

## INCREASE IN ENVIRONMENTAL COURTS AND TRIBUNALS PROMPTS NEW GLOBAL INSTITUTE

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Hundreds of specialized environmental courts and tribunals (ECTs) are suddenly emerging on every inhabited continent, in every major legal system, in rich and poor countries alike. Our University of Denver ECT study book *Greening Justice: Creating and Improving Environmental Courts and Tribunals*<sup>1</sup> and other publications document the growth of this innovative institutional approach to resolving disputes about the environment, natural resources, land use, and sustainable development.

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1. GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

Prior to the environmental movement of the 1970s, there were only a few specialized environmental adjudication bodies, yet today over 360 national or sub-national ECTs exist in some forty-two countries, approximately *half of which have been created in the last five years*.<sup>2</sup> In just the last two years alone, nations as diverse as Bolivia, Belgium, China, England, Paraguay, the Philippines, South Africa, and Thailand have created ECTs, and there are more on the drawing boards in other countries. Each is unique, developed in response to different environmental issues, laws, political institutions, cultural and religious norms, and advocacy pressures, but all have much in common and much to learn from one another.

This explosion of ECTs makes Pace Law School's launching of a new forum — the International Judicial Institute for Environmental Adjudication (IJIEA) — extremely timely and important. Currently, there is no other global forum in which environmental judges, commissioners, officials, and other stakeholders can share perspectives and learn from each other.<sup>3</sup> The IJIEA will connect countries and people seeking to increase access to environmental justice — through sharing ECT successes and failures, brainstorming new ECT innovations, and evaluating the contribution of ECTs to environmental protection and sustainable development.

Why the sudden upsurge in specialized ECTs? In over 175 interviews with ECT-experienced judges, prosecutors, development attorneys, government officials, nongovernmental organizations (NGOs), and academics in twenty-four countries, we found six factors converge, leading to their development.

The first and second factors, not surprisingly, are the growth of environmental problems and public awareness of them. Rapid development, industrialization, and urbanization in many countries

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2. We use “court” to indicate a body in the judicial branch of government and “tribunal” to indicate all non-judicial bodies empowered to decide disputes (typically in the executive or administrative branch of government).

3. Some *regional* environmental-judicial organizations exist, bringing together certain geographic groupings of states, *e.g.*, European Union Forum of Judges for the Environment (EUFJE), <http://www.eufje.org/> (last visited Dec. 2, 2010); Australasian Conference of Planning and Environment Courts and Tribunals (ACPECT); the Asian Justices Forum on the Environment (AJFE), <http://www.aecen.org/strengthening-asian-judiciaries> (last visited Dec. 2, 2010); the Working Group on Environmental Law of the Association of European Administrative Judges (AEAJ), <http://www.aeaj.org> (last visited Dec. 2, 2010).

have resulted in severe water, air, and land pollution; deforestation; wildlife loss; desertification; and other problems with major health, ecosystem, and societal impacts. In our own way, we all experience our London smogs, Bhopals, Chernobyls, Love Canals, Amazon rainforest destruction, and BP Deepwater Horizon blowouts. But development has also expanded public awareness and response, notably with innovations in and expansion of media, Internet, email, blogs, and other forms of communication.

The third factor is a response to the first two. Many nations have responded to these environmental pressures by adopting complex environmental laws — from constitutional “rights to a healthful environment,” to substantive environmental quality laws, to procedural rights of access to information, public participation, and access to justice.<sup>4</sup> International environmental treaties and agreements also create new rights and duties — principles such as sustainability, polluter-pays, precautionary, prevention, inter-generational equity — that increase expectations and the pressure on countries to adopt strong laws protecting the environment.<sup>5</sup> But in many countries (a cynic might say “all”), the laws on the books are not adequately enforced, and so environmental problems and public outrage continue.

Then the fourth factor can occur. In response to the lack of environmental enforcement and protection, civil society in the form of environmental NGOs, advocacy lawyers, as well as public entities begin bringing their complaints to the available general courts. At this point, the all-important fifth factor can occur — the traditional courts disappoint expectations, failing to deliver environmental justice. They often do not provide an ideal adjudication, one that is, in the succinct words of Australian court procedural law, “just, quick, and cheap.”<sup>6</sup> Barriers to existing court effectiveness in resolving environmental conflicts are many and various — the most significant being long delays, huge case backlogs, poor case management, decision-makers lacking in environmental expertise, narrow

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4. PRING & PRING, *supra* note 1, at 6-11.

