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Twenty-first century environmental dispute resolution – is there an ‘ECT’ in your future?‡

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Environmental courts and tribunals (ECTs) are public judicial or administrative bodies, chambers or officials that specialise in deciding disputes involving environmental, natural resources, land use, development or related issues. Given the rapid spread of ECTs (hundreds worldwide) and the number of ‘environment-related’ issues that can come under their jurisdiction, even attorneys, clients, public officials, and businesses in ‘non-environmental’ fields may find themselves in this new kind of dispute resolution institution. Looking ahead, it is likely that more ECTs will be created, their jurisdictions will be expanded and practice in them will increasingly differ from the general courts.

Keywords: environmental courts and tribunals; ECTs; environmental courts; environmental tribunals; Rio Principle 10: access to justice; access rights; green benches; green judges; general courts; specialized courts; alternative dispute resolution; ADR; standing; experts; enforcement; multi-door courthouse; land and environment court; planning and environment court

No matter what type of law you practise, clients you serve, countries where you practise, or public office you hold, you could soon find yourself in a new type of dispute resolution institution – an environmental court or tribunal (ECT). An ECT is a public judicial or administrative body, chamber or official specialising in deciding disputes about environmental, natural resources, land use, development or related issues. In December 2009, when the University of Denver Environmental Courts and Tribunals Study published the results of the first-ever global study of these ‘green judges’ – Greening Justice: Creating and Improving Environmental Courts and Tribunals† – we initially identified over 350 ECTs in 41 countries. We found them on every populated continent, at every level of government, in every major legal system, across the spectrum from the richest to the poorest nations, and – most amazingly – the majority created in just the last decade.

Today, only five years after that report, the explosion of ECTs continues. There are now over twice as many – more than 800 authorised ECTs worldwide. They include an amazing 320 reported in China (including a new environmental chamber in their

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‡George (Rock) Pring and Catherine (Kitty) Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (The Access Initiative/World Resources Institute 2009), xiii, i (hereafter Greening Justice), copy downloadable without charge at the ECT Study website www.law.du.edu/ect-study.

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Supreme Court), 138 existing courts designated as environmental courts (ECs) in Pakistan and 76 in Malaysia, 11 additional federal and state ECs in Brazil, five environmental tribunals (ETs) now in India, two ECs (of three planned) in Chile, and one ET each in Bolivia and in England and Wales. A 2010 Bangladesh law provides for at least one environmental trial court in each of the country’s 64 districts plus an open number of environmental appellate courts; however, only three (two trial, one appellate) have been established. In 2012, Kenya became the first nation in the world to authorise an EC in its Constitution, swore in 15 Land and EC judges and advertised for 30 more, now has 16 operating ECs, and plans to establish at least one in each of its 47 counties. In 2014, El Salvador passed final legislation to create three trial-level ECs and one appeals-level EC by 2015. Also in 2014, Hawaii’s legislature overwhelmingly authorised ECs, joining Vermont as the second state in the US to do so. Many of these new ECTs were not even being actively discussed when Greening Justice was published in 2009.

It should be noted that ‘authorised’ does not always mean actually operating. A number of countries have authorised ECTs, but have not followed through and actually set them up or have discontinued them, for budgetary, political or other reasons. Countries that have authorised ECTs but appear not to have established or not continued them include Bahamas, Fiji, Gambia, Guyana, Jamaica, Lesotho, Panama, South Africa, Tanzania and Zimbabwe.

More new ECTs can be expected to be authorised and operating in the future. For example, in the 2012 Bhurban Declaration, 3 South Asian chief justices and other judicial officials unanimously pledged the nations of Afghanistan, Bangladesh, Brazil, India, Indonesia, Jordan, Nepal, Pakistan and Sri Lanka:

To strengthen specialized environmental tribunals and provide environmental training for the judiciary and other members of the legal fraternity; …

To implement existing rules of procedure for environmental cases and develop the same where they do not exist, which may include a flexible approach to legal standing, special rules of evidence for environmental cases, expeditious disposal of cases, special remedies, injunctive relief, and other innovative environmental processes; …

To establish green benches in courts for dispensation of environmental justice …

In our continuing study, we have interviewed and communicated with several hundred legal experts in 35 countries – judicial branch EC justices and judges, administrative branch ET decision-makers, general court justices and judges, government environmental officials, environmental advocates, public interest attorneys, corporate and business attorneys, criminal prosecutors, academics and ECT staff and mediators. We have continued to analyse this data and find it surprisingly consistent and positive.

Specialised courts and tribunals exist in most countries, but specialised environmental ones have both proponents and critics.4 The proponents’ arguments view ECTs as providing some or all of the following:

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2See Zhang Minchun and Zhang Bao, ‘Specialized Environmental Courts in China: Status Quo, Challenges and Responses’ (2012) 30 JERIL 361 (reporting ‘nearly 100’ ECs in China as of 2011); they now report that China’s ECs have increased to ‘at least 320’ as of 31 August 2014, email from Bao Zhang, Asst Prof, Central South University School of Law, to Rock Pring (17 October 2014, 08:56 MDT) (on file with authors).


4For more discussion of the ECT pro-con arguments, see Greening Justice, n 1 above, 13–18.
• greater expertise;
• efficiency;
• visibility;
• cost savings;
• uniformity;
• more open standing;
• commitment;
• government accountability;
• prioritisation of cases;
• creativity;
• alternative dispute resolution (ADR);
• issue integration;
• remedy integration;
• public participation;
• public confidence;
• problem-solving approach; and
• judicial activism.

Opponents’ arguments include:

• competing areas needing expertise;
• marginalisation of environmental issues;
• fragmentation;
• trust in existing general courts;
• insufficient caseload;
• budget increase;
• public confusion;
• difficulty defining what is ‘environmental’;
• capture by special interests;
• bias in favour of the environment;
• lack of expert judges and decision-makers;
• judicial activism;
• career dead end for judges; and
• creation of an ‘inferior’ court.

Based on the data, a growing number of countries have decided the positive arguments outweigh the negative and have established ECTs. The negative arguments persuaded the US not to establish ECs in its federal (national) court system, but it has established several national ETs, and US states and local governments are free to operate ECTs. It cannot be assumed that an ECT, once formed, is immune from criticism, review, change or even abolition, as has happened in several countries.

