

**SPECIALIZED ENVIRONMENTAL COURTS AND TRIBUNALS:  
THE EXPLOSION OF NEW INSTITUTIONS TO ADJUDICATE ENVIRONMENT,  
CLIMATE CHANGE, AND SUSTAINABLE DEVELOPMENT**

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**Abstract**

The rapid growth of serious environmental problems, including anthropogenic climate change, coupled with increasing public awareness and concern, has generated demand worldwide for new forms of governance to adjudicate environmental issues justly, quickly, and cheaply. The result has been an explosion of specialized environmental courts and tribunals (ECTs) and a parallel escalation in climate change litigation over the past five years. The authors link the two, suggesting that specialized ECTs can provide an ideal forum for assuring access to environmental justice in climate change lawsuits. Well-designed ECTs have the capacity to resolve complicated environmental cases expertly, independently, holistically, rapidly, consistently, and justly, incorporating key principles of sustainable development such as the precautionary, polluter-pays, and intergenerational equity principles. Climate change litigation is proving problematic in traditional court systems while being dealt with competently in specialized courts, resulting in calls for the creation of more ECTs to hear climate change and other complex environmental cases, at the subnational, national, and international levels.

**1. Introduction**

Two global explosions in environmental jurisprudence have occurred in the first decade of the 21<sup>st</sup> century. The first is the rapid growth of a new type of environmental governance institution – the specialized environmental court or tribunal (ECT), authorized specifically to

resolve disputes concerning environmental, natural resource, land use, and related issues. (*Pring and Pring* 2009, 9; *Pring and Pring* 2010; *Pring and Pring* 2011). The second is the escalating number of climate change lawsuits being brought in courts around world, including ECTs. (*Gerrard and Howe* 2010; *Wold et al.* 2009, 497-536, 784-825).

The hypotheses of this article are two-fold. We propose (1) that ECTs are uniquely qualified to adjudicate climate change claims and (2) that the pressure on generalized courts from increased climate change litigation will result in a corresponding growth in ECTs at the local, regional, national, and perhaps international level.

The key characteristics of ECTs that allow effective and efficient adjudication of climate change suits include:

- Fast-tracking of environmental litigation
- Integrated jurisdiction over relevant laws
- Expertise of decisionmakers
- Ability to manage scientific and technical expert evidence
- Expanded standing for plaintiffs
- Adoption of flexible rules of procedure
- Consistency in decisions
- Ability to employ a problem-solving approach to adjudication

Each characteristic, when incorporated in a specialized ECT, can facilitate access to environmental justice in climate change cases and incrementally assist in both mitigating and adapting to the impacts of global warming.

However, let it be said, courts in general and ECTs in particular are no substitute for strong climate change laws, regulations, and actions by the legislative and executive branches of government, at the international, national, and subnational levels. The immensity of the problems of climate change attributable to anthropogenic releases of greenhouse gases (GHGs) is clear and action needs to be taken (*Hildreth et al.*, 5-20; *Wold et al.*, 5-47; *National Geographic* 2004, 2-75). Questions are certainly being raised about whether courts are suitable decisionmakers in climate change matters, given the scale, complexity, and political nature of the issues (*Ruhl* 2010, 1 et seq.; *Wold, et al.* 2009, 497-8, 783-6; *Gerrard* 2007, 40; for the counterargument that courts are highly appropriate for climate change see *Osofsky* 2009, 5-7). But the fact is that climate change cases *are* being filed and adjudicated by courts in large numbers and in large part because

of the inaction of the legislative and executive branches (*Wold et al.* 2009, 497; Osofsky 2009, 3-4; Gerrard 2007, 34).

## 2. The ECT Explosion

Our initial project for the University of Denver Environmental Courts and Tribunals Study provides the first global comparative analysis of ECTs in *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (Pring and Pring 2009). In it, we define ECTs as “judicial or administrative bodies of government empowered to specialize in resolving environmental, natural resources, land use development, and related disputes” (id. 3). Environmental courts (ECs) refers to bodies within the judicial branch of government, and environmental tribunals (ETs) are those within the executive or administrative branch. They include free-standing ECs and ETs, formal and informal panels of judges within a court of general jurisdiction (“green benches” or “lists”), individual judges within generalist courts who have training and expertise in environmental law and to whom environmental cases are assigned formally or informally, and ETs housed within another government body such as the environmental agency.

As of September 2010, some 360 ECTs are known to exist or to be authorized in 42 countries, over 50% of which were created in just the last five years. The newest example is Kenya, whose 2010 Constitution requires Parliament to “establish courts with the status of the High Court to hear and determine disputes relating to...the environment and the use and occupation of, and title to, land” (Kenya 2010, art. 10:162(2)(b)). Brazil has just added four new federal ECs in the four Amazon Basin states, and Chile’s legislature is currently considering a bill to create an ET Green Tribunal. England just created its first ET on April 6, 2010, and India’s Parliament passed a “National Green Tribunal” bill on May 1, 2010, in part to counteract the activist “Green Benches” of its Supreme Court.

