

# GREENING JUSTICE

## CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS

George (Rock) Pring & Catherine (Kitty) Pring  
With an Introduction by Lalanath de Silva



# Greening Justice:

## Creating and Improving Environmental Courts and Tribunals

**George (Rock) Pring and Catherine (Kitty) Pring**

*with an Introduction by*  
**Lalanath de Silva**  
Director, The Access Initiative  
World Resources Institute



Each Access Initiative(TAI) report represents a timely, scholarly treatment of a subject of public concern. TAI takes responsibility for choosing the study topics and guaranteeing its authors and researchers freedom of inquiry. It also solicits and responds to the guidance of advisory panels and expert reviewers. Unless otherwise stated, however, all the interpretation and findings set forth in TAI publications are those of the authors.

**April Osmanof**

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# Foreword

Decades of experience and quantities of hope crystallized in 1992 when 178 Governments adopted the Rio Declaration at the first Earth Summit. In it is embedded Principle 10 which recognizes that environmental issues are best handled with “appropriate access to information”, “the opportunity to participate in decision-making processes” and “effective access to judicial and administrative proceedings, including redress and remedy” for “all concerned citizens”.

Since 1992 over 80 Governments enacted laws that provide citizens greater access to environmental information. *Voice and Choice: Opening the Door to Environmental Democracy* (WRI 2008) pointed out that the new challenge is to implement these laws effectively. And even while they have recognized the importance of access to information, Governments have done less well in providing their citizens opportunities to participate in decision-making, or offering new means to resolve environmental disputes, justly and effectively. When such institutions are effective, they provide greater accountability for decisions on environmental matters and a pathway to reconciling competing interests necessary for achieving sustainable development.

Over the last three decades judicial institutions in some countries have responded to environmental challenges in innovative ways. Perhaps the best example is the Green Bench of the Supreme Court of India that hears public interest environmental cases filed by citizens. In other countries, Governments have set up specialized environmental courts and tribunals. The Land and Environment Court of New South Wales, Australia, is a leading example of a specialized court. Over 350 specialized environmental courts and tribunals have been established in 41 countries.

Nevertheless, most citizens still lack adequate access to justice. Comparative research to help us with a deeper understanding of the capabilities and impact of these institutions is almost non-existent. *Greening Justice: Creating and Improving Environmental Courts and Tribunals* seeks to fill this knowledge gap in the hope that all those involved in creating or improving these specialized institutions will have the benefit of a growing body of global experiences.

George and Catherine Pring, a professor at the University of Denver Sturm College of Law and a professional mediator, respectively, from Colorado, authored this volume based on field research they completed over the last two years. They have interviewed judges, lawyers, litigants, officials, and civil society representatives in dozens of countries to unravel the key characteristics — the “building blocks” — which contribute to making environmental courts and tribunals effective in providing citizen access to justice in environmental matters. They identified 12 such characteristics and present them with examples of successes and failures from around the world. For those involved in creating or improving environmental courts and tribunals, one of the most useful aspects is the examples of best available practices relating to each of the 12 characteristics. The volume also provides a framework against which to assess existing or proposed institutions.

This volume is published by the Access Initiative (TAI), the largest civil society network dedicated to ensuring that communities have a voice in decisions concerning their natural resources. For nearly a decade, WRI has been privileged and proud to serve as the Global Secretariat of TAI. TAI partners have worked hard in over 45 countries to identify gaps in laws, institutions

and practices in the implementation of Principle 10. In the last 4 years, TAI has ramped up its advocacy efforts and worked with Governments to reform laws and institutions to improve transparency, citizen voice and accountability in environmental decision-making. To support its work, TAI has undertaken or commissioned research that fills or supplements key knowledge gaps in good governance. This volume represents one such important effort. The challenge is to take this knowledge and apply it to courts and tribunals to provide cheaper, faster and effective justice in environmental matters.

Our thanks go out to the authors, the hundreds of interviewees who gave of their time and shared their valuable experiences with the authors, the University of Denver Sturm College of Law, the TAI network and the Core Team of civil society organizations that help man-

age it, the Hughes Foundation, the Nanda Center for the Study of International Law, Global Environmental Outcomes (GEO), the many reviewers of this volume for their precious input. Our special thanks go to the Netherlands Ministry of Foreign Affairs, Swedish International Development Cooperation Agency (SIDA), the Royal Danish Ministry of Foreign Affairs and The Development Grants Facility of the World Bank for generously providing funds for publishing this volume and enabling it to reach global audiences.

**Jacob Werksman**

*DIRECTOR  
INSTITUTIONS & GOVERNANCE PROGRAM  
WORLD RESOURCES INSTITUTE*

# Acknowledgments

It is said that it takes a village to raise a child. In the case of *Greening Justice – the Environmental Courts and Tribunals (ECT) Study* – it took a global community of environmentally concerned professionals to research, review, and disseminate this small book! Over 200 individuals and organizations have made contributions of wisdom, insight, critical thought, and time to the study over the past two years, and hundreds more provided critical background information which is included in the Bibliography.

We sincerely thank each of the judges, attorneys, advocates, academics, legislators, and government officials who participated in our research, helped frame the findings and conclusions, and taught us so much about access to environmental justice in their nations.

This global study would not have been possible without the generous financial support of the University of Denver Sturm College of Law and its Dean Emeritus Beto Juarez, the University of Denver Faculty Senate, the Hughes Foundation, the Nanda Center for the Study of International Law, and our own consulting firm, Global Environmental Outcomes (GEO). Without that support it would have been impossible to make the on-site visits to countries with ECTs and learn first hand from experts about their successes and failures. We appreciate their faith in the value of this study, their commitment to access to justice, and their support of us as a research team.

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Our goal from the beginning has been to provide useful information to individuals and organizations interested in improving access to environmental justice through the creation or reformation of a specialized ECT. Many organizations have given us an opportunity to present the findings of the study to audiences of decision-makers around the world and get their criticisms and contributions. To date, these include the Faculty of the University of Denver Sturm College of Law, USAID/AECEN/Eco-Asia, the Thailand Supreme Court, the Thailand Administrative Court, the ABA/ROLI China Project, the India Society of International Law, the Abu Dhabi Department of the Environment, the International Union for the Conservation of Nature's Academy of Environmental Law (IUCN-AEL), Sweden's University of Uppsala, the Oregon Law School, the Queensland District Court Judges Association, and the Colorado Statewide ADR Conference. We thank you for providing a discussion platform for the topic and enhancing both the content and visibility of the study.

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# Introduction

by

**Lalanath de Silva**

*Director, The Access Initiative  
World Resources Institute*

The Access Initiative (TAI) is a world leader in evaluating and supporting “access rights” – access to information, access to public participation, and access to justice – the three critical pillars of good environmental governance in all nations. The World Resources Institute (WRI) functions as the Global Secretariat for the TAI network. TAI’s programs are designed to focus attention on how countries are currently providing access rights and how they can be improved. Environmental courts and tribunals (ECTs) – specialized forums for resolving environmental, natural resources, land use, and related disputes – are one very important mechanism for providing “access to justice” and, in so doing, protecting access to information and promoting public participation.

TAI is proud to present *Greening Justice: Creating and Improving Environmental Courts and Tribunals* – the third in its series of major publications on access rights. This is a first-ever collaborative, comparative, global examination of ECTs. Its authors are the husband-wife team of George (Rock) Pring, a law professor, constitutional/human rights consultant, and former environmental litigator, and Catherine (Kitty) Pring, a professional alternative dispute resolution (ADR) expert, institutional systems analyst, and former government health and human services officer. Together, they bring their multidisciplinary perspectives to this in-depth, “on-the-ground” analysis, based on research, observations, and interviews with scores of ECT judges and experts.

In the existing, excellent literature on ECTs, it is surprising how little is comparative. To date, studies chiefly examine single ECTs in depth or report on multiple ECTs without evaluating and comparing their specific features in a fashion that would give readers guidance

in choosing among the available options. The authors of this report have site-visited and evaluated 33 ECTs in 21 countries. The main purpose of the report is to provide guidance to promoters of ECTs everywhere. The result is extremely valuable information, evaluation, and resources never before published in a comprehensive document. It will serve as a “toolkit” for creating and improving ECTs and for incorporating good design elements and best practices – to assist government and civil society leaders who are considering establishing or reforming an ECT.

## The Dream of an Environmental Tribunal

When people ask me why specialized ECTs are important, I am reminded of my experience as an environmental lawyer in the regular (non-specialized) courts in Sri Lanka. I will never forget the judge looking down at me from the bench and asking “what is an EIA?” In the early 1980s, Environmental Impact Assessment (EIA) was a new concept in many countries. But I was addressing the court in 1997. I was at pains to explain the meaning of an EIA to the learned judge.

In that particular case, I was representing a civil society organization that was challenging a highway project. The EIA on the project, which was several hundred pages long, dismissed the environmentally friendly railway option in just over a page! Weeks later we learnt that we lost the case! In the judgment, the court pointed to the few paragraphs in the EIA about the railway option and stated that the option had been considered. Worse, there was a sting in the tail. The court slapped my client with punitive costs for bringing the action. The punitive order was removed after an appeal to the Supreme Court.

Each time I had to explain environmental concepts to judges of regular courts, I kept hoping for a specialized tribunal with judges trained in environmental law. Environmental disputes in Sri Lanka have to be brought before the regular courts. In 1994, I functioned as the convener of a ministerial task force funded by UNEP. Its mandate was to propose a new national environmental law. The final proposals included an Environmental Tribunal with wide ranging powers, enforcement mechanisms, and alternate dispute resolution options. Sadly, the new law never saw the light of day. It got mired in bureaucratic obstruction spurred by industrial and political interests.

### Principle 10 & The Access Initiative

The world has come to recognize that good environmental governance is fundamental to achieving sustainable development. At the Earth Summit in Rio de Janeiro in 1992, 178 governments signed the Rio Declaration affirming, among others, the principle that environmental decisions are best made with the participation of all relevant stakeholders – participation that is supported by access to information and backed by access to remedies and relief. As discussed in chapter 1.2 of this report, Principle 10 of the Rio Declaration lays the foundation for these three pillars of good environmental governance: transparency, inclusiveness, and accountability. These basic pillars have matured into “access rights” embedded in local and national laws, regional and international agreements, and judicial decisions.

Ten years after the Rio Declaration, world leaders met in Johannesburg to evaluate progress on international agreements and decisions made at the Earth Summit. While some progress had been made on several issues, civil society groups felt that implementation of Principle 10 had lagged behind. Motivated by the weak implementation of Principle 10, five non-governmental organizations (NGOs) launched The Access Initiative (TAI) to build a network of civil society partners committed to accelerating implementation of access rights around the world. TAI developed a toolkit with dozens of indicators to assess the performance of governments on access to information, public participation, and access to justice. They pilot tested the toolkit in nine countries and produced a report: *Closing the Gap, Information, participation and justice in environmental decision-making for the environment* (Petkova/TAI-WRI).

*Closing the Gap* demonstrated that it was possible to develop a toolkit of universally applicable indicators to assess the performance of governments on access rights. The assessment could form the basis of a dialogue with the government to spur reforms. *Closing the Gap* also highlighted the many gaps that existed between law and practice on the one hand, and international aspirations captured in the Rio Declaration and reality on the other. The report became a benchmark for TAI and for the next few years the network grew in numbers spreading to every continent. By 2005, TAI had established civil society coalitions in over 30 countries and carried out over 27 assessments using the toolkit.

Significant legal, institutional and practice reforms were initiated in several countries after 2002. After taking stock in 2008, TAI published *Voice and Choice: Opening the Door to Environmental Democracy* (Foti/TAI-WRI). In this report, TAI identified key arguments in favor of access rights, including human rights and instrumental arguments. It also identified four hurdles to be overcome if access rights are to be fully realized. These are: managing vested interests and the politics of access, closing the gaps in information systems, fostering a culture of openness, and investing in access capacity. *Voice and Choice* was another milestone for The Access Initiative. TAI has ratcheted up its efforts to effect legal, institutional, and practice reforms through advocacy, campaigns, and dialogue.

*Voice and Choice* evaluated evidence from 27 TAI assessments and extensively dealt with results and achievements in access to information and public participation. However, it did not comprehensively cover access to justice. There were two main reasons for this. First, the TAI toolkit’s access to justice indicators was new and experience of the network in this area was limited. Second, there were inadequate case studies from assessments to use as data points. TAI has begun to strengthen its access to justice program recognizing that this is a pillar, together with public participation, that has received less attention than access to information.

*Greening Justice* is an important part of TAI’s effort to engage governments in access to justice reforms. Together with another publication dealing with broad access to justice planned for 2010, it lays the foundation for civil society advocacy and reform efforts in this area.

## The Importance of Access to Justice

Access to justice plays a direct and important role in promoting government accountability. *Voice and Choice* identified four principal purposes served by access to justice in environmental decision-making.

First, it strengthens freedom of information, allowing civil society to press governments for information they were otherwise denied. Second, access to justice allows citizens the means to ensure that they participate meaningfully and are appropriately included in decision-making on environmental matters. Access to justice also levels the playing field by empowering groups that may not have influence in the legislative process or may not have the ear of government ministries to seek redress in the courts and other forums. Finally access to justice increases the public's ability to seek redress and remedy for environmental harm. (Foti/TAI-WRI, 37)

Chapter 1.3 of this report discusses the growth of ECTs. Much of the development of environmental law described in that chapter was motivated by public frustration with government agencies that were seen as failing to protect the environment and public health. Industrial accidents like Bhopal in India (1984) killed thousands of poor people and the spraying of DDT in industrialized countries seriously affected wildlife and human health. Civil society groups around the world galvanized to demand new and more stringent environmental laws. Chapter 1.3 also traces the rise of environmental rights and the growth of ECTs from the 1970s through the 1990s.

Access to justice in environmental matters has gained ascendancy as an effective mechanism for holding governments accountable and ensuring that environmental laws and regulations are enforced. While access to the regular courts has opened up in many countries, legal claims to these courts have also shown that they can be expensive, time consuming, and inefficient in resolving environmental disputes. This report demonstrates that demand for greater access to justice combined with the growing complexity of environmental laws and science are some of the key factors that have led to the growth of ECTs.

## Environmental Courts and Tribunals

Environmental Courts and Tribunals (ECTs) are a species of specialized courts and tribunals. Specialized courts, tribunals, and judges are not new and have

existed in ancient and modern times. For example, in ancient Rome the *Praetor Urbanus* adjudicated disputes between Roman citizens while the *Praetor Peregrinus* adjudicated disputes between foreigners (in Latin *peregrini*) and Roman citizens. Ecclesiastical courts in Europe specialized in claims against or by priests. In my own country, Sri Lanka, the Dutch colonial government established *Land Raads* in the 17th century – courts specializing in adjudicating land disputes. Modern examples of specialized courts and tribunals are workmen's compensation tribunals, landlord-tenant tribunals, tax courts, commercial courts, labor tribunals, anti-discrimination commissions, tribunals dealing with compensation for victims of crime, planning commissions, and electricity tribunals. In Chapter 2, the authors have identified the value of establishing specialized tribunals. These include efficiency and speed in the disposal of cases, harnessing expertise relevant to the specialized field, reducing the costs of dispute resolution, uniformity of decision-making, visibility for the subject area, integrating related issues and remedies, and increasing public participation and confidence,

While such specialist courts and tribunals have been created from time to time, their accelerated growth is a 21st century phenomenon. Chapter 1.3 shows that the earliest forms of ECTs began to appear around the 1900s. Today, over 350 ECTs are authorized in 41 countries. The authors of *Greening Justice* have conducted over 150 interviews and visited and studied 33 ECTs in 21 of these countries. This surprisingly large number of ECTs bears testimony to the growing trend of establishing specialized judicial and quasi-judicial institutions to provide access to justice in environmental matters. The chapter also identifies the main reasons for the growth of these bodies.

## Greening Justice – How to Use this Report

This report lays out a decision-making framework for creating an ECT that can be useful in different legal cultures and political situations. It provides the tools and support necessary to enhance access to environmental justice in countries around the world that, in turn, will advance the principles of environmental protection, sustainable development, and intergenerational equity through the institutions responsible for delivering environmental justice. Chapter 2 discusses arguments for and against creating ECTs. Costs, expertise, visibility, uniformity, and efficiency are but some of the key elements identified and elaborated. Every nation that is

contemplating establishing or reforming an ECT ought to consider these arguments thoroughly in making its decision.

Most importantly, the authors have identified a dozen elements that either make or break an ECT. For each of these elements they provide best available practices and illustrations of successes and failures. They make the important point that a “cookie cutter” or “one size fits all” approach is not helpful. In discussing the creation of specialized tribunals, H.W.R Wade emphasizes that each one is “devised for the purposes of some particular statute” and must therefore be “tailor-made.” (Wade, 884-886) The framework provided by this report will allow promoters of ECTs to design an institution that fits the legal culture and specific environmental and developmental needs of that country or region.

Finally, it is our hope that this landmark report will help shape the future of ECTs and access to justice for citizens everywhere. TAI and its partners plan to use it to promote the establishment and improvement of ECTs in their own countries. They will take the findings of this report to the next step – application of the framework and best available practices to real world ECT creation and improvement in the national and sub-national context. For instance, TAI partners in India will use the report as the starting point for assessing the problems associated with the National Environmental Appellate Authority (NEAA) and the Central Empowered Committee (CEC). Based on their findings they plan to campaign for revising the new Green Tribunal Bill being considered by the legislature. We invite all promoters of ECTs to use this report in constructive ways to improve access to justice on environmental matters and promote the accelerated implementation of Principle 10.

# Executive Summary

*Greening Justice: Creating and Improving Environmental Courts and Tribunals* is designed as a guide for government, judicial, and civil society leaders and members of the public who are interested in creating or reforming a specialized environmental court or tribunal (ECT) to improve access to environmental justice.

Effective “access to justice” can be seen in three basic stages – at the beginning, middle, and end of the adjudication process: (1) access to get to and through the ECT door; (2) access within the ECT to proceedings which are fair, efficient, and affordable; and (3) access to enforcement tools and remedies that can carry out the ECT’s decision and provide measurable outcomes for preventing or remedying environmental harm. This study analyzes the processes for establishing or improving ECTs to provide access to justice in all three stages. It does not attempt the subjective task of evaluating the quality of the outcomes or decisions in individual ECT cases.

This University of Denver ECT Study, co-directed by George (Rock) Pring and Catherine (Kitty) Pring, provides a comprehensive, global, comparative study of specialized ECTs. The authors bring their multidisciplinary perspectives – of an international environmental law professor, litigator, and human rights consultant, and a professional mediator, alternative dispute resolution (ADR) expert, and organizational systems change analyst – to this in-depth, “on-the-ground” analysis of these specialized forums for resolving environmental disputes. The result is a user-friendly guide or decision framework of comparative structures, operations, and best practices for those jurisdictions considering establishing or improving an ECT.

The number of ECTs has grown from only a handful in the 1970s to over 350 in 41 different countries today. Over half of these new courts and tribunals have been created just since 2004. This dramatic growth of ECTs worldwide is a function of other growth – growth in the complexity of environmental laws; in public awareness of environmental problems; and in the pressure on governments to provide access to information, access to public participation, and access to justice in protecting the environment for today’s and future generations.

The study is based on the authors’ extensive interviews with over 150 ECT-experienced justices and judges, prosecutors, court staff, government officials, private-sector attorneys, nongovernmental organizations, and academics visited in 24 countries representing 152 ECTs established or under consideration on every inhabited continent. The interviews are further supplemented with literature review, internet research, and court observation.

The analysis begins with a background chapter (chapter 1.0) on the **study methodology**, on public “**access rights**” which have long been the focus of The Access Initiative of the World Resources Institute, and the **explosive growth** of ECTs. Chapter 2.0 objectively lays out the debate – explaining the **arguments for and against specialized ECTs**.



*Authors Kitty and Rock Pring in the Philippines Supreme Court, the first court to give Access to Justice to “future generations.”*

*Credit: John Paul Galang.*

The essential findings of the study make up chapter 3.0 – the 12 “**building blocks**” or **design decisions** that define all ECTs. The alternatives and options found within each of the 12 factors allow planners to design their ECT to fit the unique legal-political system, culture, and goals of their particular country or jurisdiction. No two ECTs studied use exactly the same model, and this step-by-step examination of the 12 building blocks enables planners to understand the variety of options, examples, and best practices, and to evaluate what best promotes access to justice in that country’s system.

The 12 basic building blocks or design decisions are:

1. **Type of forum** (whether to choose a judicial court or administrative tribunal and at what level of independence)
2. **Legal jurisdiction** (over what substantive laws, policies, and principles will the ECT be given authority)
3. **ECT decisional levels** (should the ECT’s level(s) be trial (first-instance), intermediate appellate, and/or supreme (final review) and should its power(s) be civil, criminal, administrative, or a combination)
4. **Geographic area** (what territory should be covered by the ECT, from a town to a city to a state or province to an entire nation)
5. **Case volume** (will the jurisdiction make the workload appropriate or too low or too high)
6. **Standing** (what qualifications will be required of parties to bring an action in the ECT or otherwise participate in a case)
7. **Costs** (what are the expenses for parties from the time of filing to a final decision and what are the mechanisms to reduce those costs)
8. **Access to scientific and technical expertise** (how will the ECT manage to get adequate, unbiased input on the increasingly complex scientific-technical issues in environmental cases)
9. **Alternative dispute resolution (ADR)** (can ADR – often a cheaper, faster, better way to resolve environmental conflicts – be incorporated, as it is by a majority of the ECTs studied)
10. **Competence of ECT judges and decision-makers** (including qualifications, training, tenure, and salary are needed for quality decision-makers)

11. **Case management** (what process mechanisms will permit ECTs to move cases through the decision-making process more efficiently and effectively and less expensively).
12. **Enforcement tools and remedies** (what powers will be needed to make the ECT’s decisions effective, from mediated agreements to injunctions to criminal fines and incarceration, and all the creative alternatives in between).

The most critical of these design decisions for enhancing access to justice are 6–9: standing, costs, scientific and technical expertise, and ADR. Close seconds are the decisions about legal jurisdiction, case management, and enforcement tools and remedies.

Detailed “**best practices**” are identified for each of the 12 categories based on the opinions of the experts interviewed and the experience of the research team. These are not “one size fits all,” but depend on the legal framework, political system, and goals for each country establishing an ECT. Each decision impacts the next analytic step in the process and will determine which best practice “fits” a jurisdiction. However, some decisions work to enhance access to justice, while others erect or maintain barriers for parties seeking environmental justice.

Whatever **type of forum** is chosen, independence from undue political influence is a critical best practice for achieving a fair, just, and respected ECT. Ideally, **legal jurisdiction** should be broad enough to permit integrated review of both land use and environmental areas of concern and should incorporate civil, criminal, and administrative powers. **ECT decisional levels** can be at one, two, or all three stages from trial through supreme court, but, if one had to pick one to start with, the expertise an ECT provides is most crucial at the first-instance trial or review level. **Geographic area** should be broad enough to generate sufficient caseload to support the ECT, while insuring that the ECT is accessible to the people, problems, and sites in areas with transportation difficulties. Anticipated **case volume**, based on a careful review of past experience, will drive the initial structure of an ECT, and can permit starting small and adjusting procedures as caseload grows or diminishes. **Standing** should be as broad as possible and not restrict public interest lawsuits or be used as a “door-keeper” to prevent lawsuits.

Every effort should be made to reduce **costs** to parties, particularly community and public interest parties. Use of **scientific and technical expertise**, both on the ECT and off, should be designed to focus issues quickly and accurately. Incorporating **alternative dispute resolution (ADR)** mechanisms, especially ECT-annexed, facilitated negotiation and mediation, produces better general outcomes, including reducing the ECT's and parties' time and costs. **Competence** rules should assure selection of ECT judges and decision-makers who are dedicated, highly qualified, and trained in environmental law and who are provided some security of tenure, a professionally competitive salary, and career potential. Inclusion of one or more of the **case management** tools identified will improve efficiency and effectiveness of the ECT, thereby enhancing access to justice. Finally, a broad range of

**enforcement tools and remedies** allows ECTs to be creative in individually tailoring enforcement to maximize real environmental justice.

Chapter 4.0 examines the need for on-going **evaluation** of ECTs to promote transparency, public confidence and support, and constant improvement. The study recommendation is that every ECT should build in and disseminate an annual comprehensive performance evaluation, including procedural, process, and substantive outcomes.

In Chapter 5, *Greening Justice* concludes with predictions for **the future** of ECTs. Clearly the number and variety of ECT models will continue to expand – as will demands that the models adopted truly maximize access to justice in a fair, efficient, and affordable way.



# 1 A Study of Access to Justice in Specialized Environmental Courts and Tribunals

The 21<sup>st</sup> century is experiencing an amazing growth in environmental courts and tribunals (ECTs).

Over 350 of these specialized forums – focused on resolving environmental, natural resource, land use development, and related issues – can now be found in dozens of countries in every region of the world.

Concerns with how the general, nonspecialized court systems handle environmental and land use issues affecting development and future sustainability – concerns of litigants, judges, government decision-makers, public interest nongovernmental organizations (NGOs), and developers alike – have accelerated the creation of ECTs. The issues regarding general courts cited in both the literature and by interviewees – including accessibility, lack of legal and technical expertise, high litigation costs, delay, decision quality, lack of public information and participation, and public trust – are all seen as limiting access to environmental justice. Frequently, charismatic champions have emerged and led the charge for reform.

During the past two years, the number of ECTs has doubled, with over 130 new national, regional, and local ECTs being created in China, Thailand, Belgium, and the Philippines alone. Some 354 ECTs have been

found in 41 countries identified to date. (See Appendix 1 for a complete list of the known ECTs.) Also, a number of other nations are currently considering establishing these specialized judicial or administrative forums as a means of dealing more efficiently and effectively with environmental issues or are considering ways to improve the ECTs that already exist.

As a result, judges, legislators, government administrators, NGOs, community groups, private-development attorneys, academics, and other stakeholders around the world are debating whether creating an ECT is a good step for their countries – and asking what factors need to be considered in order to establish one. But the published research has not kept up with these developments. In particular, there is a surprising lack of (1) *comparative analysis* of the different “models” of ECTs now existing, and (2) *systems analysis* of the “decision steps” necessary to create (or reform) an ECT so that it provides access to environmental justice.

The volume of ECT literature is impressive quantitatively, but not comparatively (see Bibliography). There have been a few helpful surveys of some ECTs, principally in Europe and Australia (see for example, in the Bibliography, Lavrysen 2006; Lavrysen et al.; Scottish

Government). There are excellent analyses of a few individual ECTs in some depth, principally in Australia and New Zealand (e.g., Stein 1995; Birdsong; Rackemann 2004; Preston 2006, 2007, 2008). And there have also been studies evaluating the desirability of establishing ECTs in particular jurisdictions, such as England (Woolf 1996; Macrory & Woods), Scotland (Scottish Executive), and India (Law Commission of India). However, to date there has not been an in-depth comparative analysis of the diverse range of existing ECTs to see how they can enhance access to environmental justice and what specific factors contribute to their effective design and operation.

This study is designed to fill this gap and provide a practical framework for ECT decision-makers and stakeholders. To do that, the research team of George (Rock) Pring (an environmental, international, and constitutional law professor and former environmental litigator) and Catherine (Kitty) Pring (a professional mediator, systems analyst, and former government human services administrator) undertook a comprehensive international study of existing and proposed ECTs. Using stakeholder interviews and extensive research, the study examines ECTs' origins, history, forms, operations, and people's perceptions of their operational successes and failures. The authors enlisted the support of the University of Denver Sturm College of Law, the University of Denver, the Hughes Research Fund, and Global Environmental Outcomes (GEO), their own consulting firm, to fund this global multidisciplinary study in 2008 and 2009 (see <http://www.law.du.edu/index.php/ect-study>).

*Greening Justice*, the resulting report, provides insights into why many nations have created or are interested in creating an ECT, a frank discussion of the pros and cons of ECTs, a "design-decision" framework of 12 crucial elements to be considered in developing an ECT, and a summary of "best practices." The design decisions provide as full a range as possible of the options or alternatives available, recognizing that every country will have its own unique legal system, environmental goals, political structure, culture, and socio-economic situation to consider. The best practice recommendations are based on the perspective of improving "access to justice in environmental matters" as a consequence of the authors' finding that a major impetus in creating or reforming ECTs is the desire to enhance that "third pillar" of environmental democracy. This goes along with the other "access rights" of access to information and to

public participation in decision-making, as exemplified by the 1998 Aarhus Convention (Foti TAI/WRI; Aarhus Convention).

Effective access to justice can be viewed as a three-stage process – with a beginning, a middle, and an end:

1. Beginning: Access to get to and through the courthouse door (having the information and knowledge, the standing, the legal and technical support, the ability to take on the risks);
2. Middle: Access within the ECT to proceedings which are fair, efficient, and affordable; and
3. End: Access to enforcement remedies and tools that can give effect to the ECT's decision.

A word of caution: Evaluating "effectiveness" or "success" in access to justice can mean quite different things, depending on which of the three stages one examines. This report examines the first and second stages, that is whether access to justice is being provided by ECTs in terms of allowing parties **access to the adjudication process**. The report does *not* purport to measure effectiveness or success in terms of the third stage of **substantive environmental outcomes**, that is, whether an ECT's decisions are "good" or contribute to "environmental justice" or promote "sustainable development." (On sustainable development generally, see Sands & Werksman; Pring 1998, INECE.)

Whether ECTs produce "good" environmental decisions is a tempting, but extremely subjective, "eye-of-the-beholder" judgment that is difficult to measure objectively, let alone one that lends itself to community consensus. An interesting attempt has been made in an academic study of court decisions in environmental cases in the four Nordic countries that surveys whether "environmental interests [were] protected" by those courts' decisions in 1996-2005 (Anker, et al.); results were mixed to say the least. In fact, no ECT has been found that has developed an evaluation model to determine if its decisions are environmentally protective or promote sustainable development over time.

Rather, this study focuses on the effectiveness of ECTs in providing the crucial access to justice *process* steps prior to and after the decision – an open accessible forum with resource-efficient operating rules and adequate powers of enforcement. Or, as Australian law so succinctly puts it, a process that is "just, quick, and cheap" (Preston 2008, 10).

The goal of this report is to offer guidance for governments and other stakeholders interested in ECT capacity building in order to resolve environmental disputes and improve environmental democracy, with the hope that sustainable outcomes will result. **The Access Initiative (TAI) of the World Resources Institute (WRI)** shares the goals of enhancing institutional effectiveness and achieving greater environmental democracy and already has made major contributions in the areas of access to information and access to public participation (Foti TAI/WRI, 3). Capacity building for ECTs has been and is being provided by other leading institutions, including the United Nations Environment Programme (UNEP 2006; UNEP 2007), the UN Economic Commission for Europe (UNECE Workshop), the US Agency for International Development (USAID Success), the European Commission (EC Inventory), the EU Forum of Judges for the Environment (EUFJE website; Lavrysen, et al.), the Asian Environmental Compliance and Enforcement Network (AECEN Thailand), the American Bar Association-Rule of Law Initiative (ABA-ROLI), the Land and Environment Court of New South Wales (Land and Environment Court 2007, 4, 43-44), and other national and international organizations.

A “cookie cutter” or “one-size-fits-all” approach to ECTs is not useful, given the wide diversity of laws, legal institutions, and cultural and socio-economic contexts internationally. More useful, it is hoped, is a decision-making framework for ECT creation and on-going evaluation

and improvement which can serve a full range of different legal cultures and political situations. The authors and publisher hope that this study will provide needed tools and support for enhancing access to environmental justice in countries around the world. Accessible, effective ECTs, in tandem with stronger national and international environmental protection and land use laws that incorporate the principles of sustainable development, intergenerational equity, and environmental democracy hopefully will contribute to better long range outcomes for communities, nations, and the world.

### 1.1 Study Methodology

The study focuses on national and sub-national ECTs, defined as *judicial or administrative bodies of government empowered to specialize in resolving environmental, natural resources, land use development, and related disputes*. The term “court” is used to indicate a body in the judicial branch of government and “tribunal” to indicate all non-judicial government dispute-resolution bodies (typically in the executive or administrative branch of government).

The findings are based on (1) extensive review of the existing literature, internet, and media sources on ECTs, (2) observations of ECT proceedings, and (3) over 150 interviews with judges and other experts from a representative cross-section of the diverse range of ECT types in the world. The ECTs studied represent



*Authors interviewing Katsuji Oouchi, Chair of Japan's Environmental Dispute Coordination Commission (or “Kouchoi”), the national environmental tribunal of Japan*

*Credit: T. Utsugi, EDCC*

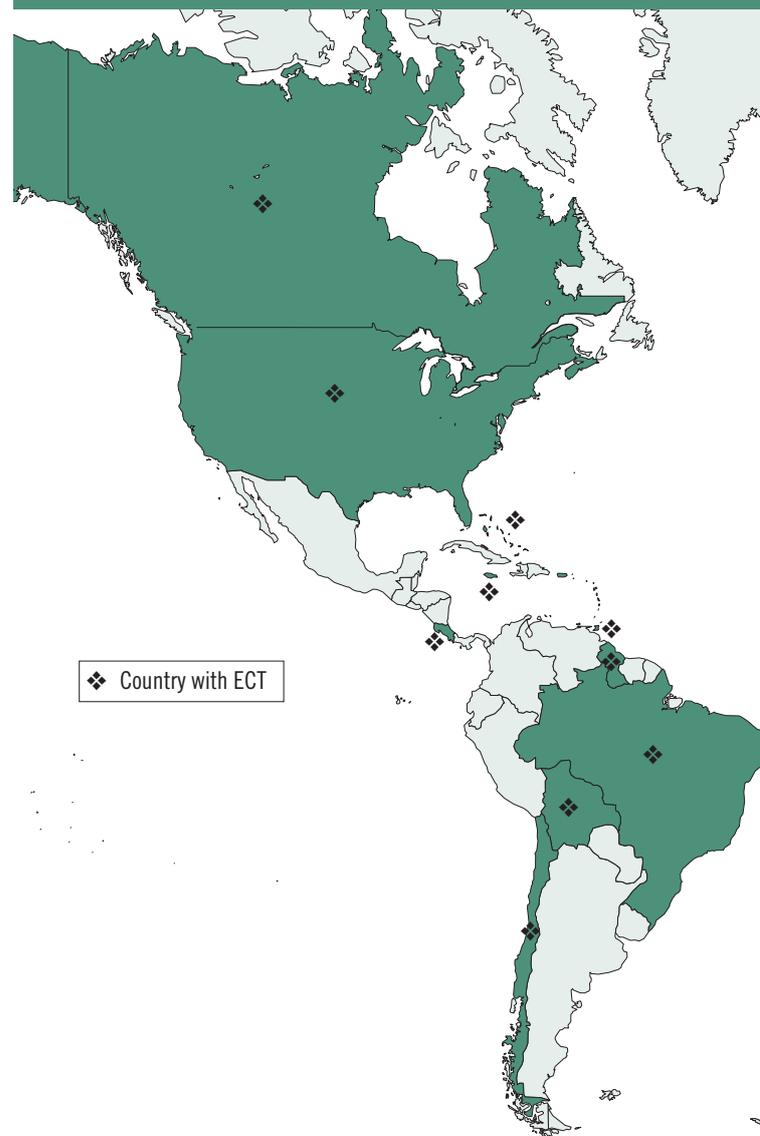
- national, state/provincial, and local government jurisdictions;
- all six inhabited continents;
- developing and developed nations, from the very rich to the very poor;
- common law, civil law, and religious law systems;
- Christian, Muslim, Hindu, and Buddhist religious environments;
- civil, criminal, administrative, and hybrid civil-criminal ECTs;
- independent ECTs as well as “green benches” in general courts;
- models ranging from purely adversarial adjudication to combined adjudication-mediation to purely mediation;
- countries with traditional (“first generation”) environmental laws and those with more modern or elaborate ones; and
- ECTs applying traditional “legalistic” approaches as well as those engaging in more holistic “problem solving.”

During 2008 and 2009, the research team conducted on-site interviews and observations in 24 countries, representing 152 existing or proposed ECTs (including the 117 recently established in the Philippines). Interviews were conducted with ECT-experienced:

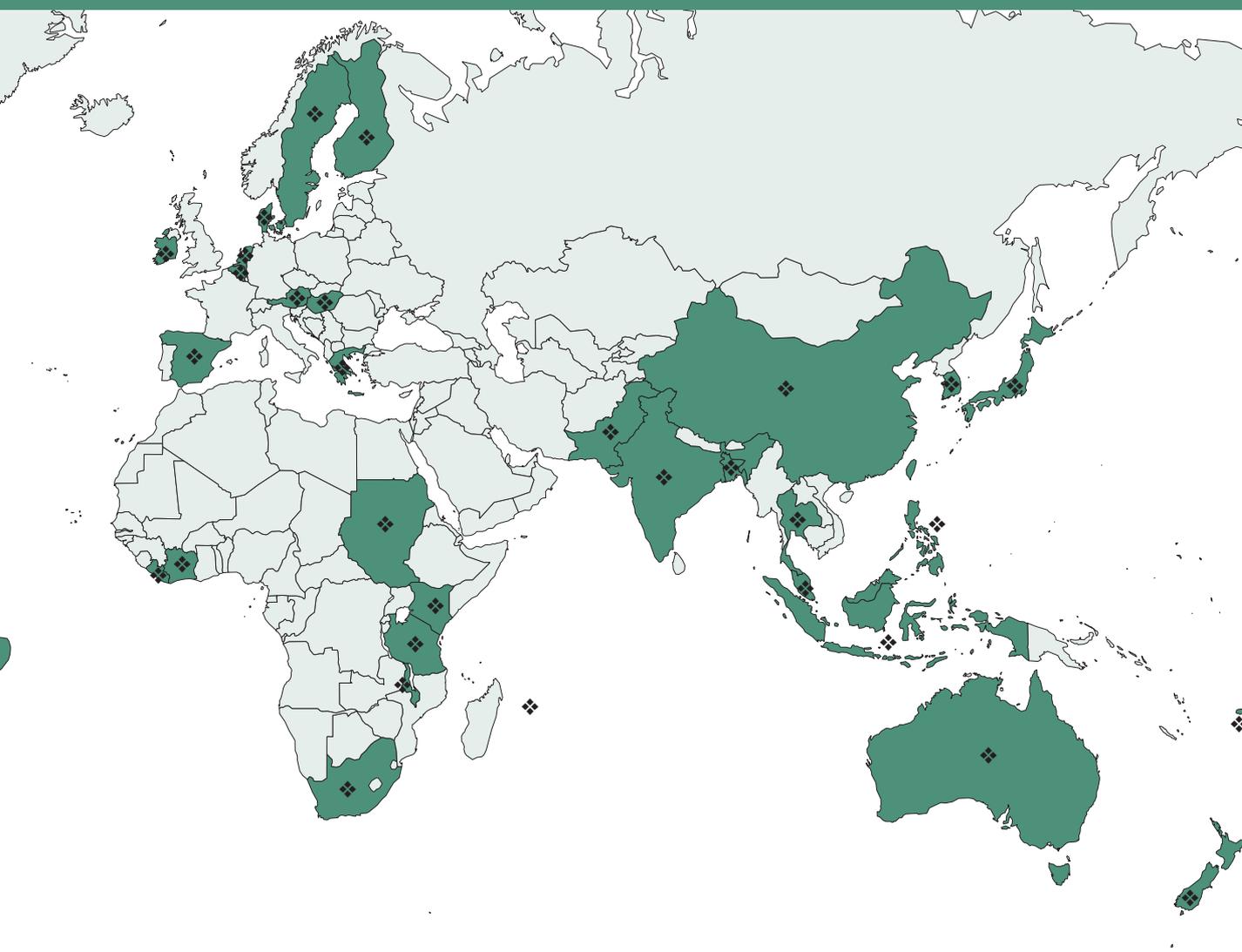
- Justices, judges, and tribunal decision-makers
- Government environmental officials
- NGOs and community groups
- Private-sector attorneys
- Environmental prosecutors
- Environmental ombudsmen
- Academics.

Countries included in the site visits represented a cross-section of the countries with ECTs. Care was taken to include in-depth ECT studies on every continent and region, including North and South America, Europe, Africa, Middle East, South Asia, Southeast Asia, East Asia, and Oceania. Limitations in selection included ability to contact and get responses from key informants, conducting research in English, and travel scheduling.

FIGURE 1 WORLD MAP OF COUNTRIES WITH ECTS



Interviews were based on a standardized set of questions (see Appendix 3), providing comparable information for the different institutions. Interviews varied in length and substance, but all were focused on eliciting both facts and perceptions of these ECT experts. Information was documented regarding origin, history, type, structure, review level(s), legal jurisdiction, geographic coverage, case volume, standing, costs, use of scientific and technical expertise, operational or case management tools, use of ADR, judicial qualifications/competence, and remedies and other enforcement tools. In addition, interviewees were asked how “effective” they thought the ECT was in providing access to justice in terms of accessibility and operations. They were also asked what changes they would recommend to other jurisdictions considering creating or reforming an ECT. No formal evaluation of the substantive judicial deci-



sions was conducted, because of the inherent subjectivity of such assessments of court outputs. However, interviewees were asked their opinion on whether the ECT resulted (or would result) in decisions which were better for the environment or sustainable development than decisions made by non-specialized, general jurisdiction courts and tribunals.

From that research, the study identified 12 structural and operational characteristics – “design decisions” or “building blocks” – which contribute to the success of ECTs in enhancing access to justice. A jurisdiction considering creating an ECT will find it useful to proceed sequentially through four decisional steps:

1. First, weigh the arguments for and against developing a specialized ECT based on that jurisdiction’s legal structure, political situation, socio-economic conditions, and environmental goals (see chapter 2.0).
2. Second, if the decision is to proceed with an ECT, then analyze the options and best practices within each of the 12 design decisions or building block factors and decide which combination of options best fits the jurisdiction’s characteristics and goals (see chapter 3.0).
3. Third, strategic planning is needed regarding implementation strategies for developing the ECT. This is beyond the scope of this study, but would include broad public information and participation, obtaining buy-in from the critical stakeholders, developing necessary authorizing legislation, public education to develop understanding of and grassroots support for the proposed ECT, arranging secure financing, selecting and training judges and staff, and adopting practice rules and procedures. (Further on this see, e.g., Stein 1999, 2000; Preston & Smith; Preston 2007f.)

4. Fourth and finally, also beyond the scope of this study, is the development of a comprehensive, ongoing evaluation of both the ECT's procedures and outcomes to assess whether a specialized ECT is "effective" in providing access to environmental justice both procedurally and substantively. The Land and Environment Court of New South Wales, Australia, is a leader in developing and applying this kind of methodology. (For a detailed description of its evaluation process, see Preston 2008, 14-25.)

*Caveats:* Although most of the known ECTs were included in the research database (see Appendix 1, List of ECTs), the study does not include data from all ECTs in the world. While specific examples are cited to illustrate building blocks or best practices, no attempt has been made to list exhaustively every ECT that could serve as an example. Every effort has been made to keep the information updated, but change is one of the major characteristics of ECTs, so changes will inevitably have occurred. The study was necessarily limited by its reliance on English in interviews and on translations of research, which may not fully capture the complexity and sophistication of some ECTs. The study did not undertake a review of international (multi-nation) ECTs.

Most importantly, as mentioned before, this study does not purport to measure whether ECTs are "effective" in terms of *outcomes* – that is, whether their decisions are better than general courts' decisions for people, the environment, or principles like sustainable development. Quality of outcomes, not surprisingly, cannot be objectively measured because it is so much "in the eye of the beholder," controlled by individuals' personal perspectives. (But for a methodology that makes an impressive attempt at this, see Preston *id.*) What this study found, based on many interviews is that, not surprisingly, judges and tribunals across the board think the world is better off because of their ECT and its decisions. Conversely, some developers and other private market interests see the ECT as an unnecessary interference with economic development, but many applaud the speed, reduced cost, and informed and often creative decision-making processes that characterize ECTs. Some government environmental agencies and politicians expressed concern about an independent body "looking over their shoulder" and reversing their decisions, but felt the same about general courts. NGOs typically supported ECTs, while often criticizing them as inaccessible, unsympathetic, costly, and failing in environmental enforcement.

Thus, this report's conclusions about whether a particular ECT or feature is "effective," "successful," or a recommended "best practice" are not based on an evaluation of outcomes, but on the experienced judgments of the ECT experts interviewed and the researchers' analysis of the ECT's or feature's contribution to access to environmental justice that is "just, quick, and cheap." While some quantitative data was documented, such as case volume, process time, and costs to the parties, access to justice cannot be measured by quantitative data alone (for example, number of cases processed as a percentage of total cases filed). Since access to environmental justice is the primary rationale underlying ECTs and this study of them, it is worth examining its legal basis briefly.

## 1.2 Access Rights: Access to Justice

"Environmental democracy is about government being transparent, accountable, and involving people in decisions that affect their environment" (Kerdeman / WRI; for more on this subject see UNECE Aarhus Clearinghouse for Environmental Democracy). International law and many national laws today recognize that there are three "pillars" supporting environmental democracy – access to information, access to participation in decision-making, and access to justice. Collectively these are called the "access rights" (Foti / TAI-WRI, 2). (This discussion of the access rights draws on the 1998 Aarhus Convention; Pring & Noé, 11 et seq.; Nanda & Pring, 43-55; Foti / TAI WRI; Petkova / TAI-WRI.)

Justification of these rights is straightforward:

Access rights are central to more representative, equitable, and effective environmental decision-making. Access to information empowers and motivates people to participate in a meaningful and informed manner. Access to participation in decision-making enhances the ability of a government to be responsive to public concerns and demands, to build consensus, and to improve acceptance of and compliance with environmental decisions. Access to justice allows people to hold government agencies, companies, and individuals accountable. Meaningful participation requires access to the information that forms the basis for decisions, the opportunity to voice opinions, and the ability to influence choice among possible outcomes. (Foti / TAI WRI 2.)

The three access rights are strongly interrelated, since no one of them can succeed without the other two. They are “a prerequisite to effective national and international management and protection in matters related to the environment and development” (Sands & Werksman, 178-179). Access rights may be of most importance to those with the least political power and those living in poverty, both groups among the most impacted by environmental harms yet least able to protect themselves (Pring & Pring 2008).

The Access Initiative’s 2008 study, *Voice and Choice: Opening the Door to Environmental Democracy* provides a unique assessment of the status of the first two access rights – information and participation (Foti TAI-WRI). *Greening Justice* addresses the third right – access to justice – by analyzing how ECTs can provide improved access for the public and parties affected by environmental actions and impacts and, in the process, balance potential conflicts between the human rights of current and future generations to a safe, healthy, and sustainable environment with this generation’s human rights to economic, social, and cultural development.

**Access to environmental justice** covers three types of legal issues: Claims (1) to challenge denial of access rights, (2) to prevent or remedy environmentally harmful activities, and (3) to enforce environmental laws. National or local laws directly control how much access to justice a particular court or tribunal provides each type of claim. A wealth of international and national laws and legal authorities require or support broad access to justice.

“Equal access to justice” has deep roots in human history (Pring & Noé 17-22). As Aristotle famously said in his *Politics* over 2000 years ago, “The only stable state is the one in which all men are equal before the law.” While a complex concept, access to justice can be simply defined as

“The ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards” (UNDP 5).

As widespread as we find the concept of a right of access to justice historically and geographically, it has by no means been universal in all times and cultures (Pring & Noé, 21). Its modern era of more universal, if not uniform, acceptance begins with recognition in the 1948 **Universal Declaration of Human Rights** and

#### BOX 1 1992 RIO DECLARATION PRINCIPLE 10

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. *Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*”

(Emphasis added)

the 1966 **Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights**. Many human rights laws have followed, laying out the so-called “first generation” human rights (civil and political rights) and the “second generation” human rights (social, economic, cultural rights), and the more recent, more controversial, but expanding “third generation” human rights (to a quality environment, development, sustainability, intergenerational equity, self-determination, and other human rights.) (see generally, Sohn; Kravchenko & Bonine). So we now have a “confluence” of human rights and environmental rights (Pring & Pring 2009; Foti / TAI-WRI, ch. 2).

One of the foundations of modern international environmental law, the 1972 **Stockholm Declaration** of the UN Conference on the Human Environment, recognizes a human right to a quality environment in Principle 1, but implementation of it through access rights received little attention except for a weak call for states to “develop further” laws helping “victims of pollution and other environmental damage” (Stockholm, prin. 22). However, only two years later, the Nordic countries entered into a binding **Convention on the Protection of the Environment** which specifically required access to justice of citizens of one country in the courts and tribunals of the others (Nordic Convention, art. 3).

By the 1980s, access to justice was becoming widely acknowledged. In 1982, the UN General Assembly adopted the landmark, but nonbinding **World Charter for Nature** (almost unanimously, the USA being the only negative vote). It provides “all persons...shall have access to means of redress when their environment has suffered damage or degradation” (art. 23). Four years

after that the Experts Group of the UN World Commission on Environment and Development produced the authoritative **Legal Principles for Environmental Protection and Sustainable Development**, stating that nations are required to “grant concerned persons access to and due process in administrative and judicial proceedings” regarding the environment and “provide remedies for persons” affected by transboundary environmental harms (WCED, arts. 6, 20).

Major recognition of access rights came in 1992 with **Principle 10 of the Rio Declaration** of the UN Conference on Environment and Development. Principle 10, in mandatory terms, specifies that “*Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided*” by states in environmental matters (Rio, prin. 10).

While Principle 10 was not intended to be immediately binding, “it has provided a benchmark against which the compatibility of national [judicial] standards can be compared” and inspired the development of a number of hard laws (Sands 118). Subsequent binding treaties providing strong access to justice rights include the 1992 **Convention on Transboundary Effects of Industrial Accidents** (art. 9(3)), the 1993 **Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment** (arts. 1, 6-11, 14(5), 18), the 1993 **North American Agreement on Environmental Cooperation** (the NAFTA “Environmental Side Agreement”) (arts. 5-7, 14-15), and the 1997 **Convention on the Law of Non-Navigational Uses of International Watercourses** (art. 32).

The 1998 **Aarhus Convention** – technically the UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters – is the first binding treaty completely devoted to access rights in environmental disputes (Pring & Noé 49; Sands 119-120). Article 1 states its sweeping objective:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each [state] Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention (art. 1).

The parties to Aarhus included virtually all of the countries of western, central, and eastern Europe (43 countries plus the European Community by December 2009). The standards for public access adopted at the Aarhus Convention, however, have gone far beyond the European countries who were parties, and have continued to influence the development of new “access” expectations, laws, and procedures in Africa, the Middle East, Asia, and South America. (See the UNECE’s Resource Directory website at “Where in the World?,” available at <http://aarhusclearinghouse.unece.org>.)

