

Presentation:
First Interamerican Forum on Environmental Justice: "Access to Environmental Justice"
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“Access to Justice and Environmental Courts and Tribunals: The Global Picture and Future Predictions”

GEORGE (ROCK) PRING:

Distinguished jurists, ladies, and gentlemen. We are very pleased to be with you. Our thanks to the 2nd Environmental Court of Santiago for hosting this very exciting conference. We congratulate Chile on the passage of Law 20,600 in 2012, and we congratulate the Environmental Courts in Santiago and Valdivia on their successful beginning.

Chile has done so much to improve access to environmental justice since 2010 when we were here last! Now we are gathered to celebrate Chile’s accomplishments and look to the next steps forward

In Kitty’s and my presentation today, we would like to split our time and present 2 pictures. First, I will look through a “telescope” with you at the current state of ECTs and Access to Justice around the world. Then, Kitty will look into her “crystal ball” and predict what we see in the future for ECTs.

We have been studying ECTs for 7 years through our University of Denver Environmental Courts and Tribunals Study (ECT Study). That research is reported in our book – Greening Justice: Creating and Improving Environmental Courts and Tribunals – and in our articles. The book and articles are all available free on our university website, www.law.du.edu/ect-study.

The experts’ conclusions – and ours – are clear: Effective ECTs can greatly improve access to justice.

As you know from the excellent speakers before us, access to justice is now a foundation principle of the Rule of Law. The need for access to environmental justice was recognized by the world’s nations in the Rio Declaration in 1992. Principle 10 of Rio stresses the need for 3 environmental “access rights” for the public – access to information, access to public participation in decision-making, and – our favorite – access to justice.

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Since Rio, we have seen Principle 10 spread and gain wide acceptance on the international scene. For example, in 1998 those 3 access rights were guaranteed in the Aarhus Convention, now binding law in 46 European countries and the EU. International financial institutions – like the World Bank, the Inter-American Development Bank, and others – now require compliance with Principle 10 rights. And in 2012, Chile was a leader in the adoption of the “Declaration on the Application of Principle 10 of the Rio Declaration,” now signed by 18 Latin American and Caribbean nations, including many represented here today. In the Declaration, you recognize that access to information, public participation, and justice are essential for good governance, sustainable development, human rights, and democracy.

As you know, one of the most exciting developments in access to justice is the specialized ECT. We call them “courts” if they are part of the judicial branch – ECs like Chairman Chateram Sinanan’s in Trinidad & Tobago – or “tribunals” if they are part of the administrative or executive branch – ETs like Judge Kathy Stein’s in the USEPA or Judge Jerry de Marco’s in Canada. Chile’s are unique in that they are independent, more or less free-standing, and not under the direction of either the judicial or executive branch. They can be full courts, like Chile’s, or a “green bench” or “green judge” of a general court or tribunal.

We have identified over 500 ECTs authorized around the world in almost 50 nations – on every inhabited continent, in every major legal system, at all government levels (national, state/provincial, and local), and in countries from the richest to the very poorest (think Bangladesh!). And Chile’s are not the newest – the country of El Salvador and our state of Hawaii have just authorized ECs. This judicial reform is spreading at an amazing pace – a majority of these ECTs were created in just the last 10 years, and more are on the way.

Chile’s new environmental courts are unique, in another way.

In most countries, the creation of ECTs is designed to give the environment more protection – more than the government agencies or general courts are providing. Chile’s ECs arose from a different focus. The Business Magazine of Chile and the Environment Ministry report that this EC law was designed to give business more protection – protection against the government environmental agencies. Their strong powers since 2010 to impose fines, block projects, and shut down companies for alleged environmental violations were a cause for concern in the business community. Some in Chile think the new ECs “will mostly be a route of appeal for companies rather than the affected communities,” although under the law both have the right of access to the court.

Evaluation over time will tell how well Chile’s ECs provide balanced access to justice.

