



## Inter-American Congress on the Environmental Rule of Law

Selected Essays



Organization of American States | More rights for more people



World Commission on Environmental Law

Commission Mondiale de Droit de l'Environnement | Comisión Mundial de Derecho Ambiental





## V. ACCESS RIGHTS: INFORMATION, JUSTICE AND PROCESS

Access rights are the cornerstone of the environmental rule of law. Instruments such as the Inter-American Strategy for the Promotion of Public Participation in Sustainable Development Decision Making and the Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation, and Access to Justice in Environmental Matters have been adopted and applicable in countries of the Americas. Trends and challenges regarding access rights are addressed in the abstracts under this sub-theme, taking into account the three different adjudication procedures that are central to access to justice in member States': (1) to challenge the refusal of access to information; (2) to seek prevention and/or damages for environmentally harmful activities; and (3) to enforce environmental laws directly." <sup>528</sup>

## 5.2 Specialized Environmental Courts and Tribunals (ECTs) – Improved Access Rights in Latin America and the Caribbean and the World.

George y Catherine Pring <sup>556</sup>



*Environmental Courts and Tribunals, ECTs, Environmental Rule of Law, Access Rights, Access to Justice, Environmental Enforcement, Sustainable Development.*

*The rapid spread of specialized environmental courts and tribunals (ECTs) is one of the most significant developments in the environmental rule of law and access to justice. ECTs now exist in 11 Latin American and Caribbean countries, with more announced and in planning. Extensive study of ECTs by the University of Denver Environmental Courts and Tribunals Study ([www.law.du.edu/ect-study](http://www.law.du.edu/ect-study)) shows they can be an important and effective means for achieving the economic, social, and environmental goals of sustainable development.*

*Judicial courts and government administrative tribunals that specialize in environmental, resource, land use, and similar lawsuits are a fast-growing worldwide phenomenon. From a handful in 2000, there are now hundreds of environmental courts and tribunals (ECTs) in dozens of countries in all types of legal systems, and their number is growing. The experience with ECTs in Latin America and the Caribbean – including Bolivia, Brazil, Chile, Costa Rica, El Salvador, Guatemala, Guyana, Jamaica, Paraguay, Peru, and Trinidad and Tobago – shows ECTs are seen as improving the environmental rule of law, access rights, and sustainable development. Extensive global research by the University of Denver ECT Study has documented “best practices” by which ECTs improve access to information, public participation, and access to justice.*

*While most countries have laws to protect the environment, promote sustainability, and improve access rights, many do not have effective institutions to enforce these laws. Successful ECTs in the LAC region and globally provide models for countries considering creating such expert forums. Effective local, national, and multi-national judicial institutions are needed to balance economic development and environmental protection, including challenges such as climate change; food, water, dwelling, and energy security; loss of biodiversity; indigenous rights; and pollution of land, air, and water. International judicial institutions like the Caribbean Court of Justice could evolve into forums for deciding transboundary environmental disputes.*

*Specialized ECTs, as well as environmental chambers and assigned “green” judges in existing general courts, can be effective means to achieve these goals.*

### 1. Environmental Courts and Tribunals in Latin America and the Caribbean

Dramatic shifts in public awareness, policy, and law regarding the environment and economic development have occurred in the last 40 years. Globalized environmental problems are resulting in environmental and land use conflicts and creating new pressures on governments to achieve sustainability. A corresponding dissatisfaction with courts of general jurisdiction has emerged, as the general courts are often perceived as inaccessible, slow, expensive, unfair, and/or lacking the expertise to make decisions based on complex scientific and technical evidence.<sup>557</sup>

The consequence has been demands by civil society, international governmental and financial organizations, and the courts themselves for institutions that can deliver access to justice and are – in the trenchant words of Australian law – “just, quick and cheap.”<sup>558</sup> This has led to the current explosion of *specialized* environmental courts and tribunals (ECTs) specifically designed to provide better access to environmental justice.

The University of Denver Environmental Courts and Tribunals Study (ECT Study) undertook a global examination of this phenomenon, reporting its findings in 2009 in the book, *Greening Justice: Creating and*

556 Published per exclusive license to publish from the co-authors who hold copyright title of the article  
557 George (Rock) Pring and Catherine (Kitty) Pring, “Twenty-first century environmental dispute resolution – is there an ‘ECT’ in your future?,” 33 J. of Energy & Nat. Res. L. 10, 17 (2015) (hereafter “ECT Future”), soon on the ECT Study website, <http://www.law.du.edu/ect-study>.  
558 Civil Procedure Act 2005, sec. 56(1) (New South Wales, Aus.), [www.austlii.edu.au/au/legis/nsw/consol\\_act/cpa2005167/s56.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa2005167/s56.html); see similarly Planning and Environment Court Rules 2010, rule 4 (Queensland, Aus.), [www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SusPlanPECRu10.pdf](http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/S/SusPlanPECRu10.pdf).

*Improving Environmental Courts and Tribunals*.<sup>559</sup> At that time, we identified over 350 ECTs in 41 countries. Today, just five years later, there are now over 800 ECTs authorized<sup>560</sup> in nearly 50 countries – worldwide, in every major type of legal system (civil law, common law, Asian law, Islamic law, etc.), at all government levels, from the richest to the poorest nations, with the majority created in just the last 10 years.<sup>561</sup> Based upon research and interviews to date with nearly 250 ECT-experienced legal experts – judicial branch environmental court (EC) judges, administrative branch environmental tribunal (ET) decision-makers, general court justices and judges, government environmental officials, criminal prosecutors, environmental advocates, business lawyers, ECT staff and mediators, and academics – we found that specialized ECTs definitely can improve access rights and the environmental rule of law.<sup>562</sup>

Latin America and the Caribbean (LAC) countries are among the leaders in developing ECTs. They are found in 11 LAC countries:

## BOLIVIA

The Tribunal Agroambiental is a judicial EC covering agricultural, forestry, environmental, water, and biodiversity issues, created by the national Constitution, which authorizes seven judges who are popularly elected and courts at nine locations.<sup>563</sup> It resolved 423 cases in 2014.<sup>564</sup>

## BRAZIL

The prolific ECT movement in Brazil has produced at least 17 ECs – nine federal district (trial) courts in seven different states, six state trial courts, and two specialized state appellate chambers in São Paulo, in addition to specialized environmental prosecutors.<sup>565</sup>

## CHILE

There are two new Tribunales Ambientales, one in the capital Santiago and one in Valdivia that are ECs in their first years of operation.<sup>566</sup>

## COSTA RICA

The Tribunal Ambiental Administrativo (TAA) is an independent ET that is part of the Ministry of Environment and Energy and one of the oldest ECTs in Latin America, created in 1995.<sup>567</sup>

## EL SALVADOR

A 2014 law authorizes four Tribunales Ambientales, as part of the judiciary, three trial or first-in-

stance ECs in each major zone of the country and an appellate EC chamber in the capital.<sup>568</sup> However, the Supreme Court has created only one EC for the whole country, citing budget and low caseload. It started in December 2014 and has already handed down several positive decisions.<sup>569</sup>

## GUATEMALA

Guatemala has joined Courts for Drug-Related Activity and Crimes Against the Environment.<sup>570</sup> In those ECs, first instance judges of crimes against the environment have jurisdiction over investigation and ordering a trial to be held; sentencing judges conduct the trial and pronounce the verdict.

559 George (Rock) Pring and Catherine (Kitty) Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (The Access Initiative of the World Resources Institute 2009) (hereafter *Greening Justice*), copy downloadable free at the ECT Study website, [www.law.du.edu/ect-study](http://www.law.du.edu/ect-study)).

560 “Authorized” may not always mean “operating.” A handful of countries have adopted ECT authorizing laws but then not set them up or discontinued them for a mix of political, budget, case load, or other reasons.

561 “ECT Future,” note 1 above, at 10-11.

562 *Id.* at 11-12, 33; *Greening Justice*, note 3 above, 13-18, 91-93.