ECTs can be found on every inhabited continent; in civil law, common law, and other legal systems; in jurisdictions from the largest (China, India, Canada, Brazil) to the smallest (Trinidad and Tobago, the City of Memphis, Tennessee); and in wealthy developed and impoverished developing nations. Historically, Australia and New Zealand have been the leaders in ECT creation, but today ECTs are spreading in Asia (examples include China, India, Japan, the Philippines, South Korea, Thailand), Africa (South Africa, Kenya, Sudan), Europe (Belgium,

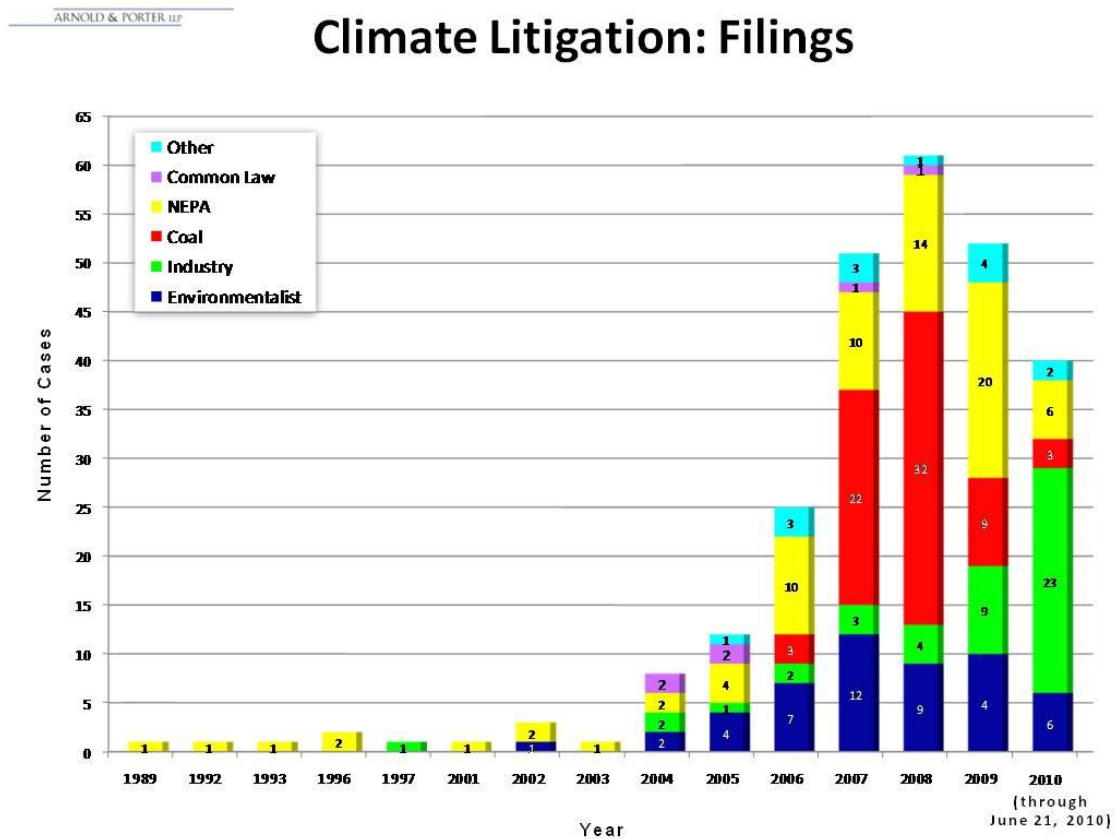
England, Finland, Hungary, Sweden), South America (Brazil, Bolivia, Guyana), Central America (Costa Rica), and North America (Vermont USA, Ontario, British Columbia). The United States is not a leader in the ECT field; it has one impressive state EC (Vermont), a number of local (city, county) ECs, and several in-house ETs at the national level, such as the US Environmental Protection Agency's Environmental Review Board and the US Department of the Interior's Interior Board of Land Appeals.

The major drivers of ECT development follow a reasonably consistent six-step pattern regardless of country. (1) First, the environmental impacts of non-sustainable development and population growth begin impacting the environment in a major way. (2) Second, civil society and advocacy groups become aware of these environmental impacts and demand laws and institutions to prevent and/or mitigate the environmental damage. (3) Third, laws are passed, which may or may not be adequate, but are not rigorously enforced. (For example, many countries have now adopted human rights to a healthy environment and/or sustainable development in their national constitutions and some international laws have created environmental rights of action, like the 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) (Pring and Pring 2010, 304-7). (4) Fourth, public dissatisfaction with the laws or their enforcement prompts litigation in the general courts. (5) Fifth, the general courts then disappoint these advocates by not having the expertise, patience, will, or incorruptibility to adjudicate environmental cases in a way that is – to quote the memorable phrase of one Australian court law – “just, quick, and cheap” (New South Wales); cases may take decades to hear, cost the parties immense sums, expose complainants to monetary liability or intimidation or worse, result in dismissal on technical grounds, and/or produce inconsistent decisions. (6) Sixth, this dissatisfaction with the general courts, by both plaintiffs and defendants, leads to a public debate over new options and the emergence of visionary leaders who believe that a well-designed ECT can address the issues.

The visionary leadership to create or improve an ECT can come from within the judicial branch, the executive or legislature, or civil society advocates. Often the leadership comes from an individual who has “switched hats” and by doing so has gained power to change the system. One such example is Justice Brian Preston, Chief Judge of the specialist New South Wales Land and Environment Court, who was a lawyer for the Environmental Defenders' Office (EDO), a leading environmental NGO in Australia, before being appointed to the bench and who has spearheaded many cutting-edge innovations in that EC.

