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# Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment

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Courts and other adjudication tribunals that specialize in environmental and developmental issues are the subject of a global comparative study at the University of Denver. The multidisciplinary University of Denver Environmental Courts and Tribunals (ECT) Study is examining how ECTs can work to enhance the human rights to a quality environment, access to justice, and environmental democracy at national, regional, and local levels across the spectrum of the world’s legal cultures.<sup>1</sup> The goal is to provide a practical

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<sup>1</sup> The University of Denver Environmental Court and Tribunal Study website is at <http://www.law.du.edu/ect-study>. The ECT Study is funded by grants from the University of Denver Sturm College of Law, the University of Denver, the Hughes Foundation, and the authors through their international consulting service, Global Environmental Outcomes LLC. Another paper on poverty alleviation and ECTs can be found at the website and is to be published in a forthcoming book of the International Union for the Conservation of Nature’s Academy of Environmental Law (IUCN-AEL) as George (Rock) Pring & Catherine (Kitty) Pring, *Specialized Environmental Courts & Tribunals: Improved Access to Justice for Those Living in Poverty*, in POVERTY ALLEVIATION AND ENVIRONMENTAL PROTECTION (forthcoming Edward Elgar Pubs. 2010). Portions of this Article draw from that paper.

analytic framework and a summary of best practices to guide governments and citizens interested in establishing or reforming an ECT.<sup>2</sup> The findings of the Study—*Greening Justice: Creating and Improving Environmental Courts and Tribunals*—were published in December 2009 by The Access Initiative (TAI) of the World Resource Institute (WRI) and made available free of charge online.<sup>3</sup>

The Study has identified over 350 existing ECTs in forty-one different countries. The research methodology has involved in-depth literature, internet and media research, court observation, and on-site interviews with over 150 ECT-experienced judges and justices, prosecutors, private attorneys, government officials, non-governmental organizations (NGOs), and academics in twenty-four countries. The Study conducted personal interviews during 2008 and 2009, and updated findings through December 2009 through ongoing communication with Study participants and developing literature. The Study identifies twelve operational characteristics or “building blocks” that contribute to the success of ECTs in addressing fundamental issues such as protection of human rights and environment; rights to information, public participation, and access to justice; sustainable development; the prevention, precautionary, and polluter-pays principles; and environmental impact assessment (EIA).<sup>4</sup>

The two fields of human rights and environment are increasingly recognized as having much common ground, as demonstrated by the important new book *Human Rights and the Environment* by University of Oregon School of Law Professors Svitlana Kravchenko and John Bonine.<sup>5</sup> That makes the *Oregon Review of International Law’s* Symposium on “The Confluence of Human Rights and the Environment” an ideal forum to reflect on what the University of

<sup>2</sup> The study uses “court” to indicate a true judicial branch body and “tribunal” to indicate collectively all other governmental organs (typically less formal administrative bodies) that are empowered to resolve environmental disputes.

<sup>3</sup> GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, *GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS* (2009), available at <http://www.accessinitiative.org/resource/greening-justice>; <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

<sup>4</sup> For more on these issues, see VED P. NANDA & GEORGE (ROCK) PRING, *INTERNATIONAL ENVIRONMENTAL LAW FOR THE 21ST CENTURY* 17–62 (2003); George (Rock) Pring & Susan Y. Noé, *The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development*, in *HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT* 11 (Donald N. Zillman et al. eds., 2002).

<sup>5</sup> SVITLANA KRAVCHENKO & JOHN E. BONINE, *HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW, AND POLICY* (2008).

Denver Study has found about the interrelation of specialized ECTs and human rights, particularly the human right of access to environmental justice.

## I THE “CONFLUENCE” OF HUMAN RIGHTS AND ENVIRONMENTAL LAW

Environmental law as a distinct legal subject is a relatively recent legal development, primarily dating from the 1970s.<sup>6</sup> Since then, it has become increasingly complex, rule-laden, and reliant on very complicated—and often conflicting—technical and economic factors. Separate laws and regulatory processes deal with water, air, land, noise, nuclear waste, environmental protection, environmental impact statements, mining, forests, habitat, flora and fauna, and a myriad of other development issues that impact the global environment. Land use, zoning, and other town and country planning laws that control local development frequently do not require analysis of potential environmental impacts on the greater community.

Human rights law has a somewhat longer history, with its first official recognition in the 1948 Universal Declaration of Human Rights.<sup>7</sup> That was followed by the Covenant on Civil and Political Rights<sup>8</sup> and the Covenant on Economic, Social, and Cultural Rights, both in 1966.<sup>9</sup> Multiple efforts have followed, elaborating the so-called “first generation” human rights (civil and political rights), the “second generation” human rights (social, economic, cultural rights), and the expanding “third generation” human rights (to a safe and quality environment, natural resources, development, sustainability, intergenerational equity, self-determination, etc.).<sup>10</sup>

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<sup>6</sup> See Joseph L. Sax, *Environmental Law Forty Years Later: Looking Back and Looking Ahead*, in BIODIVERSITY, CONSERVATION, LAW + LIVELIHOODS 9 (Michael I. Jeffery et al. eds., 2008).

<sup>7</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

<sup>8</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>9</sup> International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A(XXI), at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>10</sup> See Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 17–64 (1982) (explaining the progression of the concept of human rights). See generally KRAVCHENKO & BONINE, *supra* note 5 (explaining that third generation human rights are a more recent development

These two bodies of law have developed a substantial and synergistic confluence, or overlap, in the last twenty years. Today, environmental rights are considered by many to be enforceable human rights and are specifically included in newer national constitutions<sup>11</sup> and international human rights instruments that proclaim a right to “life” in various manners.<sup>12</sup> Further:

*Life, livelihoods, culture and society, are fundamental aspects of human existence—hence their maintenance and enhancement is a fundamental human right. Destruction of environment and thereby of the natural resources, is therefore, a violation or leads to the violation of human rights—directly by undermining the above aspects of human existence, or indirectly by leading to other violations of human rights, for example through social disruption, conflicts and even war. Conversely, human rights violations of other kinds can lead to environmental destruction, for instance, displacement by social strife/war can cause environmental damage in areas of relocation; or breakdown in sustainable common property management.*<sup>13</sup>

Case law in a number of countries furthers this relationship between human rights and environmental rights. For example, the Supreme Court of India has held that right to life, which includes pollution-free water and air for the full enjoyment of life, is fundamental under Article 21 of its Constitution.<sup>14</sup>

International conventions and other legal authorities over the last four decades have reinforced this relationship between the human right to life and the right to a healthy environment. The foundation of International Environmental Law, the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, sets forth as Principle 1: “Man has the fundamental right to freedom, equality

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and tend to be more controversial and less official than first and second generation human rights).

