

## Chapter 2

### The Thai Legislative Process in Practice: A Case Study of the Product Liability Law

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#### Introduction

This chapter aims for tracing the legislative process through which the Liability for Damages Arising from Unsafe Products Bill (hereinafter referred to as the Product Liability Bill or “the Bill”) became a law in Thailand. The process began with the Bill’s introduction to the Council of Ministers and ended with its codification into Thai law. Before approved by His Majesty the King, the Bill traversed a maze of tough scrutiny both inside and outside the National Assembly. The chapter shows the typical pattern of legislative process in Thailand that any bill is required to go through in order to become a law; it also shows some peculiar features of the legislative process of the Product Liability Bill.

It traced back all documents and correspondences available from the various sources of legislative information in Thailand. The author should note here that the information is particularly limited, especially on some part of the process.

This chapter is divided into four parts that are arranged in chronological order with author’s explanatory notes and comments where appropriate. Part I deals with the period from the very beginning of the Bill drafting by the relevant government agency to the Senate debate that ended the first effort for enacting the product liability law. Part II describes the event that disrupted the legislative process which negated all efforts that had been made in the National Assembly. Part III deals with the debate in the resumed legislative process of the Bill which was finally passed into law. Part IV summarizes the major observations on the legislative process of the Bill and conclusions.

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## I. The Legislative Process in Chronology

### A. Process Outside Parliament

Legislation in Thailand is usually proposed by a member of legislature or the executive. Generally, a proposal by the Council of Ministers to have a new bill or modify existing bill usually commences at the initiative of responsible ministry, department or other government agency because these executive units are directly responsible for an enforcement of such bill once it comes into effect. Bill drafting is typically a duty of relevant government official or legal official within a ministry or department or other government agency. With familiarity in a particular issue<sup>1</sup>, it can be argued that they are in a better position in understanding the responsible tasks, recognition of rationale, necessity, loophole, difficulty in implementation, limitation or its shortcoming of the current legislation. Because of these reasons, the mentioned official could deliver a bill or alter substantive part of an Act in the more effective manner (LRFI 2006: 37-38).

If an initiative to enact a new legislation originates from an executive branch, the government agency in charge will prepare a draft and send it to the superior organizations in the executive branch such the Department, the Ministry, and finally to the Council of Ministers upper put forward the to the higher chain of command until it reaches the head of the executive branch. The process outside the National Assembly ends when the Office of Council of State officially submits the bill to the National Assembly on behalf of the aforementioned agency.

The government agency that proposed the Product Liability Bill was the Office of the Consumer Protection Board (OCPB) under the Office of the Prime Minister. On the 4th July 2000, the Council of Ministers passed the resolution that approved the policy of the Bill, and instructed to send it to the Council of States for its examination, with taking into consideration of the comments obtained from the representatives of the Ministry of Commerce, the Ministry of Justice, and the Secretariat of the Council of Ministers.

The Bill proposed by the OCPB has the following features:

1. The type of liability was set at strict liability. Entrepreneur is liable to damages, notwithstanding to his intention nor negligence, and if he wishes

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<sup>1</sup> King Prajadhipok's Institute and Research Fund Office, A Project on Improvement of Initiative, Submission to Consideration, and Approval of Thai Law: the Executive Summary (in Thai), at 22

to be excused of such liability, he will carry a burden of proof that the damage does not derive from the defective product.

2. The Consumer Protection Board (CPB) or the private associations which are certified by the CPB may file legal proceedings for compensation on behalf of the injured party. Additionally, all fees shall be exempted.
3. The time prescription (Statute of Limitation) of right to demand compensation arising from unsafe product is different from the prescription under the Civil and Commercial Code of Thailand. It will expire after three years counting from the date when the injured party becomes aware of the damages and becomes aware of the entrepreneur's responsibility.

For acknowledgement, the Secretariat of the Council of Ministers notified the Council of State regarding such resolution about a week after it was made. In practice, once the Council of Ministers makes a resolution approving the Bill in preliminary, it will be sent to the Council of State for further examination. On several occasions, the Council of Ministers may approve only the essential of the subject matter even without a proposed bill, and may assign the Council of State to be in charge of drafting a bill from the beginning. In the case of the Product Liability Bill, which was well drafted by the OCPB, the Council of State did not have to draft a new one. Only some improvements and modifications of the Bill was made.

According to the Section 7 of the Council of State Act, 1979 (B.E.2522), the Council of State performs the consultative functions as it has the powers and duties to draft laws. It can provide legal advice and opinion, or submit its opinions or remarks to the Council of Ministers on the necessity of new legislation.<sup>2</sup> In case of urgency, with a purpose to expedite the process, the government agency forwarded the bill to the Secretariat of the Council of Ministers for policy approval, it may directly forward the draft to the Council of State for initial examination. The fast track process was considered not necessary for the Product Liability Bill.

Once the Council of State receives the bill that was given policy approval by the Council of Ministers, it will assign a suitable councilor to handle responsibilities on technical examination of the bill. Among several relevant factors, it will consider the importance, urgency, and description and prospective problem attached to the bill (LRIF

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<sup>2</sup> See Council of State, *Fact Book: Council of State (KRITSADIKHA) and Office of the Council of State*, 2008 at [http://www.lawreform.go.th/lawreform/index.php?option=com\\_content&task=view&id=468&Itemid=1](http://www.lawreform.go.th/lawreform/index.php?option=com_content&task=view&id=468&Itemid=1) (last visited 21 July 2010)

2006: 41-45).

