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Increasing Popular Participation in the Treaty-making Process

The Legislative Process of Section 190 of the 2007 Constitution of Thailand

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Abstract

Historically, the authority to conclude international treaties was exclusively exercised by administrative bodies (or the chief of state). However, recent studies pointed out that the present legislative bodies have come to play a more active role through ratification or the review of treaties in European and American countries. Harrington (2005) studied judicial reform in British dominions and criticized the past executive-dominant treaty-making process as a "democratic deficit" due to a fear that under this system the nation might be bound by international agreements for which a consensus had not been obtained. These studies indicated that people's participation in the treaty-making process has increased on a global basis, but neither of them provides sufficient descriptive evidence regarding why and how such procedures were established. The present paper therefore attempts to solve these questions by analyzing the legislative and political process of the treaty-making procedure reform in Thailand's 2007 constitution as a case study.

Keywords: treaty-making, participation, constitution, Thailand

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Introduction

International treaties bind not only the rights and obligations of contracting states, but also those of the individuals who live within them. However, unlike domestic laws, which require legislative approval, international treaties are not necessarily subject to ratification by the legislative body.

This provokes the question of how the interests of the people are reflected in international treaties. Historically, the authority to conclude international treaties was exclusively exercised by administrative bodies (or the chief of state). However, a comparative study of the treaty-making process by Riesenfeld and Abbott (1994) approvingly pointed out that the present legislative bodies have come to play a more active role through ratification or the review of treaties in European and American countries. Harrington (2005) studied judicial reform in British dominions and criticized the past executive-dominant treaty-making process as a "democratic deficit" due to a fear that under this system the nation might be bound by international agreements for which a consensus had not been obtained. These studies indicated that people's participation in the treaty-making process has increased on a global basis, but neither of them provides sufficient descriptive evidence regarding why and how such procedures were established. The present paper therefore attempts to solve these questions by analyzing the legislative and political process of the treaty-making procedure reform in Thailand's 2007 constitution as a case study.

1. Review of Studies on the Treaty-making Procedure

Generally, treaties enter into force in domestic jurisdiction after they are incorporated into the domestic law system. There are two types of approach concerning incorporation. One is called the doctrine of transformation. This doctrine regards that treaties must be expressly and specifically 'transformed' into domestic law by the use of the appropriate constitutional machinery. This doctrine grew from the procedure whereby international agreements are rendered operative in domestic law through the device of ratification by the sovereign, and the idea has developed from this

that any rule of international law must be transformed, or specifically adopted in order to be valid within the internal legal order. Another approach, known as the doctrine of incorporation, holds that international law is automatically part of domestic law without the necessity for the interposition of a constitutional ratification procedure (Shaw [2003: 128-129). Especially a treaty which provides adequate rules by which given rights may be enjoyed or duties imposed is regarded as being immediately and automatically enforceable (a self-executing treaty). However, the problem of what kind of treaty should be incorporated in this way is usually solved under the domestic law of each country. In any case, we can say that effectuation of international law (a treaty) is strongly dependent on domestic legislation procedure.

The problem of incorporation has been regarded as a part of the discussion about the order between the domestic and international legal system. However, the increasing demand for democratic institution-building has caused recent studies to focus on the distribution of power among the legislative, executive and judicial branches in the treaty-making process. As this paper has already mentioned, in history, treaty-making power was exclusively exercised by administrative bodies (or the chief of state). However, in the majority of parliamentary democratic systems today, with some exceptions, international treaties which have been proposed, negotiated and signed by the executive branch often require deliberation and ratification by legislative bodies.

Under such a system, it is necessary to specify in advance what kind of treaty requires the approval of parliament in order to conduct both international relations and national governance smoothly and effectively. In Japan, for example, treaties concerning the legislative power of the Diet or public finance, and treaties dealing with international relations are regarded as legislative treaties.[1] On the other hand, in the United States, the law of nations is traditionally deemed to be incorporated into the national law system without legislation by the Congress or declaration by the president. However, Damrosh pointed out the fact that the legislative branch (U.S. Senate, in this

[1] Response by the Director-general of the Treaties Bureau at the Foreign Affairs Committee of the House of Representatives, 46th Diet Ordinary Session 18th March, 1964. As a consensus of the government on this matter, see the response by Masayoshi Ohira, Minister of Foreign Affairs at the Foreign Affairs Committee of the House of Representatives, 72nd Diet Ordinary Session.

case) often defined the non-self-executing character of treaties by declaration and indicated that those declarations are binding on the courts (Damrosch 1996).[2] Although Damrosch regards the Senate as having constitutional authority to control the self-executing/non-self-executing character of a treaty, she argues that the Senate should refrain from exercising that power from the viewpoint of the separation of powers of three branches of government.[3]

On the contrary, Harrington's work criticizes the traditional executive branch-centric treaty-making process as a system with a "democratic deficit" (Harrington 2005). As we have seen above, treaties are not necessarily ratified by the legislative body. Moreover, Harrington pointed out that the federal government usually concludes international treaties without the consent of local governments. "Democratic deficit" is a concept which criticizes the treaty-making system whereby the will and interests of the people as the sovereign can be ignored. Harrington took up the cases of treaty-making process reform in Canada, England and Australia, countries which claim to have corrected this "deficit." In Canada, for example, the practice of submitting all treaties to Parliament before signing had been in place since 1926. After the mid 1960s, however, not a small number of cases in which the treaties have been enacted at executive discretion, without ratification, have occurred (Harrington 2005: 480-481).

