Environmental Dispute Resolution in Indonesia

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6 Conclusion: Environmental Justice in Indonesia

The cornerstone of President Suharto's New Order was economic development (*pembangunan*), which encompassed both the intensive development of the industrial sector and the exploitation of a range of natural resources. Whilst economic development brought benefits to the wider populace, the environmental cost was considerable and more often than not, ignored. Since 1997, political, economic and social crisis has shaken the nation of Indonesia, relegating environmental issues to a relatively low position on the state's political agenda.[1] Ironically, these wider changes have only intensified the incidence of environmental disputes across the archipelago as natural resources have come under increasing pressure from spiralling rates of illegal exploitation.[2] The political liberalization that followed the demise of the New Order has also been a catalyst for the re-emergence of long suppressed environmental disputes. Long suffering victims of pollution and environmental damage have become increasingly prepared to voice their dissent in ways that would have attracted severe repression in years past. In this context of change, the need for reliable mechanisms for environmental dispute resolution is clear. As we have seen the EMA 1997 has endeavoured to create a legal framework for this purpose, encompassing both judicial and non-judicial environmental dispute resolution, the application of which has been the focus of this thesis. In this final chapter, we shall assess and compare the effectiveness of these two forums for environmental dispute resolution, with reference to the theoretical framework elaborated in Chapter 1.

6.1 Environmental Litigation

As discussed in chapter 1, effective environmental litigation should facilitate access to justice in environmental matters in both a procedural and substantive sense. Ideally, litigation provides a mechanism for private interest claimants to enforce environmental rights, obtain compensation for environmental damage and resolve environmental disputes. Litigation may also provide an important mechanism through which the public interest in environmental sustainability may be protected. From a state perspective, effective environmental litigation should increase legal certainty, through the objective and impartial application of environmental law by the courts. In

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[1] The slow and ultimately ineffective response of the Indonesian government to the forest fires of 1997-8 was one example of the lack of priority given to environmental issues at the time. See - Dauvergne, "The Political Economy of Indonesia's 1997 Forest Fires."

[2] [, 2001 #913]

this concluding section, we consider the extent to which environmental litigation in Indonesia has fulfilled these functions. In answering this question, we shall draw upon the findings and conclusions of previous chapters and also refer to Appendix I, which summarises all environmental litigation cases reviewed in this thesis.[3]

As discussed in chapter 1, the extent to which environmental litigation fulfils these functions is influenced by a number of legal and non-legal factors or conditions. These conditions are diverse in nature, encompassing the procedural and substantive legal framework, the institutional resources of litigants, the independence of the judiciary and the wider social-political context. In this concluding chapter, we shall draw together our examination of these conditions and assess their influence on environmental litigation in the Indonesian context. Our concluding analysis of these conditions shall also provide a basis for a number of recommendations to improve the effectiveness of environmental litigation in Indonesia.

6.1.1 Access to Litigation

This section provides an overview of factors that have impacted upon access to environmental litigation in Indonesia. Several of the factors mentioned in this overview, such as judicial and social/political context, are only introduced here and are explored in more substantive depth later in this chapter.

6.1.1.1 Procedural Access

As discussed in chapter 1, procedural access to justice is a key prerequisite for effective environmental litigation. In chapter 2 we learnt that environmental standing was first introduced in Indonesia in the *Indorayon* case in 1989. Whilst the plaintiff in that case, WALHI, failed on substantive grounds the court did recognise its procedural right to undertake legal action on behalf of environmental interests. The *Indorayon* case was followed in several subsequent cases until the principle of environmental standing received explicit legislative endorsement in article 38(1) of the EMA 1997.

Whilst the introduction of environmental standing in Indonesia has certainly facilitated environmental public interest litigation, it has hardly opened the "floodgates" of environmental litigation as some critics feared. Over the twenty year period reviewed there have been only ten environmental public interest cases, amounting to only one case every two years. Despite the

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[3] see page 310

flexibility of "environmental standing", the right to bring environmental public interest claims appears to have been utilised by only a small number of well-resourced environmental organisations. Amongst environmental public interest litigants WALHI, the National Forum for the Environment, has been the most active litigant, acting as a plaintiff in eight of the ten cases to date. The Legal Aid Foundation, and its various associated offices, have also played an integral role in the majority of public interest actions providing legal representation and in some cases acting as co-plaintiff. In several other cases, public interest suits have been initiated by coalitions of environmental organisations for instance in the *Reafforestation Fund (IPTN)* case (5 NGOs), the *Reafforestation Fund (Kiani Kertas)* case (3 NGOs), the *Transgenic Cotton Case* (6 NGOs) and the *Eksponen 66* case (13 NGOs). Whilst the majority of public interest litigants have been larger, Jakarta based organisations, some recent actions have been initiated by regional community or environmental organisations as in the *Eksponen 66* case and the *Transgenic Cotton* case.

Whilst traditional rules of standing did not preclude private litigants who had suffered some 'material' loss due to environmental pollution or damage, procedural obstacles did exist for litigants attempting to undertake a 'representative' or 'class' action. As discussed in chapter 2, representative actions were not regulated in the EMA 1982, although that Act did contain a number of provisions that Indonesian courts could have, but did not use, to allow a class action. This procedural obstacle was apparently removed with the introduction of article 37 of the EMA 1997. Yet, despite this provision, procedural confusion still surrounded the class action mechanism, further discouraging potential litigants, until the recent enactment of Supreme Court Regulation No. 1 of 2002, which appears to have resolved the issue.

Like public interest actions, the actual number of environmental private interest suits has been relatively low. In the period reviewed, from 1982-2002, 14 environmental private interest claims were brought, thus averaging around 1 case every 1.5 years, a figure only slightly higher than the number of environmental public interest cases. Given the population of Indonesia and the reported extent of environmental pollution and damage in a range of sectors, this small number of cases suggests the legal framework for compensation and/or restoration of environmental damage has been significantly under-utilised. The remainder of this section explores some of the factors other than that of procedural access, that have been an obstacle for potential litigants seeking access to environmental justice.

6.1.1.2 Lack of Financial Resources

In Indonesia, legal aid centres under the umbrella of the Legal Aid Foundation of Indonesia (YLBHI) have played an important role in facilitating access to justice for individuals and communities in a range of disputes, including those in the environmental context.[4] Despite the contribution of legal aid, lack of financial resources remains a problem for many potential environmental claimants. Many victims of environmental pollution may not have access to a legal aid centre, which for the most part, are found only in the larger cities. The financial and human resources of legal aid centres are also limited and spread across a wide range of areas with the result that not all needy claimants can be provided with assistance.[5] In the absence of legal aid, the cost of privately funding legal representation is prohibitive for many poorly resourced victims of environmental damage or pollution. In addition to the cost of legal representation, the cost of obtaining scientific evidence, whether expert testimony or laboratory tests may also be significant. Such costs may be a significant obstacle to both private and public interest litigants, as highlighted in a recent statement by the Director of WALHI, Emmy Hafild,

> The cost of just one sample can be hundreds of thousands (rupiah), so you can imagine what sort of cost Walhi had to pay to prove the Arafura sea was polluted by tailings.[6]

Larger NGOs such as WALHI are often funded to a large extent from grants from foreign aid agencies, such as US AID or AusAid, or international donor organisations such as the Ford Foundation. Aid funding does not always come without strings attached however. In Indonesia, WALHI the National Forum for the Environment, had its funding from USAID temporarily withdrawn after initiating another legal action against US mining giant Freeport's operations in Indonesia.

6.1.1.3 Evidential Obstacles

A number of commentators on environmental dispute resolution have noted the difficulties inherent in establishing legal proof of allegations of pollution or environmental damage in a court of law. This has certainly been the case in Indonesia where the legal and technical

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[4] see discussion of the history of legal aid and the concept of 'structural' legal aid as a vehicle for social and political reform in Adnan Buyung Nasution, *Bantuan Hukum Di Indonesia* (Jakarta: LP3ES, 1981)..

[5] Rambun Tjaj, 2 July 1997.

[6] Arinto Wiryoto, "Walhi Minta Pembuktian Terbalik Buat Perusakan Lingkungan," *Tempo Interatkif*, 21 April 2001.

difficulties associated with proving pollution in court have provided another obstacle to environmental litigants. Emmy Hafild, the Director of WALHI, highlighted this problem, stating

> WALHI has brought environmental cases to court nine times now and been defeated every time. The judges' reason is usually a lack of evidence.[7]

Eye-witness accounts of pollution are usually given little weight, whilst laboratory tests which indicate excessive levels of pollutants may still not satisfy legal elements such as causation. The *Sari Morawa* case illustrates this point. In that case, the Lubuk Pakam District Court failed to uphold a claim for environmental compensation despite considerable eye-witness and laboratory evidence of pollution. Critical information and evidence may also be difficult to obtain from uncooperative government agencies, especially in the absence of established procedures facilitating access to government or public information.[8]

Conversely, the few successful environmental claims discussed in chapters 2 and 3 generally featured evidence of a particularly strong and conclusive nature. For instance, in the *Banger River* case the plaintiffs' claims of pollution were confirmed by research from several government agencies. This was further verified by the undisputed fact that the industries in question did not even own waste management units before 1996. The allegations of pollution were also supported by expert witnesses, whose testimony proved influential during the case. Similarly, in the *WALHI v. Freeport* case the death of four men in the Lake Wanagon disaster was itself evidence of Freeport's negligence in the matter, which was further confirmed by government investigation. Given the legal and technical complexities of proving pollution or environmental damage, however, it is quite rare that such conclusive and incontrovertible evidence will exist. More commonly, significant ambiguities or contradictions may appear in evidence presented to the court, making a successful claim less likely. For instance, in the *Babon River* case the court was presented with laboratory evidence that showed significant levels of pollutants in the Babon River in March 1997, whilst other data showed the industries' effluent to comply with regulatory standards at that time. Moreover, strong, conclusive evidence may in itself increase the chances of success for an environmental claim, yet by no

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[7] Ibid.

means will guarantee the outcome. In many cases, such as the *Sari Morawa* case discussed above, courts may reject apparently convincing evidence on grounds of a purportedly legal nature.

One legal solution to the problem of evidence in environmental cases is a reversed burden of proof, as discussed in chapter 2. A reversed burden of proof could be applied on the basis of the strict liability principle or through the discretion exercised by the court. Another important step in overcoming evidential difficulties in environmental cases is improving access to environmental information from both government agencies and private companies. As discussed above, art. 6(2) imposes an obligation upon "…every person carrying out a business or other activity…[to]…provide true and accurate information regarding environmental management." The decision in *WALHI v. Freeport* case is an indication of the increasing willingness of Indonesian courts to apply this right. The planned enactment of freedom of information legislation should also further facilitate access to relevant information held by environmental and other government agencies.[9]

6.1.1.4 Judicial Independence

As noted in chapter 1, access to the courts only becomes access to 'justice', where judicial adjudication is both independent (of executive influence) and impartial. In Indonesia the perceived lack of judicial impartiality and independence is another significant disincentive for environmental litigants. Probably the most significant problem is that of judicial corruption, the frequent reports of which have contributed toward widely held attitudes of scepticism and suspicion towards judicial institutions. A recent opinion survey by Berlin-based Transparency International found that most Indonesians saw corruption in the courts, rather than in political parties or the police, as the problem needing the most immediate attention in Indonesia.[10] Other problems deterring the environmental litigant include lengthy delays in the

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[8] Nuryanto, "Kendala Dan Peluang Pendayagunaan Hukum Perdata Dan Hukum Acara Perdata Indonesia Dalam Kasus Lingkungan: Refleksi Atas Penangan Kasus Lingkungan", p9. Ths issue of evidence is discussed further below.

[9] Freedom of information legislation is currently being considered by a special committee of the national legislature. Ati Nurbaiti, "Freedom of Information Act Should Set Precedent," *Jakarta Post*, 18 March 2003.

[10] The survey was based on around 1000 persons, and departed from the most common result found in other countries where respondents selected political parties as the institution most needing reform. Endy M. Bayuni, "Corrupt Courts Seen as Ri's Greatest Problem," *Jakarta Post*, 10 July 2003.

administration of justice, particularly in the case of appeals to higher courts. In the Supreme Court alone there is currently a backlog of over 16,000 cases.[11]

6.1.1.5 Social Context

According to Auerbach, the American tendency to litigiousness expressed and accentuated the pursuit of individual advantage in a society founded on individualism.[12] In Indonesia, litigation occurs within a very different cultural context where individualism and litigiousness is certainly not yet a dominant feature. Traditional culture values tend rather to accentuate the need for harmony and compromise, rather than the assertion of individual rights.[13] For this reason, mediation may be a more "comfortable" cultural choice in Indonesia than litigation. Victims of environmental damage or pollution are also in most cases the *rakyat kecil* ('little people'), who may be farmers, workers and others in the lower socio-economic strata of society. People from this stratum of society typically have minimal or no experience of navigating state institutions and processes such as litigation. Culturally, they may also be more accustomed to deferring to, rather than questioning, authority figures. Thus, the cultural attitudes and experience of pollution victims may not also support the use of litigation as a dispute resolution option.[14] Attitudes of cultural submissiveness may also be strongly reinforced in an environment of political repression. In some cases, victims of environmental damage or pollution may be unwilling to undertake litigation due to the possible sanctions that this might result in, whether legal, economic or extra-legal.

6.1.2 Case Outcomes

Besides the issue of procedural access, effective environmental litigation implies access to environmental justice in a substantive sense. That is, environmental litigation should enable private litigants to enforce environmental rights and obtain redress for environmentally related damage. Litigation should also enable public interest litigants to protect the public interest in

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[11] "Lack of Justices Blamed for Judicial Corruption," *Jakarta Post*, 2 August 2003.
[12] Auerbach, *Justice without Law* (1983), p10.
[13] see Takdir Rahmadi, "Mekanisme Alternatif Penyelesaian Sengketa Dalam Konteks Masyarakat Indonesia Masa Kini," (Faculty of Law, University of Andalas).who considers cultural attitudes such as these as a supportive factor in the use of mediation in environmental dispute resolution in Indonesia.
[14] Note in many cases these social obstacles have been overcome by intervention and assistance by NGOs. This is discussed further in section 6.1.7

environmental sustainability through judicial enforcement of environmental law. To what extent have these more substantive objectives of environmental litigation been realised in Indonesia?
An overview of environmental litigation cases reviewed in this thesis and their outcomes may be found in Appendix I. The overview divides the cases reviewed in chapters 2 and 3 into public and private interest cases. In the twenty-year period reviewed, from 1982-2002, there have been a total of ten environmental public interest cases reviewed, eight in the general courts and three in the administrative courts. Whilst the first environmental public interest case, *Indorayon*, was lost on substantive grounds, it achieved the significant procedural victory of environmental standing. This important precedent, together with the subsequent enactment of environmental standing in the EMA 1997, facilitated the series of environmental public interest suits that followed. The procedural success of environmental standing, however, was not matched by a high rate of success in a substantive legal sense. The first five environmental public interest cases were lost on substantive grounds. The sixth case was won at first instance, but lost on appeal. The seventh case was successful against only two of eleven defendants and is pending appeal. The following two cases were both lost on substantive grounds, whilst the tenth case was partially successful and is currently pending appeal. Overall, three out of ten cases were at least partially successful at the District Court level, an initial success rate of 30%. As already stated, one of these partially successful cases was overturned on appeal, whilst at the time of writing the other two cases were still pending appeal. Thus, to date, environmental organisations have been unsuccessful in achieving substantive protection of environmental interests through public interest suits.

