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### MEDIATING ENVIRONMENTAL DISPUTES

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#### ABSTRACT

This paper argues that disputes concerning the environment can arise in public law  
and private law contexts but overall without an effective national legal regime  
providing for effective and remediable causes of action the fundamentals for effective  
mediation are absent.

#### THE PAPER

As the title of this paper suggests it is in the context of the mediation of disputes  
concerning the environment that is the central theme of this paper. A definition of terms and  
some assumptions that I make are therefore relevant.

I proceed with the paper on the basis that the term 'environment' and 'environmental'  
are construed widely. That is to say:

"Environment [and 'environmental'] includes all aspects of the surroundings of  
humans, whether affecting any human as an individual or in his or her social groupings."<sup>1</sup>

Further, disputes concerning the environment include, for me, any dispute whether in  
private law or a public law, which concerns the environment.

In the context of disputes concerning the environment, I speak of a system of law,  
including customary law, giving rise to rights, duties, liabilities, obligations and privileges in  
respect of matters concerning or which might concern, the environment, examples of which  
might include land rights, permits, licenses or approvals for the carrying out of development,  
subject to conditions and which might also include private rights in contract and tort  
(negligence or nuisance) which might have an impact on the environment.

The last paragraph might also be read as demonstrating the wide range or types of  
subject matter, which may give rise to disputation and which might therefore be capable of  
mediation. It can be seen therefore that disputes, stemming from numerous fact situations, are  
nevertheless grounded in a system of law, which recognises or stipulates rights, liabilities,  
duties, obligations and privileges in respect of matters concerning the environment. In my  
view it is the system of law operating within a State, which, in the circumstances just  
outlined, is the 'crutch' by which mediation of disputes concerning the environment can be  
effectively pursued.

#### CLIMATE CONSCIOUSNESS

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<sup>1</sup> *Environmental Planning and Assessment Act* (NSW) 1979 s.4 definitions.

It would be wrong of me to suggest that what I have just said leads to an imperative, that is, that practitioners engaging in the mediation of environmental disputes should themselves (whether as mediator, or party's representative) be expert in the field of environmental law. On the other hand there is much to be said about being environmentally conscious in respect of the resolution of disputes because it must be recognised that many and various actions might have an environmental effect, whether at a local, regional, national or international level. Mediators, party's representatives and their clients should be aware of climate change issues, for example, as they go about their work.

Climate change should not be seen as being removed from the practise of dispute resolution. It is as much a local issue as it is an international issue. Climate change is a cumulative problem and the combined effect of small actions or consequences may, and probably is, environmentally significant.<sup>2</sup> Insofar as my view (based on respected Indonesian opinion both academic and jurisprudential) is that the UNFCCC is a part of the law of Indonesia's domestic law (which is explained later in this paper), disputes in relation to the implementation of the treaty and protocols may give rise to significant and resolvable issues by the mediation process.

Mediation practitioners should also be aware that the existence of a legal entitlement to carry out an activity (subject to review and appeal with time constraints) should be accompanied by an equally important but more subtle or ethereal, concept of social licence. In this context there is a growing international trend for corporations to embrace the concept of corporate social responsibility (CSR) with what has been referred to as the triple bottom line in the assessment of corporate responsibility: economic, social and environmental impacts of the business of the corporation.<sup>3</sup>

### THE MEDIATION PROCESS GENERALLY

It is so often said, and I think it is true, that mediation is a process. But in the mediation of environmental issues (defined broadly as above) it is in advancing the process that an environmentally conscious mediator having heard the parties' positions will be in a position to tease out interests to give parties the opportunity to realise that broader environmental issues have an importance perhaps previously unrealised. The chopping down of a tree or hectares of trees gives rise to the issue (amongst others) of climate impact. It becomes not a matter of relativities, but a matter of environmental impact (cumulative environmental impact indeed), against which the economic benefit of the activity, often substantially confined to a corporate entity without significant public benefit, has to be weighed.

That is one example only, but it does emphasise that environmental issues have inevitable impacts affecting more than the immediate parties to the dispute being mediated. All too often it is overlooked that environmental issues impact upon the public and, therefore, the public interest becomes a relevant consideration.

