

The logo for the Asian Development Bank (ADB), consisting of the letters 'ADB' in white serif font on a dark blue square background.

ADB

# STRENGTHENING THE CAPACITY FOR ENVIRONMENTAL AND CLIMATE CHANGE LAW IN ASIA AND THE PACIFIC

Colombo, Sri Lanka, 28<sup>th</sup> May – 1<sup>st</sup> June 2018

## SESSION 9: Environmental Litigation: A Comparative Perspective



Presented by Professor Rob Fowler, Law School,  
University of South Australia

# LEARNING OUTCOMES

## Teaching Methodology

- Appreciating the capacity to use guest lecturers

## Session Topic

- Awareness of the various forms of environmental litigation available to resolve environmental disputes
- Awareness of the particular role of the judiciary in dealing with environmental disputes



## RELEVANT SDGs

- Goal 16: Promote peaceful and inclusive societies for sustainable development, provide **access to justice** for all and build effective, accountable and inclusive institutions at all levels
- Target 16.3: Promote the rule of law at the national and international levels and ensure equal **access to justice** for all
- Target 16.6: Develop effective, accountable and transparent institutions at all levels



# FORMS OF ENVIRONMENTAL LITIGATION

- Criminal prosecution
- Private civil law actions for compensation for injury or damage to property (see also, class actions in some countries)
- Public interest litigation:
  - Judicial review (to challenge the legal validity of decisions or actions by government authorities)
  - Civil enforcement of environmental legislation (against both government authorities and non-government parties)
  - Rights-based actions (see Session 10)
- Merit appeals (to challenge correctness of decisions by authorities in terms of the environmental concerns raised) – often heard by specialist tribunals or courts



# Criminal Proceedings

- Used when there is an act or omission that is punishable by imprisonment and/or fine
- In case of private corporations, legislation may provide for “officers” of the organization (managers/directors) to also be prosecuted alongside the corporation
- Offences may at times involve “strict” liability – i.e., no need to prove intention or carelessness on the part of the defendant
- Other offences may allow for a defence of “due diligence” (usually requires a corporation to show it had a proper environmental management system)
- Penalties need to be adequate to act as a deterrent
- Civil (or administrative) penalties also may be imposed in addition to, or as an alternative to, criminal penalties



# Criminal & Civil Penalties - BP Deepwater Horizon Spill

## Criminal fines

- \$4 billion

## Civil penalties & damages

- \$5.5 billion civil penalties
  - \$14.7 damages to Federal, State and local governments
- (+ \$28 billion spent on three-month clean-up operation)



# CIVIL PROCEEDINGS

- 2 types:
  - General law claims (e.g., under common law principles or Civil Code)
  - Special claims based on provisions in environmental legislation (e.g. claims for pollution clean-up costs or for damages for harm caused to natural resources)



# CIVIL PROCEEDINGS – GENERAL LAW CLAIMS

- Normally focused on claiming **financial compensation** for the victims of pollution for damage caused to their health or property or business
- Basis of liability: may be either strict liability or negligence (i.e., lack of due care by the polluter)
- Procedure: where there is a large group of victims, a **class action** may be brought by representatives on behalf of all the victims;
- Causation: need to prove
  - Defendant caused the relevant pollution;
  - In cases of personal injury or harm, that the pollution caused the particular illness or death





# A SPECIAL ASPECT – TRANSNATIONAL CIVIL CLAIMS

- Bhopal December 1984
  - 1986: New York District Court dismisses civil claim on grounds of *forum non conveniens* on condition that Union Carbide accepts civil jurisdiction of Indian courts.
  - February 1989: Indian SC approves settlement of \$470m
  - December 1989: SC upholds authority of Indian government to settle claims on behalf of victims.



# CIVIL PROCEEDINGS – ACTIONS UNDER LEGISLATION

## (1) Liability for clean-up costs re chemical contamination of land and groundwater

- Statutory liability for site contamination may be both strict and retrospective
- Can extend beyond original polluter to subsequent/current owners and occupiers of relevant site
- Responsible party may be required to undertake clean-up at its own expense or to reimburse government agency for cost it has incurred in undertaking a clean-up itself



# CIVIL PROCEEDINGS – ACTIONS UNDER LEGISLATION

## (2) Liability for natural resources damage (“ecological restoration”)

- In addition to clean-up costs, polluters may be liable under legislation to pay “natural resources damages” (see, e.g., BP Deepwater Horizon)
- Applies where **ecological harm** has been caused to public natural resources (lakes, rivers, groundwater, wetlands, marine coastal waters)
- Damages are paid either to a government agency or to any other party that is a trustee for the affected resources (e.g., indigenous owners)
- Damages will cover:
  - the cost of **restoration** of the harmed ecological resources; or
  - Where restoration is not possible, the acquisition of an equivalent resource which may then be given protection from development
- Assessment of the amount of damages payable requires expert advice to be provided to the court