On 28 March 2001, the Secretariat of the Council of Ministers noticed the Council of State to examine and review the Bill. The approved Bill was then assigned into one of the committees of the Council of State to be examined on both its subject matter and form. The Bill was submitted to the Extraordinary Committee which was formed to examine and review the Bill, which included the representatives from the OCPB, the Ministry of Agriculture and Cooperatives (MOAC) (the Department of Fisheries, the Department of Livestock, the Department of Agriculture, and the National Bureau of Agricultural Commodity and Food Standards (ACFS)), the Ministry of Commerce (the Department of Internal Trade (DTI) and the Department of Trade Negotiations(DTN)), the Ministry of Industry (the Thai Industry Standards Institute (TISI), the Food and Drug Administration (FDA), the Court of Justice, and the Federation of Thai Industries (FTI) which was to provide fact and information for consideration.

Furthermore, the Extraordinary Committee also took into account and modified the Bill in consistent with the discussion and resolution by the Scrutiny Committee No.7 under the Council of Ministers, which was in charge of screening any matter relating to important policy before such matter was submitted to the Council of Ministers' meeting.

The Council of State plays a very crucial role in the legislative process before the Bill is submitted to the National Assembly. Any draft bill which is proposed by a responsible government agency is typically drafted by a legal officer who does not hold an expertise on law drafting.<sup>3</sup> In light of this, the Council of State, with legal drafting expertise, would essentially resolve the problem as it could modify words and phrases to be more accurate and concise, alter the form and structure, and receive observations and suggestions from other interested parties for the purpose of reflecting diverse interests.

Two and a half years later, the Council of State finished examining and reviewing the Bill, as evidenced in the Record of the Council of State Reference No. 747/2003. The Council of State then submitted the Bill with such record to the Secretariat of the Council of Ministers. The Record provides a concise evidence on the debate that was going on at the bill drafting stage of more than two years. It shows on what issues the Council of State and the other stakeholders agree or disagree.

1. The FTI argued that the one-year period prescribed as before coming into force of the Bill is too short for the industrial sector to make appropriate adjustments.

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<sup>3</sup> For a general problem found in Thai legislative process, *see* Meechai (2005).

The Council of State denied this argument on the ground that the industrial sector had known about the Bill since its legislative process began, and that it could be comparable to having had much time for preparation.

2. The MOAC, along with the Ministry of Commerce disagreed to have agricultural products to be covered by this bill because it might cause an undue impact on overall agricultural sector. The Council of State claimed that product liability of other countries did not exclude agricultural products because the spirit and intention of product liability was intended for consumer protection.
3. The FTI expressed that leasing business should be of exemption because such business was operational with the aim to provide financial service rather than to sell a product. The Council of State refused to make such exemption on the ground that the existing law on leasing business was still unclear whether it fully covered all aspects of the leasing business.
4. The Ministry of Commerce thought that the judgment of court in favor of the plaintiff should also order the defendant to pay for compensations to all other consumers, who were not the parties in the case. However, the Council of State was of the opinion that it was not necessary to include such clause in the Bill because it was also considering to draft a class-action bill to address this concern. The Ministry of Commerce also believed that there should be some measures designed to force the entrepreneur to cease its production, importation and distribution, or even to recall its products. However, such measures were already included in the other law, namely, the Consumer Protection Act, 1979 (B.E.2522).
5. The FTI made an observation that products complied with the industrial standards should be exempt from liability because the Industrial Product Standards Act, 1968 (B.E.2511) determined the industrial product standards for safety of the consumer. The entrepreneur would not be allowed to distribute its products if they failed to meet the said standards. The Council of State did not take this view into account as reflected by the fact that it asserted that such standards were only minimum standards of safety.
6. The FTI considered that the clause which exempted litigation fee if the CPB or other certified associations brought the case on behalf of the consumer might dramatically increase the number of lawsuits and cause the court to be overloaded. However, the Council of State believed that the Committee or other consumer protection associations would carry out their duties only for the

interest of the consumer as a whole, and such clause would not significantly increase the number of cases as the FTI anticipated.

7. The Council of State agreed with the FTI's argument to put the cap on the amount of punitive damages in order to limit the impact to the entrepreneur on expenditure to secure insurance. The effect might be overwhelming especially for the small or medium sized entrepreneur.

As a rule, if a Bill is materially amended on any of its principles, the Secretariat of the Council of Ministers must propose the bill to the deliberation of the Council of Ministers again.<sup>4</sup> On the other hand, if such bill is amended slightly or in accordance with the regular form of bill, the Secretariat of the Council of Ministers will propose the bill to the House of Representatives Coordination Committee (as informally known as “Whip”)<sup>5</sup>.

Prior to submission of the Bill to the House of Representatives, the Council of Ministers was bound to submit it to the House of Representatives Coordination Committee for consideration in detail. In fact, on 23 March 2004, the Council of Ministers made a resolution approving the Bill as already examined by the Council of State, and determined that the Bill be forwarded to the House of Representatives Coordination Committee for consideration. The Council of Ministers also assigned the relevant government agency to make the Bill known to the general public, especially to entrepreneurs, since there would be a sufficient grace period for them to make any adjustments necessary for more standardized products.

A month later, the meeting of House of Representatives Coordination Committee No. 23/2547 passed a resolution indicating that the Bill must be amended prior to

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<sup>4</sup> If the Bill is presented now, a responsible government agency must comply with the Royal Decree on Presenting and Meeting of the Council of Ministers, 2005, along with the Rule of Prime Minister's Office on Principles and Method to Present an Issue to the Council of Ministers, 2005.

