

# An Introduction to the Interrelation of Canada’s Impact–Benefit Agreement (“IBA”) and Thailand’s Environmental Impact Assessment (“EIA”)

Chaiwat Muangkeaw



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### Abstract

The concept which natural resources deter country development, mainly on economic, is known as the "curse" of natural resources. This paper scrutinises the community participation process to diminish the resource curse's impact through IBA in Canada and EIA in Thailand. Both regimes apply community participation in resource development, but they are different in detail. As a private contractual arrangement, the study shows that IBA aims to ensure that economic consequences will create less adverse effects on local communities, potentially from natural resource exploitations. The process imposed the Crown (State) to consult and accommodate to facilitate the project development and protect local communities' rights.

In comparison, EIA is utilised as a precautionary measure to mitigate adverse effects in the project development area. Community participation in EIA occurs through public hearings, which has a controversial issue on project quality. Although, Thailand and Canada are using the public ownership regime, the framework of IBA could not be found in the Thailand's legal system.<sup>1</sup> According to the Thailand's administrative laws, the concession and license for resource development would

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\* Provincial Chief Public Prosecutor, Department of Civil Dispute Settlement and Arbitration, Office of the Attorney General; LL.B. Thammasat University; LL.M. in Criminal law, Thammasat University; LL.M. (second class honors) in Oil and Gas Law, University of Aberdeen, UK (Thai Government Scholarship); LL.M. in Energy Law, University of Aberdeen, UK (Chevening Scholarship). E-mail: c.muangkeaw@gmail.com

<sup>1</sup> For instance, the Constitution of Thailand 2560 B.E., Enhancement and Conservation of the National Environmental Quality Act 2535 B.E., Petroleum Act 2514 B.E.

commence only by the permit or commitment of the government in the form of a state contract. Lastly, the Canada's experience could be applied to diminish the drawback of EIA in Thailand.

**Keywords:** impact-benefit agreement, environmental impact assessment, natural resources

## 1. Introduction

Resource-rich countries should supply a substantial funding source to promote the country's advancements and its citizens' well-being.<sup>2</sup> Paradoxically, such countries struggle with inequity, poverty, and a slow economic growth rate, commonly referred to as the resource curse.<sup>3</sup> Many refer to the Dutch disease, an economy where original exports are tradable goods, but then shift to the export of booming sector, which leads to a genuine exchange rate appreciation and the extinction of the authentic tradable goods exporting industry. Others refer to the Nigerian disease where the revenue from natural resources leads to poor governance and conflicts, resulting in a decline in economic progress.<sup>4</sup> As a developing country, Thailand also struggles with the embezzlement of natural resource revenue by state officials' corruption. Failure to appropriately distribute them to promote sustainable and economic growth contributes to the curse.<sup>5</sup>

It is recognised that public participation in resource management is an important mechanism to ensure environmentally sustainable development<sup>6</sup> and mitigate the curse. As one innovative response to the aforesaid paradoxical situation, IBA in Canada has been designed to provide a fair distribution of profits

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<sup>2</sup>Philip Daniel, Michael Keen, and Charles McPherson, **The Taxation of Petroleum and Minerals: Principles, Problems and Practice** (New York: Routledge, 2010), p. 13.

<sup>3</sup>Michael L. Ross, **The oil curse: How petroleum wealth shapes the development of nations** (New Jersey: Princeton University Press 2012), pp. 32-33.

<sup>4</sup>Mustapha, Ishaq Muhammad and Mansur Masih, **Dutch disease or Nigerian disease: a prima facie? New evidence from ARDL bound test analysis** [Online], available URL: [https://mpra.ub.uni-muenchen.de/69767/1/MPRA\\_paper\\_69767.pdf](https://mpra.ub.uni-muenchen.de/69767/1/MPRA_paper_69767.pdf), 2021 (July, 22).

<sup>5</sup>Global Witness, **Time for Transparency: Coming Clean on Oil, Mining and Gas** [Online], available URL: [www.globalwitness.org/sites/default/files/pdfs/oil\\_061.04.04.pdf](http://www.globalwitness.org/sites/default/files/pdfs/oil_061.04.04.pdf), 2016 (October, 2).

<sup>6</sup>Patricia E. Salkin, **Understanding Community Benefit Agreements: Opportunities and Traps for Developers, Municipalities and Community Organizations** [Online], available URL: <https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/article-salkin.pdf>, 2021 (July, 23).

and benefits generated from exploiting natural resources to the people who are the actual owner of natural resources.<sup>7</sup> Though the Constitution of Thailand 2560 B.E. recognised the community right to reserve and utilise natural resources<sup>8</sup>, the IBA regime does not exist in Thailand, where EIA is applied before the project commenced.<sup>9</sup> Introducing a legal mechanism to increase community participation in natural resource development, the interrelation of IBA and EIA could be considered whether IBA synchronises with Thailand legal context to diminish the drawback of the current EIA regime.

The study has chosen IBA in Canada because the country has applied a public ownership regime which is the same legal basis in Thailand. At the same time, IBA in the US is based on a Private ownership idea that is contradictory to Thailand.<sup>10</sup> In the next section, this paper will address (2) Resource curse phenomenon in a nutshell, (3) indigenous right, basis and nature of IBA. Next, (4) IBA framework, (5) The potential and prospect of IBA. Lastly, (6) Thailand's regime.

## 2. Resource curse phenomenon in the nutshell

Minerals, oil and gas are a source of wealth in resource-rich countries. The domestic utilisation of the resources could incentivise economic development and contribute to a higher standard of social condition from energy production<sup>11</sup>. Alternatively, the export and extraction of such resources could generate significant

<sup>7</sup>Ken J. Cainel and Naomi Krogman, “Powerful or Just Plain Power Full? A Power Analysis of Impact and Benefit Agreements in Canada’s North,” **Organization & Environment Journal** 23, 1 (2010): 80-81.

<sup>8</sup>Constitution of Thailand B.E. 2560, Section 43, 57, 57 and 58.

<sup>9</sup>Enhancement and Conservation of National Environmental Quality Act B.E. 2535, Section 46.

