

Environmental Courts and Tribunals – 2021

A Guide for Policymakers





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EXECUTIVE SUMMARY

As this UNEP 2021 ECT Guide seeks to update the UNEP 2016 ECT Guide, its aims remain broadly the same: to function as a guide for policymakers, judges, academics and stakeholders who have an interest in improving the adjudication of environmental disputes and establishing ECTs. ECTs may take different forms and models, with no single best model or “one-size-fits-all” design. What is best for each country depends on what fits the country’s unique ecological, historical, legal, judicial, religious, economic, cultural and political conditions. This guide sets out the main ECT models available, which can be environmental courts (i.e. instituted in the judicial branch of government) and environmental tribunals (i.e. instituted in either the executive or administrative branch). These ECTs may have different degrees of independence. They may be configured to include legally trained judges possessing a diverse range of environmental law expertise, and even non-law actors (e.g. policymakers and technical experts). Aside from ECTs, other institutions such as ombudsman offices, prosecutors and human rights commissions also contribute to achieving environmental justice.

Through the enforcement of environmental laws and the settling of environmental disputes, ECTs help countries meet the objectives of the United Nations 2030 Agenda for Sustainable Development and the Paris Agreement on Climate Change, among other international environmental instruments and commitments. They provide access to environmental justice and remedies, strengthen judicial systems to ensure accountability, and spur legal innovation and reforms.

The UNEP 2016 ECT Guide observed an “explosion” in the number of ECTs since 2000, but the observable trend today is that of steady growth, with the number of operational ECTs standing at 2,115 in 67 countries (appendix A). This trend is attributable to several factors, including: natural plateauing of numbers as countries complete their efforts to set up ECTs; increased effectiveness of existing ECTs; the prioritization of environmental issues in courts of general jurisdiction; the presence of judges who are well versed in environmental matters; the growing belief that environmental justice can be achieved through existing systems (reflected in the increasing number of environmental cases in general courts); and the growing popularity of settling disputes out of court through alternative dispute resolution. Apart from these, other recent trends of ECT development can also be noted: the proliferation of green benches; amalgamation; incrementalism; and judicial reform.

For ECTs to achieve success and sidestep potential drawbacks, this update considers good practices in both the design and operational stages of ECTs. These include independence, flexibility, inclusion of non-law decision makers, use of alternative dispute resolution, empowering ECTs with a comprehensive jurisdiction, enforcement powers, adequate resources, active public outreach, user-friendly systems, cost control, and continuous improvement and development processes. For various reasons, not all countries will establish ECTs. Thus, it is helpful for these good practices to be made widely known and implemented in judicial training programmes, so that general courts can also be equipped to provide environmental justice.



FOREWORD

This 2021 update (UNEP 2021 ECT Guide) of *Environmental Courts and Tribunals: A Guide for Policymakers* (UNEP 2016 ECT Guide), first published by the United Nations Environment Programme (UNEP) in 2016, is designed to provide policymakers and citizens around the globe with the latest information about the changing world of specialized environmental courts and tribunals (ECTs). It provides an enlarged database of the available adjudicative forums for environmental disputes – environmental courts (i.e. instituted in the judicial branch of government) and environmental tribunals (i.e. instituted in either the executive or administrative branch). It also documents good practices across various ECTs.

The UNEP 2016 ECT Guide found that the adjudication of environmental, water, land and resource use disputes by specialized government bodies is not a new phenomenon. In fact, it first emerged in Nordic countries over a century ago. However, between the 1960s and 1970s, global awareness about environmental issues increased. This both resulted from and led to more government action and non-governmental organization (NGO) advocacy. Likewise, the body of environmental laws, instruments and principles grew, and specialized government bodies were created to enforce them. International environmental law developments, such as the Rio Declaration on Environment and Development (1992), Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters (the Bali Guidelines) (2010), United Nations Conference on Sustainable Development (Rio+20) (2012), United Nations 2030 Agenda for Sustainable Development (particularly Sustainable Development Goal 16 “Peace, Justice and Strong Institutions”) (2015), and many more, established the three environmental access rights – access to information, access to public participation in decision-making and access to justice. These three rights are now regarded as key components of the environmental rule of law. Therein, access to justice is the primary driver of ECT development.

Good practices for ECTs were first identified and analysed in *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (Pring and Pring 2009). This study was updated and expanded to inform the UNEP 2016 ECT Guide. The UNEP 2016 ECT Guide documented an “explosion” of new ECTs around the world, from over 350 identified in 2009, to over 1,200 in 2016. In this update, it is found that there are now 2,115 ECTs globally, with around 850 of them

being developed since 2016. Further, this update identifies good practices by their ability to make environmental justice “just, quick, and cheap” (New South Wales, Civil Procedure Act 2005, section 56(1)).

Since the UNEP 2016 ECT Guide, there have been a number of dramatic changes in the global environmental landscape. Changes in priorities, governance, economy and health, and threats to the environmental rule of law – the most notable of which are listed as follows – necessitate a re-examination and update of this toolkit for policymakers and leaders at all levels, in every country.

Climate change

The long-standing focus on preventing and mitigating environmental degradation is now being superseded by a focus on the climate change crisis as the key threat to people and the environment now and in the future. Many new advocacy groups, such as Greta Thunberg’s Fridays for Future and the Climate Change Network, and legal research programmes like Columbia University’s Sabin Center for Climate Change Law, have inspired an international call for climate justice, not just climate action. Climate justice has been defined as fair treatment and freedom from discrimination for all in the creation of policies and projects that address climate change, as well as in the systems that create climate change and perpetuate discrimination. The concept of climate justice recognizes that the burdens of climate change are not distributed equitably, but fall heaviest on the poor, women and children, minorities, marginalized groups, underdeveloped countries, and island and coastal nations. This shift in focus from environmental degradation per se to climate change is driving change in law and actions aimed at climate change, and a parallel growth in climate litigation.

This uneven burden is a major challenge to all courts and tribunals today, increasing the need to employ new tools to improve access to justice and the environmental rule of law. Climate justice raises complex questions of law and fact, necessitating decisions that are scientifically and technically informed, sustainable, enforceable, and effective in both the short and long term. The complexity of the issue has made the precautionary principle, sustainability and access to experts even more important in adjudication. Climate change litigation can be very effectively adjudicated in an ECT, as recent decisions in Australia’s Land and Environment Court of New South Wales and other ECTs have shown.

The COVID-19 pandemic

The pandemic is resulting in extreme economic, social, political and emotional pressures throughout the world, and this is already shifting civic and governmental priorities and impacting access to justice and the rule of law. Social distancing, masking, quarantines, job losses, court closures, school and business shutdowns, vaccine distribution inequities, and health care costs are mandating novel and controversial responses by governments at all levels, including the general courts and ECTs. Some important ECT good practices – such as public court access, on-site hearings, conferences of the parties and face-to-face alternative dispute resolution – have been limited or removed during the pandemic. Some other good practices have involved a new reliance on sophisticated information technology (IT) to manage the filing, discovery, evidence presentation, hearings and adjudication processes, and may be with us long after the pandemic ends. ECTs that already were using IT were ahead of the game, but all have had to rapidly deal with developing IT procedures, systems and equipment.

Political shifts

Some countries have experienced shifts in political leadership and priorities since the UNEP 2016 ECT Guide, in some cases from more pro-environment progressive agendas to more conservative economic agendas that can affect the courts, including ECTs. The results of this shift have included amendments of ECT rules reducing their effectiveness, mergers of ECTs into other non-environmental adjudication bodies, reduced budgets, and questionable personnel appointments or lack of appointments. The consequences can be a step backward for access to justice and the environmental rule of law. Some of those consequences can be reversed by future shifts in political leadership and priorities, while some will take decades to reverse.

Polarization

Increasing gaps between groups of citizens – political, economic, social, educational, racial, gender and

aspirational – have been responsible for civil polarization in many nations. Great numbers of people are now feeling unempowered, unrewarded, and lacking in opportunities or dignity, and are as a result becoming attracted to a “populist” agenda. Policing, enforcement, scientific, and judicial systems are less trusted by the “common man”, according to surveys. Typically, these shifts can have a negative effect on support for sustainability, environmental protection, access to justice, the environmental rule of law, fact-based decision-making, science and technology, and judicial independence – some of the cornerstones of successful ECTs.

Despite these challenging global trends, specialized ECTs have increased in number, sophistication, and adaptation to changed conditions. Since 2016, there has been an increase of over 850 new ECTs, including 36 in France and hundreds in China. New ECTs are also being planned in diverse legal systems including, for example, in Ethiopia, Ireland, Turkey and the United Arab Emirates. Most ECTs have adopted some form of IT procedure across their processes in order to deal with COVID-19. Some ECTs have already returned to a mix of in-person and virtual procedures. Adaptations like these have increased access to justice and efficiency, and reduced costs and backlogs, and will certainly be continued in the post-pandemic world.

Trends noted in 2016 – including reliance on green judges and green benches in the general courts and the amalgamation of ECTs into general non-environmental bodies – have continued and may be optimal models in the future. Their advantages of cost savings and efficiency have to be weighed against the potential loss of good practices that have been hallmarks of the specialized ECTs. Focused training for environmental decision makers has been provided by UNEP and other international governmental organizations and NGOs and is helping to develop a cadre of judges who are knowledgeable about environmental law and decision-making. However, in some ECTs and even general courts, deficiencies in decisional expertise, remedies, enforcement, standing, independence, efficiency and flexibility remain hurdles for access to justice, sustainability and the environmental rule of law.

We hope that the information, analysis and examples in this update will aid in the continuous development of ECTs.



George W. Pring



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Authors of the UNEP 2016 ECT Guide



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LIST OF ABBREVIATIONS

ECT	Environmental Court and Tribunal
ELUAT	Environment and Land Use Appeal Tribunal (Mauritius)
EPA	Environmental Protection Agency (United States of America)
FAQs	Frequently asked questions
IT	Information technology
IUCN	International Union for Conservation of Nature
LECNSW	Land and Environment Court of New South Wales (Australia)
NGT	National Green Tribunal (India)
NGO	Non-governmental organization
SLAPP	Strategic lawsuits against public participation
STAB	Stichting Advisering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening/Foundation of Independent Court Experts in Environmental and Planning Law, now called Gerechtelijke Omgevingsdeskundigen (Netherlands)
UNEP	United Nations Environment Programme
USAID	United States Agency for International Development



INTRODUCTION



INTRODUCTION

This UNEP 2021 ECT Guide is designed to provide an overview for policymakers, judges, academics, and stakeholders who are interested in improving the adjudication of environmental disputes. It identifies features of ECTs, describes good practices and provides road maps for institution-building to support the achievement of the United Nations Sustainable Development Goals, particularly Sustainable Development Goal 16 “Peace, Justice and Strong Institutions”, which seeks 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.

To prepare this guide, over 80 current ECT judges and experts were interviewed, and 197 countries surveyed. Similarly to *Greening Justice* and the UNEP 2016 ECT Guide, this guide synthesizes the opinions and experience of experts and leaders in the ECT field. The data and information presented in this guide was accurate as at August 2021.

The following give an indication of what this guide was, and what it is not:

- It is a user-friendly guide to the current status of specialized ECTs around the world, that provides models and good practices for creating new ECTs or improving existing ones.
- It is designed to be a useful road map for policymakers, judges, academics and stakeholders at the local, state and national levels who are exploring ways to improve access to environmental justice, environmental rule of law and environmental sustainability.
- It is not an encyclopaedia. The reader seeking detailed statistics is pointed to the appendices for further information.
- It is a collection of recommendations based on:
 - i. questionnaire surveys, interviews and desktop research conducted by ECT experts consisting of judges, officials, lawyers, advocates and academics; and
 - ii. secondary literature from 2016 to 2020 on ECTs and broader environmental governance.

This guide was written as a practical guide for users, providing references which will be of value. A non-exhaustive list of experts is provided in appendix E.

The “good practices” are chosen based on their extent of contribution to access to justice, international law principles and environmental rule of law. Although the authors and experts believe, based on experience, that specialized ECTs incorporating some or all 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 documenting that ECT outcomes are better than decisions by generalist courts and tribunals. There have been and will continue to be visionary decisions delivered by knowledgeable judges in general courts and forums. However, such outcomes are seen as exceptions to the rule.

Many experts believe that national and subnational ECTs employing good practices can contribute to the achievement of the Sustainable Development Goals, and this guide seeks to be a firm step in that direction. Specifically, ECTs can be designed to:

- i. promote environmental rule of law at the national and international levels and ensure access to justice (Sustainable Development Goal Target 16.3);
- ii. develop more effective, accountable and transparent institutions at all levels (Sustainable Development Goal Target 16.6);
- iii. ensure responsive, inclusive, participatory and representative decision-making at all levels (Sustainable Development Goal Target 16.7);
- iv. ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements (Sustainable Development Goal Target 16.10); and
- v. promote and enforce non-discriminatory laws and policies for sustainable development (Sustainable Development Goal Target 16.10.b).

This guide does not address ECTs at the international level because international adjudication presents a different set of issues, and there are currently limited models for international ECTs. The International Court of Justice had an Environmental Chamber from 1993 to 2006, but it was discontinued as no State ever used it. The Permanent Court of Arbitration has specialized Environmental Rules for arbitration and conciliation, and a list of arbitrators and technical experts, but is only available to States which have agreed to use arbitration or conciliation to resolve disputes. The International Tribunal for the Law of the Sea can only hear disputes arising under the United Nations Convention on the Law of the Sea or related agreements. Canada, Mexico and the United States of America have created a Commission for Environmental Compliance that

can hear dispute submissions from the three parties or citizens under the North American Free Trade Agreement, but the Commission has no enforcement powers. The Court of Justice of the European Union hears cases interpreting European Union law and ensuring its equal application across the European Union member States; it has some informal judicial specialization in environmental law, but has not institutionalized it. There are proposals to create an international environmental court and other multinational environmental adjudication bodies, but these have not received significant support from States.





ECT CHARACTERISTICS

1. ECT characteristics

1.1. FUNCTION OVER TITLE

The words of Justice Brian Preston of the Land and Environment Court of New South Wales encapsulate the challenge of defining environmental law and, more specifically, environmental courts and tribunals (ECTs). In his view, there is a “core” of environmental legislation and case law that addresses environmental problems, and a “periphery” of laws that have the effect of protecting the environment but were not created for the purpose of environmental conservation (Preston 2021). Similarly, in the context of ECTs, a key question is when a court or tribunal can be considered an ECT. In this guide, an approach of substance over form has been taken: the key question is whether a particular court performs the functions of an ECT.

The UNEP 2016 ECT Guide posited that there are six modes of environmental dispute resolution (United Nations Environment Programme [UNEP] 2016). Firstly, environmental disputes may be resolved in environmental courts, which are stand-alone and have a specialized jurisdiction over environmental matters. Secondly, green chambers in general courts, such as can be found in India, may be used (Ahsan and Bueta 2015), as can environmental divisions at various levels of courts, seen in Thailand (United States Agency for International Development [USAID] 2019). Thirdly, green benches with green judges may also be used within courts of general jurisdiction, such as in Indonesia (Haba, Yunus and Risal 2020) and Pakistan (Shah 2021). Fourthly, environmental disputes may be resolved in independent administrative tribunals, including free-standing environmental tribunals or an environmental division within an administrative tribunal. Fifthly, quasi-independent environmental tribunals may be used; these are under the supervision of government agencies, but not the government agency which is being reviewed by the tribunal. Finally, there are captive tribunals, which are environmental tribunals controlled by the very agency the captive tribunal reviews, such as the United States Environmental Appeals Board (UNEP 2016).

Modes of environmental dispute resolution

- Environmental courts
- Green chambers
- Designated green judges on a general court
- Independent tribunals
- Quasi-independent environmental tribunals
- Captive tribunals

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. In most countries’ civil law, a tribunal is a lower court within the general or administrative judiciary. For the purposes of this guide, a court is differentiated from a tribunal on the basis of the branch of government in which it is instituted. Courts are bodies within the judicial branch. Tribunals are bodies within either the administrative or executive branch, which includes all government dispute resolution bodies. Though rare, there are other forms of environmental dispute resolution that may (i) specialize in environmental issues, and (ii) resolve disputes out of court, such as ombudsman offices, prosecutors and human rights commissions.





1.2. RECENT TRENDS: GREEN BENCHES, AMALGAMATION AND INCREMENTALISM

A. Green benches

Since the publication of the UNEP 2016 ECT Guide, the trend of an “explosion” of ECTs has subsided in most countries. Some countries have moved towards establishing green benches in general courts. As such, instead of having courts that adjudicate environmental cases only, judges trained in environmental law preside over environmental cases within a court of general jurisdiction.

Green benches are found in general courts and comprise judges trained in environmental law (green judges).

