“Environmental Courts and Tribunals”


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Abstract

Judicial courts and administrative tribunals that specialize in adjudicating environmental, resource development, land use, and similar litigation are now a worldwide phenomenon. Starting from only a handful in 2000, there are now over 1,200 environmental courts and tribunals (ECTs) in dozens of countries in all types of legal systems, and their number is growing. This chapter summarizes the findings of the University of Denver ECT Study (2007-current), based on interviews with over 200 ECT-experienced judges, government officials, prosecutors, business attorneys, non-governmental organization (NGO) representatives, and academics globally. It examines the key issues: the arguments for and against ECTs, the causes for their rapid emergence, how ECTs operate, how they differ from the general courts and from each other, and their advantages over general courts.

Keywords

environmental courts and tribunals, ECTs, environmental courts, environmental tribunals, general courts, green benches, green judges, specialized courts, alternative dispute resolution (ADR), land and environment court, planning and environment court, Principle 10 access rights, access to justice, standing, experts, enforcement, multi-door courthouse.

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1 Introduction

The rapid worldwide spread of specialized environmental courts and tribunals (ECTs) is one of the most dramatic developments in modern environmental law. An ECT is a public body or official in the judicial or administrative branch of government specializing in adjudicating environmental, resource development, land use, and related disputes. When the University of Denver Environmental Courts and Tribunals Study published the first global comparative review of ECTs in 2009, there were over 350 ECTs authorized in 41 countries.\(^1\) By the beginning of 2016, that number had more than tripled to over 1,200 in 44 countries.\(^2\) They are now found on every populated continent, in every major type of legal system, in the richest to (surprisingly) poorest nations, with the majority created in just the last decade. They emerged with modern

\(^1\) Pring and Pring (2009) 1.
\(^2\) Pring and Pring (2016) 1.
environmental law in the 1970s (Japan, Denmark, Ireland), although precursors exist in the ‘water courts’ and ‘land courts’ of the early 20th century, some of which later expanded into full-fledged ECs (Sweden). There is no true international (multi-national) ECT as of yet, and all of the development has been at the national and subnational level. Some examples:

- 456 ECs now established in China (including an environment chamber in their Supreme People’s Court)
- 250 general courts designated as ECs in Pakistan
- 95 ‘dedicated green courts’ designated within the general courts of Malaysia
- 13 new ECs operating in Kenya with the goal of an EC in each of the country’s 47 counties
- 10 new federal and state ECs in Brazil, added to the 7 existing in 2009
- 5 branches for India’s new National Green Tribunal
- 2 regional ECs (of 3 authorized) opened in Chile in 2013 and 2014
- 1 trial EC established in El Salvador in 2014 (of 3 trial ECs and 1 appellate EC authorized)

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3 Water courts and land courts still exist, but because of their narrower legal focus are not included in the ECT Study.
4 There are a few international bodies with some environmental adjudication aspects, like the UN International Tribunal for the Law of the Sea and the North American Agreement on Environmental Cooperation’s Commission for Environmental Cooperation, but with limited focus and powers. Pring and Pring (2012b) 487-88.
5 Zhang and Zhang (2012) 361 (reporting 100 ECs in 15 provinces in 2011); the Professors Zhang now report ‘24 provinces have established 456 ECTs’ at various levels including the Supreme People’s Court (email from Bao Zhang, Asst Prof, Central South University School of Law, Changsha, China, to authors (31 December 2015) (on file with authors).
8 Email from Justice Samson Okong’o, Presiding Judge, Environment and Land Court of Kenya, to authors (8 January 2016) (on file with authors).
9 Email from Prof Vladimir Freitas, Pontifícia Universidade Católica do Paraná, Curitiba, Brazil, to authors (18 August 2013) (on file with authors).
12 Email from Pedro Leon Gutierrez, E-Law attorney, to authors (14 April 2015) (on file with authors).
- A trial-level ET established for England and Wales in 2010\textsuperscript{13}
- On 1 July 2015, Hawaii became the second US state (after Vermont) to establish an EC, designating 22 existing trial and appellate judges to have environmental case calendars.\textsuperscript{14}