Referring to the case in the British Parliament, Harrington criticized this situation and suggested that the executive branch should disclose sufficient information about treaties in the legislative body. Incidentally, the British Parliament recently experienced further reform of the treaty-making procedure. There was a constitutional convention called the Ponsonby Rule whereby every treaty signed by the United Kingdom and subject to ratification should be laid before Parliament for 21 sitting days (although they need not be continuous). However, the Ponsonby Rule does not apply to treaties that enter into force on signature. Moreover, even if either House rejects the

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[2] In her paper, Damrosh refers to the case of the Torture Convention and the International Covenant on Civil and Political Rights (Damrosh 1996).

[3] Riesenfeld and Abbott agree with Damrosch's claim, although they do not regard the Senate as having the constitutional authority to control whether a treaty is self-executing or not (Riesenfeld and Abbott 1996: 3).

treaty, this is not legally binding. On 11th November 2010, the Constitutional Reform and Governance Act 2010 was brought into force by a commencement order. Part 2 of the Act deals with the ratification of treaties and puts Parliamentary scrutiny of treaties on a statutory footing, effectively replacing the Ponsonby Rule. This made it illegal to conclude a treaty against a resolution of the House of Commons (Kawashima [2010]).

The abovementioned studies depict the recent tendency for the legislative scrutiny of treaty-making to become more active. However, neither of them provides sufficient descriptive evidence on why and how such procedures were aspired to and established. This paper therefore attempts to solve these questions by analyzing the legislative and political process of the treaty-making procedure reform in Thailand's 2007 constitution as a case study.

As well as Britain, Thailand has recently experienced a reform of the treaty-making procedure. Section 190 of the 2007 constitution newly created stronger measures to control the government's authority to conclude international treaties. It expanded the range of treaties which require the approval of parliament. Moreover, it enhanced not only the authority of the National Assembly and the Constitutional Court, but also provided opportunities for direct participation in the treaty-making process by the people. This evokes the nationwide discussion about the balance of the three governmental powers in treaty-making in Thailand.

There are a small number of studies about the treaty-making process in Thailand. Jaturon (1996) analyzed the treaty-making procedures in Thailand under the previous 1997 (2540) constitution. In this work he offered rich information about the situation before the reform in 2007. On the other hand, Jumphot (2009) is a study about the new procedure and its legal and political influence. Comparing the contents of Section 190 of the 2007 constitution, which provides for the new treaty-making procedure, with that of other countries, Jumphot pointed out that the 2007 constitution gives the legislative branch the power not only to monitor but also to control the treaty-making power of the executive branch. He expressed concern over possible trouble regarding the implementation of international law (treaties) which might be caused by domestic law (the constitution). (Jumphot [2009 200-201]). The information and analytical frameworks of the research by Jaturon and Jumphot are seen to be of value in studying the question of the distribution of power in treaty-making process reform. In passing,

the present paper also refers to works about treaty-making practice written by diplomats as important sources of information. Visoot [1990] and Krom sonthisanya [2004] are manuals for the staff of the Department of Treaties and Legal Affairs in the Ministry of Foreign Affairs (referred to as DTA-MFA) and are rich in information about the actual procedure and past cases, which are not written in the relevant laws.

Let us first examine the features of the reform of the 2007 constitution. This paper historically reviews Thailand's treaty-making procedures as stipulated in past constitutions and compares them with those of the present time. The paper then traces the behavior of the relevant actors in the drafting process of the 2007 constitution and scrutinizes their motivations and purposes.

2. Treaty-making Procedures in Past Constitutions, 1932-1997.

The first written rule about treaty-making was seen in the Constitution of the Siam Kingdom which was promulgated in 1932 (B.E. 2475). Section 54 of the 1932 constitution specified that;

> The king has the prerogative of declaring war, concluding a peace treaty and other treaties with other countries
>
> The declaration of war which was provided for in the preceding paragraph is exercised when it is not inconsistent with the provisions of the League of Nations Covenant.
>
> A treaty which provides for a change in the territories of the Kingdom of Siam or requires the enactment of an Act for its implementation must be approved by the National Assembly (English translation by the author).

In the process of Constitution drafting, there was discussion about the definition of a legislative treaty. It is noteworthy that they agreed to confine legislative treaties to those stipulated in paragraph three of section 54 for the reason that submission of all the treaties to the Assembly would exert an inordinate burden on the government (Record [1932: 150-154]). Thus Thai constitutions have basically followed the definition in the 1932 constitution. For example, the 1946 Constitution provided that,

Section 76

> The king has the prerogative of concluding a peace treaty and other treaties with other countries.
>
> A treaty which provides for a change in the territories of the Kingdom of Thailand or requires the enactment of an act for its implementation must be approved by the National Assembly (English translation by the author).

