Chapter Six: Dispute Resolution Process in Environmental Problems

Chapter Six: Dispute Resolution Process in Environmental Problems

1. Introduction

Under the Thai laws, a dispute could be resolved in various ways. More specifically to environmental issues, there are a number of methods that the disputes could be resolved. These include negotiation, mediation, arbitration, and litigation.[1] This chapter is intended to find out the method that is most suitable for resolving environmental disputes in the case of Thailand. It begins with the examination of the background and types of environmental disputes. The Chapter then investigates the availability of the Thai statutes on which these resolutions are based before examining how these methods work. Lastly, the strengths and weaknesses of each scheme are discussed.

2. Background of the disputes: Overview of environmental situation in Thailand

Environmental problems, which include air, water, and noise pollution, the inappropriate disposal of hazardous waste, and deforestation, have been intensifying in Thailand over a few last decades. The problems result from the country's pursuit of economic growth by means of industrialization without proper planning. Increasingly, these problems pose a major threat to a well-being of Thai people.[2] For this reason, disputes between the affected people and those who have caused the problems have been escalating incessantly.

Indeed, there are a number of measures being suggested to deal with environmental issues in Thailand. These include domestic approaches such as environmental education and training, disclosure of environmental information, economic instruments, and self-regulation; and international approaches such as international environmental law, international trade agreements, and ISO 14000. However, research has found that most of the causes leading to environmental law failure in Thailand emanate from human behavior such as culture and corruption. This paper suggests the change of human behavior towards sound environment be considered as a prerequisite. This can be achieved by two approaches: environmental education, and good governance.

After the law is enacted, it must be implemented in order to translate what is stipulated in the law into action.[3] Scholars point out that enforcement process is a crucial determinant in explaining the success or failure of social regulation.[4] In the case of Thailand, environmental

---

[1] The Group of Natural Resources and Environmental Law, *Brainstorming Meeting on 'Environmental Dispute Resolution*, a paper distributed in the 2nd National Congress of Law, organized by Board of the National Research Council, at the United Nation Conference Center, Bangkok, on 27-28 September 2001.

[2] Chatchom Akapin, *'Beyond Law Reform: Revitalising Thai Environmental Regulation'*, Ph.D. thesis, The Australian National University, 2000, at 1.

[3] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, 1992, at 101-32.

[4] Neil Gunningham, 'Negotiated Non-Compliance: A Case Study of Regulatory Failure', *Law & Policy*, 1987, at 69. *See* also Christen White, 'Regulation of Leaky Underground Fuel Tanks: An Anatomy of Regulation Failure, *UCLA Journal of Environmental Law*, Vol. 14: 105, at 109.

offences are however ubiquitous despite the existence of legislation. Essentially, extensive research has found that environmental problems in Thailand remain unsolved not because of the lack of legislation, but because the country has not been able to enforce the applicable laws.[5]

Indeed, Thailand relies heavily on export and foreign investment as these international factors have strong potential to help boost Thailand's economic growth. However, the issues of trade and the environment are interrelated. Failure of environmental law enforcement could therefore hamper Thailand's economic recovery, details of which are discussed below.

The provisions as to environmental protection have been included in a number of international trade agreements such as the World Trade Organization (WTO); and the North American Free Trade Agreement (NAFTA). Under WTO, for example, environmental provision is written as an exemption of the liberal trade regime. It allows member countries to adopt any measures which they think necessary to protect human, animal or plant life or health or that related to the conservation of exhaustible natural resources.[6] However, given that there was a concern that such an environment-related statement might be manipulated as a disguised restriction to the free trade regime, WTO therefore sets out a condition in the same provision that the word "necessary" stated earlier must not be interpreted in a manner of arbitrary or unjustifiable discrimination between countries.[7]

Thailand is a member of WTO. The country has so far been involved with incidents concerning environmental issues under WTO. In one case, the U.S. government imposed a ban against over fifty shrimp exporting countries, including Thailand. It claimed that the shrimp farming techniques from the banned countries were deemed to pose a threat to the dwindling sea turtle population. Such techniques were illegal under the U.S. law, the Marine Mammal Protection Act (MMPA) (Bangkok Post, 1996).

Thailand and three other Asian countries, *i.e.*, Malaysia, India, and Pakistan brought the case to WTO, claiming that the U.S. government had raised environmental issue in banning their exported shrimps as a disguised trade barrier. WTO subsequently made its decision in favour of Thailand and the three other countries.[8] However, the case continued as the U.S. appealed to the WTO for its final and binding decision. Most recently, the WTO panel has rejected the U.S. appeal.[9]

---

5 Somrudee Nicro, 'A New Road for Industry and the Environment', *State of the Thai Environment*, 1995, at 175. *See* also Chatchom Akapin, 'Law Enforcement: An Issue to be Improved to Protect the Thai Environment', *Dullapaha*, 1996, at 83-7; Panas Tasneeyanond, 'Laws Related to the Protection and Conservation of Natural Resources', A paper delivered in the seminar *Current State Problems and Suggestions in Improving the Law and Regulation Overiding the Allocation and Use of Natural Resources for Rural Development*, Chonburi, April 1996, 56-7; and Amnat Wongbandit, 'Laws Related to Industrial Wastewater Treatment', *Dullapaha*, 1996, at 116-8.

6 David Parks, 'GATT and the Environment: Reconciling Liberal Trade Policies with Environmental Preservation', *Journal of Environmental Law, UCLA International Law and Policy*, Vol. 15, No. 2, 1996/97, at 156-7.

