



Environmental Courts & Tribunals

A Guide for Policy Makers

by George (Rock) Pring & Catherine (Kitty) Pring
Global Environmental Outcomes LLC (GEO) and University of Denver
Environmental Courts & Tribunals Study
For the United Nations Environment Programme





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A Guide for Policy Makers

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Foreword

Sound governance and enforcement of the environmental rule of law are crucial to delivering the 2030 Agenda for Sustainable Development and the Paris Agreement on Climate Change. However, as some countries face judicial backlogs of up to ten years, government reforms increasingly combine the expansion of infrastructure and personnel, with the use of specialised Environment Courts and Tribunals, which vary in both structure and performance. That is why UN Environment Programme commissioned this *ECT Guide* to inform policy makers on the existing situation, the lessons learned and the available options.

The importance of such options for national and international progress is underscored by the creation of a specific 2030 goal to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. This reinforces Principle 10 of the Rio Declaration, which acknowledges that sustainable development can only be achieved through access to effective, transparent, accountable and democratic institutions.

With over 1,200 environmental courts and tribunals now operating worldwide at the national and state/provincial level, this guide shares concise, practical advice and best practices to make them more effective, updating the 2009 “Greening Justice” report by the University of Denver Environmental Courts and Tribunals Study and published by World Resources Institute.

I hope it will be useful to policy makers and judiciary experts in all countries in their quest to deliver the 2030 Agenda, and I thank all of those who contributed their time and case studies.



Ibrahim Thiaw,
United Nations Assistant Secretary General
and Deputy Executive Director,
UN Environment Programme

Executive Summary

Improving the environmental rule of law, access to justice and environmental dispute resolution is essential for achieving the UN's 2030 Agenda for Sustainable Development and the Sustainable Development Goals (SDGs), particularly SDG Goal 16 – “to provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” Specialized **Environmental Courts and Tribunals (ECTs)** are now widely viewed as a successful way to accomplish this important goal.

The objective of this UN Environment guide is to provide the most current, comprehensive, comparative analysis of ECTs available – a synthesis of the experiences, opinions and recommendations of leaders at the forefront of the ECT field. It is designed to be a helpful **“roadmap”** for policy makers, decision makers, and other stakeholders who are exploring how to improve adjudication of environmental and land use disputes, to make them – in the memorable words of Australian court law – “just, quick and cheap.” It presents an easy **reference for those considering creating a new ECT or improving an existing one** – to make it fair, fast, and affordable.

This UN Environment guide is a 2016 update of the University of Denver ECT Study that produced the book *Greening Justice – Creating and Improving Specialized Environmental Courts and Tribunals*, published by the World Resources Institute (WRI) in 2009. This update clearly identifies the necessary goals, steps and standards for an effective ECT.

The **“explosion”** in the number of ECTs since 2000 is astounding. Today, there are over 1,200 ECTs in 44 countries at the national or state/provincial level, with some 20 additional countries discussing or planning ECTs. This continuing explosion is being driven by the development of new international and national environmental laws and principles, by recognition of the linkage between human rights and environmental protection, by the threat of climate change, and by public dissatisfaction with the existing general judicial forums.

A systems analysis of both traditional general courts and existing ECTs has been done to identify the hurdles to effective environmental dispute resolution and environmental justice. An ECT is **different from general courts** because it specializes in environmental cases and has adjudicators trained in environmental law. The decision-making process often

incorporates both lawyers and scientific/technical experts, and relies on alternative dispute resolution, open standing, streamlined case review and sophisticated use of information technology.

There are many different **models of ECTs** around the world, and this UN Environment guide describes the major choices. ECTs can be either courts (judicial branch) or tribunals (executive or ministerial branch), both reflecting the social, economic and environmental characteristics of the host nation. Some are free standing and independent, while others are “captives” inside the agency whose decisions they review. The specific ECTs described – such as the New South Wales, Australia, Land and Environment Court, India’s National Green Tribunal and the Environmental Courts of Kenya – are outstanding examples of each of the models, and employ many of the best practices identified by experts surveyed for this updated publication.

“**Best practices**” are recommended by expert judges, officials, academics, and other stakeholders and they are listed and explained because they enhance access to justice and support international principles of sustainability. Best practice examples include judicial independence, flexibility, use of ADR, comprehensive jurisdiction, open standing, effective remedies and enforcement powers, and unique case management and expert evidence tools. The guide also identifies **recent trends** in ECT development, including amalgamation, incrementalism and judicial reform, trends designed to make courts more open, transparent, accessible, affordable and accountable.

The guide outlines “**the steps**” on the road to ECT creation or improvement, including assessment of the existing judicial system, engaging stakeholders, assessing the need for change, selecting a model and planning the best practices which optimally serve each country’s unique judicial, legal, social, economic and political environment.

To prepare this 2016 update for UN Environment, the authors surveyed and consulted over 50 current ECT judges and other experts in 2015-16, reviewed a wealth of new ECT literature, and extensively updated the University of Denver ECT Study database. The guide includes in Appendices A, B, C and D current lists of known operating ECTs, ones in discussion, those created but never implemented, and the few that were created and disbanded. Perhaps most important is the Appendix E contact list of ECT and Access to Justice Experts, who can help policy makers and others understand more fully the challenges and opportunities in creating an ECT. The authors’ credentials are summarized in Appendix F, and recommended readings are provided in Appendix G.

Background

Reason for this Guide

This UN Environment guide to Specialized Environmental Courts and Tribunals (ECTs) is designed to provide an overview for policy makers, decision makers and other leaders who are interested in improving adjudication of environmental disputes. It identifies ECT features that can enhance the resolution of environmental cases, resulting in better informed decisions that directly support achievement of many of the UN's Post-2015 Sustainable Development Goals (SDG), particularly SDG Goal 16:

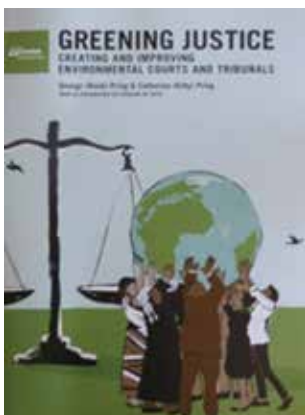
Promote Peaceful and Inclusive Societies For Sustainable Development, Provide Access to Justice for All and Build Effective, Accountable and Inclusive Institutions at All Levels.



- SDG 16,
<http://www.un.org/sustainabledevelopment/>

The guide describes different institutional models, gives examples of best practices in ECTs around the world, and provides a roadmap for those interested in exploring, creating or improving environmental dispute resolution institutions in their country.

The initial research for this book was done in 2007-2009 by the University of Denver Environmental Courts and Tribunals Study (ECT Study), co-directed by George (Rock) Pring and Catherine (Kitty) Pring, the authors of the 2009 book entitled **Greening Justice: Creating and Improving Environmental Courts and Tribunals**. That book was based



on extensive on-site, telephone and email interviews with almost 200 ECT-knowledgeable justices and judges, staff, prosecutors, government officials, private-sector attorneys, environmental non-government organizations (ENGOS), academics and other members of civil society in 24 countries representing 152 ECTs at that time. This “on the ground” research was supplemented with comprehensive literature, internet and media research. **Greening Justice** was published by The Access Initiative (TAI) of the World Resources Institute (WRI) and is the foundation on which this UN Environment guide builds. Since then, the ECT Study has continued to perform research, database development,

publishing, presenting and consulting on ECTs. (See <http://www.law.du.edu/ect-study> for further information and for free downloadable copies of **Greening Justice** and other ECT Study publications.)

UN Environment intends this 2016-updated version of the **Greening Justice** book to serve as a “guide” for policy makers, decision makers and other stakeholders who are considering either creating new ECTs or reviewing, improving, updating and/or amending existing ECTs. To prepare this UN Environment ECT guide, over 50 current ECT judges and experts were consulted and surveyed in 2015-16, the now-voluminous ECT literature of the last 6 years was reviewed, and the ECT Study database was extensively revised to reflect current ECT numbers, structures and best practices as of May 2016.

UN Environment’s objective with this guide is to provide the most comprehensive, comparative, current analysis of ECTs available, with the hope that it provides useful “how-to” information and advice for those involved in ECT building and strengthening. Like the **Greening Justice** book, this UN Environment guide is a synthesis of the expert opinions and experience of leaders in the ECT field, based on their practical and day-to-day experience.

What this publication is about – and what it is not:

1. It is a short, user-friendly guide to the current worldwide status of specialized ECTs and the “models” and “best practices” for creating new ECTs or improving existing ones.
2. It is designed to be a useful road map for policy makers, decision makers and other leaders at the national, state/province and local levels who are exploring ways to improve access to environmental justice, the environmental rule of law and environmental sustainability. In that way, it contributes to SDG 16 on Peace, Justice and Strong Institutions and in particular target 16.3 to promote the rule of law at the national and international levels and ensure equal access to justice for all.
3. It is not an ECT “encyclopedia.” If desired, more detailed information can be obtained by consulting:
 - **Greening Justice: Creating and Improving Environmental Courts and Tribunals** – the 2009 global study of ECTs (downloadable free at www.law.du.edu/ect-study, as are other publications of the University of Denver Environmental Courts and Tribunals Study)

“[T]he true rule of law cannot exist without ecological sustainability and an independent judiciary.”

– Justice Antonio Herman Benjamin, High Court of Brazil,
<http://digitalcommons.pace.edu/pelr/vol29/iss2/8> at 586

- Appendix E in this guide – a list of selected ECT and Access to Justice experts
 - Appendix G in this guide – an up-to-date list of recommended readings and references on ECTs (with internet links to free-access copies provided wherever possible).
4. It is a valuable collection of recommendations for ECT design and operation, based on
- Survey of over 50 ECT experts – judges, officials, lawyers, advocates, and academics – consulted for their practical experiences in late 2015 and early 2016
 - Research for **Greening Justice** and on-going analysis since 2009 by the authors
 - Extensive online, publication and document research.

Each of the experts surveyed and consulted has been given an opportunity to peer review the draft of this publication to maximize accuracy.

5. This UN Environment publication is not “academic” but is written as a practical guide for users. Endnotes are provided, and all links were last visited on August 2016. Experts’ responses to the surveys (email, phone, written) are summarized. Experts are named in the endnotes after their best practices recommendations, but not necessarily all experts who agreed with that statement are named.
6. The list of ECT “best practices” is chosen for their contribution to access to justice, international law principles and the environmental rule of law. Although the authors and experts believe, based on experience, that specialized ECTs incorporating some or all of these best practices do contribute to outcomes that are better for individuals, society and an enduring world, this conclusion is not based on formal research by anyone (yet) to document that ECT outcomes are inevitably better than decisions by generalist courts and tribunals over time. There have been and will continue to be visionary decisions delivered by knowledgeable judges in general courts and forums that meet national and international environmental norms. But such outcomes are seen as exceptions, not the rule.
7. “International ECTs” are not covered by this guide, as multi-nation adjudication presents a very different set of problems, and there are currently no particularly helpful models at that level. The International Court of Justice in The Hague had an Environmental Chamber from 1993-2006, but discontinued it as no state ever used it (<http://www.icj-cij.org/court/index.php?p1=1&p2=4>). The Permanent Court of Arbitration, another IGO in the Hague, has specialized Environmental Rules for arbitration and conciliation and a specialized list of arbitrators and science-technical experts for parties, but is only open to nations which have agreed to use arbitration or conciliation to resolve disputes (<https://pca-cpa.org/en/services/arbitration-services/environmental-dispute-resolution/>). The International Tribunal for the Law of the Sea, an IGO in Hamburg, Germany, can only hear disputes arising under the UN Convention on the Law of the Sea or related maritime agreements (<https://www.itlos.org/the-tribunal/>). Canada, Mexico and the USA have created a Commission for Environmental Compliance that can hear dispute submissions from the 3 parties or citizens under the North American

Free Trade Agreement (NAFTA), but has no enforcement powers (<http://www.cec.org/>). The Court of Justice of the EU (CJEU) in Luxembourg hears cases interpreting EU law and ensuring its equal application across all 28 EU member states; it has some informal judicial specialization in environmental law, but has not institutionalized it. There is also a decades-long movement to create an International Environmental Court (<http://www.policyinnovations.org/ideas/innovations/data/000240>), but that and other multi-national environmental adjudication bodies have not received significant support from states.

In every nation, challenges exist to achieving the UN's new 2015-2030 Agenda for Sustainable Development, through the agreed SDGs and the Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) that were adopted by the UN Environment Governing Council. The challenges in the judicial branch of government can include:

1. Judges who do not understand or have not been trained in international and national environmental laws, who do not have the expertise to make decisions based on analysis of constantly changing, complex, uncertain scientific and technical information, who may prefer not to be accountable for balancing the social, economic and environmental impacts of a proposed development, or who may not be able to make truly just and fair decisions
2. General court dockets that are overwhelmed by a large number of other cases resulting in lengthy delays and a denial of justice
3. High costs for litigants in court fees, attorney fees, expert witness fees, security bonds and appeals
4. Inability to prioritize cases that impact the environment
5. Insufficient remedies to resolve the environmental issues
6. A win-lose approach to decision-making versus a win-win, problem-solving approach that can promote long-range sustainability

JUDICIAL PROBLEMS IN SUPPORTING SUSTAINABILITY

1. Knowledge of IEL and EL
2. Docket delay
3. High costs
4. Prioritization of E cases
5. Insufficient remedies
6. Traditional win-lose approach
7. Inflexible rules



7. Lack of flexibility in court rules and procedures that make it impossible to respond to international environmental laws and standards, to provide alternative dispute resolution options, to encourage public participation in the process of decision making, to ensure public access to information, or to be transparent and accountable to the public.

Specifically, ECTs can be designed to:

- promote the environmental rule of law at the national level and international levels and ensure equal access to justice (SDG target 16.3)
- develop more effective, accountable and transparent institutions at all levels (SDG target 16.6)
- ensure responsive, inclusive, participatory and representative decision-making at all levels (SDG target 16.7)
- ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements (SDG target 16.10) and
- especially promote and enforce non-discriminatory laws and policies for sustainable development (SDG target 16.b).

Many experts believe that national and subnational ECTs using best practices can contribute strongly to the SDGs' achievement and that this book is a firm step in that direction.

Acknowledgements

This guide for policy makers, decision makers and other leaders – who are considering creating new specialized Environmental Courts and Tribunals (ECTs) or improving existing ones – was completed with contributions made by many experts. UN Environment wishes to particularly acknowledge and thank abundantly:

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Martin J. Katz, former Dean of the University of Denver Sturm College of Law, and DU faculty, staff and students for their continued support and enthusiasm for the DU ECT Study since its inception in 2007.

A huge vote of thanks goes out to the over 50 ECT and Access to Justice experts who contributed their wisdom and advice to this publication – justices, judges, court staff, government officials, attorneys, advocates and academics. Their responses to the 2015-16 ECT Study survey on best practices makes this a truly valuable and practical ECT guide. Many of the experts are specifically named in the endnotes in this book's discussion of each best practice. In addition, many are listed in a helpful "Contact List of ECT and Access to Justice Experts" in Appendix E, with names, positions, mail and email addresses, updated to the time of this publication.

The experts who provided valuable input to this book are (in alpha order): Judge Titular Dr. Adalberto Carim Antonio, Brazil; Judge Antonio Herman Benjamin, Brazil; PhD Researcher Jean-Christophe Beyers, Belgium; Emeritus Professor Ben Boer, Australia; Professor John Bonine, USA; UN Environment Regional Legal Officer Andrea Brusco, Panama; Registrar Jarrod Bryan, Australia; Professor Jan Darpö, Sweden; Professor Kurt Deketelaere, Belgium; Alternate Executive Chair Jerry V. DeMarco, Canada; Judge Thomas S. Durkin, USA;

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Abbreviations

ABNE	An ECT that has been authorized but not established
ACPECT	Australasian Conference of Planning and Environment Courts and Tribunals
ADB	Asian Development Bank
ADR	Alternative Dispute Resolution (also called FDR)
AJNE	Asian Judges Network on Environment
CJEU	Court of Justice of the EU, European Court of Justice
CNDH	Comisión Nacional de los Derecho Humanos (National Commission of Human Rights) of Mexico
CSECs	Local-level Consultation Services for Environmental Complaints in Japan
DU	University of Denver
EAB	The Environmental Appeals Board of the US Environmental Protection Agency
EC	Environmental Court (in the judicial branch of government)
ECB	Environmental Control Board of New York City
ECTs	Environmental Courts and Tribunals
ECT Study	University of Denver Environmental Courts and Tribunals Study
EDCC	Environmental Dispute Coordination Commission of Japan
EDI	Environmental Democracy Index
EIA	Environmental Impact Assessment
ELTO	Environment and Land Tribunals Ontario, Canada
ENGO	Environmental non-government organization
EPI	Environmental Performance Index
ERT	Environmental Review Tribunal of Ontario, Canada
ET	Environmental Tribunal (in the administrative or ministerial branch of government)
EU	European Union
EUFJE	European Union Forum of Judges for the Environment
FAQs	Frequently Asked Questions
FDR	Facilitated Dispute Resolution (also called ADR)
GEO	Global Environmental Outcomes LLC

ENVIRONMENTAL COURTS & TRIBUNALS:

A Guide for Policy Makers

HRC	Human rights commission
IAALS	The University of Denver's Institute for the Advancement of the American Legal System
IEL	International environmental law
IFIs	International financial institutions (like the World Bank or Asian Development Bank)
IGOs	International governmental organizations (like UNEP)
INECE	International Network for Environmental Compliance and Enforcement
IT	Information technology (the application of computers and telecommunications equipment to store, retrieve, transmit, share and manipulate data)
LEC	The Land and Environment Court of the State of New South Wales, Australia
MEA	Multilateral environmental agreement
NGO	Non-governmental organization
NGT	National Green Tribunal of India
NRD	Natural resources damages
NSW	The State of New South Wales, Australia
OATH	Office of Administrative Trials and Hearings of New York City
OGI	Open Government Index
PEC	Planning and Environment Court of the State of Queensland, Australia
PIL	Public interest litigation
PPECs	Regional-level Prefecture Pollution Examination Commissions of Japan
SDGs	Sustainable Development Goals
SLAPPs	"Strategic Lawsuits Against Public Participation" in decision-making
TAI	The Access Initiative of the World Resources Institute
UN	United Nations
UNEP	United Nations Environment Programme
US, USA	United States, United States of America
USEPA	US Environmental Protection Agency
WJP	World Justice Project
WRI	World Resources Institute

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The Rule of Law lies at the core of a just administration of justice and is a prerequisite of peaceful societies, in which environmental obligations, equality before the law and the adherence to the principles of fairness and accountability are respected by all. Law coupled with strong institutions is essential for societies to respond to environmental pressures and crucial for the international community to address the environmental challenges of our time.

- Elizabeth Mrema, Director, Law Division at the UN Environment¹

Through adequate, publicly promulgated environmental legislation, fairly enforced and independently adjudicated, the environmental rule of law reduces corruption, ensures accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, respect for human rights and delivers environmental justice.

- UN Environment Assembly of the UN Environment Programme²

The mouth of the Hokianga Harbour, in northern New Zealand, involved a case before the Environment Court over a proposal for an indigenous school for the Maoris.



1.0 Specialized Environmental Courts and Tribunals: The Transformation of Environmental Adjudication

1.1 The On-Going “Explosion” of ECTs

A world-wide “explosion” of specialized courts and tribunals for adjudicating environmental lawsuits is dramatically changing the playing field for environmental justice around the world. The fast global spread of these ECTs is one of the most dramatic changes in environmental law and institutions in the 21st century.

“Environmental conflicts require quick action or response, which is incompatible with the slow pace of the court system that, due to its bureaucracy and technical rituals, eventually becomes an obstacle to effective protection of the environment and to economic progress.”

– Justice Antonio Herman Benjamin, High Court of Brazil,
<http://digitalcommons.pace.edu/pelr/vol29/iss2/8> at 584

In the 1970s, only a handful of these specialized environmental courts and tribunals (ECTs) existed – primarily in Europe. In 2009, when the first global study of ECTs was done, 350 ECTs could be documented. Today, a mere 7 years later, there are *over 1,200 ECTs in at least 44 countries*, at the national and state/province levels, including local/municipal ones that are part of a national or state/province ECT system (listed in Appendix A). This does not count the great number of “stand-alone” ECTs at the local/municipal levels, which are not included in this study – such as, for example, at least 4 county/city ECs in the USA State of Tennessee alone.