The practice whereby general judges with some environmental law specialization, dedicated green judges or green benches sit as alternatives to expensive, separate, and legislatively created ECTs is increasingly common. This model is used in Hawaii (Hawaii, Hawai'i State Judiciary, no date) and California (California Association of Environmental Professionals 2021), United States of America. In Pakistan, each court has a designated green bench judge presiding over environment-related cases, reflecting Pakistan's commitment to strengthening environmental judicial proceedings (Shah 2021).

A trend of installing green judges within general courts can also be seen in Indonesia (Haba, Yunus and Risal 2020). Initially, Indonesia was interested in establishing stand-alone ECTs. However, due to political challenges and capacity constraints, policymakers decided to give general court judges environmental training instead. This has contributed to the goal of having judges who are proficient in environmental issues within the general courts (Indonesia, Supreme Court of Indonesia 2011). Development partners such the Asian Development Bank (Asian Judges Network on Environment 2015), and the Studiecentrum Rechtspleging of the Netherlands (Center for International Legal Cooperation 2017), routinely provide training for environmental matters to Indonesian judges (Figure 1) through the National Judges Training Body under the Supreme Court (Badan Litbang Diklat Hukum dan Peradilan Mahkamah Agung RI) (Mulyono 2021).

De facto green benches also exist in Europe. Because environmental cases are systematically referred to the same chambers, de facto specialization has developed at the chamber level of some general and administrative courts. This concentration of environmental cases in some



Figure 1 Example of an environmental law training certificate awarded to Indonesian judges

chambers has enabled presiding judges to become experts, or has at least provided the impetus for them to train in environmental law. This is the case in Greece (Lavrysen 2004; Pyrgakis 2021), Finland (Paloniitty and Kangasmaa 2018), Italy (Ramacci 2018) and Spain (Gudin 2018). Often, the establishment of such specialized chambers is based on a regulation of the court, or a decision of the president of the court, rather than through legislation. It is recommended that ECTs be created through specific laws, rather than discretionary decisions of court presidents or judicial councils, if they are to be secured for the long term. Many of these chambers also handle non-environmental cases and judges can be transferred to other chambers of the court (Lavrysen 2021). An exception can be found in the Netherlands where, since 2020, the new Environmental Chamber of the Council of State only handles environment and planning cases (Uylenburg 2021).

Green benches in Europe and Africa identify themselves as part of environmental courts, while green benches in

other regions identify themselves as general courts with green judges. In summary, green benches are a viable alternative for countries that do not have operational ECTs. However, these green benches might not be fully capable of incorporating the good practices that ECTs can provide.

B. Amalgamation

Amalgamation is the process of combining several institutions into one. This groups a diverse group of experts within a single institution, cutting costs, increasing efficiency and improving accessibility. However, amalgamation is a double-edged sword. On the one hand, it creates a “one stop shop” court or tribunal that offers several benefits. On the other hand, it risks diluting the pool of experts available if the process is not executed with proper consideration (UNEP 2016).

For example, in Canada, the Legislative Assembly of Ontario approved Bill 245 for the Accelerating Access to Justice Act 2021, merging a five-tribunal cluster into the single Ontario Land Tribunal. The Bill revoked the acts and provisions that established previous environmental tribunals, which were the Board of Negotiation, the Conservation Review Board, the Environmental Review Tribunal, the Local Planning Appeal Tribunal and the Mining and Land Tribunal of Ontario (Ontario, Accelerating Access to Justice Act 2021). This amalgamation was premised on the theory that adjudicators with specialized expertise were not necessary because “a good adjudicator can adjudicate anything”. In this view, reducing the number of tribunals and decision makers therein results in a cheaper, faster and more accessible decision-making process (Muldoon 2021).

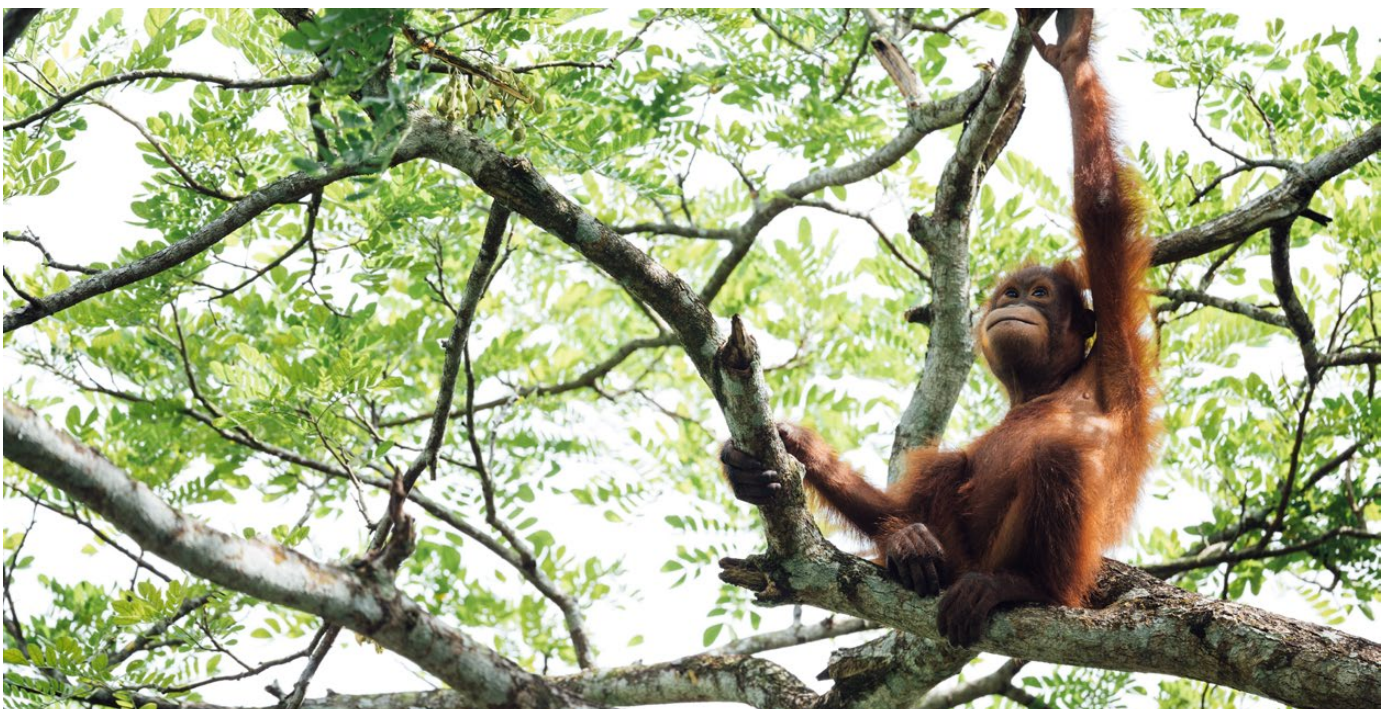
However, as observed by Peggy Sattler of the Legislative Assembly of Ontario, removing the expertise that existed in those tribunals by merging it into a single tribunal could “water down the ability of those previous tribunals to be able to really look specifically at the environmental impacts of the issues that are brought before the adjudicators” (Ontario, Legislative Assembly of Ontario 2021, p. 11,500).

C. Incrementalism

Incrementalism is a method of working that involves taking small, progressive steps over a period, as opposed to implementing drastic and far-reaching actions all at once (Ontario, Legislative Assembly of Ontario 2021).

There are pitfalls to implementing drastic, as opposed to progressive, systemic changes. For instance, in 2011, then-Chief Justice Reynato Puno of the Philippines designated 117 existing courts as environmental courts without increasing their budgets. However, this radical change did not result in the desired outcome of directing cases from general courts to these environmental courts (Ramos and Gutierrez 2021). Environment cases ended up in general courts or even criminal courts, not in environmental courts.

However, although incrementalism was once effective for progressively developing ECTs in developing countries, there are also drawbacks. The ECT may never be allowed to develop and incorporate good practices because its initial accomplishments are unimpressive, or it is politically





impossible to modify the authorizing law or rule, or the specialization gets lost as the caseload becomes more general (UNEP 2016).

1.3 CHALLENGES

ECTs are expected to be responsive to environmental problems and deliver just, quick and inexpensive resolution of disputes in order to facilitate access to justice (Preston 2008). However, our research shows that survey respondents in countries with and without ECTs are generally ambivalent about their countries' current ability to manage environmental cases. Most responses from respondents in countries without ECTs answered that they were "not sure" whether existing courts in their country could manage environmental cases; others answered that their current system is inadequate in managing environmental cases. Respondents from countries with operational ECTs also indicated that they were unsure of their country's ability to sufficiently manage environmental cases.

Some of the main challenges faced by these countries are as follows:

A. Lack of government and stakeholder support

Support from governments and other stakeholders is crucial for the success of ECTs (Preston 2014). This includes political support, whereby governments confer ECTs with legal authority to work independently, and provide sufficient budget, infrastructure, human resources and security. Security is particularly important, especially in countries where working as an ECT judge is a dangerous job. Judges may face constant threats to their safety, which can compromise their independence and impartiality in adjudication (United Nations, Human Rights Council 2020). This can erode public trust in ECTs and weaken environmental jurisprudence. It is therefore essential for courts to develop strong working relationships with law enforcement agencies and establish systems for securing the physical safety of judges. An example of this is the Judicial Security Division of the United States Marshals Service, which protects more than 2,700 sitting judges and approximately 30,300 Federal prosecutors and court officials (United States of America, United States Marshals Service, no date).

Another example of a lack of political support is seen in inadequate budgets for ECTs. This is partly because of certain countries' economic situations (exacerbated by the COVID-19 pandemic) and partly because of political efforts to reduce the costs and increase efficiency of the ECTs (Pring and Pring 2021a). In some ECTs such

as the United States Environmental Protection Agency's Environmental Appeals Board (Stein 2021) and British Columbia's new clustered environmental tribunals and Ontario's Land Tribunal in Canada (Pring and Pring 2021a), vacancies exist in the panel of adjudicators or have been filled with persons without environmental or scientific expertise. This suggests an insufficient financial budget. Having an adequate budget will help give ECT officials, judges and prosecutors the confidence to work to the best of their abilities.

B. Other competing needs – non-prioritization of ECT issues

One of the biggest challenges for ECTs occurs when ECT development is not a priority (UNEP 2016). Countries have put forth several justifications for this. For example, in many countries, ECTs are competing for priority with other special interests such as economic interests; furthermore, some may consider other areas of law that arguably need greater attention (Muldoon 2021). Others have argued that the limited number of environmental cases in the country does not justify the costs incurred by an ECT. It has also been contended that the development of specialized ECTs leads to fragmentation of the legal system, where environmental cases become isolated and are dealt with by several judges (Pring and Pring 2021a). Some countries also claim that it is difficult, or impossible, to differentiate environmental and non-environmental cases, and there is accordingly no need for a specialized ECT. Consequently, less attention is given to environmental cases and to the training of judges in environmental matters, resulting in the marginalization of environmental issues.

C. Information technology

As noted in the UNEP 2016 ECT Guide, there needs to be improved efficiency and smart use of information technology (IT) to create the just, speedy and inexpensive courts of tomorrow (UNEP 2016). The importance of incorporating technology into ECT processes is acutely underscored by the COVID-19 pandemic as litigants have been unable to gain physical access to ECTs and courts generally (Dentons 2021). The digitalization of ECT processes is thus crucial to ensure access to environmental justice and transparent environmental dispute resolution.

The COVID-19 pandemic has forced all ECTs to rapidly adopt interactive IT platforms and develop entirely new ways of conducting environmental adjudication. Our research indicates that the shift to conducting a considerable amount of court business online (including filing, taking evidence, holding hearings, conducting site visits and publishing opinions) will continue to be done using a variety of IT platforms. Interviewees believe this shift has had an extremely positive impact on access to justice, as it increases speed, eases communication,

enhances transparency and accountability, and reduces costs for litigants and the court (Pring and Pring 2021a). Environmental courts in Vermont, United States of America, for example, already installed IT infrastructure for remote hearings and online proceedings prior to the pandemic (Vermont, Vermont Judiciary 2021). Similarly, all court proceedings in India's National Green Tribunal (NGT) have been digitized to protect the health and safety of parties involved in litigation. The NGT's work has been conducted by video conferencing without the parties and counsels being physically present at the NGT complex (NGT 2021). However, many developing countries are less prepared to transit to virtual court proceedings due to lack of technological capacity and infrastructure (Sulistiawati and Linnan 2020).

Most ECTs have already resumed, or are planning to resume, in-person court proceedings and site visits, though this depends on the nature of the case and the preferences of the litigants (Mulyono 2021). Moving forward, however, it is recommended that ECTs continue to develop IT capacities and methods to enhance their effectiveness.

D. Lack of enforcement of environmental legislation

The lack of enforcement of environmental legislation in numerous countries also poses a challenge to ECTs and environmental justice generally. Enforcement problems due to the lack of financial and human resources have

been reported (Caribbean Policy Research Institute 2018). Furthermore, many of the environmental laws in developing countries do not have secondary legislation to guide enforcement efforts. Even when such secondary legislation exists, they may be inadequate for the effective implementation or enforcement of primary legislation. For example, "grey areas" for enforcement arise when several agencies are involved in the management of a protected area, but the law does not clarify the roles and powers of each agency (Isaac 2017).

Although environmental laws do not directly relate to the internal organization and design of ECTs, they affect environmental adjudication in ECTs. This is not only because environmental laws constitute the subject matter of most environmental disputes; it is also because a lack of proper enforcement reduces public trust and interest in environmental litigation. Thus, weak operationalization and enforcement of environmental laws do affect the functioning of ECTs in a country, and should be taken into account.

Enforcement is even more challenging vis-à-vis essential facilities such as sewerage treatment plants and waste disposal sites. Even if they are poorly managed and in violation of the law, they cannot be shut down because further environmental degradation would result (Caribbean Policy Research Institute 2018).





ECT OBSERVATIONS IN 2021

2. ECT OBSERVATIONS IN 2021

For the purposes of this guide, an “environmental case” is any case relating to the natural and man-made physical surroundings, all living and non-living components and all the factors, on which humanity is dependent in its activities. This is based on the definition of “the environment” set out in the 1972 Stockholm Declaration on the Human Environment (United Nations 1973).

2.1. THE TRANSFORMATION OF ENVIRONMENTAL ADJUDICATION

A. The importance of ECTs

In contrast to the “explosion” of ECTs observed in the UNEP 2016 ECT Guide, the current trend is one of steady growth. In other words, the trend of rapid increase in ECT numbers has slowed (Preston 2021). At the time of this report, there are 2,115 operational ECTs in 67 countries (appendix A). This trend is due to several factors, including: the increased effectiveness of existing environmental courts and environmental tribunals; the prioritization of environmental issues in the general courts; and the presence of judges who are well versed in environmental matters. The increase in the number of environmental cases in general courts also reflects the widespread belief that environmental justice can be achieved through existing systems (Shah 2021).

The following section examines trends in the number of ECTs in various regions, including Africa, the Americas, Asia, Europe, and Oceania and the Pacific.

Africa

For Africa, data was found from 22 out of 57 countries. As of 2021, there are 62 environmental courts and at least 21 environmental tribunals in the region.

The Environment and Land Courts in Kenya remain the most advanced type of environmental court in Africa, having developed a robust and progressive jurisprudence (Soyapi 2019). The number of Environment and Land Courts in the Kenyan counties has increased from 15 in 2016 to 26 in 2021. Accordingly, the number of judges has also increased from 34 in 2017 to 51 in 2021 (Kenya, Judiciary of Kenya 2021). Kenya also has a National Environment Tribunal established under sections 125 and 129 of the Environmental Management and Co-ordination Act 1999. Formerly, the National Environment Tribunal was under the Ministry of Environment, but is now subsumed under the judiciary. In Ghana, the 16 Land and Environmental Divisions of the High Court have continued to operate post-2016. All the District Courts have jurisdiction in sanitation



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cases, the Circuit Courts have jurisdiction in some of the environmental offences, and the High Court in the Criminal Division and General Jurisdiction Division has jurisdiction in all environmental offences (Adjei 2021). In Madagascar, a Special Court was established in 2018 to combat the illegal trafficking of rosewood and ebony (Convention on International Trade in Endangered Species of Wild Fauna and Flora 2018).

The 21 environmental tribunals in Africa mainly handle appeals against regulatory decisions regarding land planning, land use and water issues. The Water Tribunal in Kenya is a new environmental tribunal established under section 119 of the Water Act 2016. The Water Tribunal in South Africa is still operational (Dambuza 2021). The powers of the Environment and Land Use Appeal Tribunal in Mauritius (Mauritius, Environment and Land Use Appeal Tribunal Act 2012, section 3(1)), and the Appeals Committee in Botswana (Botswana, Environmental Assessment Regulations, section 73) have been broadened to hear environmental cases.