563 Official website: <http://www.tribunalagroambiental.bo/>.

564 “Bolivia – Agroambiental Court resolved 432 cases in 2014,” *Bolivia en Tus Manos* (Jan. 15, 2015), <http://www.boliviaentusmanos.com/noticias/bolivia/138896/tribunal-agroambiental-resolvio-432-causas-en-2014.html>.

565 For an early list, see Vladimir Passos de Freitas, “Environmental Law and Enforcement in Brazil,” PowerPoint at Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice, July 27-28, 2010, <http://www.scribd.com/doc/37002374/Vladimir-Passos-de-Freitas-Environmental-Law-and-Enforcement-in-Brazil>; subsequent updates in emails from Professor (former federal judge) Freitas on file with authors.

566 Official websites: <http://www.tribunalambiental.cl/> (Santiago), <http://www.tercertribunalambiental.cl/> (Valdivia).

567 Official website: <http://www.tribunalambiental.net>; see also <http://www.minae.go.cr/>. Tribunal Ambiental Administrativo, “Seis años de éxitos contra el daño ambiental (2008-2014),” [http://www.tribunalambiental.net/noticias/2014/INFORME\\_TRIBUNAL\\_AMBIENTAL\\_2014\\_Resumen\\_para\\_prensa.pdf](http://www.tribunalambiental.net/noticias/2014/INFORME_TRIBUNAL_AMBIENTAL_2014_Resumen_para_prensa.pdf).

568 David Ernesto Pérez, “Primer tribunal Ambiental funcionará dentro de seis meses,” *Diario Digital Contra Punto* (May 19, 2014), <http://www.contra.punto.com.sv/politica/primer-tribunal-ambiental-funcionara-dentro-de-seis-meses>.

569 *E.g.*, Ministerio de Medio Ambiente y Recursos Naturales, “Tribunal Ambiental da 24 horas a Alcaldía de Mejicanos para retirar basura y ordena a MIDES abrir puertas de relleno” (Feb. 12, 2015), in which the Ministry of Environment comments favorably on one of the Tribunal’s first decisions, [http://www.marn.gob.sv/index.php?option=com\\_content&view=article&id=3098:tribunal-ambiental-da-24-horas-a-alcaldia-de-mejicanos-para-retirar-basura-y-ordena-a-mides-abrir-puertas-de-relleno&catid=1:noticias-ciudadano&Itemid=227](http://www.marn.gob.sv/index.php?option=com_content&view=article&id=3098:tribunal-ambiental-da-24-horas-a-alcaldia-de-mejicanos-para-retirar-basura-y-ordena-a-mides-abrir-puertas-de-relleno&catid=1:noticias-ciudadano&Itemid=227).

570 Network in Solidarity with the People of Guatemala (NISGUA), “Courts in the Criminal Process” (2008), <http://www.nisgua.org/themes/campaigns/impunity/Guatemalan%20Courts%20in%20the%20Criminal%20Process.pdf>; see, *e.g.*, “Guatemala – Temporary detention, and subsequent release, of human rights defenders following peaceful demonstration against mining activities,” *Front Line Defenders*, [www.frontlinedefenders.org/node/27316](http://www.frontlinedefenders.org/node/27316).

## GUYANA

The Environmental Assessment Board (EAB) is an ET that is part of the government's Environmental Protection Agency (EPA)<sup>571</sup> and hears appeals of decisions by the EPA about development Environmental Impact Assessments (EIAs).<sup>572</sup> Guyana's Environmental Protection Act also authorizes an Environmental Appeals Tribunal (EAT) as a court of record to hear appeals of decisions of the EAB, although it does not appear to be operational.<sup>573</sup>

## JAMAICA

The Natural Resources Conservation Authority Tribunal, under the Ministry of Water, Land, Environment and Climate Change, hears appeals against enforcement notices and decisions of the NRC Authority, and its decisions are final.<sup>574</sup> All six cases the ET heard in fiscal year 2013-2014 were filed appealing the Authority's enforcement actions on pollution and environmental permits for developments.<sup>575</sup>

## PARAGUAY

Two "environmental courts" in Paraguay are mentioned in a UN report on indigenous issues, but no other references to them have been found.<sup>576</sup>

## PERÚ

Peru's Tribunal de Fiscalización Ambiental (TFA) is an ET that is a branch of the national government's Agency for Environmental Assessment and Enforcement (OEFA)<sup>577</sup> and hears appeals filed against OEFA actions.<sup>578</sup> It has three specialized chambers, for mining, energy, and fishing.

## TRINIDAD Y TOBAGO

This Caribbean island nation has an Environmental Commission,<sup>579</sup> which is a court of record with power to review appeals from decisions of the national environmental authority and citizen complaints. However, we found it has a very low profile and handles very few cases (an average of four per

year),<sup>580</sup> and its website appears to have been "hijacked." However, we spoke with its Chairman at an October 2014 conference, and he reported the EC is operating, doing outreach, and just had its jurisdiction expanded to include land use planning.<sup>581</sup>

In addition, Mexico has authorized ECTs to begin this year, the Bahamas has just announced plans to create one this year,<sup>582</sup> the Ecuador government and environmentalists have been discussing a "pilot" EC to protect the Galapagos Islands,<sup>583</sup> and Nicaragua is reported in one article to have an "environmental court"<sup>584</sup> but no other references to it have been found.

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- 571 [Guyana] Environmental Protection Agency, "Annual Report 2012" at p. 8, <http://www.nre.gov.gy/Annual%20Report/EPA%20AR%202012.pdf>.
- 572 Mark Lancelot Bynoe, "Citizen Participation in the Environment Impact Assessment Process in Guyana: Reality or Fallacy?," *2/1 Law, Environment & Development J.* 34, 43-44 (2006), [www.lead-journal.org/content/06034.pdf](http://www.lead-journal.org/content/06034.pdf).
- 573 See, *id.* at 44.
- 574 NRCA Act sec. 34, [http://nepa.gov.jm/legal/nrca\\_act\\_lpart1.htm](http://nepa.gov.jm/legal/nrca_act_lpart1.htm).
- 575 Environment & Risk Management Division, "Appeals," <http://www.mwh.gov.jm/emd/index.php/component/content/category/9-uncategorized>
- 576 UN Economic and Social Council, Permanent Forum on Indigenous Issues, "Information received from Governments – Paraguay" (Feb. 5, 2010), at pp. 17-18, <http://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.12%201EN.pdf>.
- 577 OEFA, "Environmental Enforcement Tribunal," <http://www.oefa.gob.pe/en/tribunal-de-fiscalizacion-ambiental>.
- 578 *Id.*
- 579 Hamel-Smith Attorneys-at-Law, "Doing Business in Trinidad and Tobago," <http://www.trinidadlaw.com/home/general/subcategory.aspx?categoryID=19&subcategoryID=63>.
- 580 "Environmental Commission collapse?," *Guardian Media* (Mar. 18, 2013), [www.guardian.co.tt/editorial/2013-03-18/environmental-commission-collapse](http://www.guardian.co.tt/editorial/2013-03-18/environmental-commission-collapse).
- 581 Chateram Sinanan, Chairman, Environmental Commission of Trinidad & Tobago, Address at the First Interamerican Forum on Environmental Justice, Santiago, Chile (Oct. 9, 2014) (in September 2014) (notes on file with authors).
- 582 Federal Law on Environmental Liability, Transitory art. 3 (Mex.), [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5301688&fecha=07/06/2013](http://www.dof.gob.mx/nota_detalle.php?codigo=5301688&fecha=07/06/2013); Antonio Gonzalez & Mauricio Llamas, "Enactment of the Federal Law on Environmental Liability in Mexico," [www.martindale.com/environmental-law/article\\_Jones-Day\\_1841844.htm](http://www.martindale.com/environmental-law/article_Jones-Day_1841844.htm).
- 583 Allyson Maynard Gibson Q.C., Attorney General and Minister of Legal Affairs of the Commonwealth of The Bahamas, "Of Justice, Safety and Freedom – Remarks upon the Opening of Legal Year 2015," page 7 (Jan. 14, 2015), [http://www.bahamas.gov.bs/wps/wcm/connect/8d053be7-8b79-4154-bebe-5938cd266606/Opening\\_legal+year+2015%5Bfinal%5D%5Bfinal%5D+\(1\)\(2\).pdf?MOD=AJPERES](http://www.bahamas.gov.bs/wps/wcm/connect/8d053be7-8b79-4154-bebe-5938cd266606/Opening_legal+year+2015%5Bfinal%5D%5Bfinal%5D+(1)(2).pdf?MOD=AJPERES).
- 584 "First environmental court in Galapagos," *Ecuador Times* (Oct. 22, 2013), <http://www.ecuadortimes.net/2013/10/22/first-environmental-court-in-galapagos/>.

