

Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment

by

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Introduction

Courts and other adjudication tribunals specializing in environment and development issues are the subject of a global comparative study at the University of Denver. The multidisciplinary University of Denver Environmental Courts and Tribunals (ECT) Study is designed to determine how ECTs can enhance the human rights to a quality environment and access to environmental justice at national, regional, and local levels across the spectrum of the world’s legal cultures.³ The key outcomes of the study will be a practical analytic framework and a summary of best practices to guide governments and citizens interested in establishing or reforming an ECT.

We have identified over 80 existing ECTs in 35 different countries. The research methodology has involved in-depth literature, internet, and media research, court observation, and on-site interviews with over 100 ECT-engaged judges and justices, prosecutors, private attorneys, government officials, non-governmental organizations (NGOs), and academics in 21 countries representing 33 existing or proposed ECT models. Personal interviews were conducted during 2008, and findings are being updated in 2009 through on-going communication with study participants and the developing literature. The study

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³ The DU ECT Study website is at <http://www.law.du.edu/index.php/ect-study>. The ECT Study is funded by grants from the University of Denver Sturm College of Law, the University of Denver, and the authors through their international consulting service, Global Environmental Outcomes LLC. Another paper on poverty alleviation and ECTs can be found at the website and is to be published in a forthcoming book of the International Union for the Conservation of Nature’s Academy of Environmental Law (IUCN-AEL) as George (Rock) Pring & Catherine (Kitty) Pring, *Specialized Environmental Courts & Tribunals: Improved Access to Justice for Those Living in Poverty*, in POVERTY ALLEVIATION AND ENVIRONMENTAL PROTECTION (forthcoming Edward Elgar Pubs. 2009). Portions of this article draw from that paper.

identifies 12 operational characteristics or “building blocks” which contribute to the success of ECTs in addressing fundamental issues such as protection of human rights and environment, rights to information, public participation, and access to justice, sustainable development, the prevention, precautionary, and polluter-pays principles, and environmental impact assessment (EIA).⁴

The two fields of human rights and environment are increasingly recognized as having much common ground – as shown by the welcome new book on “Human Rights and the Environment” by University of Oregon School of Law Professors Svitlana Kravchenko and John Bonine.⁵ That makes this University of Oregon Symposium on “The Confluence of Human Rights and the Environment” an ideal forum to reflect on what the DU Study has found about the interrelation of specialized ECTs and human rights, particularly the human right of access to environmental justice.

The “Confluence” of Human Rights and Environmental Law

Environmental Law as a distinct legal subject is a relatively recent legal development, primarily dating from the 1970s.⁶ Since then, it has become increasingly complex, rule-laden, and reliant on very complicated and often conflicting technical and economic evidence. Separate laws and processes deal with water, air, land, noise, nuclear waste, environmental protection, environmental impact statements, mining, forests, habitat, flora and fauna, and a myriad other development issues which impact the greater global environment. Zoning and other town and country planning laws which control local development frequently do not require analysis of potential environmental impacts on the greater community.

Human Rights Law has a somewhat longer history, since its first official recognition in the 1948 Universal Declaration of Human Rights⁷ and the two great 1966 Covenants on Civil and Political Rights⁸ and Economic, Social, and Cultural Rights.⁹ Multiple efforts have followed, elaborating the so-called “first generation” human rights (civil and political rights), the “second generation” human rights (social, economic, cultural rights), and the more recent, less official, more controversial, but expanding “third generation” human rights (to a quality

⁴ See VED P. NANDA & GEORGE (ROCK) PRING, INTERNATIONAL ENVIRONMENTAL LAW & POLICY FOR THE 21ST CENTURY 17-62 (2003); George (Rock) Pring and Susan Y. Noé, *The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development*, in HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT (Donald Zillman, et al., eds 2002).

⁵ SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW, AND POLICY (2008).

⁶ See Joseph L. Sax, *Environmental Law Forty Years Later: Looking Back and Looking Ahead*, in BIODIVERSITY, CONSERVATION, LAW + LIVELIHOODS 9 (Michael I. Jeffery, et al., eds 2008).

⁷ UN GAOR, 3d Sess., Pt. I, Resolutions, at 71, UN Doc. A/810 (Dec. 10, 1948).

⁸ Dec. 16, 1966, 999 UNTS 171.

⁹ Dec. 16, 1966, 993 UNTS 8.

environment, natural resources, development, sustainability, intergenerational equity, self-determination, et al.).¹⁰

These two bodies of law have developed a substantial and synergistic confluence or overlap in the last 20 years. Today environmental rights are considered by many to be enforceable human rights and are specifically included in newer national constitutions¹¹ and international human rights instruments, all of the latter of which proclaim a right to “life” in various manners.¹² Further

Life, livelihoods, culture and society, are fundamental aspects of human existence – hence their maintenance and enhancement is a fundamental human right. Destruction of environment and thereby of the natural resources, is therefore a violation or leads to the violation of human rights – directly by undermining the above aspects of human existence, or indirectly by leading to other violations of human rights, for example through social disruption, conflicts and even war. Conversely, human rights violations of other kinds can lead to environmental destruction, for instance, displacement by social strife/war can cause environmental damage in areas of relocation; or breakdown in sustainable common property management.”¹³

Case law in a number of countries furthers this relationship between human rights and environmental rights. For example, the Supreme Court of India has held that right to life is a fundamental right under article 21 of the Indian Constitution and includes the right to enjoyment of pollution free water and air for full enjoyment of life.¹⁴

International conventions and other legal authorities over the last four decades have also reinforced this relationship between human rights to life and the right to a healthy environment. The foundation of International Environmental Law, the 1972 Stockholm Declaration of the UN Conference on the Human Environment, sets forth as Principle 1: “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”¹⁵ Its

¹⁰ Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 23 AM. U. L. REV. 1 (1982); see generally KRAVCHENKO & BONINE, *supra* note 5.