This section was inherited by the constitutions of 1949 (section 154) and of 1968 (section 150). Explicit and detailed discussion over the reason for limiting the definition of a legislative treaty was seen in the record of the drafting of the 1978 constitution. In the deliberations, one of the members suggested that peace and truce accords be added to the section providing for legislative treaties "in order to prevent the government betraying the country intentionally against the interests of the nation." Another member countered this opinion by raising the objection that this might encumber the government's swift response to the situation. They also argued that it is not necessary to prescribe these accords in the section because even if the government is obliged under the truce to cede a part of Thai territory, the implementation of this would require approval by the National Assembly, as is already stipulated in the second paragraph of the section. They also discussed the status of military conventions and concluded that these should be exempted from the definition of legislative treaty, because "awaiting the ratification process might hamper the government's prompt response to the emergency. Moreover, some treaties are highly confidential due to the nature of the issue and disclosing the contents in the Assembly might make implementation of this impossible" (Sawasdikan 1988: 317-318).

Thus the past discussion about which treaties would require ratification show that importance was placed on the efficiency of administrative management and delegated treaty-making powers to the executive branch.[4]

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[4] For an actual case of a treaty's enactment without ratification for the reason that it was highly political and confidential, Jaturon mentioned the memorandum concerning usage of military bases in Thai territory by the U.S. Military which was undertaken between the Thai Minister of Foreign Affairs Thanat Khoman and the U.S. Secretary of State David Dean Rask on 6th March 1962 (Jaturon [1996: 44]).

On the other hand, the 1978 constitution added a new item to the category of legislative treaty.

Section 162

The king has the prerogative of concluding a peace treaty and other treaties with other countries or international organizations.

A treaty which provides for a change in the Thai territories or the national territorial sovereignty or requires the enactment of an Act for its implementation must be approved by the National Assembly[5].

"The national territorial sovereignty" is an expression reflecting the notion of "exclusive economic zone," which was newly established in the third Law of the Sea Convention in 1973. This section again was inherited in the constitutions of 1991, (section 178) and of 1997 (224). As we shall see later, this obscure wording caused a political confrontation over the constitutionality of the memorandum concerning the territorial problem between Cambodia and Thailand.

So far, this paper has reviewed the development of the rules concerning legislative treaties in past constitutions. It seems appropriate to remark that there was no substantial change until 2007. Recalling the Thai history of democratization, in which upheavals were experienced in the mid 1970s and again in the 1990s, it is surprising that the treaty-making provisions had been left almost untouched. Even in the 1997 constitution, which was drafted as "the most democratic constitution in Thai history" after the political turmoil of "Black May" in 1992, Section 224 provides that;

The King has the prerogative to conclude a peace treaty, armistice and other treaties with other countries or international organizations.

A treaty which provides for a change in the Thai territories or the jurisdiction of the State or requires the enactment of an Act for its implementation must be approved by the National Assembly.[6]

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[5] Constitution of the Kingdom of Thailand A.D. 1978, International Translations, Bangkok 1978

In fact, most of Thailand's treaty-making procedures, from negotiation to enactment, had been managed by the bureaucrats of DTA-MFA and legal specialists. For example, the cabinet decision of 18th December 1977 approved the delegation of the conclusion and approval of treaties concerning non-political or practical matters to the prime minister or vice premier or their surrogates. Another decision (on 6th March 1979 and on 27th July 1992) appointed MFA as responsible for treaty-making in general and for the organization of teams to conduct international negotiations. In an interview with the author, Jaturon pointed out the role of the Special Committee for Consideration of Legal Issues Relating to Treaties and Conventions, which was established in the DTA-MFA. According to Jaturon, it was the ad-hoc committee, consisting of members such as the Justice of the Supreme Court and of Court Appeals, the Director-General of the Council of State, the Attorney General, the Minister of Justice, the Minister of Foreign Affairs, the Director-General and Vice Director-General of DTA-MFA, which examined the legal consistency and social impact of treaties (Jaturon [1996:49]). According to a bureaucrat interviewed by the author, it was explained that committee members were appointed by the Minister of Foreign Affairs based on their ability and personal connection with the Minister.[7] However, the committee ceased activities in the 1990s because of the retirement of the members due to advanced age, and DTA-MFA assumed its function. From these documents and oral evidence, we can remark that Thai treaty-making procedures had been managed mainly by the executive branch, giving priority to the efficiency of administrative and diplomatic management.

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[6] Constitution of the Kingdom of Thailand (B.E. 2540), 11 October 1997, URL: http://www.unhcr.org/refworld/docid/3ae6b5b2b.html, Last accessed 8th June 2012])

[7] Interview with a bureaucrat of DTA-MFA on 15th February 2010.

