

January 2011

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Recommended Citation

George (Rock) Pring & Catherine (Kitty) Pring, The Future of Environmental Dispute Resolution, 40 Denv. J. Int'l L. & Pol'y 482 (2011).

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The Future of Environmental Dispute Resolution

Keywords

Dispute Resolution, Courts, Environmental Law, Human Rights Law

THE FUTURE OF ENVIRONMENTAL DISPUTE RESOLUTION

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A new form of environmental governance — the specialized environmental court or tribunal (ECT) — is emerging as a dynamic alternative to the general courts for providing better access to environmental justice in the 21st century. The University of Denver Sturm College of Law's Environmental Courts and Tribunals Study is conducting the first global comparative analysis of this new phenomenon.¹ Hundreds of ECTs have been established around the world in just the last decade, and, based on the DU study, we predict that ECTs will be the dominant dispute resolution models for environmental risks and crises in the decades to come.

The people and nations of the world are increasingly facing three interconnected environmental risks in the 21st century, with consequent multiple threats to the health of humans and the planet. Those risks are continued degradation of fresh and salt water, air, and soil and the ecosystems dependent on them; the impacts of current and impending climate change; and widespread economic collapse. These risks and how they are managed directly impact the ability of people and nations individually and collectively to achieve sustainable development and a viable future for life on earth. The challenges are no longer confined to countries, regions, or locales in one part of the world,

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1. GEORGE (ROCK) PRING & CATHERINE (KITTY) PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (The Access Initiative 2009) [hereinafter GREENING JUSTICE], available at <http://www.law.du.edu/ect-study>; George (Rock) Pring & Catherine (Kitty) Pring, *The "Greening" of Justice: Will It Help the Poor*, in POVERTY ALLEVIATION AND ENVIRONMENTAL LAW (Yves Le Bouthillier, et al. eds, forthcoming 2012); George Pring & Catherine Pring, *Increase in Environmental Courts and Tribunals Prompts New Global Institute*, 3 J. CT. INNOVATION 11 (2010), available at http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf; George (Rock) Pring & Catherine (Kitty) Pring, *Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment*, 11 OR. REV. INT'L L. 301 (2009).

but are truly global in scope and impact the populations of every continent. Events perceived to be in one arena generate ripple effects which result in reduction or increase in the severity of impacts in the other two areas.

Efforts to manage these related risks are being made now at every level of government through the development of principles, policy, legislation, regulations, treaties, agreements, and new governance institutions. Since the 1970s, environmental laws have been adopted at the city, state, national, and international levels. As many as 80 nations' constitutions now include a right to a healthy environment as a human right, and hundreds of new international environmental legal authorities have been adopted.² New precepts have emerged — such as sustainable development, no-transboundary-harm, precautionary, polluter-pays, environmental justice, equitable utilization of resources, and other principles.³ These and other precepts like climate change mitigation and adaptation are slowly being incorporated into a new generation of international, national, and local laws.

Today, the major difficulty is not filling the books with more environmental laws. Instead, the challenge is ensuring effective enforcement and compliance with the laws already adopted — and this can only be done through improved environmental governance and access to justice. The rapid growth of serious environmental problems, coupled with increasing public awareness and reaction, has generated global demands for new forms of governance to adjudicate and enforce solutions to environmental problems, from the smallest local issues to the largest global ones. The result has been an explosion of specialized ECTs and a parallel explosion in environmental litigation.

For the DU Study, we define ECTs as “judicial or administrative bodies of government empowered to specialize in resolving environmental, natural resources, land use development, and related disputes.”⁴ Environmental courts (ECs) refer to bodies within the judicial branch of government, and environmental tribunals (ETs) are those within the executive or administrative branch. They include free-standing ECs and ETs, formal and informal panels of judges within a court of general jurisdiction (“green benches” or “green lists”), individual judges within generalist courts who have training and expertise in environmental law and to whom environmental cases are assigned formally or informally, and ETs housed within another government body such as the environmental agency.

2. See GREENING JUSTICE, *supra* note 1, at 10.

3. See VED P. NANDA & GEORGE (ROCK) PRING, INTERNATIONAL ENVIRONMENTAL LAW FOR THE 21ST CENTURY 17-62 (2003), *also see* the updated Ch. 2 in the new 2d edition (forthcoming 2012).

