

Highlights of the Thematic Session “Innovations in Rule of Law (ROL), Policies and Environmental Jurisprudence”

A parallel session was convened during the CWT Innovations Conference co-hosted by USAID Wildlife Asia and the Supreme Court of Thailand, with the theme “*Innovations in Rule of Law (ROL), Policies and Environmental Jurisprudence*”.

Brian Gonzales, Objective 3 Lead and Partnership Specialist of USAID Wildlife Asia Activity delivered a short presentation on the objectives, composition of participants and over-all expectations from the presentations by the guest speakers. He acknowledged the strong presence of the Supreme Court of Thailand, Members of Parliaments from Thailand, Cambodia and Lao PDR, and guest speakers from the US Department of the Interior (US DOI) / *Tanggol Kalikasan* Philippines, the Court of Appeals of the Philippines representing the Asian Judges network on the Environment, and the American Bar Association (ABA).

Professor Lye Lin-Heng of the National University of Singapore (NUS) with Mr. Brian Gonzales and Ms. Sallie Yang of USAID Wildlife Asia co-facilitated the session. Top judicial officials from Thailand contributed to the proceedings, led by the President of the Environment Division of the Supreme Court of Thailand.

The objectives of this Thematic Session are:

1. To increase knowledge on policy options, programs and various strategies for strengthening CWT responses to concerned stakeholders.
2. To explore innovative platforms, policies and judicial innovations which can be used to counter wildlife trafficking.
3. To identify collaboration and partnerships opportunities, or joint projects across the policy and legal programs of CWT or environmental protection agencies.

On behalf of the Supreme Court of Thailand and the President of the Environment Division, **Chief Judge Suntariya Muanpawong** of the Research Justice Division and concurrent Secretary of the Environment Division of the Supreme Court of Thailand, gave a short welcome remarks. She reminded that the judiciary’s collective interest and participation to the thematic sessions signifies commitment to curbing wildlife crime through the rule of law, legislations, and innovations in environmental jurisprudence. Practitioners from the judiciary, the prosecution services, and the legislative fronts, are mostly confined in parliamentary session halls or courtrooms, but the sector’s actions are crucial, and serve as the backbone to law enforcement. She encouraged the participants to carry on beyond the working session, and bring back home ideas to improve judicial and policy work.

Mr. Peter Ritchie, Country Director, American Bar Association (ABA) Rule of Law Initiative (ROLI) presented on “Using anti-corruption and money laundering innovations to combat wildlife trafficking”, Financial investigation and money laundering is little used in the fight against wildlife crime. AML (Anti-money laundering) techniques main benefits include identifying additional evidence to support investigation/prosecution of the predicate crime, identifying the wider criminal network and confiscating the proceeds from crime. Removing profits equated to dismantling criminal network. He noted that corruption is a critical enabler of wildlife trafficking, but anti-corruption measures are rarely used. Promoting anti-corruption measures has strong potential to reduce wildlife trafficking. Initiative to converge responses to crimes is critical: Wildlife and timber trafficking, illegal drugs, human trafficking, tax fraud, welfare fraud, and other crimes. As a risk mitigation measure, leadership plays a key role in CWT efforts, supporting existing domestic WENs and joint investigative TOC (transnational organized crimes) teams to target networks. Another crucial consideration is the role of NGOs and the information they hold to prosecute wildlife crimes. FIUs (Financial Intelligence Units) need to understand the intelligence collection priorities of agencies with anti-corruption and wildlife trafficking responsibilities.

Honorable Justice Oscar V. Badelles, Court of Appeals of the Philippines / *Asian Judges Network on Environment (AJNE)*, presented on AJNE as an information and experience sharing arrangement among senior judges of the Association of Southeast Asian Nations (ASEAN) and the South Asian Association