<sup>11</sup> Over 100 nations have adopted or modified their constitutions to include an environmental right and/or a right to a healthy environment in addition to a right to life. KRAVCHENKO & BONINE, *supra* note 5, at 67.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> ASHISH KOTHARI & ANUPRITA PATEL, ENVIRONMENT AND HUMAN RIGHTS: AN INTRODUCTORY ESSAY AND ESSENTIAL READINGS 10 (Nat’l Human Rights Comm’n of India 2006), available at <http://nhrc.nic.in/publications/environment.pdf>.

<sup>14</sup> *Id.* at 16. The National Human Rights Commission of India, which has all the powers and characteristics of a civil court, considers water, sanitation, pollution, health, conservation, afforestation, and other environmental issues as human rights for purposes of its investigations and actions. See, e.g., National Human Rights Commission [of India], *National Human Rights Commission Brochure 2006* (2005–06), available at <http://nhrc.nic.in/Publications/NHRCIndia.pdf>.

and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and bears a solemn responsibility to protect and improve the environment for present and future generations.”<sup>15</sup> Its successor twenty years later, the 1992 Rio Declaration on Environment and Development, states as Principle 1: “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”<sup>16</sup>

These “soft law” declarations were finally solidified into conventional international “hard law” with the 1998 Aarhus Convention, which sets out new standards for human rights in connection with the environment:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.<sup>17</sup>

Aarhus goes far beyond previous law, directing its State parties to develop national procedural and substantive laws and policies to provide the “three pillars” of environmental justice: the right to information, the right to public participation in environmental decision-making, and the right to access to environmental justice.<sup>18</sup> These new “third generation” rights are often seen as in conflict with more traditional “second generation” socioeconomic human rights, including personal property rights, employment, and economic development.<sup>19</sup> The new international law paradigm of “sustainable development” highlights how governments are struggling to balance

<sup>15</sup> Conference on the Human Environment, Stockholm, Swed., June 5–16, 1972, *Report of the United Nations Conference on the Human Environment*, princ. 1, U.N. Doc. A/CONF.48/14/Rev.1 (1973).

<sup>16</sup> Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Report of the United Nations Conference on Environment and Development*, princ. 1, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I) (1993).

<sup>17</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *opened for signature* June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

<sup>18</sup> To date, forty-four states of Eastern and Western Europe and the European Union have become parties to Aarhus; so, its reach is far from global. For the latest status of ratifications, consult <http://www.unece.org/env/pp/ratification.htm>. Other international laws and legal authorities impose Aarhus-like standards on many other countries. Pring & Noé, *supra* note 4, at 28–58.

<sup>19</sup> See KRAVCHENKO & BONINE, *supra* note 5, at 19.

environmental rights with development rights, given the need for economic growth to support a higher and healthier standard of living around the world.<sup>20</sup> The implementation of sustainable development requires coordinating very different sets of values, laws, and expectations, based on the ability to predict both short-term and long-term outcomes. This complicated balancing act has forced judicial decision-makers to become problem solvers, not just legalistic adjudicators.

Specialized ECTs provide one vehicle for fairly and transparently balancing the conflicts between the human rights of environment and development. Today, in their efforts to deal with these increasingly complex environmental/developmental conflicts and to improve access to environmental justice, many nations and subnational jurisdictions have created successful ECTs while others are considering establishing them or reforming the ones they already have.

## II

### INTRODUCTION TO ECTS AND THE ECT STUDY

Specialized courts and adjudicative tribunals are part of a growing trend in many legal areas, with their overarching purpose being “to *qualitatively* improve outcomes for litigants and society.”<sup>21</sup> In the United States alone, there are trial and appellate courts with specific subject-matter jurisdiction for, among other issues: bankruptcy, tax, international trade, federal claims, veteran’s affairs, armed forces, foreign intelligence surveillance, drugs, domestic violence, divorce, family law, juveniles, mental health, and now even a federal vaccine court.

Specialized “environmental” courts and court-like administrative tribunals first appeared almost a century ago. The interviews found that Denmark’s Nature Protection Board, focused on preservation of the natural environment, was created in 1917 and Sweden’s Water Court, focused at first on water rights issues, was created a year later. The 1970s “environmental movement” generated new environmental,

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<sup>20</sup> See WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* 8 (1987); Jonathan C. Carlson, et al., *INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK* ch. 4 (3d ed. forthcoming 2010) (providing excellent material on these issues).

<sup>21</sup> David B. Rottman, *Does Effective Therapeutic Jurisprudence Require Specialized Courts (and Do Specialized Courts Imply Specialist Judges)?*, 37 CT. REV. 22, 22 (2000) (emphasis added).

natural resources, and public health laws around the world, and the Study found that many ECTs were created as part of this reform. The next wave of ECTs came in the 1990s and 2000s, according to the Study findings, prompted in large part by increasingly complex environmental laws and issues, growing court backlogs, and a recognized need for decision makers specifically trained in environmental law. So far the Study has found over 350 ECTs in forty-one countries—on every inhabited continent, in every major type of legal system, and in developed as well as developing and even least developed nations.<sup>22</sup>

Governments create specialized ECTs in response to internal and/or external pressures. These pressures can stem from judges, government environment officials, the bar, NGO advocacy groups, academics, or the media. Generally, a charismatic, credible advocate—often a judge—takes the lead in urging the creation of an ECT. The most frequent reasons mentioned in the literature and the Study interviews are:<sup>23</sup>

- Efficiency: To reduce decisional time.
- Economy: To reduce costs for all concerned with a more efficient handling of cases, aggressive case management, more efficient use of experts, and use of Alternative Dispute Resolution (ADR).
- Expertise: To increase decisional quality with judges who have more expertise and experience with the complex environmental laws, technical/economic questions, and value-laden issues than general jurisdiction judges.
- Uniformity: To increase consistency in the interpretation and application of environmental law across the jurisdiction and discourage forum shopping.
- Access to Justice: To improve access to justice for business, government, public interest NGOs, and civil society generally by having an open and identified forum to handle environmental complaints.
- Case Processing: To improve case processing and reduce backlog of undecided cases in the general court system.

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<sup>22</sup> Interestingly, the United States has resisted creating an environmental court at the national level since the 1970s. See Scott C. Whitney, *The Case for Creating a Special Environmental Court System*, 14 WM. & MARY L. REV. 473 (1973); *infra* note 26 (for more reconsiderations). Nevertheless, ECTs proliferate in the United States, including national environmental tribunals within executive branch agencies like the U.S. Environmental Protection Agency and the Department of the Interior, one state (Vermont), and numerous local-level ECTs (such as New York City and Memphis, Tennessee).

<sup>23</sup> See, e.g., sources cited *infra* notes 35–39.