¹¹ Over 100 nations have adopted or modified their constitutions to include an environmental right and/or a right to a healthy environment in addition to a right to life. KRAVCHENKO & BONINE, *supra* note 5, at 67.

¹² KRAVCHENKO & BONINE, *supra* note 5, at 5.

¹³ ASHIS KOTHARI & ANUPRITA PATEL, ENVIRONMENT AND HUMAN RIGHTS 10 (National Human Rights Commission of India 2006) (italics and punctuation in original).

¹⁴ *Id.* at 16. The National Human Rights Commission of India, which has all the powers and characteristics of a civil court, considers water, sanitation, pollution, health, conservation, afforestation, and other environmental issues as human rights for purposes of its investigations and actions. See, e.g., NATIONAL HUMAN RIGHTS COMMISSION [OF INDIA], ANNUAL REPORT - 2005-2006.

¹⁵ June 16, 1972, UN Doc. A/CONF.48/14/Rev. 1 at 3 (1973), 11 ILM 1416 (1972).

successor 20 years later, the 1992 Rio Declaration on Environment and Development, restates this as its Principle 1: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”¹⁶

These “soft law” declarations solidified into conventional international “hard law” with the 1998 Aarhus Convention, which sets out new standards for human rights in connection with the environment:

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 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.¹⁷

Aarhus goes far beyond previous law, directing its state parties¹⁸ to develop national procedural and substantive laws and policies to provide the “three pillars” of environmental justice – the right to information, the right to public participation in environmental decision-making, and the right to access to environmental justice. These new “third generation” rights are often seen as in conflict with more traditional “second generation” socio-economic human rights, including personal property rights, employment, and economic development. Governments are struggling with how to balance these complicated and far-reaching conflicts between environmental protection and development rights, given the need for economic growth to support a higher and healthier standard of living around the world. The implementation of sustainable development requires coordinating very different sets of values, laws, and expectations, based on the ability to predict both short-term and long-term outcomes. This complicated balancing act has forced judicial decision makers to become problem solvers, not just adjudicators of existing law.

Specialized ECTs provide one vehicle for fairly and transparently balancing the conflicts between the human rights of environment and development. Today, many nations and subnational jurisdictions have successful ECTS, while others are considering establishing them or reforming the ones they have – in an effort to deal with these increasingly complex environment-development conflicts and to improve access to environmental justice.

¹⁶ June 13, 1992, UN Doc. A/CONF.151/26 (vol. I) (1992), 31 ILM 874 (1992).

¹⁷ UN Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 1, June 25, 1998, UN Doc. ECE/CEP/43 (1998); copy at <http://www.unece.org/env/pp/treatytext.htm>.

¹⁸ To date 41 states of eastern and western Europe and the European Union have become parties to Aarhus, so its reach is far from global. Other international and national laws impose Aarhus-like standards on many other countries. Pring & Noé, *supra* note 4.

Introduction to ECTs and the ECT Study

Specialized courts and adjudicative tribunals are one of the growing trends in many legal areas, their overarching purpose being “to *qualitatively* improve outcomes for litigants and society.”¹⁹ In the United States alone, there are trial or appellate courts with specific subject-matter jurisdiction for, among others, bankruptcy, tax, international trade, federal claims, veteran’s affairs, armed forces, foreign intelligence surveillance, drugs, domestic violence, divorce, family law, juveniles, mental health, and now even a federal vaccine court.²⁰

Specialized “environmental” courts and court-like tribunals²¹ first appeared almost a century ago. Denmark’s Nature Protection Board, created in 1917, focused on preservation of the natural environment, and Sweden’s Water Court, created a year later, focused at first on water rights issues. The 1970s “environmental movement” generated new environmental, natural resources, and public health laws around the world, and many countries, states, and local jurisdictions created specialty ECTs as part of this reform. The next wave of ECTs came in the 1990s and 2000s, prompted in large part by increasingly complex environmental laws and issues, growing court backlogs, and a recognized need for decisionmakers who were specifically trained in environmental law. Today, there are at least 80 ECTs in 35 countries – on every inhabited continent, in every major type of legal system, and in developed as well as developing and even least developed nations.²²

Governments create specialized ECTs in response to internal and/or external pressures. The pressures can come from judges, government environment officials, the bar, NGOs, academics, or the media. Generally, a charismatic, credible advocate – often a judge – takes the lead in urging the creation of an ECT. The most frequent reasons mentioned in the literature²³ and the study interviews are:

- **Efficiency:** Reduce decisional time.

¹⁹ David B. Rottman, *Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?*, 37 COURT REV. 22 (2000) (emphasis added).

²⁰ Google leads to numerous articles on each.

²¹ We use “court” to indicate a true judicial branch body and “tribunal” to indicate collectively all other governmental organs (typically less formal administrative bodies) that are empowered to resolve environmental disputes.

²² Interestingly, the USA has resisted creating an environmental court at the national level. Scott C. Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973). Nevertheless, ECTs proliferate in the US, including national environmental tribunals within executive branch agencies like the US Environmental Protection Agency and the Department of the Interior, one state (Vermont), and numerous city-level ECTs (such as New York City and Memphis, Tennessee).

²³ See e.g., sources in notes 27-35, *infra.*

- Economy: Reduce costs for all concerned with more efficient handling of cases, aggressive case management, more efficient use of experts, and use of ADR.
- Expertise: Increase decisional quality with judges who have more expertise and experience with the complex environmental laws, technical-economic questions, and value-laden issues than general jurisdiction judges.
- Uniformity: Increase consistency in the interpretation and application of environmental law across the jurisdiction and discourage forum shopping.
- Access to Justice: Improve access to justice for business, government, and the public by having an open, identified forum to handle environmental complaints.
- Case Processing: Improve case processing and reduce backlog of undecided cases in the general court system.
- Commitment: Demonstrate government's commitment to protection of the environment, sustainable development, compliance with international treaties and agreements, etc., by creating a visible court symbolic of that commitment.
- Problem-Solving Approach: Open up more flexible ways to solve environmental problems than the traditional adversary process – including alternative dispute resolution (ADR), collaborative planning and decisionmaking, hybrid civil-criminal prosecution, creative sentencing and enforcement options, court appointed special commissions, and facilitated settlement agreements. The “problem solving approach” (as opposed to the strict legalistic adjudication) can work better in some environmental cases, allowing judges to craft innovative solutions, focus on outcomes rather than outputs, take account of what is best for whole communities or the environment rather than just individual parties.²⁴
- Public Participation: Encourage greater public participation and support for the decisionmaking process through more open standing, use of community expert committees, etc.
- Public Confidence: Increase public confidence in the government's environmental and sustainable development efforts by having a transparent, effective, expert decisional body.

