

## Fighting the Giants: Efforts in Holding Corporation Responsible for Environmental Damages in Indonesia

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### ARTICLE INFO

#### Keywords:

Corporate Liability;  
Environmental Damage;  
Indonesia; Court Decision

#### How to cite:

Afriansyah, A., Jayadi, A.,  
and Vania, A. (2018).  
*Fighting the Giants: Efforts  
in Holding Corporation  
Responsible for  
Environmental Damages in  
Indonesia*, Hasanuddin Law  
Review, 4(3): 325-338

#### DOI:

10.20956/halrev.v4i3.1626

### ABSTRACT

This paper focuses on examining environmental cases before the Indonesian courts from the past ten years. To be specific, this paper will study four major cases with regard private law, six major cases with regard to criminal law, and class action cases in Indonesia. This period of time explains trending increase of environmental cases before the courts. In this regard, Alternative Dispute Resolution (ADR) becomes the main preference of settling the environmental disputes. However, ADR seems not able to bring justice to the fullest especially when it comes to the corporations. It is not justice to the fullest in the sense that there seems no deterrence ADR brings to the corporations when the corporations do indeed damages the environment. As the environmental awareness increases and at the same time, ADR seems fail to fulfill the expectation to save the environment, another way to bring justice emerges namely through various efforts in lawsuits. Nevertheless, such lawsuits are not perfect as there are varieties of results from Indonesian courts. This paper argues that such variety of decisions have been heavily influence by the availability of scientific data and the knowledge of the panel of judges. Specifically, in the case of class action lawsuit, those who defend the environment has limitation on resources usually initiate such lawsuit. Whereas, corporation that being sued is relatively have the capacity to face the trial due to its high financial resources. Nevertheless, "fighting the giants" has been the paradigm when it comes to pursue the responsibility of corporation of its wrongdoing especially environmental damages.

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### 1. Introduction

December 2015 and January 2016 became the most notable events in Indonesian Environmental Law jurisprudence. In December 2015, District Court of South Sumatera had dismissed all civil charges of IDR 7.9 Trillions to PT Bumi Mekar Hijau (PT BMH). This judgment has lamented by most Indonesian environmentalist especially when they quote on of the judge's comment: "...burning the forest is not damaging the environment

*because they can be re-planted*". A month after this decision, a 180-degree court decision from District Court of Meulaboh, Aceh had held a company, PT Surya Panen Subur (PT SPS) guilty for burning a forest of 1.200 hectare by ordering the company to pay compensation of IDR 3 billions. In addition to civil liability, the court also punished two field coordinators of the company by three years of prison.<sup>1</sup>

Such contradicting results of court decisions explain the variety of result when it comes to defending the environment in context of judiciary. This article observes the trends of courts' decisions in relating to environmental damage. To be specific, this paper will study four major cases with regard private law, six major cases with regard to criminal law, and class action cases in Indonesia. Despite of the increased number of environmental cases before the courts, it seems that the judgments have far from consistent.

It can be argued that differences of capability of judges in terms of environmental knowledge have become the major drawbacks. Let alone the allegations of corruption practices among the legal practitioners also contribute significantly. Moreover, when it comes to corporate environmental liability, at least the community may give support to defend the environment by initiating the so-called "class-action" lawsuit.

This paper will firstly analyzing the environmental protection in the context of corporations in Indonesia. Then, it follows the discussion on the legal recourses to strengthen efforts to held corporation liable for environmental damage namely civil, criminal, and class action lawsuits. As the focus of this article, a number of cases will be analyzed to show how diverse is the result of the courts for environmental liability.

### **3) Corporations and Environmental Disputes in Indonesian Law**

This part will explain corporations and its relation with environmental disputes in Indonesian law. In doing so, this part will first peruse corporations related laws and explain what are the existing environmental disputes in Indonesia. Then, this part will analyze what such laws entail for corporations in Indonesia when it comes to (the adjudication of) environmental disputes.

#### **3.1. Corporations in Indonesian Laws**

This sub-part will discuss corporation related laws in Indonesia. The reason for this discussion is that it is important to know first what the legal rules say about the corporations in Indonesia. Legal rules that will be perused in this sub-part is Law No. 40 of 2007 on Limited Liability Companies, Law No. 25 of 2007 on Investment, and Law No. 32 of 2009 on Protection and Management of the Environment.

