

ISSUES, CONCERNS, AND CHALLENGES IN ENVIRONMENTAL ADJUCATION IN THE PHILIPPINE COURT SYSTEM

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“Environmental cases are usually novel and unique, with no precedent that can rely on for guidance”¹

I. Introduction

The court system is an integral part of environmental enforcement in the Philippines and has made many important contributions to the field. However, environmental cases do not always progress smoothly through the judicial system. This paper is intended to identify important legal issues in the judicial system that affect or limit environmental adjudication.² The issues are divided between access to and competency of justice, and legal procedures. While many of these issues could be analyzed further, this paper will highlight the ones to which attention should be paid in any more comprehensive study of Philippine environmental case law.³ This paper will also use examples and case studies from the United States to illustrate important legal points, since the U.S. and Philippines have similar legal systems.

II. Issues

A. Legal Procedure and Rules of the Court

Because of their unique and complex nature, environmental cases are sometimes hindered by legal mechanisms and rules of procedure designed for non-environmental cases. These include rules on standing and class action suits that often do not take into account the fact that environmental damage impacts all citizens. Furthermore, the nature and science of environmental violations often means that statutes of limitations, evidentiary rules, and burdens of proof are not suitable. Some of these issues can be handled internally by the judicial system by instructing lower courts to apply rules liberally. The impact of all of these issues, and how many actually present problems for plaintiffs, is crucial.

1. Standing of Plaintiffs and Citizens Suits

In environmental cases, a plaintiff may not necessarily be legally injured in the traditional sense by an act of environmental destruction to impair his livelihood. For example, plaintiffs cannot recover damages for fish killed by pollution because they lack standing, despite the obvious economic loss they suffered.⁴ While the destruction of natural aesthetic beauty is a moral outrage that indirectly harms all citizens, under traditional legal

¹ Hon. Hilario G. Davide, Jr., *The Role of Courts in Environmental Protection*, 17(9) *Lawyers Rev.* 76, 77 (30 Sept 2003).

² PAB and other administrative adjudication remedies are not addressed in this paper.

³ As of July 2006, PHILJA was considering a comprehensive study of environmental cases in local and regional courts.

⁴ See, e.g., *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 18 (U.S. 1981) (finding that fishermen who sought damages under water pollution laws for fish killed by pollution did not have standing).

standing person no would have standing to sue.⁵ Furthermore, environmental laws are designed to prevent catastrophic harm that is often not imminent or contained to one geographic area, as opposed to the narrow, immediate harms that provide the basis of most standing requirements.⁶ Strict rulings on standing could stifle environmental enforcement, especially since the Philippines lacks sufficient enforcement capacity and personnel.

The Philippine Supreme Court has held that standing requires:

Such personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court depends for illumination of difficult constitutional questions.⁷

The plaintiff himself must have some cognizable and redressable injury. Litigating for a general public interest, or “mere invocation... of [plaintiff’s] duty to preserve the rule of law... is not sufficient to clothe it with standing....”⁸ However, the standing requirement is considered a technicality that courts may waive if the case concerns a “paramount public interest.”⁹ In its dictum in *Oposa v. Factorum*, the Court said that children might even have intergenerational standing to sue to prevent the destruction of forests for future generations.¹⁰

There are questions as to the strength of these to reduce the standing threshold for environmental plaintiffs. While courts may waive technical standing provisions when a case deals with a paramount public interest, it is not required to do so.¹¹ Furthermore, judges may reasonably differ on what constitutes a “paramount public interest” since there is no overriding theme to define it. For example, in *Kilosbayan*, the Court found that determining the legality of an online lottery system fell within this definition, whereas in *Integrated Bar*, it held that determining whether deploying marines for crime deterrence violates the Constitution does not.¹² The Court did reduce some of this ambiguity in *Oposa* by declaring

⁵ See *Sierra Club v. Morton*, 405 U.S. 727, 735 (U.S. 1972) (finding that destruction of aesthetic beauty can be an injury in fact, but plaintiff must be among the injured). Of course, animals are often affected by environmental damage, but as of yet the Philippine Supreme Court has not decided whether or not they have standing. See *Bangus Fry Fisherfolks v. Lansanas*, G.R. No. 131442 (July 10, 2003) (questions on standing of bangus fish not resolved).

⁶ Emily Longfellow, *Friends of the Earth v. Laidlaw Environmental Services: A New Look at Environmental Standing*, 24 *Environ. L. & Pol’y J.* 3, 15 (2000), quoting Richard Lazarus.

⁷ *Integrated Bar of Philippines v. Zamora*, G.R. No. 141284 (August 15, 2000).

⁸ *Id.*

⁹ See, e.g., *Kilosbayan, Inc. v. Guingona, Jr.*, G.R. No. 113375 (May 5, 1994) (waived standing in case questioning legality of online lottery system); *Tanada v. Tuvera*, 136 SCRA 27, 36 (1985) (mandamus for release of Presidential Decrees); *Araneta v. Dinglasan*, 84 Phil. 368 (1949) (regulation of residential rental units); *Kilusang Mayo Uno Labor Center v. Garcia, Jr.*, G.R. No. 115381, Dec. 23, 1994 (rate-fixing in violation of Public Service Act); see also the Emergency Powers Cases: *Araneta v. Dinglasan*, G.R. No. L-2044; *Araneta v. Angeles*, G.R. No. L-2756; *Rodriguez vs. Tesorero de Filipinas* G.R. No. L-3054; *Guerrero vs. Commissioner of Customs*, G.R. No. L-3055; and *Barredo vs. Commission on Elections*, G.R. No. L-3056, 84 Phil. 368 (1949).

¹⁰ *Oposa v. Factoran*, G.R. No. 101083 (July 30, 1993).

¹¹ *Integrated Bar*, G.R. No. 141284.