<sup>5</sup> The House of Representatives Coordination Committee under the Council of Ministers is responsible for carrying out or coordinating any matter that is related to the House of Representatives or the National Assembly as directed by the Prime Minister or the Council of Ministers. Normally, the Council of Ministers will send any bill to the committee for consideration before sending it to the House of Representatives later. The Committee is an indispensable mechanism for communication between legislative and executive branches (as well as within the executive branch itself) in Thailand. It is especially important for Thai politics because recent Council of Ministers is usually formed into a coalition government. The cooperation among several parties that forms the government is really necessary for a stable government, please see, Work Manual on the House of Representatives Coordination Committee, the Secretariat of the Council of Ministers, at <http://www.Council of Ministers.thaigov.go.th/manual.htm> (last visited 25 July 2010)

entering the House of Representatives' session. On 27 April 2004, the Council of Ministers acknowledged the summary of the meeting of the House of Representatives Coordination Committee, as reported by the Political Coordination Office.<sup>6</sup> It also approved that the Bill be amended prior to submission to the House of Representatives intended for placing in an agenda requiring urgency, as suggested by the House of Representatives Coordination Committee.

It should be noted that because the information on this part is very limited and scattered around several government agencies, the author had to assumed that that once the Bill was modified, it would be eventually submitted to the House of Representatives for consideration

On 5 January 2005, the term of House of Representatives expired, and the general election was held a month after.

## **B. The Process within the National Assembly**

Because it is not unusual for a bill to get interrupted by either the normal expiration or an immediate dissolution of House of Representatives, the Constitution of Kingdom of Thailand 1997 (B.E.2540) (hereinafter referred to as the 1997 Constitution) provides a transitory provision so that the legislative process regarding particular bills within the National Assembly would not have to restart from the initial stage.

According to Section 178 of the 1997 Constitution<sup>7</sup>, if the term of House of Representatives expires or the House of Representative is dissolved, the Council of Ministers must request the National Assembly, the House of Representatives, or the

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<sup>6</sup> The Political Coordination Office is an arm to the Prime Minister's Office, one of its core activity is to act as a secretary to the House of Representatives Coordination Committee or other committee as assigned. For details, *see* the website of Political Coordination Office, at <http://spm.thaigov.go.th> (last visited 14 July 2010).

<sup>7</sup> Section 178, paragraph 2 of the 1997 Constitution states that  
“ In the case where the term of House of Representatives expires or where the House of Representatives is dissolved, the National Assembly, the House of Representatives or the Senate, as the case maybe, may, after the general election of members of the House of Representatives, continue the consideration of the draft Constitution Amendment, the bill, or the organic law bill which has not yet been approved by the National Assembly if the Council of Ministers which is newly appointed after the general election so requests within sixty days as from the first sitting day of the National Assembly after the general election and National assembly approves it. If the Council of Ministers does not so request within such period of time, such draft Constitution Amendment, bill or organic bill shall be lapse. The further consideration of the draft Constitution Amendment, bill or organic bill under paragraph two shall be in accordance with the rule of procedure of National Assembly.”

Senate to continue the consideration of bill within in sixty days as from the first sitting day of new National Assembly, otherwise such bill will lapse. It appeared that, by the virtue of such section, on 21 April 2005, the Joint Sitting of the National Assembly No.6 (General ordinary session) made a resolution approving the Bill to be carried out.

As there is no definite time framework for bill deliberation in the House of Representatives, it can consume up to as much time as it likes, provided that it is bound by the 1997 Constitution and the Rule of Procedures of Sitting of National Assembly, 2001 (B.E. 2544). The consideration of any bill in the House of Representatives is divided up to three readings.

The very first reading deals with a consideration for policy approval. Actually, the House of Representative does not approve the texts of a bill, but makes an approval only on the principle underlying such texts. Specifically, a consideration for approval is oriented toward the appropriateness of issuing the bill. If there are several bills with similar principles, the sitting may make an approval on either each bill separately or all of them together at the same time. The sitting also needs to consider which bills, as proposed by several parties, will be selected and considered for the second reading. In practice, the sitting usually chooses the bills proposed by the Council of Ministers (LRIF 2006). In fact, it appears that upon the proposal of the bill by the Council of Ministers, two other political parties can also submit bills which share some paralleled texts with the same principles to the House of Representatives.

On 25 May 2005, the sitting of the 23<sup>rd</sup> House of Representatives Year 1, No. 12 (General ordinary session) unanimously made a resolution approving in the first reading for adoption of the Bill in principle, and requested the Bill proposed by the Council of Ministers to be examined. The sitting also established an ad hoc committee with a special purpose to examine the Bill. As a matter of fact, an important phase of the legislative process is the action taken by the responsible committee because much time is spent for the deliberation on the Bill with an opportunity for interested parties to express their opinions. The second reading begins at the stage when the ad hoc committee starts examining the Bill in great detail. An ad hoc committee is another type of committee that can be found in either the House of Representatives or the Senate. It is established especially for purpose of examining a particular bill, or executing an affair, or investigation of a special case. Upon the completion of its mission and submission of its report, the ad hoc committee will automatically lapse.

Interestingly, Thai legislative process contains one peculiarity. It allows an ad hoc committees of the House of Representatives and the Senate to examine the bill at the



same time for the purpose of accelerating the process in the Senate because such bill will soon be passed to the Senate. This pre-studied mechanism allows the Senate to study the contents of the bill before it officially receives it.

When the sitting of the House of Representatives makes a resolution in the first reading for adoption of the Bill in principle, by the virtue of Section 109 of Rule of Procedure of the Senate 2001, the President of the Senate simultaneously assigns the Ad Hoc Committee on Senate Affairs to find an appropriate permanent standing committee or to establish a new ad hoc committee to examine the bill. As a matter of fact, the report is intended for consideration in the first reading of the Senate's sitting because certain bills may be highly technical or complicated. The Senate therefore may assign one of its committees to examine the issue in principle so that it can provide the information necessary for making a resolution whether to adopt the bill in the first reading or not.

On 1 June 2005, the 48<sup>th</sup> meeting of the Ad Hoc Committee of Senate Affairs considered that it was appropriate to have the Senate Standing Committee on Public Health responsible for the deliberation of the Bill in advance. The Committee shall submit a report to the President of the Senate at once in order to provide detail information for the deliberation in the Senate.

