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Environmental Dispute Resolution in Indonesia

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3 Case Studies of Environmental Litigation

In the previous chapter, we have discussed the noticeable change in the outcome of environmental cases subsequent to 1998. Between 1982 and 1997, only one environmental claim out of thirteen reported claims was successful. In contrast, in the period between 1998 and 2001, seven out of eleven claims were at least partially successful at the District Court level. As we have discussed the important legal milestone separating these two periods was the enactment of the EMA 1997. The revised Environmental Management Act improved the enforceability of several key provisions relating to the compensation or restoration of environmental damage or pollution. The most significant political event separating these two periods is the dissolution of President Suharto's New Order regime. It has been suggested that the far-reaching political and institutional ramifications of this event may have also had an important influence on the outcome of environmental cases. In this chapter, we explore the influence of these, and other legal, institutional and political conditions through two case studies of these recent "successful" environmental claims, the *Banger River* case and the *Babon River* case. Each case study provides a detailed discussion of the history of the environmental disputes that preceded litigation. The discussion then closely considers the legal and evidential issues raised during the course of each case and undertakes a critical examination of the interpretation and application of environmental law by the respective courts. Finally, the scope of the case studies is extended beyond the legal and evidential issues raised in the course of litigation to the wider social and political context in which the dispute resolution process occurs.

3.1 Banger River Case (1999)¹

3.1.1 *History of the Dispute*

The Banger River is a river of some 20 metres in width, which traverses the eastern section of the bustling city of Pekalongan, in Central Java. Like most rivers it has traditionally been a source of water for the everyday needs of residents in its vicinity and has also provided some with

¹ Decision No. 50/Pdt.G/1998.PN.Pkl

a livelihood, through fishing and small scale sand mining.² Pekalongan, renown as a centre of 'batik' in Java, is also the location for a number of textile factories. The majority of these are located adjacent to the Banger River, which provides both a source of water for production and a means of waste disposal. In 1988, three of the largest textile factories, PT Kesamtex, PT Bintang Triputatez and CV Enzritek, were established. From 1989, when the factories commenced operations, their untreated liquid waste was disposed of directly into the waters of the Banger River. By 1992, as the operations of the factories increased, the resulting pollution had become severe and most evident in the dramatic changes in colour and odour of the water, the death of fish and small livestock drinking from the river.³ Among those most directly effected by the pollution were the residents of Dekoro village, located a short distance downstream from the three textile factories. Residents were unable to use the water for washing or cooking, whilst livestock that grazed near the river or drank its water perished. Local fishermen were also no longer able to earn their livelihood from the river. Acute conditions associated with severe water pollution, such as skin rashes and vomiting, were a common occurrence amongst the community. Pollution of residents' wells through contamination of ground water also occurred, to the point where residents were no longer able to utilise their wells as a source of potable water.

The local community of Dekoro that had suffered the brunt of the factory's pollution formed a group named The Association of Banger River Waste Victims (KKLKB)⁴ in 1990. Following an increase in pollution levels in 1992 the group made a number of direct and written representations concerning the pollution and its effects initially to administrative agencies and subsequently to legislatures at the district (Pekalongan) and provincial (Central Java) levels. Representations were also made by the community directly to the three industries, in an attempt to resolve the problem via negotiation, yet were unsuccessful.⁵

The advocacy efforts of KKLKB, facilitated by a network of environmental organisations, successfully raised the public profile of the Banger River pollution and increased community

² YAPHI, "Narasi Penyelesaian Kasus Pencemaran Kali Banger, Pekalongan," (YAPHI, 2000).

³ The three industries that were the subject of this dispute were not the only factories disposing of waste into the Banger River. In a statement to the press on 8 March 1997 a representative of the Dekoro community stated "...16 factories along the Banger River have been dumping their toxic waste into the river for the past 10 years." "Pollution Haunts Villagers' Livelihood," *The Jakarta Post*, 8 March 1997.

⁴ *Kerukunan Korban Limbah Kali Banger*

⁵ Ismar, 5 March 2001.

pressure on the regional government to take action. In August 1995, the three industries were prosecuted in the District Court of Pekalongan and ultimately convicted of contravening article 12 of Regional Government Regulation 2 of 1993 concerning “Cleanliness, Beauty, Tidiness and Order”. The regulation under which the three polluting factories were prosecuted, however, carried a penalty of only Rp 45,000 (US\$5).⁶ According to community sources, the prosecution was actually suggested by the industries themselves who saw it as a way of pacifying the local community whilst paying only a minimal fine.⁷ No prosecution was commenced under the Environmental Management Act, which carries more weighty sanctions.⁸

Subsequent to this apparently symbolic prosecution, the three industries undertook to install a common Waste Management Unit in 1996. The unit, however, failed to function adequately and the discharged waste from the factories continued to exceed stipulated levels. In frustration at the lack of progress, community representatives resolved to take their complaints to the national level. In July 1996 a delegation met with the Second Deputy of the National Environmental Agency, Nabel Makarim, and reported the severe and ongoing pollution levels. In March 1997 representatives of KKL B petitioned the National Environmental Agency again, as no further progress had been made toward resolving the dispute. A complaint of intimidation by local security forces acting on behalf of the industries was also filed with the National Human Rights Commission by community representatives.⁹

The community complaints of pollution at the national level were widely reported in the mass media, prompting an examination of the factories’ waste management unit by the National Environmental Agency on 6 May 1997.¹⁰ The examination revealed that the industries had failed to install the necessary equipment to measure the volume of liquid waste discharged, contrary to government regulation.¹¹ An administrative warning was subsequently sent from the National

⁶ "Ketua Majelis Merasa Terganggu Demo," *Suara Merdeka*, ? 1999.

⁷ Ibid.

⁸ For example, art. 41(1) carries a maximum imprisonment of 10 years and a maximum fine of Rp 500 million (US\$6650) for “any person who in contravention of the law intentionally carries out an action which results in environmental pollution and/or damage”.

⁹ The visit produced at least some result, in the form of a letter signed by a Commission member, Asmara Nababan, requesting relevant government agencies to resolve the complaints of the Dekoro community. "Pollution Haunts Villagers' Livelihood."

¹⁰ Trias Purwadi and Syam Dakrita, "Pembuangan Limbah Lumpur Ke Kali Banger Dihentikan," *Suara Merdeka* 1999.

¹¹ Such an instrument is required by art. 6 (e), Decision of the Environment Minister No. 51/MENLH/10/1995. -

Environmental Agency on 26 May 1997 to the three factories, requesting the unit be altered in compliance with regulatory standards.¹² Despite this high level administrative warning the factories' waste management performance did not appear to improve. In June 1997 an inspection by a regional government official confirmed community reports of untreated liquid and solid waste being dumped into local irrigation channels and the factories were subsequently ordered to discontinue the illegal dumping.¹³ The continuing regulatory breaches finally prompted the regional government to take the more severe administrative sanction of rescinding the three industries' operating permits (*ijin tempat usaha*), although the industries' continued operations regardless.¹⁴ Pollution of the Banger River also continued, as confirmed in an analysis conducted in July 1998 by Gita Pertiwi, an environmental NGO, which concluded that the waste management unit required further improvement before discharged waste would comply with stipulated levels.¹⁵ A certain amount of liquid and solid waste was also being discharged from the factories without any processing.¹⁶

By late 1998 the Banger River was still polluted and its water unusable for domestic or agricultural purposes. The community's attempts to successfully resolve the dispute through environmental advocacy and direct negotiation had so far failed. Furthermore, the administrative and criminal sanctions applied by regional and national government agencies had also failed to ensure ongoing compliance with environmental standards. Litigation thus presented itself as an avenue of last resort to the Dekoro community. It was at this point that the villagers requested YAPHI, a legal aid agency based in Solo and Kudus, in conjunction with several concerned local legal advocates, to represent the villagers in a claim for compensation and environmental restoration.¹⁷ For their own part, legal representatives from YAPHI were keen to use the case as

¹² Purwadi and Dakrita, "Pembuangan Limbah Lumpur Ke Kali Banger Dihentikan."

¹³ Ibid.

¹⁴ The companies later argued that the permits could only be legally withdrawn by the Minister, who had granted them. "Penggugat Yakin Terjadi Pencemaran," *Suara Merdeka*, 30 June 1999.

¹⁵ Adi Nugroho, "Pemantauan Lingkungan Kasus Pencemaran Sungai Banger, Pekalongan, Jawa Tengah," (Solo: Gita Pertiwi, 1998).

¹⁶ Ibid. The failure of the unit to function properly was attributed by some to a rise in the price of neutralising solution due to the monetary crisis and the consequent unwillingness of the three industries to actually use the unit. Ismar.

¹⁷ The community had in fact previously engaged the Legal Aid Institute of Semarang, who had initiated the attempt at negotiation with the industries. However, the failure of this attempt and the lack of any other

an opportunity to test the new provisions relating to environmental compensation in the recently enacted EMA 1997. On 16 November 1998, almost ten years after pollution of the Banger River commenced, seventy-nine villagers from the Dekoro community provided their legal authority (*kuasa hukum*) to carry out the action on behalf of the community.