## 2. The Evolution of ECTs

ECTs are not a new idea. The earliest one appeared almost 100 years ago in Denmark,<sup>585</sup> but there was little “environmental law” to justify them until the environmental movement of the 1970s brought forth its explosion of laws governing environmental quality, land use development, and public health.<sup>586</sup> The 1972 UN Stockholm Declaration<sup>587</sup> marked a watershed that produced a flood of new environmental laws, moving away from protecting public and private exploitation of nature toward protecting the environment, human rights, and nature. Nations around the world, including those in the LAC region, began adopting complex new environmental laws and programs. More than 90 nations, including many in the LAC, have adopted provisions in their Constitutions guaranteeing citizens a right to a healthy environment.<sup>588</sup> These transformations refocus the law from economic development to sustainable development, from production of capital to elimination of poverty, from protection of private enterprise to protection of human rights, from secrecy to transparency, from focus on short-term benefits to long-range consequences, and from local and national interests to global concerns.

By the 1980s, it was clear that environmental law needed to resolve the inherent tension between environmental protection and economic development. What emerged is the concept of “sustainable development.” More than 100 definitions of sustainable development now exist,<sup>589</sup> the most famous and widely used being that of the 1987 report of the UN World Commission on Environment and Development (WCED or Brundtland Commission): “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>590</sup>

“Sustainable development” promotes the idea that environmental, economic, and social concerns can all be met within the limits of earth’s natural resources; this assumes that economic and social progress can be achieved in ways that will not exhaust or seriously diminish the earth’s finite natural resources.<sup>591</sup> Virtually all environmental laws, conventions, declarations, and programs since have been based on that concept.

The 1992 UN Rio Declaration,<sup>592</sup> another watershed, affirmed that “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”<sup>593</sup> and stressed the necessity of protecting the needs of present and future generations.<sup>594</sup> Its most far-reaching provision is Principle 10, which is now driving new actions and commitments in the LAC and around the world:

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.<sup>595</sup>

Principle 10 was turned into binding law in the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention).<sup>596</sup> Aarhus has been called “the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.”<sup>597</sup> It sets forth detailed requirements for these “three pillars” of democratic governance – public “access rights” to information, participation, and justice – that are binding on its 47 parties (states of Europe and West and Central Asia) and enforceable by the European Court of Justice.

585 See *Greening Justice*, note 3 above, at 9.

586 For details on the 1970-present history of environmental law, see Ved P. Nanda & George (Rock) Pring, *International Environmental Law and Policy for the 21st Century* 6-7, 97 et seq. (2d ed. 2013).

587 Report of the UN Conference on the Human Environment, Stockholm, June 5-16, 1972, UN Doc. A/CONF.48/14/Rev. 1 (1973), 11 ILM 1416 (1972), <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>.

588 John H. Knox, UN Independent Expert on Human Rights and the Environment, “Report on Constitutional Environmental Rights” (Nov. 21, 2014); James R. May & Erin Daly, *Global Environmental Constitutionalism* (2014).

589 “Sustainable Development Information,” <http://www.sustainabledevelopmentinfo.com/the-definition-of-sustainable-development/>.

590 WCED, *Our Common Future* 41 (1987); [www.un-documents.net/our-common-future.pdf](http://www.un-documents.net/our-common-future.pdf).

591 “The Definition of Sustainable Development,” <http://www.sustainabledevelopmentinfo.com/the-definition-of-sustainable-development/>.

592 Rio Declaration on Environment and Development, Principle 1, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992), <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>.

593 Rio Declaration on Environment and Development, Principle 1, at <http://www.unep.org/Documents>.

594 *Id.*, Principle 3.

595 *Id.*, Principle 10 (emphasis added).

596 2161 UNTS 447; 38 ILM 517 (1999), <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

597 UN Secretary-General Kofi A. Annan, <http://www.aarhusclearinghouse.org/about/>.

Furthering the development of access rights, at the 2002 World Summit on Sustainable Development in Johannesburg, over 100 senior judges from around the world, including the LAC, adopted the Johannesburg Principles on the Role of Law and Sustainable Development, reinforcing the close connection between human rights, access rights, sustainable development, and the environmental rule of law.<sup>598</sup> Access rights were elaborated in UNEP's 2010 Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) setting out 26 strong, but voluntary, guidelines "primarily [for] developing countries" on how they should implement "their commitments to Principle 10" of Rio.<sup>599</sup>

At the 2012 UN Rio+20 Conference,<sup>600</sup> over 250 of the world's Chief Justices, Judges, Attorneys General, Auditors General, Chief Prosecutors, and other high-ranking jurists "seized a generational opportunity" to contribute to the development of environmental law, sustainability, and access rights by adopting the Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability, dealing with the role of courts and tribunals in protecting the environment – including for the first time in such an authoritative forum a call for ECTs:<sup>601</sup>

Environmental sustainability can only be achieved in the context of fair, effective and transparent national governance arrangements and the rule of law predicated on:

. . . .

(b) public participation in decision-making, and access to justice and information, in accordance with Principle 10 of the Rio Declaration, including exploring the potential value of borrowing provisions from the Aarhus Convention in this regard;

. . . .

(e) accessible, fair, impartial, timely, and responsive dispute resolution mechanisms, *including developing specialized expertise in environmental adjudication*, and innovative environmental procedures and remedies;

(f) recognition of the relationship between human rights and the environment; and

(g) specific criteria for the interpretation of environmental law."<sup>602</sup>

Now, in the LAC region, another impressive movement is underway with regard to access rights. The UN Economic Commission for Latin American and the Caribbean (ECLAC, Spanish CEPAL) has brought together the region's nations to adopt the 2012 Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development, now signed by 19 of the 33 LAC member nations in ECLAC,<sup>603</sup> "launching a process to explore the feasibility of adopting a regional instrument, ranging from guidelines, workshops, and best practices to a regional convention" that will "ensure the full exercise of rights of access to information, participation and justice regarding environmental issues as enshrined in Principle 10 of the Rio Declaration of 1992."<sup>604</sup> This has been followed by several more instruments including the 2014 Santiago Decision, committing to "commence negotiations on the regional instrument."<sup>605</sup> A visionary draft of a "regional agreement" is circulating, with the goal of finalization by December 2016.<sup>606</sup> If adopted, it could potentially be an Aarhus-type agreement specially tailored to the needs and circumstances of the LAC region.

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598 <http://www.dfa.gov.za/docs/2002/wssd0828a.htm>, pg. 2.

599 [http://www.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES\\_TO\\_ACCESS\\_TO\\_ENV\\_INFO\\_2.pdf](http://www.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_TO_ENV_INFO_2.pdf).

600 On Rio+20 generally, see <http://www.un.org/en/sustainablefuture/>.

601 <http://www.unep.org/delc/worldcongress/Home/tabid/55710/Default.aspx>.

602 *Id.*, part II, 3d para (emphasis added).

