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Environmental Dispute Resolution in Indonesia

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1 Chapter 1 Environmental Dispute Resolution: Theoretical and Indonesian Perspectives

1.1 Environmental Disputes

What do we mean when we talk about an “environmental dispute”? In the literature on mediation and environmental dispute resolution we find a number of different definitions. Moore defines environmental disputes as “...tensions, disagreements, altercations, debates, competitions, contests, conflicts, or fights over some element of the natural environment.”¹ Blackburn and Bruce define “environmental conflict” as arising “...when one or more parties involved in a decision making process disagree about an action which has potential to have an impact upon the environment.”² Susskind refers to environmental disputes as “...disagreements among stakeholders in a range of public disputes which involve environmental quality or natural resource management.”³ Bingham, in her review of a ‘decade of experience’ in resolving environmental disputes, does not define “environmental dispute” but categorises the disputes reviewed into six broad categories: land use, natural resource management and use of public lands, water resources, energy, air quality and toxics, which she further subdivides into ‘site-specific’ and general policy categories.⁴

For our purposes we shall limit the scope of both “environmental” and “dispute”, so as to more clearly define our research focus. At its broadest “environmental” is an expansive concept that might connote any element of the natural environment including issues of natural resource management, energy generation, development, industrialisation. Indeed the term “environmental” may even be understood to extend beyond the natural environment to encompass aspects of the man-made or built environment, as in the case of heritage conservation or “environment” as it is used in the context of planning law. Our focus will be more specific, in part due to the more specific definition of environmental dispute in the Indonesian Environmental Management Act 1997, which limits itself to disputes relating to the incidence or suspected

¹ Moore, "The Practice of Cooperative Environmental Conflict Resolution in Developing Countries," p162.

² J Walton Blackburn and Willa Marie Bruce, "Introduction," in *Mediating Environmental Conflicts : Theory and Practice*, ed. J Walton Blackburn and Willa Marie Bruce (1995), p1-2.

³ Lawrence E. Susskind and Joshua Secunda, "Environmental Conflict Resolution: The American Experience," in *Environmental Conflict Resolution*, ed. Christopher Napier (London: Cameron May, 1998), p16.

incidence of environmental pollution or damage. For our purposes then, an “environmental” dispute is a dispute that relates in some way to the incidence, or suspected incidence of environmental pollution or damage of some kind.

What then do we refer to as a “dispute”? Moore’s definition quoted above is a broad one, encompassing conflict of seemingly any nature. In contrast, Brown and Marriot define as a dispute as “...a class or kind of conflict which manifests itself in distinct, justiciable issues.”⁵ In a similar vein, Crowfoot and Wondolleck distinguish the specific nature of a “dispute” from the more general, non-specific nature of “conflict”, which they describe as “...the fundamental and ongoing differences, opposition, and sometimes coercion among major groups in society over their values and behaviours toward the natural environment”. A “dispute” is not distinct from the conflict process, but rather it is a specific, identifiable part of it, namely a “specific conflict episode that is part of a continual and larger societal conflict”.⁶ Burgess and Burgess make a similar distinction, characterising environmental conflict as centring on entrenched, long-term differences between opposing groups’ underlying values and beliefs on the proper relationship between human society and the natural environment.⁷ Examples of environmental conflict include,

The deep ecology/fair use conflict...hunters and those favoring biodiversity and “watchable wildlife”; solitary wilderness trekkers and mountain resort patrons, pro- and antigrowth factions; advocates of a “small is beautiful”, low consumption lifestyle and proponents of a more materialistic “good life”; and advocates of tight pollution control requirements based upon the belief that human life is priceless and persons wishing to take a hard look at the economics of pollution control.⁸

⁴ Gail Bingham, *Resolving Environmental Disputes: A Decade of Experience* (The Conservation Foundation, 1986), p30.

⁵ Henry J Brown and Arthur L Marriott, *Adr Principles and Practice*, 2nd ed. (London: Sweet & Maxwell, 1999), p2.

⁶ James E. Crowfoot and Julia M. Wondolleck, "Environmental Dispute Settlement," in *Environmental Disputes: Community Involvement in Conflict Resolution*, ed. James E. Crowfoot and Julia M. Wondolleck (Island Press, 1990), p17.

⁷ Guy Burgess and Heidi Burgess, "Beyond the Limits: Dispute Resolution of Intractable Environmental Conflicts," in *Mediating Environmental Conflicts: Theory and Practice*, ed. J Walton Blackburn and Willa Marie Bruce (Quorum Books, 1995), p102.

⁸ Ibid.

Environmental conflict, as it is defined here, is largely value based and group centred in nature, and thus less susceptible to resolution. By contrast, disputes are characterised more by their specificity, which ultimately renders them more susceptible to adjudication and resolution. Felstiner, Abel and Sarat have characterised the emergence of a dispute as involving three stages: naming, blaming and claiming.⁹ Naming involves the identification of a particular experience as injurious. Blaming involves the attribution of that injury to the fault of another individual or social entity, whilst the third stage, claiming, occurs when a remedy is claimed from the person or entity believed to be responsible for the injury. Finally, a claim is transformed into a dispute when it is wholly or partly rejected. Thus it is the specific and particularised nature of a dispute, centring upon a particular claim, which make it justiciable and more amenable to resolution via methods such as litigation or mediation.

There is, nonetheless, a close relationship between environmental conflicts and disputes. Broader, value or interest based conflicts between groups in society may contribute to a pattern of ongoing disputes that relate to more particular circumstances, claims or policies. Individual disputes may well be susceptible to resolution, however, the more general and diffuse process of environmental conflict is likely to continue through subsequent disputes.¹⁰ The scope of this thesis is limited to environmental disputes and their resolution and does not extend to an investigation of their antecedents or the broader processes of environmental conflict that may underlie them. However, discussion of the broader dynamics between conflicting groups in some cases may influence the dispute resolution process and so may be the subject of commentary in later chapters.

Environmental disputes may be further categorised as either private or public interest. Private interest environmental disputes relate to damage to an individual or group's property or person caused as a result of a polluting or environmentally damaging activity in a particular location. In contrast, the central issue of public interest environmental disputes is the impact of environmentally damaging or polluting activities on the public interest in environmental preservation. Where severe, such damage may threaten essential environmental functions integral

⁹ W Felstiner, R Abel, and A Sarat, "The Emergence and Transformation of Disputes: Naming, Claiming and Blaming," *Law and Society Review* 15, no. 3-4 (1980-81).

¹⁰ Burgess and Burgess, "Beyond the Limits: Dispute Resolution of Intractable Environmental Conflicts," p104.

to the continued functioning of the ecosystem. Preservation of environmental functions is ultimately necessary for human survival and, in Indonesia, the public interest in such preservation is recognised by article 4 of the EMA 1997, which states the preservation of environmental functions to be one of the targets of environmental management.¹¹ In a public interest environmental dispute, the claimant's primary objective is protection of this public interest in environmental preservation. The respondents in environmental public interest disputes frequently include government agencies responsible for environmental protection, and may also include private industries. Environmental public interest disputes may also be site specific or may concern more general issues of policy.¹²

In practice private and public interest claims may overlap and be pursued within a single dispute.¹³ For instance, victims of environmental pollution themselves may not only pursue compensation of personal damage, but also may advocate restoration of their local environment of which they are a part. Nonetheless, the two objectives and their respective remedies remain distinct in character. In any case, the predominant character of an environmental claim as public or private can usually be determined according to the identity of the claimant. Where the claimant is an individual or group that has suffered direct, personal loss because of environmental pollution or damage then the claim may be considered predominantly private interest in character. Where the claimant is an organisation purporting to represent the public interest in environmental preservation then the claim is predominantly public interest in character. Separation of private and public interest objectives in environmental disputes will assist us at a later stage in assessing the effectiveness of the respective dispute resolution processes in meeting those respective objectives.

1.1 Approaches to Dispute Resolution

A commonly adopted categorisation in mediation literature divides approaches to processing and resolving disputes into three broad categories: power based, rights based and interest based.¹⁴

¹¹ Article 1(5) defines preservation of environmental functions as ...a set of efforts to maintain the continued supportive and carrying capacities of the environment.

¹² See for instance the *Reafforestation Case* page 108, which concerned the transfer of monies from a Reafforestation Fund to an aircraft manufacturing company.

¹³ see David Robinson, "Public Interest Environmental Law- Commentary and Analysis," in *Public Interest Perspectives in Environmental Law*, ed. David Robinson and John Dunkley (Wiley Chancery, 1995), p321.

¹⁴ see W Ury and et al, *Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict* (San Francisco: Jossey-Bass, 1986), p3-10. Roger Fisher and W Ury, *Getting to Yes: Negotiating Agreement*

In a power based approach, the disputing parties resolve their conflict through a contest of strength, which may encompass tactics such as lobbying, use of political influence, demonstrations, industrial action or physical force. Power based approaches would also encompass criminal or administrative enforcement of law or sanctions through the state apparatus, a process which rests on the power of the state.¹⁵ When a power based approach is taken, the most powerful party typically wins. In a rights based approach the dispute is adjudicated by an authoritative institution or individual such as an administrator, court, tribunal or arbitrator. The outcome of the dispute is determined according to the law, written policy or societal norms upon which the adjudicating body bases its decision. Litigation, like arbitration or a process of tribunal review, is a rights based approach to dispute resolution. Finally, in an interest based approach, such as mediation or negotiation, the conflicting parties negotiate, with or without third party assistance, in order to reach a voluntary settlement amenable to both parties' interests. The outcome is determined by the respective interests of the parties and their willingness to compromise in order to resolve the dispute at hand.

The three approaches to dispute resolution described above are roughly comparable to Donald Black's three styles of social control, which may also be understood as approaches to conflict management.¹⁶ The *penal* style is a state initiated process of punishing or penalising offenders in some manner for acts considered blameworthy or morally repugnant. A penal approach is often taken in situations where the relational or social distance between victim and offender, or between offender and state, is large.¹⁷ A penal approach to conflict management and/or social control could generally be equated with or at least encompassed within the category of power-based

without Giving In (New York: Penguin Books, 1991).; Laurence Boulle, *Mediation: Principles, Process, Practice* (Butterworths, 1996), p64.

¹⁵ Although criminal and administrative enforcement would more correctly be understood as a combination of power-based and rights-based approaches, as it is not a case of arbitrary power (although sometimes this may be the case), but rather state power exercised according to certain rules.

¹⁶ Adriaan Bedner and Benjamin van Rooij, "Environmental Disputes and Enforcement" (paper presented at the Environmental Disputes and Enforcement of Environmental Law - Indonesia in Comparative Perspective, Leiden, 2001).. See also the seminal work; D.J. Black, *The Behaviour of Law* (New York: Academic Press, 1976). and an elaboration of Black's theory in A.V Horwitz, *The Logic of Social Control* (New York: Plenum Press, 1990).

¹⁷ Black describes relational distance as the degree to which people participate in one another's lives. The closest relationships involve total interpenetration, the most distant none at all. Relational distance may be measured by, for instance, the scope, frequency and length of interaction between people, the age of their relationship, and the nature and number of links between them in a social network. Relational distance is a variable affecting both the quantity of law used in a social setting and the style of social control. - Black, *The Behaviour of Law*, p40-41.

approaches discussed above. The *compensatory* style is a victim initiated process where a victim claims payment of compensation by a violator. This style is focussed more on the proper redress of harm rather than the punishment of wrongdoing. A compensatory style is more commonly used where the relational distance is of an intermediate nature.¹⁸ A compensatory style may be equated for our purposes with a rights based approach to dispute resolution through litigation, where harm is redressed according to an established set of legal principles. The *conciliatory* style involves a third party to the dispute who helps the disputing parties negotiate a mutually acceptable resolution to the dispute, as style comparable to the interest based approach to dispute resolution described above. As the conciliatory style is consensual and not coercive, it is most effective where the relational distance between the disputants is close, involving multiple and lasting ties. Where these ties are disrupted then both parties will possess sufficient incentive to seek resolution of the conflict.¹⁹

This thesis focusses on the latter two styles, compensatory and conciliatory, equating with rights based and interest based approaches to dispute resolution, which for our purposes refers to the processes of litigation and mediation as applied to environmental disputes. Penal styles of social control, such as the prosecution of criminal offences or enforcement of administrative sanction, and power-based or political modes of conflict resolution are not directly in the scope of this study. Nonetheless, we shall not discount such modes of social control and dispute resolution as they may have an important, albeit indirect effect, on the commencement, process and outcome of litigation and mediation. Indeed, as we shall see in subsequent chapters, environmental disputants may pursue each approach at different stages or a combination of approaches in any one dispute. In the course of a single environmental dispute parties might first seek to consolidate their power bases and resolve the matter in their favour through a political contest. If a stalemate is reached, negotiation or mediation could be attempted, which, if unsuccessful might result in a final stage of litigation to resolve the dispute. Alternatively, the interaction of these different approaches may be contemporaneous, as in the case where the dynamics of a power-based

¹⁸ Yet Black still equates a compensatory style with a penal style in that both are *accusatory*, having a complainant and a defendant and ultimately a winner and a loser. Whereas a conciliatory style is *remedial* in nature, focussing on restoring social harmony and repairing social bonds. Ibid., p47.

¹⁹ However, whilst Black makes a link between a conciliatory style and close relational distance it should be noted that mediation and conciliatory forms of dispute resolution have been applied with success to a range of modern environmental disputes (see further discussion of this below) where there often is considerable relational distance between the disputants.

struggle influences the process and outcome of a rights-based/compensatory or interest-based/conciliatory approach to dispute resolution.

The interaction of these different approaches to dispute resolution will be explored in more detail in later chapters. For now, our focus turns to our main subject, the processes of litigation and mediation. In this section we undertake a theoretical overview of litigation and mediation, considering the objectives, functions and necessary conditions for these different approaches to dispute resolution. We also attempt to define an evaluative framework to be applied in later chapters when we shall consider the effectiveness of litigation and mediation in resolving environmental disputes in Indonesia.

1.2 Environmental Litigation

1.2.1 *Definition of Environmental Litigation*

Environmental litigation may be defined for our purposes as an environmental dispute (see definition above), which has resulted in one or more parties commencing legal proceedings in a civil or administrative court.²⁰ With the globalisation of modern environmental law, facilitated by international agreements such as the Stockholm and Rio Declarations, environmental litigation has become increasingly common in a range of jurisdictions. Legislative provisions defining environmental rights and stipulating grounds for compensation of environmental damage, environmental restoration and legal standing for environmental organisations are now found in a diverse range of Western and developing countries.²¹

1.2.2 *Objectives of Litigation*

1.2.2.1 Dispute Resolution

From a claimant's perspective a primary function of environmental, or for that matter other types of litigation, is dispute resolution. Indeed dispute resolution, and dispute processing, has been generally regarded by social-legal scholars as a distinguishing and central function of courts

²⁰ Criminal proceedings, which are initiated and conducted by the state prosecutorial agency are thus excluded from the scope of the present research.

²¹ Public interest environmental law and litigation in a wide range of countries including the US, UK, Australia, South Africa, India and the European Union are discussed in Robinson and Dunkley, eds., *Public Interest Perspectives in Environmental Law*. For an interesting collection of articles on environmental litigation in countries including the UK, US, Canada, Ukraine, Georgia, Denmark, Australia, France and Italy see also Sven Deimann and Bernard Dyssli, eds., *Environmental Rights: Law, Litigation and Access to Justice* (London: Cameron May, 1995).

across different societal contexts.²² Disputes are resolved, or more accurately determined, by the court's authoritative application of state law to the particular circumstances of a case, which provides a final determination of the rights, remedies and relationship of disputing parties.

Resolution of a dispute, in the judicial sense, is thus focussed on application of the law rather than reconciliation of the concerns, interests or longer term relationship of the disputing parties, a fact that has led some scholars to question the suitability of courts for dispute resolution.²³ Nonetheless, research has tended to vindicate the value of courts as dispute resolution institutions and indeed an authoritative application of law may be a particularly suitable approach to resolution of a dispute where the parties' interests are irreconcilable through more consensual approaches to dispute resolution such as mediation.²⁴

1.2.2.2 Law Enforcement

What is apparent from this discussion is that courts as an institution and the process of litigation therein serves a dual function: resolving conflict between individual disputants on the one hand but on the other hand applying and enforcing legal norms. It is well recognised that the consistent application of legal norms by courts plays an important role in maintaining social order, legal certainty and the legitimacy of a regime.²⁵ Shapiro, for instance, has argued persuasively that the conflict resolution function of courts must be seen as interdependent with their social control and law-making functions. Courts may thus play an important role in not only resolving disputes but also in applying or enforcing law. This enforcement role of the courts may provide a useful adjunct to administrative law enforcement, particularly in the environmental field. There are a number of reasons justifying such a dual approach to enforcement, perhaps the foremost amongst which is the frequent failure of government agencies to effectively enforce environmental law. Enforcement failure may occur for a number of reasons, including a lack of resources or political will. Furthermore, from a purely practical perspective, private citizens, who may initiate suits for environmental enforcement, are more likely to be directly affected by pollution and thus better situated to detect potential violations of environmental law. In this

²² D M Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980), p301. states '...the function of the court is to decide disputes'. See also the comparative model of a court in T L Becker, *Comparative Judicial Politics: The Political Functionings of Courts* (Chicago: Rand McNally, 1970).

²³ See discussion in Cotterrell, *The Sociology of Law: An Introduction* (Butterworths, 1992), p222.

²⁴ Ibid.

²⁵ see for instance discussion in Martin Shapiro, *Courts: A Comparative and Political Analysis* (The University of Chicago Press, 1981), p17.

respect, citizens have been described as “omnipresent, motivated and uniquely interested in environmental quality...” and thus “...one of a nation’s greatest resources for enforcing environmental laws and regulations.”²⁶

1.2.2.3 Environmental Justice

As discussed, the general objective of litigation (and the courts), from a state perspective, is dispute resolution through the authoritative application of state law. This principle is general enough to apply to any particular area of law. For our purposes, however, we must consider the more specific and substantive objective of environmental litigation, especially when viewed from the perspective of the environmental litigant who seeks redress for or amelioration of environmental damage or pollution. The broad objective of litigation in this respect may be termed “environmental justice”, defined as the objective and accurate application of procedural and substantive environmental law through which an environmental litigant may enforce environmental rights and/or achieve redress for environmental damage or pollution. For our purposes the specific defining parameters and criteria of environmental justice are defined by the surrounding legal framework, which will be discussed in more detail in Chapter 2. Environmental justice is thus defined in a narrower legal sense in the present context, when compared to its wider usage in numerous international instruments and agreements such as the Rio Declaration and Agenda 21, where it is used in a more general (and transjurisdictional) sense in recognition of ecological interdependence and the need for environmental sustainability.²⁷

From a private litigant’s perspective, environmental justice implies the vindication of key individual rights such as the right to a “good and healthy environment”, as guaranteed by art. 5 of Indonesia’s Environmental Management Act 1987, or the right to adequate compensation and restoration where environmental damage or pollution has occurred. Other rights may be more procedurally defined, such as the right to access accurate environmental management or the right to participate in environmental management. In this manner, the judicial process plays a crucial role in “making rights effective” and facilitating access to justice through bridging the gap between formal legal rights and the actual inability of many people to recognise such rights and

²⁶ E Roberts and J Dobbins, "The Role of the Citizen in Environmental Enforcement" (paper presented at the International Conference on Environmental Enforcement, Budapest, Hungary, September 22-25 1992), p531.

²⁷ see N.A. Robinson, "Principles of Environmental Justice: A Foundation for Dispute Prevention and Resolution," *Asia Pacific Journal of Environmental Law* 3, no. 4 (1998).

realise them satisfactorily.²⁸ Litigation may thus provide a concrete link between formal environmental rights and entitlements and actual social realities. Such a link is especially important given the growing interconnection between environmental principles and human rights in both theory and practice.²⁹ It is increasingly common to find environmental principles couched in terms of rights, such as the right to a pollution-free or healthy environment. Whilst a rights approach to environmental matters is not without its drawbacks, it also has great potential for facilitating environmental protection.³⁰

From a public interest perspective, environmental justice also may imply protection of the public interest in environmental sustainability. The specific manner in which this public interest is realised in practice will again depend on the specific features of the prevailing legal framework. Environmental justice from a public interest perspective, for instance, might encompass compliance with regulatory standards on the discharge of industrial waste, rehabilitation or restoration of areas where environmental damage or pollution had occurred or the prevention of potential environmental harm through mechanisms such as environmental impact assessment. In the wider political context, environmental litigation may also act as a catalyst for policy or political change on particular issues and thus facilitate environmental justice in a broader extra-legal sense.³¹ The primary focus in this thesis, however, is the realisation of environmental justice through effective enforcement of the laws designed to protect the public interest in environmental sustainability.

²⁸ M Cappelletti and B Garth, "Access to Justice: The Worldwide Movement to Make Rights Effective," in *Access to Justice: A World Survey*, ed. M Cappelletti and B Garth (Milan: Sijthoff and Noordhoff, 1978), p6.

²⁹ For a discussion of the indivisibility of environmental and human rights see Tony Simpson and Vanessa Jackson, "Human Rights and the Environment," *Environmental and Planning Law Journal* 14 (4), no. August (1997).;

³⁰ Michael Anderson, "Human Rights Approaches to Environmental Protection: An Overview," in *Human Rights Approaches to Environmental Protection*, ed. Alan E Boyle and Michael R Anderson (Oxford: Clarendon Press, 1996), p21.

³¹ Nonetheless, some writers have questioned the political or social value of public interest litigation. For example, Hutchinson and Monahan refer to the desegregation cases in America, which, they claim, had little or no impact on social practices of segregation. Allan C Hutchinson and Patrick Monahan, "Democracy and the Rule of Law," in *Rule of Law: Ideal or Ideology*, ed. Allan C Hutchinson and Patrick Monahan (Carswell, 1987). Furthermore, some critics have argued that pursuing such a process is actually counterproductive, as it has the effect of legalising political issues and removing such issues out of the public domain into the rarefied and elitist world of legal experts. It may thus be a moot point whether public interest litigation exposes or simply paper[s] over the abyss, which separates formal legal promises from social reality. Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?," p519.

1.2.3 Environmental Litigation: Evaluative Criteria

Our discussion above has highlighted several salient aspects of environmental litigation, which will be relevant to our analysis in subsequent chapters. As we have seen, dispute resolution is achieved through litigation by the objective and impartial application of state law. The court's decision provides an authoritative determination of the rights and remedies of the disputing parties. From an environmental claimant's perspective, litigation provides an important mechanism to enforce rights, such as the right to a healthy environment, redress damage done and resolve disputes. From an environmental public interest perspective, litigation is another important mechanism through which the public interest in environmental sustainability may be protected. From these functions of environmental litigation, we may distil several relevant criteria, in the form of questions, which will be used to assess and evaluate environmental litigation in subsequent chapters.

1. To what extent have environmental claimants had access to the legal process to enforce environmental rights and obtain justice in environmental matters?
2. To what extent has litigation enabled private litigants to achieve environmental justice in practice, including the enforcement of environmental rights and the compensation of environmentally related damage?
3. To what extent has litigation facilitated protection of the public interest in environmental preservation through the application of relevant environmental legal provisions?
4. To what extent has environmental law been applied in an objective, impartial and accurate manner by courts?

1.2.4 Conditions for Environmental Litigation

In the previous section we considered the objectives of environmental litigation from both a state and a claimant or disputant's perspective and endeavoured to distill from these objectives a number of evaluative criteria to apply to our consideration of environmental litigation in subsequent chapters. A review of the literature relating to environmental litigation, and litigation more generally, indicates that the manner and extent to which environmental law is applied through the process of litigation and the extent to which environmental litigation is likely to fulfill the objectives discussed above, is contingent upon a complex range of legal, political, social and

economic conditions, which are discussed in some detail below.³² This section is intended to provide a theoretical starting point for the consideration in later chapters of the legal and non-legal factors that influence the outcome and effectiveness of environmental litigation in Indonesia.

1.2.4.1 Procedural Access to Justice

The term 'access to justice' was popularised in the late 1970s by, amongst other things, the seminal Florence Access to Justice Project, which undertook an extensive comparative study of access to justice in twenty-three nations. According to Cappelletti, the editor of the study, 'access to justice' encompassed a number of elements including procedural representation for 'diffuse' interests, such as environmental protection. Procedural representation of environmental interests was a problem in many jurisdictions because traditional standing rules only recognised interests of a private, personal nature. A person could thus only initiate a legal action if his or her personal interests had been directly compromised by the action in question. Environmental issues, being matters of public interest, fell outside the scope of such 'private' interests and thus remained unrepresented within the legal system.

Reformation of traditional standing rules to facilitate representation of environmental interests became the subject of considerable academic debate following Donald Stone's influential treatise entitled *Should Trees have Standing?*.³³ Whilst the notion of environmental standing has on occasion been criticised by some jurists as ambiguous, unrealistic and potentially wasteful or counterproductive³⁴, broader rights of standing caught on in the context of a growing global environmental movement and have now been established in a diverse range of jurisdictions.

In the United States, for instance, citizen suit provisions in both federal and state law have enabled a considerable number of environmental organisations to utilise the courts for the

³² This section draws upon the discussion of conditions for effective environmental public interest law in Robinson, "Public Interest Environmental Law- Commentary and Analysis."

³³ C.D Stone, *Should Trees Have Standing?* (Los Altos, CA: Kaufman, 1974).

³⁴ see for instance Kramer, "Public Interest Litigation in Environmental Matters before European Courts," p15.; Paul Bowden, "Citizen Suits - Can We Afford Them and Do We Need Them Anyway?," in *Public Interest Perspectives in Environmental Law*, ed. David Robinson and John Dunkley (Wiley Chancery, 1995).

protection of environmental interests.³⁵ In Australia, judicial precedent provided some limited scope for special interest litigants, although the grounds for environmental public interest suits have now been more significantly expanded by legislative reform at the federal and state level.³⁶ Within the European Union, environmental organisations, and in some cases private citizens, already enjoy access to the courts in environmentally related proceedings in a number of member states.³⁷ Following the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which was signed by the European Union in 1998, the Union is currently considering a proposed directive on Access to Justice in Environmental Matters, which would facilitate access of citizens and organisations to environmental proceedings.³⁸

India is another notable example of a country where traditional standing rules were radically reformed, in this instance by the Supreme Court in the early 1980s, a move that greatly facilitated public interest litigation in a number of spheres including environmental.³⁹ The broadening of standing provisions has also facilitated environmental public interest litigation in a number of other developing countries including Sri Lanka, Brazil and the Philippines.⁴⁰ In some cases reform of traditional standing rules has been a result of judicial activism, whilst in other cases reform has

³⁵ see discussion in Deidre H Robbins, "Public Interest Environmental Litigation in the United States," in *Public Interest Perspectives in Environmental Law*, ed. David Robinson and John Dunkley (Wiley Chancery, 1995).

³⁶ In New South Wales, for instance, any person has the right to apply to the Land and Environment Court to remedy a breach of the Environmental Planning & Assessment Act 1979. – see discussion in Michael L Barker, "Standing to Sue in Public Interest Environmental Litigation: From *Acf V Commonwealth* to *Tasmanian Conservation Trust V Minister for Resources*," *Environmental and Planning Law Journal* 13, no. 3 (1996).

³⁷ see the detailed discussion of the law in individual member states in Martin Fuhr et al., "Access to Justice: Legal Standing for Environmental Associations in the European Union," in *Public Interest Perspectives in Environmental Law*, ed. David Robinson and John Dunkley (Wiley Chancery, 1995).

³⁸ Directives on Access to Information and Public Participation in Decision-Making in Environmental Matters have already been issued.

³⁹ Francois du Bois, "'Well-Being' and 'the Common Man': A Critical Look at Public Interest Environmental Law in South Africa and India," in *Public Interest Perspectives in Environmental Law*, ed. David Robinson and John Dunkley (Wiley Chancery, 1995), p144-46.; Chopra, "Public Interest Litigation : An Appraisal of Its Scope and Potential as a Litigational Strategy, and of the Emerging Issues in Public Interest Activism."

⁴⁰ In Sri Lanka the Environmental Foundation Ltd, a non-profit environmental organisation, has been successful in utilising rights of environmental standing to try and compel state agencies to carry out statutory functions relating to environmental protection. In Brazil environmental organisations can undertake civil public action suits pursuant to federal law to protect environmental interests - see Edesio Fernandes, "Collective Interests in Brazilian Environmental Law," in *Public Interest Perspectives in Environmental Law*, ed. David Robinson and John Dunkley (Wiley Chancery, 1995).

been legislative in nature. It is thus apparent that procedural access to the courts for environmental litigants, based on broadly defined rights of standing, is a basic or threshold condition for successful environmental public interest litigation.⁴¹

In certain circumstances procedural access may also be an issue for private litigants, who have suffered personal loss as a result of environmental pollution or damage. It is not uncommon in the environmental context for environmentally harmful activities to negatively affect hundreds or even thousands of people. In such a situation, the practicalities and expense of each individual victim bringing a separate legal action may be prohibitive and certainly inefficient. As a result of situations such as these, a number of jurisdictions have reformed procedural law to permit class or representative actions, through which classes or groups of people suffering loss of a similar nature may be represented in a single legal suit.⁴² Provision for representative actions in the environmental context is also thus an important condition for effective environmental litigation.

provision of legal aid to unrepresented or disadvantaged groups, the qualitative improvement of dispute processing procedures and simplification of the legal framework.⁴³

1.2.4.2 Strong environmental law

In addition to flexible rules on environmental standing, the broader, substantive legal framework should ideally be rule oriented, giving expression to environmental principles in specific, enforceable procedures, rules or objectives. Legislation of this nature has been termed strong environmental law.⁴⁴ This has generally the case in the US, where civil environmental suits have often resulted in the enforcement of environmental regulation through judicial decision. Where, however, environmental legislation is non-specific, vague and creates a wide scope for administrative discretion, then enforcement through the courts will be much more difficult. This has largely been the case in the UK, where the wide discretion accorded to enforcement agencies

⁴¹ Robinson makes this point in his analysis of conditions for successful environmental public interest law. see Robinson, "Public Interest Environmental Law- Commentary and Analysis," p308.

⁴² For a historical account of the political-legal evolution of the modern class action see Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (New Haven and London: Yale University Press, 1987).

⁴³ see Cappelletti and Garth, "Access to Justice: The Worldwide Movement to Make Rights Effective," p3-124.

⁴⁴ David Robinson, "Public Interest Environmental Law Firms in the United States," in *Public Interest Perspectives in Environmental Law*, ed. David Robinson and John Dunkley (Wiley Chancery, 1995), p44.

by environmental legislation in the UK has been cited as one factor contributing to the weak state of environmental public interest law in that country.⁴⁵

1.2.4.3 Institutional Resources

The first wave of access to justice reforms in the 1970s focussed on providing legal aid to those unable to afford legal services. Such reforms were undertaken, as the high cost of legal services was perceived to be one of the greatest obstacles to access to justices in many countries.⁴⁶ For even where a satisfactory legal framework is in place, potential litigants may only initiate public interest suits where they possess the necessary institutional and financial resources, more often than not lacking in the majority of countries. Legal aid programs in Western countries such as Australia and the UK are usually directed towards areas of private law, and any support for environmental public interest suits has been the exception rather than the rule. Not surprisingly, governments have been generally reluctant to fund such legal actions given they are often directed at their own regulatory agencies.⁴⁷ In the United States environmental public interest law firms have been funded largely by membership organisations including the Conservation Law Firm, the Environmental Defense Fund, the Sierra Club Legal Defense Fund and the Natural Resources Defense Council. Most of these membership-based organisations started out as fledgling, volunteer groups, but by the 1990s had evolved into influential national organisations with considerable membership bases and organisational incomes.⁴⁸ In developing countries, the necessary political and economic conditions for such organisations generally do not exist, yet in many instances environmental public interest groups in such countries have been able to obtain funding from foreign aid agencies, in addition to using volunteer assistance.

The issue of institutional resources is also relevant to the ability of the judiciary to perform the functions discussed above. In the institution building model developed by Esman and Blase and applied by Otto to judicial institutions, the internal resources of an institution are a significant

⁴⁵ Robinson, "Public Interest Environmental Law- Commentary and Analysis," p303.

⁴⁶ Cappelletti and Garth, "Access to Justice: The Worldwide Movement to Make Rights Effective," p10.

⁴⁷ Robinson, "Public Interest Environmental Law- Commentary and Analysis," p311.

⁴⁸ For example, in 1992 the National Resources Defense Council had an income of \$18 million and a membership base of 170,000. A significant role has also been played by smaller public interest law firms, including environmental law clinics associated with universities which research and run public interest cases as part of students training. In addition to income derived from membership dues and donations such organisations have also benefited from special rules as to legal fees for public interest litigants. Robinson, "Public Interest Environmental Law Firms in the United States," p58.

determinant of its ability to perform its respective tasks and functions.⁴⁹ Whilst judicial institutions are typically well-resourced, or at least sufficiently resourced in developed countries, this is certainly not always the case in developing countries such as Indonesia. Both Pompe's study of the Supreme Court and Bedner's study of the administrative courts in Indonesia have demonstrated how a lack of financial, human and organisational resources has contributed to serious problems with the quality of judicial administration in Indonesia.⁵⁰

A lack of institutional human and financial resources may also be an obstacle to the continuing education of judges. This is an issue of particular importance in the area of environmental law, which remains a relatively new area of law, containing numerous legal principles (such as environmental standing or strict liability) that may even contradict traditional legal doctrine. Effective interpretation and application of modern environmental law requires a judiciary that is adequately educated and informed about the laws and the principles underlying them before their promulgation. For this end to be achieved it is necessary that sufficient resources be applied to implementation of continuing education of judges and other legal officers in environmental law.

1.2.4.4 Legal and Environmental Activism

In his commentary and analysis on environmental public interest law, Robinson also identifies alliances of reformist lawyers with legally informed activists as an important precondition to the further development of environmental public interest law.⁵¹ In this respect Robinson suggests that environmental lawyers need to take a broader approach beyond mere client representation and technical compliance with the letter of the law. Rather environmental lawyers should seek to represent the environmental public interest and to this end play a direct role in opinion-shaping and lobbying toward the further and substantive improvement of environmental law.

1.2.4.5 Judicial independence & impartiality

A basic condition for courts to effectively and authoritatively apply the law and resolve disputes is that the court be impartial and independent in the dispute before it. Becker identified this ideal of judicial impartiality and independence as a defining characteristic of the judicial

⁴⁹ J.M. Otto, "Conflicts between Citizens and State in Indonesia: The Development of Administrative Jurisdiction," (Leiden: Van Vollenhoven Instituut, 1991).