ECTs are being planned or discussed in another 20 countries (Appendix B), and 15 more nations have authorized but not yet established them (Appendix C), while 7 nations have operated then chosen to discontinue them (Appendix D). These new specialized adjudication bodies are rapidly changing not only traditional judicial and administrative structures, but the very manner in which environmental disputes are resolved.

Calls for improved access to environmental justice, the environmental rule of law, sustainable development, a green economy and climate justice are being heard around the world. In response, policy makers, decision makers and other stakeholders – legislators, judges, administrative officials, business and civil society leaders – are responding by taking a hard

look at their governance institutions and are creating new judicial and administrative bodies to improve access to justice and environmental governance. ECTs are increasingly being looked to as the logical solution to the existing barriers in traditional justice systems.

In the words of Justice Brian Preston, Chief Judge of the Land and Environment Court of the State of New South Wales, Australia, the first EC established as a superior court of record in the world:

“The judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations. ... Increasingly, it is being recognized that a court with special expertise in environmental matters is best placed to play this role in the achievement of ecologically sustainable development.”³

Questions immediately arise:

- What is behind this ECT explosion?
- How are ECTs different from existing courts and tribunals of general jurisdiction?
- How can they improve access rights, environmental justice and the rule of law?
- What different “models” have evolved over the last two decades?
- What “best practices” make them more effective than traditional courts?
- What are the “next steps on the road” to creating an effective ECT?

This guide answers these questions for policy makers, decision makers and other stakeholders. It provides answers from ECT experts and an extensive list of additional resources for those interested in learning more about the ECT phenomena.

1.2 Roots of the ECT Explosion

“Drivers of environmental change are growing, evolving and combining at such an accelerating pace, at such a large scale and with such widespread reach that they are exerting unprecedented pressure on the environment.”

- UNEP, Global Environment Outlook-5 ⁴

The 1970s was a time of growing public awareness and concern about environmental quality, human health and the natural world, and this led to increased public advocacy for more effective actions by governments. In response, international organizations and many nations rapidly developed a body of environmental standards, laws, regulations, policies and institutions. In addition, environmental NGOs including the Sierra Club, Greenpeace,

International Union for the Conservation of Nature, World Wildlife Fund and many others emerged urging governments to be environmentally proactive. The spread of information technology (IT), such as the internet and social media, increased people's knowledge, concern and communication about environmental problems locally, nationally and internationally, and IT continues to fuel society's demands for accountable and effective environmental action.

1.2.1 New International Standards

International environmental law (IEL) also strengthened in the 1970s and began influencing countries' domestic environmental law and institutions. The pioneering 1972 Stockholm Declaration, while non-binding, laid the foundations for modern IEL. The UN Environment Programme (UNEP) was created that same year, as the leading global environmental authority and further re-confirmed as such in 2012 by the "Future We Want" document.

1992 RIO DECLARATION PRINCIPLE 10

"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 ... 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 justice and administrative proceedings, including redress and remedy, shall be provided.**" (Emphasis added.)

<http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>

This was followed by such significant international environmental law instruments as the 1982 World Charter for Nature, the 1992 Rio Declaration on Environment and Development, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, and UN Environment's 2010 Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (Bali Guidelines) among others. These international environmental law instruments provided international standards of best practice for countries' environmental governance and gave rise to the 3 environmental "Access Rights" – people's rights of **access to information**, **access to public participation** and **access to justice** in environmental matters – now considered the "3 Pillars" of the environmental rule of law.⁵ UN Environment's and other authorities' development of international standards for environmental access rights has had a profound effect on countries' national law development, for many reasons:

Access rights are central to more representative, equitable, and effective environmental decision-making. Access to information empowers and motivates people to participate in a meaningful and informed manner. Access to participation in decision-making enhances the ability of a government to be responsive to public concerns and demands, to build consensus, and to improve acceptance and compliance with environmental decisions. Access to justice allows people to hold government agencies, companies and individuals accountable.⁶

The third “pillar” of access rights – *access to justice* – as articulated in Principle 10 of the Rio Declaration and refined in the Bali Guidelines is now seen as the primary driver of new ECTs. Current steps by national governments to create a Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters for Latin American and the Caribbean and similar movements in other regions are occurring as a result.

1.2.2 Other International Environmental Law Developments and UN Environment Leadership

By 2015, UN Environment’s Law Division notes more than 500 multilateral environmental agreements (MEAs) have been adopted, many negotiated with leadership and support of UN Environment.⁷ UN Environment-sponsored intergovernmental environmental conferences such as the 2010 Special Session of the UN Environment Governing Council/ Global Ministerial Environment Forum that was held in Bali Indonesia, the United Nations Sustainable Development Conference (Rio+20), the Montevideo Programme for the Development and Implementation of Environmental Law, and the United Nations Environment Assembly have further developed environmental standards for access rights, rule of law and sustainable development. Each of these conferences and MEAs in turn drives new implementing national laws, programs and enforcement tools, paving the way for ECTs.



For example, on the sidelines of the 2012 UN Rio+20 Conference,⁸ over 250 of the world’s Chief Justices, Judges, Attorneys General, Auditors General, Chief Prosecutors, and other high-ranking jurists “seized a generational opportunity” to contribute to the development of environmental law, sustainability and access rights by adopting the “Rio+20 Declaration

on Justice, Governance and Law for Environmental Sustainability.”⁹ That declaration emphasized the role of courts and tribunals in protecting the environment – including for the first time in such an authoritative forum a call for ECTs:

Environmental sustainability can only be achieved in the context of fair, effective and transparent national governance arrangements and the rule of law predicated on:

(b) public participation in decision-making, and access to justice and information, in accordance with Principle 10 of the Rio Declaration, including exploring the potential value of borrowing provisions from the Aarhus Convention in this regard;

(e) accessible, fair, impartial, timely, and responsive dispute resolution mechanisms, *including developing specialized expertise in environmental adjudication*, and innovative environmental procedures and remedies;

(f) recognition of the relationship between human rights and the environment; and

(g) specific criteria for the interpretation of environmental law.¹⁰

Multinational environmental lawmakers and courts, such as the EU and the Court of Justice of the EU (CJEU), have also had an impact on member nations’ enforcement of the environmental rule of law and access to environmental justice. EU and CJEU enforcement actions, particularly regarding application of the Aarhus principles, have improved access to justice in Sweden, England and Ireland, among other EU nations.¹¹

Two very significant 2015 international commitments will certainly give rise to environmental disputes needing the kind of expertise specialized ECTs can provide – the UN’s 2030 Agenda for Sustainable Development¹² and the 2016 Paris Agreement on Climate Change.¹³ Both of these initiatives contain commitments, goals and targets for environmental concerns that are already contentious, and lawsuits can be expected as new national laws, decisions and actions respond (or do not respond) to these initiatives. A number of the 2030 Sustainable Development Goals and Climate Change issues have already found their way into the courts, including ECTs, and the need for expert handling of these issues can be expected to encourage the creation and improvement of ECTs.

1.2.3 Human Rights

International recognition of the interdependence of human rights and environmental rights also has had a profound impact on environmental law in general and ECT development in particular.¹⁴ UN Environment describes the relationship as follows:

Human rights and the environment are inherently interdependent and play an integral role in achieving sustainable development objectives. ... Efforts to promote environmental sustainability can only be effective if they occur in the context of conducive legal frameworks, and are greatly informed by the exercise of certain human rights, such as rights to information, public participation in decision-making and access to justice. ... A significant number of court cases, national constitutions and legislation and international instruments have acknowledged the close linkages between these fields. ...¹⁵

As Justice Winston Anderson of the Caribbean Court of Justice has noted, “*Without environmental integrity any reference to human rights is largely illusory.*”¹⁶



The human right to a clean and healthy environment began with the recognition in the 1948 UN Declaration of Human Rights that “Everyone has the right to life,” which became binding treaty law with the 1966 International Covenant on Civil and Political Rights.¹⁷ That has evolved – with the 1972 Stockholm Principle 1, 1992 Rio Principle 1, the 1998 Aarhus Convention, and subsequent hard and soft international environmental legal instruments – into emerging recognition of

humans being at the center of sustainable development in particular in relation to a “right to a clean and healthy environment.”¹⁸ The body of international environmental instruments relating to human rights and the environment is a potent driver of efforts to enhance access to environmental justice at the international and domestic law levels.

1.2.4 Climate Lawsuits

Climate change, even before the 2016 Paris Climate Change Agreement, is also increasingly resulting in litigation and far-reaching judicial decisions.¹⁹ The 2015 landmark climate change decisions of Justice Syed Mansoor Ali Shaw in Pakistan’s *Ashgar Leghari* case²⁰ and the Netherlands’ *Urgenda Foundation* case²¹ can be expected to add fuel to that fire globally.



1.2.5 Emerging IEL Principles

Very important for the development of ECTs, beyond enforceable international environmental law, is the growing body of international environmental law principles – these are the international precepts that are emerging as guidelines in treaties, decisions and scholarship but may not yet be viewed as enforceable “hard law.” UN Environment’s *Training Manual on International Environmental Law* lists them as follows:

1. Sustainable Development, Integration and Interdependence
2. Inter-Generational and Intra-Generational Equity
3. Responsibility for Transboundary Harm
4. Transparency, Public Participation and Access to Information and Remedies
5. Cooperation, and Common but Differentiated Responsibilities
6. Precaution
7. Prevention
8. “Polluter Pays Principle”
9. Access and Benefit Sharing regarding Natural Resources
10. Common Heritage and Common Concern of Humankind
11. Good Governance.²²

Lord Carnwath, Justice of the Supreme Court of the United Kingdom (UK), remarked in 2012:

“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.”

<http://www.theguardian.com/law/2012/jun/22/judges-environment-lord-carnwath-rio>

1.2.6 International Finance

International financial institutions (IFIs) – including the World Bank, the Asian Development Bank (ADB) and others – are now requiring countries seeking financial aid to have effective institutions to resolve development disputes. Applicants for IFI funding must demonstrate a conflict-resolution system characterized by the rule of law, which is competent to apply both international and national laws. These same IFIs are making substantial financial investments in capacity building and collaborate in supporting the development of ECTs. For example, ADB has been a leader in the Asia region in bringing judges, government officials and advocates together to explore the viability of ECTs at the regional and national level,²³ as have UN Environment and the World Bank.

1.2.7 National Roots of the ECT Explosion

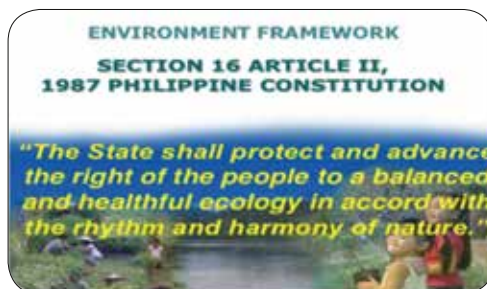
The tremendous international response to growing environmental degradation and the impacts of climate change, plus the understanding and acknowledgement that development must be sustainable if future generations and the earth as we know it are to survive, has been paralleled by the development of complex national, regional and local environmental laws and institutions.

(1) National Constitutions

Constitutions, a nation's foundational law, are also being reformed environmentally, becoming "greened" by international environmental law.

Given that constitutional provisions are among the most basic political structures of any society, the greening of the constitution is a potentially powerful mechanism for any transition away from unsustainability. Hence any change in the constitution in a green or sustainable direction could signal a profound shift in the political order.²⁴

Since Principle 1 of the 1992 Rio Declaration recognized that human beings "are entitled to a healthy and productive life in harmony with nature," provisions recognizing this "right to life," "right to a healthy environment" and similar guarantees have become imbedded in the constitutions of at least 108 countries.²⁵



New evidence from across the globe demonstrates that constitutional environmental rights and responsibilities are a catalyst for stronger environmental laws, better enforcement of those laws and enhanced public participation in environmental governance. Most importantly, there is a strong positive correlation between superior environmental performance and constitutional provisions requiring environmental protection.²⁶

Not surprisingly, these international environmental law inspired constitutional provisions are being raised in litigation and becoming another pressure for development of ECTs. For example, India's National Green Tribunal (NGT) Act of 2010 notes that part of the reason for establishing an ET is that the right to a healthy environment has been construed to be a part of the right to life under article 21 of their Constitution.²⁷ Kenya has gone a step further becoming the first country ever to authorize ECTs in its Constitution.²⁸ Visionary decisions have already been based on these constitutional rights in a number of courts, including

ECTs in Ontario, India and Kenya, and notably Brazil's High Court (a general appellate court, not an EC) under the leadership of Justice Antonio Herman Benjamin.

(2) National Laws

The impact of international legal instruments is not limited to constitutions. With increasing frequency, national (and even subnational) ECT legislation is formulated in response to international environmental law. For example, India's National Green Tribunal Act states it is implementing the country's obligations as a party to the 1972 Stockholm and 1992 Rio Declarations "to provide effective access to judicial and administrative proceedings."²⁹

Today, judges interpreting environmental law at all levels are faced with an increasingly complex legal system, one in which international environmental laws, emerging international environmental principles and new international standards and best practices overlie an already complicated framework of domestic environmental and land use laws. When one adds to the judges' challenges the necessity of evaluating complex and rapidly changing scientific and technical evidence, predicting future impacts and balancing the conflicting economic, social and environmental demands of sustainable development, it is no wonder that there is a widespread movement toward the specialized expertise found in ECTs.

1.2.8 Civil Society

Civil society is also a major political driver for creating ECTs. As those whose lives, livelihoods and life styles are on the line, the public has a vested interest in how environment, health and land use decisions are made, and whether or not those crucial decisions are fair, effective and enforced. People's dissatisfaction with the traditional general court system in many countries – based on public perceptions of delay, bias, inadequate expertise, lack of political independence, high litigation costs and/or corruption – is a major reason for civil society's push for a new court system.³⁰ In the simple, but trenchant words of Australian court law, people want a court that is "just, quick and cheap."³¹

STATE OF NEW SOUTH WALES, AUSTRALIA, CIVIL PROCEDURE ACT § 56(1)

"The overriding purpose of this Act...is to facilitate the just, quick and cheap resolution of the real issues in the [lawsuit]" (emphasis added).

The public demand for environmental justice that is "just, quick and cheap" is pushing policy makers, decision makers and other stakeholders to examine conflict-resolution institutions and evaluate whether or not they have the capacity to deliver on those 3 legitimate expectations. All too often, stakeholders conclude that the traditional justice system provides limited access to information (despite Freedom of Information Acts), few opportunities for public participation or access to justice, substantial delays in deciding a

case, huge costs for litigants in time and money, and ultimately delivers decisions that fail to protect lives, the environment or sustainable development.

Support for ECTs comes from quarters that may surprise expectations. Even the *corporate business community* feels the “pinch” of access to justice. Business interests were a major supporter for creating the new ECs in Chile and in other countries. Demands for balance, fairness, speed, efficiency, and justice come from all elements of society and all types of litigants.

Not only are people finding that many general courts and tribunals fail to meet their expectations, but adjudicators are finding that the complexity of the rapidly growing body of environmental laws and the necessity of weighing very complicated scientific evidence quickly is impossible. Faced with overloaded dockets, lack of environmental judicial knowledge, insufficient staff, and demands for environmental justice, many justices and judges have become advocates for specialized environmental forums. These include outstanding jurists in India, the Philippines, Thailand and Argentina. Fair, fast and economical processes are in everyone’s best interest.

Lake Hayes in the Queenstown-Lakes District on the South Island of New Zealand, has been the subject of litigation before the Environment Court, concerning protection of outstanding landscapes.



2.0 What is an ECT?

2.1 Characteristics of ECTs

“The judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations. ... Increasingly, it is being recognized that a court with special expertise in environmental matters is best placed to play this role in the achievement of ecologically sustainable development.”³²

ECTs are now found on every inhabited continent, in large countries and small, under democratic and non-democratic regimes and in rich developed nations and the poorest least developed nations alike. They are found in common law, civil law, Asian law and mixed law legal systems; in Christian, Muslim, Hindu, Buddhist and other religious societies. They are also found in countries with highly developed environmental laws and those with weak or inadequately enforced ones, and at all government levels, including national, state/province and local/municipal. Geographically and politically, ECTs now cover an astonishing percent of the people and land surface of the world.

As mentioned, local/municipal ECTs – of which there are a great many – have not been included in this guide’s list of existing ECTs, only those serving at the national or state/province level or serving as part of such a system (with the exception of New York City’s “stand alone” ET, as explained later). Internationally, there are no true, comprehensive-jurisdiction ECTs at the multinational level, although a few international bodies handle environmental disputes, such as the International Court of Justice, the Tribunal for the Law of the Sea and the European Court of Justice. These international bodies have not been included in this study because their jurisdictions and enforcement powers are limited and not a model for ECTs.

A SAMPLE OF THE DIVERSE NATIONS WITH ECTS:

- Australia
- Bangladesh
- Brazil
- Canada
- Chile
- China
- Costa Rica
- El Salvador
- England
- India
- Japan
- Kenya
- Malawi
- New Zealand
- Pakistan
- Philippines
- Samoa
- Sweden
- Thailand
- Trinidad & Tobago
- USA

The ECT models analyzed are as different as the countries creating them, and different from the general courts in their countries. **Environmental courts (ECs)** range from fully developed, independent judicial branch bodies with highly trained staffs and large budgets all the way to simple, underfunded village ECs that handle environmental cases one day a month with rotating judges. **Environmental tribunals (ETs)** range from complex administrative-branch bodies chaired by ex-Supreme Court justices, with law judges and science-economics-engineering PhDs, to local community land use planning boards with no law judges. Some handle hundreds or thousands of cases a year (New York City's ET processed over 600,000 cases in FY 2015, and China's 456 ECs decided 233,201 cases in the last 2 years!), yet others decide as few as 3 or 4 cases a year. Some have very comprehensive powers – including civil, criminal and administrative law powers combined – while others have only 1 or 2 of those. Some have jurisdiction over the country's full range of both environmental and land use planning/development laws, while others are limited to one without the other, while still others have jurisdiction only over only one limited type of case, such as the adequacy of environmental impact assessments (EIAs). However, the trend is to expand ECT jurisdictions to be more comprehensive and inclusive, so that issues can be addressed in an integrated fashion.

In fairness, creation of an ECT may not be the ideal solution to improve environmental justice and the rule of law when they are found lacking. There are advocates both for and against specialization. Specialized courts and tribunals have existed for many years (e.g. family, traffic, tax, drugs, bankruptcy, etc.). However, specialized environmental ones have gained widespread international attention only in the last decade or two. Here is a summary of the major arguments for and against.

2.2 Positive Features

Proponents of ECTs cite the following “pro” arguments in favor of specialized environmental adjudication bodies:³³

1. Expertise: Expert decision makers make better decisions.
2. Efficiency: Greater efficiency, including quicker decisions.
3. Visibility: Shows visible government support for the environment and sustainability and provides an easily identifiable forum for the public.
4. Cost: Can lower expenses for litigants and the courts.

5. Uniformity: Greater uniformity in decisions, so litigants know what to expect..
6. Standing: Can adopt rules that expand standing, for individuals, environmental related NGOs and public interest litigation (PIL). (China has recently adopted legislation expanding standing for environment NGOs and public interest litigators in their ECs, as have other nations.)
7. Commitment: Effectuates government's commitment to the environment and sustainability.
8. Accountability: Greater government accountability to the public.
9. Prioritization: Ability to prioritize and move on cases that are urgent.
10. Creativity: Can adopt rules allowing for innovative and flexible procedures and remedies.
11. Alternative Dispute Resolution: Broadens ability to use ADR and other non-adversarial dispute resolving processes, including restorative justice, to provide win-win enforceable agreements.
12. Issue Integration: Can deal in a more integrated way with multiple laws, particularly if the ECT has civil, criminal and administrative jurisdiction.
13. Remedy Integration: Can combine civil, criminal and administrative remedies and enforcement under one roof.
14. Public Participation: Involvement of the public can be increased, reinforcing one of the critical access pillars to justice.
15. Public Confidence: The public's confidence in the government and the judicial system can be increased, so that members of society are more likely to bring concerns to the system.
16. Problem Solving: Judges can look beyond narrow application of rule of law ("right-wrong") and craft creative new solutions.
17. Judicial Activism: Can apply new international principles of environmental law and natural justice as well as national/local law.
18. Investigation: May be authorized to undertake investigations of environmental problems on its own initiative without a case being brought.