7 *Ibid.*

8 'Thailand has won on shrimp battle', *Bangkok Post*, 15 July 1998.

9 Wasant Techawongtham, 'What's good enough for importers', Commentary, *Bangkok Post*, 16 October 1998.

Despite the defeat in the above case, some U.S. environmental groups have threatened to push the American government to ban imports from countries where shrimp farming has destroyed mangrove forests. Not only does this threat show that more innovative attempts will be made to use trade sanction as a tool to deal with environmental issue, but it will directly affect the Thai shrimp exports if such a ban is imposed. The reason is because it has long been evident that shrimp farming has destroyed much of the Thai mangrove forests[10].

Given that many industrial businesses in Thailand are exported-oriented, relentless attempts to raise environmental issues as a cause of trade sanction should prompt the Thai exporters as well as authorities concerned to ensure that the exported products are not harmful to the environment at any rate. Failure to do so could result in a ban of importation.

3. Types of environmental disputes and their alternative resolutions

Research has found that there are three main types of environmental disputes, *i.e.*, a dispute over compensation; a dispute over a halt of an ongoing project; and a dispute over rehabilitation of the environment and natural resources.[11] What are the methods used for resolving such disputes? As discussed at the outset of this paper, there are four main approaches for environmental dispute resolution, *i.e.*, negotiation, mediation (and conciliation), arbitration, and court system. Detailed discussion on how each scheme works, as well as its advantages and shortcomings is provided below.

3.1 Negotiation

3.1.1 Availability of negotiation in Thailand

The Thai Civil and Commercial Code allows the parties involved to negotiate with an aim to settling a dispute voluntarily. Once the dispute is settled, the parties can no longer bring the case to the court, providing such a settlement has been done in writing, and equipped with signatures of all the parties concerned.[12]

3.1.2 Strengths and weaknesses of negotiation

Settling the dispute through negotiation has a number of advantages. First, the parties will not at all feel hostile towards each other after the case is settled. The reason is because they are the ones who have decided to do so at their own free will. Another advantage of negotiation is that the settlement could be done without any cost. Needless to say, if the parties bring the case to the court, they have to bear a lot of expenses. These include lawyer fees and court fees.

---

[10] In fact, shrimp farmers have been trying to move their farm locations from mangrove areas to inland to avoid accusation that they have destroyed the mangroves. However, their attempts have been strongly opposed by the government, who justifies its decision that inland shrimp farming will cause environmental degradation to where the farms are located, as well as their vicinity.

[11] Ladda Kiatkongkhajorn, *A Model and Structure of Environmental Dispute Resolution Committee*, LL.M. thesis, Chulalongkorn University, 1996, at 20-23.

[12] *See* Thai Civil and Commercial Code, Sections 850-852.

Also importantly, the settlement of dispute through the negotiation saves a lot of time when compared to other means. Not least, negotiation fits the Thai's lifestyle very well. According to Eugene Clark and Suwit Laohasiriwong, the Thai are modest, considerate, and reluctant to hurt others' feelings by decisive acts.[13] Rather, they prefer to avoid conflict and confrontation as a result of their culture of compromise.[14]

Take the water pollution case at Klity Mine as an example. In April 1998, residents of the Lower Klity village situated downstream of the Klity stream in Kanchanaburi, a western province of Thailand lodged a complaint to the government that the Klity mine dumped toxic waste into the stream, as well as discharged lead-contaminated water without proper treatment. This caused hundreds of their livestock to die, or fall ill after drinking water from the contaminated stream.[15] The villagers themselves also suffered severe diarrhoea and dizziness, and rashes.[16]

In early 1999, the Environmental Health Bureau, Ministry of Public Health carried out a health examination on villagers in the Lower Klity village. It was alarming that the blood tests on 119 out of 150 people in the polluted area showed that they have usually high amount of lead in their bloodstream.[17]

After inspection, a Mineral Resources provincial officer found that the mine's tailings pond, which was used for storing toxic sediments, had broken, resulting in the discharge of overflow into the stream. To rectify the problem, the mine was ordered to suspend its operations. The plant could not be reopened unless its wastewater pond was improved to meet the safety standards.[18]

Alongside the administrative measures, those affected by the mine's activities were also entitled to claim for compensation. In essence, before these people brought the case to the court, the mine had agreed to spend 1 million baht on setting up a 'village fund', as well as offered to pay for their medical treatment. In the light of the negotiation, the civil claim ended up with a compromise.[19]

However, negotiation is not without shortcomings. As far as environmental damages are concerned, it is difficult to find just compensation upon the negotiation. More specifically, one must bear in mind that environmental damages are unique. Consequences of environmental harm in many cases are usually manifest long after the incident occurred.[20] As a result, it is not an easy task to find the right remedy that satisfies all the parties involved.

---

[13] Eugene Clark and Suwit Laohasiriwong, 'Thailand's Quest for Sustainable Development', *The Australian Journal of Natural Resources Law and Policy*, Vol. 3. No. 1, 1996, at 67.

[14] Thinapan Nakata and Likhit Dhiravegin, 'Social and Cultural Aspects of Thai Polity', in Suchart Prasith-Rathsin, ed., *Thailand National Development: Social and Economic Background*, 1989, at 185-6.

[15] 'Mine accused of lead contamination', *Bangkok Post*, 23 April 1998.