Indications are that the proliferation of ECTs will continue. International financial organizations (IFIs), like the World Bank and Asian Development Bank, have judicial capacity building programs that include support for ECTs. Organizations of green judges provide forums, expertise on best practices, and support for expansion of ECTs, such as the European Union Forum of Judges for the Environment (EUFJE), Australasian Conference of Planning and Environmental Courts and Tribunals (ACPECT), Asian Justices Forum on the Environment (AJFE), and others. Also multinational agreements on ECTs are appearing, including the 2012 Bhurban Declaration of Asian chief justices and others pledging their countries to ‘strengthen specialised environmental tribunals’, and ‘establish green benches’.\textsuperscript{15}

However, declarations and even authorization do not necessarily result in operating ECTs. A number of countries have authorized them, through legislation or court rule, but have not established them (or have discontinued them), generally for budgetary reasons or political or judicial opposition.

Specialized ECTs have critics as well as supporters.\textsuperscript{16} Opponents’ arguments include: satisfaction with the general courts’ handling of environmental cases, other issues with greater needs, relegating environmental issues ‘to the closet’, fragmentation of judicial systems, insufficient caseload, increased expense, public confusion, difficulties defining what is an ‘environmental’ issue, fear of capture by special interests, worries about judicial activism, lack of expert judges and decision-makers, and/or creation of an ‘inferior’ court. Arguments like these persuaded the USA not to establish a national EC in the 1970s;\textsuperscript{17} however, it has created several national ETs,\textsuperscript{18} and US states and numerous local governments continue to create ECTs.\textsuperscript{19}

\textsuperscript{16} For a detailed discussion of the pro-con arguments, see Pring and Pring (2009) 13-18.
\textsuperscript{17} See Whitney (1973) 33 \textit{et seq}.
\textsuperscript{18} For example, the US Environmental Protection Agency (US EPA) has both in-house trial and appellate level ETs, and the US Department of the Interior has several adjudicative ETs, including the Interior Board of Land Appeals.
\textsuperscript{19} Examples listed at Pring and Pring (2009) 109.
ECT proponents’ arguments include: making courts more ‘just, quick, and cheap’ (in the pithy words of Australian civil procedure law20), greater judicial expertise, efficiency, visibility, cost savings, uniformity, more open standing, government commitment and accountability, prioritization of cases, creativity, greater alternative dispute resolution (ADR), issue and remedy integration, public participation, public confidence, judicial activism, preventing ‘back-burnering’ of environmental cases, better decisions, and greater use of the problem-solving approach to decisions.21

Based on the data, a growing number of countries have found the positive arguments outweigh the negative for their legal systems. What factors contribute to this?

2 What is causing the explosion of ECTs?

A consistent series of steps lead to the creation of ECTs in most countries studied.22 First, a significant segment of the public becomes concerned about environmental damage, pollution, unregulated development, public health, wildlife endangerment, food, energy, and water security, etc. Second, government responds with environmental laws and agencies. Third, the public finds enforcement of these laws lacking and resorts to the judicial system to improve environmental protection. Fourth, if the courts then fail to respond quickly and effectively, civil society or business interests or both seek change in the judicial system, to provide a better process. Fifth, at that point, a specialized ECT can emerge as the reformers’ answer.

Clearly, dissatisfaction with the general court system is the major driver of ECTs, based on public perceptions of delay, inadequate expertise, lack of independence, and/or corruption.23 These factors stimulated ECT advocates in most countries, according to those interviewed by the University of Denver ECT Study.

Delay arises because general courts can have huge backlogs of cases, insufficient judges, unproductive judges, or inefficient procedural rules, or because environmental cases may get ‘back-burnered’ by judges because of bias, complexity, or disinterest. Lack of expertise can be expected with general court judges, who by their nature are legal generalists, not trained in environmental law, environmental science and technology, or a futurist approach to problem solving. The former Presiding Judge of Sweden’s Environmental Court of Appeal put it this way:

I am sometimes asked, ‘What is the difference between judging an environmental case and judging a criminal case?’ I usually say that the criminal judge looks backward trying

21 On the benefits of the ‘problem-solving approach’ to judicial decision-making (as opposed to purely legalistic approach), see, eg, Rottman (2000) 22.
22 Pring and Pring (2012b) 488-89.
to find out what has been proved about what happened, while the environmental judge looks forward asking what will happen in the future as a result of my decision. Lack of independence can be a concern in systems where judges are not selected for competence, not free from government and private-interest influences and ties to litigants, not given adequate budgets, or not immune from political retaliation, firings, and even physical threats and harm. Judicial corruption, unfortunately, can also be a significant issue.

