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Environmental Dispute Resolution in Indonesia

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Introduction

i. Environmental Disputes in Indonesia

In a world of diminishing resources, exponential population growth and rapid development, environmental disputes are increasingly common phenomena. Indonesia has proven to be no exception to this global trend. Indeed environmental problems and related conflict in Indonesia have frequently assumed international dimensions. Forest fires of unprecedented scale, uncontrolled logging of old growth rainforest and the environmental fallout from some of the world's largest mines are just some of the environmental issues that have held the international spotlight in Indonesia. An even more profuse range of environmental controversies frequents the pages of the Indonesian press including the dumping of industrial and hazardous waste, the overexploitation of natural resources, illegal logging in national parks, air pollution in overcrowded cities, flooding and landslides caused by deforestation. Within each of these complex environmental issues is a host of interrelated human disputes involving local communities, companies, local, regional and national government agencies, environmental organisations, security forces and many other parties each with their own views, interests and agenda. Such disputes, if left unresolved, can spiral into wider social conflict and exacerbate environmental degradation. In Indonesia, as in many other countries, effective mechanisms for the resolution of environmental disputes are urgently needed. This thesis, conducted under the auspices of the Indonesia-Netherlands Study on Environmental Law and Administration (INSELA), endeavours to address this need via a thorough documentation and analysis of the practice of environmental dispute resolution in Indonesia. The main question addressed in the thesis is thus: to what extent have the formal (legally prescribed) mechanisms for environmental dispute resolution, that is litigation and mediation, actually been effective in resolving environmental disputes?

ii. Academic Context

Research on this topic would appear to fill several significant gaps in the existing academic literature. The majority of environment related academic research to date in Indonesia has been

from either an environmental studies, political science or public policy perspective.¹ Whilst there has been one useful overview of environmental regulations in Indonesia², there have been few studies from a social-legal perspective of environmental law (or dispute resolution) and its implementation.³ The INSELA project, of which this research formed a part, was intended to address this gap in the current academic literature relating to environmental law and its implementation in Indonesia. In addition, this current volume seeks to add to the growing academic fields of environmental public interest law and environmental dispute resolution. The field of environmental public interest law concerns primarily the increasingly common phenomena of environmental public interest litigation and the legal framework within which it occurs. Whilst the early literature in this area was largely American based, over the last several decades an increasing number of comparative perspectives have become available from a range of

¹ See; Aden, "The Relevance of Environmental Protection in Indonesia," *Ecology Law Quarterly* 4 (1975).; George Aditjondro and David Kowalewski, "Damning the Dams in Indonesia: A Test of Competing Perspectives," *Asian Survey* 34, no. 4 (1994).; George J Aditjondro, "Large Dam Victims and Their Defenders: The Emergence of an Anti-Dam Movement in Indonesia," in *The Politics of Environment in Southeast Asia: Resources and Resistance*, ed. Philip Hirsch and Carol Warren (1998).; Ch. V. Barber, *The State, the Environment and Development: The Genesis and Transformation of Social Forest Policy in New Order Indonesia* (Berkeley: University of California, 1989).; R L Bryant and M Parnwell, *Environmental Change in South East Asia: People, Politics and Sustainable Development*, ed. R L Bryant and M Parnwell (Routledge, 1996).; Bryant and Parnwell, *Environmental Change in South East Asia: People, Politics and Sustainable Development*.; Robert Cribb, "The Politics of Pollution Control in Indonesia," *Asian Survey* 30, no. 12 (1990).; Joan Hardjono, "Environmental Crisis in Java," *Prisma*, no. 39 (1986).; Philip Hirsch and Carol Warren, eds., *The Politics of Environment in Southeast Asia: Resources and Resistance* (New York: Routledge, 1998).; Anton Lucas, "River Pollution and Political Action in Indonesia," in *The Politics of Environment in Southeast Asia: Resources and Resistance*, ed. Philip Hirsch and Carol Warren (Routledge, 1998).; Anton Lucas and Arief Djati, *The Dog Is Dead So Throw It in the River: Environmental Politics and Water Pollution in Indonesia: An East Java Case Study*, vol. 51, *Monash Papers on Southeast Asia* (Monash Asia Institute, 2000).; Colin MacAndrews, "Politics of the Environment in Indonesia," *Asian Survey* 34, no. 4 (1994).; David Potter, "Democratisation and the Environment: Ngos and Deforestation Policies in India (Karnataka) and Indonesia (North Sumatra)," *Journal of Commonwealth and Comparative Politics* 34, no. 1 (1996).; C MacAndrews, "The Indonesian Environmental Impact Agency (Bapedal): Its Role, Development and Future," *Bulletin of Indonesian Economic Studies* 30, no. 1 April (1994).; Peter Dauvergne, "The Politics of Deforestation in Indonesia," *Pacific Affairs* 66, no. 4 (1994). Peter Dauvergne, "The Political Economy of Indonesia's 1997 Forest Fires," *Australian journal of international affairs* 52, no. 1 (1998).

