Chapter V
Environmental Dispute Resolution Process

V.1 Background

In 1982, Indonesia has its first environmental Act with the promulgation of Act Number 4 on Basic Principles of Environmental Management.[277] In 1997, the Act was entirely amended, as there has been growing awareness on environmental issues.

Different from the 1982 Act, the Environmental Act of 1997 provides provisions on dispute settlement between the polluters and those sustaining injury due to the damage and destruction of the environment. The Act become the first Act in Indonesia, which allows class action lawsuit and basis for the NGO to have legal standing to file lawsuit.

V.2 Nature of Dispute

The environmental dispute can be divided into two categories. First is the dispute concerning unmanaged waste from production process that resulted in damage to the environment. Manufacturing companies, have been in the past accused of damaging the environment. The second category of dispute concerns with massive scale exploitation of natural resources that resulted in the destruction of the environment. Many companies holding concession to exploit forest and mining have been accused of destructing the environment.

Acting as plaintiff in an environment dispute is the community. Individuals rarely become plaintiff. The community will claim that their environment have been damaged or destructed by certain companies. In such claim, the community will seek compensation for the damage caused and demand the same will not occur again imposing those found guilty to take certain measures. Apart from the community NGO may also act as plaintiff, as will be discussed later.

As for the defendant, there are two categories of defendant. First, those who are suspected of damaging or destructing the environment, namely, the companies. The companies for this matter can be divided into those who own plants or factories and those

[277] Number 12 of the State Gazette of 1982, Supplement to State Gazette Number 3215

who are involved in the exploitation of natural resources, such as forestry, mining, oil and gas. Foreign companies have also been brought to court as defendant. These foreign companies are mostly those who take advantage of lax environment law enforcement in Indonesia. Apart from that, mining companies have also been brought to court even though they have taken environmental protection measures. However, many environmental activists saw that the measures are not sufficient in protecting the environment.[278]

The second category of defendant is government agency. Government agency has often times entangled in the dispute. The reason for this is the agency is responsible in issuing permits and licenses for the company's operations. If the court decides in favor of the community, by having government agency as defendant, the court may decide to instruct such agency to revoke the granted permits and licenses. As to compensation, the court will not impose any compensation against the government agency.

V.3 Provisions on Dispute Settlement

Environmental Act of 1997 defines Environmental dispute as "A disagreement between two or more parties, which arises as a result of the presence, or suspected presence, of environmental pollution and/or damage."[279] The Act further provides that environmental disputes can be settled through court or out of court mechanism based on agreement by the parties.[280] The Act, however, does not stipulate what if the parties cannot reach such agreement. It does not elaborate further which mechanism prevails. Nevertheless, that does not mean a claim will end up in deadlock. A Party claiming compensation may take legal actions to court, since dispute settlement through court does not have to be agreed by the contending party.

The agreement to settle dispute outside the court does not eliminate the possibility of one party to refer the case to the court. Under Article 30 paragraph 3 of the

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[278] On 2001, PT. Freeport Indonesia, the subsidiary of Freeport McMoran, is being sued by Walhi for suspicion of violating the Environmental Act.

[279] Environmental Act art. 1 (19).

[280] *Id.* art. 30 (1).

Environmental Act it is stated that, "Court settlement can be pursued even though parties have agreed out of court settlement if such settlement is declared unsuccessful by one of the parties to a dispute."[281] Hence, if one party is not satisfied with the out of court settlement during or after the process, such party may declare the settlement unsuccessful. This will trigger the out of court process to be abandoned; and, subsequently, one of the parties initiates court settlement.

Although this provision has never created a problem in practice, as there have been no such cases, however such provision will discourage parties to resolve their differences outside the court due to three reasons. First, parties to the dispute may feel there would be no incentive if there is no exclusive jurisdiction to the out of court settlement. Second, it would be too biased if only one party who calls the settlement unsuccessful. Third, the court will overshadow the process of out of court settlement at each and every stage.