It is hardly surprising that these four concerns lead reformers to look for alternatives in environmental and other cases. These concerns are so basic that the World Justice Project makes them a collective principle in defining the term ‘Rule of Law’:

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.

Significantly, general court justices and judges themselves can be the leaders in developing ECTs. For example, in 2008, the then-Chief Justice of the Supreme Court of the Philippines personally led the reform to designate 117 existing general courts there as ‘Special Courts’ for the environmental laws, and in 2010 that Court drafted exemplary procedural rules governing their handling of environmental cases. In another example, in 2012, a UN Environment Program (UNEP) conference of over 250 chief justices, judges, attorneys general, prosecutors, and other judicial experts issued a declaration noting ‘the importance of the Judiciary in environmental matters . . . [and] in the creation of a considerable number of specialized environmental courts and green benches.’ And, as Lord Robert Carnwath, Justice of the Supreme Court of the United Kingdom, has observed:

There is now widespread acknowledgement of an international ‘common law’ of the environment based on principles such as sustainability and intergenerational equity. There is now greatly expanded awareness of environmental issues among the judiciary, and the development of specialist courts and tribunals in many countries.

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26 World Justice Project (2014) 4 (Box 1).
27 Republic of the Philippines Supreme Court, Designation of Special Courts to Hear, Try and Decide Environmental Cases (Admin Order 23-2008).
A major stimulus for ECTs is Principle 10 of the 1972 Rio Declaration on Environment and Development and its recognition of the three ‘access rights’:

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.\(^{31}\)

Growing global recognition of the human rights of access to information, access to public participation, and access to justice, the ECT Study found, has put pressure on countries to implement these rights in environmental matters, and the third—access to justice—is a particular incentive for ECT establishment. While Principle 10 is a declaration and not binding law in itself, some countries have incorporated it into their law, most significantly the 1998 Aarhus Convention,\(^{32}\) which has made Principle 10 access rights binding law for 46 European, West Asian, and Central Asian countries, and the EU.

Principle 10 is a pressure for ECTs even in countries that have not adopted it as law. One way this occurs is through the so-called ‘greening’ of IFIs and other entities that provide financing to countries for development.\(^{33}\) IFIs like the World Bank and the Asian Development Bank are broadly engaged in programs of judicial capacity building for environmental governance, including supporting ECTs.\(^{34}\) Other drivers are similarly at work, including programs of UN agencies like UNEP, critical reporting on environmental justice by NGOs, and lawsuits and other pressures by the European Commission on its member states.\(^{35}\)

3 How ECTs differ

Innovation is a key characteristic of ECTs, and they can differ substantially from the general courts and from each other.\(^{36}\) No two are exactly alike, since they reflect each country’s unique legal, governmental, societal, and economic response to environmental protection and sustainable development. A review of the 12 ECT ‘building blocks’ or design features identified in the University of Denver ECT Study\(^{37}\) shows ECTs’ flexibility and capacity to differ and innovate.\(^{38}\)

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\(^{31}\) Rio Declaration, Principle 10.
\(^{32}\) Aarhus Convention (1998).
\(^{33}\) Nanda and Pring (2014) 162.
\(^{36}\) ibid 12, 24.
\(^{38}\) For more in-depth discussion and examples of each, see ibid 21-87.
3.1 Type of forum

ECTs can be designed as courts (in the judicial branch), tribunals (in the administrative branch), or other dispute-resolution formats. Four basic types of ECs were found: (1) operationally independent ones (separate, fully or largely autonomous ECs), (2) decisionally independent ones (within a general court, but free to make its own rules, procedures, and decisions), (3) a mix of law-trained and science-trained judges), and (4) designated green judges on a general court. Three types of ETs were identified: (1) operationally independent ones (separate, fully or largely autonomous ETs, not under the control of another government agency, department, or ministry), (2) decisionally independent ones (under another government body’s supervision, but not the one whose decisions it reviews), and (3) ‘captive’ ETs (within or otherwise under the control of the agency whose decisions they review). Other ECT formats can include special commissions, ADR programs, ombudsman (with decisional power), and human rights bodies. Some countries have several types of ECTs—for example, Kenya has ECs, an ET for reviewing environmental impact assessments (EIAs), and an ombudsman; the USA has national-level ETs and state and local level ECs and ETs; in Australia several states have ECs and other states and territories have ETs.