for Regional Cooperation (SAARC). This informal trans-governmental network is committed to providing a dynamic forum for judicial capacity building and multilateral exchanges on environmental adjudication. The Asian Development Bank (ADB) has been working with the judiciaries across Asia on a program on environment to strengthen the capacity of the judiciary to decide environmental cases and to develop expertise in environmental law. Under this program, ADB hosted the Asian Judges Symposium in 2010, which was co-hosted by the Chief Justice of the Philippines. Around 120 senior judges, environment ministry officials, members of civil society, and experts in environmental law discussed ways to promote environment protection through effective environmental adjudication and law enforcement. At the Symposium, judges called for the creation of an Asian Judges Network on Environment. They expressed enthusiasm for an informal trans-governmental network that would foster closer ties among members over shared issues and challenge and ultimately, facilitate judicial capacity-building through sustained multilateral exchanges. The first ASEAN Chief Justices' Roundtable was held in Jakarta, Indonesia in December 2011, which resulted in the adoption of a Common Vision on Environment for ASEAN Judiciaries. In these events, the Chief Justices and Senior Justices discussed not only new developments in environmental law and adjudication, but also shared experiences on diverse topics on environment, such as, biodiversity, pollution, deforestation, illegal fishing and illegal wildlife trade. As a result, they become aware of, and increasingly concerned about, the environment in general, and the illegal wildlife trade in particular. They noted the magnitude and consequence of the illegal wildlife trade, which are often committed as transnational organized crimes. By way of outcome, AJNE had supported the establishment of green benches in some jurisdictions, assisted the publication of green bench books, promoted the integration of the study of environmental law in law school curriculum, facilitated the creation of judicial working groups on environmental governance, aided in the adoption of a judicial certification program on environment, produced knowledge products in the form of country reports and reports of the proceeding of each roundtable that serve as repository of the discussions and presentations, and it promoted the dissemination and sharing of innovative concepts and new doctrines in international environmental law. AJNE strengthened the judges' capacity by providing them with a like-minded support group, introduced innovative ideas, and made available economic and technical information. They now have a neutral forum where stakeholders can come together and conduct frank discussions without any pressures or biases. Moving forward, to build on the success of its work with judges, ADB has approved a new project on Developing Judicial Capacity for Adjudicating Climate Change and Sustainable Development in Asia. It aims to assist judiciaries in developing seminal jurisprudence that is responsive to climate change and sustainable development issues. The AJNE is supported by the Asian Development Bank, which continues to provide technical expertise, institutional support and financial assistance to the AJNE and by hosting the website, facilitating face to face meetings; facilitating the Chief Justices Roundtable on the Environment, and supporting national projects with member judiciaries.

Atty. Asis Perez, In-Country Representative of the United States Department of Interior (DOI) International Technical Assistance Program and, Senior Adviser of Tanggol Kalikasan; Former Undersecretary for Fisheries, Department of Agriculture of the Philippines; Member of Subcommittee on the Rule of Procedure for Environmental Cases of the Supreme Court, presented on Supreme Court of the Philippines' Rules of Procedures for Environmental Cases, a global innovation in environmental jurisprudence. It was created from formal recommendations of Environmental Law Enforcement Summits facilitated by the law enforcement community and the Department of Environment and Natural Resources (DENR). On 13 April 2010, the Supreme Court issued the Rules of Procedure for Environmental Cases (A.M. No. 09-6-8-SC) to protect the people's constitutional right to a balanced and healthful ecology. The Rules, which took effect on 29 April 2010, will govern the procedure in civil, criminal and special civil actions involving enforcement or violations of environmental laws such as the Revised Forestry Code, the Water Code, the Philippine Mining Act, the Indigenous Peoples Rights Act, the Ecological Solid Waste Management Act, the Clean Air Act, and the Clean Water Act. Significant features of these landmark Rules include:

1. *Citizen Suit* - Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws. The court will then require all interested parties to manifest their interest to intervene within 15 days from notice.
2. *Filing fees deferred*- Payment of filing and other legal fees by the plaintiff will be deferred until after judgment unless the plaintiff is allowed to litigate as an indigent. Filing fees will constitute a

first lien on the judgment award. Environmental Protection Order (EPO) - In deciding the case, the Court may grant an EPO which directs or enjoins any person or government agency to perform or desist from performing an act to protect, preserve or rehabilitate the environment.