²⁴ Rottman, *supra* note 19, at 22. 25-26.

- Accountability: Potential review by an independent ECT encourages government agencies to be more thorough, fair, and transparent in their decisionmaking.
- Prevent Marginalization: Ensure that judicial resources will be dedicated to resolving environmental conflicts and that they will not be marginalized or pushed aside in favor of cases which are less time consuming and less complex.

On the other hand, there are counterarguments advanced against specialized ECTs. While a minority view, criticisms include the existence of other fields with legal and factual complexity, resistance to “fragmenting” the judicial system, reluctance to set environmental law apart (“in the closet”), preference for incremental reforms in the general judicial system, concerns about sufficient caseload to warrant a specialty court, added costs, susceptibility to “capture” by special interests, lack of judges with knowledge and training in the subject area, court bias, judges substituting their judgment for that of an administrative agency or conversely relying too heavily on agency/political positions, etc.

In the 1980s, the US Congress created a Federal Courts Study Committee to examine a variety of issues, including an overall evaluation of specialized courts.²⁵ The committee’s 1990 report,²⁶ *inter alia*, set out criteria for determining when to create a specialized court, including

- (1) The subject is a focused area of administrative decisionmaking, which is segregable from other claims;
- (2) The area has a high volume of cases, whose diversion might alleviate burdens in generalist courts;
- (3) There is a predominance of scientific or other technical issues requiring special expertise of decisionmakers; and
- (4) Uniformity in agency administration of the program is important.

The committee pointed out that it may not be necessary to create a new, specialized court if existing general courts or tribunals are adequate to cope with the volume, complexity, and demands of the cases. On the other hand, some would argue that environmental law has become so complex everywhere in the world that specially trained judges are critical to achieving environmental justice. One logical alternative in those jurisdictions which do not meet the generalized criteria is the creation of a “green bench,” allowing judicial specialization within the generalist docket. This choice has been made by a wide variety of jurisdictions, from India to Finland to Kenya.

²⁵ The final *Report of the Federal Courts Study Committee* is reprinted at 22 CONN. L. REV. 733 (1990); a summary of its criteria for specialized courts appears at Florida State University, *ABA Administrative Procedure Database* at <http://www.law.fsu.edu/library/admin/acus/305919.html>.

²⁶ *Id.*

Interest in ECTs is spreading globally, and a number of jurisdictions are currently considering creation of an ECT or the reforming their existing court structure for more environmental focus. For example, the UN Environment Programme (UNEP) Experts Group on Access to Environmental Justice in the Caribbean noted in 2007 that “consensus [has] emerged [in the region] on the need for the establishment of specialized and independent courts or specialized environmental divisions of the High Court judicial system”;²⁷ the same experts group recommends expanding ECTs jurisdiction beyond traditional environmental issues to include “the built environment, indigenous peoples rights, development planning issues and land tenure.”²⁸ On the opposite side of the world, China has announced plans to create an ECT in the provincial capital of Kunming.²⁹ UNEP, in the past, has been a leader in promoting ECTs, through recommendations, publications,³⁰ and judicial training.³¹ Jurisdictions as diverse as England, Abu Dhabi, and Hawaii, among others, are currently examining the potential for an ECT.

It was apparent that an in-depth comparative analysis of the different existing ECT models and practices would be useful to jurisdictions considering creating an ECT. A literature review found no such helpful study existed. Some individual ECTs have been analyzed in depth, including well-known examples like Australia’s State of New South Wales³² and New Zealand;³³ however, those models were not comprehensive displays of all options or necessarily appropriate for all jurisdictions. There have also been studies assessing the desirability of establishing ECTs in particular jurisdictions, such as England,³⁴ Scotland,³⁵ and India,³⁶ again limited in options and applicability.

²⁷ United Nations Environment Programme (UNEP), *Experts Group on Access to Environmental Justice in the Caribbean SIDS [Small Island Developing States]: Conclusions*, para. 6 (Barbados, Dec. 10-11, 2007), copy at http://www.pnuma.org/deramb/documentos/Conclusions_Workshop_Barbados_2007.pdf.

²⁸ *Id.*, para 8.

²⁹ *Kunming Plans to Establish Environment Court*, CHINA INTERNET INFORMATION CENTER (Sept. 22, 2008), copy at http://www.chinagate.cn/news/2008-09/22/content_16513054.htm. See Darcey J. Goelz, *China’s Environmental Problems: Is a Specialized Court the Solution?*, 18 PAC. RIM L. & POL’Y J. 155 (2009).

³⁰ E.g., UNEP, *MANUAL ON COMPLIANCE WITH AND ENFORCEMENT OF MULTILATERAL ENVIRONMENTAL AGREEMENTS* (2006). See particularly, *id.* at Guideline 41(o).

³¹ E.g., Earlier this decade, UNEP Headquarters in Nairobi sponsored a number of relevant programs, publications, and conferences, including training programs in environmental law for judges from Kenya, Uganda, and Tanzania, following which Kenya implemented three specialized environmental forums and Tanzania passed legislation authorizing an environmental court, which has not yet been implemented. Dinah Shelton & Alexandre Kiss, *Judicial Handbook on Environmental Law* (UNEP) (2005), http://www.UNEP.org/Law/PDF/JUDICIAL_HBOOK_ENV_LAW.pdf.

