

Special Economic Zones in the Mekong Region

Advocacy Note



ADVOCACY NOTE
SPECIAL ECONOMIC ZONES IN THE MEKONG REGION

Background

A Special Economic Zone (SEZ) is a geographically delimited area where governments facilitate industrial activity through fiscal and regulatory incentives and infrastructure support,¹ and within which a distinct legal regime governs investment and business activities. In some cases, separate administrative and governance bodies and legislative frameworks are set up to facilitate investment, and avoid bureaucratic delays.

The establishment and development of SEZs are central to many Southeast Asian governments' strategies to expand infrastructure and attract foreign investment. While most of the ASEAN Member States,² including Cambodia, Lao People's Democratic Republic, Myanmar, Thailand and Viet Nam ('CLMTV') opt for SEZs as a strategy to attract investors, create jobs, and increase export earnings, there is, in fact, considerable evidence that SEZs do not always bring net economic benefit to host states.³

A number of guidelines address the creation of SEZs and other similar industrial zones, making clear that governance, human rights compliance, lawful labour practices, environmental protection and preservation, as well as community involvement and development are central to their creation and operation.⁴

Nevertheless, in Cambodia, Laos, Myanmar, Thailand and Vietnam – all which are parties to a number of international human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) – the establishment of SEZs has been associated in many instances with a dilution of legal guarantees for the protection of human rights and the environment. Indeed, due to a lack of adequate legal protection and/or enforcement, reports of human rights violations and abuses of economic, social and cultural rights are common in SEZs located within the Mekong delta region.

Relevant International Law and Standards

In the context of the SEZs, the full range of civil, cultural, economic, political and social rights are impacted when the concerns of individuals and communities are not adequately taken into account by law and policymakers.

These rights include the right to an adequate standard of living, guaranteed under the ICESCR, which encompasses food, clothing, housing and the continuous improvement of living conditions. Enjoyment of these rights can be undermined by depriving people of access to the means to procure food, including access to land and resources indispensable for their livelihoods. CLMTV are also obliged under a range of human rights treaties, including the ICESCR, to refrain from and prevent forced evictions. Evictions may only be carried out as a last resort, when appropriate procedural protections are in

¹ United Nations Conference on Trade and Development (UNCTAD), 'World Investment Report 2019: Special Economic Zones', UN, 2019, at 128, available at: https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf

² For more information, see: <https://asean.org/about-asean/member-states/>

³ See UNCTAD's World Investment Report 2019, supra note 1

⁴ For example, UNCTAD's World Investment Report 2019, supra note 1; UNIDO, 'Leveraging a New Generation of Industrial Parks and Zones for Inclusive and Sustainable Development: Strategic Framework', 2018, available at: https://hub.unido.org/sites/default/files/publications/UNIDO_Strategic%20Framework_WEB.pdf.

place and have been respected, and once all other feasible alternatives have been explored.

The ICESCR also enshrines the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including the improvement of all aspects of environmental and industrial hygiene. States also have basic obligations under human rights law with respect to the enjoyment of a safe, clean, healthy and sustainable environment, including the obligation to conduct prior assessment of possible environmental impacts of proposed projects and policies.

The rights to and at work are protected under the ICESCR. International standards on labour rights, including the right to form and join trade unions, are also guaranteed by a number of other instruments, including conventions and recommendatory instruments adopted under the auspices of the International Labour Organization (ILO).⁵

International human rights law also imposes on States an obligation to ensure that affected communities and the public at large have access to information and an opportunity to participate in decision-making that affects them.

With regard to the corporations, the United Nations Guiding Principles on Business and Human Rights (UNGPs), the global standard on business and human rights, establish that corporations have a responsibility to “respect” all “internationally recognized human rights”, understood “at a minimum” as those enshrined in the International Bill of Human Rights, consisting of the Universal Declaration Human Rights, the International Covenant on Civil and Political Rights and the ICESCR, and the eight ILO Core Conventions as set out in the Declaration on Fundamental Principles and Rights at Work.