Almost six months later, the Senate Standing Committee on Public Health finished the examination of the Bill and submitted a report to the President of the Senate, so that it would be forwarded to the sitting of the Senate later. It was a common practice for the committee to refer the Bill to one of its subcommittees. According to this report, the Standing Committee appointed the Subcommittee on Consumer Protection Follow-up and Studies to conduct the further study and public hearings. It comprised of ten members and thirteen advisors in total. The subcommittee held hearings with participants including law professors, judges, legal officers from the OCPB, a scholar from Health Consumer Protection Project and a lawyer. The report enumerated ten important observations and suggestions as follow.

1. The Bill should encompass designated services which pose high risk to the safety of consumers. These include amusement park, air, water and land transportation, construction business, beauty parlor, massage parlor and hospitals.
2. The one-year lapse before the effective date is too long for consumer protection. It should be reduced to one hundred eighty (180) days starting from the date that the would-be Act is published in the Royal Gazette.
3. It must define the scope of the term, "consumer".

4. The subject matter of the Bill should include liabilities due to product imperfection in order to prevent business entrepreneurs from selling defective products for unfair profits without bearing responsibilities. In effect, by the virtue of this Bill, the consumer can claim for compensation if the product is damaged by being used in a normal manner.
5. Section 7(3), which exempts the entrepreneur from liability in case that the injured party has prior knowledge of the product that the product is unsafe, should be amended because in practice there may be difficulty in interpretation. They suggested that the injured party should know clearly about the unsafe of the product but choose to take risk without any reasonable reason. .Potential organizations, other than the CPB and the certified associations, should also be given power to file a lawsuit on behalf of the consumer with the exemption of litigation fee.
7. The limitation on punitive damages which is set as two fold of the actual damages is not enough for the effective deterrence to future misbehaviors of the entrepreneur.
8. It should add a 'recall' measure for unsafe products. In case the entrepreneur reacts slow, a responsible government agency should have an authority to recall unsafe products. Additionally, all expenditures should be borne by the entrepreneur.
9. The maximum time prescription set at ten years is not appropriate, and it should be extended because certain products may cause adverse effect after more than ten years from the date they are consumed.
10. The compensatory fund should be established with the aim to provide remedy to the injured party who might be unable to get compensation for its damages.

In my view, these observations are a good example that well represents some particular problems that can be found in the legislative process in Thailand. The members of committee (and henceforth the politicians) had little knowledge on legislation and legal mechanism. Some of these observations were not really the problems of the Bill because there were already covered by the existing legislation that were effective at that time. Some observations were inconsistent with a fundamental principle of the Bill. Some did not make any sense from the legal perspective. Whatsoever, the report here was intended only for consideration in the first reading,

additional in-depth technical examination by another committee has to be carried out for the consideration in the second and third reading at the Senate's sitting later.

In the meantime, upon completion of the technical examination by the ad hoc committee (House of Representatives), it had to propose the modified bill along with its original version, as well as the report indicating the changes that were made to the earlier bill, to the President of House of Representatives for consideration in the second reading. In this case, the ad hoc committee finalized the review of the Bill, and proposed the Bill together with report and observation to the President of House of Representatives.

In the third reading, the House of Representatives would make a resolution along with the second reading consecutively, without any further discussion or modification on the Bill. Its decision-making authority can only either approve or strike it down. Once the approval resolution is made, the bill will be enrolled in the Senate by the President of the House of Representatives for consideration in second tier.

In fact, on 23 November 2005, at the sitting of the 22<sup>nd</sup> House of Representatives Year 1 No. 28 (Legislative ordinary session), the ad hoc committee proposed the Bill together with report and observation of the committee to the President of the House of Representatives. In the second reading, the sitting of the House of Representatives considered the Bill section by section. In the third reading, the sitting made a resolution approving the Bill with unanimously vote. Five days later, the House of Representative submitted the Bill to the Senate.

Section 107 of the Rule of Procedure of Senate states that the President of the Senate must place it in the agenda requiring urgency. The Senate also has similar three-step examination process as we have observed in the House of Representatives.<sup>8</sup> The first reading deals with a policy approval, and the second reading similarly follows the same track of committee for debate and voting, and for consideration section by section. The third reading only involves in making approval of the entire bill. However, the time frame for the Senate differs significantly from the House of Representative because the 1997 Constitution limits the maximum period of time for consideration within sixty parliamentary days.<sup>9</sup> For shortening the legislative process, should the Senate not finish the examination within the given period, the Constitution deemed that the Senate had made an approval to the Bill.

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<sup>8</sup> Section 108 of the Rule of Procedure of the Senate, 2001.

<sup>9</sup> Section 174 of the 1997 Constitution.

Afterward, on 9 December 2005, the 26<sup>th</sup> special sitting of the Senate (Legislative ordinary session) made an approving resolution in the first reading for adoption of the Bill and establishment of the “Ad Hoc Committee Considering the Bill (Senate)” to be in charged. The ad hoc committee comprised of twenty five members with schedule to have a meeting every week. It should be noted that this resolution was made for accepting the Bill, and it was not for accepting the principle of draft bill in the same way as that of the House of Representatives stage. As a result, senators are free to modify the principle of House of Representatives approved bill due to the fact that they are not bound by the principle underlying the Bill (LRIF 2006: 51).

From the correspondence on 7, 14 and 15 December 2005, it appeared that three senators submitted a motion for amendment to the Ad Hoc Committee.

The 1<sup>st</sup> meeting, took place on 16 December 2005, of the Ad Hoc Committee Considering the Bill laid down the guideline for carrying out the mission of the Committee. The meeting also appointed a senior judge, law professor, and director of Health Consumer Protection Project to be advisors to the Committee.

