

Published in 2014 *Gyoseiho-Kenkyu* [Administrative Law Review] No. 5, pp. 3-23, in Japanese

GREENING JUSTICE:

RIGHTS OF ACCESS TO INFORMATION, PUBLIC PARTICIPATION, AND ACCESS TO JUSTICE –

- WHAT CAN ENVIRONMENTAL COURTS AND TRIBUNALS CONTRIBUTE?

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

Specialized Environmental Courts and Tribunals (ECTs) have emerged in the past 10 years as a powerful tool for implementing “green access” environmental rights around the globe. The three green access rights – the public’s right of access to information, the right to participate in environmental decision-making, and the right to access to justice – were first articulated by the international community in Principle 10 of the 1972 Rio Declaration on Environment and Development, to which Japan is a signatory:

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.¹

© 2012 George W. Pring and Catherine G. Pring

* George (Rock) Pring is Professor of Law, Sturm College of Law, University of Denver; J.D. University of Michigan; B.A. Harvard University; Principal, Global Environmental Outcomes LLC (GEO), consultants; and Co- Director of the University of Denver Environmental Courts and Tribunals Study, <http://www.law.du.edu/ect-study>.

** Catherine (Kitty) Pring is an award-winning professional mediator, alternative dispute resolution (ADR) expert, and organizational systems analyst; Principal, Global Environmental Outcomes LLC (GEO), consultants; and Co-Director of the University of Denver Environmental Courts and Tribunals Study, <http://www.law.du.edu/ect-study>.

The 1998 UNECE Aarhus Convention² makes these “three pillars” of environmental democracy legally binding for a number of countries, which have developed laws and institutions to carry them out because:

Information is power, and environmental information in the hands of public enables it to play a meaningful role in shaping a sustainable future. For this reason, progress in sustainable development and in greening the economy is directly dependent on the meaningful engagement of civil society in decision-making. Effective access to information, public participation and access to justice are essential for transparent and accountable governance, for high quality outcomes of the decision-making and to strengthen trust of public in governing institutions.³

Aarhus has been called “the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.”⁴ Additionally, a number of countries which are not parties to the Aarhus Convention, including Japan, have endorsed Principle 10 in concept and likewise developed laws and institutions to protect green access rights.

Our global Environmental Courts and Tribunals Study (ECT Study) at the University of Denver Sturm College of Law has found that ECTs can provide an ideal forum for effectuating these environmental access rights and can also provide more expert dispute resolution than the general courts in the complex areas of environmental human rights, sustainable development, climate change, biological diversity, rule of law, and growing demands for good government that is effective, transparent, and accountable.⁵ It is therefore not surprising that there has been an explosion in the number of ECTs in this century, and that many countries which created specialized environmental adjudication institutions in the past are now expanding and improving them.

¹ Rio Declaration on Environment and Development, Principle 10, U.N. Doc. A/CONF.151/26/Rev.1 (vol. 1), Annex 1 (Aug. 12, 1992); <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

² U.N. Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), June 25, 1988, U.N. Doc. ECE/CEP/43 (1998) (entered into force Oct. 30, 2001); <http://www.unece.org/env/pp/treatytext.html>. The treaty is open to global accession. As of 2013, the convention has 46 state parties, most nations in Europe and some in Western Asia; Japan is not a party.

³ UNECE, *Public Participation*, <http://www.unece.org/env/pp/welcome.html>.

⁴ U.N. Secretary-General Kofi Annan, <http://www.aarhusclearinghouse.org/about/>.

⁵ See GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, *GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS* (World Resources Institute / The Access Initiative 2009), hereafter *GREENING JUSTICE*.

The University of Denver ECT Study is designed to document and analyze the burgeoning development of specialized environmental adjudication bodies around the world and to evaluate their “success” factors. It is the first comparative study of ECTs globally, and has resulted in a book, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*,⁶ and a number of articles,⁷ focusing on the wide variety of ECT models and providing guidance concerning identified best practices for creating and improving an ECT at the national, regional, or local level.

Our study defines “ECTs” as any government body – national, state/regional, or local – that specializes in resolving disputes about the environment, natural resources, land use, or related issues. It can be a judicial body (a court or EC) or an administrative body (a tribunal or ET). Some ECTs have very broad-reaching jurisdiction, such as the Land and Environment Court of New South Wales, Australia, and some are very limited, such as the An Bord Pleanála of Ireland, which only handles land use permit appeals from the local planning and zoning agencies. Japan’s national Environmental Dispute Coordination Commission (EDCC or Kouchoi) and its local Prefectural Pollution Examination Commissions are examples of ECTs with a limited scope and caseload. The study does not include multinational bodies, there being only one or two examples.