3.2 Legal jurisdiction

ECTs’ legal jurisdiction can range from broad to narrow—from very comprehensive competence over laws relating to the environment, land use, and public health to very narrow competence, possibly even limited to one particular law, like Kenya’s ET that only reviews EIAs. Some countries legislate lists specifying the laws under the ECT’s jurisdiction, while others use very sweeping language, like Kenya’s Constitution that gives ECs jurisdiction over all disputes ‘relating to environment and land’. ECTs can also be given civil, administrative, or criminal jurisdiction, or a combination of two or more of these.

Defining what is ‘an environmental law’ can be difficult, as is deciding what to do with a case with both environmental and significant non-environmental issues. The majority of ECTs deal primarily with environmental quality laws, such as pollution control and permitting and natural resources development. To this core, some, like New York City’s huge ET, are given a fuller range of issues, such as land use development, zoning, sanitation, building codes, noise, transportation, etc. At the other extreme, some ‘planning’ bodies have jurisdiction only over land use laws, but not environmental laws. ECTs’ jurisdiction may also be restricted in other ways, such as limitations on what enforcement powers and remedies they have (see X.3.12 below). The most powerful ECs, like those in the Australian states of New South Wales and Queensland, have comprehensive integrated jurisdiction over both environmental quality and development laws. The trend is toward increased, more inclusive jurisdiction (Ireland, New Zealand, Sweden, Trinidad & Tobago).

3.3 Decisional levels

ECTs can be established at any stage(s) of the adjudication process. They can be (1) the initial internal agency decisional body (eg, granting or denying permits), (2) the internal agency review level (eg, reviewing agency decisions on permits), (3) outside the agency at the trial level (first instance review), (4) the external appellate level (second instance review), and (5) the final appellate level (eg, the supreme court) – with options (2) and (3) most frequent. Some countries
have established both trial and appellate ECTs (such as Sweden, Kenya, Finland, Thailand), some appellate only (Netherlands). A two-level ECT system (eg, Sweden, Finland, Belgium, India, and the US EPA) can provide the most knowledgeable and uniform outcomes. If two levels are not justified or affordable, an ECT at the trial or first-instance level appears preferable to one only at a higher level, because a well-informed trial decision will then come more quickly is less likely to be appealed, and can have a more solid record.

3.4 Geographic area

An ECT’s geographic jurisdiction can cover an entire nation (eg, Denmark, Ireland, Japan, South Korea, US EPA, Trinidad & Tobago), a state or province (Canada, Australia, Brazil, China, Vermont), or a local government entity like a county or city (Philippines, China, Kenya, numerous US cities and counties). Geographic coverage can be an issue if the area is too large for realistic citizen access to justice, but accommodations can be made such as travelling courts/judges, tele- and video-communication, on-site hearings, etc.

3.5 Case volume

The number of cases anticipated is a major factor in the decision of the type of ECT to be created. ECTs with hundreds of thousands of cases a year (New York City) have significant management, cost, and staffing challenges. At the other extreme, an excellent ECT can be created but then attract only a miniscule number of cases, making it hard to justify politically or financially (Trinidad & Tobago). Rigorous advance analysis of expected case volume and examination of barriers to filings are critical steps in planning an ECT. Best estimates are that at least 100 case filings per judge per year are required to ‘justify’ a stand-alone ECT. Case volume can also be increased or decreased by some of the 12 ‘building blocks’, particularly laws under its jurisdiction, geographic scope, and ADR.