- **Commitment:** To demonstrate the government's commitment to the protection of the environment, sustainable development, compliance with international treaties and agreements, etc., by creating a visible court symbolic of that commitment.
- **Problem-Solving Approach:** To open up more flexible ways to solve environmental problems as opposed to the traditional adversary process—including ADR, collaborative planning and decision making, hybrid civil-criminal prosecution, creative sentencing and enforcement remedies, court appointed special commissions, and facilitated settlement agreements. The “problem-solving approach” (as opposed to strict legalistic adjudication) can work better in some environmental cases, allowing judges to craft innovative solutions, focus on outcomes rather than outputs, and take account of what is best for whole communities or the environment rather than just individual parties.<sup>24</sup>
- **Public Participation:** To encourage greater public participation and support for the decision-making process through more open standing, use of community expert committees, etc.
- **Public Confidence:** To increase public confidence in the government's environmental and sustainable development efforts by having a transparent, effective, and expert decisional body.
- **Accountability:** To encourage government agencies to be more thorough, fair, and transparent in their decision-making through potential review by an independent ECT.
- **Prevent Marginalization:** To ensure that judicial resources will be dedicated to resolving environmental conflicts and that they will not be marginalized or pushed aside in favor of cases which are less time consuming and less complex.

On the other hand, there are arguments raised against ECTs. While appearing to be a minority view, criticisms include the existence of other fields with legal and factual complexity, resistance to “fragmenting” the judicial system, reluctance to set environmental law apart (“in the closet”), preference for incremental reforms in the general judicial system, concerns about sufficient caseload to warrant a specialty court, added costs, susceptibility to “capture” by special interests, lack of judges with knowledge and training in the subject area, court bias, judges substituting their judgment for that of an

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<sup>24</sup> Rottman, *supra* note 21, at 22, 25–26.

administrative agency or conversely relying too heavily on agency/political positions, among others.<sup>25</sup>

In the 1980s, the U.S. Congress created a Federal Courts Study Committee to examine a variety of issues, including an overall evaluation of specialized courts.<sup>26</sup> The Committee's 1990 Report, *inter alia*, sets out criteria for determining when to create a specialized court, including when:

1. The subject is a focused area of administrative decision-making, which is segregable from other claims;
2. The area has a high volume of cases, whose diversion might alleviate burdens in generalist courts;
3. There is a predominance of scientific or other technical issues requiring special expertise of decision-makers; and
4. Uniformity<sup>27</sup> in agency administration of the program is important.

Even where existing general courts or tribunals are seen as adequate to cope with the volume, complexity, and demands of the cases, some interviewed argued that environmental law has become so complex that specially trained judges are critical to achieving environmental justice.<sup>28</sup> One logical alternative in those jurisdictions that do not meet the generalized criteria is the creation of a "green bench," which allows judicial specialization within the general docket. This choice has been made by a wide variety of jurisdictions, including India, Finland, Kenya, and Thailand.

Interest in ECTs is spreading globally, and a number of jurisdictions are currently considering the creation of an ECT or reforming their existing court structure for more environmental focus. For example, the United Nations Environment Programme (UNEP) Experts Group on Access to Environmental Justice in the Caribbean noted in 2007 that "consensus [has] emerged [in the region] on the need for the establishment of specialized and independent courts or

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<sup>25</sup> These issues were raised in some of the interviews. *See also* Whitney, *supra* note 22 (discussing creating a specialized environmental court system); sources cited *infra* notes 34–38.

<sup>26</sup> *See Report of the Federal Courts Study Committee, reprinted in 22 CONN. L. REV. 733 (1990)* [hereinafter FCSC Report]; *see, e.g.,* Administrative Conference of the United States, *Recommendations of the Administrative Conference of the United States*, <http://www.law.fsu.edu/library/admiu/acus/305919.html> (summarizing its criteria for specialized courts in Florida).

<sup>27</sup> FCSC Report, *supra* note 26, at 6.

<sup>28</sup> *Id.*

specialized environmental divisions of the High Court judicial system.”<sup>29</sup> The same experts group recommended expanding ECTs jurisdiction beyond traditional environmental issues to include “the built environment, indigenous peoples rights, development planning issues and land tenure.”<sup>30</sup> On the opposite side of the world, China has created more than a dozen new environmental courts or benches since 2007.<sup>31</sup> UNEP, in the past, has been a leader in promoting ECTs through recommendations, publications,<sup>32</sup> and judicial training.<sup>33</sup> Jurisdictions as diverse as England, Abu Dhabi, and Hawaii, among others, are currently examining the potential for establishing an ECT.

In-depth comparative analysis of the different existing ECT models and practices would be useful to jurisdictions considering creating an ECT. Unfortunately, no such helpful study existed.<sup>34</sup> Some individual ECTs have been analyzed in depth, including well-known examples like New South Wales (N.S.W), Australia<sup>35</sup> and New

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<sup>29</sup> United Nations Environment Programme [UNEP], Barbados, Dec. 10–11, 2007, *Experts Group on Access to Environmental Justice in the Caribbean SIDS*, ¶ 6, [http://www.pnuma.org/deramb/documentos/Conclusions\\_Workshop\\_Barbados\\_2007.pdf](http://www.pnuma.org/deramb/documentos/Conclusions_Workshop_Barbados_2007.pdf).

<sup>30</sup> *Id.* ¶ 8.

<sup>31</sup> E-mail from Yanmei Lin, Program Officer, China Program, Am. Bar Assoc. Rule of Law Initiative (ABA-ROLI), Beijing, China (Oct. 18, 2009, 08:59 pm MDT) (on file with authors); see Darcey J. Goetz, *China’s Environmental Problems: Is a Specialized Court the Solution?*, 18 PAC. RIM L. & POL’Y J. 155 (2009) (discussing specialized courts in China).

<sup>32</sup> E.g., UNEP, *Manual on Compliance With and Enforcement of Multilateral Environmental Agreements* (2006), particularly guideline 41(o), available at [http://hqweb.unep.org/delc/docs/UNEP\\_Manual.pdf](http://hqweb.unep.org/delc/docs/UNEP_Manual.pdf).

<sup>33</sup> For example, earlier this decade, UNEP Headquarters in Nairobi sponsored a number of relevant programs, publications, and conferences, including training programs in environmental law for judges from Kenya, Uganda, and Tanzania. Following these programs, Kenya implemented three specialized environmental forums and Tanzania passed legislation authorizing an environmental court, which has not yet been implemented. DINAH SHELTON & ALEXANDRE KISS, UNEP, *JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW* (2005), available at [http://www.unep.org/Law/PDF/JUDICIAL\\_HBOOK\\_ENV\\_LAW.pdf](http://www.unep.org/Law/PDF/JUDICIAL_HBOOK_ENV_LAW.pdf).

<sup>34</sup> Literature review done by authors.

