

Legal Problems of Environmental Impact Assessment in Thailand Calling for Law Revision

Darika Phothiruk

School of Law, National Institute of Development Administration, Thailand.

E-mail: naruchol.p@hotmail.co.th

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ABSTRACT

The Environmental Impact Assessment (EIA) is well-known and widely used as an essential tool for environmental management. Over the past 40 years, there have been problems and obstacles in law enforcement and prosecutions in many cases under the EIA laws related to national development projects in Thailand. For this reason, this article aims to present the results of a study of the legal measures on the EIA process in Thailand. This study was conducted through reviewing concepts and theories concerning the EIA and related laws both in Thailand and abroad. The main objective of this study was to analyze the condition of problems and obstacles caused by attempts made in the law enforcement. The importance of the study would result in revision of the laws related to the EIA process to achieve sustainable development goals.

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1. Introduction

Thailand has long been issuing various laws related to the conservation of natural resources. It started with the very first specific environmental law of the country called "the Enhancement and Conservation of the National Environmental Quality Act, B.E. 2535 (1992)." The main rationale for the act included the large destruction of the resources and environment in Thailand in that period, the crisis of industrial pollution, the severe pollution problems caused by industrial waste, the rapid population growth, the flow of population from rural areas into large cities, the overuse of natural resources to quickly deplete forests, minerals, and fuels, the establishment of industries, and the adoption of technologies regardless of the consequences such as the degradation of environmental quality.

In a public movement against the pollution and a public awareness of the pollution problems in the country.¹ Moreover, there was an international stimulus from the United Nations Conference on the Human Environment (UNCHE) and the Asian Plan of Action for the Human Environment of the Economic and Social Commission for Asia and the Far East (ESCAPE). Based on that international influence, Thailand began to adjust the country development approach towards sustainability. From the public movement to call on the government's awareness of the importance of natural resources and environment conservation in accordance with the basic state policy under the Constitution of the Kingdom of Thailand, B.E. 2517 (1974), the government enacted "the Enhancement and Conservation of the National Environmental Quality Act, B.E. 2535 (1992)," which has been an important law for the environmental management in Thailand. In addition to the act, there was specification of policy as a tool for the environmental management, environmental standards, authority to tackle pollution problems in an emergency, and environmental impact assessment.

Environmental impact assessment has been used by many countries as an essential tool for environmental management towards sustainable development. This type of assessment is based on the concept of the precautionary principle and preaudit.² It helps place measures to prevent environmental problems caused by development projects. It also offers guidelines to solve such problems rather than tackling problems immediately after they occur (post audit). According to its principles, the sooner the environmental impact assessment process starts, the more efficient and effective it will be. The process should begin from the project planning stage. However, each country applies the results of the analysis of the environmental impacts to different stages according to the context of that country.³ Over the past 40 years, Thailand has adopted the Environmental Impact Assessment (EIA) towards its environmental management. Nevertheless, there have been problems and obstacles from the enforcement of the EIA, resulting prosecutions in many cases.

For the above reason, this article aims to present the results of a study of the problems and obstacles of laws related to the environmental impact assessment process in Thailand. The study analyzed the process of laws in the stage of defining projects required to provide the EIA result report and the stage of providing the EIA result report. The particular focus of the study was given to the issue of public participation, which was one of the major problems that made the EIA process unsuccessful. The results of the study would lead to improvement of the EIA laws to be more effective.

2. Method

The research design was qualitative research conducted as documentary research, reviewing studies and documents on concepts and theories concerning the Environmental Impact Assessment (EIA) and related laws both in Thailand and abroad. The data gathered from various sources was analyzed and compared with the context

¹ Wells-Dang, A., Soe, K.N., Inthakoun, L., Tola, P., Socheat, P., Van Nguyen, T.T., Chabada, A. and Youttanakorn, W., (2016). A Political Economy of Environmental Impact Assessment in the Mekong Region. *Water Alternatives*, 9(1).

² Ruechai, K. (1995). "New Environmental Laws". *Journal of Environmental Law*, 1(1): 19

³ Pope, J., Annandale, D., & Morrison-Saunders, A. (2004). "Conceptualising Sustainability Assessment". *Environmental Impact Assessment Review*, 24(6): 595-616 doi: 10.1016/j.eiar.2004.03.001

and conditions of Thailand to obtain findings on the issues identified in the scope of the study content and other useful issues.