² Carol Warren and Kylie Elston, *Environmental Regulation in Indonesia* (University of Western Australia Press, 1996).

³ A few exceptions in this respect include; J.M. Otto, "Implementation of Environmental Law: Harmonisation, Environmental Management and Enforcement by the Courts, with References to Indonesian and the Netherlands by Executive Summary," *Indonesian Journal of Environmental Law* II (1997). Mas Achmad Santosa, "Citizen Participation in Environmental Administrative Decision-Making: A Case Study of Indonesia" (York University, 1990).

jurisdictions.⁴ Nonetheless, there has not been any detailed English language studies of environmental public interest litigation or citizen-initiated enforcement of environmental law in Indonesia. Indonesian language studies of environmental law and its application are, of course, more numerous. Academic studies have provided some useful overviews of laws and associated regulations, but for the most part have not encompassed detailed examination of judicial interpretation of environmental law, nor of the surrounding social-political context and its interaction with legal processes.⁵ The bulk of Indonesian language commentary on environmental public interest law and its application has originated from environmental NGOs active in the area, principally the Indonesian Centre for Environmental Law (ICEL), the Indonesian Forum for the Environment (WALHI) and the Indonesian Legal Aid Foundation (YLHBI).⁶ The work of these organisations has been documented in a diverse array of case

⁴ A useful, recent and comparative commentary on this area of law is David Robinson and John Dunkley, eds., *Public Interest Perspectives in Environmental Law* (Wiley Chancery, 1995). Other references include: Jill Cottrell, "Third Generation Rights and Social Action Litigation," in *Law and Crisis in the Third World*, ed. Sammy Adelman and Abdul Paliwala (Hans Zell Publishers, 1993); Ross Cranston, "Access to Justice in South and South-East Asia," in *Good Government and Law: Legal and Institutional Reform in Developing Countries*, ed. J Faundez (MacMillan Press, 1997); Ludwig Kramer, "Public Interest Litigation in Environmental Matters before European Courts," *Journal of environmental law* 8, no. 1 (1996); Martin Lau, "The Right to Public Participation: Public Interest Litigation and Environmental Law in Pakistan," *Review of European Community and international environmental law* 4, no. 1 (1995); Andrew Harding, "Public Interest Groups, Public Interest Law and Development in Malaysia," *Third World Legal Studies* 231 (1992); G Peiris, "Public Interest Litigation in the Indian Subcontinent: Current Dimensions," *International and Comparative Law Quarterly* 40 (1991); Bharat Desai, "Enforcement of the Right to Environment Protection through Public Interest Litigation in India," *Indian journal of international law* 33 (1993); Hans W Micklitz and Norbert Reich, eds., *Public Interest Litigation before European Courts* (1996); Mario Gomez and Jill Cottrell, "In the Public Interest: Essays on Public Interest Litigation and Participatory Justice," *The international and comparative law quarterly* 43, no. 1 (1994); John Denvir, "Towards a Political Theory of Public Interest Litigation," *The North Carolina law review* 54, no. issue 6 (sep) (1976); Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?," *The American journal of comparative law : a quarterly* 37, no. 3 (1989); Shambhu Chopra, "Public Interest Litigation : An Appraisal of Its Scope and Potential as a Litigational Strategy, and of the Emerging Issues in Public Interest Activism," (Allahabad : [Chopra]). Susan D. Susman, "Distant Voices in the Courts of India : Transformation of Standing in Public Interest Litigation," *Wisconsin international law journal* 13, no. 1 (1994).