3. *Temporary Environmental Protection Order (TEPO)* - If it appears from the verified complaint with a prayer for the issuance of an EPO that the matter is of extreme urgency and the applicant will suffer grave injustice and irreparable injury, the executive judge of the multiple-sala court (before the case is raffled) or the presiding judge of a single-sala court, may issue a TEPO ex parte (or without notice to hearing from the other party). The TEPO shall be effective for only 72 hours from the date of receipt of the TEPO by the person enjoined. Within this 72-hour period, the court where the case is assigned will conduct a summary hearing to determine whether the TEPO may be extended until the case is terminated. The TEPO may be dissolved if it appears after hearing that its issuance or continuance would cause irreparable damage to the party or person enjoined while the applicant may be fully compensated for such damages as he may suffer, subject to the posting of a sufficient bond by the person enjoined. The court will periodically monitor the existence of acts that are the subject matter of the TEPO and may lift the same at any time as circumstances may warrant.
4. *No Temporary Restraining Order (TRO) or Preliminary Injunction* - Except the Supreme Court, no court can issue a TRO or writ of preliminary injunction against lawful actions of government agencies that enforce environmental laws or prevent violations thereof.
5. *Filing fees deferred* - Payment of filing and other legal fees by the plaintiff will be deferred until after judgment unless the plaintiff is allowed to litigate as an indigent. Filing fees will constitute a first lien on the judgment award.
6. *Special prosecutor* - In criminal cases, where there is no private offended party, a counsel whose services are offered by any person or organization may be allowed by the court as special prosecutor, with the consent of and subject to the control and supervision of the public prosecutor.
7. *Period to decide the case* - The court has 1 year from the filing of the complaint to try and decide the case. Before the expiration of the one-year period, the court may petition the Supreme Court for the extension of the period for justifiable cause. The court shall prioritize the adjudication of environmental cases.
8. *Plaintiff's reliefs* - In its judgment, the court may grant to the plaintiff proper reliefs which shall include the protection, preservation or rehabilitation of the environment and the payment of attorney's fees, costs of suit and other litigation expenses. The court may also require the violator to submit a program of rehabilitation or restoration of the environment, the costs of which shall be borne by the violator, or to contribute to a special trust fund for that purpose subject to the control of the court.
9. *The court may convert the TEPO to a permanent EPO or issue a writ of continuing mandamus* directing the performance of acts which shall be effective until the judgment is fully satisfied. (Writ of continuing mandamus below is explained below)
10. *Strategic Lawsuit Against Public Participation (SLAPP)* - SLAPP is a legal action filed to harass, vex, exert undue pressure or stifle any legal recourse that any person, institution or the government has taken or may take in the enforcement of environmental laws, protection of the environment or assertion of environmental rights. The defendant may interpose as a defense that the case is a SLAPP. Hearing on the defense of SLAPP shall be summary in nature. The defendant must prove by substantial evidence that his act is a legitimate action for the protection, preservation and rehabilitation of the environment, while the plaintiff must prove by preponderance of evidence that the action is not a SLAPP and is a valid claim.
11. The defense of SLAPP shall be resolved within 30 days after the summary hearing. If the court dismisses the action, the court may award damages, attorney's fees and costs of suit under a counterclaim if such has been filed. The dismissal shall be with prejudice.

12. Special Civil Actions: *Writ of Kalikasan* - The writ is a remedy available to a natural or juridical person, entity authorized by law, people's organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.
13. *Precautionary Principle* - When there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect, the court shall apply the precautionary principle in resolving the case before it. The constitutional right of the people to a balanced and healthful ecology shall be given the benefit of the doubt. Standards for application: In applying the precautionary principle, the following factors, among others, may be considered: (1) threats to human life or health; (2) inequity to present or future generations; or (3) prejudice to the environment without legal consideration of the environmental rights of those affected.

Three Breakout group sessions ensued to brainstorm and answer questions pertinent to policy and innovations in jurisprudence.