<sup>10</sup>Gary D. Libecap, **The Consequences Of Land Ownership** [Online], available URL: <https://www.hoover.org/research/consequences-land-ownership>, 2021 (August, 5).

<sup>11</sup>Phillip Daniel, op.cit.

revenue that, if managed effectively, could accelerate the development of such nations. Unfortunately, many resource-rich countries are not receiving interest from this wealth but experiencing unstable living conditions and high poverty rates.<sup>12</sup> This phenomenon commonly refers to the paradox of plenty or a resource curse.<sup>13</sup> This phenomenon described a situation where natural resource wealth leads to repressive conditions, further corruption, conflict, and poverty instead of facilitating country development.<sup>14</sup>

The curse affects the economy, widely known as the Dutch disease. The term showed an apparent causal relationship between a decline in other sectors (e.g. the agriculture and manufacturing sector) and the increasing economic development of a specific industry (for example, natural resources exportation).<sup>15</sup>

Although the possibility of Dutch disease in Thailand is low because it is a petroleum-consuming country,<sup>16</sup> the issue of the weak institution and mismanagement of revenue from natural resource exploitation needs to be reconsidered. Since the other type of curse that affects institutions is referred to as Nigerian disease,<sup>17</sup> income from natural resources leads to more flawed governance and conflicts. It gives rise to governments that are less accountable to the people, has little incentive for institution-building, and fail to implement growth-enhancing reforms.<sup>18</sup> Higher corruption, more rent-seeking activity, more significant civil conflict, and

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<sup>12</sup>Global Witness, op.cit., p. 4.

<sup>13</sup>Michael L. Ross, op.cit., p. 33.

<sup>14</sup>Ibid.

<sup>15</sup>Peter Kaznacheev, “Curse or Blessing: How Institutions Determine Success in Resource- Rich Economies,” *Policy and Analysis Journal* 808, 1 (2017): 3.

<sup>16</sup>Energy Policy and Planning Office, *THAILAND Energy and Natural Resources* [Online], available URL: [www.eppo.go.th/images/policy/PDF/docs/Thailand\\_Energy\\_Brief.pdf](http://www.eppo.go.th/images/policy/PDF/docs/Thailand_Energy_Brief.pdf), 2021 (February, 17).

<sup>17</sup>Kablan, and others, *Is Chad affected by Dutch or Nigerian disease?* [Online], available URL: [https://mpra.ub.uni-muenchen.de/39799/1/MPRA\\_paper\\_39799.pdf](https://mpra.ub.uni-muenchen.de/39799/1/MPRA_paper_39799.pdf), 2021 (July, 23).

<sup>18</sup>Mohammad Amin, *Dutch Disease vs. Nigerian Disease* [Online], available URL: <https://blogs.worldbank.org/psd/dutch-disease-vs-nigerian-disease>, 2021 (July, 23).

erosion of social capital are some of the outcomes associated with the Nigerian disease.<sup>19</sup>

In addition, the curse is also relevant to the ownership<sup>20</sup> of natural resources. Theoretically, most international legal systems vest the title of a natural resource to the government<sup>21</sup> or the Crown.<sup>22</sup> The private ownership regime in the United States, in contrast, grants the landowner a right to decide how to exploit the sub-soiled resources.<sup>23</sup> Nowadays, the state's exploitation of natural resources could be undertaken via state-owned enterprises or authorised private companies.<sup>24</sup> Public ownership of the state's natural resources should imply that these resources are a public asset and, consequently, are managed and conserved for its citizens' well-being.<sup>25</sup> The revenue generated from the natural resource sector could substantially support the nation's economic growth as a whole.<sup>26</sup> However, the exploration and exploitation of natural resources could cause substantial negative impacts on a local community in many aspects, such as environmental, cultural, and social aspects.<sup>27</sup> It could be claimed that, from weak institutional development, the

<sup>19</sup>Ibid.

<sup>20</sup>Arpita Asha Khanna, "Revisiting the Oil Curse: Does Ownership Matter?," *World Development* 99, 214 (2017): 214.

<sup>21</sup>Petroleum, Act B.E. 2514, Section 23.

<sup>22</sup>Patrick Wieland, "Going beyond panaceas: Escaping mining conflict in resource-rich countries through middle-ground policies." *New York University Environmental Law Journal* 20 (2013): 204-209.

<sup>23</sup>Ibid.

<sup>24</sup>Ibid., p. 209.

<sup>25</sup>Ibid.

<sup>26</sup>Phillip Daniel, op.cit.

<sup>27</sup>Irene Sosa, and Karyn Keenan, **impact benefit agreements between aboriginal communities and mining companies: their use in canada** [Online], available URL: <http://metisportals.ca/MetisRights/wp/wp-admin/images/Impact%20Benefit%20Agreements%20-%20Mining.pdf>, 2016 (October, 14).

adverse outcomes could lead to economic inequities, public tension and disrupt society's life, reinforcing the resource curse.<sup>28</sup>

Legal mechanisms should be designed to increase community participation to avoid the revenue from resources selling maintained in the hands of a few that leads to poorer governance and conflicts.<sup>29</sup> Fair distribution of resource wealth plays a vital role to mitigate the effect of the curse.<sup>30</sup> There are defining and evaluating the unavoidable impacts of resource exploitation and off setting them by benefiting those whose lives will be affected in all the exploitation process stages.<sup>31</sup> While, at the same time, providing access and opportunity to benefits of economic development,<sup>32</sup> such mechanism so-called IBA.

### 3. Indigenous right, basis and nature of IBA

This section will reflect the historical backdrop of indigenous peoples who typically apply IBA and the concise nature of IBA to provide precise knowledge of the procedure. The area begins with historical background for indigenous rights before delving into the basis and essence of IBA. This section also highlights the process's drawbacks while providing a brief comparison between IBA and Thai legislation.

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<sup>28</sup> Oxfam International, **Lifting the Resources Curse** [Online], available URL: <https://www.oxfam.org/sites/www.oxfam.org/files/bp134-lifting-the-resource-curse-011209.pdf>, 2016 (October, 14).

<sup>29</sup> Arakan Oil Watch, **Burma Resource Curse: The case for revenue transparency in the oil and gas sector** [Online], available URL: <http://www.burmacampaign.org.uk/image/uploads/Burmas-Resource-Curse.pdf>, 2016 (February, 11).