3. Analysis of Concepts, Theories, and Principles involved with the EIA Process

3.1. Sustainable development

The concept of sustainable development began to be widely adopted in the 1980s when there was a global environmental crisis as a result of unbalanced and unsustainable national development. The development focused only on economic and industrial growth. Limited resources were largely used to meet the increasing human needs. As a result, the available resources became less or entered the state of degradation. Those natural resources and the environment were finally destroyed. The United Nations held the United Nations Conference on Human Environment (UNCHE). The results of the conference made countries around the world alert to common environmental problems and adjust their development approaches towards the environment protection for the future generations.

In 1983, the United Nations established the World Commission on Environment and Development or the Brundland Commission to conduct a study on balancing the environment and the development. This commission made a report on “Our Common Future” or “Brundland Report.” The main point of the report was “sustainable development,” calling on the world community to make a change in the extravagant lifestyle, to shift development approaches to non-pollution development, to take the limitation of natural resource into consideration, and to see that all mankind could lead to sustainable development.

In 1992, the United Nation Conference on Environment and Development (UNCED) was held in Rio de Janeiro, Brazil.⁴ The main issue of discussion was still “sustainable development.” At the meeting five important documents were signed, including the Rio Declaration on Environment and Development, the Agenda 21, the Statement of Principles on Forestry, the United Nations Framework Convention on Climate Change (UNFCCC), and the Convention on Biological Diversity (CBD). The essence of sustainable development was stated in the Agenda 21, which was the world’s master plan for balanced and sustainable actions. It was aimed at economic, social, and environmental development through pollution prevention, natural resource and environment conservation, benefit sharing, and public and private participation in making decisions that would have impacts on the environment. This will make environmental management in the most efficient and beneficial way.

⁴ Jarusombat, S., & Nuchmorn, N. (2013). *Looking Backward Looking Forward: 20 Years after Rio and Thailand’s Sustainable Development Path*. Bangkok: Good Governance for Social and the Environment Institute, p. 54