In this writing, the term "corporations" includes the limited liability companies. According to Law No. 40 of 2007 on Limited Liability Companies (hereinafter, "Law No. 40 of 2007"), the definition of "limited liability companies" is:

*"...a legal entity which constitutes an alliance of capital established pursuant to a contract in order to carry on business activities with an authorized capital all of which is*

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<sup>1</sup> Sapariah Saturi, "Putusan Hukum Ini Beri Kabar Baik bagi Lingkungan, Apakah Itu?" (This Law Judgement gives Good News for the Environment, What is that?), 30 January 2016, available at <<http://www.mongabay.co.id/2016/01/30/putusan-hukum-ini-beri-kabar-baik-bagi-lingkungan-apakah-itu/>>

*divided into shares and which fulfils the requirements stipulated in the Law and its implementing regulations.”<sup>2</sup>*

With regard to the protection of environment, Law No. 40 of 2007 regulates that corporations in Indonesia, when they do their business in the field of or in relation to the field of natural resources, they must conduct what the Law calls as “Environmental and Social Responsibility”.<sup>3</sup> It is indeed right that the Environmental and Social Responsibility is not quite relevant to the environmental disputes that become the center of the discussion in this writing. Nevertheless, it is still pivotal to mention the Environmental and Social Responsibility here to show that in Indonesian legal context, specifically Law No. 40 of 2007, the corporations must take into account the environmental sustainability when doing their business.<sup>4</sup>

Other than Law No. 40 of 2007, Law No. 25 of 2007 on Investment (hereinafter, “Law No. 25 of 2007”) and Law No. 32 of 2009 on Protection and Management of the Environment (hereinafter, “Law No. 32 of 2009”) are to other laws that are regulating about corporations in Indonesia. Law No. 25 of 2007 regulates about investment in Indonesia. Regarding the corporations, the provisions of Law No. 25 of 2007 includes the provisions on the rights, obligations and responsibilities of investors. Such rights, obligations, and responsibilities are stipulated in the Article 14 to Article 17 of the Law No. 25 of 2007. Investors here includes corporations themselves.<sup>5</sup> In relation to the environmental protection, Article 16 of the Law No. 25 of 2007 stipulates that investors have the responsibilities to protect the environment. Furthermore, Article 17 of the Law No. 25 of 2007 regulates that investors that conduct their business in the field of non-renewable natural resources, such investors have the obligation to provide funds to restore the environment based on the existing laws and regulations. Here again in the Law No. 25 of 2007, there exists responsibilities even obligations for the corporations to care about the environment.

The last law that will be discussed here is Law No. 32 of 2009. According to the Considerant Part of this Law, Law No. 32 of 2009 is important because it meant to “...ensure the legal certainty and the protection of the right of every person to earn a good and healthy living environment as part of overall protection of the ecosystem...”<sup>6</sup> In this Law, corporations not only have the obligations to protect the environment but also this Law regulates what are prohibited activities to be done for the sake of protecting the environment. Article 69 of the Law No. 32 of 2009 provides a list of prohibited activities which includes prohibition to pollute and damage the environment and to dump prohibited, dangerous and poisonous waste onto Indonesian territory.

To sum up, corporations in Indonesia are bound to responsibilities and obligations to protect the environment. Such responsibilities and obligations are stipulated in Law No. 40 of 2007, Law No. 25 of 2007, and Law No. 32 of 2009.

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<sup>2</sup> Unofficial translation by the author. See Law No. 40 of 2007 on Limited Liability Companies.

<sup>3</sup> See Article 74 of Law No. 40 of 2007 on Limited Liability Companies.

<sup>4</sup> See also Considerant part of Law No. 40 of 2007 on Limited Liability Companies.

<sup>5</sup> See Article 1 Paragraph 4 of Law No. 25 of 2007 on Investment.

<sup>6</sup> Unofficial translation by the author. See Considerant Part of Law No. 32 of 2009 on Protection and Management of the Environment, letter f.

### 3.2. Environmental Disputes in Indonesia

This sub-part will discuss environmental disputes in Indonesia specifically how does Indonesian law says about (resolving) environmental disputes. This sub-part will peruse Law No. 32 of 2009 on Protection and Management of the Environment.

The primary Indonesian law that regulated about (resolving) environmental disputes is Law No. 32 of 2009 on Protection and Management of the Environment (hereinafter, "Law No. 32 of 2009"). The Law defines "Environmental Disputes" as "*disputes between two parties or more arising from activities that are potentially and/or already impact the environment*".<sup>7</sup> To choose which forum that will be settling the environmental disputes, the Law regulates that it is according to the parties (voluntary choice) which forum that they want to choose in resolving environmental disputes.<sup>8</sup> There are two forums for settling environmental disputes namely court and non-court (the non-court includes through mediation or arbitration).<sup>9</sup> As for the burden of proof in settling environmental dispute, the Law No. 32 of 2009 uses strict liability. Strict liability means liability without the burden to prove guilt or fault.<sup>10</sup>

In the Law No. 32 of 2009, there are at least three parties that have the standing to file a lawsuit. The first party is the national and local government.<sup>11</sup> National and local government here means institution of national and local government that has responsibilities in protecting the environment.<sup>12</sup> The second party is the communities of people utilizing class action lawsuits.<sup>13</sup> The class action lawsuits can be filed if there are similarities in facts or events, legal basis and type of lawsuits between the representative of the communities and the communities themselves.<sup>14</sup> Last but not least, organizations that focus in the environmental field can file lawsuits.<sup>15</sup> However, there is limitation of this right. As stipulated in Article 92 Paragraph (2) of Law No. 32 of 2009, the limitation is that what can be asked in the lawsuits are limited to asking to do certain activities without compensation other than actual expenses.