<sup>30</sup> Patricia E. Salkin, op.cit., p. 2.

<sup>31</sup> Ibid., p. 1.

<sup>32</sup> Ibid.

### 3.1 Context of indigenous right

In Canada, indigenous (Aboriginal) rights are collective rights that flow from Aboriginal peoples continued use and occupation of specific areas.<sup>33</sup> Aboriginal peoples have inherent rights as the first nation has practised and enjoyed before European contact and colonisation.<sup>34</sup>

During settlement and colonisation, treaties were negotiated between the Crown and local Aboriginal populations, guided by the Royal Proclamation of 1763.<sup>35</sup> The Proclamation was a British Crown document that acknowledged British settlers would have to address existing Aboriginal rights and title to further settlement<sup>36</sup>

Because each First Nation has historically functioned as a distinct society, no one official overarching Indigenous definition of these rights.<sup>37</sup> Although these specific rights may vary between Aboriginal groups, they generally include rights to the land, subsistence resources and activities, self-determination and self-government, and the right to practice one's own culture and customs, including language and religion.<sup>38</sup> Aboriginal rights have not been granted from external sources. Still, they result from Aboriginal peoples' occupation of their home territories, on going social structures, political and legal systems.<sup>39</sup> It could be referred that Aboriginal rights are separated from rights afforded to non-Aboriginal Canadian citizens under Canadian common law.

<sup>33</sup> John Borrows, “Tracking Trajectories: Aboriginal Governance as an Aboriginal Right,” *UBC Law Review* 38, 285 (2005): 290.

<sup>34</sup> *Ibid.*, p. 288.

<sup>35</sup> The Canadian Encyclopaedia, *The Royal Proclamation of 1763* [Online], available URL: <https://www.thecanadianencyclopedia.ca/en/article/royal-proclamation-of-1763>, 2021 (July, 25).

<sup>36</sup> *Ibid.*

<sup>37</sup> First Nation and Indigenous Study, *Aboriginal Rights* [Online], available URL: [https://indigenousfoundations.arts.ubc.ca/aboriginal\\_rights/?fbclid=IwAR2ZO\\_vFgkzhK\\_lO1osloxpUXlwrqJz\\_ffY0aLlaolrgk22ru56duONMl6k](https://indigenousfoundations.arts.ubc.ca/aboriginal_rights/?fbclid=IwAR2ZO_vFgkzhK_lO1osloxpUXlwrqJz_ffY0aLlaolrgk22ru56duONMl6k), 2021 (July, 25).

<sup>38</sup> John Borrows, *op.cit.*, p. 306.

<sup>39</sup> *Ibid.*, pp. 308-309.

### 3.2 Basis and nature of IBA

With the unique background of indigenous rights, IBA, as a legal remedy to the curse, is a private contractual arrangement that the local government and investors generally sign based on voluntary negotiation.<sup>40</sup> The core idea of IBAs is that it is unacceptable to develop such resources in the mean by which the benefits will be sent elsewhere while applying costs on those whose land is affected.<sup>41</sup> Negotiation of binding arrangements between indigenous communities or regional governments and companies<sup>42</sup> could enable local communities to mitigate and confront the project's adverse cultural, environmental, and social impacts.<sup>43</sup> Not only securing the community's benefit, but a bilateral arrangement signed by investors would also assert the community relative political independence from the state.<sup>44</sup> The regime allows government to maintain competitiveness and economic development while ensuring more socially and ecologically sustainable energy and mining sectors.<sup>45</sup> Because of the disengagement and moving to the state's private framework by enforcing private contract law ensuring the IBA's implementation.<sup>46</sup>

Natural resources development could also generate substantial economic benefits to the community in many forms, including revenue from royalties, training and employment opportunities, capacities building and preferential treatment between investors and local communities.<sup>47</sup> In return, the benefited

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<sup>40</sup> Cathleen Knotsch, and Jacek Warda, **Impact Benefit Agreements: A Tool for Healthy Inuit Communities?** (National Aboriginal Health Organization 2009), p. 12.

<sup>41</sup> Ibid., p. 80.

<sup>42</sup> Courtney Fidler, and Michael Hitch, "Impact and Benefit Agreements: A Contentious Issue for Environmental and Aboriginal Justice," **Environments Journal** 35, 49 (2007): 57.

<sup>43</sup> Guillaume Peterson St-Laurent and Philippe Le Billon, "Staking claims and shaking hands: Impact and benefit agreements as a technology of government in the mining sector," **ELSEVIER** 2, 590 (2015): 594.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid., p. 591.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid., p. 594.

communities would have a better perception of the project development.<sup>48</sup> It could be referred that IBA provides the parties with a social license to carry on the project with certainty. A risk associated with the delay caused by a political disruption should be minimised as a critical aspect.<sup>49</sup>

Nevertheless, the IBA governed under the common law system regarding a contract generally contains regulatory and contractual instruments either a precondition for issuing authority license or voluntary.<sup>50</sup> The Canada Constitution Act 1982 Section 92A allows a local authority to fully exploit or grant a natural resources exploitation license in such provinces; the local government itself is consigned as a remarkable external role in IBA negotiation.<sup>51</sup> The private characteristic of IBA constitutes the regime subject to the provisions of confidentiality.<sup>52</sup> It could be reasonably claimed that the expected outcomes of IBA may not efficiently benefit locals depend on the capacity of each indigenous community due to IBA generally is negotiated outside state oversight according to its secrecy nature.

Considering IBA from Thailand's perspective, the legal basis of the agreements between investors and the community, as in IBA, could not be found in the Thailand's legal system. Since the country applies public ownership model, the absolute right to allow the private sector and international investors to explore and exploit natural resources belongs to the state<sup>53</sup>, the cabinet as the supreme representative of the executive authority.<sup>54</sup> An Administrative contract regime governs

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<sup>48</sup> Adam J. Wright, "Impact and Benefit Agreements: The Role of Negotiated Agreements in the Creation of Collaborative Planning in Resource Development," (Master Major Research Paper, The University of Guelph, 2013), p. 22.

