

COUNTRY REPORT: THAILAND

Krisdakorn Wongwuthikun*

Introduction

In this report, the focus will be on two main issues. After setting the scene for this country report by outlining the current political situation in Thailand and the administrative consequences of that situation, this contribution will firstly report on the recent Thai court's decision in relation to the issue of transboundary pollution arising from the construction of the Xayaburi Dam on the Mekong River, an international watercourse which has its origin in China and which flows through Myanmar, Thailand, Lao PDR, Cambodia and Viet Nam. This is the first time that the issue of the Xayaburi Dam has been addressed judicially, therefore it is interesting to consider what may be learnt from the judgment (although the case is still at a preliminary stage of litigation). Secondly, the current situation of the illegal elephant ivory trade in Thailand will be described. As the illegal ivory trade in Thailand has not yet been fully suppressed, this report, will elaborate the response of the Secretariat of *the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)* to this matter.

Political and Administrative Developments in Thailand

It is appropriate to begin by giving some information about the Thai political situation in 2014. Since 22 May 2014, Thailand has been governed by a military government as a consequence of a coup d'état in which the military regime claimed that Thailand needed to be reformed in several areas, including the utilisation of natural resources and the protection of the environment, though it described both areas as being of secondary importance.

* PhD Candidate, School of Law, the University of Dundee, United Kingdom, email k.wongwuthikun@dundee.ac.uk. The author would like to thank Ms Elizabeth Kirk for her invaluable comments, which were helpful in improving the quality of this report.

The administrative structure has also been reformed so that the elected constitutional Minister of Natural Resources and the Environment has been replaced by a militarily appointed officer, General Dapong Rattanasuwan who, in turn, is under the control of the Deputy Prime Minister and the Defence Minister who was also appointed by the military. Recently, the Minister has declared new policies for protecting and preserving the environment. These policies are in fact not new, but they place more emphasis on law enforcement which needs to be strengthened, in particular emphasizing the protection of Siamese rosewood that has been heavily illegally harvested.¹ The focus of these policies is the sustainable management of natural resources and the environment in accordance with the Royal Initiative of His Majesty the King Bhumibol Adulyadej. The aims are to improve and enhance economic growth and to develop the country sustainably.²

Current Developments in the Case concerning the Construction of the Xayaburi Dam on the Mekong River

The Xayaburi Hydroelectric Dam, which is presently being built in the Mekong Basin by a Thai engineering company (Ch.Karnchang Plc.) will be the first large dam located in northern Lao PDR.³ This hydroelectric power project started in March 2012, and is projected to be concluded, according to the annual report of Ch.Karnchang Plc, in 2019.⁴ The company has agreed to sell 95% of the electricity that will be generated to Thailand through the Electricity Generating Authority of Thailand (EGAT), the sole buyer of this electricity.⁵ The EGAT signed the Power Purchase Agreement (PPA) with the Xayaburi Power Company Limited with the approval of the National Energy Policy Council and the Cabinet.⁶ This event has caused serious concerns about the adverse impact on the environment that may occur as a

¹ Policy of the Minister of Natural Resources and the Environment (16 September 2014), 9 http://www.mnre.go.th/ewt_dl_link.php?nid=3308 <accessed 6 November 2014>.

² Ibid, 13.

³For more information see Stuart Orr, Jamie Pittock, Ashok Chapagain and David Dumaresq, 'Dams on the Mekong River: Lost Fish Protein and the Implications for Land and Water Resources' 22 *Global Environmental Change* 925, 925.

⁴ Ch.Karnchang Plc has established a new subsidiary project company incorporated under the laws of Lao PDR, the Xayaburi Power Company Limited, in 2009 to be responsible for the project; see Ch. Karnchang, *Annual Report* (2014)

⁵ The Thai government signed the power purchase agreement with Xayaburi Power Company Limited in October 2011. See <http://www.internationalrivers.org/resources/thai-utility-commits-to-purchase-power-from-xayaburi-dam-3692> <6 November 2014>.