To aid in the evaluation of an ECT, our study has identified 9 factors that measure how well an ECT provides access to justice. In evaluating a planned or existing ECT, one should ask the following questions:

1. Accessibility: Are members of the public – citizens, businesses, and organizations – able to get to the decision-makers, either in person or electronically? Does the ECT travel to the people to save them time, jobs, and money? If not, what can be done to improve public access, knowledge, and confidence?
2. Jurisdiction: Does the ECT have competence over all of the provisions of the country's Constitution, laws, and regulations affecting the environment? Does it integrate both pollution laws and land use development laws? If its jurisdiction is not integrated and exclusive, how could that be improved?
3. Standing: Can any interested person, community, business, or organization get access to justice in the ECT – that is, file a complaint or participate in a pending case? Or are there barriers to legitimate cases? Studies by the Australia Law Reform Commission show that opening up standing – opening the courthouse doors wider – does not cause unmanageable problems of court congestion, groundless-frivolous lawsuits, or other problems, as some think.
4. Costs: Are the expenses of litigating in the ECT too high and keeping people from using it? If so, what can be done to lower those costs, for parties, witnesses, and others?
5. Speed: Is environmental justice being delivered in a “speedy,” efficient, timely way? What could be done to make the process faster and fairer? Does the ECT have rules of procedure and evidence that are efficient? Do the judges enforce deadlines? Is there an effective case management system in place to monitor case progress? Can information technology help?
6. Experts: Are the ECT's decision-makers experienced in environmental law? Do they engage in continuing training? Do they have access to unbiased scientific and technical expertise, either as co-judges or advisors to the court? Can they apply complex legal principles – like those discussed yesterday by Justice Antonio Herman Benjamin of Brazil – including the prevention, precautionary, polluter-pays, non-regression, and sustainable development principles, among others?
7. Consistency: Are the ECT's decisions consistent within the ECT, with other ECTs in the country, with the general courts? Are the decisions, hearing process, and treatment of parties transparent, independent, and free of bias and politics? Is the ECT trusted by the parties and the public?
8. Problem-solving approach: Do the decision-makers approach cases with a desire to find a good, creative solution to the problem? Do the decision-makers have adequate enforcement tools and remedies to really solve the problem presented? Do

they have the authority to develop creative solutions and remedies that are legal, but not necessarily spelled out in the law?

9. Alternative Dispute Resolution: Most important! Does the ECT provide ADR opportunities, such as mediation, with its own trained staff? Are cases assessed at the outset for ADR? Do the judges understand its value?

If the answers to any of these questions is No or only partially Yes, then there are opportunities to improve access to justice by designing and implementing changes.

Now, allow me to turn this over to Kitty – to envision what the future holds for ECTs

CATHERINE (KITTY) PRING:

Our thanks to the 2d EC of Santiago for sponsoring this visionary and exciting First Interamerican Forum on Environmental Justice and for assembling this impressive gathering of distinguished jurists and thinkers.

“May you live in interesting times” – we know this as a Chinese curse, one that reflects times of uncertainty, change, and danger, rather than peace and status quo. We definitely live in very “interesting times” with ECTs – and it appears they are only going to become more interesting in the decades to come!

Our University of Denver ECT Study continues to analyze ECTs in our rapidly changing times. We see a number of trends developing with ECTs – trends that affect access to justice – and we can make a number of future predictions:

PREDICTION 1 – MORE ECTs:

We predict many more specialized ECTs will be created, and those already in existence will undergo change and improvement.

The primary driver of ECT development is growing public awareness of environmental degradation, climate change, unregulated development, poverty, pollution, and food and energy security – thanks to the spread of information technology, social media, and the internet. This results in the passage of generally strong environmental and land development laws, raising public expectations. However, when government enforcement lags behind the laws, the public looks to the justice system to protect their rights. If the general court system fails to deliver access to environmental justice, then pressures emerge for more expert, efficient, and

independent justice systems, often leading to the creation of specialized ECTs, such as the many models we have heard about yesterday and today.

Acknowledging escalating climate change and its potential devastating global impacts is perhaps the biggest challenge we all face. We can predict ECTs will emerge as the forums for balancing the risks and benefits of climate-affecting development.

