Environmental Law in the Thai Supreme Court Green Bench

Address to a delegation from various countries attending The Roundtable for ASEAN Chief Justices and Senior Judiciary on Environmental Law and Enforcement- Judicial Reforms to Respond to Environmental Challenges: Institutionalizing Environmental Expertise through Specialization and Environmental Courts,
In Jakarta, Indonesia, 5 - 7 December 2011

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Introduction:

Your excellencies, Ladies and Gentlemen,

It is a great honor for me to be invited to present to you some features concerning environmental law before the Supreme Court of Thailand. And I hope that what I am going to say will allow you to make some interesting comparisons between our legal systems and the work of the Courts of Justice.

I shall deal with the role that environmental law plays in the caseload of the Thai Supreme Court as well as the role of the Green Bench in applying and shaping Thai environmental law. I shall also focus on the recent jurisprudence and indicate the number of cases before the Green Bench after four years of its operation since 2005, then discuss briefly who appears as a party to such cases, before turning to the outcome of the cases with an emphasis on showing how parts of Thai environmental law has been shaped by Supreme Court practice. Also I shall provide a brief history of the establishment of green benches in Thailand including short overview of Thailand’s judicial system; background on jurisdictions of green benches; procedure for handling environmental cases from trial courts to appeals courts; and identify some challenges in the establishment of green benches as well.

Thai legal and judicial system:

Let us begin with some introductory explanations, since Green Bench’s decisions in the field of environmental law must be regarded in the light of the general features of Thai legal system. Nor is environmental law a clear-cut concept as each area of law has something to offer environmentally.

Thai law has many similarities with the law of other civil law countries. But in comparative law, Thai law can also be seen as a mixing group between civil and common law because in practice the Courts of Justice strictly follow the doctrine of judicial precedent as influenced by the English common law system. However, statutory law is the foundation of the legal system - with such large codifications of legal statutes. Many
administrative law statutes, described as the expression of executive branch’s policies, give wide discretionary powers to public authorities, especially in environmental law. In private law statutes, they frequently refer to the Civil and Commercial Code which includes provisions relating to general principles, obligations, contract law, the law of wrongful act, property law, family law and the law of succession. These substantive private rights are only as good as the procedures available to enforce them. But the effective enforcement of the substantive private law depends on a properly functional procedure law. When deciding cases the Thai Courts of Justice always consider in this close relationship between substantive private law and the Civil Procedure Code.

According to current influence from international law, rights and obligations under the law are not binding on national courts unless they have been transposed by a Thai Act of Parliament. However, a number of the most important international environmental laws and concepts have been incorporated into Thai laws in order to facilitate the country’s development as well as to recognize the world summit at Rio Conference on Environment and Development in 1992 (2535 Buddhist Era or BE). Among the amended laws, laws dealing with environment such as the Enhancement and Conservation of National Environmental Quality Act of 1992, Public Health Act of 1992, Factory Act of 1992 etc., have embraced the principle of sustainable development in the hope that country development would improve the economic without destroying natural resources and environment.

The role of the Supreme Court in environmental law is affected by its role in general. And please bear in mind that the Thai Supreme Court has its jurisdiction to try merely civil law cases and criminal law cases. Moreover, it performs several designated tasks under the 2007 Constitution which are including the selection of five justices of the Supreme Court to be justices of the Constitution Court and nomination of five qualified persons to the Chairman of the House of Senate for the selection of an Election Commissioner. The administrative law cases are the task performed by the Administrative Court.

Environmental law cases are subjected to the screening under certain restrictions provided by the Civil Procedure Code, Criminal Procedure Code and other procedural laws/codes applicable for proceedings to be carried out in the specialized courts, i.e. in the Labour Court, the Tax Court, the Intellectual Property and International Trade Court, and the Bankruptcy Court etc.. Both factual and legal questions of appeal may be heard by the Green Bench. The bench itself can hear witness and perform surveys on the disputed site – in practice it is likely to hear an appeal only where the use of written descriptions and photographs or videos is deemed sufficient to clarify matters.

**Environmental law in Thailand:**

Environmental law in Thailand is mainly statute-based. There is no environmental code as such but separate acts covering the conservation of certain aspects of the environment such as the Town Planning Act of 1975, the Public Health Act of 1992, and the control of certain types of pollution sources such as the Factory Act of 1992 and the Hazardous
Substances Act of 1992. These are enabling statutes which have been followed by many subordinate regulations under licensing schemes. In addition, natural resources legislation and legislation on specific industries have environmental implications, such as the Forestry Act of 1941, the National Park Act of 1961, the Wildlife Conservation and Protection Act of 1992, the National Reserved Forest Act of 1964, and the Fishery Act of 1947.