5. *Id.*

6. Civil Procedure Act, 2005, § 56(1) (N.S.W. Consol. Acts); see Hon. Justice Brian J. Preston, *Operating an Environment Court: The Experience of the Land and Environment Court of New South Wales*, 25 ENV'T & PLAN. L. J. 385, 393 (2008).

definitions of plaintiff standing, the high cost and economic risks of litigation, lack of consistent decisions, intimidation, and corruption.<sup>7</sup>

At this point the decisive sixth factor can occur. Visionary leadership emerges, with strong environmental advocates inside and/or outside the government urging ECTs as a solution to the problems with the general courts. When these strong environmental advocates connect with reform-minded judicial or governmental leaders, the prospects for an ECT multiply. In some instances, these visionary leaders even “change hats” — from advocate to judge or advocate to government official — giving them the ability to implement the changes they have been seeking.

The convergence of these six factors — environmental problems, public awareness, unenforced laws, public interest litigation, traditional court failure, and emergence of reform-minded leaders — prompts the search for new solutions. As William Ruckelshaus, the first administrator of the U.S. Environmental Protection Agency, summed up recently, “Yesterday’s solutions worked well on yesterday’s problems, but the solutions we devised back in the 1970s aren’t likely to make much of a dent in the environmental problems we face today.”<sup>8</sup>

At this point, ECTs can be an attractive solution for some or all of the following reasons:

- expert judges and decision-makers with knowledge of environmental law, science, and economics
- greater efficiency through careful case management
- higher visibility of environmental cases and decisions
- cost reduction, including special rules of procedure
- consistency in decision-making
- expansion of standing to permit public interest lawsuits (PILs) and class actions
- demonstration of government and judicial commitment to environmental justice
- increased transparency and accountability for government agencies
- prioritization of environmental cases over other civil,

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7. PRING & PRING, *supra* note 1, at 13-16.

8. William Ruckelshaus, *A New Shade of Green*, WALL ST. J., Apr. 17, 2010, <http://online.wsj.com/article/SB10001424052702303410404575151640963114892.html> (last visited February 11, 2011).

criminal, and administrative cases

- ability to be creative, reform procedures, remove barriers, and use problem-solving approaches not available in traditional courts
- use of alternative dispute resolution (ADR) to craft non-adversarial solutions for environmental problems
- ability to integrate environmental, sectoral, and land use laws to achieve more holistic decisions
- authority to use a broader range of remedies
- expansion of public information, leading to greater public participation and confidence
- potential for judicial activism and reform by judges committed to environmental justice<sup>9</sup>

There are of course arguments against ECTs. Some opposition is based on practical considerations (concerns about insufficient caseload, training costs, competing needs, and industry capture), and some on more theoretical issues (concerns about marginalization, fragmentation, defining “environmental,” and judicial activism).<sup>10</sup>

Given the many positive arguments, why have ECTs so far been created in only about 20% of the world’s nations? The U.S. government, for example, considered creating a national environmental court in the 1970s and decided against it,<sup>11</sup> and major European nations, such as France, Germany, and Italy, also do without specialized environmental courts. Experts we interviewed point to public satisfaction with the general courts — absence of the fifth factor — as forestalling development of ECTs in those and other countries. We anticipate that the increasingly complex environmental issues of the twenty-first century, such as climate change, will increasingly move government and civil society leaders to consider expert ECTs.

Pace Law School’s Advisory Board for the IJIEA and other

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9. PRING & PRING, *supra* note 1, at 13-16. See also, *inter alia*, RICHARD MACRORY & MICHAEL WOODS, *MODERNIZING ENVIRONMENTAL JUSTICE: REGULATION AND THE ROLE OF AN ENVIRONMENTAL TRIBUNAL* (University College London 2008); Preston, *supra*, note 6; Donald Kaniaru, *Environmental Tribunals as a Mechanism for Settling Disputes*, 37 ENVTL. POL’Y & L. 459 (2007) (Neth.); LAW COMM’N OF INDIA, 186TH REPORT OF THE LAW COMMISSION OF INDIA: PROPOSAL TO CONSTITUTE ENVIRONMENTAL COURTS (2003).