An interesting feature of this overview is that all the successful or partially successful public interest claims (3 in total) have occurred from 1998 onwards, in the post-New Order period. All successful claims have also occurred in the general courts, with all three of the environmental public interest suits in the administrative courts failing. The three (partially) successful claims were also all granted at the District Court level in contrast to the lack of successful environmental public interest claim at the appellate level (High Court or Supreme Court). The broader implications of these findings are considered further in more detail below.[15]

The number of private interest environmental claims brought pursuant to the Environmental Management Acts of 1982 & 1997 in the same period (1982-2002) was slightly higher than public interest claims at fourteen cases, as already noted in the preceding section on access to

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[15] see particularly the discussion of judicial decision making (6.1.4) and social/political context (6.1.6).

justice. The number of successful private interest environmental claims was also slightly higher. Of these fourteen cases, ten were lost and four were, at least partially, successful at the District Court level, an initial success rate of 40%. However, as with public interest cases, the success rate was lower at the appellate level, where only two claims have been partially successful. Furthermore, only one of these two claims (the *Muara Jaya* case) has resulted in an actual payment of compensation, whilst the other (the *Banger River* case) is still pending an appeal to the Supreme Court. Compensation was also paid in a third case (the *Peat Land/Farmers Compensation Case*), yet this was the result of a settlement rather than an actual decision of the court. Thus, whilst private interest litigants have been more successful than public interest litigants, their success in achieving substantive remedies has been limited, with compensation so far paid in only 2 out of 14 cases.

Like public interest claims, successful private interest environmental claims have been concentrated in the post-New Order period (1998-). All four successful claims at the District Court level were decided in the post-New Order period. The one exception and successful claim during the New Order period was the *Muara Jaya* case (1994). Private interest claims have also had a higher success rate at the District Court level (4 cases), compared to the appellate court level (2 cases), as was also the case with public interest claims.

In those environmental cases that were successful, the most common remedy was that of compensation, awarded in six cases, of which three were reversed on appeal. Environmental measures, relating to the prevention or rehabilitation of environmental damage or pollution, were ordered by courts in only four cases. This tendency of courts to place somewhat more emphasis on pecuniary rather than environmental remedies was also noticeable in the litigation case studies examined in Chapter 3. As mentioned above, claims that have actually been finalised and remedies implemented are found in only two cases, the *Muara Jaya* and *Kalimantan Peat Land (Farmers Compensation)* cases, both of which involved only remedies of a pecuniary nature. There are therefore no examples of private or public interest cases where protective or restorative environmental measures have actually been implemented by a court, although the High Court in the *Banger River* case did order optimisation of the companies' waste management unit but the case is still pending an appeal to the Supreme Court.

6.1.3 Substantive Legal Framework

One important determinant of the ability of potential environmental litigants to access environmental justice through litigation is the nature of the procedural and substantive legal framework governing environmental claims. The issue of procedural access to the courts has already been the subject of some discussion above in section 6.1.1.1. According to Robinson, the substantive environmental legal framework should ideally consist of "strong law", that is legislation with explicit objectives and substantive remedies that may be effectively adjudicated by courts, if it is to effectively facilitate environmental public interest litigation.[16] By contrast, "weak law" is non-specific in nature and relies on the exercise of administrative discretion for its implemention.

On the whole legislation in Indonesia (*undang-undang*) has tended to be very broad and general in nature, relying to a large extent upon implementing regulations and executive directives for its implementation.[17] This was certainly a fault of the EMA 1982, for which many implementing regulations were never enacted.[18] As discussed in chapter 2, this absence of implementing regulations was a contributing factor in Indonesian courts' apparent reluctance to enforce environmental law, such as the right to compensation for environmental damage.

The second EMA of 1997 was clearly an improvement in this respect, with a number of provisions being further elaborated, thus facilitating their enforcement without the need for implementing regulations. For instance, the right to compensation for environmental damage [art. 34] and the principle of strict liability [art. 35] were both sufficiently elaborated in the EMA 1997, so as to not refer to or require further implementing regulations. Whilst still intended as an "umbrella act" for environmentally related legislation, the EMA 1997 was thus much less dependent on implementing regulations for its elaboration and enforcement when compared to its more general predecessor, the EMA of 1982.

Moreover, the second EMA introduced several important new legal principles, including environmental standing [art.38(1) – a confirmation of the *Indorayon* precedent], community

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16 Robinson, "Public Interest Environmental Law- Commentary and Analysis." See further discussion in Chapter 1

17 E Damian and R N Hornick, *Indonesia's Formal Legal System: An Introduction* (Bandung: Penerbit Alumni, 1992).

18 Nicole Niessen, "The Environmental Management Act of 1997: Comprehensive and Integrated?," in *Towards Integrated Environmental Law in Indonesia?*, ed. Adriaan Bedner and Nicole Niessen (Leiden: CNWS, 2000), p67.

representative actions [art. 37] and an action for environmental restoration [art. 38]. This improved legal framework has certainly been one element supporting access to environmental justice in Indonesia. Public interest litigants such as WALHI have utilised the principle of environmental standing on numerous occaisons to initiate environmental suits. Private interest litigants were also more successful under the EMA 1997, for instance, than under the previous EMA where the lack of implementing regulations was often a block to compensation claims. Nonetheless, the potential of the environmental legal framework does not appear to have been fully realised, when one examines the limited number of cases to date and the rather conservative application of potentially far-reaching legal principles by Indonesia courts. The actual application of environmental law by Indonesian courts is examined in more detail below.

As the current EMA 1997 is due for review in the near future an opportunity to further improve the legal framework exists. Several improvements to the Act could be made and have been discussed in some detail in Chapter 2. Possible reforms include:

6.1.3.1 Broadening the scope of environmental standing

The application of environmental law has been facilitated by reform of traditional standing rules through the *Indorayon* case and article 38(1) of the EMA 1997. However, pursuant to the latter provision, the right of "environmental standing" is restricted to environmental organisations, which meet several criteria stated in the legislation, as discussed in chapter 2. Whilst environmental standing provisions have been utilised by NGOs, the number of cases (approximately 1 every 2 years) is very limited for a rapidly developing country of around 200 million people with a plethora of environmental problems. Access to environmental justice could be further strengthened by the broadening of environmental standing to enable citizens, in addition to environmental organisations, to bring actions for the enforcement of environmental law. This broadening of environmental standing is logical given the right of every person to a "good and healthy" environment (art. 5) and the obligation of every person to "combat environmental pollution and damage" (art. 6) and would make such rights and obligations enforceable.

6.1.3.2 Increasing the remedies available to environmental public interest litigants

Access for public interest litigants is only meaningful if litigants can obtain effective remedies to affect enforcement of environmental law. In chapter 2 it was argued that the remedies in art.38(2) should be broadened to include claims for the cost of environmental restoration. This would

increase the enforceability of art. 34, which creates an obligation for polluters to pay compensation in the event of environmental pollution or damage. Damages awarded could be paid into a environmental trust fund to be used specifically for rehabilitation of the polluted site.

6.1.3.3 Legislative Protection from SLAPP suits

As discussed in chapter 3, the defendants in the Babon River case launched a counter-claim for damages against the plaintiffs due to injury to their reputation resulting from the plaintiffs' allegations. Reference was also made in that chapter to the Tanah Lot dispute in Bali, where several farmers were successfully counter-sued by a developer and consequently were ordered by the court to pay US$35,000 damages. Claims of this nature have been described as "SLAPP" suits (Strategic Lawsuits Against Public Participation) and are a phenomena found in many jurisdictions where well resourced defendants seek to intimidate potential litigants from enforcing their environmental rights. The risk of such suits is relevant to environmental litigation as it may prove a strong disincentive for victims of environmental pollution or damage to seek redress through the courts. SLAPP suits could be prevented through legislation aimed at protecting a well-defined right of public participation and which prohibits improper interference with this right through a range of means.

6.1.3.4 Clarification of the application of strict liability (art. 35)

As discussed in chapter 2, Indonesian courts have largely failed to apply the potentially far-reaching principle of strict liability in environmental disputes to date. In the *Laguna Mandiri* case, the only case to directly address art. 35 and the issue of strict liability, the High Court of Banjarmasin (in this writer's opinion) incorrectly interpreted the principle of strict liability by restricting its operation to cases involving hazardous and toxic materials. It is essential for the correct application of this important principle that clarification be made, either by way of Supreme Court circular letter or alternatively in the Elucidation to art. 35 EMA 1997, which endorses the correct and broader interpretation of that article's scope.

6.1.3.5 Legislative recognition of NGOs

Article 19 of the EMA 1982 originally gave specific legislative recognition of the role played by non-government organisations in environmental management. The article was omitted from the EMA 1997, although under that later law NGOs did receive an explicit grounds for

access to the courts in environmental matters through art.38(1). Nonetheless, it is argued that an article in a form similar to the old art.19 be reintroduced to the current EMA, to provide a legal foundation for the broader participation of NGOs in environmental management. As the EMA seeks to provide a framework for environmental management in Indonesia it is appropriate that the role of NGOs be recognised and given satisfactory legal endorsement within such framework.

6.1.3.6 Strengthen citizen initiated mechanisms of administrative enforcement

In many litigation cases reviewed in chapters 2 and 3, litigants turned to the courts partly because the response of administrative agencies to the environmental pollution or damage in question had been inadequate. The response of administrative agencies to environmental problems can do much to facilitate or obstruct access to environmental justice. Whilst citizens may often feel powerless to influence the response of government agencies, there is, nonetheless, existing legal provision in the EMA 1997 to facilitate citizen initiated administrative enforcement. Article 25(3) states that a "third party which has an interest has the right to submit an application to the authorised official to carry out an administrative sanction". Similarly, art. 37(1) gives a community "the right…to report to law enforcers concerning various environmental problems which inflict losses on the life of the community." Whilst these provisions facilitate the communication of environmental grievances to administrative agencies, the strengthening of these provisions could facilitate both access to justice and the administrative enforcement of environmental law. Article 25 (1), for instance, could be strengthened by requiring a written decision on an application to an authorised official within a reasonable time frame, which, if contrary to law in the applicant's opinion, could be challenged in the administrative courts. The enforceability of article 37 could also be improved by imposing an obligation to act upon administrative agencies where environmental damage or pollution is established.

6.1.4 Judicial Decision Making

Our review of case outcomes (in section 6.1.2) indicates that the substantive success of litigation has been limited from the claimant's perspective, whether in facilitating environmental protection (public interest) or the compensation or restoration of environmental damage/pollution (private interest). The concluding review of the environmental legal framework in the preceding section indicates that, whilst improvements still could be made to the law, the EMA 1997 has

overcome a number of legal deficiencies from the preceding EMA 1982. Since enactment of the EMA 1997, the legal framework in itself no longer appears to be a serious obstacle to effective environmental litigation. Rather, our review of case outcomes suggests the more serious obstacle at present to be the manner in which the legal framework is interpreted in practice, namely the nature and quality of judicial decision-making in environmental cases, which has been a major focus of discussion in chapters 2 and 3.

As discussed in chapter 1, the judicial process ideally involves an independent and impartial application of the law, which facilitates the final determination and resolution of a dispute. Yet, even where judicial decision-making is independent and impartial, it is still inevitably influenced by a range of factors, including the social and political character of the judiciary itself. As argued in chapter 1, environmental public interest law has tended to flourish more in countries where it is applied by an 'activist' judiciary that is prepared to value environmental sustainability as a matter of public interest comparable with economic growth or national security. What has been the nature and quality of Indonesian judicial decision-making in environmental cases and how has it affected the efficacy of litigation as a process of environmental dispute resolution?

There have been probably only a few instances of judicial decisions at what might be called the 'activist' end of the judicial decision making spectrum. The *PT IIU Indorayon* case, as discussed above, is one such case. In that case the court took considerable initiative in revising traditional civil procedural law to allow an environmental organisation standing to sue. In doing so the court emphasised the public interest in environmental preservation and argued that the environment was in itself a legal subject with an instrinsic right to be sustained. Yet the activism of the court in this case appeared limited to issues of a procedural, rather than substantive, nature. On the substantive issue of the legality of PT IIU's operating permits, the Court took a much more conservative approach, essentially excluding application of the EIA regulations from activities commenced prior to its enactment. It is this latter, more formalistic and conservative approach, rather than the 'activist' attitude of the court toward environmental standing, that has characterised the application of environmental law in the majority of environmental cases, at least up until 1998.

Courts, for instance, have shown great reluctance to "fill in the gaps" of the environmental legal framework, where, for instance, implementing regulations had not been enacted in relation to a specific provision. The absence of implementing regulations for art. 20 of the EMA 1982, for example, was cited as a reason for refusing environmental claims in the *PT SSS* case and the

Surabaya River case. Whilst such a stance may be justified legally, courts also could also have found legal justification for a more activist approach. As discussed in chapter 1, art. 27(1) of the Law on Judicial Authority No. 14 of 1970 provides some scope for judicial 'law-making', authorising judges to "…uncover, follow and understand the principles of living law in the community."

Inconsistency has also characterised judicial decision-making in environmental cases. For example, the absence of implementing regulations was not an obstacle for a claim for compensation of environmental damage in the *Muara Jaya* case, yet it was a basis for refusing claims in the *PT SSS* and *Surabaya River* cases. Inconsistency has also been apparent in environmental cases related to the administrative jurisdiction. In the two *Reafforestation Fund* cases, review of certain presidential decrees was refused, as they were not of a 'final' nature and hence did not fall within the specific jurisdiction of the Administrative Courts. Logically, presidential decrees that fell outside the jurisdiction of the administrative courts would still be reviewable in the general courts. An opportunity to test this proposition was presented in the *Kalimantan Peat Land* case, where a challenge to several Presidential Decrees was undertaken in the Central Jakarta District Court. Yet this claim was also refused on jurisdictional grounds, with the result that presidential decrees are apparently not reviewable in either the administrative or the general courts.