⁵⁰ see S van Hoeij Schilthouwer Pompe, "The Indonesian Supreme Court: Fifty Years of Judicial Development" (Leiden, 1996).; Adrian Bedner, "Administrative Courts in Indonesia: A Social-Legal Study" (PhD, University of Leiden, 2000).

⁵¹ Robinson, "Public Interest Environmental Law Firms in the United States," p58.

process across different societies.⁵² Without impartiality or independence the legitimacy of the court as an adjudicating institution is undermined, as one or other of the disputing parties may perceive themselves to be disadvantaged. On a broader societal level, the consistent and objective application of state law by courts is essential to the creation of real legal certainty, which Otto has described as a systemic objective of law.⁵³

How is judicial independence defined? The comparative legal scholar Theodore L. Becker offered the following definition,

Judicial independence is (a) the degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values, and conceptions of judicial role (in their interpretation of the law), (b) in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and (c) particularly when a decision adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judges personally or on the power of the court.

As this definition illustrates, judicial independence implies that judges adjudicate the cases before them without any intimidation, control or influence from the executive branch of government. Freedom from executive influence is also central to transnational standards such as the International Bar Association Code of Minimum Standards of Judicial Independence. Article A.2 of the Code states The judiciary as a whole should enjoy autonomy and collective independence vis-a-vis the Executive. Article A.5 reiterates this point stating The Executive shall not have control over judicial functions. Accordingly, individual judges should enjoy personal independence and substantive independence [A.1(a)] in that the terms and conditions of judicial service are adequately secured, to ensure judges are not subject to executive control and that ...in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.⁵⁴

⁵² Becker, *Comparative Judicial Politics: The Political Functionings of Courts*, p26.

⁵³ Jan Michiel Otto, "Toward an Analytical Framework: Real Legal Certainty and Its Explanatory Factors," in *Implementation of Law in the People's Republic of China*, ed. Jianfu Chen, Jan Michiel Otto, and Yuwen Li (Den Haag: Kluwer Law International, 2002), p25.

⁵⁴ see "International Bar Association Code of Minimum Standards of Judicial Independence," in *Judicial Independence: The Contemporary Debate*, ed. Shimon Shetreet and Jules Deschenes (Dordrecht: Martinus Nijhoff Publishers, 1985).

A related concept is that of judicial impartiality, which requires that the judge not have any bias, personal interest or stake in the dispute before her. Article G.45 of the IBA Code addresses this issue, stating,

A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.

Similarly, article G.46 states,

A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

Where judicial impartiality or independence is lacking then the litigation process will not provide access to justice in any meaningful sense of the word, as the decision may be the result of either external influence or personal interest rather than an independent exercise of judgment.

1.2.4.6 Political Character of the Judiciary

The basic concept of judicial independence as explained above should not be confused with the traditional, juristic conception of judicial decision-making as a purely value-neutral and deductive process by which general legal principles are applied to specific factual situations. This latter notion has come under considerable and legitimate academic criticism from a number of quarters. For instance, the influential Australian academic Professor Julius Stone was an early critic of traditional juridical explanations of legal reasoning. His analysis of precedent and judicial decision-making argued that legal doctrine and logic did not in themselves compel particular decisions in appellate cases, but rather provided so-called illusory categories of reference, which justified decisions ultimately based on a policy choice.⁵⁵ Other critics of traditional, objective notions of judicial decision making have argued that it is the personal attitudes and values of judges, not legal principles, that are a primary, or at least significant, factor influencing judicial decision-making. Critics such as Griffiths have thus sought to debunk the traditional view that depicts the judge as a kind of political, economic and social eunuch, [with] ... no interest in the world outside his court.⁵⁶ Griffiths's analysis of the English appeal courts highlighted how English judges were guided by a particular, homogenous view of the public interest rooted in their professional training and socio-economic background.⁵⁷ In America, judicial behaviouralists, such as Schubert, endeavoured to quantitatively analyse the

⁵⁵ see Julius Stone, *Precedent and Law: Dynamics of Common Law Growth* (Butterworths, 1985).

⁵⁶ J A G Griffith, *The Politics of the Judiciary* (Fontana, 1985), p193.

correlation between empirically ascertainable elements of a judge's background, including age, sex, race, social-economic class, attitudes and values, with actual pattern of judicial decision-making.⁵⁸ Other critics, however, have criticised the psychologising of judicial behaviouralism as both oversimplistic and unconvincing, in part due to the looseness of the concept of attitude, which theorists have sought to correlate with judicial behaviour.⁵⁹

Nonetheless, behaviouralism, like legal realism before it, has at least succeeded in questioning traditional notions of judicial neutrality and re-contextualising understandings of the judicial process within its political and social context. In this vein, Griffith challenged the notion of the judiciary as a check and balance on government power, instead arguing that judicial opposition to the government (in Britain) was an aberration and that the judiciary was synonymous with established authority and was thus necessarily conservative and illiberal.⁶⁰ Other theorists have also recognised the important role of the judiciary in preserving the status quo. For instance, in Shapiro's comparative, functionalist analysis of courts he argues that courts, in addition to their dispute processing function, serve as a social controller and an extension of the administration and in doing so play an important part in the maintenance of political regimes.⁶¹

Nonetheless, oversimplified, elitist accounts of judicial power do not serve to explain examples of liberal judicial activism, including judicial review of state decisions and the promotion of minority rights. According to Cotterrell, such contrasting judicial functions reflect the contrasting values of order and justice, both of which are the foundation of law's legitimacy.⁶² Whilst the judiciary helps maintain the stability of the social and political order by providing legal frameworks and legal legitimacy for government and government acts, it also strives to preserve the integrity of the legal order itself. This is achieved by both upholding professional standards of doctrinal rationalisation, judicial impartiality and also meeting the wider demands of justice, part of which relates to the effective administration of the dispute resolution

⁵⁷ Ibid., p198.

⁵⁸ see for instance, Glendon Schubert, *Human Jurisprudence: Public Law as Political Science* (Honolulu: The University Press of Hawaii, 1975).

⁵⁹ Cotterrell, *The Sociology of Law: An Introduction*, p219.; Roman Tomasic, *The Sociology of Law* (London: Sage Publications, 1985), p81.

⁶⁰ Griffith, *The Politics of the Judiciary*, p223.

⁶¹ C Neal Tate, "Judicial Institutions in Cross-National Perspective: Toward Integrating Courts into the Comparative Study of Politics," in *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis*, ed. John R. Schmidhauser, *Advances in Political Science* (Butterworths, 1987), p24.

function of courts.⁶³ Clearly how the demands of order and justice will be interpreted will vary widely amongst individual judges, let alone amongst the varying social-legal contexts of different jurisdictions.

What these various theoretical perspectives do illustrate is the considerable discretion exercised by any judge who applies or interprets a legal framework. The bare fact that an exercise of judicial judgment is free from executive interference or personal interest (as judicial independence would require) does not inform us as to what other, legitimate, forms of influence have bearing upon the judicial judgment. Judicial discretion may be influenced by a range of factors highlighted in the literature, ranging from personally held values or notions of the public interest, to wider, indirect pressures of an institutional, social or political nature. As the influential social-legal scholar Donald Black observed, legal doctrine alone cannot adequately predict or explain how cases are handled.⁶⁴ Judicial decision-making can thus not be solely comprehended as the logical extrapolation of legal principles, but must be understood and analysed within the broader social-legal context within which it occurs.

Thus, although legal rhetoric depicts litigation as a purely objective process determined by the letter of the law itself, in reality the subjective interpretation of the judge plays a large role. As discussed above, the values and political views of judges have been recognised as an important influence on the manner in which they interpret and apply legislation.⁶⁵ In this respect, a more rigorous approach to environmental law enforcement is likely to be taken where judges value environmental sustainability as a matter of public interest comparable with economic growth or national security. Such an approach was taken by US courts in the 1970s, when ...activist judges interpreted provisions of the National Environmental Policy Act in order to require rigorous environmental assessment.⁶⁶ An activist judiciary, moreover, is prepared to go beyond the adjudication of individual, legal conflicts and address more far-reaching issues of social or political policy.⁶⁷ However, where judges regard environmentalism as merely a partisan cause, or where they are unwilling to stray into the realm of judicial law or policy making, then they may be more reluctant to adopt a rigorous approach to the interpretation of environmental law. In

⁶² Cotterrell, *The Sociology of Law: An Introduction*, p235.

⁶³ Ibid., p234.

⁶⁴ Donald Black, *Sociological Justice* (Oxford University Press, 1989), p6.

⁶⁵ Cotterrell, *The Sociology of Law: An Introduction*, p230-34.

⁶⁶ Robinson, "Public Interest Environmental Law- Commentary and Analysis," p313.

the United Kingdom, for instance, judges have for the most part shunned the activist mantle stressing the liberal, individualist view that judges should remain independent of supposedly partisan interests.⁶⁸

In this respect, Robinson has distinguished between communitarian and Diceyan, individualist attitudes to environmental public interest law.⁶⁹ A communitarian attitude sanctions environmental public interest actions, regarding them as a legitimate means of political participation and a check or balance to the authority of parliaments and bureaucrats. Such a view supports a more radical, political role for the judiciary. In contrast, a Diceyan, liberal attitude, such as that adopted by the judicial majority in the UK, sees the role of the court in a solely legalistic light – as an independent, neutral arbiter of disputes and means for impartial application of the law.⁷⁰ Such a view allows little scope for a judiciary seeking to respond in a creative legal fashion to society's values with regard to the environment.

The political character of a judiciary, and the extent to which it is prepared to be activist, is a function of a number of political and intellectual conditions. Activist judiciaries are more common in federal polities, such as the United States, Canada, Australia and India, where parliamentary and executive power is more diffused.⁷¹ The absence of a career judiciary has also been identified as a factor contributing to more activist judiciaries in common law countries such as the U.S. and Australia, although this has not been the case in England.⁷² Judicial independence is a necessary precondition for judicial activism, although in itself it will not necessitate an activist judiciary.⁷³ In the United Kingdom, for instance, appellate courts have displayed little tendency toward activism despite a long history of judicial independence. The available scope for judicial activism will also depend upon the predominant political and legal doctrines. Generally the scope for judicial law making in the common law tradition appears greater than in the civil law tradition.⁷⁴

⁶⁷ Kenneth Holland, *Judicial Activism in Comparative Perspective* (Macmillan, 1991), p1.

⁶⁸ Robinson, "Public Interest Environmental Law- Commentary and Analysis," p317.

⁶⁹ Ibid., p301.

⁷⁰ Ibid., p316-17.

⁷¹ Holland, *Judicial Activism in Comparative Perspective*, p7.

⁷² Ibid., p8.

⁷³ Ibid. .

⁷⁴ Ibid., p9.

1.2.4.7 Effective Implementation

Legal certainty and effective environmental litigation requires not only an independent and impartial application of law but also actual implementation of the eventual decision made by the court.⁷⁵ Without an effective process of implementation, legal certainty and the integrity of the judicial process are undermined. The efficacy of the implementation process depends, once again, on the integrity of the government officials charged with the task and the adequacy of the resources at their disposal.

1.2.4.8 Societal Context

According to the institution building model, applied by Otto to judicial institutions, the ability of an institution to perform certain tasks depends upon a number of factors namely a) institutional factors (such as internal structure, resources and leadership), b) linkages with the target group (access of disputants to court), and c) the wider social, economic and political context or environment.⁷⁶ In a separate study, Otto elaborated on the nature of contextual countervailing forces, which may undermine legal certainty, as encompassing cultural mores, political power structures, economic interests and the capacity of state institutions.⁷⁷ Ideally, cultural mores or values should support both compliance with state laws and an awareness of legal rights and a willingness to enforce them. From a political perspective the rule of law should not only be embraced ideologically but be reflected in the structural separation of legislative, executive and judicial functions in government. The economic interests of key groups in society should also support legal certainty and a functioning legal system. Finally, key institutions within the legal system should have sufficient resources and linkages to their target group and wider environment so as to function effectively.⁷⁸

Jayasuriya has also argued that our understanding of the rule of law and legal institutions needs to be grounded in the specific political-economic context within which it is located.⁷⁹ In East Asia, Jayasuriya argues, law and legal institutions have been utilised to consolidate state

⁷⁵ Otto, "Toward an Analytical Framework: Real Legal Certainty and Its Explanatory Factors," p25.

⁷⁶ Otto, "Conflicts between Citizens and State in Indonesia: The Development of Administrative Jurisdiction," p10.

⁷⁷ Otto, "Toward an Analytical Framework: Real Legal Certainty and Its Explanatory Factors," p29.

⁷⁸ Ibid., p29-33.

⁷⁹ see Kanishka Jayasuriya, "Corporatism and Judicial Independence within Statist Legal Institutions in East Asia," in *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions*, ed. Kanishka Jayasuriya (Routledge, 1999).

power rather than limit it, in contrast to the historical development of law and judicial power in western liberal democracies, where it became a check or balance to legislative and executive power.⁸⁰ In this sense, East Asian countries have experienced rule by law, rather than rule of law. Jayasuriya describes the relationship between judicial and executive arms of government as corporatist, based upon close consultation and collaboration and exercised within a broader ideological concept of an integral state. This is in contrast with the relationship between judiciary and executive in western liberal democracies, which is based on a very different liberal conception of the state and the separation of powers doctrine. In each case, the development and role of legal institutions have been influenced by very different political and economic contexts. In East Asia, Jayasuriya argues, the presence of a regulated economy, strong state structures and a managed civil society has tended to engender legal institutions which reflect and seek to implement state objectives. On this basis he argues that western notions of rule of law have only limited application or relevance in the East Asian context.

In this respect, Jayasuriya's argument is similar to earlier arguments by social-legal scholars such as Trubek and Galanter, who questioned the ethnocentric and naive application of the liberal rule of law model, which they labelled liberal legalism, to the developing world.⁸¹ Whilst the arguments of Trubek and Galanter helped stymie the growth of law and development studies in the western world, the practical work of legal institution building continued apace in the developing world notwithstanding such eclectic critique.⁸² In support of such efforts, Tamanaha has persuasively argued the case for a more constructive approach to legal institution building in developing countries. As Tamanaha points out, the gap between the liberal legal model and the reality in Third World countries was well-known and acknowledged even by those who espoused its application.⁸³ The mere fact that such a gap exists, or that there are difficulties in application, is not a reason to reject the liberal legal model as irrelevant. On the contrary, liberal-legal principles such as the rule of law may be particularly relevant in developing countries as a check on the untrammelled power of authoritarian governments. On this account

⁸⁰ Although authors such as Griffiths or Shapiro would tend to suggest that even in western liberal democracies has been strongly oriented toward the consolidation and strengthening of state power and the maintenance of social control.

⁸¹ Brian Z. Tamanaha, "The Lessons of Law and Development Studies," *The American Journal of Internata* 89 (1995): p473.

⁸² Ibid.: p474.

⁸³ Ibid.

alone, argues Tamanaha, law-and-development theorists ...should be striving to devise ways in which the rule-of-law model can be adapted to local circumstances and nurtured into maturity, rather than expending the bulk of their efforts in tearing this model down.⁸⁴ To this end, Tamanaha contends that the ...basic elements [of the rule of law] are compatible with many socio-cultural arrangements and, notwithstanding the potential conflicts, they have much to offer to developing countries.⁸⁵

For our purposes the common ground of the different theoretical approaches discussed above is that an understanding of the wider social, political and economic context is vital in our comprehension of the processes of environmental litigation and the institutions upon which it depends. The effectiveness of environmental litigation will depend to some extent upon the wider social-legal context, including the relationship between the executive and the judiciary and the extent to which the rule of law has been established. Our discussion of environmental litigation in subsequent chapters will accordingly examine, in the constructive manner proposed by Tamanaha, the influence of these wider societal conditions upon the process, outcome and effectiveness of environmental litigation.

1.3 Environmental Mediation

1.3.1 *Definition of Mediation*

Mediation may be defined as a form of dispute resolution in which negotiations between the disputing parties are facilitated by a third party (the mediator) who assists the parties in resolving their differences.⁸⁶ Mediation processes, whilst in practice varying widely according to context and circumstance, usually share a number of features:

- *Third Party Facilitation* – As already stated above, mediation is facilitated by a third party mediator, distinguishing it from negotiation where the disputing parties negotiate directly with each other. In most cases the mediator is chosen by the parties, however, this may not always be the case.
- *Voluntary* – The choice to commence mediation, continue and eventually conclude an agreement is usually a voluntary one made by the parties to the dispute. However, in

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Boule, *Mediation: Principles, Process, Practice*, p7.

certain circumstances legislation or court regulation may require disputing parties to at least attempt mediation prior to, for instance, the furtherance of a legal suit.

- *Neutrality of Mediator* - The third party mediator is ideally neutral, although the extent to which this is the case may vary in practice. Mediation may thus be distinguished from conciliation, which involves the intervention of a third party acting as a representative of one of the parties, rather than a neutral facilitator.
- *Consensual Decision-making* - The outcome in mediation is determined consensually by the parties and is not imposed by the mediator. Mediation thus differs from arbitration or litigation where a decision is imposed upon the disputing parties by an authorised third party.
- *Post-Dispute* – Mediation usually commences at point of impasse when discussions between parties degenerate into conflict and neither party can unilaterally achieve their objectives. In this respect mediation may be distinguished from conflict anticipation, joint problem-solving and policy dialogue, which involve consensus based deliberations facilitated by a third party, yet are aimed at conflict prevention rather than resolution and hence commenced at an earlier stage.
- *Informal* – Mediation is usually characterised by less formal or rigid rules and procedures, especially when compared to litigation.
- *Private/Confidential* - Mediation is essentially a private process of dispute resolution in that settlement is determined in accordance with each parties private or personal interests rather than in reference to a public legal or societal standard. In most cases, mediation is also conducted in private between disputing parties and the content of negotiation is the subject of confidentiality.

Besides these most common features of mediation processes, there are many other factors that will vary considerably from one mediation process to another including the nature, type and extent of the mediator's interventions, the manner in which negotiations are structured and the legal status of any negotiated settlement.⁸⁷

⁸⁷ For a more detailed discussion of different models and approaches to mediation see Carrie Menkel-Meadow, "The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms, and Practices," *Negotiation Journal* July (1995).

1.3.2 *Comparison of Mediation and Litigation as Approaches to Dispute Resolution*

Mediation, as defined above, is thus a process in which disputing parties negotiate with the assistance of a third party mediator in an attempt to resolve their differences and create a mutually acceptable settlement. In most cases, the objective of mediation is the resolution of the dispute, signified by both parties subjectively accepting the dispute has ended.⁸⁸ From our discussion above, it is evident that litigation and mediation approach the task of dispute resolution in quite a distinct manner. As we have seen, dispute resolution is achieved in litigation through a court's authoritative determination of the rights, remedies and relationship of disputing parties, by reference to legal norms. In mediation, however, resolution is a consensual process of facilitated negotiation, which is based on the interests of the disputing parties, rather than legal or societal norms. In litigation, decision making control is held by a third party authority, some parties may be coerced by law to participate and the parties exercise little control over the outcome. By contrast, mediation is a voluntary and consensual dispute resolution process, over which the parties have much greater control.⁸⁹ Furthermore, the adversarial character of litigation usually necessitates an outcome of a binary nature, that is a party will either win or lose. In contrast, mediation endeavours to accommodate and reconcile the interests of both parties, thus obtaining (in theory at least) a win-win outcome.⁹⁰

There is extensive references in the literature on mediation and ADR to the purported advantages of those approaches to dispute resolution when compared to traditional or court-based dispute resolution through litigation. Whilst we will not undertake an exhaustive review of this debate, we will at least review the main criticisms of litigation as a process of dispute resolution and the advantages, which mediation supposedly offers as an alternative. The main faults of litigation as detailed by its critics include⁹¹:

- The high cost of legal representation

⁸⁸ Brown and Marriott, *ADR Principles and Practice*, p130.

⁸⁹ For a more detailed discussion of the differences between mediation and litigation see Boule, *Mediation: Principles, Process, Practice*, p74-76.

⁹⁰ *Ibid.*, p87.

⁹¹ This summary is based on the discussion in Hilary Astor and Christine M Chinkin, *Dispute Resolution in Australia* (Butterworths, 1992), p30-58.;

- The frequently protracted nature of litigation, which is often subject to delays before a case is heard.
- The formality of the court process, which is usually beyond the comprehension of the layman.
- The adversarial character of litigation which tends to further damage, rather than restore human relationships.
- The tendency of litigation to focus on and turn on legal technicalities, rather than issues of substance to the parties.
- The lack of control that disputants have over the course and outcome of the litigation process.
- The inflexibility and restricted scope of legal claims and remedies.

Studies on access to justice proposed mediation (and other approaches to ADR) as one response to overcoming these and other problems identified in the litigation process and thus streamlining the adjudication of disputes in cases where the parties were willing to undertake mediation. Mediation and ADR was advocated by its proponents as a solution to many of the problems associated with litigation. Mediation has been claimed to be⁹²:

- More affordable and hence accessible to the average disputant.
- More time efficient when compared to the delays in the litigation process.
- Less confrontational and adversarial and thus tending to restore rather than destroying relationships between disputants.
- Directed and controlled by the disputants themselves.
- Focussed on issues of substance and import to the disputants rather than revolving around legal technicalities.
- Flexible in its process and outcome and responsive to the needs and wishes of the parties.
- Conducive to win-win outcomes where the outcome benefits both parties to the optimal degree.

Certainly some of the claimed advantages of mediation have been verified by experience and research, contributing to its widespread acceptance in many countries as an alternative to litigation and in many cases its institutionalisation as a court-connected adjunct to litigation.

⁹² This summary is based on Boule, *Mediation: Principles, Process, Practice*, p54-66. and Astor and Chinkin, *Dispute Resolution in Australia*, p30-58.

Yet a number of authors have questioned the basis for some of the more strident claims of mediation and ADR's superiority. O'Leary, for instance, notes that the frequent claims of environmental mediation's success in the literature, were not adequately supported by empirical evidence. Astor and Chinkin also emphasise the need to separate the rhetoric around ADR from the reality of its application and note that many of the more strident claims for ADR have been presented by those with a direct stake in its wider acceptance, often without sufficient empirical support.⁹³ Those authors also cite a number of studies, which demonstrate that ADR does not always prove to be more affordable, efficient or consensual in practice, and further question the basis upon which high success rates of ADR have been calculated.⁹⁴ Boule also refers to a number of studies where unsuccessful mediations had an increased cost in time and expense compared to similar cases that went to trial.⁹⁵

Criticism of litigation has also certainly not remained unanswered. In an early broadside against advocates of settlement, Fiss argued that litigation is better equipped than mediation to protect parties in a powerless position. Settlement, he contended, ...is also a function of the resources available to each party to finance the litigation, and these resources are frequently distributed unevenly. Where an imbalance of power influences the bargaining process then ...settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant.⁹⁶ Fiss' account of litigation, however, is somewhat idealised. As Galanter has demonstrated, the litigation process is also far from a level playing field, and frequent litigants (whom Galanter terms repeat players) are at a significant advantage over one-off litigants.⁹⁷ Nonetheless, litigation does offer procedural safeguards which mediation lacks, including principles of due process, rights of appeal and rules on the collection and evaluation of evidence.⁹⁸

⁹³ Astor and Chinkin, *Dispute Resolution in Australia*, p44.

⁹⁴ For instance, the authors cite one study of divorce mediation in which the parties with the highest costs were those who had tried mediation and failed - "Report to the Lord Chancellor on the Costs and Effectiveness of Conciliation in England and Wales," (University of Newcastle upon Tyne, 1989). cited in Astor and Chinkin, *Dispute Resolution in Australia*, p44 & 46.

⁹⁵ Boule, *Mediation: Principles, Process, Practice*, p63-64. Although he also cites numerous studies in support of mediation's claims to greater efficiency etc.

⁹⁶ O M Fiss, "Against Settlement," *Yale Law Journal* 93 (1984): p37.

⁹⁷ M Galanter, "Why the Haves Come out Ahead: Speculations on the Limits of Legal Change," *Law and Society*, no. Fall (1974).

⁹⁸ Astor and Chinkin, *Dispute Resolution in Australia*, p57.

The litigation-mediation(ADR) debate has also focussed on the broader philosophical and social-political differences between these two approaches to dispute resolution. One important point of distinction and contention in this respect is the public character of litigation and the private character of mediation. Dispute resolution through litigation is achieved by the application of public legal norms. The actual process of litigation is also usually open and may be viewed by members of the public. In contrast, dispute resolution through mediation is largely a private matter between the disputing parties, which attempts to reconcile their private, subjective interests. As such, the relationship of mediation and mediated agreements to law and the public domain may be ambiguous. In his influential article *Against Settlement*, Fiss criticised this aspect of mediation arguing that parties might settle while leaving justice undone. According to Fiss the purpose of adjudication should be understood in broader, more publicly defined terms. Adjudication was not simply about resolving individual conflicts, but rather concerned the interpretation and application of values embodied in laws and the Constitution and the effort to bring reality to accord with those values.⁹⁹

Menkel-Meadow has also elaborated on this point, describing mediation as going

...beyond the law, legislating, as it were, for the particular and not for the general population. Solutions to mediated problems may be beyond or outside the law (or located in interstices) when the parties choose remedies, solutions or outcomes that are not specifically identified in more general legal pronouncements.¹⁰⁰

The private, extra-legal nature of mediation has prompted criticism from some scholars who have argued that legal standards should serve to define justice and that matters of public significance should not be privatized through mediation processes.¹⁰¹ It has also been argued that the widespread practice of private settlement could make litigation less efficient by reducing the stock of available legal precedents.¹⁰² Certainly the private and subjective character of mediation is potentially problematic in the environmental context, where the public interest in environmental preservation is often at stake in what otherwise might be regarded as private

⁹⁹ Fiss, "Against Settlement," p1085.

¹⁰⁰ Carrie Menkel-Meadow, "Introduction," in *Mediation: Theory, Policy and Practice*, ed. Carrie Menkel-Meadow (Dartmouth: Ashgate, 2001), xiv.

¹⁰¹ Ibid., xv.; Boule, *Mediation: Principles, Process, Practice*, p73.

¹⁰² M Galanter and J Lande, "Private Courts and Public Authority," *Studies in Law Politics & Society* 12 (1992): p398. cited in Boule, *Mediation: Principles, Process, Practice*, p73.

interest disputes. Environmental mediation therefore aims, at least in theory, to create a holistic solution, in which environmental interests are accommodated along with the private interests of the disputants. Where there does not occur, conflict related to continuing environmental externalities is more likely to recur. From a state or legal perspective, accommodation of environmental interests would entail compliance with environmental legislation, so that mediated agreements would further rather than undermine legal certainty in the environmental field.

Whilst litigation, as rights based dispute resolution, and mediation, as interest based dispute resolution, are distinct approaches they are nonetheless closely related in many respects. Both mediation and litigation adopt the basic logic of the triad in conflict resolution, namely that whenever two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution.¹⁰³ Litigation and mediation thus share a common goal, that of dispute resolution, and a common means, the use of a triad structure to resolve conflict. It is in the actual role of the third party that litigation and mediation differ. In litigation, the role of the third party (the court) is that of the authoritative decision-maker, whose decision the disputants must abide. In mediation, the role of the third party (the mediator) is facilitative, assisting a consensual resolution between the parties themselves. Yet even this distinction is not absolute. Whilst courts are the least consensual and most coercive on the continuum of dispute resolution, in many cases judicial systems still retain strong elements of mediation, for example through the use of court annexed mediation.¹⁰⁴ Similarly, a mediator may play a highly directive role in the mediation process in a manner not dissimilar to some types of litigation.

In the framework of this thesis our comparison litigation and mediation is also based on a common subject matter, namely environmental disputes. The claimants in an environmental dispute share the same objective of environmental justice, whether they choose litigation or mediation as a means to this end. Both litigation and mediation as different approaches to environmental dispute resolution in practice share the following objectives:

¹⁰³ Shapiro, *Courts: A Comparative and Political Analysis*, p1.

¹⁰⁴ Ibid., p9.

- Compensation of personal loss related to environmental damage or pollution
- Restoration or rehabilitation of environmental damage or pollution
- Resolution of the dispute, whether through a rights based (litigation) or interest based (mediation) approach
- Adequate implementation of the judicial decision or mediated agreement

The precise emphasis of these goals may vary according to the private or public interest nature of the dispute. For example, a dispute between an environmental organisation, government agencies and a polluter may focus more on the issue of environmental restoration than compensation. Conversely, a dispute arising out of personal loss caused by environmental damage or pollution may be more focussed on the issue of compensation for that personal loss. As discussed above, private or public interest perspectives often overlap and either or both may be pursued through litigation or mediation.

1.3.3 Objectives of Environmental Mediation & Evaluative Criteria

As we have seen, the objectives of environmental mediation are distinct, but certainly comparable to those of environmental litigation. The objective application of public norms is not ostensibly a function of mediation, which instead seeks first and foremost a harmonious resolution of the disputing parties' interests. Nonetheless, environmental legal norms are likely to be of considerable relevance in defining the substantive objectives of environmental claimants in a mediation process, which in practice may be quite similar to objectives of environmental claimants in a litigation process. Accordingly, the following evaluative criteria may be elaborated.

1. To what extent have the disputing parties been able to arrive at a mutually beneficial resolution of the dispute?
2. Has this resolution adequately compensated personal loss relating to environmental damage or pollution?
3. Does the mediated agreement provide a holistic solution to the dispute, incorporating environmental interests?
4. Has the agreed resolution to the dispute been implemented and do the parties thus consider the dispute to have ended?

1.3.4 Conditions for Effective Environmental Mediation

A review of the literature indicates that a range of conditions may influence the outcome and ability of mediation to fulfill the objectives discussed in the previous section. These conditions are examined in more detail below and are intended as a theoretical framework and starting point for the consideration and analysis of environmental mediation in Indonesia undertaken in subsequent chapters. Whilst it may not be possible to comprehensively stipulate the conditions sufficient for effective mediation, it is at least possible to identify a number of conditions that will make mediation more likely to succeed.¹⁰⁵ The following section discusses some of these conditions, drawing upon the growing body of literature relating to mediation and the practice of environmental mediation in particular.¹⁰⁶

1.3.4.1 Skilled and Impartial Mediator

In most cases the selection and appointment of a mediator is a matter determined by the parties to a dispute.¹⁰⁷ A mediator should firstly possess the appropriate skills, experience and/or qualifications to undertake this task and maintain the confidence of the disputing parties.¹⁰⁸ The majority of commentators also recommend that the mediator be accepted by all parties as an impartial and neutral figure and not possess any personal stake in the dispute. Personal bias on the part of the mediator is likely to undermine the commitment of one or other disputing party to the dispute resolution process, which is voluntary in nature. There will be little incentive for a disputant to voluntarily remain in a mediation process in which the mediator is biased against their interests. Impartiality is thus essential and is described in Boulle's leading text on mediation

¹⁰⁵ Boulle, *Mediation: Principles, Process, Practice*, p77.

¹⁰⁶ The summary draws upon the Electic Theory of Environmental Mediation presented by J Walton Blackburn, "Environmental Mediation Theory and Practice: Challenges, Issues, and Needed Research and Theory Development," in *Mediating Environmental Conflicts : Theory and Practice*, ed. J Walton Blackburn and Willa Marie Bruce (Quorum Books, 1995).and Laurence Boulle's leading text on mediation Boulle, *Mediation: Principles, Process, Practice*. in addition to other sources where noted.

¹⁰⁷ Exceptions to this include court assisted mediation where the mediator is appointed by the court.

¹⁰⁸ These qualifications may vary in practice and include prior experience in mediation, training in mediation skills and/or a history of experience in environmentally related matters. A moderate level of technical expertise in the subject of the dispute may be of assistance, although some commentators have thought it advisable that the mediator not have great technical expertise in the specific subject of the dispute as this may result in a technical over-emphasis at the expense of relationship building. Blackburn, "Environmental Mediation Theory and Practice: Challenges, Issues, and Needed Research and Theory Development," p276.

as ...a core requirement in mediation, in the sense that its absence would fundamentally undermine the nature of the process.¹⁰⁹

Nonetheless, impartiality does not necessarily imply complete independence from the disputing parties. As Boulle notes, impartiality, which is essential, may be distinguished from neutrality, which may be a question of degree. Mediation may be conducted effectively by a mediator who has some pre-existing relationship with the disputing parties or someone who is interested, as opposed to disinterested, in the outcome of the dispute.¹¹⁰ In Indonesia, for example, consensus based dispute resolution termed *musyawarah* was traditionally conducted by a respected village elder.¹¹¹ The social authority of such a mediator may allow she or he to more actively direct the parties toward resolution.¹¹² As long as the parties accept the position and authority of the mediator, and he or she is still perceived as sufficiently impartial, then mediation may still be effectively conducted in this manner. Where a related mediator is not acceptable to either party, then it is preferable if the mediator operates from an institutional base that is also independent from any of the parties. Finally, the mediator must also be prepared to maintain the confidentiality of all communications made pursuant to mediation, and have the confidence of the parties that this requirement will be carried out.

A comprehensive discussion of the specific skills and techniques employed by mediators is beyond the scope of this chapter. However, several of the more important basic tasks, which must be performed by a successful mediator, bear to be mentioned here. Given the complexity of environmental disputes, an initial task of the mediator is to clearly define the problem at hand and reach agreement between the parties on the specific issues that will be addressed in the mediation process. It may also be necessary for the parties to agree on the geographical boundaries and time horizons of the issues in dispute.¹¹³ Once the relevant issues have been identified, these may be broken down into smaller steps and addressed systematically. In this way, a mediator can help

¹⁰⁹ Boulle, *Mediation: Principles, Process, Practice*, p14.

¹¹⁰ Ibid.

¹¹¹ *Musyawarah* is discussed further in chapter 4.

¹¹² Of course if it is the mediator who ultimately makes the decision then the process is no longer one of mediation.

¹¹³ RESOLVE, "Environmental Mediation: An Effective Alternative?," (RESOLVE, Center for Environmental Conflict Resolution, 1978), p28.

clarify the problem situation and achieve an initial consensus between the parties as to the parameters of the dispute and the specific issues requiring resolution.¹¹⁴

Another general task of the mediator is to facilitate better communication between the disputing parties. Miscommunication or unfounded inferences about a disputing parties statements or claims can be a major contributing factor in the origin and escalation of a dispute.¹¹⁵ A mediator should endeavour to correct such misperceptions, enabling each party to comprehend more clearly what the other actually means, wants and feels. The mediator may also encourage parties to attack the problem, not the people, thus assisting disputants to shift from personal recrimination to finding mutually acceptable solutions to the specific issues at hand.

