๓ แห่งพระราชบัญญัติป่าไม้ พุทธศักราช ๒๔๘๔ ซึ่งแก้ไขเพิ่มเติมโดยพระราชบัญญัติป่าไม้ (ฉบับที่ ๗) พ.ศ. ๒๕๒๕ และให้ใช้ความต่อไปนี้แทน

“ในกรณีความผิดตามมาตรา นี้ ถ้าการกระทำผิดนั้นเกี่ยวกับ

(๑) ไม้สัก ไม้ยาง ไม้ชิงชัน ไม้เก็ดแดง ไม้โอเม็ง ไม้พะยุงกลบ ไม้กระพี้ ไม้แดงจีน ไม้ชะยุง ไม้ซิก ไม้กระซิก ไม้กระซิบ ไม้พะยุง ไม้หมากพลูดักแตน ไม้กระพี้เขาควาย ไม้เก็ดดำ ไม้โอเฒ่า ไม้เก็ดเขาควาย หรือไม้หวงห้ามประเภท ข. หรือ

(๒) ไม้อื่นเป็นต้นหรือเป็นท่อนอย่างใดอย่างหนึ่ง หรือทั้งสองอย่างรวมกันเกินยี่สิบตันหรือท่อนหรือรวมปริมาตรไม้เกินสี่ลูกบาศก์เมตร หรือไม้ที่ได้แปรรูปแล้วรวมปริมาตรไม้เกินสองลูกบาศก์เมตร

ผู้กระทำความผิดต้องระวางโทษจำคุกตั้งแต่หนึ่งปีถึงยี่สิบปี และปรับตั้งแต่ห้าหมื่นบาทถึงสองล้านบาท”

ข้อ ๖ ให้ยกเลิกความในลำดับที่ ๕๓ ในช่องประเภท ก. ไม้หวงห้ามธรรมดา ของบัญชีท้ายพระราชกฤษฎีกากำหนดไม้หวงห้าม พ.ศ. ๒๕๓๐

ทั้งนี้ ตั้งแต่บัดนี้เป็นต้นไป

ประกาศ ณ วันที่ ๒๑ กรกฎาคม พุทธศักราช ๒๕๕๗

พลเอก ประยุทธ์ จันทร์โอชา

หัวหน้าคณะรักษาความสงบแห่งชาติ

## **Vita**

Watcharachai Jirajindakul earned his LL.B. and LL.M. (International Law) at Thammasat University Bangkok, Thailand, in 2002 and 2008. After practicing law and working as a researcher for five years, he went to study law and economics at the University of Hamburg and received European Master in law and economics (EMLE) in 2010. Since 2011, he works as a law lecturer at Graduate School of Law, National Institute of Development Administration, Bangkok, Thailand. With the Thai Government Scholarship, he came to study Asian and Comparative Law and completed his Ph.D. in law in 2016 at University of Washington School of Law.