As discussed above, the reticence of courts to uphold environmental claims may in some cases be explained by deficiencies in the legal framework, particularly in relation to the earlier EMA of 1982. There are, however, several examples of equally conservative decision making in environmental cases made on the basis of factual or evidential considerations rather than legal grounds. For example, in the *Sari Morawa* case, the court apparently did not consider the absence of implementing regulations for art. 20 EMA 1982 an obstacle to that claim for environmental compensation. The court instead refused the claim on evidential grounds despite the presentation of convincing laboratory, expert and witness evidence by the plaintiffs, a considerable part of which was not even considered by the court. Similarly, in the *PT SSS* case the main reason cited in the judgement for refusal of the claim was the fact that government facilitated mediation had not preceded the claim. In fact a government investigation and mediation had been carried out prior to the claim, yet this was not considered in the court's decision. The court also made no attempt to assist the environmental litigants by directing an appropriate government agency to facilitate the necessary investigation or mediation process.

Similarly, in cases where jurisdiction has been a bar to adjudication of a claim, courts have made no attempt, through for instance an interim decision, to redirect litigants to an appropriate court prior to a full hearing of the claim.[19]

Even subsequent to the enactment of the more detailed EMA 1997, which depends to a far lesser extent on implementing regulations than its legislative predecessor, Indonesian courts have still shown a discernible reticence in applying potentially far reaching environmental legal principles such as strict liability, enacted by article 35 of the EMA 1997. Despite numerous opportunities, the principle of strict liability has not been applied by any Indonesian court to date. In the *Laguna Mandiri* case, the strict liability principle was at least discussed by the High Court of Banjarmasin but, in the opinion of this writer, incorrectly discounted. Representative actions, introduced in article 37 of the EMA 1997, were also initially under-utilised by the courts, although cases since 2000 illustrate the growing familiarity of the Indonesian judiciary with this western derived legal mechanism. The recent (2001) Supreme Court memorandum on representative actions also appears to have clarified judicial ambiguity concerning the appropriate procedure for representative actions and should assist in their application.

There have, however, been important exceptions to the more conservative aspects of Indonesian judicial decision making in environmental cases. As discussed above, courts have been willing and consistent in applying the doctrine of environmental standing, even prior to its enactment in the EMA 1997. In the *Muara Jaya* case (1994) both the High Court of Samarinda and the Supreme Court proved willing to award a significant sum as compensation for environmental damage caused by installation of an oil pipe. The most discernible change in the tenor of judicial making in environmental cases, however, has occurred in the post-New Order period, from 1998 onwards. Prior to 1998, no public interest environmental cases had succeeded on substantive grounds. In contrast, in the post-New Order period there have been 3 environmental public interest claims at least partially upheld at the District Court level. A similar trend is evident in environmental private interest cases. Prior to 1998 only one claim for compensation of environmental damage or pollution had been upheld. Yet from 1998 onwards there have been four private interest environmental claims upheld at the District Court level. This greater willingness to uphold environmental claims seems more apparent at the District Court than the High Court level. Two of the private interest environmental claims upheld at the District

Court level since 1998 have been rejected on appeal to the respective High Courts. This was also the case with one of the successful public interest claims in the post New Order period.

In these more recent, successful claims, which include the *Banger River* and *Babon River* disputes examined in Chapter 3, courts have appeared increasingly willing to actually apply the environmental legal framework. In the *Banger River* case, for instance, the decision of the District Court of Pekalongan emphasised in its judgement that "…industrial development must be sustainable…" and concluded that the defendant industries had polluted and were liable to pay compensation. In a surprising decision, given the more conservative tendency of appellate courts in environmental cases, the High Court of Semarang also upheld this decision on appeal and, moreover, awarded a significant compensatory sum of Rp 750 million (US$100,000) in addition to ordering improvements in waste management practices. A greater willingness to apply the environmental legal framework was also evident initially in the Babon River case where a claim for compensation due to pollution was upheld at least in part by the District Court of Semarang.[20] Similarly, in the recent *Freeport v. WALHI* case, a environmental public interest suit against the mining multinational Freeport was upheld in part by the District Court of South Jakarta, which concluded the company had acted illegally in polluting the environment in the vicinity of the factory and making factually incorrect statements. It remains to be seen whether this progressive trend in judicial decision making will be encouraged by the Supreme Court, which is due to hear appeals in a number of the cases listed above.

6.1.5 Social-Legal Context of Judicial Decision Making

As discussed in the previous section, judicial decision making in environmental cases has ranged across a spectrum from reactionary to conservative to progressive and even, in a few cases, activist. There are multiple factors which might have influenced and could serve to explain the decision-making patterns of Indonesian judges in environmental cases. Given the purported objective of the legal process is an impartial application of law, then the letter of the law itself is clearly a significant factor influencing the outcome of an environmental claim. If a legal basis for an environmental claim does not exist, then naturally the claim is bound to fail. Accordingly, we have examined the legal framework and its adequacy in a preceding section, considering its

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[19] see for instance the *Ciujung River* case, the *Reafforestation Fund* cases and the *Kalimantan Peat Land Development* case.

impact on access to environmental justice. In this section, however, we go beyond the legal framework to consider the social-legal context within which environmental law has been applied in Indonesia and the possible influence of several factors on the process of environmental litigation.

6.1.5.1 The Judicial Context

In chapter 1 the notion of judicial independence was considered as a prerequisite for effective environmental litigation. It was suggested that effective judicial enforcement of environmental law requires a judiciary that is substantively impartial and independent from executive influence. In Indonesia the principles of judicial independence and the rule of law are given at least formal recognition in the Indonesian 1945 Constitutional Law (*Undang-Undang Dasar 1945*) which proclaims " Indonesia is a state based on law (*rechtstaat*), not merely based on power (*machtstaat*)." The Elucidation to the Constitution further defines judicial authority as "an independent authority, in the sense that it is beyond the influence of the government". [21]

Yet during the New Order period in Indonesia, legal rhetoric depicting Indonesia as a *negara hukum* (state based on law) was criticized by many as little more than a transparent attempt to legitimize a political system built along authoritarian and corporatist lines. Throughout this period, the judicial system as a whole was directly responsive to the influence of a highly powerful executive. A frequently cited example of executive influence over judicial decision-making in an environmentally related matter is the *Kedung Ombo* case. In that case, a landmark Supreme Court decision in 1993 to award record levels of compensation to villagers displaced by a dam and irrigation project was reversed, following high-level political pressure and a reputed request by President Suharto that the ruling be reviewed.[22] Executive influence over judicial decision-making was supported by the structural integration of the legal and executive apparatus, which granted the Minister of Justice financial, administrative, and organizational supervision of the court.[23] Such authority was not infrequently used to influence the course of justice, through

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[20] As discussed in Chapter 3, however, the decision was later overturned by the High Court of Central Java on appeal.

21 See Todung Mulya Lubis In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990 (PT Gramedia Pustaka Utama, Jakarta: 1993)

22 See Nicholson, "Environmental Litigation in Indonesia", p84.

23 Law on the General Court No.2 of 1986, art. 5 (Indonesia). The term "General Court" includes the District Court and the Court of Appeal of the District Court.

selective manipulation of judicial transfers and promotions.[24] Over time, the political co-optation of the judiciary became more complete, until such overt mechanisms of control were no longer necessary. In a repressive political environment, the judiciary internalised the rules of political compliance for itself.[25] For example, whilst not possessing powers of legislative review, the Supreme Court was nonetheless empowered to review regulations and executive directions, which in fact constituted the majority of substantive executive policy. Yet in practice the Supreme Court consistently refused to hear cases where it was asked to quash executive regulation, contributing to its image as a "toothless court" (*Mahkamah Ompong*).[26] Pursuant to article 27 (1) of the Basic Law on the Judiciary No. 14 of 1970 judges also have the authority and duty to "discover" law as reflected in the changing legal mores in the community. Yet such authority has rarely been utilised in the context of environmental cases where judges have generally adopted a formalistic and narrow interpretative approach.

The close linkages between the judicial and executive arms of government in Indonesia is also evident in the often close correlation of executive and administrative responses in environmental disputes. In a number of the environmental litigation cases reviewed in chapters 2 and 3, an apparently significant factor influencing judicial decision-making has been the previous response of executive or administrative bodies to the dispute in question. In a number of cases where environmental claimants were successful, the decision of the court was preceded by administrative or executive condemnation of the pollution or environmental damage in question. This point was evident particularly in the *Banger River* case study, where the polluting companies had been the subjects of both criminal and administrative sanction, including the attempted withdrawal of the factories' operating permits. Indeed, in that case the High Court of Semarang treated the fact of prior administrative sanction as sufficient evidence in itself of the defendant's culpability for the pollution in question. In the recent *WALHI v. Freeport* case the decision of the court in upholding part of WALHI's claim was also preceded by high level political condemnation of Freeport's apparent negligence in the Lake Wanagon incident. Similarly, in the *Babon River* case, the six defendant industries had been identified as polluters by the regional government and in the Clean Rivers program. Administrative sanction, in the withdrawal of 166 forest use permits from timber companies, was also an apparently strong consideration in the

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24 Pompe, "The Indonesian Supreme Court: Fifty Years of Judicial Development", p222.
25 Ibid., p101.
26 Ibid., p118-19.

court's decision in the *Eksponen 66* case. Thus, whilst prior executive or administrative sanction will by no means ensure a similar judicial decision, where it is more politically safe to uphold an environmental claim, Indonesian courts appear more prepared to do so.[27]

Judicial impartiality has also been significantly impaired by the incidence of corruption at all levels of the judiciary.[28] Following a recent review of Indonesia's justice system, United Nations' special rapporteur Dato Param Cumaraswamy declared Indonesia's judiciary one of the most corrupt in the world.[29] Widespread corruption has produced an unsurprising correlation between the financial resources of a litigant, and their capacity to influence the judicial decision-making process in their favour.[30] In environmental litigation, this places industry litigants at a significant advantage over public interest litigants or victims of environmental damage, who tend to be from socially and economically disadvantaged sections of society. Whilst it is difficult to identify corruption as a determining factor in particular cases, given its general incidence in Indonesian courts it is without doubt a contributing factor to the low success rates of environmental claims and the sometimes intransigent quality of judicial decision-making in certain cases where claims have failed despite clear legal grounds and strong evidence. As discussed above, the prevalence of judicial corruption has contributed to a deeply held skepticism in the community toward the integrity and capacity of judicial institutions, which in turn discourages potential environmental litigants.[31]

Whilst it is perhaps the lack of judicial independence and impartiality that produce the greatest distortions in the legal process, other factors also play a part. The failure of judges and other legal actors handling environmental disputes to understand and correctly apply environmental law has also been evident in some cases discussed above. Judicial decision-making in environmental disputes has tended to interpret environmental legislation in a legalistic, narrow and conservative manner to the frustration of environmental public interest litigants. Principles of environmental management and participation underlying environmental law are frequently not understood by the

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[27] However, prior administrative sanction would not seem sufficient in itself to necessarily result in a favourable outcome for an environmental claim. In some cases reviewed, for example the *Sari Morawa* dispute, the court rejected the plaintiffs' claim despite the fact the regional government had clearly identified the defendant industry as a polluter.

28 Pompe, "The Indonesian Supreme Court: Fifty Years of Judicial Development", p343..

[29] "Hukum Di Indonesia Salah Satu Terburuk," *Suara Merdeka*, 22 July 2002.

[30] See discussion in Bedner, "Administrative Courts in Indonesia: A Social-Legal Study", p289-.

31 Hyronimus Rhiti, "Penyelesaian Sengketa Lingkungan Menurut Uuplh," *Suara Pembaruan*, January 22 1998.

judges that seek to apply them. Whilst this may be the result to some extent of the institutional pressures discussed above, inadequate judicial education concerning environmental law may also be a contributing factor. Highlighting this problem, one Indonesian legal academic recently observed,

…[Indonesian] judges don't fully understand environmental law. At the time they carried out their studies, senior judges never received material on environmental law.[32]

As this comment highlights, the need for specialised judicial training in environmental law is heightened in Indonesia as many modern environmental legal principles, such as representative actions or strict liability, have their basis in common law jurisdictions. Such principles may appear quite foreign to some Indonesian jurists with a traditional, civil law training. Besides novel legal principles, environmental cases often involve complex scientific evidence, which may require specialised knowledge or handling.[33] For instance, in the *Walhi vs. PT Pakerin* case, satellite photographs of fire "hot-spots" were presented as evidence, yet were apparently not considered by the court. Reforms have been undertaken to address the need for specialised judicial training in environmental law, and are discussed further in section 6.1.5.4 below.

The issue of specialist training has recently been addressed by several initiatives in environmental law training and capacity building. In 1998 and 2001 a Course on Environmental Law and Administration (CELA) was undertaken in the Netherlands and Indonesia for a number of Indonesian judges and jurists. In 1999 an Australian sponsored program for the specialised training of Indonesian judges in environmental law was also initiated. Both programs were run in conjunction with the Indonesian Centre for Environmental Law, which has played a key role in the specialist training of Indonesian judges in environmental law. Ongoing programs include plans for selected judges to study environmental law and its application overseas in countries such as the United States and Australia.[34] Currently, around 700 judges at the district, high and Supreme Court levels have completed specialist training in environmental law.

The creation of a core of judges with specialised knowledge in environmental law has the potential to greatly improve the quality of judicial decision making in environmental cases. This potential could be more fully realised if the adjudication of environmental cases was restricted to

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[32] "Hakim Kurang Paham Lingkungan Hidup," *Suara Merdeka*, 23 June 2003.

[33] "Rumit, Pembuktian Pencemaran Lingkungan," *Suara Merdeka*, 13 July 2002.

[34] According to a recent statement by the Environment Ministry, twelve jurists (including prosecutors and judges) were to be sent overseas to study environmental law - Ibid.

judges certified to have received specialist environmental law training, as recently proposed by the Indonesian Centre for Environmental Law.[35] A core group of judges specially trained in environmental law could even form the basis for a separate judicial division for environmental (and potentially land related) cases. A similar, but more far reaching reform, would see the creation of a specialist court for environmental cases.[36] Calls for an environmental court were backed by the Environment Minister, Nabiel Makarim, who proposed a plan named "Formula 12", whereby environmental cases would be handled by 12 prosecutors and 12 judges specialised in environmental law.[37] A specialist court would not only ensure the necessary level of judicial expertise but could incorporate non-judicial technical assessors and, moreover, resolve the problems of defining jurisdiction in environmental matters between the general and administrative courts.