Misunderstandings may also arise over factual matters, especially in the context of environmental disputes where the subject matter of the dispute may be scientifically or technically complex. The mediator should thus also endeavour to ensure that all representatives have an adequate understanding of the facts relevant to the dispute.¹¹⁶ It may be useful for the participants to reach agreement over the facts and data relevant to the dispute, even if agreement cannot be reached over the consequences of those facts, although this will not be possible in all cases.¹¹⁷ To this extent, the mediator has an obligation to bring the best and most complete substantive environmental information into the discussions, thereby ensuring that all important issues will be confronted and any decision will reflect sound environmental data.¹¹⁸ To achieve this aim, it may be necessary to arrange information sharing by all participants and also for third party experts to participate in the mediation process.

1.3.4.2 Feasibility of Compromise

As noted above, mediation is a voluntary and consensual process and so dispute settlement in mediation inevitably involves a ...search for compromise.¹¹⁹ A mediator aims to facilitate the process of compromise by encouraging the parties to distinguish between their respective

¹¹⁴ Boulle, *Mediation: Principles, Process, Practice*, p9.

¹¹⁵ Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, Second Edition ed., *The Jossey-Bass Conflict Resolution Series* (San Francisco: Jossey-Bass Publishers, 1996), p62.

¹¹⁶ Blackburn, "Environmental Mediation Theory and Practice: Challenges, Issues, and Needed Research and Theory Development," p277.

¹¹⁷ Ibid.

¹¹⁸ RESOLVE, "Environmental Mediation: An Effective Alternative?," p28.

positions and interests, thus facilitating compromise. A position may be defined as a specific outcome or action, which a party perceives as meeting its immediate needs.¹²⁰ It is typically concrete in nature and as a result, minimally negotiable. In contrast, a party's interest refers to their desires, fears, values and concerns that they hope to advance. An interest is a broad concept rather than a specific action or outcome, which fosters discussion and enables compromise as it may be satisfied by a range of potential outcomes. By assisting the parties to distinguish between their positions and interests, a mediator may identify potential areas for compromise that were not apparent before.

Given that mediation is premised upon mutual compromise, one condition necessary for successful mediation is that some compromise is actually possible between the disputing parties. Consequently, one category of typically unmediable disputes is that where no common ground exists between the disputing parties. Such disputes, which may involve conflicts of fundamental values, have also been described as either-or disputes, a common example being the construction of a nuclear reactor. Disputes concerning broad matters of policy or cases where one or both parties sought to set an important legal precedent would also be less amenable to mediation¹²¹. The possibility of compromise may also be reduced where a history of contentious or intensely hostile relationships between the opposing parties exists.¹²² A dispute may thus only be considered mediable only where some common ground or common interest exists between the disputing parties, even though initially confrontational positioning may obscure this.¹²³ Initially intransigent parties may become willing to negotiate where a skilled mediator is able to highlight common interests, the mutual benefits of a win-win solution to both parties and the costs of not pursuing the mediation process. Compromise may also be more feasible in cases where there is more than a single issue in dispute, as multiple issues provide more scope for creative bargaining arrangements involving tradeoffs and linkages between issues.¹²⁴

The existence of appropriate measures to mitigate the adverse impact of a proposed development will also increase the potential for compromise. Such measures must satisfactorily

¹¹⁹ Ibid., p14.

¹²⁰ For a more detailed discussion of the distinction between positions and interests see Fisher and Ury, *Getting to Yes: Negotiating Agreement without Giving In*.

¹²¹ Boule, *Mediation: Principles, Process, Practice*, p80-81.

¹²² Blackburn, "Environmental Mediation Theory and Practice: Challenges, Issues, and Needed Research and Theory Development," p276.

¹²³ RESOLVE, "Environmental Mediation: An Effective Alternative?," p11.

meet the objections of opponents, and the appropriate party should be willing and fiscally able to undertake them.¹²⁵ Where satisfactory measures cannot be realistically undertaken to mitigate the adverse impact of a project then the likelihood of compromise is slim.

1.3.4.3 Absence of a Better Alternative To a Negotiated Agreement (BATNA)

The willingness of parties to reach compromise will also be more likely where a stalemate or impasse has been reached between the parties.¹²⁶ An impasse implies that neither party should have the ability to unilaterally achieve their objectives through alternative channels whether they be power based (political, repressive, demonstrations etc) or rights based (litigation). If a party believes that a Better Alternative to a Negotiated Agreement (BATNA) exists then they will possess little incentive to compromise. In this respect there should be, at the least, uncertainty about the possible outcome of pursuing resolution of the dispute through other judicial or administrative channels.¹²⁷ Where, moreover, parties stand to suffer adverse consequences if a stalemate or impasse continues, then the requisite motivation to undertake mediation will most likely be present. Of course, the possibility of adverse consequences is dependent to a large extent on the existence of a functional system of administrative and judicial environmental law enforcement. The threat or prospect of litigation often provides the most direct incentive to mediate, a phenomena termed bargaining in the shadow of the law. Where law enforcement is fickle, and the law casts little shadow, the more powerful disputant may not be compelled to undertake mediation.

1.3.4.4 Commitment to a Negotiated Settlement

Given the voluntary nature of the mediation process, the extent to which compromise is possible will ultimately depend upon the willingness of each party to compromise and their commitment to pursue the mediation process until an agreement is reached. As discussed above, the presence or absence of a better alternative to a negotiated settlement may influence this commitment. However, the perceived presence or absence of alternatives will not necessarily be

¹²⁴ Boule, *Mediation: Principles, Process, Practice*, p79.

¹²⁵ RESOLVE, "Environmental Mediation: An Effective Alternative?," p12-13.

¹²⁶ Blackburn, "Environmental Mediation Theory and Practice: Challenges, Issues, and Needed Research and Theory Development," p276.

¹²⁷ Ibid.

sufficient to ensure a personal commitment to a negotiated settlement, which ultimately must come from each party themselves.¹²⁸ Where either party lacks this commitment, a negotiated settlement is less likely and an adjudicative process of dispute resolution, such as litigation, may be a more appropriate choice.

1.3.4.5 Balance of Power between Disputing Parties

One of the criticisms of mediation discussed above (section 1.3.2) was that less powerful parties may be more vulnerable in the mediation process than they might be in litigation. Certainly, the issue of power disparities between disputants in mediation has generated much comment in the mediation literature. A number of mediators and writers on the subject have also emphasised the need for a perceived balance of power between the disputing parties, for mediation to be successful. As one practitioner put it in relation to environmental disputes, the public interest side must be able to offset the deep pocket of business or government.¹²⁹ Nonetheless, mediation has been used successfully in disputes where power disparities existed. Some mediators justify this by reference to mediation's voluntary character, pointing out that participation in and agreement reached through mediation is a matter of voluntary choice. Other authors have even argued that the mediation process may be particularly suited to addressing and redressing power disparities between disputants.¹³⁰

Power disparities are frequently a problem in environmental disputes, where economically and politically powerful government agencies or companies are sometimes at loggerheads with often under resourced environmental or citizen organisations. Whether or not an adequate balance of power can be achieved between disputing parties will depend upon a diversity of factors, including the strength of civil society, the influence of the media or the political influence held by industry lobby groups. If a party is in a position sufficiently powerful to achieve its aims unilaterally, then may lack motivation to undertake mediation in the first place.

The difficulty inherent in this requirement or precondition is its ambiguity and somewhat subjective nature. Clear criteria have not yet been identified which could be used to assess the so-

¹²⁸ Boule, *Mediation: Principles, Process, Practice*, p79.

¹²⁹ Bob Golten, "Confessions of an Environmental Litigator," *Environmental Consensus*, no. Spring (1980).

¹³⁰ A Davis and R Salem, "Dealing with Power Imbalances in the Mediation of Interpersonal Disputes," *MQ* 6 (1984). cited in Boule, *Mediation: Principles, Process, Practice*, p72.

called balance of power and indeed such criteria would be difficult to formulate due to the diversity of variables affecting a parties power in relation to others. Although ambiguous, it is nonetheless a consideration borne in mind by many environmental mediators. Moreover, whilst mediation is not precluded by an imbalance of power, the eventual outcome may be less equitable, tending to favour the more powerful party. A mediator may therefore seek to ensure that parties participating in mediation at least maintain parity in their access to information, resources and representation.

1.3.4.6 Continuing Relationship between the Parties

As discussed above, the conciliatory style, in Black's styles of social control, is most suited to situations where the social distance between parties is close. Research has also indicated that mediation may be a suitable choice where the parties in dispute have a continuing relationship.¹³¹ The continuing relationship may be a matter of necessity, as in the case of parents in a matrimonial dispute or neighbours, or a matter of choice, as in the case of commercial entities that wish to maintain future relations. A continuing relationship is not only an incentive to seek a harmonious resolution to the conflict, but enables parties to integrate future interests into the bargaining process.

1.3.4.7 Inclusion of All Stakeholders

Environmental disputes are usually characterised by a diversity of stakeholders, which may include industry, local resident groups, regional or national environmental organisations and government agencies at the national, regional or local level. A generally accepted principle in the literature on environmental mediation is that all stakeholders in a dispute should be included in the mediation process. A stakeholder is defined generally as a person or institution with a direct interest in the outcome of the resolution process. The term stakeholders usually includes government agencies with jurisdiction over the subject of the dispute, any party that would be affected by the decision, and any party that has the capacity to intervene in the decision-making process, or block implementation of an agreement.¹³² All such parties should ideally be included in the mediation process as the failure to do so may subsequently compromise the implementation of an agreement. Besides the practical reasons for comprehensive stakeholder inclusion, several

¹³¹ Laurence Boulle, *Mediation: Principles, Process, Practice* (Butterworths, 2001), p93.

¹³² Steven Shrybman, "Environmental Mediation: From Theory to Practice," (The Canadian Environmental Law Association), p32.

commentators have additionally argued that it is ethically incumbent upon the mediator to ensure, or at least encourage, sufficient representation of all affected interests. Of particular concern in environmental disputes are interests of an environmental nature, which may not have sufficient representation for a variety of reasons.

A successful mediation process should not only ensure adequate participation of all interested parties but also adequate representation. Each party involved in the mediation process should have a clearly identified constituency, which they are representing. Other commentators have emphasised the need for representatives to have sufficient understanding and competency in the concept of representative bargaining in order to ensure that their constituencies stay properly informed through the process and the authority of the representative remains effective.¹³³ This is an important consideration as where representation is not properly negotiated, an alienated constituency may subsequently undermine an agreement concluded by a representative. Representatives should also possess full decision making authority on the issues at hand, so that the process of negotiation will not be unduly obstructed or delayed. For such authority to be effective constituencies must remain informed and representation remain current.

1.3.4.8 Effective Mechanisms for Implementation of Agreement

The outcome of an effective mediation process should be a comprehensive written agreement acceptable to both parties, that encompasses all disputed issues. Satisfactory implementation of this agreement is essential to the success of the mediation process as a whole. Consequently, the issue of implementation should be addressed early on in the mediation process and mediation should only be attempted where implementation will be possible. Where a government agency or other third party will be responsible for monitoring or implementation of an agreement, such party should ideally participate in the mediation process as a stakeholder. The solutions specified in the agreement and the means by which they will be implemented, should be politically, technically and financially feasible.¹³⁴ The agreement itself should clearly establish legal mechanisms to bind the parties to its terms and provide sufficient detail as to what steps will be undertaken to implement the agreement, by whom and when. There are various legal mechanisms to achieve enforceability. These include formalising the agreement as a binding contract enforceable through the courts, adoption of the agreement as a decision by a government

¹³³ RESOLVE, "Environmental Mediation: An Effective Alternative?," p18.

¹³⁴ Ibid., p17-18.

agency enforceable through administrative sanction, ratification of the agreement by judicial order or enactment of an agreement by government regulation/legislation thus providing the agreement with the force of law.¹³⁵ Finally, provision in the agreement should be made to deal with further disagreement between the parties over the matter of implementation. Such disagreement may be referred to further mediation, arbitration or an administrative/legal forum depending on the legal enforcement mechanisms employed in the agreement.

1.3.4.9 Supportive Social-Political Context

Like litigation, the effectiveness of mediation as an approach to dispute resolution will be influenced by and contingent upon the wider societal context including the nature of prevailing cultural mores, the distribution of political power, economic interests and the capacity of key institutions.¹³⁶ The wider social-political context may influence several of the conditions discussed above. For instance, the balance of power between disputing parties will be directly affected by social-political context. The social, political and economic resources of each disputant will be determined by this context as will the role played by other influential actors, such as state agencies. Where, for instance, protests against polluting activities are regularly repressed by the state, or where civil society is weak and disorganised it may be difficult to achieve an equitable balance of power. Similarly, the presence or absence of a better alternative to a negotiated agreement (BATNA) may be largely determined by the wider social-political context. For instance, the potential sanction of judicial or administrative enforcement of environmental law will only exist where the administrative apparatus to support such enforcement is functioning effectively. Thus our analysis of environmental mediation in subsequent chapters must be cognizant of the impact of this wider social-political context on the process and outcome of mediation.

1.4 Environmental Dispute Resolution in Indonesia: An Overview

1.4.1 Legal Framework

In Indonesia environmental dispute is defined by article 1(19) of the Indonesian Environmental Management Act 1997 (EMA 1997) as ...a disagreement between two or more

¹³⁵ Blackburn, "Environmental Mediation Theory and Practice: Challenges, Issues, and Needed Research and Theory Development," p278.

¹³⁶ This process is comparable to the influence this range of factors has upon the implementation of law - Otto, "Toward an Analytical Framework: Real Legal Certainty and Its Explanatory Factors," p29-33.

parties which arises as a result of the existence or suspected existence of environmental pollution and/or damage . As with the definitions drawn from the literature and discussed above, a dispute must be characterised by a tangible disagreement between identifiable parties, which usually means that the stages of naming, blaming and claiming will have been passed through.¹³⁷ Thus an environmental problem, such as deforestation or water pollution, which one party might identify, highlight or discuss, is not in itself a dispute. An environmental problem becomes a dispute when distinct parties make incompatible claims over it, concerning for instance, responsibility for and remedying of the problem.

Absent from the EMA 1997 definition and also from the scope of this research are environmentally related disputes, which may concern an aspect of the natural environment, but do not specifically concern environmental pollution or damage – for example, land tenure disputes. There are also certain limited categories of disputes not covered by the EMA definition, which I have included within the scope of my analysis. The EMA definition refers only to the existence or suspected existence of environmental pollution or damage and so seemingly excludes disagreements over prospective environmental pollution or damage which may involve attempts to prevent certain actions or policies expected to result in environmental damage or pollution from occurring. I have included such environmental disputes concerning prospective environmental damage, which appear rare in Indonesia in any case, within the scope of my analysis.

Chapter 7 of the EMA 1997 concerns Environmental Dispute Settlement (*Penyelesaian Sengketa Lingkungan Hidup*). Article 30(1) in the first Part of that Chapter makes a distinction between court based and non-court based dispute settlement stating,

Environmental dispute settlement can be reached through the court or out of court based on the voluntary choice of the parties in dispute.

The two formal, legally prescribed channels of environmental dispute resolution are thus litigation (through the court) and mediation (out of court).¹³⁸ Pursuant to article 30(2) these two choices do not apply to disputants whose actions would attract criminal liability, which is separately regulated in Chapter 9 of the Act. The second Part of Chapter 7 of the Act makes more

¹³⁷ cross ref.

detailed provision for environmental dispute settlement outside of the court. According to article 31 the object of this process is reaching agreement between the disputing parties concerning the form and size of compensation (for environmental damage or pollution) and/or the carrying out of certain actions to prevent further environmental damage or pollution. Article 32 clarifies that out of court settlement may involve the use of a third party, who may or may not have final decision-making authority to bind the disputing parties. Thus, a range of alternative dispute resolution techniques may be utilised as out-of-court dispute settlement for the purposes of the EMA 1997, including negotiation, mediation, conciliation or arbitration. Whatever the particular approach, the choice to pursue out-of-court dispute settlement itself is a voluntary one made by the parties [art. 30(1)]. However, where out-of-court settlement has been undertaken, then court based settlement (i.e. litigation) may only be commenced where one of the parties has declared the out-of-court settlement to have failed [art.30(3)]. The legal framework pertaining to environmental mediation, and its application, is examined in more detail in Chapter 5 of this thesis.

The third Part of Chapter 7 EMA 1997 stipulates a number of principles relevant to environmental litigation. Article 34 requires compensation for environmentally polluting or damaging actions contrary to law, which cause damage to other persons or the environment. Article 35 enacts the principle of strict or no-fault liability for industries that produce a significant impact on the environment, use hazardous materials or produce hazardous waste. Article 37 allows a community that has suffered environmental damage or pollution to bring a representative action to court or report such damage or pollution to administrative enforcement bodies. Pursuant to article 38 an environmental organisation may also bring a legal action on behalf of environmental interests, although the organisation must meet certain criteria, and the available remedies do not include compensation. The legal framework for environmental litigation, and its application, is examined in more detail in chapter 2 of this thesis.

1.4.2 Environmental Disputes by Sector

An exhaustive inventory of environmental disputes in Indonesia is certainly beyond the scope of this chapter, as is a comprehensive discussion of the political, economic and social antecedents of such disputes. Nonetheless, in this section we will pursue the more limited objective of outlining

¹³⁸ As noted below a range of approaches out-of-court settlement may be undertaken pursuant to art.30 including, besides mediation, negotiation, conciliation or arbitration. However, mediation is the most commonly adopted ADR approach and the main focus of the present research.

the nature, context and types of environmental disputes in several different industry sectors in Indonesia. The discussion is intended to further illustrate the private interest/public interest distinction introduced above and to contextualise the discussion of specific environmental disputes that follows in subsequent chapters.

1.4.2.1 Industry

After 1965, under President Suharto's leadership, Indonesia embarked on an intensive process of industrialisation. The subsequent expansion of manufacturing and the industrial sector contributed greatly to economic growth, with manufacturing's share of GDP tripling from 10% in 1967-73 to 29% in 1987-92.¹³⁹ Yet, the rapid expansion of industrial plants in Java and Sumatra also resulted in the dumping of (often untreated) industrial effluent into the waterways of Java, Sumatra and other islands. Whilst assessing the extent of industrial pollution in Indonesia is difficult given the paucity of data, what data there is indicates the problem to be extremely serious, particularly in the areas mentioned above where industry is concentrated.¹⁴⁰ The problem of industrial waste disposal has been compounded by a number of factors.¹⁴¹ Despite the enactment of environmental legislation and regulations for pollution control, poor law enforcement has allowed many industries to operate without a waste management unit contrary to their legal obligations. In several cases larger, more heavily polluting factories have been protected by their considerable economic and political influence.¹⁴² Bribery of government officials overseeing factories is also common as is intimidation of regional officials seeking to enforce environmental regulations.¹⁴³ Even where an industry has installed a waste management unit, such units are frequently incomplete, not maintained adequately or simply not used due to

¹³⁹ Hal Hill, *The Indonesian Economy*, 2nd ed. (Cambridge University Press, 2000), p21.

¹⁴⁰ In a 1994 report by the Australian International Development Assistance Bureau (AIDAB) testing carried out in all four provinces in Java showed the level of pollutants in rivers to significantly exceed government standards. Lucas and Djati, *The Dog Is Dead So Throw It in the River: Environmental Politics and Water Pollution in Indonesia: An East Java Case Study*, p8.

¹⁴¹ see also useful discussion of river pollution in Indonesia in Lucas, "River Pollution and Political Action in Indonesia."

¹⁴² For example, PT Barito Pacific, one of the more infamous environmental vandals in Indonesia due to its illegal logging and discharge of large volumes of untreated waste from wood processing factories is owned by Projo Pangestu, a business partner of two of President Suharto's children during the New Order period. see SKEPHI, *Delapan Perusahaan Perusak Lingkungan* (SKEPHI, 1994). and Lucas, "River Pollution and Political Action in Indonesia," p184, 97.

¹⁴³ Lucas and Djati, *The Dog Is Dead So Throw It in the River: Environmental Politics and Water Pollution in Indonesia: An East Java Case Study*, p16-17.

high operating costs.¹⁴⁴ As a result, discharged industrial waste is frequently in excess of stipulated regulatory limits and thus a grave danger to the environment and human inhabitants. In islands such as Java and Sumatra, a combination of high population density and poor spatial planning has also contributed to the location of most factories in close proximity to both agricultural and residential areas. The same rivers used for agricultural and human use are utilised by factories as waste dumping grounds, with both pollution and serious conflict the inevitable result. It is not surprising, therefore, that industry related environmental disputes are among the most common type of environmental dispute¹⁴⁵ and account for almost half of the total number of civil environmental court cases to date.¹⁴⁶

In the case of industry, the most common category of dispute are private interest disputes involving local communities afflicted by pollution from nearby factories. A significant number of the environmental court cases discussed in Chapter 2, where local communities had initiated legal suits for compensation and environmental restoration, fall within this category. For instance, in the *PT Pupuk Iskandar Muda* case a poisonous gas leak from a factory in North Sumatra caused symptoms ranging from unconsciousness to nausea in over 600 nearby residents.¹⁴⁷ In the *PT Sarana Surya Sakti* case, zinc and chromium waste from a tyre factory polluted residents' wells in a village in East Java.¹⁴⁸ Similarly, in the *Sari Morawa* case, effluent from PT Sari Morawa, a pulp and paper mill in Kalimantan had allegedly polluted the Belumai River upon which the 260 plaintiffs in that case depended for their daily needs and agriculture.¹⁴⁹ The two disputes that form the basis of the litigation case studies examined in Chapter 3 also fall within the category of private interest, industry related environmental disputes. In the *Banger River* case, industrial effluent from three textile factories in Pekalongan, Central Java polluted river and ground water used by the village community of Dekoro.¹⁵⁰ In the *Babon River* case, the dispute arose due to pollution from industrial effluent from a group of six factories. The factories' effluent had been disposed, untreated, into the Babon River the waters of which were also used to flush the ponds of a small group of prawn farmers. The high level of pollutants in the

¹⁴⁴ Lucas, "River Pollution and Political Action in Indonesia," p187.

¹⁴⁵ SKEPHI, *Delapan Perusahaan Perusak Lingkungan*.

¹⁴⁶ See Table of Cases, Appendix I, p310

¹⁴⁷ see page 66

¹⁴⁸ see page 81

¹⁴⁹ see page 85

¹⁵⁰ see page 134

water caused a significant decline in the farmer s prawn catch to the point of threatening their livelihood.¹⁵¹

Private interest, industry related disputes also account for the majority of environmental mediation cases considered in Chapters 4 and 5. In these cases, communities that have suffered the effects of industrial pollution sought recourse through a mediation process. In the 1991 *Tapak River* dispute, for instance, the disposal of untreated effluent by a number of factories into the Tapak River in Central Java had caused severe and ongoing pollution. The pollution caused considerable damage to local residents health, agricultural yields and the surrounding environment.¹⁵² Similarly, in the more recent (2000) *Kanasritex* dispute the disposal of industrial effluent by a textile factory near Semarang caused pollution of surrounding fields and the consequent failure of rice harvests.¹⁵³ The same recurrent and increasingly common pattern of industry related water pollution and resultant conflict between factory owners and local residents is also found in the *Sambong River*, *Siak River*, *Sibalec*, *Ciujung River* and *Naga Mas* disputes discussed further in Chapter 4. The two environmental mediation case studies examined in Chapter 5 are further examples of predominantly private interest, industry related environmental disputes. In the *Palur Raya* case study, the Ngringo community situated in Solo (Central Java) was severely afflicted by ground, water and air pollution from a local MSG factory, PT Palur Raya. With the assistance of local NGOs, the community commenced a mediation process in an attempt to obtain compensation and improvement in the factory s environmental performance. In the second case study of environmental mediation, the *Kayu Lapis Indonesia* case, land owned by a traditional prawn farming community in Mangunharjo (Central Java) was flooded due to development work carried out by the Kayu Lapis Indonesia wood-processing factory. In conjunction with several NGOs and related government agencies, the afflicted community commenced a structured mediation process aimed at resolving issues of compensation and environmental restoration.

Pollution from industrial sources has also been the background to several public interest environmental cases. One of the earliest environmental cases in Indonesia, the *PT Into Indorayon Utama* case, was brought by WALHI, a national environmental organisation. The case concerned the Indorayon pulp and paper factory in North Sumatra, whose operation had caused severe

¹⁵¹ see page 152

¹⁵² see page 178

¹⁵³ see page 201

environmental damage in the surrounding area. WALHI sought to represent the public environmental interest and contended that issuance of operating permits to PT IIU was contrary to environmental law. The principle of standing for environmental organisations was ultimately accepted by the court, paving the way for other environmental public interest suits such as the *Surabaya River Case*. In that case WALHI brought an environmental action against three paper processing factories accused of polluting the Surabaya River, the main source of drinking water for the 2 million residents of Java's second largest city, Surabaya.¹⁵⁴

1.4.2.2 Forestry

Exploitation of Indonesia's rainforests, approximately 10% of the world's remaining rainforest, intensified in the late 1960s as the New Order government endeavoured to service the increasing foreign debt and reduce spiralling inflation.¹⁵⁵ Since that time commercial logging of rainforests, and the consequent deforestation, has continued to increase. By the late 1980s Indonesia was estimated to be losing approximately nine hundred thousand hectares of forest every year.¹⁵⁶ Large forest concessions were rewarded to favoured military and business cronies of the Suharto family, the operation of which was often financed by foreign multinationals who benefited from investor friendly laws granting extensive tax breaks.¹⁵⁷ Foreign earnings from timber rose 2800% from 1969 to 1974, allowing the national government to fund five-year development programs through foreign revenue from unprocessed log exports.¹⁵⁸

The economic and political crisis that marked the end of the New Order does not seem to have slowed the rate of deforestation. On the contrary, any remaining forest was seen by regional governments and illegal loggers alike as a valuable source of revenue in a time of economic crisis. As the remaining areas of timber have become scarcer, the level of illegal logging has increased dramatically, to the point where it is now estimated to outstrip the output of logging from legal concessions.¹⁵⁹ Due at least in part to the diminishing area available for forest

¹⁵⁴ see page p100

¹⁵⁵ Dauvergne, "The Politics of Deforestation in Indonesia," p513.

¹⁵⁶ Ibid.: p497.

¹⁵⁷ Mark Poffenberger, "Rethinking Indonesian Forest Policy: Beyond the Timber Barons," *Asian Survey* XXXVII, no. No. 5, May (1997): p455.

¹⁵⁸ Dauvergne, "The Politics of Deforestation in Indonesia," p513.

¹⁵⁹ According to a recent statement by WALHI Indonesia's annual timber consumption was around 100 million cubic meters a year, of which only 43 million cubic meters originated from legal sources. Thus the majority of the timber supply, some 57 million cubic meters, is the product of illegal logging. Bambang

concessions, illegal logging activities has spread even into national parks. Currently illegal logging is the prime contributing factor to Indonesia's annual deforestation rate of around 2-3 million hectares/year.¹⁶⁰ As both legal and illegal logging continue apace, most commentators now predict the extinction of Indonesia's primary forests to occur within the next 5-10 years.¹⁶¹

Rapid deforestation in Indonesia has resulted in a devastating loss of biodiversity and serious land degradation leading to increased soil erosion and flooding.¹⁶² Widespread logging has also contributed to higher temperatures, drought and the outbreak of uncontrollable forest fires in 1997 and 1998. The devastating fires consumed more than 5 million hectares of forestland, contributed to the deaths of more than a thousand people and carried an economic toll to Indonesia estimated at over US \$9 billion.¹⁶³ International environmental groups described the fires, which resulted in extraordinary amounts of carbon emissions, as a planetary disaster.

Intensive logging has also had serious social consequences for the indigenous communities who lived within the forests and whose livelihoods depended upon them. The mapping of forest concessions, usually ranging from 100,000 to several million hectares, were not based on any consideration of the use of forest tracts by indigenous communities for hunting, gathering or swidden agriculture.¹⁶⁴ In Kalimantan alone some 2.5 million indigenous Dayak peoples were displaced or resettled due to development activities such as logging and related resettlement projects.¹⁶⁵ Indigenous, forest dwelling communities such as these have had no legal recourse, given the lack of legal recognition afforded to *adat*, or traditional community rights over forests.

Given the environmental damage and social dislocation that has accompanied logging activities, it is not surprising that one of the most common types of forestry related disputes are

Nurbianto and Fitri Wulandari, "Kalimantan's Forests Could Disappear in 5 Years," *The Jakarta Post*, 10 December 2001.

¹⁶⁰ Edith Hartanto, "Indonesia Forests Dwindling Rapidly by the Year," *Jakarta Post*, 27 December 2001.

¹⁶¹ World Bank predictions estimate the disappearance of Kalimantan's forests within nine years, whilst Sumatra's lowland forests are predicted to last for only another four years.;Ibid. see also;Wulandari, "Kalimantan's Forests Could Disappear in 5 Years."

¹⁶² Over a decade ago the Indonesian government had classified 8.6 million hectares as critical land defined as ...unable to fulfil any of the normal soil functions, including water absorption or the production of even a meagre subsistence crop. A further 12 million hectares was classified at that time as suffering from serious erosion. Phillip Hurst, *Rainforest Politics: Ecological Destruction in South-East Asia* (London: Zed Books), p4.quoted in Dauvergne, "The Politics of Deforestation in Indonesia," p508.

¹⁶³ Hillary Mayell, "Study Links Logging with Severity of Forest Fires," *National Geographic News*, 3 December 2001.

¹⁶⁴ Poffenberger, "Rethinking Indonesian Forest Policy: Beyond the Timber Barons," p456.

¹⁶⁵ Ibid.

private interest disputes involving local, indigenous communities long dependent on forest resources, whose livelihood and very survival have been threatened by commercial logging interests. During the New Order period, such communities were generally displaced from their land or resettled, thus severing their traditional (*adat*) rights over their land. Any protests or resistance were routinely suppressed by the military, which itself developed extensive interests in the forestry sector during the New Order.¹⁶⁶

Following the collapse of the New Order regime in 1998 and the corresponding contraction of military control, many of these suppressed conflicts have re-emerged. In March 2000, for instance, the Association of Indonesian Forest Concessionaires (APHI) reported that at least 50 companies with concessions totalling around ten million hectares of forests in West Papua, Kalimantan and Sulawesi had stopped logging because of conflicts with local communities.¹⁶⁷ In East Kalimantan itself 77 logging companies threatened to close in the event authorities failed to resolve disputes, where local people have seized logging equipment and demanded compensation.¹⁶⁸ Illegal logging operations have also resulted in disputes with local communities opposed to the further destruction of forestland. As indigenous communities have resorted to direct action to assert their rights, logging companies have been forced to negotiate or, alternatively, face the closure of their operations.¹⁶⁹ In one case, in February 2000, negotiations resulted in 14 co-operatives and 4 indigenous councils receiving a 20% share in profits worth Rp 100 to Rp 200 million (US \$13-26,000) each.¹⁷⁰

Several of the private interest environmental court cases discussed in Chapter 2 are also forestry related. For example, in the *Laguna Mandiri* case members of the Dayak Samihim community in the regency of Kotabaru, Kalimantan brought a legal action for compensation against several companies, including PT Laguna Mandiri, which owned coconut plantation estates adjoining the plaintiffs' villages. The community claimed that fires intentionally lit by the

¹⁶⁶ Owen J Lynch and Emily Harwell, *Whose Resources? Whose Common Good?: Towards a New Paradigm of Environmental Justice and National Interest in Indonesia*. (Jakarta: Lembaga Studi dan Advokasi Masyarakat (ELSAM), 2002), p60.

¹⁶⁷ "Communities Confront Loggers," *Down to Earth* 45, no. May (2000).

¹⁶⁸ Ibid.

¹⁶⁹ see also "Disesalkan, Hti Yang Rusak Hutan Adat," *Kompas*, 20 November 2000.

¹⁷⁰ "Communities Confront Loggers."

companies to clear forestland between July and November 1997 had spread out of control, destroying large areas of the plaintiff community's crops and housing.¹⁷¹

Several prominent environmental public interest cases have also arisen in the forestry sector. These cases have emerged out of a growing debate over Indonesian forest policy fuelled by increasing opposition to the continued destruction of Indonesia's unique forest ecosystems amongst a range of non-government organisations both within Indonesia and internationally. The *Eksponen 66* case, which arose out of the devastating forest fires in 1997 and 1998, blended elements of both public and private interest. In that dispute a group of environmentally minded community organisations launched a class action against the Indonesian Forestry Entrepreneurs Association (APHI), headed at the time by timber tycoon Bob Hasan, together with five other timber industry associations. The organisations demanded compensation for the social, economic and environmental damage caused by the forest fires and resultant thick haze which blanketed much of Indonesia in the latter half of 1997. The environmental organisation WALHI also brought an environmental public interest suit relating to the forest fires in South Sumatra in the same year.¹⁷² In that case, WALHI claimed Rp 2 trillion for environmental restoration from a number of plantation and logging companies whose operations had allegedly contributed to the outbreak of fires. Other forestry related public interest cases have been more policy related than site specific in nature. For example, in the *Reafforestation Fund (IPTN)* case a group of environmental NGOs mounted a legal challenge to the transfer of money from a fund for the reforestation of logged-over land to a state company involved in aircraft manufacture. The Reafforestation Fund in question was something of a cash-cow during the New Order period for a range of state projects other than reforestation, and became symbolic of the corruption that pervaded the entire sector.¹⁷³ In another case related to the Fund, *PT Kiani Kertas*, environmental organisations challenged the transfer of funds from the State Reafforestation Fund to a company funding the development of a pulp and paper factory located in East Kalimantan.

¹⁷¹ see page 96

¹⁷² *Walhi v. PT Pakerin*, Decision No. 8/Pdt.G/1998/PN.Plg

¹⁷³ Illegal pay-outs from the Reafforestation Fund included a loan of Rp 80 billion to Suharto's grandson Ari Sigit for a urea tablet fertiliser project; a Rp 500 billion loan for Suharto's pet Kalimantan Peat Land project (discussed further in chapter 2); Rp 35 billion was given to the Consortium financing the 1997 Southeast Asian Games (chaired by Suharto's son Bambang); in 1996 over Rp 400 billion was used to

1.4.2.3 Mining

The Indonesian archipelago is home to a diverse wealth of minerals, including significant deposits of diamonds, copper, gold, nickel, coal, tin, mineral sands, chromite, uranium and bauxite.¹⁷⁴ Since 1967, when the Suharto government signed a contract allowing Freeport to establish the giant Grasberg mine in West Papua, mining in Indonesia has been a drawcard for foreign investment and the Indonesian government's largest source of revenue.¹⁷⁵ Yet whilst the wealth of Indonesia's minerals has enriched both foreign investors and the domestic (mostly Jakartan) political elite, it has in many cases brought little benefit to local, indigenous communities, which have instead borne the brunt of mining's environmental and social fallout.¹⁷⁶ In Indonesia the environmental impact of large-scale mining operations, whilst inadequately documented, is known to include water pollution (surface and sub-surface) from the disposal of mining wastes, erosion, deforestation, large-scale land excavation and air pollution from smelting and refining activities.¹⁷⁷ Serious environmental effects such as these have had a severe impact on communities living in close proximity to mine sites.