⁶ Ibid.

result of the proposed dam. It is believed that if Thailand terminates the PPA, the project will eventually be discontinued. Consequently, a group of 37 villagers in 8 provinces who live alongside the Mekong River, namely Chiang Rai, Loei, Nong Khai, Nakhon Phanom, Bueng Kan, Mukdahan, Amnat Charoen and Ubon Ratchathani submitted a case before the Administrative Courts of the First Instance (the Central Administrative Court) against the five defendants, namely the Electricity Generating Authority of Thailand (EGAT), the National Energy Policy Council, the Ministry of Energy, the Ministry of Natural Resources and the Environment and the Council of Ministers.⁷

They claimed that their livelihoods, as people living in the area which the Mekong River flows into, will be affected as a consequence of the construction of the proposed dam which is being built on the Lower Mekong River's mainstream located wholly in the territory of Laos. Therefore, it may cause significant transboundary impacts on the natural flows of the water and its ecosystem in Thai territory. The plaintiffs sought an order in the following terms:⁸

1) The PPA concluded between the EGAT and the Xayaburi Power Company Limited is an unlawful project and shall be revoked;

2) The resolutions adopted by the NEPC and the Cabinet authorising the EGAT to sign the agreement should be invalidated;

3) The process of acquiring the electricity from the proposed dam is inconsistent with both domestic law and international law, viz.

a) The PPA was concluded in a way that was contrary to the Constitution of the Kingdom of Thailand, B.E. 2550 (2007) which provides a right of information and public participation to individuals and communities whose livelihoods *etc.* may be affected by a project or activity

b) The requirement to provide information was not fulfilled since the information given was incomplete and inadequate and was not such as to allow the people to apprehend those facts that may affect their livelihoods. In addition, opportunities to participate were not ensured since public hearings were only held in some areas, not in all

⁷ See case concerning an Unlawful Act and Omission of an Administrative Agency or State Official and a Dispute in connection with an Administrative Contract (appeal against the order of the Administrative Courts of First Instance)(Order No. 8/2014), 17 April 2014, 3.

⁸ Ibid, 8.

the eight provinces that are adjacent to the Mekong River as required by domestic and international law.⁹

Therefore, it was argued, such actions should be considered to be unlawful and the plaintiff requested the Court to order all the defendants to act in accordance with the Constitution, laws, resolutions of the cabinet concerning the proper notification and disclosure of information, public consultation and environmental/health and social impact assessment both in Thailand and in the neighbouring States prior to purchasing the electricity from the proposed dam.

The Administrative Courts of First Instance rejected all three of the plaintiffs' allegations. The plaintiffs then appealed. On 17 April 2014, the Supreme Administrative Court (hereinafter the Supreme Court) upheld the decisions of the Administrative Courts of First Instance in relation to the first two allegations.¹⁰ However, the last allegation concerning the right to participate and the right to be informed and consulted was accepted.¹¹ In addition, all 37 plaintiffs were considered as persons aggrieved or injured or who may be aggrieved or injured in consequence of an act or omission by an administrative agency or State official.¹² That is to say all 37 plaintiffs were considered to have been or to be at risk of being injured as a consequence of an omission of the National Energy Policy Council, the Ministry of Energy and the Council of Ministers since those three administrative agencies did not control or suspend the construction of Xayaburi Project conducted by the EGAT. The Supreme Court also made reference to the provisions with regard to the rights of a community that are enshrined in the Constitution.¹³ These provisions constitute one of the most important parts of the Constitution conferring rights of communities to, *inter alia*, participate in the management, maintenance, preservation and exploitation of natural resources, the

⁹ The PPA was concluded in a way that was contrary to the Agreement on the 1995 Cooperation for the Sustainable Development of the Mekong River Basin and the Procedure for the Notification Prior Consultation and Agreement (PNPCA) see the text of the Agreement in <http://www.mrcmekong.org/assets/Publications/policies/Procedures-Notification-Prior-Consultation-Agreement.pdf>; <http://www.mrcmekong.org/assets/Publications/policies/Guidelines-on-implementation-of-the-PNPCA.pdf> <accessed 10 November 2014>.

¹⁰ Order No. 8/2014 (n 7) 16-20.

¹¹ *Ibid*, 20; see also Section 9 (1) the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999).

¹² Section 42 of the Constitution.