There is a pending Federal environmental tribunal in Ethiopia which is expected to be operational in 2023 (Samuel 2020). The environmental tribunal has been inspired by ECTs in Kenya, India and Australia. It will be an independent tribunal with broad jurisdiction, albeit not criminal. There will also be an emphasis on alternative dispute resolution, interim relief, the use of electronic communications, simple rules of procedure, transparency and broad standing (Baird and Jacobs 2021).

The Caribbean

There is one environmental court in Trinidad and Tobago. There are environmental tribunals in Antigua and Barbuda, Dominica, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago. These environmental tribunals fall into one of two categories: planning environmental tribunals established to



hear appeals against planning-related decisions, or non-planning environmental tribunals which hear decisions not related to planning (e.g. appeal of water extraction permit requirements). Examples of the latter include Saint Lucia's Water and Sewerage Appeals Tribunal (Saint Lucia, Water and Sewerage Act 2008) and Jamaica's Natural Resources Conservation Appeals Tribunal (Jamaica, Natural Resources Conservation Authority Act 1991, section 34(2)).

Central America

The number of ECTs in the Central American countries of Belize, Costa Rica and El Salvador has also stabilized. Belize and Costa Rica each have one environmental tribunal. El Salvador has four environmental courts (UNEP 2016), three of which were reported as authorized but not established in the UNEP 2016 ECT Guide, but began operating in 2017 (Gonzalez 2021).

North America

In the United States of America, most states do not have environmental courts, though some have specialized land courts that adjudicate disputes on real estate title, mortgage title, real estate contract and other technical issues. One example is the Massachusetts Land Court. This type of land courts are not environmental courts because of their limited focus on technical, non-environmental issues.

While there are also no environmental courts in California State, there are environmentally trained judges in 28 out of 58 Californian counties. In each of the 28 counties, there is at least one trial judge dedicated to rule on cases involving the California Environmental Quality Act. Such cases make up most of the environmental litigation in California, of which there is a great deal (Robie 2020).

Environmental tribunals exist in many states in the United States of America, but were not studied in detail as tribunal decisions may be reversed by the executive agency whose decision is under review. In Vermont, the Environmental Court became a Division of the Vermont Superior Court, though its jurisdiction and authority were unchanged.

Canada currently has 32 environmental tribunals – 1 at the national level, 24 in 6 (of 10) provinces, and 7 in the 3 territories.

South America

In Colombia, the creation of environmental courts was proposed in July 2020 under Bill No. 047/2020C, but this was subsequently withdrawn following calls to clarify and improve certain provisions in the Bill (Colombia, Cámara de Representantes 2020).



Other South American countries have experienced no change in ECT numbers. Brazil has 73 environmental courts and 27 environmental tribunals. In Argentina, an Environmental Trial Secretariat and an Environmental Justice Office within the Supreme Court were created in 2014 (United Nations Economic Commission for Latin America and the Caribbean 2018). Chile has three operational environmental courts, one of them newly established in 2017 (Retamal Valenzuela 2019). Peru has four environmental tribunals. In Ecuador, although there were plans for a pilot environmental court in the Galapagos Islands, evidence that this has been established could not be found. Guyana has two environmental tribunals: the Environmental Assessment Board and the Environmental Appeals Tribunal (UNEP 2016).

Asia (excluding South-East Asia and West Asia)

Seven countries in this region have operational ECTs: Bangladesh, China, India, Japan, Pakistan and the Republic of Korea. In most of these countries, the number of ECTs has not changed since 2016.

Bangladesh established four operational environmental courts pursuant to its Environmental Court Act 2010.

India has established five environmental tribunals since 2010, namely the NGTs in Bhopal, Chennai, Delhi (Central Branch), Kolkata and Pune. Pakistan has five environmental tribunals, one in each province, which were established pursuant to the Environmental Protection Act 1997. In addition to these, there are 250 green benches in regular courts, including state-level High Courts and the Supreme Court (Shah 2021).

Japan and the Republic of Korea have demonstrated a preference for using alternative dispute resolution for environmental cases. Japan has a national-level Environmental Dispute Coordination Commission and 47 prefecture-level Environmental Dispute Coordination Commissions, established since 1972 (Japan, Ministry of Internal Affairs and Communications, no date). The Republic of Korea has one national and 16 regional Environmental Dispute Resolution Commissions (Republic of Korea, Central Environmental Dispute Mediation Committee, no date).

In China, however, the number of operational ECTs has increased. In 2017, there were 976 ECTs in the People's Courts at all levels, an increase of 418 compared to 2016. Of the 976 ECTs, 21 are environmental and resource tribunals at the Higher People's Courts (China, Supreme People's Court of the People's Republic of China 2017). According to a white paper published by the Supreme People's Court, the number of ECTs increased to 1,353 in



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2019. This number includes 513 environmental tribunals (26 in High People's Courts, 118 in Intermediate People's Courts and 368 in Grassroots People's Courts), 749 Collegial Benches and 91 People's Courts. Of the High People's Courts, 23 have adopted either a "two-in-one" model (i.e. the court hears civil and administrative environmental cases) or a "three-in-one" model (i.e. the court hears criminal, civil and administrative environmental cases) (China, Supreme People's Court of the People's Republic of China 2020).

Bhutan still has its one green bench in the High Court, which was established in 2015 (Wangchuk 2018).

South-East Asia

The Philippines and Malaysia are the only two countries in this region with environmental courts, most of which were established prior to the 2016 study. In the Philippines, 117 environmental courts were established in their general courts in 2008, with one environmental court per city or municipality (Ramos and Gutierrez 2021). By 2016, Malaysia had two Sessions Courts and 53 Magistrate Courts established as environmental courts, with jurisdiction over criminal environmental cases only. All High Courts, Magistrate Courts and Sessions Courts across Malaysia's 13 states were subsequently designated as Special Environmental Courts in order to hear civil environmental cases (Asian Development Bank 2018).



Indonesia's previously announced plans to establish ECTs have not been executed. The plan to establish a special court for the environment has been modified to having designated green benches within the general courts and training regular judges (Syarif 2021).

Similarly, Thailand's plan to create a Supreme Court-level ECT by transferring jurisdiction from its Supreme Court and Supreme Administrative Court has not been implemented. Thailand courts and the Government organize general and specific training courses for general court judges in environmental matters, and regularly provide scholarships to judges to study environmental law abroad. A bill to establish a specific environmental court was proposed, but it was controversial. However, the Court of Justice and the Administrative Court agreed to develop the law on environmental court procedures, which is currently in its first draft. Additionally, the Court of Justice has developed the Environmental Law Division in the Supreme Court, the Appeals Court, Appeals Courts Regions 1–9 and the Civil Court. The Division in the Supreme Court works intensively and has a regular meeting every month to develop environmental jurisprudence (Muanpawong 2021).

There are no environmental tribunals in this region.

West Asia

The United Arab Emirates has an ECT that has been authorized but not yet established (Thacker 2021); no further information on this could be found. Although there are no ECTs in Turkey (Turgut 2021), plans to develop environmental courts were announced on 2 March 2021 as part of the President's Human Rights Action Plan and published in the Official Gazette on 30 April 2021 (Turkey, Ministry of Justice, Department of Human Rights 2021).

Europe

Our research shows that there are 70 environmental courts and nine environmental tribunals in Europe, and this number has remained largely unchanged since the UNEP 2016 ECT Guide. An important degree of environmental specialization has developed at chamber level within the general and administrative courts in several European countries. Since environmental cases are referred to specific chambers in the general and administrative courts, judges sitting in these chambers either become experts in environmental law by way of experience or by receiving training. Such specialization can be seen in Belgium, Bulgaria, Finland, Germany, Greece, Italy, the Netherlands and Spain (European Union Forum of Judges for the Environment 2019). The appointment of specialized chambers is often based on regulations promulgated by

the court or a decision of the court president. Thus, even though these chambers are not mandated by law, their numbers have remained stable for many years.

Another type of ECTs in Europe are administrative appeal bodies. Their competences are restricted to appeals against decisions, fines or permits falling under specifically listed environmental legislation (e.g. Belgium, Denmark, Iceland, Ireland, Malta, and the United Kingdom of Great Britain and Northern Ireland). Their number remains stable.

A broader reach of environmental specialization can be found in Sweden. Both the Land and Environment Courts, and the Land and Environment Court of Appeal, are part of the general court system. They have administrative and civil jurisdiction but no criminal jurisdiction (Sweden, Sveriges Domstolar, no date).

In France, 36 specialized environmental courts were created in 2020 within the general courts to address the most complex environmental cases (France, Loi relative au Parquet européen, à la justice environnementale et à la justice pénale spécialisée (1) 2020). In Ireland, there are plans to create a new Planning and Environmental Law Court, in the form of a separate list in the High Court, which will have its own specialist judges (Mason Hayes & Curran 2020).

Oceania and the Pacific

In comparison to the rest of the region, Australia and New Zealand have the most advanced environmental jurisprudence and most complex legal systems. In both countries, the number of ECTs has not changed since 2016.

In Australia, there is one environmental court in New South Wales, three environmental courts in Queensland, three environmental courts in South Australia, two environmental tribunals in Tasmania, one environmental tribunal in Victoria, and two environmental tribunals in West Australia. In New Zealand, there are two environmental courts and one environmental tribunal. There is one environmental court in the Cook Islands and one environmental court in Niue.

The number of ECTs in the Pacific Island countries has also remained the same. There is one environmental court each in Kiribati, Marshall Islands, Palau, Papua New Guinea, Tonga, Tuvalu and Vanuatu. There are two environmental tribunals in Fiji, two environmental tribunals in Nauru, one environmental tribunal in Papua New Guinea, one

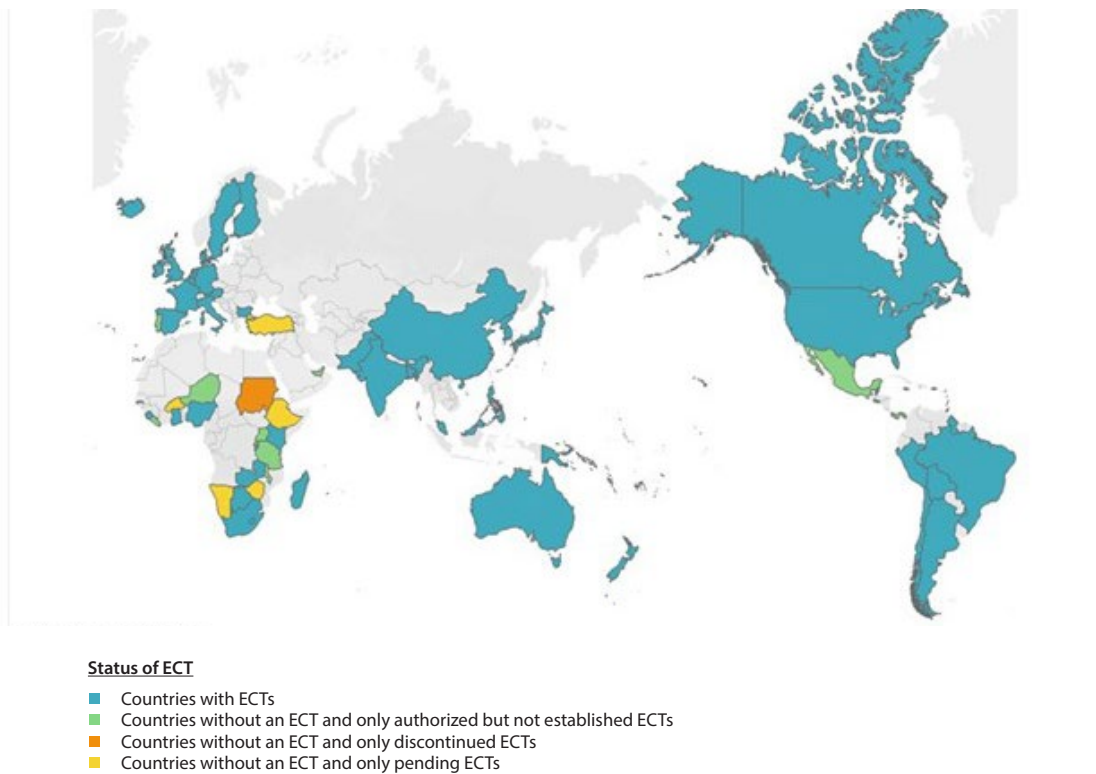


Figure 2 Global distribution of ECTs

environmental tribunal in Samoa, one environmental tribunal in the Solomon Islands and one environmental tribunal in Tonga.

Figure 2 presents the global distribution of the ECTs discussed here.

B. The functions of ECTs

ECTs play an important role in providing access to justice and remedies (Preston 2021). These are important aspects of environmental dispute resolution, whether in large cities or in more rural areas. As such, laws establishing any ECT should contain provisions that empower the ECT to grant remedies, including injunctions, remediation orders, and compensation for environmental harm (Preston 2014).

In remote regions, access to justice remains elusive because of the lack of resources including manpower, expertise, physical facilities, and funding. Therefore flexible ECTs, such as the “mobile” ECTs of the Pacific, may address the problem of inadequate access to justice (Preston 2021)

Unlike traditional civil litigation, which is retroactive in nature, “environmental cases look to the future, and set the ground for sustainable management going forward.

- Justice David Kirkpatrick, New Zealand (Kirkpatrick 2021)

ECTs strengthen judicial systems and promote accountability by enhancing a country’s legal capacity to address environmental challenges, as well as by providing sound explanations to the public on the workings of environmental law (Preston 2014). In some cases, ECTs spur innovation and legal reform. In China, the Supreme People’s Court can engage in innovation because it is legislatively empowered to develop new procedures to suit its needs (Preston 2021). In India, ECTs have developed innovative environmental investigation procedures, albeit with room for improvements in efficiency and effectiveness (Dutta 2021). In comparison to general courts, ECTs are also designed to be better equipped to address environmental issues including sustainable development, equity and the effects of climate change. Furthermore, as independent institutions with specialized expertise and clearly defined jurisdictional authority, ECTs can generate stronger environmental jurisprudence. These points will be further discussed in chapter 3.



2.2. CASELOAD

Set out below are specific trends of environmental cases adjudicated by ECTs, green benches and general courts in each region, which are based on research data. However, conclusions about any general, global trend could not be reached due to insufficient data. This is because several countries neither collect nor make publicly available information about their environmental law cases; as seen in Figure 2, 32 respondents from countries with operational ECTs and 39 respondents from countries without ECTs said that they were unsure about the number of cases.

Africa

In Kenya, the number of cases filed in Environment and Land Courts has been decreasing: 9,970 in 2016; 5,834 in 2017; 4,494 in 2018; and 3,156 in 2019. According to Kenya's State of the Judiciary and the Administration of Justice Annual Report, this can be explained by the enhanced pecuniary and statutory jurisdiction of magistrates to handle land matters. Despite an impressive case clearance rate of 175 per cent, the Environment and Land Courts have one of the largest case backlogs in Kenya, of 13,630 cases at the end of 2019. This is due to the limited number of judges currently serving in the court (Kenya, Judiciary of Kenya 2021). Contrastingly, the number of cases filed before the National Environment Tribunal in Nairobi increased from 18 in 2017 (Kenya, Judiciary of Kenya 2019) to 40 in 2019 (Kenya, Judiciary of Kenya 2021).

North America

In the United States of America, the Vermont Environmental Court adjudicates about 200 cases per year. These include an estimated 150 appeals from municipal determinations, 20 appeals from state land use determinations, and 30 state and municipal environmental enforcement actions (Pring and Pring 2021b). In Hawaii, there were 1,317 charges filed in the District Court, three charges filed in the Circuit Court, and five civil cases before the Circuit Court from 1 July 2019 to 30 June 2020 (Hawaii, Hawai'i State Judiciary 2020).

South America

In Chile, environmental cases are increasing. While there has been an increasing number of judicial actions in Chile since 2012, yearly increase is marginal (Hantke-Domas 2021). Specifically, in Chile's Third Environmental Court, there was an increase in the number of claims filed in 2020 and a decrease in the number of claims for reparation for environmental damage, which may be attributed to the effect of COVID-19 in the country (Retamal Valenzuela 2021). In Brazil, there has been an increase in the number of environmental cases, from 39,460 in 2018 to 48,354 in 2019 and 57,444 in 2020 (Brazil, Conselho Nacional de Justiça 2020).

Asia (excluding South-East Asia and West Asia)

Caseload data is scarce in Asia, but official data sources were available for a few countries. In China, the number of environmental cases has been on the rise. The number of civil environmental cases reached a high of 189,120 cases in 2019 (China, Supreme People's Court of the People's Republic of China 2020), up from 182,691 cases in 2018 and 151,152 cases in 2017 (China, Supreme People's Court of the People's Republic of China 2021). In India, the NGT handled more than 5,000 cases in 2020, up from 3,062 cases in 2017 (Economic Times 2017). Before the COVID-19 pandemic, each of the five NGT benches heard from 50 to 60 cases per day. The number of cases heard by the NGT benches has declined since the pandemic began in 2020 (Dutta 2021). The Republic of Korea's Environmental Dispute Resolution Commission has had a growing caseload from 162 cases processed in 2016 to 244 in 2020, peaking in 2019 at 256 cases (Republic of Korea, Central Environmental Dispute Mediation Committee, no date).