Mining operations have also caused the displacement and relocation of indigenous communities, resulting in the breakdown of cultural traditions, social cohesion and the loss of food self-sufficiency and economic autonomy. Not surprisingly, mining related disputes between local, usually indigenous, communities and mining companies are common in this sector. Disputes usually centre on issues of land ownership and compensation and the environmental impact of mining operations. State agencies responsible for issuing or administering mining law, regulations and particular licences, and the security forces responsible for mine security, are also key players in such mining disputes.

One of the most prominent and long running disputes between a mining company and local communities in Indonesia has centred on the operations of the giant Grasberg copper-gold-silver

finance construction of the N2130 jet by state-owned aircraft manufacturer IPTN, a project coordinated by Suharto crony, B J Habibie. "Bob Hasan's Fall from Favour," *Down to Earth* 38, no. August (1998).

¹⁷⁴ Carolyn Marr, *Digging Deep: The Hidden Costs of Mining in Indonesia* (Down to Earth: International Campaign for Ecological Justice in Indonesia, 1993), p9-11.

¹⁷⁵ The Freeport contract was signed before the UN sponsored 'Act of Free Choice' in West Papua, which was to transfer sovereignty over that area to Indonesia, was completed in 1969. Ibid., p73.

¹⁷⁶ Ibid., p3.

¹⁷⁷ Lynch and Harwell, *Whose Resources? Whose Common Good?: Towards a New Paradigm of Environmental Justice and National Interest in Indonesia*, p65. Marr, *Digging Deep: The Hidden Costs of Mining in Indonesia*, p19.

mine in West Papua, owned by Freeport McMoran. Freeport was the first major foreign investor in Indonesia following General Suharto's take-over in 1965. The company's investment was initially made on the most lucrative terms, including an extended tax holiday, concessions on normal levies, an exemption from royalties and an exemption from the requirement for Indonesian equity.¹⁷⁸ Operation of the Grasberg mine resulted in the displacement of two indigenous tribes, the Amungme and Komoro, from their traditional lands. Human rights abuses of local residents, including torture and killings, were also alleged to have been committed by security and company personnel.¹⁷⁹ Currently, a legal action claiming damages from Freeport has been initiated by community representatives in the United States.¹⁸⁰

In the Freeport case, the issue of the mine's environmental impact has been pursued by several environmental NGOs through political and legal channels. The mine's operations, which produce nearly 300,000 tonnes of waste daily, have resulted in the regular dumping of unprocessed tailings, widespread deforestation and the destruction of entire landscapes through open cut mining.¹⁸¹ For the first two decades environmental monitoring of the mine's operations was lax or non-existent. The first environmental impact assessment was done more than a decade after the mine commenced operation and the results of this were never made public.¹⁸² The environmental impact of the mine is likely to worsen with the increased scale of Freeport's operations, following an expansion in the company's concession area from 10,000 to 2.5 million hectares covering much of the West Papuan central mountains.¹⁸³

Conflict over Freeport's environmental impact has provided the backdrop for at least two environmental public interest actions in Indonesia. In 1995 WALHI mounted a legal challenge against the approval granted by the Department of Mining and Energy to Freeport's environmental management plan. WALHI cited widespread environmental damage and social dislocation caused by Freeport's operations, arguing that the Department should have withheld environmental approval.¹⁸⁴ A further legal suit was filed by WALHI following an incident in

¹⁷⁸ Subsequent renegotiation of the contract in 1976 led to cancellation of the remaining 18 months of tax exemption and purchase by the government of an 8.5% stake in the company's operations. Marr, *Digging Deep: The Hidden Costs of Mining in Indonesia*, p15.

¹⁷⁹ "Court Orders Freeport to Clean up Its Act," *Down to Earth* 51, no. November (2001).

¹⁸⁰ see *West Papua: Obliteration of a People*, 3rd ed. (Tapol, 1988).

¹⁸¹ "Rio Tinto under Pressure," *Down to Earth* 38, no. August (1998).

¹⁸² *West Papua: Obliteration of a People*, p78.

¹⁸³ Marr, *Digging Deep: The Hidden Costs of Mining in Indonesia*, p71.

¹⁸⁴ see further discussion of this case, page 122

May 2000 when a dam holding overburden waste burst, flooding the lands of nearby villagers and claiming the lives of 4 workers.¹⁸⁵ In its highly publicised case WALHI argued that the mining company had provided misleading information in relation to the dispute and deliberately misled the company.

Besides the several court cases relating to Freeport's operations there has only been one another reported civil mining related case concerning environmental issues, the *Muara Jaya* case. In that case a community suffered environmental damage from the installation of an oil pipe in West Kalimantan. After several appeals the community were ultimately successful in obtaining compensation in the Supreme Court. In most cases, the legal or practical obstacles associated with litigation appear to be sufficient to compel communities to adopt more of a direct action approach in disputes with mining companies, employing tactics such as blockades and occasionally violence or damage to property. For example, in May, June and July 2000 local Dayak villagers blockaded a gold mine operated by PT Kelian Equatorial Mining in Kalimantan, a subsidiary of international mining giant Rio Tinto, for almost one month. The blockade, which forced a suspension of mining operations, signalled the breakdown of an agreement reached in June 1998 between PT KEM, a community organisation (LKMTL), Rio Tinto and environmental NGO Walhi to address issues of land compensation, human rights abuses and environmental pollution.¹⁸⁶ According to local NGOs, PT KEM had refused to pay fair compensation for requisitioned land and had endeavoured to divide the local community by negotiating with local government heads rather than community appointed representatives.¹⁸⁷ A mediation process was subsequently resumed and is discussed in more detail in Chapter 4.¹⁸⁸

The proliferation of illegal or unlicensed mining, much like illegal logging in the forestry sector, has also contributed to the rise in the number of environmentally related disputes in the mining sector. Unlicensed mining first became prominent in the mid 1980s, and by 1990 the production of unlicensed gold mining was estimated at 10-14 tonne compared to the 2-4 tonnes of

¹⁸⁵ see further discussion of this case, page 106

¹⁸⁶ Environmental pollution at the KEM mine in Kalimantan have included hazardous levels of manganese and cyanide in water discharged from the mine and excessive levels of suspended solids discharged into the Kelian River. "Rio Tinto under Pressure."

¹⁸⁷ "Rio Tinto: Blockades and Strikes Hit Kalimantan Mines," *Down to Earth: International Campaign for Ecological Justice in Indonesia* No. 47, no. November (2000).

¹⁸⁸ see page 208

licenced gold mines.¹⁸⁹ Unlicensed mining has further spread in the wake of economic instability and political crisis following the collapse of the New Order. In November 2000 illegal mining was estimated to be occurring in over 700 locations throughout the archipelago and to be costing the state in lost revenue around Rp 315.1 billion/year.¹⁹⁰ As illegal mining has spread, disputes have frequently emerged between unlicensed and licenced miners over rights to resource extraction. In the vast majority of disputes the position of the larger mining companies is supported by both the legal framework and government agencies.¹⁹¹ Nonetheless, government agencies have struggled to control unlicensed miners, prompting several mining companies to threaten closure of mining operations due to unregulated illegal mining. Yet the matter of so-called illegal mining is a complex one. Advocates for the rights of indigeneous communities have argued that traditional mining carried out by local communities should be protected and allowed by the law.¹⁹² In response to such criticisms, the government has directed that only unlicensed miners using sophisticated equipment in large scale operations would be considered illegal, whilst local residents using traditional methods would not.¹⁹³ Unlicensed mining on a larger scale is often coordinated by profiteering middlemen who employ unsafe and environmentally hazardous methods. For example, the widespread use of mercury in unlicensed mining in Central Kalimantan has had a grave environmental impact, with some 10 tonnes of mercury being released into the major tributary Kapus River annually.¹⁹⁴ The spread of illegal mining is likely to cause further environmental pollution and related disputes. Already in Western Kalimantan a NGO called the Community Forum for the Victims of Unlicensed Mining has been formed to oppose such environmentally damaging methods of mining and seek compensation for victims who have suffered its effects.¹⁹⁵

¹⁸⁹ Marr, *Digging Deep: The Hidden Costs of Mining in Indonesia*, p50-.

¹⁹⁰ Ibid., p52.

¹⁹¹ Article 26 of the Basic Mining Law requires local communities to surrender their traditional property rights to mining concessionaires. Lynch and Harwell, *Whose Resources? Whose Common Good?: Towards a New Paradigm of Environmental Justice and National Interest in Indonesia.*, p66.

¹⁹² Ibid.

¹⁹³ In practice, however, traditional miners have continued to be displaced and prosecuted by enforcement agencies. Marr, *Digging Deep: The Hidden Costs of Mining in Indonesia*.

¹⁹⁴ "Kalimantan Rivers Highly Contaminated by Mercury," *Indonesian Observer*, 13 September 2000.

¹⁹⁵ "Wilayah Pertambangan Tanpa Izin Mencapai 713 Lokasi," *Bisnis Indonesia*, 24 November 2000. "Tim Terpadu Peti Tak Mampu Atasi Maraknya Penambangan Liar," *MinergyNews.Com*, 24 November 2000.

1.4.2.4 Agriculture

The modernization of agriculture through the Green Revolution was another much lauded achievement of the New Order. Whilst agricultural modernization greatly increased productivity, enabling Indonesia to briefly achieve self-sufficiency in rice production, the limitations of modern, industrial approaches to agricultural production have become more evident in recent years. The environmental impact of the Green Revolution has included the loss of genetic diversity in rice strains and the widespread use of environmentally damaging artificial fertilisers, pesticides and herbicides. More recently, grandiose Green Revolution approaches have been applied to some of the outer islands in an attempt to dramatically increase agricultural productivity. One of the last mega-projects of the Suharto era was the Kalimantan Peat Land Project, which aimed to convert some 1 million hectares of peat land into productive rice fields. The project was commenced in 1995 and bypassed many of the usual environmental assessment procedures due to personal backing from the President.¹⁹⁶ The environmental impact of the grandiose project was severe and included widespread deforestation and destruction of a vast area of fragile wetlands. Ultimately the land proved unsuitable for agriculture. Yet due to poor planning procedures this realisation was made only after the vast area of land had been devastated environmentally and local, indigeneous communities displaced. The agricultural debacle resulted in two legal suits to obtain environmental compensation and restoration. In the *Kalimantan Peat Land Case*, WALHI sued a number of government agencies allegedly responsible for the project and its environmentally damaging outcome. In a separate case, a group of local farmers whose livelihood had been undermined by the project's devastating environmental impact sued the government for compensation.¹⁹⁷

The purpose of the last section of this chapter was to provide some introduction to environmental disputes and the legal framework for their resolution in Indonesia. As already outlined in the Introduction (see Overview of Thesis), it is the purpose of this thesis to examine environmental dispute resolution from an empirical and normative standpoint, thus analysing its effectiveness and making appropriate recommendations for its further development. We

¹⁹⁶ Longgena Ginting, "Mega Proyek Lahan Gambut Sejuta Hektar, Sejuta Masalah," *Tanah Air* 4, no. XVIII (1998): p2.

¹⁹⁷ see page 117

commence this examination and analysis in the next chapter with a detailed study of environmental litigation in Indonesia, centring on the legal framework and its application by courts in environmental cases to date.

2 Environmental Litigation in Indonesia: Legal Framework and Overview of Cases

The ability of citizens or environmental organisations to utilise law and the legal process to prevent, ameliorate or compensate environmentally related damage has become increasingly relevant over the last several decades in Indonesia, which have been characterised by rapid industrialisation, intensive exploitation of natural resources and a proliferation of environmental disputes, as discussed in the previous chapter. For concerned citizens affected in some way by environmental pollution or damage environmental litigation represents one possible response, and avenue of dispute resolution. This Chapter firstly examines the legal framework governing the process of environmental litigation, focussing in particular on a number of key provisions relevant to environmental litigation from Part Three, Chapter VII of the Environmental Management Act 1997 which governs Environmental Dispute Settlement through the Court . The legal issues provided for within that Chapter include environmental standing (art.38), representative actions in environmental disputes (art.37), compensation for environmental damage (art.34), strict liability (art.35) and environmental public interest suits (art.38). Reference is also made to other relevant provisions in the Act, notably the community rights and obligations stipulated in Chapter III, such as the right to a good and healthy environment and the right to environmental information which, as enforceable legal rights, hold particular relevance to the process of environmental litigation. Each of these issues is considered in detail below, with attention given to the legal provisions in question and how these provisions have been implemented in practice through the Courts.

Other laws of direct relevance to environmental litigation include the Administrative Judicature Act No. 5 of 1986 (AJA), which governs legal suits against the state in the administrative courts.¹⁹⁸ Public state agencies have a direct stake in most environmental disputes as both the grantors of licences for industrial development or natural resource exploitation and as the authority for environmental protection and/or conservation. On several occasions to date,

¹⁹⁸ Actually, the AJA does not necessarily govern all such actions but rather has a specific jurisdiction defined in the Act itself. See further discussion on this point, page 96

state agencies that have allegedly improperly performed their duties have become the subject of environmental public interest suits in Indonesia. In most cases of this nature, the AJA provides the legal framework for environmental litigation, although in some cases the Act may not be applicable and general principles of public administrative law will apply. This Chapter thus also discusses provisions of the AJA and principles of public administrative law of particular relevance to environmental litigation and examines how these have been implemented in cases to date in Indonesia.

As stated above, this chapter endeavours to not only document and analyse the legal framework for environmental litigation, but particularly to examine its interpretation by Indonesian courts in environmental cases to date. The discussion of pertinent legal principles or provisions is therefore accompanied by a summary and analysis of cases where those provisions have been applied by Indonesian courts. The concluding discussion in this chapter considers overall trends in judicial interpretation of Indonesian environmental law with reference to the theoretical framework elaborated in chapter 1. The cases examined in this chapter are environmental civil and administrative cases that relate in some way to the Environmental Management Act of 1982 and 1997. Cases involving criminal prosecution for environmental offences under the EMA are thus not represented. Due to the lack of an organised judicial reporting system, the data on environmental cases has been gathered from a range of sources including judicial decisions, newspaper reports, NGO reports and interviews. Given the limitations of judicial reporting in Indonesia, the overview in this chapter cannot claim to be an exhaustive overview of all civil and administrative environmental cases from 1982-2002. Nonetheless, the chapter endeavours to present the most comprehensive summary of civil environmental cases possible, given the information available.

2.1 Standing

Standing or *locus standi*, which refers to a right of audience before a court or tribunal, is a necessary prerequisite to most forms of litigation.¹⁹⁹ The conventional approach to the issue of standing in both civil and common law jurisdictions requires a potential litigant to possess a personal, typically proprietary, interest in the subject matter of the dispute. This principle was confirmed by the Indonesian Supreme Court (*Mahkamah Agung*) in its decision of 7 July 1971

¹⁹⁹ Geddes, "Locus Standi and Eec Environmental Measures," *Journal of Environmental Law* 4, no. No. 1 (1992): p30.

No. 294/K/SIP/1974.²⁰⁰ In Indonesia, as in other jurisdictions, the requirement of standing, has been a significant procedural obstacle to the public interest litigant seeking to enforce a public, often non-pecuniary, interest.²⁰¹ Consequently, the common interest in environmental sustainability has remained, until recently, largely unrepresented in judicial forum due to its non-private nature. However, in many modern jurisdictions, courts have taken the lead in revising the traditionally restrictive doctrine of standing.²⁰² They have done so within a social context of growing environmental concern and within a developing legal context of environmental laws and regulations. As will be described below, Indonesia has proved to be no exception to this global trend.

2.1.1 *PT Into Indorayon Utama Case (1989)*²⁰³

A more liberalised approach to standing in relation to environmental matters was first adopted by an Indonesian court in the now well known *PT Into Indorayon Utama* case. The Indorayon factory, located on the Asahan river near Lake Toba in North Sumatra, commenced operations within a 150 000 ha concession area at the beginning of 1984. Severe environmental damage has been attributed to the factory's operations ever since by local residents and environmental organisations, including deforestation of the surrounding area identified as a contributing factor to floods and a landslide that claimed the lives of nine villagers. The factory has also caused heavy pollution of the Asahan River, which local people had previously relied on for their day-to-day living needs.²⁰⁴ Pollution of the river reached a height when an artificial lagoon built by the company to hold toxic waste burst, releasing some 400,000 cubic metres of toxic waste into the Asahan River near Lake Toba.²⁰⁵ In the case before the Central Jakarta District Court was brought by WALHI, a national environmental organisation. WALHI argued that it should be

²⁰⁰ see Mas Achmad Santosa, "Standing Atau Locus Standi: Persoalan Pokok Dalam Gugatan Lingkungan," *Forum Keadilan* 6 (1988): p100.

²⁰¹ For example, standing was an obstacle in a celebrated public interest action concerning cigarette advertising and its impact on youth by R.O. Tambunan against the cigarette company P.T. Bentoel - see.Ibid. Note, however, in the case of persons directly and materially affected by environmentally damaging activities the requirement of standing would be fulfilled.

²⁰² Liberalised approaches to environmental standing have been adopted in many jurisdictions around the world. For example, in the Netherlands a liberalised approach to standing was judicially adopted in the *Nieuwe Meer* and *Kuunders* cases. In Australia the traditional doctrine of standing was modified in *Onus v Alcoa* (1981) 36 ALR 425, and further modified by legislation.

²⁰³ Decision No. 820/Pdt./G/1988/PN. Jkt.Pst.

²⁰⁴ *Environesia*, Vol.2 No.3 ,Dec1988 p1

²⁰⁵ Arimbi, "Unrevealed Things in the Indorayon Case," (Jakarta: Walhi, 1994), p1.

allowed to represent the public environmental interest and contended that issuance of operating permits to PT IIU was contrary to environmental law.²⁰⁶

In its decision, the Court granted WALHI standing to bring its suit against 5 government agencies as well as the Indorayon Company. The court justified its decision, notwithstanding the lack of a material interest on WALHI's part, on a number of grounds. Firstly, the Court described the environment as common property and emphasised the public interest in environmental preservation.²⁰⁷ It also emphasised the environment was a legal subject itself with an intrinsic right to be sustained. The environmental interest in question could be legitimately represented by WALHI, a national environmental interest group, in court. Such a representative capacity was legally justified given the right and obligation of every person to participate in environmental management²⁰⁸ and the specific endorsement given to the participatory function of NGOs by art.19 of the EMA 1982 which recognises self-reliant community institutions as performing a supporting role in the management of the living environment. .

2.1.2 *Legislative Standing for Environmental Organisations*

The PT IIU decision was significant in that it helped surmount the procedural obstacle of environmental standing, thus paving the way for future legal actions protecting environmental interests. The judicial precedent on this issue furthermore acted as an impetus for subsequent legislative reform through the EMA 1997. Article 38 (1) of that Act grants environmental organisations the right to bring a legal action in the interest of preserving environmental functions. This provision thus marks the legislative adoption of the liberalised approach to standing taken by Indonesian courts in the cases discussed in the previous section. The Elucidation confirms that standing according to the stipulated criteria is available in respect of actions in both the general courts and the administrative courts.²⁰⁹

²⁰⁶ In the *Samidun Sitorus et al v. PT Inti Indorayon* case a number of local families also sought compensation for environmental damage attributed to PT IIU through a case in the Medan District Court. This case is discussed at page 81

²⁰⁷ The Court justified its view in this respect by reference to the 1973 Broad Outline of the Nation's Direction (GBHN) and statements made in front of the national parliament (*Dewan Perwakilan Rakyat*) on 23 January 1982 prior to the enactment of the Environmental Management Act 1982.

²⁰⁸ Art. 6(1) of the EMA 1982

²⁰⁹ An Elucidation in Indonesian law is an explanatory appendix commonly included in Indonesian legislation. Whilst not formally a part of the Law, it is nonetheless a primary reference point for its interpretation.

As defined in art. 38(3), environmental organisations must be a legal body or foundation, the articles of association of which clearly state environmental preservation to be one of the founding goals of the organisation. The organisation must also have undertaken activities in pursuit of this aim. The requirements stipulated in art. 38(3) were largely an adoption of criteria enunciated in the *IPTN (Reafforestation Funds) Case* (1994), where the Jakarta State Administrative Court granted standing to 4 of 6 environmental organisations who challenged Presidential Decree No.42 of 1994, concerning a transfer of funds from a reafforestation fund to PT Industri Pesawat Terbang Nusantara (IPTN).²¹⁰ The Court justified its decision stating,

the contended decision afflicted the interest that could be induced from the well-defined goals they pursued according to their statutes. Moreover, they had a clear organisational structure, and could prove that they had actively sought to realise their goals.²¹¹

The *IPTN* case confirms the precedent of *Indorayon* in accepting the principle of environmental standing, but stipulates further criteria to restrict the scope of the doctrine. Some NGO workers have questioned the need for such restrictive criteria, fearing they might exclude a number of potential public interest litigants whose articles do not state their founding goal to be preservation of the environment.²¹² In the *IPTN* case, 2 of the 6 plaintiff organisations were in fact excluded by the court, yet this was on the grounds that their purported representatives had not been correctly appointed in accordance with procedural requirements, rather than the requirements in art. 38(3).

2.2 Representative Actions

Whilst legal claims of a purely public interest nature have been excluded in the past due to a lack of standing, another procedural obstacle is raised where a large number of litigants seek to bring a joint claim grounded in similar legal and factual circumstances. In environmental cases, pollution from a single source may affect hundreds or even thousands of people. Processing numerous claims arising out of similar factual circumstances on an individual basis is inefficient,

²¹⁰ Note that the Court in this case actually stipulated a fourth criteria, that an organisation should be sufficiently representative, however this was not incorporated in article 38 (3). - Decision No. 088/G/1994/Piutang/PTUN.Jkt.

²¹¹ *Forum Keadilan* 5-1-1995 quoted in Bedner, "Administrative Courts in Indonesia: A Social-Legal Study", p91.

²¹² Nur Amalia, 24 November 1999.

time consuming and expensive. The legal doctrine of a class action evolved in common law jurisdictions in the 1800s to facilitate the efficient adjudication of such cases. In a class action, a large number of plaintiffs whose claim is grounded in common factual and legal circumstances, are legally represented by a smaller, representative group drawn from their number. Whilst the doctrine of class actions originated in the common law world, it has also been introduced more recently to a number of civil law jurisdictions.

2.2.1 *Representative Actions in Indonesia (Pre-EMA 1997)*

Unlike common law jurisdictions such as England or America, there was no specific legal basis in the Indonesian Civil Codes for a representative action. Yet, whilst class actions in the common law sense were unknown, it was not uncommon for multiple plaintiffs or defendants to be joined in a single action.²¹³ Traditional civil procedure thus provided some scope for common claims to be grouped together, although the practicality of this approach was limited by the requirement of each plaintiff to individually issue an authority for representation (*surat kuasa*).²¹⁴ Whilst the matter of class actions was not specifically regulated in the first EMA of 1982, a number of more general principles enunciated within that Act held considerable relevance to the issue of class or representative actions. For instance, art. 5 (1) confirmed the right of every person to ... a good and healthy living environment. . The Elucidation defined person as an individual person, a group of persons, or a legal body . Thus the Act explicitly recognised the possibility that the right referred to in art. 5 be vested in, and hence was exercisable by, a group of persons. Similarly, the Act envisaged both an individual and collective vesting of the obligation contained within clause 2 of article 5, which recognises the obligation on every person ... to maintain the living environment and to prevent and abate environmental damage and pollution. The Elucidation to the Act stipulated that this obligation ...is not separated from [a person s] position as a member of the community, which reflects the value of man as an individual and as a social being. Thus the EMA 1982, whilst failing to make explicit provision in relation to class actions, did nonetheless provide statutory grounds for at least the consideration of group compensation claims due to pollution or environmental damage.

²¹³ see for instance the *Sari Morawa* case where 260 individual plaintiffs in a common claim sued PT Sari Morawa for pollution of the Belumai River. Whilst the claim was rejected on substantive grounds, the joinder of the individual claims was allowed by the court. See further discussion of the case, page 86

²¹⁴ Individual authorities for representation are not required in a representative action.

Legislative scope for the introduction of representative actions was also found in the Judicial Authority Act No 14 of 1970. Article 4(2) of that Act requires justice to be administered in a efficient, swift and economical manner.²¹⁵ Article 5 (2) of the same Act states courts shall assist justice seekers and make the utmost effort to overcome all obstacles and distractions so as to achieve justice which is efficient, swift and economical. The Act thus affords some discretion to courts and, particularly, emphasises the important of efficiency, speed and economy in the administration of justice, all of which are greatly facilitated in cases involving numerous plaintiffs by a representative mechanism.

2.2.1.1 PT Pupuk Iskandar Muda (1989)²¹⁶

The *Pupuk Iskandar Muda* (PT PIM) case, was the first environmental case where a large number of plaintiffs who had suffered pollution attempted to sue a common defendant. The case involved 602 plaintiffs, yet was not a class action in the strict sense, as each plaintiff had provided legal authority and was identified in the claim. The defendant in this case, PT PIM, owned a liquid gas-processing factory in Northern Aceh, from which, in 1988 and subsequently on several occasions, poisonous gas leaked out and spread through several villages in the near vicinity. A large number of residents who inhaled the fumes experienced symptoms ranging from unconsciousness to nausea.²¹⁷ In the case that followed, 602 local residents, represented by the Medan Legal Aid Institute, sued PT PIM claiming compensation for damages.²¹⁸ The claim for compensation failed, both at the first instance and in a subsequent appeal to the High Court of Aceh. In rejecting the legal suit, both courts stated that the individual claims of respective victims could not be contained in one, single claim. According to the court, no legal connection existed between the respective claims, and consequently, each claim should be advanced individually on its own grounds.

Contrary to the court's opinion, it is actually arguable in this case, that the plaintiffs' claim did comply with existing civil procedure. Each of the 602 claimants had provided legal authority to sue and were identified respectively in the formal claim.²¹⁹ There are many cases where courts

²¹⁵ *Peradilan dilakukan dengan sederhana, cepat dan biaya ringan.*

²¹⁶ Decision No. 45/Pdt.G.1989/PN.Lsm. This account draws upon the comprehensive discussion of this case in A Hutapea, ed., *Beberapa Penanganan Kasus Lingkungan Hidup* (Jakarta: WALHI, 1993), p15-48.

²¹⁷ *Ibid.*, p15.

²¹⁸ E Sundari, "Implementasi Prinsip Class Action Dalam Wacana Sistem Hukum Acara Perdata Indonesia" (Usul Penelitian, 1999), p12.

²¹⁹ Compared to a class action proper where individual claimants need not be identified.

have entertained in practice claims involving either multiple plaintiffs or multiple defendants. Indonesian civil procedure does not limit civil cases to single defendants or plaintiffs necessarily.²²⁰ There were, furthermore, obvious factual circumstances that connected the claims in this instance. Nonetheless, the number of plaintiffs in this case (602) was arguably so large as to make a joined claim impractical for the court to adjudicate. A more appropriate response on this point would have been the separation of the claim into several, more adjudicable claims, rather than its outright rejection on the grounds that no connection existed between the claims. Furthermore, the environmental nature of this case clearly fell within the scope of the EMA 1982, which arguably supports a broader vesting of environmental rights in both groups and individuals.²²¹

2.2.1.2 Ciujung River (West Java; 1995)²²²

In this case liquid waste discharged from a group of five factories ²²³ on the Ciujung River in West Java had severely affected several villages since September 1992, the approximately 5000 residents of which depended on the river for fishing, irrigation, prawn farming and other daily needs. The residents' claims of pollution had been confirmed by research conducted by the national Environmental Impact Agency and the Centre for Fisheries Research and Development.²²⁴ After several attempts at mediation had failed²²⁵ a number of community

²²⁰ Sundari, "Implementasi Prinsip Class Action Dalam Wacana Sistem Hukum Acara Perdata Indonesia", p12.

²²¹ Hutapea, ed., *Beberapa Penanganan Kasus Lingkungan Hidup*, p25-26.

²²² This account is based on the following sources: "Menabur Limbah Menuai Tanggung Jawab," (Jakarta: Indonesian Centre for Environmental Law

Legal Aid Institute of Jakarta

Association of Ciujung Water Users, 1995).; TM Luthfi Yazid, "Ciujung River Pollution Case: Some Obstacles to Set up the Adr Mechanism in Indonesia," (ICEL).; R Dwiyanto Prihartono, "Kendala Dan Peluang Mendayagunakan Hukum Perdata Dan Hukum Acara Perdata Indonesia Dalam Kasus Indonesia" (paper presented at the Semiloka Litigasi Lingkungan, Malang, 9-11 September 1995).; Mas Achmad Santosa and T M Luthfi Yazid, "Kasus Pencemaran Sungai Ciujung," in *Mediasi Lingkungan Di Indonesia: Sebuah Pengalaman*, ed. Mas Achmad Santosa, Takdir Rahmadi, and Siti Megadianty Adam (Jakarta: ICEL, 1997). District Court of North Jakarta, *Ciujung River* (West Java: 1995). and a compilation of newspaper clippings. and a compilation of newspaper clippings.

²²³ The five factories were PT Indah Kiat Pulp and Paper, PT Cipta Paperia, PT Onward Paper Utama, PT Sekawan Maju Pesat and PT Picon Jaya all of which produced paper except the last which produced leather.- Jakarta, *Ciujung River*.

²²⁴; Prihartono, "Kendala Dan Peluang Mendayagunakan Hukum Perdata Dan Hukum Acara Perdata Indonesia Dalam Kasus Indonesia", p4.; Jakarta, *Ciujung River*. "Menabur Limbah Menuai Tanggung Jawab," p7.

²²⁵ The residents' attempts at mediation are discussed further in Chapter 4 .

representatives conveyed their legal authority to the Legal Aid Institute of Jakarta. A representative action was subsequently registered with the District Court of North Jakarta. In the pioneering class action a group of 17 residents acted as class representatives for a class membership of some 5000 residents who had been affected by pollution from the five factories the subject of the claim. The plaintiffs argued that both the EMA 1982 and the Law on Judicial Authority No 14 of 1970 provided a legislative basis for a representative action in this case, in which a large number of people had allegedly suffered damage as a result of pollution from the same source.²²⁶

However, the procedural issue of a representative action and the substantive liability of the defendants were never addressed by the Court. The plaintiffs claim in this case proceeded no further than the issue of jurisdiction, upon which it foundered. The plaintiff had lodged the claim in the North Jakarta District Court as the registered office of the second defendant, PT Cipta Paperia, was located in North Jakarta. Whilst this was indeed the location of its original office, the company had in fact moved its registered office to Serang in West Java. As a result, all the Defendants and Plaintiffs were located outside of North Jakarta and accordingly the Court concluded that it held no jurisdiction over the matter.

2.2.2 Article 37: Legislative Provision for Environmental Representative Actions

In Indonesia, a specific legal mechanism for environmental representative actions was first introduced by article 37 of the EMA 1997, which states²²⁷:

The community has the right to bring a representative action to court and/or report to legal authorities various environmental problems, which adversely affect the life of the community.

In the Elucidation the right to bring a representative action is defined as,

The right of a small group of the community to act in representing a community of a large number which has incurred losses based upon a similarity in problems, legal facts, and demands arising from the environmental pollution and/or damage.

²²⁶ See the discussion of the specific provisions pertaining to representative actions from these two Acts above.

²²⁷ Class action provisions are also now found in the Consumer Protection Act No. 8 of 1999 and the Forestry Act No. 41 of 1999.

Inclusion of such a provision, which provides a legal basis for the conduct of class actions in environmental disputes, represents a significant improvement on the previous EMA, which alluded to the vesting of environmental rights in groups but did not stipulate a mechanism for this to occur. The concept of a representative action has, as discussed above, been adapted from common law models and is a novel development in Indonesian law. Whilst the Elucidation to the Act explains the nature of a class action, there is no specific clarification of the procedure accompanying such an action. The matter of procedure is separately raised in article 39, which states,

The procedure for the submission of a claim in an environmental dispute by a person, community and/or environmental organisation shall refer to existing Civil Procedure Law.

Unfortunately, this provision is inadequate in the matter of class actions, which is foreign to and hence not encompassed within existing Civil Procedure Law.²²⁸ What existing civil procedure law does require is that any person representing another person in legal proceedings possesses a letter of authority to do so.²²⁹ In contrast, class actions are designed to enable large numbers of people to be legally represented without the usual formal requirements of a written authority.²³⁰ The deficiency of the Act in this respect seems to have contributed to an apparent reluctance amongst sections of the Indonesian judiciary to utilise the new procedure, which is perceived by some as contradictory to existing civil procedure law.²³¹ A similar reticence has been evident amongst some environmental public interest litigants as well, who have persisted until recently in obtaining individual legal authorities (*surat kuasa*) even in cases with large numbers of plaintiffs, due to the likelihood of a representative action being defeated on procedural grounds.²³²

This procedural obstacle to the implementation of art. 37 has recently been addressed by Supreme Court Regulation No. 1 of 2002 concerning Procedure of Representative Actions, enacted on 26 April 2002. Importantly, the regulation specifically states that in the context of a

²²⁸ Existing civil procedural law refers to the *Het Herziene Indonesisch Regelement (HIR)* and the *Regelement op de Burgelijk Rechtsvordering (RBg)*, neither of which contain a provision relating to representative actions.

²²⁹ art. 147 (1) RBg

²³⁰ Class or representative actions, as they operate in the US, Canada and Australia, usually involve a notification requirement whereby potential members of a class are notified of then may opt-out if they choose to do so.

²³¹ For instance, one senior Indonesian judge commented in a legal seminar that he would not apply article 37 given that the HIR does not refer to representative actions. – [, 1998 #766]

representative action a class representative is not required to obtain individual legal authorities (*surat kuasa*) from each member of the class.²³³ There are, nonetheless, specific procedural requirements to be met by class representatives (*wakil kelompok*) in commencing a representative action. Article 3 requires that the letter of claim for a representative action state a number of specific details concerning the action including the identity of the class representative; a detailed and specific definition of the class, without specifying the name of each class member; information to assist notification of class members and a detailed stipulation of compensation claimed including suggestions for distribution of any compensation to all members of the class.