4. GREENING JUSTICE, *supra* note 1, at 3.

At the start of 2012, some 465 ECTs are known to exist or to be authorized in 46 countries, over 70 percent of which were created since 2005. Some of the newest examples include eleven administrative courts in Thailand,⁵ four additional ECs in Brazil,⁶ and nearly 100 ECs in 15 provinces in China.⁷ Kenya adopted a new Constitution in 2010 that requires Parliament to “establish courts with the status of the High Court to hear and determine disputes relating to . . . the environment and the use and occupation of, and title to, land.”⁸ Also in 2010, England created its first ET, and India’s Parliament passed a “National Green Tribunal” bill in part to counteract the activist “Green Benches” of its Supreme Court.⁹ In 2011, Pakistan added three new environmental tribunals, and South Africa announced it would re-establish an environmental court in Port Elizabeth, Eastern Cape.¹⁰ Other countries, including Ecuador, Bolivia, Vanuatu, Dubai, Abu Dhabi, Lebanon, Jordan, and Kuwait considered establishing an ECT in 2011.

ECTs can be found on every inhabited continent; in civil law, common law, and other legal systems; in jurisdictions from the largest (China, India, Canada, Brazil) to the smallest (Trinidad and Tobago, the City of Memphis, Tennessee); and in both wealthy developed and impoverished developing nations. Interestingly, the nations which have most aggressively embraced ECTs as a mechanism for improving environmental governance are China, Brazil, and developing nations, not the highly developed USA or countries of the EU. Historically, Australia and New Zealand have been leaders in ECT creation, but today ECTs are spreading in Asia (examples include China, India, Japan, the Philippines, South Korea, Thailand), Africa (South Africa, Kenya, Sudan), Europe (Belgium, England, Finland, Hungary, Sweden), South America (Brazil, Bolivia, Guyana), Central America (Costa Rica),

5. *Administrative Courts Launch New Environmental Case Divisions*, BANGKOK POST (Mar. 8, 2011, 12:00 AM), <http://www.bangkokpost.com/lite/news/250008/administrative-courts-launch-new-environmental-case-divisions>.

6. Interview with Vladimir Passos de Freitas, former Chief Judge of Federal Court of Appeal, 4th District, Brazil, and Professor of Environmental Law.

7. Zhang Minchun & Zhang Bao, *Specialized Environmental Courts in China: Status Quo, Challenges and Responses*, 30 J. OF ENERGY & NAT. RES. L., No. 3 (forthcoming 2012) (at 1st page of article).

8. CONSTITUTION, art. 162(2)(b) (2010) (Kenya).

9. Richard Macrory, *Environmental Courts and Tribunals in England and Wales – A Tentative New Dawn*, 3 J. CT. INNOVATION 61 (2010), available at <http://www.courts.state.ny.us/court-innovation/Winter-2010/jciMacrory.pdf>; Sandeep Dikshit, *Parliament Approves “Green Benches” Bill*, HINDU (May 6, 2010), <http://www.hindu.com/2010/05/06/stories/2010050661222000.htm>.

10. B.P. Sonjica, South Africa Environmental Affairs Minister, *Speech on the Department of Environmental Affairs’ 2010/11 Financial Year Budget Vote*, available at <http://www.pmg.org.za/briefing/20100416-environmental-affairs-ministers-budget-speech>.

and North America (Vermont USA, Ontario, British Columbia).¹¹ The United States is not a leader in the ECT field; it has one impressive state EC (Vermont), a number of local (city, county) ECs, and several in-house ETs at the national level, such as the US Environmental Protection Agency's Environmental Review Board and the US Department of the Interior's Board of Land Appeals.¹²

The pressure for creation of ECTs as a new form of environmental governance comes from both environmental advocates and business/development interests, the DU Study found, and it comes in response to any of eight major problems with courts of general jurisdiction:

1. Delayed Justice:

The first problem, not surprisingly, is the long delays that can occur in general courts. General court dockets in many countries are overloaded, and it may take years for a filed case to be heard. In 2011, when Thailand established new environmental divisions in all 11 administrative courts across the country, more than 1,300 "green cases" were already on file.¹³ For citizens, public interest groups, and advocates, delays can mean health or environmental damage that is irreversible. For developers, time is money, and delays are costly. All sides share an interest in speedy resolution of complex environmental issues. An ECT can set cases for a speedy hearing because the court or tribunal has a single legal jurisdiction, defined by law. The ECT jurisdiction usually includes many different specific laws, such as those affecting air, water, land, human health, biodiversity, public land protection.¹⁴ However, all can be integrated under the environmental and/or land use umbrella for purposes of non-fragmented problem solving and decision-making.