South-East Asia

In Indonesia, there were 26 environmental cases in the District Court in 2017, 265 cases in 2018 and 133 cases in 2019 (Indonesian Institute for Independent Judiciary 2020).

Anecdotal evidence from the Philippines indicates a decline in the number of environmental cases post-2016, but no official data is available.

Europe

The number of cases in the Land and Environment Courts of Sweden has increased from 6,109 in 2017, to 7,289 in 2020. This is also the case for the number of cases filed at the Land and Environment Court of Appeal: 2,290 in 2017; 2,113 in 2018; 2,575 in 2019; and 2,607 in 2020 (Andersson 2021).

Iceland's Environmental and Natural Resources Board of Appeal received on average 120 cases per year in the years 2012–2015. This number increased to 175 in 2016, 158 in 2017, 153 in 2018, 134 in 2019, and 141 in 2020; it is estimated that there will be a record of more than 200 cases in 2021 (Magnadóttir 2021).

In Belgium, the number of cases filed with the Enforcement College of the Flemish Region increased from 45 in 2017/18; 70 in 2018/19; and 92 in 2019/20. The number of cases filed with the Council for Permit Disputes of the Flemish Region first increased, from 916 in 2017/18 to 1,032 in 2018/19, but decreased again to 915 in 2019/20 (Belgium, Dienst van de Bestuursrechtscollleges 2020).



Oceania and the Pacific

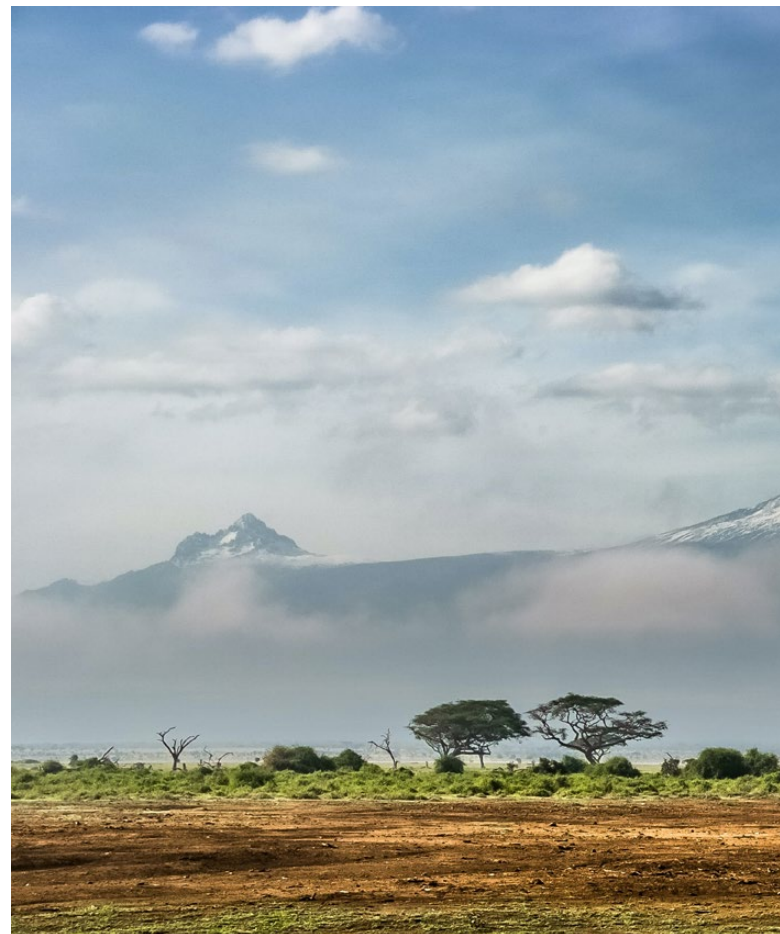
From 2016 to 2019, there was an increase followed by a slight decrease in the caseload of the Land and Environment Court of New South Wales (LECNSW), Australia. Its caseload was 1,332 in 2016; 1,408 in 2017; 1,486 in 2018; and 1,363 in 2019 (New South Wales Department of Justice 2020).

In Queensland, the Land Court experienced a decrease and subsequent increase in the number of cases filed from 1,150 in 2017; 735 in 2018; 339 in 2019; and 757 in 2020 (Queensland, Land Court of Queensland 2017; Queensland, Land Court of Queensland 2018; Queensland, Land Court of Queensland 2019; Queensland, Land Court of Queensland 2020). On the other hand, the caseload of the Planning and Environmental Court has remained stable at 518 in 2016; 547 in 2017; 530 in 2019; and 483 in 2020 (Queensland, District Court of Queensland 2016; Queensland, District Court of Queensland 2017; Queensland, District Court of Queensland 2019; Queensland, District Court of Queensland 2020).

A. Notable environment cases

In *Smith v. Fonterra Co-operative Group Limited* (2021) in New Zealand, the claimant argued that the defendant's contributions to climate change constituted torts of public nuisance, negligence and breach of a novel duty to cease contributing to climate change. The High Court dismissed the first two claims but allowed the third claim to proceed to trial. It noted that although the claimant would face significant hurdles in persuading a court to recognize this new duty, the relevant issues should nevertheless be explored in a trial.

In Kenya, *Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd.* (2016) saw the revocation of a licence for building a coal power plant near a UNESCO World Heritage site in Lamu. The National Environment Tribunal held that the National Environmental Management Authority granted an environmental impact assessment licence without proper and meaningful public participation. It further found that the environmental and social impact assessment produced by the Amu Power Company was incomplete and scientifically insufficient, thereby violating regulations. The National Environment Tribunal focused particularly on the fact that the environmental and social impact assessment failed to consider the Climate Change Act and directed the Amu Power Company to conduct a new assessment in compliance with the relevant regulation and take into account relevant considerations including climate change (UNEP 2019a).



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In Honduras, seven men were sentenced to prison in 2019 for the killing of Bertha Cáceres, an environmental activist who had opposed the dam project of Agua Zarca, a hydroelectric company (BBC 2019). This case is significant because it has drawn significant attention and consequences from overseas. Much of Agua Zarca's funding came from international development banks including the Netherlands Development Finance Company (Grupo Asesor Internacional de Personas Expertas 2017). In 2018, lawyers in the Netherlands filed a lawsuit against the Netherlands Development Finance Company alleging that it had disregarded warnings of human rights abuses associated with the Agua Zarca project (Ford and Jones 2018). Media attention over the killing has also led to other international investors withdrawing from the project (Lakhani 2017).

In Pakistan, the Supreme Court in *D.G. Khan Cement Company v. Government of Punjab* (2019) affirmed the legality of the Punjab Government's decision to declare an area to be a "negative area", where the establishment or expansion of cement plants is prohibited. The petitioner owned and operated a cement manufacturing plant in Kahoon Valley. The provincial Government issued a notification in 2018 to demarcate a negative area, so no cement plants could be expanded or be newly established. As such, the petitioner sued the Government, claiming that



the notification was, inter alia, unlawful and infringed on his constitutional right to freedom of trade, business and profession. The judges confirmed that the governments and courts of Pakistan have an obligation to protect the fundamental rights of the public and therefore, an obligation to protect the environment. In doing so, they invoked the precautionary principle, established in the Rio Declaration, to prevent scientific uncertainty from allowing “threats of serious or irreversible damage” (principle 10) to materialize. Moreover, this line of reasoning was merged with the ecocentric environmental principle in *dubio pro natura* (IUCN World Declaration on the Environmental Rule of Law 2016, principle 5) to highlight decision makers’ internationally recognized obligation to resolve matters in a way most favourable to environmental protection and conservation. Most importantly, the decision reiterated the importance of sustainable development and intergenerational justice.

2.3. CAUSES AND IMPLICATIONS

Following the worldwide “explosion” of ECTs between 2009 and 2016 described in the UNEP 2016 ECT Guide, the number of ECTs worldwide has since slowed to a steadier growth.

Several factors have contributed to this outcome:

- As there is a limited number of countries (and subnational regions) in the world, it is only natural that the number of ECTs would eventually stop increasing.
- The courts of general jurisdiction can effectively provide environmental justice because more resources have been devoted to developing their capacity to adjudicate environmental disputes, including specialist training in environmental law for judges (Shah 2021).
- With growing popularity of alternative dispute resolution, there is a decreasing caseload for courts and therefore less need for new ECTs to be established. For example, in Antigua and Barbuda, alternative dispute resolution is encouraged under the Environmental Protection and Management Act. The Department of Environment is legally obliged to facilitate cooperation among various stakeholders and encourage the use of alternative dispute resolution to avoid or expeditiously resolve disputes (Antigua and Barbuda, Environmental Protection and Management Act 2019, section 17(1)).

There are, however, several factors that determine why and when ECTs are established:

A. Civil society

Civil society was identified in the UNEP 2016 ECT Guide as a major political driver for creating ECTs, as citizens want a court system that is “just, quick and cheap” (Preston 2014) for the resolution of environment, health and land use conflicts. Those in favour of ECTs include judges who advocate for specialized environmental forums, the business community and various NGOs (e.g. Friends of the Earth and Worldwide Fund for Nature).

Since the UNEP 2016 ECT Guide, environmental activism by civil society, most notably climate activism, has grown. The last five years have seen the rise of far-reaching, social media-driven, decentralized groups and movements such as Extinction Rebellion, Fridays for Future and the Sunrise Movement (Extinction Rebellion, no date; Fridays for Future, no date; Sunrise Movement, no date). These movements have contributed to a surge in “climate consciousness” among citizens and governments across the world, and awareness of the need to “take action to mitigate and adapt to climate change” (Preston 2021). These civil society movements coincided with an increase in climate change litigation, as will now be seen.



B. Climate change litigation

Climate change litigation continues to grow in importance. *The Global Climate Litigation Report: 2020 Status Review* published by UNEP noted that between March 2017 and July 2020 the number of cases nearly doubled, with at least 1,550 climate cases filed in eight countries. The Sabin Center for Climate Change Law indicated that as of October 2021, there are 1,756 and 529 climate change litigation cases within and outside the United States of America respectively.

A notable trend is that the number of “strategic cases” (i.e. cases that aim to bring about some broader societal shift in climate policy) is dramatically increasing (Setzer and Higham 2021). A key reason for the rise in strategic cases is the growing willingness of climate change activists and the public to take legal action. The clearest examples are *Notre Affaire à Tous v. France* (2021) and *VZW Klimaatzaak v. Kingdom of Belgium* (2021). The former case, described as “the case of the century”, was brought by four NGOs supported by over two million members of the public, who signed a petition which was submitted to the court (Baudouin 2021). In the latter case, more than 65,000 citizens acted as co-claimants and supporters (Klimaatzaak, no date).

Other notable decisions include:

- *Urgenda Foundation v. The State of The Netherlands* (2019)
On 20 December 2019, the Supreme Court of the Netherlands ruled that articles 2 and 8 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms require the Government of the Netherlands to take steps to reduce carbon emissions consistent with limiting global warming to an average of 1.5°C, consistent with the Paris Agreement (Baudouin 2021).

- *Juliana v. United States* (pending)
On 17 January 2020, the Ninth Circuit Court of Appeals of the United States held, in a 2:1 decision, that ordering the federal Government to adopt a comprehensive scheme to decrease fossil fuel emissions and combat climate change exceeds a federal court’s remedial authority, as such decisions involved complex policy considerations. The case is currently pending a ruling on the plaintiffs’ motion for leave to file an amended complaint (Our Children’s Trust, no date).
- *Milieudefensie et al. v. Royal Dutch Shell plc* (pending)
On 26 May 2021, The Hague District Court ordered Royal Dutch Shell to reduce its carbon dioxide emissions by 45 per cent relative to 2019 by the end of 2030. The emissions include those produced during the consumption of Shell’s oil and gas products (known as Scope 3 emissions). This case has been described as a “monumental victory” (Vetter 2021) because it is the first time a court has ordered a company to reduce its emissions, including Scope 3 emissions, by a specific amount.



These high-profile cases created a ripple effect and inspired similar cases, including rights-based lawsuits filed by youth plaintiffs in *Kim Yujin v. Republic of Korea* (UNEP and Sabin Center for Climate Change Law 2020) and *Duarte Agostinho and others v. Portugal and 32 other States* (pending).

The proliferation of climate change lawsuits around the world have created the impetus for courts to engage with the issue and develop dynamic environmental jurisprudence in the process. For example:

- The NGT has heard most of the climate change cases in India. Cases include *Om Dutt Singh and another v. State of Uttar Pradesh and others* (2015); *Society for Protection of Environment and Biodiversity v. Union of India* (2017); and *Sukhdev Vihar Residents Welfare Association and others v. State of NCT of Delhi and others* (2017). *Court on its own motion v. State of Himachal Pradesh* (2016) is a unique example of an ECT taking up a matter using its *suo moto* (“on its own motion”) powers, after judges came across a newspaper report on the felling of 200 trees on private property without the prior permission of the relevant authorities.
- The LECNSW is a pioneer ECT advancing the frontiers of climate change litigation. In *Bushfire Survivors for Climate Action Incorporated v. Environment Protection Authority* (2021), the claimants were a group of Australians impacted by the 2019/20 Australian bushfires. They initiated proceedings against the New South Wales Environment Protection Agency for failing to perform its statutory duty of developing instruments to protect the environment from climate change. On 26 August 2021, the LECNSW affirmed this duty, which arises from section 9(1)(a) of the Protection of the Environment Administration Act 1991 (New South Wales). In a first for any Australian court, LECNSW ruled that the Environment Protection Agency had in fact breached this duty, and therefore ordered the Environment Protection Agency to fulfil its duty and take specific steps to address climate change.

Therefore, as climate change litigation demonstrates, ECTs have merged jurisdiction over environmental matters. Coupled with their access to specialist environmental law and science knowledge, they are in a good position to catalyse developments in environmental law.

C. Human rights

As described in the UNEP 2016 ECT Guide, international recognition of the interdependence of human rights and environmental rights, including the United Nations’ recent recognition of the right to a clean, healthy and sustainable environment, has had a profound impact on environmental law generally and ECT development specifically. Recognizing humanity as the centre of sustainable development and the right to healthy environment has driven efforts to enhance access to environmental justice at the international and domestic levels. This is reflected in the growth of both hard and soft international environmental law.

For example:

- Various countries, including Kenya and the Philippines, have framed environmental rights as constitutional rights. It has been noted that countries “with constitutionally enshrined human rights and environmental rights have higher regard for international decisions and the promotion of better environmental protection outcomes” (Asian Development Bank 2018).
- Anti-strategic lawsuits against public participation laws and regulations are being developed to ensure that environmental defenders and other potential plaintiffs are not harassed by counter-lawsuits.
- As discussed above, human rights have formed the basis of reasoning in many significant climate decisions, including *Urgenda Foundation v. The State of The Netherlands* (2019) and *Milieudefensie et al. v. Royal Dutch Shell plc* (pending). Academics have commented on the close relationship between human and environmental rights.

The UNEP 2016 ECT Guide noted that at least 108 countries enshrine the right to a healthy environment in their national constitutions, or have had the right to life judicially interpreted as including the right to a healthy environment. Since then, constitutional environmentalism has continued to flourish and is found in the constitutions of at least 148 out of 196 countries with national constitutions (O’Gorman 2017). This bodes well for environmental protection; it has been demonstrated that the inclusion of constitutional environmental rights provisions often results in better environmental performance in a jurisdiction (Jeffords and Minkler 2016).



D. International environmental law principles

The growing body of international environmental law principles continues to be important for the development of ECTs. The 14 principles of international environmental law, as listed in the UNEP Training Manual on International Environmental Law (UNEP 2006), and as updated by the IUCN World Declaration on the Environmental Rule of Law (2016) and Resolution A/HRC/48/13 (United Nations, Human Rights Council 2021), are:

1. Sustainable development, integration and interdependence
 2. Intergenerational and intragenerational 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
 12. In dubio pro natura
 13. In dubio pro aqua
 14. Right to a clean, healthy and sustainable environment
 15. Principle of non-discrimination
 16. Businesses' responsibility (to respect human rights)
- the adoption of more than 500 multilateral environmental agreements;
 - various conferences and forums which have emphasized the role of courts and tribunals in protecting the environment and called for the development of specialized expertise in environmental adjudication, including via the establishment of ECTs; and
 - major international commitments such as the United Nations 2030 Agenda for Sustainable Development.