Specialization does not, by itself, guarantee any of these potential positive characteristics will automatically occur. However, ECT architects can include special design features to ensure some or all of these features – features which are not typical of and may not be possible in the traditional judicial institutions.

2.3 Potential Drawbacks

Opponents of specialization in general and ECTs in particular raise the following “con” arguments in support of maintaining a non-specialized, general court approach to environmental dispute resolution:³⁴

1. **Competing Needs:** There are other areas of the law that arguably need specialization as much or more.
2. **Marginalization:** Takes environmental cases out of the mainstream and may mean less attention, less qualified judges, less budget, and limited opportunities for judicial advancement.
3. **Fragmentation:** This fragments the legal system and isolates important environmental issues and judges.
4. **Internal Reform:** It’s better to reform within the existing general court system.
5. **Insufficient Caseload:** Not enough environmental cases to justify an ECT.
6. **Cost:** The cost of creating a new institution isn’t worth it.
7. **Confusion:** Potential public confusion about what is defined as an environmental case and determining in which of several forums to lodge a complaint.
8. **What’s “Environmental”?:** Difficulty in defining what is an “environmental” case and how to handle cases with both environmental and non-environmental issues.
9. **Capture:** Special interests will be able to more easily influence and control a small ECT outside the general court system.
10. **Generalist Judges:** Some feel generalist judges with a broad perspective and experience will focus on the forest not the individual trees and decide cases better than “specialists.”
11. **Judicial Bias:** Specialist judges may be advocates and biased in favor of environmental protection, not balanced and comprehensive in their analysis.
12. **Judicial Activism:** An ECT will encourage the judges to overstep their judicial authority and act like legislators and policy makers.
13. **Training Gap:** Not enough judges or lawyers exist with the needed expertise.
14. **Judicial Careers:** The narrow focus will be a “dead end” for a judge’s career.
15. **“Inferior” Courts:** Risk of creating a court with lower status than the general courts and “lesser” judges with consequently less power

Responding to the survey for this guide, Professor Richard Macrory of University College London’s law faculty, a strong advocate for ECTs and the “father” of the new ET for England and Wales, summarizes the opposition arguments he encountered as follows:

Environmental issues [can] get side tracked down a specialist route when the environment should be integrated into all areas of legal decision-making; non-specialized but high quality judges can bring fresh perspectives and insights; and ... drawing clear demarcation lines between environment and non-environment cases is not easy.

Another opposition concern, expressed by one expert survey, is that ECTs could foster “a patronage culture of providing sinecure, post-retirement assignments to former [general court] judges, senior administrators or technocrats.”

These possible drawbacks to specialized ECTs should only be read as “warning signs.” Implementation strategies and best practices can and should be planned to avoid these potential downsides and to maximize the access, justice and future benefits of specialization.

Judge Michael Rackemann presiding in the Queensland, Australia, Planning and Environment Court, showing that EC's use of information technology.



3.0 ECT Models

There is no one best model for an ECT – no “one-size-fits-all” design. Every EC and ET reflects its national character, culture and legal system. This is understandable because what is “best” for each country is an ECT that fits that country’s unique ecological, historical, legal, judicial, religious, economic, cultural and political environment. It is the model that results in the most effective dispute resolution process with access to justice for all affected interests. What will work best should be explored in an open, transparent planning process that permits thorough analysis.

There are many excellent models to consider, based on the ECT Study findings and input from the experts surveyed (see Appendix E for the list and their contact information). The selected models have been chosen as examples because they represent a variety of diverse nations, legal systems, experience and different levels of development, cost and sophistication. For each model identified below, actual ECT examples are given, although other fine examples could also be cited. The best practices described for a selected ECT are not unique to that example, but are also found in other ECTs.

3.1 Initial Considerations

Beware! The following factors will influence the model you choose, for better or worse. Evaluating these factors will help policy makers determine the most realistic ECT model for the circumstances:

- Leadership strength – without strong leadership the ECT will flounder
- Public demand – necessary to support the process and educate the community
- Political support – with no political will or budget, failure is certain
- Judiciary support and ownership – opposition of the existing judiciary to specialization can kill efforts or result in authorization but no establishment (an ABNE)
- Budget – a dedicated budget is necessary, even for minimalist models
- Opposition arguments – powerful opposition from the judiciary, the administration and business interests can torpedo ECT creation
- Changing the status quo – there may be a need first to modify existing institutional and environmental laws and regulations if they are weak or create significant barriers
- Anti-democracy sentiment – a government or system that does not support public access to justice or rule of law can undo the best efforts of ECTs

- Inadequate or corrupt enforcement agencies – without effective enforcement agencies, an ECT may be powerless
- Lack of environmentally trained judges and decision makers – it is preferable for all initial appointees to be environmentally knowledgeable
- Lack of environmentally trained attorneys – without a base of environmental lawyers the ECT may not get cases or have them presented well
- Inadequate judicial training capacity – judicial education is needed, through a judicial training academy, university, IGO or NGO with environmental education expertise and commitment
- Literacy of the affected population – community education and awareness is the cornerstone of an effective ECT and an important element to develop in the planning process.

“COURT” OR “TRIBUNAL”?

In some countries the words “court” and “tribunal” can be used interchangeably. For example, in Spanish the word “*tribunal*” is used for both judicial courts and administrative tribunals or bodies. For clarity, the ECT Study uses the words based on the branch of government in which the ECT operates – “court” for the judicial branch, “tribunal” for non-judicial branch.

As mentioned, the term “court” is used in this study for a body or individual in the judicial branch of government and “tribunal” to indicate all non-judicial government dispute resolution bodies (typically in the administrative /executive/ ministerial branch of government). There are also other examples of environmental dispute-resolution entities discussed below – such as ombudsman offices, prosecutors and human rights

commissions – if they have the power to (1) specialize in environmental issues and (2) resolve disputes without going to court, but such entities are rare.

ECTs’ existence, jurisdiction, powers, budget, accountability mechanisms, etc., may be defined by (1) legislation, (2) rules of their parent branch of government, or (3) the ECTs’ own rules. Law-trained judges are the typical decision makers in ECs, although a growing number of ECs also include non-law science-technical judges or commissioners (Sweden, Chile, New Zealand). ETs may have only law-trained judges, but are somewhat more likely to join them with science-technical decision makers and even nonprofessional lay member decision makers, and at least one ET does not require that any of its members have to be lawyers (Ireland).

Some nations, such as Canada, take pride in having what they call a “tribunal culture” rather than a “court culture” for environment and land use decisions. Other nations, such as the Philippines, Pakistan and Chile, have a court-based environmental adjudication culture.

Civil law nations, such as Thailand, often have two separate court systems – one for general civil and criminal actions (involving private parties) and one for administrative actions (involving the government); in Thailand’s case, both of the two systems have specialized ECs at all court levels. Some nations, like Belgium, also have a constitutional court, but none of those have been found with a formal environmental chamber. Australia and the USA have a mixture of ECs and ETs depending on the state or territory. A few have ECs, ETs and Ombudsmen, like Kenya with its trial and appeal ECs, an ET for EIA cases and an independent environmental ombudsman panel!

Each EC or ET model has potential strengths and weaknesses. For each model described, specific ECT examples have been selected with their identifying characteristics and best practices noted.

3.2 Environmental Courts

This revised UN Environment ECT study has identified 4 distinct EC models and a 5th alternative approach, based on their decision-making independence:

ENVIRONMENTAL COURT MODELS

1. **OPERATIONALLY INDEPENDENT EC** (separate, fully or largely independent environmental court)
2. **DECISIONALLY INDEPENDENT EC** (within a general court, but separate and free to make its own rules, procedures, and decisions)
3. **MIX OF LAW-TRAINED AND SCIENCE-TRAINED JUDGES** (may be either model 1 or 2 above with the 2 types of judges sharing decision making)
4. **GENERAL COURT “DESIGNATED” JUDGES** (assigned environmental cases in addition to their regular docket, often without necessary interest, expertise or training)
5. **ENVIRONMENTAL LAW-TRAINED JUDGES** (who may or may not therefore be assigned environmental law cases from time to time).

3.2.1 Operationally Independent ECs

Free-standing, fully or substantially independent courts represent the zenith of ECs. Typically, they are the most expensive and complex, have the widest jurisdiction and incorporate the greatest number of best practices – often called “Rolls Royce models.” For these reasons, they are goals to aspire to, but may not necessarily be the best approach for a “start-up” EC. Three uniquely different examples show what can be done with this model:

EXAMPLES: OPERATIONALLY INDEPENDENT ECs

- (1) State of New South Wales, Australia – Land and Environment Court
- (2) New Zealand – Environment Court
- (3) State of Amazonas, Brazil – Court of Environment and Agrarian Issues.

State of New South Wales, Australia–Land and Environment Court (LEC) (<http://www.lec.justice.nsw.gov.au/>) is universally viewed as one of the very best operationally independent ECs. A superior court of record, the LEC is a part of the state judicial system, with its decisions reviewed by both

the civil and criminal appeals courts and the state Supreme Court, but it maintains a high degree of independence in its operations and decisions. A free-standing EC, dating from 1980, it is recognized as one of the most visionary and successful, based on its innovations, best practices and advising of other ECs around the world. The LEC has 6 law judges and 21 science-technical commissioners and has very comprehensive and exclusive jurisdiction over environmental, land use planning and development matters. It has been able to adopt a series of innovations and best practices³⁵ that show commitment to continuous improvement, including:

- An International Framework for Court Excellence with 7 performance measures for court evaluation
- An Online Sentencing Data Base for environmental criminal offenses that gives judges instant access to sentencing statistics and commentary
- Commitment to leadership in legal and judicial communities globally
- Commitment to ECT publication, papers and lectures for the global legal community³⁶
- Continuing professional training for judges, commissioners and staff
- A Court Users Group and a Mining Court Users Group, which evaluate the EC, make recommendations to the Chief Judge, and act as catalysts for improvement initiatives
- The “Multi-Door Courthouse” operating design that provides complainants access to a full range of dispute resolution services both initially and as the case proceeds, including conciliation, early neutral case evaluation, mediation, arbitration
- Innovations in the management of expert testimony (as have Queensland, Western Australia and New Zealand among others), specifically court rules requiring experts to adhere to a code of conduct with paramount duty to the court not clients, joint conference of experts, written reports, concurrent evidence and using the expertise of court commissioners³⁷
- Pioneering use of restorative justice where victims and perpetrators of environmental damage participate in a process to repair the harm and prevent it from recurring
- A Principled Sentencing approach where the sentence is tailored to fit the particular crime.

The New South Wales model did not spring full-blown in its present form, and has undergone significant innovation and improvement since 1980. Beginning with the passage of progressive authorizing legislation in 1979 and followed by over 35 years of practice, judicial leadership, sufficient budget, comprehensive jurisdiction, political support and stakeholder overview, the result has been what most experts consider to be a superb EC model that other jurisdictions may aspire to create over time.

New Zealand – Environment Court (www.justice.govt.nz/courts/environment-court) is also one of the oldest free-standing ECs and viewed as one of the best. It is staffed with 9 law-trained environment judges and 15 environment commissioners trained in a variety of scientific-technical, business, and agricultural fields as well as mediation. It serves the entire nation with three registries in different parts of the islands and has the ability to hold hearings at the place in issue. This allows the EC to create consistent national environmental jurisprudence for all citizens, including the indigenous Maori, while being geographically accessible.

The EC relies heavily on a wide range of court-assisted ADR methods, facilitated by one of the 15 trained commissioners. The ADR results in a very high percentage of cases being resolved without a court hearing/decision. Mediated agreements can be submitted to the court and approved or amended by a judge as part of the final court order.



Special session in the large courtroom of the New Zealand Environment Court, Auckland, NZ.

Significantly, the authorizing act allows the EC to regulate its proceedings as it thinks fit, so that it is not bound by general court rules of procedure or evidence. Individuals and groups may represent themselves without a lawyer; if so, they are assigned a “process advisor” to guide them through the procedures and consolidate issues for efficient adjudication. The EC has embraced information technology (IT) extensively, including iPads to track case materials, an interactive website, video and phone conferencing and, while the court does not as of mid-2016, have a complete e-filing process (definitely a best practice of other ECTs), they are currently exploring it.

State of Amazonas, Brazil – Court of Environment and Agrarian Issues (http://www.tjam.jus.br/index.php?option=com_qcontacts&view=local&id=442) is another example of a substantially independent EC, notable for having one of the widest and most innovative range of remedies – far above and beyond most environmental statutes. In Portuguese, the EC is called “Vara Especializada do Meio Ambiente e de Questões Agrárias,” and is known by its acronym “Vemaqa.” Its leader, Judge Adalberto Carim Antônio, has fashioned many innovative remedies, or as he calls them “fit for purpose” remedies. A standout is his “Oficina para Infratores Ambientais” – a night school for environmental law violators which won Brazil’s 2013 Prize of National Quality in the Judiciary. According to Judge Carim:

Besides repairing the environmental damage, the mandatory environmental course in more than a decade has proven its effectiveness and importance. During this period of time the level of recidivism is almost 0. The participants turn into ecologists, learning the basics of environmental law and the very role of the Environment Protection Organs [of government].



Other remedies include community service, restoration of environmental harm and such unique sentences as requiring large businesses to pay for environmental education signs on buses and elsewhere. An accomplished artist, the judge writes and illustrates comic books for use in environmental education classes he teaches in local schools, printed and paid for by offenders. Part of the reason for the success of these innovative remedies is that much of Brazil’s environmental enforcement is in criminal laws, so the judge can offer convicted offenders a choice between the usual criminal fines and jail or “voluntarily” agreeing to environmental night school, working for a wildlife organization or paying for public environmental education efforts.

In addition, this EC is noteworthy for creating a bus outfitted inside as a mini-courtroom in which hearings can be held in outlying areas, as well as using boats on the Amazon River system to reach other isolated areas for hearings.

3.2.2 Decisionally Independent ECS

There are ECs that are a part of the general court system, within its supervisory, budget, staff and management, but nevertheless have substantial independence in terms of their procedures, rules and decisional freedom. Two ECs on opposite sides of the world are excellent examples of this model:

State of Queensland, Australia – Planning and Environment

Court (PEC) (www.courts.qld.gov.au/courts/planning-and-environment-court) is another EC that is widely viewed as an outstanding success model, based on the benefits of its administrative

structure and its many best practices. As a distinct specialized court within the general state trial court system, it can be easily identified, is highly regarded and – by sharing overhead, budget, courtrooms, staff and facilities with the general court – benefits from lower administrative expenses, less management time and greater efficiency. The PEC judges are located throughout the state, and can hold hearings when appropriate elsewhere in Queensland.

EXAMPLES: OPERATIONALLY INDEPENDENT ECs

- (1) State of Queensland, Australia – Planning and Environment Court
- (2) State of Vermont, USA – The Environmental Division of the Vermont Superior Court

Some of the PEC’s best practices include:

- Expert judges, appointed based on their knowledge, expertise and interest in environmental and land use planning law
- A registrar who conducts case management conferences, chairs meetings of experts and conducts mediation without cost to the parties, resulting in a high percentage of cases resolved without a judicial trial
- Methods for managing expert witnesses and evidence that eliminate much of the dreaded “battle of the experts,” including requirements that the parties’ experts:
 - o represent the court, not parties, or face possible contempt charges
 - o attend ADR meetings with the registrar to discuss their evidence and proposed testimony
 - o develop a joint written statement of areas of agreement and disagreement shared with the judge and parties before trial

- o have their testimony controlled and curtailed during trial by the judge
- Directions hearings in which the judges actively manage deadlines and expectations
- Opportunities for affected residents and the public to observe proceedings affecting their communities
- Taking hearings to the area in question as much as possible, given Queensland's immense size, including "flying judges."

This is not a complete list of all the best practices found in this EC, by any means, nor are they necessarily unique to it. They do illustrate key features that are viewed as important contributors to access to justice, rule of law and the EC's effectiveness.

State of Vermont, USA – The Environmental Division of the Vermont Superior Court (<https://www.vermontjudiciary.org/GTC/Environmental/default.aspx>) is an effective trial court with statewide jurisdiction within the state's general trial court system. Often still referred to by its old name, "Vermont Environment Court," it is the first and only state-level EC in the USA. (The State of Hawaii's new system is not a separate or independent EC, but a listing of 22 existing general court judges who are required to devote one or more days per month to environmental cases.) In the Vermont EC almost all cases that go to trial are heard de novo (with an evidentiary trial).

Best practices observed in this court include:

- Consolidated jurisdiction over most environmental and land use laws and enforcement appeals, making it a "one stop shop" for environmental litigation and easier for both litigants and attorneys to file in the correct venue, according to Environmental Judge Thomas Durkin
- Two highly qualified law-trained environmental judges, experienced in environmental science and technology issues, who hear only environmental cases
- Flexible procedural rules specially tailored for the EC
- Judges are assigned cases on an "every other filing" basis, so litigants cannot judge-shop or forum-shop
- Geographic access to justice is achieved because both judges handle cases throughout the state and hold hearings close to the litigants
- A court registrar who also serves as case manager, advising litigants and counsel about processes, ensuring correct filings and enforcing deadlines
- Cases are evaluated for ADR and, although not required to use them, parties are given a court-maintained list of qualified private mediators whose fees are paid by the parties (not as good a practice as court-annexed free ADR, although it may give parties incentive to reach a reasonable solution more quickly, saving both litigant dollars and court time)

- A lay Advisory Committee on Mediation that reviews mediator qualifications to be on the court list
- Judges can incorporate mediated agreements or any other settlement into a court-enforceable order.

3.2.3 Mix of Law-Trained and Science-Trained Judges - Multidisciplinary Decision Making

A number of ECs and ETs have both law-trained judges and scientific or technically trained judges deciding cases together on an equal footing. This ECT model can be found in both ECs and ETs and in both the operationally independent (3.2.1) and decisionally independent (3.2.2) models above. They are highlighted separately here because of their unique “partnership” approach to adjudication, combining the analysis and decision-making of both law-trained and science/technical-trained judges hearing cases together as co-decision makers. The two models below are only a few examples of the ECTs that have this partnered practice.



A majority of the experts surveyed believe that this combined approach can deliver more expert, fair, and balanced judgments, which can directly contribute to sustainable development and environmental protection. Because environmental adjudication is increasingly based on highly complex scientific and technical projections of uncertain future impacts on intricate social, economic and environmental factors – and law-trained judges do not generally have the scientific-technical training to analyze expert testimony on these issues – this “partnership” model has the potential to deliver more rational, sophisticated and comprehensive decisions.

EXAMPLES: MIX OF LAW-TRAINED AND SCIENCE-TRAINED JUDGES

- (1) Sweden – Land and Environment Courts
- (2) Chile – Environment Courts

One of the oldest and one of the newest such systems provide good examples:

Sweden – Land and Environment Court (www.domstol.se/funktioner/english/the-swedish-courts/district-court/land-and-environment-courts/) is an example of a decisionally independent EC (3.2.2 above) with a multidisciplinary judicial approach. When Sweden’s ECs were authorized in its 1998 Environmental Code, it was among the first to formally acknowledge that environmental cases can involve complex, multidisciplinary scientific and

technical issues, in addition to legal issues, and to put both kinds of decision makers on their benches. Sweden has 5 regional ECs and one appellate EC that are components within the general court system. The regional ECs function both as (1) trial courts (first-instance) on permits for hazardous activities, water developments and environmental damage claims made by individuals, groups, NGOs or government and as (2) appellate courts (second-instance) for appeals of decisions by local and regional bodies on environmental permits, disposal of waste and cleanup orders. The one Environmental Court of Appeal hears appeals of cases from the regional ECs. Its decisions in the category (1) cases can be appealed to the Supreme Court, and its decisions in category (2) are in most instances final.