<sup>49</sup> Ibid.

<sup>50</sup> Cathleen Knotsch, and Jacek Warda, op.cit., p. 12.

<sup>51</sup> Ibironke T Odumosu-Ayanu, "Governments, Investors and Local Communities: Analysis of A Multi-Actor Investment Contract Framework," *MelbJlInt Law* 15, 1 (2015): 17.

<sup>52</sup> Ibid.

<sup>53</sup> Petroleum Act B.E. 2514, Section 23.

<sup>54</sup> Petroleum Act B.E. 2514, Section 22 and the Announcement of the Revolutionary Council No. 58, B.E. 2515.

the contractual arrangement between state and investor<sup>55</sup>, granting administrative privileges to the state over the investor as a means to protect the public interest.<sup>56</sup> In such circumstances, it is unlikely that a community as a group of individuals could apply administrative contract and granting concession or license to an investor in the absentia of state. Though the Constitution certified the rights and duties of the community to maintain and utilise natural resources<sup>57</sup>, the definition of "community" and its rights in natural resource exploitation are required to be discussed later in Section 6: Thailand's regime.

#### 4. IBA framework: Duty to Consult and Accommodate ("DCA")

It is recognised that public participation in resource management is an important mechanism to ensure environmentally sustainable development. On the one hand, DCA has rooted in Article 35 of the Canada Constitution 1982, which imposes the Crown's responsibility to consult with local communities when individuals' rights might be affected by state contemplates action and provide accommodation in case of judge required.<sup>58</sup> A private negotiation arrangement could merely serve as administrative supplementary to state official consultation.<sup>59</sup> Such negotiations could not replace the Crown representatives in the accommodation and consultation system, which play a substantial role in the stakeholder's

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<sup>55</sup> สำนักงานศาลปกครอง, คดีพิพากษาที่เกี่ยวกับสัญญาทางปกครอง [Online], available URL: [http://law.tsu.ac.th/UserFiles/1570687161\\_%E0%B8%AA%E0%B8%B1%E0%B8%8D%E0%B8%8D%E0%B8%B2%E0%B8%97%E0%B8%B2%E0%B8%87%E0%B8%9B%E0%B8%81%E0%B8%84%E0%B8%A3%E0%B8%AD%E0%B8%87.pdf](http://law.tsu.ac.th/UserFiles/1570687161_%E0%B8%AA%E0%B8%B1%E0%B8%8D%E0%B8%8D%E0%B8%B2%E0%B8%97%E0%B8%B2%E0%B8%87%E0%B8%9B%E0%B8%81%E0%B8%84%E0%B8%A3%E0%B8%AD%E0%B8%87.pdf), 2564 (สิงหาคม, 2).

<sup>56</sup> อนันต์ คงเครือพันธ์, แลงค์ดีในการพิจารณาคดีปกครองเกี่ยวกับประโยชน์สาธารณะ [Online], available URL: [https://www.admincourt.go.th/admincourt/upload/webcms/Academic/Academic\\_270217\\_144631.pdf](https://www.admincourt.go.th/admincourt/upload/webcms/Academic/Academic_270217_144631.pdf), 2564 (สิงหาคม, 2).

<sup>57</sup> Construction of Thailand B.E. 2560, Section 43, 57, 57 and 58.

<sup>58</sup> Guillaume Peterson St-Laurent, and Philippe Le Billon, op.cit., p. 595.

<sup>59</sup> Adam J. Wright, op.cit., p. 25.

identification, picturing potential consequences and mitigation plans<sup>60</sup> Chief Justice McLachlin provides the sliding scale rule, which means that the more significant claims and severe impact would need more in-depth consultation and possibly accommodation.

In comparison, the weaker and fewer impacts may require lower care of consultation.<sup>61</sup> A private company has practically replaced the Crown in consult and accommodation because the Crown considers that the private industry requires a social license.<sup>62</sup> It could be referred that the proponents have been imposed the duty to complete all heavy burdens in consultation and accommodation processes.<sup>63</sup>

Supposing the Crown fails to fulfil the duty of consult and accommodate on, leading to litigation. In that case, the proponent has to bear the risk of project delaying if the court decides to favour an indigenous community.<sup>64</sup> In such a case, the proponents must meet the court's traditional benchmark, reflecting all reasonable consultation efforts with all possibilities affecting indigenous communities.<sup>65</sup>

On the other hand, DCA does not exist in the Petroleum Act of Thailand. The well-matched remains in Section 58 of Thai Constitution 2560 B.E. and Section 46 of Enhancement and Conservation of National Environmental Quality Act, 2535 B.E. imposed duty for the state to conduct EIA before commencing the development which might severely affect the natural resources, environmental quality, health and sanitation. The exact section also provided that a person and a community shall have the right to receive information, explanation, and reasons from a State agency before implementing or granting permission. Nevertheless, the

<sup>60</sup> Haida Nation v. British Columbia (Minister of Forests) 2004.

<sup>61</sup> Jeffrey Thomson, "The Duty to Consult and Environmental Assessments: A Study of Mining Cases from across Canada," (Master Thesis the University of Waterloo 2015), p. 20.

<sup>62</sup> Adam J. Wright, n50, p. 26.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid., pp. 26-27.

<sup>65</sup> Ginger Gibson and Ciaran O'Faircheallaigh, "IBA community toolkit" (2015) The Gordon Foundation, p. 30.

right to participate and receive information in the process is not entirely operated in practice.<sup>66</sup> The local community rarely understands the complex technical term of the project development, for instance, in petroleum and energy industries, which might affect their environment and health little by little for the long duration of project life.<sup>67</sup>

It could be concluded that EIA in Thailand is a preventive mechanism to minimise the impact on people, community, environment, and biodiversity and shall undertake to remedy the grievance or damage for the affected people or community in a fair manner.<sup>68</sup> If evidence shows EIA failed after concession commenced, the court could unlikely intervene, which affects the concession<sup>69</sup> as occurring in Canada.