It is clear from the study’s database that the world is currently experiencing an “explosion” of ECTs. Almost 400 ECTs have been authorized to date in 53 countries. China’s local environmental courts have been proliferating rapidly, and have grown from only a few five years ago to nearly 100 today. Similar patterns of expanding specialized environmental adjudication have also happened in the Bangladesh, Belgium, Brazil, Canada, Pakistan, the Philippines, and Thailand. Most are authorized by legislation, a few by court rules, and, in 2010, Kenya became the first country creating one in their new Constitution. A few countries, such as South Africa, have set up ECTs and have since closed them. And a few countries, such as Tanzania, have passed legislation authorizing an ECT, but for political or financial reasons have never implemented it.

The principle driver for new ECTs is public pressure for more procedural access rights and more substantive environmental enforcement than a country’s general courts are providing.⁸ National and international conferences continue to press for access rights, a recent example being the March 2013 international conference in Awaji, Japan, “Towards Effective Guarantee of the Green Access: Japan’s Achievements and Critical Points from a Global

⁶ *Id.* See GREENING JUSTICE for more detailed information on the topics in this article.

⁷ See the ECT Study website at <http://www.law.du.edu/ect-study>.

⁸ George Pring & Catherine Pring, *Increase in Environmental Courts and Tribunals Prompts New Global Institute*, 3 J. OF COURT INNOVATION 11, 12-14 (2010), copy at <http://www.law.du.edu/ect-study>.

Perspective,” sponsored by the Green Access Project of Osaka University. Based on our over-100 interviews around the world with ECT-experienced jurists, lawyers, environmental officials, and public-interest advocates, we find that specialized ECTs definitely can improve green access rights, for the reasons that follow.

ECT Tools to Increase Access to Information

The study identified a number of creative tools that ECTs are currently employing to increase public access to information. Perhaps most important, ECTs can enforce national freedom of information acts (FOIAs), such as Japan’s 2001 National Information Disclosure Law.⁹ Litigants in environmental disputes in many countries also may have a right to “discovery” of public documents that can then be made public. Special court rules can allow publication of specific information about case filings, case status, and decisions; for example, in New Zealand’s Environment Court, discovery and other case documents are made available to the public via the web and the cloud, not just to attorneys for the parties and the judicial decision-maker, and decisions are in writing and published. The power of the internet and information technology are opening access to public information to the public, regardless of their geographic location, association with the court, level of education, or status.¹⁰

Many ECTs maintain publically accessible websites, explaining in helpful detail the rules for using the court, allowing e-filing of papers on-line, and posting hearing dates and other pertinent information, so the public has access to the court and to the progress of a case through the court. New Zealand’s Environment Court is clearly the leader in using technology for green access. Generally, ECT decision-makers have the ability to do independent research, obtain documents from the government and parties, conduct site visits, and consult scientific and technical experts – on or off the court – in order to inform themselves more fully and make independent, sound decisions.

ECT Tools to Increase Public Participation

A primary characteristic of effective ECTs is their incorporation of rules and procedures to encourage and provide means for the public to participate in environmental dispute resolution. One such means is allowing individuals and representatives of the public to bring public interest lawsuits (PILs) against government and private parties. PILs involve past,

⁹ Lawrence Repeta & David M. Schultz, Japanese Government Information: New Rules for Access (2002), <http://www.gwu.edu/~nsarchiv/nsa/foia/japanfoia.html>.

¹⁰ Catherine (Kitty) Pring, Cutting-Edge Court Innovations: Embracing Information Technology to Improve Access to Information and Justice and Court Efficiency and Effectiveness, Address at Conference on Courts, Rule of Law, and the Environment: A Side Even to the World Bank’s Law, Justice, and Development Week (Dec. 11, 2012) (copy with authors).

present, or prospective damage to the environment (water, air, soil, wildlife, economy, culture, historical features, etc.) that impacts the health and safety of the public or mother nature. Their goal is not personal gain or compensation, but restitution, restoration, and future protection of the threatened environment for the benefit of the public and future generations. An excellent example of a PIL is the 1999 *Manila Bay Case*, brought by an outstanding environmental advocate and public interest attorney in the Philippines, Tony Oposa, to force the cleanup of heavily polluted Manila Bay. The case was finally decided in favor of the public interest by the Supreme Court in 2009, and, through a continuing mandamus action, the Supreme Court continues to monitor progress through a committee of participating citizens and officials.