Wider judicial reform initiatives, including efforts to promote the rule of law, judicial independence and the eradication of corruption, have assumed at least a nominally high priority in the post-Suharto era of *reformasi*, prompted by both domestic and international pressure. Recent legislation amending the Basic Law on Judicial Authority No. 14 of 1970 has entirely transferred responsibility for judicial management (in matters such as promotions and transfers) from the Ministry of Justice to the Supreme Court.[38] Such administrative reform will potentially assist in demarcating the boundaries of executive and judicial power.[39] The amending legislation also has pre-empted further regulation establishing mechanisms of judicial supervision, including a Council of Judicial Honour (*Dewan Kehormatan Hakim*), which will establish a code of judicial conduct and review issues such as recruitment, promotions and judicial corruption. In 2002 a monitoring division of the Supreme Court was set up to establish a judiciary "…free of

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35 Rino Subagyo, "Peradilan Lingkungan Di Indonesia," *Hukum dan Advokasi Lingkungan* 4, no. September (2002).

36 There are several successful examples of specialist environmental courts, one being the Land and Environment Court in New South Wales, Australia. See - Paul Stein, "A Specialist Environmental Court: An Australian Experience," in *Public Interest Perspectives in Environmental Law*, ed. D Robinson and J Dunkley (Wiley Chancery, 1995).

37 "Pembentukan Peradilan Khusus Lingkungan Jangan Ditunda-Tunda," *Media Indonesia*, 16 September 2002.

38 See Law No. 35 of 1999 (Indonesia).

39 cf. Pompe, "The Indonesian Supreme Court: Fifty Years of Judicial Development", p109. who questions whether a transfer of court administration to the Supreme Court of Indonesia would in fact contribute to judicial independence.

corruption, collusion and nepotism".[40] In its first year the monitoring division recommended punitive action against 11 judges. Yet doubts over the capacity of the judiciary for self-monitoring has also led to calls for external supervision of the judiciary. Several non-government judicial supervisory bodies have been created, including the Indonesian Institute for an Independent Judiciary (*Lembaga Kajian dan Advokasi untuk Independensi Peradilan*) and Judicial Watch. Pompe has also made a number of recommendations toward strengthening the role and independence of the judiciary, particularly that of the Supreme Court, based on a detailed analysis of the history of that court over fifty years. Pompe's recommendations include increasing judicial income levels (to reduce the incentive for corruption); ensuring objective, high standards of recruitment and the broadening of recruitment beyond 'career judges'; increasing the quality of judicial training and education; improving the security and tenure of judges (ensuring judges aren't subject to transfer by way of punishment); ensuring advancement in the judicial hierachy is according to public and objective criteria (rather than personal favour or influence); granting the Supreme Court the right of judicial (constitutional) review; and ensuring public access to all Supreme Court decisions and the publication of selected decisions through an independent authority.[41] Following an equally detailed analysis of the administrative courts in Indonesia, Bedner has made recommendations of a similar nature, including the increase of judicial salaries, the clarification of transfer procedures, broader recruitment policies, specialised training for judges and improved publication of case law.[42]

More specifically, the suspected prevalence of corruption in environmental cases has highlighted the need for greater scrutiny of judicial decisions in environmental cases. For instance, in July 2002 the Indonesian Centre for Environmental Law (ICEL) called for reforms to enable investigations into environmental cases where there are indications that corruption may have occurred.[43] The environmental organisation recommended investigations be carried out by the National Ombudsman Commission or, alternatively, jointly conducted by the Environment Ministry and the Supreme Court based on a memorandum of understanding. Certainly effective mechanisms of judicial monitoring will be required to combat the incidence of corruption. As discussed above, community pressure and scrutiny of the judicial process may in some cases

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40 "Lack of Justices Blamed for Judicial Corruption."
41 Pompe, "The Indonesian Supreme Court: Fifty Years of Judicial Development", p410-04.
42 Bedner, "Administrative Courts in Indonesia: A Social-Legal Study", p330-32.
43 "Peringatan Ulang Tahun Icel Ke-9," *Hukum dan Advokasi Lingkungan* 2002.

fulfill this role in an informal manner. Effective monitoring, however, requires independent monitoring on a more permanent and institutionalised basis such as that suggested by ICEL. Whilst comprehensive reform of the judiciary will no doubt be a protracted and challenging process, the prospects for its success have been greatly increased by the dramatic political changes in Indonesia, which include democratic elections in 1999 and the ongoing transition from a highly centralized authoritarian regime to a more politically diversified and pluralist polity.

6.1.5.2 Political Context

The issue of judicial independence from the executive is closely related to the wider political and institutional context within which judicial institutions are embedded. For instance, during the "Guided Democracy" years of President Sukarno, the concept of judicial independence was ridiculed by Sukarno, who firmly established executive influence over the appellate courts.[44] During the New Order era, judicial independence and the rule of law was promoted as part of the New Order's statist ideology, but in practice executive will dominated the upper echelons of the judiciary as discussed above. The relationship between judicial and executive decision-making will thus vary greatly according to social-political context, a fact that has led some commentators, such as Shapiro to question the relevance of the traditional, universal 'prototype' of an 'independent' judiciary.[45] Yet, as argued in chapter 1, whilst the notion of judicial independence may be greatly qualified in its implementation in different societal contexts, this does not disqualify its utility as a principle of good governance underlying real legal certainty in modern societies. At the same time, however, we must openly acknowledge and closely examine the definite and tangible influence of the political and institutional context upon judicial decision-making.

The review of environmental cases in this thesis suggests that judicial decision-making in environmental cases has been strongly influenced by the wider political context. As we have seen, there was only one successful environmental case in the period from 1982, when the first EMA was enacted, to 1998, when New Order period came to an end following President Suharto's resignation. Thus, despite the introduction of an environmental legal framework

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[44] Daniel S Lev, "Judicial Authority and the Struggle for an Indonesian Rechsstaat," *Law and Society* 13, no. 1 (1978).

[45] For instance, Shapiro argues that the "universal pattern" is in fact that "...judging runs as an integral part of the mainstream of political authority rather than as a separate entity." Shapiro, *Courts: A Comparative and Political Analysis*, p20.

purportedly intended to, amongst other things, facilitate every person's right to a "good and healthy environment", actual access to environmental justice increased very little. Whilst deficiencies in the legal framework may have been one element contributing to this outcome, a more significant factor, as argued above, was the conservative and intransigent manner in which the legal framework was applied by Indonesian courts. As already noted, there have been a few exceptions to this trend of conservative judicial decision-making, the most celebrated of which was the granting of environmental standing to WALHI in 1989. This occured at a time when environmentalism was being embraced by the New Order government (and championed by a dynamic Environment Minister, Emil Salim), both as a concession to international and domestic middle class concerns and as a means to further extend bureaucratic control over the economy in an era where there was continuing pressure to deregulate.[46]

Nonetheless, whilst the New Order government was willing to adopt environmental policies and laws and to make some concessions of a symbolic nature, these were limited in a more substantive sense. Indeed, the lack of resources devoted to implementation of this policy & legislative framework, suggests it was not seriously intended to significantly impact upon the political-economic interests of the ruling elite, which were closely interwined with the forestry, mining, industrial and development sectors.[47] Similarly, the patterns of judicial decision-making in environmental cases demonstrate that the granting of symbolically important procedural concessions, such as environmental standing, was not matched by a willingness to allow substantive claims that may have jeopardised, or been perceived as jeopardising, the political-economic interests of the state. The style of judicial decision-making in environmental cases in this period thus appears oriented to fulfilling the function of "social control" and helping maintain the essential interests of political regime and its ruling elite. This close accordance of state interests and judicial responses in the environmental context in this respect matches Jayasuriya's description of the close collaboration and consultation between the judicial and executive arms of government in East Asian countries, including Indonesia, which he describes as "corporatist".[48]

The one successful environmental claim during this period, the *Muara Jaya* case, is an exception to the otherwise consistent pattern of failed claims. Interestingly, that case was not

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[46] see Robert Cribb, "The Politics of Environmental Protection in Indonesia" (Working paper, Centre of Southeast Asian Studies, Monash University, 1987).

[47] The Environment Ministry lacked, and still lacks a departmental structure and thus lacks the institutional framework and resources necessary for effective implementation of environmental law and policy.

brought by an activist NGO or a legal aid organisation, but rather involved a group of middle-class housing estate residents suing a mining company for environmental damage to their estate. Whilst it is difficult to draw a definitive conclusion regarding the reasons for the success of this particular claim, it was certainly in sociological and political terms, a claim that was more likely to succeed. Cribb, for instance, has argued that legislative responses to pollution control in the 1980s were partly attributable to growing concern over the effects of pollution amongst the increasingly influential middle-class and ruling elite.[49] Other commentators have also drawn attention to the increasing influence of the "new rich" on state policies in Indonesia and Southeast Asia generally, during the 1980s and 1990s.[50] Yet, as numerous studies on the growing theme of environmental justice have highlighted, the distribution of environmental 'externalities' has tended to be skewed strongly toward poorer, marginalised communities.[51] Whilst this has not been a subject of analysis in this thesis, it is fair to say that the victims of environmental pollution or damage in the majority of cases reviewed in this thesis, tended to be from communities at the lower end of the socio-economic spectrum. Cases of 'middle-class' environmental complaints are thus relatively few and far between.

Whilst the overall substantive failure of environmental litigation in the period 1982-2002 is an interesting reflection on the inter-relationship of judiciary and state, the fact that the legal framework was utilised and that claims were brought, especially by high-profile environmental organisations, is also a reflection of the dynamics of civil society at the time. The area of environmental management was one area among many that saw the proliferation and increasing influence of non-government organisations during the 1980s and 1990s.[52] As discussed in the preceding section on access to justice, NGOs such as WALHI and the Legal Aid Institute have been particularly active in attempting to utilise the environmental legal framework since the late 1980s. Thus, although the fruits of this environmental legal activism were limited by the conservative approach of the courts, an important foundation of alliances between reformist lawyers and environmental activists was being established during this period. In this respect,

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[48] Jayasuriya, "Corporatism and Judicial Independence within Statist Legal Institutions in East Asia," p182.
[49] Cribb, "The Politics of Pollution Control in Indonesia," p1128-29.
[50] see R Robison, Robinson, and D Goodman, *The New Rich in Asia: Mobile Phones, Mcdonalds and Middle Class Revolution* (Routledge, 1996).
[51] see, for instance, Richard Hofrichter, ed., *Toxic Struggles: The Theory and Practice of Environmental Justice* (New Society Publishers, 1993).;

Indonesia has differed markedly from countries such as India, where the development of environmental public interest law was spearheaded by an activist Supreme Court. In Indonesia, reformist lawyers together with environmental activists have taken the lead in attempting to utilise the legal framework for the protection of the environment.[53]As discussed in chapter 1, this in itself is an important condition for the successful development of environmental public interest law, and indeed the potential of these alliances and their efforts at utilising environmental law have arguably begun to bear more fruit in the post-Suharto period.

Although the substantive legal success of environmental public interest litigation was limited by the conservative response of the courts, it is also important to view the outcome of these public interest cases from a wider political perspective. As discussed in chapter 1, public interest litigation can in some instances function as a catalyst for wider political change, regardless of the formal legal outcome of proceedings. Certainly, the litigants and activists responsible for bringing the environmental public interest suits in question were cognizant of this point and were not under any illusions as to the slim likelihood of a favourable political outcome. As noted in the conclusion to chapter 2, public interest litigants have conciously utilised the courts as a "stage" for high profile environmental cases, in the context of wider campaigns on important environmental issues. Whilst this thesis has not attempted detailed evaluation of such an approach from a political science perspective, it is safe to say that this approach has been fruitful. In the *Kalimantan Peat Land* case, for instance, the suit against the President was a focal point for publicity in a broader political campaign to publicize the disastrous environmental effects of the project and pressure the government to abandon it. In the *IPTN* case and the *PT Kiani Kertas* cases, NGOs were also successful in publicly embarrassing the government and focussing considerable media attention on the government sponsored misappropriation of monies from the Reaforrestation Fund. As noted in chapter 2, the political campaign in this instance was ultimately successful and, in the changed political circumstances of *reformasi,* government prosecutors convicted several influential figures involved in the embezzlement of considerable sums of money from the Reafforestation Fund. The *WALHI v. Freeport* case (2001) was also a

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[52] for an in depth discussion of this topic see Philip J. Elridge, *Non-Government Organizations and Democratic Participation in Indonesia* (Oxford University Press, 1995).

[53] There are of course some important exceptions of state leadership in the environmental arena including Emil Salim, the first Environment Minister who was an outspoken and widely respected advocate of environmental interests, and Paulus Lotulung, the judge (now a member of the Supreme Court) who initially recognised environmental standing in the *Indorayon* case.

political coup for WALHI in its ongoing campaign against Freeport's operations in West Irian. Whilst the substantive legal remedies ordered by the court were limited, the court's finding that the company had made factually incorrect statements to the public was symbolically potent. WALHI's subsequent press release publicly and triumphantly broadcast the fact that Freeport "had lied" to the public. Indeed, WALHI's political-legal campaign against Freeport was so apparently damaging to that company's reputation, that Freeport pressured USAid into withdrawing aid funding previously granted to WALHI.

Environmental public interest suits such as these can thus have a politically potent symbolic effect, despite the fact that the action ultimately fails legally. Even where the action does not legally succeed, the protracted court process offers numerous opportunities for publicising the plaintiff's case in the national press and across the television networks. As noted above, even during the New Order period, when the executive strongly dominated judicial decision-making, the regime still purported to be a *negara hukum* (state based on law). The rule of law thus remained a important political symbol and a source of political legitimacy for the regime, both domestically and internationally. As Bourchier has noted, the desire of the New Order to improve its international image as a state based on the rule of law was one important factor contributing to the establishment of the administrative court system. Public interest suits were arguably a successful means of appropriating this rule of law discourse so as to both successfully express opposition to the regime and publicly embarrass the regime by reference to the standards that it purported to uphold.[54]

The political context in Indonesia changed dramatically in May 1998, with the forced resignation of President Suharto amid a wave of demonstrations and riots. The political liberalization and decline in military control that accompanied the demise of the New Order has enabled the victims of environmental damage or pollution to become increasingly assertive and vocal. For instance, in both the *KLI* and the *Palur Raya* cases, environmental claims were only openly pursued in the post-Suharto period, although the communities had suffered the effects of environmental damage and pollution for a number of years. Correspondingly, it would seem

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[54] Public interest suits also flourished in other areas following the introduction of the administrative courts in 1991. For instance the *Tempo* case, where the editor of the critical Tempo magazine Goenawan Mohamad challenged the decision of Information Minister Harmoko withdrawing his magazine's public permit, became a cause celebré in 1995 and transformed Judge Benyamin Mangkoeldilaga into an instant celebrity when he upheld the claim. David Bourchier, "Magic Memos, Collusion and Judges with Attitude:

judicial institutions in environmental cases have become somewhat more responsive to environmental public interest actions and community based claims for compensation or environmental restoration. The overview of cases above has demonstrated the distinct change in judicial decision-making trends that occurred in the post-New Order period. Six of the seven successful environmental claims have occurred in the post-Suharto period. In the more open political context of *reformasi*, courts have thus appeared to be more willing to uphold both public interest and private interest environmental claims.