Aarhus Article 9 contains elaborate access to justice provisions. First, states must provide someone denied access to information with “a review procedure before a court of law or another independent and impartial body established by law” (art. 9(1)). Second, states must provide members of the public with “sufficient interest” or an injured right with a review procedure to challenge any decision, act, or omission subject to public participation (arts. 2(5), 9(2)). Third, national law must provide “wide access to justice” (art. 9(2)). Fourth, any environmental NGO shall be deemed to have “sufficient interest” for standing (*id.*). Finally, Aarhus includes a ground-breaking provision requiring states to provide access to judicial or administrative forums to enforce environmental laws against both private persons and the government (art. 9(3)), the kind of “citizen suit” provision that is typical of US pollution laws (e.g. CWA § 505).

The 21<sup>st</sup> century continues to see expanded recognition of access rights beyond the parties to Aarhus. For example, in 2000 the Organization of American States (OAS) adopted the **Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development** stating:

“Legislative and administrative bodies should ensure access to justice at all levels in order to secure rights, review decisions, or redress grievances, among other purposes. Meaningful access should be assured by providing legal standing... for all affected and interested parties; the right of appeal to or review by, when pertinent, a higher government authority; and through alternative dispute resolution mechanisms to promote settlement; as well as through maintenance of independence among authorities responsible for implementation, appeals, and oversight.” (OAS-CIDI.)

Another example is the 2006 **UNEP Bandung Roadmap**, a policy adopted by experts from Asian and African countries to outline “a way forward for the advancement of environmental law and policy to achieve environmental goals and objectives of sustainable development.” One of its recommendations is to “Promote the development of mechanisms to facilitate the prevention and peaceful settlement of environmental disputes, including the use of . . . *environmental courts and other practical dispute resolution mechanisms.*” (Oliver, 498-499, emphasis added.)

### 1.3 The Spread of Specialized ECTs

Specialized courts and tribunals – limited to select legal issues or select constituencies – are a longstanding, widespread, and growing phenomenon worldwide and at all levels of government. There are courts and tribunals at trial and appellate levels specializing in taxes, bankruptcy, drugs, mental health, traffic, probate, international trade, monetary claims against the government, small claims, business, land claims, indigenous people’s entitlement to land and other natural and cultural resources, water rights, mine safety, foreign intelligence surveillance, immigration, divorce and family matters, domestic violence, juveniles, teenagers, homeless persons, the armed forces, military veterans, terrorism suspects, landlords and tenants, and now even a “national vaccine court” in the United States. Fascinating evidence of this growing trend to create courts specialized by legal subject, just in the United States, is the creation of a “Specialty Courts InfoCenter” by the National Center for State Courts (NCSC website) and the new American Bar Association subgroup, the National Conference of Specialized Court Judges (ABA-NCSCJ website).

The establishment of specialized adjudication bodies is chiefly motivated by two sets of goals:

1. Case management – to improve the quantity and quality of case handling over that provided by general courts, and
2. Alternate jurisprudence – to expand from the traditional “legalistic” adjudications to a “problem solving” or “therapeutic” or “interdisciplinary” approach (USDOJ-NIJ; Nolan; Rottman).

Specialized *environmental* courts and tribunals or ECTs are not a new phenomenon, having existed since at least the early 1900s. For example, Denmark created a Nature Protection Board in 1917, and Sweden and Fin-

land created specialty Water Courts in 1918 to protect use and allocation of the nations’ water supply. (Water issues have been the catalyst for broader-based ECTs in a number of countries.)

During the 1970s, modern environmental law emerged and grew rapidly. A quality environment that supports physical and ecological well-being began to be recognized as a human right, and its importance was acknowledged along with economic, social, and cultural rights (Kravchenko & Bonine). The “environmental movement” of the 1970s brought forth increasingly complex laws governing environmental quality, natural resources development and preservation, land use, town

#### BOX 2 “CONSTITUTIONAL” ENVIRONMENTAL RIGHTS

Some examples of modern constitutions providing environmental rights:

Brazil (1988), art. 225. “All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations. . . .”

Finland (2000), sec. 20: “Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.”

India (1977), art 21: “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

Art. 48A: “The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.”

Art. 51A(g): “It shall be the duty of every citizen of India . . . to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.”

Philippines (1987), art. II, sec. 16: “The state shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”

Chile (1980), art 19, sec. 8: “The Constitution guarantees to all persons . . . the right to live in an environment free of contamination. It is the duty of the state to watch over the protection of this right and the preservation of nature.”

**BOX 3 ECTs – BALANCING COMPETING ENVIRONMENT VS. DEVELOPMENT GOALS**

In Sweden, a windmill company applied to the Regional Environmental Court in Umeå for a permit to build a group of wind energy turbines on the tops of mountains in a large area of primeval forest. The court granted the permit for 19 windmills, with many conditions designed to protect the surrounding environment, based on the national goals of supporting renewable wind energy to reduce reliance on carbon fuels. The decision was appealed by the county administrative board, the indigenous Sami government, and a prominent environmental NGO, charging violation of Sweden's environmental quality objectives to protect sustainable forests and to promote a diversity of plant and animal life.

The Environmental Court of Appeal carefully sought to balance the national environmental objective of reducing climate change with the competing national objectives of protecting forests and biological diversity. It ultimately ruled that 14 of the windmills on three mountains were appropriate and required the company to take a number of additional steps to safeguard the environment. In denying the permit for five windmills on a fourth mountain, Mount Taka-Aapua, the Environmental Court of Appeal found the proposal would cause substantial damage even if necessary environmental precautions were taken. The Court chose to carefully balance the values and goals of the nation, and struck a middle ground. The case is now on appeal to the Supreme Court by the NGO, Svenska Naturskyddsforeningen.



*The Environmental Court of Appeals in Sweden has sought to balance the competing concerns of renewable energy and environmental protection in wind farm cases.*

*Credit: Vattenfall*

and country planning, and public health at national, state/provincial, local, and international levels.

An indication of the growing international recognition of the need to protect the environment, the health of citizens, and environmental democracy is the incorporation of specific “rights” language in new national constitutions. Constitutions are the basic building blocks of a country’s rule of law, the authority that “constitutes” the government, giving it its powers and limits to power (to protect individual rights). Today, the constitutions of more than one third of the world’s 200+ countries recognize the right to a clean and healthy environment along with the more conventional rights (Foti / TAI-WRI, 2; see box 2). Constitutional protections provide citizens the broadest legal foundation, but are difficult to enforce without specific environmental and land use laws. Specific laws have been promulgated in most countries, whether or not a constitutionally based right has been adopted.

Historically, only a few of these environmental laws included the establishment of a specialized ECT to help enforce the new legal framework. Those countries that did create ECTs during the 1970s include Japan (the Environmental Dispute Coordination Commission), Denmark (the Environmental Board of Appeal), Ireland (An Bord Pleanála, the Planning Appeal Board), several Canadian provinces, and New York City. Others, such as the United States national government, evaluated the potential for a specialized ECT and decided not to create one, for a variety of reasons (Administrative Conference of the US; USDOJ-LNRD).

Over time national, state/provincial, local, and international environmental laws have become increasingly complex, rule-laden, and reliant on technical and economic considerations. A myriad of separate laws have developed dealing with water, air, land, noise, waste streams, nuclear byproducts, environmental protection, environmental impact assessments (EIAs), mining, forests, habitat, flora and fauna, and other

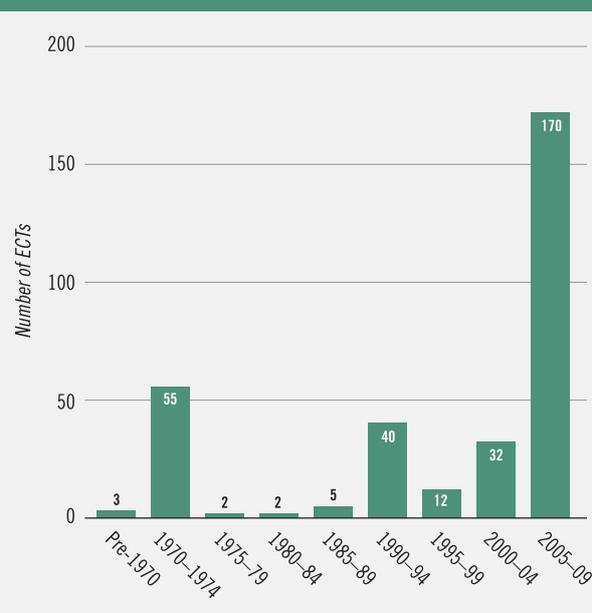
issues. Detailed zoning, land use, and town and country planning laws frequently did not (and still do not) require analysis of the full range of potential environmental impacts. Modern advances in scientific and technical understanding of the environment have also made substantive decision-making more and more complicated. Added to this, environmental principles have emerged or strengthened, including the Aarhus access rights (chapter 1.2); sustainable development; intergenerational equity; and the precautionary, prevention, and polluter-pays principles (Nanda & Pring, ch. 2). These principles also need to be thoughtfully integrated and balanced with more traditional socio-economic rights, including personal property use, employment, and economic development.

These complex, fragmented, and often conflicting aspects of environmental management and protection have made it difficult for governments, developers, communities, and advocacy groups to achieve consistent and long-range sustainable development. This has resulted in pressures to streamline and rationalize the adjudication and enforcement process and increase access to justice.

ECTs are looked to as one solution for fairly and transparently balancing the conflicts between protecting the environment and promoting development; for managing cases more efficiently and effectively; for supporting greater public information, participation, and access to justice; and for achieving more informed and equitable decisions. A number of prominent ECT models have paved the way and provided successful examples for other nations. Environmental justice advocates have been persuasive that specialized ECTs can be an efficient and effective way of achieving environmental goals. In addition, international governmental organizations such as the United Nations Environmental Programme (UNEP) and national foreign aid agencies have supported the creation and implementation of ECTs as part of their efforts to promote environmental democracy, access to justice, rule of law, and sustainable development (see chapter 1.2).

The study has so far identified over 350 specialized ECTs authorized in 41 countries (including the 117 just created in the Philippines in 2008, 15 created in China in 2008-2009, and ones authorized in Bolivia and Chile in 2008-9). Some countries, such as India and Tanzania, have passed legislation to create specialized ECTs but have thus far failed to implement the legislation.

FIGURE 2 HISTORICAL DEVELOPMENT OF NEW ECTs



Note: No data for 33 local courts. Clear explosion in past five years, with over 140 created in 2008 and 2009. Data reflects 117 new ECTs in the Philippines created in 2008, which skews the numbers. Most recent was authorized in Chile, but has not yet been implemented.

Countries on every continent and as diverse as Australia, Bangladesh, Belgium, Brazil, China, Japan, Kenya, Thailand, Trinidad and Tobago, and the United States have created ECTs at national, state/provincial, and/or local levels (see Appendix 1 for a comprehensive list of known ECTs). ECTs are under official consideration or are being advocated currently in jurisdictions including Abu Dhabi, El Salvador, England, Scotland, Hong Kong, Hawaii, and the Small Island Developing States of the Caribbean (SIDS).

Each of the jurisdictions with ECTs that were studied in depth has developed a model that reflects its unique government, judicial structure, culture, religions, economic climate, constitution, laws, and environmental goals. Many of the same basic questions and challenges have been addressed, albeit with differing answers. While there clearly is no one "right model" ECT, the study found that some models are viewed as considerably more successful at ensuring access to information, public participation, and justice than others. However, each example studied incorporates elements that contribute to providing environmental democracy and improving environmental protection for that jurisdiction, making it worth studying for what it can contribute to other countries' decisions about whether and how to create an ECT.



# 2

## To Create a Specialized ECT or Not?

Whether or not to create specialized courts and tribunals can be a hotly debated topic among judges, legislators, government administrators, NGO advocates, academics, and civil society. Although various types of specialized forums or judicial chambers exist in most countries, it has only been in the past few years that specialized environmental courts and tribunals have mushroomed. Based on the data, a growing number of countries have decided the positive arguments outweigh the negative and have established ECTs, including 170 in 2008 and 2009 alone. On the other hand, the US government considered establishing a national ECT in the 1970s and decided against it (Judicial Conference of the US), Scotland's Executive recommended against one in 2006 (Scottish Executive), and Finland and Austrian officials advised us that they are considering dissolving their ECTs. South Africa recently dissolved its environmental court in the Western Cape; however, there are talks underway at the ministerial level to reestablish this court. India is in the process of creating a new National Green Tribunal and repealing legislation that created the National Environment Tribunal in 1995 and the National Environment Appellate Authority in 1997.

Several ECTs appear to have stopped functioning or communicating, including Bahamas, Guyana, and Jamaica. Several have been authorized by legislation but not yet implemented, such as Tanzania, Fiji, and India. However, other jurisdictions are currently considering establishing an ECT, as mentioned above. Of the known countries that have explored ECTs, only a few have decided not to proceed with implementation.

However, there are compelling reasons given by both sides of the pro-con debate – both in the survey interviews and in the ECT literature. The following arguments for and against can all be found in the extensive ECT literature on the debate (see particularly Macrory & Woods, 18-21, 38-39; Preston 2008, 386; Kaniaru; Whitney 1973a, 1973b; The Environmental Court Proposal, 677-686; Rajamani; Vempalli; Scottish Executive, 35-41; Stephens, et al., part 3; Rottman; Administrative Conference of the U.S.; Judicial Conference of the U.S., vol. I, part IV.A; Royal Commission, 67-68; Law Commission of India, 1-18).



*Environmentalists demonstrating for access to justice in front of a court house in Golden, Colorado, USA.*

*Credit: [www.CityMtnViews.com](http://www.CityMtnViews.com)*

## 2.1 ECT Proponents' Arguments

The proponent view is summed up by Justice Brian Preston, Chief Judge of the New South Wales, Australia, Land and Environment Court, the first ECT established as a superior court of record in the world:

“The judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations. . . .Increasingly, it is being recognised that a court with special expertise in environmental matters is best placed to play this role in the achievement of ecologically sustainable development.” (Preston 2008, 386.)

The proponents' arguments include:

1. **Expertise:** The reason most often given for creating an ECT is the need for decision-makers who are knowledgeable experts about national and international environmental law. Generalist judges in ordinary courts usually do not have sufficient experience with the complex laws and principles that make up environmental law and may not be comfortable with the highly technical expert testimony that is often required to balance anticipated environmental harm and economic benefit. Specialized ECTs usually require that decision-makers have a background and experience in environmental law and related fields of expertise, and provide ongoing training. Even countries which have not yet developed an ECT, such as Indonesia, may require that environmental cases be assigned only to judges with environmental law training (Foti / TAI-WRI, Box 3.9 on 70, photo on 68). In addition, some ECTs – both courts and tribunals – include non-lawyers who have planning, technical, or scientific knowledge to hear cases in their areas of expertise, either on panels or alone. This creates an opportunity for multi-disciplinary decision-making.
2. **Efficiency:** Many generalist trial and appellate courts are suffering from a crippling backlog of cases, requiring plaintiffs and defendants to wait years before receiving a hearing. Delay can be extremely costly for governments and private interests who may have invested huge sums in planning programs or developments – “time is money” being a frequent justification for speedy proceedings. And delay can be detrimental to environmental or community parties by allowing a project to move ahead, inflicting environmental damage, absent a hearing or injunction. Moving environmental cases from the general court docket to an ECT can allow them to be fast-tracked and handled more efficiently.
3. **Visibility:** Globally, governments are being pressured both internally and externally to be responsive to the demand for environmental protection and improved access to environmental justice. Internal pressures come from civil society, business interests, and others seeking to ensure protection of human and environmental health for current and future generations. External pressures come from IGOs, NGOs, and other sources supporting good governance and related missions. Creating an ECT

is one way to visibly show identifiable progress in those directions.

4. **Cost:** Cost is a huge barrier to access to justice. Environmental cases in particular can be extremely expensive for all parties as well as the judicial system. Expenses include attorneys, expert witnesses, time to trial and time in trial, transcription of lengthy testimony, travel distances, filing fees, lost employment, and the possibility of a losing party being ordered to pay the expenses of the winning party. Faster, more efficient forums reduce costs for themselves and all parties. Specialized ECTs can be given distinct powers to adopt rules and procedures that dramatically reduce costs for the parties, in ways not available to or feasible for large general court systems.
5. **Uniformity:** The need for consistency in decisions and uniform precedent is another justification advanced for the creation of ECTs. Opinions by trained, knowledgeable decision-makers who are familiar with the law and with other decisions in the field are more likely to be uniform and consistent. This uniformity gives parties and their attorneys predictability – precedent upon which they can rely. At least one court is analyzing and computerizing sentencing data to allow consistent sentences for environmental crimes (Preston 2007a, 2007b). Uniformity in decisions can also prevent “forum-shopping” (parties picking forums they think more likely to give them a favorable judgment).
6. **Standing:** The single biggest barrier to the first step of access to justice is the issue of standing – the credentials required to open and get through the door of justice. Specialist ECTs may be empowered to define standing more broadly or in ways not legally or politically feasible for the general courts, opening the door to public-interest litigation (PIL), interested third parties, and class actions aimed at protecting public rights and the rights of future generations, not just individual or adjacent property owner rights.
7. **Commitment:** The same advocates who are demanding an easily accessible, visible forum for environmental justice are also demanding that governments be more environmentally responsible and demonstrate their commitment to environmental protection. The creation of an ECT is a demonstrable commitment to environmental justice, particularly when supported by open and transparent access to information and opportunities for public participation.
8. **Government Accountability:** One motivation for creating an ECT is to provide strong oversight and accountability for executive branch agencies, particularly Departments of the Environment, which may not be effective in environmental regulation, enforcement, and conflict resolution. Government can become more accountable to the public when environmental conflict is overseen by an independent ECT. Government agencies are more liable to act in a transparent and responsible manner if they have an informed judiciary looking over their shoulders, holding them accountable for both process and outcomes.
9. **Prioritization:** In an ECT, urgent cases can be prioritized or fast-tracked, while in regular (nonspecialized) courts the cases are usually considered in the order in which they are filed, so less urgent cases may be heard well in advance of a case dealing with immediate harm to the environment. Moreover, judges tell us, a regular court judge may be tempted to postpone complex, difficult cases — as environmental cases often are — in favor of deciding easier, smaller ones in order to show a high case turnover.
10. **Creativity:** Many ECTs have adopted flexible rules of procedure and evidence, employ informal, less intimidating proceedings, and have introduced a number of other creative approaches that would not be possible in an ordinary court. Many of those innovations have been introduced specifically to remove barriers to access to justice, including standing, costs, requirements for complex scientific and technical expertise, need for an attorney, need to travel to the court, length of the proceeding, and readily available information about how to access the ECT and ECT decisions.
11. **Alternative Dispute Resolution (ADR):** Over half of the ECTs studied have embraced the use of alternative dispute resolution, including conciliation, mediation, third-party neutral evaluation, arbitration, and even restorative justice (see chapter 3.9). The use of ADR, when appropriate, tends to produce a high settlement rate as well as innovative solutions to problems, potentially resulting in better outcomes for the parties and for the environment and reducing the number of cases which must have a full hearing. In addition, ADR can increase pub-

lic participation and access to justice by including interested stakeholders in collaborative decision-making or mediation prior to a judicial decision, and can reduce costs to the parties and the courts.

12. **Issue Integration:** ECTs can be specifically empowered to take a more integrated approach to dealing with separate environmental laws collectively, in ways general courts may not. For example, while there is a trend toward integration of environmental and land use laws, few nations or jurisdictions have fully integrated both sets of laws. However, most appreciate that the two areas are greatly interdependent. In creating ECTs, legislators and policy makers can break through this segmentation and combine these issues in one forum. Thus, an ECT may be given authority to review simultaneously all of the permits a development needs (zoning, building, public health permits; air, water, waste permits; EIAs; ecological preservation requirements; native rights, and pre-historical, historical, and cultural preservation — rather than have such decisions strung out before different decision-makers, at different times, with different (sometimes conflicting) outcomes.
13. **Remedy Integration.** Another type of integration which has been used effectively in ECTs combines civil, criminal, and administrative law jurisdictions in one forum. Judges can then select the most effective remedy or combination of enforcement orders when deciding a case, a spectrum of sanctions typically unavailable in a single general court. (“Civil” jurisdiction – not to be confused with the “civil law” legal jurisdictions – typically deals with private controversies between individuals, businesses, and others on issues such as personal injury, property damage, and contracts, where the public is not ordinarily a party. “Criminal” jurisdiction deals with violations of the government’s laws defining criminally prohibited conduct and meting out punishment such as incarceration and/or monetary fines. “Administrative” jurisdiction typically deals with claims by or against the government; it is merged with the civil jurisdiction courts in some countries, such as the United States, and a separate court system in others, such as civil law countries. (See chapter 3.12 for further discussion.)
14. **Public Participation:** The flexibility and transparency of some ECTs (although not all) has allowed greater public participation through web-based information, open standing, and publicly accessible hearings. Allowing both open third party standing and class actions expands opportunities for public knowledge and participation in the decision-making process. ADR, when used by an ECT, can allow a fuller range of interested or affected persons to participate in community-based problem-solving.
15. **Public Confidence:** Closely tied to the issues of accountability, commitment, and expertise is the concept of maintaining public confidence in the environmental conflict resolution process. Generally, the public has more confidence and trust in a process which is visible, easily accessed, and easily monitored. This transparency is a typical and desirable characteristic of highly regarded ECT models.
16. **Problem Solving:** Resolving complex environmental issues and achieving sustainable development often requires a multi-faceted approach that goes beyond traditional legalistic decision-making, and may include use of mediation and other forms of ADR, participation of a broad group of stakeholders in collaborative decision-making, development of non-traditional remedies, and/or creative sentencing. Judges who view themselves as “problem solvers” look beyond the narrow application of the rule of law and the simplistic right-or-wrong determination and craft creative new options that will maximize both short- and long-term outcomes for the parties and for the environment. An example, given to us by a Queensland ECT judge, is that instead of simply ruling to affirm or reverse an agency decision on a development permit, he will sit down with the parties and the development plan and discuss physical changes that satisfy both parties (“like moving the parking to the rear of the building”). The “right” long term solution may not be contemplated or incorporated in existing law or precedent. Or there may be no clear right or wrong, and the decision-maker is required to shape the approach and remedies to really solve the problem, rather than being limited to pre-determined remedies.
17. **Judicial Activism:** Given the mandate to balance environmental and economic rights to achieve sustainable development, and the freedom to be creative problem solvers, many judges have become activist advocates for protection of the environment.

## 2.2 ECT Opponents' Arguments

In spite of the many arguments in favor of creating a specialized ECT, there are opponents – including, interestingly, avid environmental advocates. The majority of the arguments against ECTs, however, are arguments that have been used to oppose any form of judicial specialization, and are not specific to ECTs. Opponents' arguments include:

1. **Competing Areas Needing Expertise:** Why create an expert forum for the environment, when there are so many other areas of the law that have equal or greater fact and law complexity (health and employment for example)? Environmental law is not so different from other types of law and benefits from a generalist perspective.
2. **Marginalization of Environmental Cases:** Some environmentalists feel that separating environmental cases from the mainstream will result in their getting less attention, less-qualified decision-makers, and inadequate budgets, thus crippling the ECT's effectiveness. One Italian general court judge who is very interested in environmental cases even told us it was "ghettizzazione" ("ghetto-ization"). In at least several ECT jurisdictions, these fears have been realized.
3. **Fragmentation:** There is resistance to fragmenting the judicial system, potentially isolating both judges and subject matter from the mainstream.
4. **Reform from Within:** The effort required to create an ECT is more difficult than incremental reform from within the general court or agency. If knowledge of environmental law is critical, then all decision-makers should be given an opportunity to be trained, and then cases can be informally directed to those who are particularly interested or experienced in that area of law. A recent empirical study of US Court of Appeals judges shows that these "generalist" judges in fact routinely engage in "opinion specialization" (Cheng). This informal-assignment approach to environmental cases has certainly worked in some jurisdictions including Belgium and Finland.
5. **Insufficient Caseload:** In some jurisdictions, doubts are raised about there being sufficient environmental cases to support a separate ECT. Clearly an ECT will require a caseload of sufficient size and complexity to warrant the time and expense. When there are few cases, it does not make good administrative sense to develop a separate forum, resulting in judicial down-time and uneven workloads compared with the rest of the judiciary. In Bangladesh, where the Environmental Ministry controls whether a case can go to the Environmental Court, so few cases do that the Environmental Judge has to take on a substantial non-environmental caseload or his career prospects will suffer.
6. **Cost:** Creating an entirely new agency or court can entail substantial additional budget for judges, staff, space, equipment, training, and oversight, which may not be justified or possible. Diluting the existing budget for an already underfunded or overburdened judiciary or administrative agency may actually reduce access to justice and is not good management.
7. **Public Confusion:** The public may not understand the law and jurisdiction of the ECT, and therefore be confused about where to file a complaint. This is a problem in jurisdictions where zoning, land use, building, environmental permits, water use, nuclear issues, fishing, agriculture, and natural resources are not integrated but are covered by different laws with different enforcement provisions in different courts or tribunals—not all under the jurisdiction of the ECT.
8. **What's "Environmental"?:** Environmental cases can involve non-environmental issues and non-environmental cases may have a subsidiary environmental issue. As one European generalist judge queried us, how do you decide whether these "mixed" cases go to an ECT or the general courts? ECT opponents argue that only a regular court generalist judge can address all the non-environmental issues in a case effectively, so that the case is not required to be filed in multiple forums to be resolved.
9. **Capture:** Special interests – be they developers, government agencies, or environmental advocates – can more easily influence and control a small ECT than the general court system. The "capture syndrome" is well-known in agencies where powerful groups can control the appointments process, political pressure, career advancement, tenure, salaries, and budgets. There is evidence of this in jurisdictions where the ECT judges or officials are actually appointed by the very Minister or Department of the Environment whose decisions the ECT reviews and who determines their salary and tenure.

10. **Judicial Bias:** Prior knowledge of and experience with environmental law may prejudice the decision-maker so that decisions are not neutral, “too environmental,” and therefore objectionable. Some of the sitting ECT judges and decision-makers have, in fact, come from a background of environmental advocacy and are not trusted by development or political interests to be fair.
11. **Talent Gap:** Effective ECTs need environmentally trained and experienced judges and decision-makers, as well as access to scientific and technical experts in various disciplines. Many countries lack such highly qualified professionals.
12. **Judicial Activism?:** As problem-solving decision-makers, ECT judges and decision-makers may – and often do – go beyond narrow application of the “rule of law” and develop jurisprudence unique to the case. This approach has been frowned upon as making policy – an arena typically vested in the executive and legislative branches. In some instances, ECTs have been accused of “substituting their judgment” for that of the responsible government agency. Professor Lavanya Rajamani observes that judicial activism by the Supreme Court in India has restricted the growth of a responsible and independent bureaucracy (Rajamani, part 6).
13. **Judicial Careers:** Assigning judges to a specialized court or chamber can limit their professional growth and advancement to higher courts that may not be specialized (Calendaria & Ballesteros, 2). It will therefore be difficult to attract and retain the most qualified decision-makers.

14. **Creation of an “Inferior” Court:** Some advocates and judges fear that a specialized environmental court will be viewed as non-mainstream and inferior and not adequately respected, resourced, or supported. This “step-child” perception has indeed been reported as happening in at least several ECTs.

As a coda to this chapter, one should reflect on “the generalist ideal” for judges. A ground-breaking empirical study of US Court of Appeals judges discloses that this “generalist” ideal is in part “a myth” and that substantial informal specialization occurs even on regular courts, with certain judges being assigned particular types of cases in which they have some expertise (Cheng). The study’s author concludes (providing ammunition to both the pro and con sides of the ECT debate):

“Not only does opinion specialization [on general courts] increase judicial expertise and efficiency, but it also does so without many of the costs that often attend specialized courts. . . . To be sure, opinion specialization does not capture the benefits of specialization as cleanly as specialized courts. Most notably . . . opinion specialization does not guarantee an expert on every panel, and whenever nonexperts handle specialized cases, they incur expertise and efficiency costs. . . . Dispelling the myth [of the generalist judge] could therefore liberate jurists and reformers alike from their traditional boxes.” (*Id.* at 561-562.)

# 3

## The Study Findings: The 12 Critical Decisions in Building an ECT

There is no one “best model” – no “one-size-fits-all” structure – for an ECT, because the best model for each jurisdiction is the unique combination of elements which results in a relevant, efficient environmental dispute resolution process with access to justice for all affected interests. What will work best in the particular ecological, legal, socio-economic, cultural, political, and judicial environment the ECT serves needs to be examined in a transparent planning process that permits analysis of the pros and cons and the variety of options for each of 12 factors.

Some ECT models included in the study are clearly more successful at enhancing access to environmental justice than others. But what works in New South Wales or Kenya may not work well for Abu Dhabi or China. For example, a court may not automatically be a better choice than a tribunal. In Australia, three states (Queensland, New South Wales, and South Australia) have created formal, separate *courts* and the remaining five states and territories (Tasmania, Western Australia, Victoria, the Northern Territory, and the Australian Capital Territory) have created *specialized tribunals or “lists” within a tribunal* to decide environmental conflicts.

Transposing models or design options from one country to another requires both careful analysis and modification to ensure that the specialized forum addresses the individual

needs and political environment of the jurisdiction. Some nations have initiated ECTs using a top-down approach, beginning with the Supreme Court (Thailand); others have used a bottom-up approach, beginning with trial courts or internal agency tribunals (Philippines). Some nations have chosen to create at the national level (Kenya), while others have chosen to start with very local, city, or county level ECTs (China), and some have done both (Sweden).

Factors influencing the choices to be made within each of the 12 design decisions will include

- leadership
- political will
- available budget
- opposition arguments
- need to modify existing laws
- level of public demand for enhanced environmental accountability
- non-democratic government
- inadequate or corrupt enforcement agencies
- availability of environmentally trained judges or decision-makers

- availability of environmentally trained lawyers to represent parties
- willingness of the existing judiciary to relinquish some control
- literacy of the affected populations and their access to information about and participation in environmental decision-making.

Based on the research of many diverse ECTs, however, it is possible to distill recommended “best practices” based on existing models that have effectively minimized barriers to access to environmental justice. A comparative analysis of experts’ perceptions of ECT operational successes and failures and relative strengths and weaknesses, based on the opinions of those interviewed and the expertise of the research team, reveals options and approaches that are more highly recommended than others. The question remains, will they work in the particular environment in which that particular ECT will operate? Ultimately,

this question can only be answered by the stakeholders designing an ECT and through subsequent experience and performance evaluation.

To provide insights and direction for planners who are advocating the creation or reform of an ECT, the researchers identified a decision framework. The framework consists of 12 distinct ECT “design decisions” – structural and operational “building blocks” which decision-makers should consider in creating (or improving or reforming) an ECT. The 12 are:

1. Type of forum
2. Legal jurisdiction
3. Level of decisional review
4. Geographic coverage
5. Case volume
6. Standing

#### BOX 4 THE 12 “BUILDING BLOCKS” OR DESIGN DECISIONS FOR CREATING ECTS

BUILDING BLOCK DECISION	DEFINITION	INTERESTING EXAMPLES
1 <b>Type of Forum</b>	Judicial court, quasi-judicial tribunal, ombudsman or other	Vermont Environmental Court, Tasmania Resources, Management and Planning Appeals Tribunal, Hungary's Office of the Parliamentary Commissioner for Future Generations, Japan's Environmental Dispute Coordination Commission
2 <b>Legal Jurisdiction</b>	What laws included under ECT's authority; civil, administrative, criminal or combined jurisdiction	Land and Environment Court of New South Wales, Australia, Environmental Commission of Trinidad and Tobago
3 <b>ECT Level</b>	Internal agency review, trial, intermediate appellate, or final appellate	Supreme Court of India, United States Environment Protection Agency
4 <b>Geographic Area</b>	Area included in jurisdiction: municipal, regional, state, provincial, national or other	Amazonas Environmental Court in Brazil, Planning and Environment Court of Queensland, Australia
5 <b>Case Volume</b>	Number of cases needed to justify type of ECT selected	Environmental Court of Dhaka, Bangladesh
6 <b>Standing</b>	Plaintiff credentials needed to file a complaint	Republic of South Africa, Supreme Court, Philippines
7 <b>Costs</b>	Variety of costs and risks to parties filing an environmental complaint	Environmental Court of New Zealand
8 <b>Access to Scientific-Technical Expertise</b>	Methods for assuring decision-makers have access to unbiased experts	Environmental Court of Appeal in Sweden, Environmental Board of Appeal in Denmark
9 <b>Alternative Dispute Resolution (ADR)</b>	Incorporation of various types of ADR in ECT process to save money and generate better outcomes	Multi-door courthouse of Land and Environment Court of New South Wales, Australia
10 <b>Competence of ECT judges and decision-makers</b>	Need for selection processes, qualifications, training, tenure and salary to support competence	Finland's Supreme Administrative Court, Supreme Court of Thailand, New York City, Brazil
11 <b>Case Management</b>	Administrative tools to increase efficiency, effectiveness, and access	Planning and Environment Court of Queensland, Australia
12 <b>Enforcement Tools and Remedies</b>	Powers of ECT to use the right remedy(ies) to solve the problem	Federal prosecutors of Brazil

7. Costs
8. Scientific and technical expertise
9. Alternative Dispute Resolution
10. Competence of judges and decision-makers
11. Case management
12. Enforcement tools and remedies.

Within each “building block” a variety of options or alternatives are presented for consideration and decision by planners prior to implementation.

This chapter is thus a capacity-building checklist for ECT planning. In it, each of the 12 building block factors is described, a variety of available options and alternatives are analyzed, and case examples, key insights, and “best practices” which enhance access to justice are presented.

### 3.1 TYPE OF FORUM

ECTs include judicial courts, administrative tribunals, and other dispute-resolution forums. Three types of environmental courts were identified by the study: free-standing courts, green chambers within a general court, and designated green judges on a general court. Three types of environmental tribunals were identified: independent tribunals (completely separate from another agency or ministry), quasi-independent ones (under another agency’s supervision but not the agency whose decisions they review), and “captive” tribunals (within the control of the agency whose decisions they review). Other ECT types can include special commissions, ADR programs, ombudsman, and human rights bodies. Some countries have several types of ECTs, such as Kenya which has a green bench at the High Court, an environmental tribunal for reviewing EIAs, and an ombudsman. Australia also has both courts and tribunals in different states.

The types of ECTs examined in the study were diverse. Judicial models included:

1. Free-standing specialized environmental courts
2. Formal and informal chambers or panels of judges within a regular (nonspecialized) court assigned environmental cases (“green chambers”)
3. A select judge or judges on a general court assigned environmental cases (“green judges”).

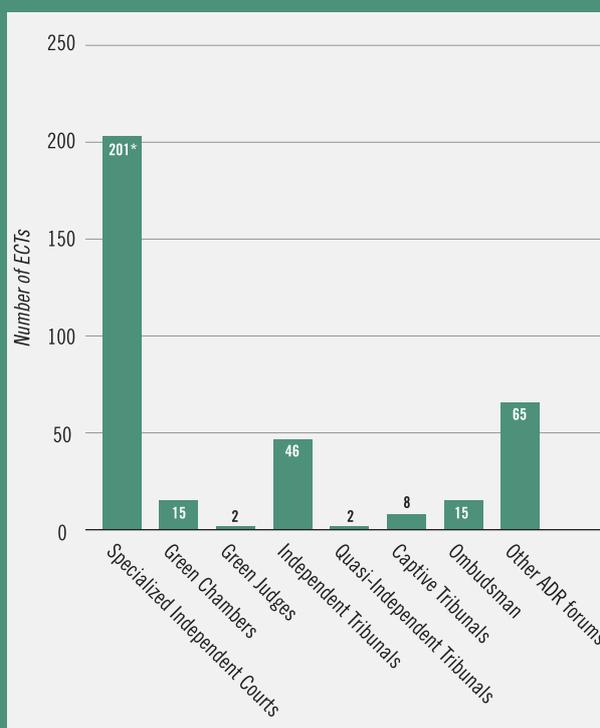
Judicial models were found and studied at all levels, including trial level (initial fact-finding/decision stage),

intermediate appellate (first stage of appeal), and supreme or highest court (final appeal stage). They exist in all standard court systems – civil, criminal, administrative, and hybrids of those three (see chapter 2.1 Pro Argument 13 for explanation). And models were found exercising every level of review — including first, second, and third instance (see chapter 3.3 below for explanation).

Administrative tribunal models studied included:

4. Separate, independent specialized environmental tribunals
5. Quasi-independent environmental tribunals under the supervision of an executive branch official or office. This can be the chief of state, attorney general, office of administrative hearings, or other authority not involved in the tribunal’s jurisdiction
6. “Captive” environmental tribunals located within the same environmental department or agency whose decisions they review
7. Other specialized forums, including environmental commissions, mediation services, ombudsmen programs, and independent tribal forums.

FIGURE 3 TYPES OF ECTs



\* Including 117 environmental trial courts in the Philippines.  
 Note: There is a clear preference for independent courts in the judicial branch of government.

What distinguished each of these models as an ECT was that it was a government dispute resolution forum (judicial, administrative, or quasi-judicial) dealing specifically with environmental, land use, and/or related legal issues. Some of these forums or decision-makers dealt exclusively with environmental cases, while others ruled on non-environmental cases in addition to environmental ones. Effective models for providing access to environmental justice were found for each type of forum, as well as models that were considered less effective. The different ECT models vary chiefly in independence, jurisdiction, competence, standing, and cost.

Specific characteristics of these different ECT models are described in more detail under each type. Structural and organizational options which directly contributed to enhanced access to justice are included in the conclusion to each decision element discussion as best practices.

## Courts

### 1. SPECIALIZED COURTS

This option is a freestanding court, in the judicial branch, with legally trained, expert judges. It is operationally independent of the executive and legislative branches of government. It has a separately identified budget, not controlled by agencies subject to its review. It provides judges security of tenure (life, to a specific age, or term of years). Ideally, these judges do not hear other types of cases (examples include New South Wales, Australia; New Zealand; Amazonas State, Brazil; and Vermont State in the United States).

Some of these environmental courts also include non-lawyer, scientific or technical experts as judges or commissioners alongside the law-trained judges. Examples include Sweden, New South Wales, and New Zealand (see chapter 3.8 on Expertise).

The most successful specialized courts have been created in jurisdictions that have a large enough environmental caseload to justify at least one full-time judge and support staff, if not more. A political will and mandate to adequately fund the court is an important consideration. Judges are selected based on demonstrated expertise and training in environmental law, ideally by an independent selection board, and are required to have the qualifications necessary to be a judge. A hallmark of this type is the flexibility to develop its own rules, procedures, fees, and operational tools.



*In the USA, there is only one state-level environmental court — the 2-judge Vermont Environmental Court, built in classic New England Georgian style architecture.*

*Credit: The Hon. Thomas S. Durkin, Environmental Judge, Vermont Environmental Court.*

Specialized environmental courts require carefully defined jurisdiction which makes it clear what laws are covered and what enforcement tools are available (see chapter 3.2). These courts' decisions are enforceable against government agencies as well as private parties. They also require considerable public education about the court, how to access it, and what procedures to expect.

This model is truly independent of the executive and legislative branches. Or it is as independent as courts ever get – recognizing that legislatures control courts' law, budgets, salaries, and powers, and executive branches control prosecutors, enforcement, finances, and physical security of the court in the "balance of powers" among government branches.

The independence exhibited by these courts is a critical factor in access to environmental justice, as the more independent a court is of the political process and administrative pressure, the more likely its decisions are to be fair, equitable, and unbiased, and perceived as such by government and the public. However, even free-standing courts can be at the mercy of the political process if the administrative agency whose decisions it reviews can control what cases get to the court, as the researchers discovered through interviews in Bangladesh.

Although the separate, free-standing specialized environmental court is the most publicly visible and publicly accountable ECT, it may be the most complicated and expensive to create. It almost certainly will need authorizing legislation or a high level government man-



*Justices of the Thailand Supreme Court's "green chamber" and other officials in a 2009 training conference on Natural Resource Damages.*

*Credit: Watcharee Limanon, AECEN Secretariat.*

date, as well as a separate budget and a good public relations campaign to educate the community about where and how to file what complaints.

An interesting variation of the totally free-standing court model is the Planning and Environment Court (PEC) of the State of Queensland, Australia. The PEC has its own legislated authority and therefore is an independent body. However, it is located within the regular state trial-level District Court and shares administrative staff. PEC judges are appointed by the Chief Judge of the District Court from the full roster of District Court judges. The PEC judges are competent to hear non-environmental civil and criminal cases, and may actually have a very diverse docket when traveling outside Brisbane to hear cases. The only staff person who works solely for the court is the Registrar, who is also a trained mediator and environmental lawyer. This model has enabled Queensland to have a dedicated court with little additional cost and with the opportunity for communication, case discussion, mentoring, collegiality with peer generalist judges, a broad judicial career path, and the flexibility to develop independent rules and practices and respond to changes in caseload volume and complexity.

## 2. SPECIALIZED GREEN CHAMBERS

General courts can create a specialized chamber, bench, panel of judges, or a judge within the court to hear environmental cases. This "green chamber" or "green bench" may be formally designated or an ad hoc or

temporary assignment of a judge volunteering to take environmental cases. It does not require special legislation to create or a separate budget, and may not require either judicial expertise or interest in environmental law. Examples include the High Court of Kenya, the Supreme Court and Administrative Courts of Thailand, as well as courts in Sweden, Netherlands, Finland, Belgium, and Greece. In Uganda, environmental cases can be moved by the Chief Justice of the Supreme Court to a judge or chamber that has judges trained in environmental law, although there is no formally designated green bench or green chamber.

Specialized chambers generally are at the will and direction of the chief justice of the supreme court or chief judge of the parent court. That individual may have a special personal interest in addressing environmental issues and provide the impetus and leadership or may be responding to pressure from external entities to handle environmental cases better.

Green chambers require careful screening, evaluating, and assignment of all cases when they are filed, which is typically done by the court registrar or one of the judges. This model allows the court to manage a caseload where the number and complexity of environmental cases fluctuates, and still ensure that the workload of the court is spread evenly among all the judges. It does not require the public to file in a separate court, which may be in a different location, and it does not require special community education about what constitutes an environmental case. Nor does it necessarily require

appointment of judges who are trained in or even interested in environmental law. In fact, some such chambers have general judges rotate through them on a regular basis.

A downside is that it is difficult for a green chamber to adopt different rules, fees, or court procedures from those used by its parent regular court. Thus, this model may have the advantages of expertise, sufficient caseload, and no additional cost, but lose the flexibility which allows separate innovations that enhance access to justice and can provide a creative, problem-solving approach to deciding cases.

The Supreme Court of India is a unique model of a “green bench.” It is a general court that, in addition to all its other cases, has taken upon itself the role of environmental protector based on the national constitutional guarantee of a “right to life.” (For details of the following see Rajamani; Law Commission of India, ch. III.) India’s Constitution, like many modern constitutions, provides a fundamental right to life, which, starting in the 1990s, the Supreme Court interpreted to mean a “right to a wholesome environment” and pollution-free water and air. The court provides an unusual procedure allowing any person to file a complaint to protect fundamental rights *directly in the Supreme Court with no prior lower court or administrative hearing*. In the 1990s there were very public-interest-oriented activist justices on the Supreme Court who shared a deep concern that India’s government agencies, law enforcement, and local courts were not acting to protect human health and the environment. In response, the Supreme Court took on the role of hearing major cases and making policy in these arenas. This judicial activism has resulted in some notable public interest litigation (PIL) victories – including reformer M.C. Mehta’s case protecting the Taj Mahal from acid air pollution and advocate Sanjay Parikh’s case to control hazardous waste dumping throughout India. However, it also has resulted in a tremendous work overload for the Court and criticism from government, NGOs, the media, and the bar. The Court has recently backed off its aggressive activism, but is still struggling with an overwhelming caseload and ineffective policy development, monitoring, and enforcement of the constitutional remedies it has ordered. A “National Green Tribunal” is being considered to address these issues.

### 3. GREEN JUDGES

In some jurisdictions, there may be insufficient caseload and/or insufficient financial or human resources to justify either a separate court or chamber of judges specializing in environmental law cases. To overcome this, some ECTs have started by designating a single trial or appellate judge who is interested and knowledgeable, and to whom cases are assigned based on having environmental law issues. As generalist judges, these individuals are competent to rule on all areas of jurisprudence within a case, and can be assigned other subject matter cases if they have a light environmental caseload. This can serve as a one-step-at-a-time model capable of expansion to a free-standing ECT when caseloads and other factors permit.

Indonesia represents a variation on this model which will be of interest to jurisdictions wanting the benefits of “green judges” without setting up an ECT first. UNEP reports that a “Judge Certification Program” is underway so that “only those judges who have taken environmental law courses and are certified are allowed to adjudicate environmental cases” (Yang, slide 14). This is a first step toward an ECT, which Indonesia is now considering establishing (*id.*).

### Tribunals

“Tribunal,” as used in this study, covers a number of options that are not courts in the judicial branch but are still specialized government bodies empowered to make binding decisions in environmental disputes. (For a ringing endorsement of tribunals over courts, see Kaniaru.) Tribunals usually are created by authorizing legislation, have legislatively approved annual budgets, may have significantly more flexible rules of procedure and evidence, and may or may not have enforcement powers.

Tribunals can have very diverse memberships. Typically the chair is a lawyer, but they can include a mix of judges, lawyers, scientific-technical experts, environmental planners, business or NGO representatives, and laypersons — or even all laypersons (Ireland). In some jurisdictions, the chair of the tribunal must be a sitting supreme court judge or a retired supreme court judge. Tribunal members are generally political appointees, but in some cases the members are appointed by a range of political and civil-society interests. Members may or may not have security of tenure following appointment and may or may not have areas of expertise relevant to the work of the tribunal.



*Leading environmental advocate M. C. Mehta's 1980s lawsuit resulted in a precedent-setting Indian Supreme Court decision protecting the Taj Mahal from air pollution by shutting down hundreds of coal-burning industries.*

*Credit: Monika Kerdeman*

Tribunals have the advantage of being able to conduct more informal proceedings that are less intimidating for the public. They also have flexibility in the way they manage their caseload to meet the needs of the parties. Usually they have a very clearly identified legal jurisdiction, sometimes very narrowly focused, such as only appeals from an EIA (Kenya). On the downside, the tribunal structure may sacrifice independence, legal expertise, consistency, and continuity compared to a court.

The independence of tribunals varies considerably, but there are basically four models: highly independent, quasi-independent, “captive,” and other types.

#### 4. INDEPENDENT TRIBUNALS

The independent tribunals are typically appointed by and answerable to a political leader outside the environmental-development area – the head of government, attorney general, or government body (possibly judicial). To protect independence, the legislation may require a politically powerful chair, such as a judge from an existing court (a common practice in South Asia). Independent tribunals operate outside the substantive and procedural control of other environmental or land use agencies, particularly the agencies whose decisions they review (examples include Kenya; Province of Ontario, Canada; Trinidad and Tobago; Malawi; the State of Victoria, Australia).

#### 5. QUASI-INDEPENDENT TRIBUNALS

“Quasi-independent” tribunals are housed within and under the direction of another agency, although not one whose decisions they review. A classic example is the huge and highly independent New York City Environmental Control Board (ECB) which in 2008 was removed from within the environmental agency whose decisions it reviews and placed within New York City’s Office of Administrative Trials and Hearings (OATH). OATH is designed to professionalize the city’s administrative adjudication tribunals and can conduct administrative hearings for any agency, board, or commission of the city. OATH itself is an independent agency, answerable directly to the city mayor, so it shields the ECB and its other tribunals from undue influence by politicians, prosecutors, or the agencies whose decisions are being reviewed. OATH can set rules, standards, and procedures for the ECB and evaluate its performance, so the ECB is not completely independent in the broad sense, but otherwise it has the attributes of the independent tribunals. The US Government Office of Administrative Law Judges (OALJ) is another example of a very independent agency of specialized tribunal judges that provides trial-level hearings for the US Environmental Protection Agency (USEPA) as well as other agencies, while remaining highly independent of undue influence by USEPA.

## 6. CAPTIVE TRIBUNALS

“Captive tribunal” in this study refers to those bodies whose members are appointed by, answerable to, and/or housed in the environmental agency whose decisions they are supposed to review. Examples include South Korea, Austria, Denmark, Costa Rica, the US Department of the Interior’s Interior Board of Land Appeals (IBLA), and the USEPA’s appeal level, the Environmental Appeals Board (EAB). The EAB, which reviews decisions of the OALJ trial judges (above), is composed of USEPA-selected political appointees and is required to carry out the policies of the administration in power, although its judges nevertheless are considered very professional.

## 7. OMBUDSMEN AND OTHER SPECIALIZED ENVIRONMENTAL FORUMS

There are a variety of other specialized forums for resolving environmental disputes that differ from the strict court or tribunal models.

- *Special Commissions* of experts and laypersons can be appointed by a court to investigate a dispute and make recommendations to the court on how it should rule. The India Supreme Court relies heavily on special commissions to help with some of its overwhelming PIL caseload and to take on very factually complex, country-wide issues such as forestry use (see chapter 3.8 on Expertise for details of India’s forestry cases).
- *ADR Programs* offer mediation, conciliation, and other forms of ADR with limited decision-making or enforcement power (Japan).
- *Environmental Ombudsman Offices* can have investigative and recommendatory powers. Some even have legislative standing and funding to represent the public and other complainants in court (Kenya, Costa Rica, Austria, Greece, and Hungary and New Zealand).
- *Human Rights Commissions* can have investigative and decision-making authority as well as standing to file lawsuits in the environmental area in countries whose constitutions provide a right to life/environment (India, South Africa).

### BEST PRACTICES – TYPE OF FORUM:

*Access to justice is enhanced in a clearly identified independent judicial court that is easily identified by the public, whose decision makers are highly trained in environmental law, and whose decisions are documented and published.*

*Independence is perhaps the most important attribute of an ECT for access to justice. It is fostered by a democratic form of government, an unbiased judicial selection process, protection of decision-makers from political pressure or punitive consequences for their decisions, and institutional separation from the agency whose decisions are being reviewed. The New South Wales, Australia, Land and Environment Court and the New Zealand Environment Court are best practice examples of separate, free-standing environmental courts.*

*Well-conceived tribunals can also be best practice models, so long as they have independence and are highly visible. The Environmental Review Tribunal of the Province of Ontario, Canada is a best practice example of a predominantly independent tribunal that is viewed as improving access to justice.*

## 3.2 LEGAL JURISDICTION

**ECTs have very different legal jurisdictions, from very broad (including and integrating all laws that relate to environment, land use development, and public health) to very narrow (sometimes even limited to a single law, like water pollution or an EIA law). The ECT can also be given civil, criminal, or administrative jurisdiction, or some combination of these powers. The most powerful ECTs have comprehensive legal jurisdiction and a range of enforcement powers.**

A critical consideration in establishing any type of ECT is identifying what its legal jurisdiction will be. Jurisdiction describes the laws, issues, and persons over which the ECT has authority. The comprehensiveness of the laws included in jurisdiction will also partially control case volume, another important consideration. Two separate types of decisions need to be made when determining legal jurisdiction: (1) the specific laws it will include and (2) whether it has civil, criminal, or administrative jurisdiction, or some hybrid of those enforcement powers.