Another means for ensuring public participation is to expand the definition of “standing” (*locus standi*) to bring an environmental complaint beyond just those immediately and personally affected. Often in courts of general jurisdiction, standing is severely limited by physical proximity to an act or the ability to prove personal impact on the claimant. Standing rules in progressive ECTs allow members of the public, environmental nongovernmental organizations (NGOs), class action suits, and representatives of future generations to file cases and be heard, providing the claim is not found to be frivolous.

ECTs can not only permit the filing of *amicus* (“friend of the court”) briefs, but can actually encourage and solicit them. These briefs allow different facts, legal analysis, perspectives, and scientific and technical information to be reviewed by the judges before making a decision. Some ECT judges permit and/or request involvement of members of the public to offer testimony, participate in discovery and evidence gathering, and take part in monitoring of enforcement of court decisions.

ECT Tools to Increase Access to Justice

The major focus of the University of Denver ECT study has been on the relationship between ECTs and access to justice. At least nine features of the most effective ECTs internationally have been identified which have a very direct impact on access to justice. These are discussed in depth in the following sections (and in GREENING JUSTICE). In summary, they include: (1) reducing expenses for litigants; (2) ability to speed the trial process; (3) use of expert judges, including scientific and technical experts as judges, who are knowledgeable about environmental law; (4) consistent decisions within the ECT; (5) more governmental and private sector transparency and accountability; (6) controlling “SLAPPS” by quick dismissal and by hearing “SLAPP-backs”;¹¹ (7) utilizing a problem-solving approach rather than a legalistic

¹¹ For more on the problem of “Strategic Lawsuits Against Public Participation” in government, see GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996).

“right or wrong” approach in decision-making; (8) being accessible, both geographically and physically; and (9) generating public confidence and trust by being accessible, honest, and following the rule of law so that citizens are willing to bring cases.

The 12 “Building Blocks” of Effective ECTs¹²

The ECT Study identifies 12 key “Building Blocks” or institutional design decisions which characterize effective and successful ECTs. All these factors have a direct impact on green access for the public. As discussed below, the 12 Building Blocks are: (1) type of forum, (2) legal jurisdiction, (3) decisional levels, (4) geographic coverage, (5) caseload volume, (6) standing, (7) costs, (8) access to scientific and technical expertise; (9) alternative dispute resolution, (10) competence of judges and decision-makers, (11) case management and creative rules of procedure, and (12) enforcement tools and remedies.

1. Type of Forum

The research identified six different basic institutional models for ECTs and a handful of others that are less common. These are: (1) independent, specialized courts (in the judicial branch or department); (2) specialized “green chambers” (formal panels within a court of general jurisdiction); (3) select “green judges” in a general court, who are assigned environmental cases by the chief judge or the court clerk based on expertise or preference; (4) independent tribunals (in the executive branch or an administrative department, but not under the control or supervision of another agency); (5) quasi-independent tribunals (under the supervision of an agency, but one whose decisions the tribunal does not review); (6) “captive” tribunals (located in an agency whose decisions the tribunal does review); and (7) less commonly, other types of adjudication bodies, such as (a) special advisory commissions (usually with investigative and recommendatory powers but frequently no final decision-making authority), (b) alternative dispute resolution (ADR) entities that are outside the court system, (c) ombudsman programs (where the ombudsman has adjudicatory or quasi-adjudicatory powers); and (d) human rights commissions.

Is there an “ideal” model for an ECT? The answer to that depends heavily on a country’s goals for the environment, environmental laws, budget, environmental caseload, and political commitment to independence and transparency. If those factors are positive, most agree the ideal is an independent court or tribunal. However, when a nation or region has insufficient potential caseload, budget problems, or political unwillingness to support an independent ECT, other models may be effective as well. It is completely possible to start small (for example,

¹² For more in-depth analysis of these 12 factors see GREENING JUSTICE 19-87.

with a single “green judge” in a general court or tribunal and then expand or modify the ECT with experience and on-going evaluation. Chief Judges in some jurisdictions have even taken active leadership and created green chambers or appointed green judges without legislative or executive approval and with no additional budget.