3. Reform of the Treaty-making Procedure in the 2007 Constitution

1) The features of Section 190 of the 2007 Constitution

The 2007 constitution fundamentally changed the conventional treaty-making procedures that we have reviewed in the previous chapter. Section 190 of 2007 constitution provides that,

> The King has the prerogative to conclude a peace treaty, armistice and other treaties with other countries or international organizations.
>
> A treaty which provides for a change in the Thai territories or the extraterritorial areas over which Thailand has sovereign rights or has jurisdiction in accordance therewith or in accordance with international law or requires the enactment of an Act for the implementation thereof or has extensive impacts on national economic or social security or generates material commitments in trade, investment or budgets or the country, must be approved by the National Assembly. For this purpose, the National Assembly shall complete its consideration within sixty days as from the receipt of such matter.
>
> Prior to taking steps in concluding a treaty with other countries or international organizations under paragraph two, the Council of Ministers shall provide information and cause to be conducted public hearings and shall give the national Assembly explanations on such treaty. For this purpose, the Council of Ministers shall submit to the National Assembly a framework for negotiations for approval.
>
> When the treaty under paragraph two has been signed, the Council of Ministers shall, prior to the declaration of intention to be bound thereby, make details thereof publicly accessible and, in the case where the implementation of such treaty has impacts on the public or operators of small- or medium-sized enterprises, the Council of Ministers shall take steps in rectifying or remedying the impacts suffered by aggrieved persons in an expeditious, appropriate and fair manner.
>
> There shall be the law on the determination of procedures and methods for the conclusion of treaties having extensive impacts on national

> economic or social security or generating material commitments in trade or investment and the rectification and remedying of impacts suffered by persons in consequence of the implementation of such treaties, having regard to justice to persons benefited and persons aggrieved by the implementation thereof as well as to general members of the public.
>
> In the case where there arises a problematic issue under paragraph two, the power to make the determination thereon shall be vested in the Constitutional Court and, for this purpose, the provisions of section 154 (1) shall apply *mutatis mutandis* to the referral of the matter to the Constitutional Court.[8]

The section drastically expanded the definition of treaties requiring legislative approval, adding treaties which have "extensive impacts on national economic or social security or generate(s) material commitments in trade, investment or budgets or the country." Furthermore, it reformed not only the definition of legislative treaty but also the procedures themselves. The Figure 1 shows the flow of treaty-making procedures provided by the 2007 constitution.

The figure shows that the 2007 constitution put the negotiation process under direct public scrutiny by mandating information disclosure at the pre-negotiation and pre-signatory phase. Moreover, Section 190, paragraph six stipulates granting the power of judicial review to the Constitutional Court. Another noteworthy point is that it provides for legislation of enforcement law pertaining treaty-making procedures in paragraph five of section 190. The actual measure, which is called "The Bill concerning Treaty-making Procedure and Process, B. E. …." (Referred to as the Treaty-making Procedure Bill) was drafted immediately after the effectuation of the 2007 constitution. The bill was submitted to the National Assembly by the cabinet of Prime Minister Abhisit Vejjajiva in March 2009 and was expected to be enacted within the

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[8] Constitution of the Kingdom of Thailand, B.E. 2550 (2007), Bureau of Committee 3, The Secretariat of the House of Representatives, URL: http://www.senate.go.th/th_senate/English/constitution2007.pdf. last accessed on 10th June 2012.

month. However, it has not yet been established since it was withdrawn due to great opposition from the opposition party.

Nevertheless, the feature of the treaty-making procedure under the 2007 constitution can be summarized as placing strong restrictions on the treaty-making powers of the executive branch in the form of checks by the legislative branch, national scrutiny and by judicial review.

2) Politics in the Legislative Process of Section 190

Let us now see how and in what circumstances Section 190 was established. What is most interesting for us about the legislative process of Section 190 of the 2007 constitution is that it was promoted not only by the government agencies and jurists but also by civic groups. NGOs such as the consumer's group Munlanithi puea phuboriphok and a farmer's group Munlanithi khaokhwan have worked together as an NGO network, FTA Watch, and have actively expressed opinions about treaty-making procedures through mass media or demonstrations since 2007. Originally, their actions began as a protest against the free trade agreement (FTA) policy of Thaksin Shinnawatra's government (2001-06). They then turned their eyes to the opacity of the treaty-making procedures, which allowed little room for legislative or public examination and launched appeals to reform these procedures by drafting a new constitution.[9]

Moreover, since they had expressed their dissatisfaction with the draft constitution by the Constitution Drafting Committee suggested in April 2007, FTA Watch suggested their own draft of the section pertaining to treaty-making.[10] The

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[9] See the declaration titled " Thalaengkan reuang botbanyat nai ratthathamanun waduai kantham nanseusanya rawang prathet tongyuenyan lakkan thuang duntruwatshp rawang amnat fainitibanyat fai borihan lae phak prachachon pheua fa wikrot thang tan thangsethakit lae sangkom 9 mesayon 2550 (Declaration of the opinion that the provision in the constitution pertaining to international treaty-making should balance the powers among executive, legislature and the people in order to resolve the socio-economic turmoil on 9th April, B.E. 2550 (2007). URL: http://www.thaingo.org/cgi-bin/content/content3/show.pl?0785. Last downloaded on 10th June 2012.

[10] From an FTA Watch internal document titled "Rang khong khanakamathikan yokrang matra 186 (19 mesayon 2550), Rang tamkhosanue khong phak prachachon matra 186 (24 mesayon 2550) (Section 186 of the Draft Constitution by Constitution Drafting Committee (24th April B.E. 2550) and Sec. 186

second paragraph of section 190, providing that a treaty which "has extensive impacts on national economic or social security or generates material commitments in trade, investment or budgets or the country, must be approved by the National Assembly" was incorporated from the draft by FTA Watch after deliberations in the First Sub-committee of the Constitution Drafting Committee on 11th May, 2007 (Khana annukammathikan [2007]).