Furthermore, there are three types of lawsuit in the context of environmental disputes in Law No. 32 of 2009. Those three types are administrative, criminal, and civil lawsuits. As stipulated in Article 93 Paragraph (1) of Law No. 32 of 2009, administrative lawsuits can be filed, for example, if the state institution or apparatus gives environmental permit even though the documents to apply such permit are incomplete (without Analysis about Environmental Impact or AMDAL document). As for criminal conducts, it is regulated in the Part XV of the Law No. 32 of 2009. Criminal conduct here for example distributing genetically modified products to the environment that is not in accordance with laws and regulations. As for civil lawsuits, it can be a lawsuit asking for compensation for environmentally damaging activities.

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<sup>7</sup> Unofficial translation by the author. See Article 1 number 25 of Law No. 32 of 2009 on Protection and Management of Environmental Law.

<sup>8</sup> Article 84 Paragraph (2) of the Law No. 32 of 2009 on Protection and Management of Environmental Law.

<sup>9</sup> Article 84 Paragraph (1) and Article 85 of the Law No. 32 of 2009.

<sup>10</sup> See Andri Gunawan Wibisana (2015), "Menggugat Kebakaran Hutan", Kompas 7 Oktober 2015, <http://print.kompas.com/baca/2015/10/07/Menggugat-Kebakaran-Hutan> [last accessed 4 September 2017].

<sup>11</sup> Article 90 of the Law No. 32 of 2009.

<sup>12</sup> Article 90 Paragraph (1) of the Law No. 32 of 2009.

<sup>13</sup> Article 91 of the Law No. 32 of 2009.

<sup>14</sup> Article 91 Paragraph (2) of the Law No. 32 of 2009.

<sup>15</sup> See Article 92 of the Law No. 32 of 2009.

To briefly sum up, Law No. 32 of 2009 regulates about environmental disputes including the forum to resolve such disputes namely court and non-court, the types of lawsuits namely civil, criminal and administrative lawsuits, and types of party that can file lawsuits namely government both local and national, communities of people, and organizations that focus in environmental field.

#### 4) Corporations and the Efforts of Resolving Environmental Disputes in Indonesia

After discussing what the legal rules in Indonesia says about the corporations and knowing what are the existing environmental disputes in Indonesia, this sub-part then will analyze what such legal rules entail for the corporations and give succinct elaboration on the positioning of the corporations when it comes to resolving environmental disputes.

As mentioned before, in the Indonesian law, corporations have the obligations in protecting the environment. Such obligations are enshrined in laws like Law No. 40 of 2007 on Limited Liability Companies, Law No. 25 of 2007 on Investment, and Law No. 32 of 2009 on Protection and Management of the Environment. The orientation of the corporations should not only be their business *per se* but also, when their business is in relation with or about natural resources, the corporations must conduct what is called as Environmental Social Responsibilities.

Nevertheless, when it comes to environmental disputes according to the Law No. 32 of 2009, corporations have different positioning. Positioning here means that how the law perceived corporations; do they simply the bearer of the obligations to protect the environment and must conduct Environmental Social Responsibilities? Or there is more that can be done when it comes to environmental disputes? Law No. 32 of 2009 puts the possibilities of having corporations to be responsible for environmental damages they make not only in civil lawsuits but in criminal lawsuits as well.

First of law, Law No. 32 of 2009 defines “every person” as both natural person and legal person in which the legal person includes corporations such as limited liability companies.<sup>16</sup> In the context of Law No. 32 of 2009, such “every person” can be held liable both in civil and criminal lawsuits if they allegedly damage the environment through prohibited activities particularly under the Law No. 32 of 2009.

Secondly, the corporations can be used based on either (or both) in criminal or civil lawsuits. It is not unfamiliar in Indonesian legal context to make corporations responsible and using the civil lawsuits against them. Nonetheless, it is subject to discussion about suing the corporations to be held responsible criminally.<sup>17</sup> Suhartono explains that corporations can be held liable in criminal sense based on three criteria namely (a) if the corporations do the environmental crime by themselves, (b) if such crime is carried out for the advantages of the corporations, and/or (c) if such crime is done in the name of or on behalf of the corporations.<sup>18</sup> As for the civil lawsuits, as

<sup>16</sup> Article 1 Number 32 of Law No. 32 of 2009

<sup>17</sup> See Slamet Suhartono (2017), “Corporate responsibility for environmental crime in Indonesia”, *Journal of Law and Conflict Resolution* Vol. 9(1), pp. 1-8, June 2017, <http://www.academicjournals.org/journal/ILCR/article-full-text-pdf/D428B6165071> (Last accessed 4 September 2017). See further Abdul Salam Siku (2013), “Corporation Crime Liability of Perspective Penal Reform”, *Journal of Humanity*, Vol. 1, No. 1, July 2013, <http://www.journalofhumanity.org/index.php/jh/article/view/2/2> (Last accessed 4 September 2017).

