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## Environmental Courts and Tribunals: How Can Nations Tackle the Growing Demand for Justice on Environmental Issues?

### Keywords

Courts, Environmental Law, Human Rights Law, Dispute Resolution

## **ENVIRONMENTAL COURTS AND TRIBUNALS: HOW CAN NATIONS TACKLE THE GROWING DEMAND FOR JUSTICE ON ENVIRONMENTAL ISSUES?**

*Reviewed by Erica Woodruff*

GEORGE PRING & CATHERINE PRING, *GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS* (2009).

Principle 10 of the Rio Declaration on Environment and Development declares that states shall provide citizens with “[e]ffective access to judicial and administrative proceedings.”<sup>1</sup> This tall order leaves states wondering how they should structure their court systems to best address environmental issues and concerns. In *Greening Justice*, George “Rock” Pring, a University of Denver Sturm College of Law professor, and Catherine “Kitty” Pring, a professional mediator, offer a comprehensive guide to environmental courts and tribunals across the globe and the best ways for a state to both create and maintain these tribunals.<sup>2</sup> This guide is the culmination of two years of research and interviews across twenty-four countries, representing one hundred and fifty-two existing or proposed environmental courts and tribunals (“ECTs”).<sup>3</sup> Because countries have differing legal systems and face diverse environmental problems, this guide highlights the wide variety of ECT structures, and considers which characteristics should be emphasized when states determine what type of ECT is best for their citizens.

Based on their research, the authors focus on twelve “building blocks” that are elements of what they believe form a successful ECT: type of forum; legal jurisdiction; ECT decisional levels; geographic area; case volume; standing; costs; access to scientific and technical expertise; alternative dispute resolution (“ADR”); competence of ECT judges and decision-makers; case management; and enforcement tools and remedies.<sup>4</sup> By focusing on these elements, a nation can

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\* University of Denver Sturm College of Law, J.D., expected 2012. Erica would like to thank Alonit Cohen and Tessa Mendez for the opportunity to write this book review and their support in editing this article.

1. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992).

2. George (Rock) Pring & Catherine (Kitty) Pring, *GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS* (2009).

3. *Id.* at 4.

4. *Id.* at xiv.

ensure that its ECT will enhance a citizen's access to courts on environmental issues.<sup>5</sup> Of these factors, the authors considered standing, costs, access and ADR to be the most important components because they have a direct impact on a citizen's initial access to ECTs.<sup>6</sup> Throughout this guide, the authors also give examples of effective and non-effective designs for each factor, as well as create a list of the "best practices" for each of the categories based on their interviews with experts and the authors' own experiences.<sup>7</sup> This perspective not only offers insight into some of the world's smallest ECTs, but also provides inspiration for countries looking to reform their own ECTs or possibly create a new one entirely.

#### *Type of Forum*

The first "building block" that the authors consider is the type of forum that would be most appropriate for citizens to voice their concerns about environmental issues.<sup>8</sup> During their research, the authors examined several different types of forums, including freestanding specialized environmental courts, "green chambers," and "green judges."<sup>9</sup> Within a normal, non-specialized court, a "green chamber" is a court that takes only environmental law cases.<sup>10</sup> Similarly, "green judges" are specific judges on a general court who are only assigned environmental cases.<sup>11</sup> After considering all of these options, the authors determined that the "best practice" for a forum is a "clearly identified independent judicial court that is easily identified by the public, whose decision makers are highly trained in environmental law, and whose decisions are documented and published."<sup>12</sup> This type of forum provides the public with reassurance that the ECT is an accessible, legitimate, unbiased place for citizens to bring their concerns about the environment.<sup>13</sup>

The authors especially emphasize that independence is a critical factor for any type of forum.<sup>14</sup> To ensure that an ECT is truly independent, a neutral third party must nominate the ECT's judges, and these judges should not be influenced or controlled by the government.<sup>15</sup> One example of a "best practice" independent environmental tribunal is the Environmental Review Tribunal of the Province of Ontario, Canada, which has the legislative authority to make binding decision on environmental issues. This type of tribunal stands as a separate entity from other courts and is not subject to the control of environmental and land use agencies. This separation allows the environmental tribunal to review these agencies' decisions without the fear of retribution.<sup>16</sup> As a result, citizens can be confident

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5. *Id.* at 5.