¹² Compare *Kilosbayan*, G.R. No. 113375, with *Integrated Bar*, G.R. No. 141284. In comparison, in both the U.S. and the ancient Roman Republic, the legality of troops being

that the right to a balanced and healthful ecology "concerns nothing less than self-preservation and self-perpetuation," presumably a "paramount public interest."¹³ However, because the Court's discussion on standing in *Oposa* was dictum, neither this claim nor the right to intergenerational standing is binding law upon the lower courts.¹⁴ Without further guidance from the Court, it is likely that many lower court judges would be reluctant to act boldly by declaring that a particular issue is a "paramount public interest" and would deny standing.

Congress tried to reduce the standing threshold with citizen suit provisions in environmental statutes, but these have been of limited use thus far. First, only the Philippine Clean Air and Ecological Solid Waste Management Acts contain citizen suit provisions;¹⁵ notably, the Philippine Clean Water Act, enacted after these two laws, does not.¹⁶ Second, citizens still bear the risk of paying a winning defendant's attorney's fees, which could be costly enough to discourage even valid suits. Most importantly, these suits are still subject to the "actual controversy" requirement of the Constitution.¹⁷ What this means in the context of citizen suits has not yet been heavily litigated in the Philippines. However, lower court judges often require plaintiffs to show actual injury in the narrow or traditional legal sense.¹⁸ Likewise, when prosecutors deputize citizens to enforce a suit, judges sometimes insist that such deputization is only valid for a single case or even invalid under the Rules of the Court.¹⁹ As a result, citizens suit provisions have been largely unused.²⁰

deployed to the capital city has been the penultimate legal question. The Roman Republic fell in large part because Julius Caesar refused to obey Roman law on this subject. Thus, for some societies the questions presented in *Integrated Bar* would be of paramount public interest.

¹³ See *Oposa*, G.R. No. 101083.

¹⁴ Dante B. Gatmaytan, *The Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory*, 15 *Geo. Int'l Envtl. L. Rev.* 457, 459 (2003) (arguing that the court only granted a cause of action for environmental destruction and did not expand standing).

¹⁵ See Philippine Clean Air Act, Rep. Act No. 8749, § 41 (1999), and Ecological Solid Waste Management Act, Rep. Act No. 9003, § 52 (2000). In criminal cases, citizens may still file complaints as an offended party, expanding the standing applicability, although not as liberally as citizens suit provisions do. See Section 3, Rule 110, Revised Rules on Criminal Procedure; see also *Laraya v. Hon. Pe., et al.*, CA-G.R. No. 80927 (holding that a criminal case against fishermen must be filed by solicitor general, not naval officer).

¹⁶ Philippine Clean Water Act, Rep. Act No. 9275 (2004); see also Manuel Peter S. Solis, *Water Quality Management Reforms Under the Philippine Clean Water Act 2004*, 31(1) *J. of the Integrated Bar of the Philippines* 43, 65-67 (2005) (criticizing the lack of a citizens suit provision in the CWA).

¹⁷ See Const. (1987), Art. VIII, § 1.

¹⁸ Nicole A. Tablizo, *Environmental Citizen Suits: Strengthening Legal Standing* (2005) (unpublished law thesis, Ateneo de Manila University School of Law), 61 and 72-4 (arguing that a judge's refusal to apply *Oposa* standing to a criminal fisheries case was incorrect).

¹⁹ Interview with Attys Gerthie Mayo-Anda, Asst. Exec Dir., ELAC-Palawan (8 Nov 2002), quoted in Maria Carmelita V. Torres, *The Right to Private Persecution of Environmental Crimes* (2003) (unpublished law thesis, Ateneo de Manila University School of Law), 57-8.

²⁰ These problems have occurred in other countries. See Susan Casey-Lefkowitz, *The Evolving Role of Citizens in Environmental Enforcement*, 4th INECE International Conference Proceedings, Vol. 1 (1996), as reprinted in 1 *Making Law Work*, 2 *Making Law Work: Environmental*

Standing under environmental laws is hotly contested in the U.S.²¹ The U.S. has put citizens' suit provisions into almost all of its environmental laws.²² Plaintiffs are required to show 1) an injury in fact, 2) causation between the injury and the defendant's actions, and 3) redressability in court.²³ NGOs can sue upon a showing that any of their members would have had standing to sue.²⁴ The focus is not on the injury to the environment, but rather the injury to the plaintiff or NGO representing him. However, the injury can be economic or non-pecuniary, including aesthetic or recreational value.²⁵ The Court also held that civil penalties payable to the U.S. Treasury serve as redress as they deter polluters.²⁶ Causation is often the more difficult element to prove, which will be discussed below in § 4.

In New Zealand, the Environment Court has taken a more radical approach. It has eliminated formal standing provisions, requiring only that a plaintiff have a greater interest than the public generally in a controversy or that he represents a relevant public interest.²⁷ This makes citizen enforcement very easy. However, one might also be concerned about whether this would overburden the court; granting standing is a fine balance between permitting valid environmental claims and risking frivolous litigation.

2. Class Actions and Large Number of Plaintiffs

As the notorious mudslide at Ormoc in 1991 and Marcopper mine tailings in Marinduque show, injuries from environmental damage can be grave, costly, and affect a huge number of persons.²⁸ Even in less publicized events, the number of injured persons may often make individual litigation burdensome and complex. Furthermore, some members of an

Compliance & Sustainable Development, at 562 (Durwood Zaelke, et al., Cameron May Ltd. 2005).

²¹ The Supreme Court's rulings on standing have gone through several phases. The current court may decide upon this issue in the near future in *Massachusetts v. EPA*, 367 U.S. App. D.C. 282 (D.C. Cir. 2005), cert. granted 2006 U.S. LEXIS 4910 (U.S. June 26, 2006) (No. 05-1120) (deciding that petitioners had standing under Clean Air Act to challenge EPA decision not to regulate carbon dioxide); see also James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits* at 30, 10 *Wid. L. Symp. J.* 1 (2003) (decisions in favor of citizen suits and "agency forcing actions" have decreased in recent years).