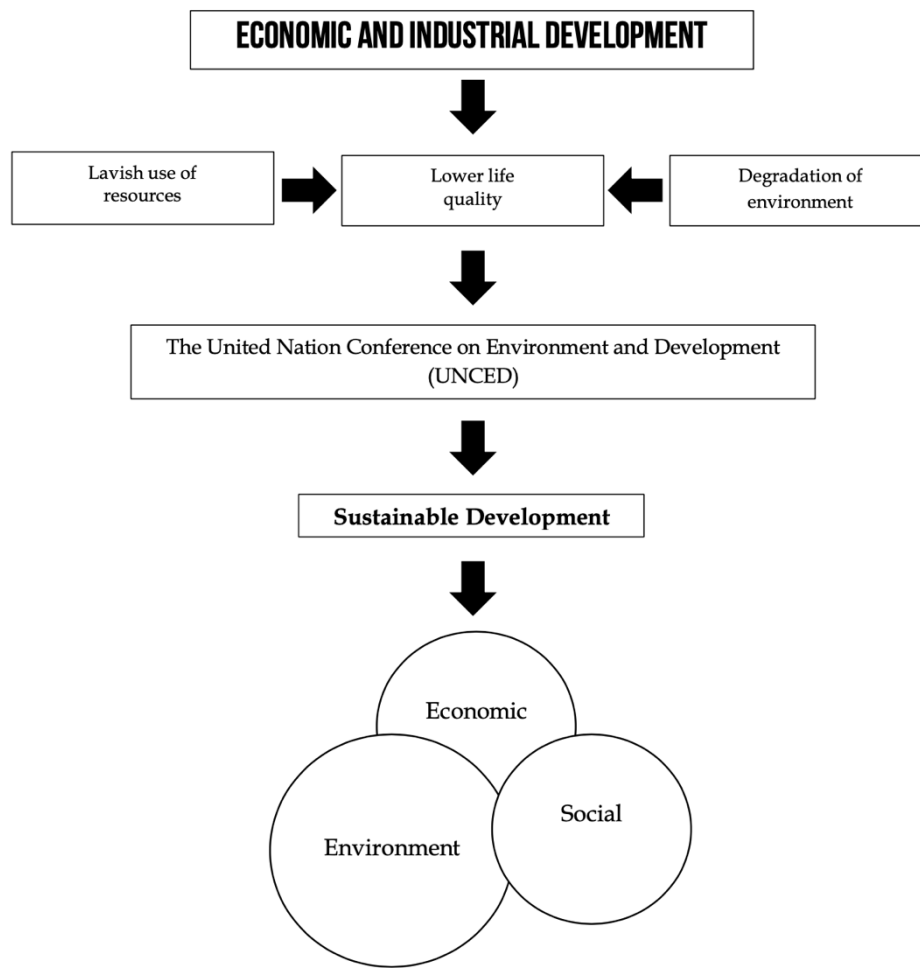


Figure 1. Background and concept of sustainable development
 Source: Ministry of Natural Resources and Environment, 2013 (Edited)⁵

3.2. Environmental Management

The concept of environmental management was recognized to promote the efficient use of natural resources and environment to benefit human beings as it should be. It is a response to the needs for human benefits in a long run for the next generations. Natural resources and environment could be sustained. Proper management of natural resources and environment was an urgent solution to be conducted. Important concepts of environmental management are as follows:

Precaution Principle is an approach to prevent environmental impacts due to human activities that may cause environmental problems. It is a proactive measure to prevent environmental problems from the beginning of any activities without letting them affect humans or the environment.⁶ Precaution principle is a measure, approach, or method appropriate to prevent impacts on natural resources and the environment or to allow the

⁵ Ministry of Natural Resources and Environment. (2013). Introduction to Sustainable Development. Bangkok: Amarin Printing and Publishing, p. 11

⁶ Mallikamarl, S. (2002). *Environmental Law Enforcement* (2nd ed.). Bangkok: Nititham Publishing House, p.188

smallest impact to happen. Any impact that occurs has been pre-expected. The Environmental Impact Assessment is another measure that has been taken to prevent environmental problems in advance for environmental protection. The State must take this precautionary approach widely in case of serious or irreversible damages to environment. Explicit lack of scientific evidence must not be taken as a reason to waive actions on prevention. Budgeting should be based on cost-effective measures to prevent environmental degradation.

Polluter Pays Principle was introduced in the early 1970s as a result of the enforcement of strict environmental regulations. This principle was first adopted by the Organization for Economic Co-operation and Development (OECD), which proposed it as a fundamental principle for the prevention of pollution problems. This principle is based on an idea that producers or polluters generally do not take the degradation of natural resources and the environment as production costs. For this reason, it causes the production to largely use resources to profit for themselves as much as possible, leading to environmental problems. Therefore, internalization of environmental cost must be incorporated into production costs to reflect the actual cost of production.

The key point of “Polluter Pays Principle” is to set the polluter’s responsibility for the internalization of environmental costs necessary for the prevention and remediation of pollution problems arising from their productions or activities. The responsibility also covers all the costs of pollution elimination which the State undertakes to solve the pollution problems. It is also the polluter’s responsibility for any damage to the life, health or properties of any person. In this case, the polluter has to compensate the affected person.

3.3. People’s Rights in Environmental Processes

The key concept of people’s rights in environmental processes is the right to live in a good environment. This concept is part of the right to life. It is stated in Article 3 of the Universal Declaration of Human Rights (UDHR) of 1948 that “Everyone has the right to life, liberty and security of the person,” and in Article 25(1) that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” The right to live in a good environment has been deemed by lawyers as a procedural right. That is to say, it is a right to participate in the conservation of the environment such as access to information, public participation in decision-making, and access to justice and to relief.⁷

3.4. People’s Rights of Participation

People’s participation is the key to natural resource management. It can be said that environmental issues are best dealt with the participation of people who are concerned at all levels. Receiving local people’s acceptance is essential to implementing development projects. It helps reduce resistance from the local sectors and finally turns projects into a success. Individual person should be adequately and appropriately informed by government agencies of projects in concerns. They should be provided with opportunities to participate in the decision-making process. The State has a duty to facilitate and support in raising the local community’s awareness and participation. It also has to provide effective channels to access to the judicial system, management