To further complicate matters, there is no ‘typical’ ECT. We found no two are exactly alike. They differ based on each country’s cultural, societal, governmental, legal and fiscal commitment to environmental protection and development controls. However, our interviews and analysis found all ECTs being shaped by 12 basic ‘building blocks’ or design decisions.5

5For a detailed discussion of each ‘building block,’ see ibid, n 1 above, 19–87.
(1) Type – judicial court, administrative tribunal or independent/free-standing?
(2) Legal jurisdiction – competence over all environmental laws or only some; integrated jurisdiction combining environmental and land use matters or not?
(3) Decisional levels – trial, intermediate appellate and/or final review?
(4) Geographical area – town, region, state/province, nation or multinational?
(5) Case volume – high, low or unknown caseload and growth expected?
(6) Standing – open or narrow, class actions, public interest plaintiffs, representatives of future generations?
(7) Costs – means for reducing high litigation expenses?
(8) Scientific and technical experts – how are they incorporated and managed?
(9) ADR – part of the court or external, mandatory or voluntary, agreements incorporated into court orders?
(10) Competence – qualifications, training, tenure, salary, prestige, independence of judges or decision-makers?
(11) Case management – mechanisms for moving cases efficiently and fairly, use of information technology, deadlines enforced?
(12) Enforcement tools and remedies – creative means to make its decisions effective, adequate fines, damages, follow-up?

Each of these design decisions will have major implications for the ECT's effectiveness and for ECT users. 6

With the proliferation of ECTs around the world, more practitioners of environmental, natural resources, energy and land use law will find themselves in this new type of forum. However, so too will counsel and public officials in corporate, banking, construction, development, human rights, indigenous peoples, insurance, international trade, real estate and a multitude of other fields where activities can raise environmental issues.

What is causing the explosion of ECTs?
ECT development follows a reasonably consistent pattern in most countries. 7 First, public awareness grows about environmental problems, unregulated development, public health, poverty, food, water and energy security. Secondly, environmental laws and institutions are authorised, raising public expectations. Thirdly, if government enforcement lags, the public looks to the justice system to protect the environment and public health. Fourthly, if the general court system fails to deliver access to

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6Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 J of Envit L 365–393, http://jel.oxfordjournals.org/content/early/2014/07/04/jel.cqu019.abstract; a longer version appears as a presentation at the Eco Forum Global Annual Conference, Guiyang, China (20 July 2013), at www.lcc.justice.nsw.gov.au/lcc/speeches_papers.html. Justice Preston is the Chief Judge of one of the most impressive ECs, the Land and Environment Court of the State of New South Wales, Australia. He is also a leading judicial authority on ECTs, with a wealth of articles and papers available to the public at that URL.

Another prolific judicial authority on successful EC performance is Michael E Rackemann, judge of the impressive Queensland Planning and Environment Court as well as judge of the District Court of Queensland. Links to Judge Rackemann’s many publications and speeches on ECTs are at www.seloql.org.au/judicial-papers/judicial-profiles/profiles/mrackemann/papers/1.

environmental justice, civil society and business interests begin calling for reform, to get a more expert, efficient and reliable process. Fifthly, these pressures often lead to the creation of specialised ECTs as a solution.

Augmenting this progression is the emergence of complex national and international principles of environmental law – like sustainable development, polluter-pays, prevention, precautionary, non-regression, human rights to environment, inter-generational equity and other principles. These add to the pressure for more expert forums for their application. A standout among these principles and a major contributor to the spread of ECTs is increasing worldwide attention to the three ‘access rights’ of Principle 10 of the Rio Declaration – the public’s right of access to information, access to public participation and access to justice in environmental matters. Our study found that ECTs have a unique ability to focus on, expand and enforce all three access rights, particularly access to environmental justice.

As Lord Carnwath, Justice of the Supreme Court of the United Kingdom (UK), recently 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. ... There has been progress also on public involvement, information and access to justice under Rio Principle 10.

Interestingly, general court judges are among the leaders in urging the creation of ECTs, recognising the limitations of general courts in providing access to environmental justice that is (in the trenchant words of Australian civil procedure law) ‘just, quick and cheap’.

Another driver pushing ECTs is the ‘greening’ of international financial institutions (IFIs) and official development assistance (ODA) agencies that provide financial funding for development. Stringent ‘environmental and social safeguard policies’ are imposed as a condition of funding by IFIs (such as the World Bank, Asian Development Bank, and Inter-American Development Bank) and ODA agencies (such as the US

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12For example, in 2012, a seminal gathering of over 250 chief justices, judges, attorneys-general, prosecutors and other legal experts convened by UNEP to make input to the UN Conference on Sustainable Development (Rio + 20), produced a declaration noting ‘the importance of the Judiciary in environmental matters ... [and] in the creation of a considerable number of specialized courts and green benches’ and calling for ‘developing specialized expertise in environmental adjudication’. World Congress on Justice, Governance and Law for Environmental Sustainability, Rio + 20 Declaration on Justice, Governance and Law for Environmental Sustainability (21 June 2012), copy at www.unep.org/rio20/Portals/ 24190-Rio20_Declaration_on_Justice_Gov_a_Law_4_Env._Sustainability.pdf.
14Nanda and Pring, n 8 above, 162–63.
Agency for International Development). These include detailed environmental impact assessment (EIA) requirements and, significantly, requirements for in-country dispute resolution mechanisms that ensure development-impacted people and the public are given accurate information and an opportunity to raise concerns and complaints.\textsuperscript{14} The conditions are forcing recipient nations to actualise the trio of ‘green access rights’ – the public’s rights of access to information, participation and justice in environmental matters – first articulated by the international community in non-binding fashion in Principle 10 of the 1972 Rio Declaration on Environment and Development, which states:

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.\textsuperscript{15}

The 1998 UN Economic Commission for Europe (UNECE) Aarhus Convention\textsuperscript{16} makes these ‘three pillars of environmental democracy’ legally binding on 46 European, Western Asian and Central Asian countries and the EU, which have developed or are developing laws and institutions to carry them out. It does so because:

Information is power, and environmental information in the hands of [the] public enables it to play a meaningful role in shaping a sustainable future. For this reason, progress in sustainable development and in greening the economy is directly dependent on the meaningful engagement of civil society in decision-making. Effective access to information, public participation and access to justice are essential for transparent and accountable governance, for high quality outcomes of the decision-making and to strengthen trust of [the] public in governing institutions.\textsuperscript{17}

These access ‘conditionalities’ for development financing are forcing even nations that have not adopted the Aarhus Convention to incorporate the Rio 10 principles of public access to information, participation and justice in their national policies and to create or enhance environmental adjudication institutions at the national and regional levels. One of the consequences is the creation of ECTs.

\textsuperscript{14}A recent EIA submitted by Bangladesh to the World Bank for funding is an example. It specifically incorporates the Bangladesh Environment Court Act of 2010 and a detailed ‘grievance redress mechanism’, including disclosure, documentation and monitoring of complaints and public consultation and disclosure.


\textsuperscript{16}Rio Declaration Principle 10, n 9 above.


\textsuperscript{18}UNECE, Public Participation – Home, now archived at http://archive.org/organisations/unece.org/2014-11-08_4879856 22/Public Participation Home UNECE/ (copy with authors); see current version at www.unece.org/env/pp/welcome.html.
The Asian Development Bank (ADB) has heavily invested in improving ECTs and environmental adjudication in Asia.