⁵ Leading Indonesian texts on environmental law include: Koesnadi Hardjasoemantri, *Hukum Tata Lingkungan* (Yogyakarta: Gadjah Mada University Press, 1992); Koesnadi Hardjasoemantri, *Hukum Perlindungan Lingkungan: Konservasi Sumber Daya Alam Hayati Dan Ekosistemnya*, 1st ed. (Yogyakarta: Gadjah Mada University Press); Daud Silalahi, *Hukum Lingkungan: Dalam Sistem Penegakan Hukum Lingkungan Indonesia* (Bandung: Penerbit Alumni, 1992); Dr A Hamzah, *Penegakan Hukum Lingkungan* (Jakarta: Arikha Media Cipta Jakarta, 1995). Rachmadi Usman, *Pokok-Pokok Hukum Lingkungan Nasional*, 1st ed. (Jakarta: Akademika Pressindo, 1993).

⁶ These studies are referred to in subsequent chapters and generally originate from public interest environmental lawyers such as Mas Achmad Santosa (Indonesian Centre for Environmental Law)

notes, practitioner reflections, press releases, newsletters, seminar papers and short articles much of which has been invaluable in the course of the present study.⁷ More detailed and comprehensive studies, incorporating theoretical and comparative perspectives, have to date been lacking, however.

Literature on environmental mediation or alternative dispute resolution also had its roots in the United States, where informal modes of dispute resolution gained popularity as an alternative to litigation in the late 1970s onwards. As in the case of environmental public interest law, the literature has had a strong practitioner focus, although more recently attempts at more detailed theoretical formulations have been made.⁸ Whilst the practice of environmental mediation has spread outside western countries to the developing world, there have been relatively few studies on the application of Western derived approaches to environmental mediation in countries such as Indonesia.⁹ Indonesian language commentaries on environmental mediation are limited, but include a useful compilation of case studies sponsored by the Ford Foundation, to which reference is made in the course of Chapter 4.¹⁰ To date, however, the available literature has lacked a comparative, theoretically based study of both litigation and mediation as approaches to environmental dispute resolution, which the present study attempts to remedy.

iii. Methodology

The research methods employed for this study have combined legal and social-scientific approaches. The theoretical discussion of environmental dispute resolution in Chapter 1 presents

⁷ Specific sources from ICEL and other NGOs are referred to where relevant in subsequent chapters. The Indonesian Centre for Environmental Law (ICEL) also publishes a useful information bulletin on environmental law and advocacy titled *Hukum dan Advokasi Lingkungan* and until 1999 published an environmental law journal (*Jurnal Hukum Lingkungan*) in Indonesian and English.

⁸ On this point see; Rosemary O'Leary, "Environmental Mediation: What Do We Know and How Do We Know It?," in *Mediating Environmental Conflicts : Theory and Practice*, ed. J Walton Blackburn and Willa Marie Bruce (Quorum Books, 1995). and J Walton Blackburn, "Theoretical Dimensions of Environmental Mediation," in *Theory and Research in Conflict Management*, ed. M Afzalur Rahim (New York: Praeger, 1990).

⁹ The few studies that have been done include; Christopher W. Moore, "The Practice of Cooperative Environmental Conflict Resolution in Developing Countries," in *Environmental Conflict Resolution*, ed. Christopher Napier (London: Cameron May, 1998).; Christopher Moore and Mas Achmad Santosa, "Developing Appropriate Environmental Conflict Management Procedures in Indonesia: Integrating Traditional and New Approaches," *Cultural Survival Quarterly*, no. Fall (1995)., Takdir Rahmadi, "The Potential of Developing Environmental Mediation in Indonesia" (Dalhousie University, 1988). Mas Achmad Santosa, ed., *Resolving Environmental Disputes through Cooperative Dispute Resolution: A Case Evaluation* (ICEL, 1996).