2.2.2.1 Eksponen 66 and others. v.APHI and others.(1998)²³⁴

Representative actions pursuant to article 37 have been attempted in several environmental cases to date, the first being the *Eksponen 66* case in North Sumatra. The action was initiated by a group of various community organisations with a self-professed interest in the state of the environment. Defendants to the suit included the Indonesian Forestry Entrepreneurs Association (APHI), headed at the time by timber tycoon and Suharto crony Bob Hasan, together with five other timber industry associations, for the damage caused by forest fires and resultant thick haze which blanketed much of Indonesia in the latter half of 1997. The plaintiff community organisations, said to be representing the people of Northern Sumatra, argued that the state declared national disaster of devastating fires and thick smog was caused by timber and plantation companies who routinely used burnt off tracts of forest and waste forest products. The organisations also criticized the failure of the timber companies to minimize environmental damage from the fires or assist the local populace in any form. Accordingly the plaintiffs requested the defendant forestry associations, whose members were the timber and plantation companies supposedly responsible for the fires, undertake environmental restoration in addition to paying an amount of Rp.2.5 trillion as compensation for damage incurred by the community

²³² Interview with Nur Amalia, Jakarta, 24 November 1999.

²³³ Article 4

²³⁴ Decision No. 425/Pdt.G/1997/PN.Mdn

of Northern Sumatra to health, economy, society, communications, education and work activities.²³⁵

The timber associations raised a number of procedural and substantive defences against the claim, arguing firstly that the plaintiffs were not legally entitled to represent the people of Northern Sumatra and did not possess any legal interest, which would permit them, according to civil law, to bring the action in question. The forestry related associations who were the subject of the claim denied any legal responsibility for the actions of their members. Finally, the defendants also claimed that the forest fires were a national disaster due to natural phenomena and could not be attributed to the actions of particular companies.

In a surprising decision, given the relative lack of legal and factual detail in the plaintiffs broad ambit claim, the District Court of Medan awarded an unprecedented amount of Rp. 50 billion (US\$6.5 million) in damages, to be applied toward environmental restoration.²³⁶ In their decision, the three presiding judges firstly recognised the 13 applicants as community organisations who, in accordance with art.37, could legitimately represent the people of Northern Sumatra in defence of their collective right to a good and healthy environment.²³⁷ On the substantive issues, the court considered the evidence presented by the plaintiffs sufficient to establish that,

...the national disaster of smog resulting from forest fires was caused by the burning of forests by industries including those holding Exploitation Rights for Commercial Plantation Enterprises (*Hak Pengusahaan Hutan Tanaman Industri*) ...²³⁸

The judges further concluded that the actions of forest concessionaires and plantation owners in lighting and failing to control the fires was contrary to their obligation to protect environmental sustainability and prevent environmental damage pursuant to the Environmental Management Act 1997.

²³⁵ The plaintiffs claim also attributed the crash of a Garuda Indonesia passenger jet near Medan on 26 September 1997, and consequent death of 234 passengers and crew, to the thick smoke resulting from the forest fires.

²³⁶ The judges disagreed with the plaintiffs attribution of the Garuda airbus crash of 26 September 1997 to the smog and further considered that, as the claim for Rp 2.5 trillion was not justified in detail, the court should be free to award an amount of compensation it considered fair and just. "Eksponen 66 V. Aphi," (District Court of Medan: No. 425/Pdt.G/1997/PN.Mdn, 1998), p44.

²³⁷ The Court's decision in this respect was made despite the fact that only 5 of the 13 community organisations produced their articles of association or constitution to the court, and of those most were photocopies rather than certified originals.

The decision of the court to affirm the plaintiffs' claim was made notwithstanding the relative generality of the plaintiffs' evidence consisting primarily of two satellite photographs (showing the extent of smog) and a number of selected newspaper articles relating to the forest fires.²³⁹ From the decision itself, it appears the judges were most influenced by the widely reported strong suspicion of government agencies that the smog was a result of forest fires lit by forest concessionaires. Further proof was found in the reported withdrawal of 166 Forest Use Permits (*Izin Pemanfaatan Hutan*), administrative action being taken by regional administrative authorities and the stated intention of the Forest Minister to resign in relation to the forest fires if required by the President.²⁴⁰ Besides this, there was of course the visibility and direct impact of the air pollution felt by all residents of North Sumatra. As the judges stated,

It appears that there would not be one person from the community of North Sumatra that would not complain of this recent national smog disaster in which the level of dust exceeded stipulated levels.²⁴¹

The court was also prepared to hold the defendant associations liable, despite the fact that it was their members rather than the associations themselves that had presumably caused the fires. On this point the court acknowledged that the obligation of the forest associations was ...essentially one based on moral responsibility rather than criminal or civil responsibility...²⁴² Nonetheless, the court considered this a sufficient basis to hold the associations liable for environmental restoration and payment of compensation. In this respect, the Court likened the position of the forestry associations to the incumbent Forestry Minister who had proffered his resignation due to the fires disaster,

As the Forestry Minister...assumed responsibility for the smog disaster resulting from the fires and was ready to resign although not due to the result of any of his own actions, so as associations, communication forums, consulting and coordinating bodies for their members the entrepreneurs, who until this time have

²³⁸ "Ekspone 66 V. Aphi," p42.

²³⁹ The evidence was, for instance, much less detailed than the satellite photos of 'hotspots' used as evidence in the *WALHI v. PT Pakerin* case which was nonetheless rejected by the District Court in that case.

²⁴⁰ "Ekspone 66 V. Aphi," p41.

²⁴¹ *Ibid.*, p40.

²⁴² *Ibid.*, p45.

profited greatly from the forests now burning, it is morally appropriate and legally justified for [the defendant associations] to bear compensation.²⁴³

The decision in this case also illustrates the confusion that surrounded the procedural application of article 37, at least before enactment of the Supreme Court regulation no. 1 of 2002. Neither the plaintiffs' claim, nor the court's decision, clearly specified the usual elements of a class action, particularly the defining factual and legal characteristics of the class in question. The manner in which class members were to be notified of the action was not addressed, nor was the distribution of compensation. On the latter point, the court's decision only directed that compensation be paid in coordination with relevant agencies. Clearly, the payment of such a large sum to the community of an entire province requires more specific direction and management if it is to be effective.²⁴⁴

Yet, despite its particular flaws, the District Court of Medan's decision in this case stands out as a rare example of judicial activism in the environmental context. Given the absence of procedural law supporting article 37, and the extremely wide ambit of the plaintiffs' claim, it would have been certainly possible for the court to refuse this claim on a number of legal grounds. Yet, notwithstanding these factors, the court was willing to hear the claim and attempt to apply art. 37 to the circumstances of the case. The court's reasoning demonstrated a clear recognition of the public interest in environmental preservation rarely apparent in prior environmental cases. The court's more activist stance in this case appears from the decision to have been influenced by the extent of the disaster, which caused widespread social disruption, health complaints and significant economic loss. The Court's view of the impact of the fires and the resultant public sentiment was apparent in their judgment:

It would seem there is not a single person from the community of North Sumatra who would not complain of this recent national disaster of smog where dust parameters exceeded stipulated standards. School children were sent home, people were warned to reduce their activities outside the home and use masks for fear of suffering breathing disorders

The court also appeared to justify, or at least frame, its decision by reference to statements and actions taken by senior government figures in the response to the fires. For instance, the judges

²⁴³ Ibid.

²⁴⁴ Mas Achmad Santosa and Indro Sugianto, "Class Action: Sekedar Trend Atau Senjata Ampuh (Refleksi Atas Putusan Pengadilan)," *Hukum dan Advokasi Lingkungan* 4, no. September (2002): p3.

decision referred to a statement by a senior official describing the fires as a threat to national development and a state emergency in 8 provinces, to the Forestry Minister's offer of resignation and pending administrative sanctions being taken against forest concession holders.²⁴⁵ The activist stance adopted by the District Court of Medan in this case was not followed by the High Court of Northern Sumatra when the decision was subsequently appealed. The appellate court subsequently overturned the decision by the District Court, thus denying the claim for compensation.

2.2.2.2 Way Seputih River (2000)²⁴⁶

In the *Way Seputih River* case a representative legal action was initiated on behalf of 1,145 family heads (*kepala keluarga*) drawn from 11 villages who had suffered loss due to pollution of the Way Seputih River in the Lampung region of Southern Sumatra.²⁴⁷ The large group of plaintiffs, all fisherman by trade, was represented by a smaller group of 27 consisting of community leaders who had also suffered loss of the same nature. The plaintiffs alleged that three industries: PT Venong Budi Indonesia, an MSG factory, PT Sinar Bambu Mas, a paper factory, and PT Budi Acid Jaya, a tapioca chip factory, had polluted the Way Seputih River from 26 April until 2 May 1999. Residents reported the waters of the river to turning red and foul smelling, causing the death of fish in the river. The river's pollution caused the deprivation of the plaintiffs' livelihood as fishermen and rendered the waters unusable for daily needs by the adjoining villages.

Following a report by the plaintiffs to the regional government of Central Lampung, an administrative warning was issued to the three industries, requesting the industries' waste management units be improved. Following this, a further investigation into the incident was launched by a *Prokasih* ²⁴⁸ Team, which was to examine the condition of the waste management units and quality of the discharged effluent. The results of inquiry showed the rudimentary units

²⁴⁵ "Ekspone 66 V. Aphi," p41.

²⁴⁶ Decision No. 04/Pdt.G/2000/PNM.

²⁴⁷ In fact 13 villages had been adversely affected by the river's pollution, however, two villages chose to withdraw from the action and were not represented.

²⁴⁸ *Prokasih* stands for *Program Kali Bersih*, the Clean Rivers Program, a major environmental law enforcement initiative undertaken by national and provincial environmental impact agencies to improve the management of industrial waste discharged into rivers.

to be inadequate²⁴⁹ with the discharged effluent from all factories clearly exceeding stipulated standards.²⁵⁰ The Team's findings prompted the district Regent to issue a final warning (*peringatan keras*) to the industries to improve waste management. Despite subsequent assurances by industry to resolve the matter by negotiation, industry representatives failed to attend several meetings convened by regional government officials and denied any culpability in the pollution.²⁵¹

The subsequent legal claim of the plaintiffs referred firstly to article 37 of the EMA 1997, which granted the communities ...a right to bring a class action to court...concerning various environmental problems which inflict losses on the life of the community. The plaintiffs' claim emphasised that the loss suffered by the class members and the class representatives was identical in nature, namely the pollution of the Way Seputih River, which had deprived all the plaintiffs of a livelihood and source of clean water.²⁵² On the substantive matter of liability, the plaintiffs alleged that the pollution of Way Seputih River was contrary to the companies' obligation ...to preserve the continuity of environmental functions and protect and combat environmental pollution and damage.²⁵³ The actions of the three industries had thus ...given rise to adverse impacts on other people or the environment²⁵⁴ resulting in an obligation to pay compensation and stop the discharge of any further waste pursuant to article 34. The plaintiffs also argued that, as the defendant industries had caused a large impact on the environment, it was consequently strictly liable for any losses given rise to with the result that the plaintiffs were absolved of the burden of proving fault as would usually be the case. In any case, the unambiguous results of the investigation into the pollution by the *Prokasih* Team, was sufficient, in the plaintiffs' opinion, to establish the fact that the companies had in fact polluted.

²⁴⁹ All three factories lacked an instrument to measure the volume of discharged water contrary to Ministerial Decision KLH No.51/MENLH/10/1995, as well as a permanent tank for storage of waste.

²⁵⁰ As an illustration of variance in scientific investigations, the results of this investigation may be contrasted with that of an investigation carried out in the same month by a *Prokasih* Team from the provincial (Level I) government. The latter investigation did not find evidence to indicate that PT Ve-Wong had polluted the river and concluded that the factory's waste management unit was in functioning order and that the company had not in fact disposed of waste to the river since commencing production.

²⁵¹ Whilst denying culpability two of the three defendants did offer voluntary assistance in the form of construction of a place of worship, and assistance in reestablishing fish stock in the river.

²⁵² To the credit of the legal representatives of the plaintiffs, the claim also provided a useful summary of the legal history, nature and elements of the class action mechanism which until recently has been unknown in Indonesian law.

²⁵³ art. 6, EMA 1997.

²⁵⁴ art. 34, EMA 1997

In comparison to the *Eksponen 66* case, the representative claim in this case complied more closely to the typical elements of a class action. The plaintiffs' claim clearly specified the class members, class representatives and the common circumstances out of which the claim had arisen. The representative nature of the claim was accepted by the District Court of Metro notwithstanding the absence of a specific procedure for representative actions. The Court rejected procedural objections by the defendants concerning the legal authority of the plaintiffs and the adequacy of representation and recognised that the 27 plaintiffs ...had the right to represent the interests of the class members.²⁵⁵ The argument of the defendants that as only 11 of the 13 communities affected by pollution were represented (2 communities had withdrawn from the action) the class representation was inadequate and therefore inadmissible was also rejected by the Court. On this point, the Court, ruled that the 11 villages were entitled to bring an action themselves and did not require representation from the remaining 2 villages as they were not purporting to act on their behalf.

Ultimately, however, the plaintiffs' suit was defeated on procedural grounds of a different nature. In a surprising decision, the Court held that the plaintiffs' application was procedurally defective, as it had failed to include the regional government, represented by the provincial and regency level Environmental Impact Agencies, as defendants in its claim. The Court referred to several provisions in concluding that it was these agencies, which held legal responsibility for environmental monitoring and so should properly be included in any legal action relating to environmental matters. The conclusion of the Metro District Court on this point may be criticised on several grounds. The legal suit in this case did not address the issue of environmental monitoring generally, but rather the specific, private law matter of the damage caused to the plaintiffs by the defendants' alleged actions contrary to law. The issue was, therefore, a matter of private rather than public law, notwithstanding the use of the class action mechanism. There thus seems to be no legal basis for compelling the plaintiffs to sue public agencies when they are simply seeking to enforce their private interests. It should not have been incumbent upon the plaintiffs, as private citizens, to take the time consuming and expensive step of suing public agencies and compelling performance of their public duties. Whilst the latter action would be open to the plaintiffs, it should properly be a matter of choice and not a prerequisite for the enforcement of private rights. There are also numerous precedents where communities have

²⁵⁵ "Way Seputih River," ed. Lukman et al (District Court of Metro: No. 04/Pdt.G/2000/PNM., 2000).

brought legal actions against polluting companies without involvement of government agencies as defendants.²⁵⁶ In any event, the reasoning adopted by the court seems inadequate grounds upon which to defeat an entire action. If the Court was of such an opinion, it is difficult to fathom why it did not instruct the plaintiffs at an earlier stage, inviting appropriate revision of the plaintiffs claim.

2.2.2.3 Pekanbaru Smog Case (2000)²⁵⁷

Like the *Eksponen 66* case, this case arose out of forest fires caused by land clearing activities on the island of Sumatra. In this representative action the plaintiff, the Legal Aid Institute of Riau, sought to represent the 600,000 residents of Pekanbaru in a claim relating to smog that had blanketed the city from 1 February 2000 until 10 March 2000. The severe smog had caused a range of health complaints in the populace of Pekanbaru and deprived the plaintiffs of a clean and healthy environment during that period. In its claim, the Riau Legal Aid Institute argued that the land clearing activities carried out by the four defendant companies, in which existing forest was burnt down, was the cause of the smog covering Pekanbaru during this period. The class members in this case were the 600,000 residents of Pekanbaru, whilst the class representative was the Legal Aid Institute of Riau, described in the claim as a group of people from the community of Pekanbaru.

One of the objections raised by the Defendants was that as the plaintiff was a legal foundation and not a natural person it could not be described as a member of the group of persons, which it sought to represent. On this point, however, the Pekanbaru District Court disagreed, stating that whilst a foundation, the Plaintiff was nonetheless a group of persons within the community that was represented in this case. The issue that ultimately became a legal obstacle for the plaintiff in this case, was that of notification. The Court emphasised both during the hearings and in its decision that the plaintiff in a representative action was required to notify potential class members of the pending claim. Notification would allow potential members to opt out if necessary and would enable a more exact determination of the number of plaintiffs. The court informed the Riau Legal Aid Institute of the necessity of carrying out notification during the course of the

²⁵⁶ See for example the *Babon River* case discussed in detail in Chapter 4. In that case, the plaintiffs were actually pressured by the district government to drop the Mayor of Semarang as a co-defendant in the legal suit. Eventually the Mayor was excluded as a party and the plaintiffs suit proceeded solely against the accused polluting companies.

²⁵⁷ Decision No. 32/PDT/G/2000/PN-PBR

hearing. Notification, however, was not carried out by the plaintiff due to a lack of funds. As a result, the District Court of Pekanbaru refused the Plaintiff's claim because it did not fulfil the stipulated requirements in art. 37.

In the decision, the District Court of Pekanbaru appeared willing to adjudicate a representative action despite ambiguity regarding the correct procedure with which to do so. The court was conversant with the elements of a representative action and correct in requiring notification of potential class members to the claim. In the absence of regulation governing the matter of notification, the court adopted a flexible approach, stating that notification could be carried at the commencement or during the course of proceedings. The class representative in this matter was a legal foundation, the Legal Aid Institute of Riau, rather than a natural person as was also the case in the *Ekspone 66* claim. The defendants' objections on this point were ultimately disallowed by the court, which accepted the plaintiff as a legitimate representative of the class. Nonetheless, the use of organisations in representative actions does point to a tendency amongst Indonesian jurists to confuse the causes of action available to environmental organisations pursuant to art. 38 with representative actions pursuant to art.37, which actually have quite distinct requirements.²⁵⁸ A class or representative action is of a personal or private nature and requires a class representative to have suffered the same loss as the other class members he or she seeks to represent. The use of an environmental organisation as class representative rather than an individual/s in most cases will only confuse the issue and compound the task of establishing commonality in fact and law.

2.3 Compensation for Environmental Damage

Overcoming the procedural hurdles discussed, whilst crucial to the success of any environmental public interest action, does not guarantee success in any substantive sense. Whilst environmental litigation may be initiated in pursuit of political objectives, legally speaking the primary objective is to obtain an appropriate remedy for the loss in question. The cause of action and remedy sought in environmental suits may vary from case to case. A common legal remedy, especially where the litigant has suffered direct loss because of environmentally damaging activities, is that of compensation. In this section of the paper, the different statutory grounds for

²⁵⁸ Santosa and Sugianto, "Class Action: Sekedar Trend Atau Senjata Ampuh (Refleksi Atas Putusan Pengadilan)," p2.

claiming compensation in civil environmental cases and their application in recent cases are considered in some detail.

2.3.1 Article 1365 of the Civil Code

Article 1365 of the Civil Code states that,

Every action contrary to law, which causes loss to another person, obliges the person by whose fault the loss has resulted, to compensate that loss.²⁵⁹

To establish that an action contrary to law (*perbuatan melawan hukum*) has been committed four elements must thus be established:

- a. The action in question must be contrary to law.
- b. The person committing the action must be at fault
- c. There must be damage or loss.
- d. There must be a sufficient causal connection between the action and the damage in question.²⁶⁰

An act (or omission) “contrary to law” may be contrary to legislation, imply transgression of a personal right, or constitute a failure to exercise reasonable care in particular circumstances.²⁶¹ Fault is generally understood to encompass both a subjective and objective element. Subjectively, a person must have understood the meaning and nature of the action, which he or she undertook. The person must also have acted with deliberate intention or negligence in carrying out an action or omission contrary to law.²⁶² Objectively, a reasonable person in the same circumstances would have foreseen the potential damage that resulted and acted differently. To establish fault both elements must be fulfilled. Damage or loss may refer to both material and immaterial loss. Examples of the latter include damage to one’s health or enjoyment of life. Causation implies the action in question was the most proximate and actual cause of the loss in question.

²⁵⁹ Hardjasoemantri, *Hukum Tata Lingkungan*, p358.

²⁶⁰ Nusantara, "Sengketa Lingkungan Dan Masalah Beban Pembuktian" (paper presented at the Prosiding Diskusi DuaHari "Masalah-Masalah Prosedural dalam Penyelesaian Sengketa Lingkungan", Jakarta, 19 June 1989), p57.

²⁶¹ Paulus Effendie Lotulung, *Penegakan Hukum Lingkungan Oleh Hakim Perdata* (Bandung: PT Citra Aditya Bakti, 1993), p19-27.

²⁶² M Ramdan Andri, "Masalah Ganti Kerugian Dalam Penegakan Hukum Lingkungan Secara Perdata," *Jurnal Hukum Lingkungan V*, no. 1 (1999): p2.

The burden of proof in respect of article 1365 lies upon the plaintiff, who seeks compensation for damage.²⁶³ In environmental disputes, the elements of fault and causation may be particularly difficult for a plaintiff prove. Personal loss resulting from pollution involves a complex chain of causality most of which is not apparent to the human eye. Expert scientific testimony is a necessity in such cases to simply establish a chain of causation for legal purposes. Pollution also often originates from multiple sources, and it may therefore be difficult to establish that the actions of a particular defendant caused the loss in question. Moreover, incriminating evidence may be withheld or deliberately concealed by polluting companies.²⁶⁴ The complexities of discharging the plaintiff's burden of proof in environmental suits can result in protracted and expensive legal proceedings with only a small chance of success. Victims of pollution or environmental damage, who in the majority of cases originate from the socially and economically weak sectors of society, are seldom in a position to afford the expenses associated with such proceedings. The legal structure of "fault liability", as contained in article 1365, acts as a deterrent to environmental victims to seek redress and on the other hand does little to deter potential polluters.²⁶⁵

A reversed burden of proof has been suggested as a possible solution to the difficulties mentioned above.²⁶⁶ It is, however, established law that the burden of proof in respect of article 1365 is borne by the party claiming compensation. The Civil Code only provides for a reversed burden of proof in certain prescribed circumstances. For instance, section 1367 (2), (5) establishes a reversed burden of proof in cases concerning the responsibility of animal owners.²⁶⁷ Whilst the court may not apply a reversed burden of proof in environmental disputes based on the Civil Code, it may nonetheless limit the burden placed upon the plaintiff by making a balanced apportionment of the evidential burden, according to the discretion of the court.²⁶⁸ However, this does not seem to have actually occurred in practice.

²⁶³ Whilst the burden of proof does lie upon the plaintiff, the Judge retains a general discretion to vary the distribution of the burden of proof in the requirements of justice in each case.

²⁶⁴ see for instance WALHI, *Gugatan Dan Jawaban : Proses Peradilan Masalah-Masalah Lingkungan* (Jakarta: 1991), p6.

²⁶⁵ On this point see discussion in Andri, "Masalah Ganti Kerugian Dalam Penegakan Hukum Lingkungan Secara Perdata," p3.

²⁶⁶ see Siti Sundari Rangkuti, "Beberapa Problematika Hukum Lingkungan," *Jurnal Hukum Lingkungan* 1 (1995): p54.

²⁶⁷ per article 1865 BW; article 163 HIR; article 283 R.Bg.

²⁶⁸ Rangkuti, "Beberapa Problematika Hukum Lingkungan," p52.

2.3.2 Article 20 EMA 1982

In addition to containing a number of important legislative principles that provided the basis for a judicial reconsideration of standing, the EMA 1982 also explicitly provided for a right of compensation for victims of environmental damage. Article 20(1) of the EMA 1982 stated,

Whosoever damages and/or pollutes the living environment is liable for payment of compensation to victims whose right to a good and healthy living environment has been violated.

Article 20(1) does not explicitly refer to the notion of “fault” as does article 1365. Nonetheless, Indonesian jurists have generally regarded the article as a particularised (*lex specialis*) restatement of art. 1365 in the environmental context, thus implicitly encompassing the elements of fault and causation.²⁶⁹ Article 20 clause 2 further provides for the investigation of complaints and determination of damages by a tripartite team including representatives of the respective parties, government and expert opinion as required. Where conciliation via the tripartite team fails to produce agreement then the matter may be taken to court.²⁷⁰

2.3.2.1 Samidun Sitorus et al v. PT Inti Indorayon (1989)²⁷¹

The necessity of a prior government investigation into pollution pursuant to article 20(2) was a legal bar to an environmental suit arising out of the *Indorayon* dispute discussed in relation to standing above. In this action a claim was made by residents adjoining the Asahan River who had suffered loss due to the pollution from the Indorayon factory. The claim was dismissed on the basis of article 20 which required, according to the court, prior investigation by a team into the type and extent of damages and the procedures for seeking compensation and restoration. Only where unanimous agreement could not be reached within a certain time, should the matter be taken to court.

Given the general reluctance of regional government agencies to investigate pollution claims, the procedural requirement for a tri-partite investigation prior to lodging a legal claim for compensation in practice obstructed, rather than facilitated, claimants’ access to justice. Another

²⁶⁹ Fault based liability on the basis of art. 1365 Civil Code and art. 20 EMA 1982 is distinguished from the system of strict liability (based on risk rather than fault) enacted in art. 21 EMA 1982 and art. 35 EMA 1997. refs

²⁷⁰ Elucidation art.20 (2)

legal obstacle was the absence of implementing regulations referred to in article 20(2), which contributed to a general judicial reluctance to apply the provision.

2.3.2.2 PT Sarana Surya Sakti Case (1991)²⁷²

The issue of mediation pursuant to article 20(2) was considered in the decision of the Surabaya District Court in the *PT. Sarana Surya Sakti (PT. SSS)* case.²⁷³ In that case, a claim for compensation was made by the residents of village Tembok Dukuh who claimed zinc and chromium waste from the PT SSS factory had resulted in pollution of groundwater and village wells. The claim was rejected by the Surabaya District Court on the grounds that article 20 (2) required a claim for compensation to the court be preceded by mediation via a tripartite team. Rangkuti has criticised the decision in this case, arguing that art.20 did not require that mediation precede any claim for compensation but rather presented mediation as an alternative course of action. According to Rangkuti, art.20 presented two possible and separate courses of action: a claim for compensation in court based on art.20(1) read in conjunction with art. 1365 of the Civil Code; and secondly a process of mediation via a tripartite team to agree on a sum of compensation as stipulated in art.20 (2).²⁷⁴ Lotulung, on the other hand, has suggested that the terms of the Elucidation required all claims for compensation to be preceded by mediation.²⁷⁵ Certainly, the language of the article itself, when read in conjunction with the Elucidation, seems to explicitly link the two clauses together and thus require any claim for compensation to be preceded by the stipulated process of mediation.

In any case the reasoning of the court in *PT SSS* case seems hard to justify even on the facts, as extensive government facilitated mediation had in fact taken place both prior to the claim being advanced to the court and subsequently, at the request of the court.²⁷⁶ Furthermore, the

²⁷¹ Decision No. 154/Pdt.G/1989/PN.Mdn. Account adapted from Arimbi, "Unrevealed Things in the Indorayon Case," p2.

²⁷² No. 373/Pdt.G/1991/PN. Sby

²⁷³ *Sarana Surya Sakti* (District Court of Surabaya: No. 373/Pdt.G/1991/PN. Sby, 1993).

²⁷⁴ Rangkuti, "Tanggungugat Pencemar Dan Beban Pembuktian Dalam Kasus Pencemaran Lingkungan" (paper presented at the Prosiding Diskusi DuaHari "Masalah-Masalah Prosedural dalam Penyelesaian Sengketa Lingkungan", Jakarta, 19 June 1989).

²⁷⁵ Lotulung does maintain, however, that art. 1365, as a general provision (*lex generalis*), presented an alternative course of action to art. 20, as a specific provision. Thus in practice the two views are not that different as litigation could still be undertaken even if it were not preceded by mediation. See discussion in Paulus Effendie Lotulung, "Aspek Hukum Perdata Dalam Pengelolaan Lingkungan" (paper presented at the Semiloka Litigasi Lingkungan, Malang, 9-11 September 1995).

²⁷⁶ see Hutapea (ed.), *Beberapa Penanganan Kasus Lingkungan Hidup*, WALHI, 1993, p6

community's allegations of pollution had been substantiated by the investigation of an official government technical team, the outcome of which the parties had agreed to accept.²⁷⁷ However, the attempts at mediation and the results of the official investigation were apparently not given consideration in the decision of the court. A subsequent statement by the presiding judge in that case indicated that it was the absence of implementing legislation referred to in art. 20 (2) that contributed to the reluctance to interpret or apply the provision.²⁷⁸

2.3.2.3 Muara Jaya (1991) ²⁷⁹

The *Muara Jaya* case is the sole example of a successful claim for compensation relating to environmental damage under the EMA 1982. In this case, installation of an oil pipe in West Kalimantan by PT Santan Mas DRC, a subcontractor of Total Indonesia Inc., caused significant damage to the environment of local residents of a housing estate.²⁸⁰ Following the protests of local residents the Samarinda Mayor had ordered PT Santan Mas to cease its activities, as it did not hold the required regional mining permit. The environmental damage was subsequently confirmed, and payment of compensation recommended, by a government investigation carried out pursuant to art. 20. A claim for compensation for environmental damage totalling Rp 977,433,500 was then advanced by the affected community to the Balikpapan District Court, but was rejected.²⁸¹ The plaintiffs were, however, successful on an appeal to the High Court of Samarinda, where compensation of Rp 677 433 500 (US\$90,000) was awarded.²⁸² A final appeal by PT Santan Mas DRC to the Supreme Court failed. In its decision dated 17 March 1993, the Supreme Court stated that nothing in the previous High Court's decision conflicted with existing law, and that as a result the decision was valid.²⁸³ It is interesting that the Supreme Court did not

²⁷⁷ Letter from Walikotamadya Kepala Daerah Tingkat II to Director PT SSS dated 25/10/90.

²⁷⁸ M Toha, "Sulitnya Menjerat Sang Pencemar," *Forum Keadilan*, 2 September 1993, p 83. This issue is discussed in relation to the *Surabaya River* case. Whether this was actually the reason for the court's decision in this case is difficult to say. In any case, the absence of implementing regulations certainly provided a reason for the court to avoid applying the provision.

²⁷⁹ Decision No. 2727K/Pdt/1991

²⁸⁰ Damage included entry of mud and sand into the residential area of the plaintiffs, closure of irrigation channels and water pipes damaging the plaintiffs' crops, local roads and the plaintiffs' wells. *Muara Jawa* (No. 2727K/Pdt/1991, 1991).

²⁸¹ Decision No. 18/Pdt/CI/1989/PN.BPP

²⁸² Decision No. 03/Perd/1991/PT KT SMDA

²⁸³ see *Buletin Informasi Hukum dan Advokasi Lingkungan*, No.02/1993, Indonesian Centre for Environmental Law.

see fit to reject the suit due to the lack of implementing regulations in respect of art. 20, and yet few lower courts have followed this precedent.

The discussion above illustrates the inadequacies of the legal framework for compensation of environmental damage under the EMA 1982. The cases discussed also demonstrate the markedly conservative approach of the Indonesian courts to this matter. The fact that implementing regulations in respect of article 20 had not been enacted should not have been sufficient to preclude plaintiffs from enforcing their rights. Certainly, courts have the option of exercising judicial discretion in applying legal provisions, even in the absence of more specific implementing regulation. In any case, even where compensation claims could not be received based on art. 20 due to a lack of implementing regulations, there is no reason why such claims could not have proceeded based on art. 1365.²⁸⁴ Similarly, the requirement in article 20(2) for mediation by a tri-partite team was interpreted in a formalistic manner by courts to preclude claims, even where mediation had in fact taken place as in the *PT SSS* case. Conservatism also characterised judicial evaluation of evidence, as in the *Sari Morawa* case, where strong evidence of pollution was discounted by the court. Overall, article 20 thus only facilitated access to justice for citizens suffering the effects of environmental damage or pollution in one out of five reported cases, *Muara Jaya*.

2.3.2.4 Singosari SUTET case (1994)²⁸⁵

This case arose when a high-voltage power line was constructed in Singosari in Gresik regency, East Java. The power lines crossed over a number of residences in the Singosari and Indro villages. Whilst the project commenced in November 1989, residents were only informed of the planned powerlines in January 1991. By August 1992 construction was complete and operation of the high voltage lines commenced. The claim for compensation was brought by 92 residents of Singosari and Indro villages whose residences were located under the powerlines. The majority of these residents had voluntarily relocated into makeshift accommodation once the powerlines had been made operational. The plaintiffs claimed that the high voltage cables posed

²⁸⁴ for a more detailed discussion of this point see Paulus Effendie Lotulung, "Aspek Keperdataan Dalam Penegakan Hukum Lingkungan" (paper presented at the Kesamaan Persepsi tentang Penegakan Hukum Lingkungan, Departemen Kehakiman, Jakarta, 29-30 May, 1991), p8.

²⁸⁵ Decision No. 35/Pdt.G/1994/PN.Jkt.Pst

a threat to human health due to the effects of electro-magnetic radiation. Lawyers for the plaintiff cited six different international scientific studies, which had concluded that electro magnetic fields from high-voltage power lines did pose a threat to human health. According to the studies, possible effects included a higher incidence of childhood leukemia and cancer.

The plaintiffs sued the State Electricity Industry, the Department of Mining and Energy and the East Java regional claiming material damages of Rp 70,025,000 (US\$9,300) (relating to their relocation and land devaluation) and immaterial damages of Rp 4,000,000,000 (US\$530,000) (relating to the anxiety and emotional suffering caused by the project) in addition to the relocation of the power lines. The plaintiffs also argued that the high voltage powerline project was contrary to law, as it transgressed their right to a good and healthy environment²⁸⁶, contravened a statutory obligation for the State Electricity Industry to show consideration for public health²⁸⁷ and furthermore contravened Government Regulation No. 29 of 1986 on Environmental Impact Assessment, as an environmental evaluation had only been approved in March 1993, subsequent to the project's commencement.

The case was heard by the Central Jakarta District Court, which rejected the plaintiffs' claim for compensation. The court accepted the Defendants' argument that the high voltage power lines complied with standards stipulated by the International Radiation Protection Association (IRPA) and the World Health Organisation. The Court discounted the substantial body of scientific evidence presented by the Plaintiffs, on the grounds that it was not carried out in Indonesia and hence could be considered relevant in this case. On these grounds the Court concluded that the high voltage power lines did not in fact pose a threat to the health of residents living under them and so did not give rise to an obligation to pay compensation. Whilst the effects of electro-magnetic radiation from power lines is obviously a matter of some controversy the Court's decision in this case to simply discount a large body of international scientific opinion on the grounds that it was not Indonesia based seems difficult to support.