### 1. LAWS COVERED

A starting point is to inventory and list all environment-related laws in the jurisdiction, then decide which ones the ECT should be empowered to enforce and what existing statutory complaint processes would need to be amended. The majority of ECTs deal primarily with environmental quality laws and issues, such as air-water-waste pollution permits and natural resources development. Some expand beyond these to include laws regarding energy, endangered species, parks and recreation, health and safety, forests, fisheries, marine resources, and

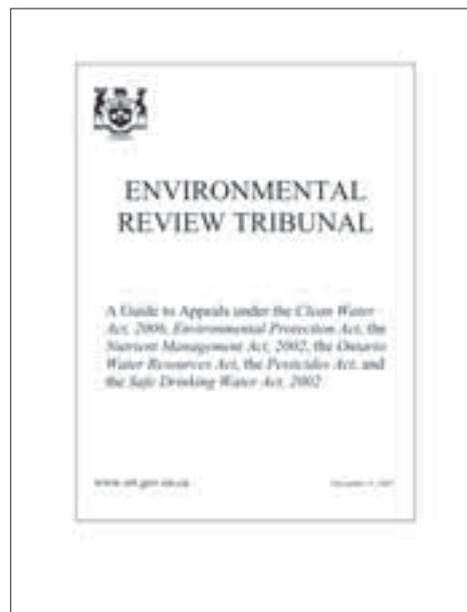
mining. Some include an even fuller range of issues, adding land use, zoning, sanitation, building codes, noise, transportation, and fire regulations (New York City). On the other hand, some deal only with land use laws and not environmental laws (Ireland). Still others may deal with only one issue, such as EIA appeals (Kenya National Environmental Tribunal). A few include nuclear power decisions, typically preempted by the executive or legislative branch. ECT jurisdictions often have a special exclusion for “developments of national significance,” allowing politicians to keep certain projects and programs out of the ECT, particularly those sponsored or favored by the government or involving national security or where time is of the essence.

Constitutions are laws, so, in those countries with a constitutional right to life/environment, a decision should be made whether or not the ECT’s jurisdiction should include claims of violations of those constitutional human rights. India is an example of why care must be taken with how broad to make this jurisdiction in order not to actually prevent access to justice. There, individuals’ rights to file such environmental-rights claims directly in the Supreme Court (with no more than a post card) has caused a huge backlog of cases, such that the Justices may “hear” and dispose of 70 cases in a single day.

## 2. ENFORCEMENT JURISDICTION

Most ECTs have civil jurisdiction (to hear individual’s cases claiming actual or threatened injury from violation of environmental laws). Most also have administrative law jurisdiction (to review government decisions or projects affecting the environment, including promulgation of rules, issuance of permits, and issuance of fines). A number of legal systems, like the United States, treat administrative complaints as civil issues, and handle them with no distinction in the same forum in their court systems. Quite a few ECTs have criminal jurisdiction under their laws (to hear prosecutions of environmental crimes or criminal permit violations and/or appeals of same). A few have only criminal jurisdiction (Belgium). More powerful ECTs have a “hybrid” combination of civil, administrative, and criminal powers (Sweden; New South Wales, New Zealand; Brazil; and a number of local government ECTs in the United States).

Deterrence is an important consideration in designing an ECT’s enforcement jurisdiction (Preston 2007a, 94-96). Some nations feel that civil remedies alone (including injunctions, orders, and monetary penal-



ties) are sufficient to punish and deter environmental law violators. For example, the USEPA relies primarily on civil enforcement, although it has criminal enforcement powers which are less used. Other nations feel civil sanctions are dismissed as just “the cost of doing business,” while criminal sanctions carry such moral and reputational embarrassment, given the culture, that they rely on them for the majority of violations (Brazil). In either case, more comprehensive and effective ECTs have authority to impose civil, administrative, and criminal penalties, including monetary penalties (civil) or fines (criminal), jail terms, and other criminal sanctions that are sufficiently high that they act as an effective deterrent (Preston 2007b).

Administrative appeals of agency decisions, including such issues as fines, penalties, permit approval or denial, and justification and compensation for land takings tend to be the domain of tribunals, where the vested authority of the ECT is to review whether the action complies with adopted rules, policies, and plans.

## 3. JURISDICTIONAL LIMITS

In addition to restricting the ECT’s laws and powers, other limits may be imposed, particularly on tribunals. If the environmental agency is very powerful, the ECT finding a violation of law may be given only the power to send the case back to the agency for further review. An ECT may be limited to ruling only on defined legal issues (“rule of law”), and not given the authority to engage in more creative “problem solving” processes to balance the social, economic, cultural, and environmental impacts of proposed developments and programs.

Integration of land use and environmental protection decisions into one ECT forum is clearly a trend, although, to date, few countries have achieved true integration of those two complex fields of law. Integrated Pollution Prevention and Control (IPPC) permit laws point a way to enhancing access to justice by creating a “one-stop shop” approach for development, where all the impacts of a proposal can be considered in a single application, rather than multiple applications to multiple authorities.

ECTs like Queensland and Ontario, among others, have broad jurisdiction over planning and environmental issues. Costa Rica’s Tribunal Ambiental Administrativo (TAA), at least on paper, has some of the broadest jurisdiction, including both civil and criminal authority and all the issues under the Organic Law of the Environment (issues of wildlife, biodiversity, forestry, soil conservation, shoreline protection, health, water, construction, and urban planning). In contrast, Ireland’s An Board Pleanála (Planning Board) has only land use and building permits under its jurisdiction, but not environmental laws. Today, some politicians and civil society advocates in Ireland are exploring expansion of this authority to include environmental pollution, nature protection, and other more traditional environmental arenas as they are impacted by development. Sweden’s Environment Court of Appeal, which currently includes water cases that were originally assigned to Water Courts and jurisdiction over 16 different environmental acts, is now considering legislation that would integrate land and building issues in its scope of authority.

Another jurisdictional issue is whether or not the ECT has the authority to grant permits initially, or to deny, approve, amend, suspend, or add conditions to permits granted at the agency level. A few ECTs have been given the power to grant permits and monitor and enforce permit conditions (Ireland, Malaysia). More typically, permit decisions are made by the environmental or development agencies and only reviewed by the ECTs. For example, Sweden defines three levels of development: A, B, and C. No permit is needed for the minor C-type activities, a local government permit is needed for impactful B-type activity, and one of five regional environmental courts hears and actually issues permits for the major A-type activities, which are appealable to the Environment Court of Appeal.

Ideally, ECTs would have *integrated* jurisdiction over the full range of land use, zoning, planning, environmental

protection, integrated pollution control, compensation and remedies for environmental damages, sustainable development issues, and permit reviews. This can be achieved through assignment of the relevant laws to its jurisdiction. No ECT found had such comprehensive jurisdiction, although the Land and Environment Court of New South Wales, Australia, comes close.

#### **BEST PRACTICES – LEGAL JURISDICTION:**

*An integrated environmental and land use planning court, with civil, administrative, and criminal jurisdiction and enforcement powers adequate to the task, represents the jurisdictional scope that best provides comprehensive access to environmental justice. Such a model can provide a streamlined, comprehensive one-stop shop for litigants with broad and effective remedies. Adopting such a complex model requires a carefully thought-out scope of covered laws and issues. Best examples are the Environmental Court of New Zealand, the Land and Environment Court of New South Wales, and the Planning and Environment Court of Queensland. Jurisdictions exhibiting interesting attributes, but not all of the desirable characteristics, include Japan’s Environmental Dispute Coordination Commission (a tribunal with adjudicatory authority, integrated subject matter jurisdiction, but no criminal jurisdiction) and Brazil’s state and federal environmental courts (having civil, administrative, and criminal jurisdiction while heavily oriented toward the latter, but having no land use planning, development jurisdiction).*

### **3.3 ECT DECISIONAL LEVEL(S)**

**ECTs exist at many different stages in the decision-making process, including the initial agency decision level (on permits for example), the agency review level, the trial level (first instance), the appellate level (second instance) and the final appellate level. Some have de novo or merits review powers, and some can only review the record of the decision of a lower forum. In a few countries, such as the United States, an agency may have an ECT at both the internal trial and the appellate level.**

ECTs can be created at any decisional level in the adjudication hierarchy – the internal agency, trial court, intermediate appeals court, and/or the supreme court level. The frequently used term “first instance” refers to the first time an adjudication body, like an ECT or general court, hears a case (typically a civil or criminal claim or an administrative review-appeal of an agency staff or other government decision). “Second instance” refers to the next level of appeal in either another ECT

or court, and “third instance” constitutes the next appeal level, usually in a final hearing in an appellate or supreme court.

### 1. INTERNAL AGENCY ECT

An ECT inside the environmental or other regulatory agency can be either of two kinds:

- *Decisional Body*: The ECT can be a forum (typically a tribunal) that makes the agency’s initial decision to issue a permit, enforce a violation, or approve a plan, based on staff recommendation. In this case, the ECT takes the place of the normal political decision-maker, be that the head of the agency or some delegated staff member. The advantages of substituting an ECT for the individual decision-maker are that it can (1) free the agency’s personnel to do their substantive work rather than run hearings; (2) enable greater public access rights by providing notice and a public hearing opportunity; and (3) allow the ECT to consider agency or government policy, not just law. An appeal of this ECT’s decision can be directed to the head of the agency, another inside tribunal, or to an outside court or tribunal.
- *Review Body*: More often, agency staff (not an ECT) make the initial agency decision and the internal ECT is the forum to which that decision can be appealed (USEPA, US Dept. of the Interior). Subsequent appeals of this “first instance” ECT review then typically go to a court (trial or appeal) in the judicial branch for a “second instance” review, based on law not policy.

### 2. TRIAL COURT LEVEL ECT

Most common is an ECT outside the agency at the trial-hearing level. These can have either or both of two functions:

- *New Case Filing*: In this case, the ECT hears new case filings that are not appeals of agency decisions, such as one neighbor suing another for pollution, property damage, or noise; a prosecution of a polluter; or an environmental NGO suing the government to stop a dam project. After this first-instance decision, appeals usually go to an intermediate appeals court (second-instance review), then possibly to the supreme court on issues of law not fact (third or final instance).
- *Review or Appeal*: In this case, the ECT hears appeals of agency decisions, such as a factory appealing an

agency monetary penalty for pollution, a developer appealing denial of or conditions put on its building permit by the agency, or an NGO challenging an agency decision to grant a permit. Appeals from these generally follow the same path as appeals of new case filings.

### 3. APPEAL COURT LEVEL ECT

ECTs can be established at all three levels – trial, intermediate appellate, and supreme court. For example, Finland and Sweden both have specialized environmental trial courts and supreme administrative appeals courts to review *environmental* decisions. The Thailand Supreme Court has established an Environmental Division of 13 justices and is in the process of establishing both environmental appeals and trial courts. The environmental courts in the Intermediate People’s Courts of Kunming and Wuxi, China, both accept first-instance filings of public interest lawsuits (PILs), although they are appellate-level courts. The rationale for PILs jumping over the trial level and going straight to the appellate level is that there is no environmental specialization at the trial level in those jurisdictions, nor are there procedural rules for PILs, and the appellate courts wanted to ensure that such cases were given special attention.

How much discretion do these ECTs have in making a decision? Here there are three possibilities:

1. “Review on Questions of Law” – the ECT may be given only the power to review and rule on the formal legality of a decision below and its compliance with the strict letter of the controlling law or laws. Thus, it conducts only a review of points of law, not points of fact;
2. “Merits Review” – the ECT may in addition be empowered to rule on the actual content of the decision, its policy or substantive reasonableness, and consider points of fact; or
3. “De Novo Review” – in rare cases, the ECT may be given the power to reconsider the decision below de novo (“anew” in Latin) and hold a completely new trial. A de novo review entails rehearing and re-considering all of the evidence, even allowing new witnesses and evidence (which ordinarily is not allowed in appeals), and not giving any deference to the decision below (as is customary in appeals of the other two types).

The State of Vermont Environmental Court, although constituted as an appellate court to which environment agency decisions are appealed, has de novo powers. This is a feature criticized by both business and environmental interests because of its additive costs and lack of predictability. Conversely, some appellate courts are limited to review of the record of the lower court and do not take any additional facts into consideration, except in rare instances.

**BEST PRACTICES – ECT DECISIONAL LEVEL(S):**

*Specialized ECTs at both the trial and appeal levels with merits review powers can maximize both judicial competence and speed of decision-making. If the case volume justifies it, having two-tiered ECTs appears to provide the most knowledgeable and uniform outcomes, and thus greater access to environmental justice. Sweden, Finland, Belgium, Japan, and the United States EPA currently have such a two-tiered approach, and India and Thailand are moving in that direction. If two levels are not justified, an ECT at the trial or first-instance level is preferable to one only at a higher level because a well informed decision is less likely to be appealed and will be made earlier in the dispute resolution process.*

*The specialized environmental tribunal in Ontario, Canada, and the National Environmental Tribunal in Kenya are excellent examples of environmental specialization at trial-level only. De novo review of the decision of a previous court (whether the agency’s decision or a lower ECT body) is not recommended because of the excessive costs, wasted time, and unpredictability. Allowing new evidence at second- and third-instance review levels also is not recommended for the same reasons (except for extremely important evidence not available earlier).*

**3.4 GEOGRAPHIC AREA**

ECTs geographic coverage can range from a small municipality to a county to a state or province to an entire nation. Some cover a water basin or the lands of an indigenous people. The larger the region geographically, the more difficult it is to provide access to justice and the forum, necessitating the development of traveling courts and use of information and communication technology to bring in testimony. The Environmental Court in the small state of Vermont, USA, ensures access by doing site visits and holding hearings in the community impacted by a decision.



*ECTs covering large geographic areas, like the State of Queensland, Australia, have to make special accommodations to reach all citizens and provide real access to justice.*

The geographic coverage of an ECT can be as large as a huge nation, such as India, or as small as a suburb of a municipality. The size of the jurisdiction is a function of the existing judicial structure, the laws to be included in the ECT's jurisdiction, and the practicalities of transportation. Usually, but not always, the area served is determined by the preexisting judicial/political structure, so that the ECT matches some municipal, state, provincial, or national boundary and is consistent with the jurisdiction and level of review assigned to the court.

Initially, Sweden created regional environmental courts based on the areas of its old water courts and their river basin geographic jurisdiction. Today, the boundaries are being redrawn to incorporate population and development areas and land use planning issues, in addition to water basins. The Mackenzie Valley Environmental Impact Review Board is an interesting example of an ECT having a water basin (the Mackenzie Valley in the Northwest Territories, Canada) and the interests of a resident indigenous people as its geographic jurisdiction. It is responsible for environmental assessments and environmental impact reviews of development proposals in order to protect the environment and enhance the social, economic, and cultural well-being of Mackenzie Valley residents.

In a dramatic move in 2008, the Philippines Supreme Court designated 117 existing municipal and regional trial courts whose jurisdiction already included forestry cases to handle all environmental cases, while still keeping their general jurisdiction caseloads and geographic areas. Thailand is considering a three-tiered approach to covering the entire nation at all levels, with environmental courts in its supreme, appellate, and trial court jurisdictions.

The mechanics of geographic coverage are an important consideration for ECTs with large areas or where travel to the court seat may be difficult, since geography alone can diminish access to justice. ECTs have responded to this challenge in a number of innovative ways, including creating "easy" filing procedures (such as on-line), traveling courts (the Environmental Court in the State of Amazonas, Brazil, uses a van containing a complete mini-courtroom), flying judges (Queensland, which covers almost one quarter of Australia, an area 2½ times the size of Texas), holding hearings at the site of the proposed development (Vermont), and permitting testimony by teleconferencing and video conferencing (New Zealand). Flexible hearing locations may be

preferable to stationary ECTs that hold hearings only in the capital or even in regional centers, if transportation time and expense are issues.

#### BEST PRACTICES – GEOGRAPHIC AREA:

*Geographic coverage compatible with other judicial/political boundaries is easily understood by the public and permits sensitivity to "physical" access to justice. If the area is large, special accommodations can be made to permit access to the ECT by persons who live far from the forum by use of "traveling" courts and judges, tele- and video-communication, and other schemes. Traveling ECTs are preferable, since they allow the decision-makers actually to visit the site in dispute; accommodate persons who are unable to travel to the forum for financial, physical, or work reasons; and increase public participation in the affected area. The Vermont Environmental Court in the United States covers a small geographic area and splits hearings geographically between two judges. The court also does on-site hearings locally in impacted communities. Accommodation for persons with physical disabilities, including mobility, hearing, and vision issues, and for persons who need language translation services are included in the most accessible ECTs.*

### 3.5 CASE VOLUME

**The number of cases anticipated is a major determinant of the type of ECT to be created. Some excellent ECTs, such as Trinidad and Tobago, have too few cases to justify a separate ECT. Others, like New York City, USA, have huge caseloads that are difficult to manage. Case volume is also increased or decreased by others of the 12 factors, including geographic area, jurisdiction, and ADR.**

Caseload is crucial to the success of a free-standing ECT. As the head of one environmental tribunal advised us:

*"I feel somewhat embarrassed to have to admit that our case load is indeed very small. . . . The caseload that was anticipated when the Commission was established has just not materialized. I believe one of the reasons for this is that all the relevant legislation that should have been put in place . . . is yet . . . to be drafted, and where drafted has not been assented to [by the government].. . . As it stands at present it seems very difficult to justify the existence of the Commission in light of its small caseload." (Communication to authors from Sandra Paul, Chair of the Trinidad and Tobago Environmental Commission.)*

A careful analysis of the anticipated volume and complexity of cases to be diverted to the ECT, based on an initial review of current and past cases, is a critical step in planning. Projected case volume will also influence whether the best decision is a free-standing court or tribunal, or re-designation of existing courts, or creation of a specialized chamber, or simply assigning a single judge to handle environmental cases. Actual ECT volume will be one test of the success of an ECT design, as it can be an indicator of making a significant reduction in the regular courts' case backlog, of managing cases efficiently and effectively, of having appropriate legal and geographic jurisdiction, and of being accessible to the public.

The factors that drive case volume are:

- The options selected from each of the first four building blocks above (type of forum, legal jurisdiction, court level, and geographic area)
- Economic conditions – the number of environmental cases tends to increase when development is booming
- Development policy – governments that aggressively pursue economic development, natural resources development, and foreign direct investment (FDI) will have more economic activity and more potential for conflict
- Environmental laws – the more numerous, stringent, and complex the applicable laws are the more potential there is for conflict, including developer-government disagreements and PIL lawsuits by individuals, communities, and NGOs
- Standing – the more open the ECT's standing (right to file cases, see chapter 3.6 on Standing), the greater the universe of persons who theoretically can file actions before the ECT
- Enforcement – the more rigorous the monitoring, inspections, and enforcement, the more potential violations will be identified and brought to the ECT (see chapter 3.12 on Enforcement Tools and Remedies)
- Public awareness – the better the ECT makes itself and its procedures known to the public, the more people will be aware of and use their access rights
- Accessibility – the more accessible, visible, and transparent the ECT is and the easier it is to file a complaint or an appeal, the greater the likelihood of case filings
- Barriers – the less intimidating the process of filing a case before the ECT and the lower the risk to parties, for example, government pre-approval for filing (Bangladesh), cost and other financial risks (see chapter 3.7 on Costs), the more willing people will be to use the ECT.

The study discovered ECT case volume as low as only five new cases a year (Trinidad and Tobago 2006, 26) – making it difficult to justify a specialist ECT. A similar issue exists with Kenya's National Environmental Tribunal, which has single-purpose jurisdiction over EIA appeals only, limiting its caseload substantially. At the other extreme, New York City's Environmental Control Board has over 175,000 hearings per year, requiring hundreds of ALJs and support staff. One overworked state ECT judge in the heart of the Amazon had a caseload of 2,900 pending cases in 2008 and decides about 100 a month.

The Trinidad and Tobago Environmental Commission (see quote beginning this section) has been surprised by how few cases it receives (only 5-8 new cases a year for a total of only 40 in the nearly 10 years since its founding). Sandra Paul, Chair of the Environmental Commission, sees the cause as insufficient laws providing it insufficient jurisdiction. Her solution:

"I have . . . at a meeting with our Prime Minister, advanced the argument that . . . its jurisdiction should be expanded to cover planning matters and certain types of land matters as obtains in the Land and Environment Court, New South Wales, Australia. My suggestion met with some receptiveness, so I am cautiously optimistic that there would be expansion to the jurisdiction of the court." (*Communication to authors from Sandra Paul, Chair of the Trinidad and Tobago Environmental Commission.*)

While multiple factors can result in low caseload (see bullet list above) and need to be analyzed, the cause can often be one dominant, curable factor such as overly limited jurisdiction (laws covered), lack of public awareness, accessibility problems, or poor public credibility based on performance.

The Dhaka Environmental Court in Bangladesh dramatically illustrates another problem causing insufficient caseload – lack of political independence. The court was created in 2002, within the Dhaka Divisional Court, to hear cases of alleged environmental crimes, including matters under the jurisdiction of the nation's Department of Environment (DOE). Amazingly, the Environ-

mental Court law provides that no one may file a complaint in the court without first filing a complaint with the DOE. A precondition of access to the court is that the DOE must investigate and issue a complete report, which only then can be used by the complainant as a basis for filing a case with the court. Gesturing to piles of files filling the room, the DOE director freely admits there are thousands of complaints, dating back years, which his agency will never investigate or generate a report which would permit a judicial filing. As a result, the Environment Court has only heard 93 cases in its first six years – only 17 in 2007, the last year with complete statistics. This is a tragedy, since the single judge assigned to the court has an outstanding background in environmental law and is committed to environmental enforcement. But because of the low caseload, he does not receive spacious accommodations, modern computer equipment, or staffing. His career prospects are limited because judicial promotion is based on the volume of cases a judge processes each year. The young judge is now taking the majority of his caseload from the general docket to keep busy. Clearly, this environment court is not effective in providing access to environmental justice, in spite of a dedicated and trained judge and adequate laws on the books, because the law allows the government environment agency complete control as a “gatekeeper” creating a significant barrier to environmental justice.

#### BEST PRACTICES – CASE VOLUME:

*Advance analysis of anticipated case volume and case backlog, and thoughtful elimination of barriers to filings are critical steps in planning and politically justifying an ECT. Best estimates are that at least 100 actual case filings per judge per year are required to justify a “stand alone” ECT. If insufficient volume is anticipated but access and other considerations weigh in favor of an ECT, several choices exist, including (1) beginning with one judge or decision-maker who is assigned all environmental cases and gives them priority but also hears other general matters, (2) expanding the legal jurisdiction to include both environmental and land use cases, (3) reducing standing barriers (see chapter 3.6 on Standing), (4) increasing public education about use of the ECT, and (5) controlling cost risks (see chapter 3.7 on Costs). The Planning and Environment Court of Queensland is a good example of case volume justifying a separate ECT, with unique flexibility for the overseeing District Court Chief Justice to respond to changes in volume by assigning additional judges to the environmental court and/or assigning environmental court judges to hear other matters when conducting hearings outside the capital of Brisbane.*

## 3.6 STANDING

**The right to have access to justice in an ECT can be blocked by restrictions on “standing,” the qualifications a party is required to have to file or participate in a case. These restrictions, usually controlled by legislation and/or ECT rules and procedures, are a significant barrier to access to justice. Many jurisdictions limit standing and restrict the parties who can access the ECT, but the justifications for this “door keeper” approach are suspect, since ECTs can be given authority to dismiss or penalize improper filings. A rule allowing “any person” to raise an environmental issue provides the most open standing, particularly for nonprofit public interest lawsuits.**

Standing (or *locus standi* in court Latin) is the set of legal rules that determine who can initiate a lawsuit or participate in a government proceeding. Standing rules, either stated in legislation or developed through judicial or administrative decisions, describe the qualifications that a person, business, government agency, or NGO must meet in order to obtain access to justice. Standing restrictions are a threshold barrier in both general courts and ECTs.

The study found that rigidly interpreted standing rules can be a huge barrier to access to environmental justice, particularly for public interest lawsuits (PILs), citizen suits, and class actions brought by individuals or NGOs. If you cannot get through the door of the courthouse there is no access to environmental justice.

The concept of restricting standing is an issue in a number, but by no means all, legal systems. Where standing is restricted, it is usually because of one or more of four concerns:

1. “Floodgates” – the assumption that without standing restrictions, courts will be “flooded” with too many lawsuits.
2. “Frivolous-vexatious lawsuits” – the fear that unqualified persons may bring groundless claims or use the courts to abuse other parties.
3. “Improper court role” – the idea that issues may be brought which are inappropriate for courts – decisions which more properly belong to the legislative or executive branches.
4. “Development inhibiting” – the notion that PILs and some other types of lawsuits may attack, prevent, or add costs to property and economic developments.

Studies conclude that these concerns are either groundless or not appropriate reasons for or aided by restricting standing (see Australian studies later in this section).

Standing rules for national courts and tribunals, like ECTs, can come from one or more of four sources:

1. Constitution: A country's constitution may provide a human right to a safe/clean/quality environment, in which case standing to protect that right is itself deemed to be a constitutional right. India's Constitution does this, among many other countries, as discussed below.
2. Legislature: In adopting a law, the legislature often expressly or impliedly indicates who may file cases regarding violations of that law. South Africa's law, below, is one such example.
3. Court rulings: In "common law" jurisdictions (England, British Commonwealth countries, and others), judges may announce standing rules in their decisions as a matter of their common-law powers (judge-made law based not on constitutional or legislative law, but on what is deemed reasonable or fair). England's approach, discussed below, relies in part on this.
4. Court rules: In any jurisdiction, courts may provide standing requirements in their court operating rules. The Philippines draft rules, below, are one example of this.

A virtual stand-alone exception to this is the federal court system in the United States, where the US Supreme Court has interpreted the federal Constitution as authorizing courts to dictate to the legislature how much standing it can legislate, rather than the reverse (Hodits 1911-1912). The Court bases its power on the repetition of two words in the US Constitution which it deems limits federal courts to hearing only "cases" and "controversies" (US Constitution art. III, section 2). The United States' "constitutionalizing" of standing *restrictions* (as opposed to standing *rights*, like India) has been specifically rejected in other countries (such as Australia in the *Truth About Motorways* case) and even in some US states which do not have such language in their state constitutions (Kravchenko & Bonine 316-356).

Standing is a non-issue when three things are clear: the plaintiff's injury, defendant's causation, and the court's ability to provide an effective remedy. But environmental harms are seldom so clear. With death believed to be

caused by a factory's air pollution or property damage from underground seepage from a nearby dump, it is often very hard to prove injury and/or causation. Concerned citizens, communities, public interest NGOs, and others are often victims of standing restrictions because they cannot provide sufficient evidence at the start of a case about the causal link between the plaintiffs, the harm, and the cure.

What are the criteria for standing that a plaintiff must meet in order to have a complaint heard? This is no easy task to answer since the laws of standing vary enormously among jurisdictions, often being inconsistent, confused, and unpredictable (Bonine 2001; Vera et al.).

Standing rules range from very open to extremely narrow. The most open standing criteria the study found appear in the proposed "Draft Rule of Procedure for Environmental Cases" for the Supreme Court of the Philippines (Philippines Draft Rule). They are the only standing rules known to expressly identify "future generations" as having standing to sue. These truly "futurist" rules stand as a tribute to one of the best known international public interest environmental lawyers, Antonio A. (Tony) Oposa Jr., who won a world-famous lawsuit in 1993 on behalf of his own children's and future generations' rights to enjoy forests and a healthy environment, *Oposa v. Factoran* (CIEL).

The Philippines Draft Rule 2 states in part:

SEC. 5. *Who may file.* – Any person or group of persons, by themselves or through duly-authorized representatives, or in representation of others, including generations yet unborn, in a class suit, may file a civil action involving a violation or enforcement of environmental laws and shall include:

- (a) Any citizen;
- (b) Minors with the assistance of their parents or guardians;
- (c) People's and non-governmental organizations and public interest groups;
- (d) Indigenous peoples and local communities;
- (e) Others similarly situated.

Parties in interest shall have the right to intervene to protect their own individual interest" (Philippines Draft Rule, Rule 2, Section 5).

An equally broad example (except for future generations) is provided by South Africa's environmental legislation:

32. Legal standing to enforce environmental laws.

– (1) Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources –

(a) in that person's or group of person's own interest;

(b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;

(c) in the interest of or on behalf of a group or class of persons whose interests are affected;

(d) in the public interest; and

(e) in the interest of protecting the environment. (South Africa National Environmental Management Act 107 of 1998.)

England also favors open standing, generally requiring only that the plaintiff have "a sufficient interest," construed liberally, to mount an effective lawsuit, because

"[i]t would . . . be a grave [gap] in our system of public law if a pressure group . . . or even a single public spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped" (*Inland Revenue* case).

However, the "interest" test can open interpretive opportunities for restricting standing not found in the Philippines or South African approaches. "In general, individuals need to show the impairment of a right (e.g., property, health, procedural rights) or that they have a sufficient interest (e.g., geographic vicinity) to be granted standing" (Vera, et al. 6). UNEP recommends the open approach in no uncertain terms: "States should provide broad and inclusive interpretation of standing in proceedings concerned with environmental matters" (UNEP, Guideline 17).

Where is the rest of the world on standing? The study found examples of standing covering the spectrum from

#### BOX 5 STANDING TO SUE FOR FUTURE GENERATIONS SUIT

On July 30, 1993 the Supreme Court of the Philippines handed down a landmark decision acknowledging the right of this generation to have standing to sue to protect the environment, not only for itself but for "generations yet unborn." Award-winning PIL attorney Anthony J. Oposa Jr. (see also Box 16), representing 40 children and their parents including his two sons and daughter, dramatically linked the twin concepts of "intergenerational responsibility" and "intergenerational justice." The case demanded that the Philippines Department of Environment and Natural Resources cancel existing timber agreements and stop issuance of new ones, since the immense deforestation of the country's rainforests violated plaintiffs' constitutional rights to a balanced and healthful ecology. In the first decision of its kind in the world, the Supreme Court ruled "This case . . . has a special and novel element. Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. . . . Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony [of nature] for the full enjoyment of a balanced and healthful ecology." (*Oposa v. Factoran.*)

very broad (see Finland Wolf case, Box 6) to restricted (see Italy Cinque Terre case, Box 7), with all ECTs having some mechanisms to prevent or penalize improper lawsuits. Standing rules can impact not only access to "court room justice" — but also access to information and access to public participation in decision-making. A few of the most open and liberal standing rules exist in some of the least developed nations, as well as in long-established ECTs like New South Wales, Australia.

Examples of restricted standing:

- Bangladesh's Environmental Court has a virtual "locked door." No one can file a case in it without prior review and report approving the complaint by the government environmental agency (even when the agency may be the defendant in the case!). The agency has a multi-year-long backlog of complaints which have not been and probably will not be investigated (see 3.5 above).
- You can only participate in the New York City Environmental Control Board appeals process if you have had a complaint filed against you by a public agency. There appears to be no public standing to



*Finland's Supreme Administrative Court has granted standing to wildlife NGOs to contest the hunting of Finnish gray wolves, a species protected by the EU Habitat Directive.*

*Credit: Jan-Michael Breider*

In 2007, Finland's national Ministry of Agriculture and Forestry, acting under the country's Hunting Act, granted a license to allow shooting of Finnish gray wolves, a species protected by the EU Habitats Directive. In hearings on the license, the Ministry denied standing to an objecting wildlife NGO. Under Finland's Administrative Judicial Procedure Act, "standing" belongs only to those whose "rights, obligations or interests" are at stake. The NGO appealed to the Supreme Administrative Court of Finland. The Court granted the NGO standing, by drawing an analogy to Finland's Nature Conservation Act (which does provide NGOs appeal rights), to its Constitution (which provides environmental rights), and to the need to assure effective enforcement of EU law. Ultimately that Court upheld the Ministry's grant of the hunting license as not being contrary to Finnish or EU law, but only after considering the NGO's arguments. (Communication from Justice Kari Kuusiniemi of the Supreme Administrative Court.)

appear before the Board, but anyone can file a complaint with an agency for investigation of an infraction of a municipal law. The investigating agency then writes a citation, which can be the subject of an appeal.

- The Environmental Court in the State of Vermont in the United States is under different standing rules for different laws. For example, for appeals on large projects of statewide interest (under Act 250), only abutting property owners have standing, making an NGO or PIL appeal extremely difficult.
- Some laws restrict standing to only those persons who participated in the prior administrative decision-making process, including some US federal and state laws (e.g. the State of Colorado). The logic of such a requirement is that it (1) ensures that issues are dealt with at the earliest level where they may be easier to resolve and (2) allows the appellate decision-maker(s) to review the case on a complete record. The problem, of course, is that it presumes adequate local public knowledge about a problem, the sophistication to analyze the potential impacts early on, the understanding of how to make a local appearance, and the willingness to confront local politicians and businesspersons who may also be one's neighbors, customers, or friends.
- Some countries have overly strict rules about what NGOs qualify for standing. For example, until

2009, Sweden granted standing only to NGOs with at least 2,000 members, among other requirements, and only two NGOs in the entire country had that many members. In a very important precedent for access to justice, on October 15, 2009, the European Court of Justice ruled that Sweden's 2,000-member standing restriction was "precluded" by the EC Directives implementing the Aarhus Convention (*Djurgården-Lilla* case).

- The Aarhus Convention defines standing in a manner that may perpetuate more restrictive standing rather than less. For access to justice in environmental matters, the treaty requires parties to "ensure that members of the public concerned . . . have access to a review procedure before a court of law and/or another independent and impartial body established by law," if they meet either of two standing requirements: "(a) Having a sufficient interest or, alternatively, (b) Maintaining impairment of a right" (Aarhus, art. 3, para. 2). Aarhus then goes on to say, "What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention" (*id.*). This language would not appear on its face to prevent countries from continuing restrictive standing rules, depend-

## BOX 7 RESTRICTIVE STANDING - ITALY'S CINQUE TERRE CASE

The World Wide Fund for Nature (WWF), one of the world's largest and most respected conservation NGOs, was denied standing by Italy's Council of State (a non-specialist national administrative appeals court) in a 2003 case. The Municipality of Riomaggiore, on Italy's beautiful and heavily touristed Cinque Terre coast, issued a permit allowing construction of buildings in the town's historic city park. The WWF filed a request for information concerning the granting of the permit, which was denied by the municipality. It ruled that the permit was governed by the city planning laws – which did not specify a right to information – rather than the country's environmental protection laws, which do. The WWF filed a court appeal based on Italy's national laws granting rights to information in environmental matters. The Council of State, however, upheld the municipality's denial, ruling that normal city planning decisions are not environmental decisions and therefore the legal rights to information and standing in environmental laws do not apply. (Communications from Judge Giovanni Tulumello, Primo Referendario, Tribunale Amministrativo Regionale della Sicilia.)

It is ironic that Italy has very broad standing provisions in its environmental laws, but narrow ones in its land use planning laws,



One of the world's largest NGOs, the World Wide Fund for Nature (WWF), was denied standing to challenge erection of buildings in the historic city park of Riomaggiore, Italy, on technical grounds.

Credit: Scott Templeton [www.flickr.com/photos/oaklandnative/](http://www.flickr.com/photos/oaklandnative/)

as if land use planning was divorced from environmental protection. This lack of integration between the two types of law is not unusual, however.

ing on how narrowly they choose to define “sufficient interest” or “right.” (See Kravchenko 2007, 5, 40-41; Ebbesson, 4.)

- In the Netherlands, which historically has had very open standing, the Parliament has been considering restricting standing for NGOs to limit it to “interested parties” only.
- In Austria, non-profit NGOs that have been in existence for three years, have a written mission to protect the environment, and participated in the initial government hearing have standing to appeal. In addition, citizen groups that do not meet the NGO tests but have 200 community members and have filed comments in the initial hearing have standing. Individual persons must show a direct economic or physical impact on their persons or property or have a substantive right that will be impeded by the proposed action in order to have standing.
- The standing rules in the Province of Ontario, Canada, are thought restrictive and archaic by both NGO and private-sector attorneys interviewed for the study. Only immediate stakeholders have legal standing. However, the current government sup-

ports open standing and the Environmental Review Tribunal (ERT) has chosen to interpret the rules expansively. There are three categories of participants given standing before the ERT – parties (full participation), participants (some participation), and presenters (can only speak to the tribunal). As in most ECT jurisdictions, the head of the environment agency has automatic standing to bring an action to protect the environment.

Examples of more liberal standing:

- Some countries' constitutions or laws provide for an *actio popularis*, the ancient Roman law action by an individual or group in the name of the general public. These laws typically provide that “any person” can sue the government when it breaks a law and can be found in the Netherlands, Portugal, Spain, Estonia, Slovenia, and other countries (Bonine 2001; Vera, et al.).
- Similarly, in Trinidad and Tobago any individual or group of individuals expressing a general interest in the environment or specific concerns can bring a

direct party action alleging a violation of the Environmental Management Act.

- Sudan reports that any person can lodge a claim where there has been environmental damage, with no proof of direct connection to such damage.
- In countries like Kenya and Brazil, with a constitutional right to a quality environment, any person has standing to bring suit if their environmental human rights are infringed upon, including public interest groups and NGOs.

The countries with constitutional human-environmental rights typically have the most open standing. India is an extreme case, as Professor Lavanya Rajamani points out:

“A few activist judges in the late 1970s and early 1980s, in a series of high profile cases bristling with procedural innovations and doctrinal creativity, laid the groundwork for the growth of public interest litigation in India. The most significant of these cases is *S.P. Gupta v Union of India* in which Justice Bhagwati relaxed the rule of *locus standi*, and opened up the doors of the Supreme Court to public-spirited citizens – both those wishing to espouse the cause of the poor and oppressed (representative standing) and those wishing to enforce performance of public duties (citizen standing).” (Rajamani, 293 note 4.)

“[I]n the last 15 years the judicial gaze has zeroed in on the protection of the environment. The constitutionally-protected fundamental right to life and liberty has been extended through judicial creativity to cover unarticulated but implicit rights such as the right to a wholesome environment . . . . The right was recognized as part of the right to life in 1991. . . . The court has since fleshed out the right to a wholesome environment by integrating into Indian environmental jurisprudence not just established but even nascent principles of international environmental law. These include the polluter pays principle, the precautionary principle, the principle of inter-generational equity, the principle of sustainable development and the notion of the state as the trustee of all natural resources.” (Rajamani, 294).

India allows individuals to file human-environmental rights cases *directly in the Supreme Court* (bypassing the trial and intermediate appeals levels entirely), even for very minor or localized grievances.

This same open approach to standing was not characteristic of a major national ECT in India – the National Environment Appellate Authority (NEAA) – until a series of court reversals in 2009. The NEAA is authorized to hear appeals from “any person aggrieved” by government approvals of various industrial, dam, and other infrastructure projects based on EIAs. In its 11 years of existence, the NEAA had *dismissed every appeal filed with it but one* (de Silva; Dutta, Feb. 14, 2009). In a 2009 case, the NEAA again denied standing to a citizen to appeal the government’s approval of an aluminum smelter plant, and the Delhi High Court in a “landmark” ruling reversed, holding:

“public spirited interested persons, environmental activists or other such voluntary organizations working for the betterment of the community as a whole . . . are to be construed as ‘aggrieved persons’ within the meaning of that [standing section] of the Act” (Dutta, June 7, 2009).

This and several other Delhi High Court rulings against the NEAA in 2009 appear headed to reform its practices, including standing. Also in 2009, the Indian Parliament is considering legislation to replace it with a new “Green Tribunal” which may have more open standing.

In jurisdictions with more limited standing, there may be other means for gaining standing to sue when citizens and public interest litigants are restricted. Some intermediary institutions may exist with standing sufficient to provide access to environmental justice, including prosecutors, ombudsmen, and legal aid organizations.

Environmental prosecutors can provide this kind of alternative public standing (full discussion in chapter 3.12). Public prosecutors have automatic standing under criminal environmental laws to bring cases against violators and can even be given standing under civil environmental laws, although this is rare so far. Professional, environmentally trained and dedicated public prosecutors can bring cases based on complaints from members of the public or on their own initiative, so that individual members of the public do not have to face requirements of standing, case preparation, and related risks or expense of the lawsuit.

Another successful alternative to citizen standing can be the environmental ombudsman. A number of countries, including Austria, Costa Rica, Greece, Hungary, and Kenya have instituted independent environmental ombudsmen – or specialized environmental com-

plaints departments within an ombudsman office. Ombudsmen accept and investigate complaints from any member of the public and may have standing to go to court to address well-founded complaints at government expense. (See full description of the Ombudsman approach in chapter 3.7.)

Other alternatives for gaining standing and thus access rights for individuals and groups include (1) NGOs with legal staff and the financial wherewithal to sue to protect the environment, such as the Bangladesh Environmental Lawyers Association (BELA), Fundepublico in Latin America, Advocates Coalition for Development and Environment (ACODE) in Uganda, Pro Public in Nepal, and many others internationally; (2) government- or NGO-sponsored legal aid organizations tasked with representing individuals or groups who cannot represent themselves; and (3) class action suits brought by private or NGO attorneys, which may result in damage awards for a large group of otherwise unrepresented individuals (and payment of attorneys' fees and other costs). While these entities may be barred by the same restrictive standing rules, they may have memberships or other attributes which allow them to access justice.

Studies fail to support the negative assumptions that are advanced to support restrictive standing. For example, the Australian Law Reform Commission reviewed the arguments against more open standing and found them to be rebuttable. The four primary reasons given for restricting access (as mentioned at the start of this section) are that relaxed rules will cause (1) a "flood" of litigation, (2) "frivolous or vexatious" lawsuits, (3) courts exceeding their role, and (4) delay and increased cost for property and economic development. The Commission in 1985 and again in 1996 found that the first three are easily dealt with and the fourth is legitimate but must be balanced against the pro-standing counterarguments.

Regarding the first or "flood" argument:

"The standing rules do not work as a gate, guarding Australia against a flood of litigation or guarding Australian business against damaging and meddling interference. Experience over the last ten years indicates that there is not a flood of litigants waiting to be released and that, even if there were, standing tests are not an effective restraint. Where there is a need for protection against damaging interference in government regulation of business and other activities, this requires better case man-

agement and better government decision making. ...The current law on standing is therefore a door-keeper that courts do not need as protection and litigants cannot afford." (Australian Law Reform Commission 1996, Overview 1-2.)

Regarding the second or "frivolous-vexatious" argument, the Australian Commission amusingly observes that a court can have "an 'open door', but with a 'pest screen'":

"These claims are unfounded. Liberalisation of standing in certain areas – even to the extent of *allowing any person to sue* – has not produced a rash of litigation. The Courts . . . possess a number of powers which can be used to prevent frivolous claims being made: for example, the power to strike out a vexatious claim and the power to declare individual litigants vexatious. Similarly, there is no evidence that the phenomenon of a large number of plaintiffs, all suing on the same course of action, will arise frequently if standing is widened." (*Id.* at xxi.)

Regarding the third or improper-role argument, the Commission concludes:

"Restrictive standing rules are sometimes said to be necessary because public interest litigation is likely to impose on courts challenges for which they are inadequately equipped [and which are more properly the role of the legislative and executive branches]. But there is no evidence that the courts are unfitted to determine the legal questions that arise in reviewing the actions of administrative officers and dealing with other forms of public interest litigation. In any event, if this were the case, the proper response would be to limit expressly [in legislation] the types of case in which the courts could intervene, rather than use the law of standing to deny to some plaintiffs (though not others) the right to approach the courts." (*Id.*, xx.)

Regarding the fourth argument – effect of litigation on economic development – the Commission finds it a legitimate issue, but needing to be balanced against the benefits of PILs (*id.*). Lawsuits can and do add to the time, cost, and feasibility of development, from a neighbor's new fence to a multi-billion-dollar oil and gas refinery. Pro-development governments, especially in impoverished nations, make it clear that they do not want development or foreign direct investment delayed, discouraged, or otherwise impeded by litigation and are less concerned about environmental and community

protection than economic advancement. However, sustainable development requires that economic concerns must be balanced against the environmental, social, cultural, human rights, and other serious legal and social concerns. Jurisdictions have found that suppressing the filing of legitimate grievances can be counterproductive, leading to societal unrest, and that access to justice is a good safety valve (Pring & Noé, 22).

The Australian Law Reform Commission concluded:

“The current law on standing for [PIL] proceedings . . . is counterproductive. It acts as an extra source of unnecessary legal costs and delay. It does not act as an effective filter for disputes that are futile, vexatious or otherwise inappropriate for litigation. Such a filter is provided by other laws and discretions available to the court.

“It also acts as an unpredictable technical barrier. In particular, [Australia’s] ‘special interest’ test can be uncertain, complicated, inconsistent and overly dependent on subjective value judgements. This can make the legal system appear unfair, inefficient and ineffective.

“. . . The current law on standing is therefore a door-keeper that courts do not need as protection and litigants cannot afford.”

(Australian Law Reform Commission 1996, Overview 1-2.)

#### **BEST PRACTICES – STANDING:**

*ECT laws and rules that provide the best access to justice authorize standing for “any person” raising an environmental issue, including individuals, citizen and community groups, businesses, NGOs, and future generations. The ECT can be given authority to dismiss and/or penalize frivolous, vexatious, or otherwise improper filings, rather than use standing restrictions as a “door keeper.” The Philippines Supreme Court 2009 draft rules and South Africa’s National Environmental Management Act No. 107 of 1998, above, are good examples of definitions of open standing provisions in court rules and in legislation, respectively.*

## **3.7 COSTS**

**The expense of bringing a case in an ECT is another major barrier to access to justice. Many countries and ECTs have adopted noteworthy approaches to reduce the costs for litigants and enhance access to justice, listed in the Best Practices. The more mechanisms used to reduce costs, the more affordable access to justice becomes. Generally, proceedings in tribunals are less expensive than courts.**

The costs and financial risks of engaging in an ECT proceeding are another big barrier to access to justice, along with standing. The Aarhus Convention recognizes this and requires governments to make sure access to justice is not “prohibitively expensive” (Aarhus Convention art. 9, para. 4). It also requires them to “consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice” (*id.*, para. 5). Community groups, NGOs, and even business attorneys interviewed by the researchers uniformly cited costs and financial risk as a major chilling factor to bringing a complaint before an ECT.

ECTs around the world have taken steps to make the process economically more affordable and less high-risk for all litigants, and particularly for PILs and NGOs, local communities, and other public interest representatives. The plaintiffs’ “cost concerns” fall into six categories:

1. Filing, transcript, and other court fees
2. Professional fees for attorneys and expert scientific and technical advisors, witnesses, studies
3. Cost-shifting awards against the losing side
4. Security for costs for an injunction
5. Risk of being countersued — a “SLAPP” suit (a lawsuit filed for the express purpose of intimidation and preventing public participation) (Pring & Canan)
6. Lost time/salary/opportunity for those filing a case

This chapter analyzes each cost-concern area for plaintiffs, describes what some ECTs are doing to deal with that concern, and highlights alternatives. (The cost of civil and criminal monetary penalties and fines for violating environmental laws are discussed in chapter 3.12.)

While some of these same costs apply to both courts and tribunals, generally tribunals are less expensive to access than courts of law. The relative cost-risks for



*Collins Odote Oloo, Secretary of the Institute for Law and Environmental Governance, being interviewed by authors at the ILEG offices in Nairobi, Kenya. ILEG is an excellent example of a nonprofit NGO that advocates for sustainable development and environmental justice.*

*Credit: Kitty Pring.*

parties is one of the considerations to be taken into account when deciding on the type of forum that is most desirable.

### 1. COURT FEES

ECT filing fees can be high and a barrier to access to justice, but this is the exception rather than the rule. The study found filing fees as low as zero in some ECTs, such as Sweden and Denmark. Tribunals often do not charge a fee for filing a claim, and when they do, it is affordable – British Columbia’s Environmental Appeal Board, for instance, charges Canadian \$25. However, in New South Wales filing fees ranged up to a high of Australian \$5,452 for a corporation filing a Class 1 action on a million-dollar-plus development proposal. Some courts, such as the Kenya High Court, recently decided to waive filing fees in some environmental cases to eliminate this possible barrier. In addition, a litigant can sue as a pauper in some jurisdictions, like Tasmania, and have fees waived. The Netherlands has adopted a two-tier system of filing fees, where individuals pay 150 Euros and corporations 250 Euros.

Court-reporter transcripts are needed to appeal a decision to a higher ECT or court, and these can cost thousands of dollars for hearings that extend over multiple days or weeks. Most general courts have provision for waiver of transcript fees in their rules, and a number of ECTs have followed suit. Transcript fees can be waived (in effect paid for by the ECT) in appropriate cases on grounds of poverty or for PIL and other cases brought

to protect broad public or community interests rather than the private interests of the plaintiff. Miscellaneous other court fees can mount up – for filing documents, record searches, certification of documents, copying, filing appeals, and copies of the ECT rules – and some have waiver provisions for these as well.

Almost every jurisdiction interviewed reported efforts to reduce these filing and related court costs as a means to increase access to justice. How widely these options are publicized by the court and how much they are known and requested is an issue, as individuals may believe the costs are higher than they actually are, creating a *perceptual* barrier to access to justice that may not be real, but works as negatively as if it were.

There is a downside to these reductions: Reduced fees reduce ECT revenues. ECTs need funding and, while some jurisdictions support them entirely out of general funds, others expect ECTs to be largely if not entirely “self supporting” through charging fees. In ECTs such as New South Wales, Australia, and Malaysia, the court depends upon filing fees for a substantial part of its budget and therefore is unable to establish minimal or zero fees or generous waivers, or does so at the risk of losing operational capacity.