<sup>35</sup> E.g., Paul L. Stein, N.S.W. Court of Appeals Judge, Address at the United Kingdom Environmental Law Association Seminar on the Final Report on the Environmental Court Project: Down Under Perspective of the Environmental Court Project (June 27, 2000), available at [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_stein\\_270600](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_270600); Brian J. Preston, Chief Judge, Land and Env’t Court of N.S.W., Keynote Address at LEADR N.S.W. Chapter Annual Dinner: The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse, available at [http://www.lawlink.nsw.gov.au/lawlink/lec/ll Lec.nsf/pages/LEC\\_speeches\\_and\\_papers#preston](http://www.lawlink.nsw.gov.au/lawlink/lec/ll Lec.nsf/pages/LEC_speeches_and_papers#preston).

Zealand.<sup>36</sup> However, those models were not comprehensive displays of all options or necessarily appropriate for all jurisdictions. There have also been studies assessing the desirability of establishing ECTs in particular jurisdictions, such as England,<sup>37</sup> Scotland,<sup>38</sup> and India,<sup>39</sup> which are, again, nationally relevant but limited in transferability.

A “cookie cutter” approach to ECTs is not useful. What is needed is a decision-making framework for ECT creation that can serve a broad range of different legal cultures and political situations.

### III STUDY METHODOLOGY

The University of Denver ECT Study focuses on national and subnational ECTs,<sup>40</sup> defined by the Study as *government, judicial or*

<sup>36</sup> E.g., Bret C. Birdsong, *Adjudicating Sustainability: New Zealand’s Environment Court*, 29 *ECOLOGY L.Q.* 1 (2002).

<sup>37</sup> E.g., Sir Harry Woolf, *Are the Judiciary Environmentally Myopic?*, 4 *OXFORD U. J. ENVTL. L.* 1 (1992); Richard Macrory with Michael Woods, Centre for Law & the Environment, *Modernising Environmental Justice: Regulation and the Role of the Environmental Tribunal* (2003), available at [http://www.ucl.ac.uk/laws/environment/tribunals/docs/full\\_report.pdf](http://www.ucl.ac.uk/laws/environment/tribunals/docs/full_report.pdf).

<sup>38</sup> Scottish Executive Environment Group, *Strengthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland* (Nov. 2006), available at <http://www.scotland.gov.uk/Resource/Doc/155498/0041750.pdf>.

<sup>39</sup> Law Commission of India, *One Hundred Eighty Sixth Report on Proposal to Constitute Environment Courts* (Sept. 2003), available at <http://www.lawcommissionofindia.nic.in/reports/186th%20report.pdf>.

<sup>40</sup> International or multinational ECTs are not a focus of this study since they are presently not a particularly promising terrain. The International Court of Justice established a special chamber to deal with environmental matters in 1993, but it has not been used in the Court’s several important environmental cases and appears to have been abandoned. Philippe Sands, *Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law* at 6–7, paper distributed at the Organization for Economic Co-operation and Development (OECD) Global Forum on International Investment, Mar. 27–28, 2008, available at <http://www.oecd.org/investment/gfi-7>. The Permanent Court of Arbitration, an intergovernmental organization of over 100 member states, has developed a “unified forum” for arbitrating environmental and natural resources disputes. Permanent Court of Arbitration, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1027](http://www.pca-cpa.org/showpage.asp?pag_id=1027); Dane Ratliff, *The PCA Environmental Arbitration and Conciliation Rules* (2003), *TRANSNATIONAL DISPUTE MANAGEMENT*, [http://www.transnational-dispute-management.com/samples/freearicles/tvl-vl-roundup\\_12.htm](http://www.transnational-dispute-management.com/samples/freearicles/tvl-vl-roundup_12.htm). See also International Court of Environmental Arbitration and Conciliation, <http://iceac.sarenet.es>. Canada, Mexico, and the United States have created a Commission for Environmental Cooperation (CEC) under the North American Agreement on Environmental Cooperation (the North American Free Trade Agreement (NAFTA) “Environmental Side-Agreement”), and that international body is authorized to hear citizen submissions on NAFTA governments’ failures to enforce environmental laws, but it has no enforcement powers. CEC, *Citizen Submissions on Enforcement Matters*,

*administrative bodies empowered to hear and resolve environmental, natural resource, land use, and related disputes.* The researchers in this Law and Society-type study are a husband-wife team who bring a multidisciplinary focus to the work: George (Rock) Pring, a professor of environmental, international, and constitutional law and former environmental litigator, and Catherine (Kitty) Pring, a professional mediator, alternative dispute resolution (ADR) expert, institutional systems analyst, and former government human services official.

The findings are based on extensive literature review, observation of ECTs in action, and over 150 in-depth interviews with judicial, legal, and civil society experts from a representative collection of the ECT types in the world.

The ECTs studied represent:

- national, state/provincial, and local jurisdictions;
- all six inhabited continents;
- developed and developing nations from some of the richest to some of the poorest;
- common law, civil, and religious legal systems;
- Christian, Islamic, Hindu, and Buddhist cultures;
- civil, criminal, administrative and combined jurisdiction ECTs;
- stand-alone ECTs as well as “green judges” or “green benches” in general courts;
- purely adjudication to adjudication-mediation to purely mediation models;
- countries with well-developed environmental laws to those with less well-developed laws; and
- the spectrum from problem-solving ECTs to those applying only the rule of law.

ECTs are nothing if not diverse, and many of those are in the process of some change and reform. The Study learned that some jurisdictions are currently investigating the development of an ECT, while other jurisdictions with ECTs are considering eliminating such specialization. The interviews disclosed that some nations with ECTs are analyzing ways to make them effective in dealing with cutting-edge issues, such as climate change, the precautionary principle, and

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<http://www.ccc.org/citizen/index.cfm?varlan=english>. For an example of one of the many articles and calls for the creation of an International Environmental Court, see International Court of the Environment Foundation, <http://www.icef-court.org>.

the Aarhus “three pillars,” and some are not. ECT study everywhere involves a moving target that is dynamic and evolving.

During 2008 and 2009, the Study conducted over 150 face-to-face interviews in twenty-four different countries, representing thirty-three different ECT models. ECT-experienced judges, prosecutors, private attorneys, government officials, NGOs, and academics were interviewed in sessions ranging from forty-five minutes to over five hours. From the research and the interviews, twelve critical “building blocks” or design decisions emerged that the authors have developed as the analytic framework for structuring an ECT and the focus for determining best practices. The complete Study Report, published in both soft cover and electronic mode publication in December 2009, is available free of charge and includes in-depth analysis of existing practices and alternatives, with best practice recommendations within each of the twelve design decisions.

#### IV FRAMEWORK OF DESIGN DECISIONS

Twelve distinct “building blocks” or design decisions for ECTs were identified by the Study. The options or alternatives within each area should be evaluated by any jurisdiction considering creating or reforming an ECT. This section briefly outlines the twelve building blocks (as developed at the time of the *Oregon Review of International Law*’s symposium in February 2009, now updated and somewhat revised in the book). All twelve have an impact on access to environmental justice, but some have considerably more relevance than others to the intersection of human rights and environmental quality (and are discussed in more detail in section V below).