²² See, e.g., *Endangered Species Act*, 16 U.S.C. § 1540(g) (2006).

²³ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (U.S. 2000); see also Longfellow, *supra* note 6, at 8-9.

²⁴ E.g., *Sierra Club*, 405 U.S. 740 (holding that had any Sierra Club members been in affected areas, it would have had standing to sue).

²⁵ E.g., *Laidlaw*, 528 U.S. 167 (holding that NGO suing company for violation of permit has standing as damage is appreciable and members harmed); *Fairview Township v. United States Environmental Protection Agency*, 773 F.2d 517, 523, n.10 (3d Cir. 1985) (noting that plaintiffs have standing when they can demonstrate non-economic injury).

²⁶ *Id.*

²⁷ Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court*, 29 *Ecology L.Q.* 1 (2002), as reprinted in 2 *Making Law Work*, *supra* note 20, at 464.

²⁸ See, e.g., *Philippine mudslide rescue halted*, BBC News (Feb 24, 2006), at <http://news.bbc.co.uk/2/hi/asia-pacific/4748814.stm> (5,000 people died in a mudslide in Ormoc because of deforestation); Oxfam Australia, *Mining Ombudsman Case Study: Marinduque, the Philippines* (Oxfam Australia, 2004) (200 million tons of mine tailings were dumped into Calancan Bay, which supported 20,000 people, causing cancer, dementia, and stomach disorders).

injured class may be too poor to prosecute their claims individually. Class action suits can facilitate litigation of such situations by providing for:

[T]he protection of the defendant from inconsistent obligations, the protection of the interests of absentees, the provision of a convenient and economical means for disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims.²⁹

Other studies have shown that class action suits can provide important social benefits and encourage citizen enforcement to supplement agency regulation.³⁰

Class actions may the discourage attorney disloyalty that encourages lawyers to plea bargain for less than the actual injury. As happened in the Chinese poachers case in Palawan, lawyers or prosecutors may not seek full compensation for the damage caused because they have an incentive to expend less time and money on a small case.³¹ However, because class actions provide aggregate incentives for lawyers, and fees and settlements undergo higher judicial scrutiny, such “disloyal” settlements are less likely to occur.³²

While the Philippine Rules of the Court provide for class action suits,³³ judges will sometimes be reluctant to certify classes and instead treat the injuries of plaintiffs as separate, despite any common questions of law or fact. In *Newsweek, Inc. v. IAC*, the Supreme Court ruled that a defamatory remark directed at 8,500 sugar planters do not necessarily apply to every individual in a group, and therefore are not actionable as a class action.³⁴ Likewise, a judge might refuse to certify a class of pollution victims because they suffer different types of physical injuries, even if the source was the same pollution. In a more litigated legal system, there would be more case law to guide judges on the appropriateness of class actions. However, in the Philippines, this does not yet exist. Add to this the high cost for lawyers, and class actions become even less feasible for most Philippine plaintiffs.³⁵

²⁹ United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (U.S. 1980); see also Rachel Tallon Pickens, Too Many Riches? Dukes v. Wal-Mart and the Efficacy of Monolithic Class Actions, 83 U. Det. Mercy L. Rev. 71, 88 (2006) (decertifying class of Wal-Mart employees could bring over one million individual suits to the courts).

³⁰ See John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 669-71 (class actions create economic incentives for citizen enforcement of environmental tort law); see also Deborah R. Hensler and Thomas D. Rowe, Jr., Complex Litigation at the Millennium: Beyond “It Just Ain't Worth It”: Alternative Strategies for Damage Class Action Reform, 64 Law & Contemp. Prob. 137, 137-8 (2001), and Martin H. Redish, Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals, 2003 U Chi Legal F 71, 87 (2003).

³¹ Grizelda Mayo-Anda, Assistant Executive Director, Environmental Legal Assistance Center, Recent Legal Developments on Fisheries Laws, Address Before the Environmental Lawyers Conference and Workshop (Oct. 25-27, 2005).

³² See David Rosenberg, Class Actions for Mass Torts: Doing Individual Justice by Collective Means, 62 Ind. L.J. 561, (1987).

³³ Section 12, Rule 3, Rules of Philippine Courts.

³⁴ See, e.g., *Newsweek, Inc. v. IAC, et al.*, G.R. No. L-63559, May 30, 1986).

³⁵ Interview with Antonio Oposa, Jr., Attorney, Oposa Law Office, in Manila, Philippines (June. 20, 2006).

In the U.S., it is much easier to litigate environmental class action suits. The Supreme Court has clearly instructed courts to construe its class action rules liberally and encourage class action suits.³⁶ This limits judicial discretion in refusing to certify classes to only extreme situations. Furthermore, the rules allow plaintiffs to join by default rather than affirmatively.³⁷ For environmental cases, the courts will look at the potential number of plaintiffs or the size of the estimated areas that a pollutant has infected to see if plaintiffs have met the numerosity requirement, but they are not required to meet a certain minimum number.³⁸ For the Philippines, which, unlike the U.S., has too few environmental class action suits, adopting some of these mechanisms may create a more efficient adjudication process for plaintiffs, defendants, and the courts.

3. Statute of Limitations and Delayed Injuries

Unlike a traditional tort or crime, many environmental injuries are not discrete events but only manifest themselves after many years. Pollutants may build up in soils, waters, or human bodies for years without reaching a dangerous level. Cleanup of such sites can take even longer. For example, when the U.S. military left Subic Bay in 1992, it left behind hazardous waste sites with contaminated water that continue to poison the land over a decade later.³⁹ However, for environmental torts, the statute of limitations is four years, a relatively brief time. This could preclude the litigation of injuries from pollutants with an onset delayed for many years.