3.6 Standing

The effectiveness of an ECT can be thwarted by restrictive rules of ‘standing’ (locus standi), the qualifications a litigant is required to have to file or participate in a case. Standing requirements are typically controlled by legislation, court rules, and judicial interpretations of them,39 and restrictive standing rules can be a significant barrier to access to justice.40 It is generally not an issue when there is (1) injury to the plaintiff, (2) caused by defendant, (3) which a court order can remedy. However, the causes and effects of environmental harms are often not so clear cut. Did the industry’s pollution really cause the plaintiff’s cancer or will logging in a wilderness actually harm a distant NGO’s interests?

Standing rules around the world range from very restrictive to very open. Examples of restrictive rules include ones that limit litigants to only those whose case is first reviewed and approved by the environmental agency, even if it is the defendant (Bangladesh). Other rules can

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39 The US federal (national) courts are an exception to this, since the US Supreme Court has interpreted the US Constitution as authorizing the courts to dictate standing restrictions to the legislature and lower courts. Such ‘constitutionalizing’ of standing has been rejected in other countries (Australia) and even in some US state courts. See Pring and Pring (2009) 34.

40 [Cross-reference to Mank chapter on standing]
restrict plaintiffs to nearby property owners only, to those who participated in the prior administrative decision-making process, to NGOs with a specified minimum number of members, to only those with a property interest, etc. At the other extreme, the Philippines Supreme Court has adopted extremely open standing rules allowing any citizen to file an action ‘to enforce rights or obligations under environmental laws’, even to represent ‘generations yet unborn’. Arguments advanced to support restrictive standing (flood of litigation, frivolous lawsuits, excessive court activism, and delay) are not supported by the empirical studies. The most effective access to justice is provided by standing rules open to ‘any person’ raising an environmental issue, while giving the ECT authority to dismiss and/or penalize frivolous, abusive, or otherwise improper filings.

3.7 Costs

The expense of a lawsuit is another significant barrier to access to justice. ECTs have innovated many ways to reduce costs to the public, ways often not available in the general courts. These can include lowered, even eliminated court fees, ADR, efficient case management, government funding, public prosecutors taking on cases, proponent funding (eg having developers pay the expenses of citizen opponents), attorney-fee recovery laws, elimination of cost-shifting rules (like ‘the loser pays’ rule), reduced or eliminated bonds for injunctions, and prompt dismissal of ‘SLAPPs’ (Strategic Lawsuits Against Public Participation in government).

3.8 Scientific-Technical Expertise

Expert evidence is fundamental in much of environmental litigation, particularly in areas such as causation, damages, and future impacts. ECTs have pioneered a number of innovative ways to provide and manage objective scientific and technical expertise, both by providing their own internal experts and by managing the parties’ external experts.

Internal expertise can be furnished by appointing judges with scientific, engineering, or economic training in addition to those trained in law. It can also be provided by appointment of special expert commissions to advise the ECT, having expert advisors on the court staff, developing lists of volunteer experts in the community, and calling in experts in the government agencies or prosecutor’s office (when neutral).

The parties’ external expert witnesses can give rise to the dreaded ‘battle of the experts’ if not carefully managed by the ECT. ECTs have innovated a number of measures to manage the parties’ experts, reduce the role of lawyers in controlling their evidence, and lessen bias. Techniques (rare in the general courts) include ‘directions hearings’ (in which the judge lays ground rules governing the experts), requiring that experts’ first duty be to the court rather than individual parties (and subject to contempt for violations), ordering experts to meet and file in advance of the trial a joint report of their areas of agreement and disagreement, judicial sequencing of the evidence, and soliciting ‘friend of the court’ reports from independent experts.

3.9 ADR

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41 eg Aust L Ref Comm’n (1995).
The extensive use of alternative dispute resolution (ADR) is a hallmark of many ECTs. ADR can significantly increase access to justice by reducing time and costs, widening public participation, lowering standing barriers, supporting problem-solving by the parties themselves, and reducing caseloads and backlogs. ADR techniques can include mediation, conciliation, negotiation, arbitration, early neutral evaluation, restorative justice, collaborative decision making, and hybrid combinations of these. Some ECTs require all cases to go to ADR before litigation (Tasmania), and some use the ‘multi-door courthouse’ approach of screening all cases at the outset for the best fit with a diversity of available dispute resolution processes (New South Wales).