⁷ Birnie, P., & Boyle, A. (1992). *International Law and the Environment*. Oxford: Clarendon Press, p. 194

processes as well as compensation and relief. Participation is a two-way communication process. It is aimed to seek cooperation in solving problems in order to lead to better goals accepted by all parties. According to Principle 10 in the Agenda 21:

Article 25 (1): Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

4. Findings of the Study

The study found 2 laws which have been related to the Environmental Impact Assessment (EIA) process in Thailand; the Constitution of the Kingdom of Thailand and the Enhancement and Conservation of the National Environmental Quality Act (No. 2), B.E. 2561 (2018). There was secondary legislation that specified details of the legal process. It was found that the Environmental Impact Assessment (EIA) process in Thailand had problems and obstacles in the stage of defining projects required to provide the EIA result report and the stage of providing the EIA result report.

4.1. Determination of Projects Required to Prepare the EIA Result Report

Available laws in Thailand specify two types of development projects according to impacts on environment; projects with an impact on environment and projects that may have an impact on natural resources, environmental quality, health, sanitation, quality of life or any other significant interest of people or community or environment. Those laws in relation to the Environmental Impact Assessment (EIA) did not give definitions of both projects with an impact on environment and projects that may have an impact on natural resources, environmental quality, health, sanitation, quality of life or any other significant interest of people or community or environment. Instead, lists of types and scales of projects were made. The lack of clear definitions created problems in the interpretation, especially projects, which seriously impact communities in the aspects of environmental quality, natural resources and health, shall be consistent with Section 58 of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017).

In addition to the lack of definitions, avoidance of the Environmental Impact Assessment (EIA) was another problem. Due to the above fact, the project screening was conducted in the form of lists of types and scales of both the projects with an impact on environment and projects that may have an impact on natural resources, environmental quality, health, sanitation, quality of life or any other significant interest of people or community or environment. The project owners took this gap to reduce the project capacity and project area to be lower than the legal limit in order to avoid the Environmental Impact Assessment (EIA). Project scales or capacity were slightly decreased to be below the threshold, or a project was separated into several subprojects to avoid the legal criteria. For example, the construction of a hotel did not exceed 79 rooms. The construction of a power plant reduced the power capacity to 9.9 megawatts, while a port's construction can support only 499 gross tonnages. These examples of construction were regarded as legal and free from impacts on the environment.

4.2. Preparation of the EIA Result Report and Public Participation

It was found that the laws stipulated the qualifications of a person entitled to prepare the EIA result report. This led to a lack of eligible persons to make the EIA result report. Moreover, there were problems in collecting data and samples to present in the report.

Data gathered by consulting firms did not reflect the facts, so local people did not trust and accept the report.

For the problem of public participation, the Office of Natural Resources and Environmental Policy and Planning as the main organization responsible for the Environmental Impact Assessment (EIA) issued a notification to hold a public hearing to proceed to conduct a study and assessment of the impacts on environmental quality. In practice, it was found that the public hearing process experienced problems in the law enforcement such as the stakeholder analysis which covered only people who lived in a radius of 5 kilometers from the project area and the number of the report pages. The laws did not set the number of the report pages. As a result, a report had too many pages which were inconsistent with the time period for the public to consider. Another problem was the use of academic language and technical terms in the report which were difficult to understand among the stakeholders participating in the public hearing. This made gaps in the public participation and led to prosecution to revoke the report.

5. Determination of Projects with an Impact on Environment and Projects

The lack of clear definitions caused problems in the interpretation, especially projects that may have an impact on natural resources, environmental quality, health, sanitation, quality of life or any other significant interest of people or community or environment. According to Section 58 of the Constitution of the Kingdom of Thailand, B.E. 2560 (2017), there were obligations to proceed to conduct a study and assessment of the impacts on environmental quality and health of people or communities and to hold a public hearing for the people with interests and relevant people and communities in order to be used in consideration on operation or legal permission. For this reason, specification of clear definitions of projects with an impact on natural resources, environmental quality, health, sanitation, quality of life or any other significant interest of people or community or environment would bring clear interpretation of an individual project.