603 [http://repositorio.cepal.org/bitstream/handle/11362/37214/S1420707\\_en.pdf?sequence=1](http://repositorio.cepal.org/bitstream/handle/11362/37214/S1420707_en.pdf?sequence=1), 2d preamble. They are Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Bolivia, Saint Vincent and the Grenadines, Trinidad and Tobago, and Uruguay, *id.* at footnote 2 therein.

604 <http://www.cepal.org/rio20/noticias/paginas/8/48588/Declaracion-eng-N1244043.pdf>.

605 Copy of the Santiago Decision at [http://repositorio.cepal.org/bitstream/handle/11362/37214/S1420707\\_en.pdf?sequence=1](http://repositorio.cepal.org/bitstream/handle/11362/37214/S1420707_en.pdf?sequence=1).

606 [http://www.cepal.org/dmaah/noticias/noticias/8/54818/Preliminary\\_Document\\_P10\\_ECLAC\\_March\\_31st\\_2015.pdf](http://www.cepal.org/dmaah/noticias/noticias/8/54818/Preliminary_Document_P10_ECLAC_March_31st_2015.pdf).

### 3. How ECTs Can Improve Access Rights

Based on the University of Denver Environmental Courts and Tribunals Study research, interviews, and observations around the world, we found that specialized ECTs definitely can improve access rights and the environmental rule of law.

#### 3.1. ECT Tools to Increase Access to Information

The ECT Study identified numerous methods ECTs are currently using to increase public access to information in environmental matters.<sup>607</sup> Perhaps most important is ECTs can enforce national “freedom of information” acts (FOIAs), such as many LAC countries have adopted.<sup>608</sup> ECTs can provide “discovery” procedures, giving litigants access to public and private documents. They can require full disclosure of information about cases; for example, New Zealand’s Environment Court – a leader in using information technology (IT) and the internet – makes available all discovery and other case documents and decisions to the public via its website.

The power of IT and the internet are opening access to information to the public, regardless of their status, location, education level, or involvement in the case.<sup>609</sup> Many ECTs maintain publically accessible websites, explaining rules, allowing e-filing, and posting hearing dates, as Chile’s two ECs do. ECT judges and decision-makers can do their own research, obtain documents, conduct site visits, and consult scientific experts to give themselves access to critical information.

#### 3.2. ECT Tools to Increase Public Participation

Effective ECTs have education outreach, rules, and procedures to encourage and empower the public to participate in environmental dispute resolution.<sup>610</sup> ECT education programs can involve IT, actual meetings, advertisements, and travel to educate the public about using the ECT. Our favorite example is the amazing Manaus State EC judge in the Amazon of Brazil, who – being also an artist – creates professional *comic books* for school children educating them about environmental protection and the EC (paid for with the fines collected from polluters)!<sup>611</sup> Some ECT judges in the Philippines and Brazil actually drive to remote locations in buses or vans equipped inside like miniature courthouses! Permitting public interest lawsuits (PILs) challenging government or private actions is another critical tool.

ECTs can improve public participation through legislation or rules expanding the definition of “standing” (*locus standi*) to allow persons and groups beyond those directly affected to file or participate in a case. Standing rules in progressive ECTs allow members of the public, environmental organizations, class action filers, and even representatives of “future generations” or nature itself to file non-frivolous cases and be heard. They can encourage participation beyond the parties by calling for “friend of the court” briefs, soliciting testimony from experts and other interested persons, and involving the public in monitoring enforcement of ECT decisions.

#### 3.3. ECT Tools to Increase Access to Justice

The major focus of the University of Denver ECT Study has been on how ECTs can enhance access to justice. At least nine interlocking categories of “best practices” have been identified that directly impact access to justice:

**3.3.1. Improved Access:** A primary goal of effective ECTs is to create a “user-friendly” judicial system. This involves streamlined filing procedures; physical, cultural, and linguistic accessibility; psychological accessibility; and public information.

**Filing Procedures:** The “doorway” to general courts is typically difficult for the public to understand, let alone an uneducated, impoverished, or rural individual or group. Effective ECTs make it *easy* to file or join a case, with open standing, education, assistance, plain-language directions, on-line filings, community

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607 “ECT Future,” note 1 above, at 15.

608 See <http://www.freedominfo.org/regions/latin-america/>; <http://www.freedominfo.org/regions/caribbean/>.

609 “ECT Future,” note 1 above, at 17, 28-29.

610 *Id.* at 29.

611 *Greening Justice*, note 3 above, see photo at 87.

outreach, and personalized help from court staff.<sup>612</sup> Filing fees are often eliminated, waived, or reduced. In a number of ECTs – such as the Trinidad and Tobago EC and the Tasmania State, Australia, ET – the staff advise people on how to prepare a filing and proceed. Some use environmental prosecutors, such as those for which Brazil is famous,<sup>613</sup> who can talk with a complainant, do an investigation, and file a case. An “ombudsman” (an independent public advocate) can investigate and address people’s complaints and in some countries like Costa Rica even file a case in court.<sup>614</sup> Most important, ECTs can prioritize cases based on the immediacy of the threat to the environment or public health.

**Physical, cultural, and linguistic accessibility:** ECTs can provide handicapped-accessible facilities, broadcast trials, hold court on evenings and weekends, and even take the court to the people, like the EC in Valdivia, Chile, and “Flying” Judge Michael Rackemann of the EC in the huge Queensland State of Australia.<sup>615</sup> ECTs can provide multi-lingual staff representing various indigenous cultures, arrange translators, and give special accommodation to the visually and hearing impaired. Telephone testimony and audio-visual equipment is used by many, including the EC in Santiago, Chile, to allow evidence and testimony to be given from afar. All these tools have made access to the judicial process much easier and quicker.

**Psychological accessibility:** Some ECTs have embraced informality and dispensed with intimidating black robes, marble buildings, formal procedures, and arcane legal language. Instead, they provide staff and counsellors who will talk with citizens, an “early neutral evaluation” (to assess the case frankly), and a “multi-door courthouse” of services.<sup>616</sup> The result is a judicial forum that is truly accessible psychologically.<sup>617</sup>

**Public Information:** Model ECTs constantly work to educate the public about the court and its processes.<sup>618</sup> No longer are proceedings cloaked in secrecy, but instead are accessible through open hearings, IT, and the internet. A number of ECTs in LAC do these things, as well as ECs in New Zealand, Australia, and around the world.

**3.3.2. Lowered Costs:** The high costs of litigation are often a barrier to access to justice, but there are many innovative methods of eliminating or reducing costs in ECTs, for litigants and for the ECT and government budget.<sup>619</sup> Examples include adjusting filing fees, allowing *pro se* litigants (without attorneys), court-provided ADR and expert witnesses, transcripts on-line, shifting the burden of proof to the entity proposing the action, cost awards not automatically assigned to the losing party, eliminating or reducing security bonds for injunctions, intensive (even mandatory) use of ADR, government funding, and streamlined proceedings. Other cost-cutters include sharing staff and facilities with the general courts (as the Queensland EC does), use of “green judges” within general courts (as the Philippines does), and streamlined procedural rules.

**3.3.3. Expert Judges and Decision-Makers:** Effective ECTs require that appointed judges and decision-makers have experience in environmental law or undergo training and engage in continuing environmental law education.<sup>620</sup> Numerous ECTs in LAC have these requirements. Most nations have judicial training institutes, such as the Caribbean Academy for Law and Court Administration (CALCA),<sup>621</sup> which could provide specialized training for ECT judges, decision-makers, and staff in environmental law. UNEP, the Asian Development Bank, the Environmental Law Institute, and other international governmental and nongovernmental organizations also provide judicial training in environmental dispute resolution.

Some ECTs have very careful selection processes for judges and decision-makers to screen for principled jurists who are independent, unbiased, honest, and committed to the environmental rule of law and access rights. Chile, among others, has a very elaborate selection process (that is still on-going for judges for the third EC in Antofagasta).

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612 “ECT Future,” note 1 above, at 29; *Greening Justice*, note 3 above, at 76-79.