Thus far statutes of limitation issues have not been a significant factor in environmental litigation. The Philippine Supreme Court addresses similar problems in other fields of law with the discovery rule, allowing the statute of limitations to run when the plaintiff actually or should reasonably have discovered the injury.⁴⁰ However, as the courts handle more brown environment cases, it will have to address the tensions between punishing past violators and protecting defendants from time-barred claims.⁴¹

U.S. courts have adopted the due diligence discovery rule, particularly for Clean Water Act and wetlands violations. Because immediate detection of pollution or illegal fill into a wetlands is almost impossible, applying a statute of limitations strictly would defeat the

³⁶ See, e.g., *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 89 (7th Cir. 1941) (holding that the wording of the Federal Rules of Civil Procedure suggests a permissive interpretation for class action suits).

³⁷ U.S.C. Fed Rules Civ Proc R 23(c)(3).

³⁸ See, e.g., *Rex v. Owens*, 585 F.2d 432 (10th Cir. 1978) (noting that a class of only a few hundred, or even 20, persons is not too small to form a class action if joinder is impractical); *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986) (determining that the numerosity requirement of class actions is satisfied by showing that thousands of buildings had non-conforming asbestos installed).

³⁹ See Bob Egelko, "Judge kills suit seeking toxic survey. Superfund law doesn't apply to U.S. bases in Philippines, he rules," *The San Francisco Chronicle*, Dec. 12, 2003, at A-6.

⁴⁰ See *Sermonia v. Court of Appeals*, G.R. No. 109454 (June 14, 1994).

⁴¹ According to WWF, 80% of coastal wetlands have already been drained, degraded, or destroyed in the past 30 years. See *Worldwide Fund for Nature, Threats to Wetlands*, WWF Freshwater Website (Nov. 13, 2005). The legal mechanisms of statutes of limitations are often applied to wetlands cases in the U.S., and may be of use for this critical problem.

remedial purpose of the act.⁴² Courts try to effectuate the Congressional purpose of the statute with the due diligence discovery rule and giving the government a chance to file action against the polluter once the violation is reported to the EPA.⁴³

Some courts⁴⁴ realize that a statute of limitation may be inappropriate for cases when pollution continues to cause problems over time. These courts argue that a:

Defendant's unpermitted discharge of dredged or fill materials into wetlands on the site is a continuing violation for as long as the fill remains. Accordingly, the five-year statute of limitations ... has not yet begun to run.⁴⁵

The statute of limitation will not run for as long as the pollution remains. Many courts will also treat common law tort nuisances as continuing violations.⁴⁶ This approach has the added benefit of allowing the government to fine violators for each day the pollution remains, capturing the more of the costs of environmental destruction.⁴⁷

Much of U.S. case law regarding the effect of statutes of limitations on environmental issues comes from ambiguities in the statute of limitation for complex processes, particularly the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), or Superfund law.⁴⁸ Because Congress anticipated the complexity and long-term nature of site cleanups, it structured the statute of limitations in a flexible manner, allowing the court hear an initial cost recovery action prior to issuing a declaratory judgment to avoid letting the statute run. It also allows the plaintiff to file subsequent cost-recovery actions to recapture further response costs incurred at the site.⁴⁹ However, the law's different statutes of limitation for remedial and removal actions phases of the cleanup has led to confusion over how the

⁴² See Clean Water Act, 33 U.S.C. § 1362(12) (The term "discharge of a pollutant" means any addition of any pollutant to navigable waters).

⁴³ *United States v. Windward Properties, Inc.*, 821 F. Supp. 690, 695 (D. Ga. 1993) (allowing discovery rule for alleging when statute of limitation for discharging dredged materials into streams accrued); *Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 287-8 (D.N.Y. 1986) (statute of limitation did not run until violation was filed with EPA); see also Joseph G. Theis, *The Application of the Federal Five-Year Statute of Limitations for Penalty Actions to Wetlands Violations Under the Clean Water Act*, 24 N. Ky. L. Rev. 1, (1996).

⁴⁴ Only a few of the thirteen circuit courts of appeal hold this. Most apply the discovery rule.

⁴⁵ *United States v. Reaves*, 923 F. Supp. 1530, 1534 (D. Fla. 1996); compare with *North Carolina Wildlife Federation v. Woodbury*, 29 Env't Rep. Cas. (BNA) 1941 (E.D.N.C. 1989) (holding that continuing violation theory does not apply for statute of limitations purposes).

⁴⁶ *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1125, 1142 (Cal. Ct. App. 1991) (holding that claims for trespass and nuisance of hazardous wastes are not barred by 3-year statute of limitations).

⁴⁷ David S. Foster, *The Continuing Violations Doctrine and the Clean Water Act: Untenable Solutions and a Need for Reform*, 32 *Envtl. L.* 717, 742 (2002) (continuing violation doctrine removes problem of inadequate fines for brief dumping time); see also James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 *Va. Envtl. L.J.* 589 (1996).

⁴⁸ See Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9613(g) (2006).

⁴⁹ 42 U.S.C. § 9613(g)(2).

phases are defined. Courts often defer to EPA determinations in characterizing the type of action due to its technical expertise, rather than making that judgment itself.⁵⁰

4. Meeting the Burden of Proof

In environmental cases, there may be no line of direct evidence from the perpetrator to the harm. In pollution cases it is often impossible to prove that the plaintiff's harm was caused by his exposure to the toxic material.⁵¹ For example, if several factories dump pollution into Manila Bay, it is impossible to determine which caused a particular environmental harm. Furthermore, the courts cannot expect absolute scientific certainty on the effects of a health risk such as electro-magnetic fields from power cables.⁵² Given these problems, the traditional burden of proof standards, preponderance for civil cases and beyond a reasonable doubt for criminal,⁵³ may prove to be prohibitively high.

