

UNEP GLOBAL JUDGES PROGRAMME

APPLICATION OF ENVIRONMENTAL LAW BY NATIONAL
COURTS AND TRIBUNALS

PRESENTATION 6

HOW ENVIRONMENTAL CASES COME BEFORE COURTS

OUTLINE OF PRESENTATION

CLASSES OF CASES

Constitutional rights litigation

Government enforcement and NRD actions

Private party civil litigation

Review of administrative agency decisions

PROCEDURAL ISSUES

locus standi

Pro se litigation

Timeliness of action

Public interest litigation

CONSTITUTIONAL RIGHTS LITIGATION

- Increasing number of constitutions have right to clean environment
- Others have provisions from which an implied right to a clean environment has been inferred
- Assuming enforceability and justiciability, environmental concerns may be presented in the fundamental rights suits

ENFORCEMENT ACTIONS

- Civil and criminal enforcement actions brought under pollution control and natural resource laws, such as:
 - Air, water and land pollution statutes
 - Natural resource management statutes
 - Planning statutes
 - Heritage protection statutes

CIVIL ENFORCEMENT ACTIONS

- Lower standard of proof
- Lower standard of proof can result in lower prosecution costs
- Easier to reach settlement because of diminishing stigma
- Wide array of remedies



ACTIONS IN TORT

- NUISANCE
- NEGLIGENCE
- TRESPASS

Private nuisance

Public nuisance

Damages

Injunctions to stop
particular actions

CRIMINAL PROSECUTIONS

- Maximizes deterrence message
- Most potent stigma in terms of deterring future violations by others
- Remedies often include imprisonment
- Standard of proof (“beyond reasonable doubt”) is more demanding than the civil standard
- Settlement can be more difficult because desire to avoid stigma of criminal conviction can diminish willingness to plead guilty to the charged offence or a lesser offence

THE PROCESS OF PROSECUTION

- Collection of scientific and other evidence
- Role of police
- Specialist environmental prosecutors
- Need to prove elements of the offence

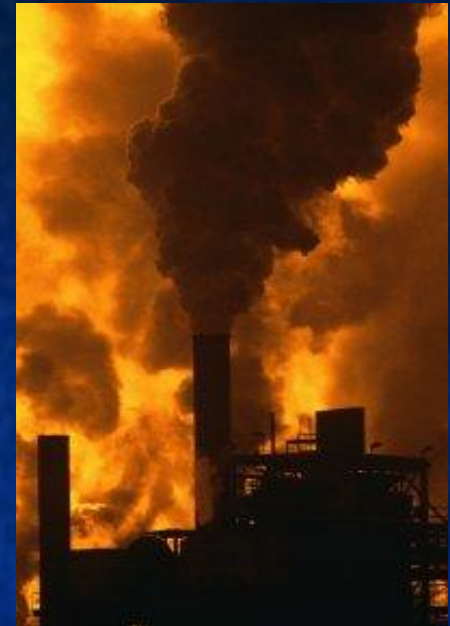
NUISANCE

Definition: an indirect interference with a person's land or enjoyment of land because of noise, smell, air pollution or water pollution