The out of court settlement only applies to private or civil dispute. The Act reconfirms this legal doctrine, which states that settlement outside the court does not include criminal offence.[282]

The Act further provides that the purpose of outside court settlement will be for parties in dispute to agree on the form and size of compensation and imposing certain party to take actions to ensure the negative impact on the environment will never occur again.[283]

The out of court settlement can be in the form of mediation and conciliation, or it can take the form of arbitration.[284]

The Act further provides that the government or public may establish an independent and impartial center for the settlement of environmental dispute.[285] To date there has yet been any such center established.

The Act stipulates that settlement of environmental dispute through court has to be on the ground of tort by a party causing pollution or damage to the environment

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281 *Id.* art. 30 (3).
282 *Id.* art. 30 (2).
283 *Id.* art. 31.
284 *Id.*art.32.
285 *Id.* art. 33 (1).

resulting others to sustain injury.[286] If proven, such party has the obligation to pay compensation to the injured and has to take measures to avoid the same occurrence in the future. The judge in its decision may instruct the polluter to pay certain amount of money for each day the polluter fails to observe the decision.[287]

The Environmental Act of 1997 allows lawsuit initiated based on class action. Under Article 37 paragraph 1 it states that, "(T)he community has the right to bring a class action to court or report to the law enforcers on environmental issues that resulted in the lost of basic community life."[288] Furthermore, the Ministry in charge of the environment can act in the interest of the community, if such Ministry has knowledge that the community has suffered from the environmental pollution or damage.[289]

The Act also stipulates that NGO have legal standing to initiate lawsuit in the interest of sustaining the environment against suspected polluter.[290] The lawsuit, however, is restricted only to demand that polluter takes certain measures. The lawsuit may not demand polluter to pay financial compensation, except real expenses that have been incurred by NGO for initiating the lawsuit.[291] This provision has its importance to avoid NGO who only seek financial gain rather than for the good cause of protecting the environment. In addition, it avoids from other complexities, such as who will have entitlement of the compensation and how the compensation will be distributed, since the NGO is not the injured party.

Not all NGOs can have legal standing to initiate a lawsuit against a party suspected of polluting the environment. The Environmental Act provides only NGO that satisfies three requirements will have legal standing.[292] The first requirement is the NGO has to be in the form of legal entity or foundation. The second requirement is the articles of association of such NGO, has to mention clearly that the objective for its establishment is to preserve the environment. The third requirement is the NGO has been carrying out activities consistent with its objective.

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286 *Id.* art. 34 (1).
287 *Id.* art. 34 (2).
288 *Id.* art. 37 (1).
289 *Id.* art. 37 (2).
290 *Id.* art. 38 (1).
291 *Id.* art. 38 (2).
292 *Id.* art. 38 (3).

These three requirements are important for distinguishing between the genuine NGOs who are most concern and dedicated with environmental issues and NGOs that have other purpose having nothing to do with environment. The later is, of course, excluded from possessing legal standing. Nevertheless, the three requirements are very broad and have to be interpreted. In practical terms, it is the judge handling the case that has to interpret these three requirements. The judge will decide whether certain NGO has legal standing.

V.4 Dispute Resolution in Practice

V.4.1 Court Mechanism

In many environmental disputes through court mechanism, the plaintiffs have been the community, sustaining injury caused by pollution. Public interest lawyers have been taking part in representing the community. In the absence of NGO and public interest lawyer, the dispute would not proceed as high as court. There are several reasons to this. To begin with, the defendant by far has more power than the plaintiff does. The community will just settle with the company suspected of polluting even if it means the company is treating them unfairly. The defendants have been companies suspected of polluting the environment.

The situation becomes worst with the involvement of the government. The government seldom takes neutral stand on the dispute. In many instances, it has taken side with the company. The two may have common interest for disregarding the environmental issues. The company wants to cut the production cost by not taking any consideration of environmental issues. For the company, to concern with environmental issues will mean more cost on production. The government, on the other hand, is not to keen with environmental issues because it wants to attract businesses to the region. Many officials within the government think that imposing environmental laws and regulations strictly will scare businesses away.