##### *A. Type of Body*

ECTs can be structured in many ways, varying chiefly in independence, competence, jurisdiction, and cost.

##### *1. Specialized Court*

This model is an actual judicial branch court with trained, expert judges. It is independent of the executive and legislative branches of government, has a separately identified budget, and gives judges security of tenure (life, to a specific age, or term of years). Typically, these judges do not hear other types of cases (examples include New South Wales, Australia; New Zealand; Vermont, United States).

## 2. *Specialized Court Chamber*

This is a general judicial court with a specialized chamber of a judge or judges set up within it to hear environmental cases. This “green bench” or chamber may be formally designated or assigned on an ad hoc basis to a judge who volunteers to take environmental cases. Its creation does not require special legislation or a separate budget (e.g., Netherlands, Finland, Thailand, Kenya) and may not require either judicial expertise or interest in environmental law.

## 3. *Tribunal*

This term covers a number of options that are not judicial branch courts but are still specialized government bodies empowered to make binding decisions in environmental cases. Tribunals are usually created by legislation, have approved annual budgets, and may or may not have enforcement powers. Their membership can include a mix of judges, lawyers, and lay persons or, in some cases, all laypersons (Ireland). Tribunal members are generally political appointees and may or may not have tenure following appointment. Tribunals’ independence varies, but there are basically three models:

1. Independent Tribunals: answerable to the head of government and operating outside the executive branch environment agency whose decisions, permits, plans, and actions they are reviewing (Ontario, Canada; New York City, United States);
2. “Captive” Tribunals: housed within the environmental regulating agency (Austria; U.S. Environmental Protection Agency (USEPA) Environmental Appeals Board; Kenya National Environmental Tribunal); and
3. Quasi-independent Tribunals: housed in a different executive branch agency (such as the Attorney General’s Office or the Office of Administrative Law Judges which serve the USEPA at the trial level).

## 4. *Other Specialized Forums*

These include entities such as special commissions appointed by a court to investigate and make recommendations to the court (India), wholly non-judicial bodies relying on mediation and other forms of ADR (Japan, South Korea), and special environmental ombudsmen, with potential standing and funding to mediate and/or represent complainants in court (Kenya, Austria) but not necessarily decision-making or enforcement powers of their own.

### ***B. Legal Jurisdiction***

What laws and issues will the ECT cover? The majority of ECTs deal primarily with environmental laws and issues such as pollution permits, environmental quality, and natural resources development. Some expand beyond these to include endangered species, parks and recreation, health and safety, etc. Some provide an even fuller range of issues, adding land use, sanitation, building codes, noise, transportation, fire regulations, and food safety (New York City, United States). Some deal only with land use laws and not environmental laws (Ireland). Still others may deal with only one issue, such as EIAs (Kenya National Environmental Tribunal).

### ***C. Court Level and Appeals***

ECTs can be created at any level in the adjudication hierarchy: the internal agency level, trial court, intermediate appeals court, and/or supreme court level.

#### ***1. Internal Agency ECT***

An ECT inside the environmental or other regulatory agency can be either of two kinds: the forum that makes the agency's initial decision to issue a permit, enforce a violation, approve a plan, and so on; or a forum to which such initial agency decisions can be appealed (USEPA, for example, has both). Appeals of this first instance ruling typically go to a trial or appeals level court within the judicial branch for a second instance review.

#### ***2. Trial Court Level ECT***

An ECT is most commonly created at the trial level, and can be either of two kinds:

1. **Second-Instance Review:** These hear appeals of agency decisions and rulings. Appeals go to an intermediate appeals court for a final ruling (third instance review) and possibly to another level (such as the supreme or highest court of the jurisdiction).
2. **First-Instance Case:** These are trial-level forums and hear new case filings that are not appeals of agency decisions, such as, one neighbor suing another for pollution, property damage, or noise. Appeals also go to an intermediate appeals court (second-instance review), then possibly on to the highest court (third instance).

### 3. *Appeal Court Level ECT*

In a few instances, an agency decision can be appealed directly to the intermediate appeals court, bypassing the trial court level. This usually occurs only when the agency is viewed as having a very trustworthy, competent, and objective internal adjudication process that is as good as a trial court could provide (USEPA). In at least one jurisdiction (India), new case filings alleging violation of constitutional rights to the environment can actually be made in the highest court without going through lower courts at all!<sup>41</sup>

#### ***D. Geographic Coverage***

Geographic coverage is an important consideration for countries that have large jurisdictions and where travel is difficult. ECTs have responded to this challenge of distance by creating “easy” filing procedures (e.g., standard forms and on-line filing), traveling courts (Brazil; Queensland, Australia), holding hearings at the site of the proposed development (Vermont, United States), and permitting testimony by teleconferencing and video conferencing (New Zealand). A few ECTs, the Study found, define geographic jurisdiction by river basin or indigenous lands.

#### ***E. Case Volume***

The ECT’s caseload is primarily controlled by the choices of legal jurisdiction (*B* above) and court level (*C* above). The Study found volumes ranging from as low as seven cases per year (Trinidad-Tobago)—making it difficult to justify a specialist court—to as high as over 700,000 per year (New York City), requiring hundreds of administrative law judges (ALJs).

#### ***F. Standing***

Standing (who can file or participate in a case) is a critical factor covering a huge spectrum from very open to extremely limited standing, with all ECTs having some limits or mechanisms to prevent “groundless or frivolous” lawsuits. Care must be taken not to exclude important constituencies with a real stake (such as the poor, indigenous peoples, communities, NGOs, etc.) or important societal values (such as endangered species, protection of old growth timber,

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<sup>41</sup> Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 OXFORD U. J. ENVTL. L. 293, 293 n.4 (2007).

climate change, etc.). Interestingly, ECTs with the most open standing (Canada, United States, Australia, India) have had very few problems with groundless and frivolous lawsuits because judges have power to dismiss cases and litigation is expensive. These jurisdictions have found that access to justice is a good safety valve and that suppressing the filing of legitimate grievances can be counterproductive, leading to a loss of public confidence and societal unrest.

### *G. Costs*

The expenses involved in bringing a case to a court or tribunal are one of the greatest barriers of all to access to environmental justice. Cost barriers can include court fees; fees for lawyers, experts, and other professionals; the risk of cost-shifting to the losing side (“loser pays winner” laws); security of costs for injunctions; risks of countersuits; and lost time, salary, and other opportunities. Many countries and ECTs have adopted noteworthy approaches to reduce costs for litigants on both sides and enhance access to justice. These can include reducing or waiving court fees, efficient court and case management systems, procedures not requiring lawyers, government funding for public interest plaintiffs, public environmental prosecutors taking the lead, proponent funding, no cost-shifting, and especially ADR.