PUBLIC NUISANCE

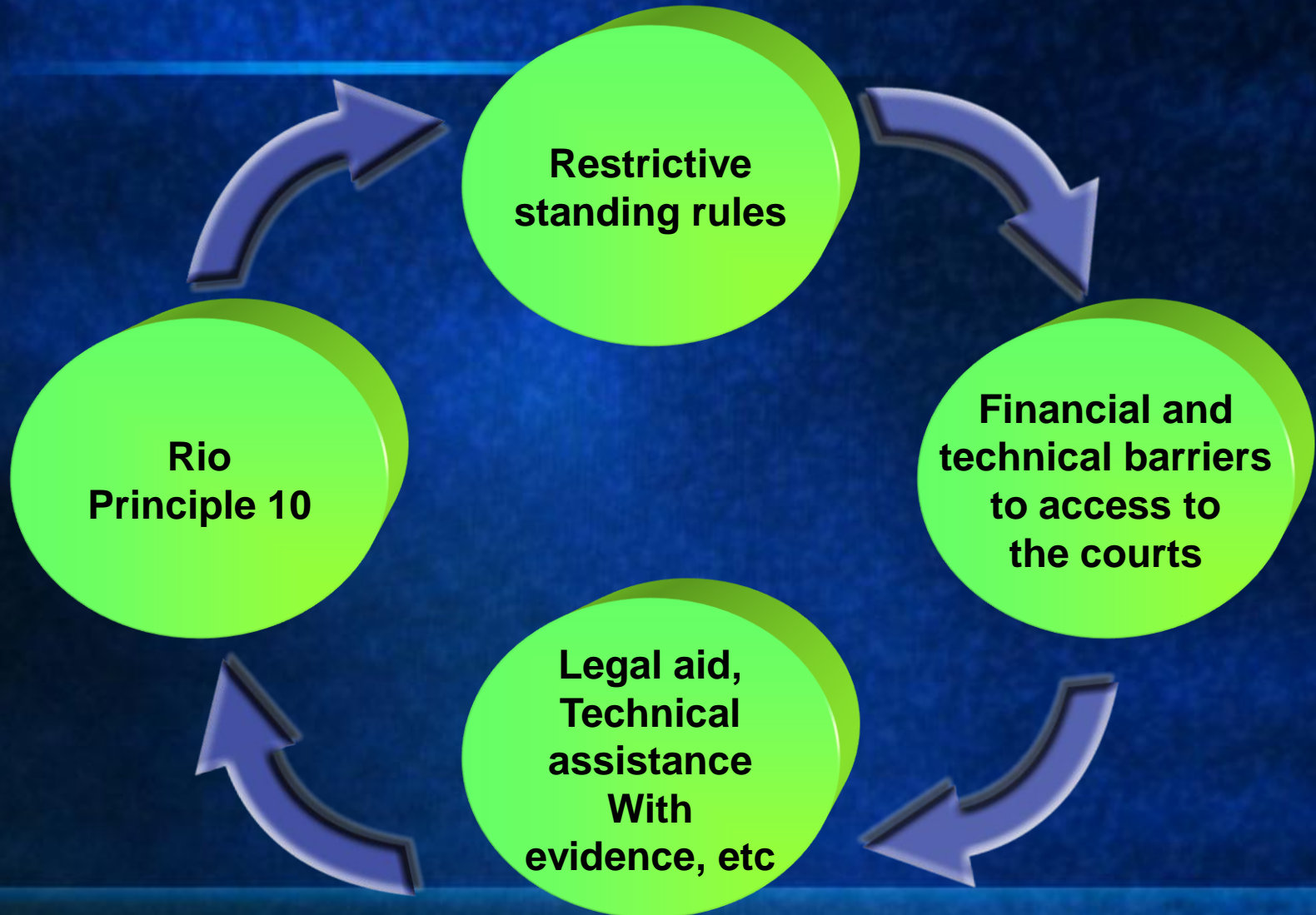
- Public nuisance is an activity which materially affects the reasonable comfort and convenience of a section of the public



ACTIONS CHALLENGING GOVERNMENT ACTION

- Actions challenging government action or inaction/delay
- A number of legal issues unique to this type of litigation
 - Standard of review
 - Scope of review
 - Timeframe for review

ACCESS TO COURTS



ENVIRONMENTAL ISSUES REQUIRE BROADER ACCESS TO THE COURTS

- Increasingly, the right of the public to participate in environmental decision-making is viewed as a fundamental notion of justice and essential to the rule of law



ACCESS TO JUSTICE: INTERNATIONAL APPROACHES

Aarhus Convention on
Access to Information,
Participation in
Decision-making and
Access to Justice in
Environmental Matters
(Europe 1998)



EXAMPLES OF NEED FOR BROADER ACCESS

- *Ministerio Publico v Federal Union* plaintiff claimed need to incorporate local people in planning and decision-making process
- Construction of hydro-way would drastically affect customs and traditions, and affect their constitutional rights over their traditional lands