PREDICTION 2: HUMAN RIGHTS

Another prediction we can make is that there will be a growing convergence – an intersection – of human rights with environmental rights. You have heard this already from a number of speakers, including His Honor Sergio Muñoz Gajardo, President of the Supreme Court of Justice of Chile. Governments, business, and individuals are increasingly being held accountable in national and international forums for ensuring that all persons – including women, children, the poor, minorities, indigenous peoples, and the disenfranchised – have enforceable human rights. As many as 147 of the 193 United Nations member countries have explicitly recognized environmental human rights and/or responsibilities in their constitutions, laws, or judicial decisions, as Chile has in its Constitution. More rights beyond health and safety, rights of “future generations yet unborn,” rights of Nature independent of humankind, and other new rights are being recognized.

We predict that ECTs will be leading the way in developing and expanding these environmental rights, in the context of human rights which are legally protected.

PREDICTION 3: NEW LEGAL PRINCIPLES

New international legal principles are emerging, as you heard from Justice Benjamin. The leading example is “sustainable development,” which the international community is making into a requirement in international and regional treaty law, in international bank funding, in UN work, in national law, and as a response to climate change. Can land use and resource development be allowed only if it meets a standard of “sustainability”? That is, development that meets the needs of the present without compromising the ability of future generations to meet their own needs. In short, how do we balance economic, social, cultural, and environmental objectives, now and in the future? ECs in Australia and elsewhere are already deciding EIA cases based on this principle.

Another of the new international standards that will make challenging work for ECTs is the “precautionary principle” announced in Rio Declaration Principle 15. It states that if there is uncertainty about whether a proposed development or government action will cause harm to the public or the environment, the burden of proving that it is not harmful falls on those supporting the action, not those opposed to it. So the vexing problem of scientific uncertainty and doubt will fall on the shoulders of those who want to change the status quo – and on the ECTs applying this principle.

PREDICTION 4: ALTERNATIVE DISPUTE RESOLUTION

We foresee that ECTs will increasingly use ADR as a substitute for contested trials and judicial decisions. Mediation led by a neutral professional working for the court appears most successful and can substantially reduce court and parties' time and costs. ECTs are finding ADR can result in greater efficiency, reduced judicial caseload, lower costs for all, and higher satisfaction with outcomes for parties and the public.

PREDICTION 5: MORE JURISDICTION

We see a trend to add more laws and claims to the jurisdiction or competence of ECTs, once established. Many start out, like Chile's, with less than a full list of environmental laws or claims that the ECT can adjudicate. This leaves other environmental, land use, and resource development problems beyond the ability of the ECT to resolve. It also leaves cases clearly affecting the environment and public health in the hands of other courts, creating confusion or "forum shopping" by parties, or, worse, problems with no access to justice at all. The trend in established ECTs is "integration" – an effort to bring all environment-affecting laws and issues "under one roof," as you heard is happening in Ontario, Canada, and Trinidad & Tobago.

Of course, we can predict this will lead to an increased caseload for the ECT.

PREDICTION 6: EVALUATION

It is easy to predict that there will be an increasing demand for evaluating the effectiveness of an ECT, thinking of the 9 factors Rock discussed. This will require regular, objective studies analyzing how successfully the ECT is providing access to justice "from start to finish" – from the inception of cases through the decision and through the enforcement and remedies. Evaluation will be essential to maintain public credibility, respect, and funding.

PREDICTION 7: COLLABORATION

We see a growing collaboration among ECTs around the world – a sharing of knowledge, ideas, experiences, systems and techniques, decisions, and other expertise. We hope that this gathering will lead to a collaborative association among the South and North American ECTs represented here – an Inter-American Network for Environmental Justice – like those already seen in Europe and Australasia.

PREDICTION 8: SUCCESS

We envision great success for the ECTs of this region and the success of your "Lima Vision for a Regional Instrument on Access Rights Relating to the Environment," just approved last November by Chile and other countries here. Your Lima Vision foresees the development of an international agreement that will be guided by these seven excellent principles for access to environmental justice:

- Equality
- Inclusion
- Transparency
- Proactivity
- Collaboration
- Progressive Realization
- Non-regression.

Indeed we do live in interesting times – challenging times for ECTs and for the future of the human race. Environmental courts and tribunals hopefully will become the “Protectors of the Future,” not simply the protectors of the status quo, since they are in fact created to change the status quo.

Thank you.