Environmental Courts or Environmental Tribunals – Which Model Works Better?

by

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The growing international phenomenon of specialized environmental courts and tribunals (ECTs) – created to adjudicate environmental, land use, public health, and related disputes – is the focus of the University of Denver Sturm College of Law ECT Study. The resulting book, Greening Justice: Creating and Improving Environmental Courts and Tribunals, is the first comprehensive, global comparative examination of these adjudication forums. The authors and the ECT Study continue to research, analyze, and advise regarding this mode of access to environmental justice.

Greening Justice analyzes the 12 essential “building blocks” or “design decisions” to be evaluated in the creation or reform of an ECT. The very first decision is what type of forum will work best for the jurisdiction – a court or a tribunal or both? Courts are part of the judicial branch; tribunals, even quasi-judicial ones, are part of the executive or administrative branch of government. Although there are excellent examples of both environmental courts and tribunals around the world, on balance the ECT Study finds courts can be more effective and efficient institutions than tribunals for environmental adjudication. The ultimate answer of course is jurisdiction-specific, based on each jurisdiction’s existing legal framework, legal culture, political-social-economic environment, and goals for environmental justice.

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There are seven important areas where specialized environmental courts can excel over tribunals, based on the Study's findings:

1. Credibility and public trust
2. Comprehensive jurisdiction
3. Decision-maker independence and competence
4. Caseload management
5. Administrative cost
6. ADR familiarity
7. Enforcement and remedy powers

1. **Credibility and Public Trust:** In nations whose executive, legislative, and judicial branches are separate, courts are typically held in higher esteem by the general public than either the administrative or legislative branches of government. Although there are corrupt and/or incompetent judges in every nation, the concept of justice based on the rule of law is a respected value identified with courts, not executive branch tribunals.

2. **Comprehensive Jurisdiction:** Courts, even specialized ones, have wider and more comprehensive legal jurisdiction than tribunals typically are given. As the complexity of environmental problems and the demand for sustainable development have escalated internationally, it has become increasingly important for decision-making forums to have the ability to deal with the full range of environmental issues, not just one facet like water pollution, but related factors such as land use, natural resources, economic development, and climate change. Some tribunals have very narrow jurisdictions, limited to subjects like environmental impact assessment (EIA) appeals, or mining or water claims, or pollution, or compensation for personal injury, or acts of the government's environment agency. Courts with wider scope – including civil, criminal, administrative, and/or constitutional jurisdiction – permit an expanded vision and the use of a more comprehensive range of remedies. In many nations, environmental crimes go hand in hand with civil environmental violations, and both can lead to breaches of constitutional rights. When jurisdiction is comprehensive, an issue can be resolved more holistically in a single court proceeding. Combining criminal, civil, and administrative jurisdiction in one specialized court, such as occurs in the Land and Environment Court of New South Wales, Australia, results in a more streamlined and effective judicial system and enhances access to justice for parties.

3. **Decision-maker Independence and Competence:** Most environmental courts have judges who meet minimum standards of legal and environmental training, work fulltime, are tenured, and are compensated reasonably. Although judges may be politically appointed, their allegiance is to the law, not to the person or party who appointed them. Most tribunals have decision-makers who must meet minimum standards of environmental competence, but not necessarily legal competence. They are usually untenured, may be uncompensated or
under-compensated and are often selected by the environmental agency or government based on support for the political and policy decisions of the appointing authority. The appointment and compensation process for tribunal members is therefore more likely to compromise independence in decision-making. The lack of tenure results in a loss of decisional continuity and knowledge of precedent by tribunal members. If no members of a tribunal have legal training and experience, it is possible that decisions could be made without full understanding of their legal ramifications, resulting in bad decisions and/or further court appeals.

Environmental court judges are also very active regionally and internationally in expanding their competence and expertise through associations, conferences, training workshops, and collaborative sharing of perspectives and best practices, more so than we found tribunal decision-makers to be. A new international body for environmental judges and others is the International Judicial Institute for Environmental Adjudication (IJIEA). Regional associations of environmental judges have been formed, such as the European Union Forum of Judges for the Environment (EUFJE), the Asian Justices Forum on the Environment (AJFE), and the Working Group on Environmental Law of the Association of European Administrative Judges (AEAJ). Tribunal members generally do not have equivalent multinational associations or conferences to share experiences and expertise. A notable exception is the Australasian Conference of Planning and Environment Courts and Tribunals (ACPECT) that commendably reaches out to include both courts and tribunals.

Some have raised the concern that specialized environmental courts may result not only in knowledgeable judges but in activist judges who are biased advocates for environmental protection. The Study’s research findings did not substantiate this concern. The researchers did not find evidence or expert opinion that sitting environmental court judges were viewed as biased by the parties or of making decisions founded in subjective prejudice. On the contrary, developer attorneys and environmental advocates alike found it preferable to have their case heard by decision-makers who understood environmental law and scientific and technical evidence, who could objectively balance the complex issues of sustainable development, and who handled cases efficiently and effectively.

4. Caseload Management: Environmental caseloads vary tremendously, based on the jurisdiction’s economy and the amount of proposed development, public awareness, knowledge and activism, passage of new environmental rules

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4 The IJIEA website is [www.pace.edu/school-of-law/international-judicial-institute-environmental-adjudication-ijiea](http://www.pace.edu/school-of-law/international-judicial-institute-environmental-adjudication-ijiea). For its first publication, including the authors’ article at n. 3, above, click on that website’s hotlink for the “Journal of Court Innovation.”

5 [www.eufje.org](http://www.eufje.org).