Philippine courts employ liability-shifting mechanisms to manage this difficulty in environmental cases. For example, pursuant to the Fisheries Code, courts use reverse burden of proof to place the burden of exculpation on defendants found with high-explosive or cyanide fishing gear.⁵⁴ Furthermore, the courts have begun to experiment with the precautionary principle, placing the constitutional rights to health and safety above development.⁵⁵ The courts also employ *res ipsa loquitur* in tort suits,⁵⁶ although this has not been a prominent feature of environmental litigation. Plaintiffs may also hold multiple

⁵⁰ Steve Rypma, *Colorado v. Sunoco: The Tenth Circuit's Stand on Statute of Limitations for CERCLA Cost Recovery Actions*, 81 Denv. U.L. Rev. 645, 647 (2004).

⁵¹ Mary Elliott Rolle, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 Geo. Int'l Env'tl. L. Rev. 135, 142 (2003).

⁵² See *Hernandez v. NAPCOR*, G.R. No. 145328 (March 23, 2006) (holding that despite conflicting evidence on the health effects of electromagnetic fields, the Court should decide upon the probability of such harm).

⁵³ Section 5, Rule 133, Rules of Philippines Courts; see also Justice Minita V. Chico-Nazario, Associate Justice, Supreme Court of the Philippines, *Challenges in Environmental Adjudication in the Philippines*, Address Before the Asian Justices Workshop on the Environment (April 26-27, 2006). While PAB, decides cases on a standard of substantial weight of the evidence, its decisions are technical findings outside of the judicial system. *Pollution Adjudication Board v. Court of Appeals*, 195 SCRA 112 (1991) (holding that in PAB cases plaintiffs need not show threat to life, only that allowable pollution levels were exceeded).

⁵⁴ See The Philippine Fisheries Code, Rep. Act No. 8550, § 88 (1998); *Hizon v. Court of Appeals*, 265 SCRA 517 (1996) (court should apply presumption of guilt when explosives found in defendant's fishing boat); *People v. Vergara*, 270 SCRA 624 (1997) (holding that illegal fishing paraphernalia and fish samples showing signs of blasting is sufficient to prove blast fishing); see also Section 3(j), Rule 131, Rules of Philippine Courts (presumption of ownership of a thing in a person's possession is valid but may be rebutted).

⁵⁵ Oposa, *supra* note 35.

⁵⁶ *Africa v. Caltex*, GR No 72986 (March 3, 1966), cited in Karen Sy Ong, *The Application of the Strict Liability Doctrine in Philippine Environmental Legislation* (1998) (unpublished law thesis, Ateneo de Manila University School of Law).

defendants jointly and severally liable for an act of environmental destruction that cannot be traced to a single defendant company, such as the pollution in Manila Bay.⁵⁷

Until recently, Philippine lawmakers did not see a need to introduce a strict liability⁵⁸ regime into environmental laws.⁵⁹ Strict liability was employed in other fields, but not environmental laws. More recent anti-pollution laws such as the Clean Air and Solid Waste Management Acts establish that a violation of the standard is actionable through citizen suits.⁶⁰

In U.S., because of its common law tradition, courts are more willing to employ strict liability. Generally, when a defendant, “though without fault, has engaged in [a] perilous activity . . . , there is no justification for relieving it of liability.”⁶¹ Such “perilous activities” include operating explosives, nuclear energy, hydropower, fire, high-energy explosives, poisons, and other extremely hazardous materials.⁶² For citizens suits under environmental statutes, plaintiffs need only show that the law was violated, not prove fault or any actual or threatened harm, without regard to *mens rea*.⁶³

When it is impossible to determine the proportion of fault of a large number of defendants, U.S. courts may approximate fault through other indicators, including market share and production output. For example, in *Hymowitz v. Eli Lilly & Co.*, the New York Court of Appeals calculated the size of each defendant drug company’s market share for DES to determine their fault in the injuries caused by the drug.⁶⁴ This also allows courts to address injuries sustained in the past by approximating past fault through data available in the present.

The Environment Court in New Zealand has adopted an even more radical approach and done away with formal burdens of proof. It focuses instead on obtaining the best possible evidence for a case. This makes it easier for plaintiffs appealing to the court to dislodge an

⁵⁷ As happened recently in *Oposa v. Government*, Court of Appeals 4th Region (2005), discussed in Editorial, A New Deal for Manila Bay, *The Manila Times*, Nov. 4, 2005, at <http://www.manilatimes.net/national/2005/nov/04/yehey/opinion/20051104opi1.html>.

⁵⁸ In this paper, strict liability refers to the tort concept that focuses on the danger of the activity rather than the defendant’s conduct. One generally does not need to show *mens rea*, or the mental element of the crime, under environmental statutes. See James R. MacAyeal, *The Comprehensive Environmental Response, Compensation, and Liability Act: The Correct Paradigm of Strict Liability and the Problem of Individual Causation*, 18 *UCLA J. of Env’tl. L. & Pol’y* 217, 218 (2001).

⁵⁹ Ong, *supra* note 56, at 37.

⁶⁰ Rep. Act No. 8749, § 45, and Rep. Act No. 9275, § 27.

⁶¹ *Yukon Equipment, Inc. v. Fireman’s Fund Ins. Co.*, 585 P.2d 1206, 1208 (Alaska 1978) (holding that a company storing explosives is liable for explosion despite precautions taken and intervening circumstances).

⁶² Dan Dobbs and Paul Hayden, *Torts and Compensation*, 687-94 (5th ed. 2005).

⁶³ See, e.g., 16 U.S.C. § 1540(g).

⁶⁴ See, e.g., *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1072 (N.Y. 1989) (holding that plaintiffs could sue drug companies for damage caused by DES without proving fault and by apportioning liability according to the company’s market share); it is worth noting the state had adopted a statute reviving claims beyond the statute of limitations in this case.

unfavorable opinion from a lower court.⁶⁵ While the Philippine Supreme Court may not wish to go this far, the court could more strict liability for hazardous materials and market share liability tools.

