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ADB

***STRENGTHENING CAPACITY FOR ENVIRONMENT
THE ASIA-PACIFIC : DEVELOPING ENVIRONMENTAL LAW
CHAMPIONS***

Chiang Mai, Thailand, 19-23 June 2017

**SESSION 9: Environmental Litigation:
A Comparative Perspective**

Presented by Professor Rob Fowler



LEARNING OUTCOMES

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

Teaching Methodology

- Appreciating the capacity to use guest lecturers



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)
- Merit appeals (to challenge correctness of decisions by authorities in terms of the environmental concerns raised) – often to specialist tribunals or courts
- 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)



Criminal Proceedings

- Available when there is an act or omission that is punishable by imprisonment and/or fine
- In case of private corporations, officers of the organization may also be prosecuted alongside the corporation
- Offences may at times involve “strict” liability – i.e., no need to prove intention or carelessness
- Other offences may allow for defence of “due diligence”
- Increasing use of “civil” or “administrative” penalties by environmental authorities (lesser burden of proof) – either as an alternative, or in addition, to criminal penalties (see, e.g., Exxon Valdez and BP Deepwater Horizon oil spills in USA)



CIVIL PROCEEDINGS

- 2 types:
 - General law claims (e.g., under Civil Code or common law principles)
 - Special claims based on legislative provisions (e.g. for clean-up costs and natural resources damages)



CIVIL PROCEEDINGS – GENERAL LAW CLAIMS

- Normally focused on claiming financial compensation for the victims of pollution for damage caused to their health or property
- 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



CIVIL PROCEEDINGS – ACTIONS UNDER LEGISLATION

(1) liability for clean-up costs

- Common re contaminated land/water and oil or other pollution spills;
- Liability may be both strict and retrospective (for site contamination)
- 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 ahs incurred in undertaking a clean-up itself
- In criminal proceedings, convicted party may also be ordered to pay clean-up costs in addition to a fine or imprisonment penalty



CIVIL PROCEEDINGS – ACTIONS UNDER LEGISLATION

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

- In addition to clean-up costs, polluters may be liable to pay “natural resources damages”
- 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 requires expert advice to be provided to the court



PUBLIC INTEREST ACTIONS

- *Most environmental litigation 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.*
- *Critical issue in public interest actions is the right to sue (“standing”):*
 - *See, e.g., **Sierra Club v Morton** ((1972) (USA) and **Australian Conservation Foundation v Commonwealth** (1977) (Australia)*
 - *Re rights for nature, see Christopher Stone, “Should Trees have Standing?” (1972) and more recent “wild law” discussions*
 - *See also public trust doctrine, based on Roman law principle (Joseph Sax, “Defending the Environment”)*
 - *Legislative recognition of standing now common*



US PUBLIC TRUST LAW

PENNSYLVANIA ENVIRONMENTAL DEFENSE FOUNDATION v. COMMONWEALTH OF PENNSYLVANIA, AND GOVERNOR OF PENNSYLVANIA (decision handed down 20 June 2017)

- Article I, Section 27 of the Pennsylvania Constitution provides:

“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people including generations yet to come.”



US PUBLIC TRUST LAW

PENNSYLVANIA case

- Supreme Court of Pennsylvania held:

“Because state parks and forests, including the oil and gas minerals therein, are part of the corpus of Pennsylvania’s environmental public trust, we hold that the Commonwealth, as trustee, must manage them according to the plain language of Section 27, which imposes fiduciary duties consistent with Pennsylvania trust law. We further find that the constitutional language controls how the Commonwealth may dispose of any proceeds generated from the sale of its public natural resources.”

- Decision has significant implications for future Marcellus shale gas operations in Pennsylvania (i.e., from “fracking”), in particular challenging recent additional leases and the diversion of royalties from conservation purposes to general revenue.



PHILLIPINES: the OPOSA case (Supreme Court, 1993)

- *There are numerous examples of public interest environmental law actions in the Asia-Pacific region, often initiated by individual environmental law “champions” – e.g. the Oposa case in the Philippines*
- *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;*
- *applicant was a Philippines lawyer (Antonio Oposa) who 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*



PHILLIPINES: the OPOSA case (Supreme Court, 1993)

- *under 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”.)*
- *(Justice Davide 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.*
- *He refused to accept the argument by the government that the action raised a purely political question*
- *Justice Davide also recognised the standing of children yet unborn to bring the proceedings under the principle of intergenerational equity.*



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

- *Mr. M.C. Mehta is an Indian advocate who 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 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;*
- *Most of the cases brought by Mehta to the Indian Supreme Court have arisen from the lack of proper implementation and enforcement of environmental legislation by the national and State governments and have resulted in detailed and extensive orders against the relevant government authorities*



LESSONS FROM THE INDIAN EXPERIENCE

- *The example set by the Indian Supreme Court has been followed in the State High Courts; for example, the Gujarat High Court in April 2000 ordered the removal of all unauthorised buildings erected in the numerous lakes in the city of Ahmedabad;*
- *when the Court ascertained in April 2002 that government officials had ignored the order by issuing building approvals to many people, the court set aside the approvals, asked the relevant officials to provide an unconditional apology to the court and directed them to give a personal undertaking to pay damages to the parties whose approvals were cancelled;)*
- *The Gujarat case demonstrates the challenge faced by the Indian Courts in trying to compel governments to implement environmental laws in the face of insufficient resources, lack of political will and frequent corruption.*



OTHER EXAMPLES OF PUBLIC INTEREST LITIGATION

- *There are many other decisions in Asia-Pacific countries which involve the implementation and enforcement of environmental law*
- *for example, courts that have taken a liberal approach to the recognition of standing in environmental cases (eg., in Bangladesh, see *Farooque v Bangladesh* (1996); in Malaysia, *Kajing Tubek v Ekran Bhd* (1996) (the *Bakun Dam case*));*
- *Differences in the political, legal and social cultures of different countries deserve recognition and respect, but nevertheless the opportunity exists in all Asian-Pacific countries for the judiciary to demonstrate a clear and unequivocal commitment to the proper administration of environmental law*



ENVIRONMENTAL OR “GREEN” COURTS AND TRIBUNALS

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”



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 (as of 2016)
- 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”.

See 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>