### *H. Expert Evidence*

ECTs take many different approaches to assure needed expert testimony. For example, some ECTs:

- Hire their own independent experts using budgeted judicial funds (Ontario, Canada; Japan).
- Rely solely on the expert witnesses presented by the parties—the so-called “battle of the experts” (USEPA; Vermont, United States).
- Rely on experts working for the government agency (New York City, United States).
- Appoint experts (scientists, engineers, etc.) as judges with equal weight given to the opinions of the legal judges on the panel (Sweden has a lawyer and a chemical engineer as judges on one panel).
- Keep lists of volunteer experts in various disciplines in academia, think tanks, consulting firms, etc., on whom the ECT can call (Denmark, Belgium).

- Make parties' experts swear that their duty is to the court and not the parties (although the parties are paying the experts) with the potential punishment of being held in contempt of court (New South Wales, Australia; Queensland, Australia).
- Require parties' experts to focus only on issues of professional disagreement, possibly putting both sides' experts on the witness stand together and having them respond directly to each others' points of disagreement—so-called “hottubbing” (New South Wales, Australia).
- Utilize site visits to see, evaluate, and make informed judgments (Ireland; Brazil; Vermont, United States; China).
- Appoint special commissions of experts to investigate and report their recommendations back to court (India, Philippines).
- Rely completely on the record of the preceding decision-maker or court for expert testimony (Tasmania, Australia; Finland; typical appellate-level ECTs).
- Employ trial *de novo*, that is, re-trying the case with testimony from the same or different experts (Vermont, United States).

### ***I. Enforcement Tools***

An ECT must have effective enforcement powers to ensure justice and compliance. The majority of ECTs in the Study were civil, non-criminal courts and their enforcement tools included settlement conferences, mediation, monetary penalties, interim or preliminary relief, cease and desist orders, community service, new permit conditions, remand back to the agency for reconsideration, and required remediation and closure. ECTs with criminal powers may be able to employ some of these tools as well as prison sentences and fines (even for government officials who are found negligent (Costa Rica)). Criminal enforcement is most effective in cultures where there is a great social stigma attached to a person or corporation accused of crimes (Belgium, Brazil). The size of the fine permitted by law is also an important consideration; if the fine is not large enough to act as a strong deterrent, it is wholly ineffective. Courts with civil, criminal, and administrative powers have the widest range of remedies at their disposal and some of these, the Study found, are now employing creative sentencing approaches (like mandatory environmental education and community service) to ensure effective outcomes.

### *J. Alternative Dispute Resolution*

ADR techniques are the cutting-edge trend in ECTs, particularly in ECTs that define their role as problem-solving (rather than only applying the rule of law like an umpire). Some examples include:

- Mediation (the most widely used technique): Trained, neutral facilitator supports communication and develops acceptable options between the parties (Tasmania, Australia; Vermont, United States; New Zealand; China).
- Restorative Justice (criminal cases): Cooperative sessions involving the victim, perpetrator, and community focus on the harm to the victims and society rather than just penalizing the wrong-doer (New Zealand).
- Ombudsmen (Austria, Kenya, Costa Rica): Individuals or commissions separate from the ECT or the agency can negotiate the interests of the public, monitor outcomes of court orders, and may have standing to represent concerned parties in court.

Jurisdictions more focused on rule of law (Sweden, Finland, Denmark) generally do not use ADR, except for judge-supervised settlement conferences. On the other hand, a few countries (South Korea; Japan) appear to primarily use mediation, not adjudication, in their ECTs.

### *K. Judicial Expertise*

ECT judges range from those with no specialized environmental law training or interest to others with extensive environmental law training, expertise, and commitment who are carefully selected based on their competence and willingness to serve. Some jurisdictions have an insufficient number of cases to justify a specialized judge for the ECT, so they use competent general judges. For the most part, those interviewed felt that judges who were highly trained, experienced, motivated, and served fulltime were clearly preferable.

### *L. Operational Tools*

Many ECTs developed and now employ new operating tools for increasing effectiveness and efficiency, some of which are quite different from the traditional court system.

#### *1. Case Management*

Perhaps the most significant operational innovation in ECTs is the use of rigorous case management. Case management includes a combination of an assigned staff person(s) who is the initial contact

for the litigants and maintains contact with them during the entire adjudication process. It also includes a sophisticated computer data management system that supports the case manager and the litigants (see 2 below). The case manager explains court processes, reviews the case record, may recommend or actually conduct mediation, may have the power to hold directions (scheduling) hearings, assures that parties are notified of all deadlines in advance, monitors filings with the ECT, and may draft decisions for the judge(s). A case manager can even be assigned post-judgment work, such as monitoring compliance with judicial orders. The scope of the case manager's authority depends on the judge and the case manager's training and expertise. Depending on the scope of authority assigned, lawyers or non-lawyers can act as case managers.

## 2. *Information Technology (IT)*

Sophisticated computer data management systems are being developed by ECTs. These systems can track every step in the cases by filing date, type, assigned judge, specific dates and deadlines, time until a final decision, outcome (including sentencing details), court costs, and compliance with court orders. In addition, IT is used to support the video teleconferencing of hearings and off-site expert testimony (New South Wales, Australia), immediate transfer of verbal testimony on the record via a Word document to a judge in another locality (New Zealand), historical analysis of sentencing for violations to establish sentencing guidelines when they are not set by statute, and to evaluate court performance over time. IT can allow filings to be made online and provide websites that give the public access to information about procedures, costs, and decisions.

## 3. *Directions Hearings*

To prevent delay, some ECT judges regularly require direction (scheduling) hearings to establish and monitor firm court filing and hearing deadlines. Directions hearings keep cases moving and prevent both inaction and routine requests for postponement.

## 4. *Traveling Courts*

In order to make the environmental court easily accessible for litigants and the public, and to allow judges to see the physical sites in issue, many courts travel out of the court seat for investigations and hearings.

### 5. *Simplified Rules of Procedure*

A number of courts are streamlining the court process by using simplified rules of procedure. In particular, the rules regarding evidence are being analyzed to improve the quality of the fact record, focus only on the issues in dispute, and save court, litigant, and expert witness time and expense.

### 6. *Reduced Costs*

In an effort to make access to environmental justice more affordable for low-income litigants, local communities, and NGOs, some ECTs have reduced filing fees substantially, made online filing possible, and adopted rules against cost shifting to the losing party.

## V

### ECT CHARACTERISTICS WITH PARTICULAR SIGNIFICANCE FOR HUMAN RIGHTS

Some of the twelve identified “building blocks” have a greater impact than others on protection of human rights to life and a healthy environment and access to environmental justice. The Study finds that the “building blocks” with the most human rights significance are legal jurisdiction, standing, specialized prosecutors, enforcement tools, ADR, case management, and reduced costs (including elimination of the “loser pays winner” doctrine).