10. PRING & PRING, *supra* note 1, at 17-18.

11. Judicial Conference of the United States, *Federal Courts Study Committee Report*, 22 CONN. L. REV. 733 (1990).

authors in this issue of the *Journal of Court Innovation* are excellent examples of the visionary leaders who have helped create ECTs:

Before going on the bench, Ambassador Hilario Davide Jr.<sup>12</sup> personally authored the provision in the Philippines' 1987 Constitution creating a "right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."<sup>13</sup> When he was appointed to the Supreme Court of the Philippines, he wrote the landmark opinion in *Oposa v. Factoran*<sup>14</sup> and subsequently became chief justice. That groundbreaking 1993 case was brought by award-winning environmental advocate Antonio (Tony) Oposa against the national government for failing to protect hundreds of thousands of acres of virgin Philippine forests from clearcutting. Davide's decision laid the foundation of Philippines environmental jurisprudence, establishing the constitutional right to a sound environment as enforceable and "grant[ing] standing to [the plaintiff] children in the present generation to represent both their own interests and those of future generations."<sup>15</sup> External advocacy continued to receive internal support under Davide's successor, Chief Justice Renato S. Puno, who has just retired. Under Puno's leadership, in 2008 the Court designated 117 existing trial courts as "environmental courts."<sup>16</sup> In 2009, it ruled against the government in another Tony Oposa case demanding the cleanup of polluted Manila Bay and adopted the remedy of "continuing mandamus" as an environmental enforcement tool.<sup>17</sup> In 2010, it produced a sweeping set of Supreme

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12. Ramon Magsaysay Award Foundation, *2002 Ramon Magsaysay Award for Government Service: Citation for Hilario Davide, Jr.* (2002), <http://www.rmaf.org.ph/Awardees/Citation/CitationDavideHil.htm> (last visited Dec. 2, 2010).

13. Const. (1987), Art. II, sec. 16, (Phil.).

14. *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.), [http://www.lawphil.net/judjuris/juri1993/jul1993/gr\\_101083\\_1993.html](http://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html) (last visited Dec. 2, 2010).

15. Jon Owens, *Comparative Law and Standing to Sue: A Petition for Redress for the Environment*, 7 ENVTL. L. 321, 342 (2001).

16. Philippines Supreme Court Administrative Order, A.O. No. 23-2008, Re: Designation of Special Courts to Hear, Try and Decide Environmental Cases (Jan. 28, 2008).

17. *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*, G.R. Nos. 171947-48 (S.C., Dec. 18, 2008) (Phil.), <http://sc.judiciary.gov.ph/jurisprudence/2008/december2008/171947-48.htm> (last visited Dec. 2, 2010); see also Presbitero J. Velasco, Jr., *Manila Bay: A Daunting Challenge in Environmental Rehabilitation and Protection*, 11 ORE. REV. OF INT'L L. 441 (2009) (opinion author's article about the case).

Court Rules of Procedure for Environmental Cases,<sup>18</sup> including a unique fast-track Writ of *Kalikasan* (Nature), which permits a serious environmental complaint affecting two or more locations to be filed directly in the Supreme Court, streamlining the trial-appeal process; Advocate Oposa has just filed the Supreme Court's first Writ of *Kalikasan* petition, involving climate change and water storage.<sup>19</sup>

Merideth Wright, Judge of the Environmental Court of the State of Vermont in the United States since its creation in 1990, is another example of this leadership synergy and ability to "change hats." Dedicated environmentalists took office in key state government environmental positions in the 1980s,<sup>20</sup> and the creation of an Environmental Court was initially advanced by opponents who wanted a "watchdog" to protect against overzealous environmental enforcement. Wright, then the Director of the Environmental Division of the Vermont Attorney General's Office, was selected as its first judge, and has overseen the expansion of the Environmental Court's jurisdiction and budget, the development of its jurisprudence and procedures, and the appointment of a second judge in 2005.

Barrister Richard Macrory, a Professor at University College London, continues a distinguished career in and out of government, focusing on environmental justice and judicial reform. He has been a member of the Royal Commission on Environmental Pollution, a board member of the Environment Agency of England and Wales, and has co-authored one of the seminal works on the need for an

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18. Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (S.C., Apr. 13, 2010) (Phil.).

19. The Global Legal Action on Climate Change v. The Philippine Government, Special Civil Action, G.R. No. 191806 (S.C., filed Apr. 21, 2010) (Phil.). See Edu Punay, *Supreme Court orders government to answer first kalikasan petition*, THE PHILIPPINE STAR, Apr. 29, 2010, <http://208.184.76.174/Article.aspx?articleid=570587> (last visited Dec. 2, 2010).