Further, even though this paper suggests that environmental issues might arise in private law as well as public law, it is in the latter that there is more likely to be a party significantly representing the public interest, that is a public authority, whether at a local, regional or national level. It is my view that a public authority does or should represent the public interest and the public interest should extend to considerations not merely of domestic

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<sup>2</sup> *Implementing a climate conscious approach in daily legal practice* Preston, Hon Justice Brian, CJ Land and Environment Court of NSW 4 December 2015, Monash Uni Law Chambers Melbourne.

<sup>3</sup> Wilson, Dennis *Corporate Social Responsibility in the Energy and Resources Sector in Liberia* Sept 2012 Academia.edu (accessed 30 February 2016)

laws pursuant to which they function, but, as well, international considerations arising under treaty law. After all, Indonesia, for example, is not only a member of the UN, but the nation has as well ratified, acceded to accepted or approved a number of international treaties and protocols, including, for example, the ratification of the United Nations Framework Convention on Climate Change (UNFCCC) up to and including the agreements and protocols reached at Conference of the Parties 21 (COP 21) Paris December 2015.

It is neither my purpose nor wish to suggest that the Courts of Indonesia or of any other State for that matter, should interpret that Country's laws consistently with international treaties. But what I can suggest is that the flexibility of addressing issues in dispute in mediation can quite properly consider these matters and might reasonably be reflected in the issues and interests of the parties addressed as a part of the mediation process.

### THE LEGAL FRAMEWORK FOR DISPUTATION

Generally, I assume that mediation of environmental issues can only be effective where the legal system of the State within which the dispute arises provides for enforceable rights, duties, liabilities, obligations and privileges. Without the ability to test the validity of administrative decisions and without the ability to seek the enforcement of those rights, duties etc. either by criminal sanction or civil enforcement, there is little incentive for disputes concerning the environment to be the subject of mediation at all. In that sense, the legal system prevailing in a State is I repeat, the crutch by which mediation can stand as an appropriate method of dispute resolution.

Of course, that gives rise to the question of standing, or a right of action in individuals or organisations to commence action in a Court for or in respect of the enforcement of an environmental law. The question of standing is not so much an issue in a private law action. In public law 2 examples, that of New South Wales, Australia and that of Indonesia, might be addressed.

In a paper by Fajar Winarni published in 2013<sup>4</sup> the author identifies the legal basis of the right of environmental organizations in Indonesia to take action 'associated with the responsibility to preserve the function of the environment' stipulated in Article 67 of Law No. 32 of 2009 on the Protection of Environmental Management:

"...participation rights are...based on every person's right to a good and healthy environment as stipulated in Article 65"

That standing is in contrast to the constraint in Indonesian tort law, that is, 'point d'interest, point d'action' or 'no action without legal interest.'

The breadth of the law is important because standing in public and private law issues to protect the environment, from the judicial testing of the validity of an administrative action to a broad action in respect of the enforcement of an environmental law to the private action in tort which may directly or indirectly affect the environment, seems to be clear. The areas of disputation giving rise to the possibility of a mediated solution, including issues which might involve the public interest are seemingly wide in Indonesia. That is to say, the legal system of Indonesia gives good opportunity in its laws to bring actions in Courts in respect of environmental issues giving rise to disputes, which are capable of a mediated solution. The author approaches the topic with a degree of realism however, recognising that both

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<sup>4</sup> Winarni, Fajar *The Recognition of the Legal Standing of Environmental Organizations in Indonesia* 2013 *Mimbar Hukum* Vol 25 3 October 2014 505-515

environmental organizations and the Courts have a way to go in order to completely accept the standing of such organizations in accordance with the apparent intent reflected in the law.

In New South Wales Australia, s123 (1) of the Environmental Planning and Assessment Act provides relevantly:

“Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.”<sup>5</sup>

The very wide standing provision has allowed it to be suggested that ‘the man from Timbuktu’ has the same standing to bring an action as a person more directly affected by the breach complained of.

### INTERNATIONAL LAW IN INDONESIA

In the context of international law, my view has for a long time been that Indonesia is a monist country where international treaties, once ratified, acceded to etc. become a part of the domestic law of the nation. That view has arisen from a number of sources, but mainly academic literature and jurisprudence, the former including the work of Professor Mochtar Kusumaatmadja, formerly Dean of the Faculty of Law at University of Padjadjaran in Bandung, Indonesian Justice Minister (1973-78), and Indonesian Foreign Minister (1978-83).