613 Lesley K. McAllister, *Making Law Matter: Environmental Protection and Legal Institutions in Brazil* (2008).

614 L. Arias, “Costa Rica Ombudsman’s Office files complaint against GM corn,” *The Tico Times*, June 5, 2013, <http://www.ticotimes.net/2013/06/05/costa-rica-ombudsman-s-office-files-complaint-against-gm-corn>.

615 “ECT Future,” note 1 above, at 29; *Greening Justice*, note 3 above, at 76-79.

616 The Hon. Brian J. Preston, “The Land and Environment Court of NSW: Moving Towards a Multi-Door Courthouse,” 19 *Australasian Dispute Resolution J.* 72 (Part I) and 144 (Part II) (2008), free copy at [http://www.lec.justice.nsw.gov.au/lec/speeches\\_papers.html#Justice\\_Preston,\\_Chi](http://www.lec.justice.nsw.gov.au/lec/speeches_papers.html#Justice_Preston,_Chi). Justice Preston is Chief Judge of one of the most impressive ECs and a leading authority on them, with a wealth of articles and papers available to the public at that URL.

617 *Id.*

618 *Id.*

619 “ECT Future,” note 1 above, at 21-22; *Greening Justice*, note 3 above, at 40-54.

620 “ECT Future,” note 1 above, at 28; *Greening Justice*, note 3 above, at 72-75.

621 <http://www.calca-cj.org/>

**3.3.4. Use of Scientific and Technical Knowledge:** Today’s environmental cases frequently require complex scientific, economic, and technical knowledge and the ability to deal with uncertainty in future outcomes. ECTs employ a number of innovative ways to deal with this problem, using both internal and external expertise.

**Internal Experts:** A unique characteristic of some ECTs is the use of judges other than those trained in law, but trained instead in a scientific, economic, engineering, or other technical field.<sup>622</sup> ECs in Sweden were among the first to do this. In addition to law judges; the ET in Costa Rica has a judge who is an engineer, the two ECs in Chile have primary and alternate judges who are economists, an engineer, and a marine biologist; the Trinidad and Tobago EC law authorizes judges in engineering, natural sciences, and social sciences fields. These experts may have the same powers as a law judge, or act as advisors to the bench.

Other ECTs may have expert commissioners or a list of experts who can be called to judge a case in their area of expertise, such as Denmark with its panel of some 200 vetted volunteer experts. Some ask for advisory testimony or friend-of-the-court briefs from local institutes, government agencies, or universities.

**External Experts:** Expert witnesses provided by the parties can lead to the dreaded “battle of the experts,” frequently a poor process in terms of costs, time, and truth. Effective ECTs use “active management” of parties’ experts to deal with bias, disagreements, and dishonesty. Two excellent state ECs in Australia – the Planning and Environment Court of Queensland and the Land and Environment Court of New South Wales – are models for managing experts. Perhaps the most powerful tool is giving them pointed instructions with the judge requiring they be *solely responsible to the court* in their testimony, not the interests of the party paying them, or else be held in contempt.<sup>623</sup> Some ECT judges require the experts to meet together (often alone, without parties or attorneys present), identify their areas of agreement and disagreement, and write a joint report setting out the areas of disagreement and limiting court testimony to that. The technique of “hottubbing” – a tongue-in-cheek term from Australia – can be used, in which the ECT takes concurrent testimony from all parties’ experts on a particular topic while the experts sit together in the jury box (“the hottub”). Sequencing issues is another technique, in which, for example, all parties’ air pollution experts are heard in succession.

**3.3.5. Maximizing Alternative Dispute Resolution:** A hallmark of successful ECTs is the extensive use of ADR – mediation, early neutral evaluation, and other ways of resolving cases without trial – providing efficiency, saving expense, producing higher outcome satisfaction, and improving compliance.<sup>624</sup> Again, such services can be provided “internally” by court-paid mediators, commissioners, or judges or “externally,” paid for by the parties. Restitution and restoration are often achieved by consent of the parties. In some ECTs, up to 95% of cases reach a mediated solution, which can then be formalized as a court order. We found ADR is a critical tool for resolving many environmental disputes, and that it is more effective when it is an integral part of the ECT structure.

**3.3.6. Special Procedural Rules:** ECTs may need procedural rules that are quite different from the general courts in order to be more “just, quick, and cheap.”<sup>625</sup> In a famous example in the Philippines, a predominantly civil law system, the Supreme Court adopted specialized procedural and evidence rules for its ECs in 2010.<sup>626</sup> Although it is more challenging to adopt special rules for “green judges” within courts of general jurisdiction, it is not impossible, as the Philippines example shows. Special rules can be used to prohibit SLAPPS<sup>627</sup> and provide for processes like “continuing mandamus”<sup>628</sup> and the *writ of amparo*.<sup>629</sup> Other innovations include the development of a sentencing data base, court performance evaluation, public reporting mechanisms, fast-track directions hearings for the attorneys, and procedures to insure public access to information and participation.

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622 “ECT Future,” note 1 above, at 23-25; *Greening Justice*, note 3 above, at 55-61.

623 The Hon. Michael E. Rackemann, Judge of the State of Queensland District Court and the Planning and Environment Court, Address to the International Conference on Global Environmental Issues, New Delhi, India, Mar. 15, 2015, at 10, <http://www.scljld.org.au/judicial-papers/judicial-profiles/profiles/merackemann/papers/1>. Judge Rackemann sits on one of the most impressive ECs and is an authority on them, with a wealth of articles and papers available to the public at that URL.<sup>624</sup> The Hon. Brian J. Preston, “Characteristics of Successful Environmental Courts and Tribunals,” 26 J. of Env. L. 365 (2014), free copy at [http://www.lec.justice.nsw.gov.au/lec/speeches\\_papers.html#Justice\\_Preston\\_Chi](http://www.lec.justice.nsw.gov.au/lec/speeches_papers.html#Justice_Preston_Chi) at 15, 24.

624 “ECT Future,” note 1 above, at 25-27; *Greening Justice*, note 3 above, at 61-72.

625 “ECT Future,” note 1 above, at 28-32; *Greening Justice*, note 3 above, at 76-87.

626 RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No 09-6-8-SC (2010) (Phil.), [http://www.lawphil.net/courts/supreme/am/am\\_09-6-8-sc\\_2010.html](http://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html).

627 As the Philippines expressly does. For a treatise on SLAPPS, see George W. Pring & Penelope Canan, *SLAPPS: Getting Sued for Speaking Out* (1996).  
628 Juan Arturo Iuminado C. de Castro, “Cleaning up Manila Bay: Mandamus as a Tool for Environmental Protection,” 37 *Ecology L. Q.* 797 (2010), [www.boalt.org/elq/documents/elq37\\_2\\_27\\_decastro\\_2010\\_0630.pdf](http://www.boalt.org/elq/documents/elq37_2_27_decastro_2010_0630.pdf).

629 Gloria Orrego Hoyos, “The Amparo Context in Latin American Jurisdiction: an approach to an empowering action” (2013), <http://www.nyulawglobal.org/globalex/Amparo.htm>.

**3.3.7. Intensive Case Management:** Many of the elements of effective case management have been covered in the above sections. Successful ECTs have adopted a number of tools to better manage the parties, data, case files, experts, and public access to information and employ IT.<sup>630</sup> Intensive case management aids both the parties and the ECT – providing information, assistance, and counselling and preventing cases from being needlessly delayed, documents unfiled or lost, and precedents forgotten. The ECs in Brazil and Chile, among others like the Australian and New Zealand models, have incorporated many of these tools.