### 3. The Climate Change Litigation Explosion

The increase in climate change lawsuits since 2005 has tracked the same exponential “hockey stick” curve as has the increase in ECTs and has many of the same drivers (see Gerrard and Howe 2010; Osofsky 2009, 2 et seq.). In the USA, according to Columbia Law Professor Michael Gerrard and his Columbia Law School Center for Climate Change Law in cooperation with the Arnold & Porter law firm, the number of climate change lawsuit filings grew from a relative flat-line 1-2 per year from 1989-2003, jumping to 8 in 2004, and to 61 in 2008, as shown in the following chart:



While there was a small decrease to 54 in 2009, as of June 21, 2010 there had already been 40 cases filed, and dozens of additional petitions were filed in July and August 2010 challenging EPA’s new rules on greenhouse gas (GHG) endangerment finding, reporting, and auto/light truck emissions (Gerrard and Howe). Internationally, the Center documents 62 climate change cases filed through mid-2010, all but a few of which have been filed in the past three years. Clearly, the

USA is the leader in the total number, diversity, and complexity of climate change cases. The European Union (22 cases) and Australia (18) account for the majority of the non-U.S. cases, with the others found in Canada (4), Czech Republic (1), France (1), Germany (1), New Zealand (4), Nigeria (1), Ukraine (2), and the United Kingdom (8).

Climate change is not a new phenomenon on earth, but the rate at which earth temperature is warming is rapidly accelerating, with the increase in human-caused releases of GHGs since the Industrial Revolution. Since 1990, the Intergovernmental Panel on Climate Change has issued four assessment reports, documenting the rate and impacts of global warming.

Consistent scientific evidence predicts that climate change will have dire implications for both natural systems and human institutions. . . . [T]he IPCC's most recent assessment concluded that "the resilience of many ecosystems is likely to be exceeded this century by an unprecedented combination of climate change, associated disturbances (e.g., flooding, drought, wildfire, insects, ocean acidification), and other global change drivers (e.g., land use change, pollution, overexploitation of resources)." (*Burns and Osofsky* 2009, 7).

More and more of the world's citizens are becoming aware of the problem through the increasing reach of communications technology – the Internet, email, cell phones, and other social media. Worldwide awareness is being promoted by the charismatic leadership on this issue of climate change scientists and individuals such as Al Gore, Thomas Freidman, Anthony Oposa, and others. That has led to increasing societal concern and demands for government action in the form of international, regional, national, and subnational hard and soft laws, regulations, plans, and policies for mitigation and adaptation. In the main, such as in the US, little effective government action has yet occurred at the national level, leaving a policy void. The combination of the urgency of the problem and the general lack of effective legislative or executive response has resulted in civil society resorting to the judicial branch to achieve mitigation and adaptation measures to reduce GHG.

How quickly climate change creates impacts people care about and how different levels of governance around the world respond will determine what [law]suits people are motivated to bring and their likelihood of success. The less effective we are in addressing the issue of climate change, the more salient these [court] actions will become. (*Burns and Osofsky* 2009, 384).

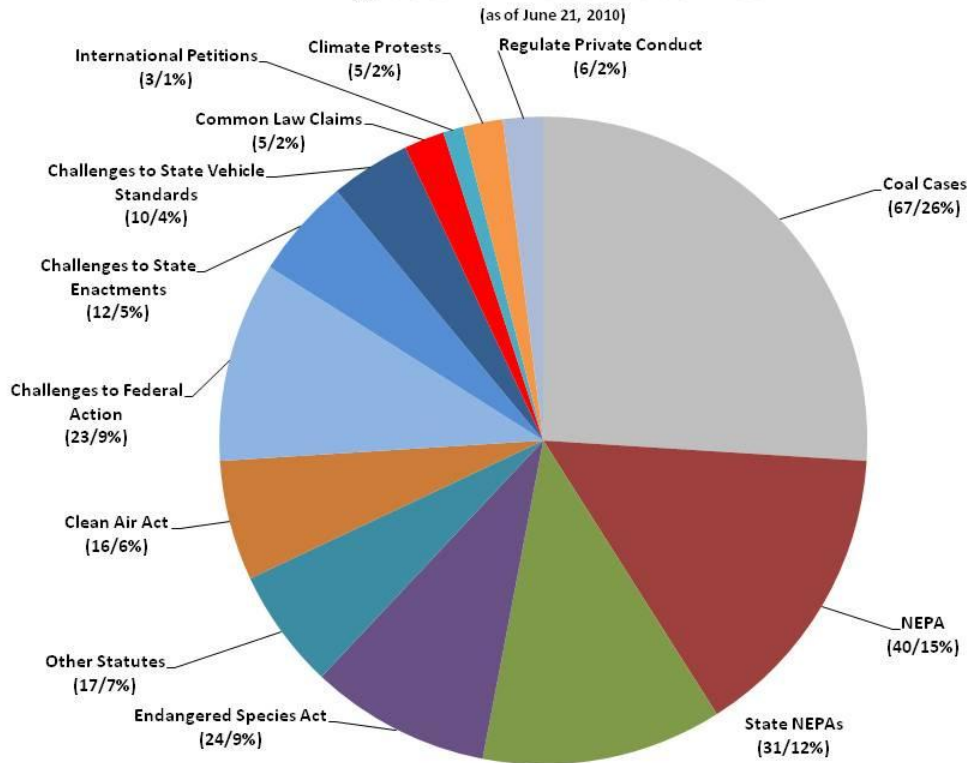
Climate change is especially challenging to litigate (or regulate) because its impacts are both local, regional, national and global in scope and escalate over time – or, to use University of Minnesota Law Professor Hari Osofsky’s term, climate change impacts are complex because they are “multiscalar” in geographic, governance, and temporal spheres (Osofsky 2009, 13 et seq.).