3.1.2 District Court of Pekalongan Case

In the court case that followed the Plaintiffs (the community of Dekoro) argued that since 1989, when the three factories had commenced operations, untreated liquid and solid waste from the factories had been discharged into the Banger River. Whilst, due to community pressure, the factories had installed a waste management unit in 1996, pollution nonetheless had continued, as the unit did not function effectively. As a result of the pollution, the Dekoro community claimed to have suffered various types of damage, including¹⁸:

- Residents were no longer able to use river water for everyday needs, such as washing, cooking etc;
- Death of livestock (chickens, ducks & goats) that had grazed near the river;
- Death of fish in the Banger River and consequent loss of livelihood for local fishermen;
- Skin disorders and health complaints experienced by residents as result of pollution;
- Failure of rice harvests in fields where river water had been used for irrigation;
- Pollution of residents wells to the point where well water could no longer be utilised for everyday consumption;
- Fear and apprehension experienced by residents for years due to the ongoing hazard of pollution.

The Plaintiffs argued that the action of Defendants in discharging polluting waste into the Banger River was contrary to a number of laws and regulations. Firstly, the Defendant's actions had violated the residents' "right to a good and healthy environment", a right enshrined in the EMA No. 23 of 1997. Article 34 of that Act further states that:

substantive progress prompted community representatives to seek assistance from alternative sources. Yusuf and Haryati, 12 October 2000.

¹⁸ "Banger River Case," p5.

every action which infringes the law in the form of environmental pollution and/or damage which gives rise to adverse impacts 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.

Lawyers for the Dekoro community thus argued that the environmentally damaging actions of the three industries obliged them to pay compensation to victims of the pollution and to carry out environmental restoration. The right of the Dekoro community to compensation was also based on article 1365 of the Civil Code, which stipulates that where an action contrary to law (*perbuatan melawan hukum*) causes loss to another person, then the person responsible for that action is obliged to pay compensation to the person sustaining such loss. The discharge of polluting effluent by PT Kesamtex, PT Bintang Triputatez and CV Enzritek was furthermore said to contravene legal obligations and standards stipulated in Law No.5/1984 concerning Industry, Government Regulation No. 20/1990 concerning Control of Water Pollution, Decision of the Minister of Population and Environment No. MNKLH/02/1991 concerning Stipulated Waste Standards and the Decision of the Minister of Population and Environment No. 35/MNKLH/07/1991 regarding the Clean Rivers Program.

On the basis of these provisions the Plaintiffs claimed compensation for material and immaterial loss as a result of the pollution caused by the defendants' actions. Compensation claimed for material loss amounted to a total of Rp 1,322,303,500 (US\$176,000) in respect of failed crops, fisherman's loss of livelihood, death of livestock, and pollution of residents' well water. The Plaintiff's also claimed compensation for immaterial loss, described as "...the feeling of fear and apprehension suffered by those living alongside the Banger River due to the danger caused by the pollution." The sum claimed in respect of immaterial loss was Rp 1,500,000,000 (US\$200,000). On the basis of art 34 of the EMA 1997, the Plaintiffs also requested the Defendant be ordered to carry out environmental restoration by improving the waste management unit so as to ensure that discharged waste satisfied stipulated standards.

The Plaintiffs' claim in this case was supported by a range of testimonial and documentary evidence including first hand witness testimony from nine local residents and one NGO worker. According to witnesses, the liquid waste discharged daily from the factories via open water channels was described as alternately brown, violet, black, yellow and red in colour. Residents reported that the foul smelling discharge would burn and blister the skin if contact was made.

Accounts of villager's ducks, chickens, goats that had died when grazing near the river were also given. According to one account, a resident of Dekoro village had suffered the loss of 200 ducks subsequent to their foraging on the banks of the Banger River in 1993.¹⁹ One hundred wells adjoining the river in Dekoro village had become "black and smelly" and unusable subsequent to the pollution, whilst rice harvests according to one witness had failed in some 43ha of land in Dekoro village. Whilst local fisherman had previously been able to catch as much as 10kg of fish in one day, subsequent to the pollution (1988 onwards) no fish were to be found in the Banger River.²⁰

To further support their case, lawyers for the Plaintiffs also submitted records of the abovementioned decision of the Pekalongan District Court in which the Defendants were held criminally liable for illegally discharging waste which polluted public water and the environment, contrary to article 12 (2) of Regional Government Regulation No. 2 of 1993. As discussed above, the conviction was largely symbolic in nature, carrying a penalty of only Rp 45,000. Nonetheless, it was technically a criminal conviction and it was, in the words of a community representative, a "weapon" of some significance during the course of the trial.²¹ Lawyers for the Dekoro community also drew attention to administrative sanctions applied by the Regional Pekalongan Government to the Defendant companies due to their failure to implement measures to control pollution through the discharge of waste, especially in the Banger River. Initially the Mayor of Pekalongan had made a written recommendation to the Governor of Central Java that administrative action be taken against the Defendant companies due to their pollution of the Banger River. Subsequently the regional government of Pekalongan, through its mayor, had allegedly withdrawn the three factories operating permits, although this was contested by the industries themselves.

Considerable evidence of a scientific nature was also presented in support of the Dekoro community's legal suit. Amongst these, laboratory tests conducted by BPPI on 29 April 1998 demonstrated that liquid waste discharged from the factory subsequent to waste management processing still did not fulfil stipulated standards.²² Earlier examinations conducted by the National Environmental Impact Agency had also concluded that waste discharged from the

¹⁹ Ibid., p19.

²⁰ Ismar.

²¹ Yusuf and Haryati.

²² "Banger River Case," p8.

factories exceeded stipulated limits. Finally, the testimony of two expert witnesses further supported the Plaintiff's assertion that the waste discharged from the factory had caused pollution and environmental damage to the surrounding community.²³

The three industries the subject of the claim raised a number of procedural and substantive defences in the case before the District Court of Pekalongan. Firstly, the three industries argued that the Plaintiffs possessed no legal interest connecting them with the Banger River and therefore had no legal "standing" to bring the case in question. Given the principles enunciated in the EMA 1997 and the acceptance of environmental standing in the *PT IIIU* case this was a defence that was unlikely to succeed. In an even more tenuous defence, from the perspective of environmental law at least, the co-defendants claimed that their waste management consultant, PT Sarana Tirta Kutolestari, was legally responsible for management of industry's waste and thus liable for any resulting damage. It was this company, in the defendants' opinion, together with the Environmental Impact Agency (as supervisor of waste management), that should have been made the subject of this claim.

On a substantive level, the Defendant industries further argued that even if pollution had occurred it should not give rise to any claim as the Banger River was not legally categorised as a source of agricultural or drinking water. It was therefore, at least in the industries' eyes, legitimate for it be utilised as a means for disposal of industrial waste. In any case, argued the lawyer for the Defendants, waste discharged from the three factories was processed via a waste management unit, operational since 1996 with a monthly operating cost between Rp 25 – 60 million. Contrary to the Plaintiff's assertion otherwise, the waste management unit did function effectively and its effluent was examined on a monthly basis. Tests carried out by the Agency for Industrial Research and Development on 7 December 1998 demonstrated that effluent from the factory fulfilled regulatory standards.²⁴ Whilst other factories along the Banger River dispose of untreated waste directly into the river, waste from the three Defendant factories was processed prior to disposal. It was thus a central tenet of the defence that other factories disposing of waste into the Banger River should also have rightly been made a subject of the claim in question.

Interestingly, the Defendants pointed to a lack of administrative sanction as evidence contradicting the Plaintiffs' claims. If the Defendant factories had in fact contravened the legal

²³ The expert witnesses were Prof. Ruchayat and Dr Norma Afiati.

standards relating to effluent then their permit for disposal of liquid waste would have been revoked in accordance with art. 33 Government Regulation No 20 of 1990, whereas this had not occurred. The Defendant's denied the Plaintiff's allegation that their operating permits had been withdrawn by the regional government of Pekalongan, arguing that the permits could only be legally revoked by the Minister who had originally granted them.²⁵

3.1.3 Court Hearings

The hearing of the Banger River case at the Pekalongan District Court was attended by a large number of residents of Dekoro village bearing banners demanding a fair trial. The ensuing session was reported in a local newspaper as "...coloured by the protests of the residents' lawyers and numerous visitors who nearly destroyed a dividing wall in the session hall."²⁶ Considerable anger was triggered by the apparent intimidation of a witness by the sitting judge, and contained only by the appeals for calm by the residents' lawyers and representatives.²⁷ Subsequent sittings of the District Court were equally well attended by residents of the Dekoro community, prompting the Head Justice to complain

...if there is a demonstration at each sitting, the sitting cannot go smoothly. For the sake of a smooth hearing, the case should be entrusted to the legal representatives.²⁸

Despite the Chief Justice's protestations, no attempt was made to restrict access to the sittings and the Dekoro community showed no decline in interest in the matter before the court. In the words of one community member,

We are allowed to watch the hearing, because its open for the public. And as this case involves a lot of people, what's wrong if a lot of people attend?²⁹

²⁴ "Banger River Case," p16.

²⁵ According to evidence produced by the plaintiff it seems the case that the Pekalongan Regional Government did at least attempt to revoke the industries' operating permit. The defendants' position was based on their argument that only the Minister, who had issued the permits, could revoke them. In any case the administrative action in question seems to have had no impact on the operations of the three industries which continued regardless as discussed above. This issue was specifically discussed in the decision of the High Court – see page 145

²⁶ "Sidang Pencemaran Kali Banger: Pengacara Dan Pengunjung Protes Pada Majelis," *Suara Merdeka*, 7 April 1999.