2.3.2.5 Sari Morawa Case (1996)²⁸⁸

A narrow and conservative approach to the evaluation of scientific evidence was also taken in the *Sari Morawa* case. In this case, a group of some 260 plaintiffs who resided next to the Belumai River sued PT Sari Morawa, the owner of a pulp and paper mill adjoining the same river

²⁸⁶ art. 5 EMA 1982

²⁸⁷ art. 15(1) Law No. 15 of 1985 on Electricity

upstream from the villages of the plaintiffs. The villagers alleged that since July 1992 the Belumai River had been severely polluted by untreated waste discharged from the PT Sari Morawa factory into the river. Convincing evidence of the pollution was presented by the plaintiffs to the Lubuk Pakam District Court, including research carried out in 1994 by PT Sucofindo, which indicated that hazardous waste was being discharged from the factory greatly in excess of stipulated limits. Further data compiled by the environmental impact agency, *Bapedal*, confirmed that waste discharged from the Sari Morawa factory failed to comply with applicable regulations. The continuing discharge of untreated waste from the factory, and the company's failure to install appropriate waste management facilities, prompted *Bapedal* to give the factory a "black" rating, the worst pollution rating available.²⁸⁹

The District Court of Lubuk Pakam consented to hear the Plaintiffs' claim based on art. 20 (1) EMA 1982 and art. 1365 of the Civil Code, notwithstanding the lack of implementing regulations for the former provision. Yet, on the substantive issue of compensation, the Court rejected the Plaintiffs' claim. In its decision, the Court concluded that the evidence presented to it did not establish that the action of the Defendant in discharging waste into the River Belumai had resulted in pollution and thus caused the plaintiffs' loss.²⁹⁰ Such proof, the presiding judges stated, would require samples to be taken from the river and examined in laboratories especially designed for testing environmental pollution. Strangely, in coming to this conclusion the Court did not discuss the main evidence upon which the Plaintiffs' case was based - laboratory research carried out by PT Sucofindo demonstrating that waste discharged from the Sari Morawa factory was greatly in excess of regulatory standards, and in fact constituted hazardous waste.²⁹¹ According to the Plaintiffs, PT Sucofindo was also authorised to carry out and publish laboratory examinations in relation to pollution²⁹², a fact not commented upon by the Court.

²⁸⁸ Decision No. 24/PDT/G./1996/PN-LP

²⁸⁹ The rating was part of an environmental enforcement initiative (PROPER) carried out by the national environmental impact agency, where industries were publicly related according to their compliance with environmental regulations.

²⁹⁰ As discussed above, art. 1365 of the Civil Code requires proof of causation, that is that the defendant's action caused the loss of the plaintiff.

²⁹¹ The PT Sufocindo data presented a laboratory analysis of waste discharged from the PT Sari Morawa factory. The data was as follows (regulatory limits are in parantheses for comparison): pH 10.77 (6-9); BOD 1,045.46mg/L (150mg/L); COD 1,712.18mg/L (350mg/L); suspended matter 1,568ppm (200ppm). The court's decision was also contrary to testimony from expert and eye witness testimony confirming pollution from the factory.

²⁹² In accordance with Governor's Decision No. 660.3/1776/K/1993.

2.3.3 Art. 34 EMA 1997

The right of compensation in relation to environmentally damaging activities was revised in the new Environmental Management Act 1997, article 34 of which reads:

Each action contrary to law in the form of pollution and/or environmental damage causing loss to another person or the environment, obligates the party responsible for the enterprise and/or activity to pay compensation and/or carry out certain actions.

In contrast to the EMA 1982 (discussed above), a claim pursuant to art. 34 need not be preceded by any process of mediation. The drafters of the new law made a clear distinction between resolution of environmental disputes within and outside of courts, in order to avoid the confusion that had arisen in relation to art. 20 EMA 1982.²⁹³ Whilst parties may choose to opt for mediation in environmental disputes, the choice is voluntary and if declared to have failed by one or both parties, then the matter may proceed to court. Note also the wider scope of application of art.34 when read in conjunction with art. 37, which enables a community to bring a representative action in respect of environmentally-related damage, as already discussed.

The wording of article 34, unlike article 1365 of the Civil Code, does not make explicit reference to the element of fault. Nonetheless, in practice article 34, like art. 20 of the EMA 1982, has been treated as a particularized restatement (*lex specialis*) of article 1365 of the Civil Code, thus encompassing the element of fault. In addition to compensation, the court may order “certain actions” (*tindakan tertentu*) be carried out by the Defendant pursuant to art. 34. This category of actions is not limited by the terms of the article, although examples of certain actions are provided in the Elucidation, including:

- Install or repair a waste treatment facility such that the waste complies with environmental quality standards which have been applied;
- Restore environmental functions;
- Remove or destroy the cause of the arising of environmental pollution and/or damage

Article 34 thus affords courts with considerable discretion to not only compensate victims of environmental damage but also to order appropriate action to remedy the causes of the

²⁹³ Personal communication, Mas Achmad Santosa, May 1999 Leiden University.

environmental damage or pollution and prevent their recurrence. Article 34 has been the basis for several environmental claims since the enactment of the EMA 1997, which are considered below.

2.3.3.1 Babon River Case (1998) ²⁹⁴

In the *Babon River* case, a community of prawn farmers sued a group of industries for damage attributed to water pollution from the factories. The farmers practiced a traditional method of prawn and fish farming in which their ponds were flushed by the tidal flow from the mouth of the nearby Babon River and the ocean. The six industries the subject of the claim were located further upstream on the Babon River, into which they regularly discharged their waste effluent. Prior to 1995, when none of the industries had owned or operated a waste management unit, the effluent was untreated. In September 1994, the prawn harvest of the fishpond farmers failed for a period of 4 months and subsequent to this resumed but at a much-depleted level. The group of prawn farmers attributed the loss to the six industries located on the Babon River and sued them in the District Court for compensation of environmental damage. The plaintiff farmers were partially successful at the District Court level, obtaining an award for compensation in respect of environmental damage of Rp 4,400,000, although this was well short of their claimed amount of Rp 51,645,000. Upon appeal to the Semarang High Court, however, the claim was rejected, on the grounds that a previous payment to the community from the industries in fact constituted compensation and so absolved the Defendants of further liability. The factual circumstances, legal issues and conditions influencing the final outcome in this case are analysed in further detail in Chapter 4.

2.3.3.2 Laguna Mandiri (1998) ²⁹⁵

Another case where claimants succeeded at the District Court (*Pengadilan Negeri*) level yet failed at the High Court (*Pengadilan Tinggi*) level, was the *Laguna Mandiri* case, which arose out of the devastating fires that swept much of the Indonesian archipelago in 1997. The fires consumed an estimated 1.5 million hectares of forest and blanketed much of the Southeast Asian region in a thick haze.²⁹⁶ In this case a number of members of the Dayak Samihim community in

²⁹⁴ Decision No.42/Pdt.G/1998/PN.Smg. The *Babon River* case is the subject of a detailed case study in Chapter 4.

²⁹⁵ Decision No. 09/Pdt.G/1998/PN.KTB

²⁹⁶ Whilst the Indonesian government initially sought to attribute the fires to natural phenomena, independent analyses of the destruction and subsequent statements by Indonesian authorities themselves

the regency of Kotabaru, Kalimantan brought a legal action for compensation against several companies, including PT Laguna Mandiri, that owned coconut plantation estates adjoining the plaintiffs' villages.²⁹⁷ The plaintiffs claimed that fires intentionally lit by the Defendants for the purpose of land clearing between July and November 1997 had spread out of control, destroying large areas of the plaintiff community's crops and housing. By way of compensation for their loss, the plaintiffs sought payment of a sum of Rp 406,813,788,780 from the Defendants²⁹⁸ and in addition requested that the Court order the Defendants to undertake environmental rehabilitation.²⁹⁹

The Plaintiffs alleged that the Defendants' act of land clearing by fire and their failure to implement a system of fire prevention and control constituted acts or omissions contrary to law, contravening a number of legal provisions or regulations including the following:³⁰⁰

- Article 5 (1) EMA 1997 – The right of the plaintiffs to a good and healthy environment;
- Decision of the Director General of Agriculture No.38/KB.110/SK/DJ.BUN/05.95 concerning Land Clearing without Burn offs which, according to the Plaintiff, in effect prohibited the use of fire for land clearing;³⁰¹
- Decisions of the Director General of Forestry (PHPA) No. 243/Kpts/DJ-VI/1994 and No. 248/Kpts/DJ-VI/1994 concerning the Prevention and Control of Forest Fires which requires the installation of fire barriers and monitoring of potential fire outbreaks which the Defendants had allegedly failed to do.

identified illegal man-made fires as the primary cause. see A.P Vayda, "Finding Causes of the 1997-98 Indonesian Forest Fires: Problems and Possibilities," (Jakarta: World Wildlife Fund for Nature, 1999).

²⁹⁷ The defendants to the claim were PT. Laguna Mandiri I, II and III, PT. Langgeng Muaramakmur III and PT. Swadaya Andika. All the companies the subject of the claim were part of the Salim Group, one of the largest corporate conglomerates in Indonesia, owned by Liem Sioe Liong. The environmental dispute in this case was not the first dispute between the plantations and the adjoining communities who had already been at loggerheads regarding the company's appropriation of traditional lands owned by the communities without proper compensation.

²⁹⁸ Rp 813,788,780 was in respect of material loss, including the loss of crops, housing, and income (due to time spent fighting the constant fires); Rp 300 billion for environmental restoration and Rp106 billion for immaterial loss.

²⁹⁹ "Laguna Mandiri I," in *PT Laguna Mandiri dkk.*, ed. Iceng Awal dkk. (District Court of KotaBaru: No. 09/Pdt.G/1998/PN.KTB, 1998), p39.

³⁰⁰ The plaintiffs further argued that art. 35 EMA 1997, concerning strict liability, applied in this case with the effect that it was not necessary to prove the fault of the defendants in this case. This issue was considered by the appellate court and is discussed in more detail below

³⁰¹ "Laguna Mandiri I," p18.

The Plaintiffs' case was actually pleaded based on article 35, which applies the principle of strict liability.³⁰² Strangely, the District Court of Kotabaru did not refer to this article in their decision, or to the equally applicable article 34, but rather considered the case as an action contrary to law based on article 1365 of the Civil Code.³⁰³ The Court considered that the documentary and witness evidence submitted by the Plaintiff was sufficient to establish that the fires which had destroyed the crops and housing of the Plaintiffs during the period from July to November 1997 had in fact originated from fires deliberately lit for the purpose of land clearing in the plantation areas of the Defendants. It was found that whilst the rapid spread of the fire beyond the Defendants' control to the Plaintiffs' land was related to the unusually long dry season at the time, the loss caused to the Plaintiffs' was nonetheless a result of the negligence of the Defendants and constituted an action contrary to law.³⁰⁴ Accordingly, the Defendants were held liable to pay compensation Rp 150,000,000 to the Plaintiffs, and furthermore ordered the Defendants to implement systems of fire control on their properties as a preventative measure.

The District Court's decision was greeted with elation by the plaintiffs, with a spokesperson for WALHI describing the decision as,

...an important moment for environmental law enforcement, and a precedent for the judiciary to handle cases of intentional environmental damage seriously, whether such cases were brought by a government agency, NGO or community....Whilst the District Court of Kotabaru did not accept all the community's claims, the decision legally and politically proves that large scale commercial industries had a close connection with the devastating forest fires that occurred [in 1998]... in Indonesia.³⁰⁵

The Decision of the District Court of Kotabaru in the *Laguna Mandiri* case was appealed by both the Plaintiffs and the Defendants, and subsequently heard by the High Court of Banjarmasin. The High Court reversed the legal finding of the District Court, rejecting the compensation claim of

³⁰² Strict liability, and the application of article 35 in the *Laguna Mandiri* case is discussed further below

³⁰³ This is a good illustration of the propensity of most Indonesian judges to rely on "traditional" legal provisions, such as those in the Civil Code, rather than more novel environmental legislation with which they evidently have less understanding or familiarity. Instances such as these demonstrate the need for further judicial education in environmental law, a subject considered further in Chapter 6.

³⁰⁴ "Laguna Mandiri I," p18.

³⁰⁵ This connection also was seemingly confirmed in the *WALHI v PT Pakerin* case and the *Ekspone 66 v. APHI* cases relating to the 1997/1998 fires, both of which were at least partially successful. WALHI, "7 Anak Perusahaan Salim Group Terbukti Membakar Hutan," (1999).

the Plaintiffs. The Court did not consider article 35 applicable, for reasons discussed below,³⁰⁶ and furthermore did not discuss the potential applicability of article 34. In considering the claim for compensation based on art.1365 of the Civil Code, the Court was of the opinion that the evidence presented was insufficient to prove that the fires causing the loss to the plaintiff had resulted from the fault of the Defendants. Items of evidence evaluated by the Court included a letter from the Director of Forestry Protection naming the Defendants as among a list of companies under suspicion of causing forest fires through land clearing by fire. The judges also referred to the fact that there had not been any subsequent investigation or prosecution in a criminal court concluding that the fires had been caused by an action of the Plaintiffs. Finally, the Court concluded that none of the 9 witnesses who testified on behalf of the Plaintiffs "...knew for certain that the cause of the crops fire was the fault of the Defendants".

The High Court decision in this case illustrates the difficulty of establishing causation and "fault" and, implicitly, the need for legal provision for environmental compensation that excludes the 'fault element'. The failure of the Court to even refer to article 34 in this respect is unfortunate whilst the Court's decision and evaluation of the evidence based on art. 1365 appears seriously flawed. The fact that no successful prosecution of the Defendants had been made was, in legal terms, entirely irrelevant to the present proceedings. The lack of a successful prosecution probably goes to prove more the inadequacy of prosecutorial agencies than the fault or lack of it of the Defendants. It is also difficult to justify the Court's discounting of the rather convincing testimonial evidence in this case.³⁰⁷ All of the 7 witnesses testified that they had seen fire on the Defendants' estate that subsequently spread on to the property of the Plaintiffs, causing damage to crops and houses. Two of the witnesses (witness 2 and witness 9) not only had seen the fire spread from the Defendants' property to the Plaintiffs' property, but had also witnessed employees of the Defendants burning off piles of wood, the fire from which had subsequently spread. The appellate Court in this respect took an opposite view to the Court at first instance,

³⁰⁶ see section on Strict Liability, p94.

³⁰⁷ The majority of the witnesses who testified in this case gave eye witness accounts of fires deliberately lit within the properties of the defendants and then spreading to the village of the plaintiff community. In some cases the witnesses were actually past employees of the defendant companies. For example the following excerpt from Dedi Suprianus bin Kumuj who at the time was working as a work supervisor for the defendant company: "...Around 2pm the witness saw fire on the industry's property from a distance of 30 metres. The witness knew and saw himself Arpani (industry foreman) lighting a pile of wood. Upon being asked Arpani said that the burn-off was an order from above...after being lit the fire slowly got bigger and burnt coffee, rattan and coconut plantations owned by the community." "Laguna Mandiri I," p56.

which concluded that the witness evidence “proved that the fire originated from the area of the coconut plantation of the Defendants”. Thus, from an objective evaluation of the witness evidence, it is clear that the fires were intentionally lit by the Defendant companies, which in itself satisfies the element of fault. It is also clear that the use of fire for land clearing per se was contrary to law and that certainly the Defendant’s failure to maintain an adequate system of fire control was similarly illegal. The fact that the Defendant knowingly used fire without proper precautions should thus have been sufficient to establish fault. The *Laguna Mandiri* decision at the appellate level is thus difficult to justify on either legal or factual grounds.

2.3.3.3 Banger River Case (1999) ³⁰⁸

A claim for compensation based on article 34 was also brought in the *Banger River* case, which is the subject of a more detailed analysis in Chapter 4. In this case, three large textile factories located near Pekalongan in Central Java disposed of their waste effluent into the Banger River, which by 1992 had become visibly polluted. The pollution also had a severe impact on the residents of Dekoro village, who lived a short distance downstream from the three factories. Drinking wells became polluted, small livestock drinking from the river perished and residents were no longer able to use the river water for any domestic use. The Dekoro community sued the three factories for compensation and environmental restoration based on article 34. At the District Court level the community was successful in its claim, obtaining an award for compensation of Rp 49,184,000. In its decision, the court demonstrated a clear understanding of environmental legal principles, noting the legal responsibility of each person “...to protect environmental sustainability...”³⁰⁹ and emphasising that “...industrial development must be sustainable for the safety of humankind.”³¹⁰ Notably, and in contrast to the *Babon River* and *Laguna Mandiri* cases, the decision was upheld on appeal to the High Court of Semarang. In fact, the Court not only upheld the District Court’s previous decision but also increased the award of compensation for environmental damage to Rp 165,523,000 (US\$22,000) and ordered the industries to ensure optimal operation of their waste management unit. The decision of both the

³⁰⁸ Decision No. 50/Pdt.G/1998.PN.Pkl. The *Banger River* case is also the subject of a detailed case study in Chapter 4.

³⁰⁹ “Banger River Case,” in *PT Bintang Triputrarex PT Kesmatex*

CV Ezri, ed. Indra Prasetya et al. (District Court of Pekalongan: No. 50/Pdt.G/1998.PN.Pkl, 1999), p 36.

³¹⁰ *Ibid.*, p 40.

District and High Courts in this case is an important demonstration of the growing familiarity of Indonesian courts with environmental law and a corresponding willingness to apply it.

2.3.3.4 Kalimantan Peat Land (Farmers Compensation) Case (1999)³¹¹

This claim arose out of the controversial and ultimately unsuccessful attempt of the Suharto government to convert some 1 million hectares of peat land in Kalimantan into productive rice fields.³¹² The project had a devastating environmental and social impact, disrupting the fragile ecology of this unique wetlands area and undermining the subsistence agriculture practiced successfully by many indigenous Dayak communities.³¹³ In this particular case, a group of forty-nine traditional fish farmers from the regency of Kapuas sued a number of national and regional government agencies for compensation relating to environmental damage caused by the Peat Land Project.³¹⁴ Land clearing and construction of a network of irrigation canals had resulted in the destruction of traditional fishponds (*beje*) used by the farmers for generations.

The farmers' compensation claim was upheld at first instance by the District Court of Kuala Kapuas on 30 November 1998. The Court calculated material damage on an individual basis according to the number of fishponds owned by each farmer. The total amount of compensation awarded, which related to material damage of the fishponds, was Rp 625.6 million (US\$83,500). The court also awarded compensation totalling Rp 23.4 million (US\$3120) for the farmers' lost income since July 1996. The Defendants appealed to the High Court of Palangka Raya. Before the hearing at the appellate level, both parties indicated their willingness to attempt to settle the matter. The court then adjudicated to a pre-trial settlement conference at which an agreement was reached between the parties. Pursuant to the agreement, compensation was granted at a slightly lower rate³¹⁵ totalling Rp 383 million (US\$51,000). The agreement was adopted as a decision of the court.

³¹¹ Decision No. 06/Pdt.G/1998/PN.K.Kp; Decision No. 03/PDT/1999/PT.PR (appeal)

³¹² The project is discussed further below at page 117 in relation to a public interest action brought by WALHI.

³¹³ Hanni Adiati, "Ambisi Swasembada Yang Menghancurkan Ekosistem Dan Ekonomi Rakyat," *Tanah Air* XVIII, no. 4 (1998).

³¹⁴ The defendants to the action were the Coordinating Minister for Economy, Finance and Industry; the Minister of Public Works; the Minister for Finance; Environment Minister; PLG project director; the Governor of Central Kalimantan.

³¹⁵ In the original district court decision the court awarded compensation of Rp 10 million for a larger fishpond (*tatah ikan*) and Rp 200,000 for a smaller fishpond (*beje ikan*). In the court adjudicated agreement the compensation rates were Rp 5 million (US\$660) for a larger fishpond and Rp 1 million (US\$130) for a smaller fishpond.

2.4 Strict liability

Concern over the difficulties associated with establishing fault-based liability in environmental disputes has contributed to the enactment of “strict liability” for environmentally dangerous activities in a number of jurisdictions. Pursuant to the principle of strict liability, the element of “fault” is excluded. Thus, a defendant may not be absolved of responsibility because he or she did not intentionally or negligently commit the act in question. It is sufficient rather that the plaintiff establishes the defendant committed the action in question and that the action caused loss to the plaintiff. The subjective or objective ‘fault’ of the defendant is, for the purposes of strict liability, irrelevant. Given the inherent difficulty in establishing the element of fault and the corresponding reduced burden of proof on the plaintiff, strict liability thus has a significant potential to greatly increase access to justice.

The first Environmental Management Act 1982 introduced the principle of strict liability in the environmental sphere, yet its application required the enactment of further implementing regulations which never occurred. Unsurprisingly, the article was never applied by courts as a result. Article 35 of the new EMA 1997 has made more specific provision for strict liability, stating:

The party responsible for a business and/or activity which gives rise to a large and significant impact (*dampak besar dan penting*) on the environment, which uses hazardous and toxic materials, and/or produces hazardous and toxic waste, is strictly liable for any resulting losses, with the obligation to pay compensation directly and immediately upon occurrence of environmental pollution and/or damage.³¹⁶

Article 35 thus applies strict liability to three situations:

1. where a business or activity gives rise to a large and significant impact on the environment;
2. where a business or activity uses hazardous and toxic materials;
3. where a business or activity produces hazardous and toxic waste.

³¹⁶ Art 35(2) also stipulates several exceptions to the application of strict liability. Strict liability will not apply where it can be proved that the pollution or environmental damage resulted from a natural disaster, war, an extraordinary situation beyond human control or the actions of a third party. In the latter case strict liability will apply to the third party responsible for the environmental damage.

Whilst “large and significant impact” is not defined in the Act the term is also used in article 15(1) of the Act which states that every business or activity plan which may “...give rise to a large and significant impact on the environment, must possess an environmental impact analysis”.³¹⁷ Implicitly then, every business or activity obliged to undertake an environmental impact assessment would also be subject to strict liability in the event of resulting pollution or environmental damage – a wide scope of application indeed.³¹⁸ Whilst “large and significant impact” is not defined by the Act, the Elucidation to art. 15(1) states a number of criteria to be used in measuring the potential environmental impact of an activity. These criteria include:

- a. the number of people who will be affected by the impact of the business and/or activity plan;
- b. the extent of the area affected;
- c. the intensity and duration of the impact;
- d. the amount of other environmental components which will be affected;
- e. the cumulative nature of the impact;
- f. reversibility or non-reversibility of the impact

As discussed above the principle of strict liability excludes the element of fault and thus lightens the burden of proof on the plaintiff. Only limited defences are available to the defendant who wishes to relieve himself of strict liability. If the defendant can prove, or the plaintiff fails to establish, that the defendant’s business or activity caused the loss in question, then strict liability will clearly not apply.³¹⁹ Further defences are stipulated in article 35(2) and include natural disaster or war, forced circumstance beyond human control or actions of a third party that cause environmental pollution or damage.³²⁰ Given the wide scope of article 35, and its potential impact in facilitating access to justice, it is surprising that the article has been considered in so

³¹⁷ The Elucidation to art. 15(1) states a number of criteria which may be used in assessing the impact of an environmental activity: the number of people affected; the extent of the area affected; the intensity and duration of the impact; the amount of other environmental components which will be affected; the cumulative nature of the impact; the reversibility or non-reversibility of the impact.

³¹⁸ A more restrictive interpretation of the article was made by the High Court in the *Laguna Mandiri* case discussed below.

³¹⁹ Causation is not stated as an explicit defence in article 35(2) but is implicit in the wording of art. 35(1).

³²⁰ The Elucidation defines ‘action of a third party’ in this clause as ‘an action of unfair competition or a Government fault’.

few cases. Two cases are discussed below where the issue of strict liability was at least raised, although ultimately not applied in either case. As in the case of representative actions, the failure of the courts to apply strict liability may at least partially be attributed to a lack of familiarity and understanding of the doctrine.

2.4.1 *Laguna Mandiri* (1998)³²¹

The *Laguna Mandiri* case was discussed earlier in relation to the issue of compensation for environmental damage. It may be recalled that in that case it was claimed by the plaintiffs that the fires intentionally lit by the Defendants for the purpose of land-clearing between July and November 1997 had spread out of control, destroying large areas of the plaintiff community's crops and housing. The Plaintiffs argued, *inter alia*, that the burning off carried out by the Defendants had resulted in a large and significant impact on the environment, including the loss of crops that represented the livelihood of the Plaintiffs and, moreover, far-reaching ecological damage. Accordingly, based on art. 35(1) EMA 1997, it was argued that the Defendants were strictly liable for loss caused by their actions and obliged to pay compensation.

The claim for compensation was accepted, in part, by the District Court of Kotabaru on the basis of art. 1365, without reference to the doctrine of strict liability. The court ordered the Defendants to pay Rp 150 million in compensation (US\$20,000) and implement a fire control management system as a preventive measure. On appeal, however, the plaintiffs' claim was rejected by the High Court of Banjarmasin, which nonetheless did consider the issue of strict liability. The court adopted a more restrictive interpretation of art. 35, stating that the clause applied only to industries producing a large and significant impact on the environment, which used hazardous and toxic materials and/or produced hazardous and toxic waste. Article 35 was thus interpreted as applying to only 2 rather than 3 categories of circumstances. As the Defendants in the *Laguna Mandiri* case did not use such materials in the course of their activities, given that they were a plantation company rather than an industrial company, strict liability could not apply. The language of the article itself does not, on the face of it, seem to support such a restrictive interpretation. If it had been the intention of the drafters to restrict application of strict liability to two rather than three categories of circumstances, then the article presumably would

³²¹ Decision No. 09/Pdt.G/1998/PN.KTB

have been drafted differently.³²² Furthermore, the phrase “large and significant impact” is also used in the Act in relation to environmental impact assessment and is defined in a manner that supports a broader interpretation of this article. Legal commentary concerning article 35 to date has also adopted the wider interpretation, applying strict liability to three distinct situations as discussed above.³²³

2.4.2 *Walhi v. PT Pakerin et al (1998)* ³²⁴

The issue of strict liability was also raised in the *Walhi v. PT Pakerin* case in which WALHI claimed an amount of Rp. 2 trillion for the purpose of environmental restoration from eleven forestry companies whom they alleged were responsible for catastrophic environmental damage caused by the 1997 forest fires.³²⁵ The 11 companies operated extensive forest concessions located in the region of Southern Sumatra, one of several regions devastated by uncontrollable forest fires between September and November 1997. Besides widespread devastation of flora and fauna, the thick smoke from the fires caused record levels of air pollution³²⁶ and an outbreak of serious breathing disorders among the general populace.

The Defendant companies were included in a list compiled by the Department of Forestry of 176 companies suspected of the illegal yet common practice of land clearing through burn-offs. Detailed satellite photos, cross-referenced with maps of forest concessions, also confirmed the location of “hot-spots”, or fire epicentres on concessions operated by the Defendant

³²² The restrictive interpretation of article 35 adopted by the High Court of Banjarmasin would be justified only if the article read as follows:

“The party responsible for a business and/or activity which gives rise to a large impact on the environment *and* which uses hazardous and toxic materials, and/or produces hazardous and toxic waste, is strictly liable for losses which are given rise to, with the obligation to pay compensation directly and immediately upon occurrence of environmental pollution and/or damage.” However, the absence of the conjunction “and” and the inclusion of the conjunction “and/or” suggests the three categories contained in article 35 should be separately applicable.

³²³ see for instance,;Suparto Wijoyo, "Penyelesaian Sengketa Lingkungan Menurut Uuplh," *Jurnal Hukum Lingkungan* V, no. I (1999): p32-33. Koesnadi Harjasoemantri, "Strict Liability (Tanggung Jawab Mutlak)" (paper presented at the Lokakarya Legal Standing & Class Action, Hotel Kartika Chandra, Jakarta, 7 December 1998), p7.

³²⁴ "Walhi V. Pt Pakerin Et Al," (District Court of Palembang: 8/Pdt.G/1998/PN.Plg, 1998).

³²⁵ The companies the subject of WALHI's claim were: PT Pakerin, PT Sentosa Jaya, PT Inhutani V, PT Sukses Sumatera Timber, PT Inti Remaja Concern, PT Nindita Bagaskari, PT Musi Hutan Persada, PT Sinar Belanti Jaya, PT Sri Bunian Trading & Co, PT Daya Penca, PT Family Jaya Group.

³²⁶ Data from the Palembang Department of Health stated that on October 7 1997 dust levels measured 2.7762mg/m3 compared with a regulatory limit of 0.26mg/m3. "Walhi V. Pt Pakerin Et Al," p6.

companies.³²⁷ Further testimonial or eye-witness evidence presented by WALHI related to only two of the eleven Defendants: Defendant VII (PT Musi Hutan Persada) and Defendant III (PT Inhutani), two forestry companies which were originally amalgamated within a larger company, PT Enim Musi Lestari.

In its decision, the Court only evaluated the testimonial evidence, which, as discussed above, related to Defendant III and Defendant VII. In the case of Defendant III, PT Inhutani, a further witness called by the Defence had stated that the fire burning within the PT Inhutani's property had actually originated outside the area of land owned by the company. The Court considered this account sufficient evidence that the fire in question had not been caused by PT Inhutani and the company therefore could not be held liable. The latter Defendant VII, PT Musi Hutan Persada, however, had failed to advance evidence contrary to the Plaintiff's claims.³²⁸ The Court therefore held that the Plaintiff's claims against PT Musi Hutan Persada were established. Defendant V, PT Inti Remaja Concern, had failed to file a defence nor attend the court hearings despite being properly served notice of the proceedings. Consequently, the Court concluded that this particular Defendant had no objection or defence to the claim in question, which was held established.

The Court made only passing reference to the other documentary and expert witness evidence advanced by the Plaintiff, and considered that it did not specifically establish the claim in respect of the other 8 defendants. The judges' decision in this respect was disappointing, as in doing so they failed to explicitly discuss the main grounds of WALHI's claim: the analysis of satellite pictures which depicted with a high level of precision the location of fires during the period September to December 1997 within the forest concessions operated by the 13 Defendants within Southern Sumatra. Certainly, the main limitation of such evidence was that it could not prove conclusively that the companies themselves had *intentionally* lit the fires. Yet, if the doctrine of strict liability were to be applied, this should not have been sufficient to defeat WALHI's claim. WALHI argued on this point:

³²⁷ Satellite photos from the American satellite NOAA illustrated the hottest points of the fires, which corresponded with their sources, or points of origin. This data was overlayed with Department of Forestry maps detailing the concessions held by particular companies to determine from which specific areas the fires had originated.

³²⁸ Actually 5 witnesses were called by defendant VII, who provided not so much eye witness accounts of the fires but rather general assertions including that the PT Musi Hutan Persada had not cleared land with slash and burn methods since 1994 and that the company made efforts to assist the local community with fire control. "Walhi V. Pt Pakerin Et Al," p30-.

- that the Defendants should be held strictly liable on the basis of art. 35 EMA 1997 for such “...a large impact on the environment...[and] losses given rise to”, in which case fault or intention would not be relevant;
- that the negligence of the Plaintiffs in failing to maintain an adequate system of fire control on their properties was in any case contrary to environmental law and obliged the companies to carry out environmental restoration and pay compensation for resulting damage;

Taken in the context of the above legal arguments, the documentary evidence produced by WALHI, particularly the satellite photos the accuracy of which could not be disputed, constituted a strong case for the culpability of the Defendants. This case was not seemingly negated by the argument that the fires were a natural disaster and the result of an exceptionally long dry season and the “El Nino” weather phenomena. Expert witnesses for both the Plaintiff and Defendant VII confirmed that whilst the El Nino pattern might have increased dryness, it would not in itself have caused the outbreak of fires.³²⁹ In any case, if the fires constituted a “large and significant impact on the environment”, then the burden of proof should have been borne by the Defendants not the Plaintiff, through application of the strict liability doctrine.

The stipulation of strict liability for such a wide range of environmentally damaging acts by article 35 is one of the most far reaching legal provisions enacted in the Environmental Management Act 1997. By excluding the element of fault in certain situations the doctrine of strict liability is a legal means of implementing the important environmental principle that the polluter must pay. However, despite the legislative basis provided in art. 35 and several opportunities to apply the article in the cases discussed above, the potential of this important legislative principle has yet to be realised in the course of environmental litigation.

2.5 Environmental Restoration

The two previous sections have discussed the grounds upon which persons directly affected by environmental damage may claim compensation from those responsible. Yet, as explained in the Introduction to this Chapter, environmental litigation encompasses both private pecuniary

³²⁹ Ibid., p26-.

interests as well as public, environmentally related interests. An issue of particular significance in environmental litigation then is the legal grounds upon which a polluting party may be obligated to compensate for or restore public environmental damage.

2.5.1 Article 20(3) EMA 1982

An obligation to pay environmental restoration costs was first introduced by the EMA 1982, article 20(3) of which provided that,

Whosoever damages and/or pollutes the living environment is liable for payment to the State of the restoration costs of the living environment.

According to the Elucidation to the Act, evaluation of environmental restoration costs were to be undertaken by the same government investigation team established under art.20 (2) for the determination of compensation levels. From the article, itself it was unclear whether environmental organisations could bring an action to compel payment of restoration costs to the State.³³⁰

2.5.1.1 Surabaya River Case (1995)³³¹

In the Surabaya River Case Walhi brought an environmental public interest suit against three paper mills accused of polluting the Surabaya River – the source of drinking water for the residents of Java's second largest city, Surabaya.³³² During the proceedings, Walhi produced laboratory tests taken over a period of some 22 months to support its allegation that the three defendant industries had discharged liquid waste exceeding stipulated pollutant limits into the Surabaya and Tengah Rivers. The laboratory results demonstrated considerable ecological damage and pollution caused by the discharged waste which had, in addition, rendered the water in the Surabaya River unfit for use as drinking water.³³³

³³⁰ The article was cited, and compensation claimed for environmental restoration by Walhi in the *Surabaya River Case*, however the suit was rejected due to the lack of implementing regulations both in respect of art. 20(1) and (3)

³³¹ Decision No.: 116/PDT.G/1995/PN.SBY

³³² The three factories were PT. Surabaya Mekabox, PT Surabaya Agung Industri Pulp dan Kertas and PT. Suparma.

³³³ Tests of waste discharged from PT Surabaya Mekabox over a 22 month period indicated an average BOD (Biological Oxygen Demand) level of 680, approximately 22 times the maximum level of 30, and an average COD (Chemical Oxygen Demand) level of 1408, approximately 17 times the maximum level of 80. In the same period waste from PT Surabaya Agung Industri Pulp dan Kertas showed an average BOD level

The plaintiff Walhi argued that the defendant factories had acted contrary to a number of environmental laws, including:

- Decision of the Governor of East Java No. 414 of 1987 concerning Waste Standards which stipulated maximum BOD (30mg/L) and COD (80mg/L) levels;
- Art. 13(1) of Government Regulation No.22 of 1982 concerning Water Management, which states that where water is utilised for drinking (as the Surabaya River was in this case) this need takes priority above all others.
- Art. 33 of Government Regulation No.22 of 1982 concerning Water Management, which states that the community is obligated to assist in controlling and preventing water pollution which could compromise water use and/or the environment.
- Art. 5(2) EMA 1982 obligating ‘each person’ to protect the environment and prevent environmental damage or pollution;
- Art. 21(1) Law No. 5 of 1984 concerning Industry requiring industries to prevent environmental damage or pollution resulting from industry activities;
- Art. 17(1) Government Regulation No. 20 of 1990 concerning Control of Water Pollution, which requires each person disposing of liquid waste to comply with regulatory standards.