ADB’s long-term strategic framework, Strategy 2020, recognizes the environment as a core operational area, and good governance and capacity development as drivers of change. Moreover, ADB has committed to ‘strengthen the… legal, regulatory, and enforcement capacities of public institutions on environmental considerations.’

For example, it has partnered with the United Nations Environment Programme (UNEP) in hosting a number of environmental judicial conferences, networks and agreements, such as the Asian Judges Network on the Environment, the Association of Southeast Asian Nations (ASEAN) Chief Justices’ Roundtables on Environment and the Bhurban Declaration.

In addition to these ‘green conditions’ for funding, international law itself is now being enforced to improve access to justice. The European Commission, the EU’s executive body, has in recent years taken several EU Member States to court for their shortcomings in access to justice in environmental matters, including Germany, Estonia, Ireland and the UK.

Moreover, NGOs now report critically on the access to justice provided by individual countries, with implications for IFI/DAA funding among other things. A leading example is the World Justice Project‘s ‘Rule of Law Index,’ which spotlights the extent to which countries adhere to the rule of law in practice, with special attention to the judiciary. Another is the Access Initiative of the World Resources Institute. ECTs generally incorporate the principles of the rule of law and sustainable development, making them ‘model’ institutions in the eyes of financiers and investors.

Principle 10 access rights are continuing to be promoted and enhanced globally. UN bodies such as the UNEP, UN Development Programme (UNDP), the new UN Environment Assembly of UNEP (UNEA) and the UNECE conduct major initiatives for improving access rights at the national and international levels. The Aarhus Convention has a Working Group on Access Rights, which has developed training programmes and works with non-Aarhus countries to advance access rights. The UN Economic Commission for Latin America and the Caribbean (ECLAC) has organised...
meetings that have led to the ‘Declaration of the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean’, now signed by 19 countries in the region and laying the groundwork for a regional equivalent to the Aarhus Convention. And conferences promoting access rights abound, an impressive recent example being the First Interamerican Conference on Environmental Justice, sponsored by the new EC in Santiago, Chile (9–10 October 2014). 

Dissatisfaction with the general court system is a driver of ECTs in many countries, based on public perceptions of delay, inadequate expertise, lack of independence and/or corruption in the courts. Delay is a factor because many courts have large backlogs of cases or consciously ‘back-burner’ environmental cases because of their complexity, making justice a slow and expensive process. When a developer has an affordable construction loan in hand or an industry has just dumped toxic waste in a public water supply, time is of the essence. Waiting years for a case to be heard and a decision to be reached is a tremendous burden on the participants and can result in huge financial and environmental damage. A number of ECTs have power to issue preliminary emergency orders to deal with eminent and irreparable harm to the environment, which the general courts may lack or only use at the conclusion of a case.

Inadequate expertise is also a factor because general court judges are, by their nature, legal generalists – not trained in environmental law let alone relevant environmental science and technology. Generalist judges may be uncomfortable with or not understand the key sustainability decisional tool – the precautionary principle – which guides decisions in the face of scientific uncertainty or unprovable cause and future effect (think climate change cases!). One of the hallmarks of successful ECTs is decision-makers who are well versed in environmental law and often share the analysis and decision-making with non-lawyer co-judges or commissioners who are experts in ecology, engineering, land use planning, forest management and other relevant fields. Also, leading ECT jurists have taken the position that balancing the conflicting issues of sustainable development requires them to be futurists and creative problem solvers, not simply routine appliers of the law.

Independence is also a factor. In some general court systems judges may not be carefully selected, not free from government and other outside influences, not impartial,

27 Pring and Pring, ‘Future’, n 7 above.
28 Nanda and Pring, n 7 above, 63–65. The precautionary principle states: ‘Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’ Rio Declaration, n 9 above, Principle 15.
29 The retired 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 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.

Ulf Bjällas, ‘Experiences of Sweden’s Environmental Courts’ (2010) 3 J of Court Innovation 177, 184
not politically immune from retaliation and/or not free from corruption, factors stimulating ECT advocates in many countries, according to those we interviewed.  

How could your case fall within an ECT’s jurisdiction?

The jurisdictional scope of ECTs varies widely around the world – from very limited to extremely broad – depending on the number and types of laws placed under the ECTs’ competence by the constitution, legislation and/or court rules. You do not need to be an environmental or land use lawyer to find your case subject to an ECT, since their jurisdictions can run a wider spectrum than just ‘environmental’ matters. At the lesser end of the spectrum, for instance, the ‘environmental’ cases that come before the Environmental Court of the City of Little Rock, Arkansas, US, include refuse accumulation, an abandoned car, operating a business without a licence, loud noise or music, cruelty to animals, failure to vaccinate pets, loitering, being in a city park after hours or a parking ticket.

At the other end of the spectrum, Kenya’s new 2010 Constitution specifically called for ECTs (the first to do so) and the legislature passed an implementing Environment and Land Court Act in 2011, authorising ECTs to have original and appellate civil and criminal jurisdiction and ‘to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land’. As if these powers were not sweeping enough, the law also gives the Court jurisdiction over violations of ‘rights or fundamental freedom relating to a clean and healthy environment under … the Constitution’. The Kenyan Environment and Land Court thus has the most comprehensive jurisdiction of any ECT we have found, although there are others with very comprehensive jurisdiction, such as the ECTs in the states of Queensland and New South Wales, Australia and New Zealand.

Scattered across this jurisdictional spectrum are ECTs with a relatively narrow focus, such as Ireland’s An Bord Pleanála (Planning Appeals Board), whose jurisdiction is limited chiefly to appeals of land use/building law decisions by local planning authorities, and the National Environmental Tribunal of Kenya, largely limited to the review of EIAs. Because sustainable development almost inevitably involves both environmental and land use considerations, the most effective ECTs are those whose legal authority includes both sets of laws. In recognition of this, ECTs like those in Sweden and Trinidad and Tobago have recently had land use/development cases added to their environmental competence.

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30 Greening Justice, n 1 above, 72-75.
34 Ibid ss 13(1), 13(2)(a) (emphasis added).
35 Ibid s 13(3).
37 Bjallás, n 29 above, 180 (Sweden in 2011); Chateram Sinanan, Chairman, Environmental Commission of Trinidad and Tobago, Address at the First Interamerican Forum on Environmental Justice, Santiago, Chile (9 October 2014) (in September 2014) (notes on file with authors).
Thus, ECTs can be a ‘magnet’ for cases far beyond the purely environmental. What can you anticipate if your next dispute is drawn into the jurisdiction of an ECT rather than a court or tribunal of general jurisdiction?