An example of a case, which is brought by the community based on class action to certain company, is the pollution of Way Seputih River located in Central Lampung in around 1999.[293] The community as plaintiff is represented by classes of people living in

[293] Civil Case Number 04/Pdt.G/2000 PN.M

the villages where the river is running. These classes are represented by attorneys from the Lampung Legal Aid Institute. They lodged a lawsuit against three companies operating near the river who are suspected of causing pollution by dumping their production wastes to the river. The three defendants are PT. Vewong Budi Indonesia, a company producing cooking seasoning, PT. Sinar Bambu Mas, a company producing paper and PT. Budi Acid Jaya, a company producing cassava flour.

The lawsuit was registered at Metro (Lampung) District Court on 23 February 2000. The suit is initiated on the ground of tort by the defendants. The defendants were accused of causing pollution and destruction to the environment and therefore, under article 34 paragraph 1 of the Environmental Act, have the obligation to pay compensation and take certain measures. For such purpose, the plaintiff had requested the court to order the defendants pay compensation in the amount of a little over IDR 5 billion for material and immaterial damage, in addition to temporary closure of the plants.

The three defendants, of course, refuted all arguments as put forward by the plaintiff. They argued that they have managed the waste and make sure that the waste did not cause pollution to the environment.

In 4 September 2000 the court decided that the lawsuit as invalid because the plaintiff brought the defendants who had no relationship whatsoever with each other, at the same time. The court cites a Supreme Court decision of similar situation where defendants were brought at the same time who had no relationships; such lawsuit was declared invalid.[294] By declaring the lawsuit invalid, the court had not deliberated the substance of claim by the plaintiff. In sum, the claim was unsuccessful due to procedural matters.

An example whereby an NGO having legal standing initiated a lawsuit against company suspected of causing pollution is the landmark case of PT. Inti Indorayon Utama Pulp Company (hereinafter referred to as "IIU"). Many considered this as a landmark case because for the first time, prior to the existence of 1997 Environmental Act, court in Indonesia had allowed Wahana Lingkungan Hidup (hereinafter referred to as "Walhi"), an environmental NGO, to have legal standing to initiate lawsuit against suspected polluter, IIU.

[294] Supreme Court Decision Number 343K/Sip/1975 of 17 February 1977.

On 30 December 1988 when Walhi registered its lawsuit at the Central Jakarta District Court against IIU and five government agencies as defendants.[295] The government agencies were the Investment Coordinating Board, the Ministry for Home Affairs, the Ministry of Industry, the Ministry of Environmental Affairs and the Ministry of Forestry.

The plaintiff requested the court, among others, to declare invalid permits that have been issued allowing IIU to operate. In effect, the plaintiff demanded the halt of pulp factory operations. The ground for such demand was the factory would cause further damage and destruction to the environment. To this end, the defendants had violated and failed to comply with the Environmental Act of 1982, as the case occurred prior to the promulgation of Environmental Act of 1997.

The court at the initial stage had to decide whether Walhi had legal standing as plaintiff as it does not sustain injury from the defendants' actions nor it represents an injured party. The court on this issue had ruled that Walhi has legal standing to initiate lawsuit and, therefore, can act as plaintiff even though there is no direct relations between the plaintiff and the defendants.[296]

The court then proceeded with the substance of the dispute. In one of its rulings, the court had refused the demand by the plaintiff to declare IIU had caused destruction to the environment and, for such reason, make available funds for restoring the damaged environment. The court further said that since damage was not proven, the defendants cannot be declared as negligence in forming an independent team to assess the damage of the environment.

Irrespective of the decision made by the court, but amid strong opposition from surrounding people where the plant is located and environment activists, the Abdurrahman Wahid administration had closed down IIU operations. However, recently under the Megawati Soekarnoputri administration, it has announced that IIU would

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295 Civil Case Number 820/PDT.G/1988 PN.JKT.PST.