On the basis of art. 19 EMA 1982, which recognises the “supporting role” of community institutions in environmental management, Walhi had researched water consumer complaints over a period of one month and undertaken testing of the Surabaya River for water quality. The environmental organisation claimed the reimbursement of these expenses from the defendant industries. The organisation’s second claim related to environmental restoration. Art. 20(3) EMA 1982 required any person responsible for environmental pollution or damage to pay the costs of environmental restoration to the State. Similarly, art. 36(1) of Government Regulation No. 20 of 1990 stated that the costs of controlling and restoring water pollution resulting from an activity were to be borne by the person or company responsible for that activity. To ensure environmental restoration and prevention of further pollution Walhi requested the court order an interim cessation of the factories’ operation, an open environmental audit, installation of waste

of 417 and COD level of 870 whilst effluent from PT Suparma tested at an average of 197 BOD and 352 COD.

management units, environmental rehabilitation and continuing monitoring of environmental compliance with local community participation.³³⁴

In an interim decision, the Surabaya District Court rejected one of the Plaintiff's witnesses, the Assistant Governor, because he possessed an interest in environmental matters. This particular senior official had developed a reputation for responding firmly to polluting industries, upon which he often launched surprise examinations. Ultimately, information was received from the official in question, but on a private basis.³³⁵ In relation to the substantive claim the Surabaya District Court at first instance rejected it because implementing regulations for article 20 (1) and (3) concerning payment of compensation for environmental damage and restoration of the environment respectively, had not yet been enacted. As a result, the Court held that the claim could not be further considered. The Court also criticized the compensatory sums claimed by Walhi, stating that the basis for such amounts was not clear and that, pursuant to art. 20, a team should be established to determine the form, type and amount of compensation. The District Court's decision was upheld on appeal to the High Court of East Java.

2.5.2 Article 38 (2) EMA 1997

The legal rights of environmental organisations to bring a public interest suit have been more clearly stipulated in art. 38 of the Environmental Management Act 1997. As discussed above article 38(1) acknowledges that,

In the scheme of implementing responsibility for environmental management consistent with a partnership principle, environmental organisations have the right to bring a legal action in the interest of environmental functions.

Article 38(2) makes further stipulation as to the exact nature of the legal action that environmental organisations may initiate. That clause states that the right of an environmental organisation to bring a legal action is limited to,

...a claim for the right to carry out certain measures excluding any claim for compensation, with the exception of expenses or real outlays.

³³⁴ "Surabaya River (First Instance)," in *PT Surabaya Mekabox PT Surabaya Agung Industri Pulp dan Kertas*

PT Suparma, ed. WALHI (Surabaya District Court: Decision No.: 116/PDT.G/1995/PN.SBY, 1995), p15.

³³⁵ Eko Nuryanto, "Kendala Dan Peluang Pendayagunaan Hukum Perdata Dan Hukum Acara Perdata Indonesia Dalam Kasus Lingkungan: Refleksi Atas Penangan Kasus Lingkungan" (paper presented at the Semiloka Litigasi Lingkungan, Malang, 9-11 September 1995), p7.

The Elucidation to the EMA 1997 describes three sub-categories of “certain measures” which may be legitimately claimed by an environmental organisation pursuant to art.38:

- i) Application to the court for an order that a person undertake certain legal actions connected with the preservation of environmental functions;
- ii) A declaration that a person has carried out an action contrary to law due to pollution or damage to the environment;
- iii) An order that a person carrying out a business and/or activity install or repair a waste treatment unit.

Pursuant to article 38(2), an environmental organisation may thus initiate a legal suit to compel restoration of environmental damage. The Elucidation further states that “expenses or real outlays”, which an environmental organisation may claim, are “expenses which can in fact be proven to have been outlaid by an environmental organisation.” Although the Elucidation does not explicitly present the list of remedies as exhaustive, the language used suggests that this is indeed the case.³³⁶ Notably absent from the list of potential remedies provided in the Elucidation is an order of an injunctive nature, that a person refrain from carrying out actions which cause pollution to or damage of the environment. This could, however, conceivably be included within the scope of “a”, if cessation of an ongoing activity could be described as a “legal action”, which might be the case if it compliance with a regulatory standard were required and a legal consequence thus intended. The absence of an expedited procedure to cease polluting activities is a further deficiency of the remedies presented above. A possible alternative in this respect would be a tort action encompassing a provisional claim for the cessation of unlawful polluting activities, based on the *Wetboek van Burgerlijke Rechtsvordering*.³³⁷

The exclusion of claims for compensation of environmental damage by environmental organisations on behalf of environmental interests significantly diminishes the potential deterrent effect of public interest suits towards potential polluters. Such exclusion also seems somewhat inconsistent with the right of environmental compensation created by art. 34(1). That article states:

³³⁶ Note that whilst the Elucidation is not formally a part of the law, it is nonetheless the primary reference point for its interpretation.

³³⁷ Personal communication, Adriaan Bedner, 7 December 1999.

Every illegal action of pollution and/or damage to the environment, which has an adverse impact on other people, *or the environment*, obliges the party responsible for the business and/or activity to pay compensation and/or to carry out certain actions.³³⁸

This article thus explicitly creates an obligation on the part of a polluting party to pay compensation, *inter alia*, where the environment is damaged or polluted as result of their activities. It is unclear why environmental organisations should be excluded from claiming compensation for environmental damage when an obligation for polluters to pay compensation is created by art. 34(1). Moreover, there has been to date no administrative or regulatory initiative to stipulate which government should claim and/or administer such compensation. In the absence of a reliable government mechanism, it is difficult to see how such an obligation is to be enforced if environmental organisations are prevented from claiming such compensation through legal action on behalf of environment interests. The existing scope allowed by art. 38(2) allowing an environmental organisation to claim restitution of expenses outlaid in cleaning up the environment is insufficient in this respect, as this will only occur where such an organisation has the required funds in the first place. Clearly, this will not always be the case. On both logical and practical grounds, then, the exclusion of compensation as a remedy available to environmental organisations thus seems inconsistent with both the legal obligation in art.34 and the recognition of environmental organisations as representatives of environmental interests in art.38(1).³³⁹

2.5.2.1 WALHI v Pt Pakerin and others³⁴⁰

The issue of what “measures” an environmental organisation might apply for pursuant to art.38(2) was raised in the case of *WALHI v. Pt Pakerin*, discussed above in relation to the issue of strict liability. In its claim, WALHI had described the amount of Rp 2 trillion (US\$267 million) claimed by it as costs of environmental restoration (*pemulihan*), rather than compensation. The presiding judges, however, ruled that the amount claimed by WALHI, whilst described as restoration costs, in fact constituted compensation (*penggantian rugi*) and was thus disallowed by the terms of art.38(1). Nonetheless, two of the Defendants were found to have

³³⁸ Italics added.

³³⁹ It is notable that compensation is also excluded as a potential remedy in articles 3:305a and 3:305b of the Dutch Civil Code, which possibly provided a model in the drafting of the above provision.

³⁴⁰ "Walhi V. Pt Pakerin Et Al."

committed actions contrary to law in polluting and damaging the environment, and were accordingly ordered to implement a forest fire management system in their respective areas.³⁴¹

Thus whilst the procedural obstacles to environmental public interest suits are to some extent overcome by the recognition of standing in art.38(1), much of the potential impact of such suits is undermined by the exclusion of compensation as a possible remedy. The possibility of environmental organisations claiming “real expenses” is not a sufficient answer to this problem. Clearly, the damage caused by the catastrophic forest fires in the *WALHI v. PT Pakerin* case was beyond the capacity of an NGO like WALHI to clean up itself. There is thus little prospect that environmental restoration could be first carried out and then such “real expenses” claimed against the companies responsible. Yet the restrictions of art. 38(2) prevents a concerned environmental NGO such as WALHI from claiming compensation against those parties responsible. Given the widely acknowledged failure of prosecutorial agencies to deal with those responsible for the forest fires, it is unfortunate that such a claim is denied by the restrictive terms of art. 38(2).

2.6 Right to Environmental Information

The need for public access to accurate information concerning environmental management has been widely recognised as essential to community participation in environmental management and effective environmental law enforcement.³⁴² This principle finds legislative expression in the EMA 1997; article 5(2) of which recognises the right of each person “...to environmental information which is related to environmental management roles.” The right contained in art. 5(2) is complemented by an obligation stipulated in article 6 (2) on “...every person carrying out a business or other activity...[to]...provide true and accurate information regarding environmental management.”

At the institutional level, the Central Environmental Impact Agency (*Bapedal Pusat*) formed an Environmental Monitoring and Information Centre (*PPIPL*), charged with the task of developing a system for the dissemination of environmental information.³⁴³ One of the problems

³⁴¹ Decision No. 8/Pdt.G/1998/PN.Plg.

³⁴² For example, international standard ISO 14001 requires industry to communicate all aspects of environmental management to the community in its vicinity. Effendy Sumardja, "Kebijakan Hak Atas Informasi Lingkungan" (paper presented at the Lokakarya Hak Atas Informasi Lingkungan, Jakarta, 4 March 1999), p6.

³⁴³ One initiative taken by *Bapedal* to increase access to environmental information is publicising of a daily Air Pollution Standard Index for five major cities via *Bapedal*'s web site and local radio. Sudarsono,

confronted by the Centre at the institutional level has been a lack of coordination and consistency between government agencies. Thus, multiple investigations by different agencies into the same incident of pollution have often produced wildly different results and conclusions. Moreover, at the community level, access to environmental information remains extremely problematic with access often denied by industries or government agencies or, not infrequently, with deliberately misleading information being provided. To date the issue of environmental information has only been raised in one case, that of *Walhi v. PT Freeport*.

2.6.1 *WALHI v. PT Freeport (2001)*

On May 4, 2000 a breach in an upholding wall of Lake Wanagon, used as a receptacle for overburden waste by PT Freeport Indonesia, caused the overflow of a vast quantity of water, sludge and overburden waste. The burst in the dam wall tragically claimed the lives of four workers and flooded the land of the nearby Banti village. Subsequent government investigations into the tragedy attributed it largely to Freeport's negligence – an unsurprising conclusion given similar breaches of the lake's walls had occurred twice before.³⁴⁴ The company's handling of this human and environmental tragedy, and its previous history of environmental controversy, prompted WALHI to file its second legal suit against Freeport in the Central Jakarta District Court. The suit accused Freeport of deliberately misleading the public and providing false information in relation to the incident. This, asserted WALHI, was contrary to art. 6 of the EMA 1997 which states that,

Every person carrying out a business or other activity must provide true and accurate information regarding environmental management.

Contrary to Freeport's public statements, Walhi charged the multinational company with causing extensive environmental pollution and damage through its mining operations, including the discharge of heavy metals and hazardous waste into Lake Wanagon and the Wanagon River.³⁴⁵ In contrast to previous claims, the outspoken environmental watchdog did not make any monetary

"Hak Atas Informasi Lingkungan Hidup" (paper presented at the Hak Atas Informasi Lingkungan Hidup, Jakarta, 4 March 1999), p4.

³⁴⁴ An investigation by a team from the Environmental Impact Agency was launched into a similar incident in 1998, with the subsequent team's eventual report criticising inadequate construction and waste disposal carried out by Freeport and the incapacity of Lake Wanagon to receive overburden waste, especially given the susceptibility of the area to seismic activity.

³⁴⁵ "Walhi Akan Ajukan Freeport Ke Pengadilan," *Kompas*, 22 May 2000.

claim, but rather demanded Freeport publicly apologize, via a range of media, for its alleged misdeeds. An order was also sought for the company to immediately reduce its production level, to avoid further unsustainable levels of overburden and tailing waste.

In a decision issued on 28 August 2001 the South Jakarta District Court concluded that the mining giant had acted illegally in polluting the environment in the vicinity of the factory and making factually incorrect statements at the time of the Lake Wanagon incident regarding the impact of tailing. The presiding judges stated that Freeport was incorrect in stating that the company's mining activities did not pose a threat to either human health or the environment in the long term. Contrary to such statements, evidence indicated that hazardous tailing waste had indeed had a negative impact on the environment. Whilst the Court did not order a public apology by Freeport, as requested by the plaintiff, the company was ordered to improve waste management of tailings containing hazardous waste and ensure that stipulated water quality standards were met in respect of Lake Wanagon and Wanagon River.³⁴⁶

The *Freeport* case is one of the few public interest environmental cases in which the claimant has been at least partially successful. The decision of the District Court in this case was in line with and may have been partially influenced by the government's response to the Wanagon incident, which had attracted significant national and international publicity. In a cabinet meeting on the issue, the then Environment Minister Sonny Keraf had ordered the mining company to stop dumping overburden waste into Wanagon Dam and devise a new plan, subject to government approval, for the processing of such waste. In any case, the decision of the South Jakarta District Court was at least a partial victory for WALHI's efforts to "implement" key environmental law provisions through public interest cases and its sustained political campaign against Freeport's mining operations in Irian Jaya. The Court's decision has potentially opened another 'door' for environmental public interest litigants and is the first indication that the right to environmental information stipulated in art. 6 may have more than a purely symbolic value.

2.7 Administrative Environmental Litigation

Community-initiated enforcement of environmental laws via the courts in Indonesia may also occur in the context of public administrative law, where the subject of litigation is typically a decision or action of the state, which permits or condones environmentally damaging activities.

Decisions of the state in the environmental context usually take the form of state-issued licences, a number of which are required for almost all forms of development in Indonesia.³⁴⁷ Where it is believed that an administrative decision to grant or withhold an operating licence is erroneous, that decision may be challenged in the State Administrative Court (*Pengadilan Tata Usaha Negara*).³⁴⁸ The process of challenging state administrative decisions is governed by the Administrative Judicature Act No. 5 of 1986 (AJA), which stipulates a number of conditions for contesting a state decision.

2.7.1 *Standing in the Administrative Courts*

Firstly, the applicant must have suffered a loss as a result of the contested decision.³⁴⁹ Material damage to person or property caused by polluting activities would certainly constitute a “loss” under art. 53 (1), justifying challenge of the operating licences facilitating such activities. Moreover, the scope of administrative standing was extended in the case of environmental public interest actions in the 1994 *Reafforestation Funds (IPTN) Case*.

2.7.1.1 Reafforestation Fund (IPTN) Case (1994)³⁵⁰

In this case a group of environmental NGOs lodged a legal suit with the State Administrative Court in Jakarta requesting that Presidential Decree No. 42 of 1994, concerning a transfer of funds from a reafforestation fund to PT Industri Pesawat Terbang Nusantara (IPTN), be declared invalid. The Reafforestation Fund was created by Presidential Decree No 29 of 1990 and comprised of levies upon forest concessionaries. The use of proceeds from the levies was restricted to reafforestation, commercial plantation development and land rehabilitation. In practice, however, the fund was used to bankroll a wide range of projects outside these legally sanctioned purposes. In a statement on 15 October 1999 the then Forestry Minister, Muslimin

³⁴⁶ WALHI, “Pt Freeport Bohong,” (2001). The decision was immediately appealed by Freeport and later also by WALHI.

³⁴⁷ Typical licences include the Industry Enterprise Permit (*Izin Usaha Industri*), the Location Permit (*Izin Lokasi*), the Building Permit (*Izin Mendirikan Bangunan*) and the Mining Authority (*Kuasa Pertambangan*). The *Hinderordonnantie* (*Ordonansi Gangguan* Nuisance Ordinance) also requires permits to be obtained for a wide range of development activities, including most forms of industrial development.

³⁴⁸ Pursuant to the Administrative Judicature Act No.5 of 1986. A state administrative action, as distinct from a written decision, may not be challenged in the State Administrative Court. In certain circumstances, however, it may be challenged as an “action contrary to law” (*perbuatan melawan hukum*) in the general or civil courts, which is discussed further below.

³⁴⁹ Article 53(1) Administrative Judicature Act 1986

³⁵⁰ Decision No. 088/G/1994/Piutang/PTUN.Jkt.

Nasution, estimated that between 1993/1994 and 1997/1998 financial years Rp 1.6 trillion had been misappropriated from the fund for unauthorised purposes.³⁵¹

In its decision the Court endorsed the principle of “environmental standing”, whereby an environmental organisation may bring a legal action in defence of the public interest of environmental preservation.³⁵² The Court emphasised, however, that only environmental organisations fulfilling certain criteria would be qualified to bring such an action. The Court set out four such criteria:

- i) That the aim of an organisation must be environmental protection or preservation and stipulated as such in its Constitution.
- ii) That the organisation must be a Legal Body or Foundation.
- iii) That the organisation must demonstrate a concern for the environment in its actual activities.
- iv) That the organisation must be sufficiently representative.

The Court found that 4 out of the 6 plaintiffs fulfilled these criteria and they were thus allowed legal standing. In the case of the second Plaintiff, The Indonesian Foundation for Tropical Nature (*Yayasan Alam Tropika Indonesia*) the Court found that the Foundation’s Articles of Association were not properly executed by a Notary as legally required. Similarly, a letter appointing the representative of the Foundation did not fulfil the necessary legal requirements. In the case of the sixth plaintiff, the Indonesian Rainbow Foundation (*Yayasan Pelangi Indonesia*), the purported representatives had not been appointed in a way that satisfied stipulated legal requirements. The criteria enunciated by the Jakarta State Administrative Court in this case were given legislative

³⁵¹ "Dana Reboisasi Rp 1,6 Trilyun Diselewengkan," *Kompas*, 15 October 1999. Non forestry projects to which funds were applied included Minister Habibie’s aeroplane (IPTN) project (Rp 400 billion), the Kalimantan peat swamp project (Rp 527 billion), an enterprise credit program (Rp 100 billion), loan deposit for PT Ario Seto Wibowo (Rp 80 billion), converting foreign currency for PT Mapindo Parama (Rp 186,279 billion) and the 1997 Sea Games Consortium (Rp 35 billion). - "Dr Dan Ikh Bocor Rp 15,025 Triliun," *Bisnis Indonesia*, 15 October 1999.

³⁵² The Court referred to literature published by jurists on this subject (Dr Paulus Effendi Lotulung, “Masalah Perijinan yang Berkaitan dengan Bidang Lingkungan Hidup”, *Gema Peratun*, Tahun I, No.2 Agustus 1993) and the previous decision of the Jakarta District in the *PT IIU* case to justify its position in this respect. - *Kembalikan Dana Pelestarian Hutan: Memori Banding & Putusan Dalam Perkara Pembatalan Surat Keputusan Presiden No. 42/1994 Tentang Bantuan Pinjaman Kepada Pt. Iptn*, (1995), p35.

force by article 38(2) of the EMA 1997, the Elucidation to which specifically extends that provision to the Administrative Courts. Note, however, that the fourth requirement, that the organisation be sufficiently representative, was omitted from art. 38(1).³⁵³

2.7.2 *Administrative Court Jurisdiction*

The extent of the administrative courts' jurisdiction is defined by a number of provisions in the Administrative Judicature Act. The border of jurisdiction between the administrative and general courts has been the subject of considerable confusion and even conflict on a number of points. The Act begins with art. 47 which states conveys upon administrative courts "...the duty and jurisdiction to examine, decide, and solve administrative law disputes.". The latter phrase "administrative law disputes" is further defined in article 1(4) as,

...disputes that arise in the field of administration between a person or civil legal body with a (central or regional) administrative body or official, as a consequence of an administrative decision being issued.

A jurisdictionable dispute must thus have arisen due to the issuance of an administrative decision, a term which is further defined by art. 1(3) as:

...a written determination issued by an administrative body or official containing an administrative act in law based on prevailing legislation, that is of a concrete, individual and final nature, which has given rise to legal consequences for a person or civil legal body.³⁵⁴

This provisions encompasses a considerable number of specific criteria which must be fulfilled for an administrative decision to be within the administrative courts' jurisdiction. Some of the criteria, such as "written"³⁵⁵, are reasonably well defined in both law and application. Other elements of the definition, such as "administrative act in law", "final" or "giving rise to legal consequences" have been less consistently defined by the courts and the source of considerable confusion as a result.³⁵⁶

³⁵³ see discussion of article 38(1) above, page 63

³⁵⁴ Bedner, "Administrative Courts in Indonesia: A Social-Legal Study", p60.

³⁵⁵ "Written" does not require that the decision be in an official form, but rather that it be evidenced by, at the least, some written note or memorandum. Ibid., p60-61.

³⁵⁶ For a detailed discussion of all of these criteria, which is outside the scope of this chapter, see Ibid., p60-.

2.7.2.1 Reafforestation Fund (IPTN) Case (1994)

The issue of jurisdiction was raised in the *Reafforestation (IPTN) Case* discussed above, which was the first environmental public interest suit brought in the Administrative Courts. Whilst the Plaintiffs in that case won the procedural victory of environmental standing (discussed above), the substantive application was, unsurprisingly, defeated.³⁵⁷ In their application, the Plaintiffs had argued that the contested Presidential Decree, authorising the transfer of Rp 400 billion (US\$54 million) to PT IPTN from the Reafforestation Fund, was a reviewable administrative decision, according to the provisions of the Administrative Judicature Act.³⁵⁸ It was submitted by the Plaintiffs that the decision in question was inconsistent with, *inter alia*, the provisions of the EMA 1982 concerning the government's role in sustainable development, Presidential Decision No.29 of 1990 and Presidential Instruction No.6 of 1986 which stipulated the use of Reafforestation Fund money was to be solely for reafforestation and rehabilitation.

In reply, legal counsel for the President argued that any Presidential Decree possesses the same legal force and standing as laws (*undang-undang*) enacted by the Indonesian Legislative Assembly (*Dewan Perwakilan Rakyat*) and thus is not subject to judicial review. It may be noted here that the term "judicial review", in contrast to common law jurisdictions, has a restricted meaning in Indonesian law, being limited to reviewing the validity of regulations and similar instruments made pursuant to legislation. Legal counsel for the President also asserted that Presidential Decree No.42 of 1994 fell outside the jurisdiction of the State Administrative Court as it was not yet a decision of a "final" nature.³⁵⁹ In support of this assertion counsel for the defence cited art. 5 of the Decree, which stated that the loan which was the subject of the Decree, and the manner of its repayment, would be further implemented by both the Minister of Forestry and the Director of IPTN. As the terms of the decree had yet to be fully implemented, and as

³⁵⁷ In the political context at that time, it was considered a victory that the Administrative Court would even entertain a legal action against the President in the first place –David Nicholson, "Environmental Litigation in Indonesia" (Unpublished Honours Thesis, Murdoch University, 1994), p54.

³⁵⁸ The Presidential Decree in question was No.42 of 1994 regarding Loan Funds to PT IPTN.

³⁵⁹ Art. 1 (3) of the Administrative Judicature Act of 1986 states that a state administrative decision which may become the subject of a State Administrative Court's jurisdiction, may be defined as a "...written determination issued by a State Administrative body or official containing administrative action based on valid regulations or legislation, of a concrete, individual and *final* nature..." (emphasis added)

further regulation on a Ministerial level was required in this respect, the decree could not be said to be a decision of a “final” nature.³⁶⁰

In its decision the Jakarta State Administrative Court concurred with this latter opinion, concluding that the Presidential Decision in question did not constitute an administrative decision as defined in the Administrative Judicature Act, as it was not final in nature. As a result, it was not within the authority of the Court to review the Presidential Decision in question. The Court’s decision in this respect was justified on the facts, given that the transfer of money to IPTN was indeed in the form of a loan requiring further implementation via an official contract³⁶¹, and serves to illustrate the limitations of the administrative court jurisdiction. Significantly, whilst the Court ruled the contested Presidential Decree was not “final” and thus not reviewable, the judges did not state that Presidential Decrees were, by their very nature, not subject to judicial review as had been argued by Counsel for the President. The potential for future judicial review of this highly important form of executive decision-making thus remained, at least in theory.³⁶²

2.7.2.2 Reafforestation Fund (PT Kiani Kertas) Case (1997)³⁶³

The Reafforestation Fund was the subject of a further suit in the Administrative Courts initiated by environmental public interest groups challenging the validity of Presidential Decree No. 93 of 1996, which authorised the loan of Rp 250 billion from the Reafforestation Fund to PT Kiani Kertas for the development of a pulp and paper factory located in East Kalimantan. This apparent misappropriation of public funds earmarked for reafforestation attracted the ire of several environmental groups, who sought to utilise the courts as a avenue to stymie the loan or, at the least, embarrass the government.

The case that followed was heard by the Jakarta Administrative Court. The plaintiffs argued that the Decree authorising the loan was contrary to previous Presidential Decrees (No. 29 of 1990 and No. 40 of 1993), which had stipulated the nature and purpose of the Reafforestation

³⁶⁰ Harian Umum Republika, 1 November 1994.

³⁶¹ *Perjanjian* no.928/*Menhut/II/RHS*/1994. Note that the decision in this case was appealed to the High Administrative Court. The judges at appellate level endorsed the decision and reasoning of the first instance Court without any further alterations.

³⁶² The decision of the State Administrative Court was upheld on appeal to the Jakarta Administrative High Court without any further substantive judicial comment - “Iptn - Appeal,” (No. 33/B/1995/PT.TUN. JKT, 1995).

³⁶³ Decision No. 037/G.TUN/1997/PTUN-JKT

Fund. The Decree was also allegedly contrary to a Ministerial Decision³⁶⁴ concerning Mechanisms for Utilisation of the Reafforestation Fund; and various provisions of the EMA 1982 which stipulated the obligation of each person to protect the environment and prevent environmental damage and the role of the government in ensuring the sustainability of development for present and future generations.³⁶⁵

In its decision dated 31 July 1997 the Jakarta State Administrative Court rejected the public interest suit, citing grounds almost identical to those used by the Court in the *Reafforestation (IPTN) Case* of 1994. The Court accepted the Defendant's submission that the Presidential Decree "...still required further implementation by an act of civil law, such as a cooperative agreement between the Forestry Minister/Funding Bank with PT Kiani Kertas... which would stipulate the length of the loan, level of interest, provisions etc."³⁶⁶ As the Decree required further implementation by act of civil law to be effective, it had not given rise to a legal consequence for a person or legal body and could not be said to be "final". Accordingly, surmised the Court, it was not an administrative decision as defined by the Administrative Judicature Act and thus was not within the authority of the court to review.³⁶⁷ The decision was subsequently upheld on appeal to the Jakarta Administrative High Court without further substantive judicial comment.³⁶⁸

2.7.3 General Court Jurisdiction

Both the cases discussed above illustrate the problems of jurisdiction in the administrative context. As discussed administrative court jurisdiction is limited to administrative legal disputes arising because of the issuance or non-issuance of a state administrative decision, which must be final, individual and concrete in nature. A state action which does not constitute a "state administrative decision" and thus is outside the jurisdiction of the state administrative courts, may nonetheless, in certain circumstances, be litigated as an "action contrary to law" (*perbuatan melawan hukum*) within the jurisdiction of the general courts pursuant to art. 1365 of the Civil Code. The Elucidation to the AJA confirms that:

³⁶⁴ Decision of Forestry and Financial Ministers No. 169/Kpts-II/90; No. 456/KMK.013/90 concerning Mechanisms for Use of Reafforestation Fund - Jakarta State Administrative Court, *Reafforestation Fund (Pt Kiani Kertas)* (037/G.TUN/1997/PTUN-JKT, 1997).

³⁶⁵ Ibid.

³⁶⁶ Ibid.

³⁶⁷ Ibid.

...administrative disputes which according to this Law are not within the competence of the Administrative Court shall be resolved by the General Courts.

The General Courts thus retain an important residual jurisdiction in the field of administrative law, in respect of disputes not falling within the specific field of jurisdiction held by the Administrative Courts. Several criteria have been adopted by the Indonesian courts in determining whether a particular action constitutes an administrative “action contrary to law”. Firstly, inconsistency with valid regulations, legislation or even community norms or general principles of good governance would provide grounds for the court concluding a particular action was “contrary to law”. However, the court must also consider the appropriateness of the government action in the circumstances, in making its determination.³⁶⁹ In evaluating such “appropriateness”, the court should weigh the need to protect individual rights against the interest of the wider community as represented by the state.³⁷⁰ It is usually only in instances where a government agency or official has acted arbitrarily and in disregard of the public interest that this particular cause of action would be established.³⁷¹ Finally, the Indonesian Supreme Court has clearly stated that acts of the state constituting policy do not fall within the scope of the court’s powers of review. Based on the principle of executive policy discretion (*kebebasan kebijaksanaan*)³⁷², areas of state policy that may not be evaluated by the courts include: military and policing matters, foreign affairs, public interest matters, emergency actions.³⁷³

2.7.3.1 PT Into Indorayon Utama Case (1989) ³⁷⁴

The *Indorayon* case, discussed above in relation to the issue of standing, is an illustration of an environmental public interest suit based upon the administrative jurisdiction of the General Court, in this case the Central Jakarta District Court. In this case WALHI argued that the government agencies the subject of the claim had acted contrary to law in issuing their respective operating permits to PT IIU and accordingly sought nullification of PT IIU’s operating permits, and the

³⁶⁸ "Kiani Kertas - Appeal," (Jakarta Administrative High Court: No. 113/B/1997/PT.TUN JKT, 1997).

³⁶⁹ *keputusan yang harus diperhatikan oleh Penguasa* see Hadjon, *Pengantar Hukum Administrasi Indonesia* (Gadjah Mada University Press, 1993), p306.

³⁷⁰ Ibid.

³⁷¹ Indroharto, *Usaha Memahami Undang-Undang Tentang Peradilan Tata Usaha Negara*, vol. I (Jakarta: Pustaka Sinar Harapan, 1993), p59.

³⁷² being a translation of the Dutch term *beleidsvrijheid*.

³⁷³ Hadjon, *Pengantar Hukum Administrasi Indonesia*, p306.

³⁷⁴ Decision No. 820/Pdt./G/1988/PN.Jkt.Pst

payment of environmental rehabilitation costs by the defendants. WALHI contended that the issuance of the permits conflicted with existing legislation including the obligation of the government as outlined in article 8(1) of the EMA 1982 to “...sustain the capability of the living environment to support continued development.”. WALHI also argued that the issuance and renewal of PT IIU’s operating licences conflicted with article 16 of the EMA 1982 and Government Regulation No. 29 of 1986 which required any plan “...likely to have a significant impact upon the environment...to be accompanied with an analysis of environmental impact.” Whilst the Government Regulation No.29 of 1986 had been enacted subsequent to PT IIU commencing operation, the company was still required by art. 39 to complete a Presentation of Environmental Information (*Penyajian Informasi Lingkungan (PIL)*) which it had not done.

In its decision the Central Jakarta District Court denied all the claims of the plaintiff.³⁷⁵ The court considered that as the implementing regulations referred to in clause (2) of article 8 of the EMA 1982 had yet to be implemented the article conferred an unlimited authority (*kewenangan bebas*) upon the government in terms of its implementation. The court made a similar interpretation of art.16, noting that at the time PT. IIU’s operating licences were issued the implementing regulations in respect of art. 16 had not been enacted. Thus, as in the case of art.8, the government enjoyed an unrestricted authority in its implementation of the provision at the time the licences were issued. According to the court, where there is an unrestricted government authority to implement a particular provision, then only two grounds are available for judicial review of an executive action or decision. Neither of these two grounds, being abuse of power³⁷⁶ or arbitrary action³⁷⁷, were in the court’s view established by the plaintiff WALHI. Furthermore, given that Government Regulation No. 29 of 1986 concerning Environmental Impact Analysis, had not been enacted at the time the first through fifth defendants issued operating licences to PT. IIU the defendants could not be held negligent for failing to take those Government Regulations into consideration when issuing the licences in question.

Certainly, the Court was correct in concluding that the government agencies had not acted contrary to law at the time of the original issuing of the licence, as this date had preceded the enactment of the environmental provisions in question. Nonetheless, it is difficult to see why the

³⁷⁵ Interestingly, the District Court decision in this case was never appealed by the plaintiffs who, during the course of the case, had already been subject to intense government pressure and branded “anti-development”. Isna, 4/01 2001.

³⁷⁶ *penyalahgunaan wewenang /détournement de pouvoir*

agencies were not required to amend or reissue their licences to bring them into line with current environmental legislation. As discussed above art. 39 at the minimum requires companies who have already commenced activities at the time the Law takes effect to complete a Presentation of Environmental Information (*Penyajian Informasi Lingkungan (PIL)*), which PT IIU had not done. In any case, the Plaintiff argued that PT IIU should have been legally obliged to comply with the requirements of the regulations once enacted and upon renewal of their licences.³⁷⁸ This argument appears convincing and it is unfortunate it was not given proper consideration by the Court, which instead applied a narrow interpretation of the Environmental Impact Analysis regulations, excluding all previously licensed activities from its scope.

2.7.3.2 Sulawesi Case (1992)³⁷⁹

In this case, eight community representatives from the Tana Toraja area in Sulawesi challenged a government decision to grant PT Bina Produksi Melosia a permit to develop a coffee plantation in the Tana Toraja area of Southern Sulawesi. A large area of forest within the planned plantation had been used by the local, indigenous communities both as a source of livelihood and also as a site for important cultural rituals. Part of the forest also served as a water catchment area for two nearby villages. The plaintiffs argued that the companies' proposal was likely to have a large and significant impact on the environment, given the planned size of the plantation at 1500 ha. Accordingly, it was required by art. 16 EMA 1982 and Government Regulation No.29 of 1986 to carry out an environmental impact assessment. This requirement, however, was not fulfilled prior to the Governor of South Sulawesi (First Defendant) issuing a permit for the planned development. Other government agencies, including the Forestry Department, the Coordinative Agency for Investments, the Regent of Tana Toraja and the Tana Toraja Department of Public Works had similarly issued permits or letters of recommendation to support the proposed development without the completion of an environmental impact assessment. The plaintiffs had therefore had no opportunity to voice their objections to the proposed development prior to its approval by government agencies. Subsequent to the granting of government approvals, the development had commenced, resulting in the destruction of forest, the exclusion of local communities from lands traditionally used by them and the disruption of water catchment and a large water course used for agricultural purposes. The plaintiffs requested the court nullify

³⁷⁷ *tindakan kesewenang-wenangan or willekeur*

³⁷⁸ Article 38 of GR 29 of 1986 applies an implicit obligation in this respect.

the government decisions approving the development and order an investigation by a government team into the payment of compensation for environmental damage pursuant to art. 20 EMA 1982.