5. Damages and Remedies

Even if a plaintiff wins damages from a defendant, if the defendant keeps polluting or cutting trees, the damage will continue.⁶⁶ In the Philippines, this is particularly problematic as the fines and penalties imposed under law are often not enough to change a company's behavior.

In order to encourage development, Congress prohibited temporary restraining orders against government projects.⁶⁷ Since government infrastructure projects can cause massive damage to ecosystems, this prohibition is significant. Some courts try to avoid this loophole by claiming that the prohibition cannot violate a person's constitutional right to health or safety.⁶⁸ The extent of this loophole is unclear.

Finally, even if a plaintiff or prosecution wins its case, most of the time the true costs of the defendant's actions will not be reflected in the award. Damages in civil cases and punishments in criminal cases generally capture the costs of any suffering caused to humans, not animals or plants. While some settlements may include forcing a defendant to install pollution-control equipment or contribute money to conservation programs, this still likely does not recoup the full extent of damage to the environment. It is difficult to regenerate natural forest, coral reefs, or populations of endangered animals.

The judicial system does not have much power to remedy this problem. The decision on the purpose of environmental laws and how much plaintiffs recover is for the Congress. However, it is important for judges to understand that environmental cases deal with only a fraction of the true costs of environmental damage. This may convince some judges to be more sympathetic toward environmental cases. While punishments for defendants may seem exorbitant, understanding the unaccounted costs of environmental damage puts these into perspective.

B. Access to and Competency of Justice

Aside from the legal issues described above, in any country, there are a host of practical and logistical issues that impede the judicial system's ability to handle environmental cases. This includes the lack of financial resources of plaintiffs, particularly in poorer parts of the Philippines. Plaintiffs and their lawyers must also feel safe from physical

⁶⁵ Birdsong, *supra* note 27, at 461.

⁶⁶ Pericles R. Casuela, *Rights of Private Persons in the Enforcement of Environmental Legislation* (1992) (unpublished law thesis, Ateneo de Manila University School of Law), 54.

⁶⁷ *Prohibiting Courts from Issuing Restraining Orders or Preliminary Injunctions in Cases Involving Infrastructure and Natural Resource Development Projects of, and Public Utilities by, the Government*, Pres. Dec. No. 1818 (1981), replaced by *An Act to Ensure the Expeditious Implementation and Completion of Government Infrastructure Projects by Prohibiting Lower Courts from Issuing Temporary Restraining Orders, Preliminary Injunctions or Preliminary Mandatory Injunctions, Providing Penalties for Violations Thereof, and for other Purposes*, Rep. Act No. 8975, § 3 (2000).

⁶⁸ Hernandez, G.R. No. 145328 (P.D. 1818 is not intended to be blanket prohibition without regard to fundamental rights to health and safety).

and financial harassment while litigating their case. On the other hand, both courts and lawyers are often unfamiliar with environmental laws and science, limiting their ability to adjudicate in the field. Finally, court dockets are often congested, and environmental cases are not given priority. The judicial system's role in addressing these issues ranges from fairly involved to almost no role. Yet, in attempting to understand environmental adjudication in the Philippines, it is crucial to recognize the role these practical realities play.

1. Financial Costs of Adjudication

In any legal system, filing and litigating a case takes an enormous amount of time and money. Philippine courts impose a filing and transcript fee, although these are waived for citizens suits. Reflecting on his experiences, famous environmental attorney Antonio Oposa suggested that these costs were the greatest inhibitions for most plaintiffs.⁶⁹ Furthermore, for injunctive remedies, plaintiffs must post a bond to cover the defendant's potential damages, which may be too large for a poor plaintiff with livestock and property as his only assets.⁷⁰ Most Philippine lawyers do not use a contingency fee system, so plaintiffs must be able to pay for legal services up front and over the lengthy litigation process.⁷¹ On top of this, there is the risk of financially crushing harassment suits from defendants, or Strategic Lawsuit Against Public Participation (SLAPP). Even the logistics of feeding and housing witnesses, and their lost time from work, poses significant problems for predominantly poorer plaintiffs.

In the U.S., NGOs often receive enough donations to allow them to engage in litigation and have staff lawyers. More importantly, plaintiffs' attorneys often work on a contingency basis, allowing poorer plaintiffs to avoid large financial risk. Furthermore, NGOs and environmental groups seeking injunctive remedies are often required only to pay a nominal bond or may be exempted completely.⁷² While some might worry this makes litigation in the U.S. too easy, it drastically improves poor people's access to justice.

Pursuant to the Constitution's emphasis on the poor, the Supreme Court of the Philippines has taken some efforts to alleviate this problem. Poorer plaintiffs are exempted from paying docket, transcript, and other fees and are granted free legal counsel. Furthermore, the Court provides an annual grant to the Integrated Bar of the Philippines' Free Legal Aid Program.⁷³ However, not all environmental plaintiffs qualify as poor, particularly NGOs, even though they often have limited financial resources. Furthermore, even though

⁶⁹ Oposa, *supra* note 35.

⁷⁰ Nina Patricia D. Sison, *Nominal Bond or No Bond: An Access to Preliminary Injunction in Environmental Cases* (1997) (unpublished law thesis, Ateneo de Manila University School of Law), 56-7.

⁷¹ See Portia Alino-Hormachuelos, Justice, Court of Appeals, *The Role of the Judiciary on Environmental Protection and Problems Faced by the Courts in Fulfilling Their Role*, Haribon Seminar.

⁷² See, e.g., *NRDC v. Morton*, 337 F.Supp 167 (1971) (bond \$750,000 reduced to \$100 for plaintiffs because area they sought to protect was important natural resource); *Friends of the Earth v. Brinegar*, 518 F.2d 322 (9th Cir. 1975) (bond reduced from \$4.5 million to \$1,000 after court panel already granted injunction, so likelihood of success certain); *Randall Morgan v. Lt.Col. James A. Walter*, 728 F.Supp. 1483 (D.Idaho 1989) (exempting NGO from bond noting its scant resources and lack of financial interest in outcome).