[16] Supawadee Susanpoolthong, 'Groups unite to block lead threat', *Bangkok Post*, 22 May 1999.

[17] Anchalee Kongrut, 'High level of contamination seen in Klity', *Bangkok Post*, 11 May 1999.

[18] Vasana Chinvarakorn and Atiya Achakulwisut, 'Lead mine shut down', *Bangkok Post*, 24 April 1998.

[19] Paswajee Srisuwan, 'Contaminated Lead in Clity Creek', in Apinya Tantaweewong (ed.), *Pai Pit* (Loss to Toxic Pollution), 2001, at 69-70.

[20] Peter Wetterstein, 'A Proprietary or Possessory Interest: A Conditio Sine Qua Non for Claiming Damages for Environmental Impairment?' in Peter Wetterstein, ed., *Harm to the Environment: The Right to Compensation and the Assessment of Damages*, 1997, at 29-30.

Furthermore, environmental disputes usually involve many people. Put it simply, when environment-related harm occurs, it usually affects more than one person. Take the Mab Ta Phut air pollution case as an example. There were many affected parties in the case as a lot of students and teachers in Mab Ta Phut Pan Pittayakan School located near the Industrial Estate Authority of Thailand (IEAT) have been suffering from the stench emitted by factories in the industrial estate for years. In June 1997, two students were admitted to a local hospital because the high content of toxic substances in their blood caused headache and stomachache.[21]

It is conceivable that the negotiation to determine compensation in this case could not reach an agreement easily. The equation is simple. The more the number of those affected in this case are, the more variety of the desire among them will be. This will bring about complication and difficulties in the negotiation, which as a result will deter the success of the dispute settlement.

3.2 Mediation and Conciliation

Although mediation and conciliation is based on negotiation, they are not conducted by the parties concerned alone. Rather, they involve a third party who plays a crucial role in persuading all the parties to settle the dispute with a compromise. How does a mediator do his or her job? Indeed, a mediator and a conciliator do not make a decision. Their main responsibility is to induce the parties to come to a settlement by themselves.[22]

What is the difference between mediation and conciliation? In fact, both methods share the same characteristic, *i.e.*, there must be a third party involved in the process of dispute settlement. However, mediation is relatively casual while conciliation has more formal characteristic. Such a difference can be seen from those who act as mediators and conciliators. As for the mediation, research has found that most mediators are drawn from the people in a community whom the parties, as well as others respect. These include headman of the villages, senior citizens, teachers, and monks.[23]

Why is this the case? In the Thai context, the Thai, especially those in the provinces, prefer to live together in the form of community. Also importantly, Thai culture teaches people to respect those who are senior to them in terms of ages, knowledge, and social positions. As a result, whenever people strike any problems, they usually seek advice from village headmen, senior teachers, and monks. Not surprisingly, when the Thai have disputes, they also prefer to ask this group of people to help settle the dispute as well. [24]

---

[21] Panomporn Chomchuen, 'Taxic Gas Problem must be dealt with as soon as possible', *Bangkok Post*, 28 June 1997.

[22] Surinder Kaur Verma, *Alternative Dispute Resolution System: Problems and Prospects*, A paper presented in the Roundtable Meeting on Law Development and Socio-Economic Change in Asia (II)' organized by Central Intellectual Property and International Trade Court (Thailand), Faculty of Law, Thammasat University (Thailand), and Institute of Developing Economics, IDE-JETRO (Japan) on 19-20 November 2001, Bangkok, Thailand.

[23] Ladda, *supra*, at 25.

[24] *Ibid.*

On the other side of the coin, the appointment of a conciliator is relatively formal. However, there are two kinds of conciliation in Thailand, *i.e.*, in-court conciliation, and out-of-court conciliation, details of which are discussed below.

3.2.1 Availability of conciliation in Thailand

In-Court Conciliation

Under the Thai Civil Procedural Code, judges are empowered to conciliate the case regardless of how far the progress of the case has been made.[25] In doing so, the judges may either conciliate the cases by themselves or appoint any person or a group of people as conciliators with an aim to achieving the goal of dispute settlement.[26]

Does the in-court conciliation work? Evidence shows that this strategy of dispute settlement is quite satisfactory, particularly in the light of Thai culture of compromise. More specifically to environmental issues, there is a classic case showing the success of in-court conciliation. This is the air and noise pollution case between Khunying Chodchoy Soponpanich, et al., the plaintiffs versus the Bangkok Metropolitan Administration (hereinafter BMA) and the Bangkok Governor, the defendants. The parties quarreled over an issue of information disclosure. In this case, BMA granted a concession to construct an elevated trainline for transporting commuters in Bangkok to Thanayong Co. Ltd. The construction of the railways and many stations were likely to affect the public with respect to environment and scenery.

In March 1994, Khunying Chodchoy Soponpanich, president of the Thai Environmental and Community Development Association, an environmental NGO, requested the Governor of BMA to disclose information on this project according to Section 6 of the Enhancement and Conservation of the National Environmental Quality Act 1992. The Governor somehow ignored her request. As a result, Khunying Chodchoy, along with another 74 citizens jointly brought this case to the Bangkok Civil Court in March 1995. The defendant accordingly contended the case.