2. Legal Jurisdiction

This Building Block looks at the body of laws that are assigned to the ECT. ECTs can be found with jurisdiction over just one law (such as the environmental impact assessment law), or those with jurisdiction over the laws administered by one other government agency (such as the national environmental agency or ministry); or those with only land use planning laws as their base of power; or those that have comprehensive jurisdiction over both land use planning laws and the full range of laws protecting the environment. In structuring the ECT’s jurisdiction, jurisdiction over the following laws (and others) should be considered:

- Constitutional rights to a healthy environment and/or a right to life, which might already be under the jurisdiction of a Constitutional Court or a Supreme Court.
- Environmental quality laws (air pollution, water pollution, sanitation, landfills, hazardous waste, noise pollution, etc.).
- Natural resource protection laws (forests, water, wetlands, wildlife, natural areas, outdoor recreation, historic preservation, public trust doctrine resources, etc., particularly as they relate to sustainable development and the rights of future generations).
- Land use (town and country) planning laws.
- Natural resource development and permitting laws (forests, waters, wetlands, energy and mineral resources, etc.).
- Public health and safety laws.
- Transportation laws.

A crucial question is what types of cases should be given the ECT. Should it have civil (non-criminal) powers, criminal, administrative (dealing with government decisions or actions), or a combination of these? Another question is should there be special *exceptions* to jurisdiction, situations when specific cases are taken away from the ECT. These might be exemptions in the national interest (like nuclear permitting or litigation of nuclear disasters), discretionary exemptions (like instances where the government may withdraw a case); emergency situations; or monetary claims against the government?

An ECT with jurisdiction over too many laws or jurisdiction that is very loosely defined can be overwhelmed by the volume of cases and involved in apparent competition with other courts and tribunals with overlapping jurisdiction. Or such ECTs can become a dumping ground

for other courts or decision-makers who find a case too complex, too time-consuming, or too political to adjudicate. On the other end of the spectrum, ECTs with jurisdiction that is too narrow or including too few laws may find themselves with the opposite problem – a very limited caseload, inadequate enforcement powers, public frustration with lack of performance, and inability to attract competent, environmentally trained judges. Clearly defining jurisdiction is one of the most important steps in creating an ECT. As other countries have found, jurisdiction can be expanded in the future, given a demonstrated demand and political will. The best practice in this area appears to be integrated jurisdiction, which incorporates both environmental and land use issues, which always overlap! Sweden has recently moved to such an integrated model of legal jurisdiction.

3. Decisional Levels

ECTs can be found at every level of the legal process – from inside an administrative body all the way up to the country’s highest court. They exist at the trial (first instance or first adjudication) level, at the intermediate appellate level (second instance) review, at the highest appellate level (second or third instance), and in some nations, at several of these levels. Some appellate ECTs conduct merits review (rehearing or reconsidering the factual evidence) and others are restricted to consideration of the trial record of the court below. Japan’s system is an excellent example of both regional and a national dispute coordination commissions. Thailand has environmental courts in both its general court system and also in its separate administrative court system, with problems of overlapping jurisdiction for some of the same cases. It makes administrative and budgetary sense to start at an appeal level, with a jurisdiction that will provide a sufficient caseload to justify a separate court. However, green chambers or green benches can be created at any level within any existing independent institution established to resolve environmental disputes.

4. Geographic Coverage

A very important Building Block is the decision about what geographic jurisdiction the court will cover. National ECTs located in the capital of a country make physical access very difficult for participants, particularly those who are living in rural areas and/or in poverty. Other geographic models have used a state or province, a county, or even a local municipal district as the defined jurisdiction. Small ECTs, such as the municipal and county ECTs in the United States, have an independent court, staffed by regular general court judges, which only hears cases several evenings a month, to match staffing and budget to the demand. Some ECTs have been set up based on water basins, like Sweden, or on development areas, or the lands of indigenous people. An ECT which has geographic coverage compatible with other judicial/political boundaries is easily understood by the public and permits easier physical and financial access. That being said, the judges of many centralized courts travel to local

jurisdictions both to collect evidence and to hold hearings, which may be a more efficient and effective way to ensure public access and participation and to allow the decision-makers first-hand exposure to the issue.