³² E.g., Paul L. Stein, *Down Under Perspective of the Environmental Court Project* (2000), http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_270600; Brian J. Preston, *The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse* (2007), http://lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_speeches_and_papers#preston.

³³ E.g., Bret Birdsong, *Adjudicating Sustainability: New Zealand’s Environment Court*, 29 *ECOLOGY L. Q.* 1 (2002).

³⁴ E.g., Lord Justice Sir Harry Woolf, *Are the Judiciary Environmentally Myopic?*, 4 *OXFORD U. J. OF ENVTL. L.* 1 (1992); Richard Macrory with Michael Woods, *Modernising Environmental Justice:*

A “cookie cutter” approach to ECTs is not useful. What is needed is a decisionmaking framework for ECT creation that can serve a broad range of different legal cultures and political situations.

Study Methodology

The University of Denver ECT Study focuses on national and sub-national ECTs,³⁷ defined by us as **government judicial or administrative bodies empowered to hear and resolve environmental, natural resources, land use, and related disputes**. The researchers in this Law and Society-type study – George (Rock) Pring, a professor of law, and Catherine (Kitty) Pring, a professional mediator and alternative dispute resolution (ADR) consultant – bring a multidisciplinary focus to the work.

The findings are based on

- extensive literature review
- observation of ECT sessions and
- over 100 in-depth interviews with judicial, legal, and civil society experts from a representative collection of the ECT types in the world.

The ECTs studied represent

- national, state/provincial, and municipal jurisdictions

Regulation and the Role of the Environmental Tribunal (2003),

<http://www.ucl.ac.uk/laws/environment/tribunals>.

³⁵ Scottish Executive Environment and Rural Affairs Department Environment Group, *Strengthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland* (2006),

<http://www.scotland.gov.uk/Publications/2006/11/22152827/0>.

³⁶ Law Commission of India, *One Hundred Eighty Sixth Report on Proposal to Constitute Environment Courts* (Sept. 2003), <http://lawcommissionofindia.nic.in/reports/186th%20report.pdf>.

³⁷ International or multinational ECTs are not a focus of this study, since they are presently not a particularly promising terrain. The International Court of Justice established a special chamber to deal with environmental matters in 1993, but it has not been used in the Court’s several important environmental cases. *International Court of Justice* (para 1.2), WIKIPEDIA,

http://en.wikipedia.org/wiki/International_Court_of_Justice. The Permanent Court of Arbitration, an intergovernmental organization (IGO) of over 100 member states, has developed a “unified forum” for arbitrating environmental and natural resources disputes, <http://www.pca-cpa.org>; Dane Ratliff, *The PCA Environmental Arbitration and Conciliation Rules*” (2003,

http://www.gasandoil.com/ogel/samples/freearticles/roundup_12.htm. See also, the NGO International Court of Environmental Arbitration and Conciliation website, <http://iceac.sarenet.es>. Canada, Mexico, and the USA have created a Commission for Environmental Cooperation (CEC) under the North American Agreement on Environmental Cooperation (The North American Free Trade Agreement (NAFTA) “Environmental Side-Agreement”), and that international body is authorized to hear citizen submissions on NAFTA governments’ failures to enforce environmental laws, but it has no enforcement powers. CEC, *Citizen Submissions on Enforcement Matters*, <http://www.cec.org/citizen/index.cfm?varlan=english>. There are many articles and calls for the creation of an International Environmental Court; see, e.g., the International Court of the Environment Foundation website, <http://www.icef-court.org>.

- all 6 inhabited continents
- developed and developing nations from the richest to the poorest
- common law, civil, and religious legal systems
- Christian, Islamic, Hindu, and Buddhist cultures
- civil, criminal, combined civil-criminal ECTs
- stand-alone ECTs as well as “green benches” in general courts
- purely adjudication to adjudication-mediation to purely mediation models
- countries with well-developed environmental laws to those with less well-developed laws and
- the spectrum from “problem solving” ECTs to those applying only “the rule of law.”

ECTs are nothing if not diverse, and many of those are in the process of some change and reform. Some jurisdictions are currently investigating the development of an ECT, while other jurisdictions with ECTs are considering eliminating such specialization. Some nations with ECTs are analyzing ways to make them effective in dealing with cutting-edge issues, such as climate change, the precautionary principle, and the Aarhus “three pillars.” ECT study everywhere involves a “moving target” that is dynamic and evolving.

During 2008, we conducted over 100 face-to-face interviews in 21 different countries, representing 33 different ECT models. ECT-engaged judges, prosecutors, private attorneys, government officials, NGOs, and academics were interviewed in sessions ranging from 45 minutes to over 5 hours (!). The interview data is being comparatively analyzed, and the 12 critical characteristics that emerged are being developed as the analytic framework and the focus for determining best practices. The complete study is being prepared for publication in 2009 and will include in-depth analysis of existing practices and alternatives, with “best practice” recommendations, within each characteristic.

Framework of Characteristics

Twelve distinct characteristics or “building block” decisions for ECTs were identified by the Study. The options or alternatives within each characteristic should be evaluated by any jurisdiction considering creating or reforming an ECT. This section briefly outlines the 12 characteristics (to be discussed in substantially more detail in the final study). All have an impact on access to environmental justice, but some have considerably more relevance than others to human rights to environmental quality, and these are marked with an asterisk in this section and then discussed further in the section following this.

1. **Type of Body:** ECTs can be structured in many ways, varying chiefly in independence, competence, jurisdiction, and cost:

(1) **Specialized Court:** This model is an actual judicial branch “court,” with trained, expert judges. It is independent of the executive and legislative

branches of government, has a separately identified budget, and gives judges security of tenure (life, to a specific age, or term of years). Typically, these judges do not hear other types of cases (examples include New South Wales, Australia; New Zealand; State of Vermont, USA).