The more active engagement with communities affected by environmental pollution in pursuing redress and the more receptive response of judicial institutions to such claims was evident in the two case studies examined in chapter 3. One noticeable aspect in both these cases was the role of community or social pressure, which appeared to have some influence on the presiding courts in both cases. This was particularly evident in the *Banger River* case, where court sittings at both the District Court and High Court level were attended by large numbers from the Dekoro community. Several participants considered the high degree of community pressure to return a "fair" verdict a likely influence on the eventual decision of the Courts. Indeed, at one point after 200 or so observers had "pounded their chairs in disappointment" the presiding judge conceded that he would "...in principle...defend the people's interests."[55] A prominent and vocal community presence was also maintained in the District Court hearing of the *Babon River* case, where the environmental claim was upheld. In contrast, no community presence was maintained during the High Court hearings when the initially favourable decision was overturned – a fact that several participants attributed in part to a lack of community pressure or scrutiny.

The vocal expression of community sentiments, even during the course of a hearing, is an expression of the more open and tolerant political context in the period immediately following Suharto's resignation. From one perspective, such pressure might be described as a "power based" approach, utilised in these cases by claimants to influence the outcome of the rights based litigation process. Resort to power based strategies to influence the outcome of litigation is certainly not unknown in the Indonesian context. Bribery and political interference in the judicial process are well-established traditions in the Indonesian political context and are discussed in

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Notes on the Politics of Law in Contemporary Indonesia," in *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions*, ed. Kanishka Jayasuriya (Routledge, 1999).

55 "Pengunjung Sidang Gebrak Kursi."

more detail below. However, to equate community pressure of this nature with other, more covert power based tactics such as bribery and political interference is probably to exaggerate its influence and also to unfairly denigrate its intent. Certainly, where community pressure contains a threat of violence it is a threat to the impartiality and integrity of the judicial process, which should not be condoned. Yet, public attendance and even the vocal expression of support falls short of such a threat and may be accommodated within a public dispute resolution such as litigation.

Community pressure and strongly held public sentiments may thus play an important role in environmental disputes, which are often public or controversial in nature. In the *Eksponen 66* case, for instance, strong community sentiments of a more general nature were an apparent influence on the court's decision making. The plaintiffs in that case were a diverse collection of community organisations representing a wide cross-section of society. The public interest action undertaken by the plaintiffs articulated a widespread sense of anger at the unprecedented environmental, social and economic damage caused by the uncontrollable forest fires. The district court's decision in upholding the claim appeared to be influenced more by these articulated social sentiments than by the specific factual and legal circumstances of the claim.

In cases such as this one, the relational distance between the court as a social control agent and the community represented by the public interest suit appears to have narrowed significantly.[56] The closer relational distance between court and claimants may be one factor contributing to the greater success of environmental claims at the District Court level than at the appellate court level. As discussed above, ten environmental cases were (at least partially) successful at the District Court level, compared to only two at the High Court or Supreme Court levels. Appellate courts are geographically further removed from their district constituencies. High courts are located in the capital cities of provinces, whilst the Supreme Court is located in the national capital Jakarta. The appellate process is also generally less open and accessible to the public and usually will not involve more extensive public hearings, as may occur at the District Court level. There are therefore less opportunities for claimant communities to attend, view or participate in the appellate process, as may be possible at the District Court level. If public participation in or scrutiny of the judicial process tends to narrow the relational distance between environmental

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[56] see discussion of the concept of relational distance at page 30

claimants and judicial decision-makers, this may be one explanation for the different outcomes at the District Court level compared to the High Court or Supreme Court levels.

6.2 Environmental Mediation

In parallel with our concluding discussion of environmental litigation, in this section, we also begin with an overview and analysis of outcomes in the environmental mediation cases reviewed in chapters 4 and 5. The overview of cases is followed by a concluding examination of the conditions, introduced in chapter 1, which have been most influential in shaping the process and outcome in environmental mediation cases. This discussion will refer particularly to the two detailed case studies presented in chapter 5 and will provide a comparison for the concluding discussion of environmental litigation in the previous section. Finally, our comparative and concluding analysis of environmental mediation will also form the basis for a number of recommendations to improve its effectiveness in Indonesia.

6.2.1 Cultural Basis & Legal Framework for Mediation

Consensually based forms of dispute resolution (*musyawarah*) have a strong cultural base and a long history in Indonesia. At the village level, various forms of consensual deliberation have been utilised for dispute resolution and community decision-making throughout the archipelago. Group deliberation toward consensus (*musyawarah untuk mufakat*) is even enshrined as one of the five basic principles (*Pancasila*) of the Indonesian Republic, reflecting the high priority afforded to values of compromise, consensus and harmony within Indonesian culture. As discussed in chapter 4, several commentators have considered the traditional practice of *musyawarah* as a solid foundation and cultural precedent for the use of mediation in environmental disputes. Nonetheless, the social-political context of modern environmental disputes is very different to the traditional cultural context of *musyawarah.* Furthermore, the ideology of *musyawarah* has itself been utilised in the modern political context as a pretext for stifling dissent, rather than achieving true consensus. Thus, whilst the *musyawarah* tradition remains an important cultural base for modern forms of mediation, comparison between the two approaches should be cognizant of the social and political complexities of modern environmental disputes.

The cultural basis for mediation in Indonesia has been supplemented by legislation institutionalising mediation as a channel of dispute resolution in environmental disputes. In

comparison to the legal framework for environmental litigation the framework for environmental mediation established by Part Two, Chapter VII of the EMA 1997 is succinct and relatively basic. Most importantly, the provisions in Part Two provide formal, legal recognition to "out of court" environmental dispute settlement. The legal bottleneck created by article 20 of the EMA 1982, which made mediation via a government tri-partite team compulsory prior to litigation, has been resolved by art. 30 of the EMA 1997, which has confirmed the voluntary nature of mediation. Article 30 has ensured that mediation constitutes an alternative, but not an obstacle to environmental litigation and does not compromise the parties' rights to civil process. Furthermore, mediation may be initiated by the disputing parties themselves and is not dependent upon government facilitation, as was the case under the EMA 1982, which may or may not eventuate.

6.2.2 Access to Mediation

The cultural familiarity and procedural informality of mediation has tended to increase its accessibility to potential environmental claimants in Indonesia. Certainly, in the majority of environmental disputes, at least some type of non-judicial dispute settlement, such as negotiation or mediation, may have been attempted. In many cases, the first response of community members is to approach either factory management or local government figures to discuss the problem of pollution and attempt to negotiate a solution. The success of such informal attempts at negotiation or mediation is low, however, and is often met with indifference or inaction on the part of industry or government. For instance, in both the *KLI* and *Palur Raya* cases, early attempts at negotiation were made, but these were unsuccessful in providing a comprehensive resolution to the disputes. Cases where a more structured, independently facilitated and inclusive process of mediation has occurred to resolve the dispute appear to be fewer in number. Whilst more affordable and procedurally informal than litigation, a structured mediation process is not always immediately accessible to environmental disputants. In both the *Palur Raya* and *KLI* cases, for example, a structured mediation process was undertaken only after an extensive process of community campaigning and high-level government intervention. Mediation is a voluntary choice and depends upon the willingness of all parties to participate, which may not always be present.

Access to properly facilitated and structured mediation processes would be improved by a proper institutional framework to facilitate the implementation of environmental mediation. Although the Environmental Control Agency (*Bapedal*) and a number of its regional counterparts

have on several occasions encouraged or initiated mediation processes in environmental disputes, the Agency has recently been dissolved. Devolution of environmental management responsibilities to the district level, pursuant to decentralisation laws, is unlikely to facilitate access to environmental mediation. In both the *KLI* and *Palur Raya* cases the district governments were ineffective in facilitating a mediation process themselves. A structured mediation process was only initiated in both cases following ministerial intervention from the national level and, in the case of *KLI,* strong support from the provincial governor. Access to mediation could certainly be improved by implementation of the recently enacted Government Regulation No 54 of 2000 concerning Environmental Dispute Settlement Providers. This regulation provides a legal basis for central or regional governments to form an environmental dispute resolution service provider pursuant to art. 33 of the EMA 1997. To date dispute resolution providers have still not been created pursuant to this regulation and thus the proper institutional support for an independent, well facilitation mediation process is in the majority of cases thus still lacking. In the absence of this, environmental mediation is often a sporadic and ad hoc process, dependent largely on support from influential government figures for its success.

6.2.3 Case Outcomes

In chapters 4 and 5 of this thesis a total of seventeen environmental mediation cases were reviewed, two of which were the subject of detailed case study in chapter 5. The outcomes of the cases are summarised in Appendix II.[57] The majority of the cases reviewed were industry related disputes located in Java, with the exception of the *KEM* mining dispute in Kalimantan, in which a formal mediation process had been commenced. Agreements were reached in a high percentage (80%) of the cases reviewed. Yet, as the discussion in the previous chapters indicates, a written agreement in itself does not necessarily result in either the cessation of further pollution or the resolution of the dispute. In several instances, mediated agreements were concluded yet were not subsequently implemented. Where implementation did occur one of the most common outcomes of a mediated agreement was the payment of some form of compensation. In the cases summarised above, a payment of some form was made by industry to the environmental claimants in 11 out of 17 cases (65%). In the majority of cases, however, these payments were framed as 'contributions' to community development rather than as compensation for pollution or environmental damage. In the *Palur Raya* case, for instance, the payment ultimately made to the

Ngringo community was described as a contribution to community development rather than compensation despite the industry's earlier acknowledgement of pollution in the mediation agreement of June 2000. Similarly, in the *KLI* case, despite independent research confirming the impact of KLI's development activities, the payment made by the industry to the 16 farmers was described as a goodwill rather than compensatory payment. There was thus in both cases no explicit acknowledgment that pollution or environmental damage had in fact occurred. This common failure to acknowledge pollution in the first place underlies the common emphasis placed by most industries on a monetary rather than an environmental solution.[58] Indeed, in a number of cases, monetary payment by industry was used to install a piped water supply, so the community is no longer dependent on polluted river or ground water in their daily lives. Ironically, this apparently has allowed industries to continue polluting in many cases, whilst minimising the prospect of future conflict.

Not surprisingly, continuing pollution or environmental damage has been a problem in a number of the environmental mediation cases reviewed. Although mediated agreements frequently included provisions pertaining to improved environmental management, in practice pollution remained a problem even after mediation in nine out of seventeen cases (59%). In most cases, the problem in this respect has been one of implementation. Whilst industries had pledged pursuant to written agreements to improve environmental management or undertake environmental restoration, this had not occurred to the satisfaction of the community in the subsequent implementation phase. Nonetheless, of the cases reviewed there were several examples where significant improvements in environmental management had occurred through the mediation process. For example, in the *Kanasritex* case a permanent disposal channel for wastewater was constructed as a result of mediation. In the *Samitex* dispute repair of a waste management unit was undertaken as a result of mediation. In the *Palur Raya* case improvements in waste management prevented offensive odours being emitted from the factory. Where improved environmental management measures have not been adequately implemented this has led in a number of cases to further conflict between the disputing parties, even where compensation for prior environmental damage had in fact been paid. In eight out of fifteen cases

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[57] see page 315

[58] As one industry owner put it "Give the money, the conflict is finished" (*Kasih uang, konflik selesai*) Sindu, 18 November 2003.

(53%) of the mediation cases reviewed, significant further conflict had occurred between the industry and the community subsequent to the mediation process.

6.2.4 Social-Legal Context of Mediation

6.2.4.1 Relational Distance, Balance of Power and BATNAs

In chapter 1, we discussed Black's styles of social control, which may also be understood as approaches to conflict management. The *conciliatory* style described by Black was a remedial approach, such as negotiation or mediation, where both parties sought to negotiate a mutually acceptable resolution to the dispute. Black makes the point that this style of conflict management is most suited where the relational distance, or social distance, between parties is close. Where relations are close, there is less 'law' involved, and both parties themselves will have sufficient incentive to seek resolution of the conflict. It is precisely in this manner that traditional mediation approaches (*musyawarah*) were applied at the village level in Indonesia, where social bonds were close and conflict could not easily be ignored. In contrast the social context of environmental disputes in Indonesia is very different. The relational distance between environmental disputants in the all the cases reviewed in chapters 4 and 5 was considerably more distant to the relational distance that might have existed between disputants at the village level. In the majority of cases the industry owner or CEO lived in a different city altogether to the factory location and certainly was from a very different social-economic stratum of society. The majority of disputants in both cases were also not employed by the respective industries, and in some cases had livelihoods that were directly threatened by the industries' operation. Unsurprisingly, in this context, relations between disputants in both the *Palur Raya* and *KLI* disputes were characterised by a considerable degree of hostility. The natural inclination to seek a harmonious restoration of social bonds was thus absent in these cases as there were no pre-existing social bonds of a close nature.

Nonetheless, as noted in chapter 1, the literature on environmental mediation makes it clear that conciliatory approaches such as mediation have been applied with success to a range of modern environmental disputes where the relational distance between disputants may be great. What this literature does note, however, is that certain conditions should exist if attempts at mediation are to bear fruit. One of these conditions, which we discussed in chapter 1, was that a relative parity or balance of power exist between the disputants in a mediation process. In the case studies reviewed in chapters 4 and 5, however, this condition was often not present, at least initially. In the two case studies reviewed in chapter 5, for instance, the alleged "polluters" were

large industries with significant political and economic clout at the provincial and national levels. In contrast, the "victims" of environmental damage and pollution were villagers of relatively simple means, with limited economic and political resources at their disposal. This is by no means an atypical pattern, as studies in a number of countries have demonstrated the uneven distribution of environmental externalities, which tend to be inflicted disproportionately upon the marginalised or poorer sectors of society.[59]

Yet such a significant power disparity between disputants presents a considerable obstacle to the success of mediation, due mainly to the likelihood that the more powerful party will have several "better alternatives to a negotiated agreement" (BATNA's) at its disposal. However, as the literature reviewed in chapter 1 suggested, the success of mediation depends in part upon the absence of a "better alternative to a negotiated agreement" (BATNA). What this means is that neither party should be able to achieve its aims unilaterally, through either power-based (lobbying, intimidation, bribery, political influence etc) or rights-based (litigation) approaches. When both parties reach this "point of impasse" then it is more likely that each party will be sufficiently motivated to commit to a negotiated settlement, which will inevitably involve some compromise.