However, environmental protection is not the main objective of those laws. So no single piece of legislation is dealing with environmental problems as a whole until 1975 when the Enhancement and Conservation of National Environmental Quality Act (ECNEQ) was enacted. It is the first law directly dealing with the environment in general. There are 3 government agencies responsible for this Act; the Office of Natural Resources and Environmental Policy and Planning (OEPP), The Pollution Control Department (PCD) and The Department of Environmental Quality Promotion (DEQP). The Act has 3 important principles as follows; to protect the natural resources and environment, to remedy the effected areas, and the Polluter Pays Principle. At that time the National Environmental Board (NEB) was created, environmental quality standards were issued and environmental impact assessment (EIA) was also introduced. Nonetheless, this environmental act was not that effective for many reasons; for example, most members of NEB were government officials and its chairperson was a deputy prime minister and NEB itself had no power in setting up environmental quality standards.

Above them all are the new 2007 constitutional provisions on the environment, Article 56, 57, 66 and 67\(^1\), which provide an enforceable right to the environment not just a symbolic statement only. It accords the rights to access public information, recognizes the rights to participation and the role of local communities and individuals in natural resources management and exploitation as well as conservation and requires an environmental and health impacts assessment obtaining consultations from the public and stakeholders, and an independent body’s comments for a project with possibly adverse severe effects. Sometimes in the practice of the Supreme Court, it has been referred to as a relevant legal argument for an environment-friendly interpretation of the law in particular cases.

Private law remedies also play a significant role in environmental law as well. The civil liability in concept of wrongful act and property law under the Civil and Commercial Code Section 420-448 and Section 1335-1337, 1339-1355 has served as a basis for adjudicating local nuisance or unreasonable annoyance, such as odors or noise or vibration from neighbors or adjacent property. However, the nature of environmental law cases which is a dispute arising from damaging act, or violation of law or failure to comply with it, so differs from civil law cases in general as the act or the violation committed causing damage to public domain natural resources not personally belonging to any individual, affecting on the livelihood of large number of people in society, requiring experts to prove damage and taking time to materialize. In the field of environmental law liability there is a scope for environmental remedies which is wider than traditional liability, as I shall show later.

\(^1\) See Articles 56, 57, 66, 67 at the end of the manuscript
Establishment of Environmental Divisions in Courts of Justice:

According to the two-day Regional Meeting in Bangkok, Thailand on 17 - 18 June 2003, the Office of the Supreme Court of Thailand had set up a group of specialists with expertise in substantial law concerning the management of natural resources and environment and specialists with expertise in procedural law, namely professor of law and judges to study and conduct a research project in order to increase the capacity of judges and Courts of Justice to cope with the environmental law cases and the controversies involving environmental issues. The research purpose is to analyze environmental cases in Courts of Justice for clear understanding of the true nature of the environmental cases problems with regard to difficulties, obstacles and constraints which will efficiently lead to the appropriate roles and authority of Courts of Justice in protecting, providing remedies to the injured, suppressing the offenders of those with tendency to commit offence.

Finally, the research concludes that in order to enhance the efficiency and the judges’ roles in exercising fair civil and criminal jurisdiction which will protect and remedy the injured and suppress violators. It is then recommended for further consideration and implementation as follows:

a. Short – term plans
   1. Enhancement of environmental law knowledge for judges should be carried out in every court level.
   2. Judges should be provided with the nature of the environmental problems and the methods to deal with them by environmental laws.
   3. An Environmental division (Green Division) should be set up within the Supreme Court to create environmental cases awareness of lower courts.

b. Long-term plans
   1. Organizing continual trainings and seminars on environmental laws and environmental protection for judges thus providing them with significant roles by using environmental case proceedings.
   2. Setting up of Judicial Exchange Program with foreign countries both at regional and international levels.
   3. Establishing the Specialized Environmental Court at trial court level.

Therefore, resulting from that study, the environmental division (Green Bench) has been officially established within the Supreme Court of Thailand since the beginning of October 2005. This specialized division composes of the President, the Secretary and a number of learned – and – trained justices in the field of environmental law knowledge.