The information presented in this note was gathered from members of civil society organizations who participated in an online meeting organized by the International Commission of Jurists (ICJ), EarthRights International and the Land Watch Thai on 19 July 2022.⁶

Regional civil society groups have reported abuses of economic, social and cultural rights, including the rights to adequate housing and livelihood; instances of detrimental impact on the environment; labour rights abuses; as well as instances of failure to ensure transparency, consultation and accountability. These reports are set out in greater detail in the sections below. There were also reports documenting examples of development bodies investing in SEZs that had resulted in human rights abuses and about the same bodies’ failure to take adequate steps to address such abuses.⁷

⁵Cambodia is a party to C087, C098, C029, C105, C100, C111, C138 and C182; Lao PDR is a party to C029, C100, C111, C138, C182, C155 and C187; Myanmar is a party to C087, C029, C138 and C182; Thailand is a party to C029, P029, C105, C100, C111, C138, C182 and C187; Vietnam is a party to C098, C029, C105, C100, C111, C138, C182, C155 and C187. For more information, see: https://www.ilo.org/dyn/normlex/en/f?p=1000:10011:::NO:10011:P10011_DISPLAY_BY,P10011_CONVENTION_TYPE_CODE:1,F

⁶ Twenty-four lawyers, members of civil society organizations and academics from Cambodia, Lao PDR, Myanmar, Thailand and Vietnam attended the meeting. The participants explored existing adverse impacts and potential future impacts on human rights arising from the implementation of the current SEZ legal frameworks in their respective countries.

⁷ For example, in the case of Myanmar’s Thilawa SEZ, see: UN Forum on Business & Human Rights, ‘Thilawa Special Economic Zone, Myanmar’, 2015, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/ForumSession4/ThilawaSpecialEconomicZoneMyanmar.pdf>. See also: Business & Human Rights Resource Centre, ‘Myanmar: Thilawa economic zone launches complaint mechanism, NGO says it falls short of intl. standards;

Abuses of the Rights to Adequate Housing and Livelihoods

The development of SEZ typically requires removing the people already living there to allow new businesses to move in. Land transfers from communities to business entities have often been carried out by the government and/or the companies without adequate consultation. There have been reports of large-scale evictions,⁸ sometimes with little or no notice, violating international human rights standards prohibiting forced evictions. Certain plots of land that were acquired for industrial activities as part of some SEZs were reportedly unsuitable for such activities. For example, areas that are currently used for traditional premium rice plantation fields were transformed from zones of rural and agricultural to industrial use.⁹ Additionally, the customary, collective, or traditional tenure rights of affected communities are frequently violated by the government or zone developers (indeed they are usually not recognized properly or at all in the domestic legislation of the host States). Regardless of their legal title, compensation provided to affected communities and individuals has often been inadequate, inconsistent and, sometimes, dependent upon the outcomes of lopsided negotiations.

Support from developers and governments is often insufficient. As a result, displaced communities struggle to access livelihoods, face increased levels of debt, and some individuals become homeless. Criminal actions have been brought against residents who protest against land acquisitions or refuse to leave land they own, rent or rely on.

Detrimental Impact on the Environment

Reports indicate that corporations involved in developing and establishing SEZs in CLMTV have often not complied with environmental protection laws and regulations. Developments in SEZs have been affected by environmental problems experienced by nearby communities, including:

1. air pollution from factories;
2. drought induced by water scarcity and tensions between communities and industries;
3. illegal disposal of industrial waste resulting in both land and water contamination;
4. wastewater flowing from industrial areas into local canals and residential areas; and
5. destruction of ecosystems and wildlife habitat as a result of the SEZs' constructions and operations.

Requirements for environmental impact assessments have often been deliberately avoided and circumvented, while in many instances when they have been conducted, they were carried out haphazardly, without public disclosure, and with limited meaningful participation of the affected communities. There have also been reports indicating fraudulent or negligent practices in the conduct of environmental assessments by the companies. In addition, reports point to the lack of independent review to address

inc. responses from company & other agencies', 2018, available at: <https://www.business-humanrights.org/en/latest-news/myanmar-thilawa-economic-zone-launches-complaint-mechanism-ngo-says-it-falls-short-of-intl-standards-inc-responses-from-company-other-agencies/>

⁸ For example, in case of Myanmar's Kyauk Phyu SEZ, see: ICJ, 'Special Economic Zones in Myanmar: the State Duty to Protect Human Rights', 2017, at 49-68.