5. Caseload Volume

Anticipating the new ECT's probable caseload requires extensive review of court statistics – including court history and current backlog, which may be very difficult in countries where cases are not tracked and categorized by their main issues. The actual caseload will be determined by a number of institutional, social, economic, and political factors. These include: (1) public awareness of and confidence in the new institution and its decision-makers; (2) the existence of advocates and trained environmental attorneys to advise and bring cases; (3) the adequacy and complexity of the jurisdiction's environmental and land use laws; (4) the laws under the ECT's jurisdiction; (5) the actual accessibility and the perceived accessibility of the ECT to the public; (6) the level of administrative and legislative support; (7) the geographic coverage; (8) existing economic conditions and government development policy; (9) the public perception of the ECT as being effective, fair, and free of corruption, political influence, and the possibility of retaliation for bringing a complaint; (10) the actual and perceived costs of filing a complaint and the available means for making litigation financially within the reach of citizens most impacted – who are likely to be poor and disenfranchised.¹³

Experience in Trinidad and Tobago has shown that without sufficient cases, the ECT will be viewed by both politicians and the public as a waste of taxpayer resources.¹⁴ On the other hand, a court may be given so many cases that it can no longer hear and decide cases within a reasonable timeframe, resulting in public frustration and lack of confidence. Actual case volume should be the baseline for deciding legal and geographic jurisdiction and actual institutional structure for any proposed ECT, ranging from multiple bodies to just one part-time green judge who only hears environmental cases when they are filed with the general court. Starting small, and then expanding based on experience and demand is preferable to creating an institution that is liable to fail in its first years of operation. However, some advocating reforms in ECTs in some jurisdictions report significant political inertia blocking change and argue that it is best to set up an ECT well once and for all the first time.

¹³ George (Rock) Pring & Catherine (Kitty) Pring, *The Greening of Justice: Will It Help the Poor?*, in POVERTY ALLEVIATION AND ENVIRONMENTAL LAW 223 (International Union for the Conservation of Nature / Academy of Environmental Law 2012), copy at www.law.du.edu/ect-study.

¹⁴ *Environmental Commission collapse?*, GUARDIAN MEDIA, Mar. 18, 2013, at <http://www.guardian.co.tt/editorial/2013-03-18/environmental-commission-collapse> (“There seems little to justify the considerable expense of the commission’s existence...”).

6. Standing

Green access rights can be thwarted by an ECT's application of "standing" rules (*locus standi*), which range from making courthouse doors broadly open to extremely closed to litigants. Standing rules can be laid out in the constitution, legislation, or court rules and decisions and govern who can bring cases or participate in cases in the ECT. Unless a person or organization is granted standing, there is no legal recourse for the resolution of an environmental conflict aside from political or other non-adjudicative pressure.

Some examples of the requirements on the very restrictive, access-denying end of the spectrum are requirements of (1) being "substantially and materially affected," (2) government approval prior to filing, (3) being geographically very close to the problem, (4) having "participated in the prior administrative decision-making process," (5) only organizations having a high number of members, (6) having a "sufficient interest," (7) maintaining "impairment of a right," and the like. On the other end of the spectrum, some ECTs have very open, access-encouraging requirements like (1) authorizing an *actio popularis* (suit against government for violating a law), (2) needing only a "general interest" in the problem, (3) no requirement of injury connected with the environmental violation, or (4) the Philippines' liberal allowance of standing to "any person or group" claiming a violation of environmental law, including representing "future generations."

Strict standing rules to block lawsuits are justified on four basic arguments: (1) preventing a "flood" of lawsuits, (2) stopping "groundless and frivolous" cases, (3) preventing courts "usurping the role of the legislature or executive," and (4) avoiding delay and expense for economic development. It turns out these arguments do not stand up to scrutiny. The Australian Law Reform Commission has performed two extensive studies showing the flaws in each of the four arguments, concluding "The current law on standing is therefore a doorkeeper that courts do not need as protection and litigants cannot afford."¹⁵

7. Costs

The real and imagined costs of environmental litigation constitute a huge barrier to access to justice. Typically in courts without special provisions for making litigation affordable costs can be exorbitant for both the plaintiff and defendant. Environmental cases tend to be lengthy and require expensive experts and in-depth discovery. They can include court costs, professional fees for attorneys and experts, costs of lost work, travel, and other personal resources, cost-shifting where the loser is required to pay the costs of the winning party (so-called English or "costs follow the event" rule), security for costs for an injunction, risk of a

¹⁵ GREENING JUSTICE, *supra* note 5, at 40.

countersuit or “SLAPP,” and potential personal loss of credibility and other psychological pressures on plaintiffs. Specialized environmental tribunals generally are much less costly than environmental courts for litigants.