<sup>18</sup> Slamet Suhartono (2017), *Id*, p. 7-8.

mentioned above, it is usually about asking for compensations for the environmental damages that the corporations make.

Thirdly, corporations can face many kinds of lawsuits that coming from various kind of parties. As explained before, not only the national and local government can sue the corporations but also communities of people and organization that focus in environmental field can do so as well. This writing is particularly interested in the lawsuits by communities of people or class action lawsuits, which this writing will elaborate on this in the Part 3 of this writing.

Lastly, other than lawsuits, the corporations also can be given administrative sanctions if they do not comply with (administrative) legal rules in environmental field. According to Article 76 Paragraph 1 of the Law No. 32 of 2009, the administrative sanctions will be given if there is a violation in the environmental permit. Based on the Article 76 Paragraph 2 of the Law No. 32 of 2009, types of administrative sanctions are written notice, enforcement by the government, permit freeze and permit annulment.

Back to the above question: do corporations simply the bearer of the obligations to protect the environment and must conduct Environmental Social Responsibilities? Or there is more that can be done when it comes to environmental disputes? Based on the provisions on the Law No. 32 of 2009, corporations are not simply have the obligations and conduct their Environmental Social Responsibilities. Under the Law No. 32 of 2009, there are ways to make corporations responsible for the environmental damages they make. However, the next question will be: will those ways including civil, criminal, and class action lawsuits effective in making the corporations responsible for the environmental damages? This writing will elaborate more on this question in the case analysis part below.

### **3. Cases Related to the Environment Protection**

This part will explain class action in the context of Indonesian law and in relation to the environmental disputes in Indonesia. To do so, this part will discuss Law No. 32 of 2009 on Protection and Management of the Environment and other relevant legal instruments.

As previously stated, under the Law No. 32 of 2009, communities of people can file an environmental related lawsuit. This lawsuit by the communities of people is regulated under the Article 91 of Law No. 32 of 2009. Another name for this kind of lawsuit is class action lawsuit in which a term that will be used throughout this writing.

Other than Law No. 32 of 2009, there are two related laws with regard the class actions lawsuits. Santosa explains those laws are among others Law No. 41 of 1999 regarding Forestry and Law No. 8 of 1999 on Consumer Protection.<sup>19</sup> Furthermore, it is also worth to look at the civil law when discussing about the class action lawsuit in Indonesian legal context.

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<sup>19</sup> Mas Achmad Santosa, "Indonesia National Report", [http://globalclassactions.stanford.edu/sites/default/files/documents/Indonesia\\_national\\_report.pdf](http://globalclassactions.stanford.edu/sites/default/files/documents/Indonesia_national_report.pdf) [last accessed 7 September 2017].

According to Santosa, there are six stages of procedure based on the Indonesian civil law procedure. Those six stages are as follow:<sup>20</sup>

- a. File the suit. In order to file a class action lawsuit, especially in the context of environmental dispute, the requirements stipulated in the Article 91 of the Law No. 32 of 2009 must be followed. Article 91 (2) of the Law No. 32 of 2009 says that the lawsuit can be filed if there are similarities in facts or events, legal grounds and type of suits between the representative of the communities and the communities themselves.
- b. Counter-plea between plaintiff and defendant.
- c. Present evidence before the court.
- d. Decision/verdict.
- e. Execution.

Furthermore, Santosa explains that the distinctive characters of procedures in class action lawsuit in comparison with civil lawsuit (as explained above) are that in the class action lawsuit: (i) there is a stage in the procedure to certify and notify. This stage probably is made to accommodate the large number of people so that they know what the lawsuit is about and to prevent false claims made by the representative of the communities in filing the lawsuit; and (ii) at the decision stage, there will be a proposal of temporary settlement and a time to notify the distribution of the compensation.<sup>21</sup>

As mentioned before, Law No. 41 of 1999 regarding Forestry (hereinafter, "Law No. 41 of 1999") also regulated about class action. Article 71 Paragraph (1) of the Law No. 41 of 1999 stipulates that communities of people have the right to file a class action lawsuit through their representative(s) for the damaging activities on forest that disadvantages their livelihood.<sup>22</sup> Furthermore, the Article 72 of the Law No. 41 of 1999 stipulates that such class lawsuit is only limited to damaging activities in term of forest management in which such activities are not in accordance with the existing laws and regulations.