**3.3.8. Standard and Creative Remedies:** Effective ECTs must have a sufficient range of remedies or enforcement tools to see that their decisions are implemented in the real world. Powers of courts of general jurisdiction are often limited by ineffective fines and inadequate remedies which fail to restore environmental damage, prevent future damage, or guarantee sustainable development. Essential remedies include: preliminary injunctions, interim relief, permanent injunctions, monetary damages, punitive damages, remediation orders, restitution, power to deny or amend a development proposal, adequate monetary fines, contempt of court, and attorneys fees awards.<sup>631</sup> Ideally, an ECT should have civil, criminal, and administrative jurisdiction and remedies. Power to employ “innovative” remedy powers, such as continuing mandamus, community service, restorative justice, financial assurance bonds, and natural resource damages, is also important. These in some ECTs have resulted in requiring polluters to attend and graduate from an environmental school (funded by the ECT from fines), ordering illegal loggers to replant and restore cut areas, holding coal companies liable for climate-change emissions by end-users, requiring construction of health clinics and infrastructure for impacted communities, financing environmental awareness ads and recycling programs, having NGOs monitor cleanups, and requiring polluters to hire environmental “watchdogs” on staff to report compliance to the ECT. The combination of broad enforcement remedies and ADR has allowed ECTs to develop, order, and enforce many of these effective solutions.

**3.3.9. Embracing a Problem-solving Approach:** Perhaps most important for sustainability and the environmental rule of law is the use of a problem-solving approach – finding an on-going *solution for the problem*, not just applying the law in a routine win-lose way that may not serve the parties or the environment. As the Hon. Brian J. Preston, Chief Judge of the State of New South Wales, Australia, Land and Environment Court, has stated:

The ECT...is better able to adopt a creative and innovative “problem solving” approach to restraining, remediating or compensating for environmental harm. Such a creative and innovative approach enables an ECT to effectively determine not only the legal aspects of the disputes but also the non-legal aspects of a dispute (eg ecological integrity). ...[It is also] a less adversarial and more flexible, problem-solving based approach to expert testimony where participants are all working towards resolution of issues in dispute....<sup>632</sup>

The Hon. Michael E. Rackemann, Judge of the State of Queensland, Australia, Planning and Environment Court, describes his problem-solving approach this way:

...[C]ertain important elements...should be part of any environmental dispute resolution process. ...[This one] is crucial: you need to approach [the case] from a *problem solving perspective*. All we are concerned about [in standard cases] is resolving their dispute, and often that is done by the payment of some money. But environmental disputes are different: they’re not about who owes who how much money; they’re about the silent party in the case – the environment. Something which has a public interest and a public effect.<sup>633</sup>

Synergistically and in combination, the problem-solving approach and the other eight interlocking categories of “best practices” described above can dramatically improve the environmental rule of law, access rights, and sustainable development outcomes in ECTs.

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630 “ECT Future,” note 1 above, at 28-30; *Greening Justice*, note 3 above, at 76-79.

631 “ECT Future,” note 1 above, at 30-32; *Greening Justice*, note 3 above, at 79-87.

632 The Hon. Brian J. Preston, “Characteristics of Successful Environmental Courts and Tribunals,” 26 J. of Env. L. 365 (2014), free copy at [http://www.leg.justice.nsw.gov.au/lec/speeches\\_papers.html#Justice\\_Preston,\\_Chi](http://www.leg.justice.nsw.gov.au/lec/speeches_papers.html#Justice_Preston,_Chi) at 15, 24.

633 Rackemann Address, note 68 above, at 1, 8-9, <http://www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/merackemann/papers/1>.

## 4. The Latin American-Caribbean Region and Projected Growth of ECTs

The membership of the UN's ECLAC (or CEPAL) – 33 LAC member nations and 13 associate member non-independent territories in the Caribbean – for convenience define the LAC region.<sup>634</sup> All are confronting poverty and a wide range of environmental issues – from development, mining, logging, urban pollution, protecting marine life and fisheries, and others. All are concerned at some level about water, food, energy, shelter, and health security. Some of the nations are reasonably prosperous economies – such as Brazil and Chile – and have ECTs. Others, such as Trinidad and Tobago, are less developed small island states, which have also embraced enforcement of the environmental rule of law through an ECT. Still others, such as El Salvador, Mexico, and the Bahamas are just beginning the creation of ECTs to serve their differing needs.

### 4.1. Current Status of Access Rights and Rule of Environmental Law

The 46 LAC nations and territories cover a very wide spectrum of ratings in terms of the rule of law and access rights based on several studies. The independent and well-respected World Justice Project (WJP) measures “open government” in terms of access rights and defines it as “a government that shares information, empowers people with tools to hold the government accountable, and fosters citizen participation in public policy deliberations...a necessary component of a system of government founded on the rule of law.”<sup>635</sup> The report ranks 102 countries based on four measures: (1) publicized laws and government data, (2) right to information, (3) civic participation, and (4) complaint mechanisms.<sup>636</sup> It ranks 18 LAC countries from “most open” to “least open.”<sup>637</sup> Although more than half of the LAC nations are not included in this project, it is apparent that those surveyed are very different in terms of open government – from highly ranked Chile, Costa Rica, and Uruguay to Bolivia, Nicaragua, and Venezuela which are ranked very low as to the government's openness.<sup>638</sup>

The World Justice Project also produces a larger annual report, *The Rule of Law Index*, measuring countries' adherence to the rule of law. Its definition of “rule of law,” based on internationally accepted standards, is whether the following four principles are upheld:

1. The government and its officials and agents as well as individuals and private entities are accountable under the law.
2. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient.
4. Justice is delivered by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.<sup>639</sup>

In 2014, the report's most recent year, it examined 99 nations, including 15 in the LAC, ranking Uruguay and Chile highly, while ranking Bolivia and Venezuela among the lowest in following the rule of law.<sup>640</sup>

A third measure of access rights and the environmental rule of law in the LAC is ECLAC's 2013 report “Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean: Situation, Outlook and Examples of Good Practice,”<sup>641</sup> which states:

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634 <http://www.cepal.org/en/estados-miembros>. Two additional entities in the area, French Guiana in South America and Saint Barthélemy in the Caribbean, which are overseas dependencies of France, are not members of ECLAC, <http://lanic.utexas.edu/subject/countries/>. There are also 11 ECLAC members from outside the region.

635 World Justice Project, “Open Government Index: 2015 Report” at 4 (2015), [http://worldjusticeproject.org/sites/default/files/ogi\\_2015.pdf](http://worldjusticeproject.org/sites/default/files/ogi_2015.pdf).

636 *Id.*

637 *Id.* at 5, 15-17.

638 World Justice Project Open government Index, 2015 Report, pg. 16.

639 The World Justice Project, *Rule of Law Index 2014* at 4 (2015), [http://worldjusticeproject.org/sites/default/files/files/wjp\\_rule\\_of\\_law\\_index\\_2014\\_report.pdf](http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf).

640 *Id.* at 172-174.

641 LC/L.3549/Rev.1 (Apr. 12, 2013), [http://www.cepal.org/rio20/noticias/paginas/4/49604/2013-247-PR10-Access\\_to\\_information.pdf](http://www.cepal.org/rio20/noticias/paginas/4/49604/2013-247-PR10-Access_to_information.pdf).

There is growing recognition by civil society and governments that access to information, participation and justice in environmental issues are essential for advancing towards environmental protection and sustainable development. In order to progress towards sustainable development, the countries of Latin America and the Caribbean need to work on developing policies based on a more informed, participatory process...<sup>642</sup>

It concludes “notwithstanding the significant progress made in the past 20 years, many countries [in the LAC] have yet to develop the legislation needed to facilitate the implementation of Principle 10 of the Rio Declaration, or are finding it difficult to apply in practice.”<sup>643</sup> It found that limitations on access rights stemmed from a shortage of financial resources, lack of training, weak institutional frameworks, limited importance afforded environmental issues, insufficient release of information and education, and/or lack of participation by traditionally underrepresented groups.

With regard to access to justice in particular, the ECLAC report found that the “main barriers to access to justice in the region” include

- limitations on standing
- prohibitively high costs of litigation
- requirements for a security deposit (“undertaking for damages”) to obtain an injunction
- lack of measures to help the poor gain access to justice
- insufficient integration of indigenous communities
- resolution of the question of “creating bodies with specialized jurisdiction” (*i.e.* ECTs and environmental prosecutors)
- alternative mechanisms for environmental conflict resolution
- means for disseminating information on access to justice.<sup>644</sup>

These are all barriers that ECTs have developed means to overcome.