ADR can be ‘court annexed’ (provided and usually paid for by the ECT) or ‘court referred’ (external, usually at the parties’ expense). In the former, ADR experts on the ECT staff, judges and decision makers, or volunteers can serve the function, although this requires a commitment in advance and on-going professional ADR training. Court-referred or ‘party paid’ ADR is not optimal and generally results in less success (Netherlands). In either case, ADR providers should be professionally trained, experienced with environmental law and issues, and approved by the ECT. ADR-based settlements should be reviewed and approved by the ECT and made into enforceable orders.

3.10 Expert judges and decision makers

ECTs can only improve on the existing general courts if the judges and decision makers selected are competent, independent, secure, and environmentally knowledgeable. The selection process, qualifications, on-going training, tenure, and salary level all influence the justice provided.

Ideally, the selection should be through as neutral a process as possible given the political environment, for example through civil service testing (Brazil), appointment by an official or committee with no vested interest in the ECT’s decisions (New York City, Queensland) and not by an official or agency whose decisions are reviewed by the ECT (as is the case with US EPA’s appellate ECT). Qualifications ideally should screen for environmental law or scientific-technical education, training, experience, and commitment (New Zealand). Judges should want to serve, not be involuntarily ‘designated’ as a green bench on top of their existing heavy caseload. The ECT’s budget should be insulated from political retaliation (Brazil’s courts receive a fixed percentage of the overall government budget). Judges need security of tenure (Sweden), pay and advancement like other judges (Belgium, Canada), an effective anti-corruption system, and protection from threats and harm based on their decisions.

3.11 Case management

ECTs have been very innovative in creating operational tools that dramatically increase their efficiency, effectiveness, and access to justice. Examples include highly trained case-management staff, directions hearings, ADR screening, interactive public websites, public awareness education, information technology and data management systems, sentencing databases, regular performance/outcomes evaluation processes, flexible accommodations like traveling courts and alternate court hours, and relaxed rules of procedure and evidence. These can significantly increase the cost of running an ECT, but leaders in this effort (New South
Wales, Queensland, New Zealand) attest that the costs are more than justified by the increased efficiency, case processing speed, and litigant satisfaction.

3.12 Enforcement tools and remedies

Access to justice depends on more than these design features. The decisions have to be implemented in the real world. Having adequate post-judgment enforcement tools and remedies is one of the biggest differences seen with ECTs. Remedies (the types of orders available to address the problem) and enforcement tools (the powers to compel obedience) are critical to an ECT’s effectiveness. They depend in part on whether the ECT is given civil (non-criminal), criminal, administrative, or combined jurisdiction; those with the latter typically have the widest range of tools and remedies.

The range of enforcement tools and remedies can be similar to those of the general courts, including injunctions, money damages, restitution, mandamus, declaratory relief, contempt, cost-allocation awards, judicial review of administrative decisions, and criminal sanctions. Yet, some ECTs (like some courts) are created lacking authority to impose some of these critically important remedies—such as lacking preliminary and permanent injunction, contempt, judicial review, and criminal powers—which can render them helpless to stop or even remedy environmental problems.

The most important powers to have, according to the ECT Study interviewees, are the powers to order the following: preliminary injunctions or interim relief prior to decision, waiver of an injunction bond, denial or change in a development proposal, effectively high monetary awards or fines, allocation of awards/fines to environmental restoration, environmental remediation by defendant, and alternative and/or creative remedies to fit the violation. The State EC in Amazonas, Brazil, is an excellent example, having civil, administrative, and criminal enforcement power and a very creative approach to remedies (including an ‘environmental night school’ for offenders).

4 Conclusion

Based on the proliferation of ECTs in recent years, the success models, and the findings of the University of Denver ECT Study, specialized ECTs can be a means of enhancing access to environmental justice and can be expected to spread. It is also predictable that they will develop new legal principles and processes for environmental protection, link human rights with environmental rights, expand reliance on ADR, find their legal jurisdictions and powers expanding, engage in regular performance/outcome evaluations, and even contribute to the development of international (multi-national) ECTs in the years ahead.

Bibliography