## 5. Potential and prospects of IBA

### 5.1 The confidentiality

Apart from its benefits on imposing the DCA to accomplish reconciliation and establish positive relationships with indigenous people, transparency in IBA has been limited by its secrecy clauses. Despite seemingly protecting sensitive monetary information, these clauses restrict different communities' ability to share data and learn from others' experiences.<sup>70</sup> This limitation also leads to more complications to evaluate IBA and their results for local communities.<sup>71</sup> Also, the local government's structure and lacking of transparency could be challenged on unfair distribution

<sup>66</sup> เครื่อข่ายธรรมวิบาลสิ่งแวดล้อมไทย, คู่มือการมีส่วนร่วมของประชาชนในการประเมินผลกระทบต่อสิ่งแวดล้อม [Online], available URL: <http://www.tei.or.th/tai/2014-Book-EIA.pdf>, 2564 (กรกฎาคม, 30).

<sup>67</sup> นาริสา เกิดอยู่, “วิเคราะห์ปัญหาและอุปสรรคทางกฎหมายเกี่ยวกับการมีส่วนร่วมของประชาชนสำหรับโครงการที่มีผลกระทบต่อสิ่งแวดล้อม: ศึกษากรณีโครงการสำรวจพัฒนาและผลิตบีโตรเลียม,” (วิทยานิพนธ์นิติศาสตรมหาบัณฑิต, สถาบันบัณฑิตพัฒนบริหารศาสตร์, 2558), หน้า 7.

<sup>68</sup> Constitution of Thailand B.E. 2560, Section 58.

<sup>69</sup> Petroleum Act B.E. 2514, Section 51.

<sup>70</sup> Courtney Fidler, and Michael Hitch, op.cit., p. 58.

<sup>71</sup> Ibid.

issues. Not only the mentioned issue but the benefits generated from IBA might also possibly be dispensed unequally throughout the community, which the benefits usually remain in the hand of local elites as a result.<sup>72</sup> In other words, instead of combating the curse, IBA might accidentally contribute to the curse.

Ross suggested that instead of transferring wealth to local government, the Alaskan model,<sup>73</sup> as an alternative regime, reallocates such revenue directly to local through cash payment.<sup>74</sup> The regime's benefits allow local people, who stayed more connected to the resources than the central government, to choose the best possible way to spend the windfall economic rents prudently.<sup>75</sup> It could serve as an opportunity to tackle rent-seeking behaviour and corrupt practices.<sup>76</sup> Not only it could supply more fair rent distribution, but it is also used to complement public objectives.<sup>77</sup> Nevertheless, the model's drawback could be seen from the complexity of the operation due to the population database's magnitude and the fact that the regime would not work correctly in the area lacking a well-developed monetary framework.<sup>78</sup>

## 5.2 The Job Benefits

One common element of IBA in terms of economic benefits to the local community is clauses concerning training and employment opportunities,

<sup>72</sup>Fraser Institute, **What are Impact and Benefit Agreements (IBAs)** [Online], available URL: [http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-\(IBAs\)/](http://www.miningfacts.org/Communities/What-are-Impact-and-Benefit-Agreements-(IBAs)/), 2016 (October, 13).

<sup>73</sup>Alaskan Permanent Fund was created in 1976 via amended constitution difference from IBAs which base on private contractual arrangement please see Patrick Wieland, op.cit., p. 272.

<sup>74</sup>Macartan Humphreys, and others, **Escaping the Resource Curse** (Columbia University Press 2007), p. 242.

<sup>75</sup>Ibid., p. 243.

<sup>76</sup>Ibid.

<sup>77</sup>Ibid.

<sup>78</sup>Ibid., p. 244.

capacities building<sup>79</sup> that could also be seen in the “local content” provided in the upstream contract between government and investor, such as PSCs Indonesia.<sup>80</sup> The main idea of local content is that oil and gas activities (and other developments) provide economic rent and encourage development and economic growth if they effectively comply with the national economy.<sup>81</sup> It could be reasonably claimed that IBA could be utilised with local content provisions and focus on the local community directly affected by natural resource exploitation. They also give indigenous people more “right to say” regarding their ancestor land and natural resources.

The hindrances of employment goals might arise because the local community could not provide adequate training<sup>82</sup> and high-quality oil and gas or mining industry standards.<sup>83</sup> Moreover, it seems unlikely that the locals could hold a sophisticated job due to its enclave nature but only low-wage positions.<sup>84</sup> The mentioned issue may lead to whether or not IBA and local content are beneficial to the local community in this regard. Thus, sufficient consultation is required to reflect the actual capacity of the indigenous community.<sup>85</sup> Responding to its limitation, the external expert should work alongside community base expertise to collect and analyse the community stability before negotiation.<sup>86</sup> In case of the capacity building required, hiring an external expert for the training program from the outset

<sup>79</sup> Guillaume Peterson St-Laurent and Philippe Le Billon, op.cit., p. 594.

<sup>80</sup> Hildegunn Kyvik Nordas, “The Upstream Petroleum Industry and Local Industrial Development: A Comparative Study,” (2003) Institute for Research In Economics and Business Administration, SNF-Project No.4245, p. 28.

<sup>81</sup> Marie-Claire Aoun and Carole Mathieu, ‘Local Content Strategies in Oil and Gas Sector’ (2015) IFRI Center for Energy Research Paper, 5.

<sup>82</sup> Hildegunn Kyvik Nordas, op.cit., p. 28.

<sup>83</sup> Ibid.

<sup>84</sup> Paul Stevens, and others, “The Resource Cures Revisited,” The Royal Institute of International Affairs, The Chatham House research (2015): 32. And Macartan Humphreys, and others, op.cit., p. 241.

<sup>85</sup> Courtney Fidler, and Michael Hitch, op.cit., p. 62.

<sup>86</sup> Ginger Gibson, and Ciaran O’Faircheallaigh, op.cit., p. 79.

of IBA might cost a little more but benefit the locals in the long run.<sup>87</sup> All of which is to avoid a negative impact on the community, the project and the potential of severe issues resulting from unrealistic commitment in IBA.<sup>88</sup>

## 6. Thailand's regime

The section delivers an in-depth comparison between two regimes to suggest improving Thailand's current approach. It begins with the scope and background of the community and its right then shift to community participation in resource management to point out the similarities and differences between the two approaches.