Then, Law No. 8 of 1999 on Consumer Protection stipulates the possibility of filing a class lawsuit in its Article 46 Paragraph (1) letter b. The article says that the groups of consumers who have the same interests can file a lawsuit against the business actors/entrepreneurs who (allegedly) violates the laws and regulations.<sup>23</sup>

In the context of environmental dispute, there have been discussions on the utilization of class action lawsuit in order to provide the communities a means to seek environmental justice for them. The focus of such discussions includes the procedures on the class action itself (like Santosa does) and/or the progress of the utilization of class action lawsuit in the environmental context. Nicholson discusses the first case where there was a number of plaintiffs in the environmental dispute namely the case of PT Pupuk Iskandar Muda in 1989.<sup>24</sup> The case was about the leakage of poisonous gas.<sup>25</sup> However, as Nicholson explained, this case was not a class action *per se* despite the fact

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<sup>20</sup> *Id.*

<sup>21</sup> Mas Achmad Santosa, "Indonesia National Report", p. 5.

<sup>22</sup> Article 71 Paragraph (1) of the Law No. 41 of 1999.

<sup>23</sup> In its Article 1, the Law No. 8 of 1999 defines "business actors"/"entrepreneurs" as "an individual person or a company, in the form of a legal or non-legal entity established and domiciled or engaged in activities within the legal territory of the Republic of Indonesia, conducting various kinds of business activities in the economic sector through contracts, both individually and collectively", <http://www.bu.edu/bucflp/files/2012/01/Law-No-8-Concerning-Consumer-Protection.pdf> [last accessed 7 September 2017].

<sup>24</sup> David Nicholson (2009), "Environmental Dispute Resolution in Indonesia", Leiden, the Netherlands: KITLV Press, p. 55.

<sup>25</sup> *Id.*

that there were 602 plaintiffs in the case.<sup>26</sup> Since in that case those plaintiffs have their own legal representative, it is quite different with class action as there will be a representative of a community (or communities) in filing and proceeding in the lawsuit.

The case of PT Pupuk Iskandar Muda was an old one. The class action in Indonesia especially in the environmental disputes context is now progressing. It is progressing in a sense that the environmental law namely the Law No. 32 of 2009 provides chance to file a class action lawsuit for the communities of people that have been harmed by the environmental damage done by among others the corporations.

One of the recent cases of class action in the environmental dispute, as reported by Mongabay -a website for environmental news and development, is in 2014.<sup>27</sup> The case involved *Gerakan Samarinda Menggugat* (the communities of people in Samarinda that file the class action lawsuit) againsts the Samarinda City government, governor of the East Kalimantan, Ministry of Energy and Mineral Resources of the Republic of Indonesia, Ministry of Environment of the Republic of Indonesia, and the local parliament of Samarinda City.<sup>28</sup> At the first level court, the Court was in favor of *Gerakan Samarinda Menggugat* as the Court decided that the parties that the *Gerakan Samarinda Menggugat* went against was guilty of not fulfilling their duty to create a livable environment.<sup>29</sup>

The lawsuit by *Gerakan Samarinda Menggugat* gives a hope to the effectiveness of the utilization of class action lawsuit in the environmental disputes. Nevertheless, it is pivotal to note that in the *Gerakan Samarinda Menggugat*, the communities of people are essentially up against the government's agencies (both local and nationals) in which those agencies almost always bear the burden to provide the livable environment for their citizens (the Samarinda cities citizens and national citizens as well). What about if such citizens are up against the corporations? This is precisely what this writing wants to further study (specifically in the Part 4 of this writing) namely whether the utilization of class action (and other lawsuits such as civil and criminal lawsuits for that matter) in those lawsuits will successfully make the corporations responsible.<sup>30</sup>

#### **4. Case Study: Environmental Disputes in Indonesia from 2012-2017**

This part will analyze cases in Indonesia from 2012 to 2017. Those cases are civil and criminal lawsuits filed against the corporation and most of them are about the land burning that affect the communities of people surrounding the land. This case analysis is crucial because then it helps to portray the answer of whether the civil, criminal, and class action lawsuits are effective in making the corporations responsible for the environmental damages in Indonesia.

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<sup>26</sup> *Id.*

<sup>27</sup> Yustinus S. Hardjanto (2015), "Gerakan Samarinda Menggugat: Perjuangan Panjang Menuntut Pemerintah yang Lalai", *Mongabay*, <http://www.mongabay.co.id/2015/01/26/gerakan-samarinda-menggugat-perjuangan-panjang-menuntut-pemerintah-yang-lalai/> [last accessed 8 September 2017].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Though, as previously elaborated, corporations in Indonesia do have the obligations to protect the environment through, for example, Environmental Social Responsibilities.