296 Walhi ever since has initiated lawsuits against many companies around Indonesia. In 1995 at Surabaya for example, Walhi filed a law suit against PT. Surabaya Meka Box, PT. Surabaya Agung Industri Pulp dan Kertas and PT. Suparma who were suspected of causing gross pollution to Surabaya river. The court decision on case is the lawsuit is declared as invalid or unacceptable. Again in1998 at Palembang, Walhi filed a lawsuit against PT. Pakerin et. Al. who were suspected of causing haze in the South Sumatera Province between September to November 1997. The court decision on this case is the defendants found guilty of certain acts which caused haze.

resume its operations of paper pulp production. By this time, IIU has changed its name to Toba Pulp Lestari to reflect government policy of stopping rayon fiber production.

V.4.2 ADR Mechanism

There have been many examples where ADR is being employed in environment dispute. People who sustain injury have frequently asked NGO to act on their behalf to negotiate settlement with the company suspected as polluter and the government. The settlement outside the court sometimes can be successful, but in other times, it may simply fail.

To give example of a case where the out of court settlement had been successful is the Kali Tapak case.[297] The case involved village community at Tapak village in Semarang, Jawa Tengah who complained about environment pollution on their small river, Kali Tapak.

A company who had been producing raw materials (calcium citrate) for soft drinks was suspected to be responsible for the pollution since 1976. The company had disposed production waste to Kali Tapak without going through a proper waste management. As a result, the waste had contaminated the village community fishing ponds. The ponds had significantly deteriorated and the cultivation of fish and shrimp of the village community had substantially declined.[298]

In 1977, the village community had asked the head of the Semarang Regency to look into the matter. However, the government refused to take any actions since the location had been approved for such industry. The village community then turned to Semarang Legal Aid Institute to take their case. The Legal Aid Institute, at the initial stage explored the mediation process between the village community on the one hand, and the company and the government on the other.

The three parties then concurred with the mediation process to which a series of meetings was held. At the end, the three parties reached an agreement. The three had agreed that the company should pay contribution to manage the waste, in addition to

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[297] The report of this case can be read in, Mas Achmad Santosa, et. al., Mediasi Lingkungan di Indonesia: Sebuah Pengalaman (Environmental Mediation in Indonesia: An Experience), (Jakarta: Lembaga Pengembangan Hukum Lingkungan Indonesia, 1998), 5-15.

[298] Hadimulyo, "Study on Alternative Dispute Resolution for Land, Labor and Environmental Dispute," The Institute for Policy Research and Advocacy, paper, without year.

managing the waste in accordance with government standard. They had also agreed that the community village withdraws the lawsuit against the company. The NGOs even agreed not to boycott the company and other surrounding companies suspecting of polluting the Kali Tapak. Mediation in this case has been successful as parties abandoned to take up the case before the court.

An example of where out of court settlement failed is the Tembok Dukuh case.[299] This case occurred in 1990 in Surabaya. The case concerns a company who was suspected of polluting water at the village of Tembok Dukuh. The village community turned to NGO for assistance. The NGO then proposed mediation to the local government. The proposal was agreed to which the village community, the company suspected of polluting, and the local government held meetings. However, after a series of meeting, the parties cannot reach any agreement and the mediation had come to failure.

As a result, the village community represented by the NGO took the case to the court. At the court, there was another effort for mediation. The judge examining the case acted as mediator. Unfortunately, it failed again. The lawsuit was then continued and the village community lost their case. They appealed to the Supreme Court, however the Supreme Court found there was not enough basis for the village community to file a lawsuit since, according to the Supreme Court, mediation process had not been thoroughly employed.

[299] The report of this case can be read in, Mas Achmad Santosa, et. al., Mediasi Lingkungan di Indonesia: Sebuah Pengalaman (Environmental Mediation in Indonesia: An Experience), (Jakarta: Lembaga Pengembangan Hukum Lingkungan Indonesia, 1998), 75-90.