(2) Specialized Court Chamber: This is a general judicial court with a specialized chamber of judges set up within it to hear environmental cases. This “green bench” or chamber may be formally designated or an ad hoc assignment of a judge volunteering to take environmental cases. It does not require special legislation to create or a separate budget (Netherlands, Finland, Thailand, Kenya Supreme Court), and may not require either judicial expertise or interest in environmental law.

(3) Tribunal: This term covers a number of options that are not judicial branch courts but are still specialized government bodies empowered to make binding decisions in environmental cases. Tribunals usually are created by authorizing legislation, have approved annual budgets, and may or may not have enforcement powers. Their membership can include a mix of judges, lawyers, and lay persons, even in some cases all laypersons (Ireland). Tribunal members are generally political appointees, and may or may not have tenure following appointment. Tribunals’ independence varies but there are basically four models:

- Independent tribunals – answerable to the head of government and operating outside the executive branch environment agency whose decisions, permits, plans, and actions they are reviewing (Ontario, Canada; New York City, USA);
- “Captive” tribunals – housed within the environmental regulating agency (Austria, US Environmental Protection Agency (USEPA) Environmental Appeals Board, Kenya National Environmental Tribunal);
- Quasi-independent tribunals – housed in a different executive branch agency (such as the Attorney General’s Office or the Office of Administrative Law Judges which serve the USEPA);

(4) Other specialized forums: Include entities such as Special Commissions appointed by a court to investigate and make recommendations to the court (India), wholly non-judicial bodies relying on mediation and other forms of ADR with no decisionmaking or enforcement power (Japan, South Korea), and special environmental Ombudsmen, potentially with standing and funding to represent complainants in court (Kenya, Austria) but not necessarily decisionmaking or enforcement powers of their own.

*2. Legal Jurisdiction: What laws and issues will the ECT cover? The majority of ECTs deal primarily with environmental laws and issues such as pollution permits, environmental quality, and natural resources development.

Some expand beyond these to include endangered species, parks and recreation, health and safety, etc. Some provide an even fuller range of issues, adding land use, sanitation, building codes, noise, transportation, fire regulations, food safety, etc. (New York City). Some deal only with land use laws and not environmental laws (Ireland). Still others may deal with only one issue, such as EIAs (Kenya National Environmental Tribunal).

3. **Court Level and Appeals:** ECTs can be created at any level in the adjudication hierarchy – the internal agency level, trial court, intermediate appeals court, and/or the supreme court level.

(1) **Internal Agency ECT:** An ECT inside the environmental or other regulatory agency can be either of two kinds:

(a) It can be the forum that makes the agency's initial decision to issue a permit, enforce a violation, approve a plan, etc.

(b) More often, it is an internal forum to which such initial agency decisions can be appealed (USEPA).

Appeals of this "first instance" ruling then typically go out to a trial or appeals level court in the judicial branch for a "second instance" review.

(2) **Trial Court Level ECT:** Most common is an ECT at the trial level, and these can be either of two kinds:

(a) **Second-instance Review:** Hearing appeals of agency decisions and rulings, with appeals of this going to an intermediate appeals court for a final ruling (third instance review), but not on to the supreme court typically.

(b) **First-instance Case:** Hearing new case filings that are not appeals of agency decisions, such as one neighbor suing another for pollution, property damage, noise, etc., with appeals also going to an intermediate appeals court (second-instance review), then possibly the supreme court (third instance).

(3) **Appeal Court Level ECT:** In a few instances, an agency decision can be appealed directly to the intermediate appeals court, bypassing the trial court level. This usually occurs only when the agency is viewed as having a very trustworthy, competent, and objective internal adjudication process that is as good as a trial court could provide (USEPA).

4. **Geographic Coverage:** Geographic coverage is an important consideration for countries that have large jurisdictions and where travel is difficult. ECTs have responded to this challenge of distance by creating "easy" filing procedures (e.g., standard forms, on-line filing, etc.), traveling courts

(Brazil), holding hearings at the site of the proposed development (Vermont), permitting testimony by teleconferencing and video conferencing (New Zealand),

5. **Case Volume:** The choices of legal jurisdiction (2 above) and court level (3 above) primarily control the caseload of the ECT. We found volume as low as 17 cases per year (Bangladesh) – making it difficult to justify a specialist court – to over 700,000 per year (New York City), requiring hundreds of ALJs.

*6. **Standing:** Standing (who can file or participate in a case) is a critical factor covering a huge spectrum from very open to extremely limited, with all ECTs having some limits or mechanisms to prevent “groundless or frivolous” lawsuits. Care must be taken not to exclude important constituencies with a real stake (such as the poor, indigenous peoples, communities, NGOs, etc.) or important societal values (such as endangered species, protection of old growth timber, climate change, etc.). Interestingly, ECTs with the most open standing (Canada, USA, Australia, India) have had very few problems with groundless-frivolous lawsuits because judges have power to dismiss cases and because litigation is expensive. These jurisdictions have found that suppressing the filing of legitimate grievances can be counter-productive, leading to loss of public confidence and societal unrest, and that access to justice is a good safety valve.

*7. **Specialized Prosecutors:** Environmentally trained prosecutors and technical staff can significantly improve efficiency, competence, coverage, and credibility of the enforcement process. Some countries provide environmental prosecutors with civil power in addition to traditional criminal power, particularly useful in jurisdictions where NGOs and other potential citizen/community groups are weak or unlikely to bring ECT cases (Brazil).