²⁷ "Soal Kali Banger, Warga Datangi Polres," *Suara Merdeka*, 20 April 1999.

²⁸ "Ketua Majelis Merasa Terganggu Demo."

²⁹ Ibid.

The disorder experienced in the first hearing was again repeated in a subsequent session when around 200 visitors "...pounded their chairs in disappointment..." when the decision of the court was postponed to a subsequent date. After the group was pacified by community and NGO representatives, the presiding judge conceded that he would "...in principle...defend the people's interests."³⁰

The visible and vocal presence of the Dekoro community during court hearings was notable. Legal representatives for the community considered this a key influence on the judges in both the District and High Court hearings.³¹ The pressure on the presiding judges to return a "fair" verdict was tangible and made explicit at several points during the trial when community members threatened to destroy a partition and throw objects into the courtroom.³² Legal representatives for the community realised that behaviour of this nature was unacceptable in a court setting and were successful in pacifying the community members present, enabling the trial to proceed.

3.1.4 *Decision of Pekalongan District Court*

The decision of the District Court of Pekalongan in this case stands out from most previous judicial decisions in environmental cases in that the Court appeared to be relatively well informed about environmental legal principles, rights and responsibilities. The judges first recognised that the dispute before them was of an environmental nature and that according to the EMA 1997 each person "...has a responsibility to protect environmental sustainability...[and] to participate in efforts toward that end."³³ The efforts of the Dekoro community in contacting government agencies and finally in bringing a legal suit for compensation and environmental restoration clearly fell within this category. As individuals within a living environment, the Court recognised that the Plaintiff's "...held an interest in their environment's preservation".³⁴ The panel of three judges thus rejected the Defendant's argument that the Plaintiffs held no standing in the matter. The dispute before them was "...connected with the environment, and so must be differentiated from interests connected only with civil law..." The judges also rejected the Defendant's procedural exception that its third party waste management contractor, PT Sarana Tirta Kutolestari, bore the legal responsibility for the pollution. According to the court, "...legal

³⁰ "Pengunjung Sidang Gebrak Kursi," *Suara Merdeka*, 29 June 1999.

³¹ YAPHI et al., 3/4 November 2000.

³² "Sidang Pencemaran Kali Banger: Pengacara Dan Pengunjung Protes Pada Majelis."

³³ "Banger River Case," p36.

³⁴ Ibid.

responsibility for waste pollution is held fully by the owner of the industry that produces the waste.”³⁵

On the substantive issues before it the Court concluded that the three Defendant industries “...had disposed of liquid waste into the Banger River...causing pollution to the environment and damage to the Defendants...[by]...polluting sources of water used by humans, animals and plants.”³⁶ The affirmative decision of the court in this respect caused great elation among the members of the Dekoro community observing the trial, a number of whom exclaimed “These are what you call reformist judges!”³⁷ The fact that the Banger River was not legally categorised as a source of drinking water did not, in the Court’s opinion, justify or excuse the pollution carried out by the Defendants. On the contrary, the three justices emphasised that

...industrial development must be sustainable (*berwawasan lingkungan*), for the safety of humankind. Thus, regardless of whether the Banger River was stipulated as a source of drinking water or not, environmental preservation must still be observed.³⁸

On the evidence before it the Court concluded that pollution had at least occurred between 1992 and 1996, as it was only at that point that the waste management unit became operational.³⁹ Evidence of tests carried out by BPPI, presented by the Defendants, only demonstrated that the factories’ effluent satisfied regulatory standards from December 1998 onwards. The Court thus determined that pollution had occurred between 1992 and 1997. For this period it was thus “...proven that the Defendants had contravened art. 34 of the EMA 1997 and committed an action contrary to law as per art. 1365 of the Civil Code.”⁴⁰ The Defendants were consequently legally obliged to pay compensation to the victims of the pollution, in this case certain members of the Dekoro community.

Whilst upholding the Plaintiffs’ claim for compensation based on art. 34 EMA 1997 and art. 1365 Civil Code, the Court chose to make its own assessment of the level of damages to be awarded and did not award immaterial damages. The total amount of damages awarded was Rp 49,184,000 (US\$6,500) calculated by reference to the loss each particular claimant had suffered.

³⁵ Ibid., p37.

³⁶ Ibid., p39.

³⁷ "Tiga Pencemar Kali Banger Dihukum Rp 48,69 Juta," *Suara Merdeka*, 20 July 1999.

³⁸ "Banger River Case," p40.

³⁹ This was a conservative estimate as most witnesses for the plaintiffs referred to pollution dating from around 1988 when the factories commenced operations.

⁴⁰ "Banger River Case," p42.

Furthermore, the order requested by the Plaintiffs that the Defendants improve their Waste Management Unit to an adequate level was declined by the Court. In the Court's opinion, the Unit was already functioning at an adequate level, and further restoration was not needed. In arriving at this conclusion the justices noted the expenditures made on the unit by the three industries, some Rp 2.5 billion (US\$330,000) for installation and between Rp 25-60 million (US\$3,300-8,000) for monthly operating costs. The Court considered the amount of money spent monthly by the Defendants to date on the Waste Management Unit and also the fact that tests had been taken on 7 December 1998 which demonstrated that the waste output satisfied stipulated levels of pollutants.⁴¹ Accordingly, the Court concluded that it was not necessary to make any further orders in this respect.

3.1.5 Appeal and Decision of Semarang High Court

On 2 August 1999, the legal representative of the Dekoro community lodged an appeal against the decision of the District Court of Pekalongan. Whilst the decision was a victory for the community, there was nonetheless disappointment at the level of compensation awarded, which was considerably less than the community had claimed.⁴² A spokesman for the Dekoro community stated at the time,

The appeal was made because the decision of the District Court absolutely failed to satisfy the claims of the community concerning compensation for pollution from factory waste. The compensation awarded was only Rp 49 million whereas we asked for Rp 2,82 billion.⁴³

The legal representative for the community also strongly criticised the failure of the Court to adequately address the issue of environmental restoration, emphasising that the Dekoro community were not only concerned with matters of material compensation.⁴⁴

The appeal was subsequently adjudicated by the High Court of Semarang which, in a decision dated 8 December 1999, reaffirmed the decision of the District Court and the grounds upon which

⁴¹ Ibid., p16.

⁴² As discussed above, the Court awarded Rp 49,184,000 whereas the Dekoro community had claimed compensation of Rp 1,322,303,500 for material damage and Rp 1,500,000,000 for immaterial damage, a total of almost Rp 3 billion (around US\$350,000) – approximately 60 times the amount actually awarded by the Court.

⁴³ "Korban Kali Banger Naik Banding Ke Pt," *Suara Merdeka*, 9 October 1999.

it had been made. In particular, the High Court emphasised that several letters of administrative sanction sent by the regional government to the defendant industries provided sufficient evidence that the industries had in fact polluted. The letters in question, dated 15 October 1997, related to the withdrawal of the operating permit (*ijin tempat usaha*) of the three industries due to their failure to implement pollution control measure. The High Court's decision in this case illustrates the common tendency of Indonesian courts to elevate evidence of prior administrative sanction above other evidence that may also present, including eyewitness testimony, expert evidence, and laboratory research. From an evidential perspective this is questionable, as prior administrative sanction, or the lack of it, can only really provide secondary evidence of actual pollution or environmental damage, when compared to 'first-hand' evidence such as witness testimony or laboratory tests. In this case, however, the High Court considered that the letters of administrative sanction issued by the regional government to the companies established "...that the Defendants committed actions contrary to law." It is unfortunate that the High Court chose to base its decision solely upon the prior administrative sanction by the regional government, without reference to the range of other evidence presented in the case.

The Court went on to reassess the amount of compensation awarded on an individual basis, arriving at a total amount of Rp 165,523,000 (US\$22,000) an amount which accounted for perished livestock, failed rice harvests, the costs of cleaning polluted wells and the loss of fishermen's livelihood. However, the three judges in this case felt that the amount so calculated could not accurately reflect the full extent of the damage suffered by the Plaintiff community, as the loss in question was not just a loss of property, but a loss of capital. When this loss of capital was considered over a period of seven years (from 1992 to 1999) ⁴⁵ the three justices considered it appropriate to treble the calculated amount of compensation to arrive at a rounded figure of Rp 500,000,000 (US\$66,500) a more than ten-fold increase on the sum awarded by the District Court. In addition, the High Court acknowledged that the pollution caused by PT Kesamtex, PT Bintang Triputrtez and CV Enzritek had resulted in pain and suffering experienced by the local community over a period of seven years. Accordingly, the Plaintiffs, as a part of the community whose environment had suffered pollution, were legally entitled to receive compensation for the immaterial damage suffered by them. The Court thus awarded an amount of Rp 250 million to

⁴⁴ "Tiga Pencemar Kali Banger Dihukum Rp 48,69 Juta."

⁴⁵ The Appellate Court did not seem to adopt the view of the District Court that the pollution only continued until the end of 1997, but it did not expressly address this matter.

account for this damage, bringing the total compensation amount to Rp 750,000,000 (US\$100,000).