The 2<sup>nd</sup> meeting, on 19 December 2005, of the Ad Hoc Committee Considering the Bill considered the structure, principle and basis, and definition of the Bill. It also made comments about the Bill in comparison to product liability laws of some other countries. The meeting made an attempt to define the extent of “product” in order to make it consistent with the spirit and legislative purpose of the Bill. As the Bill may have was expected to make a wide impact on society, the Committee invited seven experts from relevant governmental authorities to discuss about and comment on the issues that might arise. Those seven experts were from TISI under Ministry of Industry, the OCPB, the DTI and the DTN under the Ministry of Commerce, the ACFS, and Food and Drug Law Group under the FDA.

Shortly after, on 23 December 2005, the FTI formulated the “problematic issues” with theoretical basis and grounds, and proposed to the Ad Hoc Committee Considering the Bill that the Bill should be revised accordingly. It should be emphasized that the FTI had continuously showed its concern in the debate on the Bill since the beginning of its legislative process. Having hope to succeed somehow, it brought along preceding arguments that were once rejected by the Council of State as well as newly raised arguments to contest the issues concerning plaintiff’s burden of proof and whether services should be included in the Bill.

Anyway, the FTI finally gave full support to the Bill, perceiving that the Bill could create higher safety of manufactured products and distribution of Thailand, and

thereby increase the competitiveness of Thai products in the global market. However, in comparison to the product liability laws of the US, EU and Japan, the FTI expressed grave concerns over the following issues.

1. All these foreign product liability laws excludes “service” business from its “product” definition because the consumer may prove fault of the entrepreneur in service business without making much efforts. If such definition under the Bill includes service business, the scope of the Bill will go beyond that of other countries. In addition, it would be inappropriate to cover agricultural commodities because the Bill will eventually expose Thai farmers to more substantial legal risks derived from normal trading. Thailand’s economy is driven by exports of agricultural commodities exporting to the rest of the world, and Thai farmers only earn modest income. Itt might impact the economy of the country. While Should an agricultural commodity be included, it would be more appropriate to cover only the related products arising from manufacturing processes.
2. For any entrepreneur to be liable under strict liability in other foreign comparable countries, the injured party shall prove that a product in dispute is defective, damage has occurred, and there is a causation between such defect and the damage. Under Section 6 of the Bill, in contrast, the injured party shall prove that the injured party sustained damages from the product of the entrepreneur, and the use or storage of the product was done in a normal manner. It is emphasized that the injured party does not have to prove the defect of product as well as its casual link.

The aforementioned difference is perhaps the most noteworthy point that the FTI paid very close attention to. Actually, a change in burden of proof that deviated from a typical tort claim is the deepest concern surrounding the present problems of this legislation. It is feared that a significant degree of departure may pave the way for an ever-increasing abusive of this Bill, as unfaithful consumers may easily take an advantage of entrepreneurs by seeking for profit from the compensation (probably with punitive damages). This legal risk is unattractive because it may scare off foreign investments from producing goods for exportation due to the anticipated rise of costs associated with potentially being sued thereafter.

3. The exemptions of liability provided under the Bill is too limited, and the

compulsory product standard and state-of-the-art defense should be applicable as well. It is believed that compliance to product standard required by government authority is supposed to provide certain level of legal protection to entrepreneurs (i.e. exemption from full liability). In addition, the lack of state-of-art defense in the draft bill may lower incentives for research and development activities owing to riskiness of utilizing newly discovered technology.

4. Damages shall not include the damage to unsafe product itself because the damage to product is already covered by a warranty (express or implied) clause in a sale contract.
5. Defectiveness embedded in a product must exist even before the product is delivered to the consumer. The entrepreneur may be exempted from liability if the defect is found to be occurred after the time of delivery.

Subsequently, on 26 December 2005, the 3<sup>rd</sup> meeting of the Ad Hoc Committee, with presence of those seven experts, considered issues of preliminary burden of proof, production technology and entrepreneur exemption of liability. The meeting made a resolution to hold public hearings in February 2006.

About a month later, the FTI, and the Thai Chamber of Commerce (TCC) and the Board of Trade of Thailand (BTT) respectively asked the Ad Hoc Committee Considering the Bill if it could attend the next meeting in order to discuss about the upcoming public hearings held by the Ad Hoc Committee. In response, on 1 February 2006, the Ad Hoc Committee granted both of the requests. This is required by the Rule of Procedures of the Senate, 2001, which states that only a member or a person who is allowed by the committee has the right to attend the meeting of the committee.

The 4<sup>th</sup> meeting of the Ad Hoc Committee with presence of those seven experts considered whether agricultural commodities and services should be included in the Bill or not. This may cause an impact on a burden of proof, claim on compensation, punitive damages as well as non-pecuniary damages.

The 5<sup>th</sup> meeting, on 2 February 2006, of the Ad Hoc with presence of those 7 experts considered the issues of definitions, joint liability of different but involved entrepreneurs and exemptions of liability.

On 9 February 2006, in the 6<sup>th</sup> meeting of the Ad Hoc Committee with presence of those seven experts, the TCC and BTT submitted a statement to the Ad Hoc Committee at the sitting of the House of Representatives, which states that the House of

Representatives does not have any power to amend the definition in the Bill.

On 16 February 2006, the 7<sup>th</sup> meeting of the Ad Hoc Committee invited those seven experts as in the second meeting. The issues considered in the meeting include definitions, joint liability of different but involved entrepreneurs and burden of proof.

The Ad Hoc Committee held a public hearing~~s~~, at the National Assembly on 17 February 2006, entitled “What are the benefits of the Bill for Thai people?”. The purpose of this hearing was to collect information, receive comments and conduct a public discussion with representatives of all sectors from both public and private ones. Concretely, those who represented the Ad Hoc Committee, the Senate, the Senate Standing Committee on Public Health, the Standing Committee on Consumer Protection, the House of Representatives, the FTI, the TCC, and the BTT, relevant consumer protection associations, relevant governmental authorities and private sectors, qualified scholars and media, added up to approximately one hundred in attendances.