Sweden's Environmental Code provides that each of the regional ECs is to have a panel consisting of one law-trained "judge," one environmental "technical expert" (with a science or technical education) and two "lay expert" members. The regional judge and technical expert are fulltime employees of the court, and the two lay experts are selected depending on the expertise(s) required in a given case. All 4 members of the panel are equals in the decision-making process. The Environmental Court of Appeals consists of 3 law-trained judges and 1 technical expert, the latter having technical training in the substantive area at issue. However, shifting caseload demands can result in the law-trained judges being temporarily assigned to a general case or to other divisions of the general court, and judges without environmental expertise can be assigned to sit in the EC.

Because science-technical experts have a quite different approach from law-trained judges with regard to fact-finding, analysis and outcome prediction, their inclusion as decision makers "make[s] it easier to find the correct balance point."³⁸ Nor do the law-trained judges intimidate the non-law expert judges; in fact, "The law-trained judges in some cases may be too dependent upon the expertise of the technicians, who may have very strong opinions, even in purely legal issues," according to a survey response from Swedish law professor Jan Darpö, an expert on this EC and EU courts in general.

In 2011, the jurisdiction of the ECs was expanded by the legislature to include land use issues and the name changed from "Environmental Courts" to "Land and Environmental Courts," acknowledging that land use decisions have a direct impact on the environment, environment decisions frequently impact land uses, and complaints concerning development plans often involve multiple government agencies. This expansive jurisdiction and issue integration are best practices reflecting the nature of environmental cases and the need to approach environmental problems comprehensively. Both parties and adjudicators benefit because a more "just, quick and cheap" solution is possible, improving access to justice for the parties and efficiencies for the system.

Chile Environment Courts. In 2012, Chile's National Congress authorized 3 substantially autonomous ECs (an example of 3.2.1 above), with multidisciplinary panels of judges, and made them independent of the administration and not directly part of the existing judicial system, but under the administrative, policy and financial review of the Supreme Court (an example of 3.2.1 above). The law authorized the First Environmental Court (*Primer Tribunal Ambiental*) to be located in the country's northern city of Antofagasta, the Second EC (*Segundo Tribunal Ambiental*) in Chile's centrally located capital Santiago, and the Third EC (*Tercer Tribunal Ambiental*) in the southern city of Valdivia. The Second EC began hearing cases in 2013 (<http://www.tribunalambiental.cl/2ta/environmental-court-of-santiago/>), and the Third EC in 2014 (www.tercertribunalambiental.cl), but, to date, judges have not been appointed for the First EC, and its cases are being heard by the Second.

The authorizing law specifies that the ECs will each have 3 judges – 2 lawyers and one person who holds a science degree (including engineers and economists) – plus 2 substitute or alternate judges – one of these a lawyer and the other a person with a science degree. The law requires the judges to have experience as a professional or academic in environmental or administrative law or in environmental science-technical matters. They are chosen through a lengthy 4-step political selection process with Chile's civil service recruitment department proposing names to the Supreme Court, which vets nominees from that list to be sent to the President, who picks nominees to go to the Senate for ratification. At present, the Second EC's judges are a lawyer, an economist and one vacancy, and the alternates are a lawyer and an engineer. The Third's judges are also a lawyer, an economist and one vacancy, and its alternates are a lawyer and a marine biologist. All EC judges have law, business, academic or political backgrounds, but there are no judges with public-interest backgrounds at present. Panels of 3 hear the cases, with a high degree of agreement.

Another interesting aspect of Chile's ECs is that they were supported by the *business-development community*, not always advocates of ECTs. The ECs are a critical component of the redesign of the country's environmental institutions. In 2010, the legislature created a new environmental agency with sweeping powers, including the power to levy fines in the millions of US\$ for environmental infractions, and conservative lawmakers on behalf of the business lobby insisted on creating ECs to give businesses several legal recourses and remedies against tough government sanctions. Chile's Undersecretary of the Environment Ricardo Irrázabal explained this "compromise" as follows in 2013:

You need a counterweight for public administration. There's an asymmetry between the [environmental] administrator and the administrated. The one most likely to win is the administration, so judicial oversight is called for.³⁹

3.2.4 General Court Judges Assigned Environmental Cases

It is tempting – to save lengthy authorization debates, budget, time, planning effort and the hiring process – for a general court simply to “designate” or assign established courts or judges as “green benches” or “green judges” and declare that it has created an EC. A number of countries have chosen this expedient route, with varying success. Examples abound, including:

EXAMPLES: ASSIGNED GENERAL COURT JUDGES

- (1) Philippines – Environment Courts
- (2) State of Hawaii, USA – Environmental Courts

Philippines – Environment Courts (no website) were created by the Philippines Supreme Court in 2008. The Supreme Court issued an order “designating” as Special Courts to try and decide violations of environmental laws” an amazing number – 117 – of first- and second-level regional and municipal trial courts throughout the country. This designation means:

- Individual judges were not named, consulted as to their environmental interest and experience or offered reduced general caseloads
- The designated courts still continue as general jurisdiction courts and continue to be assigned non-environmental criminal, civil and other cases as usual
- Environmental cases are now to be filed in those designated “green” courts only, and environmental cases filed in other courts are to be transferred.

According to the Supreme Court Administrator, all 117 are still operating as ECs in 2016; however their statistics show the environmental caseload appears to be declining.

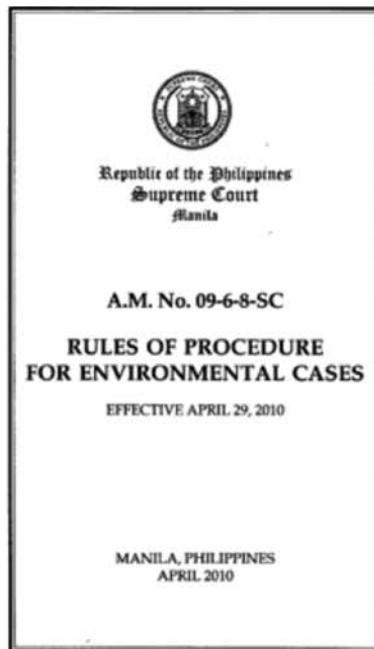
There is no website for the ECs, and they are not mentioned on the Philippine Judiciary website (<http://www.judiciary.gov.ph/>), while other specialized courts are. The respected Philippine Judicial Academy (PHILJA) (<http://philja.judiciary.gov.ph>) holds about one environmental law training for judges a year.

In 2010, the Philippines Supreme Court issued an extensive and innovative “**Rules of Procedure for Environmental Cases**” that remains one of the very best models of EC practice rules in the world today.⁴⁰ The Rules include (even pioneer) a number of best practices, including:

- Standing: The most open and inclusive standing to file or participate in a case to be found anywhere in the world: “Any real party in interest ... may file a civil action involving the enforcement of any environmental law” and “Any Filipino citizen in representation of

others, including minors and *generations yet unborn*, may file an action to enforce rights or obligations under environmental laws” (emphasis added)

- Continuing Mandamus: Authority for “continuing mandamus,” the power post-judgment for the EC (or its selected representatives or commissions) to engage in on-going monitoring of government compliance until a court order is “fully satisfied”
- “Strategic Lawsuits Against Public Participation”: “SLAPPs” – lawsuits filed to intimidate those protecting the environment – are subject to summary hearings and dismissal, with damages, attorneys’ fees and cost awards for the victims⁴¹
- Writ of Kalikasan: Perhaps the most innovative best practice in the rules is the creation (indeed the invitation to PIL attorneys to file) a writ (complaint) of kalikasan (nature). This is a legal remedy for persons whose right under the Philippines Constitution to “a balanced and healthful ecology” is violated by an unlawful act or omission of a public official, employee or private individual or entity
- Precautionary Principle: The rules require the ECs to apply the IEL precautionary principle and give “the benefit of the doubt” to protection of “a balanced and healthful ecology” whenever “there is a lack of full scientific certainty in establishing a causal link between human activity and environmental effect”; this is a deliberate reversal of the burden of proof, putting it on those who seek to change the status quo rather than environmental plaintiffs.



The mere “designation” of courts as ECs, without doing more, is not a best practice. Yet, these very model Rules of Procedure for Environmental Cases create a foundation and a model to consider for access to justice and the environmental rule of law. As the Philippines illustrates, however, designation of “green” courts and adoption of progressive rules and procedures is not sufficient. Strong implementation and on-going leadership are necessary if success is to be achieved and maintained.

State of Hawaii, USA – Environmental Courts (www.courts.state.hi.us/special_projects/environmental_court.html) are also “designated” ECs like the Philippines’ – but without the comprehensive jurisdiction, visionary rules of procedure, ADR or judicial training. Under a 2014 legislative authorization, Hawaii’s Supreme Court on July 1, 2015, designated 22 existing general judicial system district court (small claims) and circuit court (larger claims)

judges throughout the islands as “environmental court judges.” This means that those courts will set aside a specific day or days each month for an “environmental calendar.” There is no requirement that the selected judges have environmental law interest, training or experience, although some Hawaiian judges do, and training is being planned. Nor is there any indication of involvement of science-technical experts, ADR or adjustment of caseloads. Although the ECs have both civil and criminal jurisdiction, they do not have broad integrated jurisdiction, because an effort to include land use law jurisdiction was stopped in the legislature by developer interests, which “leaves out some high-profile environmental conflicts”⁴² Appeals from the EC will go as usual to the general court of appeals and supreme court. Environmental critics, perhaps unfairly, view the designations as merely “a procedural change.”⁴³

For the court’s website to say that it is “the second state in America to have a statewide environmental court” (after Vermont, above) is an overstatement. It is a commendable, but minimalist, first step in improving environmental justice, simply to require judges to devote time each month to environmental cases. It does not yet reflect the sophistication of the Philippines “EC-by-designation” model, let alone the sophistication of the Vermont Environmental Court.

However, as a first step, it may be something countries with substantial barriers to ECs may want to consider. Other countries have also taken this approach, including **Malaysia** (95 lower courts designated as ECs for criminal cases), **Pakistan** (250 trial and high courts designated as “green benches”) and **Thailand** (environmental divisions at all levels of its Courts of Justice and Administrative Courts – a total of 21 ECs).

3.2.5 General Court Judges Trained in Environmental Law

This category is not really an EC model, but is mentioned because at least one nation – **Indonesia** – has chosen not to create ECs but to start first with environmental training for select judges. Since 1999, the Indonesian Supreme Court has been providing environmental law training to some general court trial and appellate judges (typically one-week courses), and this was elevated to a “certification program” in 2013. However, the rules do not assure that environmental cases will go to the certified judges, so the training expense may not be efficient.

Indonesian Supreme Court Justice Takdir Rahmadi, a member of the Supreme Court’s Working Group for Judicial Certification, admits the reason for this approach is that it avoids “going through a political process where the [legislature] and the president play major roles.”⁴⁴ Indonesia has developed an environmental training curriculum, guidelines

for judges hearing environmental cases, methods of selecting judicial trainees, schedules and evaluation programs. Perhaps as the judiciary evaluates this training approach, this training step will lead to a developed EC system.

Argentina's Supreme Court has also taken a "first step" in the direction of an EC in 2014 by creating an "Environmental Office" within the Supreme Court.⁴⁵ Although it does not adjudicate cases and is therefore not counted as an EC, it is to perform judicial training, case research, international engagement, and development of sustainable practices for the judicial system. In 2015, the Court created a "Secretary of Environmental Cases," a specialized unit for the study of the country's environmental cases, taking another step towards an EC.⁴⁶

3.3 Environmental Tribunals

This UN Environment ECT study has identified 3 different types of environmental tribunals (ETs), based on their decision-making independence:

3.3.1 Operationally Independent ETs

Two very different ETs illustrate the diversity of operationally independent ETs – that is, ETs that in general control their own operations, rules and (most importantly) decisions:

Kenya – National Environment Tribunal

(NET) (<http://net.or.ke>) has a very limited jurisdiction, but of cases with potentially large environmental impact. Its principal function is to decide appeals from decisions of the national environmental agency on issuance, denial or revocation of EIA licenses for major developments (such as roads, industries, housing facilities, hazardous waste, tourist facilities and marine activities). Developers can appeal adverse EIA decisions, and individuals, NGOs and others can appeal approvals. It is also authorized to hear appeals of forestry decisions and to advise the government when requested, but these are rarely used.

ENVIRONMENTAL TRIBUNAL MODELS

1. **OPERATIONALLY INDEPENDENT ET** (separate, fully or largely independent environmental tribunal)
2. **DECISIONALLY INDEPENDENT ET** (under another agency's supervision, but not the one whose decisions they review)
3. **CAPTIVE ET** (within the control of the agency whose decisions they review).

EXAMPLES: OPERATIONALLY INDEPENDENT ETs

- (1) Kenya – National Environment Tribunal
- (2) Japan – Environmental Dispute Coordination Commission

NET, like the environment agency, is under the Ministry of Environment. While the Ministry controls NET's finances and staffing, NET operates as an independent entity from the Ministry and the environment agency with regard to its decisions and operating rules. There is a current proposal to merge NET into the judiciary, to make its independence clear, since the environment agency is always a party in its cases.

NET has decided 140 appeals since it began in 2005. It functions very much like a court of law, with wide powers to confirm, overturn or vary the environment agency's decisions, even to issue an EIA license itself if it overrules the agency or issue a development injunction to stop a project. It is not bound by court rules of evidence and has the power to make its own rules of procedure, which it keeps "simple and precise...to ensure the proceedings are informal and people-friendly," particularly for self-represented parties. Its fees are lower than the courts "to make justice more accessible to the public." It can appoint experts to advise it.

NET consists of 5 members: a chair nominated by the national Judicial Service Commission (with qualifications to be a judge of the High Court), one lawyer qualified to appear before the High Court of Kenya nominated by the Law Society of Kenya, another lawyer with environmental qualifications appointed by the Minister, and two other members of "exemplary academic competence in environmental management" appointed by the Minister.

Appeals from NET formerly went to the High Court but now go to the new Environment and Land Courts (ELCs). NET's jurisdiction survived being given to the ELCs during passage of the ELCs' operating act in 2011, and question remains whether it should continue or have its cases transferred to the ELCs. However, NET is currently developing a 5-year strategic plan.

Japan – Environmental Dispute Coordination Commission (EDCC) (www.soumu.go.jp/kouchoi/english/index.html), also called the "Kouchoi," is a quite different model of a relatively independent ET, in that it emphasizes a "settlement system" based on investigations and ADR conducted by its members, "instead of adversary proceedings." However, recent studies indicate the EDCC may be moving toward a more adjudicatory model.

The national EDCC is an independent external agency of the Prime Minister's Office. There are also subnational or provincial versions of it, called Prefecture Pollution Examination Commissions (PPECs) established in 37 of Japan's 47 prefectures; in each of the other 10 prefectures there are authorized Pollution Review Commissioners to perform ADR. In addition, at the local government/municipal level there are Consultation Services for Environmental Complaints (CSECs), which, according to one report, handle some 100,000 applications a year employing a total staff of over 11,000.

The EDCC and the prefecture and local units do not have power to review or overturn decisions of government agencies. Traditionally their major role has been the award of compensation to individuals for harm done by industry pollution and development (with the government largely paying the compensation rather than the violator). The EDCC does not apply principles of international environmental law. A substantial benefit for those filing complaints is that there are no filing fees and the entire investigation process is paid for by the EDCC. It is viewed as just, quick and cheap for the limited jurisdiction it has. South Korea has a similar system, which is currently under review for possible changes.

3.3.2 Decisionally Independent ETs

ETs can be found that are not “free-standing,” being lodged within another government agency that has supervisory and operational control, but not one whose decisions the ET reviews, so that the ET retains full independence over its decisions. This can be an attractive model for some to consider. There are 2 primary variations: (1) the ET is under an entity that is not itself an ET such as the Ministry of Justice or (2) the ET is part of a “Super Tribunal” that amalgamates or brings together a number of smaller tribunals on various issues, including one or more ETs. Three examples show the diversity of this model:

EXAMPLES: DECISIONALLY INDEPENDENT ETs

- (1) India – National Green Tribunal
- (2) Province of Ontario, Canada – Environmental Review Tribunal
- (3) New York City – Environmental Control Board

India – National Green Tribunal (NGT) (www.greentribunal.gov.in), created in 2010, incorporates a number of best practices. It is independent of the Ministry of the Environment and is supervised by the Ministry of Law and Justice, giving it formal independence from the agency whose actions it reviews.

The NGT has the powers and features of a civil court, including the power to summons, conduct discovery, receive evidence, requisition public records, sanction for contempt and issue cost orders, interim orders and injunctions – so it is something of an ET-EC “hybrid.” Its jurisdiction is limited to 7 major environmental laws, and, typical of ETs, it does not have criminal jurisdiction. It has the power to regulate its own procedures (although the Central Government also has some rule-making authority over it). It is not bound by the general courts’ Code of Civil Procedure or Rules of Evidence, but is to apply principles of “natural justice” and IEL, including sustainable development, precautionary and polluter pays principles.

As a sign of its power position, appeals from it go directly to India's Supreme Court, not an intervening appeals court. The NGT's authorizing act sets high standards for selection of the Chairperson (requiring a former Supreme Court judge or High Court chief justice), other "Legal Members" (former High Court justices) and "Expert Members" (advanced science-engineering degrees and 15 years of experience, as well as 5 years of environmental specialization), assuring both legal and science-technical expertise on its bench.

The NGT has become "a major arbiter of some of the most pivotal environmental battles in India,"⁴⁷ including Ganges River pollution, New Delhi air pollution, waste collection, mining, toxic dumps and dam projects. As the authorizing legislation (itself a model for detail, see Appendix G) specifically gives the NGT the authority to apply natural law and international environmental laws and principles, many of its decisions have been visionary and innovative. Ritwick Dutta, a leading Indian environmental barrister, says "The Green Tribunal is now the epicenter of the environmental movement in India. . . . It has become the first and last recourse for people because their local governments are not doing the job of protecting the environment."⁴⁸



Hearing in session in the Ontario, Canada, Environmental Review Tribunal.

Not only does the NGT take on high profile cases against government and industry, it reaches out for cases on its own initiative and is adjudicating huge numbers of cases quickly. The NGT Act and its regulations are model ECT laws, and the NGT is considered an extremely active and effective ET model.

Province of Ontario, Canada – Environmental Review Tribunal (ERT) (<http://elto.gov.on.ca>) is a very impressive independent ET and is one of 5 ETs housed within a “clustered” umbrella-type tribunal, the Environment and Land Tribunals Ontario (ELTO), which has jurisdiction over some 100 laws. (The other 4 ETs in ELTO are subject-compatible ones dealing with property taxation/valuation, land expropriation, cultural heritage properties and land use planning.) ELTO and its sub-tribunals are organizationally under the Ministry of the Attorney General allowing them independence from the agencies and ministries whose decisions they review. ELTO’s mission for its ETs emphasizes

- “Modern, fair, accessible, effective and timely dispute resolution services”
- “Consistency in procedures and outcomes”
- “An evolving development of the law”
- “Outcomes that are in the public interest.”

Accordingly, the ERT exemplifies a large number of best practices, including highly trained adjudicators. It also has within it 2 other ETs, the Niagara Escarpment Hearing Office and the Office of Consolidated Hearings. The ERT has

- A comprehensive, user-friendly website with instructions and easily understood explanations
- E-filing
- Public participation opportunities
- Decisions posted online for the public
- Hearings as close to the subject site as possible
- Mediation
- Quick decisions (a target of 60 days from filing to conclusion)
- Regularly updated Rules of Practice and Practice Directions, available online.

Access to justice requires “the ECT to provide a forum that fosters the participation of aboriginal peoples and provides appropriate mechanisms for the incorporation of traditional knowledge ... to accommodate persons under the Human Rights Code, accessibility legislation, French-language services legislation, etc., and provide a welcoming and open forum that fosters full participation by the public.”