Question No. 1 *"After having heard 3 presentations from our colleagues please share at your table which innovative platforms, policies and judicial innovations which we can use to counter wildlife trafficking. Please focus on things that work or have worked, not on gaps and problems"*

Judicial Cooperation and Reform

1. Establishment of Green Courts and Specialized Environmental / Wildlife Prosecution Service. Green benches (e.g. Thailand, Philippines and Indonesia) that can take the lead in reforming sentencing guidelines, sharing of best practices and case studies
2. Creation of Enforcement and Prosecutorial networks across regions
3. Rules of Procedures for Environmental Crimes
4. *In Dubio pro Natura* (the Precautionary Principle)
5. Speed-up of trials using affidavits instead of direct examination
6. Continuous trial and being strict on trial dates
7. Set judgment date in advance
8. Clear docket (SC)
9. Need to educate prosecutors, judges, customs officers, police

Legislative Reforms

1. Return proceeds of violators to protectors (i.e. legislating a wildlife or conservation fund under Wildlife Acts)
2. Laws that elevate wildlife crime as a serious crime that makes money laundering and racketeering charges an option
3. Develop a project in ASEAN to provide financial rewards and incentives to people and organizations that assist the identification and prosecution of wildlife traffickers funded by proceeds of crimes.
4. Use Whistleblower (Witness Protection Programs) statutes. Take out profits from violators
5. Laws that enable enforcement of other countries wildlife laws, such as US lacey act, restitution, etc.
6. Laws/ policies that mitigate and shine a light on corruption (Freedom of Information Acts)
7. We should beef up whistleblower laws to make it profitable to turn in offenders: a portion of the fine should go to the informer and perhaps also his village. But we need to ensure informers and their families are protected. Here we need to go further & explore how to use the US Whistleblower laws which have handsome rewards for informers
8. Laws must be strengthened to bring them in line with the UNCTOC, at least 4 years imprisonment; predicate crime; beef up seizure laws and money laundering laws; here we noted that Thailand's penalties for wildlife crimes are extremely low, except for laws regarding ivory.
9. There must be laws making it an offence to make or sell or be in the possession of animal traps; laws that allow the confiscation of equipment including vehicles, guns, traps etc that are used in the commission of the offence

10. Should there be a minimum penalty across all ASEAN states? If so, this must be linked to the per capita income as this varies?
11. In order to serve as sufficient deterrence, there should not be a maximum figure for a fine but it should be based on many times the value of the wildlife/goods?
12. Fines should go back to the agencies to help strengthen them, and a portion should go to the informer or his village to incentivize reporting.
13. Clear guidelines are needed to deal with responsibilities re: wildlife that is confiscated.

Regional Cooperation and Partnerships

1. Advance the USAID Wildlife Asia Program through APEC Pathfinder Dialogue on Wildlife Trafficking to be held in Ho Chi Minh City in August 2017, co-chaired by the Government Inspectorate of Vietnam and the US Government (State, INL/C).
2. National government platforms that bring together all the key stakeholders in the enforcement continuum. Example given was the Wildlife Council in Nepal.
3. While its better to consider what's working, we cannot ignore or stop identifying the gaps. The gaps are a good indicator as what needs to be improved, what works and what doesn't. This should be shared amongst the
4. Using the full toolbox – The stakeholders need to understand it is not just wildlife, its transnational organized crime. Therefore they (the different agencies) have no choice but to work together if they want to effectively tackle transnational organized crime. Question, has any country managed to do that. Yes, Thailand (Chaimat case with AMLO). The Philippines, Indonesia (Fishery and anti-corruption).
5. Partnership approach -ARREST was mentioned. Harness the strength of different organization to work towards a common goal instead of competing.
6. AIPA – Greater engagement of parliamentarians is necessary.
7. Use existing platform and improve on it –e.g. ASEAN-WEN

Public Engagement and Outreach

1. Demand reduction efforts and legal reforms must go hand in hand.
2. Importance of educating the local communities on the need to protect/safeguard wildlife as these are their natural resources to be treasured. Convince them not to be hunters but to be protectors of the forests.
3. Need to reduce demand? Again, education needed here but must be mindful of cultural sensitivities and use these to advantage.

Question No. 2 *“How can we policy makers, judges and prosecutors better collaborate to end wildlife trafficking in our region. Which partnership opportunities do you see?”*