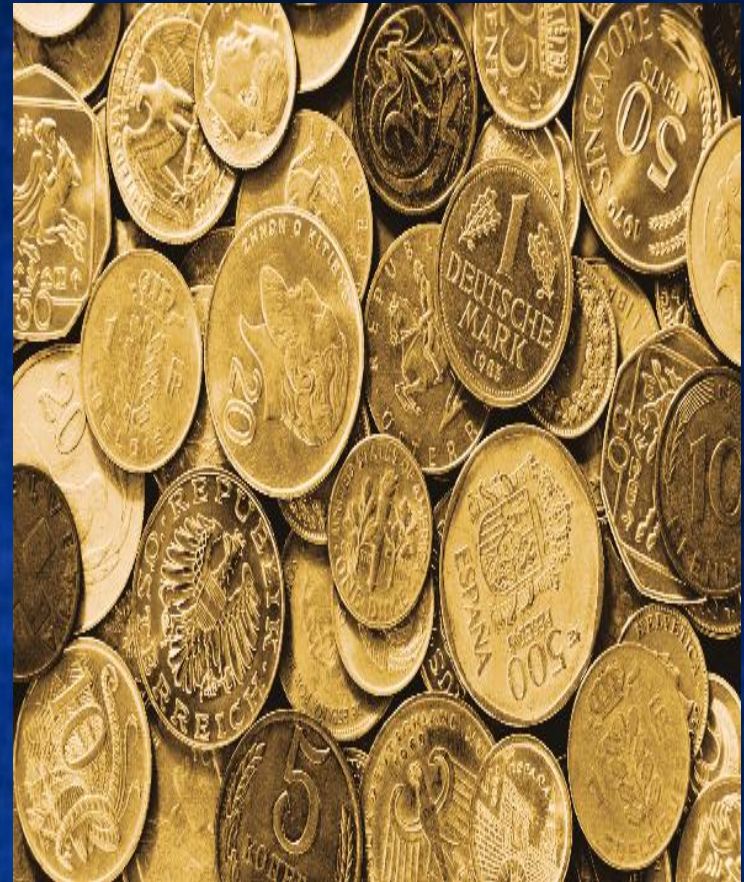


LEGAL PRINCIPLES GOVERNING ACCESS

- Standing
- Actio popularis
- Limits to Access: justiciability, ripeness, exhaustion, finality, political question, advisory opinions

LOCUS STANDI IN THE COMMON LAW

- Historically, standing rules have tended to limit access to the courts unless the plaintiff can show a property or financial interest



TRENDS IN ACCESS TO THE COURTS

- In a number of states legislatures and/or courts have embraced innovative procedures to give greater access to the courts



“OPEN STANDING” IN LEGISLATION

- Some jurisdictions have legislated for “open standing”



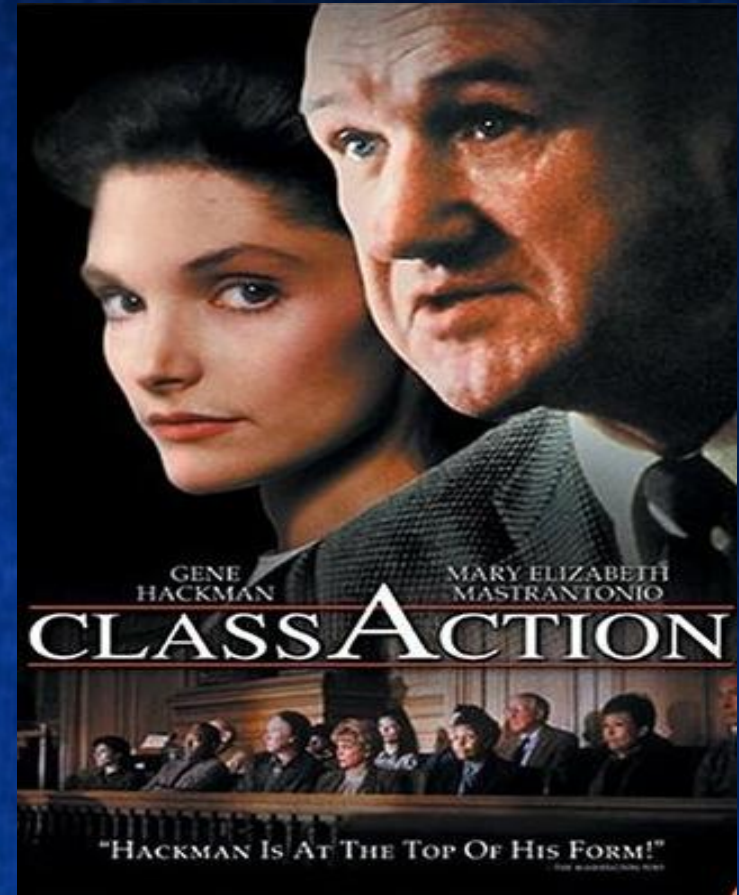
PUBLIC INTEREST LITIGATION AND CITIZEN SUITS

- Citizen Suits
Authorized by
Statute
- Public Interest
Litigation/Epistolary
Jurisdiction
- Legal Aid Schemes



CLASS ACTIONS

Class actions: by a representative on behalf of a group of plaintiffs with claims involving common questions of law and fact, often in negligence to seek damages and, where necessary, injunctions