draws upon academic literature in the field of environmental mediation and litigation. Chapter 1 also includes an overview of environmental disputes in several sectors, which is based upon a compilation of written materials, including Western and Indonesian academic literature, press clippings and reports by several environmental organisations.¹¹

Chapter 2 provides an overview of environmental litigation in Indonesia, focussing on the legal framework and its interpretation by Indonesian courts. The primary legal sources for this chapter are the various Indonesian environmental laws and regulations discussed and the transcripts of judicial decisions from environmental cases. Copies of judicial transcripts on environmental cases were not always easy to find, due to the absence of a judicial reporting service specific to the area of environmental law. The majority of transcript copies I obtained from legal practitioners or NGOs active in the field of environmental law and advocacy. Where I refer to a judicial decision I am referring unless otherwise noted to a copy of the judicial transcript from that decision. The discussion in Chapter 2 covers all civil and administrative environmental cases in Indonesia from 1982-2002 that I have been able to obtain some report of. Nonetheless, the lack of reliable judicial reporting systems in Indonesia means that, whilst the chapter is illustrative, it cannot claim to be absolutely comprehensive and inclusive of all relevant environmental cases in this period. The commentary and analysis of judicial interpretation in this chapter is also based upon a range of secondary materials including press clippings, practitioner commentaries and interviews.

The four case-studies of environmental litigation and mediation discussed in Chapters 3 & 5 are based on a compilation of written materials and interviews. Written materials were of a diverse nature, including correspondence, press releases, newspaper clippings, case notes, institutional reports, photographs and minutes of meeting gathered during the course of field visits. Interviews were conducted during several visits to Indonesia in July 1997, October 1999, May 2000 and a more extended period of field research from August 2000 until June 2001. I have also conducted several follow-up interviews in June and November 2003.¹² During these periods of field research I was based in either Jakarta or Yogyakarta and often travelled to other locations throughout Java, particularly Semarang, Kudus and Pekalongan. My fieldwork and

¹⁰ Mas Achmad Santosa, Takdir Rahmadi, and Siti Megadianty Adam, *Mediasi Lingkungan Di Indonesia: Sebuah Pengalaman* (Jakarta: ICEL, 1997).

¹¹ Including the Indonesian Forum for the Environment (*Walhi*), the Indonesian Centre for Environmental Law and the London based International Campaign for Ecological Justice in Indonesia.

empirical research was thus Java-centred and also mainly focussed on industry related disputes, which were the most common in these areas. Interviews were generally semi-structured according to questions I had previously prepared, although usually were flexibly conducted to allow the conversation to take its own course. Interviews were conducted with a range of actors in the selected case studies and in relation to environmental dispute resolution in general. My primary sources in this respect included local, regional and national environmental organisations involved in environmental disputes or advocacy, representatives from communities who had suffered environmental damage or pollution, legal aid practitioners involved in environmental litigation or mediation, journalists that had researched or written about high-profile environmental disputes, governmental officials from environmental agencies at the national, provincial and district level, legal academics, judges and industry representatives.

Interviews were also a source of information for several of the cases included in the overview of mediation in chapter 4. The chapter is primarily literature based, however, as it seeks to provide an overview of reported, high profile environmental mediation cases to date in Indonesia. The overview draws upon a diverse literature including published Indonesian language studies of environmental mediation, practitioner commentaries and articles and press reports. This chapter also reflects a Java and industry related focus, although I have included one mining dispute (the *KEM* dispute) located in Kalimantan. The bias of the chapter toward Java and industry related disputes, is not a comment on the lack of disputes in other areas or sectors in Indonesia. It is rather a reflection of the focus of my own empirical research, which was Java and industry related, and the focus of the available literature on environmental mediation in Indonesia, upon which I drew in compiling the overview.

iv. Overview of Thesis

As explained above, this research is undertaken within the broader framework of the Indonesia-Netherlands Study on Environmental Law and Administration in Indonesia (INSELA), the aim of which was to analyse environmental law and management in Indonesia from both a empirical and normative perspective and to make recommendations on the basis of that analysis. The central research problem addressed by the INSELA project was as follows:

What have been the consequences of the enactment and implementation of the 1997 Law on the Environment and its predecessor of 1982 for environmental management in Indonesia, and to

¹² Followup interviews in November 2003 were conducted by phone from Perth, Australia.

what extent may certain legislative and policy measures, notably regarding harmonisation of legislation and the decentralisation of management, contribute to increased effectiveness and legal certainty in the protection of the environment?

