

COUNTRY REPORT: THAILAND

Thailand's Struggle with Enforcing Environmental Law

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As of December 2015 Thailand continues to be governed by a military government with elections planned no sooner than 2017. In spite of this, official government websites of the Courts of Justice and the Administrative Court indicate that these Courts are functioning,¹ and that local government offices are fully staffed. On several occasions armed forces of national government offices have stepped in on illegal environmental activities in National Parks and the fishing industry. These so called 'crackdowns' were covered by national television and newspapers like the Bangkok Post.²

At the international level Thailand has been the recipient of outspoken criticism of its ability to comply with its international environmental obligations. The European Commission gave Thailand a 'yellow card' for clear deficiencies in the fight against Illegal, Unreported and Unregulated (IUU) fishing. In a press release the European Commission specifically mentioned Thailand's deficient legal framework, enforcement measures and administrative arrangements, as an important reason for the Commission's decision.³ The U.S. State Department TIP Report into human trafficking and slavery has downgraded Thailand and the IUCN advised the World Heritage Committee to put one of Thailand's natural World Heritage Sites on the 'Endangered List'.

This country report focuses events in one of Thailand's National Parks which constitutes a World Heritage Site which highlight deficiencies in the Thai Legal Framework and administrative arrangements that impact on Thailand's ability to enforce environmental law.⁴

¹ Courts of Justice Thailand <http://www.coj.go.th/en/index.html> and Administrative Court Thailand http://www.admincourt.go.th/amc_eng/login_eng.aspx.

² <http://www.bangkokpost.com/print/421689>.

³ EU Press Release 21 April 2015 http://europa.eu/rapid/press-release_MEMO-15-4807_en.htm.

⁴ UNESCO World Heritage Documents, available at <http://whc.unesco.org/en/list/590/documents/> and <http://whc.unesco.org/en/soc/3243>.

Situation in Thap Lan National Park

Over 400 cases against resorts and farmers in and around the Thap Lan National Park area, which is part of the Natural World Heritage Site 'Dong Phrayayen-Khao Yai Forrest Complex' (DPYKY-FC) for *inter alia* illegal logging and wrongful land use have been prosecuted. Yet only a small number of court orders to remove the illegal building structures and a rubber plantation have been executed (even partly) through government crackdowns: some illegal resorts were damaged, but not completely removed, by officers of the Department of National Parks so that they were not fit for operation and some trees of an illegal rubber plantation have been cut with the assistance of armed forces. Other resorts are still operational. Meanwhile the IUCN reports more encroachments, wrongful land use (involving unsustainable farming practices) illegal logging, poaching and resort building and the state of the site is described as critical. The 2014 IUCN Reactive Monitoring Mission to the DPYKY-FC advised the World Heritage Commission to add the property to the List of World Heritage in Danger.⁵ The effectiveness of Thailand's strategy for protecting the Site is therefore called into question.

Why Crackdowns?

While this report does not promote the kind of forceful actions the Central Thai Government uses to reach its goals, the use of crackdowns reveals an underlying problem in the Thai Legal Framework that has a negative impact on the Country's ability to enforce law and to comply with its international obligations.

The example of the problems in the DPYKY-FC mentioned in the IUCN reports from the last ten years, shows that the crackdowns are a direct consequence of the fact that for a long period of time relevant laws, like the National Park Act (1961),⁶ were not enforced. Although the government's local district officer's duties are to watch over and direct the laws and policies of the central government, to report to provincial and national government (Civil Service Act 2008),⁷ and the district police has authority in the National Park (National Park Act 1961), the court's order to remove building structures and rubber trees in Thap Lan National Park, was in fact forcefully executed (through a 'crackdown') by national government agencies assisted by armed forces. This implies that the local governments are not effectively enforcing the law so as to prevent or stop encroachment and illegal resort

⁵ UNESCO World Heritage Documents, <http://whc.unesco.org/en/list/590/documents/>.

⁶ National Park Act, B.E. 2504 (1961), <http://faolex.fao.org/docs/html/tha21343.htm>.

⁷ Civil Service Act, Thailand, 2008, available at:

https://www.ocsc.go.th/ocsc/th/uploads/law/Act_law2551En.pdf.

building. From the perspective of the central government, a crackdown is a legitimate tool to restore at least some order and authority. The crackdown itself has no long term effect however and in relation to forest conflicts, and may violate local and poor people's basic Human Rights.⁸

Why Do Local Governments Not Enforce the Law?