OTHER LEGAL REFORMS THAT FACILITATE ACCESS TO THE COURTS

- Freedom of information legislation
- Community right to know legislation

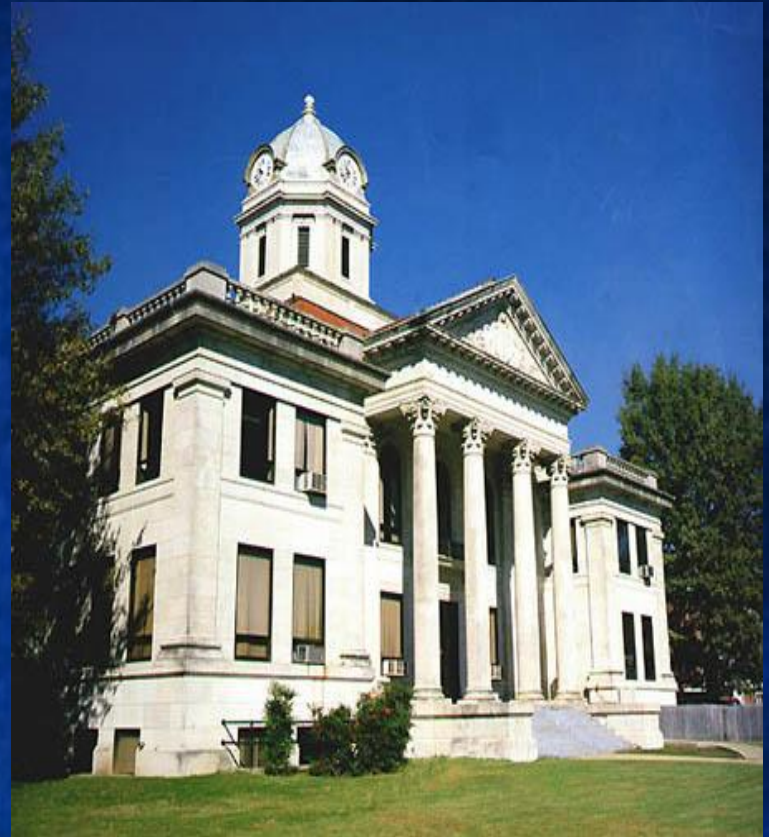
Case Law on *Locus Standi*

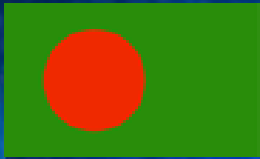


PHILIPPINES

Oposa vs Factoran 1993

- Class suit by 43 children claiming that they were entitled to the full benefit, use and enjoyment of "the natural resource treasure that is the country's virgin rain forests."

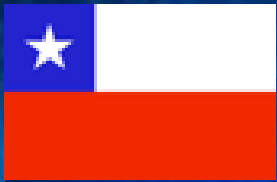




BANGLADESH

Dr. Mohiuddin Farooque v Bangladesh, Represented By The Secretary, Ministry Of Irrigation, Water Resources & Flood Control & others

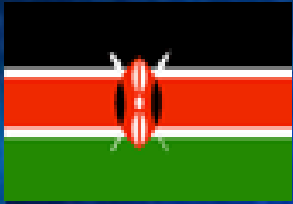
"The expression 'any person aggrieved' approximates the test of or if the same is capsulized, amounts to, what is broadly called, "sufficient interest". Any person other than an officious intervener or a wayfarer without any interest in the cause beyond the interest of the general people of the country having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from a breach of some public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. The real test of 'sufficient interest' of course essentially depends on the co-relation between the matter brought before the Court and the person who is bringing it." (Hon. Mr. Justice A.T.M. Afzal, Chief Justice.)



CHILE

Antonio Horvath Kiss and others v National Commission for the Environment

- Supreme Court March 19 1997
- The court held the standing of the plaintiffs, ruling that the Constitution does not demand that the affected people themselves present the constitutional protection action.