In addressing this broad research agenda, the project was further divided into four sections: Part A focussing on national environmental and sectoral legislation and policy, Part B on decentralisation and local management institutions, Part C on environmental law enforcement and dispute settlement and Part D on diagnosis, comparative research, recommendations and interventions. Whilst this thesis addresses research questions within all of these parts, our particular focus is on Part C, relating to legal mechanisms for environmental dispute resolution. Specifically, this thesis examines the legal framework and legally prescribed mechanisms for environmental dispute resolution in Indonesia, namely litigation and mediation. We shall examine the extent to which such mechanisms have been effective in resolving environmental disputes and the factors (both legal and non-legal) influencing the outcomes of litigation and mediation in environmental disputes. Finally, we shall make recommendations based on our analysis for the further development and improvement of environmental dispute resolution in Indonesia.

Chapter 1 begins with a discussion of theoretical perspectives on environmental disputes and environmental dispute resolution, particularly litigation and mediation, illustrated in parts with references to the Indonesian context. The discussion of litigation and mediation defines the functions, objectives and necessary conditions of these two approaches to environmental dispute resolution. This theoretical discussion provides an evaluative framework that is referred to in subsequent chapters, particularly the conclusion (chapter 6).

Chapter 2 presents a detailed study of environmental litigation in Indonesia, providing an overview of the environmental legal framework relevant to litigation and considering how key provisions have been interpreted and applied by Indonesian courts in environmental cases. The overview covers a 20-year period, dating from 1982, when the first Environmental Management Act was enacted, to 2002. The chapter seeks to evaluate salient trends in judicial decision-making and the success of private and public interest litigants in obtaining environmental justice in this period.

In chapter 3, our examination of environmental litigation is further developed in a more detailed study of two particular cases, the *Banger River* and *Babon River* disputes. The two case studies provide more insight into the history of the disputes, efforts to resolve the dispute before

commencing litigation and the actual process of litigation. The case study approach taken in this chapter, and later in chapter 6, is intended to provide a more empirically grounded, politically contextualised consideration of litigation's role in resolving environmental disputes.

In Chapter 4 the focus shifts to environmental mediation, with an overview of the use of mediation in Indonesia to resolve environmental disputes to date. The chapter examines the legal, institutional and cultural framework for mediation in Indonesia and includes an overview and analysis of reported mediation cases, in order to assess relevant trends in the process and outcomes of mediated environmental disputes to date. Again, the overview does not purport to be comprehensive, but rather is a selection of relatively high-profile environmental disputes in which a formal process of mediation was undertaken. The aim of the chapter is to identify common trends, issues, problems and outcomes in applying mediation to environmental disputes in Indonesia.

In Chapter 5, a more in-depth examination of mediation is undertaken in two case studies of environmental mediation, the *Palur Raya* and *Kayu Lapis Indonesia* disputes. Each case study provides a detailed description and analysis of the mediation process, considering the different variables influencing the course of mediation with reference to the theoretical framework introduced in Chapter 1. In the concluding chapter 6, we endeavour to synthesise the insights gained from our overview and case based analysis of environmental litigation and mediation. The chapter evaluates the outcomes of both approaches to environmental dispute resolution and considers the extent to which they have facilitated access to environmental justice in practice. The chapter then provides a concluding analysis of the legal and non-legal variables that have most noticeably influenced the process and outcomes of environmental litigation and mediation, referring to the theoretical framework elaborated in chapter 1. On the basis of this analysis, the chapter also endeavours to make recommendations to improve the effectiveness of environmental dispute resolution in Indonesia.