Behind this, Dr. Somkhit Lertpaitpong of Thammasat University, a member of the Drafting Committee, pointed out the connection with the political conflict among Thai society over the Thaksin administration's FTA policy.[11] Aiming to boost competitiveness of the Thai economy, Thaksin proactively pursued FTAs with countries such as the U.S., Japan, China and Australia. The FTA negotiations were expedited by bureaucrats, representatives of business associations or big companies led by Thaksin's advisors (Aoki [2008]). An opposition movement by NGOs and farmers developed against this negotiation style from around 2004. The movement insisted that it is not "democratic" to negotiate FTAs without offering the nation opportunities for hearings and exchanges of opinions, since the treaties may have possible negative effects on their lives. In January 2005, ten thousand people from the anti-globalist NGO, the farmer's group and a support group for HIV-infected persons held a rally in Chiangmai to demonstrate against the Thailand-US FTA negotiations.

With this situation in mind, the Surayudh Chulanont government, formed after the Thaksin government was overthrown, initiated a policy of disclosing a part of the FTA negotiation process to the public. For example, a committee to consider compensation for possible damage to small- and medium-sized enterprises and farmers which could be caused by an FTA was established in November 2006. This was followed by a public hearing on the Thailand-Japan Economic Partnership Agreement (JTEPA) held in December.

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of the Draft Constitution submitted by the representatives from the private sector)" referred to the Drafting Committee by courtesy of Mr. Bunthoon Sethasirote.

[11] Interview with the author conducted at Thammasat University on 18th February 2010.

Considering this background, Dr. Somkhit explained to the author that the Constitution Drafting Committee decided to draft the third and fourth paragraphs of Section 190 in order to make the treaty-making system open to the public not only in the ratification phase, but also during negotiations. By providing an opportunity for public discussion in the pre-negotiation phase, the government would be able to reflect the interests of the people regarding the treaty. At the same time, this would enable the government to avoid serious conflict during the ratification process in the National Assembly.

However, there still remained the problem of to whom the power to judge the constitutionality of the treaty-making procedure belongs. This was at one time highlighted in the case of an injunction demand on the signing of the JTEPA by the consumer's association and the farmer's group of Thailand in March 2007. The Central Administrative Court, which received the demand, rejected the judgment concerning constitutionality stating that it was a matter beyond their authority. In order to avoid such a situation, Dr. Somkhit explained, the Constitution Drafting Committee drafted Section 190, paragraph six, which authorizes judicial review power to the Constitutional Court.

3. Politics over the Treaty-making Procedure under the 2007 Constitution

1) Constitutional Reform

The reform of Section 190 of the 2007 constitution was an epoch-making event in the history of Thai treaty-making procedures. However, a demand for a constitutional amendment arose in the National Assembly only two years after its enactment.

Originally, the idea for a constitutional amendment was suggested in the meeting for national reconciliation organized by the Cairman of the National Assembly (held in April 2009) as a part of the measures against the national confrontation that had taken place since the coup in 2006. Then, in September 2009, a six-pronged draft of the constitutional amendment was submitted to the Assembly, in which Section 190 was included (Khanakammakan samanachan [2009:40]). The draft faced serious resistance from both the opposition and the ruling parties because it included critical issues for

politicians, such as abolition of the provision concerning party dissolution, reform of the constituency system and procedure for elections to the Senate, abolition of the ban on the concurrent holding of double offices and on participation in other public sectors. After a four-month controversy, the ruling coalition, except for the Democrats (the largest ruling party), submitted a draft amendment of Sections190 and 94 (a provision concerning measures for the selection of members to the House of Representatives) to the National Assembly Chairman with signatures of one hundred and two members of the parties.

Together with the draft by the one hundred and two Representatives, a draft by Thaksin's supporter's group, National United Front of Democracy against Dictatorship (UDD), and a further draft by the Democrats and other ruling parties called the "Government's Version" were also submitted. Of these, only the Government's Version passed the First Reading conducted at the Joint Sitting of the National Assembly held on 23rd November 2010.

The Table 1 compares the section pertaining to treaty-making procedures in the Government's Version of the draft amendment and that of the 2007 Constitution. The aims of the Government's Version amendment can seemingly be summarized into two points; to narrow the definition of a legislative treaty and to clarify the range of the jurisdiction of the Constitutional Court. As the table shows, the definition of a legislative treaty is limited to pacts concerning a change of Thai territory (or extraterritorial areas over which Thailand has sovereign rights or has jurisdiction) in government's draft amendment (the second and third paragraph). A narrower definition for legislative treaties means less power to the legislative branch in the treaty-making process. On the other hand, the draft specifies the range of the Constitutional Court's jurisdiction more precisely, or rather, even more narrowly (the seventh paragraph). While paragraph six of the 2007 Constitution can be interpreted as vesting the Constitutional Court with the authority to review almost all treaties, paragraph seven in the government's draft seemingly attempts, in paragraphs two and three, the interpretation that there are treaties which remain beyond the Court's jurisdiction and outside the definition. Thus the power distribution among the three governmental branches in treaty-making was changed within the short span of only two years. In the following section, let us examine the background to this change.