**Differences between ECTs and general jurisdiction courts and tribunals**

A number of major differences in the operations of an ECT are possible that can actually make your task easier and more efficient. As a leading Australia trial judge who also sits on an ET states: “There is a will and capacity to innovate in the ECTs more than in the general courts.” Although there are tremendous individual differences among ECTs, there are some common themes that may make legal practice different. At least seven of the 12 basic factors we have identified may affect what you and your client can expect during the dispute resolution process. These are:

1. standing;
2. cost;
3. handling of scientific and technical expertise and experts;
4. extensive use of ADR;
5. competence of judges/decision-makers;
6. intensive case management;
7. a wide range of enforcement tools and remedies.

**Standing**

Standing (locus standi), the legal rules governing who may initiate or participate in an adjudication, may be more ‘open’ in an ECT that in many courts and tribunals of general jurisdiction. Standing requirements can come from the constitution, legislation or ECT rules and decisions. They can be very restrictive, for example limiting standing only to those with ‘direct economic injury’ or those who ‘participated’ in earlier administrative proceedings. Standing rules of general courts (and some ECTs) may ‘close the courthouse door’ to public interest lawsuits, class actions, suits by small-membership organisations, suits on behalf of future generations, suits to protect broadly shared environmental interests, suits to prevent environmental damage that has not yet occurred, aesthetic complaints about destruction of nature and wildlife, even challenges to government actions and decisions.

The clear trend in the ECT arena is to create more open standing for persons or groups with arguable environmental concerns. Possibilities for the public and environmental non-governmental organisations (NGOs) to challenge environmental decisions have been increased with more relaxed standing criteria in Belgium, Germany, Ireland, Sweden and Slovakia and with increased possibilities to go to court in the Czech Republic, France and Poland, as a result of pressure from the EC or the Compliance Committee of the Aarhus Convention. This perspective is illustrated by the comments of one of Sweden’s regional EC judges:

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David Parry, Judge of the State of Western Australia District Court and Deputy President of the State Administrative Tribunal, presentation at the IBA Annual Conference in Boston, US (8 October 2013) (notes on file with authors).

For more detail on this topic, see Greening Justice, n 1 above, 33-40.

A recent example of very open ECT standing is the visionary 2010 Rules of Procedure for Environmental Cases promulgated by the Supreme Court of the Philippines. Their standing rules provide:

- 'Any real party in interest ... may file a civil action involving enforcement or violation of any environmental law.'
- 'Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws.'
- 'Citizen suits ... shall be governed by their respective provisions [of legislation].'

Most strikingly, a defendant’s motion to dismiss the complaint on standing or other grounds is strictly prohibited.46

Another example is Kenya’s 2011 Environment and Land Court Act, which stipulates that ‘Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment.’ Along similar lines, the European Court of Justice ruled in 2009 that Sweden’s standing rule, requiring an NGO to have at least 2000 members in order to file a public interest suit on behalf of the environment, was too limiting and was ‘precluded’ by the European Council Directive implementing the Aarhus Convention requirement for public participation in environmental decision-making.48

More liberal and expansive standing rules improve access to justice for litigants and make motions to dismiss over standing less advantageous. Thus, if an environmental complaint is filed in an ECT with liberalised standing, it is liable to be heard.
regardless of the status of the party filing the complaint – good news for NGOs, public interest lawyers and concerned individual plaintiffs and potentially bad news for defendant government agencies or development and business interest opponents.

Costs

Holding down costs is a key element of access to justice. A lawsuit in an ECT can be much less expensive than the same lawsuit in the general courts of law. The cost of a general court action can be daunting – potentially tens of thousands or even millions in US dollars – to engage counsel, hire expert witnesses, perform discovery, conduct investigations and testing, spend days or weeks in trial, and then appeal an adverse decision. This results in many legitimate complaints going unfiled, unheard and unresolved. Other financial risks to litigants include court filing, transcript and other fees, cost shifting awards against the losing side, security for costs of an injunction and the risk of being countersued or ‘SLAPPed’. ECTs have adopted innovative ways to reduce costs for litigants, recognising that access to justice must be affordable for those most affected by development, who are often least able to afford litigation. These innovations have helped make environmental dispute resolution significantly more affordable for individuals, NGOs, public interest law firms, communities, and businesses in jurisdictions which have adopted one or more of them.

What specific cost-saving measures have been adopted by cutting-edge ECTs?

- Extensive use of ADR has made a major impact on court costs in over 50 per cent of the jurisdictions studied. (See the ADR section below.)
- In some ECTs, including Denmark and Sweden, there are no court filing fees for those filing an environmental complaint. In others, there are reduced fees or no fees for indigent parties or for ENGOs. Others determine the amount of filing fee by the type of plaintiff – individuals pay much less than corporations in the Netherlands and New South Wales, Australia.
- Some use sophisticated information technology, through which cases can be filed online; hearings can be held by phone, teleconferencing or video-conferencing; documents, discovery, orders and decisions are published on the EC’s website for the public; the court’s records can be electronically searched by the public free of charge, and judges can access complete case files from ‘the cloud’ on their laptops and iPads.
- Some ECTs waive transcript fees when the complaint is based on public or community interests rather than private interests, and the court absorbs the cost.
- Progressive ECTs use aggressive case management to reduce attorney time and costs, through the use of information technology, directions hearings, fixed

49 For more detail on this topic, see Greening Justice, n 1 above, 40–54.
50 Darpö, n 40 above, 16–19.
52 A requirement of Aarhus Convention, n 16 above, Art 9, para 4.
deadlines, fast-track calendars, careful management of expert testimony and intense utilisation of ADR before and during the hearing.

- Alternatives to a costly attorney are found in some countries, including using pro bono or public interest NGO legal organisations, law school student clinics, government environmental prosecutors, self-representation (pro se), private attorneys who offer reduced rates for impoverished clients, government-funded legal aid, specialised environmental ombudsmen, proponent funding of public intervention, attorneys fee awards to incentivise public interest lawyers and procurement of charitable grants and donations.

- Innovative ways to obtain affordable scientific and technical experts, as discussed in the next section.

- A number of ECTs have rejected the 'loser-pays' rule (the so-called 'English rule' or 'costs follow the event' rule) that requires the losing party to pay the litigation expenses of the prevailing party, regardless of the merits of the case. Application of the loser-pays rule can bankrupt community groups and individuals and intimidate others from seeking access to justice. Those ECTs that do not follow the 'loser-pays' rule increase access to justice by removing one of the huge risks of challenging a well-financed opponent.

- In courts with the power to issue a preliminary injunction to prevent imminent and substantial harm to the environment, a security bond may be required of the party requesting the injunction, which can make an injunction financially out of reach for plaintiffs. The solution in some ECTs is to hold an immediate preliminary hearing, applying the 'prevention principle' and the 'precautionary principle' and shifting the burden of proof that there will not be substantial harm onto the party seeking to change the status quo, thereby not allowing exorbitant bonds to block protection of the environment.