20. The Director of the State Agency of Natural Resources at the time was Jonathan Lash, previously an attorney for the environmental NGO Natural Resources Defense Council (NRDC) and now President of the World Resources Institute (publisher of *Greening Justice*). See World Resources Institute: Jonathan Lash, <http://www.wri.org/profile/jonathan-lash> (last visited Dec. 2, 2010). His second-in-command as Commissioner of the Department of Environmental Conservation was Patrick Parenteau, previously a Vice President of the environmental NGO National Wildlife Federation and now Senior Counsel to the Environmental and Natural Resources Law Clinic and Professor of Law at Vermont Law School. See Vermont Law School: Patrick A Parenteau, <http://www.vermontlaw.edu/x6702.xml> (last visited Dec. 2, 2010).

environmental tribunal in Britain.<sup>21</sup> He has seen his advocacy rewarded with England's establishment of the new "First-tier Tribunal (Environment)" in April 2010.

Nicholas A. Robinson, Pace University Professor on the Environment and founder of Pace Law School's globally-regarded Environmental Law Program, is the ideal catalyst for the new IJIEA. One of our most respected international environmental law leaders, he has practiced, taught, and advised on environmental law issues and has led major government and public interest environmental bodies since the 1960s. His contributions to environmental jurisprudence, to judicial training and capacity-building, and to the development of national and international environmental law can now be carried on in new and creative ways through the IJIEA.

The research we conducted for *Greening Justice* reveals similar stories of the interaction of environmental advocates with responsive judges and other officials in almost every country with an ECT. Examples include:

- India's M.C. Mehta brought his landmark cases to a sympathetic "green bench" of the Supreme Court of India, resulting in major new environmental precedents, principles, and practices, leading to the creation of India's new National Green Tribunal in 2010.<sup>22</sup>
- Vladimir Passos de Freitas, the distinguished Brazilian law professor and longtime advocate of ECTs, while president of the Federal Court of Appeals of the Fourth Circuit in 2003-2005 created trial-level federal environmental courts in each of the three states in his circuit.<sup>23</sup>
- Kurt Deketelaere, now secretary general of the League of European Research Universities, "changed hats" from a leading environmental law professor to chief legal advisor and chief of staff for the Environment Ministry of the Flemish Region of Belgium (Flanders), where he led the drafting of

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21. See MACRORY & WOODS, *supra* note 9.

22. M.C. Mehta Environmental Foundation, <http://mcmef.org/> (last visited Dec. 2, 2010).

23. Vladimir Passos de Freitas: Resumé, [http://www.vladimirfreitas.com.br/bio\\_en.asp](http://www.vladimirfreitas.com.br/bio_en.asp) (last visited Dec. 2, 2010).

legislation creating several new regionwide ECTs in 2009.<sup>24</sup>

- Donald Kaniaru, a pioneering Kenyan environmental lawyer and former United Nations' Environment Programme official, helped establish Kenya's National Environmental Tribunal in the 2000s,<sup>25</sup> with support from dedicated University of Nairobi environmental law professors Charles Okidi and Alfred Mumma.
- Indonesia's environmental NGO Forum for the Environment (*Wahana Lingkungan Hidup Indonesia* or WALHI) has litigated important precedents, including establishing citizen standing for class actions and public interest lawsuits. In response, the Indonesian Supreme Court is now considering a special training and certification program to qualify judges to hear environmental cases.<sup>26</sup>

ECTs are among the most innovative adjudication bodies in the world. Judges and other decision-makers have stepped "out of the box" in many countries to transform traditional environmental jurisprudence. Some of the creative examples (of which the IJIEA can help raise awareness) include:

- In the heart of Brazil's Amazon, State Environmental Court Judge Adalberto Carim Antonio is the master of the creative criminal remedy. He regularly orders offenders to attend an environmental night school he has created; makes community service directly relate to the offense (e.g., sentencing waste dumpers to work in a recycling plant, illegal foresters to plant trees, wildlife poachers to work for wildlife recovery groups); and provides community education through billboards on buses and environmental comic books he has personally authored and illustrated and which are paid for by offenders

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24. Kurt Deketelaere – Work History, <http://www.kurtdeketelaere.be/> (last visited Dec. 2, 2010); League of European Research Universities – Secretary General, <http://www.leru.org/index.php/public/about-leru/office/SecretaryGeneral> (last visited Dec. 2, 2010).