One can conclude, from these and similar studies, that while progress has been made in achieving the framework for environmental rule of law and the guarantee of access rights in environmental matters, there is still a long way to go in many LAC nations and territories.

#### 4.2. Recent Developments Which May Spur More ECTs in the LAC

Achieving the environmental rule of law and access rights has become a priority in the LAC region. There are now several intersecting processes that could make the LAC region a world leader in institutionalizing the environmental rule of law and access to information, public participation, and justice and could trigger growth in the number of ECTs.

The first is the groundbreaking initiative to develop a “Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean.” This visionary, multinational, collaborative process to draft and ratify such an agreement by December 2016 is an offshoot of the Rio+20 initiatives. The end result could be anything from a nonbinding declaration to an enforceable treaty as powerful for the environmental rule of law and access rights in the LAC as the Aarhus Convention has been for its state parties. A “Preliminary Document of the Regional Instrument,”<sup>645</sup> based on numerous prior meetings and discussions, was released by ECLAC on March 15, 2015, for the countries’ further consideration. It sets forth a proposed “Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean.”<sup>646</sup> Its Article 9 on Access to Justice is particularly relevant, as it *requires*:

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642 *Id.* at 3.

643 *Id.* at 44

644 *Id.* at 41-42.

645 Note 51 above.

646 *Id.* at 1.

1. Each Party shall guarantee the right to access justice in environmental matters within a reasonable period of time through administrative and/or judicial means, in the framework of a process that grants guarantees of due process based on the principles of legality, effectiveness, publicity and transparency, through clear, fair, appropriate and independent procedures. The Parties shall ensure the right of appeal to a superior administrative and/or judicial body.
2. Each Party shall ensure, in the framework of its national laws, that any person is entitled to have access to a judicial body or other autonomous, independent and impartial body or administrative procedures to challenge the legality of:
  - (a) any decision, action or omission related to the access to environmental information;
  - (b) any decision, action, or omission, with respect to substance or procedure, related to participation by the public in environmental decision-making; and
  - (c) any decision, action or omission by an individual, public authority or private entity that could affect the environment or violate, with respect to substance or procedure, the environmental laws and regulations of the State related to the environment.
3. To guarantee this right, the Parties shall establish:
  - (a) jurisdictional or non-jurisdictional entities specialized in environmental matters;
  - (b) effective, reasonable, fair, open, rapid, transparent, equitable and timely procedures;
  - (c) broad active legal standing in defense of the environment, which may include collective actions;
  - (d) timely and effective execution mechanisms for decisions;
  - (e) timely, adequate and effective mechanisms for redress, including restitution, compensation and other suitable measures, and attention to victims as applicable, and establishment of funds;
  - (f) the possibility of ordering precautionary, interim and oversight measures to safeguard the environment and public health; and
  - (g) measures to facilitate the determination of environmental damage, including objective responsibility and reversal of the onus of proof.

The Parties shall encourage, insofar as possible, the establishment of judicial and/or administrative standards of review in cases pertaining to environmental damage, such as the *in dubio pro natura* principle.<sup>647</sup>

Article 9(3) of the draft agreement is nothing less than a prescription for the creation of specialized ECTs! Further, it provides for dispute settlement that relies on “negotiation...or any other means” and refers unsettled disputes to the International Court of Justice or arbitration.<sup>648</sup> If this visionary agreement is ratified by LAC nations, it will most certainly be a driving force for creation of more specialized ECTs or environmental chambers and assigned green judges in general courts, to fulfill the agreement’s vision.

The second process impacting the environmental rule of law, access rights, and ECTs in the LAC region is the global negotiation of the post-2015 Millennium Development Goals (MDGs).<sup>649</sup> The UN Secretary General’s roadmap<sup>650</sup> sets out several essential elements for implementation, including protecting our ecosystems for all societies and our children, ensuring healthy lives, and promoting safe and peaceful societies and strong institutions to achieve justice.<sup>651</sup> ECTs which include the nine characteristics discussed in section III above can provide an effective institution for implementing those goals.

A third process potentially affecting the environmental rule of law, access rights, and ECTs in the Ca-

647 *Id.* at 18-19 (emphasis added).

648 Article 18, *id.* at 25-26.

649 UN Economic and Social Council, “Millennium Development Goals and Post-2015 Development Agenda,” <http://www.un.org/en/ecosoc/about/mdg.shtml>.

650 UN, “The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet – Synthesis Report of the Secretary General” (Dec. 2014), [http://www.un.org/disabilities/documents/reports/SG\\_Synthesis\\_Report\\_Road\\_to\\_Dignity\\_by\\_2030.pdf](http://www.un.org/disabilities/documents/reports/SG_Synthesis_Report_Road_to_Dignity_by_2030.pdf).

651 *Id.* at 20.

ribbean is the CARICOM Strategic Plan for the Caribbean Community 2015-2019.<sup>652</sup> This may seem strange, since it is an economic plan focused on “development needs” and “socio-economic progress.”<sup>653</sup> However it has provisions for the environment and access rights. One of its goals is “To ensure sustainable human and social development in the Region, with reduced levels of poverty and equitable access by vulnerable groups and significant improvement of citizen security by facilitating a safe, just and free Community.”<sup>654</sup> It calls for strategies to

- reduce vulnerability to disaster risk and the effects of climate change and ensure effective management of natural resources across the region
- advance climate adaptation and mitigation
- advance disaster mitigation and management
- enhance management of the environment and natural resources
- increase use of clean and renewable energy
- mainstream environmental sustainability into policy, planning and public education and public awareness of sustainable environmental management
- develop arrangements for participatory governance.<sup>655</sup>

The CARICOM Strategic Plan specifically calls for judicial reform:

Facilitating Justice Reform – modernized and efficient court systems and procedures, including the use of technology to facilitate case management and efficient filing, disposition and tracking of court matters; reduction of backlog in the judicial system; training and retaining skilled personnel in the justice system – judges, lawyers, police officers, investigators and counselors; structured cross-border/regional systems to bolster national and regional efforts in justice protection, mutual legal assistance, law enforcement, enforcement of judgements; and improved access by the legal profession and the public to legislation, case-law and other legal information.<sup>656</sup>

And it recognizes that “good governance encompasses the rule of law” and that “the rule of law is one major aspect of a governance framework which provides a foundation for sustainable development.”<sup>657</sup>

As this strategic plan is implemented over the next five years, development disputes can be anticipated, requiring expert balancing of the needs of the economy and the environment. Adjudication of such conflicts, enforcement of the environmental rule of law, and application of key legal principles could clearly benefit from expert, effective ECTs.

### 4.3. The Potential Role of a Regional Environmental Court or Courts in the LAC

The Caribbean area already has a respected regional court<sup>658</sup> – the Caribbean Court of Justice (CCJ)<sup>659</sup> – which could develop an expert ECT-type chamber or judges. As yet, Latin America has no such region-wide, multinational court on which to build a specialized green bench.

The CCJ began operations in 2005<sup>660</sup> and has 15 Caribbean countries as parties.<sup>661</sup> It constitutes a dynamic model for handling economic and environmental issues within the region. It is a hybrid, being a court

652 <http://caricom.org/jsp/secretariat/caribbean-community-strategic-plan.jsp>.

653 *Id.*

654 *Id.* at 21.

655 CARICOM, *Strategic Plan for the Caribbean Community 2015-2019: Repositioning CARICOM, Vol. 1 – The Executive Plan* (July 3, 2014) at 12-13 and 14 *et seq.*, <http://caricom.org/jsp/secretariat/caribbean-community-strategic-plan.jsp>.

656 *Id.* at 24.

657 *Id.* at 36.