⁹ For example, see: ICJ, 'The Human Rights Consequences of the Eastern Economic Corridor and Special Economic Zones in Thailand', 2020, at 54.

stakeholders' legitimate concerns and/or to the lack of accountability of the relevant authorities.

Labour Rights Abuses

Employers often ignore labour law protections, and their enforcement is weak in any event, as part of the attraction of SEZs to businesses is more flexible labour arrangements. Key reported concerns included: inadequate minimum wages to ensure a decent living; underpayment of wages; forced overtime; restricting holidays; denying the right to maternity leave; dismissing pregnant workers; harsh labour conditions; and safety issues. Slavery-like labour practices, including forced labour and human trafficking, have also been reported in some instances. Several employers reportedly entered into a short-term employment contract with their employees, as a means of bypassing various social protection laws. Some companies were not registered, resulting in limited legal protection for their employees. Alternative dispute-resolution mechanisms were reported to be impractical. Union members report not being able to organize freely and facing discrimination in regard to hiring or any term or condition of employment, intimidation, dismissal, violence and judicial harassment as a result of their union membership and involvement.

Failure to Ensure Transparency, Consultation and Accountability

The lack of transparency and accountability on the part of the authorities in CLMTV with respect to SEZs' decision-making, planning and construction, as well as during the operational phases of development, are a common concern. Persons affected by the SEZs have not been afforded genuine opportunities to make or challenge decisions made about project plans or future livelihood and living arrangements. Where meetings between SEZ officials and residents have occurred, known examples of decisions or plans being altered in response to residents' input or proposals have been rare. The lack of transparency about the income and revenue generated from the SEZs gives rise to a real potential for corruption.

SEZ management and oversight bodies are usually composed of representatives from governmental institutions and/or the business sector. Without any consultation, they are granted broad powers, while they are given no specific duty to consult regularly with affected communities to seek their input. As a result, it is difficult for persons adversely affected by the SEZ to discuss, challenge or litigate administrative decisions in the SEZ. Furthermore, on several occasions, it has been reported that certain SEZs were heavily guarded by officers of the investing companies, leaving the government and law enforcement officers of the hosting countries a limited power to supervise and monitor the zones.

For more information and case studies:



ICJ, 'Special Economic Zones in Myanmar and the State Duty to Protect Human Rights', 2017



ICJ, 'The Human Rights Consequences of the Eastern Economic Corridor and Special Economic Zones in Thailand', 2019



Kuaycharoen, P., Longcharoen, L., Chotiwan, P., Sukin, K., Lao Independent Researchers, 'Special Economic Zones and Land Dispossession in the Mekong Region', Bangkok: Land Watch Thai, 2020.



Cambodian Center for Human Rights (CCHR), 'Fact Sheet on Cambodia's Special Economic Zones and Human Rights', 2018; and other relevant Briefing Papers.



Charlie Thame, 'SEZs and Value Extraction from the Mekong: A Case Study on the Control and Exploitation of Land and Labour in Cambodia and Myanmar's Special Economic Zones, Bangkok: Focus on the Global South, 2017.

Recommendations

Recommendations to the Governments in CLMTV

1. Examine the economic rationale of the SEZs and their impact on the human rights of the affected individuals and communities, and take adequate steps to rectify and suspend the policy and projects that do not bring economic benefits and/or violate international and domestic law and standards, including human rights law and standards;
2. Adopt a human-rights-based approach to SEZ development projects, and ensure that decisions are made in consultation with individuals and communities about SEZ developments that may potentially harm their communities and the environment;