One of the hallmarks of effective ECTs is their use of a variety of means to minimize costs and risks. There are ECTs today which have adopted one or more of the following methods to make environmental litigation more affordable: (1) advance cost awards for public interest litigants (PILs) to subsidize their on-going case expenses, (2) proponent-funding of public intervention (for example, making the developer proposing a building permit provide funding for its opposition), (3) waived or reduced court costs for PIL or poor litigants, (4) rule against the English “loser pays” rule, (5) permitting parties to represent themselves without an attorney (*pro se*); (6) a government ombudsman who can investigate and bring an action on behalf of a complainant and pay the costs, (7) ECT staff support and guidance materials for parties, (8) use of ADR, both court annexed and private sector, (9) volunteer attorneys including law school student clinics to represent litigants, (10) government environmental prosecutors to bring cases instead of private parties, (11) court-appointed and court-paid expert witnesses, and (12) expedited hearings and decisions to hold down costs. Clearly, the more cost-reduction tools an ECT has, the more affordable it is and the more access to justice it can provide.

8. Access to Scientific and Technical Expertise

The more complex an environmental issue, the more likely the decision-makers will be required to rely on scientific and technical experts to provide facts and opinions. Climate change cases are an example where there is a tremendous amount of conflicting data and opinion, and little agreement on short and long term impacts of development on climate change. ECTs have filled this knowledge gap, and supported their application of the precautionary principle in a number of creative and unique ways.

The ECT Study found that effective ECTS both (1) provide that expertise inside the court and (2) manage the parties’ outside experts in unique ways to ensure a solid factual foundation for decision-making. For inside expertise, some ECTs actually have their own in-house experts who are not attorneys but have expertise in chemistry, biology, computer sciences, land use planning, nuclear science, etc. In some, these non-lawyer experts actually sit as judges or decision-makers and in others serve as advisors to the law judges. This ensures that the court has expertise accountable to the court to evaluate scientific and technical evidence presented in a case. Other ECTs employ expert citizen panels, special commissions, court staff consultants-inspectors, environmental agency experts, prosecutor’s experts, independent scientific institutes, community volunteers, and even court-hired experts for cases requiring specialized expertise.

As to the outside experts, effective ECTs manage the litigants' experts carefully before, during, and after the hearing process. Some ECTs are requiring litigants' experts to meet in advance of the hearing with a mediator, judge, or clerk to focus the issues, specify the areas of agreement and disagreement, and then allow testimony only on the latter. In several ECTS, parties' experts are informed they are now "officers of the court" and owe their first duty to the court, even though they are being paid for by one of the parties. Techniques like these can help avoid the proverbial "battle of the experts," which is expensive, time wasting, and difficult to reconcile. Other courts take concurrent testimony from experts, or place them in the witness box together to discuss areas of disagreement (referred to jokingly in the New South Wales ECT as "hottubbing"). The court can decide to sequence the testimony of experts, based on issues the court has prioritized. One of the most effective tools being used by the Queensland, Australia, Planning and Environment Court is requiring the parties' experts to pre-file their written testimony for review by the judge, who uses it to help focus the issues for in-court testimony. Through "expert management" approaches like these, ECTs can ensure that scientific and technical expertise is available, comprehensible, and on-point to aid judges and decision-makers in reaching an informed, fair, and equitable decision.

9. Alternative Dispute Resolution (ADR)

One of the most effective tools now being used by over half the ECTs studied is Alternative Dispute Resolution or ADR. Incorporation of ADR as part of the environmental conflict-resolution process can result in a considerably cheaper, faster, more equitable process and produce solutions that resolve problems rather than the general courts' more legalistic win-lose, confrontational approach. In addition, ADR is a less formal, more open and participatory, and less adversarial process than a formal court hearing. ADR usually results in outcomes that are more acceptable to the parties because they have been intimately involved in crafting the resolution and will be responsible for monitoring enforcement of the decisions reached.