During the trial, the presiding judges always attempted to conciliate the case. And it worked. After a few trial sessions, the case ended up with a compromise as a result of the in-court conciliation. The defendant agreed to disclose such information to the public and the plaintiffs then withdrew the case from the court.[27]

Out-of-Court Conciliation

Along with the in-court conciliation discussed above, there is also the out-of-court conciliation. Under this scheme, the conciliators are usually appointed in the form of a

---

[25] Udom Suppakit, *Disputes and Resolution of Disputes* (Through Litigation and Non-litigation), A Paper presented in the seminar, Environmental Law and Dispute Resolution, organized by The Federation of Thailand's Industry and Faculty of Law, Chulalongkorn University, on 17 August 1995, at Sirikit National Convention Center, at 48. *See* also Thailand's Civil Procedural Code, Section 20.

[26] Civil Procedural Code, Section 21.

[27] Chatchom Akapin, 'Beyond Law Reform: Revitalising Thai Environmental Regulation', A Ph.D. thesis, the Australian National University, 2000, at 37-38.

committee. As discussed earlier, the conciliation has relatively formal characteristic. Such formality is evidenced by the availability of the laws that empower the appointment of conciliators. At present, Thailand's Local Administration Act 1914 empowers sub-district and village headmen to persuade and convince those who have disputes to compromise with each other.

Furthermore, the Ministry of Interior in 1987 issued a regulation on Dispute Conciliation by Village Committee. This Regulation sets up a village committee comprising those who are in this position *ex efficio* such as village headmen and their assistants, and those elected from people in the village, most of whom are senior people.[28]

Despite the committee appointed from government officials discussed above, there has been an attempt to set up the committee on environmental dispute resolution the members of which also comprise those who are not government officials. As Ladda Kiatkongkhajorn argues, the parties concerned should be able to participate in the conciliation process. She therefore suggests the Committee on Environmental Dispute Resolution be established. Most importantly, the committee must have a tripartite characteristic, *i.e.*, members of the committee must draw from affected parties, those whose activities have caused environmental damages, and a third party. The committee is appointed by a provincial governor.[29]

3.2.2 Strengths and weaknesses of Mediation and Conciliation

Settlement of dispute through mediation and conciliation has a myriad of advantages. First, similar to negotiation, mediation and conciliation create the atmosphere of 'win-win' solution, *i.e.*, none of the parties concerned feels that they lose anything. The reason is because it is the parties who make decision, not the mediators or conciliators who merely persuade and convince the parties to have the disputes settled.

Mediation and conciliation also suits Thai culture very well. As scholars suggest, the Thai tend to avoid confrontation and as a result prefer to have the dispute settled in a peaceful way. Furthermore, given that they respect the senior as discussed above, they are likely to ask this group of people to mediate. Alternatively, in the case of conciliation, the people whom they respect always get involved as conciliators as discussed earlier.

Another advantage of mediation and conciliation is that they are not time-consuming like litigation. One should bear in mind that the courts do not have only environmental cases to work on. Rather, they try all sorts of cases. Furthermore, the problem of delay may be worsened in Thailand as the Court of Justice has just introduced the new system of trial. Under this system, a case is tried continuously from the beginning until the end. This system replaces the old one where a case is, on average, tried once a month due to the dense of the cases pending for trial in courts.

---

[28] Damri Soodteimee, The Role of Village Committee in the Settlement of Dispute: A Case Study on Village Conciliation Project, Supanburi Province, a Master of Political Science Comprehensive Paper, Thammasat University, 1992, at 79-86.

[29] Ladda Kiatkongkhajorn, *supra*, at 80-84.

To fulfil the new system is nevertheless challenging. Clearly, it is not possible to embark the new system immediately as there are tens of thousands of cases the trial of which are on-going in courts when the new system begins. As a result, it takes some time before the 'continual trial' can start off. In some courts, the first continual trial will not start until the year 2003.[30] Given this, it is therefore obvious that settling environmental disputes through mediation and conciliation certainly saves a lot of time.

Along with the time-saving advantage lies the cost-saving one. As we are aware, to bring the case to the court requires expenses such as court fees, and lawyer fees, etc., while most mediation and conciliation are free of charge.

Mediation and conciliation however have some weaknesses. As discussed above, mediators and conciliators do not have decisive power. They just merely attempt to persuade all the parties concerned to settle the case with a compromise. For this reason, if the parties refuse to come to an agreement suggested by mediators and conciliators, the case will not be settled. It is therefore clear that there is a possibility that the case may end up with no settlement despite a lot of time and energy spent on mediation and conciliation.

Another shortcoming is that some environmental disputes may not be settled with the parties' willingness. Rather, the success of mediation and conciliation may result from the parties' respect or consideration toward the mediators or conciliators. Why is this the case? As far as the Thai culture of *kreng jai* (consideration) is concerned, the parties may do as the mediators or conciliators have suggested just to show their respect to them although they do not really agree with the suggestions.