Concentration of power among prominent families is common in Thailand. According to Freedom House some 42 per cent of the Thai lawmakers elected in 2011 replaced family members.⁹ An inspection of registers of the sub-district offices in the Thap Lan National Park area show that family members of the former MP from this district hold key positions in local governments and land offices and that they have large agricultural and other commercial interests inside the boundaries of the protected area.

The IUCN's World Heritage Outlook states that the protected areas (where this prominent family has commercial interests) are covered by strong legislation.¹⁰ The National Park Act (1961, Section 16) does not allow unsustainable agricultural practices (like mono-crop 'till' systems (corn, tapioca), the use of herbicides/pesticides), unlicensed businesses/resorts, poaching, logging, garbage and land/forest burning in these areas. However, the inspection of plots of government-owned land designated for sustainable use inside the National Park also with members of the prominent family and other government officials as the registered user shows a variety of illegal activities.¹¹ Concerning enforcement, there is a conflict of interest for government officials who have commercial interests in this area to enforce relevant laws and to run their businesses in the most profitable way by ignoring the relevant laws. One could call the decision to not enforce and to act against these laws by government officials, an act of corruption.¹²

⁸ Several local residents and their families inside the Thap Lan National Park (a part of the World heritage Site DPYKY-FC), received eviction orders ('Matra 22'), while they have official house registrations from the local government. The community reported this to IUCN, WHC and OHCHR by sending them a letter with detailed information referring to the relevant (violated) articles of The Universal Declaration of Human Rights on 26 May 2016.

⁹ Freedom House, Thailand Report, <https://freedomhouse.org/report/freedom-world/2014/thailand>.

¹⁰ World Heritage Outlook, DPYKY-FC:

<http://www.worldheritageoutlook.iucn.org/search-sites/-/wdpaid/en/902480>.

¹¹ Unsustainable agricultural practices, use of herbicides/pesticides), unlicensed businesses/resorts, garbage and land/forest burning.

¹² Definition corruption by <http://www.merriam-webster.com/dictionary/corruption>.

One would expect that periodically reports from the local government to the national government agencies would alert them to the problems within the park. However, the Institute for Global Environmental Strategies reported in 2004 that local governments only send reports on request and that a request from the central governments only seems to be made after media coverage of certain issues gets the attention of the Director General.¹³ Regarding the example of protected areas and National Parks, these offices also have only small budgets compared to their responsibilities, limiting their capacity to act even where there is a will to do so.

The Role of the Administrative Courts of Thailand

The Act on establishment of administrative courts and administrative court procedure, (1999),¹⁴ gives Administrative Courts the power to ‘try and adjudicate’ administrative cases. Publications of acting and former Judges of the Supreme Administrative Court of Thailand show that there are problems with having the Administrative Court’s enforcement order executed in cases where the government office or official ignores the Court’s order. The following has been observed by those former Judges:

The Administrative Court has no authority to amend, modify, or substitute the administrative decision.¹⁵

and:

*The law should be modified for greater clarity as well as prescribe measures for cases where the administrative party does not comply with an enforcement order of the Administrative Court, such as imposing fines from agencies in the case State agencies fail to comply.*¹⁶

These quotes represent an interpretation of the law that the Thai Administrative Court cannot require that the decision has to be executed within a certain time by using financial or other

¹³ People and Forest — Policy and Local Reality in Southeast Asia, the Russian Far East, and Japan. June, 2004; M. Inoue & H. Isozaki, (eds). Institute for Global Environmental Strategies, Vol. 3.

¹⁴ Act on Establishment of Administrative Court and Administrative Court Procedure, B.E. 2542 (1999) http://www.admncourt.go.th/AMC_ENG/02-LAW/laws/e2act.pdf.

¹⁵ Dr. Charnchai Sawangsagdi, Judge of the Supreme Administrative Court of Thailand, Thailand Report to the 10th Congress of IASAJ, Sydney, Australia, March 2010, NATIONAL REPORT OF THAILAND ‘Review of Administrative Decisions of Government by the Administrative Court of Thailand’ p.76.

¹⁶ Dr. Bhokin Bhalakula, Former Vice President of the Supreme Administrative Courts ‘Execution in Administrative Cases’, p.60.

penalties in the event that the Government office or official ignores the Court's enforcement order. Ignoring the Court's order has no consequences for the Administrative agency or official.