2. Access to Justice:

A second problem with general courts is that they frequently present more than a temporal delay. People's access to justice can be thwarted by complicated filing procedures, lack of knowledge about courts, limited understanding about the issue and how to challenge it, substantial physical distance between the location of the controversy and the location of the court, minimal to no institutionalized procedures for public participation, narrow court standing requirements, and other

11. See GREENING JUSTICE, *supra* note 1, at 106-09.

12. See *id.* at 108-09.

13. *Plenty On Agenda For New 'Green Court' Division*, THE NATION (Thai.) (Aug. 3, 2011), <http://www.nationmultimedia.com/2011/08/03/national/Plenty-on-agenda-for-new-green-court-division-30161823.html>.

14. GREENING JUSTICE, *supra* note 1, at 26-28.

barriers.¹⁵ ECTs around the world are charged with overcoming these barriers, opening the courthouse doors to a wider public, and assisting rather than blocking those with complaints.

3. Technical expertise:

Lack of scientific and technical expertise limits the competence of the general jurisdiction court, which generally must rely on the testimony of the parties' expert witnesses for information (the so-called "battle of the experts").¹⁶ Most general court judges (and juries) do not have the expertise to evaluate expert testimony or to predict probable outcomes, a crucial gap given the complex issues that can arise in environmental cases. Lack of technical competence or interest may even result in a judge's unwillingness to set a complicated case for hearing. Interviewees in the Philippines informed us that some judges there pushed environmental cases to the bottom of their dockets repeatedly, prior to the establishment of local ECTs and intensive judicial training in 2009.

4. Legal Expertise:

Not only do courts of general jurisdiction lack ready access to reliable scientific and technical expertise on the bench, but many judges have never studied environmental law or had any specific training in it. As national environmental laws have become increasingly complex and interrelated, generalist judges are handicapped by lack of specific knowledge of and experience with environmental law.

5. Expense:

Financial costs in general courts — including filing fees, attorney fees, expert witness fees, lost employment, potential adverse costs awards, retaliatory lawsuits, and other financial barriers — are crippling for citizens and environmental advocacy organizations, as well as for defendants. In addition, the so-called British Rule of "costs follow the event" (that is, "loser pays winner's costs") remains the rule in many countries. This rule, where even a litigant with a real grievance can be forced to pay huge sums, clearly discourages the filing of legitimate cases since the ultimate outcome and costs are unknowable at filing.¹⁷ Environmental organizations are forced to pick and choose clients and issues with great risk-aversion, leaving many legitimate complaints unfiled and unresolved. There are instances in Australia where non-profits have actually been forced to file for bankruptcy

15. *See id.* at 14-16.

16. *Id.* at 55-60.

17. *Id.* at 51-52.

following a costly legal environmental battle in which they had a legitimate case that was however dismissed on a technicality.

6. ADR:

Alternative dispute resolution (ADR) is not an integral part of most general jurisdiction courts.¹⁸ (One exception is family courts dealing with divorce and child custody issues.) Often the use of ADR, managed by a trained neutral third-party, can help litigants arrive at a successful resolution to a conflict which was not envisioned by the judge or prescribed by law. The use of court-integrated ADR methods can also help reduce costs, speed decisions, and achieve true “win-win” results – for the parties, the court, the environment, and the economy.

7. Case-management:

Streamlined case-management and special rules of procedure for environmental cases are not possible in a general court, which typically cannot employ different rules for different types of cases. ECTs around the world have maximized the use of a number of special case management tools and procedures, resulting in a more efficient and effective decision-making process. Many ECTs actually employ a case-manager to assist parties and to carefully track public notice, time limits, hearing dates, and even to conduct court-annexed ADR.¹⁹

8. Enforcement / Remedies:

General court enforcement tools and remedies are typically limited to those formalized in law or court rules. Preliminary injunctions, creative sentencing, community service and fines directed to environmental projects rather than the general fund, restorative justice, and other less traditional enforcement tools may be more effective at resolving environmental issues than traditional civil or criminal outcomes. Creative sentencing is a hallmark of effective ECTs.