The principal purpose of this new division is to create awareness of the lower courts and judges on environmental law cases as well as to adjust their roles suitable for and inline with the true nature of the present environmental problems. And in the year later the Green Benches has been set up in all Courts of Appeals.
Jurisdiction of the Green Bench:

Under the regulation of the President of the Supreme Court NO. 30 BE.2547 (AD.2004), it has jurisdiction on all criminal and civil controversies or disputes, affecting national resources and environment, relating to a group of environmental laws both in the area of national resources and pollution as follows:

A. The series of 13 - environmental laws in the area of national resource, namely;
   1. Wildlife Conservation and Protection Act,
   2. National Park Act,
   3. Mineral Act,
   4. Fishery Act,
   5. National Reserved Forest Act,
   6. Forestry Act,
   7. Navigation in Thai Waters Act,
   8. Petroleum Act,
   9. Enhancement and Conservation of Energy Act,
   10. Earth Excavation and Landfill Act,
   11. Royal Irrigation Act,
   12. Ground Water Act,
   13. Bangkok Canal Preservation Act,

B. The series of 11 - environmental laws in the area of pollution, namely;
   1. Enhancement and Conservation of the National Environmental Quality Act,
   2. Public Health Act,
   3. Hazardous Substances Act,
   4. Cleanliness and Orderliness of the Country Act,
   5. Munitions of War Control Act,
   6. Atomic Energy for Peace Act,
   7. Industrial Estate of Thailand Act,
   8. Factory Act,
   9. Gasoline Control Act,
   10. Land Allocation Control Act,
   11. Announcement of the Revolution Party of Liquid Propane Gas Control, and

C. The other related matters as may be deemed appropriate by the President of the Supreme Court.

The bench has power to review judgments or decisions of lower courts. When hearing appeals from environmental divisions of Courts of appeals, it may review decisions, weigh the evidence, judge the credibility of witnesses, and determine controversial questions of facts and laws. Every drafts of judgments are subjected to be examined by the research justice of the bench. All sentences are required approval by the meeting of the division members and by the President of the Supreme Court, or Vice-President as may be designated by the President of the Supreme Court as well.
Environmental law cases:

Though it is difficult to define and to scope sharply what an environmental law case is like. The clear definitions are important to classify environmental law cases from normal cases. The idea used in the Regulation of the President of the Supreme Court NO. 30 BE.2547 (AD.2004), is that any civil and criminal cases relating to environmental statutes in the field of pollution and nature conservation including cases where the subject matter of the dispute concerns the natural environment, even if the legal issues tried relate to other statutes or general rules of law, are environmental law cases. Mostly, the bench handles criminal law cases which primarily deal with the effects on the environment or natural resources, such as violation of logging, fisheries or hunting regulations.

The Statistical figures of environmental law cases:

Over the last 5 years, the division has decided 1,263 environmental law cases. Of these decisions, 97 % related to criminal matters (1,229 cases) and 2.7 % to civil matters (34 cases). Since the year 2006, this amounts to 1.3 % of the total number of appeals heard by the Supreme Court. The proportion of environmental cases is slightly higher with respect to both civil and criminal cases (1.6 % since 2007, 1.7% since 2008, and 2.1% since 2009). These increasing numbers of criminal cases indicate that more appeals have been lodged against the lower courts level as a result of the more severe judgments the Appellate Courts imposed on the convicted as well as the sustained efforts of the new special prosecuting unit for environmental crime in enforcing environmental law and prosecuting environmental crime. The figures do not include decisions in criminal cases concerning violent-demonstrations or civil disobedience against asserted violations of environment. Though, cases against demonstrators had an impact on the caseload of the Court especially in the highly controversial coal-fired power plant projects in Prajaub Kirikhan Province in southern of Thailand.

Now turning to the subject matter of the cases, 91.4 % (1,155 cases) concerned nature conservation including biodiversity and 5.8 % (74 cases) related illegal fishery and trafficking and trading of endanger species. Out of the remaining cases, about 24 involved pollution of all sorts, including wastewater discharge, hazardous waste disposal, and radiation, and 10 concerned natural resources destruction.

Let’s take a closer look at the civil cases. Local disamenities basically tried under the Civil and Commercial Code which also has a role to play for the assessment of compensation in cases of toxic tort. Occasionally, civil liability under Enhancement and Conservation of the National Environmental Quality Act (1992), provision of 96 (Strict liability for damage from point source of pollution) and provision of 97 (Civil liability for damage on natural resources) ² comes into play while cases related to destruction of natural resources are now pending in the Court due to problems of the acceptability and accountability of the valuation method used in assessing natural resources damages which become the central point in dispute of such lawsuits. It is submitted that to value

² See Provisions 96, 97 at the end of the manuscript
the environment is the newest topic and the most difficult question we are facing in the civil law case so far, or might face in the near future.