The High Court finally addressed the issue of environmental restoration, which had been raised in the Plaintiff's claim, emphasising that payment of compensation did not alleviate the Defendant industries from preventing further environmental damage. The Defendant industries were thus obliged to ensure the optimal operation of their waste management unit to prevent any further environmental pollution and ensure compliance with regulatory standards. For each day the three industries failed to do this, they would be liable to pay an additional fine of Rp 50,000.

3.1.6 Appeal to Supreme Court

The Banger River case has yet to be finally resolved as an appeal, lodged by both parties, is currently pending to the Supreme Court of Indonesia. From the Dekoro community's perspective, the decision of the High Court came much closer to satisfying their claim than the previous decision of the District Court. Indeed, it is surprising, given the scarcity of successful claims for environmental compensation or restoration in Indonesia, that the Plaintiffs chose to lodge a further appeal to the Supreme Court. The decision of the High Court, in significantly increasing the award of compensation for environmental damage seems unlikely to be endorsed by the Supreme Court, which in the past has been noted for its political conservatism and deference to executive will.⁴⁶ A further appeal will also result in more delays in an already lengthy dispute resolution process dating back twelve years. Nonetheless, not all members of the community representative group, KKLBB, were satisfied with the decision of the High Court. In a vote subsequent to the High Court's decision, 75% chose to lodge a further appeal to the Supreme Court.⁴⁷ Representatives of the Dekoro community felt the decision, whilst it did require optimisation of the waste management unit, did not adequately address the issue of environmental restoration. The community had hoped, for instance, that measures such as dredging toxic solid waste from the river would be implemented to ensure proper restoration of the environment to its original condition.⁴⁸ In the plaintiff's view, it would have been appropriate therefore if the Defendants had been obliged to pay compensation toward such restoration.⁴⁹

⁴⁶ see, for instance, the discussion of Supreme Court decision making in Pompe, "The Indonesian Supreme Court: Fifty Years of Judicial Development".

⁴⁷ Ismar.

⁴⁸ Ibid.

⁴⁹ "3 Pabrik Harus Bayar Ganti Rugi Rp 750 Juta," *Suara Merdeka*, 31 March 2000.

As in the previous hearings in the District and High Courts, the Dekoro community has attempted to pursue a strategy of political advocacy alongside the ongoing legal proceedings. Representatives of the community have made several trips to Jakarta and attempted to meet with the judges adjudicating the case as well as senior political figures from the Environmental Impact Agency and the Ministry of the Environment. Whilst the representatives were successful in communicating their views to officials at the latter two government agencies they were unable to communicate with the judges presiding over the case and were advised that resolution of the case was in process.⁵⁰

3.1.7 Conclusion

The Dekoro communities' struggle for environmental justice has been a prolonged one, and still, at the time of writing, had not yet been resolved.⁵¹ The community first felt the effects of pollution around 1990, shortly after the three factories commenced operations. In the ensuing eight years, a process of advocacy and lobbying was undertaken by representatives of the community, assisted by NGOs based in Pekalongan and the nearby regional capital, Semarang. The community's claims were taken to administrative agencies and parliaments at the district, provincial and national levels. Partially because of this sustained, and often publicised campaign, and partially because of regional government pressure, the three factories agreed to install waste management units in 1996. Yet, this did not end the pollution. The intransigence of the industries involved in this case undermined subsequent attempts that were made to resolve the dispute through mediation. The Dekoro community was clearly motivated to pursue litigation as an option of last resort. In this case, access to the courts was not an obstacle, given the willingness of a non-government legal aid agency (YAPHI) to act as representatives for the community. The willingness of the legal agency to bring the case was bolstered by the new EMA 1997, which stipulated a clear right to compensation for environmental damage that was not dependent upon prior investigation by a government team or the promulgation of implementing regulations, as had been the case with the EMA 1982.

⁵⁰ Ismar.

⁵¹ At the time of writing, November 2003, the appeal was still pending to the Supreme Court. Lusila Anjela Bodroani, 18 November 2003.

The decisions of the Pekalongan District Court and the Semarang High Court level in the *Banger River* case provide some evidence of an increasing familiarity with environmental legal principles amongst Indonesian judges. The decisions also demonstrate a hitherto rare willingness to award significant amounts of compensation for environmental damage against industry Defendants on the basis of such legal principles. In line with a number of decisions since the *PT IJU* case, the District Court in this case made no hesitation in discounting the Defendants' contention that the Dekoro community lacked a legal connection with the Banger River, emphasising instead the broad right and interest of the community to participate in environmental preservation. The Court was also clear in its emphasis of the non-delegable responsibility of the industries to ensure proper waste management, rejecting their attempt to shift liability onto a third party contractor. Moreover, in marked contrast to the more formalistic approach of Indonesian courts in earlier cases, the Court based its decision upon the broad concept of sustainable development as enshrined in the Environmental Management Act.⁵²

Yet, probably the most notable feature of the *Banger River* case, beyond the courts' comparatively adept discussion of environmental legal principles, is the outcome at both District and High Court level. Whilst several past environmental cases have obtained only procedural concessions, the Plaintiffs' victory in this case has been more than procedural, extending to the substantive remedies of compensation and, to a lesser extent, environmental restoration. As the discussion in the previous chapter demonstrates this is, in the context of Indonesian environmental litigation, a rarity. In particular, the *Banger River* case is an exception to the pattern found in a number of other cases where the Plaintiff's win at the District Court level only to lose later on appeal at the High Court level.⁵³ The High Court decision in this case was also conspicuous in its award of compensation 15 times higher than that awarded by the District Court. Moreover, the High Court issued orders to optimise the companies' waste management unit, whereas the District Court before it had not done so.

Several factors may be identified as contributing directly to the legal outcome in this dispute. The pollution of the Banger River was severe and renown in the area in which it occurred. Furthermore, the allegations of the Plaintiffs were supported not only by local knowledge, but also by research from several government agencies. The fact that the industries in question did not even possess a waste management unit before 1996 made it extremely difficult for the

⁵² "Banger River Case," p40.

pollution, at least during the period prior to this, to be discounted. The allegations of pollution were also supported by expert witnesses, whose testimony proved influential during the case.⁵⁴ The Plaintiffs' case was thus bolstered by strong evidence from a number of sources.

Further weight was added to the claims of the Plaintiffs by the previous criminal conviction and administrative sanction that had been applied by the government. In the words of the legal counsel for the plaintiffs,

In this case it was clear the companies had polluted. The administrative sanctions and the criminal conviction were evidence of this. Although the criminal conviction was a minor one, with a fine of just Rp 45,000, it was still a conviction. So we were able to use this as a weapon.⁵⁵

Whilst the administrative and criminal sanctions applied to the three industries were not given particular emphasis in the District Court decision, the High Court made a point of doing so stating,

...the withdrawal of the operating permits due to the Industries' failure to implement measures to control waste pollution in the Banger River...proves that the Defendants committed an action contrary to law which damaged the Plaintiffs.

As discussed above, the logic employed by the High Court in this instance appears questionable. The fact that the regional government chose to withdraw operating permits on certain grounds does not establish that the factual and legal elements of an action contrary to (environmental) law have been made out. This latter determination is one for the Court to make, rather than a government agency. In any case, the Court's statement serves as an indication of the weight given in this case to the previous administrative and criminal sanctions applied by the government. Prior executive and criminal sanction of the polluting companies in this case seemed to strongly influence the Court in deciding upon compensation and restoration for environmental damage.

Another notable feature of the Banger River Case was the strong and sustained community pressure both before and during the litigation process. The vocal presence maintained by the Dekoro community during the court hearings expressed a strong public sentiment to the presiding judges. Several of the lawyers who had represented the community considered this a likely

⁵³ This for instance happened in the *Babon River* case discussed in detail below.

⁵⁴ Isna.

influence on the eventual decision of the Courts.⁵⁶ The influence of community pressure in this case may certainly have been amplified by the political circumstances of that particular time. The Pekalongan District Court hearing and the Semarang High Court hearing were held in a period of economic and political turmoil following the fall of President Suharto's New Order government. The transition to the post-Suharto era was accompanied by massive student demonstrations and waves of urban rioting in several cities in Java. Neither the military or police were able to contain the explosion of civil discontent which acted as a catalyst for the eventual resignation of Suharto as President. In the ensuing era of *reformasi*, the continuing dissolution of the rigid political and military control that had characterised the New Order created new opportunities for the expression of civil and political discontent, yet also brought a lingering fear of social anarchy. Security could no longer be guaranteed, and government decision makers, such as judges, were seemingly in a much more vulnerable position than had been the case previously. In the more politically open and vulnerable environment of post-Suharto Indonesia, it may be the case that the community presence and pressure maintained during the court hearings had an increased influence on the Pekalongan District Court and the Semarang High Court. This is less likely to be an influence on appeal to the Supreme Court, however, given the reduced proximity and accessibility of that Court to the community.

⁵⁵ YAPHI et al.

⁵⁶ Yusuf and Haryati.