#### 4.1. Civil Lawsuits

There are four cases that will be analyzed in this sub-part. Those cases are PT. Kallista Alam in Aceh Province (hereinafter, “**Case I**”)<sup>31</sup>, PT. Surya Panen Subur in Aceh Province (hereinafter, “**Case II**”)<sup>32</sup>, PT. Bumi Mekar Hijau in South Sumatra Province (hereinafter, “**Case III**”)<sup>33</sup>, and PT. Waringin Agro Jaya in South Sumatra Province (hereinafter, “**Case IV**”)<sup>34</sup>. These four cases are about land burning where the ministry in charge of environmental matter filed the lawsuit againsts those companies.

Before analyzing the cases, first of all, it is paramount to explain that judges in Indonesia when examining environmental disputes are expected to be progressive in a sense that the judges implement principles of environmental policies which includes (i) substantive legal principles, (ii) principles of process, and (iii) equitable principles and to do judicial activism. This suggestion is based on the Decision of the Head of the Supreme Court of the Republic of Indonesia No. 36/KMA/SK/H/2013 (hereinafter, “Decision No. 36/KMA/SK/H/2013”).<sup>35</sup> As for the principles of environmental policies stipulated in the Decision 36/KMA/SK/H/2013, it means as follow:<sup>36</sup>

- a. Substantive legal principles means that judges take into account: (i) principles of preventing the environmental damage, (ii) precautionary principles, (iii) polluter pays principle, and (iv) principle of sustainable development.
- b. Principles of process means that judges take into account: (i) community empowerment, (ii) sustainability of ecosystem, (iii) rights of *masyarakat adat* and local communities, and (iv) enforceability.
- c. Equitable principle means that judges take into account: (i) intragenerational equity and intergenerational equity, (ii) common but differentiated responsibility, and (iii) equitable utilization of shared resources.

But, the Decision 36/KMA/SK/H/2013 does not elaborate what it means by judicial activism and to what extent the judicial activism can be carried out. The Decision just says that such judicial activism can be done by interpretation technique by the judges.<sup>37</sup>

In the mentioned four cases, the role of judges in making the corporation responsible for the environmental damages and in implementing the Decision 36/KMA/SK/H/2013 is more apparent in the **Case I** and **Case IV**. In the **Case I** on PT. Kallista Alam, even though in the case there was a lack of evidence about types of environmental damages in the light of asking for compensation for such damages, the judges in the **Case I** still granted the amount of compensation asked by the plaintiff. To do so, the judges refer to the precautionary principle and the *in dubio pro natura* (“when in doubt, favor the nature”<sup>38</sup>).

<sup>31</sup> Decision of First Instance Court (2012): 12/PDT.G/2012/PN.MBO, Decision of Appeal Court (2014): 50/PDT/2014/PT.BNA, and Decision of Cassation Court (2015): 651 K/PDT/2015.

<sup>32</sup> Decision of First Instance Court (2013): 700/Pdt.G/2013/PN.Jkt.Sel, Decision of Appeal Court (2014): 796/PDT/2014/PT DKI, and Decision of Cassation Court (2015): 2905 K/Pdt/2015.

<sup>33</sup> Decision of First Instance Court (2015): 24/Pdt.G/2015/PN.Plg, and Decision of Appeal Court (2016): 51/PDT/2016/PT.PLG.

<sup>34</sup> Decision of First Instance Court (2016): 456/Pdt.G-LH/2016/PN.Jkt.Sel.

<sup>35</sup> Bahasa Indonesia version of the Decision of the Head of the Supreme Court of the Republic of Indonesia can be accessed here: [http://bawas.mahkamahagung.go.id/bawas\\_doc/doc/036\\_kma\\_sk\\_ii\\_2013.pdf](http://bawas.mahkamahagung.go.id/bawas_doc/doc/036_kma_sk_ii_2013.pdf) [last accessed 9 September 2017].

<sup>36</sup> See Decision No. 36/KMA/SK/H/2013, *Id*.

<sup>37</sup> See Decision No. 36/KMA/SK/H/2013.

<sup>38</sup> See Oxford Reference (2011), “Guide to Latin in International Law”, <http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-912> [last accessed 9 September 2017].

In the **Case IV**, the judges did the so-called judicial activism in a sense that though in the lawsuit from the plaintiff, the plaintiff did not really elaborate the strict liability well, the judges interpreted such lawsuit using the *strict liability* as the basis of their argument.