¹³ Order No. 8/2014 (n7) 22.

environment and biological diversity in a balanced and sustainable fashion.¹⁴ Furthermore, an individual also has the right to participate in the conservation, preservation and exploitation of natural resources and biological diversity and in the protection, promotion and preservation of the quality of the environment for the sake of his regular and continued livelihood in the environment in a way that is not hazardous to his or her health and sanitary condition, welfare or quality of life, and this right must be protected as appropriate.¹⁵

The Constitution also requires that environmental and health impact assessments must be conducted prior to the operation of a project or activity, in a case where the project or activity may seriously affect the community in the sense that it may deteriorate the quality of the environment, natural resources and health. In addition, a public hearing has to be conducted with a view to consulting the public as well as interested persons.¹⁶ Finally, the right of a community to bring a lawsuit against a Government agency, a State agency, a State enterprise, a local government organisation or other State authority that is a juristic person for the performance of duties shall be protected.¹⁷ It is interesting to note that Section 67 of the Constitution is akin to the obligations provided in the Aarhus Convention which takes the rights-based approach in protecting the right of individuals in environmental matter by requiring States to grant them 1) access to information, 2) public participation rights and 3) access to justice.¹⁸ Consequently, the group of 37 plaintiffs, representing different local communities, was able to bring the case before the Administrative Court.

In this case, the Supreme Court, for the first time, accepted that the construction of the Xayaburi dam is a project that may potentially have widespread effects on the environment, the quality and quantity of waters, the volume of water flowing through the Mekong River, the equilibrium ecosystems of the Mekong Basin. Since the proposed project is being built in the northern part of Laos, the upper riparian State, it may have transboundary impacts on the lower riparian States, notably the local communities located within eight Thai provinces that are adjacent to the Mekong River. Their health, sanitation, ways of life and environment

¹⁴ Section 66 of the Constitution.

¹⁵ Section 67 (1) of the Constitution.

¹⁶ Section 67 (2) of the Constitution.

¹⁷ Section 67 (3) of the Constitution.

¹⁸ See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (done 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

may potentially be widely affected.¹⁹ The implication of this pronouncement of the Supreme Court is that the Xayaburi Dam is perceived as a potentially harm-generating project. Although there has been controversy about the nature of the project among the riparian States,²⁰ these controversies had not been addressed judicially until this Supreme Court decision explicitly pronounced on the characteristics of the dam and the environmental effects arising from the construction of the dam. From now on, Thai administrative agencies will need to pay more attention to these issues and take this jurisprudence into account when adopting any policies in relation to this project. The rights of the local community as well as the principle of sustainable development should not be ignored. Furthermore, this case can be considered as a milestone for environmental litigation in Thailand. That is to say, even if such projects or activities are carried out beyond Thai national jurisdiction, if they may cause significant adverse impact on the environment or the livelihoods of the Thai people, the local communities can still bring a lawsuit against governmental agencies.²¹

Another interesting point that needs to be mentioned is that the Supreme Court also made a reference to two international agreements, namely *the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin*²² and *the Procedure for the Notification and Prior Consultation and Agreement (PNPCA)*,²³ and required the Thai administrative agencies to take these agreements into account in decision making. These two agreements set out the principles concerning the utilisation and diversion of water and the protection of ecosystems. This ruling of the Supreme Court is relatively innovative and is peculiar in a dualist legal system such as Thailand's. In these systems courts rarely invoke international obligations directly unless such obligations have already been implemented

¹⁹ Order No. 8/2014 (n 7) 24.

²⁰ This situation can be compared to the *Gabčíkovo-Nagymaros* case, at the ICJ, where at the very beginning of the project that Hungary and Slovakia had a mutual interest in damming the Danube for, *inter alia*, electricity production. However, later, they had different opinions about the Project since the Hungarian Government decided to abandon the construction on its part as the project was no longer environmentally or economically viable, but Slovakia desired to continue the Project; see *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)* (Judgement) [1997] ICJ Rep 7.

²¹ See <http://www.admincourt.go.th/00%5Fweb/environment/environment-article-20140707.htm> <accessed 7 November 2014>.

²² Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, (adopted and entered into force on 5 April 1995) 34 ILM 864 (1995).

²³ Order No. 8/2014 (n 7) 23-26.

within the domestic law, but in this case the international obligations have not yet be incorporated into domestic law.²⁴

Although this case is still at a preliminary stage of litigation since the Supreme Court only accepted a lawsuit and the merits of the case have not yet been decided (i.e. whether or not the administrative agencies had breached the provisions provided in the Constitution), the Supreme Court has introduced several innovative aspects of legal interpretation into its ruling which make it worth commenting on now. The remaining question that the Court will have to answer is whether or not the defendants had actually acted in consistency with the laws which accord the local communities the right to receive information and the right to participate in those projects or activities that may have an impact on the natural resources and the environment. It remains to be seen how the Supreme Court will rule in this case.