The "better alternative" for industries in many of the cases reviewed was, at least initially, the stone-walling or denial of pollution claims, particularly in the New Order period prior to 1998. In a number of cases, community complaints were voiced for a period of several years before industry representatives proved willing to negotiate. In the *Palur Raya* case, community complaints over pollution were first expressed in 1992, but were met with indifference and intimidation until 1998 when industry representatives agreed to enter a negotiation process. In the *KLI* case, residents of Mororejo and Mangunharjo had suffered the effects of KLI's development activities since 1987, yet only felt safe to openly voice their claims after the political changes of 1998. In the *Tapak River* case residents had tried unsuccessfully to resolve pollution problems for 14 years before a mediation process was finally commenced in 1991.

In these cases, maintenance of the status quo was the better alternative to negotiation as far as industry was concerned. This alternative was possible in these and other cases for three main reasons. Firstly, in these cases the enforcement of environmental law by administrative agencies was inadequate or non-existent. This was certainly the case in both case studies examined in

chapter 5, where local and regional authorites were unable or unwilling to enforce administrative sanctions despite obvious breaches of legal requirements. Secondly, there was no real threat of law enforcement through the courts either. In the *KLI* case, industry representatives on more than one occaison invited the community to sue them if it had a claim for damages. Legal representatives for the community, however, advised against this course given the legal and technical difficulties of proving pollution and the vulnerability of the courts to corruption. Thirdly, in some cases, particularly during the New Order period prior to 1998, the security forces of the state actually helped industries maintain the status quo by directly repressing protests against the effects of environmental pollution. A notorious example of such a repressive response was the Nipah tragedy when security forces opened fire on a peaceful demonstration over the Nipah dam construction on the island of Madura in 1993, killing four people and injuring three.[60] Whilst the Nipah case attracted widespread publicity, it was commonplace during this time for large scale developments to be accompanied by a deliberate program of intimidation by police, military or civilian hired thugs. It was the threat of this kind of response that suppressed conflicts such as the *KLI* and *Palur Raya* disputes prior to 1998, despite the fact that pollution had been ongoing for years.

Yet, as is evident from the overview of case outcomes in the previous section, mediation was successful in at least partially resolving disputes in a number of cases. In our two case studies, the intransigence of industry was finally overcome in both disputes and mediation at least commenced. What has been the catalyst for the commencement of mediation in these cases and in other cases reviewed in chapter 4? The main catalyst appears to be a shift in the power balance between the disputing parties and a corresponding shift in the "better alternatives" available to industry other than negotiation or mediation. In other words, it became harder for industry to stonewall or suppress environmental claims and, as a result, mediation presented itself as a more viable option for resolving the situation. In the cases we have reviewed in chapters 4 and 5, there have been two main mechanisms through which this has occurred: increased community pressure and increased government pressure and/or intervention. We shall discuss each of these in turn.

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[59] For a comprehensive bibliography of environmental justice studies see http://www.epa.gov/compliance/resources/publications/ej/ej_bib.html

[60] International Amnesty, *Power and Impunity: Human Rights under the New Order* (Amnesty International Publications, 1994), p58.

6.2.4.2 Community Organisation

The capacity of a community involved in an environmental dispute to effectively organise and advocate their interests was one important condition which influenced both access to a structured mediation process and the outcome of that process was. An initial function of effective community organisation is that it may help facilitate access to a mediation process. If a community suffering pollution is to proceed beyond the indifference, denial or intimidation from industry and government agencies that greets many initial environmental claims, a sophisticated degree of organisation and campaign skills may be necessary to raise the profile of their case. For example, in the *Palur Raya* case, community organisation and strategic planning was undertaken in conjunction with several NGOs. Subsequent to this a public campaign was conducted, raising the profile of the case and finally prompting the intervention of the National Environment Minister who ordered the initiation of a mediation process. In this case the *Consortium of Waste Victims* formed by community representatives and NGO workers provided an important vehicle for communication of environmental and community concerns to the mass media and government agencies. A similar process was evident in the *Kayu Lapis Indonesia* case, where formation of the community forum *KMPL* provided a vehicle for the clarification of community demands and their communication to the mass media, government agencies and industry. In this case, the community of fishpond farmers was forced to undertake extensive lobbying of district, provincial and finally national government representatives before a mediation process was finally undertaken to resolve the dispute. Effective community organisation through, for example, the creation of representative forums also served in these case studies to clarify internal decision-making within a community and enabled more effective representation of community interests during the mediation process. In both the *KLI* and the *Palur Raya* cases, the intervention of non-government organisations skilled in advocacy and organisation was critical to the ability of each community to effectively organise and advocate their interests.

Similar trends are evident in some of the other environmental mediation cases reviewed in chapter 4. In the *Tapak River* case, for instance, a community boycott appeared to influence the willingness of the polluting industries to negotiate. Increased community pressure and the blocking of a factory waste outlet in the *Indoacidatama* case prompted the formation of a fact-finding team to resolve the dispute. Similarly, in the *Kanasritex* case widespread publicity and government support for the community's claims prompted a change in the industry's stance and the commencement of a ultimately successful mediation process. In these examples community

organisation and advocacy is usually facilitated by non-government organisations working closely with community members to raise their awareness of environmental rights and to train community representatives in key advocacy skills. More effective community organisation and advocacy is not an end in itself but rather a tool to assist communities in clarifying and communicating their demands in key public forums such as the legislature, media and executive decision-making offices at the regional and national levels. In particular the regional and national media may play a significant role in raising the profile of an environmental dispute and by doing so escalate the public pressure on government and corporate decision makers.[61] In both the *KLI* and the *Palur Raya* disputes the communities were relatively skilled in coordinating advocacy efforts with media coverage. Even in earlier disputes during the New Order period, such as the Tapak River case, media coverage has played an important role in this respect. Despite the tight rein held by the government over the media during the New Order period, environmental disputes were still publicised and popular opinion often expressed through cartoons critical of pollution's effects on local people.[62] The scope of media coverage of environmental disputes was, nonetheless, sometimes limited by editorial censorship, industry or government pressure and also bribery of journalists assigned to report environmental issues.[63] Now, in the very different political context of post-Suharto Indonesia, there appear to be few restrictions on media coverage, a fact which is likely to amplify the role of the media, and its use by communities and environmental organisations, in environmental disputes.

The ability of a community to mobilize public support, communicate their claims to the mass media and lobby senior government agencies may thus go some way towards redressing the power imbalance that usually exists between the polluter and the victims of pollution in most environmental disputes. This ability may not only serve to facilitate access to a structured mediation process but also increase the willingness of industry or government agencies to compromise, thus influencing the final result. For example, in the *Palur Raya* case, the ability of community representatives to mobilize public support, utilize the media and effectively advocate

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[61] 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*, p19.

[62] "Bali Sing Ken-Ken!?: Tourism, Culture and the Environment in Balinese Political Cartoons" (paper presented at the ASAA Biennial Conference, Fremantle Arts Centre & Murdoch University, Perth, 13 to 31 July 1994).

[63] 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*, p19.

their interests was a strong influence on the final outcome of the initial mediation process. Yet, whilst effective community organisation may serve to redress a power imbalance and potentially influence the outcome of the mediation process, this of course will not always be the case. In the *Kayu Lapis Indonesia* case, for example, whilst community advocacy facilitated the commencement of a structured mediation process it seemingly could do little to influence the instrangient attitude of industry management, which led to KLI's withdrawal from the mediation process. Continued community advocacy, however, facilitated the subsequent resumption of mediation with government agencies and reopening of negotiation with KLI on the matter of compensation.

6.2.4.3 Government Intervention

The review of cases in chapters 4 & 5 also demonstrate the importance of the role and response of government agencies and influential government figures to the commencement and outcome of a structured mediation process. As noted above, government intervention or administrative pressure may also play an significant role in increasing the committment and willingness of industry to negotiate. Whilst industries such as *KLI* and *Palur Raya* possessed considerable political and economic clout, they do not operate independently of government patronage and their operations are ultimately dependent upon the support of key government decision makers. Thus, in the *KLI* case personal pressure exerted by the Governor of Central Java was essential in drawing the industry into the mediation process. In the *Palur Raya* case, the personal intervention of the Environment Minister in the final phase of the mediation process was a critical factor in the agreement that was ultimately reached.

In a number of cases the national Environmental Impact Agency (*Bapedal*), in particular, has played a key role in initiating and supporting environmental mediation. For instance, in the *Palur Raya* case the intervention of the national Environment Minister prompted the regional environmental agency to take a more active role in facilitating a mediation process between the disputing parties. The same Environment Minister was also a catalyst for the mediation process in the *Kayu Lapis Indonesia* case. A number of other cases have followed a similar pattern, including the *Kanasritex, Sambong River* and *Siak River* disputes. Yet whilst support from the national environmental agency has facilitated mediation in some instances, in other cases it has failed to do so, where support was not also forthcoming from the regional government concerned. For instance, in the *Ciujung River* case pollution was confirmed by research from the national environmental agency, which also supported an initiative to resolve the case via mediation. The

mediation initiative, however, ultimately failed in the absence of support from the regional government of Serang.

In other cases environmental mediation has resulted in a more successful outcome where support from regional authorities has been evident. For example, in the *Samitex* case the regional Yogyakarta Environmental Bureau was responsible for mediating the ultimately successful conflict resolution process. Similarly, in the *Naga Mas* case district government officials successfully mediated an environmental dispute at the instigation of Batang regent. In the *KLI* case, the support of the Central Java Governor was key not only in starting mediation but also in compelling KLI to reenter the mediation process following its initial withdrawal. Whilst the response of regional administrative or executive authorities has been significant in mediation cases, regional legislative assemblies have also played an important role in several cases. In the *Kayu Lapis Indonesia* case a widely publicized visit to the regional legislature and a subsequent legislative hearing on the dispute facilitated commencement of the dispute resolution process in the following month. Similarly, in the *Naga Mas* case a complaint conveyed by community representatives to the legislative assembly facilitated a subsequent investigation into the community's pollution claims. In the *Tawang Mas* case, a permanent committee of the legislative assembly actually mediated the dispute and brokered the final agreement to redirect the Tawang Mas river. In the case of mediation the degree of administrative and/or legislative support for mediation appears to play an essential role in both facilitating access to a mediation process and moreover influencing its final outcome.

Given the relevance of the administrative context to the environmental dispute resolution process, it is likely that the recent moves toward decentralisation in Indonesia are likely to have a significant impact. The decentralisation laws in question provide for a significant devolution of administrative authority from the national to the district (regency/city municipality) level.[64] In the mediation cases reviewed in chapters 4 and 5, district environmental agencies played the least significant role in facilitating the mediation process, when compared to agencies at the provincial and national levels. In both the *KLI* and *Palur Raya* case studies, mediation only commenced after intervention and support from the provincial and/or national levels. In the *Ciujung River* case the Serang district government actively opposed attempts to commence a mediation process. The generally supportive position of district governments toward industry in environmental

disputes is understandable given the reliance on district governments on revenue from this sector. In this context, devolution of environmental management authority to the district level is unlikely to support the objectives of environmental dispute resolution.

6.2.4.4 Role of the Mediator

Whilst effective community organisation and government support may facilitate the commencement of mediation, the actual outcome of that process is by no means a pre-determined fact. As discussed in chapter 1, the ability and impartiality of the mediator may strongly influence the potential course and outcome of the mediation process. The academic literature on mediation has tended to emphasise the need for a mediator who is both neutral and impartial. Government Regulation No 54 of 2000 reiterates this principle, stating that a mediator should possess the appropriate skills and experience and have no interest in the dispute at hand. Despite the enactment of this regulation, however, this has not been the case in the majority of environmental mediation cases to date. In practice, mediators are often government officials who, by virtue of their office, have a clear interest in the dispute. In some cases, this interest has been apparent by the attempts of mediating officials to influence the outcome of the mediation. For example, in the *Tembok Dukuh* case, regional government officials acting as mediators pressured residents to compromise and accept the industry's offer of compensation. In other cases, however, government appointed mediators have mediated in a sufficiently neutral and effective manner. For example, in the *Sambong River* dispute, the government appointed mediator was not only sufficiently neutral but was able minimize animosity between parties through "shuttle diplomacy" and overcome a deadlock on the matter of compensation. In the *Siak River* dispute, a senior official from the Environmental Control Agency acted as mediator and facilitated an agreement in principle between the disputing parties. Similarly, in the *Samitex* case, officials from the Yogyakarta Environmental Bureau successfully performed the task of mediation.

Indeed, in some cases, the position and influence of a senior government mediator may be an important catalyst to facilitate compromise between the disputing parties, especially where a deadlock exists. For instance, in the *Palur Raya* case, the personal intervention of the national environment minister as a mediator was a key factor in overcoming an impasse, influencing

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64 The laws in question are Law 22 of 1999 on Regional Governance and Law No. 25 of 1999 on the Fiscal Balance between the Central Government and the Regions

industry and bringing the parties to agreement. Similarly, the intervention of the Governor of Central Java in April 2003 facilitated implementation of the agreement. In the *KLI* case, the influence of the Governor of Central Java was significant in initially bringing KLI to the negotiating table and in facilitating the eventual payment of compensation to the fishpond farmers. A government mediator with senior status may thus also be effective and may be particularly appropriate where the parties need a more directive approach.

One disadvantage of a government mediator is that he or she is probably at a greater risk of appearing biased. For instance, in the KLI case, community representatives reported considerable pressure from regional government authorities during the "small format" mediation process to accept industry offers of compensation. A high status mediator is also more likely to dominate the process and outcome of mediation, playing more of a directive rather than a facilitative role. Nonetheless, use of high status or 'vested interest' mediator may well increase the likelihood of an industry's participation in the mediation process. As argued above, key government figures have played an important role in facilitating mediation through their personal and political influence on industry. Sometimes, this intervention has occurred as mediator, as was the case in the *Palur Raya* case in the final stage of mediation. It is also interesting that in the *KLI* case, the apparently 'neutral' mediator agreed to by both parties was ultimately rejected by the industry, who agreed to negotiate only through the mediation of the Vice-Governor.