7 [www.aeeaj.org](http://www.aeeaj.org).

and regulations, and level of oversight and enforcement. Being able to adapt to wide fluctuations in caseload size is critical, when the caseload may vary from as few as seven cases annually (Trinidad & Tobago) to hundreds of thousands (New York City). All ECTs studied had a basic administrative structure, with a budget, staff, and other resources. Some of the tribunals with lower caseloads operated on a part-time basis, but were not cost-effective if only a few cases were filed. Others had far too many cases for the staff available, resulting in long and expensive delays for parties and public frustration. Courts, particularly those that are an integral part of a larger general court, can be far more flexible in accommodating fluctuating caseloads without a loss of efficiency or effectiveness. Queensland, Australia’s Planning and Environment Court (PEC) is a model of how a specialized court can respond to changes in caseload volume. Although the PEC is a separately authorized and independent body, it is an integral part of the state’s general-jurisdiction District Court and shares judges, staff, and other resources with that court. If the caseload is low, then the “environmental” judge hears other types of cases as a District Court judge. If the caseload balloons and exceeds the capacity of the sitting judge to hear the cases in a timely way, an additional judge or judges from the District Court can be assigned to pick up the slack, maintaining effective and efficient administration of justice.

Other caseload management approaches that have been adopted by courts are the appointment of a single “green judge” or the designation of a multi-judge “green bench” to which environmental cases are assigned. In both of these scenarios, the chief judge can accommodate caseload size by varying the number of judges assigned to environmental cases and assigning those judges other cases from the general docket when required. Environmental jurisprudence and expertise and general judicial knowledge are thus developed across the court.

5. **Administrative Cost:** Some administrative costs are necessitated when a court or a tribunal is created, and those costs grow or shrink in response to caseload size over time. Both independent environmental courts and tribunals necessitate a hearing room, office, staff, and other resources. These can be free-standing or integrated into another court or agency for the sharing of resources. The more separate and independent the ECT, the higher the basic overhead costs, as there is limited ability to share resources with other entities. Queensland’s PEC, as mentioned, is an example of efficient cost-sharing. Because the PEC is integrated with the general-jurisdiction District Court, overhead costs are minimal. All resources, except the specialized environmental registrar-mediator and some office and court space, are shared with the general court and are included in the latter’s budget. This type of flexibility is precluded in the tribunals studied, as they each have a separate annual administrative budget with dedicated staff and no ability to borrow or lend resources from another tribunal as workload demands change. A few environmental tribunals are housed within an umbrella master tribunal – such as those in Ontario, Canada;
Victoria, Australia; England; and New York City – so they have the financial advantages of sharing overhead with other tribunals with different jurisdictions. Still, even these cannot readily share decision-makers when needed, because there are none with the necessary environmental expertise. Tribunals housed within the government’s environment agency have the advantage of being able to share overhead and possibly staff, but at the cost of loss of appearance of independence and neutrality.

6. **ADR Familiarity:** Around the globe, most people are unaware of what alternative dispute resolution (ADR) is or how it works. Today, many lawyers are being exposed to ADR in law school. Many judges now routinely refer cases to mediation, and some are trained mediators or arbitrators themselves. ADR is mandated in many business contracts, property transactions, and family law disputes and is required in some courts prior to the setting of a hearing. So, there tends to be greater familiarity and confidence in the ADR process amongst judges than amongst the general public. The Study found that the majority of specialized ECTs have embraced ADR and annexed it to the case management process. They have found that mediation can result in better, faster, and cheaper decisions – and can substantially reduce the number of cases that must go through a full judicial hearing. The process has been found to be both effective and efficient for the parties and the court. Mediated agreements in association with a court usually become part of a court order which is public and enforceable.

This is not the general practice of tribunals, where ADR settlements are typically kept confidential, not enforceable, not appealable, and not public. By its nature, mediation is voluntary and the parties generally have legal recourse to the courts if they can not reach a settlement. Thus, complaints may go through a tribunal ADR process only to be ultimately filed or appealed to a court of law – doubling the time and expense of the parties and the government to resolve the conflict. In Australia, a number of the specialized forums for environmental adjudication – both courts and tribunals – have incorporated ADR into their processes to some extent. The New South Wales Land and Environment Court and Queensland’s PEC are heavily reliant on ADR, as is the Resource Management and Planning Appeal Tribunal of Australia’s State of Tasmania.

7. **Enforcement and Remedy Powers:** Environmental courts generally have a much wider range of enforcement tools than environmental tribunals, including flexible sentencing when they have criminal jurisdiction. Few tribunals have authority to preserve the status quo (cease and desist or preliminary injunction powers), to set security bonds, to levy significant fines, to determine natural resources damages, or to exercise criminal or contempt powers. None of the tribunals studied was able to use innovative remedies such as community service, restorative justice, continuing mandamus, or environment-benefitting alternatives to fines. Enforcement of orders was also an issue for some
In Greening Justice

bench within the judicial branch, using the T2 decisional building blocks outlined by, an independent, comprehensive/insiders' consultation environmental court or green is a strong and integrated judiciary which authors believe is generally preferable to competence of existing institutions in deciding between court or tribunal. If there are no other institutions of ECT's, it is important to evaluate the need for the existing legal culture, the socio-political-economic environment, and the special

In conclusion, when considering the creation, consolidation of other
easy way to send difficult or politically charged cases to alternative forums.

be better able to evaluate expert evidence. Include decision-makers with scientific/technical expertise on a tribunal, and they may be easier to

Both courts and tribunals, both courts have greater legal leverage. Fines and compensation awards for harm may be difficult to collect for