8. **Expert Evidence:** ECTs take many different approaches to assure needed expert testimony. For example, some ECTs:

- Hire their own independent experts using budgeted judicial funds (Ontario, Canada);
- Rely solely on the expert witnesses presented by the parties, the so-called “battle of the experts” (USEPA, Vermont);
- Rely on experts working for the government agency (New York City);
- Appoint experts (scientists, engineers, etc.) as judges, with equal weight given to their opinions as to the legal judges on the panel (Sweden has a lawyer and a chemical engineer as judges on one panel);
- Keep lists of volunteer experts in various disciplines in academia, think tanks, consulting firms, etc., on whom the ECT can call (Denmark, Belgium);

- Make parties' experts swear to represent only the court, not the parties (although the parties are paying the experts) or be in contempt of court (New South Wales);
- Require parties' experts to focus only on issues of professional disagreement, possibly putting both sides' experts on the witness stand together and having them respond directly to each others' points of disagreement – so-called "hottubbing" (New South Wales);
- Utilize site visits to see, evaluate, and make informed judgments (Ireland, Brazil, Vermont);
- Appoint special commissions of experts to investigate and report their recommendations back to court (India);
- Rely completely on the record of the preceding decision maker or court for expert testimony (Tasmania, Australia; Finland; appellate level courts);
- Employ trial de novo, starting over with testimony from the same or different experts (Vermont).

*9. **Enforcement Tools:** An ECT must have effective enforcement powers to ensure justice and compliance. The majority of ECTs in our Study were civil, non-criminal courts, and their enforcement tools included settlement conferences, mediation, monetary penalties, cease and desist orders, community service, new permit conditions, remand back to the agency for reconsideration, required remediation and closure, etc. ECTs with criminal powers can employ these as well as prison sentences and fines (even for government officials who are found negligent (Costa Rica)). Criminal enforcement is most effective in cultures where there is a great social stigma attached to a person or corporation accused of crimes (Belgium, Brazil). The size of the fine permitted by law is also an important consideration; if the fine is not large enough to act as a strong deterrent, it is wholly ineffective.

*10. **Alternative Dispute Resolution (ADR):** ADR techniques are the cutting-edge trend in ECTs, particularly those that define their role as "problem solving," rather than only applying the "rule of law" like an umpire. Some examples:

- Mediation is most widely used – a trained, neutral facilitator to support communication and develop acceptable options between the parties (Tasmania, Vermont, New Zealand);
- Restorative justice in criminal cases – cooperative sessions focused on the harm to the victims and society rather than just penalizing the wrongdoer (New Zealand);

- Ombudsmen are utilized in some jurisdictions (Austria, Kenya) – individuals or commissions separate from the ECT and the agency who negotiate the interests of the public, may have standing to represent concerned parties in court, and can monitor outcomes of court orders.

Jurisdictions more focused on “rule of law” (Sweden, Finland, Denmark) generally do not use ADR, except for judge-supervised settlement conferences. Reversing that, a few countries (Japan, South Korea) appear to use only mediation, not adjudication, in their ECTs.

11. **Judicial Expertise:** ECT judges range from those with no specialized environmental law training or interest to judges with extensive environmental law training, expertise, and commitment who are carefully selected based on their competence and willingness to serve. Some jurisdictions have an insufficient number of cases to justify a specialized judge, so they use competent generalist judges for the ECT. Generally, those interviewed felt that judges who were highly trained, experienced, and motivated and who served fulltime were clearly preferable.

12. **Operational Tools:** Many ECTs have developed and employ new operating tools for increasing effectiveness and efficiency, some quite alien to the traditional court system. These include:

* (1) **Case Management:** Perhaps the most significant operational innovation in ECTs is the use of rigorous case management. Case management is accomplished by a combination of (a) an assigned staff person(s) who is the initial contact for the litigants and who maintains contact with them during the entire adjudication process plus (b) a sophisticated computer data management system that supports the case manager and the litigants (see 12(2) below). The case manager explains court processes, reviews the case record, may recommend or actually conduct mediation, may have the power to hold directions (scheduling) hearings, assures that parties are noticed in advance on all deadlines, monitors filings with the ECT, and may draft decisions for the judge(s). In at least one jurisdiction, the case manager also monitors compliance with judicial orders. The scope of authority given the case manager depends on the judge and the training and expertise of the case manager. Lawyers or non-lawyers can act as case managers, depending on scope of authority assigned.

(2) **Information Technology (IT):** Sophisticated computer data management systems are being developed by ECTs that can track every step in the cases by filing date, type, assigned judge, specific dates and deadlines, time to a final decision, outcome (including sentencing details), court costs, and compliance with court orders. In addition, IT is used to support video teleconferencing of hearings and off-site expert testimony (New South Wales), immediate transfer of verbal testimony on the record via a Word document to a

judge in another locality (New Zealand), historical analysis of sentencing for violations to establish sentencing guidelines when they are not set by statute, and to evaluate court performance over time. IT can allow filings to be made on-line and provide websites giving the public access to information about procedures, costs, and decisions.

(3) Directions Hearings: To prevent delay, some ECT judges regularly require directions (scheduling) hearings to establish and monitor firm court filing and hearing deadlines. Directions hearings keep cases moving and prevent inaction and routine requests for postponement.

(4) Traveling Courts: In order to make the environmental court easily accessible for litigants and the public and to allow judges to see the physical sites in issue, many courts travel out of the court seat for investigations and hearings.

(5) Simplified Rules of Procedure: Streamlining the court process, using simplified rules of procedure, is also being explored by a number of courts. The rules regarding evidence in particular are being analyzed to improve the quality of the fact record, focus only on the issues in dispute, and to save court, litigant, and expert witness time and expense.

* (6) Reduced Costs: In an effort to make access to environmental justice more affordable for low-income litigants, local communities, and NGOs, some ECTs have reduced filing fees substantially and even made filing possible online and adopted rules against cost shifting to the losing party.

ECT Characteristics with Particular Significance for Human Rights

Some of the 12 identified factors have a greater impact on access to environmental justice and protection of human rights to life and a healthy environment than others. We find the characteristics with the most human rights significance are legal jurisdiction, standing, specialized prosecutors, enforcement tools, ADR, case management, reduced costs (including elimination of the “loser pays” doctrine).

Legal Jurisdiction: The more limited the jurisdiction of the ECT, the less protective of human rights it appears to be. Those ECTs dealing only with assessing the “correctness” of an EIA or those limited to development planning decisions have the least power to impact the right to a healthy environment for current and future generations. On the other hand, those ECTs whose purview is based on a constitutional right to a healthy environment as well as a right to life have the greatest scope.