The debate however appears to be ongoing and there is a significant body of academic literature suggesting that Indonesia is a dualist country to the effect that international treaties require domestic legislation to be a part of the domestic law of the nation.<sup>6</sup>

This paper assumes that Indonesia is a monist nation consistent with respected Indonesian authority, and that Australia is a dualist nation to the effect that in Indonesia once ratified, international agreements override domestic law to the extent of any inconsistency.<sup>7</sup> Contrast Australia where to be a part of the domestic law of the country, domestic legislation is required (see for example the International Arbitration Act 1974 (Australia) making the ‘New York Convention’ and the ‘Model Law’ a domestic law of Australia).<sup>8</sup>

If the position in Indonesia is as I assume it to be, then international agreements must, it seems, be considered in terms of environmental impact whenever, for example, a state instrumentality or authority grants a license, approval, permit to carry out an activity or development.

But, the legal and institutional framework for environmental law (and, it might be said, matters giving rise to environmental issues) tend to be highly individualised and very different from country to country. But I note that in Indonesia, for example, there is a form of judicial review of administrative decisions.

In the example of Indonesia, State Administrative Courts would appear to have the authority to examine, adjudicate and decide state administrative disputes, that is, disputes

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<sup>5</sup> *Environmental Planning and Assessment Act 1979* [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au) (accessed 30 January 2016).

<sup>6</sup> Butt, Simon *The Position of International Law Within the Indonesian Legal System* Emory International Law Review 2014 Vol 28 p1.

<sup>7</sup> Ibid.

<sup>8</sup> And see also the *Protection of the Environment Administration Act 1991*s6 of which brings into the domestic law of New South Wales the concept of Environmentally Sustainable Development including the ‘precautionary principle’ and the concept of ‘inter-generational equity.’

between persons or civil legal entities and a state administrative official or institution as a consequence of the issuance of a State Administrative Decision. State Administrative Decisions that can be examined by the courts with appeal rights to the State Administrative High Court are decisions that are concrete, individual and final.

The groundwork for an environmental dispute is clear in those circumstances and it would be difficult to suggest that the mediation process is not an appropriate vehicle to resolve such disputes.

### NEW SOUTH WALES, AUSTRALIA AS AN EXAMPLE

The hub of Environmental Law in New South Wales might be said to be the Environmental Planning and Assessment Act 1979<sup>9</sup> and the provisions of s123 have already been mentioned. The Land and Environment Court Act 1979 (Court Act) established the Land and Environment Court and Part 3 Division 1 of that Act gives the Court jurisdiction to hear and determine a wide range of issues. Importantly, for the purpose of this paper is s34 of the Court Act:

“(1) If proceedings are pending in Class 1, 2 or 3 of the Court’s jurisdiction, the Court:

(a) may arrange a conciliation conference between the parties or their representatives, with or without their consent, and

(b) if it does so, must notify the parties or their representatives of the time and place fixed for the conference.

(1A) It is the duty of each party to proceedings where a conciliation conference has been arranged under subsection (1) to participate, in good faith, in the conciliation conference.

(2) A conciliation conference is to be presided over by a single Commissioner.”

S34 and s34A of the Court Act and Part 4 of the Civil Procedure Act 2005 (New South Wales) comprehensively provide within the procedures of the Land and Environment Court a system of alternate dispute resolution of disputes concerning the environment within its jurisdiction. Each Commissioner in the Court is a trained mediator and it is generally the Commissioner who presides in the alternate dispute resolution procedures in the Court.

Generally speaking most matters commenced in the Court go through alternate dispute resolution procedures and, if not resolved, then to a hearing. The system has been shown to be successful. The legislative provisions are also indicative of the State acceptance of alternate dispute resolution as a legitimate means of addressing public and private law issues concerning the environment, including that the public interest can be adequately addressed within the mediation process.

### CONCLUSION

As can be seen an effective legal system with causes of action and identified wrongs, and effective remedies (civil and criminal) facilitates meaningful mediation of environmental disputes. In the examples of Indonesia, and Australia, effective legal systems are crucial. Matters capable of mediation are of a broad character and include matters of public as well as private law.

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<sup>9</sup> Above n5

It is important in my view that mediators and representatives of parties in mediation be aware of environmental issues. The resolution of disputes may therefore be under the umbrella of a sound environmental culture.