– Ontario ERT Assoc. Chair Jerry DeMarco

In addition, the ERT has developed a body of groundbreaking decisional law based on Canadian constitutional rights, public interest values and application of IEL principles, according to ERT Associate Chair Jerry DeMarco’s responses to the survey. For instance, its

2014 decision in *Citizens Against Melrose Quarry v. Ontario* bluntly rejects the government's position as follows:

[T]here is good reason to believe that no reasonable person, having regard to the principles of ecosystem approach, cumulative effects, sustainable development including water conservation, the precautionary approach and adaptive management, could have made the decision to approve the [permit].⁴⁹

The ELTO is also a “success story” of the recent trend of bringing together or clustering administrative tribunals under an umbrella “super tribunal.” They find this creates substantial staff and budget efficiencies and increases coordination, judicial assignment flexibility and decisional consistency. In the case of the ELTO, it does not control the decisions of its member tribunals, and its decision makers can fluidly serve on several of the tribunals. Other examples of amalgamating tribunals containing an ET are England and Belgium and the Australian States of Western Australia and Victoria; the Australian State of Tasmania is currently studying a move toward amalgamation of its ET with other tribunals.⁵⁰

New York City – Environmental Control Board (ECB) (www.nyc.gov/ecb) is a division of the City's large general Office of Administrative Trials and Hearings (OATH) (<http://www.nyc.gov/html/oath/html/home/home.shtml>). (OATH is an independent city agency in the executive branch, under the Mayor's Office, created to conduct adjudicatory hearings for virtually all agencies of the city. Authorized in the 1988 City Charter (the same as the City's constitution), OATH cannot be dissolved by political action short of the difficult task of amending the Charter. It houses the ECB and 3 other smaller tribunals (for some trial issues, health and taxis), and the 4 collectively hold over 300,000 hearings a year, the great majority in the ECB. OATH judges are held to the standards of the state judicial code of conduct, unlike other New York City administrative judges and hearing officers.

The ECB began under the control of the city's environmental agency and was moved into OATH in 2008 specifically to professionalize and insulate it from political pressures. OATH offers multiple other advantages for its 4 tribunals, including budgeting, administration, staffing, an Administrative Judicial Training Institute and a Center for Creative Conflict Resolution – without controlling their decisions.

The ECB hears appeals of summons or tickets issued by some 12 different City agencies (such as environmental protection, sanitation, buildings, landmark preservation, police and fire) for violations of city environment, health or public safety laws. Like other ETs, it has power to confirm monetary fines, but no criminal jurisdiction to jail someone.

The ECB is the only local government ECT analyzed in detail in this ECT study. It is included because of its *astounding case volume* (the highest caseload of any ECT in the world). It processed 623,758 violations in FY 2015 (several hundred thousand of which go to hearing each year).⁵¹ ECB has a very large staff of hearing officers in multiple locations in New York City, making it easy for residents to access a branch. It also will hear appeals by mail, phone and online. Its hearing offices offer mediation and extensive translation services, considered best practices in any ECT.

3.3.3 Captive ETs

“Captive” ETs are defined as those under the administrative, fiscal, and policy control of an agency whose decisions the ET reviews. They are therefore presumed not to be independent of the policies, judgments and political agendas of their parent agency. Although the “captive” label carries a negative connotation, the example selected is the opposite. It is an extremely independent, professional and respected ET, showing that even this type of model can operate effectively with public confidence.

The Environmental Appeals Board (EAB) in the U.S. Environmental Protection Agency (USEPA) (http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf) serves as the appellate (second-instance) adjudicator of administrative cases arising under the many environmental laws over which USEPA has jurisdiction. Created in 1992, the EAB generally hears cases after first-instance decisions by the USEPA Office of Administrative Law Judges (an independent agency also highly regarded for their professional competence) or permit decisions by the USEPA Regional Offices (multistate entities). EAB’s decisions are generally final for the agency and may be appealed to the federal courts in accordance with the individual statute(s) involved. It is staffed with 4 experienced Environmental Appeals Judges who report directly to the USEPA’s Office of Administrator, as well as 8 experienced attorneys serving as counsel to the Board.

EAB Judges Kathie Stein, Mary Beth Ward and Mary Kay Lynch (there was a vacancy in the 4th judgeship at the time of the survey) jointly responded about what they see as the success factors for the EAB, as follows:

- Professional judges who understand environmental law and science
- Permanent career judges carefully prescreened by the US Senior Executive Service in the independent US Office of Personnel Management
- Judges not limited in the number of terms they can serve (no arbitrary “term-limit” rules)
- A ban on ex parte contacts and conflicts of interest
- Clear written rules and procedures published on a user-friendly website
- All case filings and decisions available online

- Final agency decisional authority (unless a party is another government agency)
- Mediation on request
- Community outreach
- Training and collaborative exchange of best practices with other ECTs and stakeholders domestically and internationally
- Consultation with other governments on access to justice, environmental democracy and best practices.

Although technically the EAB represents a “captive” ET model, it does not exhibit a lack of independence, professionalism, objectivity or best practices – problems that do exist in other “captive” ETs – thus it is presented here as a positive, instructive model.

3.4 Ombudsman, Prosecutors, Human Rights Commissions

At least 3 other types of institutions can make major contributions to resolving environmental conflicts, but are not ECTs, strictly speaking. These are environmental ombudsman and prosecutors’ offices and human rights commissions.

3.4.1 Ombudsman

The ECT Study has identified specialized environmental ombudsman offices in several countries including Austria, New Zealand, Hungary, Kenya and Greece. In addition, there are specialized environmental divisions within some national ombudsmen offices. An ombudsman typically receives complaints from the public against government (and sometimes private parties), then investigates, mediates and reports findings and recommendations to higher government authorities. They typically do not have binding decision or enforcement powers, but some can initiate or participate in lawsuits. General ombudsman offices are found throughout the EU and elsewhere in the world, but specialized environmental ones are rare. General ombudsman staff are experts on government administration issues, but usually not experts on environmental matters. Such lack of expertise can lead to superficial, drawn-out investigations with no expert outcomes.

Hungary, from 2007-2011, had the most comprehensive, powerful environmental ombudsman in the world, the “Office of the Parliamentary Commissioner for Future Generations” (<http://jno.hu/en>), with oversight of the public’s right to a healthy environment, including future generations’ rights. It was unique because the office could issue binding and enforceable resolutions for environmental problems (like an ECT). However, its strength led to its demise. The legislature abolished the office after only 4 years and merged it into a newly created Office of Hungarian Commissioner for Fundamental Rights, covering many

other rights issues. The Ombudsman for Future Generations was demoted to a deputy commissioner with no enforceable resolution powers (<http://www.ajbh.hu/en/web/ajbh-en/>), as that official concedes in a publication:

Ombudspersons in Hungary have no authority to issue binding and enforceable resolutions. ... We should not conceal the fact that many environmental experts would like to see a more active, more prominent FGO [Future Generations Ombudsman]. This is an absolutely just claim, as due to our methodological approach, most of the times we cannot ... react immediately to the emerging environmental issues⁵²

Austria has environmental ombudsman offices located in each of its 9 landers or states with the duty to represent the interests of nature conservation and the environmental laws (e.g. www.tiroler-umweltanwaltschaft.gv.at/en/advocacy/party-status). They have all the usual powers and are also authorized to bring complaints before Austria's courts. They do not have ECT-like power to issue enforceable decisions.

New Zealand has an independent, very active environmental ombudsman, the Parliamentary Commissioner for the Environment (PCE) (<http://www.pce.parliament.nz>). That body has the power to investigate government environmental efforts and environmental problems, compel the production of information whether it is public or not, summon people under oath, and report and advise the House of Representatives and recommend changes in the laws. Like all ombudsman offices (except briefly Hungary's), the PCE can reach conclusions and make recommendations but does not have enforcement power.

In **Kenya**, the Public Complaints Committee on Environment (<http://pccenvironment.or.ke/>) is an environmental ombudsman and covers the whole country. It has a lofty mission "to facilitate access to environmental justice to the public by providing a forum for environmental conflict resolution and contributing to environmental policy" and a vision "to be the leading environmental ombudsman in Africa." However, the committee is under-resourced and generally unable to investigate all of the complaints it receives, let alone act to resolve them.

Environmental ombudsman offices are attractive because they are paid for by the government so can represent individuals and communities without cost, can be given substantial independence and oversight powers and can bring about resolution of environmental complaints in or out of court. A strong, well-funded environmental ombudsman can make a substantial difference in terms of environmental protection, but it is no substitute for an ECT, and alone does not meet the Aarhus Convention requirements for access to justice.

3.4.2 Prosecutors

Environmental compliance and enforcement are essential for the rule of law, good governance and sustainable development. Specialized environmental prosecutors play a key role in achieving this in some countries. The respected International Network for Environmental Compliance and Enforcement (INECE) (<http://inece.org>) includes prosecutors from around the world, along with ECTs, general court and administrative agencies, and works cooperatively to improve their capacity to enforce environmental law.

In a number of countries, there are specialized environmental prosecutors assigned exclusively to environmental laws and cases. For example, most of the countries in Latin America have specialized environmental prosecution offices,⁵³ and environmental prosecutors in both Latin America and in Europe have created “networks” to exchange information and experiences, build capacity, hold training programs and plan joint activities (www.mpambiental.org; www.environmentalprosecutors.eu).

Brazil has exemplary environmental prosecutors to investigate and prosecute criminal and civil complaints on behalf of the people and the environment.⁵⁴ Their offices have both civil and criminal jurisdiction, are well-staffed with dedicated and experienced lawyers and technical experts, can initiate cases on their own and have strong enforcement powers. Brazilian environmental prosecutors have the power to negotiate “adjustment agreements” with accused violators, similar to mediated agreements, but with the power of media exposure or a court filing as an incentive to sign and comply. In these cases, the prosecutors are acting very much like an ECT, because they are deciding the outcome of an environmental case. Some caution about this practice – since it takes place outside the public eye and without judicial oversight – is that it could lead to abuses, suboptimal agreements or sweeping problems under the rug in order to increase “success” statistics.

The **USA** also has specialized environmental prosecutors at both federal and state levels. For example, the US Department of Justice has an Environmental Crimes Section with 43 fulltime environmental prosecutors that bring criminal cases against private and public parties for violating the nation’s laws protecting the environment (<https://www.justice.gov/enrd/environmental-crimes-section>). In the 16 years from 1998-2014, these prosecutors concluded criminal cases against 1,083 individuals and 404 corporations, leading to 903 years of incarceration and detention and US\$ 825,000,000 in criminal fines and environmental restoration. Their cases have set the modern standards for natural resources damages (NRD) and funding for ecological restoration. They have the ability to negotiate settlements of cases they file, so, like Brazil, have some of the decisional control powers of an ECT.

3.4.3 Commissions

There is a close and overlapping relationship between human rights and environmental rights.⁵⁵ A human rights commission (HRC) is an international, national or subnational government body set up to investigate, hold hearings and protect human rights. Some HRCs include coverage of environmental rights, particularly if the country's constitution includes a right to a healthy environment or right to life. While HRCs can operate like courts, holding hearings and taking testimony, most have only recommendation powers and do not specialize in environmental issues, so they are not ECTs or substitutes for them. However, they can move to resolve environmental problems and thereby provide a valuable service where environmental enforcement agencies and courts are weak or do not act and there is no ECT.

Mexico offers a good example with its national HRC, Comisión National de los Derecho Humanos (CNDH) (<http://www.cndh.org.mx/#translate-en>). It has the power to receive and investigate complaints about human rights violations and give its findings and recommendations to the government. The 2012 addition in Mexico's Constitution of a right to a healthy environment legitimizes CNDH's accepting and acting on environmental complaints, thus providing a non-judicial mechanism for increasing citizen participation, highlighting environmental issues and achieving environmental justice. India's National Human Rights Commission (<http://nhrc.nic.in/>), prior to the creation of the NGT, had some successes investigating and exposing developments adversely affecting human health and environment. It appears to have concentrated on other areas since the NGT was established.

Mediation in progress in the Queensland, Australia, Planning and Environment Court.



4.0 ECT “Best Practices”: Improving Environmental Justice

This UN Environment ECT Study has identified a wide range of “best practices” that characterize successful ECTs. “Successful” is defined as those practices that assure better access to justice, improve environmental jurisprudence, enhance the rule of law and use processes that result in a faster decisions and reduction in participant costs. So the test of “best practices” is more comprehensive than simply “just, quick and cheap” decision-making.⁵⁶

This compilation of best practices is based on the DU ECT Study’s “12 building blocks” for ECTs,⁵⁷ plus new input from the diverse group of ECT experts around the world surveyed for this publication in December 2015 and January 2016 (see Appendix E for a list with their contact information). Select experts recommending a particular best practice are shown in the endnotes, but many other experts support these practices as well. Interestingly, there was no great disagreement among the experts on the best practices (although some would prioritize them differently). The best practices can be divided into two categories – depending on the stage of planning – whether design-stage or operating-stage. Design best practices should be considered during the planning and creation stage of the ECT; operating ones can be assessed after the ECT is implemented.

Best practices are the same regardless of what model is chosen – EC or ET. Further, what is a best practice for an ECT is also a best practice for courts and tribunals of general jurisdiction, however these are often prevented from adopting them because of rigid laws, rules, politics and traditions. ECTs, as new “start-ups,” can be made different from the traditional courts in approach, methods, problem solving, predictive analysis, creative remedies and enforcement. The most successful ECTs are not just general courts with a new name on the door or a judge in green robes!

4.1 Design Stage – Best Practices

The ECT experts surveyed overwhelmingly agree that the following best practices should be considered in the initial authorizing legislation and rules creating the ECT:

4.1.1 Independence

ECT independence from political intervention or pressures in decision-making is critically important to assure the rule of law.⁵⁸ Independent decision-making insulated from government and other outside pressures also generates public credibility, confidence and greater willingness to bring cases to the forum. Independence can improve jurisprudence by promoting judges' confidence to "step outside the box," employ emerging IEL principles and experiment with effective new processes and remedies.

ADVANTAGES OF AN INDEPENDENT JUDICIARY

- **It is the independence of the Judiciary that allows the courts to play a central role in ensuring that there is no misuse of power by the legislative and executive.**
- **It also plays a crucial role in protecting the Fundamental Rights of a citizen because anyone can approach a court if they believe that their Rights are violated.**
- **Politicians cannot use their power to change any judgement.**

Any ECT model can be designed to be independent, even "captive" ETs that are housed in and resourced by the agency whose decisions they review.⁵⁹ However, there is wide agreement that independent ECTs – ones that have substantial administrative, fiscal and legal freedom and are not supervised by an agency or ministry whose decisions they review, such as the Ontario's ERT, India's NGT and Brazil ECs (discussed in Models chapter 3.0 above) – are less likely to be influenced by politics or lobbyists. However, an ECT should not be so independent that it becomes isolated from the public and stakeholders, an issue noted in a recent review of Ireland's ET.⁶⁰

There is no agreement whether the ECT should be a judicial court or administrative tribunal; both can work well. Nor is there agreement whether it should be at the trial (first-instance) level, the appeal (second-instance) level or at all levels in the system. Least successful in terms of the advantages of specialization – but cheapest, quickest and easiest to create – is simply designating an already sitting general court or judge as an "EC" to handle environmental cases, on top of his or her regular docket; this minimalist model has been chosen by the Philippines, Hawaii and a few other jurisdictions. There is general agreement that the ECT should have both merits review (power to consider all of the evidence and decide what the correct outcome is) and judicial review (a narrower power to decide whether the previous decision maker followed the requirements of law).

4.1.2 Flexibility

Allowing an ECT the flexibility to develop its own rules, procedures and remedies is a highly ranked best practice.⁶¹

Freeing the ECT from the limitations of the general court system's rules about standing, evidence, management of expert witnesses, cost awards, orders, penalties, etc. allows the ECT to develop a wider range of "made for purpose" rules that enhance access to justice and effectiveness. Where ECTs have such flexibility, they are able to use innovative and "problem-

solving" approaches to dispute resolution that can be superior to traditional court rules and procedures. The New Zealand Environment Court, India's NGT and Kenya's ECs are examples that are authorized to develop their own rules and procedures, a unique best practice to put in the enabling legislation, and the Vermont and Philippines ECs have their own special rules adopted by their Supreme Courts.

"High on the list [of best practices] is ... proactive case management and flexibility. ... It is of considerable benefit to the Court that [our authorizing act] provides for the Court to regulate its own procedure... and without procedural formality; also ... [to] receive anything in evidence it considers appropriate. ... [So] the Court is not tied to prescriptive legislation, acts of parliament, regulations, and formal rules."

– NZ Principal Environment Judge Laurie Newhook

4.1.3 Non-Law Decision Makers

Including both law-trained judges and science-technical decision makers (scientists, engineers, economists, planners, academics) is a best practice for most experts surveyed.⁶² This brings two essential skill-sets into the adjudication process – law competence and scientific-technical competence, both crucial to successful decision-making in complex environmental cases.

Environmental and land use/development conflicts are both multidisciplinary and can benefit from different backgrounds and analytic approaches. Science, economics and technology are changing faster than the law, and today's conclusions will likely be overturned by new developments tomorrow. In this uncertain field, two (or more) different kinds of heads can be better than one. Different perspectives can provide better decisions.⁶³ A few experts point out that law-trained judges can get this kind of input for their decisions from science-technical advisors without necessarily making them voting adjudicators.

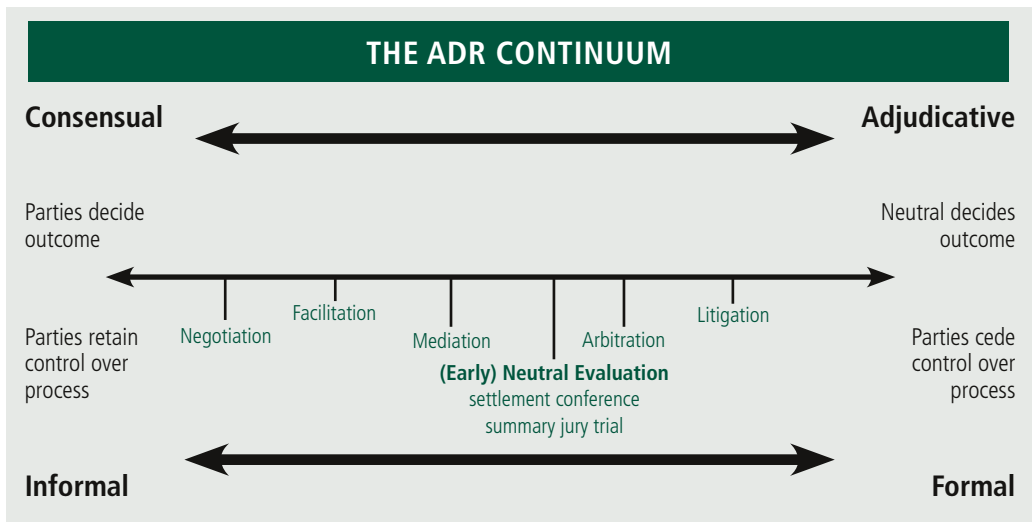
4.1.4 Selection of Adjudicators

ECT judges and decision makers should be appointed in a transparent, open and competitive selection process.⁶⁴ Brazil, Queensland, and the US EAB are examples of rigorous selection processes. ECT positions should not be awarded as a sinecure, political "plum" or retirement

award. Further, judicial members should have tenure, salary equivalent to other judges and equal opportunities for career advancement. Appointments based on credentials, interest and high ethical standards not only improve the quality of decisions, but improve public confidence in the institution. It is ideal to have selection criteria that require prior training and experience in environmental issues or else provide such training initially and as part of continuing professional development.

4.1.5 ADR

If one were to choose the one best practice that typifies successful ECTs, it would be use of alternative dispute resolution (ADR) processes (also called facilitated dispute resolution or FDR).⁶⁵ The majority of ECTs incorporate ADR, including conciliation, early neutral evaluation, mediation and arbitration. A number, like New Zealand, “actively encourage” ADR in their rules. One ECT even mandates it as a first step in all cases (Tasmania), but this is not universally considered a best practice.