To further complicate the judicial approach, climate change legal challenges are being brought in a number of different adjudication forums based on a variety of different legal theories. Gerrard and Howe have developed an elegant schematic for the types of climate cases and their multiple causes of action (Gerrard and Howe 2010 charts). They divide cases into (1) statutory claims (including those brought (a) by state governments and environmental groups to force government to act on climate change, (b) by states and environmentalists to stop government action believed to have negative climate impact, (c) by industry to block government action to regulate climate change, and (d) by environmentalists to regulate private conduct); (2) common law claims (those not based on environmental statutes but on personal injury or public nuisance torts seeking injunctive relief and/or money damages), (3) public international law claims (such as petitions to human rights commissions or the World Heritage Commission), and (4) those brought by or against climate change protesters and scientists (see also Gerrard 2007, 34 et seq.)

US-statute-based lawsuits have been filed by environmental interests to force the government to act positively primarily under the national Clean Air Act, but also innovatively using other statutes including the Endangered Species Act, Marine Mammal Protection Act, Clean Water Act, Freedom of Information Act, and others. US-statute-based lawsuits have also been filed by environmental interests to stop government action, primarily to block project approvals for coal-fired electric power plants; typically under the Clean Air Act and the National Environmental Policy Act (NEPA) and its state equivalents. Conversely, US-statute-based lawsuits have been filed by industry to challenge federal government attempts to regulate climate change, such as USEPA’s endangerment finding (in response to the Supreme Court’s decision in *Massachusetts v. EPA*, 549 US 497 (2007)), reporting, tailoring, cars/light trucks, and other rules, as well as against state and local government regulatory efforts. Innovative cases and petitions have been filed in courts and administrative agencies primarily involving requirements for disclosure of companies’ climate risk information (Gerrard and Howe 2010).

Gerrard and Howe provide percentages for these different US case types as shown in the following chart:

## Types of Climate Cases Filed



Climate change cases in countries other than the US are equally diverse if less in volume. The Center’s charts break the “non-US” cases down into (1) lawsuits against governments (on issues as diverse as (a) GHG emissions reduction and trading, (b) access to information, (c) environmental assessment and permitting of projects, (d) human rights, and (e) protecting biodiversity and ecosystems); (2) lawsuits against individuals (protesters and others); and (3) lawsuits against corporations (Gerrard and Howe 2010).

Chief Judge Brian Preston of the New South Wales Land and Environment Court, as a sitting EC judge of many years experience, has contributed extensively and authoritatively to the academic and public literature on climate change litigation, as well as the court precedents. He categorizes the grounds for climate change cases to date from another viewpoint:

Conceivably, climate change might arise under many of the grounds of judicial review, however, the most likely grounds would be: under the rubric of illegality, failure of the repository of power to have a required state of mind before exercising the administrative power; under the rubric of irrationality, failure of the repository of power to consider relevant matters or making a manifestly unreasonable decision; and, under the rubric of

procedural impropriety, failure of the repository of power to comply with some procedure in the statute, such as a requirement for environmental impact assessment, or for consultation.” (Preston 2010, 7).

For additional analysis of climate change litigation, also see generally *Hildreth et al* 2009, *Wold et al.* 2009, and *Smith and Shearman* 2006. As all of these authorities show, the complexity of the cases, the variety of the legal theories upon which they are based, the difficulties of the expert scientific evidence and models, and the causation and remedial conundrums make climate change litigation a supremely difficult subject for courts or tribunals to adjudicate.

#### **4. ECTs and Climate Change Litigation**

Most climate change cases to date have been filed in general jurisdiction courts or tribunals (Gerrard and Howe 2010 charts), but a significant number have been adjudicated in specialized ECTs. In Australia, several landmark climate change cases have been decided by four different state-level ECTs, including the New South Wales Land and Environment Court, the Queensland Planning and Environment Court, the South Australia Environment Resources and Development Court, and the Victoria Civil and Administrative Tribunal Planning and Environment List. The national-level Environment Court of New Zealand has also made climate change decisions.

A very significant, statute-based climate change case was just filed in April directly in the Supreme Court of the Philippines, by award-winning Philippines environmental attorney Antonio (Tony) Oposa. It is the first Writ of Kalikasan (i.e. Nature) filed under that Court’s new 2010 Rules of Procedure for Environmental Cases (Philippines / Rules). It seeks a continuing mandamus to compel the national government to carry out an ignored law requiring the construction of rainwater collection systems in every community, as an adaptation measure to deal with the recurrent cycles of floods and droughts which are believed to be increasing due to climate change (Global Legal Action). While the Philippines Supreme Court itself does not have a formal “green chamber,” it has just adopted these innovative (indeed model) special rules of procedure for environmental cases that have effectively made all courts in the nation ECs, with special emphasis on the 117 trial courts actually designated as ECs in 2008 because of their location in environmentally sensitive areas (Philippines / Designation).