Compensation claims for environmental damage and personal injury may arise as a result of private acts such as encroachment of forest preserve area, illegal mining or rocking and wastewater discharges, polluted air emissions, or discharge of other waste or pollutants from point sources of pollution including illegal dumping of hazardous waste. But they do not figure prominently in the caseload. As there may be several reasons for this, including that environmental harm is often difficult to assess in economic terms and the existing procedural rules with adversary fashion for civil proceedings which intent to protect private rights and provide a dispute resolution mechanism by way of adjudication are not suitable for providing equality in environmental litigation and adjudication but create more problems and difficulties to the parties and the Courts rather.

**Parties to the actions:**

In responding to the primarily question of who takes a civil environmental case to the Supreme Court? Please allow me to distinguish between different groups: (1) individuals suffering or affecting from environmental damaging act, (2) registered non-governmental organisations (NGOs) being a juristic person under the Thai or foreign law with an interest in the environment (3) government or local government authorities.

Private individuals usually become a party to an environmental case because their economic interest are affected. Under the rule of standing in section 55 of Civil Procedure Code, only “the injured party” is the one whose rights or duties are involved in a dispute and is entitled to institute environmental case in courts. In practices courts strictly and narrowly interpreted the meaning of “injured person” by defining that he/she must have the existence of present injury or injury in fact and excluding the indirectly injured person to be the party to the case. So only a real party in interest has standing to sue.

Do NGOs take environmental conflicts to the courts? They have been a party to 1 or 2 cases pending in the Court, since section 8 (5) of ECNEQ provides that the NGOs with juristic person status and registered under the law, are able to; (1) providing legal aid to the affected people from leakage of pollutants or contamination and (2) representing the pollution victims to bring lawsuit and litigate claim in court for legal remedies to them.

The Supreme Court study suggests that, in a Thai perspective, high litigation costs – court fees or trial expenses as well as lawyers’ fees – provide a significant disincentive against litigation initiated to protect the environment. The economic imbalance between the parties may be reinforced by the fact that most affected people are usually poor and lack of financial resources while there is no class action litigation employed in Thai procedural system. The study also recommends that the adversarial nature of judicial proceedings, as opposed to the inquisitorial proceedings, puts environmental litigation at a disadvantage stage due to in environmental cases most involve the issue of causation and the duty to present evidence rests on the alleging party which may result to an unfair
trial for environmental litigation especially in pollution cases. Furthermore, the lack of environmental or scientific expertise on the Bench may also cause a reticence to review finding of fact and assumptions on cause and effect made by the parties having access to relevant expertise.

**Early precedent in civil and criminal environmental case:**

The last main point is how Thai environmental law has been shaped by the Supreme Court. It is fair to say that the answer to this gives a varied picture.

The criminal cases show that the Green Bench has not been willing to let perpetrators get away with environmental crime. Time and again the bench has emphasised the need for severe sentences – I hasten to say, severe by Thai standards, or more severe than formerly. The division has in its judgments frequently stressed the importance of environmental values as well as the need for sentences that can serve as general deterrent because many environmental crimes are difficult to investigate, particularly if they are committed in the natural environment. It was also done in a case on unlawful import and export violating the CITES Convention on international trade in endangered species.

In civil law, the Supreme Court used to take the position that the legal standards of Civil and Commercial Code should be applied in a manner which would serve to protect private party’s environment against various emissions. But subsequent judgments are too few to provide a clear picture.

An important consideration to be kept in mind, however, is that there has no special rules of procedure for environmental cases yet. The following sample cases will demonstrate the Supreme Court’s effort and need to fulfill the judicial role of the Courts of Justice in promoting sustainable development by balancing the environmental, social and development considerations in the judicial decisions by applying all existing procedures to cases as justice of each case demands. Though, there are several other examples of how the Green Bench of the Supreme Court has interpreted environmental legislation so as to promote effective protection of the environment. Just to mention two most recent ones on the account of procedural technicalities;