KENYA

Waweru v Republic of Kenya 2006

- ...a development that threatens life is not sustainable and ought to be halted
- “The council is in a position of public trust to ... ensure that adequate land is available for sewage treatment works”
- Government is under the law under an obligation to approve sustainable development and nothing more, which is development that meets the needs of the present without compromising the ability of future generations to meet their needs”
- At this time and age, no development is valid which cannot answer the requirements of sustainable development”



MEXICO

Homero Aridjis and others v Secretary of Environment, Natural Resources and Fishery

- The lower court denied the petitioner's request after considering that they had failed to demonstrate their standing for the administrative review petition
- The Tribunal reviewed the first instance decision and rejected its conclusions. The Appeal Tribunal stated that the content of the resolution related to the protection of the environment despite its goal of administrative simplification. Therefore, the tribunal granted the plaintiffs standing supported by domestic legislation, notwithstanding the fact that North American Agreement on Environmental Cooperation (NAAEC) also granted these same rights



SOUTH AFRICA

Wildlife Society of Southern Africa & others v Minister of Environmental Affairs & Tourism & others, Case No. 1672/1995 SA

The applicants applied for an order compelling the respondents to enforce the provisions of Decree 9 (Environment Conservation) 1992. The first applicant was the Wildlife Society of Southern Africa and the second its Conservation Director. The third and fourth applicants were two lawful occupiers of cottages located on the coast and members of the (Wild) Coast Cottage Owners' Association. The first respondent was Minister of Environmental Affairs, the second the Premier of the Eastern Cape, the third the Minister of Agriculture and Environmental Planning. The locus standi of the applicants was challenged but later conceded by reason of the constitutional provisions and the Court ordered the first respondent to take such steps necessary to enforce the provisions of S.39(2) of Decree 9 (Environment Conservation) 1992 promulgated by the Government of Transkei.

TANZANIA

Festo Balegele & 749 others v Dar es Salaam City Council

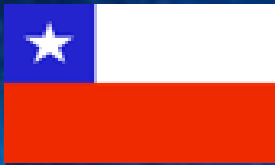
- The applicants sought orders of:
 - *certiorari* - quash decision of dumping waste
 - prohibition - barring future use of site
 - *mandamus* - establish a suitable site
- The respondent –
dumping temporary, sought order to continue
- *locus standi* of applicants upheld & orders granted
- Life deliberately exposed to danger
 - Denial of a basic right



UK

R v Her Majesty's Inspectorate of Pollution, Ex P. Greenpeace Ltd (No 2)

“Premises” as defined in the Radioactive Substances Act 1960 Section 19(1) included plant on site and the company were already permitted to dispose of waste from their premises. Testing of the new plant was within the purpose of any undertaking carried on by the company at the premises in accordance with the licensing regime. It was appropriate, therefore, for the respondents as the regulatory authority to supervise this activity by variations of the licence. Nonetheless, the applicant had sufficient interest in the issues raised for it to be granted *locus standi*. Its supporters may not have an effective opportunity to bring action individually and it was entirely appropriate that an established body with a genuine interest in the issues should do so on behalf of its members.



CHILE

Aurelio Vargas and others v. Municipalidad de Santiago and others

- This was a public interest case and the strategy employed by the residents consisted of: (i) using the "Protection Action" established in the Chilean constitution before the court to ask the court to assure urgent enforcement not only of the constitutional right of the residents "to live in an environment free from contamination", but also of all the statutes and regulations violated by the polluter companies' activities; (ii) garnering the participation of the people in the affected community; and, (iii) using procedural means in court to force the polluter companies to release information concerning the impact of the wastes on the ecosystem.
- The Santiago Court of Appeals granted an order for the unsanitary garbage dump to be cleaned up or close down in 120 days.



PAKISTAN

General Secretary, West Pakistan Salt Miners Labour Union (Cba) Khwra, Khelum v The Director, Industries and Mineral Development,

Quoting Article 184(3) of the Constitution, the Court observed that "It is well settled that in human rights cases/public interest litigation under Article 184(3), the procedural trappings and restrictions, precondition of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the Court. This Court has vast power under Article 184(3) to investigate into questions of fact as well, independently, by recording evidence or appointing commissions or any other reasonable and legal manner to ascertain the correct position. Article 184(3) provides that this Court has power to make Order of the nature mentioned in Article 199. The fact that the Order or direction should be in the nature mentioned in Article 199 enlarges the scope of granting relief and the relief so granted by this Court can be moulded according to the facts and circumstances of each case."



UGANDA

The Environmental Action Network Ltd v The Attorney General and the National Environment Management Authority

- The plaintiff, a public interest litigation group, brought an application on its own behalf and on behalf of the non-smoking members of the public, to protect their rights to a clean and healthy environment, their right to life, and for the general good of public health in Uganda.
- The Court held that Article 50 of the Constitution did allow public interest litigation by the plaintiff, given that the interest of public rights should transcend procedural technicalities.

CONCLUSION

A number of different types of cases carry environmental issues to the courts

Public participation is viewed as vital to the rule of law in the environmental setting

Access to the courts and to information is a significant issue in the environmental context