These ECTs share several characteristics that distinguish them from courts of general jurisdiction and make them more suited for the adjudication of climate change cases:

- Ability to fast-track cases
- Integrated jurisdiction over both environmental laws and land use planning decisions to a greater or lesser degree
- Highly competent decisionmakers committed to fairly adjudicating environmental claims
- Unique tools for managing scientific and technical expertise
- Expanded standing for public interest claims, class action suits, and individual causes of action
- Ability to adopt flexible rules of procedure to ensure efficient and effective case management
- Consistency
- A problem-solving approach

**4.1 Fast tracking:** By being focused on environmental cases, ECTs generally do not have to adjudicate any other types of cases (see generally *Pring and Pring* 2009, 76-79). As a result, environmental cases can be heard much faster than they would be in courts of general jurisdiction, where the priority of hearing is based on the filing date or the preference of the judge. In the Philippines, prior to the new Rules of Procedure for Environmental Cases (Philippines / Rules) that require environmental cases to be prioritized, some trial court judges routinely placed environmental cases at the bottom of their dockets because they were more complicated, lengthy, and politically charged (*Pring and Pring* research interviews). ECTs do not have such issues, as their only business is environmental cases, and they are under public scrutiny to adjudicate the cases quickly, effectively, and fairly.

**4.2 Integrated Jurisdiction:** An “integrated” environmental and land use planning court, with civil (non-criminal), administrative (government review), and criminal jurisdiction, with enforcement powers adequate to the task, represents the jurisdictional scope that best provides comprehensive access to environmental justice (*Pring and Pring* 2009, 28). Legislatures can give

ECTs this scope, although all do not have it. Among other things, this allows an ECT judge to evaluate the environmental aspects of land use decisions and the land development aspects of environmental decisions, as well as to consolidate cases arising under different technical causes of action.

An example of such “integrated review” is the case of *Gray v. Minister for Planning* decided in 2006 by the Land and Environment Court of New South Wales. The plaintiff objected to the government’s acceptance of an environmental assessment report (EAR) for the Anvil Hill coal mine (prepared by the mining company), which did not include analysis of the downstream GHG emissions by the overseas consumers of the mine’s millions of tons per year of export coal to be burnt outside of Australia and the control of the mining company. The applicable environmental law required the government to consider the “public interest” in land use decisions of this type, and the court ruled that that term included consideration of the overall policy of “environmentally sustainable development,” including its components of intergenerational equity and the precautionary principle. (For discussion of these and related principles see *Nanda and Pring* 2003, 17-62). The court then ruled that the government’s failure to consider downstream climate change effects of coal mining violated the intergenerational equity and precautionary principles. Thus “environmental” laws converted a “land use planning” decision into a climate change case resulting in a ruling requiring consideration of climate change impacts in future EAR approvals. The following year, the government issued a policy requiring consideration of downstream GHG emissions in future development applications (Preston 2010, 15-17; McAllister 2009, 59-61, 71).

The New Zealand Environment Court’s 2005 decision in *Genesis Power Ltd. v. Franklin District Council* (2005) took a different environmental approach to a land use planning action when it reviewed a local government’s decision blocking construction of a wind farm based on impacts to the local environment and indigenous peoples’ cultural resources. The EC overturned the local government’s decision and allowed the wind farm based on a national law and policy favoring renewable energy projects to address climate change (Trisolini and Zasloff 2009, 72 et seq.). Acknowledging the clear links (and possible conflicts) between local land use planning and national environmental policy is possible in a specialized ECT, with integrated authority to adjudicate and balance such matters

**4.3 Competence of Decisionmakers:** Perhaps the single most important advantage that ECTs have over general jurisdiction courts or tribunals is the potential high level environmental

expertise of their bench (*Pring and Pring* 2009, 72-75). In most ECTs, judges and decisionmakers are chosen specifically because they have experience, expertise, and continuing interest in environmental law. In addition, most participate in on-going training, workshops, conferences, and other learning to expand their knowledge and to share perspectives on environmental jurisprudence. A recent example of this type of ECT training is the biennial Australasian Conference of Planning and Environment Courts and Tribunals (ACPECT), held August 30-September 3, 2010 in Sydney, Australia. Over 70 judges representing Australia, New Zealand, India, Kenya, Canada, Brazil, Indonesia, the Philippines, Thailand and the United States spent multiple days learning about climate change science and the built environment from experts such as Professor Andy Pitman, Co-Director of the Climate Change Research Centre of the University of New South Wales and Evan Jones, Chair of the Centre for the Built Environment and Health Advisory Board of the University of Western Australia and Chair of the Australian Council for New Urbanism. Other relevant sessions included speeches on Human Rights and the Environment, Ethics and the Environment, The Internationalization of Environmental Law, Planning Principles and Precedents of Land Use Decisions, and Alternative Dispute Resolution. Judicial training centers, such as the Philippines Judicial Academy (PHILJA), have special programs for training EC judges.