Standing: Standing rules vary widely in ECTs and can be a very significant barrier to the public’s access to environmental justice and protection of human

rights. Standing not only impacts access to the judicial process, but can impact the parallel Aarhus rights of information and public participation. The stated purpose of standing, in the words of a famous US Supreme Court precedent, is to assure a litigant has “such a ‘personal stake in the outcome of the controversy’...as to ensure that the dispute...will be presented in an adversary context and in a form...capable of judicial resolution.”³⁸ That is, access to the courts should be limited to those who have (1) a genuine injury, (2) caused by the opposing side, (3) which a court order can redress.

Some ECTs’ standing rules are much more restrictive than necessary to assure non-frivolous litigants and are particularly exclusionary for NGOs, community groups, indigenous peoples, or others whose lives or livelihoods may be affected by a proposed development or government action. For example, some ECTs only give standing to those owning real property within a prescribed distance (very few meters) of the activity complained of (Ireland). Some only allow standing for those with actual, demonstrable physical or economic impacts on their property or health. Some bar standing for those who did not participate in the administrative proceedings leading up to the lawsuit, regardless of lack of notice or insufficient funding. Sweden, of all places, disqualifies NGOs unless they have been operating for three or more years and have over 2,000 members (only 2 NGOs in that entire country reportedly meet those requirements). Most outrageous of all, Bangladesh allows litigants access to its ECT only after they have applied for and received permission to sue from the national environmental agency (whose decisions are the subject of the lawsuit)!

Excessively strict or illogical standing requirements have a disproportionately exclusionary effect on the poor, who lack funds to participate in agency actions or to challenge standing requirements in court. Such a “narrow court house door” also excludes issues that may be of great importance to those whose right to life is directly threatened by such issues as slum conditions, water and air pollution, hazardous wastes, public health threats, food safety, and energy security.

Countries with a constitutional provision that provides a right to a healthy environment (such as Finland, Belgium, Austria, India) have more open standing than countries that rely on individual environmental protection acts, which can be interpreted restrictively by the courts (USA). India is at an extreme, allowing any person to complain of a violation of his/her constitutional right to a healthy environment and to do so without a lawyer – merely by sending an email or a note to India’s highest court! Thousands take advantage of this ease of access, resulting in an overburdened appellate court attempting to hear factual cases de novo, a standing approach that goes too far the other way.

Providing standing for environmental NGOs (ENGOs), whose lawyers are familiar with the courts, procedures, and issues, actually increases access to

³⁸ *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972).

justice. However, the historical mission of ENGOs is generally not the protection of the disadvantaged or of human rights, but the protection of the environment. Only fairly recently have some ENGOs such as the Sierra Club taken on the mantle of “environmental justice,” sustainability, and human rights, in addition to environmental protection. ENGOs all have donor limitations, financial constraints, and staffing limitations which requiring them to be very selective in choosing cases, and thus look to case factors like the ability to establish an important precedent, to make a major impact on the environment, and to be “marketable” so that they can raise funds for the very expensive costs of litigation that may go on for years. Environmental attorneys willing to serve pro bono and law school clinics – especially environmental, indigenous, or human rights clinics – also are major contributors to access to environmental justice, with or without ECTs.

The more expansive the standing, the better the access, and the more accountable the administrative decisionmaking process. A recent conference of European judges concluded that “it is very likely that better access to the courts in environmental issues will incite the administration to better prepare its decisions, to more carefully consider its omissions to act, and to better associate individuals and environmental organizations in this process.”³⁹

Specialized Prosecutors: Jurisdictions with strong specialized environmental prosecutors, such as Brazil, increase access to justice and protection of human rights by aggressively pursuing actions that negatively impact communities of people who are often impoverished and unempowered to represent themselves. These legal challenges have no direct cost for the most impacted communities because the prosecutors are government employees. For example, the Parana State environmental prosecutor’s office has pursued litigation against the government challenging its plans to construct a dam that would wipe out the homes and livelihoods of hundreds of people living in and adjacent to the dam site. Clearly this type of action forces the court to balance the existing community’s rights to housing, employment, and use of private land against the rights to clean water and economic development. In Amazonas State, prosecutorial actions have been brought against the timber industry and wildlife poachers.

However, environmental prosecutors are not a panacea for assuring access to justice or protecting the rights of indigenous communities, as Brazil also illustrates. With some of the strongest environmental protection legislation in the world, but a huge landmass and some of the worst environmental problems, the prosecutors are hampered by size of caseload, lack of sufficient

³⁹ European Commission, Environment Directorate-General, *Conclusion of the Summary Report on the Inventory of EU Member States’ Measures on Access to Justice in Environmental Matters (the Milieu Inventory)* (Sept. 19, 2007), full report at http://ec.europa.eu/environment/aarhus/study_access.htm; extracts including the quotation can be found in *The Judge in Europe and Community Environment Law Conference: Participants’ Documentation* at 15/69 (Oct. 9-10, 2008).

investigative and monitoring personnel, lack of aggressive local enforcement once verdicts have been handed down, and lack of both sufficient prosecutors and judges to handle all the violations. In addition, some prosecutors feel their existence discourages the development of NGOs who could bring environmental actions.

Enforcement Tools: Among all the enforcement tools potentially available to ECTs, perhaps the most important in the protection of both the environment and human rights is the cease and desist order. Not all ECTs have this power, but without it, irreparable damage can be done before the judicial process has run its course. “In any case, an effective system of interim relief must be installed. The procedure has to be easily available. It must be speedy, protect against irreversible damage.”⁴⁰ Other powers, such as the ability to add conditions to permits for development, the ability to require remediation, and the ability to require evidence of sustainability as a condition of development contribute to ensuring access to justice and protection of the environment for present and future generations. Whatever enforcement tools a court uses, they must be adequate in impact (size of fines, criminal consequences, public embarrassment) to discourage re-offending and new offenders. They must also have the power to monitor for on-going and future performance, yet most ECTs do not have such a power and rely on the environmental agency, the community, or the prosecutor to identify and report failures to follow court orders.