3.2.3 Mediation and Conciliation in Environmental Disputes

As discussed earlier, mediation and conciliation is suitable for Thai culture. Take the case of air pollution at Mae Moh as an example. In October 1992, hundred of villagers in Mae Moh, a district in Lampang, a northern province of Thailand in which power plants of the Electricity Generation Authority of Thailand (EGAT) are located, had to be hospitalised after exposure to toxic fumes emitted by a lignite-fired power plant. The late Mr. Phisan Moolasartsathorn, the Minister of Science, Technology and Environment at the time, visited the polluted site and mediated the case. In doing so, he demanded that EGAT pay compensation to those suffered from the incident. Simultaneously, he informed the public that the power plant would not continue to operate unless pollution control measures were installed under the supervision of his Ministry.[31]

Despite the Minister's involvement, the incident recurred two weeks later when the plant continued to operate at full power. As a consequence, several hundreds of more villagers fell sick, 8 cows and 20 buffaloes died, and many agricultural products were damaged.[32] Against this background, EGAT negotiated to pay the sum of 8.14 million bath to affected villagers as compensation, as well as spending 7.02 billion bath on the installation of dust scrubbers at the

---

[30] Case Appointment Book, Nonthaburi Provincial State Attorney Office.
[31] John Baker, *Formation, Maintenance, and Operation of Environmental NGOs in Thailand*, Ph. D. thesis, Department of Political Science, Northern Illinois University, 1995, at 152-153.
[32] Sunee Mallikamarl, *Environmental Law Enforcement*, 1997, at 126-129.

plants, and on lengthening the power plants' chimneys to minimize air pollution at Mae Moh. As a result of negotiation and mediation, the disputes ended up with a compromise.

3.3 Arbitration

Arbitration is a well-established form of ADR.[33] It is on the one hand like mediation and conciliation as there is a third party involved in settling the case. On the other hand, it inherits a vital characteristic of the court of justice, *i.e.*, power to make decision.[34]

Increasingly, arbitration has become the popular means of resolving many kinds of disputes, most of which involve technical and commercial issues. It should be noted that arbitration is well recognized internationally as an efficient tool that helps settle the disputes. In 1985, the United Nations Commission on Trade Law (UNCITRAL) adopted the UNCITRAL Model on International Commercial Arbitration.

3.3.1 Availability of Arbitration in Thailand

In Thailand, arbitration has been in place for more than a decade. The country passed the Arbitration Act in 1987. According to the Thai Arbitration Act, arbitration must be mutually agreed upon by both parties.[35] In addition, such mutual agreement is to be done in writing.[36]

To fulfil the Arbitration Act 1987, the Thai Arbitration Institute (TAI) has been established in 1990. The institute is however under supervision of the Ministry of Justice. Although arbitration is gaining momentum as an alternative method in settling disputes with regard to business transactions in Thailand, evidence shows that such popularity has so far been limited to the business whose structures involve foreign investment in one way or another. Examples include the contracts on the construction of the expressways between the Government of Thailand and Chor Karnchang and partners, which include those from aboard. The contracts state that should any dispute related to the contract occur, both parties have to appoint arbitrators to settle the dispute.

3.3.2 Strengths and weaknesses of Arbitration

Use of arbitration in dispute settlement has a number of advantages. First, it suits the business culture very well as arbitration's process is less time-consuming than that of the court system. Under the Thai Arbitration Act 1987, arbitrators normally have to award their decision within 180 days as from the day the last arbitrator or the umpire has been appointed.[37] For this reason, it is senseless for most business executives to spend time and energy on fighting the case in the court as it takes much more time than arbitration.

---

[33] Surinder Kaur Verma, *supra*, at 4.
[34] Sunee Mallikamarl, 'New Dimension for Environmental Dispute Resolution', *Chulalongkorn Law Journal*, January 1997, at 68.
[35] See Thailand's Arbitration Act 1987, Section 5.
[36] See Thailand's Arbitration Act 1987, Section 6.
[37] See Thailand's Arbitration Act 1987, Section 21.

Furthermore, as the types of businesses have become more diverse, problems associated with such diversity develop accordingly. It is apparent that the business community needs more than laws and regulations for determining business disputes nowadays. Rather, understanding in business cultures, finance and administration is also indispensable. As a result, the people who have genuine interest and specialty in business transaction are the better choice for settling business dispute at present rather than the court of justice who are mainly trained to be generalists.

However, arbitration has some weaknesses. In the case of Thailand, although arbitrators have decisive power to make decision on the dispute settlement, they lack power to enforce their decision. Under the Thai Arbitration Act 1987, if the party who has lost in the arbitration refuses to comply with the arbitral awards, the party of whom the arbitrators are in favour must seek an order from the court of justice.[38] This makes arbitration less powerful as it lacks the final say.

Another disadvantage of arbitration is that the parties concerned are likely to bear remuneration for arbitrators and umpire. According to the Thai Arbitration Act 1987, disputing parties are required to appoint arbitrators. In doing so, both parties are entitled to jointly appoint one single arbitrator. Alternatively, the parties may opt to separately appoint an arbitrator for one each before the two arbitrators will jointly appoint an umpire.[39] Unlike the court system whereby the parties are not required to pay for the judges as their work is considered as public service, most arbitrators charge for fees.[40] Furthermore, the attorney fees could be huge if the arbitration trial lasts very long.[41]

3.3.3 Arbitration in Environmental Disputes

It appears that the use of arbitration as a means of settling environmental disputes are not as popular as negotiation, and mediation. More specifically to the case of Thailand, none of environmental issues has been determined by arbitration at the time of writing. Why is this the case? As discussed above, arbitration involves expenses, which could be a large sum of money, while most of environmental disputes are the disputes between industry and the public. As we are aware, many of the Thai are still poor. Thus, how can they afford to pay for arbitrators and umpire?

Moreover, arbitration is in its infancy in Thailand. At present, most people still do not really understand what it is and how it works. Given that arbitration has to be established by mutual agreement by all the parties concerned, it is therefore likely that the public may hesitate to enter into this kind of agreement with industry unless they have better understanding of arbitration.

