

GREENING JUSTICE:

INFORMATION, PUBLIC PARTICIPATION, AND ACCESS TO JUSTICE – WHAT CAN ENVIRONMENTAL COURTS AND TRIBUNALS CONTRIBUTE?

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Purpose of the University of Denver Environmental Courts and Tribunals (ECT) Study

1. Perform first comparative study of ECTs globally
2. Evaluate role of ECTs in improving access to public information, participation, and environmental justice
3. Provide guidance about models and “best practices” for creating or improving an ECT
4. Result: “Greening Justice” book, articles, presentations, and country consultations.



Definition of an “ECT”:

Any government body
- judicial or administrative -
specializing in resolving disputes
about the environment, natural resources,
land use, or related issues

*Japan's National Environmental Dispute Coordination
Commission (Kouchou) and Prefectural Pollution
Examination Commissions are examples of ECTs*

Nearly 400 ECTs in 53 countries authorized!



ECTs Can Improve All Rio Prin. 10 Green Access Rights for the Public:

- 1. Access to Information
- 2. Access to Public Participation in Decision-Making
- 3. Access to Environmental Justice



Access to Information

- ECT rules can make information public about cases, process, outcomes
- ECT website
- ECT does independent research, site visits, etc.
- Public access to hearings
- Posting of court's, parties', experts' documents on line
- Requiring disclosure of information from government and parties.



Access to Public Participation

- Allow public interest complaints against government, private parties
- Expand “standing” to:
 - Public
 - Environmental NGOs
 - Class actions
 - Future generations
- Permit “friend of the court” briefs
- Allow greater public involvement in discovery, evidence gathering, etc.



Access to Justice

- Reduced costs
- Speed process
- Expert judges, decision-makers
- Consistent decisions
- More government and private sector transparency and accountability
- Control “SLAPPs”
- Provide a “problem-solving” approach
- Increased public confidence



The Study Findings:

Successful ECTs are built on 12 key “Building Blocks” (Design Decisions) – and all affect Green Access:

1. Type of forum
2. Legal jurisdiction
3. Level of review
4. Geographic coverage
5. Case volume
6. Standing
7. Costs
8. Access to scientific and technical expertise
9. Effective remedies
10. Alternative dispute resolution (ADR)
11. Competence of judges and decision-makers
12. Creative rules of procedure



1. TYPE OF FORUM

COURTS

(in the Judicial Branch of Govt.):

1. Independent , specialized judicial courts
2. Specialized “green chambers” (panels within a general court)
3. Select “green judges” (assigned environmental cases)



1. TYPE OF FORUM (continued)

TRIBUNALS

(in the Executive or Administrative Branch of Govt.):

4. Independent tribunals (not under another agency’s supervision)
5. Quasi-independent tribunals (under supervision of an agency whose decisions tribunal does not review, like Japan’s Kouchoi)
6. Captive tribunals (located in an agency whose decisions tribunal does review)
7. Other types of tribunals
 - Special advisory commissions
 - ADR bodies
 - Ombudsman programs
 - Human rights commissions



2. LEGAL JURISDICTION

What laws are assigned to the ECT?

- Constitutional rights?
- Environmental quality laws?
- Natural resource development laws?
- Natural resource protection laws?
- Land use (town & country) planning laws?
- Public health laws?
- Exemptions (issues of national significance, nuclear, minister’s discretion, etc.)?



2. LEGAL JURISDICTION (cont.)

What kinds of enforcement jurisdiction?

- Civil?
- Criminal?
- Administrative (dealing with Govt. action)?
- Combination?



3. LEVEL OF REVIEW

Where should the ECT come in the decision process?

1. Internal agency ECT
2. Trial court level (1st instance)
3. Appeal court level (2nd instance)
 - Record review only
 - Merits review
 - De novo review
4. Supreme court level (2nd or 3rd instance)
5. ECTs at several levels



4. GEOGRAPHIC AREA

How big an area should the ECT cover?

- National
- State / province
- County
- Local / municipal
- Water basin
- Development area
- Several of these
- “Traveling ECTs”



5. CASE VOLUME

Will the ECT be used enough? Depends on:

- Public awareness and activism
- Respect for ECT
- Environmental laws – adequacy, complexity
- Scope of laws under ECT’s jurisdiction
- Accessibility vs. barriers that keep people away
- Government support
- Geographic coverage
- Economic conditions, development policy
- ECT’s enforcement effectiveness



5. CASE VOLUME (continued)

An ECT needs enough cases to justify itself

- ECT case loads range from 100,000s of cases per year (New York City) to as few as 5 (Trinidad-Tobago) !
- No minimum number needed for a green chamber or a green judge (better to start small?)



6. STANDING

How “open” is the ECT’s door?

ECTs vary from to broadly accessible to extremely closed . . . depending on their “standing” rules

Standing rules govern who can bring cases or participate in them

They can be a huge barrier to A2J and the ECT’s success.