As for the **Case II** againsts PT. Surya Panen Subur, the judges said that PT. Surya Panen Subur is not guilty of the land burning since the negligence cannot be proven and as such, PT. Surya Panen Subur won the case. Furthermore, the **Case III** againsts PT. Bumi Mekar Hijau caught quite attention from the public as the land burning happened involved more concerns from other countries like Singapore.<sup>39</sup> In 2016, the appeal court granted that PT. Bumi Mekar Hijau is guilty.<sup>40</sup>

To briefly sum up, **Case II** is the only case where the corporation won -PT. Surya Panen Subur- while the other three cases the plaintiff -ministry that in charge of environmental matters in Indonesia- won. If the question then whether the civil lawsuit is effective in making corporations responsible for environmental damages, at least from these four cases, it can be seen that only one corporation won out of four cases. Though, the further question still remains as to what extent this is a winning for those who concern on the protection of the environment. Nevertheless, at least in the two out of four cases, the judges try to implement Decision 36/KMA/SK/H/2013 where the judges take into account the principles of environmental policy and judicial activism.

#### 4.2. Criminal Lawsuits

There are six cases that will be analyzed in this sub-part. Those cases are the case of Suheri Terta and Fachruddin in which the former is the Director of PT. Mekarsari Alam Lestari and the latter was the Estate/Project Manager (hereinafter, "**Case V**")<sup>41</sup>, a lawsuit against PT. Kallista Alam (hereinafter, "**Case VI**")<sup>42</sup>, a lawsuit againsts PT. National Sago Prima (hereinafter, "**Case VII**")<sup>43</sup>, a lawsuit against the Estate Manager of PT. Dua Perkasa Lestari (hereinafter, "**Case VIII**")<sup>44</sup>, a lawsuit against the assistant of the head of the plantation of PT. Jatimhaya (hereinafter, "**Case IX**")<sup>45</sup>, and a lawsuit against PT. Surya Panen Subur (hereinafter, "**Case X**")<sup>46</sup>. These cases are mostly about land burning where the ministry in charge of environmental matter filed the lawsuits against those companies.

As explained before, the Law No. 32 of 2009 regulates about pursuing criminal lawsuits against the corporations. The lawsuit can be filed against the corporation or the individual as a part of the corporation.

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<sup>39</sup> See Francis Chan and Arlina Arshad (2016), "Pulp firm Bumi Mekar Hijau found guilty of starting illegal fires", *The Jakarta Post*, <http://www.thejakartapost.com/news/2016/08/31/pulp-firm-bumi-mekar-hijau-found-guilty-of-starting-illegal-fires-.html> [last accessed 9 September 2017].

<sup>40</sup> *Id.*

<sup>41</sup> Decision of Appeal Court (2012): 235/PID.SUS/2012/PTR, and Decision of Cassation Court (2014): 1266 K/PID.SUS/2014.

<sup>42</sup> Decision of First Instance Court (2013): 131/Pid.B/2013/PN.MBO, Decision of Appeal Court (2014): 201/PID/2014/PT.BNA, and Decision of Cassation Court (2015): 1554 K/Pid.Sus/2015.

<sup>43</sup> Decision of First Instance Court (2014): 574/Pid.Sus/2014/PN.Bls, and Decision of Appeal Court (2015): 27/PID.SUS/2015/PT.PBR.

<sup>44</sup> Decision of First Instance Court (2014): 88/Pid.Sus/2014/PN.Ttn.

<sup>45</sup> Decision of First Instance Court (2015): 72/Pid.Sus/2015/PN.Rhl, and Decision of Appeal Court (2015): 186/Pid.Sus/2015/PT.PBR.

<sup>46</sup> Decision of First Instance Court (2014): 54/Pid.Sus/2014/PN-Mbo, and Decision of Appeal Court (2016): 61/PID/2016/PT.BNA.

For example, in the **Case V** against Suheri Terta and Fachruddin Lubis of PT. Mekarsari Alam Lestari. The argument in the lawsuit is that Suheri Terta and Fachruddin Lubis are responsible not only because their position at the PT. Mekarsari Alam Lestari but also they have the intention and knowledge about the land burning. Furthermore, in those six cases, there were three cases against the corporation and three cases against the individual as a part of the corporation –including **Case V**.

In short, in term of criminal lawsuits, the efforts to bring corporations responsible for environmental damages are there that such efforts were brought not only against the corporations *per se* but also individuals that in charge in those corporations.

### 4.3. Class Action Lawsuits

As mentioned in the Part 3, one of the recent cases of environmental disputes where there was a class action lawsuit was the *Gerakan Samarinda Menggugat* case.<sup>47</sup> Other than this case, there were four other cases namely Mandala case (hereinafter, “**Case XI**”)<sup>48</sup>, Tanjung Pinang case (hereinafter, “**Case XII**”)<sup>49</sup>, PLTD case (hereinafter, “**Case XIII**”)<sup>50</sup>, and IUPK case (hereinafter, “**Case IV**”)<sup>51</sup>.

In the **Case XI**, class action lawsuit was brought because the environmental damage namely the fall of Mandalawangi Mountain that such fall affected local communities there. Whereas **Case XII** was a class action lawsuit for the damages caused by the establishment of small port that affect the fishermen of the local communities in Tanjung Pinang. As for **Case XIII** and **Case IV**, those cases were class action lawsuits asking for revoking the permit previously given by the government because of the environmental damages that the activities (stipulated in such permit) make.