---

[38] *See* Thailand's Arbitration Act 1987, Sections 23, 24. *See also*, Vichai Ariyanuntaka, *Alternative Dispute Resolution in Thailand*, A paper presented at the Roundtable Meeting on Law Development and Socio-Economic Change in Asia (II)' organized by Central Intellectual Property and International Trade Court (Thailand), Faculty of Law, Thammasat University (Thailand), and Institute of Developing Economics, IDE-JETRO (Japan) on 19-20 November 2001, Bangkok, Thailand, at 7 (footnote 6).

[39] *See* Thailand's Arbitration Act 1987, Section 11.

[40] *See* Vichai, *supra*.

[41] *Ibid*.

3.4 Court System

In Thailand, the judiciary is one of the three authorities that guarantee the country's democracy, apart from legislative and administrative power. At present, judiciary in Thailand could be divided into two parallel categories of courts, *i.e.*, the court of justice, and the administrative court,[42] each of which is involved with environmental disputes in different ways. While the court of justice deals with compensation and injunction in civil cases,[43] and criminal offences in criminal cases[44], the administrative court is responsible for environmental cases where government agencies and/or public officials are accused of either misusing their power, delaying in doing their job, or failing to perform their duties.[45]

3.4.1 Strengths and Weaknesses of the Court System

The court system has existed in Thailand for hundred years. This is long before the introduction of democratic regime to the country in 1932. Therefore, people are familiar with the use of court system as the last resort to seek justice. This inevitably has an impact on the studies of law. Currently, Thai law students are trained to rely heavily on court system. This is evident from most of law school curriculum that mainly focus on both substantive and procedural laws. Little has been offered to develop the students' skill in negotiation, mediation, and arbitration. As a result, most of law graduates perceive the use of court system as a mainstream method of dispute resolution.

Another advantage of the court system is that it has a final say. After the case starts in the court, it will end in this institution too although the case may not end in the court of first instance, *i.e.*, the parties may appeal to the court of appeals, and the supreme court. Unlike the arbitration where a court order must be sought if the party who has lost the case ignores to comply with the arbitral award, the parties in the court cases do not have to move to any other authority for the final say.

Moreover, there is legal aid service available in the court system. As discussed earlier, the court system is a public service in Thailand. Therefore, to make sure that everyone in the country has access to justice, many pieces of laws provide legal aid for those who are not able to afford the court fees. According to the civil procedural code, if any party can prove that he or she is too poor to pay for the court fees, he or she will be exempted from the fees. This system is called 'legal proceedings for the poor'.[46] Importantly, the exemption of court fees is not available in similar measures such as arbitration.

Apart from the legal provision allowing exemption from the court fees, those who are not able

---

[42] See the Constitution of Thailand 1997, Sections 271, 276.

[43] The laws and regulations empowering the court of justice to determine compensation and conjunction include the Enhancement and Conservation of the National Environmental Quality Act 1992, Civil and Commercial Code, and Civil Procedural Code.

[44] Many pieces of Thai laws criminalize some certain activities as criminal offences. These include the Enhancement and Conservation of the National Environmental Quality Act 1992, the Factory Act 1992, the Public Health Act 1992, and the Hazardous Substances Act 1992.

[45] *See* the Act for the Establishment of Administrative Court and Administrative Procedures 1999.

[46] *See* Civil Procedural Code, Sections 149-160.

to afford lawyers fees can also seek legal aid from Office of the Attorney General, as well as the Lawyers Association of Thailand. In the case of Office of the Attorney General, if a state attorney is convinced that a person has to seek justice from the court, but he or she cannot afford to hire a lawyer, a state attorney will provide the party with a volunteered lawyer registered with any branches of the Office across the country.

Alternatively, in order to seek the legal aid from the Lawyer Association of Thailand, a person also has to prove that he or she is too poor to afford to hire a private lawyer. If the Association is so convinced, they will provide a volunteered lawyer to represent that person in doing the trial.

As many scholars argue, however, court system is not without shortcomings. A prominent weakness of the court system is that it is a time-consuming process. In one case, it could take years to finish in any court of the Court of First Instance such as the Bangkok Civil Court, a provincial court, or a even in a district court, not to mention much more time spent in the Court of Appeals and the Supreme Court. As discussed earlier, a judge is presently overwhelmed with a large number of cases. Hence, it is not surprising for a case to take years to finish.

Take the toxic air pollution case in Klong Tuey. On March 2, 1991, a fire took place in a warehouse of the Port Authority of Thailand located in Klong Tuey (Klong Tuey is the name of an area near the Port of Bangkok. It is also home to thousands of poor people living in slum areas inside Klong Tuey). The warehouse that caught fire was used for storing many kinds of chemicals. Importantly, the fire broke out to the Koh Lao Community adjacent to the warehouse. Along with the fire, there was a huge chemical smoke. The fire and smoke covered the warehouses and the community for two days. Hence, when Ms. Usa Rojpongkasem, the plaintiff entered into the fired areas to help her relatives to evacuate, she unavoidably inhaled the toxic smoke.[47]

Later on, the plaintiff got a fever, coughed, vomited, became dizzy, and lost her hair as well as weigh. After the plaintiff underwent a blood test, the doctor diagnosed that she had toxic in her blood. Her sight and hearing then became impaired. Moreover, she was later diagnosed with a tumor in her brain.[48]