2) The Influence of the Territorial Dispute over Preah Vihear Temple

In mid June 2008, the foreign ministers of Thailand and Cambodia issued a joint communiqué regarding Preah Vihear Temple, an ancient ruin located on the border between the two countries. In the communiqué, they confirmed three points; Cambodia's formal and single inscription of the ruin on the World Heritage List at the 32nd session of the World Heritage Committee in 2008, Thailand's support for it, and the fact that this had no effect on the inscription on the demarcation of the countries' common border around the ruin.[12] Furthermore, the ministers agreed to submit a plan on co-management of the disputed territory around the ruin to UNESCO by 2010. Although Preah Vihear Temple and its surrounding territory was internationally regarded as belonging to Cambodia based on a ruling of the International Court of Justice (ICJ) in 1962, the Thai government had retained its right to claim sovereignty.

This was followed by the opinion submitted at the end of the month to the Thai Constitutional Court by two hundred and twenty eight members of the National Assembly, in which they required the Court's judgment on whether the joint communiqué would violate Section 190 paragraph 2 of the 2007 constitution or not. The Constitutional Court accepted the opinion and initiated a review, focusing on the points of whether or not the joint communiqué meets the definition of a "treaty," and if it is deemed as a "treaty," whether or not it falls under the classification of a legislative treaty as stipulated in Section 190 paragraph 2 of the 2007 constitution. Noppadon Pattama, the Minister of Foreign Affairs who signed the communiqué, argued in the hearing that the communiqué cannot be deemed a "treaty" in the light of Section 2, paragraph 1 a) of the Vienna Convention on the Law of Treaties 1969 because it was a memo of the meeting which indicated no intention to conclude an international treaty, and was not an agreement in written form.[13] He further argued that the communiqué

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[12] See, Joint Communiqué by H.E. Mr. Sok An, Deputy Prime Minister, Minister in charge of the Office of the Council of Ministers of the Kingdom of Cambodia, and H.E. Mr. Noppadon Pattama, Minister of Foreign Affairs of the Kingdom of Thailand, 18th June 2008, Phnom Penh.

[13] Actually, Thailand has not yet ratified the Vienna Convention. However, in the judicial review of 1999 on whether or not the letter of intent which the Thai government submitted to the International Monetary Fund was deemed a legislative treaty, the Constitutional Court ruled that it did not fall

does not fall under the classification of a treaty requiring legislative approval in Section 190 paragraph 2, citing the reason that it is not an agreement whereby the parties intended to change Thai territory, and accepted the ICJ's 1962 ruling (Jumphot [2009: 257-258]). Against this, the Constitutional Court ruled that the communiqué can be deemed a "treaty" falling under the Vienna Convention on the law of Treaties for the reason that "when a joint communiqué does not provide within itself to be included in the domestic law of either party, (the communiqué) should be under international law." The court also ruled that the communiqué meets the definition of legislative treaty given in Section 190 because "A treaty with the potential to provide for a change in the territories of Thailand or the extraterritorial areas over which Thailand has sovereign rights or has jurisdiction in accordance therewith or in accordance with international law must be approved by the National Assembly."[14]

The ruling of the Constitutional Court caused a deterioration in the bilateral relationship between Cambodia and Thailand. In early May, Thai newspapers reported on "the deal" between the governments of Cambodia and Thailand in which the Thai side "bought" an oil concession in Cambodia with recognition of Cambodia's sovereignty over disputed territory.[15] This provoked popular hostility toward Cambodia and demonstrations against the Thai government. Since the government at that time was led by Prime Minister Samak Sundravej, who once claimed himself to be the successor to Thaksin, the anti-Thaksin group People's Alliance for Democracy (PAD) fiercely condemned the government as a traitor that sold Thai territory to Cambodia. The Constitutional Court's ruling fueled this patriotic campaign and it eventually led to a military clash near Preah Vihear Temple in October of that year.

As a result of this, Foreign Minister Noppadon and the Director General of DTA-MFA were forced out of their posts. In addition, the Constitutional Courts' ruling could be literally interpreted as meaning that almost all international agreements can be "treaties" before being incorporated into domestic jurisdiction, and that treaties merely

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under the definition of a treaty in the light of the Vienna Convention from the position that the Convention had became a part of international custom. See the Constitutional Court Ruling 11/2542, on 25th May 1999.

[14] See the Constitutional Court Ruling 6-7/2551 on 8th July 2008.

[15] It was not confirmed that this "deal" had actually taken place.

with “the potential” to bring about a change in Thai territories or the extraterritorial areas over which Thailand has sovereign rights or has jurisdiction require the approval of the National Assembly. Recalling the fact that the Treaty-making Procedure Bill, which is the law for enforcement of Section 190 of the 2007 constitution, we can say that the only concrete definition of a legislative treaty in Thailand is the ruling of Constitutional Court on the case of the territorial dispute over Preah Vihear Temple.

The case revealed the problem that the 2007 constitution vested greater power in the judicial branch over treaty-making, while the detailed rules for enforcement had been left absent. A staff member of MFA told the author that the bureaucrats declined to judge on their own which treaties require legislative approval, and began to submit almost all treaties directly to the National Assembly.[16] In this situation, the government suggested urgent enactment of the Treaty-making Procedure Bill, together with an amendment of the 2007 constitution itself.