25. Kenya Community Development Foundation – KCDF Trust, <http://kcdf.or.ke/page/kcdf-trust/> (last visited Dec. 2, 2010).

26. Friends of the Earth Indonesia, <http://www.walhi.or.id/en> (last visited Dec. 2, 2010).

in lieu of fines.<sup>27</sup>

- In New South Wales, Australia, Chief Justice Brian Preston of the Land and Environment Court is creating a model “multi-door courthouse,” utilizing different adjudication pathways, ADR, and social services.<sup>28</sup>
- In New Zealand’s Environment Court, Alternate Environment Judge Fred McElrea requires some parties to participate in a “restorative justice” process, in which the community that has been harmed assists in designing the sentences for environmental violators.<sup>29</sup>
- In the Philippines, the Supreme Court recently designated 117 local trial courts as environmental courts and adopted revolutionary new rules of procedure for environmental cases, such as creating a Writ of *Kalikasan* (Nature).<sup>30</sup>
- In Sweden’s Environmental Court of Appeal, scientists and engineers sit with law-trained judges to make environmental decisions.<sup>31</sup>
- In Ireland, the An Bord Pleanála holds hearings in the locality of the dispute and conducts site visits to understand the problems first-hand.<sup>32</sup>
- In South Korea, the national and subnational Environmental Dispute Resolution Commissions rely primarily on mediation to resolve environmental complaints.<sup>33</sup>
- In Denmark, the Environmental Board of Appeals maintains a

27. See Karen Johansen, *The Environmental Court of Manaus: Review and Analysis*, 5 ENVIRONMENTALLY FRIENDLY 20 (Fall 2001), <http://web.pace.edu/emplibrary/Env.%20Law%20GreenLaw%20Issue%20Volume%2051.pdf> (last visited Dec. 2, 2010).

28. Hon. Justice Brian J. Preston, *Keynote Address – The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse* (Nov. 15, 2007), [http://www.bocsar.nsw.gov.au/lawlink/lec/ll\\_ec.nsf/vwFiles/Paper\\_15Nov07\\_Preston\\_LEC\\_Multi\\_door\\_Court.doc/\\$file/Paper\\_15Nov07\\_Preston\\_LEC\\_Multi\\_door\\_Court.doc](http://www.bocsar.nsw.gov.au/lawlink/lec/ll_ec.nsf/vwFiles/Paper_15Nov07_Preston_LEC_Multi_door_Court.doc/$file/Paper_15Nov07_Preston_LEC_Multi_door_Court.doc) (last visited Dec. 2, 2010).

29. Restorative Justice Online – Fred McElrea, <http://www.restorativejustice.org/leading/mcelrea> (last visited Dec. 2, 2010).

30. Rules of Procedure for Environmental Cases, *supra* note 18.

31. Sveriges Domstolar – Environmental Court, [http://www.domstol.se/templates/DV\\_InfoPage\\_\\_\\_2328.aspx](http://www.domstol.se/templates/DV_InfoPage___2328.aspx) (last visited Dec. 2, 2010).

32. An Bord Pleanála, <http://www.pleanala.ie> (last visited Dec. 2, 2010).

33. National Environmental Dispute Resolution Commission, [http://eng.me.go.kr/content.do?method=moveContent&menuCode=abo\\_sub\\_resolution](http://eng.me.go.kr/content.do?method=moveContent&menuCode=abo_sub_resolution) (last visited Dec. 2, 2010).

list of several hundred volunteer environmental experts — from government, industry, agriculture, NGOs, and academia — that it can call upon to sit on and decide cases requiring special expertise.<sup>34</sup>

While every ECT is unique, each model has much to share with other ECTs as well as with civil, judicial, and governmental leaders interested in creating or reforming ECTs in their jurisdictions. Whether the sharing is about new computerized case management tools, creative use of ADR, development of environmental training programs, adoption of innovative rules of procedure, unusual but effective remedies, special approaches for access to scientific and technical expertise, principles for expanding standing, reducing costs for parties, taking justice to the people through traveling courts and site visits, or evaluation methodology for ECT performance — all ECTs have exciting innovations to share.

Pace's timely creation of the new IJIEA will provide a valuable forum for sharing the best theories, experiences, and practices from environmental decision-makers, enhancing environmental justice globally.

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34. Danish Ministry of the Environment, Decision-Making Process in Denmark § 4.1.3, <http://www2.mst.dk/udgiv/publications/1995/87-7944-324-9/html/4.htm> (last visited Dec. 2, 2010).