On 23 February 2006, the 8<sup>th</sup> meeting of the Ad Hoc Committee invited those same seven experts from the second meeting. Prior to this meeting, seven senators filed a motion for amendment of the Bill to the Ad Hoc Committee. In formality, the Ad Hoc Committee must send out invitation letters with endorsement by the Secretariat of the Senate, for them to attend the committee meeting. Actually, those letters were just endorsed on this date. Despite its unfinished job, this was the last time the Ad Hoc Committee had a chance to meet altogether because there was an interruption occurring to the legislative. In sum, there were eight meetings in total as well as one public hearing at this stage. The process had not finished yet, and it apparently needed to pass the sitting of the Senate once again to come into a full effect.

On 24 February 2006, there were several key events happening on this remarkable day. The president of the Ad Hoc Committee Considering the Bill submitted a statement to the President of the Senate in order to request extension in time for examining the Bill. Because the Bill was considered to be a finance-related bill, the Senate was bound to finish considering it within thirty parliamentary days counting from the date the Bill was submitted to the Senate (to be exact, 28 November 2005 – 10 March 2006). The Ad Hoc Committee believed that there were still issues in detail that needed further comments, facts, and other documents from various organizations to make their deliberation inclusive. By the virtue of Section 174 of the 1997 Constitution together with the Section 94(1) of the Rule of Procedures of the Senate 2001, it therefore considered that, in this special circumstance, it required additional time to deliberate about the Bill (precisely, the extension period was made from 11 March 2006

to 21 March 2006, the expiration of the Senate term).

The president of the Ad Hoc Committee submitted a letter to the TCC and the BTT, replying that the Section 92 of the 1997 Constitution stated that a bill or an organic bill may be enacted as law only by and with the advice and consent of the National Assembly. Therefore, any modification or addition to the Bill in dispute during the sitting of House of Representatives or the Senate was carried out in accordance with the existing Constitution.

On the same day, there was an issuance of the Royal Decree of House of Representatives Dissolution to dissolve the House of Representatives in accordance with Section 116 of the 1997 Constitution. The following snap election was called on 2 April 2006. In compliance with the Rule of Procedures of the Senate 2001, Section 93 forbids any committee to consider any bill or organic bill that has been previously approved by the House of Representatives during the expiration of the House of Representatives term or the dissolution of the House of Representatives. With respect to the Ad Hoc Committee, the Bill had run through it for at least eight meetings, but did not yield any promising result, albeit the texts of the draft Bill was relatively short (only sixteen sections in total).

### **III. Political Turmoil Obstructing the Legislative Process**

On 2 April 2006, the general election was held. Shortly afterward, however, this election did not end successfully as expected due to a number of legal problems arising from what was called as “constitutional crisis” (Nelson 2006). A new round of election was called on 15 October in the same year, while the former Prime Minister continued to work as a care taker Prime Minister.

On 19 September 2006, the Military Coup overthrew the interim government of the Prime Minister Thaksin. The Announcement of the Council for Democratic Reform under Constitutional Monarchy, No. 3 abrogated the 1997 Constitution, and dissolved the House of Representatives and the Senate. In effect, the pending Bill in the Senate was lapsed as well. The National Legislative Assembly was established on 11 October 2006, which with a purpose to carry out the duty of the House of Representatives, the House of Senate, and the National Assembly under Section 5 of the Constitution of Kingdom of Thailand (Interim), 2006 (B.E. 2549) (hereinafter referred to as the 2006 Interim Constitution). The general two-tier governing body providing, at least, double



debate and scrutiny was necessarily transformed to one-tier process.

One of the most peculiarities of legislative process of the Bill is that the Military Coup wiped out all the efforts that had been made in the National Assembly. The Bill was lengthily considered in both the House of Representatives and the Senate. It may have taken not more than one or two years but the Bill would become a law, had the Military Coup not occurred. Or it may turn out that politicians might drag on the Bill as long as possible on the ground that they may lose support from their business counterparts due to the anticipated rise of costs.<sup>10</sup>

The following part will show that the Military Coup, which was at first thought to be an impediment to a legislative process under democratic system, brought this Bill (as well as almost other bills) into light. The newly-established National Legislative Assembly showed much higher legislation rate, because it showed a capability to expedite the whole legislative process that could have taken two or three years. It was only about three months from the date that the Bill was submitted to the National Legislative Assembly to the date it passed the Bill in the third reading. Nonetheless, with a relatively faster legislative process, the drawback might seemingly overwhelm because private sectors did not have a chance to participate in the process.

### **III. Legislative Process Resumed**

#### **A. Process outside Parliament**

A week after the National Legislative Assembly, a new legislative body was established, the Council of Ministers made a resolution that each Minister should determine which bill was be appreciate to be proposed to the National Legislative Assembly. In doing this, each Minister should consider whether such bill was consistent with the current government's policy priority.

On 4 May 2007, the OCPB under the Prime Minister's Office confirmed that the Bill should be proposed to the National Legislative Assembly. The proposed Bill was

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<sup>10</sup> Such prolonged postponement in the National Assembly is not an impossible strategy after all. First, the House of Representatives does not examine the Bill under time restraint. In the Senate, the bill consideration is to be finished within 30 or 60 days depending on type of bill, but this time restraint could be extended. If the bill is modified in the Senate and the House of Representatives does not agree with it, the joint committee of both Houses will be established to find an agreeable solution. This process could take additional several years until the Bill becomes law

that that was once reviewed by the Council of State in 2003, which means that a very lengthy and extensive examination on previous National Assembly was not taken into consideration.