Most ECTs do an initial case evaluation (by the registrar, case manager or judge) to evaluate if ADR is viable. ADR is less formal, less adversarial and can result in innovative remedies not contemplated by either the law or adjudicators – win-win solutions, rather than win-lose. It usually is much faster and cheaper (particularly if the ECT provides it at no cost to parties), thereby contributing to access to justice. It can involve experts, other interested parties and “friends of the court” (*amici curiae*), thus increasing public participation. Embracing restorative justice for criminal and even civil violations can involve representatives of an entire community in the adjudication process. The legislation or rules authorizing the ECT can be premised on the use of ADR as a foundation. At a minimum, the rules should ensure

ADR is available for litigants and the court, either in-house (preferable) or through an outside ADR provider, using personnel who are thoroughly trained in multiple forms of ADR and take frequent refresher training. In addition, the ECT should have the authority to incorporate an ADR agreement (or any settlement agreement) into a final binding, enforceable order. The most comprehensive model of ADR is the “Multi-Door Courthouse” approach of the New South Wales EC, which includes a wide variety of options for parties to resolve disputes outside of the courtroom.⁶⁶ Similar excellent examples are Queensland, Western Australia and New Zealand.

4.1.6 Comprehensive Jurisdiction

The jurisdiction of the ECT should be as comprehensive as possible. “Jurisdiction” covers 4 different issues: (1) geographic jurisdiction, (2) subject-matter jurisdiction, (3) level of review and (4) appeal body. All 4 jurisdictions should be as encompassing as possible.

- (1) Geographic jurisdiction: Physically, all persons in a nation or state should have relatively easy and equitable access to the ECT, including hearings held locally (even at the site of the problem). This could require planning ECTs in multiple locations. Alternatively ECT judges and decision makers can travel for site visits and hearings on site, as they do in Queensland, Ontario, Ireland, New Zealand and other jurisdictions – even using airplanes, boats and vans outfitted as mini-courthouses (State of Amazonas, Philippines).
- (2) Subject-matter jurisdiction: It is a best practice to give the ECT jurisdiction over all environment-related laws (to avoid, for example, adjudicating a wetlands issue with authority over ecosystem laws but not water laws). Another important best practice is to combine jurisdiction over environmental laws with jurisdiction over land use/planning laws, as the impacts of decisions in one area ultimately affect the other (Vermont, New South Wales, Sweden). It is also a best practice to give the ECT the ability to adjudicate civil, criminal and administrative issues together, because environmental disputes frequently involve more than one (if not all three) of these legal regimes. Inclusion of jurisdiction over criminal environmental laws, such as illegal hunting and trafficking in wildlife and illegal fishing, is key to achieving environmental justice and sustainable development. Several outstanding ECs have wide jurisdiction, which includes criminal, civil and administrative areas of the law (for example, New South Wales, New Zealand, Kenya).

TYPES OF JURISDICTION

1. **Geographic**
2. **Subject-matter**
3. **Level**
4. **Appeal**

KENYA CONSTITUTION OF 2010, ART. 162(2)-(3)

- (2) Parliament shall establish courts with the status of High Court to hear and determine disputes relating to ... the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

KENYA ENVIRONMENT AND LAND COURT ACT, 2011, SEC. 13

- (1) The Court shall have original and appellate jurisdiction 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.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
- (3) 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 under Articles 42, 69 and 70 of the Constitution.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court. ...
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the court deems fit and just, including –
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (g) [sic] restitution;
 - (h) declaration; or
 - (i) costs.

Kenya's EC-authorizing act has perhaps the most comprehensive jurisdiction of any in the world (see box). Another jurisdiction best practice, illustrated by the Ontario ERT, India's NGT and the Philippines ECs, is the express statutory authority to apply constitutional law and IEL principles in the adjudication process. Use of the precautionary principle, intra- and inter-generational equity, polluter pays and other emerging international principles allows ECTs to protect resources now and for the future, helping to support the UN's 2030 Sustainable Development Goals.

- (3) Level of jurisdiction: ECTs can be established at the trial (first-instance), appeal (second-instance), the highest level (Supreme Court) or all 3. Experts agree that ECTs should have merits (de novo) review at the first level. Some ECTs are multi-level, like Sweden's and New Zealand's, acting as first-instance courts for new case filings and second-instance review courts for appeals from decisions of local planning bodies. Thailand and China have created ECs or green benches at all 3 levels (trial, appeal and Supreme Court). If only one level can be approved initially, the best practice is to have it at the first-instance level, to develop a solid record for appeals.
- (4) Appeal jurisdiction: The fourth jurisdiction decision is where should appeals from the ECs go? Obviously, Thailand's approach of having EC decisions appealed to higher ECs gives litigants the benefit of judges theoretically having environmental law expertise at each appeal level. India's NGT is only appealable to the Supreme Court, giving the NGT strong status in the legal system. It is a less desirable practice to have an EC decision appealed to a non-expert general court bench, but this is better than having an EC decision that can be appealed to and overturned by an official of the agency being reviewed.

Having said all this, it is often politically impossible to start an ECT with broad jurisdiction. In 2014, Hawaii's state legislature overruled EC advocates and sided with developer concerns, giving their new ECs no jurisdiction over land use and development laws.⁶⁸ In some cases, wider jurisdiction only comes after some years; for example, Vermont's EC started in 1990 with only jurisdiction over environmental enforcement, but in 1996 received land use jurisdiction, and in 2005 was granted environmental permitting jurisdiction. Sweden's ECs just had jurisdiction over land use and development cases added to their environmental cases in 2011. Other ECTs are exploring ways to expand their jurisdiction. Ireland is studying increasing its ET's jurisdiction from land use permits to include environmental concerns, and Thailand is considering combining into 1 unit all of its ECs that are now separated in its Court of Justice and Administrative Court systems, for increased efficiency and consistency.

Experts generally agree that narrow jurisdiction limits the ECT's ability to take a problem solving approach or to deal with a problem comprehensively. A caveat should be added: *Only if the resources are in place.* When Kenya established its very broad-jurisdiction ECs, they were flooded with environment and land cases jettisoned on them by the general courts and found it next to impossible to keep up with the workload because there were too few EC judges.

4.1.7 Standing

Standing (*locus standi*) – the qualifications one must have in order to file or participate in a lawsuit—is prescribed by legislation, court rules and case precedent. It is a highly recommended best practice to make it as broad and open as possible, indeed to open standing to “any person” to raise an environmental issue, including public interest litigation (PIL), citizen suits and class actions.⁶⁹ Standing is the most significant barrier to access to justice; yet many countries’ general court systems (including the USA) have much more restricted standing than the above, creating an insurmountable barrier to justice for some.

STANDING TO SUE FOR FUTURE GENERATIONS

In 1993, the Philippines Supreme Court handed down a landmark decision on standing, in a case brought by award-winning Philippines PIL attorney Anthony J. Oposa Jr., representing 40 children and their parents. The case won a ruling stopping the government’s logging permit program to stop deforestation of the country’s rainforests.

In the first decision of its kind in the world, the Court ruled: “Petitioners minors assert that they represent their generation as well as generations yet unborn. We find no difficulty in ruling that they can. ... Needless to say, every generation has a responsibility to the next to preserve the rhythm and harmony [of nature] for the full enjoyment of a balanced and healthful ecology.” (Oposa v. Factoran, www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html).

In a number of jurisdictions, citizens do not have standing unless they have already suffered “actual harm” to themselves or their property, or live within a set distance from the environmental problem, or took part in earlier government agency proceedings on the problem. The European Commission (EC) and the Compliance Committee for the Aarhus Convention have successfully pressured for broader standing in a number of EU countries.⁷⁰ The EU Court of Justice has cited nations, including Sweden, for failing to meet Aarhus Convention standards for more open standing. China’s Supreme People’s Court has recently permitted PILs, resulting in a reported 36 PIL cases pending as of December 2015, as has the Thai Supreme Court. The Philippines, Kenya and India laws for environmental cases guarantee open standing for individuals, communities and ENGOs to bring cases representing the public interest.

Studies have discredited the 4 arguments advanced for restrictive standing (“flood” of litigation, frivolous lawsuits, improper court role and development inhibiting). The Australian Law Reform Commission studies in 1985 and 1995 showed that these arguments against open standing are wrong or can be easily dealt with by a court without limiting standing.⁷¹

4.1.8 Remedies

An ECT needs to have adequate remedies (powers to order action or inaction) so it can relieve and deter the environmental problems brought to it.⁷² Existing legal frameworks often authorize only a limited range of remedial powers, leaving judges little room to craft more effective steps. In some jurisdictions, fines are so low that it is cheaper for the polluter to keep dumping waste and pay the fines. Moreover, jail time and fines that go into general government coffers do not repair the environment. Without power to order preliminary or interim injunctions, judges cannot protect the environment's status quo pending the trial. The ECT authorizing law or rules should spell out a list of remedies and provide the flexibility for the court to do more if necessary (see Kenya Constitution box in section 4.1.6 above). Flexible remedial powers can permit the design of creative, effective solutions by the parties through mediation, by the judge through “principled sentencing” such as in the Manaus, Brazil EC (section 3.2.1 above) or by the community through restorative justice.⁷³ Perhaps the most important remedy for sustainability is the power to issue a *temporary injunction without a security bond* to preserve the status quo pending the outcome of the case.

4.1.9 Enforcement Powers

An ECT needs to be given adequate powers to enforce its decisions and remedies.⁷⁴ The list of enforcement powers given to the Kenya ECs is exemplary (see Kenya Constitution box in section 4.1.6 above). Another useful enforcement tool worth authorizing is “continuing mandamus” (the power for the ECT to continue to have jurisdiction over the case after its ruling in order to monitor compliance with it), as used in the Philippines, India, Pakistan and other countries. In lieu of jail and/or fines, the state EC judge in Manaus, Brazil, has the enforcement flexibility to give convicted defendants the alternative to go to his “environmental night school,” polluting bus companies to carry environmental ads, poachers to do “volunteer” work for wildlife organizations and illegal developers and loggers to renovate public parks and replant forests, with great success and little recidivism.

4.1.10 Evaluation Procedures

Transparent and publicly available evaluation and accountability procedures are a critical best practice for ECTs.⁷⁵ The NSW Land and Environment Court is a leader in implementing the International Framework for Court Excellence, a quality court evaluation and management system developed by an international consortium.⁷⁶ Many ECTs, like the two in Chile, self-evaluate and publish annual reports. Others have external oversight boards and user groups that monitor performance and user satisfaction. Best practices require an ECT evaluation process that is mandatory, regular, objective, penetrating and permits changes and improvements in the ECT over time. The NSW Land and Environment Court and others have exemplary evaluation systems well worth replicating.

4.1.11 Adequate Resources

ECTs are not cheap (“although not as expensive as some might think,” according to former Vermont EC Judge Merideth Wright). Effective ECTs need a budget, judges, staff, IT and facilities adequate for their workload and design – as well as the resources to provide free or subsidized services for needy litigants.⁷⁷

“[Austria’s] new administrative courts have proven to work effectively. [With] the establishment of specialised panels ... the quality of the judges recruited ... sufficient resources and ... adequate staff[ing], we are confident that the courts can keep a high level of effectiveness.”

- Professor Verena Madner

The Kenyan experience shows how lack of personnel planning can be a major barrier to access to justice. Complex IT systems, one of the hallmarks of operating ECT best practices, are expensive and require pre-planning. Travel of judges and staff to remote areas for site visits and hearings is another cost needing advance planning. Efforts to avoid costs (such as simply designating existing general court judges to be “environmental judges” without caseload reduction, training and adequate resources) can result in no improvement or worse, destroying public confidence and undermining access to justice.

A distinction should be made between resources to support the ECT and resources available to support needy litigants, such as the poor, citizen/community groups, PILs and ENGOs. This funding, too, should be considered for the budget. Filing fee and court cost waivers or reduction, court-paid expert witnesses and ADR, permitting self-representation (without attorneys), intervenor funding in PIL cases, amici curiae filings, waiver of security bonds for injunctions and other cost-reduction aids should be considered. It should be understood that planning ECTs to be “self-funding” from court charges will negatively affect access to justice.

The ECT’s resources should be protected from retaliatory reduction by any government displeased with their decisions. The way Brazil does this is to mandate a fixed percentage of the country’s annual budget to be allocated to the judiciary, which insulates the courts from adverse financial consequences when delivering on their mandate.

4.2 Operating Stage – Best Practices

ECTs have operating best practices, both procedural and substantive, that promote access to justice and the rule of law. Some do not even require added authority or resources. If an ECT is created or reformed so that it has the ability to be flexible as regards structure, rules, procedures, standing, remedies and enforcement, the following best practices can dramatically improve operations and effectiveness, so are in the ECT’s best interest. Countries listed are only a few examples of the many ECTs that embrace these practices.

4.2.1 Public Outreach

It is a definite best practice to educate the public fully about the ECT – all stakeholders, from citizens to developers to government officials to attorneys to NGOs to academia. A continuing effective program of educational outreach is in the public’s (and in the ECT’s!) enlightened best interest – improving ECT visibility and credibility, helping people understand the ECT’s importance, educating people on how to use the ECT effectively and what expectations to have, increasing efficiency and building networks of support. The effective ECTs use:



- IT, including a user-friendly, regularly updated, interactive website with FAQs and contacts that respond, also containing instructions, forms and potentially online filing for complainants and counsel (New South Wales, New Zealand)
- Printed materials that cover the FAQs, are easy to read and understand, in all relevant languages, including in some cases Braille (Philippines)
- Meetings with communities, stakeholder groups, and government to help explain, design, evaluate and improve the ECT (New Zealand, Hawaii)
- Stakeholder consultation processes, community oversight boards or advisory groups (India, New South Wales)
- Community panels of science and technology experts to advise the ECT decision makers (Denmark)
- Posting online notices of hearings and written decisions, available to the public.

4.2.2 User Friendly

Access to justice is enhanced when ECTs are user-focused and service-oriented.⁷⁹ Traditionally the halls of justice have been designed to be impressive, imposing and intimidating. ECTs today tend to eschew the ornate entries, long flights of steps and white marble pillars in favor of more informal and welcoming housing, with registrars and case managers who are focused on friendly, supportive customer service. Features to consider:

- Accessibility for the physically disabled
- Special support systems for the blind and deaf
- Translation services at no charge



Multilingual signage - a Best Practice where needed.

- Assistance with forms and procedures, especially for those not represented by an attorney
- A case manager that follows the progression of cases and keeps things moving
- “Travelling courts” that get judges to the people and the environmental problem
- Special efforts “to encourage participation of aboriginal peoples and provide appropriate mechanisms for incorporation of traditional knowledge.”⁸⁰

The goal is to provide “one-stop-shop” services for users (Vermont, Queensland, New South Wales).

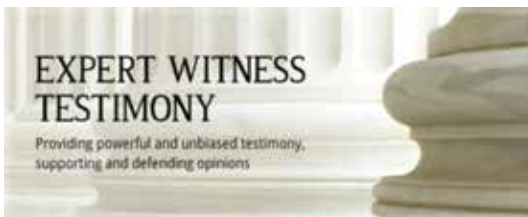
4.2.3 Case Management Services

Case management is a clear best practice, involving both dedicated staff (including the judge) and streamlined processes for moving a case from filing through adjudication.⁸¹ These services can include:

- Front-end complaint review to determine if the case is within the ECT’s jurisdiction
- Case evaluation at intake for early identification of issues and what ADR may be effective
- Directions hearings – with the registrar, case manager and/or judge – held quickly and frequently enough to establish expectations and deadlines and to enforce them
- Continuances not being favored and granted only for good cause shown
- Accessible, transparent and frequently updated court and case information
- Computer-tracking of cases to assure records are not lost, parties and judges have access to all records, and deadlines are noted and met
- Decisions issued in writing and publicly posted on the website.

An investment in good case management serves parties, stakeholders and the ECT. Efficiency is improved, costs reduced and access to justice promoted. Queensland, New South Wales, New Zealand, Vermont and the US EAB among others have exemplary case management systems.

4.2.4 Management of Experts



It is a best practice to have rules and procedures for “managing” (controlling) expert testimony and evidence to promote maximum reliability and efficiency.⁸² Australia’s ECTs – including Queensland, New South Wales and Western Australia – have multiple methods of expert witness

management for better environmental justice.⁸³ Techniques include:

- Judges advising the parties' experts in advance that their duty is to the ECT, not to the parties paying them, that they are sworn to tell the whole truth, and that they are to be unbiased – or they will be subject to contempt
- Requiring experts on an issue to meet with the registrar or case manager – without the parties or their counsel – to discuss and identify areas of agreement and disagreement
- Having experts work with the ECT's ADR personnel in appropriate cases to achieve as much consensus as possible before the hearing
- Ordering experts on an issue to prepare a joint written statement clearly stating their areas of agreement and disagreement, so the hearing can address only the latter, and provide that statement to all parties and counsel prior to the hearing, or alternatively having each expert prepare a written statement of views distributed pre-hearing
- Sequencing the experts on one issue at a time
- Having the experts on one issue sit together (possibly in the jury box) at the hearing, with the parties/counsel and judges asking questions and eliciting rebuttal sequentially (known colloquially as “hot tubbing” in Australia, given the jury box)
- Sharing innovative expert-management procedures at international conferences and in publications.

“In terms of innovation, my court is probably best known for the way it deals with experts and how it manages that, in combination with early mediation, to resolve matters in a problem solving way.”

– Queensland Planning and Environment Court Judge Michael Rackemann

Admittedly, these procedures come as a shock to some judges and lawyers – particularly in the USA where a judicial “hands off” approach to experts prevails, as opposed to the inquisitorial model of civil law judges. Of course, the price paid for neglecting these expert-management practices is dealing with the unfortunate “Battle of the Experts” problem, where the expert witnesses are not objective, only support their clients' views, conflict with each other, and truth takes a back seat.

4.2.5 Cost Control

Procedures to control and lower costs in time and money are an essential best practice.⁸⁴ “Justice delayed is justice denied” and “Only the rich can afford court” are two common themes in all judicial reform. A number of successful strategies for reducing or eliminating time and costs have been adopted by effective ECTs, including:

- Permitting self-representation without lawyers
- Consolidating similar complaints into one adjudication process
- Setting reasonable or no court fees for litigants

- Adopting and aggressively employing ADR
- Not making the losing party pay crippling costs to the winner (the so-called British rule of “costs follow the event”), except in cases of court abuse or extreme behavior
- Issuing temporary restraining orders and preliminary injunctions to preserve the status quo, without requiring the plaintiff to pay a security bond
- Providing court-appointed experts
- Case-managing the process efficiently
- Providing support for indigent parties and PIL.

ECT planners should not assume the ECT will be completely or even substantially “self-funding” from charging litigants fees, which incentivizes ECT revenue rather than client service and access to justice. The high costs of litigation are a bigger barrier to access to justice than standing in some jurisdictions.

4.2.6 Professional Development

The rule of law and sound environmental jurisprudence depend upon judges and decision makers who are knowledgeable and experienced in environmental law or their environmental profession – and continuing professional education and development is an essential best practice.⁸⁵ Ideally, the judicial selection process requires such credentials (many do not), and even when it does it is very important that continuing education be mandated, through organizations like UN Environment, judicial training institutes, universities, IFIs like the ADB, and ECT organizations and conferences.



A number of outstanding multinational judicial forums provide training and collaborative opportunities for environmental judges, such as the EU Forum of Judges for the Environment (EUFJE) (<http://www.eufje.org>), Australasian Conference of Planning and Environmental Courts and Tribunals (ACPECT) (<http://plevin.com.au/acpect2016/index.html>) and Asian Judges Network on Environment (AJNE) (<http://www.asianjudges.org>). As yet, there is no worldwide environmental judicial organization, but Brazilian Justice Antonio Herman Benjamin, USA Law Professor Nick Robinson, and other IUCN leaders are working to develop one – a **“Global Judicial Institute for the Environment.”** Many of the outstanding ECT judges and decision makers already identified are frequent presenters and trainers in such multinational forums, publish regularly, travel extensively to advise other ECTs, and invite delegations of judges and administrators from other countries to their courts for exchange of information (see Appendix E Experts List).

4.2.7 Commitment to Continuous Improvement

This best practice really reflects the leadership of the ECT’s chief judge, chair or president, and is closely tied to best practice 4.2.6 above. Group collegiality, collaboration, research, idea-sharing, reflection and evaluation are hallmarks of an effective ECT.⁸⁶ Flexibility and adequate resources are key to ECTs continuously renewing themselves in this way. New South Wales has been at the forefront of this best practice.