The latter two cases namely case **Case XIII** and **Case IV** are interesting in a sense that class action lawsuits can actually be filed against the government decision and/or government institution. Though in the relevant law that is Supreme Court Regulation No. 1 of 2002 and Decision of the Head of the Supreme Court No. 36 of 2013 it is only class action lawsuit in the term of civil lawsuits can be done, those two cases open a shifted interpretation of to what kind of cases that class action lawsuits can be filed. However, in the **Case XIII**, the formal requirements of class action lawsuit against the government decision and/or government institution must follow the requirements stipulated in the Supreme Court Regulation No. 1 of 2002 and Decision of the Head of the Supreme Court No. 36 of 2013.

To briefly sum up, as this writing asks a question of whether the civil, criminal, and class action lawsuits are effective in making the corporations responsible for the environmental damages in Indonesia, based on the explanation on civil, criminal, and class actions lawsuits above, it can be seen that the efforts to make corporations responsible are there. Those efforts come not only from the ministry in charge of

<sup>47</sup> See Yustinus S. Hardjanto (2015), “Gerakan Samarinda Menggugat: Perjuangan Panjang Menuntut Pemerintah yang Lalai”, *Mongabay*, <http://www.mongabay.co.id/2015/01/26/gerakan-samarinda-menggugat-perjuangan-panjang-menuntut-pemerintah-yang-lalai/> [last accessed 8 September 2017].

<sup>48</sup> Decision of first instance court: No. 49/Pdt.G/2003/PN.BDG, Decision of appeal court: No. 507/Pdt/2003/PT.Bdg, and Decision of cassation court: No. 1794 K/Pdt/2004.

<sup>49</sup> Decision of first instance court: No. 26/PDT.G/2009/PN.TPI.

<sup>50</sup> Decision of first instance court: No. 02/G/2012/PTUN.MTR, Decision of appeal court: No. 147/B/2014/PT.TUN.SBY, and Decision of cassation court: No. 51 K/TUN/2015.

<sup>51</sup> Decision of first instance court: No. 05/G/2013/PTUN-Pbr, Decision of appeal court: No. 99/B/2013/PT.TUN-MDN, and Decision of cassation court: No. 07 K/TUN/2014.

environmental field in Indonesia but also from the local communities themselves as the environmental damages in question affected such communities. Whether it is really effective or not, those cases above only portray who wins the case but not necessarily restoring the environment and benefitting the communities in the fullest extent since problems like enforcement of courts' decisions and paying the compensations are not free from problems. At the very least, when a case was won against the corporations, it gives message that environmental protection is really important in Indonesia and as such, the corporation must take part of it and be held responsible if they cause damage to the environment.

## 5. Conclusion

As seen throughout this writing, in making the corporations responsible for environmental damages are not the efforts belong to the government only (i.e. civil and criminal lawsuits) but it is also the efforts of the community (i.e. class action lawsuits). With regard to the class action lawsuits and the involvement of the community in such lawsuits, some scholars have argued that there are three kinds of community behavior in the community environmental disputes: the community that fights pollution for the sake of the environment; the community that fights pollution for the sake of their economic survival; and finally, the community that fights pollution for the sake of human survival and environmental conservation. In the context of environmental disputes in Indonesia, it falls into the second category since government does not stand alone, that the community fights pollution for economic survival because most of the said activities on environmental degradation disrupt the people's economic activities.<sup>52</sup>

The community will be the first of voice in protecting the environment from the harmful conduct of corporations. The government of Indonesia will respond such concerns with legal action against individuals and corporations. Unfortunately, as shown by the judgment results, such protection to the environment varies one to another.

Environmental disputes involve civil and criminal aspects and the judges who hear the cases in the ordinary courts, despite having the jurisdiction over the case, do not have sufficient knowledge and experiences with the complex nature of environment that require balance between environmental harm and economic benefit, and between the interest of individual and the community. The District Court is, however, not the appropriate court to solve the cases. The quality of the judgment is seen to limit access for people to environmental justice, such as lack of legal background on environmental law and technical expertise, high litigation costs, delay, lack of public information and participation, and public trust. Nevertheless, power imbalance between the perpetrator and the victims might also contribute to the factor that affects the quality of the court decision.

In response to non-pro-environment judges, the government should working together with the Supreme Court to strengthen judges' understanding of environmental and forestry cases. The leading ministry should also collaborates or conducts joint training with the police and prosecutors in the case of environmental understanding.

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<sup>52</sup> Achmad Romsan & Suzanna Mohamed Isa, "The Establishment of Environmental Court in Indonesia", (2016) *Malaysian Journal of Law and Society*, Vol. 20, p. 64.

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