658 Philip Dayle, “Caribbean court of justice: a model for international courts?,” *The Guardian*, Sept. 10, 2010, <http://www.theguardian.com/law/2010/sep/10/caribbean-court-judges-selection>.

659 [www.caribbeancourtofjustice.org](http://www.caribbeancourtofjustice.org).

660 Agreement Establishing the Caribbean Court of Justice (signed Feb. 14, 2001), <http://www.caribbeancourtofjustice.org/court-instruments/the-agreement-establishing-the-ccj>; CCJ, “FAQs – Establishing the Caribbean Court of Justice,” <http://www.caribbeancourtofjustice.org/about-the-ccj/faqs>.

661 Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Suriname, and Trinidad & Tobago. *Id.* (click on flags at bottom of webpage) or see International Justice Resource Center, “Caribbean Court of Justice,” <http://www.ijrcenter.org/regional-communities/caribbean-court-of-justice/>. For an excellent history of the CCJ and its human rights cases by a sitting judge of the CCJ, see The Hon. Mr. Justice Winston Anderson, “The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Law Dimensions,” 21 *J. Transnat’l L. & Pol.* 1 (2011-2012), <http://archive.law.fsu.edu/journals/transnational/vol21/anderson.pdf> (hereafter Anderson).

that both resolves treaty disputes between nations and serves as a final appellate court for civil and criminal cases. It has:

- (1) Original and exclusive jurisdiction over legal issues under the 2001 Revised Treaty of Chaguaramas<sup>662</sup> and the CARICOM Single Market and Economy (CSME),<sup>663</sup> which establish the coordinated economy of CARICOM's 15 member states and five associate member dependencies.<sup>664</sup>
- (2) Final appellate jurisdiction to hear civil and criminal appeals from CARICOM countries that have stopped using the Judicial Committee of the Privy Council of the United Kingdom as their appellate decision-maker and accepted the wider appellate jurisdiction of the CCJ.<sup>665</sup> To date, only the four Caribbean states of Barbados, Belize, Dominica, and Guyana have done so for all cases,<sup>666</sup> Trinidad and Tobago has done so for criminal cases only,<sup>667</sup> and the Jamaican Parliament will vote about joining on April 28, 2015.<sup>668</sup>

The CCJ's original jurisdiction has some environmental potential under the Revised Treaty,<sup>669</sup> but appellate jurisdiction is what has the potential to provide the Caribbean with an expert EC.<sup>670</sup>

The Hon. Justice Winston Anderson, a sitting judge of the CCJ and himself an expert in environmental and international law, has observed: "The original jurisdiction of the CCJ is of limited relevance to human rights litigation at the present time, but in its appellate jurisdiction the Court has the opportunity and responsibility to engage in human rights adjudication," pointing out "the CCJ's responsibilities for the development of an indigenous Caribbean jurisprudence."<sup>671</sup> In another article, Justice Anderson has also observed:

In our increased era of globalization more and more transnational activities adversely affect the natural environment, including illegal trade in wildlife, climate change, and pollution of the global commons. National courts are not always equipped to deal adequately with these issues which probably require adjudication by a dedicated international judicial body. Unfortunately, no such body exists inviting the question of whether the time has come for consideration to be given to the establishment of an international environmental court.<sup>672</sup>

Has the time come to consider a specialized environmental chamber for this existing international court?

The CCJ has been acknowledged as a model for appointing high-quality judges, including legal, non-legal, and civil society representatives from different Caribbean countries, and an independence bolstered by being wholly financed through a trust fund of assessments on CARICOM members – all of which help assure highly qualified, credible, unbiased, and even-handed enforcement of the rule of law.<sup>673</sup> These characteristics position it to become a Caribbean court for the adjudication of the proposed Agreement on the Application of Principle 10 for Latin American and the Caribbean.<sup>674</sup> While the draft agreement currently refers all unresolved disputes to the International Court of Justice (ICJ),<sup>675</sup> it might be preferable to have appeals go to the CCJ for the Caribbean States and to a comparable regional EC or ECs created for Latin America. This would have the advantages of decision-makers from the affected region who are knowledgeable about social, cultural, economic, legal, and environmental factors within the region, and of being much more accessible than the ICJ, 10,000 km ± away in the EU.

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662 [http://www.caricom.org/jsp/community/revised\\_treaty-text.pdf](http://www.caricom.org/jsp/community/revised_treaty-text.pdf).

663 [http://www.caricom.org/jsp/single\\_market/single\\_market\\_index.jsp?menu=csme](http://www.caricom.org/jsp/single_market/single_market_index.jsp?menu=csme).

664 List at [http://www.caricom.org/jsp/community/member\\_states.jsp?menu=community](http://www.caricom.org/jsp/community/member_states.jsp?menu=community).

665 <http://www.ijrcenter.org/regional-communities/caribbean-court-of-justice/>.

666 "Dominica Officially Joins Caribbean Court of Justice" (Mar. 10, 2015), <http://www.caribjournal.com/2015/03/10/dominica-officially-joins-caribbean-court-of-justice/#>.

667 "Jamaica's Parliament to Vote on Move to Caribbean Court of Justice" (Jan. 21, 2015), <http://www.caribjournal.com/2015/01/21/jamaicas-parliament-to-vote-on-move-to-caribbean-court-of-justice/#>.

668 *Id.*

669 *See, e.g.*, Revised Treaty of Chaguaramas, note 107 above, art. 58 ("Natural Resource Management").

670 Agreement Establishing the Caribbean Court of Justice, arts. XXV(a), (c), (d), (f), note 105 above.

671 Anderson, note 106 above, at 32, 33.

672 Winston Anderson, Judge of the Caribbean Court of Justice, Address at the UN Environment Assembly Global Symposium on Environmental Rule of Law on "Judicial Perspectives on Human Right and the Environment" (June 24, 2014), <https://westindiesstaugustine.academia.edu/WinstonAnderson>.

673 Dayle, note 103 above.

674 Agreement, note 51 above.

675 *Id.*, art. 18(2).

At a smaller regional level, the Eastern Caribbean Supreme Court (ECSC)<sup>676</sup> is a superior court of record for countries in the Organisation of the Eastern Caribbean States (OECS)<sup>677</sup> and has jurisdiction over six independent states and three British overseas territories.<sup>678</sup> That court also could serve as an appellate level EC and adjudicate Principle 10 conflicts. It already has both civil and criminal jurisdiction to interpret and apply laws of its member states and to hear appeals,<sup>679</sup> including those concerning the environment and human rights.<sup>680</sup>

## CONCLUSION

Initiatives in the Latin America-Caribbean region and globally – including the creation of an Agreement on the Application of Principle 10 Declaration for Latin America and the Caribbean, the UN negotiations on post-2015 Millennium Development Goals, and the CARICOM Five-Year Strategic Plan – will further highlight the importance of the environmental rule of law for achieving not just sustainability, but survival. With pressures for economic development will come conflicts, demanding expert, accessible, independent, affordable, and timely adjudication and enforcement of the environmental rule of law in the region. Specialized ECTs have demonstrated effectiveness as institutions capable of balancing the sustainable development conundrum, and so ECTs can be expected to increase in the region, in the interests of true sustainability for Earth and its present and future generations.

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676 Official website, <http://www.eccourts.org/>.

677 Official website, <http://www.oecs.org/>.

678 OECS, "Eastern Caribbean Supreme Court," <http://www.oecs.org/about-the-oecs/institutions/eastern-caribbean-supreme-court-ecsc>. The court's jurisdiction includes the States of Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines and the territories of Anguilla, British Virgin Islands, and Montserrat.

679 *Id.*

680 *See, e.g.,* Virgin Islands Environmental Council v. Attorney General, Claim No. BVIHCV2007/0185, ECSC (2009), [http://www.eccourts.org/wp-content/files\\_mf/1359390929\\_magicfields\\_pdf\\_file\\_upload\\_1\\_1.pdf](http://www.eccourts.org/wp-content/files_mf/1359390929_magicfields_pdf_file_upload_1_1.pdf).