It should be considered as a shortcoming if the court cannot attach a penalty to its statement, but one could expect that ignoring a court order can be treated as contempt of court, which is, according article 64 of the Act on establishment of administrative courts and administrative court procedure (1999), punishable with a financial penalty and imprisonment. However, according to a source connected to the administrative court, this article 64 is and could never be used in relation to a government office or official who ignored the administrative court's order. It is not clear whether this is a legal limitation or the court's choice not to use this Article 64. Either way, it is not used as a remedy for the court's problems to see its orders executed.

In the course of doing the research for this report, Thai legal professionals participated in discussions on this topic and shared their experiences of the mechanisms to enforce the decisions of the Administrative Court. They were also asked about their knowledge of the differences between Thailand and other countries in relation to these mechanisms and the possibility for the court to attach a penalty to its statement. Songkrant Pongboonjun, a senior environmental lawyer from the North of Thailand, noted as follows after he was asked what he thought the reason was for the problems for the Thai Administrative Court:

The question is very interesting to me, as [an] environmental lawyer I also have the same question and never get a satisfying answer. Even three years ago when I studied administrative court procedure at Thammasat University this topic is omitted, I don't know why. So when you ask about knowledge comparative view of these issues, it is very clear that few people know about this. I think this issue will be very useful both for Administrative court and civil society because we recognize that if we cannot enforce the judgment, the judgement means nothing.

Similarly, environmental lawyers of the Enlaw-Thai Foundation responding to the same question stated:

We know that to reach the final judgment in favor of environmental protection is a long rough way. It could take five years or more in one environmental administrative case. If, at the end, people and the court cannot force the responsible authority to appropriately comply with the ruling, it is then not only the waste of time but also turns it into just a piece of paper.

In the long run, this will undermine the respect of judicial power in reviewing the abusive orders and actions of administrative authorities. That is why studying on the mechanism to

execute the judgment is essential for the development of Administrative Court's role in bringing justice to the society.

Conclusion

Thailand's Legal Framework actively hinders effective enforcement of environmental law and fighting corruption which impacts on the country's stability. Although the IUCN's World Heritage Outlook states that the protected areas discussed are covered by strong legislation this assessment is not realistic and distracts Thai policy makers and the international community. The relevance and quality of the scientific insights and data that the IUCN produces are not often questioned. This gives the IUCN great responsibility for ensuring the accuracy and validity of its data. However, the IUCN assessment of the Thai Legal Framework as being 'effective' seems, based on the problems described above, to be misleading and incorrect.¹⁷ An assessment of 'ineffective' for the Legal Framework could mean that Thailand violates Article 5 of the Convention Concerning the Protection of the World Cultural and Natural Heritage.

For the execution of the court's decision to correct arbitrary government decisions not to enforce Law, the Thai Administrative Court depends on the administrative agency or the official the decision is made against or the intervention of armed forces controlled by central government agencies.

Notwithstanding the fact that Thailand's draft Constitution¹⁸ commits the country to Democratic values and the Rule of Law, Administrative Law, its arrangements and interpretation, actively hinders practical implementation of the law. When essential instruments like the possibility of attaching a penalty to a Court order, are left out of the Administrative Framework and the Administrative Court cannot, or fails, or refuses, to act independently and find a remedy within existing law, the authority of the Court is relegated to that of an advisory body which merely advises the administrative agency or a State official on the direction or the procedure for the execution of the judgment. The problems for the Court in having its orders executed discourage the public from challenging the Administrative decision and take away pressure for Administrative agencies and civil servants to improve their performance because they cannot be held accountable. The possibilities for finding remedies within the existing Law, either initiated by the government or the Administrative Courts seem numerous. Failing to try gives a strong argument to those

¹⁷ World Heritage Outlook DPYKY-FC <http://www.worldheritageoutlook.iucn.org/search/sites/-/wdpaid/en/902480>

¹⁸Draft Constitution Thailand, April 17 2015.

who suspect the Administrative Courts are not impartial and do not act independently, and are therefore acting against Thailand's own Constitution.¹⁹

Thailand's struggle with enforcing environmental law is related to the problems for the Administrative Court to have its order executed. The Administrative Court's problems in have its judgements executed are characteristic of Thailand's struggle between contending the legitimacy of the traditional powers (military, members of the judiciary and civil servants, including Privy Council) with democratic powers to the public.

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¹⁹ European Parliament resolution of 8 October 2015, section Q, 11

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0343+0+DOC+PDF+V0//EN>