The plaintiffs' suit was ultimately rejected by the District Court of Makale. The court found that the purported decisions challenged by the plaintiffs were in fact only recommendations, as the final operating permit for the land in question had not actually been granted by the regional government at the time of the case. The court also found that the seventh defendant, PT Bina Produksi Melosia, was currently undertaking an Environmental Evaluation Study, Environmental Management Plan and Environmental Monitoring Plan in accordance with Government Regulation No. 29 of 1986. The court also found, on the basis of testimony from the defendants' witnesses and contrary to community reports, that environmental damage had not in fact occurred in the area in question, which still remained largely uncleared.

2.7.3.3 Kalimantan Peat Land Case (1999) ³⁸⁰

The *Kalimantan Peat Land* case arose subsequent to the enactment of the AJA and raised a number of issues of administrative law, but was nonetheless brought to the District Court of Central Jakarta. The well publicised claim by WALHI against the President, nine Ministers and ten senior government figures related to the highly controversial plan of the Suharto government to convert some 1 million hectares of peat land into productive rice fields. Conceived in 1995, the mega-project's lauded objective was regaining Indonesia's self sufficiency in rice production, although, like most large resource development projects, it also produced lucrative opportunities for the enrichment of the President's personal network of family and cronies. Due to its presidential backing the project was fast tracked, bypassing many of the usual planning procedures, including environmental impact assessment, to enable implementation to commence immediately.³⁸¹ The environmental consequences of these initial stages of the project were immense. Wood extraction permits (*Ijin Pemanfaatan Kayu*) were granted to a number of companies who commenced intensive clearing of the 1 million hectares. Landclearing and construction of a network of irrigation canals extracted a devastating toll on the biodiversity, local climate and land of this fragile wetlands area. The indigenous population, displaced from their

³⁷⁹ Decision No. 20/Pdt.G/1992/PN. Mkl

³⁸⁰ Decision No. 27/Pdt.G/1999/PN.Jkt.Pusat

³⁸¹ Akhmad Supriyatna, "Menggugat Proyek Sejuta Hektare," *Panji Masyarakat* II, no. 14 (1998).

traditional lands and deprived of their former subsistence livelihoods, fared little better.³⁸² The extensive land clearing was also subsequently identified as a contributing factor to destructive forest fires that burned unchecked for six months.

Serious problems soon emerged in the implementation of the ambitious but poorly designed project. An expert team, which reviewed the project in 1998, concluded that the cleared peat land was largely unsuitable for intensive rice cultivation. Moreover, peat land consisted only some 40-50% of the land cleared, the remainder being wetlands of great ecological significance but little agricultural value. The team harshly criticised the “implementation first, planning later” approach that the project’s architects had adopted. The National Research Council (*Dewan Riset Nasional*) also concluded that the cleared land was unfertile and hence unsuitable for agriculture, recommending that the project be stopped.³⁸³ Ultimately, as financial and political upheaval gripped Indonesia and mounting environmental and agricultural problems proved insurmountable, the government was forced to abandon the project around mid-1999 leaving behind an ecological and social disaster of gigantic proportions.

The legal suit lodged by WALHI in the Central Jakarta District Court was an attempt to hold the government accountable for the environmental and social damage wrought by the failed project and nullify the Presidential Decree upon which the project had been based. WALHI’s claim probed a string of alleged illegalities which had been committed in the efforts to fast-track the project in accordance with the President’s wishes. These included:

- failure to provide adequate information regarding the project and facilitate community input contrary to spatial planning laws;³⁸⁴
- appropriation of monies from a Reafforestation Fund;³⁸⁵

³⁸² Landclearing destroyed the tropical forest from which local communities had harvested forest products to sell at local markets. Plantations of rattan and other crops owned by local communities were also destroyed by the rampant forest fires triggered by the frenzy of intensive clearing accompanying the project’s commencement. see Adiati, “Ambisi Swasembada Yang Menghancurkan Ekosistem Dan Ekonomi Rakyat.”

³⁸³ Supriyatna, “Menggugat Proyek Sejuta Hektare.”

³⁸⁴ Article 4 of the Spatial Planning Act No. 24 of 1994 states “Each person is endowed with a right to be informed of a spatial plan and participate in formulating the spatial plan, utilizing space and controlling space utilization in addition to obtaining fair compensation for conditions experienced as a result of implementing development activities in accordance with a spatial plan.” “Kalimantan Peat Swamp,” in *Presiden et al*, ed. WALHI (Central Jakarta District Court: 427/Pdt.G/1999/PN.Jkt.Pusat, 1999), p14. Article 12 (1) states “Spatial Planning is to be carried out by the government with community participation. Community participation is a matter of great importance in spatial planning because ultimately space is for the interests of all parts of the community...”

- failure to complete an Environmental Impact Assessment prior to the project's commencement ³⁸⁵;
- Ministerial approval of the eventual Environmental Impact Assessment despite it containing serious factual discrepancies;
- displacement of the indigenous populace from their traditional lands and destruction of their source of livelihood;
- irreversible ecological damage through intensive land clearing, uncontrolled forest fires, canal and rice paddy construction contrary to environmental legislation;³⁸⁷

WALHI thus argued that the actions of the Defendants in implementing the Peat Land project were contrary to law and general principles of good governance. The Plaintiff requested that the Court order:

- the annulment of Presidential Decrees No 82 of 1995, 74 of 1998 and 83 of 1995;³⁸⁸
- the closure of primary canals already constructed in the project area;
- rehabilitation of damaged land based on ecological principles appropriate to tropical peat swamp areas;
- creation of a biodiversity rehabilitation centre;

³⁸⁵ The provisions relating to which required monies from the Fund to be allocated towards reafforestation and land rehabilitation and discussed above in relation to the *IPTN* and *PT Kiani Kertas* cases.

³⁸⁶ Intensive land clearing and construction of canals over 1923km in length were completed in the first stage of the project prior to completion of the Environmental Impact Assessment process.

³⁸⁷ Particular provisions of the EMA 1997 referred to by WALHI including art. 5 which guarantees the right of each person to a "clean and healthy environment" and to "participate in the framework of environmental management" and article 6 which guarantees access to information relating to participation in environmental management. WALHI also argued that as the project resulted in a "large and significant" impact on the environment then, according to the terms of art. 35, the government should be held strictly liable for any resulting losses. Environmental damage resulting from the project was also alleged to have contravened the terms of other legislation including Law No.5 of 1990 on Conservation of Biodiversity, Law No.10 of 1992 on Population and Family Welfare Law No. 5 of 1994 on Biodiversity, and Presidential Decision No. 48 of 1991 ratifying the International Convention on Wetlands.

³⁸⁸ Decree No. 82 of 1995 concerning "Development of Peat Land for Agricultural Food Crops in Central Kalimantan" was the original decree initiating the project. Decree No. 83 of 1995 concerning "Formation of a Presidential Assistance Fund for Development of Peat Land in Central Kalimantan" provided for the appropriation of monies from the Reafforestation Fund toward the Peat Land project. Decree No. 74 of 1998 made minor changes to Decree No. 82 of 1995.

- protection of traditional community patterns of natural resource management;
- withdrawal of Wood Cutting Permits;

As one of the most disastrous environmental policies carried out by the New Order government, the Kalimantan Peat Land project was a predictable target for an environmental public interest suit. The hasty and unplanned execution of the project was blatantly contrary to basic provisions in environmental and spatial planning legislation, as WALHI's lengthy claim pointed out. Critics also suspected more serious improprieties and corruption associated with the project, given the number of Suharto's closest associates who benefited from the lucrative tenders handed out in the early stage of the project. However, such illegalities were not brought to light in the courtroom, as the claim was rejected in a summary fashion on jurisdictional grounds by the Central Jakarta District Court. The Court referred to art. 10 of Law No. 14 of 1970 on the Judiciary which stipulates that judicial authority is to be divided amongst:

- a. General Courts;
- b. Religious Courts;
- c. Military Courts;
- d. Administrative Courts.

The Court then referred to various provisions of the Administrative Judicature Act No. 55 of 1986 defining the jurisdiction of the Administrative Courts as a dispute concerning the issuance of a state administrative decision by a state agency or official.³⁸⁹ In the present case the claim by WALHI, a legal body, was directed against a number of state officials including the President, Ministers and subordinate officials. The claim also was directed toward the withdrawal of Decrees or Decisions issued by those officials or agencies. Consequently, the presiding judges concluded that the dispute in this case fell within the jurisdiction of the Administrative Courts rather than the General Courts, to which it had been brought by the Plaintiff.

The Court's analysis of the jurisdictional issue in this case is disappointingly superficial, going so far as to note only that the Plaintiffs' claim was directed against a number of state officials, requested the withdrawal of certain state decisions and as a result fell within the jurisdiction of

³⁸⁹ art. 1 (3) defines state administrative decision (see discussion above) as "...a written stipulation issued by a state agency or official based on valid legislation of a concrete, individual and final nature which results in a legal consequence for a person or legal body".

the administrative courts. Further analysis leads one to question this conclusion as the two main decisions raised in the Plaintiffs' claim, Presidential Decrees No. 82 and 83 of 1995, could not accurately be said to be either "final" or "individual" as required by art.1(3) of the AJA. Both decrees, like all Presidential decrees in most cases, required further implementation as did the decrees in the *IPTN* and *Kiani Kertas* case which the administrative courts rejected jurisdiction over. Furthermore, both decrees were arguably general in nature and not directed toward specific, named individuals. It is therefore likely that if WALHI's claim were taken to the administrative courts, jurisdiction also would have been refused- no doubt the reason it was advanced to the general courts in the first place. If this was indeed the case, then the District Court should have legitimately exercised jurisdiction over this matter, and was incorrect to refuse to do so.

2.7.4 *Substantive Grounds*

Besides satisfying requirements of standing and jurisdiction, an application contesting an administrative decision must also establish one or more of three substantive grounds stipulated in art. 53(2) of the Administrative Judicature Act. The first ground is inconsistency with regulations or legislation, of either a procedural or substantive nature. One regulatory restriction of considerable relevance in environmental matters is the requirement to undertake an environmental impact analysis (EIA). An EIA is required where a business and/or activity may give rise to a large and significant impact on the environment. In this case the business concerned must prepare an environmental impact analysis as a prerequisite to obtaining the necessary operating licence.³⁹⁰ Once granted, the operating licence also includes conditions and obligations to carry out environmental control efforts.³⁹¹ Where an EIA is required, but not undertaken, prior to the issue of an operating licence, then the decision to issue the licence may be contested as inconsistent with existing legislation.³⁹²

A second ground that may invalidate a state administrative decision is the use of an administrative decision maker's authority for a purpose other than that authorised by statute. This ground, also termed "abuse of power" (*penyalahgunaan wewenang*), is usually difficult to prove and as a result holds little practical significance in administrative court practice.³⁹³ The third and

³⁹⁰ Article 18 – EMA 1997; Regulation No 27 of 1999 regarding Environmental Impact Assessment now sets out the requirements for environmental impact analysis.

³⁹¹ Art. 18(3) EMA 1997.

³⁹² This occurred in the *Transgenic Cotton Case*, discussed below.

³⁹³ Bedner, "Administrative Courts in Indonesia: A Social-Legal Study", p96-.

final ground stipulated in the Administrative Judicature Law is that, on a consideration of interests relevant to the decision, the government agency concerned should not have issued a particular decision or should not have issued a decision at all. This ground further restricts the scope of the administrative discretion by necessitating a consideration of relevant interests in the decision making process. Relevant interests are usually defined by the immediate legislative framework under which the decision is made. The potential environmental impact of a project may constitute such a “relevant interest”, especially where that impact may be of a significant nature. Finally, a fourth substantive ground, not stipulated in Art 53(2) of the Administrative Judicature Act, principles of proper administration, is in practice becoming increasingly accepted in administrative court procedure.³⁹⁴ These substantive grounds were considered in WALHI’s first public interest suit against Freeport Indonesia in 1995

2.7.4.1 Freeport Case (1995)

In this case, WALHI challenged an administrative decision by the Secretary General of the Department of Mining and Energy to approve the Environmental Management and Monitoring Plans proposed by PT Freeport Indonesia. WALHI argued that the Department had failed to take into account the evaluation and recommendations of the Environmental Impact Analysis Commission, of which WALHI was a non-permanent member.³⁹⁵ At a hearing of the Commission held on 22 December 1994, WALHI had recommended that the Environmental Management & Monitoring Plans proposed by Freeport should be rejected. One of the most vocal critics of Freeport Indonesia, WALHI maintained that the mining company’s operations had caused widespread environmental damage including the dumping of unprocessed tailings into local rivers over a period of 20 years, flooding, widespread deforestation and irreversible damage to the mountainous landscape through open-cut mining. Socially, the impact of mining operations was also said to be severe, causing the removal of two indigenous tribes, the mountain dwelling Amungme and the Komoro, who inhabited the lower, coastal regions, from their traditional lands. The Commission itself had recommended that Freeport’s environmental management plans be revised in accordance with its evaluations, including those submitted by WALHI, and

³⁹⁴ Ibid., p97.

³⁹⁵ According to art. 9 (3) of G.R. No 51 of 1993 regarding Environmental Impact Assessment, the decision of an authorised agency (in this case the Department of Mining and Energy) regarding an environmental impact assessment should be based upon the evaluation of that assessment carried out by the Commission for Environmental Impact Assessment.

subsequently resubmitted to the Commission for further evaluation. A field visit to Freeport's mine was subsequently conducted and revisions to the plans carried out. The Secretary of the Environmental Impact Analysis Commission later approved the revisions, before the formal decision by the Department for Mining and Energy approved the plans on 17 February 1995.

WALHI challenged the decision of the Department firstly on procedural grounds, arguing that only the Commission, not the Secretary, had the authority to re-evaluate and approve the plans, and that it had not done so. WALHI further argued on substantive grounds that the revised plans did not satisfactorily meet the concerns and objections raised in WALHI's original submission, including consultation with the local Amungme and Komoro communities. In response, the Defendant in this case, the Department for Mining and Energy, contended that WALHI had in fact been afforded an opportunity to present its own opinion and evaluation of the plans in question, at the original hearing on 22 December 1994 and during a field visit in January 1995.

In its decision dated 9 November 1995 the Jakarta State Administrative Court concluded that the Commission had in fact discharged its duty of evaluating the environmental management plans in question, as required by legislation.³⁹⁶ The final decision of the Department of Mining and Energy approving the plans was thus, in the opinion of the Court, in accordance with regulatory procedures. In relation to the substantive grounds argued by WALHI the court concluded that whilst the Commission was bound to consider WALHI's submissions on a proposal before it, it was not bound to decide in accordance with such a submission. The ultimate decision lay within the discretionary power of the Commission, which in this case was exercised to recommend approval of Freeport's proposal. Accordingly, the Court concluded that the decision subsequently made by the Department to approve Freeport's proposal was also within its proper authority and in accordance with established procedures. Thus, the application of WALHI to nullify the decision was dismissed.

2.7.4.2 Transgenic Cotton Case (2001)³⁹⁷

This case concerned the controversial test planting of genetically modified (GM) cotton in South Sulawesi. The test crop of GM cotton, over an area of 465 ha, was to be planted by PT.

³⁹⁶ Note in coming this conclusion they did not appear to consider WALHI's argument that the reevaluation of the environmental management plans had been carried out by the Secretary to the Commission, rather than the Commission proper.

³⁹⁷ Decision No. No. 71/G.TUN/2001/PTUN-Jkt

Monagro Kimia, a joint venture between the US company Monsanto and the Indonesian-Chinese conglomerate the Salim Group.³⁹⁸ Environmentalists argued that the “test crop” was actually an attempt to by-pass environmental regulations and introduce GM cotton to Indonesia on a commercial basis.³⁹⁹ On 29 September 2000, the Environment Minister formally notified the Minister for Agriculture, who held authority in the matter, that the proposal had been introduced without an environmental impact assessment.⁴⁰⁰ Despite this notification the Minister for Agriculture proceeded to approve the proposal on 7 February 2001, authorising the restricted planting of transgenic cotton in seven regencies in South Sulawesi.⁴⁰¹

On 4 May 2001 an environmental public interest suit was lodged by six environmental organisations in the Jakarta Administrative Court challenging the decision of the Agriculture Minister.⁴⁰² The plaintiffs argued that the decision was contrary to environmental regulations as it had not been preceded by an environmental impact assessment and thus was invalid pursuant to art. 53(2)(a) of the Administrative Judicature Act. Particular provisions cited by the plaintiffs included⁴⁰³,

- art. 15 (1) EMA 1997 : “every enterprise or activity which may cause a large or significant impact on the environment is required to undertake an environmental impact assessment”.
- Government Regulation No. 27 of 1999 concerning Environmental Impact Assessment:
- art. 3(1) “enterprises and/or activities which may cause a large or significant impact on the environment include:...(f) the introduction of plant types, animal types and microorganisms”.
- art.7 (1): “environmental impact assessment is a requirement that must be fulfilled to obtain a permit to carry out an enterprise or activity from an authorised official”

³⁹⁸ Rino Subagyo, "Menggugat Kebijakan Pengembangan Kapas Transgenik Di Indonesia," *Hukum dan Advokasi Lingkungan* 4, no. September (2002): p5.

³⁹⁹ Rino, 6 June 2003.

⁴⁰⁰ Letter No. 1882/MENLH/09/2000

⁴⁰¹ Decision No. 107/Kpts/KB.430/2/2001

⁴⁰² The six environmental organisations were the Indonesian Centre for Environmental Law, the Indonesia Institute of Consumers, the National Consortium for the Nature and Forests Conservation, the Foundation for Biodynamic Agriculture, the Southern Sulawesi Consumers Foundation and the Community Research and Capacity-Building Institute.

⁴⁰³ Jakarta Administrative Court, *Transgenic Cotton Case* (2001).

The plaintiffs argued that the introduction of transgenic cotton to Southern Sulawesi was an activity which could cause a large and significant impact upon the environment and thus should have been preceded by an environmental impact assessment. Further grounds presented for the plaintiffs' claim were that after considering all relevant interests the Minister for Agriculture should not have made the decision it did, or that the Minister acted arbitrarily in coming to the decision it did.⁴⁰⁴ Relevant considerations allegedly ignored by the Agriculture Minister in his decision to approve Monsanto's project without an EIA included requests from both the Environment Minister and the legislature of Southern Sulawesi that a environmental impact assessment be carried out. According to the plaintiffs, the Minister also failed to apply the precautionary principle as stipulated in Act No 5 of 1994 on Ratification of the UN Convention on Biological Diversity and associated international protocols to which Indonesia was a signatory.⁴⁰⁵ The plaintiffs also argued that the Minister had failed to consider legal violations by PT Monsanto Kimia who had already carried out planting of transgenic planting before the Minister's decision and in fact intended the planting to be carried out at a commercial rather than experimental level.⁴⁰⁶

The Jakarta Administrative Court handed down its decision on 27 September 2001, after hearings over a period of four months, refusing the plaintiffs' claim. The Court held that in this case the Minister of Agriculture's decision was not part of the process of "obtaining a permit" referred to in art. 7, GR No. 27 of 1999, for which an EIA was mandatory. The Minister's decision did not constitute the issuance of a permit but rather was an administrative action within the scope of his legal authority. The other basis upon which an EIA could have been required was art. 15 EMA 1997, which required that in the case of all activities causing a large and significant impact on the environment an environmental impact assessment be completed. Activities of this nature are defined in art.3 GR No. 27 of 1999, which, as the Plaintiff had pointed out, included in sub clause (f) the introduction of plant types, animal types and microorganisms. Nonetheless, the Court maintained that as such activities were not specifically stipulated in the Environment Minister's Decision No. 3 of 2000 the Minister for Agriculture was not obligated to complete an EIA. The Court also considered that as the proposed activity was an

⁴⁰⁴ art. 53(2)(c) Administrative Judicature Act 1986

⁴⁰⁵ Including the Rio Declaration – see art. 15.

⁴⁰⁶ Court, *Transgenic Cotton Case*.

“experimental” planting, if any serious or negative effects were exposed these could be reviewed in a subsequent EIA process.

On the question of the precautionary principle, the Court concluded it was sufficient that several measures had been carried out before the Minister for Agriculture’s decision. These included a community announcement, reviewing the recommendation of a team of biotechnology experts and various laboratory tests, which apparently demonstrated that the cotton strain would be safe to introduce to the environment.⁴⁰⁷ On these grounds, the plaintiffs’ application to invalidate the decision of the Minister for Agriculture was refused. Both grounds for the court’s decision appear questionable. Given the planting of transgenic cotton fell within the scope of art. 15 EMA 1997 and art. 3 GR No. 27 of 1999 on EIA it is difficult to justify the Court’s position that an EIA was not required. Furthermore, the Environment Minister had informed the Minister for Agriculture in writing that an EIA would be required. The Court’s interpretation of the precautionary principle also appears to be very narrow in this case. Given the controversy and uncertainty surrounding the impact of biotechnology one would expect a proper application of the precautionary principle would have at least required that an environmental impact assessment be completed.

2.7.5 Remedies

Challenges to state administrative decisions are heard by the State Administrative Court, although in certain circumstances disputes must undergo administrative review prior to the process of judicial review. Upon evaluating the legality of an administrative decision, the court decides whether an invalidation of the decision is appropriate in the circumstances. The Court does not itself possess authority to re-decide the issue on its merits, but may invalidate a decision and submit it to the administrative decision-maker for re-decision. The administrator must take into account the decision of the court but is not obliged to arrive at a decision substantively different from that originally made. Of some significance in the environmental context is the Court’s authority to award compensation and rehabilitation where the applicant has suffered loss as a result of the administrative decision.⁴⁰⁸

One limitation on the efficacy of this process is the court’s lack of authority to directly implement its own decision. Rather, an obligation rests with the government agency responsible

⁴⁰⁷ Ibid.

⁴⁰⁸ Art. 97 (10) Administrative Judicature Act 1986

for issuing a decision subsequently invalidated by the court, to cancel and/or issue a new decision after considering the judgement of the court.⁴⁰⁹ Nonetheless, where a defendant refuses or otherwise fails to rescind a decision pursuant to court order, it will become void in four months.⁴¹⁰ One limitation on the applicability of this process in the environmental context is the stipulation that any challenge to a state administrative decision must be brought within 90 days of the decision being issued.⁴¹¹ The position in respect of interested third parties adversely affected by the decision is not clearly defined under the Administrative Judicature Act.⁴¹² This distinction is of particular importance in environmental matters, as the effects of pollution or other environmental damage caused by a particular industry or enterprise upon third parties may only be felt a number of months, or years, after the industry begins operation.⁴¹³

2.8 Conclusion

This Chapter has discussed the legislative framework for environmental litigation, and its judicial interpretation, in Indonesia. This legislative framework proscribes several important rights and remedies connected with the compensation and restoration of environmental damage and pollution. Firstly, art. 38(3) of the Act has provided legislative endorsement of environmental standing, thus enabling environmental groups to initiate legal actions in relation to environmental disputes, despite the absence of a personal or material interest. The procedurally important principle of environmental standing was, as discussed, introduced 8 years prior to the EMA 1997, by the Central Jakarta District Court in the *Indorayon* case of 1989. This significant procedural reform is notable as an example of judicial ‘law-making’ and activism in the environmental field. Other Indonesian courts have been consistent in following the precedent of *Indorayon* and recognizing this procedural right despite frequent arguments to the contrary by defendants.

⁴⁰⁹ Hadjon, *Pengantar Hukum Administrasi Indonesia*, p309. Pursuant to art. 116 (4) and (6) the Chairman of the Court may notify the government office superior to the defendant (and failing that, the President) where an order of the court is not implemented.

⁴¹⁰ article 116 (2)

⁴¹¹ Article 55; In respect of a third party the limitation period runs from the date at which he/she knew of the decision.

⁴¹² However, the Supreme Court has issued a guideline on this subject in its Circular Letter no.2/1991 (at V-3), advising judges to determine the date upon which the third party first became aware of her loss and commence the period from that day. ref bedner 2002

⁴¹³ Suparni, *Pelestarian, Pengelolaan Dan Penegakan Hukum Lingkungan* (Jakarta: Sinar Grafika, 1992), p170.

The procedural scope for environmental litigation was further widened by art. 37 of the EMA 1997, which introduced a right for a community to bring a representative action in respect of environmental damage. Attempts to bring representative actions previous to the enactment of art. 37 had failed in the *PT Pupuk Iskandar Muda* and the *Ciujung River* cases. Since the enactment of art. 37 there have been several attempted environmental representative actions. In the *Eksponen 66* case a poorly defined representative action succeeded at the District Court level, yet was overturned by the High Court of North Sumatra on appeal. The decision by the District Court of Medan in that case demonstrated the court's concern for the far-reaching environmental damage caused by the fire, yet the requisite legal elements of factual and legal commonality and causation were not properly established in this case. In the *Way Seputih* case a class action pursuant to art. 37 was procedurally accepted, yet was unsuccessful subsequently on substantive grounds. In the *Pekanbaru Smog* case a representative action was heard by the court but ultimately failed due to the failure of the plaintiff to undertake notification as ordered by the court. Certainly an early obstacle to effective utilisation of this provision was the confusion amongst Indonesian jurists over the proper procedure accompanying a representative action. This confusion, however, appears to have been resolved by the recently enacted Supreme Court Regulation on Class Actions (No. 1 of 2000), which has stipulated a detailed guide to the procedure requirements relating to class actions.

Another significant feature of the Indonesian legal framework for environmental litigation is the right to claim compensation for environmental damage or pollution. A right to compensation for environmental damage or pollution was first introduced in the environmental context in art. 20 of the EMA 1982. Application of this article was apparently obstructed, however, by two major obstacles: the requirement for a government facilitated investigation before a claim and the lack of implementing regulations. In four of the five cases concerning this article, courts rejected claims for compensation of environmental damage on either of these grounds. These two legal impediments were resolved with the introduction of article 34 of the EMA 1997, which removed the necessity of prior government investigation or conciliation and did not depend upon subsequent regulations for its implementation. Claims for compensation of environmental damage or pollution pursuant to art. 34 have apparently been more successful. In the four cases reviewed above all claimants were at least partially successful in winning compensation at the District Court level. Interestingly, in two of these four cases (*Laguna Mandiri*, *Babon River*), the decisions awarding compensation were reversed upon appeal to the respective High Courts, a

trend also evident in the *Eksponen 66* case concerning representative actions. However, in the *Banger River* case the High Court upheld, and actually increased, the award of compensation, whilst in the *Kalimantan Peat Land (Farmers Compensation)* case a compensatory settlement was adjudicated and endorsed as a decision of the High Court.

The difficulties experienced by victims of environmental damage or pollution in obtaining compensation pursuant to art. 20 (EMA 1982) and art. 34 (EMA 1997) illustrate the pitfalls of a fault-based liability regime where claimants are required to prove causation and fault. It is precisely such difficulties, experienced in a range of jurisdictions, that have led many environmental jurists to advocate shifting to a risk based system of strict liability in order to provide a more accessible, effective and fair system of compensating environmental damage or pollution. As we have seen strict liability was first introduced in Indonesia by art. 21 EMA 1982. The implementing regulations for that article were never enacted, however, and as a result the article was not applied in practice. The situation was definitely improved by art. 35 EMA 1997, which provided a more detailed application of the strict liability principle without the need for further implementing regulations. The terms of article 35 stipulates strict liability in situations causing a large and significant impact upon the environment, where hazardous materials are used, and/or hazardous waste produced. Given the wide scope of application of art. 35 and its significant effect in excluding the element of fault, this article has perhaps the greatest potential to facilitate access to justice in environmental suits. Yet, whilst strict liability has been pleaded as the basis for several environmental suits the majority of courts have avoided discussion of this issue and have proceeded to deal with disputes on a fault liability basis only. Where the article has been considered, as in the *Laguna Mandiri* case, its application has been restrictive and legally incorrect.

As discussed above, the ability of environmental organisations to represent environmental interests in court has been greatly facilitated by the legal doctrine of environmental standing first recognised in the *Indorayon* case. Yet standing for environmental organisations in itself is not sufficient to achieve environmental justice in a more substantive sense. Upon gaining access to the courts, the remedies available to environmental organisations are equally important as their procedural access. Under the EMA 1982 the role of environmental organisations in

environmental management was recognised by art. 19.⁴¹⁴ The Act, however, did not specifically stipulate either procedural standing nor substantive remedies for environmental organisations. Nonetheless, article 20(3) of the EMA 1982 did create an obligation for those polluting or damaging the environment to pay restoration costs to the state. Utilising the judicially recognised principle of environmental standing, WALHI brought a public interest action to compel environmental restoration in the *Surabaya River* case. The case failed, however, largely due to the absence of implementing regulations for art. 20. Access to remedies for environmental organisations has been improved by art. 38(3) of the EMA 1997, which enables environmental organisations to sue for a range of measures to be carried out in support of environmental functions. Yet in practice the impact of environmental public interest suits has been limited by the exclusion of compensation from the scope of article 38(1). As discussed above, the broadening of public interest remedies to include compensation for environmental damage would increase the deterrent effect of public interest suits on potential polluters and facilitate enforcement of the obligation in art. 34(1) to compensate for damage to the environment.

In this chapter we have also explored other legal grounds for environmental public interest suits. One such ground, utilised in the *Freeport* case, was article 6, which requires the provision of “...true and accurate information regarding environmental management.” In the political context of *reformasi*, transparency and provision of information have become issues of fundamental import.⁴¹⁵ Walhi’s partially successful claim in this case establishes art. 6 as a valuable mechanism to increase transparency in the provision of environmental information. Environmental public interest suits have also been advanced pursuant to the Administrative Judicature Act in the administrative courts. In the first environmental public interest suit in the administrative courts, the *IPTN* case, the principle of environmental standing was endorsed by the court. However, as in the general courts, this procedural success has not always been matched by substantive legal results. In both the *IPTN* and *Kiani Kertas* cases environmental public interest suits failed on jurisdictional grounds, demonstrating the significant jurisdictional obstacles confronting environmental claimants in the administrative courts. In a subsequent environmental dispute, the *Kalimantan Peat Land* case, environmental organisations tried to sidestep this

⁴¹⁴ Article 19 states “Self-reliant community institutions shall perform a supporting role in the management of the living environment.”

⁴¹⁵ Much attention has focussed, for instance, on the drafting and enactment of Freedom of Information legislation, which is currently being considered by a Special Committee of the national legislature.

jurisdictional obstacle by taking their challenge to several Presidential Decrees to the general, rather than administrative courts. As we have seen, this attempt failed as the Central Jakarta District Court also refused jurisdiction, stating the matter fell within the ambit of the administrative courts, despite the fact that the Presidential Decrees the subject of the suit were likely to be neither “final” nor “individual”. Between the administrative and general courts environmental public interest suits have thus fallen into something of a jurisdictional black hole. This jurisdictional failure is not a necessary result of the legal framework, however. As discussed above, the jurisdiction of the general courts, correctly applied, would encompass administrative cases that fell outside the specific scope of the administrative court’s jurisdiction.

Even where a contested administrative decision falls within the jurisdiction of the Administrative Court, establishing its illegality on the limited grounds available again presents a difficult task for the potential environmental litigant. As the Court noted in the *PT Freeport* case an agency’s discretion may be procedurally limited, in that case requiring it to hear WALHI’s submission, but still possess considerable discretion in coming to an ultimate decision itself on the substance of the matter. In a country with a history of executive dominance such as Indonesia, moreover, it is not uncommon for judges to display considerable reluctance to review administrative discretion, particularly that exercised at a senior level on issues of considerable political and economic significance as in the *Freeport* case. Similarly, in the *Transgenic Cotton* case, jurisdiction was not an obstacle to the public interest suit, yet the Court declined to invalidate the Minister for Agriculture’s decision despite the fact an Environmental Impact Assessment had not been carried out. Furthermore, even where a challenge to an administrative decision is successful, its implementation may be undermined by an entrenched administrative patrimonialism and resistance to judicial review.⁴¹⁶

Whilst the majority of environmental public interest claims in the general and administrative courts may not have achieved their substantive legal claims, such suits have often helped in achieving the broader political or policy objectives of environmental organisations. Public interest litigants such as Walhi have endeavoured to use the courts as a mechanism not only for the application of environmental law, but as another strategy to increase community and political

⁴¹⁶ Bedner, “Administrative Courts in Indonesia: A Social-Legal Study”, p322.

pressure to change environmental policy on particular issues. As a member of Walhi's legal team commented:

On a substantive level we don't expect much from these court cases. But the cases do serve as a stage for our campaigns. In most cases we target particular policies and aim to change that policy on the national level. The *Kalimantan Peat Land* case was an example of this strategy. The court case failed but was part of a broader campaign to halt the project which was ultimately successful.⁴¹⁷

In a similar vein, the bold legal action of several environmental NGOs in challenging President Suharto himself in the *IPTN* case was successful in capturing considerable media attention, although it did not achieve its legal objective. Politically, that legal action together with the *PT Kiani Kertas* case that followed it, were significant elements in a concerted campaign by NGOs to expose government and industry corruption connected with the Reafforestation Fund. Ultimately this campaign appears to have been successful, as in the changed political circumstances of *reformasi* the government successfully convicted several influential figures involved in the embezzlement of considerable sums of money from the Reafforestation Fund.⁴¹⁸

Whilst the political context may provide an important motivation for some environmental public interest claims it may equally influence the process and outcome of both private and public interest environmental litigation. The discussion in this chapter has focussed primarily on the legal framework for environmental litigation and its interpretation by Indonesian courts in environmental cases to date. Yet the process and outcome of environmental litigation cannot be separated from the social, political and institutional context within which it occurs. This chapter has examined cases since the enactment of the EMA 1982 until 2001. The most dramatic political change to occur during this period was the forced resignation of President Suharto 21 May 1998 caused by severe economic crisis and political upheaval. The dissolution of Suharto's system of authoritarian control has certainly increased political openness and pluralism, but also apparently contributed to widespread lawlessness and social disorder. There is a striking contrast in the outcome of environmental suits in the period before 1998 and in the period subsequent to it.

⁴¹⁷ Isna.

⁴¹⁸ For example, Bob Hasan, who as chairman of APKINDO and close friend of Suharto was at one time the most influential individual in the forestry industry, is now serving a six year jail term for misappropriation of reforestation funds and a fraudulent aerial mapping project carried out by one of his companies. "Forests, People and Rights: Down to Earth Special Report," (Down to Earth, 2002), p22.

Prior to 1998 all of the twelve environmental claims brought to the district courts were defeated on substantive issues. However, during and subsequent to 1998 of the nine cases surveyed seven were at least partially successful on substantive issues at the district court level – a striking contrast. On the whole, Indonesian courts have appeared more willing to uphold environmental claims for compensation or restoration of environmental damage/pollution in the period subsequent to 1998. This holds true more for the district level courts than for appellate (high) courts. Subsequent to 1998, appellate courts have played a noticeably more conservative role post-1998, with only one of four decided cases being successful on substantive grounds.