These principles are established customary international law, and are increasingly relied upon in national and local adjudication spaces.

E. UNEP leadership

Developments in international law, several of which were driven or supported by UNEP, have contributed to the creation, development and improvement of ECTs, and of environmental dispute resolution. These developments include:

UNEP continues to be important in supporting the continued development of ECTs and environmental adjudication, even as the number of ECTs worldwide has stabilized. It also continues to play an important judicial capacity-building role through the Global Judges Programme, the Asian Judges Network on Environment and the Global Judicial Institute on the Environment (Andersen 2021).

The Global Judicial Institute on the Environment has contributed to the environmental rule of law by:

- supporting judicial capacity-building and education programmes;
- providing technical assistance by sharing judicial good practices; and
- providing research and analysis which focus on environmental adjudication, dispute resolution, court practices and procedures, judicial remedies, and environmental justice (IUCN 2021).

F. International finance

International financial institutions, including the World Bank and the Asian Development Bank, frequently require that countries seeking funding provide evidence of a dispute resolution system with the competency to apply international and national laws (UNEP 2016). International financial institutions have invested, and continue to invest, in capacity-building and partnerships to support the development of ECTs. The Asian Development Bank has been a leader in Asia by bringing judges, government officials and advocates together to explore the viability of ECTs at both regional and national levels. The Asian Development Bank, together with the Asian Judges Network on Environment, also organizes environmental conferences to bring judges together. From 2018 to 2020, the Asian Judges Network on Environment, together with the support of the Asian Development Bank and UNEP, hosted the annual Asia-Pacific Judicial Conferences on Climate Change Adjudication (Asian Judges Network on Environment 2018; Asian Judges Network on Environment 2019; Asian

Judges Network on Environment 2020). These conferences continue to build support for and initiate discussions around the use of ECTs and judicial strategies in handling environmental issues.

G. The impact of COVID-19

The COVID-19 pandemic has had varied impacts on the operation of ECTs and the adjudication of environmental disputes.

- *Negative impacts:* COVID-19 has caused several economies to shrink and enter into recessions. In the face of resource scarcity and competing needs, attention and resources have been diverted from ECTs and NGOs' efforts in the adjudication of environmental disputes.
- *Neutral to positive impacts:* COVID-19 has accelerated the digitalization of many court systems, including in North America, South America and Oceania. The increased use of information and communications

technologies, such as video conferencing in hearings, can be a positive development. It will generally improve access to justice, particularly where litigants are located far from where hearings are conducted. However, parties without access to information and communications technologies may face more hurdles in accessing ECTs and therefore suffer reduced access to justice. On a macro level, the divide between rich and poor countries in terms of how effectively environmental interests are represented and environmental disputes are adjudicated may only worsen.

The COVID-19 pandemic has also affected efforts to protect the environment and combat environmental degradation. On one hand, many economies that are badly affected by COVID-19 have limited resources, and funding is being diverted from environmental efforts. On the other hand, many countries and cities view the pandemic as an opportunity for a green recovery.

Box 1: Good practices during COVID-19 by the Vermont Environment Court

The Vermont Environment Court is a Division of the Superior Court, with designated specialist judges and limited jurisdiction. The pandemic resulted in a temporary economic recession and reduction in development applications, and a consequent reduction in annual caseload from 350 a year in 2008 to about 200 a year today. This has resulted in environmental judges being assigned to some non-environmental cases. However, the environmental cases have increased significantly in complexity, and now include transboundary issues with Canada, complex water cases and big development cases, with a reduction in small neighbour-to-neighbour conflicts.

The environmental court continues to handle enforcement cases from state and municipal environmental enforcement orders. With the pandemic beginning to come under control by August 2021 (over 50 per cent of residents were vaccinated as of this date) and the economy opening up, more development applications were being filed and the case load was again increasing.

The court has become increasingly reliant on virtual technology for filings, hearings, discovery and adjudication. In-person hearings or site visits significantly reduced during the period of the pandemic. Judge Thomas S. Durkin anticipates that the court will continue to rely on e-filing and virtual hearings except for complex cases which still require in-person site visits and hearings. Judge Durkin relies heavily on court-ordered mediation, and generally orders mediation in about one third of cases each year. Of the cases where mediation has been ordered, a resolution of the environmental disputes is reached in about 75 per cent of cases without a court trial. Throughout the pandemic, the court has continued to have an active case management process that keeps filed cases moving through the system and advises potential litigants on court process and expectations.

The political atmosphere in Vermont has remained supportive of environmental initiatives and sustainable development, and the environmental court has not been the target of severe budget cuts or major reorganization. There have been legislative efforts to unify the environmental court with other divisions to increase efficiency and to disband the environmental court and return to a lay, non-court environmental board that would review cases but could not rule on legal issues. To date, these legislative efforts have failed.



2.4. JUDGE TRAINING AND NETWORKING

As environmental issues often involve complex interactions between law, science and policy, judges should have knowledge and expertise in environmental matters. When judges (whether in ECTs or general courts) lack such expertise, there is the risk of adverse consequences for the country’s environmental jurisprudence, because environmental aspects of a case may be overlooked due to a lack of judicial awareness (Preston 2014). To determine the level of environmental literacy among judges in ECTs, our research focused on: (i) the profile and experience of judges adjudicating environmental cases in ECTs; and (ii) the training available to these judges (Figure 3).

In countries with ECTs, there are more judges who have prior experience in environmental matters generally than those who have scientific training. However, the number of judges who have prior experience in environmental adjudication specifically is low, compared to judges in countries without ECTs.

In countries without ECTs, most environmental cases are solved in general courts, administrative bodies and tribunals. This raises the question of whether judges adjudicating these environmental cases have experience in environmental matters. We found that in many of these countries, judges are not required to have any

environment-related experience. We also found that legal education in most countries does not include environmental law as a mandatory subject. This means that prospective lawyers and judges are left to learn through continuing legal education programmes or, in some countries without any environmental judicial training, exclusively on the job.

That environmental matters are being adjudicated in general courts makes it all the more important for judges in general courts to receive environmental law training. Without such training, judges are likely to lack familiarity with environmental law principles and may make decisions in a manner that is detrimental to environmental governance. Environmental issues can also arise in non-environmental cases, rendering it necessary for judges to grapple with environmental law and science.

It may not be feasible to train many general court judges in environmental law. An important prior consideration is the number of environmental cases and the level of judicial interest to engage in environmental law and science.

It is arguably not justifiable to provide environmental law training to judges in a court with a small environmental caseload. Additionally, regular training as opposed to

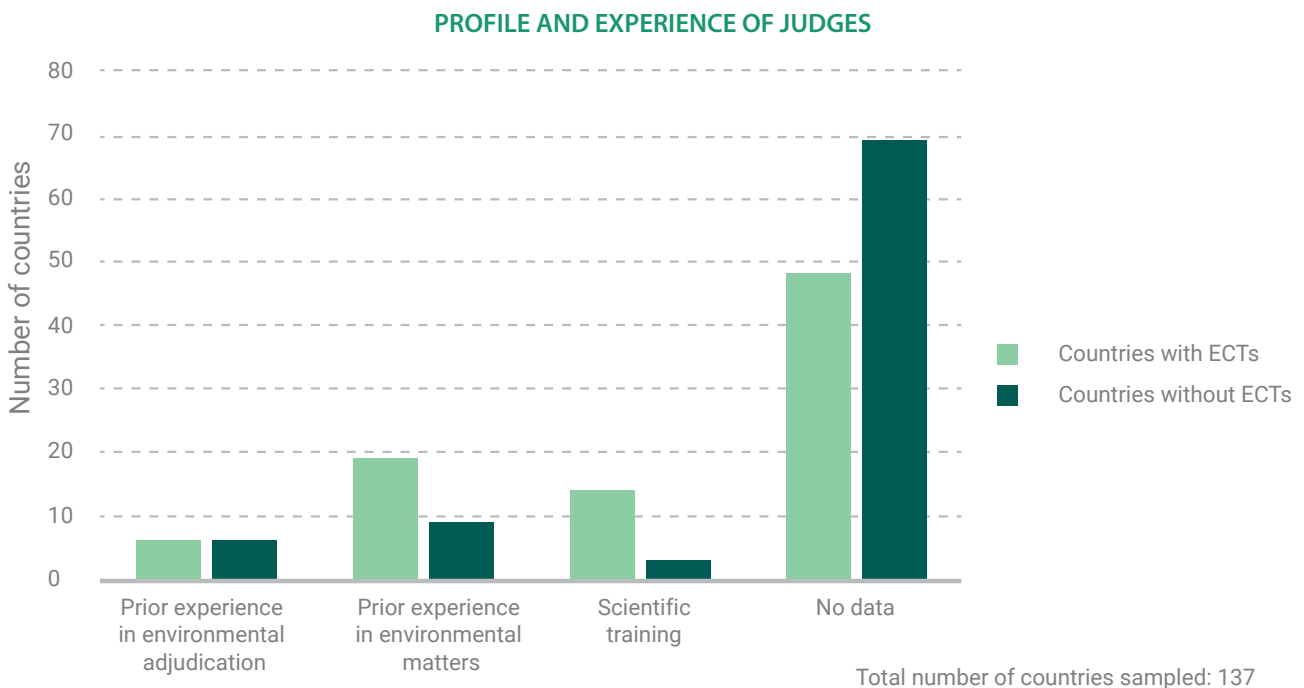


Figure 3 Profile and experience of judges

Box 2: Training Curriculum on Environmental Law for Judges and Magistrates in Africa

In 2018, African judicial training institutes worked with the support of UNEP and the Africa Judicial Educators Network on Environmental Law to develop the *Training Curriculum on Environmental Law for Judges and Magistrates in Africa: A Guide for Judicial Training Institutions*.

The *Training Curriculum* contains the minimum course content regarding environmental law. It is accompanied by three regional judicial training manuals, which are written in English, French and Portuguese respectively. These framework manuals may be adapted to suit national needs, and many African judiciaries are now using the *Training Curriculum*. The underlying goal is:

to empower judicial training institutions in Africa in the development of training programmes on environment issues to equip Judges, Magistrates and Judicial Staff with knowledge and skills on adjudication of and resolution of environment cases in a manner that ensures environmental sustainability. To ensure sustainability in the training of judges and magistrates, it is necessary to build the capacity of trainers.

UNEP 2018

one-off efforts should be considered, as judges need to constantly update their knowledge of environmental law in light of new developments.

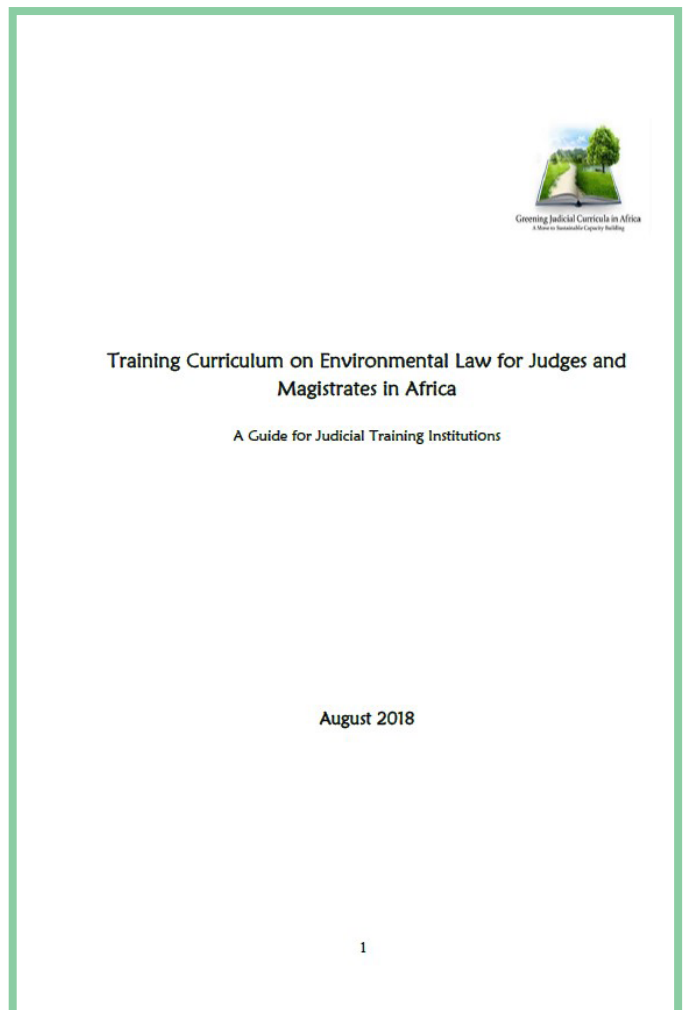
Training for judges and tribunal members

Most survey respondents were unsure about judicial training in their countries. This is likely because information on judicial training may not be publicly available, judges may not be allowed to disclose their training activities, or there is no formal judicial training institution.

In countries with operational ECTs, mandatory training for judges (whether initial or continuous) on environmental matters is not a widely adopted practice. Only 10 respondents in the 137 countries surveyed informed us that initial and/or continuous judicial training on environmental matters is mandatory, suggesting a lacuna wherein judges presiding in ECTs do not have sufficient training in environmental matters.

Judicial training programmes can be conducted by national training institutes or external third parties, such as donors and NGOs. Efforts by third parties to provide training for judges become extremely important where national training bodies do not have comprehensive environmental training programmes. An example of a supranational training programme is the European Commission's training package for judges on European Union environmental law (European Commission 2017).

Irum Ahsan, the Asian Development Bank's expert on the Environmental Judges Network, has highlighted that environmental training equips judges with a clearer understanding to handle the proceedings, context and substance of environmental cases. Training programmes also serve as networking platforms for judges to share their expertise and experience (Ahsan 2021). Training and networking can change judicial mindsets and are thus crucial for a successful ECT. In Pakistan, prior to 2016, judges were not sufficiently trained in environmental law, so lawyers were hesitant to bring environmental cases to court. However, as more regional and global networks





Box 3: Informal networks of environmental judges and prosecutors

In Europe, networks of environmental judges, regulators, prosecutors and police have been created: the European Union Forum of Judges for the Environment (EUFJE), the European Network for the Implementation and Enforcement of Environmental Law (IMPEL), the European Network of Prosecutors for the Environment (ENPE), and EnviCrimeNet.

These four networks work together to form a compliance chain. They organize joint conferences and launch joint projects to strengthen the enforcement of European Union environmental and nature laws, and such cooperation is based on the idea that the enforcement of environmental law can only be improved by joining forces (Lavrysen 2021).

In some countries, national informal networks of environmental judges and prosecutors exist. In Belgium there is simply an e-mailing list, “Milleumagistraten”, to which judges and prosecutors can subscribe, that distributes relevant case law and legislation.

On 5 June 2021, in the wake of the legislative reform which introduced 36 new environmental courts, a French association of judges and prosecutors for environmental law and environmental health law was created: Association française des magistrats pour le droit de l’environnement et le droit de la santé environnementale. The board has been elected and a scientific committee will be established. Representatives of the association will be designated and will focus on specific topics such as civil justice, climate change, criminal justice, international relations and social networks.

were established for judges from 2016 onwards, Pakistani environmental jurisprudence not only received more publicity, but judges themselves learned more about how other courts were deciding similar matters, enhancing their adjudicative skills (Shah 2021).

2.5. GOOD PRACTICES

Courts that deal with environmental cases do not necessarily have to be designated as environmental courts or environmental tribunals to perform its functions well. Similarly, the status and authority of ECTs do not seem to determine their success. An ECT at a lower court level can be successful, while an ECT at supreme court level can be unsuccessful. Instead, the success of an ECT depends

on it having comprehensive jurisdiction to handle all the environmental laws of the country and on receiving recognition from the government (Preston 2014).

ECTs operate most effectively when their status, authority and jurisdiction are clearly specified in legislation. Furthermore, ECTs must have judges who are experts in environmental law and can thus contribute to the development of environmental jurisprudence (Dutta 2021). External factors also determine the success of ECTs. For instance, there must be sufficient caseload for an ECT to develop a rich and comprehensive environmental jurisprudence (Preston 2014; Dutta 2021).

Issues surrounding an ECT’s status, authority, and jurisdiction can hinder its initial establishment. Indonesia, for example, decided not to establish a stand-alone ECT due to possible complications of the proposed ECT’s status, authority and jurisdiction (Mulyono 2021). The country would also have to revise its codes (civil, criminal and administrative) and environment-related laws, which would be a monumental task. In Thailand, a bill to establish a specific environmental court was proposed, but it was controversial. The Thailand Court of Justice and Administrative Court have agreed to develop the law on environmental court procedures, and have completed the first draft (Muanpawong 2021).