Whether a 'vested interest' mediator is necessary or not is likely to depend on the circumstances of each case. If the 'threshold' issue of industry participation is already resolved, then a neutral and independent mediator would be preferable as this would ensure impartiality between the parties. Yet at present the use of government mediators is often a necessity due to the lack of an institutional base for or source of independent, qualified mediators. Government Regulation No. 54 of 2000 addresses this problem by authorising regional governments or communities to establish environmental dispute resolution service providers and stipulating criteria which such providers must meet. To date, however, the regulation has not been implemented and thus the issue of sourcing a mediator is one that is dealt with on an ad-hoc, case by case basis. Implementation of this important regulation would at least increase the available options for choosing a mediator in environmental disputes, ensuring that a neutral and independent mediator is available where there is the most appropriate choice.

6.2.4.5 Implementation of Mediated Agreements

In a number of cases the factors discussed above – effective community organisation, government support, a skilled and sufficiently impartial mediator – combined to facilitate both mediation and a successful resolution of an agreement between the disputing parties. However, an agreement in itself does not constitute a resolution of the dispute. As noted in chapter 1, effective implementation of mediated agreements is necessary for a successful resolution in the longer term. Implementation of compensatory remedies is usually not a problem in practice, although it certainly proved problematic in the *Palur Raya* case, where the industry attempted to control disbursement of the funds. However, in the majority of cases reviewed, where industry agreed to pay compensation or a 'contribution' this in fact did occur. A more problematic issue has been implementation of measures to rehabilitate or prevent environmental damage or pollution. For example, in the *Palur Raya* case, the final agreement stipulated ongoing monitoring of the factory's compliance with environmental regulations, which was to be carried out by a regulatory team from the national environmental agency. Yet, in practice this did not occur as the team from the environment ministry was refused access to the factory site. Continuing problems with environmental pollution were in fact reported in 10 of the 17 mediation cases reviewed. In some cases, such as the *Palur Raya* dispute, industry undertakings to improve environmental management appear mostly symbolic, and designed to appease community sentiment in the short term rather than achieve actual changes in industry practice in the longer term.

The problem of enforcing environmental measures is closely related to problems of administrative enforcement of environmental regulations. Indeed, a common term in the mediated agreements reviewed was ongoing compliance with environmental regulations. To ensure such compliance it is necessary for the relevant government agencies to carry out regular monitoring and apply administrative sanctions in the event of non-compliance. Alternatively, mediated agreements could be legalised as a decision of the court and thus made enforceable through judicial mechanisms. For instance, this occurred in the *Kalimantan Peat Land (Farmers Compensation) Case* where the agreement reached through settlement was legalised as a decision of the court. Yet, judicial mechanisms of law enforcement are not likely to be any more effective than administrative mechanisms for law enforcement. Where law enforcement, whether judicial or administrative, is inadequate and sporadic, there will be little incentive for industry to comply with environmental standards in the longer term. Unfortunately, this is often the case in

Indonesia, where available evidence suggests administrative enforcement is, at best, only partially effective. In the worst cases companies may operate in blatant disregard of environmental regulation. For instance, in the *Banger River* case, the polluting factories continued operations despite the withdrawal of their operating permit by the district government.[65] Similarly, in the *KLI* case the industry redirected the Wakak River and excavated a log pond without the required permits to do so. The situation is reflected in a recent statement by a senior official of the Environment Ministry, that only 50% of chemical industries in Indonesia comply with regulations governing the disposal of hazardous waste.[66] Inadequate enforcement of environmental standards not only undermines the prospect of implementing mediated agreements or judicial decisions in environmental disputes, but also increases the number of environmental disputes requiring resolution in the first place.[67] Efforts to improve the effectiveness of mechanisms for environmental dispute resolution are thus closely interrelated with parallel efforts to improve the effectiveness of administrative enforcement of environmental law.[68]

6.3 Comparison of Environmental Litigation and Mediation

As discussed in chapter 1, litigation and mediation are in many ways quite distinct approaches to dispute resolution. Dispute resolution is achieved in litigation through a court's authoritative determination of the rights, remedies and relationship of disputing parties, through the application of legal norms. Dispute resolution through mediation, by contrast, is achieved through a voluntary and consensual process of facilitated negotiation, in which the parties attempt to reach a harmonious reconciliation of their conflicting interests. Nonetheless, for our purpose litigation and mediation may be seen as different means to a common end: that of environmental justice. In the EMA 1997 litigation and mediation are presented as two options to a claimant seeking some

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[65] At the time of writing the factories were still reportedly operating without an Operating Permit. According to a lawyer for the Dekoro community, the situation was tolerated due to the considerable number of workers employed by the factory. Bodroani.

[66] According to the statement by Masnillyarti Hilman, Deputy VII (Area for Technical Development in Environmental Management), the worst offenders were small-scale industries that lacked the financial or technical capacity to adequately manage hazardous waste. "Cuma 50% Industri Kimia Ramah Lingkungan," *Media Indonesia*, 13 March 2003.

[67] This point was made by the Environmental Ministry quoted in the note above who, given the lack of law enforcement, expressed "…no surprise that environmental pollution cases around industry cannot be avoided". Ibid.

[68] Whilst this subject is outside the scope of this paper it has been addressed by other researchers in the Indonesia Netherlands Study on Environmental Law and Administration (INSELA) project. See, for instance, Bedner and Rooij, "Environmental Disputes and Enforcement".

remedy for an environmental wrong. How do these two channels of dispute resolution compare in practice? What are their respective strengths and weaknesses? Can either be said to have been "more effective"?

6.3.1 Access

As previously discussed, there are a myriad of factors that mitigate access to a dispute resolution procedure, including social values, economic resources, legal framework and political context. As we have seen, access to litigation has been facilitated by the reform of procedural law but has in practice been limited by a number of factors including a cultural reluctance to litigate (especially against 'social superiors'), the expense of litigation and the limited availability of legal aid, the technical and legal difficulties of proving pollution in court and the institutional problems, especially corruption, which have undermined public confidence in the judiciary. Yet, notwithstanding these problems, the legal framework has been utilised in over 20 cases, although this number appears relatively limited given the scope of environmental problems and the population size of Indonesia.

At first glance, mediation appears significantly more accessible than litigation. As we have seen, mediation has a strong cultural antecedent in Indonesia as consensual forms of negotiation and decision-making (*musyawarah*) are an established feature of traditional cultures at the village level. Unlike America, where the cultural imperative of individualism underlies the litigiousness of that society, in Indonesia the cultural value placed on consensus and harmony makes mediation a more culturally familiar and comfortable choice. Mediation also lacks the legal and technical obstacles of "proving" pollution and does not involve the cost of legal representation. It is, as a result, very common for at least some rudimentary form of 'consensual' dispute settlement outside of court, usually in the form of negotiation, to be attempted in environmental disputes although the success rate of such rudimentary attempts is low. However, access to a formally structured mediation process is often more problematic and essentially depends upon the willingness of key government officials and industry representatives to cooperate. The absence of independent dispute resolution providers (as provided for in Government Regulation No. 54 of 2000) is in this respect a problem. Ultimately, where access to mediation fails and where industry or government agencies are not willing to negotiate, then litigation may prove a more accessible option, as citizens always have the right to file a legal suit at the hearing of which the attendance of any defendant will be compulsory.

6.3.2 Case Outcomes

In terms of case outcomes mediation has had a higher success rate than litigation in terms of disputants actually obtaining compensation for environmental damage or pollution. Of the fourteen private interest cases in the courts ten were lost and four were at least partially successful at the District Court level. However, only two of these were finally successful at the appellate level and one of those is still pending an appeal to the Supreme Court. The strong likelihood of appeal from any award of compensation by a court, combined with the extremely protracted nature of the appeal process, due in part to severe backlogs of cases at the appellate level, is another problematic aspect of litigation. In the *Banger River* case, for instance, the legal action of the Dekoro community was commenced in November 1998 and was still pending an appeal (to the Supreme Court) more than five years later.

In contrast, compensation payments were made in eleven of the seventeen mediation cases reviewed in this thesis, a considerably more common outcome than in litigation. Additionally, whilst mediation processes can also be lengthy, the delays involved usually do not approach anything like the protracted nature of litigation proceedings. For the most part, where payments were the subject of agreement in mediation cases they were generally made within a period of several months. Certainly, mediation appears to be a more probable and direct way of obtaining compensation for environmental damage or pollution than does litigation.

However, it is worth noting that when payments were made following mediation, they were frequently described not as 'compensation", but rather as "good will payments" or "contributions" to community development. This highlights the general tendency in environmental mediation cases to emphasise pecuniary rather than environmental remedies, although as noted some definite improvements in environmental management were evident in several cases. A similar outcome was evident in environmental litigation cases. As noted above, compensation was the most common remedy ordered by courts, and in some cases, such the *Babon River* case, the failure of the court to address the issue of environmental management was clearly evident. Nonetheless, in several cases orders relating to environmental management were made by the courts, although none of these orders were ever implemented as the decisions were either overturned on appeal or are still pending appeal.

Generally speaking, mediation appears to have been utilised in private interest, rather than public interest disputes. As discussed above, public interest suits have fulfilled an important

political function even where substantive legal outcomes have not been achieved. The open and public nature of the judicial forum lends itself more readily to use as a "public stage". In comparison, the mediation process is usually restricted to the immediate participating parties and kept as far as possible both private and confidential in nature. For instance, in the *KLI* case, the mediation process stalled early on following an alleged breach of confidentiality by one of the parties who had provided a commentary of the mediation process to the regional press. Due to its private nature the mediation process is of only limited utility to the activist environmental organisation, which may wish to publicise the broader issues of public policy that lie at the centre of the dispute. Public interest litigants like WALHI are also concerned not so much with the resolution of particular disputes, but rather with the ongoing political struggle to influence policy so as to ensure environmental protection, which we may characterise as a process of conflict rather than disputing.[69] A mediated dispute, even a successfully mediated dispute, offers little benefit to an environmental organisation engaged in such a broader political struggle. Whereas even a unsuccessful court case will bring an environmental dispute into the public spotlight, whilst a successful, or partially successful case (like the *Indorayon* case), will not only provide public vindication for a cause but may establish a favourable precedent for future cases. As a result, public interest litigants may actually avoid resolving a dispute through mediation, even where this may be a possibility. This occurred, for instance, in the *WALHI v Freeport* case (2001), where legal representatives for the environmental organisation specifically rejected the Chief Magistrate's invitation to settle the dispute through mediation.[70]

6.3.3 Social-Legal Context

Our analysis of environmental litigation and mediation in the preceding chapters demonstrates the large extent to which both are contingent upon and responsive to the surrounding social-legal context. In litigation we saw how the adjudication of environmental cases has been strongly influenced by the political character of the judiciary, which in turn has been strongly influenced by the wider political context. We have also discussed how the institutional problems of judicial corruption and lack of judicial independence have influenced the administration of justice in environmental cases. Whilst the institutional problems affecting litigation in Indonesia are a well recognised problem, this is less the case with mediation. Advocates of environmental mediation

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[69] See discussion of this point in Chapter 1

[70] "Tolak Berdamai, Walhi Tetap Tuntut Freeport Minta Maaf," *S.Karya*, 22 August 2000.

in Indonesia had hoped that mediation would provide a means of 'by-passing' these institutional problems, thus improving the adjudication and resolution of environmental disputes. Similarly, advocates of mediation in western countries have presented it as an "alternative" to the inefficiencies and detractions of the court system. Yet, whilst mediation is undertaken outside the judicial institutional context, and may thus by-pass some of the problems therein, it certainly apparent from this study that it cannot transcend the social-political context within which it is located. In this respect, much of the 'rhetoric' of mediation tends to accentuate and sometimes exaggerate the ability of state-of-the-art mediation techniques to resolve disputes, whilst failing to comprehend the significance of the wider social-political context within which these techniques operate.

As discussed above, one of the major obstacles to environmental mediation in Indonesia has been the significant power disparities between disputants. Typically, the more powerful, polluting party is not compelled nor motivated to mediate because there are better alternatives to a negotiated agreement. The most obvious of these is maintenance of the status quo, a logical choice in the face of inadequate administrative and judicial law enforcement. This dilemma illustrates the interrelation and inter-dependence of mediation with those processes of "rights-based" and "power-based" dispute resolution, which some writers have argued it should substitute. Thus, it is precisely due to the failure of rights based and power based ('command and control') enforcement mechanisms that the necessary conditions for mediation often do not exist. Fortunately this type of situation has not been an absolute obstacle to the use of mediation. As discussed, a combination of factors, such as community pressure and government intervention, may create the necessary conditions for a successful mediation process. Yet this in itself demonstrates the interdependence of 'power-based' approaches with an 'interest-based' approach such as mediation. An interest based approach only becomes possible where power-based approaches, such as advocacy, lobbying and political pressure, have brought the parties to a point of relative impasse. This approach may work on an ad-hoc basis, especially in high profile cases where there is the necessary media exposure, prolonged campaigning or personal intervention of senior government figures. However, where these conditions are not present, it is less likely that mediation will succeed in the absence of judicial and administrative mechanisms for the enforcement of environmental law. In this way, the more 'legalistic' methods of dispute resolution need to be effective as a "backstop" to mediation. There can be no 'bargaining in the

shadow of the law' when the law itself casts no shadow.[71] Litigation and mediation thus should not be seen as autonomous or exclusive "alternatives", but rather are interrelated and interdependent in their operation. To this end, reforms to improve environmental dispute resolution should simultaneously address all mechanisms of dispute resolution and law enforcement, namely administrative, judicial and consensual modes of environmental dispute settlement.

Our analysis of environmental litigation and mediation also demonstrates that these alternatives modes of dispute resolution are not only interdependent, but best regarded as complementary choices dependent upon the context of each dispute. Mediation may be an appropriate choice where the parties are at a point of impasse and are willing to pursue a negotiated agreement. Indeed, the efficiency of litigation could be greatly improved by the integration of mediation processes into the court system so as to ensure that cases that are susceptible to mediation are resolved consensually between the parties. On the other hand, where the interests of the disputants are in fact incompatible, where either party is unwilling to pursue a negotiated agreement or where a public interest claimant wishes a dispute to be resolved in a public forum, litigation may be a more appropriate choice.

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[71] The phrase "bargaining in the shadow of the law" comes from R Mnookin and L Kornhauser, "Bargaining in the Shadow of the Law," *Yale Law Journal* 88 (1979).

6.4 Summary of Recommendations[72]

Environmental Standing

1. Broaden procedural access to the courts for environmental public interest litigants by introducing a 'citizen suit' provision where any interested citizen, or community organisation, could undertake legal action for a breach of environmental law. This would remove existing restrictions on public interest standing provisions and facilitate enforcement of the EMA 1997.