⁷³ Eric Van Zant, *Laws to Favor the Poor*, 37(2) ADB Review 18 (May 2005).

the amount of the bond is under the discretion of the judge, judges are reluctant to do this because they worry about being accused of abusing their discretion.⁷⁴

2. Harassment of Plaintiffs and Lawyers

Because of the high stakes involved in environmental cases, defendants may go to extraordinary means to intimidate and harass plaintiffs and their lawyers. It is not uncommon for defendants to lodge harassment or SLAPP suits against environmental plaintiffs or DENR prosecutors to attempt to force them to drop their charges.⁷⁵ Enforcers who confiscate the equipment of criminals are often sued for robbery.⁷⁶ Some defendants take even more extreme means such as physical violence or even murder.⁷⁷ Such dangers were recently illustrated by the murder of environmental advocate Elpidio de la Victoria and death threats against attorney Oposa.⁷⁸ This makes lawyers unwilling to take on difficult environmental cases.

To stifle SLAPP suits, the courts should promptly apply the anti-SLAPP provisions in the Philippine Clean Air and Ecological Solid Waste Management Acts when applicable.⁷⁹ This means dismissing any harassment suits as quickly as possible. However, plaintiffs relying on other laws have less protection.⁸⁰ Congress must expand the use of anti-SLAPP provisions to other environmental laws. Furthermore, law enforcement must vigorously prosecute any defendants who resort to violence. In short, to facilitate environmental cases, the court must protect the ones bringing the cases.

3. Technical Knowledge Among Judges and Attorneys

Judges must decide questions of science as well as law in order to dispose of most environmental cases. This is particularly true for brown issues, which involve uncertain science regarding the exact effects of a pollutant. In the U.S., scientific understanding of pollutants led to new classes of trespass and tort suits that held emitters liable for their actions.⁸¹ However, both sides in a case will try to use any scientific uncertainty to their

⁷⁴ Interview with Vincente Q. Roxas, Judge, Quezon City, 5 January 1997, quoted in Sison, *supra* note 70, at 25; see also *Commodity Financing Co., Inc. v. Jimenez*, 91 SCRA 57, at 66 (1979) (holding that the amount of the bond is within the reasonable discretion of the judge).

⁷⁵ See Alino-Hormachuelos, *supra* note 71.

⁷⁶ See, e.g., Julian Patoc, *Harassment in Environmental Protection*, Philippine Forum on Environmental Justice: Forest and Coastal Resources, 45, 47 (Nov. 11-12 2004).

⁷⁷ See, e.g., Raul L. Zapatos, Forester, DENR Region-10, Speech for Luzon-wide Environmental Paralegal and Law Enforcers' Conference and Workshop, Environmental Lawyer's Conference and Workshop (Oct. 25-27, 2005).

⁷⁸ See, John E. Bonine, *Philippines: Earth Day Martyr and Price on Environmental Lawyer's Head*, Environment News Service, Apr. 20, 2006, at <http://www.ens-newswire.com/ens/apr2006/2006-04-20-02.asp>.

⁷⁹ Rep. Act No. 8749, § 43, and Rep. Act No. 9003, § 53.

⁸⁰ Under other laws, lawyers argue that courts should address SLAPP suits quickly because Congress expressed a desire to discourage SLAPP suits. However, courts do not act as quickly without the statute. Interview with Maria Generosa Mislang, Attorney, Tanggol Kalikasan, Manila, Philippines (June 22, 2006).

⁸¹ See *Martin v. Reynolds Metals Co.*, 221 Or. 86 (1956) (accepting that action for trespass against company emitting fluoride compound onto property in light of scientific studies on fluoride).

advantage, or even create scientific uncertainty even when it does not exist in order to confuse the court. Judges must understand what scientific evidence should be admitted and what is not valid.⁸²

Judges and lawyers need to understand the science well enough to determine which arguments are unfounded and which are plausible. Because generally the courts have general jurisdiction and are not specialized in environmental issues, this problem will have to be addressed by providing judges and lawyers with supplemental training in environmental sciences and law. PHILJA and other organizations are already successfully doing this.⁸³ Eventually, however, this problem may be resolved through a change in the adjudication system. If the Philippines moves toward environmental courts or administrative adjudication⁸⁴ (as is being considered), judges would be trained specifically to handle environmental cases.

4. Obtaining and Preserving Evidence

For green issues, preserving evidence may be difficult. After an illegal logger or fisher is captured, DENR can confiscate the logs and fish. These goods rot or deteriorate over time. Proper procedure requires taking pictures of the logs and fish for admission into court. Specially trained fish examiners prepare reports on the cause of death of fish. When done correctly, this preserves the evidence for use at court. However, some areas may not have fish examiners on hand or the prosecution may not properly prepare the pictures for admissible evidence. It is not uncommon for custodians of the confiscated items to lose track of them over time. Because cases take so long in the court system, this can be a real problem.⁸⁵

It is also difficult for enforcement agents to find and confiscate the equipment and vehicles used in environmental crimes, as the boats and trucks perpetrators use are highly mobile. Despite the inconvenience it may cause defendants, such equipment must be held as evidence and to prevent further environmental damage. The accused, or unindicted conspirators, will often petition for the release of their equipment.⁸⁶ Unfortunately, sympathetic lower court judges may sometimes grant these requests, despite the contravening case law.⁸⁷ Moreover, prosecutors must have the vehicles stored in a safe area despite the lack of storage space.

⁸² Mary Elliott Rolle, *Unraveling Accountability: Contesting Legal and Procedural Barriers in International Toxic Tort Cases*, 15 *Geo. Int'l Env'tl. L. Rev.* 135, 143-4, notes 28-33 (2003) (arguing that judges should not act as gatekeepers of scientific evidence when many are not scientifically literate).