Differences in the status, authority and jurisdiction of ECTs can be observed between and within countries. For example, in India, the NGT commands a respectable status as it is deemed to be facilitating access to justice and have developed highly specific jurisprudence (Dutta 2021). In contrast, the five environmental tribunals in Pakistan are less developed. Their status, authority and jurisdiction are regulated by the Pakistan Environmental Protection Act 1997, which gives the Federal Government power to establish as many environmental tribunals as necessary (Hassan 2014). Despite this, the number of environmental tribunals has not changed. Jurisprudence in Pakistani environmental tribunals has also developed slowly, as the regulators (as expert members of the environmental tribunals) do not require a specialization in environmental law and can have backgrounds unrelated to the environment. It has also been said that the regulators are passive in handling complaints. Furthermore, the Pakistani environmental tribunals have limited jurisdiction because citizens can only access the tribunals when they wish to challenge an environmental protection order that has been issued. In contrast, Pakistani environmental courts are instituted in the environmental chambers of general courts and strengthened with green judges trained in environmental issues. These green chambers are

established within all 250 regular courts in Pakistan, and these environmental courts are flourishing better than the environmental tribunals (Shah 2021).

A. Design stage

1. Independence

ECTs that are independent and impartial go on to establish themselves as legitimate institutions that can provide citizens redress for their grievances (Dutta 2021). Independence not only refers to independence from the other branches of government, but also to independence from non-State actors such as the media and industry, which might lead an ECT to decide cases other than on their legal and factual merits (for instance, on the basis of public opinion instead).

Institutional arrangements and rules can be designed to ensure the independence and impartiality of ECT judges or decision makers. The selection criteria for ECT judicial appointments, the provision of long-term tenure and security of tenure, safeguards against the removal of judges, the means of fixing and reviewing remuneration and other conditions of service, and the publication of decisions, are some of the institutional arrangements that ought to be taken into consideration (Preston 2014).

Our research found that most operational ECTs are politically independent. This is a positive outcome for the reasons discussed above.

Adjudicative independence is the bedrock of any ECT. Several countries have indicated that environmental justice has been hindered when external pressures from the executive and/or legislature limited and/or altered environmental jurisprudence produced by the ECT.

Administrative independence entails independence from all other governmental bodies. This should be embedded within the design of any ECT model, even for captive environmental tribunals housed in and resourced by the very agency whose decisions they review. As stated in the UNEP 2016 ECT Guide, “independent decision making insulated from government and other outside pressures also generates public credibility, confidence and greater willingness to bring cases to the forum” (UNEP 2016). The ECTs in Sweden and Vermont, among others, have authority in some types of cases to provide a decision that is different from that of the issuing agency, as well as, in other types of cases, to send the decision back to the issuing agency for a reconsideration. In Vermont, the authority to hear appeals on local land use permitting was diverted in 1995 from the general court to the environmental court (Wright 2021).

4 NETWORKS DAY



EU FORUM OF JUDGES FOR THE ENVIRONMENT
UE FORUM DES JUGES POUR L'ENVIRONNEMENT

Together in the fight against environmental crime

Date: 21 May 2021

Time: 09:00 - 12:30 | 13:30 - 16:15 CET

Location: online, hosted by LIFE+ SATEC





Institutional independence is also crucial to guard against external influences that may be peripheral to adjudication. This means that the ECT should be able to operate freely without depending on outside approval or pressure.

Taking India as an example, the judiciary selection for the NGT is conducted via an open advertisement (Dutta 2021). The recruitment process is regulated under the National Green Tribunal Act 2010, which applies uniformly across all Indian provinces. Accordingly, both judicial and expert members are selected by a committee chaired by a current or former Supreme Court Judge (India, NGT Act 2010, section 5(1)). Judicial members of the NGT must be former, retired judges of the High Court with 10 years of experience

and practice (India, NGT Act 2010, section 5). In this respect, it is a welcome anomaly that the NGT, being a statutory court, requires higher qualification standards than other constitutional courts. Significantly, the NGT also comprises expert members, who must have the requisite degree qualifications in environmental science (India, NGT Act 2010, section 5(2)).

For institutional independence to hold, there must be an adequate guarantee that ECT operations can be resourced and maintained. This will provide the necessary sense of security for all staff and stakeholders involved, guaranteeing the independence and hence the strength of this environmental justice institution. Simultaneously, the

Box 4: National Green Tribunals of India

The NGT was created pursuant to the NGT Act 2010 to hear environmental matters. A NGT has both original and appellate jurisdiction. The former allows it to hear all substantial questions relating to the environment, whereas the latter allows it to hear appeals against decisions made by central and state government agencies. Currently, there are four judicial members and four expert members in the NGT, although the Act envisioned that the NGT was to comprise of a minimum of 10 judicial members and 10 expert members.

The NGT's caseload has been stable in recent years. Around 20 to 24 cases on contested projects came before the NGT annually between 2017 and 2020, while the number of appeal cases ranged from 23 to 28.

There have been some issues with the NGT's operation so far: "The Tribunal's test of independence and expertise is in its function as the appellate authority. It is surprising if the NGT shies away from hearing appeals on merit, even when they are filed within 90 days. Not even 1 per cent of projects are appealed against and the appellants, often project-affected people from the hinterlands, deserve to be heard within the limits of reasonability" (Dutta 2021).

Nevertheless, the NGT exemplifies many good practices that are worth replicating elsewhere.

Firstly, the NGT is accessible. People are aware that they can access the five NGTs nationwide. The very fact that a villager can approach the NGT is itself a victory in terms of access to justice. It has become common knowledge that people can go to NGT to fight out environmental cases, with no need for a lawyer. Twenty per cent of the cases are argued in-person (standing rules are very broad). Some groundbreaking judgments were reached in cases where the petitioners have spoken in their own language and the judges had to translate. In *Paryawaran Sanrakshan Sangarsh Samiti Lippa v. State of Himachal Pradesh et al.* (2016), the NGT recognized the rights of forest-dwelling groups and tribes over forest land. The NGT expressed "serious anxiety on the future of the State and its progeny" due to the alarming scale at which hydroelectric projects were being approved in Himachal Pradesh, resulting in serious consequences to its ecology and environment, and the very life and livelihood of the villagers. Accordingly, the NGT mandated that Himachal Pradesh must consult with the Gram Sabha (a village assembly of all adults) of the villages of Lippa, Raring, Pangi and Telangi before any forest is cleared. This was a significant order, empowering the local community with the right to participate in the hydroelectric project in accordance with the Forest Rights Act.

Secondly, the NGT has played an important role in developing India's environmental jurisprudence. Cumulative impact assessment and restitution have become important parts of Indian law because of the NGT.

Thirdly, the NGT provides better access to justice compared to what the general courts can do (Dutta 2021). Persons may bring claims in the public interest even if they have no direct, personal connection to the matter. In addition, a person may bring a claim on behalf of a group of people, such as all the residents of a village or all fisher folk reliant on a certain fishery. The NGT can also hear cases on its own accord, known as *suo moto*. In addition to the NGT, the District, High and Supreme Courts are still avenues for the pursuit of litigation. It is possible to file one case simultaneously in multiple courts.



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appointment, careers and remuneration of ECT members (i.e. judges, prosecutors, support staff) must be transparent and in accordance with the country's wider court standards, including in terms of independence.

ECTs require independence to function properly. In some countries, political pressure, budgetary constraints, lack of governmental support, industry lobbying (Gunningham 2009), regulatory capture and even threats of physical violence (Dutta 2021), impede the rule of law and the functioning of ECTs. Small stand-alone ECTs located outside the general court system are particularly vulnerable (UNEP 2016). Without independence, ECTs cannot provide procedural fairness and accountability. They will in turn lose legitimacy and the trust of the people they are meant to serve.

Political and economic pressures have driven organizational changes within ECTs in efforts to streamline, control costs, or reduce the power and jurisdiction of some ECTs. Furthermore, the COVID-19 pandemic has seen many governments invoking their emergency decision-making powers, which have diminished judicial power and resulted

in a "backsliding of democracy". This is evident in Ontario, Canada, where the Green Energy Plan has been rescinded and its environmental tribunals have been clustered in ways that dilute their environmental efficacy. Similarly, in Hawaii, the legislature removed the jurisdiction of environmental court judges over development in forest and natural conservation reserves, such as on the dormant volcano of Mauna Kea, to permit a new telescope to be installed for perceived scientific and economic benefit. The conflict with native Hawaiians, who consider the mountain sacred and already overdeveloped, is now being reconsidered by the Governor and Legislature (Pring and Pring 2021a).

Fortunately, not all backsliding is permanent. In the United States of America, for instance, previous environmentally regressive policies, such as the withdrawal from the Paris Agreement and the circumscribing of the functions and procedures of its Environmental Appeals Board, have been recently reversed. Additionally, although the Environmental Appeals Board is not completely independent from the Government, it strives to be an impartial decision maker on administrative appeals under all the major environmental statutes administered by the United States of America's Environmental Protection Agency. For example, it strictly prohibits ex parte communications in cases with individual



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parties. At any one time, the Environmental Appeals Board is comprised of four well-qualified and outstanding judges who have both a relevant background and a genuine interest in environmental protection and justice (Pring and Pring 2021a).

2. Flexibility

Legislatively authorizing an ECT to develop its own rules, procedures and remedies is an important best practice. It gives the ECT flexibility by freeing it from the limitations of the general court system's rules on standing, evidence, management of expert witnesses, cost awards, orders, penalties and so on, allowing it to develop a wider range of "made for purpose" rules that enhance access to justice and effectiveness. Where ECTs have such flexibility, they can use innovative problem-solving approaches to resolve disputes, which can be superior to traditional court rules and procedures. The New Zealand Environment Court and the Indian NGT are examples of ECTs authorized to develop their own rules and procedures. Not far off are the Environmental Division of the Vermont Superior Court and the Philippines' environmental courts, which have their own special rules adopted by their Supreme Courts.

3. Non-law decision makers

As noted in the UNEP 2016 ECT Guide, a best practice that is commonly adopted by many ECTs in different jurisdictions is the inclusion of both legally trained judges and professionals with technical expertise (e.g. scientists, engineers, architects and economists) as adjudicators. This helps to ensure that the adjudication process adequately takes into account legal and scientific considerations, which are essential for sound decision-making in environmental cases. An example is provided by Costa Rica, where the three-member Environmental Administrative Tribunal (Tribunal Ambiental Administrativo) must comprise professionals in environmental areas, and one member must be a lawyer (Costa Rica, Organic Law on the Environment 1995).

This is discussed in greater detail in chapter 3.2, section C.

4. Adjudicators: selection and training

ECT adjudicators should be appointed via a transparent, open and competitive selection process. As discussed in the UNEP 2016 ECT Guide, examples of rigorous selection processes can be seen in Australia, Brazil and the United States of America. Positions in an ECT should not be awarded as a sinecure or retirement benefit. Further, judicial members should have tenure, salary equivalent to other non-ECT judges, and equal opportunities for career advancement. Objective appointments based on credentials, the individual's interest and their character not only improve the quality of decisions, but also public confidence in the institution. It is also ideal to require candidates to have received prior training in environmental issues. Alternatively, environmental law training as part of continuing professional development should be compulsory.

The appointment process in some countries does not embody the good practices described above, usually because of extrinsic political influence. In the Philippines, although the judiciary is theoretically independent, political agendas tend to influence the appointment of Supreme Court justices, since the President, a political authority, appoints them (Ramos and Gutierrez 2021). In Honduras, the appointment and removal of judges is influenced by the executive branch, even though the Honduran Constitution provides that the judiciary is independent and not subordinate to the legislative and executive branches (United Nations, Human Rights Council 2020).

5. Alternative dispute resolution

If one were to choose the one good practice that typifies successful ECTs, it would be the use of alternative dispute resolution processes. Alternative dispute resolution can be seen as a "win-win solution" as it is less formal, less

adversarial and can result in innovative remedies not contemplated by either the law or adjudicators. It is also usually faster and cheaper (particularly if the ECT provides it at no cost to parties), thereby widening access to justice. Its attractiveness from a budgetary, efficiency and participation point of view suggests that the role of alternative dispute resolution will only continue to expand.

The majority of ECTs incorporate **alternative dispute resolution, including conciliation, early neutral evaluation, mediation and arbitration**; most ECTs carry out initial case evaluation (by a registrar, a case manager or a judge) to evaluate if alternative dispute resolution is viable. A number of ECTs in Trinidad and Tobago and New Zealand actively encourage alternative dispute resolution in their rules. **Mediation is similarly available as a mode of alternative dispute resolution in the German administrative courts (Boom juridisch, no date)**. Some ECTs even mandate it as a first step in all cases (Tasmania, Tasmanian Civil & Administrative Tribunal, no date), and alternative dispute resolution is a compulsory pre-litigation requirement in Australia, for example in family law for matters involving children (Australia, Family Law Act 1975).

In the United States of America, the Environmental Appeals Board has incorporated alternative dispute resolution techniques in their proceedings, with an off-panel judge acting as mediator. The courts in Vermont further mandate alternative dispute resolution in all environmental disputes (Pring and Pring 2021a).

The legislative framework that authorizes the formation and functioning of the ECT can include the use of alternative dispute resolution. At a minimum, the rules should ensure alternative dispute resolution is available for litigants and the court, either in-house (preferable) or through an external provider, using personnel who are thoroughly trained in multiple forms of alternative dispute resolution and regularly update their skillsets. In addition, the ECT should have the authority to incorporate an alternative dispute resolution agreement (or any settlement agreement) into a final binding, enforceable order.

The most comprehensive model of alternative dispute resolution is the “multi-door courthouse” approach of the LECNSW. Apart from litigation and merits review, the LECNSW offers alternative dispute resolution methods such as conciliation, mediation, and neutral evaluation (Preston 2008). The housing of multiple dispute resolution processes within a single court allows the court to deliver individualized justice that is appropriately tailored to the needs of the parties.

Creating a multi-door courthouse is a challenging task. It requires having appropriate processes and guidelines for screening, diagnosis, and referral of cases to the appropriate dispute resolution process; properly trained subject matter experts and judicial officers to facilitate the alternative dispute resolution processes; and timely disclosure of information between parties to increase the prospects of alternative dispute resolution being successful. In this regard, having adjudicators with special expertise in

FORMS OF ALTERNATIVE DISPUTE RESOLUTION

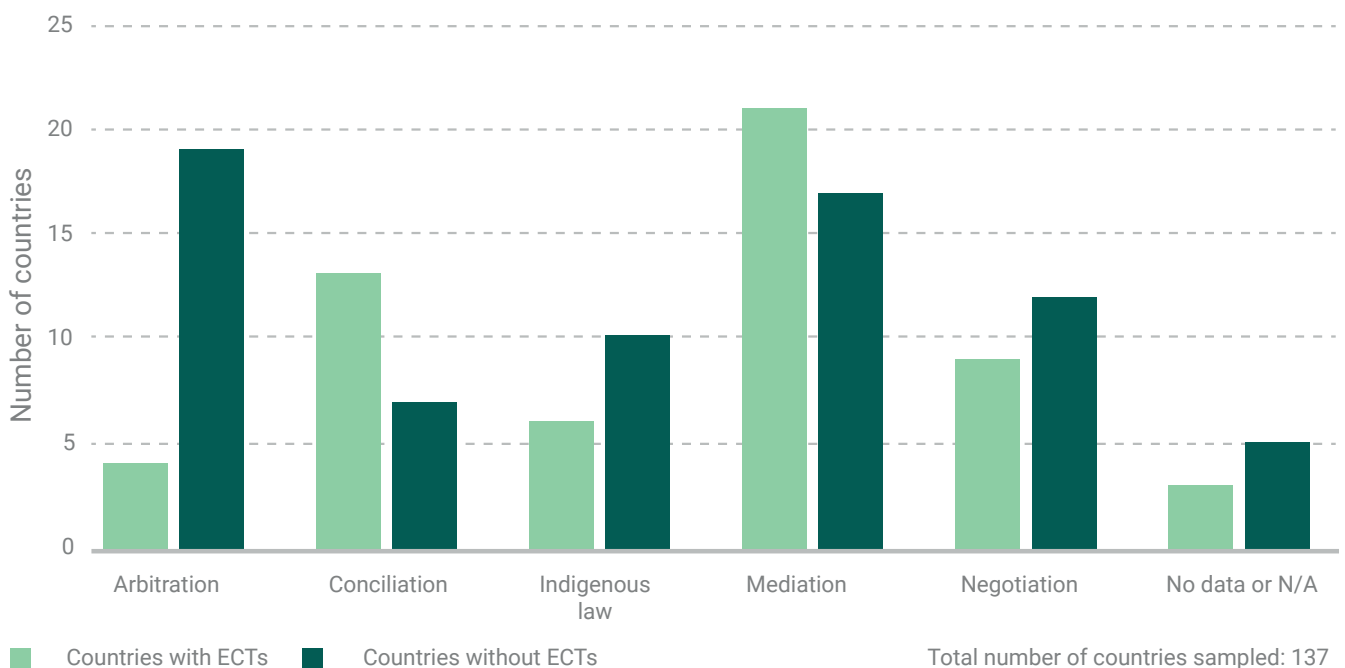


Figure 4 Forms of alternative dispute resolution



disciplines relevant to environmental, planning and land matters, training for judges and subject matter experts in various alternative dispute resolution processes, and standardized manuals that guide court personnel when referring cases to the appropriate forum, are all essential elements for a court striving to be a multi-door courthouse (Pring and Pring 2021a).