The plaintiff claimed that her exposure to the chemical smoke was a cause of her sickness. As a result of such sickness, she could not work as she had been able to. She then brought the case to the Southern Bangkok Civil Court, asking the Port Authority of Thailand and its director, the first and second defendants to pay her 3,323,000 baht as compensation. She claimed that it was the defendants' fault to have the stored in their warehouse without proper management, *i.e.*, the defendants did not classify each kind of hazardous chemical, but kept various kinds of them in the same warehouse. This was against the rules of chemicals storage under the Hazardous Substance Act 1992. As a result of such wrongdoing, the different kinds of chemicals, when stored together improperly, had an reaction which caused fire. The two defendants denied the claim, justifying that they had provided a proper management.[49]

---

[47] Southern Bangkok Civil Court, Judgement, Black Case No. 5579/B.E. 2539 (1996), Red Case No. 8918/B.E.2544 (2001).
[48] *Ibid*.
[49] *Ibid*.

In late 2001, the Southern Bangkok Civil Court rendered its verdict, ordering the defendant to pay the sum of 3,224, 000 bath to the plaintiff.[50] Astonishingly, the case took ***five years*** to come to an end in just one level of court (Thailand has three levels of courts *i.e.*, the court of first instance; the court of appeals; and the supreme court). It is quite fortunate for the plaintiff that the defendants did not appeal the case further. How long would the case last if the parties appeal to the Court of Appeals, and the Supreme Court consecutively?

Although the plaintiff has won the case, a question arises: how can the compensation help retrieve the health of the plaintiff? Given the hazard of the burnt chemical was so severe, the plaintiff can by no means have a proper treatment after spending five years on the trial. In other words, had she received the compensation much earlier, she might have been able to survive. Obviously, as scholars argue, justice delayed is justice denied.[51]

Research has also found that the use of court system does not provide the 'win-win solution'. It is clear that the court system is more like a fighting between both parties. Eventually, when the case comes to and end, the party of whom the judgement is in favour is considered the winner, while the other party is the loser. This adversarial atmosphere inevitably creates hostility between both parties as the judgement resulted from their fighting, not from their mutual agreement like negotiation, or mediation.[52]

Another disadvantage of court system is its lack of certain specialty such as highly developed technological or scientific issues. More specifically to environmental issue, it is quite difficult for the plaintiff to prove the wrongdoing of the defendant as it usually takes time for the environmental harm to manifest. Also importantly, it is quite demanding for the plaintiff to prove the defendants' wrongdoing. This is especially the case when scientific evidence is involved because even different experts in particular area have different opinion. For more insight, take the alumina case in Lampoon, a northern province of Thailand as a case study.

In 1993, Mrs. Mayuree Teiviya filed a lawsuit to the Central Labour Court, claiming compensation of six million baht from Electro Ceramics (Thailand) Co., Ltd., the second defendant, her former employer. She claimed that she had been exposed to aluminum dust for five years during her work at the defendant's plant in Lampoon. As a result, she later suffered severe body pain and headaches. During the trial, she produced a hospital's test results diagnosing that she had been exposed to chemical poisoning as supporting evidence. In 1996, the court handed down its verdict, saying that the plaintiff had failed to prove that aluminum dust in the defendant's plant was the cause of her illness. For this reason, the plaintiff was not awarded any compensation.[53]

---

[50] *Ibid*.

[51] *See* Vichai, *supra*.

[52] Yoshitaka Wada, *Globalism and Localism in Dispute Resolution*, A paper presented in the Roundtable Meeting on Law Development and Socio-Economic Change in Asia (II)' organized by Central Intellectual Property and International Trade Court (Thailand), Faculty of Law, Thammasat University (Thailand), and Institute of Developing Economics, IDE-JETRO (Japan) on 19-20 November 2001, Bangkok, Thailand, at 5-6. See also, Kraisorn Liangsomboon, *Environmental Dispute Resolution by Arbitration*, a Master of Laws thesis, Chulalongkorn University, at 138-149.

[53] Chatchom Akapin, *Beyond Law Reform: Revitalising Thai Environmental Regulation*, at 152-153. *See* also, Thaksina Khaikaew and Chakrit Ridmontri, 'Toxic law case ends in defeat', *Bangkok Post*, 29 October 1996.

Indeed, the plaintiff did not have a problem in establishing that she had been exposed to the aluminium dust in her work environment. However, she could not convince the court that there was a causal link between her exposure to the aluminium dust and her illness, because it was extremely demanding to prove that it was the dust in her workplace that was responsible for her illness. Both parties had medical doctors as their witnesses. Essentially, these doctors had different opinion. Those who had treated the plaintiff testified that her sickness stemmed from the aluminium dust in her workplace, while others who conducted the plaintiff's blood test, as well as examined her hair and urine testified that her sickness did not result from the aluminium dust in the defendant's plant.[54]

What do we learn from this case? Given that the laws require the plaintiff to prove the defendant's wrongdoing, the use of court system has become a challenging process for those who rely on this system as a dispute resolution. One may argue that the Enhancement and Conservation of the National Environmental Quality 1992 has introduced the 'strict civil liability'.[55] Under this scheme, the defendant is liable for all injuries caused by his or her activity, even without showing negligence. In theory, the plaintiff merely has to prove that it was the defendant who conducted the damaging action, regardless of his or her intention or negligence. If the court is so convinced, the plaintiff will be awarded compensation.[56]

Unfortunately, the strict civil liability provision mentioned above has not proved effective in Thailand at present. Despite the scheme, the plaintiff still has to prove that it was the defendant who caused the incident. This burden of proof discourages those who want to bring the cases to the court as it is hard to prove.[57] For example, if the water in a river has been polluted while there are ten factories located along the river, it is an onerous task for the plaintiff to prove as to which factory has caused the pollution.