3.2 Babon River Case (1998)⁵⁷

3.2.1 *History of the Dispute*

The Babon River is located on the outskirts of the sprawling city of Semarang, capital of Central Java.⁵⁸ Like the Banger River, the Babon River provides a source of water for the everyday day needs of residents in its vicinity, including in this case the villagers of Sriwulan and Bedono, numbering some 4000 people. Traditionally the river's waters have been used for cooking, washing, livestock and irrigation. In particular, the villagers of Sriwulan and Bedono are renown as traditional fishpond farmers, practicing a small-scale method of prawn farming whereby prawns (and small fish) are flushed into the ponds with the rising tide and then trapped and raised within the ponds. The ponds of the villagers are located near the mouth of the Babon River and rely on the tidal flow of water from the river and ocean.⁵⁹

Like many rivers in Java, the Babon River has also been utilised by a diverse collection of industries for production needs and the disposal of waste effluent in more recent years. The dispute the subject of this chapter involved six industries operating adjacent to the river, all but one of which are still in operation today. The six industries were PT Condro Purnomo Cipto (leather processing); PT Puspita Abadi (leather processing); PT Rodeo (clothing manufacture); PT Bintang Buana (leather processing); CV. Sumber Baru (paper); Puskud Mina Buana (cold storage). Before 1995, none of the industries had installed or operated a waste management unit. Waste effluent had as a result been disposed, untreated, into the Babon River. Unsurprisingly, the impact of this waste was soon felt by the nearby villagers of Sriwulan and Bedono. Beginning in September 1994, the prawn harvest of the fishpond farmers of Sriwulan and Bedono was to fail for a period of 4 months. This was at a time when the pollution levels in the Babon River had reached a peak. Whilst the level of pollution decreased after January 1995, the prawn catch of the farmers remained significantly diminished, forcing many prawn farmers to seek employment as factory workers.⁶⁰

⁵⁷ Decision No.42/Pdt.G/1998/PN.Smg

⁵⁸ The river is actually in the western part of Demak Regency 18km from the city of Demak, and bordering on Semarang municipality.

⁵⁹ YAPHI, "Pencemaran Lingkungan Sungai Babon-Demak," (YAPHI, 1998).

⁶⁰ "Menggugat Pencemaran Kali Babon," (Solo: Gita Pertiwi, 2000), p1.

Initially, prawn farmers in Bedono and Sriwulan did not suspect that industrial effluent had caused the sudden death of their prawns and fish. Their suspicions were raised, however, by newspaper reports of unusually high pollution levels in the Babon River and the subsequent inclusion of the Babon River in the Clean Rivers program.⁶¹ While the Babon River was located some 4-5 km from the prawn and fishponds, its waters nonetheless routinely entered the ponds via the river's mouth, when the ponds were opened to the rising tide in order to trap prawns and fish. In the period of September – December 1994, when the most severe losses of prawns and fish occurred, the water entering the ponds was noticeably discoloured, similar to the waters of the heavily polluted Babon River.

On 21 December 1994, community representatives took their complaints to the regional legislative assembly of Demak regency. A member of the assembly then requested that the environmental administrative section head (*Kabag Lingkungan Hidup*), investigate the claims.⁶² Research into the pollution claims was subsequently carried out by a Jepara based institute⁶³, which confirmed not only that the death of the farmers' prawn stock was due to pollution, but also that the water of the Babon River contained hazardous waste.⁶⁴ At the suggestion of Demak officials, community representatives then conveyed their complaints to the legislative assembly of Semarang in February 1995, yet again were referred on to the legislative assembly at the provincial level (in this case Central Java) as this particular dispute fell into two administrative districts.⁶⁵ Ultimately, a more substantive hearing did eventuate through the Commission C of the Central Java legislature in February 1995, involving legislative members, community, industry representatives and officials from the Environmental Impact Agency of Semarang.⁶⁶ Initially industry representatives denied responsibility for the farmers' loss and officials from the provincial Department of Fisheries attributed the prawns' death to illness. Yet, when community representatives presented the research confirming pollution in a follow-up meeting three days

⁶¹ *Program Kali Bersih* – an environmental law enforcement initiative spearheaded by the national environmental agency designed to improve industrial waste management and water quality of rivers in Java.

⁶² "Menggugat Pencemaran Kali Babon," p2.

⁶³ *Balai Budidaya Air Payau Jepara*

⁶⁴ (*bahan beracun dan berbahaya*) "Babon River Case," in *PT Condro Purnomo Cipto CS*, ed. Muhaimin C.S. (District Court of Semarang: No.42/Pdt.G/1998/PN.Smg, 1998), p35.

⁶⁵ The villages were located in Demak, whilst the factories were in Semarang municipality some 7km from the city of Semarang.

⁶⁶ "Menggugat Pencemaran Kali Babon," p1.

later, industry representatives finally conceded that their operations had polluted the Babon River. At this meeting, the community also presented its claim for compensation for the environmental damage, although exact amounts at that point had not been determined. A legislative member suggested that a goodwill payment (*uang tali asih*) be made the industries to the two villages. Community representatives initially opposed this suggestion as the payment would be unilateral in nature and would not address the ongoing problem of water quality. Subsequent to the hearing, however, community members were pressured by the village heads (*lurah*) and the local government council (*muspika*) to accept the payment of Rp 15 million (US\$1500), which eventually was made (in June 1995) and utilised for local road works and the payment of local government taxes.⁶⁷

In 1995, there was a gradual lessening of pollution after the six industries were targeted in the Clean Rivers program.⁶⁸ Pursuant to the program, the industries were required to install a waste management unit and have waste effluent tested every 3 months. Yet, despite some improvements in environmental management and the goodwill payment by industries in June 1995 the fishpond farmers of Bedono and Sriwulan villages did not consider the dispute to be at an end. Pollution from the Babon River, whilst lessened, nonetheless continued to reduce the farmers' yield from the fishponds, which never returned to the levels enjoyed pre-September 1994. Tests conducted in March 1997 by NGO Gita Pertiwi and the Technical Institute of Environmental Health in Yogyakarta confirmed that the Babon River continued to be polluted above regulatory standards by industrial effluent.⁶⁹ Furthermore, the personal loss of the farmers due to the pollution had not been compensated, despite the goodwill payments made to the villages as a whole. The farmers resolved to pursue their claim for compensation and in 1997 a group of some 300 farmers approached the Legal Aid Institute of Semarang providing legal authority to pursue a claim on their behalf. Yet, after little progress on the claim was made, the group of farmers withdrew their legal authority. Subsequently, in 1998, a smaller group of nine farmers that were not included in the original group approached the Kudus based Indonesian Foundation for Legal Service (YAPHI) and instructed them to bring a legal suit on their behalf.⁷⁰ Initially, legal representatives considered a large 'class action' suit representing all 300 farmers.

⁶⁷;Ibid., p2..Pencemaran Lingkungan: Babon River.

⁶⁸ "Babon River Case," p39.

⁶⁹ "Pemeriksaan Kimia Di Laboratorium (Sungai Babon)," (Yogyakarta: Balai Teknik Kesehatan Lingkungan, 1997).

However, this idea was ultimately judged premature due to the lack of regulations governing class actions in environmental law and the considerable resources required to manage such a case. Instead the farmers, in conjunction with their legal representatives, decided to bring a “test case” where the group of 9 farmers would sue the polluting industries for compensation and environmental restoration. In the event this initial suit succeeded, a larger representative or class action suit would be brought at a later date.⁷¹

3.2.2 District Court of Semarang Case (Claim & Defence)

In the case subsequently filed at the District Court of Semarang, the plaintiffs, nine prawn farmers from Sriwulan village, claimed compensation for environmental damage caused by the Defendants’ illegal disposal of waste into the Babon River. The farmers’ claim was directed against the six industries PT Condro Purnomo Cipto, PT Puspita Abadi, PT Rodeo, PT Bintang Buana, CV. Sumber Baru and Puskud Mina Baruna. In addition, the Mayor of Semarang was initially named as a co-defendant due to the alleged failure of that office to properly supervise and monitor the operation of the industries in question.⁷² Subsequently, however, the Mayor’s office was omitted as a co-defendant by the plaintiffs in exchange for an undertaking that evidence of pollution held by it would be made available during the course of the trial.⁷³

The damage suffered by the farmers included the failure of their prawn/fish harvest from September until December 1994. In the 39 months after this, the farmers claimed to have experienced a reduction in their fish/prawn catch to 70% of previous levels. The total loss of income suffered by the farmers for these two periods was calculated to be Rp 51,645,000 (US\$6880). As in the Banger River case, the farmers’ claim was based upon both article 1365 of the Civil Code and articles 34(1) and 35(1) of the Environmental Management Act of 1997. As discussed above, art. 34(1) obliges a business which “...infringes the law in the form of environmental pollution and/or damage which gives rise to adverse impacts on other people or the

⁷⁰ YAPHI et al.

⁷¹ Ibid.

⁷² The Semarang district government had carried out a “Clean Rivers” Program (*Prokasih*) and even named the 6 defendant industries as priority targets within this program. However, according to the plaintiffs’ this attempt to monitor the industries’ operations had failed as the pollution of the Babon River had continued regardless. “Babon River Case,” p6.

⁷³ The evidence in question was data collected by the regional Environmental Impact Agency in Semarang. YAPHI et al.

environment...to pay compensation and/or to carry out certain actions.” Article 35(1), concerning strict liability, was also pleaded by the Plaintiffs as a basis for the claim.⁷⁴ That provision stipulates strict liability for resulting losses on any business “...which gives rise to a large impact on the environment, which uses hazardous and toxic materials, and/or produces hazardous and toxic waste...” Whilst the provision was named as a basis for the claim, the Plaintiffs’ case lacked more specific argument supporting the application of the strict liability provision.