### 2. PROFESSIONAL FEES (AND HOW TO AVOID THEM)

Filing fees are a very minor barrier compared to the costs of attorneys and expert witness fees, which can amount to thousands, if not millions, of dollars for a

LAND AND ENVIRONMENT COURT OF NSW (Court Fees effective 7 March 2009)			
	INITIATING PROCESS	STANDARD	CORPORATION
1	Filing an originating process in Class 1 of the Court's jurisdiction (other than an originating process referred to in item 2)	\$718	\$1,436
2	Filing an originating process in Class 1 of the Court's jurisdiction under section 97 of the <i>Environmental Planning and Assessment Act 1979</i> where the matter relates to a development application (other than a development application relating to the subdivision of land) or to a building application, and where the value of the development or building: (a) is less than \$500,000 (b) is \$500,000 or more but less than \$1,000,000 (c) is \$1,000,000 or more	\$718 \$3,286 \$4,104	\$1,436 \$4,362 \$5,452
3	Filing an originating process in Class 2 of the Court's jurisdiction (Other than an originating process referred to in item 4)	\$718	\$1,436
4	Filing an originating process in Class 2 of the Court's jurisdiction where the matter relates to an application under the <i>Trees (Disputes Between Neighbours) Act 2006</i>	\$189	\$378
5	Filing an originating process in Class 3 of the Court's jurisdiction (other than an originating process referred to in item 6 or 7)	\$718	\$1,436
6	Filing an originating process in Class 3 of the Court's jurisdiction where the matter relates to an appeal or objection against a valuation of land, and where the value of the land, as determined by the respondent valuing authority: (a) is less than \$500,000 (b) is \$500,000 or more but less than \$1,000,000 (c) is \$1,000,000 or more	\$252 \$397 \$718	\$504 \$794 \$1,436
7	Filing an originating process in Class 3 of the Court's jurisdiction where the matter relates to a claim for compensation for the compulsory acquisition of land, as referred to in section 24 of the <i>Land and Environment Court Act 1979</i> , and where the amount offered as compensation by the resuming or constructing authority: (a) is less than \$500,000 (b) is \$500,000 or more but less than \$1,000,000 (c) is \$1,000,000 or more	\$718 \$3,286 \$4,104	\$1,436 \$4,362 \$5,452
8	Filing an originating process in Class 4 of the Court's jurisdiction	\$718	\$1,436
9	Filing an originating process in Class 5 of the Court's jurisdiction	\$718	
10	Filing an originating process in Class 6 or 7 of the Court's jurisdiction	\$718	
11	Filing an originating process in Class 8 of the Court's jurisdiction	\$189	\$378
12	Filing a process to commence an appeal to the Court under section 56A of the <i>Land and Environment Court Act 1979</i>	\$1,678	\$3,355
13	Filing a notice of motion	\$166	\$332

long and complex case and appeals. Attorneys who are expert in environmental litigation command staggering rates in the United States, in the US\$ 400-800 per hour range (with the US\$ 1,000 level having been topped in recent years). In other countries the billing rates may be much less, but, when multiplied by the hundreds of hours an ECT case can take, are still a formidable price to pay. Scientific and technical experts can cost \$10,000 to \$30,000 for reasonably simple cases and many more thousands for complex ones. Scientific or technical research studies, if required, can add thousands more. The result is that many litigants with legitimate, even compelling cases, are prohibited from going beyond

simple filing of comments or testifying at a hearing to contest a proposed action.

At least a dozen solutions to the professional fees problem have been used in ECT jurisdictions to enhance access to environmental justice. (Solutions for expert scientific and technical costs are similar to the attorney solutions and further discussed in the next chapter.) The cost-reduction mechanisms include:

BOX 8 COSTS – NEW SOUTH WALES CHART OF FEES (cont.)			
LAND AND ENVIRONMENT COURT OF NSW (Court Fees effective 7 March 2009) (continued)			
	INITIATING PROCESS	STANDARD	CORPORATION
<b>DOCUMENTS</b>			
14	Issuing a subpoena (for production, to give evidence, or both)	\$64	\$128
15	Receipt by the registrar of a document or thing produced in compliance with a notice to produce under Part 34 of the <i>Uniform Civil Procedure Rules 2005</i>	\$64	\$128
16	Filing or registering a copy or certificate of a judgment, order, determination, decree, adjudication or award of any other court or person under section 133 of the <i>Civil Procedure Act 2005</i>	\$72	\$144
<b>COPIES</b>			
17	Sealed or certified copy of any judgment, order, written opinion or reasons for opinion as prescribed by the <i>Civil Procedure Regulation 2005</i> Schedule 1 Part 5 item 6.	\$48	
18	Retrieving, providing access to and furnishing a copy of any document (otherwise than as provided for by item 18)	\$10, plus \$5 for each 10 pages (or part thereof) after the first 20 pages	
19	Retrieving and providing access to, but not furnishing a copy of, any document	Nil	
20	Supplying a duplicate tape recording of sound-recorded evidence	\$40 per cassette	
21	Supplying a transcript of any proceedings: (a) where the matter being transcribed is under 3 months old	\$73, plus an additional \$8.90 for each page after the first 8 pages	
	(b) where the matter being transcribed is 3 months old or older	\$89, plus an additional \$10.20 for each page after the first 8 pages	
<b>OTHER</b>			
22	Requesting production to the court of documents held by another court	\$48	\$96
23	Providing any service for which a fee is not otherwise imposed by this Schedule	\$34	\$68
<b>AFTER HOURS</b>			
24	Opening, or keeping open, the office of the registrar: (a) on a Saturday, Sunday or public holiday, or (b) on any other day before 8.30 am or after 5 pm	\$566	\$1,132

- **Efficient Court Management**

Progressive ECTs consider ways to be more efficient and speed up their proceedings, in order to reduce case time and transactional costs both for themselves and the parties. Australia's State of Queensland Planning and Environment Court (PEC) has been a leader in "individual case management" by its judges, which PEC Judge Michael Rackemann credits with much of its success in achieving efficiency and thus reducing costs for all parties to an action. In 1984, the Court instituted compulsory "directions hearings" to bring the judge, attorneys, and parties together at the outset and develop

a firm, fast-track calendar for the entire case, including setting the trial date.

"The Planning and Environment Court has, for years, operated on a case management approach characterized by directions' hearings and prompt trial dates. There is no system of formal pleadings as occurs in other court proceedings. Legal issues going to jurisdiction are identified and disposed of quickly, well in advance of the proposed trial date. Interlocutory steps [intermediate or temporary orders pretrial] are, in the main, sought to be minimized. Trial dates are generally available . . . within

three months of the directions' hearing. Most merits hearings [trials] occupy approximately three days. . . . The Court has very wide and flexible powers with respect to the directions which it can give . . . ." (Rackemann & Wilson, 5).

Attorneys for both business and NGOs originally resisted such control by the court, but have come to accept it and see its benefits for their clients (*id.*).

- **Pro Se Litigants**

A number of trial level or first instance ECTs permit litigants to file and litigate a case without an attorney, as a *pro se* ("for oneself" in Latin). The positive side of this is that a person or group does not have to retain legal services and pay prohibitive costs. The negative is, of course, that laypersons may be intimidated, confused by court process and legal technicalities, or not have the knowledge necessary to represent themselves and their issues persuasively. Thus, the old cliché (doubtless invented by lawyers) that "One who represents himself has a fool for a lawyer and a fool for a client." However, some ECTs counteract this cliché with (1) very clear on-line instructions explaining the entire process, (2) a court official who provides assistance to litigants (for example reminding them of deadlines, as the Vermont Environmental Court does), and even (3) providing a roster of volunteer attorneys. The bottom line is, generally, while attorney representation is preferable, allowing *pro se* representation is better than no access to justice at all.

- **Environmental NGOs**

Environmental and other PIL NGOs may or may not have sufficient funding to provide attorneys or expert staff *pro bono publico* ("for the public good" in Latin, usually shortened to *pro bono*). When they do, the funding is often hard to obtain and always inadequate to support every legitimate case. As an example, in Brazil there are estimated to be more than 1,000 environmental NGOs, but most are small, focused on a single issue, and only a few have lawyers on staff capable of bringing environmental public civil actions (McAllister, 157). Even with partial government support, such as received by the respected Environmental Defenders Offices (EDO) in Australia, the number of cases that can be pursued is but a fraction of the potential complaints.

In addition NGOs' activities may be limited by the government taxing authority or the funding source. Another

problem is that they may not have experts in the areas involved. A further barrier to NGOs litigating PILs is that they may have limited to no legal standing before some ECTs, as discussed in the standing chapter above.

Perhaps the most frightening barrier to NGO litigation is the risk of intimidation, threats, and actual physical harm to advocates by opponents—including government, developers, and local interests. The Bangladesh Environmental Law Association (BELA), an outstanding environmental NGO, has been a frequent target and has had its offices attacked and its staff threatened, even as the authors visited. As a result BELA maintains an office with no sign in a secluded section of Dhaka. In the Philippines, the law partner of outstanding environmental lawyer and advocate, Tony Oposa Jr., was murdered by local opponents to the lawsuit they were mounting, and Mr. Oposa freely admits that he and his family have been the target of frequent threats. Such retaliation, of course, is a major violation of both human rights and access to justice precepts.

- **Private Volunteer Attorneys**

Private practice attorneys are often not available to potential litigants *pro bono* or for reduced fees because of their personal time-cost limitations. In some countries, like the United States, the private bar has a tradition of providing volunteer work; in many other countries there is little or no *pro bono* representation in environmental litigation.

A case in the authors' own neighborhood in Jefferson County, Colorado, provides one extreme example of what volunteering to do a *pro bono* environmental PIL case can cost a private attorney. For almost 10 years, private attorney Deborah Carney worked almost full-time representing an association of community groups fighting construction of a large digital TV broadband "supertower." She worked largely *pro bono*, with the community fundraising enough to pay her only about US\$ 150,000 for her services over the 10 years that at normal billing rates would have been in the millions of dollars. The attorney costs for the other side, the consortium developing the towers, were estimated to exceed US\$ 10,000,000 – all of which ultimately will be paid by the public consumers of digital TV.

Beyond economic costs, *pro bono* private attorneys may also be faced with threats, physical violence, and death. In the Philippines, Tony Oposa's law partner in the Visayan Sea overfishing case was shot and killed by

## BOX 9 PRO BONO PRIVATE ATTORNEY IN A “TOWERING” CASE

The case of *Lake Cedar Group v. Jefferson County and CARE* is an extreme example of a private attorney’s commitment to a long and arduous public interest environmental lawsuit.

In the 1990s, television broadcasters sought to rezone property on Lookout Mountain in Jefferson County, Colorado, to construct a telecommunications “supertower” which would provide digital TV to the Denver area but increase the local community’s daily exposure to electromagnetic radiation, potentially increasing the incidence of brain and other cancers. Over 3,000 people signed a petition opposing the rezoning, beginning a nearly 10 year legal battle between the broadcasters and the community.

Deborah Carney, an experienced local attorney and solo practitioner, represented Canyon Area Residents for the Environment (CARE), an association of community groups, in a series of legal actions. The citizens and the county won issue after issue in the trial and appeals

courts, but their efforts were nullified by the US Congress, which passed a special law pre-empting local authorities and authorizing the supertower to be built.

Attorney Deborah Carney states, “I pretty much worked full time for almost 10 years. I did get paid about [US]\$150,000, a fraction of my hours. But there were many who did a great deal for no pay. Please mention that it was a community team effort where many people volunteered their time and expertise. Attorney Scott Albertson, who has 30 years experience in zoning law . . . also donated a huge amount of time and was paid nothing. . . . The legal work was just the tip of the iceberg in terms of ‘cost’ to the community. [One resident alone] admitted he donated over [US] \$500,000 of his time to electrical engineering questions . . . his area of . . . expertise.” (Communications to authors from Deborah Carney.)



*Citizens protesting in a public interest law case in Jefferson County, Colorado, against construction of a massive television “supertower” near their homes.*

*Credit: www.CityMtnViews.com*

what local media called a “work related” murder and Mr. Oposa was under a death threat for his work on the case (CIEL). Other attorneys interviewed, like BELA’s above, have also received threats of physical violence to themselves, their families, and their property.

Based on these economic and security “costs,” relying on private attorneys to provide reduced cost or free services does not guarantee access to justice for more than a handful of community groups and issues. The Deb Carneys, BELAs, M. C. Mehtas, and Tony Oposas of the world are far too few, and the issues to be litigated are far too numerous.

#### • Government Funded Legal Aid

Some governments provide funding for non-profit legal aid groups committed to ensuring access to environmental justice. Notably, in 1995 Australia’s government committed to funding a national network of environmental public interest lawyers, and today some of the NGO Environmental Defender’s Offices (EDOs) in Australia receive funding from the nation’s and states’ Attorney General Offices for providing environmental legal advice, legal education, and law reform (EDO-NSW website). Recently, the amount of government funding has been reduced and is always at risk, according to EDO attorneys. Not surprisingly, liberal progressive governments are generally more willing to provide



The Colorado mountain community being invaded by the television-radio towers in the Lake Cedar Group case (Box 9).

Credit: [www.CityMtnViews.com](http://www.CityMtnViews.com)

such financial support to a potential challenger of their pet projects than are conservative governments.

Government sponsored “legal aid” may be available in some countries, like the United States and Canada, but “by and large, it is unavailable as a source of funding for environmental litigation” (Jeffery 660). This is because legal aid is chiefly limited to funding “indigent” individuals in criminal defense and some civil areas like family and personal injury, while prohibiting law reform, class actions, or test cases. Even if the government provides funding, it may come only after the case is over, not “at the point in time when litigation most requires it, namely for the preparatory stage” (*id.*). (See Proponent Funding below.)

- **Public Environmental Prosecutors**

Government prosecutors specializing in the environment can be the most effective tool for shifting the costs of environmental justice from individual members of the public to the public in general. (See more details in the section on Prosecutors in chapter 3.12.) In Brazil, the environmental prosecutor has automatic standing and can represent the concerns of individuals, community groups, businesses, and NGOs, eliminating the legal costs for plaintiffs. A well-funded and politically protected public prosecutor with civil and criminal powers dedicated to the environmental public interest is one of the most effective means of reducing PIL litigants’ attorney costs in environmental litigation.

- **Government Agency Representation**

In most countries, government environment agencies have authority, standing, attorneys, and experts to litigate cases against violations of environmental and related laws. (An exception in some jurisdictions is programs or projects of “national significance” such as nuclear power plants, which are exempted from an agency’s litigation powers, even though they may have major consequences for the health and well-being of the populace and the environment.) So, if the government is “on the same side” as the public, the public may get a “free ride” on the coattails of government litigation. However, government agency litigation is a double-edged sword, since the public more often than not is protesting a development the government has approved or supports. It is not unusual – in a case where government has granted a development permit – for it to defend the development against objectors, presenting a “David and Goliath” cost, credibility, and expertise barrier to the objectors’ access to justice. On the other hand, one government level may disagree with another, so, for example, a local government may end up opposing a state or national development decision or vice versa.

- **Environmental Ombudsman**

Another form of government agency representation, found in a few countries, is the institution of the environmental ombudsman, a government official who investigates, seeks solutions, and can even litigate citizen complaints. Specialized environmental ombudsmen are another tool that can effectively lower costs of

citizens' access to environmental justice by shifting the burden to the ombudsman. (See ADR chapter 3.9 for a full discussion of ombudsmen.)

- **Proponent Funding of Public Intervention**

It may seem counterintuitive, but the surest way to have appropriate public involvement in ECT cases is "proponent funding" – *funding of public interest opponents by the proponent of the development, project, or permit*. Also called "intervenor funding," this means giving the ECT the power to order the business or government proponent of the project or the government agency making the decision in issue to provide funding to a qualified public-interest intervenor opposing them – sufficient for the public intervenor's attorney fees, expert expenses, and court costs – to assure the necessary public participation in the case. In short, this makes public access to justice a "cost of doing business" for those who want to change the status quo.

Professor Michael I. Jeffery, an expert environmental barrister in both Canada and Australia and a former ECT chair, has written a compelling study on public intervenor funding by proponents, based on the Province of Ontario's short-lived 1988 Intervenor Funding Project Act (Jeffery). The act was inspired by intervenor funding orders made by the Ontario Environmental Assessment Board in the 1980s, when it was chaired by Professor Jeffery. This, in the professor's own words, "startling" act empowered several Ontario environmental-planning tribunals not only to order a proponent to fund its own opposition but to do so *at the start of the case*, when it would do the most good, not after the case is over. Given his experience on an ECT, he explains that it is essential to address

"the continued imbalance and inequality between well-funded proponents (both in the private and public sectors) and the ordinary citizen. When financial assistance is forthcoming through an award of costs [after the case is over] it is too late in the process to enable the citizen intervenor to properly prepare for environmental litigation and, for the most part, renders the participation ineffective and often meaningless. The real loss to the citizenry at large, however, is the generally poor quality of the environmental decisions that result when the decision-maker is deprived of evidence obtained from parties other than the proponent.

"The inability of parties in opposition to effectively present their case seriously undermines the concept of public participation as well as the integrity of the entire decision-making process" (*id.*, 676).

Ontario's act was repealed by a conservative government in 1996, but remains a "model" for intervenor funding. In that model, the initial notice of a hearing contains a statement that persons or groups may apply for intervenor funding. Eligibility is determined by a judge or panel of the ECT who will not hear the merits of the case. For a case to qualify, the issues must "affect a significant segment of the public" and "affect the public interest and not just the private interest." To qualify, an intervenor must meet a number of requirements, including having an interest that would "assist the [ECT] and contribute substantially to the hearing," not having "sufficient financial resources" despite "reasonable efforts to raise funding from other sources," and "an established record of . . . commitment to the interest," and a "clear proposal for its use of any funds which might be awarded." (Jeffery, 672-674.)

New Zealand has taken a somewhat different approach with the government providing intervenor funding. In 2004, it created an Environmental Legal Assistance Fund (ELA Fund) that permits nonprofit public interest groups and Maori indigenous groups to apply for a maximum grant of NZ\$ 40,000 (currently about US\$ 28,000). Grants are made at the preparation phase to help defray attorney and expert costs in cases before the New Zealand ECT and regular courts in resource management cases (New Zealand ELA website). This progressive support helps enhance access to environmental justice, but is clearly insufficient for litigation of a major or complex issue without substantial additional funding.

Professor Jeffery concludes:

"When one weighs the benefits to society and the environment of better informed decision-making against the expenses associated with environmental clean-up occasioned by the approval of an inappropriate undertaking, the cost of providing adequate funding for public interest intervention pales in comparison. In turn, there is little doubt that the provision of intervenor funding is *the key* to effective citizen participation. (Jeffery, 677, italics in original).

Proponent funding is not as radical as it seems. In a sense, it is an extension of the “polluter pays principle.” That principle provides that the proponent who stands to profit from a development or the party causing the environmental harm should internalize all costs attributable to its actions (the economists’ “total social costs”). These certainly include the costs of preventing harm in the first place in the planning phase, which requires a voice advocating consideration of prevention, compensation, and mitigation measures in a timely fashion.

- **Charitable Grants and Donations**

Grants from charitable foundations and donors are another possible source of support for nonprofit community groups, NGOs, and other PIL litigants wishing to challenge an environmental decision or event. Grants can be requested for general operating support or to help finance a challenge to a specific project, but experience suggests few charitable foundations choose to fund litigation, because of its adversarial nature. Most NGOs are dependent upon a combination of foundation and individual charitable gifts or memberships for their existence, supplemented by governmental or quasi-governmental grants. They mount special fundraising drives to support specific legal challenges which may have state-wide, national, or international interest and appeal. Under US tax laws, foundations can support litigation and litigating organizations (but not legislative lobbying). Given that “big” cases can go on for as long as 10 or more years and cost millions of dollars in appeal after appeal, there is never enough financial support to assure access to justice through the court system. The international financial crisis of 2008-2009 resulted in reduced charitable donations from the public in the United States, and highlighted the risks of depending on grants and donations to protect the public’s environmental interests.

- **Attorney Fee Legislation**

In a number of US environmental laws, the US Congress has specifically provided for an award of attorney fees to plaintiffs bringing lawsuits to enforce the law as an incentive to encourage public interest lawyers to bring enforcement lawsuits (Dunne, 1-2). Fee awards may be made by the courts under the water pollution, air quality, hazardous waste, toxic cleanup, and endangered species laws in “appropriate” cases, including usually attorney and expert fees and, in some statutes, scientific-technical studies and testing. Courts have not

been overly generous in making these awards – the recipient must be a “substantially prevailing party” and fees are typically less than the actual market rates of competent attorney specialists. Moreover, the awards, if they are made, only come at the conclusion of the case, not at the beginning when they are needed for actual case preparation.

- **Law School Environmental Clinics**

Law schools in a number of countries have very active and successful environmental law clinics (ELCs). The law students and supervisors in these “hands on” learning clinics enhance access to environmental justice by providing free legal services for selected plaintiffs. The plaintiffs must have individual standing (be impacted by the decision or action, not just have a generalized interest in protecting the environment) and also have an issue that represents the greater public interest in the environment. The clinics have brought actions challenging government laws, regulations, projects, programs, plans, and decisions as well as environmental plans and violations by the private sector. Students interested in environmental, natural resources, and land use law enroll in the ELCs for academic credit, work under highly experienced environmental law professors and expert practitioners, and receive “real life” training and experience as well as achieving environmental justice. The cost advantage is that the legal services of the students and professors are provided without cost to the plaintiffs; however, the costs of filing fees, needed expert testimony, and all the other non-lawyer associated costs must still be paid by the plaintiffs or through aggressive fundraising.

The Environmental Law Clinic at the University of Denver Sturm College of Law was established in the 1970s and has won numerous important environmental law cases. It has two programs for students: one pursuing wildlife/endangered species/biodiversity cases and the other urban environmental justice/public health cases. The clinic is best known for its successful endangered species cases – on behalf of bears, tropical birds, butterflies, lynx, prairie dogs, and other species.

The Denver clinic also has filed major air pollution, energy, and renewable-energy litigation. In one of the first of its kind, the clinic’s citizen petition filed under the North American Free Trade Agreement (NAFTA) resulted in Chevron cancelling its plans to build a \$650,000,000 liquefied natural gas terminal near the Coronado Islands off Mexico’s Baja Peninsula, sav-

## BOX 10 LAW SCHOOL CLINICS - DENVER LAW STUDENTS' "BEAR" OF A CASE

The students of the Environmental Law Clinic at the University of Denver College of Law successfully sued to protect the Louisiana Black Bear over 1,000 miles away. They sued the US Fish & Wildlife Service (FWS), the national agency responsible for protecting endangered and threatened species, because it was deliberately not designating the "critical habitat" necessary to protect this bear species, listed as threatened and needing protection since 1992. Oil and gas exploration, sugar plantations, and logging were destroying the swamps and bottom land hardwood forests that are home to the bears. The clinic represented a local Louisiana man and the Louisiana Crawfish Producers Association. They won, and in 2009 the FWS designated some 1,200,000 acres (about 486,000 hectares) in the state to protect the bears.

Environmental Law Clinic Director, attorney Michael Harris, says "Our students represent environmental advocacy organizations before courts and administrative agencies in a broad range of environmental matters, including endangered species, public lands, and air quality. We're proud that the clinic's efforts have produced significant protections for the environment and public health."



*Students in the Environmental Law Clinic of the University of Denver College of Law filed a successful case to designate protective habitat for the threatened species of Louisiana Black Bear.*

*Credit: U.S. Fish and Wildlife Service USFWS/Jackson, MS  
[http://www.fws.gov/southeast/pubx/LA\\_blackbear-fs.pdf](http://www.fws.gov/southeast/pubx/LA_blackbear-fs.pdf)*

ing one of the world's most bio-diverse areas. It has brought a successful federal court lawsuit against more than a dozen US government agencies for failing to buy alternative fuel vehicles in violation of the Energy Policy Act of 1992. Clinic students handle federal court litigation under the Endangered Species Act, National Environmental Policy Act, Federal Land Policy and Management Act, National Forest Management Act, the Wilderness Act, and other federal statutes. (See the University of Denver Environmental Law Clinic website, <http://www.law.du.edu/index.php/student-law-office-clinical-programs/environmental-law-clinic>.)

Another dynamic example of how law school clinics can increase access to justice is the Environmental and Natural Resources Law Clinic (ENRLC) at the Vermont Law School (VLS), in South Royalton, Vermont, USA. The ENRLC was founded by Patrick Parenteau, VLS Professor of Law, and Senior Counsel for the clinic, who also helped create Vermont's ECT, the Vermont Environmental Court, in the 1980s when he was a state official.

A VLS clinic case that illustrates the enormous cost difficulties for PIL plaintiffs is their precedent-setting challenge when the state granted a permit for the Vermont Yankee Nuclear Power Plant to increase the discharge of heated water from their cooling towers into the Connecticut River. According to the clinic's experts the

temperature increase would threaten native fish species and their habitat. Some 20 students, two law professors, a clinic fellow, and volunteer science-technical experts worked on the case for 2½ years, for a fraction of what the utility company paid its lawyers and experts. The outcome was disappointing: In the Vermont Environmental Court, the clinic won some issues, but ultimately Judge Merideth Wright affirmed the agency permit, while adding some conditions of her own, so both sides are appealing to the Vermont Supreme Court.

How can public interest litigants deal with such overwhelming litigation costs? Professor Parenteau's conclusions, based on his many years experience with environmental litigation:

"First, don't bring cases that require proof of facts through experts. Pick relatively easy procedural cases with pure legal questions. The downside is that really limits the kinds of cases that clinics can do, limits the kind of real trial practice experience the students get, and excludes a class of clients most in need of assistance. If you are crazy enough to take on the toughest . . . fact-intensive cases like VY [Vermont Yankee] . . . there are only two choices: either find experts willing to donate time or forego putting on the best case. We did both in VY and the disappointing result is in part a reflection of the gross disparity in resources, particularly our inabil-

## BOX 11 LAW SCHOOL CLINICS - VERMONT LAW STUDENTS' NUCLEAR PLANT CASE

Students in the Vermont Law School Clinic, representing three conservation groups, brought a challenge in the Vermont Environmental Court against the state water pollution permit for the Vermont Yankee nuclear power plant to increase its heated-water discharges from its cooling towers into the Connecticut River. Experts advised that even a slight increase in water temperature would negatively impact the Atlantic salmon and American shad, two species of anadromous fish that are the subject of a major federal-state restoration effort in the Connecticut River Basin. After an extensive trial in June 2007 before Judge Merideth Wright, the Vermont Environmental Court upheld the state's permit decision, but added new conditions to protect American Shad. The case is being appealed.

Law professor, attorney, and founder of the clinic, Patrick Parenteau, estimates that he and the students spent over 2,000 hours on the trial phase. Conservatively, he estimates that would have cost the conservation groups close to US\$ 500,000 if they had hired private attorneys. In comparison, he estimates the utility spent several million dollars on 10 attorneys and other legal expenses during the same time period. Clinic experts volunteered



*The Vermont Law School Environmental Clinic team working on the nuclear power plant case in the Vermont Environmental Court - Vermont Law Professor Pat Parenteau (front, 2d from left), law students, and client (front, sunglasses).*

*Credit: Patrick Parenteau*

services worth about US\$ 150,000 compared to the utility's main consultant who testified his company was paid more than US\$ 1,000,000 for preparation and trial. (Communication to authors from Patrick Parenteau documenting costs.)

ity to afford an expert to do a full thermal model of the river to counter Entergy's truncated model that stopped at the dam. That was probably the difference in the case. Looking back at it, I'd have to say this case put a huge strain on our little clinic and although I'm proud of what we were able to do given limited resources, I wouldn't do it again without a much bigger war chest [of funding] and/or a potential cost & fee recovery. [For comparison, our Omya case is] a RCRA [hazardous waste act] citizen suit . . . case where there is a cost and fee recovery provision [in the RCRA statute's attorney fee provisions]. We just submitted our fee petition for over [US] \$800,000 in fees plus costs." (*Id.*)

Legal internships (sometimes called externships) are another way, in addition to clinics, that law schools can contribute pro bono student services that can hold PIL costs down. The University of Denver College of Law provides one of the most extensive law student internship programs in the country. Its Environmental/Natural Resources Law Internship Program includes over 60 pre-approved placements with leading federal, state, and local government agencies; international, national, and local public interest organizations; private law

firms; consulting firms; and corporations in the Denver area. Internships are done by upperclass students for academic credit (not pay) during the school year, along with their regular classes and typically for 150 hours (about the same time commitment as a standard law school course). Law interns work under the direct supervision of a lawyer-mentor in providing thousands of hours a year of volunteer legal services to environmental, community, and citizen groups.

### • Alternative Dispute Resolution

Cost control is one of the many reasons ECTs employ one or more forms of alternative dispute resolution (ADR) (see chapter 3.9). Court-annexed (court-supervised) ADR is one of the most effective means for reducing cost and improving access to justice being used by ECTs today. The availability of various ADR mechanisms – pre-trial or even mid-trial – allows parties to manage their potential costs through conciliation, negotiation, mediation, or arbitration before assuming the risks of a potentially long, drawn-out, and expensive court battle.

The particular ADR tool used in ECTs that reduces costs most substantially is court-annexed conciliation

or mediation. In this model, the mediators are judges, court employees, or select volunteers who serve without adding to the parties' costs. Parties can bring attorneys to a session, but are not required to be represented by counsel. These court-paid mediators work with the parties to focus the issues and to achieve mutually satisfactory creative solutions to a dispute before it is set for hearing. Experts may or may not be called to testify in mediation. In jurisdictions that often or always use mediation first, settlement rates tend to be high, and parties achieve a faster, positive result without exorbitant legal expenses and a lengthy trial. In fact, a pre-trial discussion of cost risks is often the deciding factor for parties in agreeing to mediation, particularly in those jurisdictions where loss in a court fight risks paying the costs of the winner.

Many nations and jurisdictions with ECTs have adopted ADR techniques in addition to other cost-control tools. In New Zealand, for instance, a plaintiff can appear pro se, can be represented by an NGO, may be able to get support from the Environmental Legal Assistance Fund, can be assured that parties will pay their own costs for legitimate actions, and have access to court-paid mediation. Different states/provinces in Australia and Canada have similar multi-pronged ADR approaches to promote affordable access to environmental justice.

### 3. COST-SHIFTING AWARDS AGAINST THE LOSING SIDE

The biggest chill factor relating to costs is the rule in some jurisdictions that the loser pays the winner's litigation expenditures (court costs, attorneys fees, expert fees, discovery costs, research studies, and other miscellaneous costs) – without regard to how well-founded, meritorious, and public-interest focused the case is. The resulting cost awards can be hundreds of thousands, if not millions, of dollars (see Vermont Yankee case costs above, although in that case each party was responsible for its own costs). Courts in Britain, Canada, Australia, and other common law countries apply this so-called “English Rule” that the losing party pays all of the litigation costs of the winner (“costs follow the event”). The so-called “American Rule” is the reverse: US judges have no common law power to engage in such cost-shifting without special legislation (for example, laws penalizing “groundless-frivolous” litigation or laws specifically awarding attorneys fees to successful plaintiffs).

Citizen groups, communities, and environmental NGOs in Australia and other “English Rule” countries are frankly fearful of bringing litigation in the general

courts because those general courts apply the “loser pays” rule. The Environmental Defender's Office (EDO) in Sydney reports that a nonprofit community group there lost a legitimate, well-researched PIL case, was ordered by the court to pay the defendant's costs, and had to *declare bankruptcy* to avoid hundreds of thousands of dollars of debt.

A January 2009 English court decision further illustrates this problem. The charitable wildlife NGO “Buglife” sued the Thurrock Development Corporation to try to save the West Thurrock Marshes on the Thames River, rated as one of the three most important sites for endangered wildlife in England and identified by the UK Government as one of the new green parks for its “Eco-Region” initiative. The environmental group alleged that the company's proposed warehouses and car park would destroy up to 70% of the marsh. Even though the three judges agreed that the company had failed to follow national biodiversity and planning policy, they ruled that it was nevertheless entitled to rely on a government environmental advisory body's withdrawal of objection, whereupon they dismissed the case in favor of the company. Buglife therefore faces the prospect of having to pay the company's legal costs of UK£ 30,000 (currently US\$ 50,000). (Jacoby.)

To counteract this chill of bankrupting costs, several Australian ECTs and others by rule or precedent make it clear that they do not generally follow the “loser pays” rule, realizing its negative impact on access to justice. Some ECTs will consider an early motion by the plaintiff for an “advance costs ruling” to be sure they will not be saddled with the other side's expenses. Establishing a clear rule that defendants' bear their own costs of litigation, absent gross misconduct or groundless-frivolous actions by plaintiffs, is to many the most important *cost* reform element in promoting access to environmental justice and protecting human rights.

Another approach is seen in laws that clearly define how judges shall make cost awards to protect legitimate plaintiffs from being penalized for filing a public interest environmental suit. An example of such a law which partially protects public interest plaintiffs in a nation that normally follows the “loser pays” rule is South Africa's National Environmental Management Act of 1998. Section 32(2) of that Act states :

“A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or

threatened breach of ...this Act or any other statutory provision concerned with the protection of the environment or the use of natural resources if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought."

#### 4. SECURITY FOR COSTS FOR AN INJUNCTION

Many development projects, permits, plans, and programs have the potential for immediate and substantial harm to the environment if the activity is not stopped, pending the outcome of the case. However, such an injunction (temporary restraining order, preliminary injunction, interim relief order, stop order, or cease and desist order) may cause large economic losses, as the land sits idle, workers are unemployed, material costs rise, interest on capital borrowing mounts, and community benefits are foregone. Courts and tribunals deal with this dilemma in one of three ways, two of which do not enhance access to justice because they protect the economic interests rather than the public interest in the environment.

First, some ECTs rarely if ever grant injunctions, instead allowing development to proceed while the case is being heard. Of course, by the time a decision is made the harm may already be done and may not be remediable. This is more often the case in ECTs focused on criminal prosecution, where the violation has to have occurred in order for prosecution to proceed. As some environmental damage cannot be corrected and potential fines or penalties may be insufficient to deter the developer, the environment may be devastated with no effective recourse for the concerned parties or public.

The second approach used by some of the ECTs studied is to require that the plaintiff post a "security bond" – personal funds or a third-party insurance company policy to cover the costs of the defendant in the event the plaintiff loses. Such bonds are often not available at all, or not available to impoverished or low-budget environmental or community groups. When available, they tend to be difficult to calculate and very expensive, due to inflated estimates of potential loss by the developer, and in long-running cases bond costs can be huge. Arguably, security bonds do discourage frivolous lawsuits and provide some measure of balance, but there are better ways to do both.

Third, the solution progressive ECTs and the majority of general courts in Europe use is to avoid either extreme of no injunctions or security bonds. Instead, when a pre-trial injunction is sought, their solution is to hold a hearing putting the burden of proof on the party requesting the injunction to show that the harm is not only probable but also would be substantial. The practice in most European general courts and the European Court of Justice is to issue an order for interim relief when the petitioner has met strict tests of urgency and substantial irreparable harm. There is no security bond required for interim relief orders which act as a temporary injunction, pending a hearing and a final decision.

Some courts still use the old "irreparable injury" test, but the more modern thinking is that this is an excessive and unnecessary burden for public plaintiffs to bear, since "remedies that prevent harm altogether . . . are always closer to the ideal of corrective justice" (Laycock, 4). What should be applied instead are the "prevention principle" and the "precautionary principle." The prevention principle is simply the modern equivalent of the old common sense adage that "an ounce of prevention is worth a pound of cure" (Nanda & Pring, 57-58). The precautionary principle states that if there is scientific uncertainty about whether an action, substance, or policy would cause severe or irreparable harm, the burden of proof should rest on those who propose changing the status quo (*id.*, 58-59). Even in jurisdictions like the United States where the law requires security bonds for preliminary injunctions, "it is common for courts in environmental cases brought by environmental groups and individuals with limited means, particularly in [EIA] cases, to require little or no security" upon proof of hardship (Riesel, § 5.07[3], p. 5-46.1). The US government is exempt from the rule requiring security bonds when it seeks an injunction (*id.*).

Most jurisdictions studied which do issue injunctions were extremely cautious in deciding to, and then made every effort to encourage early settlement. The advantages of an injunction or a cease and desist order are not only that the environment is protected until a decision is made, but the developer has added incentive to negotiate conditions or alternative development plans before spending potentially huge sums on litigation and losing opportunity costs. The old adage that time is money is true, and the more time is lost in dispute resolution, the higher the costs are liable to be.

## 5. RISK OF BEING COUNTERSUED – A “SLAPP” SUIT

A chilling “cost” factor for seeking access to justice in an ECT is the risk of a countersuit or counterclaim for monetary damages by the opposition. The pioneering University of Denver research study of this phenomenon, which led to the first book on the subject, coined the term “Strategic Lawsuits Against Public Participation” in government decision-making or “SLAPPs” (see Pring & Canan for a full discussion of the SLAPPs phenomenon). Environmental advocates and plaintiffs are frequent targets.

SLAPPs are *civil lawsuits filed against individuals, groups, and organizations simply for communicating their views to their government officials*. They can be provoked by any engagement in democratic governance, from writing a letter to a public official reporting a violation of law to lobbying for legislation. However, the majority are filed because of testimony at a public hearing or filing a public interest lawsuit – the opportunities provided by an ECT. The typically multimillion-dollar SLAPPs are overwhelmingly unsuccessful in court, but enormously successful in the real world in “chilling” public interest advocacy. As a New York judge summed it up in dismissing a typical SLAPP:

“[SLAPPs are] suits without substantial merit that are brought . . . to ‘stop citizens from exercising their political rights or to punish them for having done so’ [citing the Pring & Canan book] . . . . SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out . . . the greater the expense . . . and the closer the SLAPP filer moves to success. The purpose . . . ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a Pyrrhic victory. Those who lack the financial resources and emotional stamina . . . face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance . . . or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to [constitutionally protected] expression can scarcely be imagined.” (*Gordon v. Marrone*, 656).

Examples include developers and even government officials suing citizens for filing environmental cases or even reporting violations.

SLAPPs are a threat to environmental democracy as well as individuals, because they inhibit public use of the access rights that are so important to the legitimacy of governments in general and ECTs in particular. SLAPPs “masquerade” as ordinary lawsuits – defamation, abuse of process, interference with contract or economic advantage, malicious prosecution, and so on. However, they are classic legalistic techniques which divert parties’, courts’, and governments’ attention from resolution of real problems to SLAPPers’ claimed injuries.

SLAPPs are particularly prevalent in common law court jurisdictions, like the United States, Canada, Britain, Australia, and New Zealand, but also appear in many other countries and legal systems, such as the Philippines. More than half of the states in the US have adopted “Anti-SLAPP Laws,” to assure their quick identification and dismissal (e.g. California Anti-SLAPP Statute). The other major cure is for ECTs to take a strong position discouraging parties from filing retaliatory SLAPPs.

The Philippines is the only country found that has incorporated criminal anti-SLAPP protections in its proposed ECT rules:

“SEC. 1. *Suits and strategic legal action against public participation (SLAPP)*.- Where a criminal complaint is brought against a person who filed a citizen’s suit or against any employee, official, officer, or government agency that implements environmental laws, the public prosecutor shall immediately make a determination based on the criminal complaint and counter-affidavit of the respondent whether said legal action has been filed to harass, vex, or exert undue pressure to stifle such legal recourses of the person complaining of or enforcing environmental laws. After consideration of the pleadings, the public prosecutor shall dismiss the criminal complaint if found to be a SLAPP and devoid of merit.

“The public prosecutor shall give priority to the resolution of the SLAPP.” (Philippines Draft Rules, Rule 16, Section 1.)



*Massive case files can add substantially to legal costs and time invested in environmental cases. Here volunteers of Canyon Area Residents for the Environment (CARE), a citizen NGO opposed to construction of a massive television tower, sort through government documents.*

*Credit: www.CityMtnViews.com*

## 6. LOST TIME / SALARY / OPPORTUNITY

Major additional costs to litigants are the risk of losing large amounts of time, wages, and possibly one's job, and other opportunity costs while engaging in litigation, even tribunal hearings. Environmental conflicts can take not just weeks, but years to resolve. The time spent in gathering information, consulting with attorneys, preparing files and filings, preparing to testify, traveling to and from the hearing site, and sitting in a courtroom can take months out of the life of public interest litigants, government staff, developers, and others involved in the case. Few are willing or able to take on these risks, in addition to the potentially enormous direct costs of litigation, particularly in cases where they are attempting to protect a public interest or resource from which they will receive no personal financial gain to compensate for their volunteer time, expenses, and other losses.

Anything ECTs can do to streamline the decision-making process helps to minimize this chill and increase access to justice. Judge Michael Rackemann of the Planning and Environment Court of Queensland, Australia, estimates that the aggressive use of case management tools and mediation in that court has speeded up the time from filing to trial by months and reduced the average trial time from three weeks to three days, thus substantially reducing the risks of lost time, wages, and other opportunity costs for potential litigants.

## BEST PRACTICES – COSTS:

*No ECT studied has adopted comprehensive cost-reduction strategies for environmental conflict resolution. Incorporation of as many cost-mitigation tools as possible is recommended to enhance access to justice and support citizen's rights to be heard, including those filing public interest lawsuits. These include:*

- *Reducing or waiving filing, transcript, and other court fees*
- *Efficient court management techniques, such as directions hearings*
- *Allowing parties to represent themselves without attorneys*
- *Government funding for public interest plaintiffs*
- *Public environmental prosecutors*
- *Government agency representation*
- *Ombudsman offices*
- *Proponent or intervenor funding*
- *Attorney and expert fee legislation*
- *Alternative Dispute Resolution*
- *Judges having discretion not to shift costs to the losing side, except in frivolous or otherwise abusive or improper cases*
- *Legislation giving judges discretion in awarding costs against PIL plaintiffs in jurisdictions following the "loser pays" rule*
- *Not requiring security for costs for an injunction in appropriate cases*
- *Taking action against SLAPP suits.*

### 3.8 ACCESS TO SCIENTIFIC-TECHNICAL EXPERTISE

The resolution of many environmental disputes depends on expert testimony in areas such as causation, damages, and future impacts. ECTs can obtain unbiased expertise both by providing their own internal experts and by managing parties' external experts. The most progressive ECTs have developed procedures to manage parties' expert witnesses and their testimony to eliminate or reduce bias.

*"Expert evidence is today fundamental to adjudication in the courts and in the Land and Environment Court in particular. Science and technology have grown exponentially and permeate all aspects of our lives. Matters which previously might have been left to the common-sense of the trier of fact, now need to be illuminated by specialized knowledge. Yesterday's common sense may be today's nonsense. The uninformed opinions of the trier of fact may be idiosyncratic or just plain wrong. Expert opinion evidence is needed to assist the trier of fact to draw correct inferences in decision-making." (Preston, 2006, 1.)*

Environmental disputes frequently turn on extremely complex scientific and technical evidence. Environmental principles that are now being incorporated in international agreements and national laws, such as sustainable development, the prevention principle, the precautionary principle, the polluter-pays principle, the no-harm rule, and standards like best available technology (BAT), among many other environmental law issues, require expertise which law-trained judges and decision-makers simply do not have.

In addition, much environmental decision-making is about the future, so experts also are needed who can predict the anticipated impact of a proposed action. For instance, in the Vermont Yankee case (chapter 3.7), predicting the future impact of minute increases in river water temperature on fish and other flora and fauna was crucial to the trial court decision. This information could only be provided by scientific-technical experts.

A variety of different types of expert testimony is being used by courts and tribunals today to assist in resolving environmental conflicts. A non-exhaustive list of examples include experts who can

- evaluate whether or not physical harm has occurred

- demonstrate the cause-effect relationships of harm already caused
- suggest how to prevent or balance harm so that decisions have environmentally sustainable outcomes
- evaluate existing or future harm to individuals' or communities' health and livelihood
- estimate fair compensation for damage to health and earnings
- calculate natural resources damages (NRD) to public resources
- predict outcomes of proposed actions.

A complex case could potentially need as many as six or seven different categories of expertise, with experts presenting conflicting data for each issue. It is no wonder that environmental litigation is so expensive, and so difficult for decision-makers!

ECTs that hear cases de novo or on the merits face greater pressures to obtain reliable expertise than those that simply review a lower court record on appeal. However, even appellate courts need access to scientific-technical expertise to fully understand the issues so that they can make good judicial decisions.

Is the scientific-technical evidence provided both expert and unbiased? Decision-makers in all ECTs are constantly faced with these two questions in determining if the evidence is reliable. This is particularly difficult, as there are always legitimate differences of scientific-technical theory and evidence, and many areas where technology and impact analysis tools are constantly being improved as new ones are developed.

Almost all ECTs studied – recognizing their institutional need for reliable experts as well as the enormous cost barrier experts can be for parties' access to justice (see chapter 3.7) – have developed procedures for introducing and managing scientific-technical information. Malaysia and Bangladesh are exceptions to this rule, where there appeared to be no provision or even acknowledgment of the need for specialized expertise at the ECT level, beyond testimony from government staff.

To meet the challenges of scientific-technical expertise, the study found that ECTs have adopted two different general approaches, which occasionally overlapped. The first approach is for the ECT to *ensure internal expertise* – typically by including selected experts as judges, com-

missioners, or advisers. The second approach is for the ECT to *manage external expertise* – typically by making parties’ experts accountable to the ECT for unbiased testimony, not to the parties paying them.

ECTs’ methods for ensuring internal expertise include:

1. Expert Judges: Scientific-technical experts are included on the ECT as decision-makers (Sweden, Kenya NET, Ireland, Japan).
2. Expert Panels: The ECT has a standing panel of experts (sometimes called commissioners), selected on a case by case basis to sit with judges to make decisions (New Zealand; Tasmania, Australia).
3. Special Commissions: The ECT appoints on a case by case basis special commissions of experts to investigate, take testimony, and make recommendations to the ECT (India, Philippines).
4. Court Consultants-Inspectors: Experts can be hired by the ECT to provide advice to the court and to assist in the evaluation of evidence presented by the parties (Vermont, Ireland).
5. Agency Experts: The political ministry, department, or agency of the environment or planning provides staff members who advise the ECT (Japan, Bangladesh, New York City).
6. Prosecutors’ Experts: The ECT may rely on evidence presented by expert staff in the prosecutors’ office (Brazil).
7. Institutes: The ECT calls on independent and governmental environmental technical institutes (Finland, Netherlands).
8. Community Volunteers: Experts from the community may be called on a case by case basis based on their area of expertise (Denmark).

ECT’s methods for **managing external expertise** include:

1. Focusing Meetings: The ECT requires the parties’ experts to meet in advance of the hearing, discuss and focus their areas of agreement and disagreement, and write a report (Queensland, Australia).
2. “Friend of the Court” Instructions: Experts are advised that they are accountable to the ECT ethically and are not advocates for the parties (Ontario, Canada; Queensland, Australia).

3. Concurrent Testimony or “Hottubbing”: At the hearing, all sides’ experts on each topic are brought together (often put side-by-side in the jury box like a hottub!) and instructed to discuss the issues before the ECT, with its judge or decision-makers managing the discussion (New South Wales, Australia).
4. Issue Sequencing: Experts are called seriatim by issue (one after the other on each of the issues in dispute), rather than as an integrated part of a party’s case (New Zealand).
5. Pre-Filed Testimony: The experts to be called as witnesses by the parties are required to submit their testimony in writing to the ECT and all parties prior to the hearing (Vermont).
6. Miscellaneous Experts: These are experts not affiliated with the ECT or the parties who may be permitted to testify.

Explanation of these methods follows.

## 1. ENSURING INTERNAL EXPERTISE

### • Expert Judges

Sweden’s Environmental Courts are an excellent example of first and second instance courts where the decision-makers include non-lawyer, scientific-technical experts, with full judicial powers. The trial or first instance Environmental Court, of which there are five in Sweden, can have a panel consisting of one law-trained judge, one environmental technical advisor, and two lay expert members, who sit together to hear cases. All act as equals when making a decision, but defer to the law-trained judge on matters of law. The second instance Environmental Court of Appeal is comprised of three law-trained judges and one technical judge. Here, too, “*all members of the courts have equal votes*” (Darpö , 3, emphasis added). Technical expertise is required because the Swedish system assumes that the burden of investigation rests with the decision-making body, which takes an inquisitorial approach. The Swedish Environmental Code lays out general principles, policies, and goals rather than incorporating detailed and specific language (such as the precautionary principle, the prevention principle, and a BAT requirement), so having technical expertise on the bench is especially important when trying to apply a general law to the technical aspects of cases. Having science-technical expertise on the decision-making body also ensures that weaker parties are not entirely dependent upon tech-

nical consultants and lawyers in order to achieve fair, equitable, and affordable remedies (*id.*, 6).

Thus, Sweden has science-technical experts at each court level below the Supreme Court. Expert judges (Environmental Court of Appeal) or technical advisers (Environmental Court) can have a wide variety of backgrounds, although most are chemical engineers, water engineers, or biologists. The lay experts who act as judges are appointed based on a background in industry or environmental management. Together, they have the expertise to neutrally evaluate the credibility of testimony and impact of the proposals, independent of the parties or the record. They also have the power to change the conditions of a permit or to issue cease and desist orders, based on an independent evaluation of the outcome of the proposed development. If two minds are better than one, then an even better approach is four minds, at least one of whom is a scientific or technical professional, not a lawyer.

In other ECTs, including the National Environmental Tribunal (NET) in Kenya, experts are appointed as full members of the decision-making panel, but are not in a majority. The NET is a five member tribunal, comprised of the chair who must be a lawyer, two lawyers, and two lay persons with environmental science-conservation backgrounds. The chair is nominated by the Judicial Services Commission of Kenya and confirmed by the political-branch Minister of Environment and Mineral Resources. One attorney is appointed by the Law Society of Kenya and the other by the Minister, and the two expert members are appointed by the Minister. The expert members have an equal vote to the other members in making a decision. In addition, the chairman of the NET may appoint additional experts as advisors if expertise beyond that of the panel experts is needed. Because the majority of the NET members are appointed or confirmed by the head of the Ministry whose decisions are being appealed to the NET, questions could be raised about bias, but to date this is said not to have been an issue.

- **Expert Panels**

In the New Zealand Environment Court, there is a standing roster of 20 commissioners who are selected to participate in cases in their area of technical expertise. They are appointed either full time or part time for five-year renewable terms by the Attorney General and earn a salary 70% that of an appointed judge. The commissioners have knowledge and experience in local gov-

ernment, resource management and planning, environmental science, and Maori treaties, and include water quality experts and engineers. They also are trained to act as mediators and facilitators. Typically, an EC judge sits with two commissioners on civil cases, but alone on criminal cases. In the civil cases, the two commissioners can outvote and overrule the opinion of the judge. In addition, the New Zealand EC hears the testimony of expert witnesses brought by the parties. This system has the advantage of having access to a wide range of expertise from both internal and external experts selected for their knowledge on the precise issues in a case.