⁸³ Nazario, *supra* note 53.

⁸⁴ While PAB handles pollution cases, it is comprised of appointees rather than an administrative law judge.

⁸⁵ Interview with Maria Generosa Misleng, Attorney, Tanggol Kalikasan, Manila, Philippines (June 22, 2006).

⁸⁶ Mayo-Anda, *supra* note 19.

⁸⁷ See *DENR v. Daraman*, 377 SCRA 39 (2002) (holding that DENR had authority to detain a logging truck, overruling lower court); *Hizon v. Court of Appeals*, 265 SCRA 517 (1996) (holding that search and seizure without a warrant of fishing vessels is permissible because of their highly mobile nature); *Special Prosecutor Senson v. Judge Pangilinan*, A.M. No. MTJ-02-1430, Sept. 8, 2003 (holding that fishermen could not sue for replevin for illegal fishing gear).

Finally, it is important for enforcers to determine the location of violators, particularly close to the boundaries of natural parks. Community enforcers may not be trained in determining the exact location of where they apprehended the violators. Wealthier units can use GPS, but often the location of apprehension is disputed.⁸⁸ Any doubt in this area can destroy the prosecution's case.

5. Docket Congestion

In many countries, including the Philippines, courts are overburdened with cases. Yet, the Philippines' forests and animals are already disappearing quickly. Irreversible damage to ecosystems can occur much more quickly than the many years it may take the court system to resolve a case. As Prof. La Vina noted, the environment cannot wait for the court system.⁸⁹

According to Justice Nazario, the Philippines needs over 300 trial court judges to fill the vacancies and resolve pending cases.⁹⁰ Low pay discourages the few who are qualified. Many of these vacancies are in remote parts of the country, such as Nueva Ecija, Occidental Mindoro, and Surigao Norte, where much of the fishing and forestry violations occur. Furthermore, the Supreme Court is burdened by the large amount of cases granted review each year, including the automatic review for death penalty cases.⁹¹

Given this burdensome congestion, environmental cases are not given any special treatment on their own merits. Criminal environmental cases may be somewhat more expedited because they involve criminal punishments, but most judges and lawyers show no urgency with regard to environmental cases.⁹² The Supreme Court attempted to alleviate this problem with Administrative Order No. 150B-93, setting up special courts to handle illegal logging, but these remain underutilized.⁹³ Until cases can move through the court system more quickly, the enforcement of environmental law will be delayed.

III. Conclusion

This paper has highlighted important legal and practical issues preventing efficient adjudication of environmental cases in the Philippines. However, due to logistical and budgetary constraints, this paper focused mostly on case law from the Supreme Court and the personal experiences of lawyers. In order to fully understand environmental adjudication throughout the court system, further research should ideally analyze environmental cases from all Municipal and Regional Trial Courts, Courts of Appeal, and the Supreme Court. It is important to see how cases are actually treated, particularly with respect to the issues examined in this paper. Furthermore, there may be important regional variations, particularly between areas with more natural resources and more urban areas.

⁸⁸ Misleng, *supra* note 85.

⁸⁹ Antonio G.M. La Vina, *The Right to a Balanced and Healthful Ecology: The Odyssey of a Constitutional Policy*, 69 *Philippine Law Journal* 127, 155 (1994).

⁹⁰ Nazario, *supra*, note 53.

⁹¹ *Death Penalty Law*, Rep. Act No. 7659, § 22 (1993).

⁹² Alino-Hormachuelos *supra* note 6.

⁹³ Nazario, *supra* note 53; Oposa, *supra* note 35.

Even before such a study is undertaken, the courts can apply several lessons from this paper in the near future. First, while the courts have already taken commendable steps to waive filing fees and other costs for paupers, as mentioned above the definition of pauper may be under inclusive by not including NGOs. The courts should consider other definitions to reflect the realities of environmental NGOs.⁹⁴ Second, the Supreme Court should instruct the courts to dismiss SLAPP suits expeditiously. While the natural resource laws may not have anti-SLAPP provisions, Congress clearly did not intend to encourage such suits and there is nothing legally preventing the courts from dismissing them faster. Finally, the courts can address standing for citizens and class action suits. In particular, it should set out a clear position on standing in environmental cases.

Other challenges will require long-term planning for the courts. Reducing the docket congestion is critical to expedite justice, although doing this will likely take years and require more judges. Likewise, the ongoing effort to train judges and lawyers in environmental law and science must continue, particularly as new judges and lawyers enter the judicial system. The courts should also familiarize themselves with the legal mechanisms available to them, particularly in shifting the burden of proof. However, this will be most useful in pollution cases as they become more common in the future.

Ultimately, the challenges described above will require multifaceted solutions from various stakeholders in the Philippine legal system. For example, Congress must work to improve standing and citizens suit provisions in other environmental laws. To reduce the financial risk of bringing a suit, law firms could move toward a contingency fee system. Furthermore, it is the responsibility of DENR and environmental agencies to ensure that evidence is properly recorded and preserved. Finally, as the Philippine grows and wealth spreads, more plaintiffs will be able to undergo the financial costs of adjudication.

Eventually, the best solution to these challenges may come not from within the courts but from a new adjudication system. The U.S. has worked successfully with administrative adjudication for environmental issues in the EPA and Department of Interior. Other countries have set up independent environment courts. Based on the results of further studies and the needs of the country, the Philippines may move to adopt one of these models. This would allow expert adjudicators to handle cases under rules that make sense for environmental issues.

Finally, it is important for judges at all levels of the judicial system to understand the severity of environmental degradation in the Philippines. The only redress environmental plaintiffs or prosecutors may have is in their court. Thus, they should not be reluctant to grant standing or award large damages, when appropriate, because doing so will ensure that both humans and the environment have their proper day in court.

⁹⁴ To recoup the money lost by such waivers, the court could consider judicial penalties for SLAPP suits that would both discourage such suits and increase the court's revenue.