#### *A. Legal Jurisdiction*

The more limited the ECT’s jurisdiction, the less it can protect human rights. ECTs that only assess the “correctness” of an EIA or those limited to development planning decisions have the least power to protect the right to a healthy environment for current and future generations. On the other hand, those ECTs whose purview is based on a constitutional right to a healthy environment as well as a right to life have the greatest scope.

#### *B. Standing*

Standing rules vary widely in ECTs and can be a very significant barrier to the public’s access to environmental justice and protection of human rights. Standing not only impacts access to the judicial process, but can impact the parallel Aarhus rights of information and public participation. The stated purpose of standing, in the words of a famous U.S. Supreme Court decision, is to assure a litigant has “such a ‘personal stake in the outcome of the controversy,’ as to ensure that

'the dispute . . . will be presented in an adversary context and in a form . . . capable of judicial resolution.'<sup>42</sup>

Some ECTs' standing rules are much more restrictive than necessary to ensure non-frivolous parties. These rules are particularly exclusionary for NGOs, community groups, indigenous peoples, or others whose lives or livelihoods may be very affected by a proposed development or government action. For example, some ECTs only give standing to those who own real property within a prescribed distance (sometimes a very few meters) of the activity complained of (Ireland). Some only allow standing for those with provable physical or economic impacts on their property or health. Some bar standing for those who did not participate in the administrative proceedings leading up to the lawsuit, regardless of lack of notice or insufficient funding. Sweden, of all places, disqualifies NGOs unless they have been operating for three or more years and have over 2,000 members (only two NGOs in entire country reportedly meet those requirements). Most outrageous of all, Bangladesh allows litigants access to its ECT only after they have filed a complaint with the national environmental agency and that agency has investigated and filed a report approving the lawsuit—even when it is the same agency whose decisions are the subject of the lawsuit!

Excessively strict or illogical standing requirements have a disproportionately exclusionary effect on the poor, who lack funds to participate in agency actions or to challenge standing requirements in court. Such a narrow courthouse door also excludes issues that may be of great importance to those whose right to life is directly threatened by issues such as slum conditions, water and air pollution, hazardous wastes, public health threats, food safety, and energy security.

Countries with a constitutional provision that provides a right to a healthy environment (for example Brazil, Finland, Belgium, Austria, India) have more open standing than countries that rely on individual environmental protection acts, which can be interpreted restrictively by the courts (United States). At one extreme, India allows anyone to complain of a violation of their constitutional right to a healthy environment and to do so without a lawyer merely by sending an email or a note to India's highest court. Thousands take advantage of this ease of access, resulting in an overburdened appellate court

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<sup>42</sup> *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) (citation omitted).

attempting to hear factual cases de novo, a standing approach that leans towards being too open.

Providing standing for environmental NGOs (ENGOs), whose lawyers are familiar with the courts, procedures, and issues, dramatically increases access to justice. However, the historical mission of ENGOs is generally not the protection of the disadvantaged or of human rights, but the protection of the environment. Only fairly recently have some ENGOs, such as the Sierra Club, taken up the cause of “environmental justice,” sustainability, and human rights, in addition to environmental protection. ENGOs all have donor limitations, financial constraints, and staffing limitations that require them to be very selective in choosing cases. As a result, they look to case factors such as establishing an important precedent, making a major impact on the environment, and/or “marketability” (attractiveness for fundraising for the very expensive costs of litigation). Environmental attorneys willing to serve pro bono and law school clinics—especially environmental, indigenous, or human rights clinics—are also major contributors to access to environmental justice, with or without ECTs.

The more open the standing is, the better the access to justice, the more accountable the administrative decision-making process, and the greater the environmental justice outcomes. A recent conference of European judges concluded that “it is very likely that better access to the courts in environmental issues will incite the administration to better prepare its decisions, to more carefully consider its omissions to act, and to better associate individuals and environmental organizations in this process.”<sup>43</sup>

### *C. Specialized Prosecutors*

Jurisdictions with strong specialized environmental prosecutors (Brazil) increase access to justice and the protection of human rights by aggressively pursuing actions that negatively impact communities that are often impoverished and unempowered to represent

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<sup>43</sup> European Commission, Environment Directorate-General, *Summary Report on the Inventory of EU Member States' Measures on Access to Justice in Environmental Matters*, at 22 (Sept. 19, 2007), available at [http://ec.europa.eu/environment/aarhus/study\\_access.htm](http://ec.europa.eu/environment/aarhus/study_access.htm); extracts, including the quotation, can be found in *The Judge in Europe and Community Environment Law Conference: Participants' Documentation* at 15/69 (Oct. 9–10, 2008).

themselves.<sup>44</sup> These legal challenges have no direct cost for the most impacted communities because the prosecutors are government employees. For example, in Brazil, the Study found a state environmental prosecutor's office pursued litigation against the government, challenging its plans to construct a dam that would wipe out the homes and livelihoods of hundreds who lived in and adjacent to the reservoir site. Clearly this type of action forces the court to balance the existing community's rights to housing, employment, and use of private land against the rights to clean water and economic development. In other Brazilian states, prosecutorial actions have been brought against the timber industry and wildlife poachers.

However, environmental prosecutors, while significant, are not a perfect cure for assuring access to justice or protecting the rights of indigenous communities, as Brazil also illustrates. With some of the strongest environmental protection legislation in the world, a huge landmass, and some of the worst environmental problems, the Study found that the prosecutors are hampered by their sizable caseloads, lack of sufficient investigative and monitoring personnel, lack of aggressive local enforcement of verdicts, and lack of sufficient prosecutors and judges to handle all the violations. In addition, as prosecutors said in one Study interview, they are concerned that their aggressive cases discourage the development of NGOs who could bring environmental actions.

#### ***D. Enforcement Tools***

Among all the enforcement tools potentially available to ECTs, perhaps the most important to the protection of both the environment and human rights is the cease and desist order or interim relief to protect the environment or status quo before and during the trial. Not all ECTs have this power, and without it, irreparable damage can be done before the judicial process has run its course. The European Commission concluded that "[i]n any case, an effective system of interim relief must be installed. The procedure has to be easily available. It must be speedy, protect against irreversible damage."<sup>45</sup>

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<sup>44</sup> See Lesley K. McAllister, *MAKING LAW MATTER: ENVIRONMENTAL PROTECTION AND LEGAL INSTITUTIONS IN BRAZIL* (2008) (discussing Brazilian prosecutors who function similarly to public interest lawyers).