7. COSTS

Another huge barrier to access to justice, costs can include:

1. Court fees
2. Professional fees (attorneys, experts, etc.)
3. Costs of lost work, travel, other resources
4. Cost-shifting (“loser pays” winning party’s costs)
5. Security for costs for an injunction
6. Risk of countersuit – a “SLAPP”



7. COSTS (continued)

ECT tools to minimize costs and risks:

- ECT advance cost awards for public interest litigation (PIL)
- Proponent-funding of public intervention
- Elimination of court filing fees for PIL litigants
- Rule against “loser pays”
- Use of ADR
- Allow pro se parties (no need for attorneys)
- Private volunteer attorneys (pro bono)
- Government environmental prosecutors
- Court appointed experts



7. COSTS (continued)

More ECT tools to minimize costs/risks:

- Government agency representation
- Government-funded legal aid
- Environmental ombudsman
- Law school environmental clinics
- Charitable foundation grants
- Attorneys fee legislation
- Elimination of security bonds for injunctions
- Anti-SLAPP laws
- Efficient court management



8. ACCESS TO SCIENTIFIC & TECHNICAL EXPERTISE

1: ECTs can provide expertise

- Expert judges or commissioners
- Standing expert panels
- Special commissions
- Court staff consultants-inspectors
- Agency’s experts
- Prosecutor’s experts
- Independent scientific institutes
- Community volunteer experts list



8. ACCESS TO SCIENTIFIC & TECHNICAL EXPERTISE (cont.)

2: ECTs can manage parties’ experts

- Meetings of experts to focus issues
- Parties’ experts made responsible to the court, not to parties
- Concurrent testimony
- Issue sequencing by court
- Pre-filed expert testimony
- ECT calls own experts.



9. EFFECTIVE REMEDIES

1. **INJUNCTIONS**—Order to act or to not act
 - Preliminary, interlocutory, permanent
2. **DAMAGES**—Award of money to compensate for loss
 - Compensatory, punitive, natural resource damages
3. **RESTITUTION**—Award of money measured by the cost of restoring status quo or of depriving wrongdoer of gain
 - Cleanup and restoration, unjust enrichment



9. EFFECTIVE REMEDIES (cont.)

4. **DECLARATORY JUDGMENTS**—Order determining rights, duties, relationships, constitutionality, or interpretation of laws
5. **ADMINISTRATIVE REMEDIES**—Order concerning acts or inaction of government agencies or officials
 - Affirm, reverse, modify, remand government decision; injunction against government; continuing mandamus
6. **CRIMINAL PENALTIES**
 - Incarceration, monetary fines, required work, government supervision, restorative justice



9. EFFECTIVE REMEDIES (cont.)

7. **CONTEMPT**—Finding a person disrespectful of the ECT, its orders, process, or powers
 - criminal or civil
8. **COST AWARDS**—Order awarding a party expenses for
 - Attorneys fees, experts costs, advance cost awards, intervenor funding orders
9. **INNOVATIVE REMEDIES**—Unusual, effective orders
 - Continuing mandamus, environmental “school,” community environmental service, payment to environmental trust fund, financial contribution for environmental projects



10. ADR

Definition: A neutral, third-party-facilitated . . .

- Counseling
- Mediation
 - Interest-based
 - Facilitative
 - Directive
 - Evaluative
 - Transformative
- Conciliation
- Negotiation
- Arbitration
- Hybrid mediation-arbitration
- Early neutral evaluation
- Restorative justice
- Collaborative decision-making

All are possible in the “Multi-Door Courthouse”



11. COMPETENCE OF JUDGES & DECISION-MAKERS

Competence based on 6 factors:

1. Initial qualifications
2. Selection process
3. On-going training in environmental law
4. Tenure
5. Salary
6. Career Path



12. CREATIVE RULES OF PROCEDURE

To be successful, ECTs should have the power to adopt new rules and procedures, beyond those of the general courts.

The following are some examples of ECT rules which increase Green Access . . .



12. CREATIVE RULES OF PROCEDURE (continued)

- Increase ease of filing cases
- Open standing to PILs and NGOs
- Preliminary injunctions
- Relaxed rules of discovery, evidence, and procedure
- Increase public access to court documents
- Incorporate information technology



12. CREATIVE RULES OF PROCEDURE (continued)

- Wide range of ADR tools
- Alternate court hours (weekends, evenings)
- Special rules for SLAPPs
- Traveling courts
- Creative sentencing
- Sentencing database
- Continuing mandamus



12. CREATIVE RULES OF PROCEDURE (continued)

- Helpful case management tools:
 - Case managers
 - ADR screening in advance
 - Court assistance for litigants
 - Case tracking process
 - Directions hearings – timelines on cases
 - Computer data management
 - Video- and tele-conferencing of hearings
 - ECT website



THE FUTURE: 10 PREDICTIONS

- **COMPLEXITY:** Environmental laws will become increasingly complex – driven by climate change, demands for sustainability, and other new issues – requiring a “problem-solving approach,” not just routine law application
- **GROWTH:** Increase in ECTs and countries with ECTs
- **INNOVATION:** More innovation in ECT processes
- **ADR:** Increased use of ADR
- **INTEGRATION:** More ECTs with have integrated jurisdiction – over both environmental laws and land use planning laws – increasing ECTs’ coverage and caseload



THE FUTURE (continued)

- **COLLABORATION:** Expanded collaboration between ECT judges and decision-makers from different nations
- **CAPACITY BUILDING:** Increasing aid and training for ECTs from governments and NGOs (UNEP, USAID, World Bank and other IFIs, ABA-ROLI, etc.)
- **EVALUATION:** More rigorous performance evaluation of ECTs
- **INTERNATIONAL:** Creation of multi-country ECTs to deal with transboundary and global problems
- **HUMAN RIGHTS:** Increased recognition of human rights to a clean, healthful, quality environment.