The ECT in the State of Tasmania, Australia, uses a somewhat similar process. Tasmania's Resource Management and Planning Appeals Tribunal (RMPAT) has a standing panel of 26 experts which includes scientists, engineers, planners, architects, and other experts. Their required areas of expertise are enumerated in the RMPAT authorizing legislation and cover all the issues under the tribunal's jurisdiction. Hearing panels are normally composed of a lawyer-chairperson, who runs the hearing, and two other expert members from the standing panel, chosen based on the case's issues. Tasmania has difficulty filling the required "planning" expert positions, because there are few trained planners in this small Australian island state, and those who are professionally trained tend to be employed in private practice, earning far more than they could on a case by case basis for the tribunal. Parties to a proceeding may also bring experts, whose first duty is to the tribunal as an expert, not to the parties as their advocate.

- **Special Commissions**

In India, environmental cases filed directly in the Supreme Court can be extremely complex and litigated for years. To assist it in fact-finding, it appoints expert advisory committees. For example, in 2002 the Supreme Court created a "Central Empowered Committee" (CEC), a panel of 47 members representing government and NGOs (CEC website). The CEC's main delegated role to date has been investigating, holding hearings, monitoring, and making recommendations to the Supreme Court justices hearing forestry cases. The mammoth forestry cases began with the filing in 1995 of *T. N. Godavarman Thirumalpad vs Union of India and Ors* (Writ Petition Nos 202, 337 of 1995), complaining of illegal timber cutting, which has resulted in nearly 15 years of Supreme Court hearings and orders under its "continuing mandamus" powers (on-going court supervision of government action in the public inter-

est) (Nair). “The sheer [sic] breadth of scope of the [Supreme Court’s] Orders, addressing practically every forest management issue brought to the attention of the Court, is astonishing,” putting it in the “role of a super-administrator” of all forestry in India (*id.*, 4). Relying on the CEC, the court has prohibited tree cutting, mining, and other abuses at numerous locations; established price controls; regulated transport of timber; controlled forest revenues; ordered parks preserved; required the national and state governments to consider establishing a fund for reforestation; and relieved government forest officials of their duties (*id.*, 2-4).

- **Court Consultants-Inspectors**

A few ECTs have the power to appoint their own experts. The State of Vermont Environmental Court has the authority to appoint independent experts responsible to the court, but does not have a budget to support the authority. Other ECTs studied also have the authority, but seldom use the power because of budgetary constraints or willingness to rely on the “battle of experts” paid for by the parties. No ECTs were studied that relied only on independent court appointed and paid experts for review of the record and advice to the decision-making body.

Ireland’s An Bord Pleanála has a unique combination of an expert lay decision-making board and the largest expert professional staff of any ECT studied. It is a lay tribunal, composed of 10 members, with none of the members required by law to be attorneys (although some are from time to time). The board relies on a combination of member expertise and staff/consultant expertise in its decisions. The chairman is appointed by the Minister of the Environment based on recommendations by a statutory committee, and does have an environmental background. The other nine “ordinary” members are appointed from five expertise clusters representing (1) planning, engineering, architecture; (2) economic development, infrastructure, construction; (3) local government, farming, trade unions; (4) environment, voluntary bodies, others; and (5) civil servants. Therefore, there is substantial professional expertise on the ECT from diverse subject areas likely to be the subject of appeals. In addition, the board employs 49 inspectors, who are experts in planning, plus additional consultants chosen based on the specific expertise needed in a case. The inspectors or consultants can hold hearings, evaluate evidence, and make a recommendation to the board. The ECT member assigned to handle the case reviews the staff file and the recom-

mendation of the inspector/consultant, and makes a recommendation to the full board. Ireland goes to great lengths to ensure that the investigative, hearing, and decision process are transparent, unbiased, and reliant on professional experts.

- **Agency Experts**

Some countries rely on expertise from the environmental agency for budgetary or political-control reasons or both. This is true in Bangladesh, where the Environmental Court in Dhaka relies on the expert testimony of staff of the national Environmental Protection Agency (EPA), which is also the prosecutor of environmental crimes that the court hears. Further, the court does not conduct public hearings and makes decisions based only on the investigative record of the agency. “Aggrieved persons” do not have an opportunity to testify or bring expert witnesses before the court. As the EPA has only two environmental inspectors for the entire Dhaka metropolitan area and no attorneys, environmental expertise is in extremely short supply. Fortunately, the judge currently assigned to the Dhaka ECT is a well qualified lawyer with an extensive environmental law background. Other ECTs that rely on expert staff from the agencies whose decisions they are reviewing include the US EPA’s Environment Appeals Board, raising questions about political influence and independence (Union of Concerned Scientists).

- **Prosecutors’ Experts**

Prosecutors’ offices are usually staffed with investigators and other experts, in addition to the attorneys. Prosecutors in Brazil are unique, as they have both civil and criminal prosecutorial powers and funds to employ both expert in-house staff and independent outside experts. Some prosecutors also use volunteer academic experts and work with the experts of NGOs on cases. ECT judges in Brazil thus rely on the “state’s” evidence as a party in these cases, and often do not seek additional outside experts.

- **Independent Institutes**

Several ECTs rely on expert opinions from independent and governmental technical institutes, in addition to experts brought by the parties. Cutting-edge researchers are presumed to be in the best position to know and understand the newest scientific-technological innovations and their costs. In the Netherlands, Chamber 2 of the Administrative Division of the Council of State, which hears environmental but not town and planning

cases, relies on an independent Organization of Advisors to investigate cases and write recommendatory reports to legal staff of the ECT. Interestingly, this Organization of Advisors was originally within the Ministry of the Environment, and was heavily criticized for its lack of independence. The decisions of the Minister were often the subject of appeals before the court and the advisors were viewed as pro-agency and therefore biased. In response to the criticism, the Organization of Advisors was separated from the agency and became an independent technical foundation, whose members are selected based on their expertise but who are still paid by the environmental agency. In Finland, there is a Finnish Environmental Center which provides scientific advice to the court, and Japan and South Korea's ECTs also rely on independent technical research institutes to provide unbiased expertise to the decision-makers.

- **Community Volunteers**

In some nations, expert panels of community members are appointed to provide technical and scientific expertise to the court in complex cases. Denmark's Environmental Board of Appeal, for example, has a list of 200 experts, appointed by the Minister of the Environment and paid on a case by case basis. Half are recommended by the Environmental Protection Agency, and half by representatives of industry and agriculture, so that there is some balance of perspective. As the pay is very low, most of these persons serve for the honor, not for the fee. Experts are selected to participate in a case based on their specific area of experience and the nature of the case. The judge assigned the case refers to the list and selects the experts to sit with him/her when the judge believes technical expertise is needed. The experts have an equal vote and act as decision-makers, not as advisors. Some concern was expressed that judges were not using experts on enough cases, and were making too many decisions as a single judge. The legislature therefore created another separate panel of eight experts to screen cases and decide which should be decided by one judge and which by a panel including experts. In addition, the Environmental Board of Appeal relies on professional staff to research, review, and make recommendations.

## 2. MANAGING EXTERNAL EXPERTISE

Most ECTs studied that review cases on the merits or de novo allow parties to bring expert witnesses to testify. A number of these ECTs have moved or are moving

to "relaxed" rules of evidence which allow the judges to "manage" the experts. Judicial management of the parties' experts is designed to make them objective advisors of the ECT (not biased advocates for the party employing them), to focus them on the precise issues that are in dispute, to assure the ECT decision-makers get the answers they need to decide the case (not solely the information an advocate wants them to have), to improve the quality of decisions, and to increase efficiency and effectiveness thereby reducing the time and money spent on experts and lawyers.

This may be a shocking concept for lawyers in the United States and some other countries. It involves the judge controlling expert witnesses rather than the lawyers for the parties preparing and coaching their experts and controlling their testimony – the so-called "battle of the experts" which is such a fixture in the United States and a few other countries' courts.

"In most of the rest of the world, expert witnesses are selected by judges and are meant to be neutral and independent. Many foreign lawyers have long questioned the American practice of allowing the parties to present testimony from experts they have chosen and paid." (Liptak.)

Professor John Langbein, in his famous article on this problem, states:

"Our [USA] lawyer-dominated system of civil procedure has often been criticized both for its incentives to distort evidence and for the expense and complexity of its modes of discovery and trial. The shortcomings inhere in a system that leaves to partisans the work of gathering and producing the factual material upon which adjudication depends.

... "[S]ince the greater responsibility of the bench for fact-gathering is what distinguishes the Continental [European] tradition, a necessary (and welcome) correlative is that counsel's role in eliciting evidence is greatly restricted." (Langbein 1).

ECT expert-evidence management examples include:

- **Focusing Meetings**

The Planning and Environment Court in Queensland, Australia, has adopted the use of strong directions hearings by the judge in advance of a trial, in which the judge and parties work out an order for specific deadlines and expectations. The order may include having

the parties' experts meet without attorneys or parties present to focus their testimony and determine where they are in agreement and where they are in disagreement, then write a joint report to the court and all parties outlining what the issues are and what their testimony will be (Queensland PEC Rule 21). The responsibility of the expert is "to assist the court" and that "duty overrides any obligation the witness may have to any party to the proceeding or to any person who is liable for the expert's fee or expenses" (Queensland UCPR Rule 426).

- **"Friend of the Court" Instructions**

Many other ECTs, including Canada, Australia, and New Zealand, have likewise developed rules that clearly articulate the responsibility of all experts to the court – as objective independent advisors – not biased advocates for the parties paying them. Experts are advised of this rule by the judge prior to a hearing and advised to comply with it or face contempt of court. However, some jurisdictions, such as the United States (see above), clearly tolerate the expensive and time consuming "battle of the experts."

- **"Hottubbing"**

This is a tongue-in-cheek term developed by Chief Judge Brian Preston of the New South Wales Land and Environment Court, to describe a process of taking concurrent testimony from like experts at the same time (often in the jury box, likened to a hottub without water). The experts in the hottub are encouraged to discuss the issues among themselves and discover, with the help of questions from the bench and counsel, where they agree and where they disagree. Then their testimony is directed only to those critical issues in disagreement. This process reduces the court time required when experts are called separately to testify, reduces redundancy, increases relevance of testimony, and assures that experts can respond to each others' opinions on the spot, and perhaps reach consensus without a judicial decision.

- **Issue Sequencing**

Another approach to expert testimony is utilized by the Environment Court of New Zealand. This ECT calls experts *seriatim* (one at a time), but all the experts on the same subject are called one after the other. This allows the court to hear and weigh all the evidence concerning each issue in approximately the same time frame, rather than having expert testimony spread out

over many days with intervening arguments about other issues. As in Queensland, the Court also may require a pre-hearing caucus of the experts without attorneys or the parties present to focus the issues in advance of the hearing. Commissioners who will not sit on the case at hearing may act as facilitators of such an expert caucus.

- **Pre-Filed Testimony**

Experts are required by some ECTs, including the Vermont Environmental Court, to submit their testimony to the court and other parties in writing in advance of the first hearing. Requiring pre-filed testimony allows the judge to review the testimony, develop questions, and select the specific areas on which the court will accept more in-depth oral testimony. This tool does not facilitate the experts talking to each other or fine honing their arguments in advance, but does allow the judge and counsel to be better prepared for trial.

- ***Amicus Curiae***

Some ECTs also solicit or accept *amicus curiae* ("friend of the court") reports or briefs from experts who are not affiliated with the ECT or representing the position of a party, but have expertise to share which may not otherwise be presented, such as scientific-technical societies, think tanks, industry associations, and NGOs.

Some jurisdictions studied had insufficient access to the needed unbiased expertise, because there were no available experts in a particular region (Tasmania) or because the available experts were not affordable for one or more of the parties or the court (Vermont Yankee case) or because the available experts were considered biased for one reason or another (Bangladesh). If the decision-makers are unable to obtain unbiased but necessary expertise, their decisions could be appealed.

#### **BEST PRACTICES – ACCESS TO SCIENTIFIC-TECHNICAL EXPERTISE:**

*Ensuring Internal Expertise: ECTs, such as the Resource Management and Planning Appeal Tribunal of Tasmania, the Land and Environment Court of New South Wales, and the Environmental Court of Appeal in Sweden are examples of ECTs that have access internally to independent, neutral, scientific and technical expertise of their own choosing.*

- *The ideal is (1) a decisional body combining law-trained judges with expert scientific-technical judges plus (2) authority to engage independent experts where there may not be an appointed judge with the needed expertise. This model is clearly the most comprehensive, but may be prohibitively expensive for some ECTs.*

- *Having (1), the joint lawyer-expert bench, alone is not sufficient since no individual has expertise in all the science-technical issues that may come before the ECT.*
- *For (2), these can be professional staff of the court, experts in the community and academia, or special commissions.*
- *Access to experts in addition to the staff of the environmental agency or any other government body with a vested interest in the decision is important to assure unbiased expert testimony.*

*Managing External Expertise: The New South Wales Land and Environment Court and Queensland Planning and Environment Court are examples of ECTs with practice rules that allow the judge to control parties' experts. Rules to consider include*

- *making experts' first duty to the court, rather than the parties paying the fees*
- *assuring the public and parties who cannot afford expensive experts that they can rely on other parties' experts to testify truthfully and objectively*
- *allowing the judge to require parties' experts to have a pre-hearing facilitated meeting to resolve all areas of agreement and disagreement and write a joint report to the court and parties*
- *allowing the judge to lead, organize, and sequence experts' testimony to maximize efficiency and effectiveness*
- *permitting the filing of amicus curiae reports or briefs by independent experts.*

### 3.9 ALTERNATIVE DISPUTE RESOLUTION (ADR)

**More than half of all ECTs regularly use one or more types of ADR to assist in resolving environmental conflicts, particularly mediation. Many use court-annexed ADR, provided and paid for by the ECT rather than the parties. ADR is used because it can reduce costs, reduce court caseload and backlog, shorten time to a decision, and, most importantly, achieve outcomes that actually creatively solve a problem beyond the application of existing legal remedies.**

A major factor that distinguishes ECTs from courts of general jurisdiction is the extensive use of alternative dispute resolution (ADR). Over 50% of the ECTs surveyed use ADR. These tools for resolving environmental conflict can significantly enhance access to justice by permitting wider public participation, lowering stand-

ing barriers, reducing time and costs, supporting problem solving by the parties, and reducing caseloads. Participants tend to feel that better outcomes are achieved through the use of ADR and that creative solutions can be developed beyond those incorporated in traditional remedies (see chapter 3.12).

ADR is defined to include – as alternatives or adjuncts to litigation – *a neutral third-party-facilitated*

- **mediation** (assisting disputants to determine for themselves their issues, options, and resolution voluntarily without imposing solutions, although solutions may be suggested)
- **conciliation** (differs from mediation in that the goal is to reconcile the parties through good will, usually by seeking concessions, and the conciliator brings expert knowledge and gives substantive advice)
- **negotiation** (a dialogue or bargaining between/among the parties to produce an agreement)
- **arbitration** (one or more persons are selected to hear and decide the case like judges with their decision typically being binding)
- **hybrid mediation-arbitration** (mediation followed by arbitration for any issues not resolved through the mediation)
- **early neutral evaluation** (soon after the case is filed, an expert provides an objective evaluation of the strengths and weaknesses of the case, based on parties' submissions, presentations, and knowledge of precedent)
- **restorative justice** (focuses on crime and wrongdoing as harms against victims and communities, rather than the state, and engages those harmed, offenders, and community representatives in discussions that lead to solutions that promote responsibility, repair, reconciliation, and the rebuilding of relationships).

ADR does not include unfacilitated "settlement" discussions that typically occur between or among parties in litigation in all jurisdictions, including criminal plea bargaining and negotiation with prosecutors.

A minority of ECTs studied had no formal provision for ADR. In New York City, mediation is generally not used because (1) fines constitute a large revenue stream for the city, and the government fears loss of funds if mediation rather than adjudication is used and (2) violations of law are viewed as not appropriately resolved through

mediation as a policy matter. In jurisdictions such as Sweden, Belgium, Denmark, and Ireland, concern was expressed that mediated agreements could represent a departure from the rule of law, delegation of decision-making to unaccountable parties, and not useful for setting judicial precedent. In jurisdictions that have only criminal jurisdiction, such as Bangladesh, the view is that criminal violations cannot be mediated because the law lays out clear penalties which must be adjudicated through a court of law. A few jurisdictions see ADR as “extra-judicial” and therefore not appropriate for use in resolving environmental disputes of any kind.

The various ECTs provide ADR in one of two ways. Some provide a “court-annexed” process (conducted and controlled by the ECT’s staff, judges, or decision-makers) while others use a “court-referred” process (conducted by external paid or volunteer mediators, a government ombudsman, or an external group that is brought in to help balance power between communities and government or corporate interests).

Since the 1970s, ADR has been growing in popularity around the world as a tool for resolving environmental disputes and providing access to justice. Proponents argue that ADR saves time, costs less, better meets the interests of the parties, produces better outcomes, and ensures better compliance with the agreements reached. It has become more popular and more refined in the United States and other nations over the past several decades (Taylor, 55).

There are several distinct types of mediation or mediation “styles” in use by ECTs. These include

- **interest-based negotiation** (in which a facilitator/mediator helps parties in a dispute understand what their interests really are and how they can best be balanced with the interests of other parties)
- **facilitative mediation** (the mediator assists parties to find a mutually agreeable resolution to a dispute without pressuring the parties or offering opinions or legal advice)
- **directive mediation** (the mediator may promote one or more settlement options and may use his/her expertise to guide the discussions)
- **evaluative mediation** (the mediator frankly assesses the strengths and weaknesses of a case with the parties and evaluates what the outcome of an action may be based on both legal knowledge and experience with the decision-makers)
- **transformative mediation** (where the goal of the mediator is to help the parties develop conflict resolution and communication skills and thus “transform” their future relationships with each other and enhance their abilities to solve conflicts themselves in the future)
- **restorative justice** (as discussed above)
- **collaborative decision-making** (used in multiparty vested interest situations, the goal is to involve all stakeholders in developing options based on their interests and coming to consensus on the best solution; while similar to interest-based negotiation, collaborative decision-making is more often used in the initial planning or environmental assessment processes and is infrequently used by ECTs).

The mediation models most often adopted by the ECTs studied are the directive or evaluative models, where the mediator is an attorney experienced in environmental law and works with or for the court. In ECTs where judges or commissioners act as mediators, their evaluative mediation is viewed as the best way to help the parties “reality test” the likely outcome of litigation and create a greater willingness to participate in problem solving.

The use of ADR can further enhance access to justice by ensuring that all interests are heard and that power is balanced between or among the parties through creation of a more level playing field than is usually found in court. Many litigants are not only willing, but desirous of having their conflicts resolved by a fair and impartial process which does not involve the cost, and in many cases the agony, of a court case (Preston, 2007f, 6).

Opponents of ADR, not infrequently environmental advocacy groups, have historically taken the position that environmental issues should not be mediated because mediated outcomes necessarily entail compromise of important values and will result in some permanent and unacceptable environmental harm.

There are other legitimate concerns about the use of mediation in resolving environmental disputes. These include the confidentiality of some mediated agreements resulting in a lack of transparency and lack of public knowledge about the outcome, the unenforceability of non-court ordered mediation agreements, the lack of value of agreements as precedent, and the potential exclusion of interested members of the public from



One of many workshops for training Indonesian Judges in Environmental Law, including alternative dispute resolution, Jakarta 1998-2004.

Credit: Rob Fowler.

the decision-making process. It is clear from the research and the literature that mediation and other forms of ADR are not appropriate for all environmental cases, particularly those where a proposed action is absolutely non-negotiable for one of the parties. To ensure that only appropriate cases are referred to mediation, it is highly recommended that a formal assessment of the case be conducted when it is filed (Field, et al.).

### 1. COURT-ANNEXED MEDIATION

The most commonly employed court-annexed or court-provided ADR tools are mediation and conciliation provided by the ECT's staff, judges, or decision-makers. A few ECTs also use neutral evaluation and arbitration, although these were found in fewer jurisdictions and did not seem to play as important a role.

The US Office of the Administrative Law Judges (OALJ), who try USEPA cases, adopted mediation as a tool in the late 1980s for resolving Comprehensive Environmental Response, Compensation and Liability Act cases (CERCLA or "Superfund"), and have expanded its use to other environmental statutes (Raines & O'Leary). In the USEPA OALJ voluntary mediation program, an ALJ performs the role of mediator and does not sit on the case if it goes to a hearing. This allows the mediation to be offered "for free," since the ALJ is already being paid to act as a judge. This "hat switching" has potential pit-

falls, however. ALJs are trained as judges to make decisions, not to facilitate the parties resolving the issues themselves (*id.*, 1). They are familiar with law and precedent and so are liable to convey opinions concerning what the outcome of a hearing will be or to pressure the parties to agree to a solution that the ALJ crafts. They may not be supportive of creative "extra-legal" solutions developed by the parties but not stipulated in statute. An additional pitfall is that mediations generally occur by telephone, eliminating the benefit of non-verbal communication and real interpersonal interaction between the parties. EPA also has regional ADR specialists who are not ALJs in each of its multi-state regions. The parties also can select an outside professional mediator but must pay for the service. Mediation results in settlement agreements in over 75% of the cases where parties agree to mediate.

The Mediation Center in New Delhi, although not affiliated with an ECT, also uses judges as mediators for civil cases. Judges who have been trained in mediation rotate to mediate cases, which they will not hear if the case goes to court. In the mediations observed in New Delhi during the course of the study, judges were extremely directive, clearly explained the law to the parties, and suggested the "right" solution. The setting was informal, and the parties each got to explain their side of the issues in a facilitated and safe discussion. In fact, this approach is helpful for litigants who do not under-

**BOX 12 ADR – NEW ZEALAND RESTORATIVE JUSTICE ATTEMPT**

The authors observed a May 2008 criminal sentencing hearing by Judge Fred McElrea, a judge of the Environmental Court of New Zealand, in which an attempt at restorative justice had failed. Judge McElrea had ordered the parties to engage in a restorative justice process to explore with each other and the community how the environmental harm the defendant had done could be repaired and what the consequences should be. However, the attorneys failed to follow through or did not understand the process.

The criminal prosecution was brought by the local municipality against a property owner who had destroyed a sea cliff on his land abutting a protected seashore. The homeowner bulldozed a huge cut through the cliff to provide a roadway down to the beach, “the worst the [local council] has seen,” according to the mayor. The community suspected that he was attempting to improve access to the beach to dramatically increase his property value, and had proceeded without permits knowing they would not be granted.

Looking at photos of the damage, Judge McElrea declared from the bench, that it “looked as though a large slice had been cut out of a living organism and its entrails spilled out on the foreshore.” The judge admonished the attorneys for failing to follow through on restorative justice and warned them to follow such orders in the future. The violator was sentenced to pay a substantial fine (NZ\$ 20,000), undertake remediation (estimated at NZ\$ 60,000), and perform community service.

The judge admits that restorative justice is not appropriate for all environmental crimes. He carefully evaluates each case to determine its suitability for this community healing process as an alternative to standard penalties. If a defendant engages in restorative justice, the judge deducts those costs from the fines.

stand the law, may be intimidated by the court process, and are fearful of its costs.

Another mediation model using ECT decision-makers as mediators is utilized by some of Canada’s environmental tribunals, Trinidad and Tobago’s Environmental Commission, New Zealand’s Environmental Court, and the Resources Management and Planning Appeals Tribunal (RMPAT) of the State of Tasmania, Australia, among others. In these ECTs, tribunal board members or commissioners are trained in mediation and provide their services at no cost to parties who agree to mediate voluntarily. However, at least one ECT in Canada, the National Energy Board, has adopted rules which prohibit its board members and staff from conducting

mediations or settlement conferences. In an effort to ensure the Board remains wholly unbiased and neutral, they have adopted a rule stating that “no member or employee of the Board will participate in any mediation process involving the applicant and parties or potential parties to a regulatory proceeding.”

In New Zealand and Tasmania mediation is also available to litigants through the registrar of the ECT, but commissioners have been included to expand the capacity of the court to offer free mediation. This model has the advantages of having trained, free mediators who know the law and can evaluate the case based on experience with the court or tribunal, and the concomitant disadvantages of a “directed” settlement based on strong evaluation by the mediator during the process.

The Planning and Environment Court of the State of Queensland, Australia, is the only court studied that has employed a highly trained environmental lawyer-mediator solely to mediate cases, although other jurisdictions are currently evaluating this model. The ADR registrar may call a case management conference to review and focus the issues, conduct a “without prejudice” meeting of the parties, convene and chair a meeting of experts, and conduct mediation. Parties are ordered to produce a joint dispute resolution plan for presentation to the judge, and the ADR registrar facilitates the development of this plan with the parties. The primary judge of the ECT estimated that 60-70% of all cases filed with the court reach a settlement agreement with the help of the ADR registrar. The program has been so successful that the court is considering making mediation mandatory for most cases and hiring a deputy ADR registrar.

Tasmania’s in-house mediation model is similar to Queensland, in that the registrar is a highly trained and expert mediator, attorney, and member of the Australia Institute of Arbiters and Mediators, the professional organization representing ADR professionals. The registrar “vets” all cases for mediation and can choose to mediate or not. The current registrar’s mediation style is acknowledgedly “evaluative,” which he believes helps the parties understand both the law and how it is likely to be applied by the ECT. However, as registrar and the primary employee of the tribunal, he has many other duties that limit his time for mediation. Mediated agreements are signed by the chair of the tribunal and are the equivalent of court orders. Because this model has been so successful (84% of cases reach a mediated agreement before hearing), he has trained two commis-

sioners as mediation officers to work with him. A 2009 review by the Government of Tasmania recommends the use of mandatory mediation in the RMPAT – a clear acknowledgement of the success of mediation in Tasmania (Tasmania, 35).

Costa Rica's Tribunal Ambiental Administrativo (TAA) has a statutory mandate to promote environmental accords conciliation through mediation. In 2005, the TAA achieved a 90-95% settlement rate. Settlements are approved by the TAA and have the force of law. Considering that the case volume is almost 1,500 cases per year, that is another resounding affirmation of the role mediation can play in ECTs.

Only two ECTs were found to be trying restorative justice – the Environmental Court of New Zealand and occasionally the Land and Environment Court of New South Wales. One innovative judge in New Zealand is evaluating and ordering restorative mediation in appropriate cases, but admits to uneven results. Restorative justice concepts are derived from tribal practices of “sentencing circles” used by many indigenous peoples, where the crime is viewed as a harm to the community, not just against the victims, and where the process is directed to repairing that harm and restoring community harmony. Although this process may be well understood by tribal elders, it is quite foreign to the traditional criminal justice system, which is focused on the offender and views crimes as committed against the state. Restorative justice requires education, understanding of the process, and buy-in by prosecutors, defense attorneys, defendants, and victims. This process is occurring slowly in New Zealand, but certainly may be a model for other countries to consider.

Countries whose culture of conflict resolution is focused on restoring harmony and balance and maintaining the social order in the community, rather than on confrontational litigation, use conciliation and mediation as the preferred methods of environmental dispute resolution. An ECT example studied was Japan's Kogai-to Chosei linkai (Environmental Dispute Coordination Commission or “Kouchoi”). Article 31 of the Japanese Basic Environment Law stipulates that the state shall take necessary measures to effectively implement mediation, arbitration, and other alternative dispute resolution tools. The Confucian tradition places an emphasis on moral values as the basis for social order, not the rule of law. In the new environmental courts in China, the mediated agreements are viewed as a civil

contract between parties, and do not become judicial orders. However, in Japan a mediated agreement is legally binding and the Kouchoi has the power to adjudicate as well as conciliate or mediate. Enforcement is viewed as a personal moral obligation of the parties, rather than a public responsibility.

Justice Brian Preston, Chief Judge of the State of New South Wales, Australia, Land and Environment Court and a global leader and educator in the ECT arena, has developed a comprehensive vision for the problem solving ECT of the future. He terms it “the multi-door courthouse” (Preston, 2007f), borrowing from suggestions made originally by Harvard Law Professor Frank E. A. Sander in 1976 (Stuart & Savage, n. 1). This model is based on viewing the ECT as a dispute resolution center with many entry “doors” – that is, an array of available dispute resolution processes under one roof. “The goals of a multi-door approach are to provide citizens with easy access to justice, reduce delay, and provide links to related services, making more options available through which disputes can be resolved.” (District of Columbia Superior Court website.)

“The key elements for a multi-door courthouse program are therefore:

1. An intake or diagnosis/problem solving mechanism which would include specific referral criteria.
2. A diversity of dispute resolution processes to which cases would be referred once screened.
3. One center housing the intake/diagnostic mechanism and the various dispute resolution processes.

“The model envisages disputes being referred to the centre, not only by disputants but also by other agencies, including police, prosecutors' offices, courts, legal services and social services agencies.

“... The dispute resolution processes that can be offered in a multi-door courthouse are limited only by resources. Typically, they can include mediation; conciliation; fact finding; early neutral evaluation; arbitration; hybrid processes such as mediation-arbitration or concilio-arbitration; administrative hearings (merits review); and adjudication (litigation). Other services can be housed under the one roof such as an ombudsman or social services.” (Preston 2007f, 7-8, footnote omitted.)

Following screening, the parties can be referred to a variety of conflict resolution services within the court structure, including social services. New South Wales has recently undertaken a complete renovation of their existing courthouse to achieve a functional “multi-door courthouse,” creating a physical design that supports the expanded functions and is non-intimidating.

## 2. COURT-REFERRED MEDIATION

ECTs without in-house mediation capacity can “farm it out.” The Vermont Environmental Court recommends or orders parties to mediate, following evaluation by a judge in a pre-trial hearing, and provides them with a referral list of private mediators, approved by the court. Parties usually share the costs of mediation, which can run as much as \$1,500 a day, plus fees for attorneys if they are present. Current estimates are that approximately one third of the cases that are filed with the court are referred or ordered to mediation, and that approximately two thirds of these reach an agreement and are resolved. The Vermont Court has no funding to pay for mediation and does not use the registrar or the court case manager to mediate disputes.

Party-paid as opposed to court-paid mediation is not optimal, as an experiment in the Netherlands shows. Several years ago, the Environmental Chamber of the Council of State, Netherlands’ “green bench,” developed a pilot mediation program using outside professional mediators paid for by the court. Mediation was offered to all parties (but not court ordered) and about 50% of litigants agreed to participate. Of those, approximately 50% reached an agreement, resulting in an overall 25% settlement rate. When grant funds for the pilot project were exhausted, mediation continued to be offered by the court, but at the parties’ expense, and the result was only 10% of the parties agreed to mediate and a very low percentage of those reached an agreement. Apart from cost, another part of the explanation for this reduction in mediation is that mediated agreements are not approved by the Netherlands court and remain confidential between the parties, so they are not viewed by the parties as having the force of law. Litigants seeking an enforceable judicial order see mediation as an unnecessary and expensive step in the process, and the clerk of the court, who makes referrals to mediation, has therefore been somewhat unsuccessful in convincing parties of the benefits of mediation.

Court-referred or outsider mediation is also an option in many of the jurisdictions that have court-annexed in-house mediators available, but appears to be used less frequently if parties have the option of using trained persons affiliated with and paid for by the court. Court-annexed mediation has the advantages of cost savings to the litigants and having mediators familiar with the law, the ECT, and the process, but it often results in a more pressured, directed process than that conducted by outsiders. The obvious benefits to court-referred mediation are that the ECT does not have to budget the costs of mediation or overload their staff or decision-makers, and the mediators are truly neutral and do not have a vested interest in obtaining an agreement to save time spent in possibly lengthy hearings.

## 3. VOLUNTEER MEDIATION

In the authors’ home district, the county-government-funded Mediation Services Program of Jefferson County, Colorado, is an outstanding example of a government organization that provides independent volunteer mediation and facilitation to the general courts and to county government agencies. The handful of staff, including an administrator and two part-time attorneys paid by the county, screen cases and assign them to two-person teams of volunteer mediators, who mediate over 1,500 cases a year at no cost to the parties. The staff choose teams from a roster of over 150 professional mediators based on their specific areas of interest or expertise.

Although these volunteer mediators do not often get “big environmental cases,” where major investment or federal decisions are involved, they do mediate hundreds of lesser “environmental” cases, such as zoning, land use, neighbor disputes, noise (dog barking), and violations of various municipal and county laws. The courts, prosecutors’ offices, the police, and any county or municipal agency can refer parties to mediation. The courts can and often do approve a mediated agreement as an enforceable court order, provided the case was filed prior to being referred to mediation.

The volunteer-mediation model, using highly skilled mediators, exists in other communities in the United States, but was not observed in any other nation. The advantage to such a model is that the mediators are free, trained, and not affiliated with the government or any referring agency. The disadvantages are that parties do not have an opportunity to participate in the selec-



*Protecting the welfare of future generations is a specific goal of Hungary's environmental ombudsman.*

*Credit: Home Page of The Parliamentary Commissioner for Future Generations' website <http://jno.hu/en/>*

tion of their mediator(s), the volunteers also have professional practices and may find it difficult to schedule mediation at a convenient time, and volunteers may not be as responsible as paid professionals.

#### 4. OMBUDSMAN PROGRAMS

Six countries included in the study – Hungary, Austria, Greece, Kenya, New Zealand, and Costa Rica – have ombudsman or public complaints committees that are dedicated solely to investigating and resolving environmental complaints and disputes. Although ombudsmen usually handle only complaints concerning a government agency decision, they also may attempt to resolve disputes between citizens and private corpora-

tions. Generally, ombudsmen have authority to provide information and education to the public, conduct fact-finding through investigations and on-site visits, negotiate, conciliate and mediate, and possibly subpoena records or individuals. In some jurisdictions, the ombudsman has standing to sue the government on behalf of a citizen or a citizen group. Ombudsman programs effectively increase access to justice by providing a free dispute resolution process in which the ombudsman can act as an advocate and representative of the complainant if it is determined that the complaint is well-founded (but see box 13).

Several different environmental ombudsman models were included in the study. Austria has a legally trained

### BOX 13 OMBUDSMAN – FLAWED MODEL

The weakness of an ombudsman office without sufficient power is illustrated by a case handled by Kenya's national environmental ombudsman office, the Public Complaints Committee (PCC). Residents in the Rift Valley complained to the PCC of a 1980s government program of planting the thorn plant *Prosopis Juliflorai* in their area to curb desertification. Several decades later, the plant had "spread like a weed," and the residents documented loss of useable land, loss of forage and useful plants, death of livestock, interference with transportation, severe human injury from the thorns, blockage of rivers, displacement of people from their homes, and destruction of the pastoral basis of their economy.

The PCC investigated thoroughly with on-site visits, consultative meetings, on-line research, and public hearings. It corroborated the residents' complaints, establishing that the weed was destroying the communities' normal pastoral life. It then wrote to the Ministry of Agriculture and other government officials formally recommending

that the plant be declared a noxious weed, a program of eradication undertaken, and its planting outlawed.

However, the PCC's report fell on deaf ears and the government did not implement their strong recommendations. According to observers, nothing of substance had been done since the recommendations of the ombudsman, since "the Public Complaints Committee is a toothless body which has no mechanism for effectively and ably supervising or implementing its recommendations."

The residents then sued the government for violation of Kenya's Environmental Management and Coordination Act, which imposes a duty on the government to "safeguard and enhance the environment." The PCC provided evidence for the plaintiffs. However, the case was dismissed on technical grounds. Clearly, an ombudsman lacking sufficient authority, budget, and political clout may not be sufficient to result in environmental justice.

environmental ombudsman in each of nine länders (states), but does not have one at the national level. These ombudsmen can investigate and resolve complaints by citizens against local governmental decisions and have the power to file lawsuits.

In mid 2008, Hungary created the Office of the Parliamentary Commissioner for Future Generations under the national Ombudsman Act. It is the newest specialized environmental ombudsman found in the study and has the dual roles of guardian of future generations and investigator of complaints concerning the environment. The Commissioner's main obligation is to investigate complaints of "improprieties" relating to Hungary's constitutional right to a healthy environment. In his proceedings the Commissioner may find facts, make recommendations, or otherwise intervene in a wide range of cases. The Commissioner also can begin an investigation on his own initiative without a complaint. Typically, this ombudsman makes non-binding recommendations to the competent authorities. Perhaps the ombudsman with the greatest resources and the most comprehensive support system in the world, the Commissioner's office is supported by a Legal Department, Strategy and Science Department, Department for International Relations, and a Coordination Department. The Commissioner's 35 staff include 20 full-time staff lawyers trained in environmental law. In addition to the scientific experts on staff, the Commissioner employs

external experts on a contractual basis. (Hungary Parliamentary Commissioner website.)

The seven member Public Complaints Committee (PCC) of Kenya is chaired by an attorney qualified to be a judge, and has a representative of the Attorney General's Office, the Law Society of Kenya, an environmental NGO, the business community, and two professionals qualified as environmental managers. The Kenyan ombudsman model is unique as it works as a committee, rather than as a single individual, and has substantial environmental expertise on the committee. The PCC may make investigations and recommendations to the national environmental agency and has the power to sue the government, as well as conciliate, negotiate, and mediate. In contrast to the Parliamentary Commissioner for Future Generations in Hungary, the highly qualified and committed members are hampered by a miniscule budget and no staff (having to pay their own travel expenses for on-site field visits). In spite of these barriers, the PCC has taken on some significant issues, including challenging the development of a large tourist safari lodge in the Masai Mara National Park. This case was significant because it was viewed by the government as an important economic development given wealthy tourists, but viewed by environmentalists and the community as potentially devastating to the fragile ecosystem and unnecessary given the numerous not-fully-booked resorts already in the area.

An independent, effective, and well resourced ombudsman program is a powerful tool for providing access to justice, and for resolving environmental disputes before proceeding to court.

## 5. OTHER MEDIATION SOURCES

ECTs can and do refer or order parties in an environmental dispute to mediate. In ECTs without court-annexed or court-referred mediation services, parties are left to find and agree on a mediator on their own. The international arena has both private mediators and profit and nonprofit organizations specializing in environmental dispute resolution, contract negotiation, mediation, facilitation, and collaborative decision-making. Their services are available for a fee, and may be sought and paid for by one or more of the parties to a dispute.

The Keystone Center in the United States is an internationally respected example of such a nonprofit organization (Keystone website). It provides a wide range of environmental training and dispute resolution services locally, nationally, and internationally. A recent successful case example is the Ok Tedi Mine Negotiation conducted by staff of the Keystone Center between November 2005 and June 2007 in Papua New Guinea (PNG) (See Box 14).

The USEPA and other US government agencies have adopted and incorporated collaborative decision-making processes in the review of proposed regulations and in the planning, environmental assessment, and implementation phases of many government projects (USEPA-CBRA website). EPA views collaborative decision-making as a tool to identify the needs and interests of all stakeholders, weigh and balance issues, and resolve conflicts before they reach the court.

## 6. ISSUES TO CONSIDER IN USING ADR

Any ECT considering including ADR in its dispute resolution process should consider the following questions:

1. *Who should mediate?* There are advantages and disadvantages to court-annexed mediation, where mediators are staff or decision-makers of the ECT. If an ECT chooses to include mediation as part of the adjudication process, it must ensure that its mediators are trained, experienced in mediating environmental matters, and can act as neutrals. Mediators must be

viewed by the parties as impartial and fair, and if ECT decision-makers act as mediators, the rules should prohibit them from participating in a decision if the parties do not settle. Almost all ECTs interviewed who use mediation prefer attorney mediators with experience in environmental litigation, expressing the belief that they are best able to act efficiently and effectively by focusing the issues and using evaluative or directive mediation skills. The possible downside to this approach is that the parties may not be given an opportunity to develop innovative options that are “outside the box” and may not have control over the substantive outcomes.

2. *What cases should be mediated?* All ECTs using mediation agreed that cases must be evaluated prior to a referral or order to mediate. A 2009 professional study of over 300 land use cases in Vermont – at the local and state agency levels and in the Vermont Environmental Court – determined that “mediation screening” is an effective tool for selecting cases that could benefit from mediation (Field, et al.). The study concluded that

- Screening for mediation assists with settlement
- Screening criteria are useful but not fully determinative
- Screener’s qualifications and credibility matter
- Screening program design is important for legitimacy
- Land use mediation is more about identifying interests and options and reaching a settlement, rather than restoring relationships or building “community”
- Even when land use mediation does not result in satisfying agreements, there may be satisfaction in the process
- Encouraging mediation at the local level remains very challenging, because of the barriers of timing mediation interventions, local understanding of mediation and its benefits/challenges, town budgets, and administrative resources
- Environmental Court Influence – the Environmental Court’s embrace of mediation as a key tool in its proceedings appears to be having a positive effect upstream on municipal land use decisions and on earlier settlement. (*Id.*, Abstract.)

As a result, the study recommends:

- Mediation screeners should be trained and informed in the issues, law, and regulatory structure

Rebalancing the Equation in a Chronic Sustainability Dilemma: A Multi-party Facilitated Negotiation Process:

“[The] Ok Tedi [mine] is often cited as one of the worst man-made environmental disasters in the world. It is also a true sustainability dilemma. The mine produces 20% of [Papua New Guinea’s] gross domestic product but it has also disrupted the traditional food webs and lives of more than 50,000 by putting 90,000 tons of rock waste and tailings per day into the Fly River System.” This mine dumping has directly resulted in loss of food sources and a safe water supply for residents along the length of the river.

In 1994, indigenous Ok Tedi and Fly River landowners brought suit against the mine owners, which was settled out of court. However, in 1999 BHP Billiton, the mine owner and operator, admitted that the waste from the mine had resulted in an “environmental disaster” and in 2001 ownership was restructured and a number of agreements with impacted villages were negotiated to permit on-going operation of the mine. By 2004, it became clear that environmental conditions would be worse than originally predicted and that the settlement agreements reached in the past were inadequate to mitigate the harm done to the indigenous peoples.

The Keystone Center of Keystone, Colorado, was tasked to conduct a facilitated negotiation that would try to maximize opportunities for collaborative problem solving, transparency, and the highest possible levels of “informed consent” achievable in a country with isolated populations, extremely poor communication and transportation infrastructures, limited civil society, and high rates of illiteracy. After



*The Keystone Center of Keystone, Colorado, USA, led a multi-stakeholder facilitated negotiation over “one of the worst man-made environmental disasters in the world,” the Ok Tedi Mine in Papua New Guinea.*

*Credit: The Keystone Center*

18 months of multiparty facilitated negotiation, a comprehensive Memorandum of Agreement was reached which guaranteed the people financial assistance, community improvement projects, a variety of services to improve their health and living conditions, and a future role in decision-making.

The scope of this agreement and the direct participation of those most affected in its negotiation could never have been achieved in a court of law, according to Keystone. The negotiated agreement will make a difference while allowing the mine to continue to operate and to provide economic benefits to the country— a unique solution to the difficult task of balancing environmental and community harm against the social and economic benefits for the country.

(Excerpted from Adler, et al., 1 et seq.)

- A screening program must be transparent and clear
- Parties should have a choice in selecting the mediator
- A screening program needs feedback/evaluation on its recommendation of cases for mediation
- While acknowledging the barriers to effective screening and mediation, there are options for making the process effective.

3. *Should Mediation be Mandatory?* A few ECTs have made mediation a mandatory step (Tasmania) or are considering making it mandatory. The registrar of Tasmania’s RMPAT expressed some reservations however:

“Compulsory mediation is a concern to me. Whilst the Tribunal effectively undertakes compulsory media-

tion at the moment, it does not allow the mediators to decide NOT to mediate an appeal (where the mediator is satisfied there are threats of violence, undue influence, inappropriate subject matter for mediation – the normal things a mediator vets for).” (RMPAT Registrar Jarrod Bryan communication to authors.)

Although mediation clearly helps reduce the ECT’s docket and may achieve a faster, cheaper, better outcome, *mandating* it has risks. These include having an insufficient supply of competent mediators to manage the caseload, unwillingness of parties to participate in ADR, parties’ misunderstanding of the ADR process, a poor or non-transparent screening program, and lack of an “opt out” for cases that should not be compromised or are otherwise inappropriate for mediation. The multi-door courthouse concept is premised on a sophisticated early assessment of the dispute and the

ability to offer a range of appropriate options to the parties.

4. *How will complex technical and scientific evidence be integrated into the ADR process?* Some ECTs have resolved this issue by allowing experts to participate in the mediation. Others, such as Queensland, Australia, require the experts to participate in a meeting with the ADR registrar, separate from the parties, and write a report which can be used by the mediator, the parties, and the judge.

A study on “Managing Scientific and Technical Information in Environmental Cases” by Peter Adler et al. cautions however:

“By itself, scientific and technical knowledge is neither a ‘be-all’ nor ‘end-all’ in environmental conflicts. Parties bring to the table different kinds of knowledge: ‘traditional’ knowledge, ‘cultural’ knowledge, ‘local’ knowledge, and ‘remembered’ knowledge, all of which have a place at the table in environmental conflict resolution.

“All information . . . is subject to questions about validity, accuracy, authenticity, and reliability. . . .

“In environmental conflicts, scientific and technical issues are embedded in a political context where value choices are at play. These underlying values are the ultimate arbiters of political decision-making, even when a plethora of scientific information is available. Substituting scientific and technical information cannot finesse value choices. However, information can more fully inform the value choices that need to be made.” (*Id.*, 15, 17.)

The study outlines helpful “principles” for the management of scientific and technical information in environmental mediation (*id.*). Because environmental cases often involve disagreements about the technical aspects of a case, provision should be made for including review of all kinds of expert evidence during the mediation.

5. *Should courts or tribunals review and approve mediated agreements and make them enforceable?* If so, how is confidentiality to be handled? Some ECTs studied do review and approve mediated agreements to make them enforceable – and may even call the mediator into a hearing to explain the agreement, potentially putting aside issues of confidentiality. Others simply close the

case when notice of a settlement is received, leaving parties without a legally enforceable agreement with the power of the ECT behind it, which was why the case or appeal was filed in the first place. In China, the common practice is for judges to “mediate” a case they are assigned, and then the same judge will hear the case if it does not settle.

The Province of Ontario Environmental Review Tribunal has proactive rules and practice directions for reviewing any mediation settlement that “alters the decision [of the government agency] that is under appeal.” In that case, if the mediator is a member of the Tribunal s/he must review the settlement agreement for whether or not it is consistent with (1) the purpose and provisions of the relevant legislation, (2) the public interest, and (3) the interests of the parties, participants, and presenters. If the mediator is an outsider, not a Tribunal member, the proposed settlement must be reviewed by the Tribunal for consistency with those three factors. If not, the case proceeds to full hearing. (Ontario, Practice Direction for Tribunal Appointed Mediators No. 10 and Rules of Practice 191-194.)

The advantage of this approach is that the ECT takes full responsibility and is accountable for the settlement agreement, ensuring that it is both procedurally and substantively legal, in the parties’ interests, and most notably in the (unrepresented) “public interest.” The disadvantages are that many of the cost and time benefits of mediation are negated and the review does not apply to settlement agreements that do not change the government’s decision that was the original cause of the appeal.

A middle of the road approach appears to be the best practice, where an ECT does review and include a mediated agreement in a court order, provided it is in the public interest. This gives the agreement the force of law, and the decision can be viewed as setting a precedent for future cases, while at the same time achieving the advantages of a cheaper, quicker, better, and potentially more innovative resolution process.

6. *Is a statutory basis necessary for mediation?* This is a jurisdictional issue. Many of the ECTs studied relied on specific language in their legislation (authorizing or substantive) which urges or mandates the use of ADR. Others relied on framework legislation incorporating ADR as an option in all governmental dispute resolution arenas. The specific practice rules and/or practice directions adopted by the ECT then define the detailed

procedures for their mediation processes. Clearly, there needs to be some legal authority for the use of mediation to ensure legitimacy of the process, to encourage a more consistent approach, and to protect the ECT from the risk of acting outside its jurisdiction.

#### **BEST PRACTICES – ALTERNATIVE DISPUTE RESOLUTION (ADR):**

*Because it can make such a positive impact on access to justice, ADR – particularly mediation – is provided by approximately 50% of the ECTs visited. According to experts interviewed, ideally it should be structured as follows:*

- *A court-annexed and court-paid service*
- *Including directive or evaluative mediation*
- *Providers should be mediation-trained (ideally credentialed) attorneys experienced in environmental law and approved by the ECT*
- *ECT staff mediators are preferable to using judges or decision-makers as mediators*
- *Mediation should not be mandatory, but all cases filed with the ECT should be assessed at intake for the appropriateness of ADR and referred if appropriate*
- *Formalized screening rules providing a reliable, transparent process should be developed and used to evaluate all cases*
- *A process for incorporating needed scientific-technical information and opinion into the mediation should be adopted*
- *Mediated settlements/agreements should be reviewed and approved by the ECT and made enforceable orders*
- *Other alternative means for professional mediation can be considered if the ECT budget cannot provide mediation at no charge to litigants*
- *Part of a “multi-door” courthouse concept, providing access to a variety of ADR and adjudication processes in one place.*

*Among the many outstanding ECT examples of visionary ADR access to justice are: New South Wales Land and Environment Court’s “multi-door” approach, Queensland Planning and Environment Court’s in-house ADR staff, and Hungary’s ombudsman.*

## **3.10 COMPETENCE OF ECT JUDGES AND DECISION-MAKERS**

**Access to justice is dependent upon ECTs having decision-makers who are competent, independent, and environmentally knowledgeable. The selection process, minimum qualifications, on-going training, tenure, and salary level all influence the competence of the persons selected to hear environmental disputes.**

Ultimately, access to environmental justice is contingent not just on “getting through the door” and “getting through the process” of the ECT. It is contingent on competent, independent, environmentally knowledgeable judges and decision-makers. The study identified five important criteria for assuring that ECT decision-makers are in a position to make intelligent, just, consistent, and informed decisions in the environmental arena. These are:

1. Selection process
2. Initial qualifications
3. On-going training in environmental law
4. Tenure
5. Salary

### **1. SELECTION PROCESS**

The judges, commissioners, and other decision-making members of the ECTs are appointed in numerous different ways. The selection processes are almost as diverse as the number of ECTs surveyed. No ECT judges or decision-makers were elected, and all were appointed, raising the crucial question: Who has appointment power and what political and budgetary influence does the appointer then have over the ECT and its decisions?

Some of the most independent judges, in the sense of being free from political influence and party pressure, are in Brazil. All trial and appellate judges are qualified through a civil service test and are selected by the civil service agency based on their test scores, education, and experience. Judges start in small, rural trial courts and apply to move up to bigger, more urban courts as they gain experience, still within the civil service structure. The only level at which political appointment becomes involved is the Supreme Court of Brazil, whose justices are appointed by the President and approved by the Senate. Administrative Law Judges in the US Office of Administrative Law

Judges (trial-level hearing officers for the USEPA) and ALJs in New York City are also examples of civil service appointments.

The next most independent ECT decision-makers, are those appointed by the Ruler, President, Prime Minister, Minister of Justice, Governor, or Attorney General of the jurisdiction, typically from recommendations submitted by the legislature, a special judicial commission, a bi-partisan panel, a diverse group of citizens, or some combination of constituents. Typically, the ECT's authorizing law specifies who appoints and what qualifications are required.