- SLAPPs or 'Strategic Lawsuits Against Public Participation' have proliferated around the world as a tool for chilling citizen participation and access to justice in environmental matters. These are lawsuits or countersuits without substantial merit - often demanding millions of dollars in damages for alleged defamation, business interference, and similar claims - that have the effect of 'chilling' opponents and preventing or punishing their attempts to seek access to justice. Jurisdictions concerned about the impact of SLAPPs on individuals and government have passed anti-SLAPP laws (30 US states and territories) and have made provisions for parties to initiate 'SLAPP-Back' suits to ensure continued access to justice. The Supreme Court of the Philippines in 2010 promulgated special rules regarding how civil, criminal or administrative SLAPPs are to be summarily treated by courts.

Not all ECTs provide such cost-reduction options. However, all means of lowering the expense of environmental litigation should be explored by plaintiffs and defendants, governments and courts, because of the profound effect costs have on ECT users and access to justice.

53Pring and Canan, n 51 above.
54The Public Participation Project has a list of such state laws in the US at its website - www.anti-siapp.org - click on 'State Anti-SLAPP Laws'. Other states have Supreme Court precedents providing anti-SLAPP protection.
55Rules of Procedure for Environmental Cases, n 42 above, rr 4(g), 6.
Scientific and technical expertise

ECTs can employ novel ways to deal with the complexities and contradictions of scientific and technical expertise. Even the basic concepts that arise in environmental cases — such as causation, damages, future impacts, sustainable development, the prevention principle, the precautionary principle, the polluter-pays principle, the no-harm rule and standards such as best available technology (BAT), among others — require expertise that law-trained judges and decision-makers simply do not have. Expert witnesses can be extremely expensive and, in highly technical fields like nuclear energy and climate change, can actually cost the parties more than the attorneys and other associated court costs. Experts often disagree with each other (actually or adversarially), leading to the infamous ‘battle of the experts’ that plagues complex litigation. But without the testimony of experts and the ability to evaluate the evidence they provide, decision-makers are unable to reach fair, well-reasoned opinions.

ECTs around the world have addressed this dilemma in a variety of innovative ways, unmatched by the general courts. Depending on the ECT, you could encounter either or both of two overarching strategies for managing scientific and technical experts in the deliberative process. The first is having internal experts available directly to the court or tribunal, and the second is by managing more efficiently and effectively the external experts provided by the parties.

Internal expertise

We found at least nine different techniques for providing unbiased internal expertise within the ECT structure, depending on legislation, court rules, budget and the type of knowledge needed for a particular dispute:

1. Scientific or technical experts are appointed as regular sitting judges or hired by the ECT on a case-by-case basis. They may have an equal vote with the law-trained judges or merely an advisory role. They are independent of the parties and never substitute for the introduction of expert witnesses by the parties. Some ECTs have biologists, chemists, engineers or land use planners as regular sitting judges; some, recognising that no one branch of science, technology or economics is applicable to all cases, pull in pre-qualified independent experts to match the case’s issues; while still others use both techniques.

2. Commissioners, used in Australia, New Zealand, and Trinidad and Tobago among others, are pre-selected for their areas of technical expertise and may also be trained as mediators for the court. Commissioners may not be paid as much as a law judge and may be limited in the level of cases where they participate.

3. Special commissions of court-appointed experts have been used by the Supreme Courts of India and the Philippines to participate in fact-finding and making recommendations to the court. In the Philippines, such commissions have been appointed after the conclusion of a case to monitor compliance with the court’s continuing mandamus decisions, such as in the famous Manila Bay case.57

56 For more detail on this topic, see Greening Justice, n 1 above, 55–61.
(4) Court inspectors or consultants are an option in ECTs that have both the authority and budget. They are staff of and responsible directly to the ECT. In Ireland’s ECT, An Bord Pleanála, the inspectors can hold hearings, evaluate evidence and make recommendations to the lay board on land use disputes.

(5) Government experts, drawn directly from the professional staff of the environmental or other relevant agency, are used by a number of ECTs to investigate complaints, present expert testimony to the ECT, and to evaluate the testimony of expert witnesses brought by the parties. Questions can certainly be raised about the impartiality and independence of such agency officials, especially if their agency is a party or has a position about the dispute! The advantages, of course, are that such experts do not cost the court or the parties anything and are assumed to represent the public interest.

(6) Experts employed by the prosecutors’ office may be used to investigate, testify and even advise the ECT in a case. In Brazil, for example, the environmental prosecutors have both civil and criminal powers and budget to employ internal and external experts. This can be very helpful in situations where the parties and ECT do not have substantial budgets for experts; however, it can raise questions when the ECT judges give extra weight to the ‘state’s’ evidence or use it as the basis of their decision.

(7) Independent institutes focused on scientific research can provide cutting-edge unbiased expert testimony upon the request of an ECT. They often provide their work free of charge or at reduced rates to the ECT.

(8) An ‘expert board’ of approximately 200 outside specialists is used by Denmark’s Environmental Board of Appeal to provide evaluation and assistance in decision-making. The specialist members are selected and appointed to ensure a broad spectrum of scientific and technical disciplines, and judges select members from the panel on a case-by-case basis. Denmark also uses a separate professional screening panel to decide which cases require an expert in addition to the judge assigned the case.

(9) Some ECTs request amicus curiae (friend of the court) briefs from community experts, in an effort to get expert input from individuals or organisations who are not parties to the case but have expertise in the issue before the court. The law establishing Chile’s new ECs specifically authorises them to solicit amicus briefs from experts, a power not authorised for the general courts.58

EXTERNAL EXPERTISE

There are at least five techniques in use among ECTs for controlling the testimony of experts hired by the parties, to deal with both inherent bias and areas of disagreement. Aggressive management by the court is the key difference observed between ECTs and the general courts on this. Two excellent state ECs in Australia – the Land and Environment Court of New South Wales and the Queensland Planning and Environment Court


– are models of this.\textsuperscript{59} Examples of techniques used by ECTs to control outside experts include:

(1) ‘Friend of the court’ instructions are given to the parties’ experts, with the judge requiring them to be \textit{solely responsible to the court} in their testimony, not to the interests of the party paying them. Experts who violate this responsibility can be held in civil or criminal contempt, helping to ensure honest and independent testimony is given.

(2) Some ECTs require parties’ experts to meet together, supervised by a judge, case manager, or mediator, to discuss and identify both their areas of agreement and disagreement in advance of trial. The meetings focus on setting aside the areas of agreement, crystallising the areas of disagreement, and limiting hearing testimony solely to the latter. Counsel and parties can even be excluded from these meetings. The opposing experts can be required to write a concise \textit{joint report} to the court and parties detailing what their testimony will be. This technique saves significant court time and cost for the parties, as the issues have been carefully focused in advance of trial, and everyone knows in advance what the testimony will be, so cross-examination is highly focused and limited.

(3) ‘Hottubbing’, a tongue-in-cheek term from Australia, is a unique process whereby the court takes concurrent testimony from both sides’ experts, while the experts sit together in the courtroom’s jury box (hence the ‘hottub’). First the judge directs the experts in a back-and-forth discussion to focus the issues as they see them, and testimony is then directed to identify only the critical areas of disagreement. The result is a speedier trial, elimination of redundant and lengthy testimony on insignificant issues and reduction of costs for both the court and the parties.