The decision of the Court will have particular significance as this is the only opportunity for the local communities to bring a claim. Since there is no human rights court in which the local community can bring a case, this issue cannot be resolved by means of international litigation. Such rights can only be enforced by national courts. This is in contrast to other parts of the world where local communities may be able to raise an action for breach of human rights in a regional human rights court. For example, a similar dispute arose in Belize as a result of granting of oil concessions which were harmful to the natural environment upon which the Maya people depended for subsistence.²⁵ In this case the Mayan peoples' have had standing to enforce their human rights before the Inter-American Human Right Commission confirmed.²⁶

Since this case is concerned with the rights of the local community, the National Human Rights Commission of Thailand should also play a more active and continuous role in this case, such as conducting a thorough examination of potential human rights violation and submit the report to the Government along with remedial measures. The Government should also bear in mind that, in November 2012, it has already signed the ASEAN Human Rights

²⁴ See <http://enlawfoundation.org/newweb/?p=2270> <accessed 6 November 2014>.

²⁵ *Maya Indigenous Community of the Toledo District v Belize*, Case 12.053 IACommHR Report No 40/04 OEA/Ser.L/V/II.122 Doc. 5 rev 1 Vol 2 (2004) 727.

²⁶ Ibid and see also the rights of Yanomami Indians in *Yanomami Indians v Brazil*, Case No. 7615 IACommHR Report No 12/85 OEA/Ser L/V/II.66 doc.10 Rev 1 (1984–85) and the Mayagna (Sumo) Awas Tingni Community in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR Series C No 79 (31 August 2001).

Declaration. According to the Declaration, it accepts that 'every person has the right to an adequate standard of living for himself or herself and his or her family including... (f) the right to a safe, clean and sustainable environment.'²⁷ Therefore, the Government should take this provision, enshrined in this international instrument, into account, although it is not legally binding.

Thailand's National Ivory Action Plan (NIAP)

Thailand, as a destination country for illegal elephant ivory, submitted the NIAP to the Secretariat of *the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)* in 2013.²⁸ At the Sixty-fifth meeting of the Standing Committee which was held in Geneva (Switzerland) between 7 and 11 July 2014, the CITES Secretariat evaluated the reports on the progress of the implementation of Thailand's NIAP.²⁹ This evaluation expressed serious concerns in many respects which will be considered below.³⁰

The issues that have been rated as 'challenging' which means that 'there has been limited progress with implementation or progress has been impeded by delays or challenges, and achievement of the specified milestones and timeframes appears unlikely unless these issues are resolved'³¹ are:

- a) Revision of *the Draught Animals Act B.E. 2482 (1939)*
- b) Revision of *the Wild Animals Reservation and Protection Act B.E. 2535 (1992)*.

²⁷ 28 (f) of the ASEAN Human Rights Declaration available at: <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration> <accessed 21 November 2014>; see for more information about the Declaration in Catherine Shanahan Renshaw, 'The ASEAN Human Rights Declaration 2012' (2013) 14 Human Rights Law Review 1.

²⁸ See http://www.cites.org/eng/news/pr/2013/20130516_elephant_action_plan.php <accessed 6 November 2014>; For more information about the ivory trade in Thailand see Daniel Stiles, *The Elephant and Ivory Trade in Thailand* (TRAFFIC Southeast Asia, 2009). <https://portals.iucn.org/library/efiles/documents/Traf-107.pdf> <accessed 6 November 2014>.

²⁹ The CITES Secretariat, Sixty-fifth meeting of the Standing Committee (Geneva (Switzerland), 7-11 July 2014), Interpretation and Implementation of the Convention Species Trade and Conservation: Elephants: National Ivory Action Plan, SC65 Doc. 42.2 http://www.cites.org/sites/default/files/eng/com/sc/65/E-SC65-42-02_1.pdf <accessed 6 November 2014>.

³⁰ *Ibid*, 30-34.

³¹ *Ibid*, 4.

As far as the revision of *the Draught Animals Act* is concerned, the Secretariat was not satisfied with the delay in the implementation of the proposed legislative amendments, although it accepted that the delay might arise from the political situation in Thailand. Therefore, the Secretariat has set two deadlines for amendments to be adopted dealing with:

1) the regulation concerning a new elephant identification book system which has been drafted by the Department of Provincial Administration should be adopted by March 2015,

2) The new law which aims at removing domesticated elephants from the Act should be adopted by April 2016.

As for the revision of *the Wild Animals Reservation and Protection Act*, it was also not satisfied with the legislative amendments and it has set two deadlines for two issues, namely that:

1) Thailand should add domesticated elephants as a 'protected species' under this Act and the law should take effect in May 2016.