A range of documentary and oral evidence was produced by the Plaintiffs in support of their claim, including government correspondence, which stipulated the six defendant industries as priority targets of the government’s Clean Rivers Program. Yet despite their participation in the program, described as ‘pioneering’ by the industries themselves, pollution had apparently continued. A newspaper report dated 13 April 1998, also tendered as evidence, reported the Semarang government’s statement that pollution in the Babon River continued two years after the commencement of the Clean Rivers Program.⁷⁵ Earlier waste analysis results from 1994, carried out by the Environmental Impact Agency of Semarang, moreover indicated that effluent from the six factories had greatly exceeded stipulated levels. Further test results from the Technical Institute for Environmental Health⁷⁶ dated 22 April 1997 provided other evidence of effluent levels in excess of stipulated government standards.⁷⁷

According to several fishpond farmers called as witnesses during the course of the trial, all of their prawn-catch perished during the months of September – December 1994. Whereas the farmers typically received between Rp 5000 – 30,000/day from 1 ha of ponds, during this period of 4 months no marketable catch was made. From January 1995 onwards the situation improved, yet the level and quality of the farmers catch never returned to normal.⁷⁸ Testimony from the Head of the Semarang Environmental Impact Agency, also called as a witness, confirmed, “the waters of the Babon River were polluted and had polluted the farmers’ fishponds...” The environmental official nonetheless emphasised the regional government’s efforts to monitor and control the pollution via the Clean Rivers Program.⁷⁹ According to this official, whilst pollution levels were very high in 1995, by 1995/1996 the majority of the industries had brought their

⁷⁴ "Babon River Case," p14.

⁷⁵ Ibid., p33.

⁷⁶ *Balai Tehnik Kesehatan Lingkungan*

⁷⁷ "Pemeriksaan Kimia Di Laboratorium (Sungai Babon)."

⁷⁸ "Babon River Case," p6.

waste within stipulated limits, contrary to some of the other evidence presented by the plaintiffs.⁸⁰

Whilst several of the Defendants lodged separate defences, in general the procedural and substantive arguments presented by the respective defendant industries were similar in nature.⁸¹ An initial procedural objection made to the plaintiffs' application was that the claims of the plaintiffs should have been advanced individually, rather than as a common claim. The industries also argued that there was no legal interest connecting them and that as a result they could not be held collectively liable for the damage suffered by the plaintiffs. Moreover, the Defendant industries contended that other industries located on the Babon River, of which a number purportedly operated without waste management units, should also have been included in the Plaintiffs' claim. In the Defendants' opinion evidence that the waters of the Babon River were polluted did not necessarily prove that the six industries the subject of this claim were responsible. In any case, it was submitted, the industries had fulfilled the requirements of the Clean Rivers Program since 1995, including three monthly testing of waste effluent with satisfactory results.⁸²

The industries also challenged the factual basis of the farmers' claim, emphasising the distance of 6km between the Babon River and the ponds of the plaintiffs. Furthermore, no tributaries of the river flowed adjacent to nor fed into the ponds. Given the Babon flowed straight to the sea it was unlikely, in the Defendants' opinion, that the waters of the Babon could have polluted the farmers ponds. This seeming incongruity had, however, been addressed in evidence presented by the farmers themselves. The waters of the Babon were channelled by a natural sand embankment adjoining the mouth of that river in the easterly direction of the fishponds and then directed into small intake rivulets, which fed into the farmers' ponds.⁸³

Finally, the Defendants drew the Court's attention to the fact that the farmers operating the fishponds in Bedono and Sriwulan did not have the necessary permits to do so. The fishpond operations were thus technically illegal and, as a result, should not be afforded the protection of

⁷⁹ Ibid., p38.

⁸⁰ This statement was, however, contrary to the test results from BTKL and the statement of the regional government as reported in the Suara Merdeka article on 13 April 1998.

⁸¹ see "Babon River Case," p15-.

⁸² As discussed above, evidence presented by the Plaintiff contradicted this claim.

⁸³ "Babon River Case," p35.

the law. In what then appeared to be an attempted deterrent to further claims of this nature all the industries counter-sued the farmers for damage to their credibility and reputation. The second Defendant claimed Rp 1 billion in damages on this basis, whilst the third through sixth Defendants demanded a public apology and retraction of the pollution claims.⁸⁴ Evidence presented by the Defendants included a number of tests results from the Semarang Environmental Impact Agency and the Institute for Industrial Research and Development.⁸⁵ The tests, most of which were carried out in late 1996 and 1997, showed effluent levels mostly within government stipulated standards. The six companies also presented evidence of the good-will payment made to the villages of Sriwulan and Bedono in September 1995.

Several witnesses were also called by the Defendants, the first of which was a technical environmental consultant, responsible for the installation and upkeep of waste management units for several of the defendant industries. According to this witness, following the installation and improvement of the waste management units, effluent from these industries (PT Puspita Abadi; PT Bintang Buana; PT Condro Purnomo, CV Sumber Baru and Puskut Mina Baruna) was below stipulated standards. Another waste management consultant for PT Rodeo attested that waste discharged from the factory satisfied government standards, whilst acknowledging that renovation of the waste management unit was undertaken in 1995 as it was unable to process the necessary volume of liquid waste. Interestingly, one fishpond farmer from the village of Bedono was also called as a witness by the Defendant industries. This farmer, whose ponds were located one kilometre from the Plaintiffs ponds, claimed that whilst his prawn catch varied, he had never found dead prawns as reported by the other farmers.⁸⁶

Evidence heard in the course of the trial was not limited to that presented by the parties themselves. The Court also chose to call four witnesses to elucidate certain issues between the parties.⁸⁷ One such issue was the payment made in September 1995 by the industries to the communities of Bedono and Sriwulan, which was addressed in the testimony of two witnesses called by the court. The matter of the payment was of some contention as the Defendants argued it was specifically directed to the farmers (as compensation), whilst the Plaintiffs maintained the

⁸⁴ The first defendant in this case, PT Condro Purnomo Cipto, did not file a defence.

⁸⁵ "Babon River Case," p41-.

⁸⁶ *Ibid.*, p53.

⁸⁷ *Ibid.*, p53-.

payment did not constitute compensation and was a unilateral payment applied to road improvement for the general welfare of the two villages. The first witness called by the court was the Village Head (*kepala desa*) of Bedono who verified that the farmers in that village had received a payment of Rp 10,000,000.⁸⁸ The witness did not know for certain whether the payment had been directed to all fishpond farmers or only those affected by pollution. Following a village meeting, it had been agreed that the money would be used to pay taxes of all villagers and to fund road improvement.⁸⁹ A second witness, who had previously represented the farmers in their petition to the provincial legislature, stated that the money was paid on behalf of farmers whose fishponds had been polluted, yet was used to pay the taxes of all villagers and fund road improvement work. He also confirmed that the farmers had not previously been invited to negotiate the amount of the payment with industry or government representatives.⁹⁰

Greatest clarification on this issue was found in the testimony of a third witness, an official of the Environmental Impact Agency of Central Java that had participated in attempts to resolve this environmental dispute in 1995.⁹¹ According to the testimony of this official an agreement was reached between the agency and the industries that each industry would make a payment of Rp 2,500,000, totalling Rp 15,000,000. The money was to be divided between the residents of Bedono village (Rp 10,000,000) and Sriwulan village (Rp 5,000,000) and was handed over on 18 September 1995. Most significantly, representatives of the two communities had not been present at this meeting and the money paid was not, in the witness' opinion, compensation but rather made as a goodwill payment.⁹² Finally, an expert witness from the Environmental Research Centre of Diponegoro University was called by the Court.⁹³ The witness considered that the distance between the fishponds and the factories did not preclude the possibility of pollution. It was further confirmed by this expert witness that laboratory evidence presented by the plaintiffs did confirm that the factories' effluent would have polluted the waters of the Babon River. Even some laboratory evidence presented by the Defendants and taken at a later date, demonstrated a significant degree of pollution, although to a lesser extent than the earlier samples.

⁸⁸ The remaining Rp 5 million was directed to Sriwulan village.

⁸⁹ "Babon River Case," p53-4.

⁹⁰ *Ibid.*, p54.

⁹¹ *Ibid.*, p55.

⁹² *uang tali asih*

3.2.3 *Decision of the District Court of Semarang*

In its decision dated 13 October 1998, the District Court of Semarang first addressed the procedural propriety of the claim brought by the Plaintiffs. The three judges rejected the procedural objections of the Defendants, stating that the plaintiffs were justified in bringing the suit collectively given their common experience of pollution and environmental damage resulting from the Defendants' actions.⁹⁴ Similarly, the common liability of the defendants in this case was justified as all had caused pollution in the Babon River. Thus, from the perspective of civil procedure, the close related interests of the co-defendants and co-plaintiffs respectively justified their joinder in this case.

