

Report No. 36-39/2559 on community rights and right to participate in the management of natural resources and environment in case that the draft Minerals Act B.E. affects human rights.

Issue of Complaint

A complainant submitted a petition to the National Human Rights Commission of Thailand (NHRCT) with requesting to investigate a case that a draft Minerals Act B.E. of which the Cabinet had passed a resolution with approval on 16th June 2009, contains some provisions affecting to community rights and right to participate in the management of natural resources and environment. The complainant requested the NHRCT to investigate and put its views to provisions in a draft Minerals Act B.E. ... of which the Cabinet then had passed a resolution with approval on 21st October 2014. Afterwards the complainant submitted a petition, requesting the NHRCT to submit the case together with its views to the Constitutional Court to interpret wordings in Article 131/1 of the Minerals Act B.E. 2510 (1967). Later the National Legislative Assembly (NLA) passed a resolution to approve in principle the draft Minerals Act B.E. as proposed by the Cabinet on 17th March 2016 of which its main provision was to abolish the Mineral Royalty Rates Act B.E. 2509 (1966) and the Minerals Act B.E. 2510 (1967) and to combine the two of them into one in order that mining permission and royalty collection would be done systematically. Then petition no. 202/2559 requesting the NHRCT to investigate an accusation that provisions of the draft Minerals Act B.E. affect human rights because the draft Act's principle and rationale are not consistent with realities, and requesting to remove some provisions pertaining to gold mining from the draft Minerals Act B.E.... The complainant also viewed that this draft Minerals Act had provisions and key contents that affect community rights and right to participate in the management of natural resources and environment as stated in Section 66 and Section 67 of Constitution of the Kingdom of Thailand B.E. 2560 (2017).

Actions

The NHRCT took into its consideration the petition requesting it to investigate the draft Minerals Act B.E. of which the Cabinet had passed a resolution to approve on 16th June 2009 and the petition requesting it to investigate and oppose the draft Minerals Act B.E. of which the Cabinet had passed a resolution to approve on 21st October 2014, and saw that at present, there was no more reason to consider the draft Act. As for the petition requesting the NHRCT to submit a case together with its views to the Constitutional Court to interpret Article 131/1 of the Minerals Act B.E. 2510 (1967), to submit a case with comments to the Constitutional Court must be a case that any legal provision affected human rights and whether it was in line with the Constitution or not. To interpret provisions of the Minerals Act B.E. 2510 (1967) was not a matter that the NHRCT could submit with its comments to the Constitutional Court for consideration. Moreover at present the NHRCT does not have authority to do so anymore. As for the petition requesting the NHRCT to request for withdrawal of the draft Minerals Act B.E. ... from consideration of the NLA with a claim that it has provisions that affect human rights, it is seen that the draft Minerals Act B.E. has some provisions that do affect community rights and right to participate in the management of natural resources and environment according to Section 66 and Section 67 of Constitution of

the Kingdom of Thailand B.E. 2550 (2007) which are still protected according to Constitution of the Kingdom of Thailand (Interim) B.E. 2557 (2014). Moreover, some provisions of the draft Minerals Act B.E. ... give the state monopoly power in the management of minerals without giving any opportunity to local communities to participate in the management and protection of national resources, that may affect both the environment and sustainable livelihood of the people. As the NLA is now considering the draft Minerals Act B.E., it is right for the NHRCT to submit viewpoints and recommendations to the NLA and the Cabinet to improve the draft Minerals Act B.E. and other related laws, making them consistent with human rights principle and current situation that would be a guarantee for protection of human rights of the people.

Policy Recommendations or Recommendations for improvement of laws

Recommendations for improvement of the draft Minerals Act B.E.

(1) Concepts and basic principle concerning rights over mineral resources and duties of the state (draft Article 7): It is recommended that the concepts and basic principle should be improved by making minerals the Common Pool Resources of which the state and the people are to manage together for maximum benefits of the country and the people all over. Attention should be given to cost-effectiveness and economic appropriateness rather than focusing mainly on its economic aspect alone.

(2) Master Plan for Minerals Management (draft Article 8 to Article 10). It is recommended that provisions in Article 8, Article 9 and Article 10 should be amended and added to indicate that in preparing a Master Plan for Minerals Management, there must be a process to clearly include participation of the people and stakeholders, not just to reveal information to the people; this participation should be ensured without any exception by citing national security or economic security as an excuse.

(3) Mining in reserved area or protected area (draft Article 12): It is recommended that draft Article 12 should be improved to clearly state that it is forbidden to have mining activities in any reserved area or protected area by law.

(4) Mineral resources auction (draft Article 13): It is recommended that mineral resources auction should be conducted in consistent with draft Article 132 possibly by preparing an environment impact assessment report and seeking approval according to the law on enhancement and conservation of environmental quality in advance before making announcement about mineral resources auction in that area.

(5) Mechanism, structure and components for management of mineral resources (draft Article 15): It is recommended that (1) components of a National Minerals Board and provincial minerals committee should be balanced and (2) draft Article 184 should be completely deleted in order that this Board/Committee could function or use its authority according to this Act only when components of this Board/Committee are completely filled.