In the National Assembly, a meeting of the Sub-committee for Constitutional Amendment was held in July 2010. In the meeting, a jurist member emphasized that amendment of Section 190 paragraph 2 is not possible without enactment of the Treaty-making Procedure Bill (Khanaanukammakan phicharana naeothang [2010: 5-6]). However, as this paper has already mentioned in section 1) of Chapter 3, the bill was rejected with great opposition during the deliberations in the joint sitting of the National Assembly in March 2009. DTA-MFA then revised the bill and it was approved in the Cabinet meeting held on 3rd February 2010, in which the opinion from the non-governmental sector was incorporated, according to DTA-MFA staff.[17]

Amendment of the 2007 constitution appears to have been a fallback to the “ancient regime” in which the power of treaty-making was appropriated exclusively by the executive branch. However, it should be emphasized that the amendment was pursued along with the development of enforcement law. Moreover, what is important about the Treaty-making Procedure Bill is that it was supported and promoted by non-governmental actors such as FTA Watch. The group drafted their own version of the

[16] An interview at DTA-MFA on 16th February 2010.
[17] See footnote 16

Treaty-making Procedure Bill, and handed ten thousand signatures supporting their version to the Minister of Foreign Affairs.[18] They also tried to submit their draft law directly to the National Assembly. Although the draft was not accepted, their active involvement in the legislative process of the bill could seemingly no longer be ignored by the bureaucrats or the cabinet.

Conclusion

Thus far, this paper has presented the main points of Thailand's treaty-making procedures, and examined the process of their reform in the 2007 constitution.

To summarize the purpose of Section 190, it is to establish a procedure which limits the power of the executive and reflects the interests of the people with respect to international treaties. The Section expanded the power of the legislative branch by drastically expanding the definition of a legislative treaty, afforded opportunities such as public hearings for wider participation by the people in the treaty-making process, and vested greater authority in the judicial branch in the form of a judicial review by the Constitutional Court. As we have seen in section one of this paper, there are some cases in the world in which the government informs parliament of the content of a treaty before ratification. However, Thailand's case is quite unique in the sense that public hearings are held before negotiations.

Section 190 of the 2007 Constitution was drafted in the wake of the political dispute over the Thaksin administration's FTA policy. An FTA is a treaty which requires reform of the domestic regulations on trade in goods and services. When the people became aware of its impacts on their lives, they turned their focus to the absence of a system by which they could have their interests reflected in the treaty. In that sense, we can conclude that the reform of the Thai treaty-making procedure was led by

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[18] See the article on FTA Watch's website, titled "*Kamnod anakhod thai yud look kaphiwad 10,000 chew ruamsanue kotmai sanya rawang prathet chabap prachachon* (Determine the future of Thailand. Stop globalization. Signatures of Ten thousand people supporting International Treaty-making Bill (People's version), 13th March, 2008, URL: http://www.ftawatch.org/node/18078. Last accessed on 14th June, 2012.

consumers, farmers and small to medium producers and enterprises who were affected (or rather, supposed to be affected) by globalization, with the involvement of jurists and government agencies. Yanai (1991) once argued that in a world in which international interdependency is highly developed, the treaty-making process seems to have become more complicated and a higher legal expertise is required. However, it is particularly interesting to note that FTAs actually triggered the opening of Thailand's highly exclusive treaty-making procedure to the public. This is epoch-making in the sense that for the first time the people began to discuss how the treaty-making procedure should be conducted.

On the other hand, this paper has pointed out the problem that the 2007 constitution vested greater power over treaty-making in the judicial branch, while the detailed rules for enforcement had been left absent. The prime task now is the swift enactment of the Treaty-making Procedure Bill.

The government version of the constitutional amendment was approved and enacted on 4th March, 2011. Unfortunately, however, it was not possible to prepare sufficient information on the amendment for this paper due to time constraints. It would seem that further analysis of the legislative process of the amendment and its impact on the actual political process is needed in the future.