### 6.1 The definition of community and its right

The term community was used as overlapping meaning with the word house or village, the primary administrative unit in Thai society.<sup>89</sup> In 1962, the term was officially adopted from a change in government agencies that have fragmented local administration and established the Department of Community Development under the Ministry of Interior. The Community Organization Council Act 2551 B.E. (2008) defines “community” as a group of people who unite with shared interests and objectives to assist or support each other, undertake joint legal and moral activities, or carry out other activities for the mutual benefit of the members. The community also continually and has a management system and intentions on behalf of the group. While the Royal Decree Establishing the Institute for the Development of Community Organizations (Public Organization) 2543 B.E. (2000) defines “community” as a group of people whose lifestyles are connected

<sup>87</sup>Ibid.

<sup>88</sup>Courtney Fidler, and Michael Hitch, op.cit., p. 62.

<sup>89</sup> คณีนิจ ศรีบัวอี่ม และคณะ, “ความเชื่อมโยงระหว่างสิทธิชุมชนกับทรัพยากรธรรมชาติและสิ่งแวดล้อมภายในไดร์ชั่นธรรมนูญแห่งราชอาณาจักรไทย พ.ศ. 2560,” ศูนย์วิจัยกฎหมายและการพัฒนา, คณะนิเทศศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย, 2560 (กันยายน 8), หน้า 52.

and have regular and continuous communication due to their location, sharing or having the same occupation, engaging in common objectives, or having a common culture, belief, or interest. According to the mentioned regulations, it could be referred that the community means that a group of people has common objectives, communication, compassion, collective learning to act and manage to achieve common goals, but not limited to geographical areas.

The indigenous community has a unique character as a first nation since colonisation.<sup>90</sup> The characteristics could not be found in Thailand because the country was never colonised.<sup>91</sup> In such regard, the minority (hill tribes) in Thailand neither have the aspects of cultural inheritance nor experience of colonisation.<sup>92</sup> The protection of the “rights of traditional indigenous communities” are more intense than that of the “rights of minorities” because the traditional indigenous communities have unique nature having an element of being owner of the land and living on the land long before the majority of people who came later for occupying the territories.<sup>93</sup> In contrast, minorities are protected from discrimination by the majority. The rights that the minorities need are the same as those of the majority.

Section 58 of the Thai Constitution 2560 B.E. certified public participation and community right without discrimination. As a precaution mechanism, Thailand has initially imposed EIA to provide adequate environmental planning, manage, and facilitate economic development. The law ruled that in the case that any activities to be commenced by the state or by the permission of the state may cause potential harm to environmental quality, natural resources, health, quality of life or other significant interest of people or community, the state should undertake the evaluation of the impact on environmental and community coupled with give the right to access information and participation to all stakeholders.<sup>94</sup>

<sup>90</sup> Please see Section 2.1.

<sup>91</sup> สุจิตต์ วงศ์เทศ, ประวัติศาสตร์ไทยได้จากพงษ์ราดารแบบอาณาจักร [Online], available URL: [https://www.matichon.co.th/columnists/news\\_540060](https://www.matichon.co.th/columnists/news_540060), 2564 (สิงหาคม, 4).

<sup>92</sup> คณีนิจ ศรีบัวเยี่ยม และคณะ, เรื่องเดิม, หน้า 37.

<sup>93</sup> เรื่องเดิมกัน, หน้า 30-31.

<sup>94</sup> Enhancement and Conservation of National Environmental Quality Act B.E. 2535, Section 46.

As the majority of the world, ownership of natural resources in Thailand belongs to the state. The government has to maintain and distribute for the well-being of the Thai people.<sup>95</sup> Opposing to Canada<sup>96</sup>, the Constitution of Thailand is unlikely to allow the local community or authority fully to exploit the natural resources in such provinces without permission from the government.<sup>97</sup> In other words, the exploration and exploitation of natural resources in the jurisdiction should be commenced only with the government permission or giving a license. In the state position, a legal entity that laws allow to establish legally binding with the investor for the exploration and exploitation of natural resources in Thailand is State Organisations.<sup>98</sup> It means that the community is not included in this sense.

Thus, the Thai legal regime is unlikely to provide the legal basis for IBA as a private contractual arrangement. The exploration and exploitation of natural resources in Thailand could commence only through the channel of administrative contract, for instance, concession and licence between state and investor.<sup>99</sup> The community is not a state's legal entity or juristic person who is legalised to establish an administrative contract in such circumstances.

## 6.2 Community participation in resource management

Experience of energy-exporting nations shows that, by no means, cursed by their resource wealth.<sup>100</sup> Thailand is the 32nd largest oil-producing country globally and the 4th largest in ASEAN, behind Malaysia, Vietnam, and Indonesia.<sup>101</sup>

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<sup>95</sup> Constitution of Thailand B.E. 2560, Section 57 (2).

<sup>96</sup> Constitution of Canada 1987, Section 91, 92A.

<sup>97</sup> Constitution of Thailand B.E. 2560, Section 57 (2), 58.

<sup>98</sup> Public Private Partnership Act B.E. 2562, Section 4 of, Public Procurement Act B.E. 2560, Section 4 and Petroleum Act B.E. 2514, Section 22, 22/1, 23.

<sup>99</sup> สำนักงานศาลปกครอง, เรื่องเดิม, หน้า 6-7.

<sup>100</sup> Peter Kaznacheev, op.cit., p. 3.

<sup>101</sup> Kensuke Yamaguchi, Manaskorn Rachakarakij, and Hisashi Yoshikawa, "Natural Gas in Thailand: Curse or Blessing?," *GMSARN International Journal* 11 (2017): 69-70.