ADR techniques include mediation, conciliation, negotiation, arbitration, hybrid mediation-arbitration, early neutral evaluation, collaborative decision-making, and restorative justice. Mediation is the most frequently employed tool, and can be done by an ECT staff mediator, the registrar, a commissioner, judge, or an outside private mediator. All should have training in mediation techniques and be certified, if required by the state. The ECT on the Australian island-state of Tasmania, so believes in ADR that they require all filed cases submit to mediation before they can be heard by a judge. The New South Wales ECT has created a "multi-door courthouse," starting with an initial case evaluation by the court staff followed by referral to the most appropriate ADR technique. Japan's ECT, the Kouchoi, is based almost entirely on ADR rather than judicial-style adjudication.

ADR can either be court annexed and paid for entirely by the court budget, court annexed and charged to the parties, or done outside the court in the private sector, where the parties agree to a mediator from a court-approved list and split the costs. The court-annexed, court-provided, court-financed ADR model appears to be most acceptable to parties and the “success” rate is higher than the use of private mediators – partly because of no cost to the parties, partly because of ease of utilization, and partly because the court staff are knowledgeable about environmental law, existing precedents, and the ECT’s procedures so that they can keep cases moving efficiently.

Costs are reduced – to the parties, government, and the taxpayer – because it is not necessary for parties to pay many court costs, case conclusion is generally much faster so attorney fees (if needed) and expert fees are reduced, and there is no “loser” who might be assessed costs of the winning party. The court does not have to pay for extended judicial time on the bench and in writing decisions, court reporters are not needed, and case backloads are cleared more quickly. Mediators are typically paid substantially less than judges, although they may also be trained attorneys. Speedy resolution of cases results by having the mediator help focus issues with the parties to get to the real underlying issues, which may not be legal but perceptual, economic, cultural, or emotional; by avoiding having to schedule conferences and hearings around existing busy court dockets; by allowing the parties to reach and draft agreements themselves as quickly as they are able with the help of the mediator; and by avoiding formal testimony and cross-examination in a court.

Agreements or remedies reached as the result of ADR do not have to be legally prescribed or legally required; any ADR “agreement” can be endorsed by the court and legally enforced if not in violation of the law or against public policy. This permits the parties to develop solutions that are not necessarily considered by the law, including novel approaches to reaching a consensus-based position, where both parties give and get something in order to achieve resolution of the underlying problem. Although none of the parties may be fully satisfied or vindicated by the process, all have an opportunity to share information, discuss options, and participate in drafting the judicial order.

Formal incorporation of ADR is a very significant factor in the overall effectiveness of an ECT, both for parties and the court. In addition, ADR is not limited to civil cases, but can be incorporated successfully in criminal cases as well, as New Zealand has shown, resulting in restorative justice, apologies, changed behaviors, and better understanding and future relationships, without resorting to punitive measures or incarceration.

10. Competence of ECT Judges and Decision-Makers

Undoubtedly the single most important factor in the creation of ECTs is the selection of judges or decision-makers who are knowledgeable about environmental law, incorruptible, able to act independently without fear of political or personal repercussions, and committed to achieving access to justice for the public, positive outcomes for the environment, and intergenerational equity. In the absence of trained candidates, proper environmental law training can be done by national judicial institutes or capacity-building international government organizations and NGOs. The Philippines, Thailand, and Indonesia, among others, have invested heavily in judicial training for environmental decision-makers in recent years. Chile, which has just created three new ECTs, has reportedly appointed judges with little or no apparent environmental training or commitment and who are viewed as not competent by local advocates – impacting the credibility and confidence of the public in the new ECTs to reach fair, informed, expert decisions.

In addition to the original judicial selection process, it is important that ECT judges have access to on-going training and opportunities to learn from other ECT judges around the world. The issues of security of tenure, appropriate salary, and career progress are also important in attracting and retaining competent judges, and these should be carefully considered when the ECT is originally created. The quality of the chosen decision-makers ultimately makes or breaks the effectiveness of the ECT.

11. Case Management and Creative Rules of Procedure

ECTs are leaders in adopting case management tools to streamline court procedures. Many of the tools increase access to information, public participation, and access to justice for the public and the parties. Adoption of some case management tools is contingent on the ECT having the power to adopt special rules and procedures beyond and different from those of general courts and on having sufficient budget to make them operational.

Employing a court case manager is perhaps the most effective tool currently being used to enhance ECT performance. That person(s) is responsible for reviewing and evaluating each case filing, explaining court requirements and procedures to applicants, setting cases for conferences and directions hearings, setting up or actually doing mediation, monitoring case progress, alerting parties to dates and deadlines, managing a computer tracking system from case filing to decision, and providing the public access to court documents and publishing decisions. In some courts the case manager is the clerk of the court, or the court registrar, or a court mediator, or even, in small courts, the judge. “Lost or forgotten” cases and documents do not occur in courts with good case management skills, filing deadlines are not missed, and the judges are always aware of the progress of each case on their docket. These procedures also allow the court to be evaluated for timeliness, outcome, and efficiency.