Many ECT judges and decisionmakers are prolific writers and professors off the bench, as well. (See the impressive list of publications and speeches of the judges of the New South Wales Land and Environment Court at [http://www.lawlink.nsw.gov.au/lawlink/lec/ll lec.nsf/pages/LEC\\_speeches\\_and\\_papers](http://www.lawlink.nsw.gov.au/lawlink/lec/ll lec.nsf/pages/LEC_speeches_and_papers).) This stands in dramatic contrast to the expertise and interest of members of most courts of general jurisdiction. For example, during oral argument before the U.S. Supreme Court in *Massachusetts v. EPA* (above), the following notable exchange was recorded between Associate Justice Antonin Scalia and James R. Milkey, the attorney for the plaintiff state:

JUSTICE SCALIA: . . . But I always thought an air pollutant was something different from a stratospheric pollutant, and your claim here is not that the pollution of what we normally call "air" is endangering health. . . . [Y]our assertion is that after the pollutant leaves the air and goes up into the stratosphere it is contributing to global warming.

MR. MILKEY: Respectfully, Your Honor, it is not the stratosphere. It's the troposphere.

JUSTICE SCALIA: Troposphere, whatever. I told you before I'm not a scientist.

(Laughter.)

JUSTICE SCALIA: That's why I don't want to have to deal with global warming, to tell you the truth.

<http://www.icta.org/doc/SupCtOralArguTranscript%2011-29-06.pdf>, at 22-3)

The environmental knowledge and interest of judges is an important determinant of the outcome of a case and the provision of environmental justice, as Justice Scalia's comments and dissent in the landmark Supreme Court decision in *Massachusetts v EPA* (above) clearly demonstrate.

**4.4 Ability to Manage Scientific and Technical Expertise:** The outcome of most environmental cases, particularly climate change cases, turns on scientific and technical evidence. The ability to manage this process is key to the success of a court or tribunal (*Pring and Pring*, 2009, 55-61). Scientific uncertainty about the causation, impacts, and controls of climate change greatly complicate judicial understanding and analysis. Decisions ultimately rest on whether or not plaintiffs can demonstrate that (1) climate change is real; (2) it is caused by anthropogenic GHG emissions; (3) it is having or will have a substantial adverse impacts on plaintiffs' interests; and (4) it is caused by the action or inaction of the defendants. Climate change scientists can provide models demonstrating the truth of the first and second premise (although there are still non-peer-reviewed scientists who contest even these findings) and the likelihood of the third, depending on the constituency. (For example, it is reasonably easy to relate the consequences of already occurring and measured sea rise to the lives of humans and other species who reside in coastal areas or in small island states experiencing coastal erosion; it is more difficult to link the consequences of global warming to changes in weather patterns and the losses suffered by Hurricane Katrina's victims.) However, it is much more difficult to prove the fourth, how much the actions or inactions of the defendant are contributing directly or indirectly to the plaintiffs' climate change harms. The proof is especially difficult in jurisdictions where judges are unfamiliar with climate change science and have to manage "the battle of the experts."

In response to the need for reliable and understandable scientific and technical expert testimony, many ECTs have developed tools to assure that the court has access to the best and most unbiased evidence available, by using internal (court's) experts and managing external (parties') experts. These tools tend not to be employed by most general jurisdiction courts and are seldom used in jurisdictions where the battle of the experts is the norm (such as the US). The strategies adopted by ECTs to assure focused and unbiased expert witness testimony include:

1. Use of expert scientific-technical decisionmakers as co-judges or as commissioners

2. Judicial appointment of joint expert-and-lay commissions responsible for ensuring compliance with a court order.
3. Directing the parties' experts that they have a duty to the court, not the parties;
4. Requiring parties' experts to meet in advance to determine their areas of agreement and disagreement, focus their arguments, and reveal the evidence they will submit, and together write a report to the court. These meetings can be facilitated and can be with or without the presence of the parties and their attorneys.
5. Calling experts together simultaneously to debate in front of the judge the evidence they disagree on (often called "hottubbing") or otherwise having them present "concurrent" testimony – rather than having one side present its entire case and then have opposing testimony days or weeks later.
6. Engaging experts for the court by hiring them directly, maintaining lists of volunteers by specialty, soliciting amicus curiae briefs from unaffiliated experts, or relying on scientific research institutes, academics, or government scientists.
7. Strictly limiting the number, content, and length of expert testimony in advance.

These and other techniques for managing expert testimony can obviously be a critical factor in climate change litigation and result in a better-informed court, a more efficient process, and a more just outcome. Environmental judges typically understand the principles of sustainable development, appreciate the difficulty of balancing social, economic, and cultural values against environmental values, and know the laws they are applying – none of which can be predicted with confidence of the typical general jurisdiction judge.