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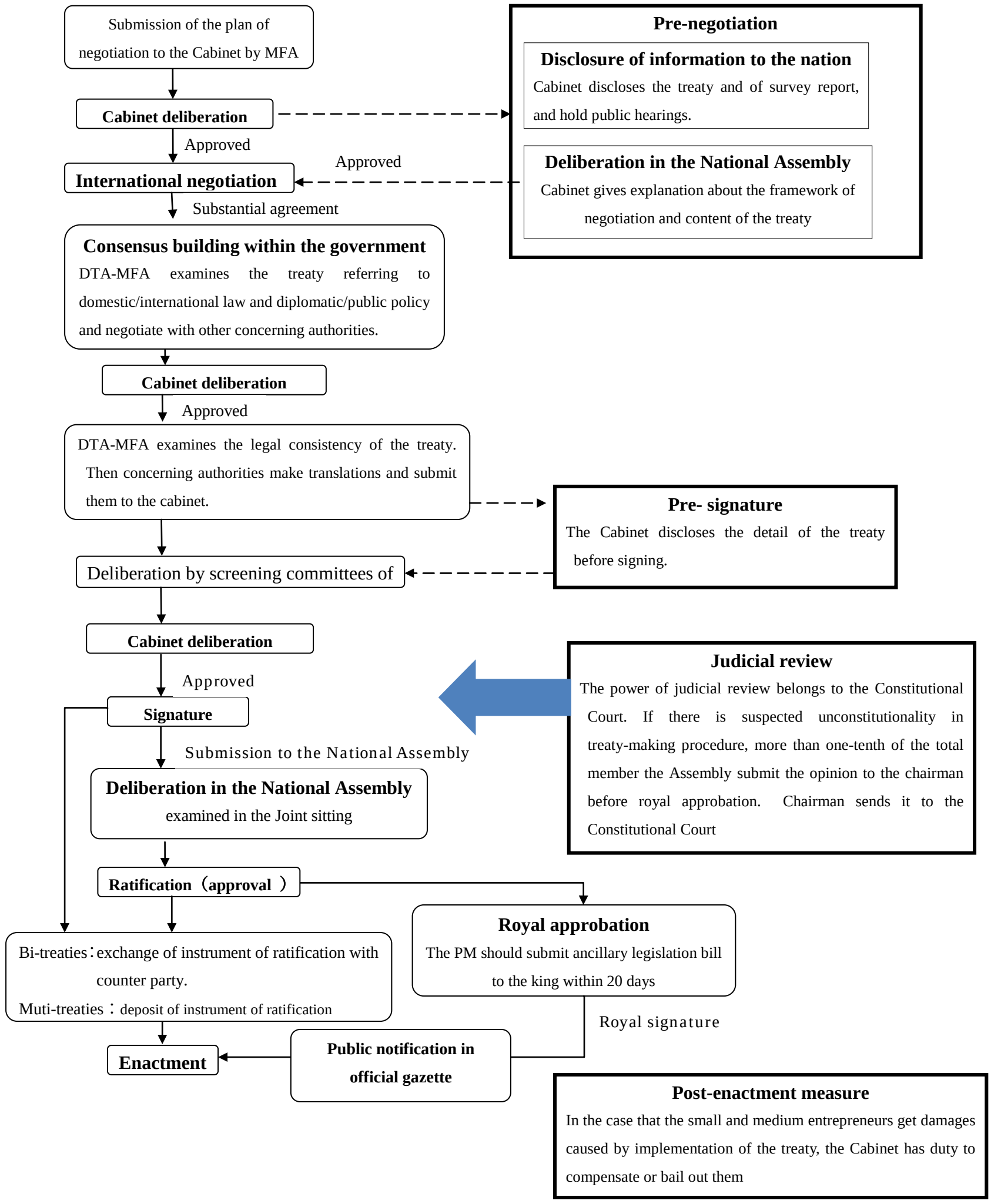
Figure　Flow of Treaty-making Procedures

Newly added procedure by 2007 constitution



Source: Jaturon [1996], Visoot [1990], Krom sonthisanya [2004] and the concerning sections in the constitutions.

Note: The figure demonstrates only the flow in which the treaty is approved.

Table Comparison of the contents of 2007 constitution and the Draft Amendment by the government

	2007 Constitution	The Government' Version Draft
Paragraph 1	The king's prerogative（to conclude peace accord and other treaties）	The king's prerogative（ to conclude peace accord and other treaties）
Paragraph 2	Definition of legislative treaty a. treaty which changes the Thai territories or the extraterritorial areas over which Thailand has sovereign rights b. treaty requiring the enactment of an Act for the implementation c. treaty having extensive impacts on national economic or social security or generates material commitments in trade, investment or budgets or the country	Definition of legislative treaty - change in the Thai territories or the extraterritorial areas over which Thailand has sovereign rights - requiring the enactment of an Act for the implementation
Paragraph 3	Procedures required for negotiation - public hearings - explanation on the contents of treaty and framework of negotiation to the National Assembly	Treaty requiring ratification following to individual stipulations, treaty having extensive impacts on national economic or social security or generates material commitments in trade, investment or budgets or the country
Paragraph 4	Procedures required before/after signature and ratification - disclosure of treaty to the public - rectification and remedy by the Council of Ministers of the impacts of the treaty on the public or operators of small-or medium-sized enterprises	Procedures for the treaty provided in paragraph 3 - public hearings before conclusion - explanation on the contents of threaty and framework of negotiation to the National Assembly
Paragraph 5	Legislation of law concerning, - the procedure for the legislative treaty provided in paragraph 2 - rectification on the public damaged by the treaty stipulated in the paragraph 2	Procedures for the treaties in paragraph 3 before/ after signature and ratification - disclosure of treaty to the public - rectification and remedy by the Council of Ministers of the impacts of the treaty on the public or operators of small-or medium-sized enterprises
Paragraph 6	Judicial Review In the case where there arises a problem under paragraph two, the power to make the determination thereon shall be vested in the Constitutional Court	Legislation of law concerning, - the procedure for the legislative treaty provided in paragraph 3 - rectification on the public damaged by the treaty stipulated in the paragraph 3
Paragraph 7	—	Judicial Review In the case where there arises a problem whether the treaty is the one provided in the paragraph 2 or 3 or not, the power to make the determination thereon shall be vested in the Constitutional Court

Source: Sapha phutaenratsadon [2010]