In Austria, the Environmental Senate's law authorizes appointments by the President from three different slates: 10 nominees of the Minister of Justice, 18 from the nine *länders* (states), and 14 representing 14 different federal ministries. When the ECT is not directly under the supervision and budgetary authority of the executive, this process produces quite independent decision-makers who are not pressured to follow governmental policies as opposed to the law. They are also reasonably free of the threat of being penalized budgetarily for their decisions. Most appointments of this nature were for terms of service that survived political changes, although a few changed every time there was a national election. No jurisdictions were found where the decision-makers were appointed by the legislative branch of government, although legislative committees may make recommendations.

However, ECTs that are appointed by the Ministry of the Environment or its equivalent raise concerns, if the ECT has jurisdiction to review decisions of that ministry. The more direct control the political environmental agency has over the appointment process, the more likely there is to be political pressure. Other variations on appointments include statutes that allow specific constituencies (business and industry, judicial commissions, bar associations, NGOs, and others) to recommend – and in a few cases actually appoint directly – the ECT members.

## 2. QUALIFICATIONS

Qualifications for environmental court judges tend to be somewhat higher than those for tribunal members, although many tribunals require that the chair meets the requirements to be a High Court or Supreme Court justice. This is true in Kenya, where the chair of the National Environmental Tribunal has judicial quali-

cations and is appointed by the Judicial Service Commission and confirmed by the Minister of the Environment. Similarly India requires the chair of both of its ECTs – the operating National Environment Appellate Authority (appeals of government approvals of certain projects, see Chapter 3.6) and its legislated but not implemented National Environment Tribunal (claims for personal or property damage from accidents involving hazardous substances) – to be or have been a judge of the Supreme or High Courts to qualify for appointment by the country's President. The chair of Denmark's Environmental Board of Appeal must have the qualifications of a High Court judge, but is appointed by the Minister of the Environment.

In the State of Victoria, Australia, the President of its Civil and Administrative Tribunal is appointed by the Governor in Council and must be concurrently a sitting judge of the Supreme Court. One of the few ECTs which does not require at least the chairperson to be an attorney is the An Board Pleanála in Ireland. Historically, Ireland required the chair to be an attorney, but changed the legislative requirements a few years ago.

Environmental courts may have both law-trained judges and commissioners; tribunals typically have at least one, and usually more, attorneys as members and most have an attorney as the chair. The law qualifications may be as little as a statement that the chair must be "suitably trained and qualified" (Malawi), or have a "higher university degree in law" (Finland). Jurisdictions such as Trinidad and Tobago and Belgium require a minimum of 10 years experience as an attorney, and may require specialized training, experience, and expressed interest in environmental law prior to appointment.

## 3. ON-GOING TRAINING

The need for initial and on-going training of judges in environmental law, ecology, and environmental decision-making is recognized internationally as critical to effective environmental jurisprudence and therefore access to justice. As one judge told us, "green chambers need green judges." Environmental law, both at the national and international levels, is a rapidly expanding, extremely complex legal area. Simply keeping up with the development of environmental law, not to mention scientific and technical advances and emerging best practices, can be an overwhelming task for a judicial decision-maker, particularly if s/he is only sitting on environmental cases on a part-time basis.



*Chinese Environmental Court judges and authors in a 2009 training program sponsored by the American Bar Association Rule of Law Initiative (ABA-ROLI) China Program, the Wuhan University Research Institute for Environmental Law (RIEL), and a local Guizhou Province water pollution agency.*

*Credit: Yan-mei Lin, ABA-ROLI China Program*

Specialized training and capacity building has been and is being sponsored by a large number of professional groups – both nationally and internationally. In this decade, many governmental and nongovernmental organizations have supported environmental law training for judges, lawyers, and others involved in ECTs all over the world, including, to name a few:

- UN Environment Programme (UNEP)
- UN Institute for Training and Research (UNITAR)
- US Agency for International Development (USAID)
- US Environmental Protection Agency (USEPA)
- EU Forum of Judges for the Environment (EUFJE)
- European Commission
- Association of Environmental Administrative Judges (AEAJ)
- European Association of Administrative Judges (EAAJ)
- The Access Initiative of the World Resources Institute (TAI-WRI)
- Asian Environmental Compliance and Enforcement Network (AECEN)
- American Bar Association-Rule of Law Initiative (ABA-ROLI)
- International Union for the Conservation of Nature (IUCN)
- Partnership for Development of Environmental Law and Institutions in Africa (PADELIA)
- Environmental Law Alliance Worldwide (E-LAW)
- International Network for Environmental Compliance and Enforcement (INECE)
- National and state-wide judicial academies, such as the Philippine Judicial Academy (PHILJA)

- and a number of others at various judicial levels.

Not surprisingly, judges are more receptive to training by other judges with experience in the field. As an example, the Chief Justice of Kenya's Supreme Court became convinced of the need for in-depth training and worked with UNEP and Professor Charles Okidi of the University of Nairobi to develop one of the first intensive judicial training conferences on the environment in 2004, bringing in justices and judges from Kenya, Tanzania, and Uganda. Since that time, the Chief Justice has moved to create a green bench in the Kenya Supreme Court, instituted rules waiving filing fees for environmental plaintiffs, and supported additional training for Kenyan judges. Tanzania authorized an ECT in 2004 but has not implemented it; Uganda decided that it was preferable to have the judiciary trained in environmental law but not to create a specialized ECT. Indonesia has taken a first step toward creating an ECT, and only assigns environmental cases to judges who have had in-depth training in environmental law.

The EU Forum of Judges for the Environment has provided conference and training opportunities for judges hearing environmental cases, as has the European Association of Environmental Administrative Judges. ECT judges in Australia and New Zealand conference annually on cutting-edge practices in their jurisdictions. At least three such international conferences targeted to capacity building for judges dealing with environmental cases were held during 2008, and at least four were scheduled for 2009. The growth in training and communication opportunities reflects the interest, commitment, and enthusiasm for building environmental

competence in decision-makers around the globe. As more and more new specialized ECTs are created, the need for in-depth initial and on-going training will exponentially increase.

#### 4. TENURE

Security of tenure protects independent decision-making and is a key to obtaining access to justice which is unbiased, unpressured, and based on jurisprudence, not on political expediency. ECTs that are part of the judicial system and are actual courts of law, rather than quasi-judicial tribunals, tend to have legally trained judges who are appointed with tenure and can only be removed for serious malfeasance or crime. Tenure in these types of ECTs can be for life, or until age 72, 70, or 65. Another important aspect of tenure, for career judges, is that they have the same career-advancement opportunities as their generalist counterparts and will not be limiting their options for promotion to higher general courts.

ECTs may also have non-tenured appointed professional commissioners representing specific areas of expertise, for terms of 2, 3, 5 or 10 years, so the “bench” is a combination of tenured judges and experts for a term. Although non-law commissioners could be tenured, no ECT was found that gave life tenure. The crucial advantages of having tenured decision-makers are retention of quality judges, competence increasing with experience, and decisions and sentencing are more liable to be consistent over time.

#### 5. SALARY

Compensation for ECT decision-makers is an important issue for several reasons. The ECT needs to be able to both attract and retain highly competent, committed judges, in which level of salary is a significant element. In a few jurisdictions, ECT decision-makers or commissioners served as unpaid volunteers, solely for the honor and recognition, but this was a rarity. Others served on a case by case basis or on a part time basis, which was not very remunerative and resulted in ECT responsibilities being secondary to their primary employment. Salaries can be set by a judicial commission, by the legislature, or by a civil service organization, and varied enormously depending on the “level” of the appointment and the wealth of the country.

When the Vermont Environmental Court was first established, the judge was treated as a “second class judge,” with a lower salary and a very small operating budget compared to her generalist counterparts. This relegated the court to a lower tier in terms of credibility, respect, and importance for potential litigants. Over time, this problem has been corrected, and the two judges of the Court today are paid and credentialed at the same level as other state trial judges. Brazil’s judges are selected and paid through the civil service, which pays judges and prosecutors extremely well relative to professional salaries in Brazil and as compared to some other countries.

#### BEST PRACTICES – COMPETENCE OF ECT JUDGES AND DECISION-MAKERS:

*The most independent and competent ECT judges and decision-makers are:*

- *Appointed by a neutral process – through civil service testing (as in Brazil) or at least appointment by a high-ranking official or committee with no vested interest in the ECTs decisions (New York City), and not an official of an agency whose decisions are reviewed by the ECT (like the USEPA’s Environmental Appeals Board)*
- *Vetted for as high quality environmental legal education, training, experience, and commitment as is possible, while allowing for public or citizen representatives as commissioners or advisors, if desired (New Zealand)*
- *Given security of tenure (Thailand, Sweden, Finland and many others)*
- *Provided an ECT budget that is as insulated from political manipulation as possible (free from punishment for unpopular decisions) (Brazil)*
- *Paid a salary, in the case of judges, commensurate with general court judges and, in the case of tribunals, at a competitive level with other comparable professional positions (Belgium and Canada)*
- *Required to engage in continuing training in environmental law and other needed skill sets provided through a judicial training institute (Philippines).*

## 3.11 CASE MANAGEMENT

“Case management” includes a variety of operational tools to increase the efficiency and effectiveness of the ECT and to increase access to justice for the public. Examples include highly trained case manager(s) on the staff of the ECT, the use of directions hearings, information technology systems, traveling courts, and relaxed rules of procedure and evidence.

ECTs around the world have adopted a number of different, creative tools for “active case management” that increase ECT efficiency and effectiveness, lower costs, enhance outreach, and improve access to justice for all. Active case management is defined as any court-based process or technology designed to move cases more efficiently and fairly from filing through trial to an appropriate conclusion. Although efficient case management tools are not limited to ECTs and have been adopted by many courts of general jurisdiction, the research found ECTs almost universally interested in innovative ways to manage their caseloads better, with many having the authority to adopt flexible rules of practice that permit new approaches.

Key examples of these active case management tools include:

- *Case Manager*: ECT staff professional who monitors case progress.
- *Counseling*: Assisting parties (and public) in advance of filing, after filing, and throughout the case with advice on the ECT processes, rules, forms, costs, and expectations.
- *Case Review*: Early and on-going review of the cases by ECT staff to assure appropriate routing, handling, timing, that deadlines are met and that filed documents are complete.
- *Directions Hearings*: Meeting with the judge, registrar, clerk of court, or other staff professional to set timelines for the case for filings, information exchange, ADR, experts’ reports, interlocutory motions, and to set final hearings.
- *Computer Data Management Systems*: Management system for cases (ideally computerized) that tracks status, progress, and deadlines that publishes public notices and decisions, and that automatically notifies staff of key dates in advance so that parties can be reminded of deadlines.

- *ADR Screening Process*: Routine system for early review of cases for suitability for mediation or other “doors” of the courthouse (see ADR chapter 3.9).
- *Website*: User-friendly, interactive website for the ECT that provides
  - Comprehensive public information about the ECT, including history, jurisdiction, copies of laws and rules, filing process, costs, case decisions, annual reports, and evaluation statistics
  - Notices of hearings, other ECT events
  - On-line e-filing capability for all filings and documents
  - Confidential communication between parties and ECT
- *Other Information Technology*: Can include
  - Video-conferencing and tele-conferencing capability for meetings and hearings
  - Simultaneous transcription and transmission of testimony that permits a judge at a distant location to have a written copy for review almost immediately
  - Sentencing database that permits review of precedents of ECT in similar cases, assuring consistency and fairness in decisions
  - Offender database that permits review of past violations and sentences by individual offender
- *Traveling Courts*: Practices for bringing the ECT and its decision-makers to the site of the parties, complaint, or environmental problem, permitting visual observation, investigation and fact-finding, and hearing on-site by decision-makers.
- *Alternate Hours*: “Night” or “weekend” courts to enable parties and public to attend without missing work.
- *Relaxed Rules*: Developing less complicated, less technical rules of procedure and evidence based on defined ECT authority to operate “differently” from generalist courts (see chapter 3.8).
- *Rapporteur*: For cases decided by a panel, efficiency may be achieved by assigning the case to a single judge or decision-maker on the panel to review the record and report a summary of and recommendations on the case to the panel. Staff can also perform these functions for the panel.

**Case managers** can be staff of the ECT: clerks of the court, registrars, attorneys, or administrators – assigned case management responsibilities – or the judges themselves may take responsibility for managing the case. Case management is generally associated with the intake function of an ECT and includes reviewing a

case when it is first filed or when parties are considering bringing an action.

The State of Vermont Environmental Court, recognizing the importance of this function, has employed an attorney skilled in environmental law and in the rules and practices of the court, whose title is Case Manager. She works with the judges and the clerk of the court to provide information to the litigants about court process; assists with forms and questions; reviews all filings and advises the judge assigned to the case; helps set preliminary hearings for the judges; meets with the parties to discuss mediation, deadlines, and court expectations; and may hold status conferences with the parties. In addition, she monitors cases through a computerized process, alerting parties to upcoming deadlines and requirements, preventing cases from being “lost” in the system or being subject to legal delaying tactics and unnecessary continuances. She does not conduct mediation or directions hearings.

In Tasmania, the registrar has a diverse range of case management duties, including conducting mediation with parties in appropriate cases. The registrar is able to set cases for hearing following review, track them, alert parties to deadlines, and negotiate changes in court established dates.

The registrar for the Land and Environment Court of New South Wales has the most sweeping powers of any court case manager studied. He recently had his role dramatically expanded by new practice directions, giving the registrar the power to take on traditionally judicial roles, depending on the type of case. In addition to the case management responsibilities found in other ECTs, he may dispense with rules in particular cases, refer cases to mediation or arbitration, conduct preliminary and directions hearings, stay proceedings, grant extensions, give leave for a number of actions including dismissal, make decisions about advance cost awards for trials expected to cost less than \$30,000, and mediate or refer to outside mediators.

Two keys to successful case management are individual-treatment and flexibility. There are no “standard” approaches, and each case is managed based on its individual issues and parties. Generally, multi-party and more complex cases require more case management time. Lawyers and ECT decision-makers note that, not surprisingly, case management is particularly necessary for litigants appearing pro se.

**Counseling** is often associated with case management, but is a separate activity focused on educating the public on access to justice and helping potential parties understand what to expect from the review process and what it may cost. A counselor does not explain the substantive law or offer direction, and does not review the facts in any detail. Counseling can cover many things, including weeding out unnecessary case filings, explanation of process steps, even assistance with filling out forms. An attorney is not needed for counseling, and in many jurisdictions it is provided by the clerk or ECT staff.

**Case review** is a critical step in intake and at status hearings. Often in-depth review is conducted by agency staff attorneys or investigators, who make evaluative decisions about whether the party has filed in a correct forum, what the issues are, and whether or not the case is appropriate for mediation or another form of ADR. Case review can assure that parties receive appropriate notices, subpoenas, and other information about the case. It is more directed at preliminary evaluation of substantive issues and is often conducted in a pre-hearing conference. In some jurisdictions, an ECT judge or decision-maker conducts this level of review initially with each case assigned to him or her, prior to ordering or referring to ADR or setting a preliminary hearing.

**Directions hearings** (sometimes called scheduling hearings or “active list” supervision) lie at the heart of the practice and procedure of the most successful ECTs. In a directions hearing, the judge/decision-maker explores options for settlement of a case with the parties, develops a strict timetable for each step of the case, and advises parties of what is expected. This function keeps cases moving, making the hearing process more efficient for both the court and the parties.

**Computer data management systems** are now being integrated at every step of the dispute resolution process. They are proving a valuable, albeit expensive, tool to support effective case management. New advances in technology permit filing a case on-line; tracking the case internally including recording all directions, deadlines, and rulings; establishing “red flags” to alert the court and the parties when a deadline is approaching; and allowing frequent communication between the court and the parties. New York City is currently developing a database that allows communication between and among districts regarding violations and penalties.

An **ADR screening process**, as a component of the intake system, is usually conducted by the registrar or judge who initially reviews the case filing. Standardized assessment tools have been developed which are reasonably good predictors of the appropriateness of mediation or some other form of ADR, and reasonably good predictors of the potential for settlement (Field, et al., 5). A standardized assessment form can be used online, and then the outcomes of ADR can be tracked for the purposes of on-going evaluation.

ECT **websites** were found in most developed countries, fulfilling the requirement for access to comprehensive information as well as assisting with counseling, case filing, and posting of decisions. New South Wales Land and Environment Court's very extensive website allows the public to access up-to-date information about the court, costs, laws, rules, case decisions, and even provides detailed information about publications of the various judges. Constant updating is a critical and expensive requirement, given the quickly changing nature of the environmental dispute resolution process. Some ECTs that claim to have a website have not maintained it and it appears to be woefully dated and incomplete. For the 21<sup>st</sup> century, websites will increasingly be relied upon to provide both the public and parties sweeping access to both general and case specific information instantly.

New innovative developments in the world of **information technology** (IT) pop up almost every day, supporting all the functions of the ECT. Two major problems exist for ECTs in the use of advanced IT, however. One is the time and expense it requires to integrate new systems with older, slower systems and ensure data transfer and compatibility. The other major issue is the downtime for ECT staff and the public in learning how to use the new system. As many decision-makers on ECTs did not grow up with a computer as a constant companion, in-depth training and retraining is required every time a system is modified, which requires overworked decision-makers to allocate substantial time to learning new technologies, which they may not be willing or able to do. One judge interviewed still writes opinions in long hand and uses the law books on his shelf for legal research rather than the internet. He was not excited about having to learn a whole new way of dealing with information and the decision process.

**Traveling ECTs** may be necessary in jurisdictions covering large areas, with limited transportation infrastruc-

ture, and/or populations living in poverty. Bringing the court to the people may be the only way to provide access to justice, efficiency, and effectiveness in some cases. Australia has "flying judges" who may hear a variety of cases in communities far from the ECT. The Environment Court in the State of Amazonas, Brazil, has a bus outfitted as a court which travels to remote locations, both for site visits and for hearings. Still other jurisdictions, like Vermont, "borrow" the use of other districts' courtrooms for local hearings, and at least one (Ireland) rents space in local hotel conference rooms to hold a convenient court on site. The advantages of bringing justice to the place of the complaint or the complainants are many: decision-makers can make a site visit to better understand the issues; parties and witnesses do not have to bear the costs of travel to a distant center; employment is not interfered with; the affected public has easy access to participation; and the setting can be familiar, convenient, and less intimidating than a formal courtroom. An alternative used by Vermont is to sub-divide the state and assign cases based on their location. This assists the judges, who live in different locations, to reduce travel time and be more easily accessible.

**Alternate hours** of operation – beyond the traditional work hours and week – is another way to (1) accommodate parties and the public, and (2) maximize efficient use of limited courtroom facilities. Some ECTs offer night or weekend hours or extended hours on one or more days a week. This tool has been combined with traveling courts to enable the decision-maker to maximize the number of cases heard while traveling to remote locations.

**Relaxed rules** of ECT procedure and evidence have two substantial benefits. First, they permit court flexibility, streamlining the process and making it more open, user-friendly, understandable, and less intimidating. Judges for some ECTs do not wear formal robes or wigs, do not require participants to stand when they are entering or leaving the court room, and take testimony informally at a conference table rather than at a raised bench. Questions arise about whether such informality diminishes the dignity and respect afforded the decision-makers by litigants, and some – particularly upper level justices – believe that informality is not consistent with the weight of the proceedings. Generally, it is only possible to adopt such flexible rules and practices if the court or tribunal is a separate, independent entity that has been given expanded authority legislatively. Green benches, individual assigned green judges, or green sub-

tribunals within a larger tribunal do not usually have the power to adopt practices which are different from those of the “parent” body.

**Rapporteurs** are judges or decision-makers on a panel who are assigned a case that will ultimately be heard by all members of the panel. Their responsibility is to review the case in depth, on its merits and on the record presented, to do additional research, brief the full panel on the case, and provide a written recommendation for the decision to be made when it comes to hearing. This allows the workload to be spread out among the panel, who rely on and trust the rapporteur’s judgment and wisdom. A similar role is played by some judicial clerks in some jurisdictions.

#### BEST PRACTICES – CASE MANAGEMENT:

*Proactive use of case management tools can measurably enhance access to justice and ECT operations. The most helpful, according to both parties and decision-makers who were interviewed, are case management itself, directions hearings, ADR screening, and IT. However, each of the tools entail costs in time and money to establish, learn, implement, evaluate, and fine-tune. No jurisdiction studied has incorporated all the possible case management tools to improve efficiency and access to justice, in part because new tools are constantly being developed and made available to the judicial system.*

## 3.12 ENFORCEMENT TOOLS AND REMEDIES

**Access to justice depends on more than an open, efficient process for deciding environmental disputes. The decisions have to be carried out. An ECT must have adequate enforcement powers and remedy options available to it in order to do that. ECTs with civil, criminal, and administrative jurisdiction have the widest range of enforcement tools and remedies and the greatest ability to actually solve environmental problems beyond the courtroom.**

As mentioned at the beginning, access to justice can be viewed as a three-stage process – with a beginning, a middle, and an end. Prior chapters have dealt with the first two stages – access to and through the ECT’s courthouse door and access to proceedings which are “just, quick, and cheap” (to quote the Australian ECT motto). This chapter analyzes the third – the enforcement tools and remedies available to plaintiffs and decision-makers to carry out the ECT’s decision.

### 1. ENFORCEMENT POWERS OF ENVIRONMENTAL PROSECUTORS

A specialized environmental prosecutorial division within the larger national or state/provincial prosecutor’s office is an important enforcement tool, as it provides professional access to the ECT’s courthouse door, knowledgeably manages the process within the ECT, and aggressively pursues available ECT remedies. Environmentally trained, independent prosecutors with technical staff can significantly improve efficiency, competence, coverage, and credibility of the enforcement process. In nations where enforcement has been weak, where there is frequent political interference or corruption, where public access to environmental justice has been limited, or where there are not effective NGOs to represent environmental interests, the role of an independent environmental prosecutorial office is extremely important.

Some countries with ECTs and criminal environmental laws use non-specialized public prosecutors with varying degrees of success. Conversely, some jurisdictions with general courts (but not ECTs) nevertheless have specialized environmental prosecutors, the United States being an example with specialized environmental prosecutor units at the national level in the US Department of Justice, at the state level in Attorney General’s Offices, and even some local government legal offices. Designating a special environmental unit or office of the public prosecutor for investigating and prosecuting environmental crimes requires a sufficient volume of environmental complaints, an informed and trusting public, sufficient legal and support staff to handle the complaints, and may require additional budgetary appropriations.

Brazil has developed a truly unique office of public environmental prosecutors, within its national Ministério Público that can serve as a model. Brazil’s environmental prosecutors have extremely broad civil and criminal powers (studied in depth in Professor Lesley McAllister’s book, on which this section draws in part). The country has some of the strongest and most comprehensive environmental laws in the world on paper – and some of the worst environmental enforcement problems. Environmental enforcement historically was weak, politically controlled, and basically ineffective. In the mid-1980s, with the demise of the military dictatorship, political and legal leaders began drafting a new constitution and legislation to reinstate the rule of law and protect public interests.

“The Brazilian Ministério Público was made largely independent of the executive branch, constituting a sort of fourth branch of government, and prosecutors were granted individual autonomy and job security equivalent to judges” (McAllister, 195). Prosecutors are “empowered to defend environmental interests and other ‘diffuse and collective interests’” through the bringing of *both criminal and civil* public actions (*id.*, 4). It became a truly independent environmental enforcement arm of government, with a separate “guaranteed budget” (a fixed percentage of the budget not subject to yearly review) and with well-paid legal staff and access to technical experts both inside and outside the office. Prosecutors are protected civil servants; achieve their positions through competitive exams; are appointed with security of tenure; have good salaries equivalent to a judge; and cannot be fired, demoted, or transferred except in extreme situations. There is however little effective oversight of their actions.

Prosecutors’ powers include acting on a complaint from the public, an NGO, or a government agency or on their own volition. When Brazilian prosecutors are notified of a real or potential harm to a public interest, they are under a legal duty to act by investigating the public complaint. The actions to be taken by the prosecutor upon the filing of a complaint or the independent discovery of a possible environmental harm include investigation, negotiation with the parties, development of a “conduct adjustment agreement” when appropriate, or filing a case with the court.

The Ministério Público has filed thousands of cases in state and federal courts since passage of the 1985 Public Civil Law Act, which authorized prosecutors to file civil (non-criminal) cases, and the 1988 Constitution, which enhanced the role of the prosecutor as a separate watchdog and enforcement arm of government. This has necessitated the creation of specialized divisions of environmental prosecutors in some states, whose staff have in-depth training in environmental law and also include technical and scientific experts and investigators.

The Ministério Público is also unique in its relationship with environmental NGOs. There are estimated to be over 1,000 active environmental groups in Brazil today, many focused on a small area or a single issue. Most of these groups act in partnership with the office of the prosecutor. The Ministério Público often represents the interests of these groups so that they do not have to pursue problem solution or litigation on their own. The

partnerships work because the environmental group can avoid the costs and risks of a lawsuit, the prosecutor can expand its base of information and knowledge, and the environmental group can enhance public awareness and pressure through their connections with the press. Professor McAllister reports an interview with an environmental NGO activist who said, “If the Ministério Público didn’t exist, we wouldn’t achieve a third of what we do . . . . We pressure the Ministério Público, and the Ministério Público pressures the environmental agency or goes after the problem itself – that is how stuff gets done” (McAllister, 152). Prosecutors told us they view part of their role as providing access to environmental justice for the public, and to do so they must be environmental advocates and enforcers. However, those interviewed for the study also bemoaned the lack of sufficient budget and staff, both attorneys and investigators. As a downside, one prosecutor told us they felt NGOs have been slow to develop effectiveness because they rely on the prosecutors too much.

The volume of prosecutor cases in the 1990s and early 2000s was one factor in Brazil’s creation of specialist environmental courts – including federal trial courts in the states of Mato Grosso, Paraná, Rio Grande, and Santa Catarina; a state trial court in Amazonas State; and a state appellate environmental chamber in the court of appeals of São Paulo State. As general court caseloads increased, courts developed backlogs and long delays. A 2001 study in Rio de Janeiro “found that it took, on average, four years for environmental public civil actions to be decided, and the lawsuits that had not yet been decided had been under judicial consideration for periods ranging from one to twelve years. . . .” (McAllister, 172). Because courts do not tend to issue injunctions while a case is under consideration or appeal, long delays can result in irreparable environmental damage. A specialist court can hear such cases more quickly and effectively.

However, the majority of environmental cases resolved by the Ministério Público never go to court. Professor McAllister found that prosecutors were more likely to negotiate extrajudicial “conduct adjustment agreements” with the violators than to file public civil actions. According to one prosecutor, these negotiated agreements account for 70-80 % of their cases. Prosecutors prefer the negotiation route to avoid long court delays, costs, and procedural problems. “In sum, the emergence of the Ministério Público as a negotiator on behalf of environmental interests is a significant aspect

## BOX 15 PROSECUTOR-NGO PARTNERSHIPS – THE AMAZON-CARGILL CASE

Brazil's Amazon Region is one of the greatest remaining rainforests in the world. It is internationally significant because of the biodiversity it supports, the communities and indigenous people who depend on it, and the role it plays in contributing to the stability of our global climate. The integrity of this complex ecosystem needs to be preserved.

The NGO Greenpeace formed a strategic partnership with Brazilian federal environmental prosecutors to challenge the global commodity giant Cargill, because of its activities which involved clearing large areas of the rainforest in Para State to grow soy. Cargill built a US\$ 20,000,000 soy processing and shipping facility on the Amazon River at Santarém to export soy to Europe to feed chickens for fast-food restaurants, but did so without the required environmental impact assessment (EIA). In 2000, the Regional Federal Court in Para suspended all permits issued to Cargill until an EIA could be prepared. Over the next six years, Cargill filed seven unsuccessful appeals of this decision, while continuing to build then use the port. Finally, in 2007, the prosecutors instructed the national Environmental Agency, IBAMA, to “immediately stop the operations of Cargill port as well as condemn the North American multinational for illegal operation.” IBAMA did.

Federal Prosecutor Felipe Friz Braga stated, “This is a historical decision and it changes the pattern of lack of governance in the region.”



*The Cargill Soy Terminal on the Amazon River at Santarém, Brazil.*

*Credit: Cargill Grain Terminal on the Amazon River - Santarém, Pará (Courtesy of David G. McGrath, Woods Hole Research Center)*

Greenpeace Brazil representative Paulo Adano agreed, “This is an important day for the Amazon rainforest and for its people. Thanks to the constant efforts of the Federal Ministry of Public Prosecution in Para state, a big step forward has been taken in enforcing the responsible use of natural resources and bringing greater governance in the Amazon.”

(Environment News Service; Greenpeace; Cargill.)

of how the prosecutorial mode of enforcement has provided ‘access to justice’ for environmental claims” (McAllister, 161).

Yet these negotiated agreements are not reviewed or approved by the courts, and therefore do not have the same level of oversight and enforceability that judicial review provides. And prosecutors are not trained mediators who are held to a standard of ethics that prohibits intimidation or threat. The practice of negotiated agreements, although effective and efficient, is open to abuse by overly zealous prosecutors as well as underperformers, may not be based on sound scientific-technical data, allows little or no public participation, creates no judicial precedents, and cannot be appealed. The agreements also are designed to force a violator to change his behavior once harm has occurred, not applying the prevention and precautionary principles. A public prosecutor could run amok and target organizations or individuals based on a personal vendetta or a political point of view rather than representing the public interest. There have been, and probably will continue to be,

efforts to provide greater oversight and accountability for the office of the Ministério Público.

Another drawback to a system of prosecution requiring prosecutors to pursue all complaints brought to them is that there is no way to prioritize cases based on environmental importance or impact. In light of limited resources and diversion of limited resources to cases of little societal consequence, some prosecutors have explored reform measures. There have been demands to increase efficiency and job satisfaction by focusing on cases with the greatest significance, based on established criteria. This approach to targeting cases, however, has no constitutional basis and is rejected by those who believe in the obligation to pursue all complaints.

On balance, the expansion and strengthening of the role of the public prosecutor in Brazil is viewed as playing a very positive role in access to environmental justice and enforcement. The public views the office as an open, effective, and credible place to bring complaints, and believe their complaints are pursued effectively.

## 2. ENFORCEMENT POWERS AND REMEDIES OF ECTS

ECTs act and provide remedies by issuing “orders.” An order – variously called order, decree, ruling, judgment, or notice – is a statement by the ECT, typically in writing and made part of the record, that interprets law or defines legal relationships. Orders generally require or authorize parties or others to carry out (or not carry out) certain steps. “Interlocutory” orders are intermediate ones given after the commencement but before termination of a case, providing a temporary or provisional decision on some issue. “Final” orders are those that dispose of a decided case.

Remedies (those court orders which address and cure the harm) and enforcement (the court’s power to compel obedience to public laws and orders, and to ensure implementation of the ordered remedies) are critical to the effectiveness of ECTs. For maximum effectiveness, the ECT should have a broad array of such powers, including:

1. Injunctions
2. Damages
3. Restitution
4. Declaratory Relief
5. Contempt
6. Attorney Fees and Other Expense Allocation Awards
7. Administrative Review
8. Criminal Sanctions
9. “Innovative” Remedies

### • Injunctions

Injunctions are orders to do or not do some specific action for some specified period of time. The purpose of an injunction is to stop on-going harm, eliminate the danger or threat of harm being done in the future, and/or restore the original condition through cleanup or repair of damage that has already occurred. Four different types of injunctions are being utilized by ECTs today:

- (1) Preventive – an order to prevent a party from causing future injury or wrong (stop an operation or install pollution control equipment)
- (2) Restorative – an order to a party to correct past injury or wrong (cleanup waste, restore trees or land forms or wildlife)
- (3) Structural – an order by which the court actually takes over supervision of an institution, factory,

government office (seen as “continuing mandamus” in several jurisdictions)

- (4) Prophylactic – an order compelling behavior not otherwise specifically required by law (environmental education, specific community projects, additional conditions).

Injunctions can be ordered before, during, or after a case. The purpose of a pre-decision injunction is to preserve the status quo and thus avoid irreparable damage or loss while a trial or appeal is pending. The study found that many of the ECTs do not have this power, and, if they do, it is seldom used and may require a substantial security bond from the party requesting the injunction. The standard of proof for the complaining party is high, and it may be difficult to convince the court of the scope or cost of the damage which will be done if an action is allowed to begin or continue. Further, in those jurisdictions requiring a security bond, it is extremely difficult for the decision-makers to determine an appropriate amount to cover lost or delayed opportunity costs, should the plaintiff not prevail. Injunctions can also be included in a final order.

The European practice when a decision can be shown to result in substantial and irreparable harm to the environment is to use interim relief orders, which have the same effect as a temporary injunction, e.g. suspending an act, regulation, or permit until a full hearing can be held on the facts. The standards for an interim relief order are similar to those for an injunction:

“It is settled case-law that the judge hearing an application for interim measures may order interim relief only if it is established that such an order is justified, *prima facie*, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant’s interests, it must be made and produce its effects before a decision is reached in the main action. Where appropriate, the judge hearing such an application must also weigh up the interests involved.”

(*Commission of the European Communities v. Republic of Malta*, Order section 21.)

Mandamus (“we order” in Latin) or continuing mandamus is an extraordinary step, involving the court in on-going supervision or control of persons or institutions, including the government after a decision. It can be precipitated by failure of the parties to comply with prior orders or doubts about their future willingness or capac-

## BOX 16 ENFORCEMENT – THE MANILA BAY CASE – CONTINUING MANDAMUS

In 1999, renowned PIL attorney Tony Oposa Jr. (see also Box 5) filed suit against a total of 10 Philippine government agencies to force the cleanup, rehabilitation, and preservation of polluted Manila Bay, and ultimately succeeded in winning an order of the Philippines Supreme Court for “continuing mandamus” (on-going court supervision). The case was filed on behalf of NGO Concerned Residents of Manila Bay and individuals, and took nearly 10 years to win finally in the Supreme Court.

The Supreme Court’s unanimous opinion, authored by Justice Presbitero J. Velasco Jr. in December 2008, not only found the 10 government agencies in violation of the law and ordered them to undertake an incredibly comprehensive list of actions in concert, but also imposed a “continuing mandamus” requiring them to make quarterly progress reports to the Supreme Court. The opinion states:

“The cleanup and/or restoration of the Manila Bay is only . . . the initial stage of the long-term solution. The preservation of the water quality of the bay after the rehabilitation process is as important as the cleaning phase. . . . It thus behooves the Court to put the heads of the petitioner-department-agencies and the bureaus and offices under them on continuing notice about, and to enjoin them to perform, their mandates and duties towards cleaning up the Manila Bay and preserving the quality of its water to the ideal level. Under . . . ‘continuing mandamus,’ the Court may, under extraordinary circumstances, issue directives with the end in view of ensuring that its decision would not be set to naught by administrative inaction or indifference. In India, the doctrine of continuing mandamus was used to enforce directives of the court to clean up the length of the Ganges River from industrial and municipal pollution.”

*(Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay.)*



*Manila Bay*

*Credit: Rock Pring*



*Child and pollution in Manila Bay*

*Credit: Br Lawrence Lew, O.P.*

ity to comply, and is usually implemented by the court appointing an individual or a committee to carry out the supervision-control with directions to report back. The Supreme Court of the Philippines took this step in 2008 in the famous “Manila Bay case,” when justices received testimony that their previous orders to polluters to stop polluting and to clean up Manila Bay were not being complied with satisfactorily. A committee has been delegated the job of monitoring the cleanup and reporting back to the court, which then could take additional steps to enforce the cleanup order.

- **Damages**

Monetary damages are the most frequent remedy employed by ECTs. Damages are always computed after

the injury has occurred, and computing damages that are realistic and fair is a difficult task. Three types of damages are used:

1. Compensatory Damages
2. Punitive Damages
3. Natural Resources Damages (NRD)

Compensatory damage, a money award to compensate a party for personal physical or property injury, is the most frequently used type. It requires proof of the loss or harm, followed by calculation of the amount of money which would be sufficient to restore the harmed party to a “rightful position” or to “make them whole.” Questions to be determined in calculating the amount include the actual economic damage, the value of non-

economic or emotional damages (such as pain and suffering), and what future damages may result that are currently unknown (such as latent cancer). These are difficult questions for judges to answer, and may involve hard choices for the decision-makers between awarding damages and issuing an injunction or other remedy to prevent additional harm.

Punitive damages are authorized as remedies in only a few of the countries included in the study. They are an extraordinary remedy for conduct that is intentional, willful and/or malicious and are specifically designed to punish past wrongdoing, to deter future similar wrongdoing (by the party and others), and to make up for compensatory damages that the court views as insufficient. For example, punitive damages in the millions of dollars have been awarded in the United States against tobacco companies and in favor of plaintiffs who have been injured by smoking their products.

Natural Resource Damages (NRD), if permitted by law, may be sought by governments for damage to publicly owned or publicly used resources, such as public lands, parks, waters, trees, minerals, endangered species, migratory birds, anadromous fish, and marine mammals. They are regularly pursued in the United States, and their use is being developed or explored by other jurisdictions, including the EU, Brazil, Thailand, and China. Actual examples include a seabird colony exposed to an oil spill that reduces their numbers such that the colony needs substantial time and protection in order to recover; permanently destroyed wetlands filled and capped to isolate a toxic spill; and primal forests illegally logged which will take hundreds of years to re-grow. NRDs are authorized by specific legislation as a remedy, and are sought and collected only by government entities which manage natural resources, such as national parks, national forests, oceans, Native American tribal lands, or state-owned lands.

NRDs are in addition to standard cleanup orders or awards and cover past and continuing harm to or loss of natural resources not corrected by usual cleanups. The goal of NRD is to fully compensate the public for the loss or lost use of natural resources or the services they provide, thus theoretically compensating or reversing the loss of the nation's national heritage. An interesting stipulation attached to NRD awards in the United States is that the money must be used by the government agency to replace, restore, rehabilitate, or acquire equivalent natural resources.

The most controversial and difficult aspect of NRD, not surprisingly, is the calculation. A number of complex techniques for assessing and calculating NRD amounts have been developed and applied in actual cases, including (1) cost to replace the equivalent of the injured natural resource, (2) lost human use values of the natural resource, (3) human non-use values (such as aesthetic appreciation), (4) contingent valuation survey (how much would you pay to avoid or accept the loss?), plus (5) the actual costs of conducting the NRD assessment.

Perhaps the most famous NRD example is the 1989 Exxon Valdez ship disaster, in which over 40,000,000 liters of crude oil were spilled and spread over 28,000 square kilometers of Prudhoe Bay, Alaska. The spill resulted in the death of thousands of seabirds, otters, seals, eagles, orcas, and billions of fish eggs, and is continuing today. The eventual settlement included US\$ 900,000,000 in compensatory and punitive damages and US\$ 670,000,000 in NRD to be used for restoration of the marine ecosystem. A very recent NRD example is the Palmerton Zinc Smelter in Pennsylvania, USA, which was charged with 90 years of emissions of hazardous metals which contaminated thousands of acres of natural areas, forests, wildlife, and waterways. In August 2009, the current owners of the site acknowledged the harm the emissions had caused, and agreed to pay NRD damages of US\$ 21,400,000 in cash and contribution of valuable property.

- **Restitution**

Restitution focuses on the profit or gain achieved by the party who committed the illegal or harmful act, rather than on the loss to the wronged party. It is therefore considered a gains-based recovery, not a loss-based recovery. Restitution takes away unjust enrichment and restores to the wronged party the property lost or its value plus any financial windfall achieved by the wrongdoer. This remedy is much easier to calculate, as it is after the fact and more easily measured. An example is an illegal taking of property for the purpose of sale. The restitution measures could include the return of the property, gift of comparable property, or transfer of the proceeds of the sale to the owner who lost the property. A common event in many of the countries included in the study is illegal logging on public property. Restitution awards have included payment of the amount the logger received in the sale, and a mandated restoration or planting of trees. NRD can be viewed as a specialized form of restitution.

- **Declaratory Relief**

Declaratory relief is simply a court order interpreting (declaring) what the laws mean or require. The declaratory judgment clarifies the legal rights, duties, and relationships of the parties, but typically does not order any other remedy (such as injunction or damages). Examples include an NGO requesting the court to determine that a factory's air pollution adjacent to a community violates the constitution's guarantee of a "right to a healthy environment"; a group of fishermen requesting a declaratory judgment that water pollution caused by upstream farmers is injuring their fisheries and their ability to earn a living; or even determination of third party liability, such as a municipality that has been court ordered to clean up a waste dump requesting a declaratory judgment that its insurance company is responsible for the cleanup costs.

- **Contempt of Court**

This remedy is used by the court when a party is found to be disrespectful of the court, its orders, process, or powers. Examples in environmental cases can include failure to obey a court order (e.g. cleanup, cease and desist, timely restoration). Other grounds are showing disrespect for the judge, disruption of court proceedings, creating unnecessary delay, or actions that jeopardize a fair trial. Punishment, depending on the court authority, may be civil or criminal. Judges in common law courts may have greater contempt powers than civil law judges.

- **Attorney Fees and Other Expense Awards**

Under some environmental laws, the court may award attorney fees, expert witness fees, and other court costs to a plaintiff. Although a costs award usually is included in a final order, in some jurisdictions the decision-making body can even make advance cost awards before the case is heard, particularly important for access to justice in PILs since litigation costs are so expensive that many legitimate plaintiffs are afraid to challenge laws or actions. Other remedies impacting litigation expenses include court fee waivers, fee-shifting, and proponent funding. (See chapter 3.7.)

- **Administrative Review**

In addition to the remedies discussed above, a majority of the ECTs studied have the power to issue civil administrative orders in lawsuits against a government agency for action or inaction. These remedies include affirming, reversing, modifying, or remanding a government

decision; and/or approving, denying, amending, or revoking permits, projects, plans, or rules promulgated by the agency. These remedies are only available in those jurisdictions that support legal challenges to government action, not just actions against a private party.

- **Criminal Sanctions**

ECTs that have criminal or penal jurisdiction and sanctions can have extensive enforcement powers. The remedies can include interlocutory orders, incarceration, monetary fines, monetary reparation to victims, and, in at least one ECT jurisdiction, the death penalty. These powers can be used to leverage a variety of "innovative" or "creative" non-criminal remedies (see next section). A few ECTs, such as those in Brazil, New Zealand, and New South Wales, have both criminal and civil powers under different laws and an extremely wide scope of available remedies that can be tailored to fit the violation. Criminal environmental laws can "brand" a person or company with a criminal record, which in some cultures is acutely embarrassing (Brazil) and in others can disqualify the party from future government contracts, jobs, and other benefits. Civil or administrative environmental laws also give the ECT broad powers, except for incarceration and the death penalty. Otherwise, there is a great deal of overlap in the enforcement powers that an ECT can have under criminal or civil/administrative laws.

- **Innovative Remedies**

Some ECTs with criminal jurisdiction have been experimenting with creative sentencing, which the judges feel may be more effective than traditional remedies in both correcting the harm, restoring the environment, and preventing future violations. Creative sentences are being used both as alternatives to and in combination with traditional legal penalties. The most innovative ECT judge found in the study is in the State of Amazonas Environmental Court in Manaus, Brazil. There, Judge Adalberto Carim Antonio may give those convicted of environmental crimes a "choice" between fines and incarceration on the one hand or participating in an alternative sentence developed by the judge specifically to address the violation (see box 17).

Sentences he has ordered include:

- mandatory environmental "night school" (complete with a graduation diploma from the Ministry of the Environment)

## BOX 17 ENFORCEMENT – CREATIVE SENTENCING ALTERNATIVES IN THE AMAZON

Award-winning Judge Adalberto Carim Antonio is the trial judge of the State of Amazonas Environmental Court in Manaus, Brazil, a major city of 2,000,000 in the heart of the Amazon jungle. He takes pride in creating sentencing alternatives to jails and fines. Among his alternative sentences that he feels are more beneficial to the environment and “investments in the future”:

- Most defendants are required to attend “environmental education school,” a two-week night course with a diploma received from the state Minister of Environment upon completion
- Requiring hands-on mitigation or resolution of the environmental problem caused by the environmental crime is common
- For a major oil spill, a large petroleum company was ordered to do a cleanup *and* build a school, water system, health facility, and social center in the affected community
- For noise and air pollution, a bus company was sentenced to pay for and put posters about environmental crimes on the backs of its 500 buses

- Polluters often pay for billboards popularizing environmental laws, publication of environmental law handbooks, and environmental education comic books for students which the judge personally writes and illustrates (see photo)!
- Others convicted, in lieu of jail and/or fines, have financed the rehabilitation of a degraded inner city park, built drive-in recycling centers, or contributed support to a “Center for Re-education of Environmental Criminals”
- Individuals are sometimes given the option of working as volunteers at environmental projects

Perhaps the most remarkable success of Judge Carim’s innovative sentences was turning a convicted game poacher of Amazonian manatees (vulnerable to extinction on the IUCN Red List) into one of the country’s leading wildlife advocates. The judge gave him the choice of a prison sentence or a year volunteering at a manatee rehabilitation center. Choosing the latter, the defendant emerged a changed person, “The Man for Manatees.”

- diverse community service directly related to the environmental wrong, such as ordering polluting factories to pay for on-going monitoring and reporting on their pollution or requiring those who injure an endangered species to perform volunteer work for a wildlife preservation group protecting the injured species
- general community service, such as requiring developers to pay for ads describing environmental laws on buses and billboards, for restoration of public parks and monuments, and for building an environmental school
- publishing environmental comic books for distribution to elementary and high school students
- funding of specific “environmental” activities, such as education, building recycling centers, covering the government’s costs of prosecution, and creation of environmental trust funds for future use
- requiring polluters to obtain financial assurance bonds to guarantee future lawful behavior
- paying for environmental “watchdogs” within the company, responsible for reporting to the environmental monitoring agency and the court on violations.

Ordering participation in restorative justice (see chapter 3.9) has resulted in innovative and creative remedies that help restore harm done to a whole community or neighborhood beyond the harm done to the immediate

environment. Although this remedy was found in only two jurisdictions with a few cases, it has the potential for achieving greater, more satisfactory access to justice. The RJ process also has been included in collaborative decision-making efforts, both pre- and post-litigation, such as those conducted by the Keystone Center in Papua New Guinea for the communities impacted by the Ok Tedi Mine (See box 14).

Almost without exception, both the courts and tribunals studied have the power to make enforcement orders and provide remedies, not just offer advisory opinions. Generally speaking, the ECTs with the broadest jurisdiction (civil, criminal, and administrative) have the greatest array of enforcement tools, and those with the most limited jurisdiction have the fewest. Courts tend to have more comprehensive enforcement tools than tribunals, although some of the quasi-judicial tribunals included in the study had a very effective range of options. Given the enforcement tools available, some judges have been considerably more innovative and “problem-solving” than others in issuing orders. Of course, enforcement powers are wholly dependent upon the effective actions of the agencies responsible for ensuring that enforcement orders are carried out, and on-going vigilant observation by the public, plaintiff, and others.



Brazilian school children with environmental education “comic books” written and illustrated by innovative Amazonas State Environmental Court Judge Adalberto Carim Antonio.

*Credit: Judge Adalberto Carim Antonio.*

However, *monitoring* of enforcement is one of the major gaps in on-going access to justice, as most ECTs do not have the capacity to monitor enforcement and must therefore rely on the environmental agency, the parties to the case, the prosecutors, and local government to “watchdog” compliance with ECT decisions and orders. Public reporting of compliance may well be the most effective monitoring device. When compliance monitoring entails scientific measurement of pollutant discharges, the most efficient monitoring is done by the polluting entity. In the face of the profit motive, reliability of test data then can be an issue. So an ECT may make decisions designed to protect the environment, the community, and future generations which are never fully implemented. This appears to happen often in very large and inaccessible jurisdictions with huge multi-national corporations, such as logging interests in the Amazon River region of Brazil, and in jurisdictions where local government may be pro-development, inadequate, and/or corrupt.



Another creative sentencing alternative is to require convicted environmental offenders to perform community environmental services after work, such as planting trees.

*Credit: Judge Adalberto Carim Antonio.*

#### **BEST PRACTICES – ENFORCEMENT TOOLS AND REMEDIES:**

The wider the range of enforcement powers given an ECT, the more flexibility the decision-makers have in crafting creative and effective remedies. Providing sufficient enforcement options to allow judges to effectively resolve the environmental disputes, monitor outcomes, and/or sentence criminal violators is critical. The most important enforcement powers, according to the interviewees, are the ability to:

- Issue interim relief or preliminary injunctions at an early stage in proceedings
- Issue injunctions without a security bond at all stages
- Deny or substantially amend a development proposal
- Award substantial monetary fines or penalties, dedicated to environmental restoration or environmental protection
- Order remediation
- Design alternative and/or creative sentences to fit the violation.

*Broad enforcement powers outlined in authorizing legislation and more specifically incorporated in the ECT's practice and procedure rules provide the basis for a truly effective ECT. Amazonas, Brazil, is an excellent example, as its ECT has civil, administrative, and criminal enforcement power and the ability to problem-solve using creative sentencing.*



# 4

## The Need for On-Going Evaluation of ECTs

ECTs, once created, need to provide on-going evidence to the government and public that they are meeting the goals established for them. It is not enough to say generally that ECTs improve access to environmental justice, or that they process environmental cases faster, cheaper, and better. ECTs themselves will have to regularly provide evidence that *this ECT* improves access to environmental justice and meets the needs of its constituents. To date, no court or tribunal has developed or adopted an evaluation model to measure substantive outcomes, such as environmental protection, contribution to sustainability, or the protection of the interests of future generations.

Constant efforts to improve access to justice operationally will be necessary – by expanding visibility and accessibility, evaluating and integrating legal jurisdictions, reviewing standing requirements, reducing costs, providing access to scientific and technical expertise, streamlining the process, assuring that decision-makers are trained in environmental law, and generally managing the conflict resolution process more effectively and efficiently.

To measure objectively whether or not the ECT is accomplishing its goals, it is necessary to develop on-going processes for evaluating performance and outcomes. This can

be done through internal measurement of performance indicators, for which the New South Wales Land and Environment Court is a model (Preston 2008, 396-405) and/or through external government or civil society evaluative inspections, such as the Australian Government Productivity Commission (Australian Government Productivity Commission, ch. 7 on Court Administration). Some courts and tribunals include “user satisfaction surveys” in their self evaluation or charge a community advisory board with on-going performance review. All such efforts should be published for public review.

Performance evaluation models are needed to decide whether to keep, expand, reform, or disband an ECT. Several cutting-edge ECTs, such as Queensland and Vermont are currently considering adding staff to improve performance. Others, such as Austria and Finland, are considering abandoning their ECT approach as no longer needed based on performance analysis. Some are examining expanding their jurisdiction because of internal performance evaluation, like Trinidad and Tobago. Some appear to have discontinued operating their ECT, like Jamaica and the Bahamas. And several jurisdictions have passed legislation authorizing an ECT but not implemented it, including Tanzania and India.