On 29 May 2007, the Council of Ministers made a resolution approving the Bill in principle, as proposed by the OCPB, which was in accordance with the previous Council of Ministers' approval. The Council of Ministers also sent the Bill to the MOAC to make it decide within a week whether to eliminate the provision on agricultural product or not. The resolution stated that if the Ministry agreed with the Bill that was reviewed by the Council of State, it should be submitted to the House of Representatives Coordination Committee prior to entering the National Legislative Assembly. However, if the Ministry regards that the Bill should be amended, the Bill will be submitted to the Council of State to have it examined one more time.

On 8 June 2007, the Minister of Agriculture and Cooperatives submitted a statement to the Secretariat of the Council of Ministers, which claimed that the provision on agricultural product embedded in the Bill should be eliminated because the more specific law on agricultural products was already in effect. It also states that the Bill will be inappropriate, because, in practice, it will cause a huge impact on international trade and standard, and it is a very sensitive issue to make agricultural products included in the list.

A week later, the Secretariat of the Council of Ministers sent this matter to the Secretariat of the Council of State again to solve this conflicting interest. It should be noted that the Council of State did not have to examine the Bill entirely again because it had already done once in the past. At this time, the issue remained was as to whether the Bill should cover agricultural products or not.

On 27 June 2007, the meeting of Council of State Committee (Extraordinary) No. 1/2550 considered the matter of agricultural products. The OCPB, Department of Agriculture and ACFS under the MOAC assigned their representatives to attend the meeting.

Two days after the first meeting, the Secretariat of Council of State requested the ACFS to appoint a senior officer with decision-making authority in respect to the issue to attend the upcoming meeting.

On 4 July 2007, the meeting of Council of State Committee (Extraordinary) No. 2/2550 made the resolution that the definition of "product" should be amended. The MOAC argued that the Bill should exclude "agricultural commodity" from the "product" definition. Firstly, it argues that individual agricultural farmers would hardly bear the

cost if they would be the party to prove that sustained damages was not caused by their products. Secondly, the definition of “product” means any movable property which seemingly covers any agricultural commodity. Thus, there is no need to explicitly restate an agricultural commodity in its definition. Lastly, the bill on agricultural product standards was in progress at that time, which suggested that there was no need to include agricultural products in another law (*i.e.* product liability law).

On the other hand, the Council of State was of an opinion that the referred bill on agricultural product standards did not include any section on consumer protection, and it would even be worse for the Ministry to exclude agricultural products from the “product” definition because the definition of “product” by itself could already cover any agricultural product.<sup>11</sup> Thus, the Council of State suggested that agricultural products be included in the Bill, provided that the agricultural products arising from natural process was excluded and it also left an option for any particular agricultural product to be opted out later by a ministerial regulation. The OCPB and ACFS accepted the suggestion.

In August 2007, the Secretariat of the Council of State submitted a report to the Secretariat of the Council of Ministers stating that the Council of State Committee (Extraordinary) completed its consideration of the Bill, as evidenced in the Record of the Council of State Reference No. 525/2550 (based on the Record of the Council of State Reference No. 747/2546).

## **B. Process within the Parliament**

Submitted by the Secretariat of the National Legislative Assembly Coordination Committee on 4 September 2007, the Council of Ministers passed the resolution acknowledging the executive summary of the meeting of the National Legislative Assembly Coordination Committee No.3/2550

. The Prime Minister sent the Bill along with memorandum on basis and reasons, as well as the executive summary to the President of the National Legislative Assembly.

A week after the submission, the sitting of National Legislative Assembly No. 50 passed a resolution of adoption of the Bill in principle and also established the Ad Hoc

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<sup>11</sup> This point might be confusing due to complicated technical issue. At first, the Bill explicitly state that an “agricultural product” is included in the “product” definition despite that an agricultural product is covered anyway had it not been explicitly stated. With a pure intention to remove an agricultural product from the Bill, the MOAC, however, falsely requested to have such a word remove. To correct, the Ministry should have requested that the draft bill explicitly stated that the Bill did not cover agricultural product

Committee responsible for consideration of the matters with respect to the Bill. The Ad Hoc Committee started examining the Bill from the ~~next~~ following week. Suggested by the Committee itself, the sitting of the National Legislative Assembly No. 56/2550 passed a resolution appointing additional members. Altogether, there were twenty one Committee members who considered the Bill.

On 22 November 2007, the Ad Hoc Committee finished considering the Bill, and submitted it with the report to the President of the National Legislative Assembly for presenting during the next sitting of National Legislative Assembly. According to the Report of the Ad Hoc Committee, the members included the representatives from the ACFS (assigned by the Council of Ministers), the Ministry of Industry (invited by the committee), and the Ministry of Justice. There were seven senators who submitted a motion for amendment. It appeared that the committee held a meeting once every week, and it had nine meetings in total before it made a final report.

One thing to be noted is that private parties, particularly the FTI, did not have a chance to participate in the process despite its active role in the early stages of the legislative process. In the past, the FTI had expressed its concerns about the Bill, especially with the issue on the burden of proof that it pointed out that it was much higher if compared with the product liability laws of foreign countries. To the author's belief, this is because it would be so compelling that its impact might be devastating to the industrial sector. However, this view was no longer taken into account in the National Legislative Assembly. Given that all participants came from the government sector, the Bill therefore failed to reflect the interest of the business sector even it would be directly affected. The author believes that this might be a "shortcoming" of this expedited legislative process. Lacking the blending opinions from all stakeholders, the Bill may do more harm than good.

On 20 December 2007, the sitting of National Legislative Assembly No. 73/2550 provided a final legislative process as the second reading was considered section by section, and the resolution was made in the third reading.