(4) Issue sequencing is another management tool, which involves calling all the experts on a specific issue one after the other. Judges then hear all the evidence on, for example, the air quality issues of the case without intervening arguments about other issues, allowing the judge and counsel to better target questions and clarify issues in contention.

(5) At least one EC, the Queensland, Australia, Planning and Environment Court even conducts training courses for external experts, to acquaint them with the EC’s rules and expectations.

Such judicial control over parties’ experts may seem shocking to some (such as US judges and lawyers) and may require modification of procedural and evidentiary rules or special rules to be adopted by the ECT. Whatever techniques are utilised, it is critically important that decision-makers employ methods to obtain comprehensive, credible scientific and technical information in the least biased, adversarial, expensive and time-consuming manner consistent with achieving justice.

\textit{ADR}

Perhaps the most common distinguishing feature of ECTs is the incorporation of ADR.\textsuperscript{60} Although mediation is found in a number of specialised courts (such as

family courts dealing with divorce and parenting responsibilities), it is not typical of most general courts, much less provided without cost to the parties. This ‘court-annexed’ mediation, where a court provides trained staff without cost to the parties, can be very successful. ECTs have embraced ADR based on evidence that it gives litigants a greater voice in the outcome, reduces hostility, improves understanding between the parties, provides a quicker path to resolution of the dispute, lowers costs to both the parties and the courts, promotes higher litigant satisfaction and allows parties and the court to craft innovative solutions to environmental and land use problems that a judge would not have the power to impose independently.

Moreover, ADR may be more appropriate culturally in societies that tend to avoid conflict and confrontation or that have already established systems of local or tribal justice based on mediation, cooperation, restorative justice and communitarian values. Court-annexed settlement rates are higher than attorney-negotiated pre-trial settlements, compliance with agreements is reasonably high, court workload is reduced, and cases can be decided more quickly, even if there are complex scientific or technical expert issues.

Depending on the ECT, you may encounter (and even be required to utilise) one of a number of different types of ADR prior to proceeding to a formal hearing. The Land and Environment Court of New South Wales has gone even further and pioneered a ‘Multi-Door Courtroom’, which provides access to a number of different types of ADR in the court, based on an initial assessment of the conflict by a court registrar. In addition, parties may choose to use an outside private mediator or may be referred to other government agencies by a case manager. Not surprisingly, more litigants willingly use ADR professionals when the ADR is provided by the court for free. If there is a cost and a choice to mediate or not, fewer parties choose ADR over proceeding straight to a court hearing, even if they understand that the process will be less formal, cheaper and quicker.

Outstanding ‘court-annexed’ ADR programmes share several characteristics that help determine the success of the programme. The first is judges who are aware of the benefits of ADR and who are committed to resolving disputes using one or more of the practices. In the Australian state of Tasmania, the law actually mandates that all cases coming before its ET, the Resource Management and Planning Appeal Tribunal, must submit to mediation before they can be heard by the tribunal. Japan’s Environmental Dispute Coordination Commissions and South Korea’s Environmental Dispute Resolution Commissions at the national and local levels rely almost entirely on a mediation-arbitration process, with the commissioners making the final decision.

66 For more on this topic, see Greening Justice, n 1 above, 61–72.
62 The main different types include conciliation, negotiation, facilitative mediation, directive mediation, evaluative mediation, transformative mediation, restorative justice, collaborative decision-making and arbitration. For explanations of these, see Greening Justice, n 1 above, 61.
64 New Zealand, for example, promotes the practice with an informative ‘everyday guide’ to ADR in its EC, You, Mediation and the Environment Court, www.mfe.govt.nz/publications/ma/everyday/court-medi.
other ECTs, the judges actually act as mediators on a rotating basis, although this model has a number of obvious drawbacks.

The second ‘success’ characteristic is careful case assessment upon filing, to determine the likelihood of a positive ADR outcome and the type of ADR that might be most successful. This includes not only reviewing the complaint but interviewing the parties. The third characteristic is having trained and experienced ADR practitioners, in whom the parties and the judges have confidence and trust. In some ECTs, the mediators are lay commissioners, or the court clerk or registrar, who have special training in ADR. For instance, in the Environment Court of New Zealand, commissioners are trained in mediation and assigned to mediate cases, and they do not sit as judges in the same cases if the mediation is unsuccessful. In others, the court may actually have sophisticated case manager mediators on staff, who conduct the initial screening assessment, set up the sessions, explain the process and facilitate discussions. Although it is not critical that the ADR professional be trained in environmental law, many are lawyers and have studied the laws under the ECT’s jurisdiction.

Techniques for incorporating scientific and technical experts in the ADR process are extremely important, and the mediator may actually facilitate discussions between the experts, without attorneys or clients present, to focus issues and develop a written report of significant agreements and disagreements and evidence to be presented. All ECTs that have a significant ADR component recognise that some issues may not be resolved to the satisfaction of the parties. The unresolved issues can then be brought to court, with the agreements already negotiated serving to streamline hearings and testimony. Not all ECTs provide enforceable judicial orders for the agreements reached in ADR, but doing so adds to their effectiveness.

ADR appears to work best when it is court-annexed with no cost to the parties. However, in jurisdictions where court budgets cannot afford this, parties may be referred to private groups or volunteer mediators. While this may save the court money, volunteers are unlikely to have knowledge of environmental issues or know the law, the court process or the precedents of the ECT they are assisting, making the service less effective. On the other hand, private mediators may charge as much as US$1500 a day, making their services unaffordable for many parties.

Environmental ombudsmen, who are employees of the government, also provide ADR services in a few jurisdictions. They can have statutory power to investigate, subpoena records and file legal actions against the government or private parties and companies. One of the most exciting ombudsman models reviewed, the Parliamentary Commissioner for Future Generations in Hungary, was recently abolished, and the ombudsman staff and duties were folded back into the regular legal staff of the nation. There are calls in Japan for a national environmental ombudsman to correct issues with public access rights, but no movement is happening currently on that initiative. Kenya’s national Public Complaints Committee, which has the powers of an ombudsman, is severely hampered by lack of funding and is therefore unable to investigate or bring actions on many complaints made to it by the public.