**4.5 Expanded Rules of Standing:** Restrictions on standing (*locus standi*), the qualifications a party is required to have to file or participate in a lawsuit, can be a significant barrier to access to justice in environmental litigation (*Pring and Pring 2009, 33-40*). Standing is typically defined by a constitution, legislation, court rules, or, as in the United States, by court rulings. Standing rules vary from jurisdiction to jurisdiction and can be quite restrictive, as in the US, or openly permissive, as in the Philippines. Unlike other jurisdictions, the US Supreme Court has "constitutionalized" standing, reading into the Constitution's vague language about "cases and controversies" a series of formidable requirements that can only be changed by the Court, not by legislation or rule. It can be seen why these requirements can make standing very

difficult for climate change plaintiffs to prove: (1) injury in fact to plaintiff that is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical; (2) causation of the injury that is fairly traceable to the action or inaction of the defendant; and (3) redressability of the injury that is likely by a favorable court decision (see e.g., *Lujan v. Defenders of Wildlife*, 504 US 555 (US Supreme Court 1992; but see also, *Friends of the Earth v. Laidlaw Environmental Services*, 528 US 167, 180-1 (US Supreme Court 2000)). Uneven application of one or more of these standing requirements has resulted in dismissal of a number of climate change cases while other similar climate change cases survived (see Wold et al. 2009, 498-522; Grossman 2009, 193-6, 206-9). Other US Supreme Court doctrines such as political question, preemption, and proximate cause also serve as barriers (Grossman 2009, 209-21). The much-vaunted US Supreme Court decision in *Massachusetts v. EPA* (above) is scant relief on standing for climate change plaintiffs. It only ruled that the *state* had standing to challenge EPA's failure to regulate vehicle GHG emissions, because of its shoreline properties and its special status as representative of its people; still, four of the nine justices vigorously dissented on that point. (but for a more positive view see Hildreth et al. 2009, 466-7).

The issue of standing to sue does not serve as a significant barrier in jurisdictions where applicable laws or court rules establish very permissive requirements, such as several of the Australian states. Victoria's environmental law states that any person is entitled to standing "who is substantially or materially affected" by a failure of the government to comply with the law, and, even more broadly, the New South Wales' environmental law states that "[a]ny person" may sue to restrain a violation of the law (McAllister 2009, 64). Most notably, the Philippines' new rules for environmental cases have expanded standing to a new level, allowing "[a]ny real party in interest" to sue for enforcement of any environmental law and "[a]ny Filipino citizen" to sue "in representation of others, including minors or generations yet unborn" (Philippines / Rules, Rule 2, secs. 4 and 5).

Even in countries with strict standing rules, so long as they can be changed by legislation or court rules, creation of an ECT provides an opportunity for developing special standing rules allowing greater access to justice in environmental or climate change cases. This is, in fact, what the Australian state legislatures and the Philippines Supreme Court, among others, have done in creating their ECTs.

**4.6 Flexible Rules of Procedure:** Similarly, the power to adopt new rules of procedure for specialized courts or tribunals may be conferred on a court or tribunal by statute or, as in the case of the Philippines Supreme Court, by the Constitution. Establishing an ECT permits rethinking the process and adopting more flexible, streamlined, and effective rules (*Pring and Pring* 2009, 61-72, 76-87). New South Wales' and Queensland's ECs, for example, have developed special rules for alternative dispute resolution (ADR), evidence, directions hearings and timetables, expert testimony, the hearing process, and enforcement remedies which greatly aid the ECTs' efficiency and effectiveness.

**4.7 Consistency:** Consistency in decisionmaking is especially important, as government, civil society, and business interests need predictable, reliable rules in order to manage such complex matters as environment and climate change. Consistency is an element of fairness and is essential to maintaining the rule of law.

General courts in the USA have not been models of consistency in judging climate change cases; in fact there is a split of authority at the US Court of Appeals level that has just reached the Supreme Court. The two cases arose on very similar facts: public nuisance suits against energy companies for contributing to climate change. In *Connecticut v. American Electric Power Co. (AEP)*, 582 F.3d 309 (2d Cir. 2009), a coalition of states, New York City, and environmentalists charged electric power producers with public nuisance due to their GHG emissions, seeking reduction; the trial court dismissed on political question and standing, and the court of appeals reversed as to both, allowing plaintiffs to proceed with their case. Defendants have petitioned for Supreme Court review (Aug. 9, 2010); the Obama Administration has filed a brief supporting the utilities' request for Supreme Court hearing on the merits and dismissal; and the Supreme Court should decide whether to take on the case before the end of 2010. In *Comer v. Murphy Oil USA*, 585 F.3d 855 (5<sup>th</sup> Cir. 2009), individuals similarly sued oil and coal companies for public nuisance for the GHG potential in their fossil fuel products; the trial court dismissed on political question and standing, and the normal three-judge panel court of appeals reversed as to both, allowing the case to proceed. At this point, amazingly, a bare quorum of the entire court of appeals, in a split vote, authorized rehearing en banc and before hearing "vacated" the three-judge ruling, which reinstated the trial court dismissal (copy of order at <http://www.leagle.com/unsecure/page.htm?shortname=infco20100528162>). Then, more amazingly still, it ruled on May 28, 2010, that it had lost its quorum (too many judges disqualified themselves, presumably because of resource company investments), so could not hear the case en banc, nor could it "dis-enbanc" the case and order the three-judge panel decision

reinstated, so the original trial court dismissal stands (*id.*). The plaintiffs have filed for Supreme Court review of this embarrassing judicial fiasco.