1. Directory of all networks (including non-traditional CWT actors), programs working on CWT (i.e. FATF, OECD, APEC, AJNE, Prosecutors, ASEAN-WEN, etc.)
2. Sharing of information and case precedents related to wildlife crimes
3. Prosecutor/ judicial training on the importance of combating wildlife crime
4. Establish information-sharing networks for prosecutors and judges
5. Establish specialized courts and prosecutors units
6. Involve judges and prosecutors in major policy-making meetings, such as CITES COPs
7. Asset recovery interagency Network for Asia and the Pacific (ARIN-AP)
8. South East Asia parties Against Corruption (SEAPAC) now an ASEAN-recognized body
9. APEC Anti-Corruption and transparency Experts Working Group (APEC-ACT which looks at WLT
10. Asia Pacific Group on Money Laundering (APG) is developing a guidance document 2017 on using anti-money laundering systems against wildlife crime.
11. OECD Paris is developing principles to combat corruption in wildlife trafficking (contact Mr. Jack Radisch, OECD High Level Risk Forum - Public Governance and Territorial Development Directorate
12. Environmental anti-corruption sections of Indonesia KPK, Office of the Ombudsman of the Philippines and in the future Thailand's NACC.
13. Have more workshops and conferences like the Innovation Conference.

14. Involve more stakeholders (prosecutors, judges, members of parliament) in CWT awareness building and law enforcement activities (e.g. Field trips and SIGs).
15. Do more cross-regional and cross-discipline workshops to share best practices and knowledge.

Key messages

1. Identified opportunities for capacity development and collaboration, through regional and south-south cooperation (i.e. intra-ASEAN twinnings of judiciaries or parliaments expertise), towards bridging critical gaps in wildlife protection and enforcement
2. Identified key innovations and specific provisions in environmental jurisprudence and national legislations to support CWT efforts
3. Utilization of existing platforms and programs to achieve reform aims in both legislations and judicial innovations (APEC, AJNE, ICCF, AIPA, ACJNE, UNEP)
4. Joint activities across the networks and programs to leverage funds and escalate achievements of targeted and tangible develop impacts

Background

Each year, billions of dollars in illegally harvested or taken wild fauna and flora (including timber) move across borders, often through the activities of international crime networks. This global trafficking problem is also often associated with the spread of zoonotic infectious disease. Rich in biodiversity, but also known for its porous borders, weak laws and patchy enforcement, Southeast Asia is a global hotspot for the poaching, trafficking and consumption of illegal wildlife and their parts.

While recent programs led by the ASEAN-WEN and its Special Operations Group, WCO-RILO, and INTERPOL have helped increase enforcement action on the ground, prosecutions and convictions are not occurring at the level and frequency necessary to dismantle and stop the criminal syndicates profiting from illegal trade in wildlife.

Government officials cannot act effectively to protect wildlife and ecosystems without the backing of strong laws or the proper application of existing laws (including wildlife laws and the full spectrum of other laws than can be used to prosecute wildlife crime) to acts of organized crime. The review and analysis of national legislation is necessary to better understand CITES/wildlife protection-legislation and to identify major weaknesses, loopholes, jurisdictional overlaps, and provide a basis for recommendations on how to rectify or improve them.

Despite the need, strengthening wildlife laws is not currently a political priority in the region, and remains sidelined on the legislative agenda. Other laws that are applied to organized crime in drug, human and arms trafficking are often also appropriate to organized wildlife crime, but are not being applied as such.

By elevating the issue of wildlife crime and wildlife law reform, partners can assist champion Judiciaries (Asian Judges Network on the Environment), AGs (Attorneys General) and Parliaments from the ASEAN Inter Parliamentary Assembly (AIPA) to gain a solid legal foundation to fully enforce wildlife laws that will help catalyze a significant shift in the regional trade context. Strengthening relevant laws and their enforcement remains the biggest challenge ahead, but represents a crucial strategy to create effective deterrents for illegal wildlife trade, and dismantle the criminal syndicates behind it. Legislators and policy makers are vital in the fight against wildlife crime, specifically through their support in strengthening national laws, and the development of region-wide regulations. Legislators also decide on budget prioritization for line agencies combatting wildlife crimes, and elevating this issue to a higher level could result in additional funding being allocated across the region to more effectively combat wildlife crime.

Novel judicial innovations and policies are also crucial to sustain wildlife enforcement efforts (e.g. wildlife/ environmental crimes sentencing guidelines, standards for the application of the precautionary principle, and the defense of strategic lawsuit against public participation (SLAPP), aimed at ensuring the effective enforcement of remedies and redress for violation of environmental laws, creation of special writs, rules of procedure, provision of *locus standi* for wildlife, etc.