What to measure? What is the appropriate analytic framework for evaluating ECTs? NSW Land and Environment Court Chief Judge Brian Preston, a leading expert on the evaluation process, states that the objectives of court administration boil down simply to three access-to-justice principles – “equity, effectiveness and efficiency” – Australian law’s requirement of “just, quick, and cheap” (Preston, 2008, 396-397).

There are many layers to each of these three basic performance principles. The Australian Government Productivity Commission uses a five-factor process-oriented analysis, requiring courts to:

- be open and accessible
- process matters in an expeditious and timely manner
- provide due process and equal protection before the law
- be independent yet publicly accountable for performance
- provide court administration services in an efficient manner.

(Australian Government Productivity Commission, 7.20, box 7.5.) Lord Woolf in his famous 1996 report on the civil justice system in England and Wales, *Access to Justice*, identified eight qualitative principles which the civil justice system should meet in order to ensure access to justice. His ideal system should:

- be *just* in the results it delivers
- be *fair* in the way it treats litigants
- offer appropriate procedures at a reasonable *cost*
- deal with cases with reasonable *speed*
- be *understandable* to those who use it
- be *responsive* to the needs of those who use it
- provide as much *certainty* as the nature of the particular cases allows
- be *effective*: adequately resourced and organized.

(Woolf, section 1, para 1.) Another view:

“Is effectiveness [of a court] to be measured by the substantive result of decision-making? Is it objective criteria such as statistics on appeal rate or appeal success? Is it subjective criteria such as notions of justice or peace, or promotion of objects of environmental legislation, including the imple-

mentation of ecologically sustainable development? Is effectiveness to be measured by procedural criteria? Is it the number of cases disposed of, either in total or by various means such as by adjudication, mediation or other settlement? Is it the time period between commencement of proceedings and disposal by the court?”

(Preston, 1999, 103.)

An ECT’s performance in achieving these objectives will be evaluated based on “output and outcome indicators” –

“Outputs are the actual services delivered. Outcomes are the impacts of these services on the status of an individual or group. . . . Measuring the performance of a court in delivering access to justice is more difficult for outcomes than for outputs of the system. . . . However, there are no accepted outcome indicators for measuring the quality of court administration.

“. . . The objectives of equity and effectiveness involve ensuring access to justice. Access to justice can be evaluated by reference to various outputs . . . both quantitative and qualitative. These include affordability, accessibility, responsiveness to the needs of users, and timeliness and delay measured by a backlog indicator and compliance with time standards. The objective of efficiency can be evaluated by output indicators including an attendance indicator and a clearance rate indicator.”

(Preston, 2008, 397-398). For a fuller discussion of the details of performance evaluation, see his article and references there cited.

The answers to these performance-evaluation questions will be various and will reflect the unique goals and characteristics of each particular ECT. But all ECTs should be prepared to incorporate on-going self-evaluation and external evaluation and should produce timely annual reports documenting evaluation results for public review. As ECT evaluation methodology evolves in the future, it may be possible to measure the degree to which the ECT’s decisions have or have not contributed to the substantive goal of sustainable development.

# 5

## 5.0 The Future

Based on the explosive growth in the number of specialized environmental courts and tribunals in the last two years, the number of jurisdictions currently considering creation of an ECT, and the new publications, capacity-building conferences, and international expressions of interest in this arena, it is clear that specialized ECTs are seen as a means to enhance access to justice and improve environmental dispute resolution. New ECTs are being proposed, considered, or developed around the globe, most recently in Chile, Bolivia, Thailand, the Philippines, China, Abu Dhabi, India, El Salvador, and Hawaii. Many established ECTs are also in a state of change, doing performance evaluations, expanding their knowledge of practices in other jurisdictions, and making reforms.

Based on the study interviews and insights, some predictions can be ventured. Chief among them, it appears that the increase in ECTs and their on-going reform and improvement will continue.

Also, changes in environmental law will continue, driven by increasing public demands for “access rights” and increasing public concern about specific environmental issues, such as climate change, sustainable development, extinction of species, loss of natural areas, and other public interests. Further, this changing legal and regulatory

environment will continue to drive change in the system for resolving environmental conflicts. As Judge Michael Rackemann of the Queensland Planning and Environment Court predicted at a recent environmental planning reform conference:

“Contemporary courts recognize that continuing vigilance is required to ensure that, so far as is practical, rules, procedures and practices remain relevant and appropriate. There is no final destination which, when reached, permits complacency. For that reason we should never presume to be ‘there yet.’” (Rackemann 2009, 1.)

Based on the interviews with experts and observations of current ECT reforms, it appears that a number of trends will characterize the ECTs of the future:

1. *Legal Complexity*: There will be continued growth in the number, coverage, and complexity of international, national, and local environmental laws.
2. *ECT Expansion*: The number of ECTs and countries creating ECTs will continue to increase.
3. *Problem-solving*: A paradigm shift will occur in ECTs as they move from a purely legalistic decisional approach to one combining law with a creative “problem-solving” approach, necessitating new legal thinking

and development of new precedents, remedies, and options that focus on solutions for environmental problems, not just applying existing legal tools.

4. *Flexibility*: Traditional complex practices will need to be reexamined in favor of simplified and “user friendly” rules of procedure and evidence; aggressive case management by court and staff; expanded public standing; an informal, transparent, and localized hearing process; and mechanisms to protect the public interest and future generations in addition to the parties to a conflict.
5. *Integration*: The integration of land use planning laws with environmental protection laws will continue. Environmental laws themselves will become more integrated, such as the trend toward “integrated pollution prevention and control” (IPPC) laws. ECTs’ jurisdiction, issues, and caseloads will expand as they deal more holistically with multi-factor environmental decisions.
6. *Collaboration*: There will be expanded collaboration and shared learning among ECT decision-makers from different nations, as ECT judges travel between courts, conferences, and training sessions to learn from their peers.
7. *Capacity Building*: Technical aid, training, and other supports for ECTs will continue to be provided by international government organizations, aid agencies, and NGOs (including UNEP, EUFJE, USAID, AECEN/ECO-Asia, ABA-ROLI, ACPECT, and others).
8. *Human Rights*: The growing recognition in constitutions and international laws of “human rights” to a healthful, safe, quality environment will expand ECTs’ jurisdiction and caseloads.
9. *IT*: Sophisticated information technology will become an increasing necessity for ECTs.
10. *ADR*: Mediation and other ADR processes will become more and more available to parties. Moreover, ECTs will increasingly insist on reviewing and approving ADR settlements, making them into enforceable court orders, and insuring protection of the current and future public interest, not just the interests of the parties.
11. *Costs*: ECT costs will come under control. Developments such as the demise of the “loser pays” rule, intervenor funding, PIL attorneys-fee awards, and other mechanisms will improve economic access to justice for parties, particularly those representing the public interest.
12. *Performance Evaluation*: More rigorous performance evaluation of ECTs will be demanded by the government, bar, and public. This will require ECTs to adopt self-evaluation as well as external community evaluation policies and procedures and to provide public reports.
13. *Public Participation*: The public’s confidence in and use of ECTs will grow.
14. *Expertise*: The expertise, training, and competency of judges and attorneys engaged in ECT cases will grow, a critical component of access to justice.
15. *Constituencies of Concern*: Access to justice will increase for those living in poverty, the unempow-



*Chinese Environmental Court judges and authors in a 2009 training program sponsored by the American Bar Association Rule of Law Initiative (ABA-ROLI) China Program, the Wuhan University Research Institute for Environmental Law (RIEL), and a local Guizhou Province water pollution agency.*

*Credit: Yan-mei Lin, ABA-ROLI China Program*

ered, minorities, indigenous peoples, and those representing the public interest of today and of future generations. These constituencies and their interests will be powerful agents for change in future ECT performance.

16. *Standing*: Restrictive standing rules will be eliminated both through legislation and ECT rules to support open access to justice for all members of the public, without using standing restrictions as a “door keeper” to the ECTs.
17. *International and Multilateral-Regional ECTs*: Transboundary environmental conflicts will increase in number, with issues of pollution, resource allocation, climate change, human rights, and the rights of future generations to a healthy sustainable environment. In turn, multinational bodies like the International Court of Justice, the European Court of Justice, and the United Nations will (re)consider creating ECTs to resolve environmental disputes between and among nations and to clarify the growing body of international environmental treaties and agreements.

These new ECT developments, changes, reforms, and innovations will be championed by charismatic, committed leaders from the courts, government, and public. Most ECTs are and will continue to be characterized by the leadership of one or more outstanding and visionary justices and judges or other civil society leaders. The changes will come about through local experimentation as well as an international exchange of best practices and capacity building already being led by dedicated ECT judges. Dr. Peter Adler’s new book, *Eye of the Storm Leadership*, describes modern strategies and tools that such visionary leaders can use to achieve change in the way environmental problems are solved in a variety of political contexts (Adler 2008).

Never has there been such a dynamic time for specialized environmental courts and tribunals. Our hope is that this comparative analysis will provide tools to assist ECT leaders and promoters in evaluating options and developing systems that will provide greater access to justice and better means of resolving environmental disputes that ensure sustainable development for all.



# Bibliography

## REFERENCES

- The Access Initiative (TAI) of the World Resources Institute (WRI). Websites at <http://www.accessinitiative.org/>; <http://www.wri.org/governance>; <http://www.wri.org/project/access-initiative>.
- Adler, P. S., et al. 2000. *Managing Scientific and Technical Information in Environmental Cases: Principles and Practices for Mediators and Facilitators*. Washington, DC: RESOLVE, Inc. Available from [http://www.resolv.org/publications/reports/Environmental\\_Cases.pdf](http://www.resolv.org/publications/reports/Environmental_Cases.pdf); <http://www.mediate.com/articles/wjc.cfm>.
- Adler, P. S., et al. 2007. The Ok Tedi Negotiations: Rebalancing the Equation in a Chronic Sustainability Dilemma. Available from <http://www.mediate.com/facilitation/keystoneOkTedi.cfm>.
- Adler, P. S. 2008. *Eye of the Storm Leadership: 150 Ideas, Stories, Quotes, and Exercises on the Art and Politics of Managing Human Conflicts*. Keystone, CO, USA: Mediate.com Publications. Available for sale from <http://www.eyeofthestormleadership.com/>.
- Administrative Conference of the United States. 1991. Specialized Review of Administrative Action (Recommendation No. 91-9). 56 *Federal Register* 67143 (U.S. Dec. 30, 1991). Available from: <http://www.law.fsu.edu/library/admin/acus/305919.html>.
- American Bar Association, National Conference of Specialized Court Judges (ABA-NCSCJ) website at <http://www.abanet.org/jd/ncscj>.
- Anderson, J. T. 2004. A Commentary on the Permit Reform Bill. *Vermont Bar Journal* 30:27 (Summer). Available from <http://69.39.146.6/Images/Journal/journalarticles/Summer%202004/permitreform.pdf>.
- Anker, H. T., et al. 2007. The Role of Courts in Environmental Law – a comparative study. PowerPoint available at <http://www.aka.fi/tiedostot/tiedostot/ENVLAW/comparative%20anker.pdf>.
- Asian Environmental Compliance and Enforcement Network (AECEN). 2008. Thailand Green Benches. Available from <http://www.aecen.org/submission.php?aid=76>.
- Australian Government Productivity Commission. 2009. *Report on Government Services 2009*. Available from <http://www.pc.gov.au/gsp/reports/rogs/2009>.
- Australian Law Reform Commission. 1985. *Standing in Public Interest Litigation* (ALRC Report No. 27). Canberra: Australian Government Publishing Service. Available from <http://www.austlii.edu.au/au/other/alrc/publications/reports/27/>.
- --- ---. 1995. Beyond the Doorkeeper – Standing to Sue for Public Remedies (ALRC Report No. 78). Canberra: Australian Government Publishing Service. Available from <http://www.austlii.edu.au/au/other/alrc/publications/reports/78/ALRC78.html>.
- Bachner, B. 2003. The Case for an Environmental Law Court in Hong Kong. *Hong Kong Lawyer* March 2003 (Part 1) and April 2003 (Part 2). Available from <http://www.hk-lawyer.com/2003-3/Mac03-enviro.htm> (Part 1) and <http://www.hk-lawyer.com/2003-4/Apr03-enviro.htm> (Part 2).
- Birdsong, B. C. 2002. Adjudicating Sustainability: New Zealand's Environment Court. *Ecology Law Quarterly* 29: 1-69.
- Birkhoff, J. E., P. Adler, et al. 2000. *Managing Scientific and Technical Information in Environmental Cases: Principles and Practices for Mediators and Facilitators*. Available from [http://www.resolv.org/publications/reports/Environmental\\_Cases.pdf](http://www.resolv.org/publications/reports/Environmental_Cases.pdf), <http://www.mediate.com/articles/wjc.cfm>.
- Bonine, John E. 2001. The Public's Right to Enforce Environmental Law, in *Handbook on Access to Justice* (S. Stec, ed.). Reprinted in Kravchenko & Bonine at 334, below.
- --- ---. 2008. Best Practices – Access to Justice (Agenda for Public Interest Law Reform). Draft available from <http://www.accessinitiative.org/resource/best-practices%E2%80%9494access-justice%E2%80%AA>.
- Bryan, P. E. 2006. *Constructive Divorce: Procedural Justice and Sociolegal Reform*. Washington, D.C.: American Psychological Association.
- Bynoe, M. L. 2006. Citizen Participation in the Environmental Impact Assessment Process in Guyana: Reality or Fallacy? *Law, Environment, and Development Journal* 2/1: 34-49. Available from <http://www.lead-journal.org/content/06034.pdf>.

- Candelaria, S. & M. M. Ballesteros. 2008. Designation of "Green Benches" in the Philippines. Available from [www.aecen.org/download/GreenCourtsPaper.pdf](http://www.aecen.org/download/GreenCourtsPaper.pdf).
- Cargill. 2009. Responsible soy production: Committed to Santarém. Available from <http://www.cargill.com/corporate-responsibility/pov/soy-production/santarem/index.jsp>.
- Carnwath, Lord Justice R. 1989. *Enforcing Planning Control*. London: Her Majesty's Stationery Office.
- --- ---. 2004. Judicial Protection of the Environment: At Home and Abroad. *Journal of Environmental Law* 16 (3): 315-327. Available from <http://jel.oxfordjournals.org/cgi/reprint/16/3/315>.
- --- ---. 2009. Tribunal Justice – a New Start. *Public Law* 48-69 (January 2009).
- Center for International Environmental Law (CIEL). 2008. 2008 Recipient of CIEL International Environmental Law Award: Antonio A. Oposa Jr. Available from [http://www.ciel.org/IEL%20Award/IEL\\_Award\\_2008.html](http://www.ciel.org/IEL%20Award/IEL_Award_2008.html).
- Central Empowered Committee of the Supreme Court of India website at <http://cecindia.org/aboutcec.html#>.
- Centre de Conférences Internationales. 2008. The Judge in Europe and Community Environment Law – Participants' Documentation. Available from [http://www.juradmin.eu/seminars/Paris2008/Documentation\\_participant.pdf](http://www.juradmin.eu/seminars/Paris2008/Documentation_participant.pdf).
- Cha, J. M. 2005. A Critical Examination of the Environmental Jurisprudence of the Courts of India. *Albany Law Environmental Outlook Journal* 10:197-228.
- Cheng, E. K. 2008. The Myth of the Generalist Judge: An Empirical Analysis of Specialization in the Federal Courts of Appeals. *Stanford Law Review* 61:519-572. Available from <http://lawreview.stanford.edu/content/vol61/issue3/Cheng.pdf>.
- Cho, H. S. 2007. Is Private Enforcement the Cure for Under-Enforcement of Environmental Law [in South Korea]? Unfinished working paper. Available from [http://www.law.wisc.edu/gls/documents/paper\\_hscho.doc](http://www.law.wisc.edu/gls/documents/paper_hscho.doc).
- Civil Society, International Courts and Compliance Bodies*. 2004. Eds T. Treves, et al. Cambridge: Cambridge University Press.
- Commission for Environmental Cooperation (CEC). Citizen Submissions on Enforcement Matters. Available from <http://www.cec.org/citizen/index.cfm?varlan=english>.
- Darpö, J. 2009. Justice Through Environmental Courts? Lessons Learned from the Swedish Experience. In *Environmental Law and Justice in Context*, edited by J. Ebbesson & P. Okowa. Cambridge: Cambridge University Press. Available from <http://www.unece.org/env/pp/a.to.j.htm> and [www.jandarpo.se/upload/EJ%20thru%20the%20courts\\_final.doc](http://www.jandarpo.se/upload/EJ%20thru%20the%20courts_final.doc).
- Day, M., R. Stein & W. Birtles. 2001. An Environmental Court. *New Law Journal* 151:638 (part 1) and 672 (part 2).
- Delhi Mediation Centre. 2007. *Annual Report 2006-2007*. Delhi: Delhi Mediation Centre. Available from <http://delhimediationcentre.gov.in/annualreport2006-07.pdf>.
- de Sadeleer, N., G. Roller & M. Dross. Access to Justice in Environmental Matters – Final Report. Study for the European Commission by the Environmental Law Research Centre. Available from [http://ec.europa.eu/environment/aarhus/pdf/accesstojustice\\_final.pdf](http://ec.europa.eu/environment/aarhus/pdf/accesstojustice_final.pdf).
- de Silva, L. 2008. Freedom of Information Victory in India (Jan. 28, 2008). Available on WRI website at <http://www.wri.org/stories/2008/01/freedom-information-victory-india>.
- Dillon, S. 1999. The Mirage of EC Environmental Federalism in a Reluctant Member State Jurisdiction. *New York University Law Journal* 8:1-73. Available from <http://www1.law.nyu.edu/journals/envtllaw/issues/vol8/1/v8n1a4.pdf>.
- District of Columbia [USA] Superior Court website. Available at <http://www.dccourts.gov/dccourts/superior/multi/index.jsp>.
- Dunne, S. M. 1990. Attorney's Fees for Citizen Enforcement of Environmental Statutes: The Obstacles for Public Interest Law Firms. *Stanford Environmental Law Journal* 9:1.
- Dutta, R. 2009. Access to Justice Victory in India (blog posting Feb. 14, 2009). Available on TAI website at <http://www.accessinitiative.org/blog/2009/02/access-justice-victory-india>.
- --- ---. 2009. Indian Court reminds Environment Tribunal about its duty to the future generation (blog posting June 7, 2009). Available on TAI website at <http://www.accessinitiative.org/blog/2009/06/indian-court-reminds-environment-tribunal-about-its-duty-future-generation>.
- Ebbesson, J. 2002. Information, Participation and Access to Justice: The Model of the Aarhus Convention. Background Paper No. 5 for Joint UNEP-CHCHR Expert Seminar on Human Rights and the Environment (14-16 Jan. 2002). Available from <http://www2.ohchr.org/english/issues/environment/environ/bp5.htm>.
- Echeverria, Carlos A. 2002. Costa Rica: Civil and Criminal Liability Due to Environmental Issues. *Inter-American Trade Report* 9(9):1, 4-9. Available from <http://www.natlaw.com/bulletin/2002/0210/troct02.pdf>.
- Emond, D. P. 1984. Co-operation in Nature: A New Foundation for Environmental Law. *Osgoode Hall Law Journal* 323-348.
- --- ---. 1991. The Greening of Environmental Law. *McGill Law Journal* 36:742-769.
- Environment News Service. 2007. Brazilian Government Shuttters Cargill Soy Plant, Port (March 29, 2007). Available from <http://www.ens-newswire.com/ens/mar2007/2007-03-29-02.asp> <http://www.waterconserve.org/shared/reader/welcome.aspx?linkid=71904>.

- Environmental Advisors Inc. 2008. Workshop Report on the GEF Regional Workshop on Policy, Legislation & Institutional Structures Related to IWCAM [Integrating Watershed and Coastal Areas Management in Caribbean Small Island Developing States] – 27-28 November 2007, Nassau, Bahamas. Available from <http://www.iwcam.org/search?SearchableText=regional> (scroll to bottom and follow links).
- Environmental court guide released for prosecutors. *The Citizen* (Johannesburg, SA, May 31, 2008). Available from <http://www.citizen.co.za/index/popup.aspx?Type=print&pDesc=45811,1,22>.
- The Environmental Court Proposal: Requiem, Analysis, and Counterproposal. *University of Pennsylvania Law Review* 123:676-696. Available from <http://www.jstor.org/stable/3311571>.
- Environmental Defenders Office of New South Wales (EDO-NSW). Website at <http://www.edo.org.au/edonsw/site/background.php>.
- Environmental Defenders Office of Tasmania (EDO-TAS). 2007. *Going It Alone: A Practical Guide for Unrepresented Litigants in the Resource Management and Planning Appeal Tribunal [of Tasmania, Australia]* (2d ed.). Hobart, Tas: Environmental Defenders Office (Tas) Inc.
- Environmental Review Tribunal [of Ontario, Canada]. 2008. Annual Report: April 1, 2007 to March 31, 2008. Available from [http://www.ert.gov.on.ca/files/AnnualR/Annual\\_Report\\_07-08.pdf](http://www.ert.gov.on.ca/files/AnnualR/Annual_Report_07-08.pdf).
- Environmental Review Tribunal [of Ontario, Canada]. 2008. 2008-2011 Business Plan. Available from [http://www.ert.gov.on.ca/files/BusinessP/BusinessP\\_0811.pdf](http://www.ert.gov.on.ca/files/BusinessP/BusinessP_0811.pdf).
- European Commission (EC), Environment Directorate-General. 2007. Inventory of EU Member States' measures on access to justice in environmental matters. Available from [http://ec.europa.eu/environment/aarhus/study\\_access.htm](http://ec.europa.eu/environment/aarhus/study_access.htm).
- EU Forum of Judges for the Environment. Website at <http://www.eufje.org>.
- Field, P. et al. 2009. Integrating Mediation in Land Use Decision Making. Available from <http://www.lincolnst.edu/pubs/PubDetail.aspx?pubid=1590>.
- Fonseca, R. de A. 2007. Introduction to Brazilian Environmental Law. PowerPoint presentation at University of Florida Center for Governmental Responsibility. Copy with authors.
- Foti, J., and The Access Initiative Staff (TAI). 2008. *Voice and Choice: Opening the Door to Environmental Democracy*. Washington, D.C.: The Access Initiative / World Resources Institute. Available from <http://www.wri.org/project/access-initiative>.
- Freitas, V. P. de. 2008. The Role of the Judiciary in the Implementation and Enforcement of Environmental Law [in Brazil]. Available from <http://www.bruylant.be/pdf/12824.pdf>.
- Goelz, D. J. 2009. China's Environmental Problems: Is a Specialized Court the Solution? *Pacific Rim Law and Policy Journal* 18:155-187. Available for free trial from <http://www.highbeam.com/doc/1G1-194277400.html>.
- Grant, M. 2000. Environmental Court Project: Final Report – Report to the Department of Environment, Transport and the Regions. London: Department of the Environment, Transport and the Regions.
- Greenpeace. 2007. Cargill's Amazon Port Facility Shut Down. Website article (March 24, 2007). Available from <http://www.greenpeace.org/usa/press-center/releases2/cargill-s-amazon-port-facility#>.
- Hallberg, Justice P. 2005. *Prospects of the Rule of Law*. Helsinki: Tekijä ja Edita Publishing Oy.
- Hassan, P. 2002. Ten Years After Rio: Implementing Sustainable Development – From Rio 1992 to Johannesburg 2002: A Case Study of Implementing Sustainable Development in Pakistan. *Singapore Journal of International and Comparative Law* 6:683-722.
- Henkin, L., et al. 2009. *Human Rights*. New York: Foundation Press.
- Higgs, S. 2007. Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court. *Environmental Law* 37:61-104. Available from [http://www.lclark.edu/org/envtl/objects/37-1\\_Higgs.pdf](http://www.lclark.edu/org/envtl/objects/37-1_Higgs.pdf).
- Hill, B. E., S. Wolfson & N. Targ. 2004. Human Rights and the Environment: A Synopsis and Some Predictions. *Georgetown International Environmental Law Review* 16:359.
- Hodits, T. C. 2006. The Fatal Flaw of Standing: A Proposal for an Article I Tribunal for Environmental Claims. *Washington University Law Review* 84:1907-1940. Available from <http://lawreview.wustl.edu/inprint/84-7/Hodits.pdf>.
- Horwich, J. L. 1998. Environmental Planning: Lessons from New South Wales, Australia in the Integration of Land-Use Planning and Environmental Protection. *Virginia Environmental Law Journal* 17:267-356.
- Hunter, D., J. Salzman & D. Zaelke. 2006. *International Environmental Law and Policy* (3d ed.). New York: Foundation Press.
- Institute for Law and Environmental Governance. 2003. *Community Guide to Environmental Management in Kenya*. Nairobi: ILEG. Available on order from <http://www.ilegkenya.org>
- International Court of Environmental Arbitration and Conciliation (ICEAC). Website at <http://iceac.sarenet.es>.
- International Court of the Environment Foundation (ICEF). Website at <http://www.icef-court.org>.
- International Court of Justice. 2009. *Wikipedia* (¶ 1.2). Available from [http://en.wikipedia.org/wiki/International\\_Court\\_of\\_Justice](http://en.wikipedia.org/wiki/International_Court_of_Justice).
- International Network for Environmental Compliance & Enforcement (INECE). 2005. Making Law Work: Environmental Compliance & Sustainable Development. Eds. D. Zaelke, D. Kaniaru & E. Kružíková. London: Cameron May Ltd. Portions available from <http://inece.org/makinglawwork.html>.

- Iqbal, M. 2008. Role of Judiciary in Providing Access to Justice and Enforcement. PowerPoint presentation at UNEP Asia Pacific Regional Conference on Environmental Justice and Enforcement (14-16 January 2008). Available from [www.roap.unep.org/program/Documents/Law08\\_presentations/Day1/Role\\_Judiciary\\_Manjit.ppt](http://www.roap.unep.org/program/Documents/Law08_presentations/Day1/Role_Judiciary_Manjit.ppt).
- Jacoby, C. Thurrock developer fends off insect group. *Land Gazette* (Jan. 29, 2009). Available from <http://www.landgazette.co.uk/index.php/legal-update/77-thurrock-developer-fends-off-insect-group>.
- Jeffery, M. I. 2002. Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making. *Arizona Journal of International and Comparative Law* 19:643-677. Available from <http://www.law.arizona.edu/journals/ajicl/AJICL2002/vol192/Jeffery.pdf>.
- Jennings, Judge Sir R. 1992. Need for Environmental Court? *Environmental Policy and Law* 22:312-314.
- Jones, G. A. 2006. Administrative Enforcement of Environmental Law in the United States. Copy with authors.
- --- ---. 2006. Administrative Enforcement Litigation – Civil Judicial Enforcement Litigation [comparison table]. Copy with authors.
- Judicial Conference of the United States, Federal Courts Study Committee. 1990. Federal Courts Study Committee Report. *Connecticut Law Review* 22:733.
- Kameri-Mbote, P. 2005. Towards Greater Access to Justice in Environmental Disputes in Kenya: Opportunities for Intervention. International Environmental Law Research Centre, Geneva Working Paper. Available from <http://www.ielrc.org/content/w0501.pdf>.
- Kaniaru, D. 2007. Environmental Tribunals as a Mechanism for Settling Disputes. *Environmental Policy and Law* 37:459-463.
- Kaulukukui, K. 2005. Establishing an Environmental Court in Hawaii: Lessons from the Environmental Courts of the United States. University of Hawaii William S. Richardson School of Law, Second Year Seminar Paper. Copy with authors.
- Keep America Beautiful Website. Toolbox for Community Change: Environmental Courts. Available from <http://www.kabtoolbox.org/toolbox.asp?id=357&rid=358>.
- Kerdeman, M. 2008. What Does Environmental Democracy Look Like? WRI website at <http://www.wri.org/stories/2008/04/what-does-environmental-democracy-look-like>.
- Keystone Center, Colorado, website at <http://www.keystone.org>.
- Khan [Shuvro], M. H. I. 2004. Environmental Dispute Settlement Perspectives of Bangladesh. Unpublished paper. Copy with authors.
- Krämer, Ludwig. 2006. Statistics on Environmental Judgments by the EC Court of Justice. *Journal of Environmental Law* 18:407-421. Available from <http://jel.oxfordjournals.org/cgi/rapidpdf/eql019v1>.
- Kravchenko, S. 2007. The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements. *Colorado Journal of International Environmental Law and Policy* 18:No.1 (2007). Available from <http://ssrn.com/abstract=1076746> (download SSRN).
- Kravchenko, S. & J. Bonine. 2008. *Human Rights and the Environment: Cases, Law, and Policy*. Durham, NC: Carolina Academic Press.
- Kuusiniemi, Justice Kari. 2008. National Administrative Courts and Community Environmental Law – Finland – Answer to the Questionnaire. Available from <http://www.juradmin.eu/seminars/Brussels2008/Finlande-Finland.pdf>.
- --- ---. 1999. Fundamental Rights and the Protection of Nature. *Turku Law Journal* 1:33-47.
- LaFranchi, S. 2005. Note: Surveying the Precautionary Principle's Ongoing Global Development: The Evolution of an Emergent Environmental Management Tool. *Boston College Environmental Affairs Law Review* 32:679-720. Available from [http://findarticles.com/p/articles/mi\\_qa3816/is\\_200501/ai\\_n14778670/](http://findarticles.com/p/articles/mi_qa3816/is_200501/ai_n14778670/).
- The Land and Environment Court of NSW. 2008. Annual Review 2007. Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_lec.nsf/pages/LEC\\_annualreviews](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_annualreviews).
- The Land and Environment Court of NSW. 2007. Annual Review 2006. Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_lec.nsf/pages/LEC\\_annualreviews](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_annualreviews).
- Langbein, J. H. 1985. The German Advantage in Civil Procedure. *University of Chicago Law Review* 52-823-866. Available from <http://www.navajocourts.org/Harmonization/ResearchMaterials/LANGBEIN%20w%20footnotes.pdf>.
- Lavrysen, Judge L. 2006. The role of national judges in environmental law. Available from <http://www.inece.org/newsletter/12/lavrysen.pdf>.
- Lavrysen, Judge L., Judge J. Van den Berghe & K. Van den Berghe. 2007. Report to the European Forum of Judges for the Environment (EUFJE) on the Belgian Situation Concerning Criminal Enforcement of Environmental Law. Available from <http://www.eufje.org/uploads/documentenbank/5d7f64df2e28b99f460307b6d2920b15.pdf>.
- Lavrysen, Judge L. 2008. Presentation of Aarhus related cases of the Belgian Constitutional Court. Paper presented at UNECE Access to Justice Regional Workshop for High-Level Judiciary (17-18 November 2008). Available from [www.unece.org/env/pp/a.to.j/Tirana%20Workshop%202008/LavrysenBelgianCasesArt.9.2.doc](http://www.unece.org/env/pp/a.to.j/Tirana%20Workshop%202008/LavrysenBelgianCasesArt.9.2.doc).
- The Law and Society Association (LSA). Website at <http://www.lawandsociety.org>.

- Law Commission of India. 2003. *Proposal to Constitute Environmental Courts*. 186<sup>th</sup> Report of the Law Commission of India (Sept. 2003). Available from <http://lawcommissionofindia.nic.in/reports/186th%20report.pdf>.
- Laycock, D. 1991. *The Death of the Irreparable Injury Rule*. Oxford: Oxford University Press.
- Leggatt, Sir A. 2001. *Tribunals for Users One System, One Service: Report of the Review of Tribunals by Sir Andrew Leggatt* ["The Leggatt Report"]. London: Department for Constitutional Affairs. Available from <http://www.tribunals-review.org.uk/leggatthtm/leg-fw.htm>.
- Lim, J. H. & S.-Y. Tang. Democratization and Environmental Policy-Making in Korea. *Governance* 4:561-582.
- Liptak, A. 2008. American Exception: In U.S., Expert Witnesses Are Partisan. *New York Times* (August 12, 2008). Available from [http://www.nytimes.com/2008/08/12/us/12experts.html?\\_r=2&partner=rssnyt&emc=rss&pagewanted=print&oref=slogin](http://www.nytimes.com/2008/08/12/us/12experts.html?_r=2&partner=rssnyt&emc=rss&pagewanted=print&oref=slogin).
- Lokur, Justice M. B. 2006. Environmental Law: Its Development and Jurisprudence [in India]. World Wildlife Fund-India 9<sup>th</sup> Greenlaw Lecture (July 3, 2006). Available from [http://assets.wwfindia.org/downloads/green\\_law\\_lecture\\_july\\_3\\_2006.pdf](http://assets.wwfindia.org/downloads/green_law_lecture_july_3_2006.pdf).
- Macrory, R. & M. Woods. 2003. *Modernising Environmental Justice: Regulation and the Role of an Environmental Tribunal*. London: University College London. Available from <http://www.ucl.ac.uk/laws/environment/tribunals>.
- Macrory, R. 2008. *Regulation, Enforcement and Governance of Environmental Law*. London: Cameron May Ltd.
- Makoloo, M. O., B. O. Ochieng' & C. O. Oloo. *Public Interest Environmental Litigation in Kenya: Prospects and Challenges*. Available on order from <http://www.ilegkenya.org/>.
- McAllister, L. K. 2008. *Making Law Matter: Environmental Protection & Legal Institutions in Brazil*. Stanford, California: Stanford University Press.
- McAuslan, P. 1991. The Role of Courts and Other Judicial Type Bodies in Environmental Management. *Journal of Environmental Law* 3:195-208.
- McClellan, Justice P. 2004. Recent Changes and Reforms at the Land and Environment Court. Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_ Lec.nsf/vwFiles/Speech\\_27Jul04\\_McClellan.pdf/\\$file/Speech\\_27Jul04\\_McClellan.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_ Lec.nsf/vwFiles/Speech_27Jul04_McClellan.pdf/$file/Speech_27Jul04_McClellan.pdf).
- --- ---. 2005. Expert Evidence – The Experience of the Land and Environment Court. Keynote address to the National Forensic Accounting Conference (24-25 February 2005). Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_ Lec.nsf/vwFiles/Speech\\_24Feb05\\_McClellan.pdf/\\$file/Speech\\_24Feb05\\_McClellan.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_ Lec.nsf/vwFiles/Speech_24Feb05_McClellan.pdf/$file/Speech_24Feb05_McClellan.pdf).
- Nair, M., T. N. Godavarman v. Union of India – The Application of “Continuing Mandamus” as a Tool for Sustained Vigilance of Forest Conservation. *The International Environmental News* (New Delhi, June 2005). Available from [http://www.abanet.org/intlaw/committees/business\\_regulation/environment/nairreportjune05.pdf](http://www.abanet.org/intlaw/committees/business_regulation/environment/nairreportjune05.pdf).
- Nanda, V. P. & G. Pring. 2003. *International Environmental Law & Policy for the 21<sup>st</sup> Century*. Ardsley, NY: Transnational Publishers.
- Nardi Jr., D. J. 2008. Greening Environmental Rights: Separating Law and Morality in Environmental Public Interest Litigation in Pakistan. *Environmental Law Reporter* 38:10029-10038.
- National Center for State Courts (NCSC), Specialty Courts Information Center website, <http://www.ncsconline.org/wc/courttopics/ResourceCenter.asp?id=17>.
- Nature Conservation Council of NSW Inc. 1999. *Promise, Perception, Problems and Remedies: The Land & Environment Court and Environmental Law 1979-1999 – Conference Proceedings*. Sydney: Nature Conservation Council of NSW.
- New Zealand Ministry for the Environment. 2009. Environmental Legal Assistance Fund (ELA Fund) information guide for applicants. Available from <http://www.mfe.govt.nz/withyou/funding/ela-information-guide.html>.
- Nolan Jr., J. L. 2009. *Legal Accents, Legal Borrowing: The International Problem-Solving Court Movement*. Princeton, NJ, USA: Princeton University Press.
- Observatory for Institutional and Legal Changes of the University of Limoges. 2007. *Administrative Justice in Europe*. Paris: Mission de Recherche Droit et Justice.
- O'Hart, A., Environmental Defenders Office (Queensland). 2006. *The Community Litigants Handbook: Using the Planning Law to Protect Our Environment*. Brisbane: Environmental Defenders Office (Qld) Inc. Available for purchase from <http://www.edo.org.au/edonq/website/general/the-community-litigants-handbook.html>.
- Oliver, Marlene. 2007. Implementing Sustainability – New Zealand's Environment Court-Annexed Mediation. In *Indian Society of International Law: Fifth International Conference on International Environmental Law* 498-519. New Delhi: Indian Society of International Law. Available from [http://www.leadr.co.nz/db/images/M\\_PDFs/marlene%20oliver%20paper.pdf](http://www.leadr.co.nz/db/images/M_PDFs/marlene%20oliver%20paper.pdf).
- Pearlman, Chief Judge M. L. 2000. The Land and Environment Court of New South Wales: A Model for Environmental Protection. *Water, Air, and Soil Pollution* 123:395-407 (Kluwer-Springer).
- Peel, J. 2006. When (Scientific) Rationality Rules: (Mis)Application of the Precautionary Principle in Australian Mobile Phone Tower Cases. *Journal of Environmental Law* 19:103-120. Available from <http://jel.oxfordjournals.org/cgi/content/full/19/1/103>.
- Permanent Court of Arbitration. Website at <http://www.pca-cpa.org>.
- Petkova, E., et al. 2002. *Closing the Gap: Information, Participation, and Justice in Decision-Making for the Environment*. Washington: The Access Initiative / World Resources Institute. Available from <http://www.accessinitiative.org/resource/closing-gap>.

- Potter, L. E., et al. 1995. Encouraging Proenvironmental Behavior: The Environmental Court as Contingency Manager. *Environment and Behavior* 27 (2): 196-212.
- Potter, L. E. 1995. The Environmental Court of Memphis, Shelby County, Tennessee: The Past, The Present, and the Future. *Georgia Law Review* 29:313-323.
- Preston, B. & Smith, J. 1999. Legislation Needed for an Effective Court. In *Promise, Perception, Problems and Remedies: The Land and Environment Court and Environmental Law 1979-1999*, pages 103-121. Sydney: Nature Conservation Council.
- Preston, Justice B. J. 2006. Appointment of Court Appointed Expert Witnesses in the Land and Environment Court. Address to the Urban Development Institute of Australia (21 March 2006). Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_dec.nsf/vwFiles/Speech\\_21Mar06\\_Preston.pdf/\\$file/Speech\\_21Mar06\\_Preston.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_dec.nsf/vwFiles/Speech_21Mar06_Preston.pdf/$file/Speech_21Mar06_Preston.pdf).
- --- ---. 2007a. Principled sentencing for environmental offences – Part 1: Purposes of sentencing. *Criminal Law Journal* 31:91-100. Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_dec.nsf/vwFiles/Speech\\_16Oct06\\_Preston.pdf/\\$file/Speech\\_16Oct06\\_Preston.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_dec.nsf/vwFiles/Speech_16Oct06_Preston.pdf/$file/Speech_16Oct06_Preston.pdf).
- --- ---. 2007b. Principled sentencing for environmental offences – Part 2: Sentencing considerations and options. *Criminal Law Journal* 31:142-164. Available from same site.
- --- ---. 2007c. Practice and Procedure in the Land and Environment Court of New South Wales. Paper presented to the Planning & Development Law Conference (8-9 February 2007). Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_dec.nsf/vwFiles/Speech\\_08Feb07\\_Preston.pdf/\\$file/Speech\\_08Feb07\\_Preston.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_dec.nsf/vwFiles/Speech_08Feb07_Preston.pdf/$file/Speech_08Feb07_Preston.pdf).
- --- ---. 2007d. Conciliation in the Land and Environment Court of N[ew] S[outh] W[ales]: History, Nature and Benefits. *Local Government Law Journal* 13:110-130. Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_dec.nsf/vwFiles/Speech\\_03Aug07\\_PrestonCJ.pdf/\\$file/Speech\\_03Aug07\\_PrestonCJ.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_dec.nsf/vwFiles/Speech_03Aug07_PrestonCJ.pdf/$file/Speech_03Aug07_PrestonCJ.pdf).
- --- ---. 2007e. Administrative Law in an Environmental Context: An Update. *Australian Journal of Administrative Law* 15:11-33. Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_dec.nsf/vwFiles/Paper\\_22Aug07\\_PrestonCJ.pdf/\\$file/Paper\\_22Aug07\\_PrestonCJ.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_dec.nsf/vwFiles/Paper_22Aug07_PrestonCJ.pdf/$file/Paper_22Aug07_PrestonCJ.pdf).
- --- ---. 2007f. The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse. *Australian Dispute Resolution Journal* 19:72 (Part I) and 19:144 (Part II) (2008). Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_dec.nsf/pages/LEC\\_speeches\\_and\\_papers#preston](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_dec.nsf/pages/LEC_speeches_and_papers#preston).
- --- ---. 2008. Operating an environment court: The experience of the Land and Environment Court of New South Wales. *Environmental and Planning Law Journal* 25:385-409. Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll\\_dec.nsf/pages/LEC\\_speeches\\_and\\_papers#preston](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_dec.nsf/pages/LEC_speeches_and_papers#preston).
- Pring, G. W. & P. Canan. 1996. *SLAPPs: Getting Sued for Speaking Out*. Philadelphia: Temple University Press.
- Pring, G. 1998. Sustainable Development: Historical Perspectives and Challenges for the 21<sup>st</sup> Century. Chapter 1 in UN Development Programme, *Proceedings of the Workshop on the Sustainable Development of Non-Renewable Resources Towards the 21<sup>st</sup> Century* 13-29.
- Pring, G. & S. Noé. 2002. The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development. Chapter 1 in *Human Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources*, edited by D. Zillman, et al. Oxford: Oxford University Press.
- Pring, G. & C. Pring. 2008. Specialized Environmental Courts and Tribunals: Improved Access to Justice for Those Living in Poverty. Presentation at the International Union for the Conservation of Nature (IUCN) Academy of Environmental Law (AEL), Mexico City, Mexico, Nov. 13, 2008, publication pending 2010. Available from <http://www.law.du.edu/index.php/ect-study>.
- Pring, G. & C. Pring. 2009. Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment. Presentation at the Oregon Review of International Law Symposium, University of Oregon, Eugene, OR, Feb. 20, 2009, to be published in *Oregon Review of International Law* 11(2) (forthcoming 2010). Available from <http://www.law.du.edu/index.php/ect-study>.
- Queensland Government, Department of Local Government, Planning, Sport and Recreation. 2007. Planning for a Prosperous Queensland: A reform agenda for planning and development in the Smart State. Available from <http://www.dip.qld.gov.au/resources/plan/planning-reform/part-1-reform-agenda-full.pdf>.
- Rackemann, Judge M. & Judge A. Wilson. 2004. The Planning and Environment Court: It's in the Way That You Use It. Address at 2004 Queensland Environmental Law Association. Available from [http://www.qela.com.au/\\_dbase\\_upl/3\\_Rackemann\\_Wilson.pdf](http://www.qela.com.au/_dbase_upl/3_Rackemann_Wilson.pdf).
- Rackemann, Judge M. 2006. The Planning & Environment Court – Judging Under the IPA. Paper presented to the 2006 Annual Conference of the Queensland Environmental Law Association. Copy with authors.
- --- ---. 2009. The Planning and Environment Court – Are We There Yet? Paper presented to the 2009 Queensland Environmental Law Association Conference. Copy with authors.
- Raffensperger, C. 2006. In Thailand, A Green Court Rethinks Law. *The Environmental Forum* 23:18. Available from <http://www.sehn.org/pdf/sept-oct2006.pdf>.
- Raines, S. & R. O'Leary. 2000. Switching Hats: Issues and Obstacles Facing Administrative Law Judges Who Mediate EPA Enforcement Disputes. *Government, Law and Policy Journal* 2(2):1-6. Available from <http://www.nysalja.org/switchinghats.pdf>.

- Rajamani, Lavanya. 2007. Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability. *Journal of Environmental Law* 19:293-321. Available for sale from <http://jel.oxfordjournals.org/cgi/content/full/19/3/293>.
- Ratliff, D. 2003. The PCA Environmental Arbitration and Conciliation Rules. *OGEL Journal (Oil, Gas & Energy Law Intelligence)* 1. Available for subscription from <http://www.ogel.org/article.asp?key=14>.
- Riesel, D. 1997. *Environmental Enforcement: Civil and Criminal*. New York City: Law Journal Press.
- The Role of the Judiciary in Environmental Governance*. 2009. Eds. L. J. Kotzé & A. R. Paterson. The Hague: Kluwer Law International.
- Rolfe, J. 2009. Planning and Environment Courts and Tribunals – Australian Capital Territory, New South Wales, Northern Territory, Queensland and Tasmania [Australia]. Memorandum to authors. Copy with authors.
- Rottman, D. B. 2000. Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialized Judges)? *American Judges Association Court Review* 37:22-27. Available from <http://aja.ncsc.dni.us/courtrv/cr37/cr37-1/CR9Rottman.pdf>.
- Royal Commission on Environmental Pollution. 2002. Twenty-third Report: Environmental Planning. London: Her Majesty's Stationery Office.
- Ruddock, K., Environmental Defender's Office Ltd [of New South Wales Australia]. 2008. Discussion paper on Access to Justice in the Land and Environment Court (18 February 2008) Available from [http://www.edo.org.au/edonsw/site/pdf/subs08/access\\_justice\\_lec080218.pdf](http://www.edo.org.au/edonsw/site/pdf/subs08/access_justice_lec080218.pdf).
- Ryan, P. 2002. Court of Hope and False Expectations: Land and Environment Court 21 Years On. *Journal of Environmental Law* 14:301-315. Available for sale from <http://jel.oxfordjournals.org/cgi/reprint/14/3/301>.
- Sakumoto, N. 2007. Development of Environmental Law and Legal Reform in Indonesia. Chapter VIII in Sakumoto, N. & H. Juwana, *Reforming Laws and Institutions in Indonesia: An Assessment*. Chiba, Japan: Institute of Developing Economies, Japan External Trade Organization. Available from <http://www.ide.go.jp/English/Publish/Download/Asedp/074.html>.
- Sands, P. & J. Werksman. 1995. Procedural Aspects of International Law in the Field of Sustainable Development: Citizens' Rights. In *Sustainable Development and Good Governance*, edited by K. Ginther, et al.. Leiden: Marinus Nijhoff.
- Sands, P. 2003. *Principles of International Law* (2d ed.). Cambridge: Cambridge University Press.
- Santo, B. G. 2009. Health Courts: The Effect of the Proposed Facelift to the Current United States Medical Malpractice System on the Defensive Practice of Medicine and Related Healthcare Costs. *American Bar Association Health eSource* 5(7). Available from <http://www.abanet.org/health/esource/Volume5/07/>.
- Santos, S.-C. H. 1992. The role of the Ministério Público in the Protection of Human Rights and the Environment. Paper of the Ministério Público [Prosecutors Office] of the State of Paraná, Brazil. Copy with authors.
- Scannell, Y. 2002. Access to Justice in Environmental Matters in Ireland. In *Access to Justice in Environmental Matters in the EU*, at 279-312. The Hague: Kluwer.
- Scottish Executive Environment Group. 2006. Strengthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland. Available from <http://www.scotland.gov.uk/Publications/2006/11/22152827/0>.
- Scottish Government. 2005. Environmental Courts – Experience in Other Countries. Copy with authors.
- Shelton, D. & A. Kiss. 2005. *Judicial Handbook on Environmental Law*. Nairobi: UNEP. Available from [http://www.UNEP.org/Law/PDF/JUDICIAL\\_HBOOK\\_ENV\\_LAW.pdf](http://www.UNEP.org/Law/PDF/JUDICIAL_HBOOK_ENV_LAW.pdf).
- Similä, J., A. Inkinen & J. Q. Tritter. Public Participation by Appeal – Insights from Empirical Evaluation in Finland. *Journal of Environmental Law* 20:391-416. Available for sale from <http://jel.oxfordjournals.org/cgi/content/full/20/3/391>.
- Singer, D. 1992. The Use of ADR Methods in Environmental Disputes. *The American Arbitration Association Arbitration Journal* 47:55-67 (March 1992).
- Smith, J. Environmental Defender's Office Ltd [of New South Wales Australia]. 2005. Jurisprudence and the Land and Environment Court. Paper delivered at 2005 EPLA Conference (21 October 2005). Copy with authors.
- Sohn, L. B. 1982. The New International Law: Protection of the Rights of Individuals Rather Than States. *American University Law Review* 32:1-64.
- Southgate, M. 2000. Environmental courts – weighing up the evidence. *Town & Country Planning Journal* 221-223 (July/August 2000).
- Stein, Justice P. L. 1995. A Specialist Environmental Court: An Australian Experience. In *Public Interest Perspectives in Environmental Law*, eds. D. Robinson & J. Dunkley (Wiley Chancery).
- --- ---. 1999. New directions in the prevention and resolution of environmental disputes – specialist environmental courts. Available online at [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_stein\\_060399a](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_060399a).
- --- ---. 2000. Down Under Perspective of the Environmental Court Project. Available from [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_stein\\_270600](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_270600).
- --- ---. 2002. Specialist environmental courts: the Land and Environment Court of New South Wales, Australia. *Environmental Law Review* 4:5-25.