On the issue of substantive liability, the Court concluded that the second through fifth Defendant had in fact discharged industrial waste into the Babon River, contrary to applicable laws and regulations, causing pollution and environmental damage.⁹⁵ On the evidence presented to it, the Court determined that the water from the polluted Babon River had entered the sea, from where it was diverted into the prawn ponds of the plaintiff farmers, causing the death of the prawns and consequent loss to the plaintiffs. In support of its decision, the Court relied upon documents prepared by the regional government before implementation of the *Prokasih* (Clean Rivers) program in 1995. These documents, submitted by the plaintiff as evidence, demonstrated the Babon River was polluted from liquid waste discharged from the industries. The documents also indicated the six Defendant industries had been targeted as potentially the most serious sources of pollution adjoining the Babon River, due to the excessive levels of pollutants detected in their waste discharge.⁹⁶ In further confirmation of this conclusion, the Court referred to the numerous records of the Semarang Environmental Impact Agency, which recorded effluent levels

⁹³ "Babon River Case," p57.

⁹⁴ *Ibid.*, 59.

⁹⁵ The claim was rejected against the first defendant, PT Condro Purnomo Cipto, who failed to appear or present any legal representative at any sitting of the court. According to two witnesses, the first defendant was continuing operations but had changed its name to PT Tri Mulyo Kencono Mas. According to the Court bailiff, the office of the First defendant had been long closed. The Court thus concluded that defendant I was no longer in existence and thus the claim against Def. I failed. The Court's decision in this respect seems highly formalistic and open to criticism, given the factory was continuing its operations albeit under a different name. If a change of name and office location is sufficient to relieve an industry of corporate liability for environmental damage, then a dangerous legal precedent has been set.

The claim against defendant VI also failed, as the factory the subject of the claim had been sold to another company and further rented to a third party. By the time of the trial the factory had ceased operations.

⁹⁶ "Babon River Case," p61-.

above stipulated levels during 1994.⁹⁷ Other evidence considered significant by the Court included the testimony of several of the plaintiffs who had suffered devastating losses to their prawn and fish catch during the period September – December 1994.⁹⁸

Based on this documentary and supporting witness testimony, the court found that from September to December 1994 Defendants II, III, IV and V had discharged waste in excess of stipulated limits into the Babon River causing both pollution and loss to the Plaintiffs. Given that the plaintiffs' has suffered loss as a result of the Defendants' illegal actions, the Court held that Defendants II, III, IV & IV were obligated to pay compensation on the basis of art. 1365 of the Civil Code and art.34(1) of the EMA 1997. Defendants II, II, IV and V were each ordered to pay an amount of Rp 1,100,000 (US\$150) to the Plaintiff farmers. In awarding compensation for this period, the Court rejected the argument of the Defendants that the previous payment of Rp 15 million to Bedono and Sri Wulan villages had exonerated them of any further obligation to compensate loss due to pollution. On this issue the Court ruled on the side of the Plaintiffs, stating the payment concerned did not constitute compensation (*ganti rugi*) that was agreed upon by the plaintiffs and defendants in accordance with art.30 of the EMA 1997. The fact that the payment was made without consultation with the two communities seems to have been most relevant in this respect. Thus, whilst the payment of Rp 15 million had been made by the Defendants it was more in the nature of a good will payment and did not discharge the obligation of the Defendants to pay actual compensation for the environmental damage experienced by the Plaintiffs.

Whilst the plaintiffs' were successful in obtaining compensation for the period September to December 1994, when their total prawn stock perished, their further claim for revenue lost since the commencement of the *Prokasih* program in 1995 was rejected by the Court. The plaintiffs alleged that during this period of 39 months prior to their claim being lodged, their prawn stock levels remained 30% below normal. Accordingly, they sought compensation from the Defendants of Rp 45,045,000. The Court, however, rejected the claim in respect of this period, justifying its decision by referring to statements by the plaintiffs' witnesses indicating that pollution levels had decreased after 1994, and that by 1995/1996 all but one of the Defendant

⁹⁷ The date of such laboratory examinations is not specified in the court decision but is presumably some time in 1994.

⁹⁸ "Babon River Case," p63.

industries had complied with waste discharge standards.⁹⁹ The Court further considered the fact that the Defendant industries had all installed waste management facilities in accordance with the *Prokasih* program, the implementation of which had commenced in January 1995. The payment of Rp 15 million already made by the Defendants also indicated their good will towards the communities in their vicinity. Given these circumstances, the Court concluded that the second claim of compensation was excessive and therefore should be refused.

The Court's decision on this point is open to some criticism. Certainly some evidence of pollution during this latter period (January 1995 onward) was presented and, moreover, accepted by the Court. The BTKL Yogyakarta tests in March 1997, for instance, demonstrated pollution resulting from factory effluent continued in the Babon River – a fact that was accepted by the Court.¹⁰⁰ Further documentary evidence included reported statements of government officials that pollution in the Babon River was continuing after two years of the Clean Rivers Program's operation. This particular evidence was disallowed on procedural grounds as a reported statement of a third party without verification. Moreover, whilst the Court emphasised the plaintiff witness statements acknowledging a decline in pollution levels from 1995 they neglected their further statements that the prawn/fish catch never returned to the pre September 1994 levels. In the case of Defendant II (PT Puspita Abadi) tests undertaken in 1996 still indicated polluting levels of waste discharge. In the case of the other Defendants, tests only indicated that effluent fulfilled stipulated standards from around April/May 1996 onwards. It was therefore not conclusively established that the Defendant industries had not polluted during 1995 at least and perhaps after that given the conflicting evidence presented to the Court. Furthermore, the fact that the Defendants had installed waste management units in accordance with the *Prokasih* program, did not constitute evidence per se that those units were successful in reducing pollution below regulatory standards. Similarly, the unilateral payment of Rp 15 million by the industries to the two communities was an indication of goodwill that should not have discharged the legal obligation of the industries to properly compensate for environmental damage.

The counter claim of the Defendants II, III, IV & V for compensation due to damage to their reputation by the Plaintiffs' claim was rejected by the Court. The Court was correct in emphasising that the fact that a party brings an action against another to defend his/her legal rights cannot be characterised in itself as an action which damages the reputation of another, nor

⁹⁹ Ibid., p77.

as an action contrary to law.¹⁰¹ This aspect of the Court's decision is to be commended both on legal and policy grounds, as an important endorsement of the rights of environmental claimants. The Court's decision in the Babon River case offers a valuable precedent against the proliferation of so called "SLAPP" suits¹⁰², which have been used by companies in a number of jurisdictions to intimidate potential environmental litigants from enforcing their rights.¹⁰³

3.2.4 *Appeal to High Court of Central Java*

Both the six defendant industries and the plaintiff farmers subsequently lodged an appeal against the District Court's decision to the High Court of Central Java. Over a year passed following the lodgement of the appeal, before the decision of the appellate Court was revealed in somewhat unusual circumstances. On 9 August 2000 a group of the affected farmers, together with NGO workers and legal representatives had decided to protest directly to the High Court concerning the protracted delay of the Court's decision. After an angry exchange between a court representative and the demonstrators, court officials agreed to search for the case's file. Upon locating the file, it transpired that the case had actually been decided a year earlier on 26 August 1999, yet had not been announced and was only returned to the District Court on 5 July 2000.¹⁰⁴

In its decision dated 26 August 1999, but belatedly revealed a year later, the High Court reversed the prior decision of the District Court, thus rejecting the plaintiffs' claim for compensation.¹⁰⁵ The crux of the Court's decision was that the payment of Rp 15 million made by the industries to the farmers on 18 September 1995 in fact constituted compensation even though it was not called such. Therefore, the farmers had in fact been compensated for damage up until that date, including the four-month period from September – December 1994 when the pollution was at its height. The three appellate judges also rejected the plaintiffs' further claim

¹⁰⁰ Ibid., p62.

¹⁰¹ Ibid., p79.

¹⁰² "SLAPP" stands for Strategic Law Suits Against Public Participation

¹⁰³ For example in a dispute in Bali over development near the Tanah Lot temple three Balinese farmers lost their legal suit against the Bali Nirwana Resort in the Tabanan court. The farmers were ordered to pay Rp 75 million (US\$35,000) to cover legal costs as well as damages to 'restore the company's good reputation'. *Bali Post*, 30 December 1995 cited in Carol Warren, "Tanah Lot: The Cultural and Environmental Politics of Resort Development in Bali," in *The Politics of Environment in Southeast Asia: Resources and Resistance*, ed. Philip Hirsch and Carol Warren (Routledge, 1998), p248. The issue of protection against "SLAPP" suits is discussed further in Chapter 6, page 281-

¹⁰⁴ "Warga Demak Demo Ke Pengadilan Tinggi Jateng," *Solo Pos*, 10 August 2000.

for compensation subsequent to this date. In respect of this period, the Court concluded that the Plaintiffs had failed to establish that their reduced catch was a result of the Defendant industries actions. In coming to this conclusion the Court cited the fact that “...the Defendants had already become participants in the Clean Rivers Program (*Prokasih*) and thus were not polluting the Babon River nor, as a consequence, the ocean.”¹⁰⁶ Furthermore, the Court stated that,

...the ocean on the north coast could be polluted by other rivers or by other industries on the Babon River that were not members of the Clean Rivers Program, thus the loss of productivity of the Plaintiffs’ prawn farmers could not be proven to be a result of the Defendants’ actions.¹⁰⁷

The High Court’s decision was disappointingly superficial in its analysis and flawed in several respects. The judges’ characterisation of the Rp15 million payment as compensation is legally incorrect given the fact that the payment was made without direct consultation with the farmers themselves. According to art. 31 of the EMA 1997,

Out of court environmental dispute settlement is held to reach agreement on the form and size of compensation and/or on certain actions to ensure that negative impacts on the environment will not occur or be repeated.