ECTs have the ability to be more consistent in their decisions for several reasons (*Pring and Pring* 2009, 76-9). In the authors' experience, the decisions of ECT judges are generally written, published, and readily available to the public. Some, like the New York City ET, employ computerized data management systems to track cases progress. Others, like New South Wales' EC, are developing a computerized sentencing base, so that penalties can be consistent. In addition, ECTs can adopt guidelines which all judges of the court are to use in deciding cases, such as New South Wales' EC's "Planning Principles"; for 42 different situations (such as "aesthetics," "ESD" ["environmentally sustainable development"], "open space," "sunlight"), these Planning Principles state the desired decision outcome or the chain of reasoning or matters to be considered (New South Wales / Planning). It is hard to imagine a generalized court adopting such specific principles for adjudication of environment and land use decisions!

**4.8 A Problem-Solving Approach:** One of the elements that can distinguish ECTs from general jurisdiction courts and tribunals is that many ECTs have adopted what they call a "problem-solving approach." This is an approach that looks to positive outcomes for cases which go beyond the routine application of the laws' technicalities. The problem-solving approach is perhaps most evident in the extensive use of ADR in most ECTs. In some, such as the Australian State of Tasmania's ECT, it is mandatory that a case be submitted to mediation before it can be set for hearing. ADR methods employed on a routine basis by ECTs include conciliation, facilitated negotiation, mediation, collaboration., early neutral evaluation, restorative justice, and arbitration – often conducted by the ECT registrar, a commissioner (sub-judge), or even a judge. The solutions arrived at by the parties are often environmentally superior to those contemplated in the statutes and actually may achieve an innovative solution to the problem. When incorporated in an enforceable court order, such agreements can be considerably better at balancing values and achieving sustainable development than those strictly legal rulings, which constitute a win-lose rather than a win-win resolution. The use of a problem-solving approach by ECTs in climate change cases could result in agreements for better technologies, adoption of green building practices, emissions standards and monitoring that exceed state or federal guidelines, and multi-state collateral agreements independent of international treaties, conventions, or protocols. Ultimately, legislation and rules and regulation may be adopted reflecting these new approaches to mitigating and adapting to climate change. The "Planning Principles" adopted by the Land and

Environment Court of New South Wales (above) are another example of using a problem-solving approach to traditional environmental issues.

**5. The Call for an International ECT to Adjudicate Climate Change:** Under the *Trail Smelter* international law prohibition of significant transboundary harm, citizens of one nation can bring legal actions against nations and corporations outside their boundaries for harm caused to their environment (*Nanda and Pring* 2003, 20-22). Some authorities believe that international (multi-nation) climate change litigation will increase dramatically in the next decade, resulting in a “tide of global climate lawsuits,” such as the suit filed this year by Micronesia under the Czech Republic’s environmental impact assessment law challenging the extension of the Prunerov power plant’s productive life (Morris 2010). This prediction is not made solely by environmental advocates; major insurance companies have begun to warn that “climate-change-related litigation could become a significant issue within the next couple of years” (id.). One answer to the difficulty of finding an appropriate forum to bring such global climate change actions is the creation of an international ECT.

There have been calls for a multinational ECT since at least the 1990s (Hinde 2004, footnote 1). The World People’s Conference on Climate Change and the Rights of Mother Earth, held in Bolivia in April 2010 urged the creation of an international environmental court similar to the UN’s International Court of Justice, which among other issues, would take climate change cases (World People’s). The International Court for the Environment Coalition sponsored a seminar in November 2009 to focus on the need to create such an over-arching global institution to provide improved access to justice following incidents of environmental damage and breaches of international treaties (International Court 2009). In 2007, Nobel Peace Laureates including the Dalai Lama appealed for the establishment of an International Environmental Criminal Court (Esquivel 2007).

Debate continues whether such a court should be lodged within the International Court of Justice, or within the UN Environment Programme, or stand-alone treaty institution, or a division within a regional human rights entity such as the Inter-American Court of Human Rights or the European Court of Human Rights, or some other form. The creation of such a court or tribunal would address the uncertain environmental jurisdiction and gaps in existing international courts and tribunals and assure environmental expertise in the adjudication of transboundary claims of environmental harm due to climate change.

**6. Conclusion:** Based on the authors' research and evaluation, specialized ECTs can be a better forum for the adjudication of environmental, land use, and climate change claims than courts or tribunals of general jurisdiction. Calls for the establishment of ECTs as a new institution for environmental governance are occurring today at state, national, and international levels, based on their demonstrated ability to deal more efficiently and effectively with the very complex, multiscalar geographic, political, and temporal nature of the environmental harm caused by anthropogenic climate change.

Although the creation of an ECT or any new institution does not necessarily guarantee a better outcome in terms of sustainable development or climate change, the improvements in efficiency, competence, and transparency afforded by an ECT can result in greater access to environmental justice. Even if ECTs are not a magic bullet for global warming, they can have positive effects on governmental regulatory decisionmaking, corporate behavior, and public appreciation of the problems by fostering interaction across levels of government and engaging disagreement about the ways in which various actors should be taking action (Osofsky 2009, 24). The experienced environmental judge Brian Preston reminds us that

“the status of the judicature and its institutional habit of public, reasoned decision-making may result in its response having meaningful effects, including a catalytic effect on the legislature and executive to take their own action to mitigate or adapt to climate change” (Preston 2010, 41).

Clearly, ECTs are far from a complete solution to the climate change conundrum, but their special attributes can be marshaled to play a very important supporting role in achieving solutions.

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