- --- ---. 2002. Use of Expert Assessors in the Hearing of Environmental Cases. Presentation to the Queensland Planning and Environment Court Annual Conference (26 March 2002). Available from [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_stein\\_260302](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_260302).
- Stephens, C., S. Bullock & A. Scott. 2001. Environmental justice: Rights and means to a healthy environment for all. London: Economic and Social Research Council Global Environmental Change Program et al. Available from [http://www.foe.co.uk/resource/reports/environmental\\_justice.pdf](http://www.foe.co.uk/resource/reports/environmental_justice.pdf).
- Stephens, T. 2009. *International Courts and Environmental Protection*. Cambridge: Cambridge University Press.
- Stone, C. 1972. Should Trees Have Standing?: Toward Legal Rights for Natural Objects. *Southern California Law Review* 45:450.
- Stuart, K. K. & C. A. Savage. (1997). The Multi-Door Courthouse: How It's Working. Available from [http://www.courts.state.co.us/userfiles/File/Administration/Policy\\_and\\_Program/ODR/documents/The%20Multi%20Door%20Courthouse%20How%20it's%20working.doc](http://www.courts.state.co.us/userfiles/File/Administration/Policy_and_Program/ODR/documents/The%20Multi%20Door%20Courthouse%20How%20it's%20working.doc).
- Talbot, Justice R. N. 2003. Pre-Hearing Procedures in the Land and Environment Court. Presentation at the Environmental Planning Law Association Conference (28-29 November 2003). Available from [http://www.lawlink.nsw.gov.au/lawlink/lec/ll Lec.nsf/vwFiles/Speech\\_29Nov03\\_TalbotJ.pdf/\\$file/Speech\\_29Nov03\\_TalbotJ.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll Lec.nsf/vwFiles/Speech_29Nov03_TalbotJ.pdf/$file/Speech_29Nov03_TalbotJ.pdf).
- Tasmania [Australia] Government, Steering Committee. 2009. Review of the Tasmanian Planning System. Available from <http://www.justice.tas.gov.au/landuseplanning/planningsystemreview>.
- Taylor, M., et al. 1999. Using Mediation in Canadian Environmental Tribunals: Opportunities and Best Practices. *Dalhousie Law Journal* 22:51-124.
- Tilleman, W. A. 1996. Environmental Appeal Boards: A Comparative Look at the United States, Canada, and England. *Columbia Journal of Environmental Law* 1-102.
- Trinidad & Tobago, Environmental Commission. 2006. *Annual Report 2005*. Port of Spain, Trinidad: Environmental Commission. Available from [http://www.ttenvironmentalcommission.org/publications/annual\\_report/Annual%20Report%202005.pdf](http://www.ttenvironmentalcommission.org/publications/annual_report/Annual%20Report%202005.pdf).
- --- ---. 2009. Statistics of Matters filed with the Environmental Commission October 30, 2000 – May 12, 2009. Copy with authors.
- Union of Concerned Scientists. 2008. Hundreds of EPA Scientists Report Political Interference over Last Five Years. Available from [http://www.ucsusa.org/news/press\\_release/hundreds-of-epa-scientists-0112.html](http://www.ucsusa.org/news/press_release/hundreds-of-epa-scientists-0112.html).
- UN Development Programme (UNDP). 2005. *Programming for Justice: Access for All – A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice*. Available from <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/tools/index1.html>.
- UN Economic Commission for Europe (UNECE) Committee on Environmental Policy. 2001. Workshop on Access to Justice in Environmental Matters Under the Aarhus Convention. CEP/WG.5/2001/5 (3 October 2001). Available from <http://www.unece.org/env/documents/2001/cep/wg.5/cep.wg.5.2001.5.e.pdf>.
- --- ---, Aarhus Clearinghouse for Environmental Democracy, website available at <http://aarhusclearinghouse.unece.org/>.
- UN Environment Programme (UNEP). 2006. *Online Manual on Compliance with and Enforcement of Multilateral Environmental Agreements*. Available from [http://www.unep.org/dec/MEA\\_Manual.html](http://www.unep.org/dec/MEA_Manual.html).
- --- ---. 2007. Experts Group on Access to Environmental Justice in the Caribbean SIDS, Barbados, 10-11 December 2007. Available from [http://www.pnuma.org/deramb/documentos/Conclusions\\_Workshop\\_Barbados\\_2007.pdf](http://www.pnuma.org/deramb/documentos/Conclusions_Workshop_Barbados_2007.pdf).
- --- ---. 2009. Draft guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters. UNEP/GC.25/INF/15/Add.2 (Oct. 29, 2008). Available from [http://www.unon.org/confss/doc/unep/unep\\_gc/gc\\_25/gc\\_25\\_inf\\_15\\_Add.2/K0842393.pdf](http://www.unon.org/confss/doc/unep/unep_gc/gc_25/gc_25_inf_15_Add.2/K0842393.pdf).
- US Agency for International Development (USAID). 2008. Success Story: Philippines' Green Benches to Deliver Environmental Justice. Available from [http://www.usaid.gov/rdma/documents/RDMA\\_SS\\_AECEN\\_Green\\_Benches082608.pdf](http://www.usaid.gov/rdma/documents/RDMA_SS_AECEN_Green_Benches082608.pdf).
- US Department of Justice, Land and Natural Resources Division (USDOJ-LNRD). 1973. *Report of the President, Acting Through the Attorney General, on the Feasibility of Establishing an Environmental Court System*. Washington, D.C.: U.S. Department of Justice.
- US Department of Justice, National Institute of Justice (USDOJ-NIJ), Specialized Courts website, <http://www.ojp.usdoj.gov/nij/topics/courts/specialized-courts.htm>.
- US Environmental Protection Agency / Environmental Appeals Board (EPA/EAB). 2006. A Citizens' Guide to EPA's Environmental Appeals Board. Available from [http://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/General+Information/Environmental+Appeals+Board+Guidance+Documents?OpenDocument](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Environmental+Appeals+Board+Guidance+Documents?OpenDocument).
- --- ---. Community-Based Risk Assessment (CBRA) website at <http://www.epa.gov/ncer/cbra/index.html>.
- University of Denver Sturm College of Law, Environmental Law Clinic website at <http://www.law.du.edu/index.php/student-law-office-clinical-programs/environmental-law-clinic>.
- Vempalli, Lakshmi Lella. 2006. Red Carpet for One-Stop-Shop Environmental Courts in India. *The ICFAI Journal of Environmental Law* 5 (4): 9-21.

- Vera, E. P., N.-R. Masson & L. Krämer. 2007. Summary Report on the Inventory of EU Member States' Measures on Access to Justice in Environmental Matters, for EU DG Environment (Study Contract. No. 07-010401/2006/450607/MAR/A1, Sept. 2007). Available from [http://ec.europa.eu/environment/aarhus/study\\_access.htm](http://ec.europa.eu/environment/aarhus/study_access.htm).
- Vermont, State of, Office of the Court Administrator. 2007. Report to the General Assembly on the Performance of the Environmental Court. Copy with authors.
- Vihervuori, Judge P. 2002. Public Environmental Law in Finland. In *Public Environmental Law in the European Union and the United States* at 127-170, edited by R. J. G. H. Seerden, et al. The Hague: Kluwer Law International.
- Wade, H. W. R. 2000. *Administrative Law* (8<sup>th</sup> ed.). Oxford: Oxford University Press.
- Whitney, S. C. 1973a. The Case for Creating a Special Environmental Court System. *William and Mary Law Review* 14:473-522.
- --- ---. 1973b. The Case for Creating a Special Environmental Court System – A Further Comment. *William and Mary Law Review* 15:33-56.
- Wilson, Judge A. & Judge M. Rackemann. The Queensland Planning & Environment Court. Address at 2004 Queensland Environmental Law Association. Copy with authors.
- Wolgast, Judge A. L. 2007. The United States' Environmental Tribunal: The Environmental Protection Agency's Environmental Appeals Board. Copy with authors.
- Woolf, Lord Justice of Appeal Sir H. 1992. Are the Judiciary Environmentally Myopic? [The 1991 Garner Lecture]. *Journal of Environmental Law* 4 (1): 1-14.
- --- ---. 1996. *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales*. London: Her Majesty's Stationery Office. Available from <http://www.dca.gov.uk/civil/final/index.htm>.
- World Bank, The. 2009. Access to Justice for the Poor. Available from <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20745998~menuPK:1990386~pagePK:210058~piPK:210062~theSitePK:1974062,00.html>.
- World Wildlife Federation-United Kingdom, et al. 2004. *Environmental Justice: A Report by the Environmental Justice Project*. Available from [http://www.wwf.org.uk/article\\_search\\_results.cfm?uNewsID=517](http://www.wwf.org.uk/article_search_results.cfm?uNewsID=517).
- Yang, W. 2008. Emerging Trends in the Judiciary and Environmental Enforcement in the Asia-Pacific Region. PowerPoint presentation to the UNEP Asia Pacific Regional Conference on Environmental Justice and Enforcement (14-16 January 2008). Available from [http://www.roap.unep.org/program/Law\\_meeting\\_jan08\\_day1.cfm](http://www.roap.unep.org/program/Law_meeting_jan08_day1.cfm).
- Zhiping, L. 2008. The Mission and Challenge of China's Environmental Court. Conference PowerPoint presentation. Available from [http://www.wilsoncenter.org/events/docs/li\\_zhiping\\_presentation.pdf](http://www.wilsoncenter.org/events/docs/li_zhiping_presentation.pdf).

## EXAMPLES OF AUTHORIZING LEGISLATION AND PRACTICE RULES FOR ECTS

- Australian Capital Territory. Administrative Appeals Tribunal Act 1989 (A1989-51), as amended through 2008-7. Available from <http://www.legislation.act.gov.au>.
- Bangladesh. The Environment Court Act, 2000. (Act No. 12 of 2000).
- Colorado, State of. Rules of Civil Procedure, Uniform Local Rules for All State Water Court Divisions, Rule 11. 2009. Available from [http://www.courts.state.co.us/Courts/Supreme\\_Court/Rule\\_Changes/2009.cfm](http://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes/2009.cfm).
- Kenya. The Environmental Management and Co-ordination Act, 1999 (No. 8 of 1999), Part XII establishing the National Environmental Tribunal (Sections 125-136).
- -- --. The National Environmental Tribunal Procedural Rules, 2003 (L.N. 191/2003).
- New South Wales, State of. Land and Environment Court Act 1979 No 204. Available from <http://www.legislation.nsw.gov.au>.
- New Zealand. Resource Management Act 1991, Part 11 Environment Court (Sections 247-343D).
- North American Agreement on Environmental Cooperation (the NAFTA Environmental Side Agreement), Sept. 14, 1993, Can.-Mex.-US, 322 ILM 1480 (1993).
- Ontario, Province of. Rules of Practice and Practice Directions of the Environmental Review Tribunal (Nov. 15, 2007). Available from [http://www.ert.gov.on.ca/files/Rules/Rules\\_of\\_Practice\\_Nov\\_15\\_2007.pdf](http://www.ert.gov.on.ca/files/Rules/Rules_of_Practice_Nov_15_2007.pdf).
- Philippines Supreme Court. Administrative Order No. 23-2008 Re: Designation of Special Courts to Hear, Try and Decide Environmental Cases (Jan. 28, 2008). Available from <http://sc.judiciary.gov.ph/circulars/2008/A.O.No.23-2008.pdf>.
- -- --. Draft Rule of Procedure for Environmental Cases (2009). Available from [http://sc.judiciary.gov.ph/publications/ejforum/draft\\_rule\\_ejforum.pdf](http://sc.judiciary.gov.ph/publications/ejforum/draft_rule_ejforum.pdf).
- Queensland, State of. Planning and Environment Court Rules of 2008 (PEC Rules). Available from <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/I/IntegPlaPECRu08.pdf>.
- --- ---. Practice Direction No. 2 of 2008, Planning and Environment Court (PEC PD). Available from <http://www.courts.qld.gov.au/PracticeDirections/PlanningandEnvironment/PE-PD-2of2008.pdf>.
- --- ---. Uniform Civil Procedure Rules of 1999 (amended through 2008) (UCPR). Available from <http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SuprCrtQUCPRu99.pdf>.

- South Africa. National Environmental Management Act of 1998. Available from <http://www.elaw.org/node/2702>.
- Tasmania, State of. Resource Management and Planning Appeal Tribunal Act 1993 (No. 66). Available from <http://www.thelaw.tas.gov.au>.
- Trinidad & Tobago. Environmental Management Act, 2000 (Act No. 3 of 2000), Part VIII Environmental Commission (Sections 81-88).
- --. The Environmental Commission Rules of Practice and Procedure, 2001.
- UNEP Draft guidelines for the development of national legislation on access to information, public participation, and access to justice in environmental matters. 2009. UNEP/GC.25/INF/15/Add.2 (29 October 2008). Available from <http://www.unep.org/gc/gcss-x/download.asp?ID=684>.
- USEPA. Environmental Appeals Board Guidance Documents. Available from <http://www.epa.gov/eab>.
- Victoria, State of. Victorian Civil and Administrative Tribunal Rules 2008 (S.R. No. 65/2008).

## OTHER LEGAL MATERIALS

- Aarhus Convention – UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, June 25, 1998, UN Doc. ECE/CEP/43 (1998), *UN Treaty Series* 2161:447. Available from <http://www.unep.org/env/pp/treatytext.htm>.
- Administrative Procedure Act (USA), Section 702, 5 US Code §702. Available from [http://www.law.cornell.edu/uscode/uscode05/usc\\_sec\\_05\\_0000702----000-.html](http://www.law.cornell.edu/uscode/uscode05/usc_sec_05_0000702----000-.html).
- California (State of) Anti-SLAPP Statute, California Code of Civil Procedure § 415.16.
- Clean Water Act (USA), Section 505, 33 US Code § 1365. Available from <http://www.law.cornell.edu/uscode/33/1365.html>.
- Commission of the European Communities v. Republic of Malta*, Order of the President of the Court of Justice of the European Communities, Case C-76/08 R (24 April 2008). Available from [http://www.lbv.de/fileadmin/www.lbv.de/artenschutz/Zugvoegel/Urteil\\_C\\_76-08\\_Malta\\_04-08\\_Vogeljagd.pdf](http://www.lbv.de/fileadmin/www.lbv.de/artenschutz/Zugvoegel/Urteil_C_76-08_Malta_04-08_Vogeljagd.pdf).
- Constitution of the Federative Republic of Brazil. 1988. Available from <http://www.v-brazil.com/government/laws/constitution.html>.
- Constitution of Finland. 1999. Available from [http://www.om.fi/uploads/54begu60narbnv\\_1.pdf](http://www.om.fi/uploads/54begu60narbnv_1.pdf).
- Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, 32 ILM 1228 (1993).
- Convention on the Law of Non-Navigational Uses of International Watercourses, May 21, 1997, UN Doc. A/51/869, 36 ILM 700 (1997).
- Convention on Transboundary Effects of Industrial Accidents, Mar. 17, 1992, 31 ILM 1330 (1992).
- Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171.
- Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 UNTS 8.
- Djurgården-Lilla Värtans Miljöskyddsörening v. Stockholms kommun genom dess marknämnd*, Case C-263/08, European Court of Justice (Oct. 15, 2009) (Sweden Standing Decision). Copy with authors.
- In re Entergy Nuclear / Vermont Yankee Thermal Discharge permit amendment* (Vermont Environmental Court, Docket No. 89-4-06 Vtec, Decision and Order, May 22, 2008. Available from <http://libraries.vermont.gov/law/envcourt>.
- Friends of the Earth Inc. v. Laidlaw Environmental Services*, 528 US 167 (2000).
- Gordon v. Marrone*, 590 New York Supplement 2d 649, 656 (1992).
- Hungary. Parliamentary Commissioner for Future Generations website at <http://jno.hu/en>.
- Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*, (1982) Appeal Cases (3d Series) 617.
- Kellas v. Department of Corrections*, 341 Oregon 471, 145 P.2d 139 (2006). Available from <http://www.publications.ojd.state.or.us/S51378.htm>.
- Lujan v. Defenders of Wildlife*, 504 US 555 (1992). Available from <http://www.law.cornell.edu/supct/html/90-1424.ZS.html>.
- Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007). Available from <http://www.supremecourtus.gov/opinions/06pdf/05-1120.pdf>.
- Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, Republic of the Philippines Supreme Court G.R. Nos. 171947-8 (Dec. 18, 2008). Available from [http://www.lawphil.net/judjuris/juri2008/dec2008/gr\\_171947\\_2008.html](http://www.lawphil.net/judjuris/juri2008/dec2008/gr_171947_2008.html).
- Nordic Convention on the Protection of the Environment Between Denmark, Finland, Norway, and Sweden, Feb. 9, 1974, 1092 UNTS 279, 13 ILM 591 (1974).
- Oposa v. Factoran*, Republic of the Philippines Supreme Court G.R. No. 101083 (July 30, 1993). Available from [http://www.lawphil.net/judjuris/juri1993/jul1993/gr\\_101083\\_1993.html](http://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html).

- Organization of American States Inter-American Council for Integral Development (OAS-CIDI), Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development, April 20, 2000, CIDI/RES. 98 (V-o/00), OEA/Ser.W/II.5, CIDI/doc.25/00 (2000).
- Rio Declaration of the UN Conference on Environment and Development, June 13, 1992, UN Doc. A/CONF.151/26 (vol. I) (1992), 31 ILM 874 (1992).
- Sierra Club v. Morton*, 405 U.S. 727 (U.S. Sup. Ct. 1972).  
Available from <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=405&invol=727>.
- Stockholm Declaration of the UN Conference on the Human Environment, June 16, 1972, UN Doc. A/CONF.48/14/Rev. 1 at 3 (1973), 11 ILM 1416 (1972).
- Summers v. Earth Island Institute*, 555 U.S. \_\_\_\_ (U.S. Sup. Ct. 2009).  
Available from <http://www.supremecourtus.gov/opinions/08pdf/07-463.pdf>.
- T. N. Godavarman Thirumulkpad v. Union of India & Ors.*, Supreme Court of India (Writ Petition Nos 202, 337 of 1995). Abstract available from [http://www.abanet.org/intlaw/committees/business\\_regulation/environment/nairreportjune05.pdf](http://www.abanet.org/intlaw/committees/business_regulation/environment/nairreportjune05.pdf).
- Truth About Motorways v. Macquarie Infrastructure Management*, High Court of Australia, 200 CLR 591 (2000). Relevant extracts available from <http://www.law.mq.edu.au/Units/law404/TAM%20extracts.htm>.
- Universal Declaration of Human Rights, UN GAOR, 3d Sess., Pt. I, Resolutions, at 71, UN Doc. A/810 (Dec. 10, 1948).
- The World Charter for Nature, Oct. 28, 1982, GA Res. 37/7 (Annex), UN GAOR, 37<sup>th</sup> Sess., Supp. No. 51 at 17, UN Doc. A/37/51, 22 ILM 455 (1983).
- World Commission on Environment and Development (WCED) Experts Group on Environmental Law, Legal Principles for Environmental Protection and Sustainable Development, UN Doc. WCED/86/23/Add. 1 (1986).

# List of Environmental Courts and Tribunals

41 countries with established ECTs. 354 jurisdictions within them with ECTs.  
Countries and ECT jurisdictions visited in bold.

## AUSTRALIA

- Capital Territory
  - ACT Planning and Land Authority
- New South Wales
  - Land and Environment Court
- Northern Territory
  - Lands and Mining Tribunal
- Queensland
  - Planning and Environment Court
- South Australia
  - Environment, Resources and Development Court
- Tasmania
  - Resource Management and Planning Appeal Tribunal
- Victoria
  - Victorian Civil and Administrative Tribunal, Planning and Environment List
- Western Australia
  - State Administrative Tribunal, Development and Resources List

## AUSTRIA

- Environmental Senate (Umweltsenat)
- 9 Länders/States — Environmental Ombudsman Offices

## BAHAMAS

- Environmental Court

## BANGLADESH

- Environmental Court of Dhaka
- Environmental Court of Chittagong

## BELGIUM

- Environmental Enforcement Court of Flanders
- Constitutional Court — informal specialization
- Council of State (Supreme Administrative Court) — informal E Division
- Brussels Environmental Board
- Ghent Court of Appeal — 10th Chamber is informal E chamber
- Ghent First Instance Court — 2 informal E chambers
- 3 Courts of First Instance and Courts of Appeal with green chambers

## BOLIVIA

- Agricultural and Environmental Court (Tribunal Agroambiental)

## BRAZIL

- Federal Environmental Court (trial) in Curitiba, Paraná
- Federal Environmental Court (trial) in Florianópolis, Santa Catarina
- Federal Environmental Court (trial) in Porto Alegre, Rio Grande
- Federal Environmental Court (trial) in Cuiabá, Mato Grosso
- Mato Grosso State — Environmental Court (trial)
- Sao Paulo State — Tribunal de Justiça (court of appeals) Environmental Chamber
- Amazonas State — Environmental Court (trial) in Manaus

## CANADA

- Alberta
  - Environmental Appeals Board
  - Natural Resources Conservation Board
- British Columbia
  - Environmental Appeal Board
  - Forest Appeals Commission
  - Forest Practices Board (ombudsman)
- Manitoba
  - Clean Environment Commission
- Nova Scotia
  - Environmental Assessment Board
- Ontario
  - Environmental Review Tribunal
- Northwest Territories
  - Mackenzie Valley Environmental Impact Review Board (and numerous other boards)
- Saskatchewan
  - Surface Rights Board of Arbitration
- Quebec
  - Environmental Review Board
  - Bureau d'audiences publiques sur l'environnement (BAPE) (ombudsman)

## CHILE

- Environmental Court (legislatively approved Nov. 2009)

## CHINA

- Guangdong Province
  - Guangzhou Maritime Court
- Guizhou Province
  - Guiyang Environmental Court in the Guiyang Intermediate People's Court (Guiyang Municipality — appellate)
  - Qianxi County Environmental Collegiate Panel
  - Qingzhen Environmental Court in the Qingzhen People's Court (Guiyang Municipality — trial)
- Hebei Province
  - Jinzhou Environmental Court in the Jinzhou City People's Court (Shijiazhuang Municipality — trial)
- Hubei Province
  - Wuhan Maritime Court
- Jiangsu Province
  - Jianye Environmental Court in the Jianye District People's Court (Nanjing Municipality — trial)
  - Wuxi Environmental Court in the Wuxi Intermediate People's Court (Wuxi Municipality — trial/appellate)
  - Xinbei Environmental Court in the Xinbei District People's Court (Changzhou Municipality — trial)
- Liaoning Province
  - Dongling Environmental Court in the Dongling District People's Court (Shenyang Municipality — trial)
  - Tiexi Environmental Court in the Tiexi District People's Court (Shenyang Municipality — trial)
- Yunnan Province
  - Chengjiang Environmental Court in the Chengjiang County People's Court (Chengjiang County, Yuxi Municipality)
  - Kunming Environmental Court in the Kunming Intermediate People's Court (Kunming Municipality)
  - Tonghai Environmental Court in the Tonghai County People's Court (Tonghai County, Yuxi Municipality)
  - Yuxi Environmental Court in the Yuxi Intermediate People's Court (Yuxi Municipality)

## COSTA RICA

- Tribunal Ambiental Administrativo (Environmental Administrative Court or TAA)
- La Defensoria de los Habitantes (ombudsman)
- Oficina del Contralor Ambiental (Environmental Comptroller)

## DENMARK

- Environmental Board of Appeal
- Nature Protection Board of Appeal

## FIJI

- Environmental Tribunal (legislatively authorized, apparently not operating)

## FINLAND

- Supreme Administrative Court — First Chamber (appeal, primarily assigned environmental cases)
- Administrative Court in Vaasa (trial, for all environmental cases nationally)

## GREECE

- Council of State (Supreme Administrative Court) — Fifth Section specializes in environmental disputes
- Greek Ombudsman, Department of the Quality of Life

## GUYANA

- Environmental Appeal Tribunal (EAT) (not yet empanelled?)
- Environmental Assessment Board (EAB)

## HUNGARY

- Parliamentary Commissioner for Future Generations (ombudsman)

## INDIA

- Supreme Court — informal Green Bench
- National Environment Appellate Authority (NEAA)
- National Environment Tribunal (legislatively authorized, not operating)
- National Green Tribunal (legislation pending in 2009)
- Regional environmental courts reported

## INDONESIA

- Only environmental law trained “green” judges hear environmental cases

## IRELAND

- An Bord Pleanála (Planning Appeals Board)

## JAMAICA

- Access to Information Act Appeal Tribunal
- Natural Resources Conservation Authority Appeals Tribunal (inactive?)
- Town and Country Planning Act Appeals Tribunal (inactive?)
- Access to Information (ATI) Act Appeals Tribunal

## JAPAN

- National Environmental Dispute Coordination Commission (Kouchoi)
- 47 prefecture-level Environmental Dispute Coordination Commissions

**KENYA**

- Supreme Court — Land and Environmental Law Division
- **National Environmental Tribunal**
- **Public Complaints Committee**

**LIBERIA**

- Environmental Administrative Court (trial, authorized; operating?)
- Environmental Court of Appeals (appeal, authorized, operating?)

**MALAWI**

- Environmental Appeals Tribunal (EAT)

**MALAYSIA**

- **Planning Appeal Board of State of Penang**
- 2 additional State Planning Appeal Boards
- National Environmental Quality Appeal Board (authorized, operating?)

**MAURITIUS**

- Environment Appeals Tribunal

**NETHERLANDS**

- **Raad van State (Council of State), Environmental Chamber (appeals)**

**NEW ZEALAND**

- **Environment Court**
- Parliamentary Commissioner for the Environment (ombudsman)

**NIGERIA**

- Environmental Protection and Waste Management Agency Court of Akwa Ibom State (trial)
- Environmental Court of Ondo State (trial)
- 5 Environmental Sanitation Courts in Borno State (trial)

**PAKISTAN**

- National Environmental Tribunal
- Environmental Tribunal Punjab
- Environmental Tribunal Northwest Frontier Province
- Environmental Tribunal Sindh
- Environmental Tribunal Balochistan

**PHILIPPINES**

- 117 municipal and regional trial courts designated as environmental courts (Jan. 2008)

**SOUTH AFRICA**

- Hermanus Regional Environmental Court (to be re-opened in 2010)
- Port Elizabeth District Environmental Court (to be re-opened in 2010)

**SOUTH KOREA**

- **National Environmental Dispute Resolution Commission**
- 16 regional Environmental Dispute Resolution Commissions

**SPAIN**

- Some State Superior Courts (top tier of the regions) reported to specialize in environmental and planning disputes

**SUDAN**

- State of Khartoum Environmental Court

**SWEDEN**

- **Environmental Court of Appeal (division of the Svea Court of Appeal, Stockholm)**
- **Regional Environmental Court (REC) of Växjö (trial/appeal)**
- REC of Umeå (trial/appeal)
- REC of Östersund (trial/appeal)
- REC of Nacka (trial/appeal)
- REC of Stockholm (trial/appeal)
- REC of Vänersborg (trial/appeal)

**TANZANIA**

- Environmental Court (legislatively authorized but not established)

**THAILAND**

- **Supreme Court, Environmental Law Division**
- **Central Administrative Court, Green Bench (trial)**

**TRINIDAD & TOBAGO**

- Environmental Commission

**UNITED STATES****NATIONAL:**

- **USEPA Office of Administrative Law Judges**
- **USEPA Environmental Appeals Board**
- US Department of the Interior
  - Interior Board of Land Appeals
  - Departmental Cases Hearing Division

## STATE

- **State of Vermont Environmental Court**
- Washington State Environmental Hearings Office, includes:
  - Pollution Control Hearings Board
  - Shorelines Hearings Board
  - Forest Practices Appeals Board
  - Environmental and Land Use Hearings Board
  - Hydraulics Appeals Board

## LOCAL GOVERNMENT:

- Alabama
  - City of Birmingham
  - City of Mobile Municipal Court
- Arkansas
  - City of Little Rock Environmental Court
  - City of North Little Rock Environmental Court
- Colorado
  - City of Denver Environmental Court
- Georgia
  - Cobb County Magistrate Court, Environmental Court Division
  - City of Riverdale Environmental Court
  - City of Smyrna Environmental Court
- Indiana
  - City of Indianapolis Environmental Court
  - Marion County Environmental Court

- Mississippi
  - City of Biloxi Environmental Court
  - City of Gulfport Environmental Court
  - City of Hattiesburg Environmental Court
  - City of Laurel Environmental Court
- Missouri
  - City of St. Louis Building Division, Environmental Court Section
- **New York**
  - **New York City Environmental Control Board**
- North Carolina
  - Mecklenburg County Environmental Court
  - City of Durham Community Life Court
- Ohio
  - City of Cleveland Municipal Court, Housing Court
  - Franklin County Municipal Court, Quality of Life Court
  - Hamilton County Environmental Court
  - Toledo Municipal Housing and Environmental Court
- Oklahoma
  - Oklahoma City Environmental Court
- Tennessee
  - City of Chattanooga Environment Court
  - Davidson County Environment Court
  - City of Memphis Environmental Court
  - City of Nashville Environmental Court
  - Shelby County Environmental Court
- Virginia
  - Wise County Environmental Court

# Findings: Best Practices for ECTs

## BEST PRACTICES – TYPE OF FORUM:

Access to justice is enhanced in a clearly identified independent judicial court that is easily identified by the public, whose decision makers are highly trained in environmental law, and whose decisions are documented and published. Independence is perhaps the most important attribute of an ECT for access to justice. It is fostered by a democratic form of government, an unbiased judicial selection process, protection of decision-makers from political pressure or punitive consequences for their decisions, and institutional separation from the agency whose decisions are being reviewed. The New South Wales, Australia, Land and Environment Court and the New Zealand Environment Court are best practice examples of separate, free-standing environmental courts.

Well-conceived tribunals can also be best practice models, so long as they have independence and are highly visible. The Environmental Review Tribunal of the Province of Ontario, Canada is a best practice example of a predominantly independent tribunal that is viewed as improving access to justice.

## BEST PRACTICES – LEGAL JURISDICTION:

An integrated environmental and land use planning court, with civil, administrative, and criminal jurisdiction and enforcement powers adequate to the task, represents the jurisdictional scope that best provides comprehensive access to environmental justice. Such a model can provide a streamlined, comprehensive one-stop shop for litigants with broad and effective remedies. Adopting such a complex model requires a carefully thought-out scope of covered laws and issues. Best examples are the Environmental Court of New Zealand, the Land and Environment Court of New South Wales, and the Planning and Environment Court of Queensland. Jurisdictions exhibiting interesting attributes, but not all of the desirable characteristics, include Japan's Environmental Dispute Coordination Commission (a tribunal with adjudicatory authority, integrated subject matter jurisdiction, but no criminal jurisdiction) and Brazil's state and federal environmental courts (having civil, administrative, and criminal jurisdiction while heavily oriented toward the latter, but having no land use planning, development jurisdiction).

## BEST PRACTICES – ECT DECISIONAL LEVEL(S):

Specialized ECTs at both the trial and appeal levels with merits review powers can maximize both judicial competence and speed of decision-making. If the case volume justifies it, having two-tiered ECTs appears to provide the most knowledgeable and uniform outcomes, and thus greater access to environmental justice. Sweden, Finland, Belgium, Japan, and the United States EPA currently have such a two-tiered approach, and India and Thailand are moving in that direction. If two levels are not justified, an ECT at the trial or first-instance level is preferable to one only at a higher level because a well informed decision is less likely to be appealed and will be made earlier in the dispute resolution process. The specialized environmental tribunal in Ontario, Canada, and the National Environmental Tribunal in Kenya are excellent examples of environmental specialization at trial-level only. *De novo* review of the decision of a previous court (whether the agency's decision or a lower ECT body) is not recommended because of the excessive costs, wasted time, and unpredictability. Allowing new evidence at second- and third-instance review levels also is not recommended for the same reasons (except for extremely important evidence not available earlier).

## BEST PRACTICES – GEOGRAPHIC AREA:

Geographic coverage compatible with other judicial/political boundaries is easily understood by the public and permits sensitivity to "physical" access to justice. If the area is large, special accommodations can be made to permit access to the ECT by persons who live far from the forum by use of "traveling" courts and judges, tele- and video-communication, and other schemes. Traveling ECTs are preferable, since they allow the decision-makers actually to visit the site in dispute; accommodate persons who are unable to travel to the forum for financial, physical, or work reasons; and increase public participation in the affected area. The Vermont Environmental Court in the United States covers a small geographic area and splits hearings geographically between two judges. The court also does on-site hearings locally in impacted communities. Accommodation for persons with physical disabilities, including mobility, hearing, and vision issues, and for persons who need language translation services are included in the most accessible ECTs.

## BEST PRACTICES – CASE VOLUME:

*Advance analysis of anticipated case volume and case backlog, and thoughtful elimination of barriers to filings are critical steps in planning and politically justifying an ECT. Best estimates are that at least 100 actual case filings per judge per year are required to justify a “stand alone” ECT. If insufficient volume is anticipated but access and other considerations weigh in favor of an ECT, several choices exist, including (1) beginning with one judge or decision-maker who is assigned all environmental cases and gives them priority but also hears other general matters, (2) expanding the legal jurisdiction to include both environmental and land use cases, (3) reducing standing barriers (see chapter 3.6 on Standing), (4) increasing public education about use of the ECT, and (5) controlling cost risks (see chapter 3.7 on Costs). The Planning and Environment Court of Queensland is a good example of case volume justifying a separate ECT, with unique flexibility for the overseeing District Court Chief Justice to respond to changes in volume by assigning additional judges to the environmental court and/or assigning environmental court judges to hear other matters when conducting hearings outside the capital of Brisbane.*

## BEST PRACTICES – STANDING:

*ECT laws and rules that provide the best access to justice authorize standing for “any person” raising an environmental issue, including individuals, citizen and community groups, businesses, NGOs, and future generations. The ECT can be given authority to dismiss and/or penalize frivolous, vexatious, or otherwise improper filings, rather than use standing restrictions as a “door keeper.” The Philippines Supreme Court 2009 draft rules and South Africa’s National Environmental Management Act No. 107 of 1998, above, are good examples of definitions of open standing provisions in court rules and in legislation, respectively.*

## BEST PRACTICES – COSTS:

*No ECT studied has adopted comprehensive cost-reduction strategies for environmental conflict resolution. Incorporation of as many cost-mitigation tools as possible is recommended to enhance access to justice and support citizen’s rights to be heard, including those filing public interest lawsuits. These include:*

- *Reducing or waiving filing, transcript, and other court fees*
- *Efficient court management techniques, such as directions hearings*
- *Allowing parties to represent themselves without attorneys*
- *Government funding for public interest plaintiffs*
- *Public environmental prosecutors*
- *Government agency representation*
- *Ombudsman offices*
- *Proponent or intervenor funding*
- *Attorney and expert fee legislation*
- *Alternative Dispute Resolution*
- *Judges having discretion not to shift costs to the losing side, except in frivolous or otherwise abusive or improper cases*
- *Legislation giving judges discretion in awarding costs against PIL plaintiffs in jurisdictions following the “loser pays” rule*
- *Not requiring security for costs for an injunction in appropriate cases*
- *Taking action against SLAPP suits.*

## BEST PRACTICES – ACCESS TO SCIENTIFIC-TECHNICAL EXPERTISE:

*Ensuring Internal Expertise:* ECTs, such as the Resource Management and Planning Appeal Tribunal of Tasmania, the Land and Environment Court of New South Wales, and the Environmental Court of Appeal in Sweden are examples of ECTs that have access internally to independent, neutral, scientific and technical expertise of their own choosing.

- The ideal is (1) a decisional body combining law-trained judges with expert scientific-technical judges plus (2) authority to engage independent experts where there may not be an appointed judge with the needed expertise. This model is clearly the most comprehensive, but may be prohibitively expensive for some ECTs.
- Having (1), the joint lawyer-expert bench, alone is not sufficient since no individual has expertise in all the science-technical issues that may come before the ECT.
- For (2), these can be professional staff of the court, experts in the community and academia, or special commissions.
- Access to experts in addition to the staff of the environmental agency or any other government body with a vested interest in the decision is important to assure unbiased expert testimony.

*Managing External Expertise:* The New South Wales Land and Environment Court and Queensland Planning and Environment Court are examples of ECTs with practice rules that allow the judge to control parties' experts. Rules to consider include

- making experts' first duty to the court, rather than the parties paying the fees
- assuring the public and parties who cannot afford expensive experts that they can rely on other parties' experts to testify truthfully and objectively
- allowing the judge to require parties' experts to have a pre-hearing facilitated meeting to resolve all areas of agreement and disagreement and write a joint report to the court and parties
- allowing the judge to lead, organize, and sequence experts' testimony to maximize efficiency and effectiveness
- permitting the filing of *amicus curiae* reports or briefs by independent experts.

## BEST PRACTICES – ALTERNATIVE DISPUTE RESOLUTION (ADR):

Because it can make such a positive impact on access to justice, ADR – particularly mediation – is provided by approximately 50% of the ECTs visited. According to experts interviewed, ideally it should be structured as follows:

- A court-annexed and court-paid service
- Including directive or evaluative mediation
- Providers should be mediation-trained (ideally credentialed) attorneys experienced in environmental law and approved by the ECT
- ECT staff mediators are preferable to using judges or decision-makers as mediators
- Mediation should not be mandatory, but all cases filed with the ECT should be assessed at intake for the appropriateness of ADR and referred if appropriate
- Formalized screening rules providing a reliable, transparent process should be developed and used to evaluate all cases
- A process for incorporating needed scientific-technical information and opinion into the mediation should be adopted
- Mediated settlements/agreements should be reviewed and approved by the ECT and made enforceable orders
- Other alternative means for professional mediation can be considered if the ECT budget cannot provide mediation at no charge to litigants
- Part of a "multi-door" courthouse concept, providing access to a variety of ADR and adjudication processes in one place.

Among the many outstanding ECT examples of visionary ADR access to justice are: New South Wales Land and Environment Court's "multi-door" approach, Queensland Planning and Environment Court's in-house ADR staff, and Hungary's ombudsman.

## BEST PRACTICES – COMPETENCE OF ECT JUDGES AND DECISION-MAKERS:

The most independent and competent ECT judges and decision-makers are:

- Appointed by a neutral process – through civil service testing (as in Brazil) or at least appointment by a high-ranking official or committee with no vested interest in the ECTs decisions (New York City), and not an official of an agency whose decisions are reviewed by the ECT (like the USEPA's Environmental Appeals Board)
- Vetted for as high quality environmental legal education, training, experience, and commitment as is possible, while allowing for public or citizen representatives as commissioners or advisors, if desired (New Zealand)
- Given security of tenure (Thailand, Sweden, Finland and many others)
- Provided an ECT budget that is as insulated from political manipulation as possible (free from punishment for unpopular decisions) (Brazil)
- Paid a salary, in the case of judges, commensurate with general court judges and, in the case of tribunals, at a competitive level with other comparable professional positions (Belgium and Canada)
- Required to engage in continuing training in environmental law and other needed skill sets provided through a judicial training institute (Philippines).

## BEST PRACTICES – CASE MANAGEMENT:

Proactive use of case management tools can measurably enhance access to justice and ECT operations. The most helpful, according to both parties and decision-makers who were interviewed, are case management itself, directions hearings, ADR screening, and IT. However, each of the tools entail costs in time and money to establish, learn, implement, evaluate, and fine-tune. No jurisdiction studied has incorporated all the possible case management tools to improve efficiency and access to justice, in part because new tools are constantly being developed and made available to the judicial system.

## BEST PRACTICES – ENFORCEMENT TOOLS AND REMEDIES:

The wider the range of enforcement powers given an ECT, the more flexibility the decision-makers have in crafting creative and effective remedies. Providing sufficient enforcement options to allow judges to effectively resolve the environmental disputes, monitor outcomes, and/or sentence criminal violators is critical. The most important enforcement powers, according to the interviewees, are the ability to:

- Issue interim relief or preliminary injunctions at an early stage in proceedings
- Issue injunctions without a security bond at all stages
- Deny or substantially amend a development proposal
- Award substantial monetary fines or penalties, dedicated to environmental restoration or environmental protection
- Order remediation
- Design alternative and/or creative sentences to fit the violation.

Broad enforcement powers outlined in authorizing legislation and more specifically incorporated in the ECT's practice and procedure rules provide the basis for a truly effective ECT. Amazonas, Brazil, is an excellent example, as its ECT has civil, administrative, and criminal enforcement power and the ability to problem-solve using creative sentencing.

# Standard Interview Questions

## University of Denver Environmental Courts & Tribunals Study

### – Interview Questions –

#### 1. HISTORY OF THE ECT

When started?  
Why?  
Court or Tribunal (not court of record)?

#### 2. COMPOSITION

How many members?  
How selected?  
What credentials:  
Judges?  
Attorneys?  
Scientists?  
Lay persons?  
Members of Ministry of Environment or equivalent?  
Members of other government agencies?  
Other?  
Tenure (job security)?  
Pay?  
Geographic (national, regional, other ECT jurisdictions)?

#### 3. FINANCIAL

ECT's annual operating budget?  
What government agency does budget come from/through?  
Cost to bring complaint to ECT?  
Lawyer needed (or not allowed)?  
Expert witnesses needed?  
Other typical costs?

#### 4. JURISDICTION (LEGAL COVERAGE)?

Court type:  
Criminal?  
Civil (non-criminal)?  
Administrative?  
Combination (explain)?  
Laws covered?  
Types of disputes covered:  
Environmental pollution?  
Development permit applications?  
Zoning/land use issues?  
Injury cases seeking monetary damages?  
Cases seeking injunction (stop order)?  
Other types of cases?  
Other remedies sought/provided?

#### 5. CASES

How do cases come to the ECT – brought by:  
Individuals?  
NGOs?  
Community groups?  
Businesses?  
Environmental prosecutors?  
Government agencies?  
Other?  
"Standing" requirements for filers?  
Decisions:  
Adjudication by judges or other decision-makers?  
Mediation:  
How selected?  
How paid for?  
Combination (explain)?  
Outcome control:  
Are prior ECT decisions controlling as precedents?  
Are government policies, plans, political pronouncements (which are not laws) controlling?  
Do government officials, politicians, others make their views/wishes known to the ECT?  
Number of case filings per year?  
Number of cases concluded per year?  
Range of monetary awards?

## 6. ALTERNATIVE DISPUTE RESOLUTION (ADR)

Are any cases mediated?

Who decides?

Who mediates?

How selected?

How paid?

Any other forms of ADR used (explain same)?

Are mediated agreements binding on the parties (enforceable in court)?

What happens when parties do not agree to mediation or quit?

## 7. APPEAL FROM ECT

Can cases be appealed?

Where (to what court)?

Beyond that?

## 8. ASSESSMENT

Is interviewee particularly proud of the ECT for:

Use of technology?

Efficiency measures?

Cost cutting?

Credibility?

Other factors?

What would interviewee like to change?

## 9. ENFORCEMENT / REMEDIES

What remedies has the ECT employed?

Can the ECT enforce its decisions?

Will courts enforce the ECTs decisions?

## 10. CASE EXAMPLES

1 short case study of a typical case?

1 short case study of a significant, interesting recent case?

## 11. INFORMATION DOCUMENTS (IN ENGLISH)

Annual reports (including most recent)?

Laws – available online where?

Law establishing the ECT?

Laws covered by the ECT (over which it has jurisdiction)?

Rules of the ECT?

Other useful documents, statistics?

# About the Authors

**GEORGE W. (“ROCK”) PRING** is a Professor of Law at the University of Denver Sturm College of Law in Denver, Colorado, USA, where he teaches Constitutional Law, Environmental Law, International Environmental Law, International Water Law, and Government Administrative Law. He has practiced law for over four decades — in a national law firm representing individuals, businesses, and local governments; in government service as Chief of Environmental Litigation for the State of Ohio Attorney General’s Office; in public-interest practice with the international NGO Environmental Defense Fund; and now as an academic, lecturer, and legal advisor. He is a principal in Global Environmental Outcomes LLC (GEO), an international consulting service. He holds a JD (honors) from the University of Michigan and a BA (honors) from Harvard University.

Professor Pring specializes in environmental and natural resources issues nationally and internationally, including sustainable development, access to justice, corporate social responsibility, human rights, resources development, environmental impact assessment, compliance, planning, land use, and nature preservation. A frequent presenter at universities, conferences, and training courses in the United States and abroad, he is co-author of the treatise *International Environmental Law & Policy for the 21st Century*, co-editor/-author of *Human Rights in Natural Resources Development* (Oxford), contributor to the *Mineral Law & Policy Compendium*, contributor to the Max Planck *Encyclopedia of Public International Law* (Oxford), and author of numerous other publications and government studies. He and his wife are the co-principal investigators of the University of Denver’s global Environmental Courts & Tribunals (ECT) Study (<http://www.law.du.edu/index.php/ect-study>).

He also specializes in constitutional and human rights issues. He co-authored the National Science Foundation-funded book *SLAPPs: Getting Sued for Speaking Out* — which first named and drew international attention to the problem of “Strategic Lawsuits Against Public Participation” in government or “SLAPPs” (lawsuits to chill citizens’ communications to their government officials) — and has written broadly on constitutional issues.

Dr. Pring is past Chair of the State of Colorado Hazardous Waste Commission, retired Adjunct Professor in Environmental Science and Engineering at the Colorado School of Mines, and has served on many government regulatory and advisory bodies. He is the United States representative on the Academic Advisory Group of the International Bar Association Section on Energy, Environment, and Resources Law; a member of the founding Board of Trustees of Galen University in Belize, Central America; Advisor to the University of Denver Environmental & Natural Resources Law Graduate Program; and co-founder and Vice-President for Land Conservation of the Clear Creek Land Conservancy.

**CATHERINE (KITTY) PRING** is an award-winning professional mediator and facilitator. She maintains a diverse alternative dispute resolution (ADR) practice in Colorado, including group and community facilitation, organizational assessment, program design, and systems evaluation in health and human services organizations. Her practice also includes group and individual conflict resolution in the areas of living environment, domestic violence, employment, family, real estate, medical practice, contract negotiations, and community issues.

As a partner in Global Environmental Resources LLC., Kitty has spent the last two years as co-principal investigator of the University of Denver Environmental Courts and Tribunals (ECT) Study — the first global comparative study of specialized ECTs — and has co-authored several papers with her partner, George (Rock) Pring, a Professor of Law at the University of Denver. Together, they make presentations and consult with jurisdictions interested in ECTs, environment and sustainable development, and access to justice.

Kitty was the State of Colorado Ombudsman for Medicaid Managed Care following her retirement after 15 years as the Director of the Adult Services Division for the City and County of Denver Department of Human Services. As Director of Adult Services, with over 240 employees, she was responsible for managing 10 major human services programs in six different locations serving over 100,000 persons on an annual basis. She also performed program development and evaluation, legislative lobbying, and grant writing. She has served as an expert witness in cases including implementation of Colorado’s computerized welfare benefit management system.

Prior employment includes being a Program Officer for a nonprofit charitable foundation where she was responsible for program review and development, Director of the State of Colorado’s Long Term Care systems development, Community Relations Consultant, Consultant to the National Environmental Health Association, and Executive Assistant to the Ohio Attorney General’s Civil Rights Section.

Kitty’s academic credentials, in addition to certification in mediation and numerous mediation classes, include an MPA and a Certificate in Gerontology from the University of Michigan and a BA in Psychology and Philosophy from Vassar College. Awards include Jefferson County Facilitator of the Year, Permanent Restraining Order Mediator of the Year, Colorado Gerontologist of the Year, and a Fulbright Fellowship to teach English in India in 1963-64.

## Appendix 5

## Abbreviations

<b>ABA-NCSCJ</b>	American Bar Association -- National Conference of Specialized Court Judges	<b>IUCN</b>	International Union for the Conservation of Nature
<b>ABA-ROLI</b>	American Bar Association-Rule of Law Initiative	<b>NAFTA</b>	North American Free Trade Agreement
<b>ACODE</b>	Advocates Coalition for Development and Environment	<b>NCSC</b>	National Center for State Courts
<b>ADR</b>	Alternative Dispute Resolution	<b>NEAA</b>	National Environment Appellate Authority
<b>AEAJ</b>	Association of Environmental Administrative Judges	<b>NET</b>	National Environmental Tribunal
<b>AECEN</b>	Asian Environmental Compliance and Enforcement Network	<b>NGOs</b>	Nongovernmental organizations
<b>BAT</b>	Best Available Technology	<b>NRD</b>	Natural Resources Damages
<b>BELA</b>	Bangladesh Environmental Lawyers Association	<b>NSW</b>	New South Wales, Australia
<b>CEC</b>	Central Empowered Committee	<b>OALJ</b>	Office of Administrative Law Judges
<b>CERCLA</b>	Comprehensive Environmental Response, Compensation and Liability Act (USA)	<b>OAS</b>	Organization of American States
<b>DOE</b>	Department of Environment	<b>OATH</b>	Office of Administrative Trials and Hearings
<b>EAAJ</b>	European Association of Administrative Judges	<b>PADELIA</b>	Partnership for Development of Environmental Law and Institutions in Africa
<b>EAB</b>	Environmental Appeals Board	<b>PCC</b>	Public Complaints Committee
<b>EC</b>	European Commission	<b>PEC</b>	Planning and Environment Court (of the State of Queensland, Australia)
<b>ECB</b>	Environmental Control Board	<b>PHILJA</b>	Philippine Judicial Academy
<b>ECTs</b>	Environmental Courts and Tribunals	<b>PIL</b>	Public-interest litigation
<b>EDO</b>	Environmental Defenders Office	<b>PNG</b>	Papua New Guinea
<b>EIA</b>	Environmental Impact Assessment	<b>RJ</b>	Restorative Justice
<b>ELA Fund</b>	Environmental Legal Assistance Fund	<b>RMPAT</b>	Resources Management and Planning Appeals Tribunal
<b>ELC</b>	Environmental Law Clinic	<b>SIDS</b>	Small Island Developing States
<b>E-LAW</b>	Environmental Law Alliance Worldwide	<b>SLAPP</b>	Strategic Lawsuits Against Public Participation
<b>ENRLC</b>	Environmental and Natural Resources Law Clinic, Vermont Law School, USA	<b>TAA</b>	Tribunal Ambiental Administrativa (Costa Rica)
<b>EPA</b>	Environmental Protection Agency	<b>TAI</b>	The Access Initiative
<b>ERT</b>	Environmental Review Tribunal	<b>UN</b>	United Nations
<b>EU</b>	European Union	<b>UNDP</b>	UN Development Programme
<b>EUFJE</b>	EU Forum of Judges for the Environment	<b>UNECE</b>	UN Economic Commission for Europe
<b>FDI</b>	Foreign direct investment	<b>UNEP</b>	UN Environment Programme
<b>GEO</b>	Global Environmental Outcomes	<b>UNITAR</b>	UN Institute for Training and Research
<b>IBLA</b>	US Department of the Interior Board of Land Appeals	<b>USAID</b>	US Agency for International Development
<b>IGOs</b>	International Governmental Organizations	<b>USDOJ</b>	US Department of Justice
<b>INECE</b>	International Network for Environmental Compliance and Enforcement	<b>USEPA</b>	US Environmental Protection Agency
<b>IPPC</b>	Integrated Pollution Prevention Control	<b>VLS</b>	Vermont Law School
<b>IT</b>	Information Technology	<b>WCED</b>	World Commission on Environment and Development
		<b>WRI</b>	World Resources Institute



# About TAI



**The Access Initiative (TAI)** is the world's largest network of civil society organizations working to ensure that people have the right and ability to influence decisions about the natural resources that sustain their communities.

Working in their respective countries, TAI partners form national coalitions that assess the performance of their governments to provide the public with

- access to information about government decisions,
- public participation in decision-making, and
- access to justice when their rights to information, participation, and a clean environment are violated.

The right to obtain government information, right to participate in government decision-making, and the right to seek justice are a bundle of valuable rights which we call 'access rights.'

TAI Partners use assessments to advocate for legal, institutional, and practice reforms, raise public awareness, and engage their governments in a constructive dialogue to create change within their countries.

The World Resources Institute (WRI) functions as the Global Secretariat to TAI.





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