The Elucidation to article 31 provides further clarification of out of court settlement,

Settlement of environmental cases through out of court discussions is carried out voluntarily by the parties which have an interest, namely the parties which have experienced losses and caused losses...

Yet, from the evidence presented at the District Court level it was clear that the decision to make the Rp 15 million payment involved only government officials and the industries themselves. The farmers, as the party that “have experienced losses” were notably absent from this negotiation process and the decision to make such a payment. Given the unilateral nature of the payment it is impossible to legally characterise the payment as compensation. Furthermore the payment was administered by the respective village heads and applied to village projects,

¹⁰⁵ *Babon River Appeal*, High Court of Central Java, No. 329/Pdt/1999/PT.Smg.

¹⁰⁶ *Ibid.*, p12

¹⁰⁷ *Ibid.*, p12

including road improvement, and did not redress the individual losses of the nine farmers that brought this legal suit.

The Court's decision to reject compensation for the period subsequent to September 1995 was also made on questionable grounds. The fact that the industries were "participants" in the Clean Rivers Program could not be sufficient proof that they had not polluted, although the Court seemed to think this was the case. No consideration was given to evidence that contradicted this conclusion, such as the BTKL laboratory tests which indicated pollution was still occurring in March 1997. The failure of the Court to substantively reappraise the evidence in this case was also very apparent. The appellate judges instead relied on generalities such as the fact the defendant industries were participants in the *Prokasih* program, or that other industries may also have caused pollution. Noticeably lacking was a specific reappraisal of the evidence that had been presented at the District Court level. In this respect the High Court's decision compared poorly to the more thorough decision at the District Court level.

A further defect of this appellate judgement was its outright dismissal of the Plaintiffs' claim. The Court's reasoning was based on its characterisation of the September 1995 payment as compensation. Implicitly, the Court was thus acknowledging that an action contrary to law had been committed, yet that the party suffering loss (the farmers) had already been properly compensated. Logically, the Court should at least have received the Plaintiffs' claim that an action contrary to law had been committed, even whilst refusing to provide further remedy.¹⁰⁸ Instead the Court dismissed the claim outright, thus burdening the Plaintiffs' with the court costs accrued to date.

The judgement of the High Court, upon its delayed announcement by a Court official, caused much disappointment and anger in the demonstrating farmers and NGO workers. The group immediately departed for the provincial legislature to continue their protest and communicate their disapproval at the decision. An appeal to the Supreme Court was subsequently lodged, yet at the time of writing a decision was still pending. Community and legal representatives have also publicly mooted the possibility of bringing a larger, representative action of 700 farmers against the industries although at the time of writing this had not been commenced.¹⁰⁹

¹⁰⁸ YAPHI et al.

¹⁰⁹ "Warga Bisa Menempuh Jalur Mediasi," *Suara Merdeka*, 12 August 2000.

3.2.5 Conclusion

The Babon River dispute commenced in late 1994, when the prawns of fishpond farmers in Sri Wulan and Bedono villages perished due to pollution originating from the Babon River. As in the Banger River dispute, the farmers of the two villages took their complaints concerning the pollution to district and provincial parliaments and environmental agencies. The farmers' efforts, aided by local NGOs, were at least partially successful. A good will payment of Rp 15 million was made to the two villages and increased administrative pressure on the factories resulted in the installation of waste management units and ongoing monitoring. Nonetheless, the dispute was not resolved from the farmers' perspective, as pollution continued to reduce the productivity of the fishponds and the individual farmers had not received compensation for lost income. In these circumstances, litigation presented a final option for the community in their efforts to resolve the conflict. As in the Banger River case, access to the judicial system was ensured by the presence of the Indonesian Legal Aid Foundation (YAPHI) in nearby Kudus, which acted as legal representatives for the group of farmers for a nominal fee.

The factual circumstances of *Babon River* dispute gave rise to two markedly different judicial decisions at the District Court and High Court levels respectively. The District Court decision provides a notably detailed analysis of the evidence presented in this case based on a clear comprehension of environmental legal principles. Whilst the decision of the Court in respect of the post 1995 period is, in the opinion of the author, questionable, it was at least defensible on the evidence presented to it. In the words of one commentator the decision was, "...like a breath of fresh air for environmental cases."¹¹⁰ In contrast, the High Court decision was based on a superficial and perfunctory analysis of the evidence before it. The Court's characterisation of a previous payment as compensation seems unsustainable on both legal and factual grounds. In any case this issue had already been addressed in some detail at the District Court level. The superficial nature of the decision, its summary rejection of the plaintiffs claims and the furtive nature of its release immediately gave rise to suspicions amongst the farming communities of Bedono and Sri Wulan that the judges had been bribed by the Defendant industries. When interviewed, the legal representative for the farmers referred to the prevalence of corruption in the courts, a fact that has been well documented by independent research.¹¹¹ Yet, whilst the

¹¹⁰ Prof Dr Sudharto P Hadi quoted in *Ibid*.

¹¹¹ see e.g. Bedner, "Administrative Courts in Indonesia: A Social-Legal Study", p289-.

circumstances and nature of the High Court decision caused considerable suspicion of corruption on the part of the community, no direct evidence of corruption was available.¹¹²

The discussion of the *Banger River* case study considered the possible influence of direct community pressure upon the judicial decisions at the District Court and High Court level. In the *Babon River* case, a similar community presence and pressure was also present, but only during the District Court hearing. In contrast, no community representatives attended the hearing of the High Court, which eventually decided against the community. One of the lawyers for the Bedono and Sri Wulan communities saw the failure to maintain community pressure as a factor contributing to the outcome at the High Court level:

In the Babon River case the community came to the District Court hearing. The people were visible and we won at that level. But the farmers didn't come for the High Court appeal. We had a problem with organisation at the community level. So the judges felt no pressure from the people.¹¹³

Another of the community's lawyers also regretted not maintaining more frequent contact with the court before its decision, which may have placed the judges under greater scrutiny and minimised the possibility of bribery occurring. Certainly, the judicial process was less public and open at the High Court level, to the point that the community was not even aware that the court had decided the case. The court itself did not appear over anxious to publicise its decision either, which was only returned to the District Court a year after it was made.

In contrast to the process of advocacy that preceded litigation in this case, the focus of the litigation process seems to have been primarily concerned with the pecuniary issue of compensation, rather than the issue of environmental restoration. It is surprising, and certainly a defect of the plaintiffs' claim, that environmental restoration was not a remedy sought by the farmers, especially given their contention that pollution was continuing despite the *Prokasih* program. Certainly, the industries would have been potentially liable to undertake environmental restoration, as required by article 34. Environmental restoration and prevention of further pollution was also not addressed by the presiding judges at either the District Court nor High Court level. It seems a common tendency amongst environmental cases to place more focus upon pecuniary remedies rather than remedies of environmental restoration. This is perhaps influenced by a juridical predilection to attempt to resolve such cases through private civil law principles,

¹¹² YAPHI et al.

such as art. 1365 of the Civil Code, which focus on remedies of a pecuniary nature. Even in cases where environmental restoration has been raised by a party, such as in the *Banger River* case, the presiding judges may ignore or neglect to properly address the issue. Consequently, cases such as this often fail to provide a comprehensive resolution of the dispute at hand, as the focus of the case is of a monetary rather than an environmental nature.

The *Babon River* case also highlights the difficulty of proving pollution in court and the ambiguity that frequently surrounds evidence of pollution in environmental cases. In this case, for instance, the court was presented with laboratory evidence that showed significant levels of pollutants in the Babon River in March 1997, whilst other data (from the Semarang Environmental Impact Agency) showed the industries' effluent to comply with regulatory standards at that time. Such inconsistencies may arise from the process of sample taking and examination, which is often bedevilled by a range of practical problems. The level of waste effluent discharged from a factory also typically varies greatly at different points in time. It is reportedly common practice for factories to intentionally dispose of waste effluent during the night or during periods of high rainfall, when the disposed waste will be least noticeable.¹¹⁴ The result of any testing will therefore depend on the particular time at which it is carried out. An accurate assessment of a factory's waste disposal is thus difficult, especially when routine tests by Environmental Impact Agencies are only carried out on a three monthly basis, thus providing at best a very partial picture of a factory's potential impact. Waste management by factories may also be conducted in a sporadic, ad hoc manner in response to agency pressure. For example, whilst many factories are forced to install waste management units by regulation, often the units are not operated, or only occasionally operated when effluent is to be tested, due to the running costs involved.¹¹⁵ In some cases factories may also utilise concealed by-pass pipes, through which untreated effluent bypasses the waste management system and is disposed of directly into

¹¹³ Ibid.

¹¹⁴ Adi Nugroho, 20 December 2000.

¹¹⁵ Ibid.

the environment.¹¹⁶ Thus, whilst the legal process demands conclusive scientific proof of environmental pollution or damage, in practice the scientific evidence available may be partial, ambiguous, contradictory or in the worst cases, simply incorrect.

¹¹⁶ See for instance the *Sambong River* dispute, *Siak River* dispute and *Palur Raya* mediation cases.