6. *Id.*

7. *Id.*

8. *Id.* at 21.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 26.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 25.

that the ECT judges are making the best decision without undue influence from other parties.<sup>17</sup>

### *Legal Jurisdiction*

The authors then consider how broad the legal jurisdiction of the ECT should be.<sup>18</sup> Depending on the court, an ECT can have broad jurisdiction, covering all environmental, land use development and public health issues, or narrow jurisdiction, such as water law.<sup>19</sup> The authors determined that an integrated environmental and land use planning ECT with both broad reach and enforcement power would be an ideal jurisdiction because it creates a “one-stop shop” for citizens with any kind of environmental law claim.<sup>20</sup> For example, the Environmental Court of New Zealand has a “hybrid” combination of civil, administrative and criminal powers.<sup>21</sup> The ability for an ECT to enforce decisions in different ways may act as a deterrent to parties who could afford civil penalties, but who may want to avoid criminal sanctions.<sup>22</sup>

### *Decisional Levels*

Third, the authors confront the issue of how many decisional levels an ECT should have.<sup>23</sup> Ideally, a jurisdiction would have specialized ECTs at both the trial and appellate levels with an ability to review the merits of each claim.<sup>24</sup> For example, the United States Environmental Protection Agency (“EPA”) uses this two-tiered system.<sup>25</sup> By giving litigants the opportunity to appeal a decision within the agency, the EPA provides environmentally knowledgeable and uniform outcomes on appeal, which in turn increase access to justice.<sup>26</sup> However, if a nation is unable to provide two levels or multiple levels are not justified, the authors argue that a trial level ECT is better than an appellate level ECT because “a well informed decision is less likely to be appealed and will be made earlier in the dispute resolution process.”<sup>27</sup>

### *Geographic Area*

The factor of geographic area greatly depends upon the jurisdiction of the ECT.<sup>28</sup> The authors conclude, however, that an ideal geographic area is one that is compatible with other judicial and political boundaries.<sup>29</sup> By coordinating with preset boundaries, citizens are more likely to have easier physical access to courts and therefore may be more willing to bring a claim than if they did not have the

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17. *Id.* at 26.

18. *Id.*

19. *Id.*

20. *Id.* at 28.

21. *Id.* at 27.

22. *Id.*

23. *Id.* at 28.

24. *Id.* at 30.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 31.

funds, physical ability, or time to travel to the nearest forum.<sup>30</sup> If there are interested parties who live far away from the forum, traveling ECTs can provide access to these citizens as well as allow the court to see the site in dispute.<sup>31</sup> The Environmental Court in the State of Amazonas, Brazil, actually travels in a van that features a complete mini-courtroom.<sup>32</sup> This feature ensures that all citizens are given an equal opportunity to voice their concerns about the environment.<sup>33</sup>

#### *Case Volume*

The authors then look at what the ideal caseload would be for a given ECT.<sup>34</sup> This factor can vary greatly depending on the forum.<sup>35</sup> Many ECTs have a large caseload.<sup>36</sup> For example, New York City's Environmental Control Board hears more than 175,000 hearings per year.<sup>37</sup> On the other hand, the Trinidad and Tobago Environmental Commission has only heard five to eight new cases per year since it began ten years ago.<sup>38</sup> In such a case, the authors have determined that other factors, such as limited jurisdiction, lack of political independence, or lack of credibility may contribute to small caseloads.<sup>39</sup> The authors conclude that "at least 100 actual case filings per judge per year are required to justify a 'stand alone' ECT."<sup>40</sup> In addition, nations should consider building flexibility into an ECT in order to handle fluctuating caseloads.<sup>41</sup> One ECT that has found a creative way to manage case overload is the Planning and Environment Court of Queensland, which allows for the District Court Chief Justice to assign additional judges when the case volume increases.<sup>42</sup> Through this process, all citizens are provided access to the ECT without judges being overworked.<sup>43</sup>

#### *Standing*

The authors emphasize that standing is a key factor in maximizing access for citizens on environmental issues.<sup>44</sup> "If you cannot get through the door of the courthouse there is no access to environmental justice."<sup>45</sup> Ideally, any person raising an environmental issue should have standing in an ECT.<sup>46</sup> However, the court should retain the ability to dismiss or penalize frivolous claims.<sup>47</sup> The

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 32.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 33.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 40.