2) The provisions which aim at controlling the possession of African elephant ivory also need to be drafted (currently the law only controls the import and export of African elephant ivory) and this should be completed in December 2017.

Thailand needs to revise its NIAP urgently, since it has been categorised as one of the Parties of "Primary Concern".³² The Standing Committee recommends that it shall submit a revised NIAP to the Secretariat by 30 September 2014 and the enactment of appropriate legislative or regulatory provision concerning the control of illegal elephant ivory should be achieved by 31 March 2015. The inclusion of the African elephant as a "protected species" under *the Wildlife Act* should be taken into account in these amendments. The establishment of a registration system for domestic ivory and a system for the registration and licensing of ivory traders are also urgent issues that should be tackled. The Standing Committee also asked Thailand to increase its law enforcement efforts against the illegal ivory trade. The first progress report is required to be submitted to the Standing Committee by 15 January 2015 and a further progress report must be submitted by 31 March 2015.

³² See <http://www.cites.org/sites/default/files/eng/com/sc/65/com/E-SC65-Com-07.pdf> <accessed 6 November 2014>.

There is a risk for Thailand if the Standing Committee is not satisfied with the revised NIAP, since the Standing Committee has the authority to apply the measures provided in paragraph 30 of the CITES compliance procedures, that is the suspension of commercial or all trade in specimens of one or more of the CITES-listed species.³³

However, Thailand has substantially achieved its aim in revising *the Department of Livestock Development's Regulations on Moving Animals and Their Carcasses regarding the Marketing of Raw Ivory under the Animal Epidemics Act*.³⁴ The most recent development is that a new marking system for ivory was signed on 1 May 2014 by the Director General and is in the process of being gazetted.³⁵ The marking system functions by means of punching unique identification numbers on whole tusks or pieces of raw ivory.³⁶ In addition, Thailand carried out a nationwide survey of ivory traders and it has also achieved its aim in compiling such information.

Concluding Remarks

This country report has given a synopsis of the environmental situation in Thailand that has revealed both a crucial role played by a judicial institution in protecting the rights of local communities concerning the protection of the environment and a surge of anxiety as shown in the issue of illegal elephant ivory. While the ruling of the Supreme Court concerning the right of local communities to participate in the decision-making process of projects that may have an adverse impact on the environment and on their livelihoods gives a positive expression of the judicial role in the environmental field, the failure of legislative bodies in Thailand to amend domestic laws to control the illegal ivory trade and the scant efforts being made by the enforcement bodies is a weak point of the Thai legislative and enforcement system. Nonetheless, it remains to be seen whether there will be further developments in both these cases. For the case that is now pending in the Supreme Court, the local communities - as well as environmental activists - are full of hope in resorting to a judicial settlement in protecting the environment,³⁷ whereas the governmental agencies would like to sustain this large-scale and controversial project with a view to supplying sufficient electricity

³³ See <http://cites.org/sites/default/files/document/E14-03.pdf> <accessed 6 November 2014>.

³⁴ National Ivory Action Plan, SC65 Doc. 42.2, 32.

³⁵ *Ibid*, 32.

³⁶ *Ibid*, 32.

³⁷ See generally in <http://www.internationalrivers.org/blogs/259-1> <accessed 15 November 2014>.

for Thailand.³⁸ This is obviously an issue of sustainable development, which the government needs to take into account when making any decision associated with the Xayaburi project or any project that may be launched in the future. With regard to the standing of the local community, although they have a standing to bring the claims before the domestic court, they cannot raise this issue before the ASEAN Human Rights Body since such Body has not come into existence as yet. In order to enforce the rights of the local community internationally, it would be desirable to establish a regional human rights court within the ASEAN.

With regard to the ivory trade issue, intense pressure is being placed on Thailand, either to accept stringent and fixed timeframes to amend its laws or to accept the complex legislative and regulatory control systems that need to be urgently established. If the problems are still unresolved and persistent, Thailand will inevitably be in a difficult position in respect of trade suspensions unless it can show that it has a strong intention to achieve compliance and put every effort into solving these problems.

³⁸ See the plan of the EGAT to imports electricity under the Xayaburi Project in the EGAT's Annual Report 2013 in http://www.egat.co.th/en/images/annual-report/2013/94_egat-annual-eng-2013.pdf and see also in <http://www.irrawaddy.org/business/thai-power-firms-business-tactics-use-burmas-weak-laws.html> <accessed 15 November 2014>.