In addition, the project screening in the form of lists of types and scales of both the projects with an impact on environment and projects that may have an impact on natural resources, environmental quality, health, sanitation, quality of life or any other significant interest of people or community or environment facilitated officials' consideration of projects required to prepare the Environmental Impact Assessment (EIA) report.

They were able to categorize projects or businesses by selecting specific projects that were necessary to conduct the Environmental Impact Assessment (EIA). The lists helped create transparency and reduce unnecessary workload for officials and entrepreneurs. However, the clear lists allowed channels to avoid the EIA. Comparing to USA laws, it was found that all public or private projects that must be approved by the State are required to conduct the Environmental Assessment (EA), except for a project that is exempt from the Environmental Assessment (EA) called Categorical Exclusion (CATEX). If the Environmental Assessment (EA) results indicate that the project has significant impacts on environment, the project responsible person must prepare an Environmental Impact Statement (EIS) report. Therefore, application of the USA project screening to the Environmental Impact Assessment (EIA) in Thailand would prevent the avoidance and reduction of the project scale to be lower than the legal requirements.

6. Preparation of the EIA Result Report and Public Participation

The Thai laws stipulated the qualifications of a person entitled to prepare the EIA result report. An eligible person shall be a juristic person. Due to this fact, the project owner hired the consulting firm to prepare the EIA result report. This would lead to a lack of eligible persons to make the EIA result report in the future. The Thai laws should provide an opportunity to form a group of persons with expertise to prepare to prepare the EIA result report. A natural person should be allowed to conduct initial environmental impact assessment. This would help reduce the lack of eligible persons to make the EIA result report.

For collection of data and samples directly affecting the reliability of the EIA result report, it was solely done by consulting firms. Local people were not convinced that the data or samples were actually collected in the area, so they did not accept the report. Therefore, in the viewpoint of the author, the public participation should be included in the data collection process. This is to build acceptance and the reliability of the EIA result report. Representatives from the local community, possibly community leaders or respected persons, should observe the data collection on site.

For public participation, the Thai laws set out public participation in the process of setting the scope of study and the environmental impact assessment. People were still not allowed to participate in the process of the project screening, which was a charge of government officials only. On the contrary, in the USA, people are allowed to take part in the project screening. If the Environmental Assessment (EA) results do not indicate significant impacts on environment, the State shall publish information related to the project and set the deadline for public comments before announcing the exemption of that project which does not need to prepare the environmental impact assessment report and then categorize it into CATEX.

Thai laws set out processes and procedures for public participation through public forums where people express their opinions and concerns as well as important issues in the area. However, some guidelines in the laws should be repealed such as the stakeholder analysis which covered only people who lived in a radius of 5 kilometers from the project area. It was not classified according to the nature of a project such as road or railway construction that had impacts all along the project site. Therefore, the stakeholder analysis should consider according to the nature of each project without only upholding the coverage of affected people living in a radius of 5 kilometers from the project area. Moreover, it should specify the minimum number and proportion of actual participating stakeholders in the area to take part in the stakeholder analysis. It was found that a previous court judgement ruled that the public hearing with the number of stakeholders lower than 25 percent of the population in the area where a project was located was unlawful. In that case, the court ruled that the public hearing was reconducted.

Furthermore, related laws in Thailand should determine the number of the EIA result report. The present EIA result reports were found too long with a large number of pages which were inconsistent with the time period for the public to consider. Also, the use of academic language and technical terms in those reports were difficult to understand among the stakeholders participating in the public hearing. In the USA, the report must be concise, not exceeding 50 pages.

7. Conclusion

Environmental impact assessment has been used by many countries as an essential tool for environmental management to prevent possible environmental problems arising from development projects. To apply it effectively, the process of the environmental impact assessment varies from country to country according to the changing context and situation of the country. It helps reduce and mitigate damages from environmental impacts that may occur and remedy them in a timely manner. The ultimate goal of the environmental impact assessment is sustainable development. Laws have been a tool that makes it possible to achieve this goal. Therefore, the enforcement of laws shall promote and support the implementation of the EIA process until its goals are achieved. Furthermore, the EIA process must not pose problems and obstacles to the operation of people involved.

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Conflict of Interest Statement:

The author(s) declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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