- the first is from Supreme Court’s Decision NO. 2291/2551 (2291/2009): the spirit of the laws related to Natural Resources under the National Park Act was construed so as to preserve and conserve the ecological system of the park by not allowing any buildings to situate in the area as an alien to it. The Court, by taking environmental concerns into account, pointed out that removing the buildings is the underlying goal of the law for managing of the national park in a sustainable way. Even though the removing buildings order was not requested by the public prosecutor and the Criminal Procedure Code section 192 expressly provides that judgment or order is restrained by the plaintiff’s plaint. This ruling set a new precedent decision in the issue of law by expanding the procedural rule under section 192, and
- the second one is from Supreme Court’s Decision NO. 3621/2551 (3621/2009): the Supreme Court in water pollution case has relaxed the plaintiff’s standard of proof by using the approach of proximate cause, that “Causation” does not need a perfect scientific certainty how the damage occurred and a high probability is sufficient for causation. Then the Court has shifted the burden of proof to defendant. The Court stated in its decision that the defendant, the motorcycle spare parts manufacturer failed to prove with the preponderance evidence that water released from defendant’s factory sewerage and discharged into public sewerage is clear and is not contaminated by a chemical used in the production process of defendant’s factory and not harmful to all fish in the farm of the plaintiff. Therefore, the defendant shall be held liable for its wrongful act.

Conclusion:

I think, referring to the judgements, Thai environmental law has been somehow developed through environmental law cases before the Supreme Court by advancing judicial approach to enforce environmental procedural rights. Moreover, I would like to inform you again that at present the Court of Justice is in a process of developing new procedural rules to overcome all challenges of the judicial process in order for the better resolution of environmental disputes before Courts of Justice. Finally, I hope the lessons learned from the Thai Supreme Court in this paper will benefit you all and your work as well. I also thank you for your kind attention.

The Constitution of Kingdom of Thailand

Section 56. A person shall have the right to receive and to get access to public information in possession of a government agency, State agency, State enterprise or local government organization, unless the disclosure of such information shall affect the security of State, public safety, interests of other persons which shall be protected, or personal data of other persons as provided by law.

Section 57. A person shall have the right to receive information, explanation and justification from a government agency, State agency, State enterprise or local government organization before permission is given for the operation of any project or activity which may affect the quality of the environment, health and sanitary conditions, the quality of life or any other material interest concerning him or a local community and shall have the right to express his opinions on such matters to the concerned agencies for their consideration.

The State shall organize public consultation thoroughly before the making of social, economic, politic and cultural development plan, the expropriation of immovable property, the making of town and country planning, the determination of land use, and the enactment of rule which may affect material interest of the public.

Section 66. Persons assembling as to be a community, local community or traditional local community shall have the right to conserve or restore their customs, local wisdom, arts or good culture of their
community and of the nation and participate in the management, maintenance and exploitation of natural resources, the environment and biological diversity in a balanced and sustainable fashion.

Section 67. The right of a person to participate with State and communities in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and conservation of the quality of the environment for usual and consistent survival in the environment which is not hazardous to his health and sanitary condition, welfare or quality of life, shall be protected appropriately.

Any project or activity which may seriously affect the quality of the environment, natural resources and biological diversity shall not be permitted, unless its impacts on the quality of the environment and on health of the people in the communities have been studied and evaluated and consultation with the public and interested parties have been organized, and opinions of an independent organization, consisting of representatives from private environmental and health organizations and from higher education institutions providing studies in the field of environment, natural resources or health, have been obtained prior to the operation of such project or activity.

The right of a community to sue a government agency, State agency, State enterprise, local government organization or other State authority which is a juristic person to perform the duties under this section shall be protected.

The Enhancement and Conservation of the National Environmental Quality Act (ECNEQ) (1992)

Section 96. If leakage or contamination caused by or originated from any point source of pollution is the cause of death, bodily harm or health injury of any person or has caused damage in any manner to the property of any private person or of the State, the owner or possessor of such point source shall be liable to pay compensation or damages therefore, regardless of whether such leakage or contamination is the result of a willful or negligent act of the owner or possessor thereof, except in case it can be proved that such pollution leakage or contamination is the result of

(1) Force majure or war.
(2) An act done in compliance with the order of the Government or State authorities.
(3) An act or omission of the person who sustains injury or damage, or of any third party who is directly or indirectly responsible for the leakage or contamination.

The compensation or damages to which the owner or possessor of the point source of pollution shall be liable according to the foregoing first paragraph shall mean to include all the expenses actually incurred by the government service for the clean-up of pollution arisen from such incident of leakage or contamination.

Section 97. Any person who commits an unlawful act or omission by whatever means resulting in the destruction, loss or damage to natural resources owned by the State or belonging to the public domain shall be liable to make compensation to the State representing the total value of natural resources so destroyed, lost or damaged by such an unlawful act or omission.