If continuous improvement does not come from within the ECT, it can come from without. In February 2016, Ireland’s Minister of the Environment released the study of a blue-ribbon independent review group making 101 recommendations for reform of that country’s ET.⁸⁷ These progressive recommendations cover the full range of best practices discussed in this guide and are a blue print for policy makers and stakeholders considering developing or improving ECTs.

Today, only a handful of ECTs demonstrate all or even most of the best practices outlined above. Those that do tend to be the “Rolls Royce” models. But there are others that do very well on a more economical budget. All it takes is careful planning and implementation.

Justice Brian Preston presiding over a trial in the Land and Environment Court of New South Wales, Australia.



5.0 Recent ECT Trends to Consider

There are several emerging trends with ECTs that may be “best practices” for policy makers in certain situations: (1) amalgamation, (2) incrementalism and (3) justice reform. Each trend can play a role in the ECT development process.

ECT TRENDS

1. Amalgamation
2. Incrementalism
3. Justice Reform

5.1 Amalgamation

There is a movement toward amalgamation, the clustering or joining of multiple existing courts or tribunals including some ECTs, into one “umbrella” or “super tribunal.” While operating under a single administrative and budget structure, these amalgamated bodies usually allow each tribunal under their umbrella to continue to operate relatively independently, but there can be some merging or blurring of the outlines of the ECTs. Tribunal amalgamation has already occurred in Canada, England-Wales, New York City, some states in Australia and other jurisdictions, and Tasmania is currently studying it.

Jarrod Bryan, the Tasmania ET Registrar who is leading that state’s study of amalgamation, in response to the survey, states that combining a number of tribunals “is entirely sensible and desirable subject to retention of the specialist nature of the jurisdictions.” The benefits include cost savings, as well as better resourcing and capacity building, access to justice and delivery of services.⁸⁸ Cost savings can come from centralizing administrative functions, increased efficiency, sharing resources of staff, space, supplies, IT, websites, newsletters, etc., and having a more flexible budget. Capacity building and delivery of service can improve because of better training and cross-training of judges and staff. Access to justice can improve as citizens can identify a single collective tribunal more easily, umbrella staff can screen and assign cases more effectively, and decisions can be more timely since judges can move where caseloads require. Care must be taken not to lose the environmental (or other) expertise factor. Independence can also be improved if captive ETs are moved from the agency they review into a neutral agency, as happened with Ontario’s ERT and New York City’s ET.

Amalgamation has even spread to the courts. In the Flemish Region of Belgium, the Environmental Enforcement Court and the Court for Building Permit Disputes (land use) have recently been put under the region’s general Service for the Administrative Courts, the overarching entity for almost all Flemish administrative courts. The 2 ECs retain their separate jurisdictions, judges and specialized staff.

Creating or moving to an amalgamated super tribunal should be explored if multiple smaller bodies already exist with compatible (if not overlapping) subject matter. The Province of Ontario's Environment and Land Tribunals (ELTO), is an excellent example of a cluster tribunal that has maintained its 5 ETs as specialized subsidiary bodies (<http://elto.gov.on.ca/>). A more drastic approach to amalgamation was taken in Austria in 2014. Before that, Austria had over 100 specialized tribunals, including an ET, the *Umweltsenat* or Environmental Senate that reviewed appeals involving EIAs. In order to improve access to justice and efficiency, the legislature abolished the tribunals and consolidated them under a new 2-tier court system. Appeals of environmental, natural resources, and land use decisions now go to one of the 9 administrative courts in the landers/states or a national-level Federal Court of Administration, depending on the subject-matter of the complaint. Under the administrative courts' rules, cases are assigned to judges by general subject area, including developing "green" panels of judges in each lander and the federal court. Not only is this more efficient, according to Professor Verena Madner's survey response, it has expanded their jurisdiction and powers, allowing for integration of issues, judicially enforceable decisions and other best practices. Appeals from the lander panels go to the highest courts in Austria, the Administrative Court or the Constitutional Court, resulting in a real improvement in environmental justice and the rule of law.

5.2 Incrementalism

Another trend to consider in creating an ECT is reflected in the old adage "Think Big. Start Small." This can provide the advantage of building bigger over time as demand, support and caseload grow. This approach may be politically more acceptable, less threatening to existing interests and cheaper and faster to implement, even though it is not as effective at delivering environmental justice initially or in the long term.



While many ECT advocates call for a completely independent, highly visible, wide-jurisdiction ECT as a first step, it may be more realistic for some to start in a more minimal manner. This approach also makes sense if it is impossible to predict future caseload, if funding is scarce, if there is intense opposition (for example, from the existing judiciary or business community) or if there is limited political will but a significant leader in support of the ECT. This happened in the Philippines where then-Chief Justice Reynato Puno

provided the leadership that resulted in the Supreme Court (not the legislature) designating 117 existing courts as ECs with no increase in budget.

But there is no such thing as an easy solution. The drawback to incremental development is that the ECT may never be allowed to grow and incorporate best practices because its initial accomplishments are so unimpressive or it is politically impossible to modify the authorizing law or rule or the specialization gets lost as the caseload becomes more general.

5.3 Justice Reform

“Civil justice reform is on the march, and it is much needed,” observes Rebecca Love Kourlis, Executive Director of the University of Denver Institute for the Advancement of the American Legal System (IAALS) and a former Justice of the State of Colorado Supreme Court.⁸⁹ A recent IAALS study reveals that people in the US also perceive their courts as political, inefficient and intimidating, a last resort rather than a preferred method of resolving disputes. To improve this, rule changes are not enough, Justice Kourlis explains, instead “the culture of the courts and of the [legal] profession needs to change ... to create the just, speedy, and inexpensive courts of tomorrow.”⁹⁰

Calls for changes, including greater interpersonal civility, a focus on justice, engaged judges, improved efficiency and smart use of IT have been emphasized. To these reforms, one could add: a move from formality to informality, from adversarial win-lose outcomes to non-adversarial “problem solving,” from standing barriers to open access to justice, and from rigid application of law to the achievement of environmental justice. These “best practices” reforms are already impacting and changing a number of the ECTs in the world and should be considered in creating new ECTs and making improvements in existing ones.

Auckland's Northern Motorway was the subject of considerable litigation before the Environment Court of New Zealand before it received approval.



6.0 Next Steps on the Road to Creating an Effective ECT

6.1 Step 1: If It Ain't Broke, Don't Fix It!



A comprehensive assessment of the existing justice system is the first step in considering if an ECT is warranted. There is truth in the old adage, “If it ain’t broke, don’t fix it.” If environmental justice and the rule of law are being delivered to citizens by the existing systems – whether courts or tribunals or indigenous justice systems – in a way that is accessible, fair, fast, and affordable,

there is little to be gained (and possibly much to lose) in moving to an ECT. Even if the current system is not “just, quick and cheap,” there may be avenues for reform within the existing system, such as mandatory judicial training, more judges or better cost controls. The US government debated establishing a national EC in the 1970s, but decided against it (although it has established a number of national ETs within several administrative agencies, see Appendix A).

Nor should ECTs be created simply to satisfy public criticism of the general courts, unless there are sufficient political will and resources to implement the change successfully. There is an entire category of ECTs that are “ABNEs,” for “authorized but not established.” At least 15 countries are in this group – including Bangladesh, Chile, Fiji, Panama, Tanzania and Zimbabwe – where ECTs have been legislatively or judicially authorized but have not yet been established. There is also a category of ECTs that are “Discontinueds,” ones that have been authorized, established, but then closed. Some 7 countries fall into this group – Austria, Bahamas, China (Jiangsu Province), Finland, Hungary, Netherlands and South Africa. Reasons given for both the ABNEs and the Discontinueds include

- Change in political leadership and commitment
- Insufficient caseload
- Lack of funds
- Adverse special-interest pressure
- Judicial opposition or preferences
- Amalgamation of several ECs into one larger unspecialized one.

There are also instances where ECTs are authorized and operating but are ineffective “toothless tigers.” This can be because they lack:

- Sufficient cases
- Trained judges
- Support of government agencies
- Protection from outside interference
- Freedom from corruption
- Citizen education on how to use the system
- Public confidence
- Adequate legal jurisdiction, funding, remedies or enforcement authority
- Flexible governing rules
- Open standing rules
- Other necessary “best practices.”

6.2 Step 2: Examine the Existing Justice System

In the event Step 1 identifies both (1) problems with the current court system and (2) commitment from stakeholders to positive change, then it is time for Step 2: Examining what’s wrong. There are good ways, both external and internal, to accomplish this.

6.2.1 External Assessments

There are independent, professional assessment tools evaluating nations’ rule of law that can help. Five of the most valuable are the following:

- (1) **Environmental Democracy Index (EDI):** This study, released in 2015, is prepared by the World Resources Institute (WRI), its division The Access Initiative (TAI) and their partners.⁹¹ WRI is a global research organization working at the intersection of environment and development, and TAI is a leading civil society network focusing on access rights. The EDI evaluates 70 of the 196 countries in the world across nearly 100 indicators of law, practice, transparency, accountability and citizen engagement, based on the UN Environment Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters.⁹² The evaluation is based on input from more than 140 lawyers around the world. Most useful are the EDI’s “country specific” results, particularly on the “Justice” guidelines (such as broad standing, effective review, affordability, effective remedies and use of ADR). Unfortunately EDI evaluated existing laws on the books, and not their application and enforcement in practice.

- (2) **Environmental Performance Index (EPI):** This index is created by Yale and Columbia Universities and other partners.⁹³ It measures two critical areas – protection of human health from environmental harm and protection of ecosystems – in 128 countries on 9 separate environmental issues. Again, it is most instructive to look at the data in-depth by country, not simply look at the country ranking.
- (3) **Aarhus Synthesis Report:** This 2013 study evaluates how well EU nations are providing access to justice in environmental cases.⁹⁴ It is compiled by synthesizing the reports of distinguished scholars, judges and environmental attorneys in each of the 28 EU countries with regard to each country’s legislative framework, judicial review, standing for the public, intensity of scope of review, costs, effectiveness, etc.
- (4) **Rule of Law Index:** This index is prepared by the World Justice Project (WJP), an independent, multidisciplinary, charitable organization working to advance the rule of law around the world.⁹⁵ The WJP has an authoritative 4-part definition of “the Rule of Law,” based on international standards:
1. **The government and its officials and agents as well as individuals and private entities are accountable under the law.**
 2. **The laws are clear, publicized, stable and just; are applied evenly; and protect fundamental rights, including the security of persons and property.**
 3. **The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.**
 4. **Justice is delivered timely 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.**⁹⁶

Using a multi-factor analysis, the 2015 Index measures the adherence of 102 countries to the rule of law, identifying strengths and weaknesses in each country to encourage policy choices that strengthen the rule of law. Although the analysis is not focused specifically on environmental indicators, it is possible to draw conclusions about the status of the environmental rule of law from its general rankings and analysis.

- (5) **Open Government Index:** This study is also prepared by the World Justice Project and measures government openness based on worldwide public surveys and in-country expert questionnaires.⁹⁷ The 2015 OGI presents scores and rankings for 102 countries and jurisdictions on each of the following dimensions of government openness: (a) publicized laws and government data, (b) right to information, (c) civic participation and (d) complaint mechanisms (including courts).



These 5 external assessments have their limitations since not all nations are represented, the studies do not agree with each other, and they show little correlation with whether or not a nation has an ECT. Interestingly, some of the nations that are ranked poorly have instituted very effective ECTs (such as Kenya and India), and some that are highly ranked have no ECTs (such as Switzerland and Singapore). The assessments do provide insight about how a country is doing, where it needs to improve and whether an ECT would help relative to improving the rule of law and environmental democracy, including access rights.

6.2.2 Internal Assessments

Even more important than assessments by external experts is an honest, facilitated assessment involving local policy makers and stakeholders, including all branches of government concerned with environmental issues, civil society, ENGOs, administrators, prosecutors, business interests, human rights organizations, academics and other relevant points of view. Stakeholder “roundtables” can answer questions about:



- Whether existing laws are adequate
- If the general court system is “just, quick and cheap”
- What the courts’ problems are
- What changes would improve court effectiveness.

Users of the environmental justice system should be asked to discuss if it:

- Follows the rule of law
- Lacks critical components (e.g. ADR?)
- Does not provide access to justice for all (standing?)
- Allows cases to languish for years
- Imposes costs that are prohibitive
- Has judges who do not understand or apply environmental laws correctly
- Is corrupt or controlled by outside interests
- Is excessively formal, inflexible or intimidating
- Does not provide uniform, consistent legal interpretations
- Is able to apply IEL principles
- Lacks remedies that are effective or do not fit the crime/action
- Fails to follow through on enforcement of its decisions.

6.3 Step 3: Crunching the Numbers

Even if the “pro” ECT arguments outweigh the “con,” a Step 3 is necessary – consider *potential case volume*. “Crunching the numbers” is essential to avoid planning too big or too small. More than one ECT has inadequately done this, resulting in unmanageably large or embarrassingly small caseloads. Planners should carefully calculate the current environmental caseload and predict future environmental caseload with an ECT. This may not be easy if court data have not been compiled by subject area. (In that case, such research can be undertaken by interested law and social science academics and students, as was done with the University of Denver SLAPPs Study.⁹⁸)



Analysis of these statistics directly drives decisions about what, if any, ECT model and size is appropriate. If there are too few complaints filed or too few environmental laws involved, it does not make sense to plan a “Rolls Royce” model – powerful, complex, highly tooled and expensive. Trinidad and Tobago created a “Rolls Royce” EC in 2000, but has since adjudicated only a few cases a year. On the other hand, the opposite should also be avoided, as Justice Samson O. Okong’o, Presiding Judge of the Environment and Land Court of Kenya, warns in a survey response:

“[T]he main weakness in our court has been shortage of judges. ... When our court was set up, all [general] courts stopped dealing with environment and land matters. The judges who were appointed to preside over our court who were only 15 in number found the volume of work overwhelming. Those countries planning to set up a court such as ours should consider the number of cases which such a court would handle and appoint judges proportionate to the caseload.”

If an assessment of need, driven by existing and anticipated caseload, had been conducted first, it is likely a less grand approach (than Trinidad and Tobago’s underutilized EC) or, the opposite, more adequate staffing (than Kenya’s overworked ECs) would have been a better way to start. Relying on no statistics or on anecdotal evidence or on one highly visible environmental disaster is definitely not advised.

6.4 Step 4: Choosing the Model and the Best Practices

If the first 3 steps indicate the need for or desirability of a new or improved ECT, then policy makers and planners should move to Step 4: What model is most desirable and what best practices should it incorporate? Here, review the preceding chapters on Models and Best Practices – and develop the comprehensive legislation or court rules necessary to authorize an effective ECT.



Court case conciliation being conducted at the site of the environmental issue by the Land and Environment Court of New South Wales, Australia.

Public education publications of the Ontario, Canada, Environmental Review Tribunal, include guides, rules, annual report – a Best Practice.



7.0 An Ideal Model for ECT Legislation

If one wanted to create the “perfect” ECT, what would go into its authorizing legislation or rules?

1. Mission: A clear statement of a mission to ensure access to justice, environmental democracy, the rule of law and sustainability
2. “Just, quick and cheap”: An explicit requirement to provide access to justice that is fair, efficient and affordable
3. Independence: Language creating decisional independence from external influence, administrative independence from government bodies whose decisions it reviews and institutional independence relating to appointment, tenure and remuneration
4. Expertise: Provision for both law-trained judges and science-technical decision makers trained and experienced in environmental issues who are competent, diverse, unbiased, ethical and committed to service and justice
5. Flexibility: Substantial freedom for the ECT to control its own rules and procedures (including standing, costs, remedies and enforcement and the ability to make future changes without requiring new authorization)
6. ADR: In-house provision of ADR for cases in which it could improve outcomes;
7. Budget: Adequate, independent, protected financial resources not subject to political retaliation
8. Integrated jurisdiction: Broad, comprehensive, integrated jurisdiction over the full range of environmental and land use planning laws
9. Information technology: Provision for a progressive, full-service IT system
10. Prosecutors: Authorization for trained specialized environmental prosecutors
11. Triple jurisdiction: Jurisdiction granted over civil, criminal and administrative cases
12. Levels: ECs at both trial and appeal levels (and possibly Supreme Court)
13. Natural resource damages (NRD): A procedure that permits government to recover money to restore, replace, or repair public natural resources, such as land, fish and wildlife, ecosystems, parks, forests, air, water, groundwater, and other resources held in trust for the public
14. Public interest litigation (PIL): Authorization for lawsuits against public or private parties for actions and inactions harmful to public health or the environment
15. Anti-SLAPPs Protection: An expedited dismissal procedure to protect litigants and others from “Strategic Lawsuits Against Public Participation” (“SLAPPs”), unjust lawsuits filed to intimidate and silence those seeking to protect the environment⁹⁹

16. Referral Process: Procedures for referring to it environmental cases filed in other courts
17. Evaluation: Requirement for regular, in-depth evaluation processes based on performance indicators.

These elements, representing many of the important best practices listed above, can all be incorporated in authorizing legislation or court rules at the national or state/province level, along with a sufficient independent budget. The authorizing law can also lay out a phased approach, in contemplation of expanding jurisdiction and flexibility in the future, pending evaluation of the initial phase – as is contemplated in Hawaii. Alternatively, if the political climate will not support a legislated ECT, judicial or administrative leadership can create strong internal EC or ETs without the legislative and political hassles. Retired Supreme Court Chief Justice Puno of the Philippines is an appropriate example of implementation of a sophisticated new set of rules and procedures and identification of new specialized courts by the Supreme Court that did not necessitate a legislative change.

Renewable energy projects come before ECTs – involving human rights, endangered species, and constitutional law issues – as did this wind farm in the Environmental Review Tribunal of Ontario, Canada.



8.0 Conclusion

Environmental rule of law integrates the critical environmental needs with the essential elements of the rule of law, and provides the basis for reforming environmental governance. It prioritizes environmental sustainability by connecting it with fundamental rights and obligations. It implicitly reflects universal moral values and ethical norms of behavior, and it provides a foundation for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective, and unpredictable.

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The explosion of ECTs in the past 15 years reflects widespread dissatisfaction with current adjudication institutions for resolving environmental disputes – and global demands for improvements in access to justice and the environmental rule of law. Research has found that carefully planned and operated ECTs do improve access to justice in ways that are more “just, quick and cheap” than the general court systems, improve access to justice, enhance environmental governance, and better support the rule of law.

This guide provides a “road map” for ECT planning and capacity building – the diverse models for ECs and ETs, an experts’ list of best practices, and a 4-step assessment process. It provides a way to determine if an ECT is the “right” solution to enhance access to information, public participation and access to justice, as well as to improve environmental justice, the rule of law, sustainable development, community credibility and “just, quick and cheap” environmental dispute resolution.

Endnotes

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Appendices

Appendix A

List of Operating ECTs

ANTIGUA & BARBUDA

1 ET = the Appeals Tribunal of the Development Control Authority (DCA)

AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY

1 ET = the Land and Planning Division of the Administrative Appeals Tribunal

STATE OF NEW SOUTH WALES

1 EC = Land and Environment Court

NORTHERN TERRITORY

1 ET = Lands, Planning and Mining Tribunal

STATE OF QUEENSLAND

3 ECs = Planning and Environment Court

Land Court

Land Appeal Court

STATE OF SOUTH AUSTRALIA

1 EC = Environment Resources and Development Court

STATE OF TASMANIA

3 ETs = Resource Management & Planning Appeal Tribunal (RMPAT)

Forest Practices Tribunal

Tasmanian Planning Commission

STATE OF VICTORIA

1 ET = Planning and Environment List of the Victorian Civil and Administrative Tribunal (VCAT)

STATE OF WESTERN AUSTRALIA

1 ET = Development and Resources List of the State Administrative Tribunal

AUSTRIA

10 ECs = Until 2014, Austria had an ET, the Umweltsenat, one of over 100 specialized-issue tribunals, panels and commissions discontinued that year with their jurisdictions merged into a new general administrative court system (2 national courts and 1 in each of the 9 landers/states). Since then, 1 of the national courts and each of the 9 lander courts are developing benches specializing in environmental and planning laws, although in times of heavy caseload those judges can be moved to other benches (e.g. asylum).