47. *Id.*

Philippines Supreme Court's 2009 draft rules provide a model example of open standing provisions, allowing any citizen, minors with the assistance of parents, NGOs, public interest groups, indigenous peoples, and "others similarly situated" to have standing in court.<sup>48</sup>

#### *Costs*

The authors note that costs also play a substantial role in citizen access to ECTs.<sup>49</sup> Because "[n]o ECT studied has adopted comprehensive cost-reduction strategies for environmental conflict resolution," the authors created a list of cost-mitigating ideas to enhance access to justice.<sup>50</sup> These factors include reducing or waiving filing or court fees, hiring public environmental prosecutors, and providing government funding for public interest plaintiffs, among others.<sup>51</sup> Australia's State of Queensland Planning and Environment Court has led the way in "individual case management," in which judges, attorneys and parties sit down together at the beginning of litigation and develop a "fast-track calendar" for the entire case, including the trial date.<sup>52</sup> This case management technique benefits both parties by cutting costs to both sides during a lawsuit because the meeting addresses legal issues that would normally be addressed in formal hearings, such as jurisdiction, and settles these issues quickly.<sup>53</sup> In addition, trial dates are usually available within three months of the meeting, and trials rarely last more than three days, reducing attorney's fees and court costs.<sup>54</sup>

#### *Access to Scientific-Technical Expertise*

An ECT's access to scientific and technical expertise is a main factor in how fair and informed each of the ECT's decisions will be. In order to make informed decisions, a judge needs to be able to understand complex environmental issues, which range from international principles to national standards such as best available technology.<sup>55</sup> Thus, the authors analyze how different ECTs ensure the "internal" expertise of judges and government experts, and how the ECTs manage the "external" expertise of expert witnesses brought to court to testify.<sup>56</sup> For example, New South Wales Land has coined the term "hottubbing" to describe its ECT's process in which judges, rather than attorneys, select which experts the jury can hear during a trial.<sup>57</sup> Before the trial, the ECT judge hears testimony from all experts and encourages them to discuss controversial issues among themselves while sitting in the jury box, jokingly "likened to a hottub without water," in order to determine areas of disagreement.<sup>58</sup> This judicial process aids judges in

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48. *Id.* at 34.

49. *Id.* at 40.

50. *Id.* at 54.

51. *Id.*

52. *Id.* at 43.

53. *Id.*

54. *Id.* at 43-44.

55. *Id.* at 55.

56. *Id.* at 55-56.

57. *Id.* at 60.

58. *Id.*

managing external environmental expertise because it reduces the number of witnesses called at trial and increases the relevance of testimony.<sup>59</sup> In some cases, this pre-trial discussion can lead to the resolution of the issue in dispute, saving the parties the cost and time of going to trial.<sup>60</sup>

#### *Alternative Dispute Resolution*

Alternative dispute resolution ("ADR") is another important aspect of an ECT.<sup>61</sup> ADR methods can be effective in increasing access to justice because they lower costs, reduce caseloads, allow for greater participation by the public and encourage creative solutions.<sup>62</sup> ADR can include mediation, arbitration, negotiations, and restorative justice.<sup>63</sup> One unique ADR method is the ombudsman program. Through this system, government-appointed ombudsmen take on citizen's complaints and provide free dispute resolution for a complainant with a valid claim.<sup>64</sup> In Hungary, the Office of the Parliamentary Commissioner for Future Generations investigates claims relating to Hungarians' constitutional rights to a healthy environment.<sup>65</sup> The Commissioner has the power to find facts and make non-binding recommendations to competent authorities with the help of a thirty-five person staff.<sup>66</sup> This form of ADR allows the government to represent citizens who may not have the funds or time to bring their own complaints in court and also to resolve some issues before they get to trial.<sup>67</sup>