When a bill has been approved by the National Assembly, the Prime Minister shall present it to His Majesty the King for signature within twenty days from the date of receipt of such bill from the National Assembly. The King as the Head of State, retains the power to enact laws only on the advice and consent of the National Assembly. If the King has given his assent to the approved bill, the Prime Minister, in capacity of the Head of an executive branch, will publish the Bill in the Government Gazette to make it effective.

It appeared that the Bill was signed on 13 February 2008. On 20 February 2008, the Bill, namely “the Liability for Damages Arising from Unsafe Products Act, 2008 (B.E.2551)”, was finally published in the Government Gazette. The Act became effective when one year period lapsed from the date of publication, exactly on 21 February 2009.

## **Conclusion**

It is usual that Thai legislative process takes quite a long time to make a bill become a law. The case of the Product Liability Bill, which took nine years before it became a law, illustrates the usual pattern of Thai legislative process. The drafting was started by the drafting of the OCPB, which would be the responsible government agency once the Bill was in effect. The Bill passed the legislative body, but was disrupted by expiration of its term. The process started again, but it was stopped suddenly by the Military Coup while the bill was in the Senate. The newly established National Legislative Assembly put the Bill on track once again, and finalized it in a relatively short time. To sum up, the Bill was examined twice at the Council of State, four times at four different committees in the two National Assembly and one National Legislative Assembly. Even after the Military Coup took place, some called upon further analysis and scrutiny, other stakeholders were not given any opportunity to participate. The fact that the burden of proof for the consumer under the new legislation is lower than that of comparable laws in foreign countries shows this well.

There is a risk that the principle underlying a draft bill may become obsolete due to the time-consuming legislative process. In the last decade, we have watched the theoretical change relating to product liability, which might have rendered our Bill out of date. Making significant changes to the Bill would have caused the further delay of the enactment of product liability law.

It is quite interesting to note that there are only negligible changes between the Bill that came into force in 2008 and the first Bill that was examined by the Council of State in 2003. In all the process in the two National Assemblies and one National Legislative Assembly through which the Bill went, merely one short phrase was taken out from the Bill. The highlight of the process is that the early efforts for examining the Bill in both Houses were negated, but it enabled the National Legislative Assembly to shorten its work on the Bill and to successfully pass the Bill into the law, which it would otherwise be very difficult under the hands of the politicians suspected of having a

conflict of interests.

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**Figure 1: Legislative Process of the Product Liability Act 2008**

Time Line	
	<p style="text-align: center;"><b>Phase I: The Beginning</b></p> <p>2000? The Office of Consumer Protection Board (CPB) sent the Bill to the Secretariat of the Cabinet</p> <p>↓</p> <p>July 4 2001 The Cabinet passed a resolution of policy approval</p> <p>↓</p> <p>March 28 2003 The Council of State started examining the Bill</p> <p>↓</p> <p>November 17 2004 The Cabinet finished examination</p> <p>↓</p> <p>March 23 The Bill was submitted by the Secretariat of Cabinet to House of Representatives Coordination Committee for consideration</p> <p>↓</p> <p>April 26 The Cabinet</p> <p>↓</p> <p>April 27 2005 House of Representatives</p> <p>↓</p> <p>January 5 Term of House of Representatives expired</p> <p>↓</p> <p>February 6 General Election was held</p> <p>↓</p> <p>April 21 Joint Sitting of the National Assembly passed a resolution approving the Bill to be continued.</p> <p>↓</p> <p>May 25 House of Representatives made a resolution approving in the first reading for adoption of the Bill in principle</p> <div style="display: flex; justify-content: space-between; margin-top: 20px;"> <div data-bbox="464 1518 890 1659" style="border: 1px solid black; padding: 5px; width: 45%;"> <p style="text-align: center;">Ad Hoc Committee (House of Representatives) with special purpose to examine the Bill</p> </div> <div data-bbox="927 1518 1369 1659" style="border: 1px solid black; padding: 5px; width: 45%;"></div> </div> <p>June 1 Ad Hoc Committee on Senate Affairs was responsible to find an appropriate committee</p> <p>November 22 Senate Standing Committee on Public Health was assigned to consider the Bill in advance</p>

November 23	House of Representative approved the Bill in the second and third reading
November 28	
December 9	Ad Hoc Committee (Senate)
	↓
	8 Meetings in Total
	↓
	Public Hearings
	↓
2006 February 24	House of Representatives was dissolved by the Royal Decree, and the snap election was called upon
<b>Phase II: Political Turmoil</b>	
April 2	General Election was held
	↓
September 19	National Legislative Assembly was established carrying out the both duty of the House of Representatives and the Senate.
	↓
October 11	National Legislative Assembly was established carrying out the both duty of the House of Representatives and the Senate.
<b>Phase III: Legislative Process Resumed</b>	
October 17 2007	The Cabinet asked each minister to determine the Bill to be proposed.
	↓
May 4	Office of the Consumer Protection Board confirmed the Bill
	↓
May 29	The Cabinet approved the Bill
	↓
	The Ministry of Agriculture and Cooperatives was asked to consider whether to include an agricultural product in the Bill or not.
	↓
June 8	Secretariat of the Cabinet was informed that a provision of agricultural product should be eliminated.
	↓
June 14	The Council of State was requested by the Secretariat of the Cabinet to solve this problem.
	↓
August	The Secretariat of Cabinet received the report from the Council of State.



September 4	The National Legislative Assembly Coordination Committee
September 12	The National Legislative Assembly passed a resolution in the first reading adopting the Bill in principle and establishing the Ad Hoc Committee.
	↓
November 22	The Ad Hoc Committee finished consideration
	↓
December 20	The National Legislative Assembly approved the second and third reading.
	↓
2008 February 13	The Secretariat of the Cabinet presented the Bill to His Majesty the King for signature
	↓
February 20	Published in Government Gazette
2009	↓
February 21	Come into effect
	↓
In Total, 8 years, 7 months, 18 days.	

(Source) The Author