Incorporation of professional ADR in the ECT is clearly a ‘best practice’ of effective ECTs around the globe. It is praised both by the judges who use it and by the majority of parties who participate, including attorneys representing litigants. It does require an adequate budget and aggressive case management to ensure that cases are moved through the system fairly and court time is minimised.
Competence of judges and decision-makers

It would seem axiomatic that ECTs would be staffed with judges or decision-makers with expertise and interest in environmental law, but regrettfully this is not always the case. In some jurisdictions, you may find that appointment to the ECT is a ‘political plum’ awarded to political cronies who may have no knowledge, expertise or commitment to the principles of sustainable development. Other countries have jumped on the green court ‘bandwagon’ and appointed ‘green judges’ on every bench, from municipal magistrate courts to the supreme court and every level in between, without regard for the judges’ preferences or any comprehensive training in environmental law. Some have attempted post facto training for ECT judges after they are appointed, with mixed results. As judicial competence is critical for decisional effectiveness and credibility, it is important that the appointment process select those qualified to interpret and apply the laws under the court’s jurisdiction and personally committed to environmental conflict resolution.

This is such a basic point that the World Justice Project makes it one of its four principles that define 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.’

It is also critical that these judges continue upgrading their knowledge of not only their country’s environmental laws and precedents but also international principles of sustainability. A number of judicial institutes and forums provide such training for ECT judges. There are now several multinational organisations of environmental judges sharing experiences, vision and practices, such as the EU Forum of Judges for the Environment (EUFJE), Southeast Asian Chief Justices for the Environment (SACJE) and Australasian Conference of Planning and Environment Courts and Tribunals (ACPECT). UNEP and ADB, among others, have helped support these efforts internationally.

Tenure is also a factor in attracting and keeping qualified ECT judges, so that they have a protected term in office and are not ‘fired’ for unpopular opinions. Retention of trained judges requires equitable salaries at least on a par with other judges of the same stature. It also required making the ECT a respected part of the judges’ career path, not a dead-end or an add-on burden to an already heavy general court caseload. Retention also requires an anti-corruption system and providing judges with protection from threats and physical harm resulting from their decisions.

Judicial independence and non-corruptibility are also key to the credibility and effectiveness of ECTs and to implementing the rule of law at the local, regional and national level. However, political pressure and bribery are more common in some countries, which require efforts to improve the integrity of the judiciary. Administrative and legislative support for the ECT are also critical, including an adequate and secure court or tribunal budget that is protected (at least partially) from political retaliation.

Case management

Innovative ECTs have designed and implemented a number of operational tools to increase their efficiency and effectiveness. In an ECT, you may find different case

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\( ^{45}\) For more on this topic, see *Greening Justice*, n 1 above, 72–75.

\( ^{46}\) World Justice Project, *Rule of Law Index 2014*, n 21 above, Box 1 at 4.

\( ^{47}\) For more on this topic, see *Greening Justice*, n 1 above, 76–79.
management techniques from the general courts. Some of these have already been mentioned in previous sections, such as initial case screening and assessment, ADR and case flow monitoring. In some ECTs, procedural delays are frowned on and often not granted, which also helps with the speedy delivery of justice and reduced costs for the parties. Examples of other creative tools currently being utilised by ECTs include:

1. Data management systems, some extremely sophisticated, which not only track dates of filings, hearings, case stages and outcomes, but measure time and notify parties of upcoming hearings and permit longitudinal evaluation of court performance. These data are used to measure whether or not the court is providing speedy and timely decision-making.

2. Interactive websites, which provide the public with comprehensive information about the jurisdiction, use, costs, forms, rules and process for accessing the ECT; provide for online filings; and display court records.

3. Public education, through outreach programmes, speakers, websites, internet videos, comic books for school children (believe it or not) and other educational tools designed to disseminate information about environmental rights and remedies and the ECT process and to make it more ‘user friendly’.

4. Directions hearings, held by the judge or other professional court staff with the parties and their attorneys to establish and enforce firm, fixed timelines for case filings, discovery, ADR, hearings and other steps on the court calendar.

5. Monitoring, with ECT staff closely following case progress, alerting parties to forthcoming dates, confirming compliance, providing forms and maintaining a record system for each case through the judicial process.

6. Internet, with some ECTs making extensive use of internet and ‘cloud’ technology for judges to share notes, discovery, reports, rulings, etc, with each other, parties and even the public, during the course of litigation. As mentioned earlier, all the judges and commissioners of the New Zealand Environment Court are issued with iPads, which give them ready access to all case documents wherever they are.

7. Information technology (IT), such as videoconferencing and teleconferencing with the parties for hearings, depositions, motions, testimony and evidence, etc, with simultaneous transcription and transmission of testimony in some ECTs.

8. A sentencing database, maintained by the ECT, that provides easy access to precedent-setting decisions in similar cases and data on offenders’ prior violations.68

9. An evaluative database, collecting case cost, time and participant satisfaction as part of a court evaluation process.

10. Flexible options to accommodate participants, such as ‘traveling courts’, which take the judges to the location of the parties, the proposed development, or the environmental impact (‘flying judges’, courts in vans and buses, hearings in local hotels, etc) and alternate court hours (evenings and weekends) in recognition of people’s work schedules.

(11) Accommodations for the disabled, such as text telephone (TTY) or signing for the deaf, hard of hearing, or speech-impaired, language translators, and adaptations of procedure to meet other physical or cultural concerns.

It is noteworthy that ECT staff are often more active in interfacing with the public and between it and the judges, than those in general courts. Staff with responsibility for managing cases is the most used model. However, in small, underfunded or understaffed ECTs, these functions are sometimes taken on by an assigned judge or shared with the general court staff.

Enforcement tools and remedies

One of the biggest differences one can encounter with ECTs is the range and creativity of the post-judgment management tools and enforcement remedies they may employ to see that their orders and decisions are actually carried out.\footnote{For more on this topic, see Greening Justice, n 1 above, 79 87.} The gap between the written laws protecting the environment and the government’s actual power to enforce them is one of the greatest problems in environmental law. The World Justice Project highlights this in strong terms:

While countries around the world have laws to protect the public health and the environment, these laws are not always enforced. Adherence to the rule of law is essential to hold the government, businesses, civil society organizations, and communities accountable for protecting the environment without unduly constraining economic opportunities.\footnote{World Justice Project, Rule of Law Index 2014, n 21 above, 6.}

Performance of court orders in many ECTs is crippled by inadequate penalties in the statutes or rules. There are jurisdictions where the maximum allowable fine or damage award is so low that it is cheaper and more profitable for a violator to pay the fine and continue violating the law. There are jurisdictions where there is no mechanism to monitor compliance with a court order and no incentive or possibility of community monitoring of performance; this is particularly true in areas where a violation is geographically isolated from population centres or where stringent measurement of results requires sophisticated equipment. And there are jurisdictions where the ‘polluter pays’ principle is not applied, but instead the government picks up the cost of remediation or restitution, providing no deterrent other than a slap on the wrist to stop the activity in the future. Without effective enforcement tools and remedies, ECTs can be put in the position of being viewed as paper tigers with no teeth.

Recognising the need for effective enforcement, with the goals of remediating prior environmental harm, preventing a recurrence, and enhancing court credibility with the public, ECTs are being given by law – and judges and prosecutors are developing and enlarging – a number of innovative (shocking to some) enforcement responses. Some of these creative management tools and remedies which are not authorised or even contemplated in statute may be considerably more effective at both solving the problem and preventing it in the future than traditional ‘on the books’ remedies.