3. Establish a body with a specific mandate to consult with affected populations and other stakeholders and monitor projects. Such body should include representatives of civil society organizations, unions and affected communities;
4. Ensure transparency, including by making publicly available information and documents related to SEZs;
5. Ensure that evictions are only carried out as a last resort after all other feasible alternatives to eviction have been explored. Procedural protections required under international human rights law should be in place and should be followed before any evictions are carried out, in particular, the requirements of genuine consultation, due process safeguards, provision of legal remedies, compensation and adequate alternative housing;
6. Recognize the social, cultural, spiritual, economic, environmental and political value of land for communities, and acknowledge the right to customary, collective or traditional land tenure and indigenous communities' right to free, prior and informed consent to the use of their land;
7. Ensure that eviction-impact assessments are carried out prior to the initiation of any project that could result in eviction or other negative impacts, with genuine consultation with affected communities, and which comply with all requirements under international human rights law and standards;
8. Ensure that environmental impact assessments and strategic environmental assessments be carried out in line with international human rights standards and good practice;
9. Ensure that the national minimum wage protects the workers' right to just and favourable conditions of work, and is sufficient to ensure a decent living;
10. Ensure that SEZ workers, regardless of their nationality and migration status, enjoy treatment no less favorable than other workers in relation to remuneration, conditions of work, social security and equal access to decent work, and urgently investigate and address reports of human trafficking and forced labour in SEZs;
11. Remove all legal and practical obstacles that prevent workers from exercising their right to freedom of association and to collective bargaining;
12. Ensure that effective, prompt and accessible judicial and non-judicial remedies are provided to those whose rights are violated by the development and operation of SEZs;
13. Ensure adequate support, provide training and strengthen expertise and understanding of officials concerning the granting approval, permission, licence or consent over operations in SEZs, including in relation to evidence-based data on environmental impacts, natural and cultural resource management, damage assessments, and restoration of damaged natural resources to their uncontaminated condition; and
14. Strengthen the capacity and independence of the judiciary and of national human rights institutions to ensure that they can take an active role in protecting human rights in the context of the development and operations of SEZs.

Recommendations to the UN and the ASEAN Intergovernmental Commission on Human Rights

1. Actively and expressly investigate, visit, address and comment on issues of concern arising in the context of SEZs, such as reports of abusive land seizures, illegal labour practices, detrimental impacts on the environment, human rights abuses, as well as the purported economic rationale of SEZ;

2. Where feasible and appropriate, engage with parliamentarians, political parties, government officials and SEZ bodies to urge the adoption and enforcement of laws, policies and practices governing SEZs that comply with international human rights law and standards; and
3. Provide international and domestic cooperation and assistance, including legal, technical and technological support, to government authorities and civil society organizations to enable them to better advocate for human rights compliance in the context of SEZs.

Recommendations to Donor Communities and Development Agencies

1. Ensure that development aid is not provided to SEZ projects that present a real risk of human rights abuses, and that aid to projects in breach of human rights obligations is suspended, including by conducting the necessary human rights due diligence to ensure that the way SEZs are established and operate does not enable infringements of human rights;
2. Ensure that investment policies support human rights, environmental protection, labour rights and corporate compliance with rights protection measures, such as guaranteeing that loan agreements make express reference to human rights; and
3. Expressly acknowledge that human rights abuses have occurred in some of the projects that have already been and are being financed, and address such abuses with the involvement of the affected communities.

Recommendations to private sector actors

1. Carry out all business activities in line with the UN Guiding Principles on Business and Human Rights;
2. Comply with all national laws related to the protection of the environment, labour, and human rights and with related rules and procedures;
3. Conduct human rights due diligence to ensure investments are responsible and are not complicit in human rights abuses, including by ensuring that land destined to SEZ projects has been lawfully acquired, and that human rights have been respected in all processes of land acquisition and conversion of land use, as well as in connection with evictions from land;
4. Ensure that environmental impact assessments are carried out independently, impartially, lawfully and effectively;
5. Ensure that employees receive adequate remuneration, are protected from discrimination and harassment in the workplace, and have the right to a safe and healthy workplace.
6. Ensure that all employees can effectively enjoy the right to freely form and join trade unions of their own choosing and not be subject to dismissal due to anti-union discrimination;
7. Establish accessible and effective Operational Level Grievance Mechanisms (OGM) designed in collaboration with affected communities, that are independent, impartial and effective, including by creating binding obligations on companies to address the concerns of affected individuals, local communities and SEZs workers that arise from their operations; and
8. End legal harassment – including through defamation and trespassing cases – of individuals and/or communities affected by SEZ policies, and who seek to legitimately bring their grievances about human rights violations to light.

Recommendations to civil society actors

1. Monitor and document SEZ developments and engage in advocacy with a view to ensuring that they only proceed when compatible with the human rights of affected individuals and communities and are planned, established and operated in line with international and domestic law and standards, including human rights law and standards;
2. Support local communities, workers and other rights holders to ensure respect for human rights, including their right to oppose proposed SEZs; and
3. Seek and engage with the UN mechanisms and bodies or institutions to strengthen advocacy work on SEZs.

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