Given such burden of proof, which is a mandatory procedure in the court system, this paper suggests that the use of the court system not be the only one method to resolve the disputes in environmental issues. [58]

Alongside, many scholars also argue that court system is costly,[59] especially when compared to negotiation and mediation. According to the Thai legal system, the plaintiff in a civil case is required to pay a court fee at the rate of 2.5 percent of the amount he or she has asked a defendant to pay. Although the amount of such a court fee is limited to 200,000 baht[60], this could be a huge burden for those who are not rich.

---

[54] 'Complaint and Judgement in the case between Mrs. Mayuree Teiviya the plaintiff versus The Social Security Office et al. Defendants', in the Group of Natural Resources and Environmental Law, *Brainstorming Meeting on 'Environmental Dispute Resolution*, a paper distributed in the 2nd National Congress of Law, organized by Board of the National Research Council, at the United Nation Conference Center, Bangkok, on 27-28 September 2001.

[55] *See* the Enhancement and Conservation of the National Environmental Quality Act 1992, Section 96.

[56] Paul Clements-Hunt, *Thailand's Status as an Emerging Environmental Market: A Comparative Analysis of Six Asian Countries*, A Paper presented at the Conference: Industry & Environment, 29 May 1995, at Queen Sirikit National Convention Center, Bangkok.

[57] Chatchom Akapin, Beyond Law Reform: Revitalising Thai Environmental Regulation, at 152.

[58] Wada, *supra*, at 5-6.

[59] *Ibid*, at 5.

[60] *See* Civil Procedural Code.

As far as environmental disputes are concerned, records show that most cases are disputes between industry and the public, or government agencies and the public. Examples include Mae Moh air pollution case between the Electricity Generation Authority of Thailand (EGAT) and the people who live in Mae Moh area discussed earlier[61], and a water pollution case between Phoenix Pulp and Paper Co. Ltd. and those living along the Nam Phong river, into which the factory released untreated wastewater, causing the death of tens of thousands of fish.[62] As we have seen, the public are usually involved as one of the parties in environmental disputes, especially as those who have suffered from government agencies or industry's activities. How can the public, most of which are not rich, afford to pay the court fees if they have to bring the case to the court?

4. Conclusion

Against the background of increasing environmental problems in Thailand, this paper has argued that an efficient strategy for environmental dispute resolution is required. As we have seen, however, there are a number of choices that environmental disputes could be resolved. These range from negotiation, mediation and conciliation, arbitration, and litigation. More importantly, each alternative method has its own strengths and weaknesses. For example, although negotiation brings about 'win-win' situation, it is difficult for both parties to determine just compensation as environmental damages are unique. In many cases, consequences of environmental harm are manifest long after the incident occurred.

We have also found that mediation and conciliation fits Thai culture as the Thai respect those who are senior to them. Apparently, mediators and conciliators are usually selected from senior citizens, village headmen, senior teachers, and monks. Given this, disputes tend to be resolved easily. However, mediators and conciliators do not have decisive power, *i.e.*, they can merely provide suggestions to the parties concerned. It is therefore conceivable that mediation and conciliation may not be the efficient method of environmental dispute resolution as it is supposed to be.

Turning to arbitration, although this approach is gaining momentum as an alternative for resolving disputes, we have found that it has some limitations. The most important obstacle to the popularity of arbitration is the fact that there are relatively a lot of expenses incurred. As this paper has argued, arbitration usually involves fees for arbitrators, an umpire, and lawyers. Given that many environmental disputes often involve those who are not well-off, it would be naïve to expect that the arbitration will become popular as far as environmental disputes resolution is concerned.

As regards litigation, we have found that the Thai are familiar with the court system as it has existed in the country for many centuries. Also importantly, the court system is seen as a 'one-stop service' as it begins and ends in one institution, *i.e.*, the court. To have such a final say makes the use of the court system pervasive in Thailand. However, we have also found that the court system has a number of disadvantages. These include its time-consuming process, considerable amount of expenses for court fees and lawyer fees, lack of specialty in environmental matters, and lack of 'win-win' solution.

---

[61] Somsak Suksai, 'Toxic follout haunts Mae Moh villages', *Bangkok Post*, 30 June 1997.
[62] 'Phoenix paper mill to be closed', *The Nation*, 21 July 1998.

Clearly, there is not a 'one-fit-all' method that could serve as a tool to resolve environmental disputes perfectly in all circumstances. This paper argues further that to determine the most efficient method in resolving environmental disputes depends on each situation. For instance, in a minor nuisance such as bad odour in the neighbourhood in which a few people are involved, negotiation or mediation is most suitable. In a formal situation such as a contract on establishment of a factory in an industrial site, this paper suggests the factory's owner and the site manager choose arbitration as the alternative method for resolving environment-related disputes.

Not least, despite the availability of other alternatives, *i.e.*, negotiation, mediation and conciliation, and arbitration, we should not leave court system out of the picture. One should bear in mind that negotiation, mediation and conciliation, and arbitration lack the power of sanction like the court system. As a result, if non-compliance with the said three methods takes place, the parties involved should resort to harness the most strength of the court system, *i.e.*, power of sanction.