At the international level as well, these problems have led to calls for the creation of a specialized international ECT. Such a body could provide a forum to adjudicate global issues, such as transboundary pollution and climate change, which now transcend national court jurisdictions, much as the International Criminal Court now does. Several international environmental forums currently exist, but are hampered by limited jurisdiction, unwillingness of states to bring issues to an international arbiter, lack of binding international environmental law, and limited enforcement powers. Existing multinational forums which could develop ECT divisions could include the International Court of Justice, the Permanent Court of Arbitration, the European

18. *Id.* at 61.

19. *Id.* at 76-79.

Court of Justice, the World Trade Organization, the NAFTA Commission for Environmental Cooperation, international financial institutions like the World Bank, international river basin commissions, and the International Tribunal for the Law of the Sea. The latter is the closest to an international ECT, but has resolved only 20 cases in its 15 years of existence.

Based on nearly five years of in-depth research on specialized ECTs around the world with the DU ECT Study, the authors predict that the ECT explosion will continue into the 21st century at all levels of government, including the international. The increase in the number of ECTs is predicated on findings that well-designed specialized adjudication bodies have the capacity to resolve environmental and climate change litigation independently, holistically, more cheaply, competently, rapidly, consistently, and justly, incorporating the key principles of sustainable development. They also have the potential to effectively mitigate all eight barriers to effective environmental governance and access to justice found in general courts.

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

- Fast-tracking of environmental litigation
- Integrated jurisdiction over relevant laws
- Expertise of decision makers
- Ability to manage scientific and technical expert evidence
- Expanded standing for plaintiffs
- Adoption of flexible rules of procedure
- Consistency in decisions
- Ability to employ a problem-solving approach to adjudication, including extensive use of various ADR methods

Each of these characteristics, when incorporated in a specialized ECT, can facilitate access to environmental justice and can incrementally contribute to environmental protection, climate change mitigation and adaptation, and sustainable development.

The progress of ECT development follows a reasonably consistent six-step pattern regardless of country. (1) First, the environmental impacts of non-sustainable development and population growth begin impacting the environment in major ways. (2) Second, civil society and advocacy groups become aware of these environmental impacts and demand laws and institutions to prevent and/or mitigate the environmental damage. (3) Third, laws are passed, which may or may not be adequate, but are not rigorously enforced. (4) Fourth, public dissatisfaction with the laws or their enforcement prompts litigation in the general courts. (5) Fifth, the general courts then disappoint these advocates by not having the expertise, patience, will, or incorruptibility

to adjudicate environmental cases in a way that is – to quote the memorably succinct mandate of one Australian state’s court procedure law – “just, quick, and cheap.”²⁰ Cases may take decades to hear, cost the parties immense sums, expose complainants to monetary liability or intimidation or worse, result in dismissal on technical grounds, and/or produce inconsistent decisions. (6) Sixth, this dissatisfaction with the general courts, from both plaintiffs and defendants, leads to a public debate over new options and the emergence of visionary leaders who believe that a well-designed ECT can address the issues.

The visionary leadership to create or improve an ECT can come from within the judicial branch, from the executive or legislature, or from civil society advocates. Often the leadership comes from an individual who has “switched hats” from one sector to another and by doing so has gained power to change the system. One such example is Justice Brian Preston, Chief Judge of the State of New South Wales, Australia, Land and Environment Court, who was a lawyer for the Environmental Defenders’ Office (EDO), a leading environmental NGO in Australia, before being appointed to the bench and who has spearheaded many cutting-edge innovations in that EC.²¹

The pressure to create an international environmental court is following a similar six-step path. It is being driven by the need for effective global adjudication of environmental conflicts to foster sustainable development, control climate change, and respond to transnational environmental impacts. These issues are multinational in scope and need a multinational adjudication forum.