ADR: We found many ECTs use mediation and other forms of ADR as important mechanisms for problem solving. ADR allows parties to focus issues and negotiate creative solutions on a “level playing field” where the interests and needs of the less-wealthy and less-powerful can be balanced against the needs of other richer and more powerful parties, including government. This is particularly effective when the court has annexed mediation to the court process, so that mediation is conducted by an employee of the court trained in both mediation and environmental law. Mediation can be court-ordered prior to the first hearing or at any time during the proceedings. The mediation process allows the parties to discuss all their needs and to negotiate outcomes which they believe will best achieve positive outcomes for themselves, for the environment, and for the larger community. Experts can be included in the process in the spirit of full disclosure and open and honest negotiation. Mediated settlements can be incorporated in an enforceable court order and can include a number of agreements that address human rights and sustainability into the future which might not emerge from a traditional judicial process. Mediation can also save the court time and money, permitting judges to focus on those cases that are not amenable to mediation.

Case management: Cutting-edge ECTs use a variety of case management tools to make the conflict resolution process more efficient and effective. A court or tribunal staff case manager may advise parties in advance

⁴⁰ *Id.* at 17/69.

about filing procedures and other requirements, arrange mediation, calendar directions hearings, set court deadlines to assure a case moves forward in a timely way, assure exchange of documents, availability of experts, etc. These functions are key to ensuring that litigants have the information and needed assistance to achieve access to justice. Increasingly courts are making information about the entire process available to the public through the internet, including how to file, what steps to expect, and whom to contact with complaints or other concerns. They are also posting court decisions on the internet for the public to follow. These tools enhance full public access to information and to public participation in the process, explain standing requirements and costs, and enhance the transparency of the decisionmaking process.

Reduced Costs: The costs and financial risks of an ECT proceeding can be the biggest element in chilling access to justice and human rights protections. The Aarhus Convention recognizes this, specifically requiring that access to justice not be “prohibitively expensive.”⁴¹ Further, it requires parties to “consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”⁴² ECTs around the world have taken major steps to make the process more affordable for all litigants, particularly individuals representing a public (as opposed to private) interest, ENGOs, communities, etc. Cost reduction efforts include reducing filing fees to minimum or no cost (some courts/tribunals allow filing of a case on-line or by letter with no fee); placing the burden of proof on the entity proposing development; providing scientific and technical experts who are court paid or advisory to the court; requiring experts to be accountable to the court, not the party paying their fees; using alternative dispute mechanisms which are court annexed and can be accessed *pro se*; and having access to funds to subsidize the litigation costs of impoverished parties or ENGOs.

The biggest chill factor we found is the rule in some jurisdictions that the loser pays the winner’s full costs (court costs, attorneys fees, expert fees, discovery costs, research studies, etc.), which can be hundreds of thousands of dollars. Britain, Canada, Australia, and many common law countries apply this so-called “English Rule” that the unsuccessful party pays all of the litigation costs of the winner (“costs follow the event”), regardless of how meritorious the action was. Australian citizen groups, communities, and environmental NGOs are reluctant to bring litigation in the general courts because they apply the English Rule. The Environmental Defense Organization (EDO) in Sydney reports that a community nonprofit lost a legitimate public-interest law-reform case and had to declare bankruptcy to avoid hundreds of thousands of dollars of debt. The “American Rule” is the reverse: US judges have no common law right to engage in such cost-shifting without special legislation (for example penalizing “groundless-frivolous” litigation). To counteract this chill of bankrupting costs, several Australian ECTs by rule make it clear that they do not follow the English

⁴¹ Aarhus Convention, *supra* note 17, art. 9, para. 4.

⁴² *Id.*, art. 9, para. 5.

Rule, realizing its negative impact on access to justice. Establishing a legal principle that parties each bear their own costs of litigation, absent gross misconduct or groundless-frivolous actions, is perhaps the most important element in promoting access to justice and protecting human rights.

Other Barriers: Access to environmental justice encounters other barriers, which some courts have made efforts to eliminate. **Distance:** Physical distances in a court's jurisdiction may make access prohibitively expensive and time-consuming and require parties to take time off from work to participate in an environmental challenge. ECTs have responded creatively with traveling courts (literally in a van in Brazil), traveling judges, electronic filings, and testimony by phone, video, or teleconferencing. **Sentencing:** A fair and equitable process requires consistency of sentencing, and some jurisdictions have developed computerized sentencing guidelines, based on precedent. **Judicial training:** Judicial expertise in environmental law varies in the ECTs studied, so some jurisdictions either provide special training in environmental law to their judges or have a selection process that assures prior training, experience, and interest prior to appointment. **Public education:** Public awareness of specialty courts requires a substantial public education program. Some ECTs have done notable work in this fashion outside the courtroom. For a truly dedicated example, one Brazilian environmental court judge authors, illustrates, and publishes comic books about his court and distributes them to schools where he personally goes to provide lectures – all paid for by persons or corporations found guilty of violating the law. Other courts maintain websites, publish pamphlets, work with ENGOs to produce educational materials, and televise proceedings.

Conclusion

Specialized Environmental Courts and Tribunals can play a very important role at the convergence of environmental law and human rights law. Violations of the one often affect the other, and administrative and judicial decisions in environmental law almost always have consequences for human rights beyond the right to a healthy environment. In some jurisdictions, human rights violations are being tried in ECTs, and in others environmental violations are being resolved in human rights tribunals. The University of Denver ECT Study finds that specialized ECTs can and do enhance access to environmental justice and the protection of human rights. We expect to see more jurisdictions, including more states and cities in the USA, creating independent specialized ECTs to enhance access to environmental justice and sustainable development for current and future generations.