Our research shows that apart from litigation, ECTs and general courts offer other methods of dispute resolution, including mediation, negotiation, conciliation and arbitration (Figure 4). In countries without ECTs, respondents have listed arbitration and mediation as their first and second most available forms of dispute resolution.

Interestingly, many respondents from countries with and without ECTs indicated that they are unaware of the alternative dispute resolution options in their legal systems, which suggests that such information is not widely available or that the focus in environmental adjudication is still predominantly on litigation.

6. Comprehensive jurisdiction

An ECT ought to have as wide a jurisdiction as possible, encompassing (i) geographic jurisdiction, (ii) subject matter jurisdiction, (iii) level of jurisdiction, and (iv) appellate jurisdiction.

- **Geographic jurisdiction:** Everyone in a country should have relatively easy and equitable physical access to the ECT, including hearings held locally (even at the site of the problem). This could require ECTs to exist in multiple locations. Alternatively, ECT judges and decision makers can travel for site visits and hearings on site, as they do in Ireland, New Zealand, Ontario, Queensland and other jurisdictions. In Brazil (Amazonas State), Nigeria (Lagos and Abia States) and the Philippines, aeroplanes, buses, boats and vans have been outfitted as mobile mini-courthouses.
- **Subject matter jurisdiction:** It is a good practice to give the ECT jurisdiction over all environment-related laws. This avoids, for example, adjudicating a wetlands issue with authority over ecosystem laws but not water laws. Another important good practice – demonstrated in Sweden, New South Wales and Vermont – is to combine jurisdiction over environmental laws with jurisdiction over land use and planning laws, as decisions in one area ultimately affect those in the other. It is also a good practice to give an 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 aspects. Inclusion of jurisdiction over criminal environmental laws, such as illegal hunting

Box 5: Kenya, Environment and Land Court Act 2011, section 18

Guiding principles

In exercise of its jurisdiction under this Act, the Court shall be guided by the following principles—

- (a) the principles of sustainable development, including—
 - (i) the principle of public participation in the development of policies, plans and processes for the management of the environment and land;
 - (ii) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law;
 - (iii) the principle of international co-operation in the management of environmental resources shared by two or more states;
 - (iv) the principles of intergenerational and intragenerational equity;
 - (v) the polluter-pays principle; and
 - (vi) the pre-cautionary principle [...]

Kenya, Environment and land Court Act 2011



and trafficking in wildlife, and illegal fishing, is key to achieving environmental justice and sustainable development. Several outstanding environmental courts have wide jurisdiction, which includes criminal, civil and administrative law (for example, New Zealand and New South Wales) (UNEP 2016).

The Environment and Land Court in Kenya has perhaps the most comprehensive jurisdiction of any in the world, although it is not given criminal jurisdiction. Another best practice from Kenya, Canada, India and the Philippines is the use of express statutory authority to apply constitutional law and international environmental law principles in the adjudication process. Use of the precautionary principle, intra- and intergenerational equity, polluter pays, and other emerging international principles, allows ECTs to protect resources now and for the future, helping to support the United Nations 2030 Agenda for Sustainable Development.

- **Level of jurisdiction:** ECTs can be established at the trial (first instance) or appeal (second instance), or the highest level (supreme court), or all three. Experts agree that ECTs should have a merits (de novo) review at the first level. Some ECTs, like New Zealand's and Sweden's, are multi-level, acting as first instance courts for new case filings and second instance review courts for appeals from decisions of local planning bodies. China and Pakistan have created environmental courts or green benches at all three (trial, appeal and supreme court) levels. If only one level can be approved initially, a good practice is to have it at the first instance level, to develop a solid record for appeals.
- **Appellate jurisdiction:** Where should appeals from the environmental courts go? Clearly, Sweden's and

Thailand's approach of having environmental court decisions appealed to higher environmental courts 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 a strong status in the legal system. It is a less desirable practice to have an environmental court decision appealed to a non-expert general court bench, but this is better than having an environmental court decision that can be appealed to and overturned by an official of the agency being reviewed.

Considering all this, it is often politically challenging to start an ECT with broad jurisdiction. In 2014, the Hawaii State Legislature overruled environmental court advocates and sided with developer concerns, giving their new environmental courts no jurisdiction over land use and development laws. In some cases, wider jurisdiction only comes after some years. For example, Vermont's Environmental Court started in 1990 with jurisdiction only over environmental issues, but it received jurisdiction over land use in 1996 and could issue permits from 2005. Sweden's environmental courts initially had jurisdiction only over land use cases, but started hearing development cases from 2011 (UNEP 2016).

Some ECTs have had their jurisdiction narrowed, which limits the ability of the ECT to solve problems in the most efficient and comprehensive manner. In Hawaii, the Environmental Court's jurisdiction over development in forest and natural conservation reserves was legislatively removed. Following protests by native Hawaiians, this removal is being reconsidered by the Governor and Legislature (Pring and Pring 2021a).





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That said, a broad jurisdiction for an ECT is only useful if the necessary resources and enforcement capacities are available. When Kenya established its very broad jurisdiction environmental courts, they were flooded with environment and land cases fielded by general courts. With too few environmental court judges, they struggled to keep up with the workload (UNEP 2016).

7. Standing

Standing (*locus standi*) is the right to bring an action or challenge some decision. It is typically prescribed by legislation, court rules and caselaw. It is a highly recommended best practice to make it as broad and open as possible, and indeed to open standing to any person to raise an environmental issue, including public interest litigation, citizen suits and class actions. Having a limited definition of what constitutes standing is the most significant barrier to access to justice, yet this is the case in many countries, including the United States of America.

In a number of jurisdictions, citizens do not have standing unless they have already suffered “actual harm” to themselves or their property, live within a set distance from the environmental problem, or took part in earlier government agency proceedings on the problem. The European Commission and the Compliance Committee for the Aarhus Convention have successfully pressed several European Union member States for broader standing (Regional Environmental Center 2017). The Court of Justice of the European Union has openly identified nations that fail to meet the broader standing requirements under the Aarhus Convention, for example Sweden (UNEP 2016).

In China, pursuant to the 2014 amendments to the Environmental Protection Law, standing rules have been relaxed allowing more NGOs to bring environmental public interest litigation (Zhang and Mayer 2017). Pursuant to the 2017 amendments in the Administrative Procedural Law (Xie and Xu 2021), procuratorates can also bring public interest lawsuits against the illegal actions or omissions of governmental departments.

In Portugal, public interest actions to preserve the environment can be brought in the form of an *actio popularis*, which confers broad access for NGOs to review decisions and to claim compensation on behalf of aggrieved parties. Public interest actions brought by environmental associations (e.g. NGOs) are partially qualified. In other words, they must fulfil certain (legal) conditions to initiate legal proceedings (Sadeleer *et al.* 2003). Similarly, Latvia allows for administrative decisions on environmental matters to be challenged via *actio popularis*. Anyone who participates in the decision-making procedures for environmental matters is entitled to bring proceedings to challenge the decision.

8. Remedies

Having adequate remedies and powers is essential to an ECT. A limited range of remedies may stymie an adjudicator's ability to provide effective redress. An ECT may have the ability to impose fines and compensation, but if it does not have the scope to articulate more stringent remedies (e.g. specific performance, restitution or declaratory relief), environmental harm can still be committed or left unrepaired. Moreover, fines which are not pledged to restore the environment leave much to be desired. There may be instances where civil remedies do include the restoration of environmental damage, but no compensation to the victims. This may not be adequate and could act to deter some claimants from making a claim before ECTs.

9. Enforcement powers

All ECTs require adequate powers to enforce their own decisions and remedies. Thus, the priority is to ensure that there are sufficient financial and human resources to enforce the decisions and remedies ordered. One useful tool used in countries including India, Pakistan and the Philippines, is the "continuing mandamus". This refers to the power of an ECT to continue to have jurisdiction over the case after its decision, namely by monitoring compliance with it. Another approach is the rehabilitation of convicted defendants to avoid recidivism, such as by imposing forced volunteer environmental work or for defendants to attend "environmental night school", which is done in Brazil (UNEP 2016). Another enforcement approach is seen in Sweden, where individuals can seek the assistance of the Swedish Enforcement Authority to enforce monetary judgments and injunctions (Sweden, Government Offices of Sweden, 2016).

10. Evaluation procedures

Another important best practice to incorporate is an evaluation system to ensure quality and achieve

improvements in the ECT over time. Transparent and publicly available evaluation and accountability procedures are useful to achieve these ends. This can be in the form of self-evaluation and the publishing of annual reports, or the deployment of external oversight boards and user groups to monitor performance and user satisfaction. One such self-assessment tool is the International Framework for Court Excellence, which evaluates court quality and management. This has, for example, been implemented by the LECNSW (UNEP 2016).

11. Adequate resources

As mentioned throughout earlier sections, a successful ECT must have adequate resources, such as adequate remedies, enforcement powers, and evaluation procedures. Aside from an adequate budget, ECT also requires competent judges, staff, IT and physical facilities to cope with the workload.

It is a challenge to garner sufficient resources to build, run and staff ECTs. In this regard, having one ECT in the country or area with pooled, sufficient resources is better than having several that are lacking in these areas. The Nanjing Intermediate Court in China, for example, has a specialized environment and resource division, designated to have jurisdiction over first and second instance environment and resource cases within Jiangsu Province (Zhao 2021). Cross-border ECTs that span several provinces are also now encouraged by the Supreme People's Court of China to better govern specific ecosystems, such as the Yangtze River (China, Supreme People's Court of the People's Republic of China 2019). If there is more than one ECT, another possibility is to share judges by having them travel across regions to hear cases. However, this may involve costs and reduce efficiency.

Further, the concern of adequate resources extends to the resources that the ECT may require from low-income litigants to gain access to the ECT, which may be prohibitive. Some ways to reduce such barriers to entry include lowering filing fees, providing for court-paid expert witnesses, allowing self-representation (i.e. without needing paid legal representation), waiving security bonds for injunctions, providing alternative dispute resolution and other cost-cutting measures.

B. Operation stage

12. Public outreach

It is a best practice to educate the public fully about ECTs – all stakeholders, from citizens to developers, government

officials, attorneys, NGOs and academia. A continuing effective programme of educational outreach is in the best interest of both the public and the ECT. It improves the visibility and credibility of the ECT in the public eye; helps people understand the importance of the ECT; teaches people how to access justice through the ECT; and informs them as to what to expect from the ECT. On the whole, this strengthens the network of support for the ECT and enables it to function more efficiently.

Effective ECTs have capitalized on the following methods to increase public outreach:

- IT, including a user-friendly, regularly updated, interactive website with a frequently asked questions (FAQs) section and contacts that respond, and also containing instructions, forms and potentially online filing for complainants and counsel, such as in New South Wales and New Zealand. The use of IT increased during the COVID-19 pandemic and has enabled ECTs to function in that period. IT plays, and will continue to play, an important role in access to justice.
- FAQs that are easy to read and understand; it is even better if this document is made available in numerous relevant languages, including Braille, which is the practice in the Philippines (Philippines, Supreme Court of the Philippines 2010).
- Meetings with communities, stakeholder groups and government to help explain, design, evaluate and improve the ECT, such as occurs in New Zealand and Hawaii.
- Stakeholder consultation processes, community oversight boards or advisory groups, such as in India and New South Wales.
- Internal or external science and technology experts to decide with or to advise the ECT decision makers, such as in the Netherlands.
- Posting online notices of hearings and written decisions, available to the public (UNEP 2016).



Box 6: Good practices by ECTs in China

The number of specialized environmental adjudication institutions in China has consistently increased. The total number of environmental judicial institutions increased from 976 in 2017 (China, Supreme People's Court of the People's Republic of China 2017) to 1,993 in 2020 (China, Supreme People's Court of the People's Republic of China 2020).

Good practices in China can be categorized into three classes:

1. Practices enhancing environmental dispute resolution effectiveness

Some Chinese ECTs have centralized jurisdiction for river basins and ecological areas that transcend administrative divisions. This improves the quality of environmental adjudication by promoting consistency in environmental judgments and adopting an integrated ecosystem approach to environmental governance. For example:

- In Hunan, three specialized environmental and natural resources courts for Xiangjiang River, Dongting Lake and Dongjiang Lake heard cross-jurisdiction environmental cases and public interest litigation cases for these watersheds (China, Supreme People's Court of the People's Republic of China 2018).
- In Jiangsu, there is a "9+1" model with nine grass roots-level courts (each dedicated to an ecological functional area) and one Nanjing Environmental and Resource Court. The latter exercises centralized jurisdiction over all environmental cases from Jiangsu Provincial Intermediate People's Court and appeals from the nine ecological functional area-based courts (China, Supreme People's Court of the People's Republic of China 2020).
- Cross-provincial judicial cooperation areas along the Yangtze River Economic Belt were established for the integrated judicial protection of the Yangtze River Delta region. The Anhui, Jiangsu, Shanghai and Zhejiang High People's Courts signed the Framework Agreement on Judicial Cooperation in Environmental and Resource Adjudication among People's Courts in the Yangtze River Delta Region (China, Supreme People's Court of the People's Republic of China 2020).
- Environmental experts pools have been created. Experts are selected from these pools to provide technical advice to judges, which lessens the difficulties and the costs typically incurred in environmental damage assessments (China, Supreme People's Court of the People's Republic of China 2020). This is a best practice, because judges may not be experts in environmental science and require technical assistance to properly apply environmental laws to the facts of the case.

2. Improving the quality of environmental adjudication

The Supreme People's Court publishes an annual collection of "model environmental cases" for the public to read. Some landmark cases that have been spotlighted include:

- *Friends of Nature v. Hyundai Automobile (2019)*
Hyundai agreed to fund the construction of charging points for electric vehicles to indirectly protect the atmospheric environment, which was considered an innovative form of ecological restoration.
- *China Biodiversity Conservation and Green Development Foundation v. Sumei and Taobao (2019)*
The claimants brought a case against the defendants for selling automotive products on the e-commerce platform Taobao that helped vehicles to fraudulently pass annual emission tests. The case has guiding significance for future cases because in ordering Sumei to compensate for the cost of cleaning up the air pollution, the Hangzhou City Intermediate People's Court set a precedent for determining a reasonable environmental restoration cost.

3. Increasing disclosure and public participation

- China implemented the open trial system where courts broadcast live trials of cases on the China Open Trial Website and the social media platforms Wechat and Weibo (China Biodiversity Conservation and Green Development Foundation v. Sumei and Taobao).



- The Law of the People’s Republic of China on People’s Assessors provides that a seven-member collegial panel consisting of three judges and four representatives from the public shall be formed for cases involving major social impacts and environmental public interest litigation cases. The people’s assessor system was implemented in *People’s Government of Jiangsu Province v. Anhui Haide Chemical Science and Technology* (2019), where the four People’s Assessors provided input on fact-finding and law application, enhancing public participation and the credibility of the adjudication process.
- Public representatives and students have also been invited to attend cases with significant impacts within their jurisdiction, promoting the transparency and openness of environmental adjudication (*People’s Government of Jiangsu Province v. Anhui Haide Chemical Science and Technology*).
- The Supreme People’s Court also releases white papers and model environmental cases on an annual basis to increase public awareness of significant developments in environmental governance (*People’s Government of Jiangsu Province v. Anhui Haide Chemical Science and Technology*).

13. User-friendliness

Access to justice is enhanced when ECTs are user-focused and service-oriented. Traditionally, the halls of justice have been designed to be impressive, imposing and intimidating. ECTs today tend to eschew this in favour of more informal and welcoming housing, with registrars and case managers who are focused on providing friendly, supportive customer service.

The following features have been added to ECTs to enhance user-friendliness:

- accessibility arrangements for people with physical disabilities;
- special support systems for the blind and deaf;
- translation services at no charge;
- assistance with forms and procedures, especially for those not represented by an attorney;
- a case manager who monitors and facilitates the progression of cases;
- “travelling courts” in large countries or regions that transport judges to the people and the environmental problem; and
- special efforts to engage aboriginal peoples and incorporate traditional knowledge.

These efforts contribute to the goal of creating a “one stop shop” court for users (UNEP 2016).

14. Case management services

As noted in the UNEP 2016 ECT Guide, good case management is an obvious best practice that involves dedicated staff (including the judge) and streamlined processes for moving a case from filing to adjudication (UNEP 2016).