<sup>45</sup> Association of European Administrative Judges, *Statement on Access to Administrative Justice in Environmental Matters—A Comment on the Milieu Study Issued by the European Commissions* (Mar. 14, 2008) available at [http://ec.europa.eu/environment/aarhus/pdf/aeai\\_comments.pdf](http://ec.europa.eu/environment/aarhus/pdf/aeai_comments.pdf).

Other powers, such as the ability to add conditions to development permits, the ability to require remediation, and the ability to require evidence of sustainability as a condition of development contribute to ensuring access to justice and protection of the environment for present and future generations. Whatever enforcement tools a court uses, they must be adequate in impact (size of fines, criminal consequences, public embarrassment) to discourage re-offending and new offenders. There must also be effective monitoring for ongoing and future performance, yet most ECTs do not have such power and rely on the environmental agency, the community, or the prosecutor to identify and report failures to follow court orders.

### *E. Alternative Dispute Resolution*

The Study found a majority of ECTs use mediation and other forms of ADR as important mechanisms for problem-solving. ADR allows parties to focus issues and negotiate creative solutions on a “level playing field” where the interests and needs of the less-wealthy and less-powerful can be balanced against the needs of other richer and more powerful parties, including government. This is particularly effective when the court has annexed mediation to the court process so that mediation is conducted by an employee of the court trained in both mediation and environmental law. Mediation can be court-ordered prior to the first hearing or at any time during the proceedings. The mediation process allows the parties to discuss their needs and negotiate outcomes which they believe will best achieve positive outcomes for themselves, the environment, and the larger community. In the spirit of full disclosure and open and honest negotiation experts can be included in the process. Mediated settlements can be incorporated into an enforceable court order and can include a number of agreements that address human rights and future sustainability which might not emerge from a traditional judicial process. Mediation can also save the court time and money, permitting judges to focus on those cases that are not amenable to mediation.

### *F. Case Management*

Cutting-edge ECTs use a variety of case management tools to make the conflict resolution process more efficient and effective. A court or tribunal staff case manager may advise parties, in advance, of filing procedures and other requirements, arrange mediation, calendar directions hearings, set court deadlines to assure a case moves

forward in a timely way, and assure exchange of documents and availability of experts. These functions are key to ensuring that litigants have the information and assistance needed to achieve access to justice. Increasingly, courts are making information about the entire process available to the public through the internet, including how to file, what steps to expect, and whom to contact with complaints or other concerns. Courts are also posting decisions on the internet for the public to follow. These tools enhance full public access to information, participation in the process, understanding of standing requirements and costs, and the transparency of the decision-making process.

### *G. Reduced Costs*

The costs and financial risks of an ECT proceeding can be the biggest element in chilling access to justice and human rights protections. The Aarhus Convention recognizes this, specifically requiring that access to justice not be “prohibitively expensive.”<sup>46</sup> Further, it requires parties to “consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”<sup>47</sup> ECTs around the world have taken major steps to make the process more affordable for all litigants, particularly individuals representing a public (as opposed to private) interest, ENGOs, and communities. Cost reduction efforts include reducing filing fees to minimum or no cost (some courts/tribunals allow filing of a case online or by letter with no fee), placing the burden of proof on the entity proposing development, providing scientific and technical experts who are court-paid or advisory to the court, requiring experts to be accountable to the court rather than the party paying their fees, using ADR mechanisms that are court annexed and can be accessed pro se (without a lawyer), and having access to funds to subsidize the litigation costs of impoverished parties or ENGOs, as well as other techniques described in the Study.

The biggest chill factor the Study found is the rule in some jurisdictions that the loser pays the winner’s full costs (court costs, attorneys fees, expert fees, discovery costs, research studies, etc.), which can be hundreds of thousands of dollars. Britain, Canada, Australia, and many common law countries apply this so-called

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<sup>46</sup> Aarhus Convention, *supra* note 17, art. 9(4).

<sup>47</sup> *Id.* art. 9(5).

“English Rule” that the unsuccessful party pays all of the litigation costs of the winner (“costs follow the event”), regardless of how meritorious the action was. Australian citizen groups, communities, and environmental NGOs are reluctant to bring litigation in the general courts because they apply the English Rule. The Environmental Defense Organization (EDO) in Sydney reports that a community nonprofit lost a legitimate public-interest law-reform case and had to declare bankruptcy to avoid hundreds of thousands of dollars of debt. The “American Rule” is the reverse: U.S. judges have no inherent power to engage in such cost-shifting without special legislation (e.g., penalizing groundless/frivolous litigation). To counteract this chill of bankrupting costs, several Australian ECTs, by rule, make it clear that they do not follow the English Rule, realizing its negative impact on access to justice. Establishing a legal principle that parties each bear their own costs of litigation, absent gross misconduct or groundless-frivolous actions, is perhaps the most important element in promoting access to justice and protecting human rights.

### *H. Other Barriers*

Access to environmental justice encounters other barriers, which some courts have made efforts to eliminate.

#### *1. Physical Access*

Physical distances in a court’s jurisdiction may make access prohibitively expensive and time-consuming and require parties to take time off from work to participate in an environmental challenge. ECTs have responded creatively with traveling courts (literally a courtroom in a van in Brazil), traveling judges, electronic filings, night court, and testimony by phone, video, or teleconferencing. The Study found ECTs making special accommodations for the disabled, for persons with language barriers, and for differing cultural values.

#### *2. Sentencing*

A fair and equitable process requires consistency of sentencing. Based on precedent, some jurisdictions have developed computerized sentencing guidelines.

#### *3. Judicial Training*

Because judicial expertise in environmental law varies in the ECTs studied, some jurisdictions either provide special training in

environmental law to their judges or have a selection process that assures prior training, experience, and interest prior to appointment. One notable example of such commitment to judicial training is the Philippine Judicial Academy (PHILJA).

#### *4. Public Education*

Public awareness of specialty courts requires a substantial public education program. Some ECTs have done commendable work in this fashion outside the courtroom. For a truly dedicated example, the Study found one Brazilian environmental court judge who authors, illustrates, and publishes comic books about his court and distributes them to schools where he personally goes to provide lectures—all paid for by persons or corporations found guilty of violating the law. Other ECTs were found which maintain websites, publish pamphlets, work with ENGOs to produce educational materials, and televise proceedings.

### CONCLUSION

Specialized Environmental Courts and Tribunals can play a very important role at the convergence of environmental law and human rights law. Violations of one often affect the other, and administrative and judicial decisions in environmental law almost always have consequences for human rights beyond the right to a healthy environment. In some jurisdictions, human rights violations are being tried in ECTs, and in others, environmental violations are being resolved in human rights tribunals. The University of Denver ECT Study finds that specialized ECTs can and do enhance access to environmental justice and the protection of human rights. The Study expects to see many more jurisdictions, including more states and cities in the United States, creating independent specialized ECTs to enhance access to environmental justice and sustainable development for current and future generations.