Since the 1980s, offshore production started commercially but did not result in adequate production to reach domestic consumption requirements, forcing the country to import considerable amounts of energy from neighbouring countries.<sup>102</sup> Since the beginning of production, Thailand has less exported energy resources.<sup>103</sup> The ratio of dependency on commercial energy import to the total domestic energy demand remained at the level of 62%.<sup>104</sup> The Thailand economy is likely independent from gas and oil revenue, a sound economic structure because the resource curse's future possibility is low.<sup>105</sup> As a developing country, Thailand is also struggling with the embezzlement of natural resource revenue by a weak institution and state officials' corruption.<sup>106</sup> Failure to distribute them to promote strong institutions, sustainable and economic growth appropriately contributes to the Nigerian disease.<sup>107</sup>

It is recognised that public participation and fair resource management distribution are essential mechanisms to ensure environmentally sustainable development and mitigate the curse. Such an idea could be seen in the Constitution of Thailand, which certified the community's rights and imposed duties to the state to achieve sustainable utilisation of natural resources.<sup>108</sup> Although Thailand's regulations do not allow IBA, the assessment is required before granting

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<sup>102</sup> Ibid.

<sup>103</sup> Ibid., p. 72.

<sup>104</sup> Energy Policy and Planning Office, THAILAND Energy and Natural Resources [Online], available URL: [www.eppo.go.th/images/policy/PDF/docs/Thailand\\_Energy\\_Brief.pdf](http://www.eppo.go.th/images/policy/PDF/docs/Thailand_Energy_Brief.pdf), 2021 (February, 17).

<sup>105</sup> Kensuke Yamaguchi, Manaskorn Rachakarakij, and Hisashi Yoshikawa, op.cit., p. 72.

<sup>106</sup> Bangkok Post, Thailand falls 3 places in corruption table [Online], available URL: <https://www.bangkokpost.com/thailand/general/2059715/thailand-falls-3-places-in-corruption-table>, 2021 (August, 15).

<sup>107</sup> Global Witness, op.cit. p. 4.

<sup>108</sup> Constitution of Thailand B.E. 2560, Section 43, 57, 57 and 58.

a license or commencing exploitation,<sup>109</sup> such impact assessment processes known as EIA.<sup>110</sup>

EIA refers to forecasting or predicting possible negative and positive impacts on the environment in every aspect that may occur from the development.<sup>111</sup> Including livelihood, economy, society, health, culture and natural resources to prevent harmful or undesirable negative impacts from occurring with as little as possible.<sup>112</sup> It can also be used as a guideline for impact reduction by making the best use of resources. There are 35 kinds of projects needed to go through the EIA process. (Annex I).<sup>113</sup>

The common aspect of the mentioned mechanisms is the presumptions that the effects and causes of threat could be predicted, and the essential effects could also be measured.<sup>114</sup> In general, impact assessment is a scheme in which information relating to the development of project potential environmental impacts is carefully considered before the possibly disastrous decision is decided.<sup>115</sup> In the aspect of the project proponent, preparation of environmental detail in parallel with the design of development creates a practical framework in which design project and environmental consideration could

<sup>109</sup> Constitution of Thailand B.E. 2560, Section 58.

<sup>110</sup> Enhancement and Conservation of the National Environmental Quality Act B.E. 2535, Section 48.

<sup>111</sup> Thailand National Chapter, ‘Handbook for Public Participation In Environmental Impact Assessment’ (2014) <[www.tei.or.th/tai/EIAtoolkitH.pdf](http://www.tei.or.th/tai/EIAtoolkitH.pdf)> accessed 16 February 2021, p. 5.

<sup>112</sup> *Ibid.*

<sup>113</sup> “ประกาศกระทรวงทรัพยากรธรรมชาติและสิ่งแวดล้อม เรื่อง กำหนดประเภทและขนาดของโครงการหรือกิจการซึ่งต้องจัดทำรายงานการวิเคราะห์ผลกระทบต่อสิ่งแวดล้อม และหลักเกณฑ์ วิธีการและ ระเบียบปฏิบัติ และแนวทางการจัดทำรายงานการวิเคราะห์ผลกระทบสิ่งแวดล้อม ฉบับที่ 6 (พ.ศ. 2557),” ราชกิจจานุเบกษา 132, ตอนพิเศษ 11ฯ (15 มกราคม 2558), หน้า 13.

<sup>114</sup> Jane Holder, and Maria Lee, *Environmental Protection, Law and Policy*, 2nd ed. (UK: Cambridge University Press 2009), p. 551.

<sup>115</sup> Stuart Bell, and others, *Environmental Law*, 8th ed. (UK: Oxford University Press 2013), p. 452.

interact.<sup>116</sup> Detailed examination of the environment might display the route in which the development could be altered to mitigate potential adverse effects, for instance, via analysing more global friendly alternatives. The mentioned process is likely to allow the formal development approval phase to run expediently.<sup>117</sup>

The scheme could improve the quality of decision-making process since public authorities have to fulfil the environmental obligation.<sup>118</sup> By analysing the impacts of development before it is commenced and more comprehensive details, authorities can create an adequate decision.<sup>119</sup> To facilitate the development, the regulation should impose the duty on public authorities, which have information, to provide and make relevant information related to the proponent's environmental statement preparation because developers are bound to comply with the environmental statement.<sup>120</sup> Also, the argument of public interest in a significant development might arise as the concern on unforeseeable adverse impacts on the community.<sup>121</sup> In-depth analysis of project consequences via an environmental statement and public engagement in the early initial development phase could mitigate the fears from lacking information, improve the ecological result, and decrease public opposition.<sup>122</sup>

However, Thailand's assessment mechanisms, especially EIA, still contain some flaws that need improvement. First, rather than declaring real implications of projects, some evidence shows that there are barely EIA reports that have failed

<sup>116</sup> The Office of Deputy Prime Minister, **Environmental Impact Assessment: A guide to procedures** (UK: Thomas Telford Publishing, 2000), p. 7.

<sup>117</sup> Malgosia Fitzmaurice, and others, **Research Handbook on International Environmental Law** (UK: Edward Elgar, 2010), p. 227.

<sup>118</sup> Patricia Birnie, and others, **International Law and the Environment**, 3rd ed. (UK: Oxford University Press, 2009), p. 165.

<sup>119</sup> Jane Holder, and Maria Lee, op.cit., p. 550.

<sup>120</sup> The Office of Deputy Prime Minister, op.cit., p. 8.

<sup>121</sup> Ibid.

<sup>122</sup> Mathew Baird, and Richard Frankel, **Environmental Impact Assessment Comparative Analysis in Lower Mekong Countries P.A.C.T Research** (2015): 9.

both by the Environmental Policy and Planning Office and the National Environment Board.<sup>123</sup> It is obviously seen that both the EIA reports are made to allow projects to be approved only in accordance with legal processes.