Remedies (the court orders to address the harm) and enforcement tools (the court’s power to compel obedience to the laws and its remedial orders) are critical to the effectiveness of ECTs. Remedies are in part a function of whether a court has civil, criminal, administrative or combined jurisdiction. ECTs with combined or integrated
jurisdiction tend to have a wider range of remedies and tools available to decision-makers.

The range of remedies one can encounter in ECTs is similar to those of most general courts: (1) injunctions; (2) monetary damages; (3) restitution; (4) mandamus; (5) declaratory relief; (6) contempt; (7) attorneys’ fees and other expense-allocation awards; (8) judicial review of administrative decisions; and (9) criminal sanctions. But there are some differences. The UNECE’s authoritative Implementation Guide for the Aarhus Convention stipulates that courts and tribunals dealing with environmental cases must have “adequate and effective remedies” and particularly stresses the need for injunctive power (both interim and final restraining orders):

In practice, use of injunctive relief can be critical in an environmental case, since environmental disputes often involve future, proposed activities, or ongoing activities that present imminent threats to human health and the environment. In many cases, if left unchecked, the resulting damage to health or the environment would be irreversible and compensation in such cases may be inadequate.

Yet some ECTs do not have injunctive power and are helpless to stop environmentally damaging activities.

Mandamus (an order to a government entity to do or not do specific legally required acts) in some courts, such as the Indian and Philippines Supreme Courts, has been transformed into a far-reaching remedy of ‘continuing mandamus’, through which the court maintains long-term, ongoing supervision and control of environmental situations and actors after the case is decided. Examples of continuing mandamus include the Philippines Supreme Court in the Manila Bay pollution case and the Indian Supreme Court in the “Forest Case”. Monetary damages (both compensatory and punitive) are standard, but ECTs, like those in Thailand, are also looking to ‘natural resource damages’ (as US federal law provides) to compensate the government for destruction of publicly owned or used resources, such as public lands, parks, waters, wildlife and beaches. Criminal or penal powers (including the death penalty in one ECT jurisdiction!) can be used to leverage a variety of ‘innovative’ or ‘creative’ non-criminal remedies in surprising ways in some ECTs (see below).

Innovative tools or remedies have proven more attractive to ECT judges in some cases than traditional ones for all three goals of enforcement – punishing the violator, protecting the environment and preventing future violations. Some of the more surprising we found include:

- A polluting company agreed with the judge to ‘voluntarily’ fund an environmental ‘night school’ to which other offenders are ‘sentenced’ for environmental education (and, upon completion, receiving a graduation diploma suitable for framing from the Ministry of the Environment).

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23 See n 57 above.
A polluting bus company was required to pay for and display ads on its buses describing environmental laws in simple terms for the public.

- Having a wealthy offender pay for environmental comic books for distribution to school children (with the creative EC judge writing and illustrating them!).
- 'Sentencing' a poacher of endangered species to work for one year as a volunteer for a wildlife organisation (in lieu of jail), which transformed the poacher into one of the country's leading spokespersons for wildlife protection.
- Requiring illegal loggers to plant trees and restore forests.
- Ordering polluting companies to pay for and install pollution monitoring and reporting equipment.
- Requiring a developer to restore completely a rundown city park that his development had encroached upon.
- Ordering environmentally destructive enterprises to obtain financial assurance bonds to guarantee future lawful behaviour.
- Making companies agree to hire and pay for environmental 'whistleblowers' to work in the company, so they can report future violations to the court and environmental agency.
- Federal and state environmental prosecutors in Brazil negotiate 'conduct adjustment agreements' directly with alleged violators without even filing a court case or seeking judicial approval, a practice that can raise eyebrows because of its potential for abuse.

Given the potential array of management tools and enforcement remedies, some ECT judges have been more 'problem solving' than others in their remedies and enforcement (or making 'deals' with violators). Of course, in the final analysis, the ECTs alone cannot assure these remedies work in the real world without effective environmental enforcement agencies, NGO watchdogs and a vigilant public to oversee compliance.

The future of ECTs

Looking into the crystal ball, what can we expect of ECTs in the future? Building on today's trends, we can predict:

1. More ECTs – many more ECTs will be created, and those already in existence will undergo change and improvement.

2. Human rights – there will be a growing convergence or intersection of environmental rights with human rights, each strengthening the other, and ECTs will lead the way in developing and expanding these human rights to a clean or protected environment.

3. New legal principles – ECTs will be employing existing and emerging principles of law, as mentioned above, such as access rights, sustainable development, polluter-pays, prevention, precautionary, non-regression, human rights to environment, inter-generational equity and others yet to be elaborated.

4. ADR – ECTs will increasingly use ADR as a substitute for contested trials and judicial decisions.

5. More jurisdiction – more laws and claims will be added to the jurisdiction or competence of effective ECTs, particularly 'integrated' jurisdiction over both environmental and land use/development laws.
(6) Evaluation – there will be increasing demand for evaluations of the effectiveness of ECTs, regular objective studies analysing how successfully the ECTs are providing access to justice from inception of cases through the decision and the completion of remedies/enforcement. Ultimately, evaluation techniques to measure the state of the environment – with or without an ECT – will surely be developed.

(7) Collaboration – a growing collaboration between and among ECTs around the world will occur, a sharing of knowledge, ideas, experiences, systems and techniques, decisions and other expertise.

(8) Success – we envision success for ECTs overall, as they proliferate and mature.

All of the legal experts we have interviewed during the course of our research – whether ECT judges and decision-makers, general civil and administrative court justices and judges, public interest group advocates and attorneys, defence counsel for businesses, government counsel and prosecutors, environmental agency officials and lawyers, and ECT staff and mediators – agree that practice before an ECT is challenging, rewarding, and certainly different from practice in a general court of law. While each national, regional, and local ECT studied is unique – with differing approaches, jurisdictions, composition, rules and standards, and effectiveness – we found most dedicated to achieving the Rio Principle 10 public access rights to information, participation, and justice and sustainability.

Many ECTs have severe budget limitations that make it impossible to adopt some of the more cutting-edge innovations of the 'model' ECTs in Australia, New Zealand, Canada, Brazil and Vermont. In addition, some operate in political environments where their hands are tied by executive and legislative rules or policies and their jobs are at risk if they make unpopular decisions. In a few countries, environmental attorneys and judges actually risk loss of life by enforcing the law against economic interests. In spite of these barriers to ECT performance, it is clear that the numbers and the jurisdiction of ECTs are continuing to increase. Global concerns and treaties addressing access to justice, sustainable development and other complex principles – plus the advantages of specialised courts – are forcing legal and judicial change, including the fast-moving trend for specialised ECTs.

So you may indeed find an ECT in your future.