

# Summary of the Constitutional Court Ruling No. 33/2543

Dated 5<sup>th</sup> October B.E. 2543 (2000)\*

**Re : Was the Convention on Biological Diversity a treaty which provided for a change in the jurisdiction of the State that must be approved by the National Assembly under section 224 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?**

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## 1. Background and summarized facts

Thailand became a signatory of the Convention on Biological Diversity on 12<sup>th</sup> June B.E. 2535 (1992) at the United Nations conference on the environment and development which was held in Rio De Janeiro, Brazil. The signing of the Convention was joined by representatives from a total of 157 countries. Nevertheless, the signing would only have a binding effect on Thailand after it had given its ratification. In this regard, the Council of Ministers entrusted the relevant agencies with the study of the Convention before such ratification was given. However, the agencies reached diverging opinions on whether or not the Convention was a treaty which provided for a change in the jurisdiction of the State or required the enactment of an Act for its implementation that must be approved by the National Assembly under section 224 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). The opinions were as follows:

The majority opinion, comprising of the Ministry of Foreign Affairs, Ministry of Agriculture and Cooperatives, Ministry of Commerce and Ministry of Science, Technology and the Environment, considered that ratification of the Convention did not require the approval of the National Assembly by reason of its being outside the scope of section 224 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). In other words, the Convention did not result in a change in the jurisdiction of the State because according to the opinion of the Ministry of Foreign Affairs, “a change in the jurisdiction of the State” meant a change in the territories which were subject to the State’s sovereign powers. Moreover, the implementation of the Convention did not require the enactment of an Act.

The minority opinion, comprising of the Ministry of Public Health and the Office of the Council of State, considered that the case was within the scope of section 224 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) because it resulted in

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a change in the jurisdiction of the State. In this connection, the Office of the Council of State expressed the opinion that “a change in the jurisdiction of the State” meant the exercise of the State’s sovereign powers.

In order to establish a practice norm, the Council of Ministers reached a resolution on 27<sup>th</sup> October B.E. 2541 (1998) directing the Ministry of Foreign Affairs and the Office of the Council of State to jointly determine the issues which would be submitted together with an opinion for the Constitutional Court to make a ruling. The following submissions were made:

(1) What did the words “provides for a change in the Thai territories or the jurisdiction of the State” in section 224 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) mean?

(2) Would section 15 paragraph two of the Convention on Biological Diversity alter the provisions of existing Thai laws? In other words, the various Thai laws related to the Convention had prescribed a licensing system under the principle that the grantor of a license could exercise an appropriate discretion in granting or refusing a license application. However, once Thailand had become a party to the Convention, the application of Thai laws should alter in such a way that the exercise of discretion should always result in the grant of a license wherever the case did not pose a problem to the environment. As a result of the application of the Convention which created a substantial change in the content of a law, the end result had an equivalent effect of a case where a law should be enacted for the implementation of the Convention. In this sense, could such a case be deemed as a change in “jurisdiction of the State” under section 224 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997)?

## **2. Preliminary issue**

The Council of Ministers was an organ under Chapter VII of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). It was entrusted with the powers and duties of State administration. The conclusion of treaties with other countries or international organisations were within the powers and duties of the Council of Ministers under section 224 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). After the signing of the Convention on Biological Diversity by Thailand but prior to the ratification of the Convention, the question of whether or not the Council of Minister required the prior approval of the National Assembly before effecting ratification was a problem on the powers and duties of the Council of Ministers as an organ under the Constitution in its implementation of section 224 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997). When the Council of Ministers submitted the matter together with an opinion to the Constitutional Court under section 266 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), the Constitutional Court had the power to accept the matter for consideration.

### **3. The issues considered by the Constitutional Court**

On the first issue, it was requested that the Constitutional Court be gave its interpretation of what the words “provides for a change in the Thai territories or the jurisdiction of the State” meant. Such a request had the characteristics of being a request for a definition of a constitutional provision, which resembled more of a discussion, and therefore the Constitutional Court did not rule on this issue.

On the second issue, the Constitutional Court considered whether or not the Convention on Biological Diversity was a treaty which provided for a change in the jurisdiction of the State that required the approval of the National Assembly under section 224 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

The Constitutional Court held the following opinion:

(1) Section 224 paragraph one of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) stated that the conclusion of a treaty with other countries or international organisations was a royal prerogative exercised by the King through the Council of Ministers subject to the conditions stated in section 224 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) that three types of treaties, namely a treaty which provided for a change in the Thai territories, a treaty which provided for a change in the jurisdiction of the State and a treaty which required the enactment of an Act for its implementation, had to be approved by the National Assembly.

The word “treaty” in section 224 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), although not defined in the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), could be defined as including all types of agreements entered into by Thailand with other countries or international organisations with a view to creating a binding obligation under international law. A treaty had to be in writing and in the form of a contract under international law. As section 224 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) mentioned “a peace treaty, armistice and other treaties with other countries or international organisations,” the words “other treaties” meant any treaty concluded with other countries or international organisations which had to be done under international law in the same manner as a peace treaty and an armistice. A treaty could not therefore include an agreement reached under the domestic laws of any country. Therefore, the Convention on Biological Diversity was a treaty under the definition in section 224 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

(2) Section 15 paragraph two of the Convention on Biological Diversity stated that “each Contracting Party shall endeavor to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention”. Section 1 of the Convention stated the objectives of the Convention as the conservation of biological

diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. In other words, a Contracting Party should create conditions to facilitate other Contracting Party's access to its own genetic resources and not impose restrictions on the use of its components as well as not impose restrictions on the sharing of benefits arising out of the utilisation of genetic resources. In brief, a Contracting Party had to facilitate other Contracting Parties in the access and utilisation of its genetic resources, which had previously been subject to the absolute sovereignty of such Party.

(3) The jurisdictional scope of the Convention in section 4 stated that (1) in the case of components of biological diversity, in areas within the limits of its national jurisdiction; and (2) in the case of processes and activities, regardless of where their effects occur, carried out under a Contracting Party's jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction, the Convention would apply both within and beyond such jurisdictional limits. Therefore, by becoming a Contracting Party to the Convention, there was an effect on the use and sharing of benefits arising out of the utilisation of genetic resources between Thailand and other Contracting Parties. There was a concurrent grant and restriction of rights, for which a law had to be enacted or the existing laws modified to comply with the objectives, principles and scope of the Convention. It was thus held that this constituted a change in the jurisdiction of the State in the use of genetic resources and the Convention was a treaty which provided for a change in the jurisdiction of the State that had to be approved by the National Assembly.

#### **4. Ruling of the Constitutional Court**

The Constitutional Court held that the Convention on Biological Diversity was a treaty which provided for a change in the jurisdiction of the State that must be approved by the National Assembly under section 224 paragraph two of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997).

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