The Coal-Fired Power Plant Project, Mae Moh, Lampang Province, reflects that, although EIA was launched, it does not focus on the accumulated impacts with efficient mitigation measures.<sup>124</sup> In contrast, the assessment only emphasises the short term impacts.<sup>125</sup> Hence, experts who possess profound knowledge, understanding, and experience parallel with participation by the public must perform when conducting the EIA.

There is another legal consideration as provided in Section 67 of Petroleum Act B.E. 2514 that Real estate for use in petroleum business to proceed with expropriation. There is no regulation requiring the state to deliver community, public participation and the EIA process for such action.<sup>126</sup>

Second, it is evident that the EIA report typically is done by the project's consultants, including private companies and educational institutions registered with the Environmental Policy and Planning Office. The preparation of the report is, therefore, not independent. It depends on the employment contract; for example, if the report is considered to receive the final payment; thereby, these consultants must adjust their writing to pass the report. If the study fails, the final huge sum will not be paid.<sup>127</sup> Besides, neither the consultants nor the authorities are punished<sup>128</sup> for issuing false information, which may cause severe impacts on public health and the environment, such as gold mining in Loei and Phichit Province.

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<sup>123</sup> ใช้ณรงค์ เศรษฐ์เชื้อ, EIA and EHIA หลุมดำของความรู้ในการตัดสินใจของรัฐไทย [Online], available URL: <http://www.isaranews.org/lsranews-article/54217-eia-54217.html>, 2021 (February, 17).

<sup>124</sup> Thailand National Chapter, op.cit., p. 16.

<sup>125</sup> Ibid.

<sup>126</sup> นารีสา เกิดอุ่น, เรื่องเดิม, หน้า 78.

<sup>127</sup> Manager Online, เปิดกลโกง EIA-EHIA เท็จ 3 หน่วยงานจับมือปั้นข้อมูล [Online], available URL: <https://mgronline.com/specialscoop/detail/9600000117624>, 2021 (February, 17).

<sup>128</sup> Ibid.

It is reasonable to claim that the mentioned defects lead to the catastrophe of information that the government shall consider to establish a well-rounded decision. Apart from increasing public and private participation, legal mechanisms are required to impose legal responsibility to project developers, consultants, and authorities for the false report to minimise the curse's possibility and achieve sustainable development.

From experience in section 2-5, revenue generated from resource sales in a specific area should be directly reallocated to communities for equitable distribution, as prosperity should not be concentrated in a single location. At the same time, abandon the source of wealth, characterised by environmental degradation and a low standard of living. Although the Constitution of Thailand guarantees the right to public and community participation, secondary legislation should detail how that right is exercised in practice to reduce controversy. The solution to the assessment disadvantage is to enact secondary laws that make the quality of EIA a condition of the state's contract, namely DCA. This method could increase community participation while also incentivising entrepreneurs to conduct a thorough EIA to receive a solid social license, reducing the possibility of project delays.

Furthermore, the laws play an essential role in eliminating or at least partially mitigating ad hoc difficulties. The solution is reallocating such revenue directly to local communities through cash payment and, in some other way, directly providing local content that provides employment or other benefits to communities. Furthermore, imposing legal liability on project developers, consultants, and authorities for the false report is reasonable to alleviate public anxiety caused by inaccurate information.

## 7. Conclusion

The term resource curse represents an economic phenomenon associated with the abundance of natural resources in countries. The term summarises a paradox that naturally gifted resource countries do not continuously develop and

grow their economies. Instead, they contribute to adverse effects on the environment and the living standard of people.

In essence, IBA is a legal instrument that aims to ensure that economic developments will consider adverse impacts on indigenous communities potentially arising from natural resource exploitations.<sup>129</sup> Such an approach is contractually accelerating economic growth and guaranteeing fair benefits distribution, simultaneously rights to control land and natural resources of the local community. Practically, the state steps aside then control the IBA remotely by delegating consult to the investor. In this regard, the investors and the local communities would negotiate to maximize each party's benefit through private contractual arrangements. However, the confidentiality clauses might unintentionally reinforce the resource curse, and the job benefit objective seems unlikely to be achieved effectively. These occur from insufficiently fulfilling the duty of consult to give local communities adequate information to make a precise decision.

On the other hand, Thailand is a petroleum-consuming country, likely independent of gas and oil revenue. The possibility of the curse in the form of Nigerian disease needs to be considered to strengthen the institution and accelerate the nation's prosperity. Contradict to IBA, EIA is the precautionary mechanism that is the presumptions that the effects and causes of threat could be predicted, and the essential effects could also be measured to avoid adverse impact on the environment and community.

Learning from Canada experience, the revenue generating from resource selling in a specific area should be directly reallocated to the communities for a fair distribution because the prosperity should not be only located in one place. At the same time, leave the origin of wealth with environmental degradation and low quality of living. Although the Constitution of Thailand certified the right of public

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<sup>129</sup> Ken J. Cainel, and Naomi Krogman, "Powerful or Just Plain Power Full? A Power Analysis of Impact and Benefit Agreements in Canada's North," *Organization & Environment Journal* 23, 76 (2010): 80-81.

and community participation, the secondary law should provide the details of such right in practice to reduce the controversy. The solution to mitigate the assessment drawback is establishing adequate secondary laws<sup>130</sup> to put the quality of EIA as a condition of the state's administrative contract, namely DCA. This method could expand community participation and incentivise entrepreneurs to establish a sound EIA for receiving a solid social license, simultaneously reducing the possibility of project delay. Besides, the laws play an essential role in eliminating or, at least partly mitigate, the ad hoc difficulties by reallocating such revenue directly to local through cash payment or, somehow, giving employment or other benefits straightly to communities. Moreover, imposing legal responsibility to project developers, consultants, and authorities for the false report is reasonable to prevent the public tension from the inaccurate information and defective of project development.

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<sup>130</sup> For instance, Enhancement and Conservation of the National Environmental Quality Act B.E. 2535 and Petroleum Act B.E. 2514.

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