Much of the public debate about ECTs takes place in international forums designed to share experience and expertise and build judicial capacity. Conferences were convened by various international organizations during 2010, 2011, and 2012 to bring members of the judiciary, executive, and legislative branches, non-governmental organizations, and academics together to develop options for international environmental problem-solving. These included symposia sponsored by the UN Environment Programme, the Asian Development Bank, the Association of Southeast Asian Nations, the European Union Forum of Judges for the Environment, and the Association of European Administrative Judges for the Environment. In 2010, a new International Judicial Institute for Environmental Adjudication was created with the support of Pace Law School in White Plains, New York, which subsequently held a major international conference of judges, government officials, and academics, and published an issue of

20. *Civil Procedure Act 2005* (NSW) s 56(1) (Austl.).

21. The Australian Centre for Environmental Law, THE AUSTRALIAN NAT’L UNIV., <http://law.anu.edu.au/ancel/staff.asp>.

the Journal of Court Innovation dedicated to “the Role of the Environmental Judiciary.”²²

The agenda for the 2012 United Nations Conference on Sustainable Development (Rio+20) includes a call for the creation of a World Environment Organization similar to the World Trade Organization. On the eve of Rio+20, UNEP will sponsor a World Congress on Justice, Governance and Law for Environmental Sustainability for judges, attorneys-general, prosecutors, and other justice officials.²³ It is expected to outline future rule of law and governance actions required to enhance sustainable development in the 21st century. Bolivia's proposal to Rio+20 specifically states “an International Tribunal of Environmental and Climate Justice must be established to judge and sanction crimes against nature that transcend national borders, violating the rights of nature and affecting Humanity.”²⁴ Whether or not there will be sufficient will amongst the delegates to agree on an international adjudication forum remains to be seen.

In conclusion, based on the authors' research and evaluation, specialized ECTs can be a better forum for the adjudication of environmental, land use, and climate change issues than courts or tribunals of general jurisdiction. Calls for the establishment of ECTs are occurring today at local, national, and international levels, based on their demonstrated ability to deal more efficiently and effectively with the very complex, multiscale geographic, political, and temporal nature of the environmental harm caused by non-sustainable development and anthropogenic climate change.

Although the creation of an ECT or any new governance institution does not necessarily guarantee a better outcome in terms of sustainable development or climate change, the improvements in efficiency, competence, and transparency afforded by an ECT can result in greater access to environmental justice. Even if ECTs are not a magic bullet for the world's environmental problems, they can have positive effects on governmental regulatory decision-making, corporate behavior, and public appreciation of the problems by fostering interaction across levels of government and engaging disagreement about the ways in which various actors should be taking action.²⁵ The experienced EC

22. Juanita Bing Newton & Michelle S. Simon, *A Word from the Executive Editors*, 3 J. CT. INNOVATION i-ii (2010), available at http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf.

23. *World Congress on Justice, Governance and Law for Environmental Sustainability*, UNEP, <http://www.unep.org/dec/worldcongress/concept.asp>.

24. State of Bolivia, *Proposal of the Plurinational State of Bolivia for the United Nations Conference on Sustainable Development (Rio+20)* (Oct. 31, 2011), ¶ 35, <http://www.uncsd2012.org/rio20/content/documents/454Submission%20Plurinational%20State%20of%20Bolivia%20Rio20%20PDF.pdf>.

25. See generally Hari M. Osofsky, *The Continuing Importance of Climate Change*

judge Brian Preston reminds us that “the status of the judicature and its institutional habit of public, reasoned decision-making may result in its response having meaningful effects, including a catalytic effect on the legislature and executive to take their own action to mitigate or adapt to climate change.”²⁶

To contribute positively to environmental governance, ECTs are dependent on commitment to the rule of law, principles of sustainable development, and enforceable laws at the local, state, national, and international level. The special attributes of well-designed and well-run ECTs can be marshaled to play a very important supporting role in achieving viable solutions. The indications are that the rising interest in and explosion of ECTs at all levels of governance will escalate in the coming decades, with a consequent improvement in access to justice and environmental governance nationally and internationally.

Litigation, 1 CLIMATE L. 3 (2010), available at <http://iospress.metapress.com/content/23746166q74620p2/fulltext.pdf>.

26. Brian J. Preston, *Climate Change in the Courts*, 36 MONASH U. L. REV. 15, 53 (2010).