# PUBLIC INTEREST ACTIONS

- Much environmental litigation around the world is brought in the “public interest” rather than to protect or promote personal or private interests;
- For example, where environmental NGO’s are seeking to enforce environmental legislation by civil proceedings or to challenge the legality of government decisions.
- A critical issue in public interest actions is the right to sue (“standing”), also referred to under broader concept of “access to justice” (see SDGs);
- In many countries, courts have been required to determine the question of standing in public interest environmental litigation – in particular, whether environment NGOs or individual persons can sue:
  - See, e.g., *Sierra Club v Morton* (1972) (USA) and *Australian Conservation Foundation v Commonwealth* (1977) (Australia)
  - see also Christopher Stone, “Should Trees have Standing?” (1972)
- Legislative recognition of standing is now common



## PIEL “Champions” – Tony Oposa and MC Mehta

- There are some famous examples of public interest environmental law actions that have been initiated by **individual** environmental law “champions”
- Two such champions are Tony Oposa (Philippines) and Mr. MC Mehta (India)



# PIEL “Champions” – Tony Oposa

## **Oposa v Factoran, Supreme Court, Philippines, 1993)**

- Antonio Oposa sued in his own name and on behalf of future generations
- He requested the court to order the Secretary of Environment to cancel all existing timber licences in the Phillipines
- Background to legal action;
  - from 1962 - 1987, Philippines’ rainforest had reduced from 16 million hectares (53% of total land area) to 1.2 million hectares (4%);
  - by 1993, rainforest had further reduced to 850,000 hectares (2.8%) – the rate of deforestation was 200,000 hectares per year;
- Case involved the *Philippines Constitution 1987*, Article 16: “the State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature”



## PHILLIPINES: the OPOSA case (Supreme Court, 1993)

- Justice Davide in Philippines Supreme Court held that:
  - Article 16 gave the applicants an enforceable **right to a balanced and healthful ecology** and imposed on the government a corresponding duty to protect and advance this right;
  - the claim by the applicant Oposa should be upheld
  - the argument by the government that the action raised a purely political question was not acceptable
  - the **standing** of children yet unborn to bring the proceedings under the principle of inter-generational equity should be recognised
- This is one of the most widely referenced environmental cases around the world.



## INDIA: the M.C MEHTA cases (Supreme Court of India)

- Mr. M.C. Mehta, an Indian advocate, has presented many petitions to the Supreme Court of India on environmental issues
- Mehta has asked for orders for the enforcement of both Constitutional environmental rights and the provisions of environmental legislation by the Federal and State governments in India
- In different cases in which MC Mehta has been the applicant, the Supreme Court has:
  - ordered the removal of industries along the River Ganga which were causing severe pollution;
  - directed a State government to assist industries to relocate due to the effect of their air pollution on the Taj Mahal;
  - ordered that an environmental message be shown in Indian cinemas before any film is presented;





# INDIA: the M.C MEHTA cases (Supreme Court of India)

- - directed the city of New Delhi to convert the entire city bus fleet to natural gas fuel and prohibited the use of private buses more than 8 years old unless they have been converted to natural gas.
- In most of these cases, the Supreme Court has relied upon Articles which were introduced into the Indian Constitution in 1976 which declare that each citizen has a **right to a clean and healthy environment** and also a right to life (see further, Session 10)



## MERITS APPEALS

- in some countries, environmental legislation provides for decisions affecting the environment by government officials to be re-examined by specialist environmental courts or tribunals
- These appeal proceedings may be instituted by an unsuccessful applicant for an approval, or sometimes by a third party who objects to an approval having been granted
- the hearing of the appeal involves a review of the MERITS of the decision, rather than whether it was made in a lawfully correct manner (as in public interest litigation)
- Often, tribunals or courts will have a panel to hear such appeals which includes both legal and scientific/technical expertise



## ENVIRONMENTAL OR “GREEN” COURTS AND TRIBUNALS

The **Global Judges Symposium** in Johannesburg in August 2002 resulted in the creation of the *Johannesburg Principles on the Role of Law and Sustainable Development* which committed to the provision of :

“...access to justice for the settlement of environmental disputes and the defense and enforcement of environmental rights”

See: <http://wedocs.unep.org/handle/20.500.11822/2034>



# Development of Environmental Courts and Tribunals

- There are now over 1,200 environmental courts and tribunals (ECTs) in at least 44 countries around the world
- ECTs are being planned or discussed in another 20 countries, whilst 15 more countries have authorized, but not yet established, them;
  - “these new specialized adjudication bodies are rapidly changing not only traditional judicial and administrative structures, but the very manner in which environmental disputes are resolved”

George Pring and Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers*, UNEP, 2017, available at:

<http://wedocs.unep.org/handle/20.500.11822/10001>



## CONCLUSIONS

- A key element of a healthy and effective system of environmental law is the ability to bring public interest actions to protect the environment
- Many countries now have legal systems that enable such public interest actions to be brought by citizens or environment NGOs
- While such actions are often based on general principles of administrative law, legislation has often reinforced them by providing for open standing and creating new, statutory causes of action (e.g. for natural resources damages)
- There is also a world-wide trend of setting up specialist environmental courts or tribunals to hear environmental cases