Environmental Compensation in Public Interest Cases

2. Broaden the remedies available to public interest litigants to include compensation for environmental damage to cover the cost of environmental restoration. This would facilitate the enforcement of article 34 in particular, which creates an obligation for polluters to pay compensation in the event of environmental pollution or damage.

"Polluter-Pays" Environmental Trust Fund

3. If public interest litigants were able to sue parties responsible for pollution or environmental damage for compensation (see recommendation 2 above), that compensation could be paid into a Environmental Trust Fund for disbursement toward environmental restoration.

Protection of Right to Participate in Environmental Management

4. Enact legislation protecting the citizen's right to participate in environmental management, including the exercise of their civil rights to litigate breaches of environmental law. This would minimise the prospect of potential environmental litigants being intimidated by the risk of a "SLAPP" suit undertaken by defendants.

Clarification of Strict Liability

5. Strict liability is, as discussed above, a legal doctrine with considerable potential to increase access to environmental justice through the courts. The significant potential of this doctrine has not been realised by Indonesian courts and in one case, has been attributed a scope much

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[72] More detailed explanations for these recommendations relating to the legal framework for litigation are discussed in section 6.1.3 above.

narrower than legislative intent arguably would allow. The strict liability doctrine and its application should therefore be clarified through several means to ensure its correct application in the future. These could be achieved through ongoing specialised training of judges in environmental law (see recommendation 8), clarification of the doctrine's application by a Supreme Court regulation (as occurred with class actions) or, alternatively, legislative clarification or elucidation of the wider scope of strict liability to enable its correct application in future cases.

Legislative recognition of NGOs

6. Reintroduction of an article, similar in terms to article 19 of the EMA 1982, which originally gave specific legislative recognition of the role played by non-government organisations in environmental management. This would provide a clearer legal foundation for the broader participation of NGOs in environmental management.

Strengthen citizen initiated mechanisms of administrative enforcement

7. Strengthen citizen initiated mechanisms of administrative enforcement of environmental law through legislative amendment of art. 25(1) of the EMA 1997, requiring a written decision on an application to an authorised official within a reasonable time frame, which, if contrary to law in the applicant's opinion, could be challenged in the administrative courts. The enforceability of article 37 could also be improved by imposing an obligation to act upon administrative agencies where environmental damage or pollution is established. Improved administrative enforcement of environmental law would indirectly improve the prospect of environmental dispute resolution through litigation and mediation, both of which have been shown to be directly influenced by administrative enforcement of environmental law.

Adjudication of Environmental Cases by Specially Trained Judges

8. As discussed above, judicial decision making has been compromised in some environmental cases by a lack of judicial familiarity or expertise in environmental matters. One basic initiative to address this problem and improve competency in environmental judicial decision making would be to restrict the adjudication of environmental cases to judges certified to have received specialist environmental law training, such as the training carried out to date in the

Ausaid or Indonesia-Netherlands Course on Environmental Law and Administration (CELA) program.

Creation of a Separate Environmental Division or Environment Court to handle environmental cases

9. A further, and more far reaching reform in this direction would be for the core group of judges specially trained in environmental law to form the basis for a separate judicial division for environmental (and potentially land related) cases. A similar, but more far reaching reform, would see the creation of a specialist court for environmental cases. A specialist court would not only ensure the necessary level of judicial expertise but could incorporate non-judicial technical assessors and, moreover, resolve the problems of defining jurisdiction in environmental matters between the general and administrative courts.

Improved Institutionalisation of Mediation

10. Access to structured mediation should be improved by providing an institutional basis within which environmental mediation processes can occur, rather than having to provide 'ad hoc' institutional support on a case-by-case basis. There are two main bases upon which this could occur. Firstly, government Regulation No. 54 of 2000 has provided a legislative basis for the creation of mediation service providers by the public or government. Proper implementation of this regulation at national, provincial and district levels is necessary to ensure the effectiveness of environmental mediation. Secondly, mediation processes could be annexed to court proceedings, which would have the effect of not only improving access to mediation but also improving the efficiency of the court system by filtering out cases that could be satisfactorily resolved by mediation. At the time of writing, a regulation on court-annexed mediation was being considered by the Supreme Court.

Environmental Investigating Office

11. The incidence of corruption in environmental court cases and also in cases of inadequate administrative enforcement could be reduced if administrative and judicial enforcement of environmental law was more effectively supervised. This could be achieved through the creation of a supervisory body, such as an "Environmental Rights Commission" or an "Environmental Ombudsman", to investigate cases where administrative or judicial enforcement of environmental

law has failed to remedy serious breaches of environmental rights or where corruption is alleged to have occurred.[73]

Continued Judicial Reform to Strengthen Judicial Independence and Impartiality

12 . This study has emphasised the influence of the judicial institutional context upon the adjudication of environmental cases in court and indirectly on the mediation of environmental disputes outside of court. Accordingly, to ensure effective environmental dispute resolution it is essential that resources be devoted to reform programs designed to improve and strengthen judicial independence, impartiality and efficiency. The nature of such reforms has been discussed in detail in section 6.1.5.1 above.

[73] The Indonesian Centre for Environmental Law has previously made a similar recommendation for supervision

6.5 Appendix 1 Overview of Environmental Litigation Cases

ENVIRONMENTAL PUBLIC INTEREST CASES 1982-2002							
No.	**Case Name**	**Year**	**Category of Dispute**	**Plaintiffs**	**Defendants**	**Summary of Claim**	**Outcome**
1.	*Indorayon* (PT Into Indorayon Utama)	1988	industry (pulp & paper)	WALHI	1. Central Agency for Coordination of Investment (BKPM) 2. Governor of North Sumatra 3. Minister for Industry 4. Minister for Environment 5. Minister for Forestry 6. PT. IIU	Issue of government permit contrary to environmental legislation.	LOST – Substantive claim rejected yet environmental standing accepted. [Central Jakarta District Court]
2.	*Reafforestation Fund (IPTN)*	1994	forestry; administrative ;	1. WALHI 2. Indonesia Institute for Tropical Nature 3. Forum for Study of Population & Environment 4. Institute for Environment & Natural Resource Development 5. Indonesian Centre for Environmental Law 6. Indonesia Rainbow Foundation	1. The President of the Republic of Indonesia	Pres. Decree No.29 of 1990 contrary to legislation.	LOST – Substantive claim rejected. Environmental standing also recognised in administrative context. [Jakarta Administrative Court]
3.	*Surabaya River/Meka Box*	1995	industrial; water pollution;	1. WALHI	1. PT. Surabaya Mekabox 2. PT. Surabaya Agung Industri Pulp dan Kertas 3. PT. Suparma	claim for compensation & environmental restoration	LOST – Substantive claim rejected due to lack of implementing regulations. [Surabaya District Court] LOST – on appeal [East Java High Court] PENDING – appeal to Supreme Court

4.	*Freeport*	1995	mining;	1. WALHI	1. Secretary General of the Department of Mining & Energy	challenge to decision to approve Freeport's env. management plan. (GR No 51 of 1993; AJA)	LOST – [Jakarta Administrative Court]
5.	*Reafforestation Fund II (PT Kiani Kertas)*	1997	forestry; administrative	1. WALHI 2. Legal Aid Foundation 3. Women's Legal Aid Association for Justice	1. President of the Republic of Indonesia	challenge to Pres. Decree No. 93 of 1996 (AJA)	LOST – [Jakarta Administrative Court]
6.	*Eksponen 66 v. APHI*	1998	forestry; land clearing; fires;	A group of 13 community, religious and student organisations based in North Sumatra	6 national and regional timber and wood-processing industry associations.	representative action for compensation/env restoration (art. 37 EMA 97)	WON – Compensation of $6.5 million awarded [Medan District Court] LOST – on appeal [North Sumatra High Court]
7.	*PT Pakerin et al*	1998	forestry; land clearing; fires;	1. WALHI	11 forestry/plantation companies located in South Sumatra	claim for env.restoration (art 38(2) EMA 97)	WON- 2 Defendants – ordered to implement an effective fire management system LOST- 11 Defendants [Palembang District Court] PENDING – Appeal to Supreme Court
8.	*Peat Land Case (Walhi)*	1999	agriculture; peat swamp development;	1. WALHI	President RI, 10 national Ministers and 10 other senior government officials.	challenge to Pres Decree No 82 of 1995	LOST – Case rejected on jurisdictional grounds [Central Jakarta District court]
9.	*Transgenic Cotton Case*	2001	agriculture, genetic modification	1. ICEL 2. Indonesian Consumers' Institute 3. National Consortium for Nature and Forest Conservation 4. Foundation for Biodynamic Agriculture 5. Southern Sulawesi Consumers' Foundation 6. Community Research and Capacity Building Institute	Agricultural Minister, PT Monagro Kimia	administrative challenge to legality of Agricultural Minister's decision to approve planting of GM cotton	LOST – Jakarta Administrative Court

10.	*WALHI v. PT Freeport*	2001	Mining;	1. WALHI	1. PT Freeport Indonesia	right to accurate environmental information	WON- [partially] Court ordered improved environmental management [South Jakarta District Court] PENDING – appeal to High Court
TOTAL NO OF CASES - 10 General Courts – 7 Administrative Courts - 3						**CASE OUTCOMES:** 7 cases lost at District Court level 3 cases won (partially) at District Court level 0 cases won at appellate level	

ENVIRONMENTAL PRIVATE INTEREST CASES						
Case No.	**Case Name**	**Year**	**Number of Plaintiffs**	**Category of Dispute**	**Summary of Claim**	**Outcome**
1.	*Indorayon II (Samidun Sitorus v.PT IIU)*	1989		industrial; pulp and paper; water pollution/deforestation	claim for compensation due to environmental damage	LOST – District Court of Medan, North Sumatra
2.	*Pupuk Iskandar Muda*	1989	602	industrial; gas leak	claim for compensation	LOST – District Court of Lhokseumawe LOST – High Court of Aceh
3.	*Sulae*	1992	8	forestry; plantation; deforestation;	compensation & environmental restoration	LOST – District Court of Makale, South Sulawesi
4.	*Sarana Surya Sakti*	1993	18	industrial; water & ground pollution;	Claim for compensation (art. 20 EMA 1982)	LOST – District Court of Surabaya LOST - High Court of East Java PENDING – Supreme Court
5.	*Muara Jaya*	1994	23	Energy (oil);	Claim for compensation	LOST – District Court of Balikpapan WON – Compensation of Rp 677.4 million awarded. [High Court of Samarinda] WON – Compensation claim upheld [Supreme Court]
6.	*Singosari Sutet Case*	1994	92	Electricity	Claim for compensation	LOST – Central District Court of Jakarta
7.	*Ciujung River*	1995	17 class representatives 5000 class members	industrial;pulp/paper; water pollution;	claim for compensation & environmental restoration	LOST – District Court of North Jakarta
8.	*Sari Morawa*	1996	260	industrial; water pollution;	claim for compensation & environmental restoration (art. 20 EMA 1997)	LOST – District Court of Lubuk Pakam
9.	*Banger River*	1998	79	industrial; water pollution;	claim for compensation and env restoration (art 34 EMA 97)	WON – Rp 49 million compensation [District Court of Pekalongan] WON – Rp 750 million compensation & improvement in environmental management ordered [High Court of Semarang] PENDING – Supreme Court

10.	*Babon River*	1998	9	industrial; water pollution;	claim for compensation (art 34 EMA 97)	WON – Rp 4.4 million [District Court of Semarang] LOST – High Court of Central Java PENDING – Supreme Court
11.	*Laguna Mandiri*	1998	106	forestry; land clearing; fires;	claim for compensation (art. 34, 35 EMA 97)	WON – Rp 150 million compensation. Order for implementation of fire control management system – [District Court of Kota Baru] LOST – High Court of Banjarmasin PENDING – Supreme Court
12.	*Peat Land Farmers' Compensation Case*	1999	49	agriculture; peat swamp development;	compensation for environmental damage	WON – Compensation Rp 649 million – [District Court of Kuala Kapuas] SETTLED – High Court
13.	*Pekanbaru Smog Case*	2000	1 class representative 600,000 class members	forest fires	representative claim for compensation & environmental rehabilitation	LOST – District Court of Pekanbaru
14.	*Way Seputih River*	2000	27	industrial; water pollution;	representative action for compensation	LOST – District Court of Metro
	TOTAL- 14 cases			Industrial – 8 Forestry - 3 Mining – 1 Agriculture – 1 Other - 1		**Outcomes:** 10 lost at District Ct. level 4 won at District Ct. level 2 won at appellate level 1 settled
Combined Public & Private Interest Cases Total – 24 cases						**Combined Public & Private Interest Case Outcomes:** 17 lost at District Court level 7 won(partially) at District Court level 2 won at appellate level

6.6 Appendix 2 Overview of Environmental Mediation Cases

Case No.	Name of Case	Agreement Reached	Compensation / Monetary Payment	Continuing Pollution and/or Environmental Damage	Significant Further Conflict
1.	*Tapak River (1991)*	Yes	Yes	Yes: continuing pollution despite industry pledges to improve waste management.	Yes
2.	*Tembok Dukuh (1991)*	No	No	Yes	Yes
3.	*Tyfountex (1992)*	Yes	No	Yes	Yes
4.	*Sambong River (1993)*	Yes	Yes	Yes – rehabilitation of dikes not undertaken	No
5.	*Siak River (1992)*	Yes	Yes	Yes: Continuing pollution despite industry pledges to improve waste management.	Yes
6.	*Sibalec (1994)*	Yes	Yes	Yes. Repair of waste management facilities but some continuing problems regarding monitoring of water quality	Minimal
7.	*Naga Mas (1994)*	Yes	Yes - payment of drinking water supply		
8.	*Ciujung River (1995)*	No	No	Yes	Yes
9.	*Samitex (1995)*	Yes	Yes	No.	No
10.	*Indoacidatama (1997)*	Yes	Yes	Yes: Environmental restoration/management not addressed by agreement. Continuing pollution problems.	Yes
11.	*PT Pura (1999)*	Yes	Yes	No	No
12.	*PT Sumber Sehat (1999)*	Yes	No	No	No
13.	*Kanasritex (2000)*	Yes	No	No: permanent waste channel constructed for waste disposal minimizing impact on adjacent rice paddies.	No
14.	*Tawang Mas (2000)*	Yes	No	Yes	Yes
15.	*KEM (2001)*	Yes	Yes	No	No

16.	*Kayu Lapis Indonesia (2001)*	No	Yes	Yes	Yes
17.	*Palur Raya (2002)*	Yes	Yes	No	No
	Total Cases: 17	Agreement Reached: 14 No Agreement: 3	Payment: 11 No Payment: 6	Continuing Pollution and/or Environmental Damage: 10	Further conflict: 8