Beyond case management, some ECTs have adopted other procedures that increase access to justice and court effectiveness. These include alternate court hours on weekends or evenings when the public and participants can more conveniently attend; traveling courts that hold inspections and hearings on site; use of e-filing and other website-based data dissemination; issuing of preliminary injunctions; directions hearings to set timetables and other requirements for litigants and attorneys; relaxed rules of discovery, evidence, and procedure; creative sentencing; and video and tele-conferencing hearings. Creative, visionary courts and judges are developing new case management tools every year to enhance the performance of ECTs, their accessibility to the public, and their credibility and public trust.

12. Enforcement Tools and Remedies

All courts, including ECTs, must have adequate and effective enforcement tools and remedies in order to actually achieve environmental protection and sustainability.

The objective of any administrative or judicial review process is to have erroneous decisions, acts and omissions corrected and, ultimately, to obtain a remedy for transgressions of law. Under paragraph 4 [of the Aarhus Convention], Parties must ensure that the review bodies provide “adequate and effective” remedies, including injunctive relief as appropriate. Adequacy requires the relief to ensure the intended effect of the review procedure. This may be to compensate past damage, prevent future damage and/or to provide for restoration. The requirement that the remedies should be effective means that they should be capable of real and efficient enforcement. Parties should try to eliminate any potential barriers to the enforcement of injunctions and other remedies.¹⁶

Other remedial powers, depending on the authority of the ECT, can include (1) temporary and permanent injunctions, (2) monetary punitive damages, (3) monetary awards to governments to compensate for natural resource damages, (4) monetary restitution measured by the cost of restoring the status quo or depriving the wrongdoer of gain, (5) declaratory judgments determining the rights, duties, relationships, constitutionality, or interpretation of laws, (6) administrative remedies affirming, reversing, modifying, or remanding decisions of government including an injunction against the government, (7) criminal penalties including incarceration, monetary fines, required work, government supervision, (8) restorative justice in a few jurisdictions, (9) contempt citations, which can be either criminal or civil (10) cost awards, ordering a party to pay expenses for attorneys fees, expert costs, advance cost awards, and intervener funding orders, (11) numerous “creative” remedies, including community

¹⁶ U.N. ECONOMIC COMMISSION FOR EUROPE, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE 209-10 (2d ed. 2013), at http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_-_text_only.pdf.

environmental service, required attendance at an environmental “school” for offenders, payment to an environmental trust fund administered by government, a financial contribution to environmental projects, producing media on the environment, and continuing monitoring of performance through the court by a “continuing mandamus” order.

ECTs without access to strong enforcement tools remedies are paper dragons – all show and no teeth or flames. They may be politically useful but practically they are wholly ineffective. For example, in some jurisdictions the ECT Study found the maximum fines authorized to be levied by the court were so low that it was considerably cheaper for a violator to pay the fines and continue degrading the environment. In other jurisdictions, the government was ordered to pay for the harm done by a private party – in direct contravention of the polluter-pays principle.

The Future

The University of Denver Sturm College of Law ECT Study will continue its research and reporting because the environmental challenges we face today will continue to drive the development and spread of specialized ECTs. Issues of sustainable development, climate change, environmental degradation, resource depletion, food and energy security, poverty and the 2015 U.N. Millennium Development Goals, the rights to life and a clean environment, including health, education, welfare, and inter- and intra-generational equity – all these issues are too complex, interwoven, and scientifically uncertain to leave in the hands of untrained general courts. The ability to balance economic, social, and cultural development with its environmental consequences for today’s and future generations is not taught in most law schools or most judicial training institutes. Problem solving is not the normal methodology of judges, who are focused on deciding technical legal rights and wrongs – not to helping litigants develop creative solutions in the face of complex uncertainty. The changing legal climate and demands for sustainable growth will drive new innovations, best handled by ECTs – including more use of ADR, integrated land use and environmental jurisdiction, more cross-boundary and in-country collaboration, increased training opportunities, and ultimately international ECTs that are effective and recognize the connection between human rights and a healthful, quality environment.