#### *Competence of ECT Judges and Decision-Makers*

The authors also consider what the general competence level of ECT judges and decision-makers should be in an ideal ECT.<sup>68</sup> The authors conclude that an independent, environmentally knowledgeable decision-maker appointed by a neutral process would provide the fairest opportunity to citizens pursuing environmental claims.<sup>69</sup> For example, the President of India will only appoint previous judges of the Supreme or High Courts to be the chairs of the country's ECTs to ensure that these tribunal members are sufficiently qualified.<sup>70</sup> In addition, a nation needs to provide a salary to decision-makers in order to be able to hire and hold onto the committed judges, rather than having to find volunteers on a case-by-case basis.<sup>71</sup>

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59. *Id.*

60. *Id.*

61. *Id.* at 61.

62. *Id.*

63. *Id.*

64. *Id.* at 67.

65. *Id.* at 68.

66. *Id.*

67. *Id.*

68. *Id.* at 72.

69. *Id.* at 75.

70. *Id.* at 73.

71. *Id.* at 75



### *Case Management*

The authors then tackle the question of what tools are necessary to achieve effective case management.<sup>72</sup> After interviewing parties and decision-makers, the authors determined that directions hearings, like Australia's State of Queensland's previously discussed "fast-track" meetings, ADR screenings, and information technology are the most helpful tools in managing a heavy caseload because they increase the efficiency of courts and lower costs.<sup>73</sup> Specifically, information technology embraces the Internet as a way to increase access to citizens through tools such as court websites with e-filing capabilities, information about costs and jurisdiction, and video-conferencing for long-distance parties.<sup>74</sup> However, the authors point out that parties and judges who are not familiar with technological advances may struggle with this method of case management.<sup>75</sup>

### *Enforcement Tools and Remedies*

Finally, the authors look at what enforcement tools and remedies are needed to make ECT decisions effective.<sup>76</sup> They emphasize that ECT judges and decision-makers need broad enforcement powers and the ability to impose a variety of remedy options, including injunctions, restitutions, and criminal sanctions.<sup>77</sup> In addition, judges need to be able to consider creative remedies in order to fit the violation.<sup>78</sup> The authors also emphasize the importance of a strong prosecutor's office in an ECT because it can aggressively pursue the available remedies.<sup>79</sup> The Ministério Público of Brazil has gained notoriety for its broad enforcement powers and credibility with the public.<sup>80</sup> This office works closely with environmental NGOs and often represents them in lawsuits, along with ordinary citizens.<sup>81</sup> Because courts in Brazil are unlikely to issue an injunction while a case is pending, these prosecutors often negotiate agreements outside of court to ensure a quick and less expensive outcome.<sup>82</sup> Although the system is not perfect, the Ministério Público has increased access to environmental justice because citizens view the office as a place where their complaints will be pursued effectively and credibly.<sup>83</sup>

### *Conclusion*

While these twelve building blocks are clearly vital to the effectiveness of ECTs, the authors acknowledge that they are not enough to ensure citizen access to courts on environmental issues.<sup>84</sup> The authors emphasize that each state needs to

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72. *Id.* at 76.

73. *Id.* at 79.

74. *Id.* at 76.

75. *Id.* at 78.

76. *Id.* at 79.

77. *Id.*

78. *Id.* at 87.

79. *Id.* at 79.

80. *Id.* at 80-81.

81. *Id.* at 80.

82. *Id.*

83. *Id.* at 81.

84. *Id.* at 89.

develop an evaluation process to ensure that its ECTs are in fact meeting the state's goals for performance and outcome.<sup>85</sup> Given the dramatic expansion of ECTs over the past decade, this guide will be a great resource for states looking for guidance on how to improve or create effective environmental courts and tribunals in the future.

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85. *Id.*