(6) Standards for controlling emission of pollution from its source (draft Article 28): Standards and methods for pollution control issued by relevant minister should have standards, criteria and methods for emission of pollution not lower than standards provided by the national law on enhancement and conservation of environmental quality.

(7) Classification of mining (draft Article 49) and joining concessions into one same mining zone (draft Article 57): It is recommended that (1) for mining classification, apart from considering size of mine area, type of minerals, volume of minerals, environmental quality, values of minerals, production rate, mining methods, possible impacts upon local communities, environmental quality, natural resources and health, and location of mine should be considered as well, and (2) draft Article 49 and draft Article 57 should be amended to prevent gaps in law enforcements, avoiding it to be regarded as the second type of mining. Joining together several concessions that are next to each other into one mining zone is authority of local mineral industry officers or local officers depending on each case to determine.

(8) Process for people's participation in determining policies, plans, licenses, concessions and other permits should be clearly prescribed to provide steps and process for participation of local communities and people in the concerned area and stakeholders in the draft Minerals Act B.E. ... by having (1) a specific chapter about process and methods to allow communities, people, stakeholders and local administrative organizations to participate in various stages, and (2) mechanism to seek settlements in case of disputes.

(9) Transfer of concessions, mineral processing permits and metallurgy permits (draft Article 67 and Article 110): It is recommended that transfers of concessions, mineral processing permits and metallurgy permits should be forbidden, unless transferees have specific qualifications and conditions the same as or no less than the operator who is assignee.

(10) Responsibilities of mining concessionaires (draft Article 85 and draft Article 131): It is recommended that draft Article 85 and draft Article 131 should be amended to not restricting responsibilities of underground mining concessionaires to only their concession areas. In case that land collapses cause damages to areas near to a concession area, it is to primarily assume that the land collapses are caused by underground mining and Department of Primary Industries and Mines is tasked to take the incidents into consideration in similar manner as those happen in concession areas and the principle of liability should be applied for all types of mining, not only for underground mining.

(11) Preparation of Environmental Impact Assessment report and seeking agreement in advance before conducting an auction on the mine area (draft Article 132): It is recommended that this should be done in accordance with the Enhancement and Conservation of National Environmental Quality Act B.E.2535 (1992).

(12) Establishing security and a fund for recovery of mining and rehabilitation of those affected by mining (draft Article 64(9)): It is recommended that (1) representatives of the community of affected persons and communities around the mine take part in directing the management and operation of the fund as well, and (2) budget could be set up to use the fund for recovery and rehabilitation of the impacts of mining when they occur without having to wait for results of assessment. Moreover, the Enhancement and Conservation of National Environmental Quality Act B.E.2535 (1992) in the Chapter about Environment Fund should be adjusted to make both Acts consistent with each other and go along the same direction.

(13) Framework, conditions and process used by the administration to issue legislative according to the Minerals Act B.E. It is recommended that (1) framework and conditions for issuing legislative should be clearly stated to prevent uses of personal judgment; and (2) the people and stakeholders must be able to participate in the process to issue legislative and there must be a Regulatory Impact Assessment (RIA).

Recommendations for amendments of other related laws are as follows:

(1) Amendment of the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992) on the issue of Environmental Impact Assessment (EIA) and Environmental and Health Impact Assessment (EHIA) report preparation: It is recommended that EIA and EHIA reports should be prepared by a central agency, and then monitored and checked by government agencies and education institutes, or other agencies recognized by the state. The Environment Fund and proclamations concerning pollution control zones and measures should be improved to be able to use them quickly. A Reporting on Emission and Transfer of Pollution to the Environment Act should also be enacted.

(2) It is recommended that a Participation in Public Policy Act B.E. ... should be enacted.

Successes/Progress in Human Rights Protection

The Cabinet on 26th July 2016 acknowledged the policy recommendations from the NHRCT and assigned Ministry of Industry to be the main agency to consider concepts and appropriateness of these recommendations together with Ministry of Natural Resources and Environment and Office of the Permanent Secretary to the Prime Minister Office, and then to summarize overall results of this consideration or implementation and to submit them to the Cabinet.

The Cabinet passed a resolution on 25th October 2016 to acknowledge results of this consideration of the NHRCT's policy recommendations and suggestions on law improvement as the Ministry of Industry reported that a meeting was organized with related agencies consisting of Ministry of Natural Resources and Environment, Office of the Permanent Secretary to the Prime Minister Office, Office of the Council of State and the Mining Industry Council on 23rd August 2016. The meeting took recommendations from the NHRCT into consideration for actions, such as a recommendation that in preparing a mineral

resources management plan, there must be a clear process for participation of the people and stakeholders, and a recommendation that laws related to the draft Minerals Act B.E. should be amended, for example. The meeting also concluded that for any recommendations that could not be implemented, the NHRCT is to be informed reasons and necessities.