BANGLADESH

4 ECs = 3 trial (Dhaka, Chittagong, and a “joint” District Court/EC in Sylhet), plus 1 appellate EC in Dhaka

BELGIUM

2 ECs = Environmental Enforcement Court of the Flemish Region
Court for Building Permit Disputes of the Flemish Region

BOLIVIA

9 ECs = Tribunales Agroambientales (Agro-Environmental Courts) in 9 different cities/towns

BRAZIL

17 ECs = Federal District Courts:

Curitiba, Paraná State

Florianópolis, Santa Catarina State

Porto Alegre, Rio Grande do Sul State

Manaus, Amazonas State

Porto Velho, Rondônia State

São Luis, Maranhão State

Belém, Pará State

Marabá, Pará State

Santarém, Pará State

State Courts:

Cuiabá, Mato Grosso State

Manaus, Amazonas State

Porto Alegre, Rio Grande do Sul State (Health and Environment District Court)

Belem, Pará State (Small Environmental Crimes Court)

Brasília, Federal District

São Paulo, São Paulo State (2 environmental appeals chambers in Tribunal de Justiça)

Porto Alegre, Rio Grande do Sul State (semi-specialized chamber in environmental crimes in 4th criminal chamber of Tribunal de Justiça)

CANADA

PROVINCE OF ALBERTA

2 ETs = Environmental Appeals Board
Natural Resources Conservation Board

PROVINCE OF BRITISH COLUMBIA

10 ETs = Environmental Appeal Board
Forest Appeals Commission
Private Managed Forest Land Council (Managed Forest Council)
Forest Practices Board
Utilities Commission
Farm Industry Review Board
Agricultural Land Commission
Oil and Gas Commission
Oil and Gas Appeal Tribunal
Surface Rights Board

PROVINCE OF MANITOBA

1 ET = Clean Environment Commission

NORTHWEST TERRITORIES

1 ET = Mackenzie Valley Review Board

PROVINCE OF NOVA SCOTIA

1 ET = Environmental Assessment Board

PROVINCE OF ONTARIO

5 ETs = Within the Environment and Land Tribunals Ontario (ELTO):
Environmental Review Tribunal, and within it:
Office of Consolidated Hearings
Niagara Escarpment Hearing Office
Ontario Municipal Board
Conservation Review Board

PROVINCE OF QUEBEC

1 ET = Bureau d'audiences publiques sur l'environnement (Office of Public Hearings on the Environment)

CHILE

2 ECs = 3 authorized but only 2 operating:
*1st Environmental Tribunal, Antofagasta (ABNE)
2d Environmental Tribunal, Santiago (operating)
3d Environmental Tribunal, Valdivia (operating)

CHINA

456 ECs (as of November 1, 2015), the Supreme People's Court reports:

= The Supreme People's Court has established a Division of Environment and Resources (civil only).

24 provinces have established ECs, among which 9 provinces (Guangxi, Guizhou, Fujian, Hainan, Hebei, Henan, Jiangsu, Jiangxi, Shandong) have established ECs in their Higher People's Court, and 4 provinces (Fujian, Guizhou, Hainan, Jiangsu) have established ECs in all 3 levels of courts (basic, intermediate, and higher court).

From Jan. 1, 2014-Nov. 1, 2015, China's ECs have concluded:

27,552 environmental criminal cases, 34,988 environmental administrative cases, and 170,661 civil cases (including 4,571 pollution tort cases), and since January 1, 2015, received 36 PIL cases.

COSTA RICA

1 ET = Tribunal Ambiental Administrativo (Environmental Administrative Tribunal)

16 ECs = Agrarian Courts – 15 first instance/trial-level and 1 appellate, in areas with possible agrarian conflicts

DENMARK

1 ET = Nature Protection and Environmental Board of Appeal

EGYPT

1 EC = One or more ECs (source: US Library of Congress)

EL SALVADOR

1 EC = *4 ECs authorized in 2014 (3 trial, 1 appellate), but only 1 created by the Supreme Court and operating (= 3 ABNE)

FINLAND

1 EC = The Administrative Court of Vaasa (trial-level) handles all Environmental and water cases

***The Supreme Administrative Court, had an EC chamber in 2008, but has merged that into the general-jurisdiction First Chamber with other non-environmental subjects.

GAMBIA

1 EC = An EC was established in the Magistrates' Court in Kanifing to handle littering cases (criminal).

*2 other announced ECs in other Magistrates' Courts have apparently not been established, and are ABNE

GREECE

1 EC = The Supreme Administrative Court (Council of State) has a special Fifth Section dealing with environmental law cases since the 1990s

GUATEMALA

2+ ECs = A number of combined courts for “drug-related activity and crimes against the environment” at the trial level in a number of municipalities and districts

GUYANA

1 ET = Environmental Assessment Board (EAB) operating in 2015
*Environmental Appeal Tribunal (EAT) is ABNE

INDIA

5 ECs = National Green Tribunal
1 principal Delhi bench and 4 regional benches, with 3 additional circuit locations to be more accessible

IRELAND

1 ET = An Bord Pleanála (The Planning Board)

JAMAICA

1 ET = Natural Resources Conservation Authority Appeals Tribunal

JAPAN

48+ ETs = 1. National Environmental Dispute Coordination Commission (EDCC or Kouchoi)
2. Prefecture Pollution Examination Commissions (PPECs) (PPECs have offices in 37 of the 47 Prefectures; in the other 10, there are 9-15 governor-appointed Pollution Review Commissioners to perform ADR)
3. Not counted: Consultation Service for Environmental Complaints (at the local government level – primarily municipal – handling according to one report 90-100,000 applications/year with a staff of 11,716)

KENYA

**15 ECs = Environment and Land Courts with judges; there are plans pending for 1 in each of the 47 counties, which would mean some 32 more).
2 ETs = National Environmental Tribunal (EIA appeals)
Public Complaints Committee on Environment (hearings/decisions)

MALAYSIA

95 ECs = 42 sessions courts + 53 magistrate's courts throughout Malaysia have been designated as ECs since 2012 (criminal cases only; appeals to High Court); environmental civil cases are still under the general civil courts.

** ECs for civil cases are being studied in 2015 and are pending; an EC High Court has also been urged by a bar publication.

MALTA

1 ET = Environment and Planning Review Tribunal

MAURITIUS

1 ET = Environment and Land Use Appeal Tribunal

NEW ZEALAND

1 EC = An Environment Court in each of 3 different locations

NICARAGUA

1 EC = Environmental Court

NIGERIA

10 ECs + = State and very local level ECs (no national-level).
Some are called "Environmental Sanitation Courts."

PAKISTAN

250 ECs = 250 judges have so far been designated to serve on "green benches" in the High Courts and District Courts. The unwritten practice is to have 1 or 2 green benches in the 5 High Courts and 2 green judges in each of the 133 districts to provide a green bench or judge at every judicial tier in each province; this has yet to be completely achieved. In the High Courts, the Chief Justice nominates a judge who has an interest in environmental law. In the districts, each district and sessions judge heading the district judiciary and each senior civil judge is appointed as a green judge by virtue of office.

PARAGUAY

2 ECs (or more) = Curuguay Canideyu EC
Alto Paraná EC

PERU

4 ETs = Tribunal de Fiscalización Ambiental (Court of Environmental Control) within the national Organismo de Evaluación y Fiscalización Ambiental (Agency for Environmental Assessment and Enforcement) has created 3 specialized chambers, 1 each for Mining, Energy, and Fisheries and Manufacture
Tribunal de Flora y Fauna Silvestre (Forest and Wildlife Court) within the Organismo Supervisor de la Inversión en Recursos Forestales (Agency for Forestry Investment Control)

PHILIPPINES

117 ECs = Designated existing 1st and 2d level courts in 2008.
3 ETs = Pollution Adjudication Board
Mines Adjudication Board
Forest Management Bureau Hearing Office

SAMOA

1 ET = The national Planning Tribunal established under a 2004 act has heard and determined 1 case

SOUTH KOREA

17 ETs = National Environmental Dispute Resolution Commission + regional EDRCs in 16 provinces/cities

SPAIN

1 EC = The 5th section of the 3rd sala (chamber) of the country's Supreme Court specializes in environmental cases

SRI LANKA

1 EC = While Sri Lanka does not have a permanent "green bench" in the Judiciary, there is "a specialized bench [of the Supreme Court] that receives environmental cases," according to a Sri Lankan Supreme Court Justice

SUDAN

1 EC (or more) = State EC in Khartoum State and "some other States"

SWEDEN

6 ECs = 1 Land and Environment Court of Appeal
5 Land and Environment Courts (trial)
(In 2011, land use planning jurisdiction was given to the ECs and "Land and" was added to their name)

THAILAND

21 ECs = 2 separate systems:

1. Environmental Divisions in the Courts of Justice:

Supreme Court (= 1)

All Appeals Courts (=10)

Central Civil Court (=1)

2. Environmental Divisions in the Administrative Courts:

Supreme Administrative Court (=1)

All Administrative Courts of First Instance (=8)

Plans are under consideration to combine the Environmental Divisions of the Courts of Justice and the Administrative Courts into a “one-stop-shop” exercising all 3 jurisdictions (civil, criminal and administrative)

TRINIDAD & TOBAGO

1 EC = Environmental Commission

UNITED KINGDOM

1 ET = First Tier Tribunal (Environment) covers England, Wales, and Northern Ireland; it is 1 of 7 chambers in the First Tier Tribunal which is within the General Regulatory Chamber

** Scotland is considering establishing an ECT

4 ECs = The Planning Court (a judicial EC that is part of the Administrative Court under the Department of Justice)

Verderers' Courts:

New Forest/Court of Swainmote

Forest of Dean/Court of Speech House

Epping Forest/Courts of Waltham Forest

UNITED STATES

NATIONAL

5 ETs = US Environmental Protection Agency (USEPA):

1. USEPA Office of Administrative Law Judges (trial)

2. USEPA Environmental Appeals Board (appeals)

US Department of the Interior (USDI):

1. USDI Cases Hearings Division (trial)

2. USDI Interior Board of Land Appeals (appeals)

Nuclear Regulatory Commission (NRC) – Atomic Safety and Licensing Board Panel (ASLBP)

STATE OF HAWAII

22 ECs = 22 existing District and Circuit Court judges “designated” as EC judges in 2015; they will hear an “environmental calendar” of cases each month in addition to their own general case docket

STATE OF MASSACHUSETTS

1 ET = Office of Appeals and Dispute Resolution in the Department of Environmental Protection

STATE OF TEXAS

1 ET = Natural Resources Team of Administrative Law Judges in the Texas State Office of Administrative Hearings

STATE OF VERMONT

1 EC = Vermont Superior Court, Environmental Division

STATE OF WASHINGTON

3 ETs = Environmental & Land Use Hearings Office:

1. Pollution Control Hearings Board
2. Shorelines Hearings Board
3. Growth Management Hearings Board

CITY OF NEW YORK

1 ET = Environmental Control Board in the Office of Administrative Trials and Hearings (OATH); this mammoth ET processed 623,758 summonses (FY 2015) for violations of city public health, safety, and environmental laws

OTHER LOCAL GOVERNMENT

The USA has a very large number of ECTs at the local government level (county, municipality).

* ECT legislatively or judicially authorized but not established (ABNE) yet.

** ECT announced/in discussion/pending.

*** ECT operated, then was discontinued.

Appendix B

List of Pending or Potential ECTs

ABU DHABI

Emirate officials are currently studying ECTs in other countries.

ARGENTINA

The judiciary of the Argentine province of Jujay announced in December 2015 plans to create an Environmental Court of 3 judges and 2 environmental prosecutors.

In 2014, the Argentina Supreme Court created within itself an Environmental Office for judicial training, case research, engagement with international bodies and planning sustainable practices for the judicial system.

BAHAMAS

The Attorney General announced in 2015 that an EC would be created as part of their “Swift Justice” initiatives.

***1995 legislation created an operating EC, but it was apparently no longer operating after the mid-2000s.

BHUTAN

In 2015, Bhutan officially announced plans to create a Green Bench in the High Court of Bhutan specifically for environmental cases, and drafting of Rules of Procedure for the Green Bench was on-going in early 2016.

BOTSWANA

A draft law for an environmental appeals tribunal was presented at a Ministry of Environment and Tourism meeting in May 2011, but it has not yet been enacted.

ECUADOR

A “pilot” EC for the Galapagos Islands is planned according to a statement of the Director of the Council of the Judiciary in 2013, and was still in development in 2015, according to an environmental NGO.

HONDURAS

The Instituto de Derecho Ambiental De Honduras, an environmental NGO, was working in 2015 to advance the idea of a Honduran EC.

INDONESIA

Indonesia's Supreme Court has chosen not to create ECs for now, but to start first with environmental training and certification for select judges, which may lead to developing an EC system.

ISRAEL

A leading environmental group called for establishing an EC in 2010, and it has since been raised in the Ministerial Legislative Committee and in political campaigning.

KENYA

Plans are pending for more ECs in addition to the 15 current ones, with a goal of having 1 EC in each of the country's 47 counties.

KUWAIT

The head of Kuwait's EPA announced that an EC would start in October 2000, but it apparently did not; the EPA again in 2009 said it aimed to establish an EC. Adoption of a stronger environmental law in 2014 has led to media and academic calls for an EC in 2015.

LEBANON

Lebanon has had a draft law calling for an EC that had been held up "for years," according to a media source, which classed it as one of Lebanon's "Top 10 Laws on Hold" in 2013; the Green Party has petitioned for an EC.

MALAWI

An Environmental Appeals Tribunal (for EIA appeals) was authorized by 1996 legislation, but is still ABNE. In 2015, progress was being made under an EU- and World Resources Institute-funded project to develop the necessary rules, budget, etc. to put the EAT into operation.

MALAYSIA

The Chief Justice reports in 2015 that "we are planning to establish" ECs for civil cases in both subordinate and high courts "in the near future," and these civil ECs will cover both "environmental" and "planning" laws.

MEXICO

Mexico's 2013 Federal Law of Environmental Liability authorized the judiciary either (1) to appoint specialized environmental judges for the new law or (2) to give existing federal judges that jurisdiction. In 2015, the judiciary chose the 2nd option, stating that the environmental caseload was yet insufficient for separate ECs. That could change if more cases are filed justifying ECs.

NEPAL

A 2012 conference of the Nepal Bar Association Environmental Law Committee addressed the need for an Environmental Bench in the Supreme Court and creation of subordinate ECTs.

UGANDA

In 2015, the Ministry of Water and Environment was reported to be in the final stages of discussions with the judiciary and other ministries to have specialized ECs established, with positive response from the judiciary.

UK – SCOTLAND

After earlier government studies rejecting an EC, the Faculty of Advocates, a leading legal body in Scotland (which has a different judicial system from England), in 2015 supported calls by FOE-Scotland and others for an EC or ET to comply with the Aarhus Convention.

VANUATU

In 2014, the Vanuatu Environmental Law Association was established, announcing one of its “main objectives” is “to dialogue with the Vanuatu Government” about establishing a national EC.

VIETNAM

A government official of the Ministry of Industry and Trade’s Industrial Policy and Strategy Institute called for the establishment of an EC at a 2013 workshop on environmental dispute resolution, as has the head of a leading environmental NGO.

Appendix C

List of Authorized But Not Established (ABNE) ECTs

BANGLADESH

60+ ECs ABNE = A 2010 Bangladesh law provides for at least 1 trial-level EC in each of the country's 64 districts, plus an unspecified number of appellate-level ECs. However, only 3 trial ECs and 1 appeals EC have been established, so 60+ ECs are ABNE.

CHILE

1 EC = 3 ECs were authorized in 2012 legislation. Of these, the 2d EC in Santiago and 3d EC in Valdivia are operating. The 1st Environmental Tribunal in Antofagasta is ABNE, with no signs of its establishment moving forward.

EL SALVADOR

3 ECs = 4 ECs were authorized in 2014 legislation (3 trial, 1 appellate), but only 1 has thus far been created by the Supreme Court and begun operating, so 3 are ABNE.

FIJI

1 ET = An ET was authorized by a 2005 act but is still ABNE.

GAMBIA

2 ECs = An EC was established within the Magistrates' Court in Kanifing in 2009 to handle criminal cases under the 2007 Anti-Littering Law, but 2 other announced ECs in other Magistrates' Courts have apparently not been established, and are ABNE.

GUYANA

1 ET = While an Environmental Assessment Board (trial-level) has been operating for some years, an Environmental Appeal Tribunal (appellate) authorized by the same 1996 law is still ABNE.

LESOTHO

1 ET = The Environment Act of 2008 authorized an ET, but it was still ABNE in 2015.

LIBERIA

2 ECs = A 2002 law authorized both an Environmental Administrative Court (trial) and an Environmental Court of Appeals (appellate); both are still ABNE.

MALAWI

1 ET = An Environmental Appeals Tribunal (for EIA appeals) was authorized by 1996 legislation, but is still ABNE; however, in 2015, progress was being made under an EU- and World Resources Institute-funded project to develop the necessary rules, budget, etc. to put it into operation

MEXICO

1 or more ECs = ECs (Juzgados de Distrito) are authorized by Mexico's 2013 Federal Law of Environmental Liability, which allows existing judges to be designated to hear environmental cases beginning in July 2015. That date has passed, making them ABNE, but planning work on them is under way in late 2015.

PANAMA

2 ECs = The General Environmental Law No. 47 of 1998 authorized 2 Circuit Court judges of the First Judicial Circuit to hear all environmental cases in addition to "the rest of [their] responsibilities." 1 of the judges was to hear all criminal cases brought by the environmental prosecutors and 1 was to hear all environmental liability (civil) cases. The judges have apparently not assumed these duties, so the ECs are still ABNE.

RWANDA

1 ET = An Environmental Tribunal was authorized by 2003 legislation, but is still ABNE.

TANZANIA

1 ET = A National Environment Appeals Tribunal was authorized by 2004 legislation, but is still ABNE.

TONGA

1 ET = A Planning Tribunal was authorized by 2012 legislation, but is still ABNE.

ZIMBABWE

1 EC = 1975 legislation authorized a Natural Resources Court, but it is still ABNE.

Appendix D

List of Discontinued ECTs

AUSTRIA

1 ET = Austria had an ET for EIA cases, the Umweltsenat, but it was abolished in 2014 and all environmental cases were transferred to the newly created general Administrative Courts, at the national and lander/state levels. The new courts are developing “green” panels of judges, so the discontinued ET has actually been enlarged into 10 ECs with greatly broadened environmental jurisdiction without sacrificing specialization.

BAHAMAS

1 EC = An EC was created by 1995 legislation and operated until at least 2002, but then apparently was no longer operating by 2007. The Attorney General announced in 2015 that an EC would be created in 2015 as part of their “Swift Justice” initiatives, but it too is ABNE.

CHINA, JIANGSU PROVINCE

Several ECs = Some separate ECs established before 2010 were canceled and merged into a centralized EC

FINLAND

1 EC = The Supreme Administrative Court had a specialized EC chamber in 2008, but has reorganized and merged it into the general First Chamber with other non-environmental subjects, while still retaining an EC at the trial level in Vaasa.

HUNGARY

1 ET = The first-ever Environmental Ombudsman of Hungary had EC-type powers (authorized to review and suspend government administrative decisions) – more powers than some ETs). After 4 years, the legislature merged that office into a general umbrella Ombudsman Office in 2012 and downgraded it to have only informational-reporting powers.

NETHERLANDS

1 ET = The Administrative Jurisdiction Division of the Netherlands Council of State (Raad van State), the country's highest general administrative court, had a specialized appellate "Environmental Chamber," exclusively for environmental and planning cases (over 60% of the court's business) in the late 2000s. A reorganization produced 3 chambers, including a "General Chamber," which still primarily handles environmental, water, land use, and nature cases, but has jurisdiction over some non-environmental issues as well (education, grants, compensation, housing and health care) so is no longer a fully specialized EC.

SOUTH AFRICA

2 ECs = 2 lower-level criminal ECs operated successfully mostly on fisheries cases – in Hermanus (2003-6) and in Port Elizabeth (2004-9) – but were discontinued by the government for unclear reasons.

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Appendix G

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