Case management services involve an open register system, where documents pertaining to each case are kept separated and accessible, and where procedural steps are duly complied with. Documents that are finalized and signed will also be registered in the system. Court systems with efficient case management processes will inevitably conclude a higher proportion of cases. Thus, investing in a good case management system benefits all parties. ECTs in Australia, New Zealand, Sweden and the United States of America have exemplary case management systems. For example, the environmental court in Queensland has an active case management process that keeps filed cases moving through the system and advises potential litigants on court process and expectations. In Sweden, all five environmental courts have coordinated and consolidated specialized information for claimants and the public on a centralized website (Sweden, Sveriges Domstolar, no date). It also bears noting that in Jamaica, judges sitting in the Court of Appeal are given training on writing judgments (Jamaica, Court of Appeal 2017) and case management (Jamaica, Court of Appeal 2020).

ECTs ease the pressure on overburdened court systems and handle environmental cases through a specialized system. This helps ensure that cases can be dealt with expeditiously, so that fewer court resources are incurred. In particular, much attention is paid to active and detailed pretrial management so that the actual trial proceeds smoothly. A wide range of features are associated with



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good case management, including directions hearings and computerized tracking of cases (UNEP 2016). A case management conference may also be set up, and a case management bundle prepared by solicitors (United Kingdom of Great Britain and Northern Ireland, HM Courts & Tribunals Service 2017). For instance, in Sweden, case management plans are set out for complicated cases at preliminary hearings, which ensures that parties remain committed to meeting court deadlines (Bengtsson 2021).

The environmental court in New South Wales is obliged to facilitate the “just, quick and cheap” resolution of disputes (New South Wales, Civil Procedure Act 2005, section 56). This calls for the application of active case management. To further this overriding purpose, proceedings are to be managed by the court with regard to the following objects:

- just determination of proceedings;
- efficient disposal of the business of the court;
- efficient use of available judicial and administrative resources; and
- timely disposal of proceedings (New South Wales, Civil Procedure Act 2005, section 57(1)).

15. Management of experts

As noted in the UNEP 2016 ECT Guide, it is a best practice for ECTs to have rules and procedures for managing expert testimony and evidence to promote reliability and efficiency (UNEP 2016). Australian ECTs have several methods of expert witness management for better environmental justice. Methods include, for example, requiring experts to meet with the registrar or case manager (UNEP 2016). Another practice is to convene experts selected by both the plaintiff and defendant in a meeting, so that they can clarify any factual disagreements. The court will also be able to identify more clearly where expert opinions diverge.

If such expert management practices are not put in place, the “battle of the experts” problem arises: expert witnesses fail to be objective, but only support their clients’ position (UNEP 2016). In this regard, the Queensland Environmental Court has introduced, inter alia, the requirement that all expert witnesses represent the court and not the parties that engaged them, or else face contempt charges.

The Environment and Land Use Appeal Tribunal in Mauritius can also order for independent specialist evidence to be adduced in addition to the evidence brought by the parties (Bhadain 2021b).

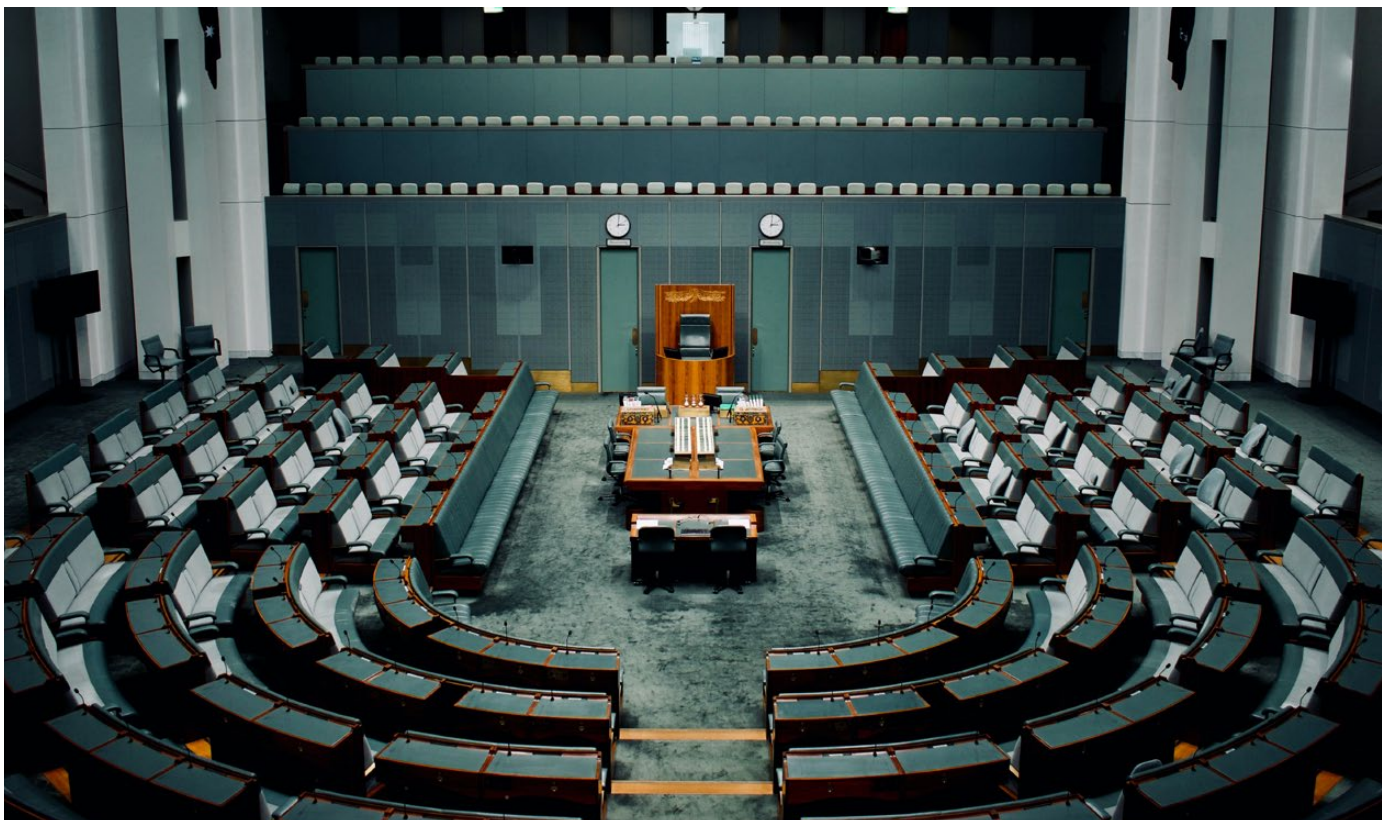


16. Cost control

Controlling and lowering costs is a best practice. 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 proactively employing alternative dispute resolution;
- not making the losing party pay disproportionate costs to the winner, except in cases of court abuse or extreme behaviour;
- 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; and
- providing support for indigent parties, especially for public interest litigation.

ECT planners should not assume the ECT will be completely or even substantially funded by litigants' fees, because this prioritizes earning revenue over providing access to justice and proper client service. In fact, it has been found that in certain jurisdictions, high litigation costs pose a higher barrier to justice than narrow standing requirements (UNEP 2016).





ECT MODELS



3. ECT MODELS

There is no one best model for an ECT, no “one-size-fits-all” design. Every environmental court and environmental tribunal 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 initial and updated 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 and experience, and different levels of development, cost and sophistication. For each model identified below, actual ECT examples are given, although other examples could also be cited. The good practices described for a selected ECT are not unique but are also found in other ECTs (UNEP 2016).

3.1. INITIAL CONSIDERATIONS

Considering the following factors will help policymakers determine what ECT model is most realistic for the circumstances:

- Leadership strength – without strong leadership the ECT will flounder.
 - Political and financial 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 ECTs being authorized on paper but not actually established.
 - 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 the 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.
 - Inadequate judicial and police training capacity – judicial education is needed, through a judicial training academy, university, international governmental organization or NGO with environmental education expertise and commitment.
 - Lack of environmentally trained attorneys – without a base of environmental lawyers, the ECT may not get cases or have them presented well.
 - Public demand – without real public demand for and support of the work of ECTs, they will likely remain underutilized and may not last for long.
 - Literacy of the affected population – community education and awareness are the cornerstone of an effective ECT and an important element to develop in the planning process.
 - Awareness of the press – without adequate media attention, environmental verdicts remain under the radar.
- ECTs’ existence, jurisdiction, powers, budget, accountability mechanisms, etc., may be defined by (i) legislation; (ii) rules of their parent branch of government; or (iii) the ECTs’ own rules. Law-trained judges are the typical decision makers in environmental courts, although a growing number of environmental courts (including Chile, Finland, New Zealand and Sweden) also include non-law scientific/technical judges or commissioners. Environmental tribunals may have only law-trained judges but are somewhat more likely to join them with scientific/technical decision makers (for example in Belize, Costa Rica, Iceland, Kenya and Malta) and even non-professional lay member decision makers (Botswana), and at least one environmental tribunal does not require that any of its members be lawyers (the An Bord Pleanála of 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 Pakistan, the Philippines and Sweden, have a court-based environmental adjudication culture. Civil law



Hearing in 2022 at the Raad voor Vergunningsbetwistingen, a specialized environmental administrative court competent for town planning and environmental permit disputes in Belgium

nations, such as most European nations, or 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). Most European and some African, Asian and Latin American nations also have a constitutional court, but none of those have been found with a formal environmental chamber (see however the work of the Environmental Trial Secretariat [la Secretaría de Juicios Ambientales] and the Environmental Justice Office within Argentina’s Supreme Court, mentioned later in this guide). The United States of America has a mixture of environmental courts and environmental tribunals depending on the state or territory. A few have environmental courts, environmental tribunals and ombudsmen, like Kenya with its trial and appeal environmental courts, environmental tribunals for environmental impact assessments and water cases, and an independent environmental ombudsman, the National Environmental Complaints Committee.

Each environmental court or environmental tribunal model has potential strengths and weaknesses. For each model described, specific ECT examples have been selected with their identifying characteristics and good practices noted (UNEP 2016).

3.2. ENVIRONMENTAL COURTS

This study has identified four distinct environmental court models and a fifth alternative approach, based on their decision-making independence:

ENVIRONMENTAL COURT MODELS (UNEP 2016)

- A. OPERATIONALLY INDEPENDENT ENVIRONMENTAL COURTS (separate, fully or largely independent environmental courts)
- B. DECISIONALLY INDEPENDENT ENVIRONMENTAL COURTS (within a general court, but separate and free to make their own rules, procedures and decisions)
- C. MIX OF LAW-TRAINED AND SCIENCE-TRAINED JUDGES (may be either model A or B above, with the two types of judges sharing decision-making)
- D. GENERAL COURT JUDGES ASSIGNED ENVIRONMENTAL CASES (assigned environmental cases in addition to their regular docket, sometimes without necessary interest, expertise or training)
- E. GENERAL COURT JUDGES TRAINED IN ENVIRONMENTAL LAW (who may therefore be assigned environmental law cases from time to time)



A. Operationally independent environmental courts

Operationally independent environmental courts are described as representing the zenith of environmental courts due to their wider jurisdiction and incorporation of the greatest number of good practices (UNEP 2016). Three environmental courts were described in the UNEP 2016 ECT Guide as examples that fall within this category: the LECNSW, Australia; New Zealand’s Environment Court; and the Court of Environment and Agrarian Issues of Amazonas, Brazil (UNEP 2016). As of 2021, all three environmental courts remain operational and continue to embody good practices.

In Australia, the LECNSW was established in 1980 and continues to be recognized as one of the most visionary and successful based on its innovations, good practices and advice for other environmental courts around the world. It has been lauded for the successful use of alternative dispute resolution and IT (UNEP 2016). The LECNSW is an example of an environmental court that has an all-inclusive jurisdiction, including both land and environment jurisdiction, as well as environmental criminal jurisdiction. In recent years, there has been a marked increase in cases filed before the court, with approximately 1,400 cases handled by the court each year (New South Wales, Land and Environment Court 2020). It has been noted that there is an increasing diversity in the arguments made before the court (Preston 2021). Although the types of cases received are effectively limited by the court’s authorizing statute, disputes on climate change obligations, human rights and the protection of indigenous land rights have increasingly been presented by plaintiffs as planning and classic tort cases (for example, the tort of nuisance).

In New Zealand, the Environment Court is one of the oldest free-standing environmental courts and continues to embody good practices, for example, by embracing IT and alternative dispute resolution (UNEP 2016). The Environment Court has three registries in different parts of the country and can hold hearings at the place in issue, thereby facilitating access to environmental justice (UNEP 2016). The number of cases before the court has increased in recent years – at present, the New Zealand Environment Court handles approximately 500–800 cases per year (Daya-Winterbottom 2021a). Moreover, the types of cases brought before the court have also become more varied (Kirkpatrick 2021). For example, in *Smith v. Fonterra Co-operative Group Limited* (2021), the claimant sought declaratory relief by arguing that the defendants had breached their duty of care by carrying out activities contributing to climate change, separate from his other tortious claims of public nuisance and negligence (Daya-Winterbottom 2021b). The New Zealand High Court allowed the climate tort claim to go to trial, although the public nuisance and negligence claims were rejected.

The Court of Environment and Agrarian Issues in Brazil is within the Federal Regional Tribunal (First Region)



and another example of an independent environmental court, notable for having one of the widest and most innovative range of remedies. The remedies available include community service, restoration of environmental harm and such unique sentences as requiring large businesses to pay for environmental education signs on buses. In *Instituto Socio-Ambiental et al. v. IBAMA and the Federal Union* (2020), three NGOs filed a lawsuit with the main objective of voiding a decision by the Brazilian Institute of the Environment and Renewable Natural Resources that allowed the export of native wood with less government oversight. The applicants highlighted the role of the Amazon forests in maintaining the ecological and climatic balance, the significant increase in the rates of illegal deforestation in the Amazon, and destruction allegedly caused by public environmental policies. The case is currently pending decision before the Seventh Federal Environmental and Agrarian Court.

Other self-standing environmental courts in other countries include the Environment and Land Court in Kenya (Ojo 2020), three environmental courts in Chile (Retamal Valenzuela 2019) and six environmental courts in Sweden (Sweden, The Swedish Environmental Code 2000; Sundberg 2018). There are 11 environmental courts in Belgium, of which two are operationally independent (European Union Forum of Judges for the Environment 2018).

B. Decisionally independent environmental courts

As was described in the UNEP 2016 ECT Guide, there are environmental courts which are part of the general court system (i.e. within its supervision, budget, staff and management), but nevertheless have substantial independence in terms of their procedures, rules and decisional freedom. The UNEP 2016 ECT Guide referred to two environmental courts as good examples of this model: the Planning and Environment Court in Queensland, Australia, and the Environmental Division of the Vermont Superior Court in the United States of America (UNEP 2016).

The Planning and Environment Court in Queensland is a specialized court housed within the general trial court system. As noted in the UNEP 2016 ECT Guide, the Planning and Environment Court “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”. Other good practices of the Planning and Environment Court involve various methods of managing expert witnesses (UNEP 2016).

The Environmental Division of the Vermont Superior Court in the United States of America is widely regarded as an effective trial court with state-wide jurisdiction within the state’s general trial court system. It is the first and only state-level environmental court in the United States of America with designated specialist judges (UNEP 2016). The

annual caseload of the court has decreased in recent years from 350 cases in 2008 to 200 in 2021, a decline which can be explained by the pandemic and economic recession. Some good practices of the Environmental Division include an active case management process, alternative dispute resolution, e-filings and virtual hearings, the latter two introduced in response to the global pandemic (Durkin 2021). To date, Vermont has remained supportive of environmental initiatives and sustainable development, and its environmental court has not been the target of severe budget cuts or major restructuring (Pring and Pring 2021b).

Similarly in Europe, the dominant ECT model is also one of specialized chambers within the general courts. Such specialization can be seen in Belgium, Bulgaria, Finland, Greece, Italy, the Netherlands and Spain (European Union Forum of Judges for the Environment and Milieu Consulting 2019). For example, the environmental courts in Belgium are specialized chambers within the Council of State and certain courts of appeal. The specialized section within the Council of State of Greece, the third chamber within the criminal section of the Supreme Court of Cassation of Italy, and the fifth section of the third chamber of the Supreme Court in Spain, also serve as environmental courts in their respective countries.

France, taking a different approach, created 36 specialized environmental courts within the general courts without creating any new structures. It did this through Law No. 2020-1672 of 24 December 2020 on the European Prosecutor’s Office, environmental justice and specialized criminal justice. Further, in the jurisdiction of each Court of Appeal, one environmental court has been designated. These environmental courts have jurisdiction to investigate, prosecute, and adjudicate offences pursuant to the Environment Code, the Forest Code, the Mining Code, the Rural Code, and other complex issues of marine fishing and illegal wood trade or products (France, Loi relative au Parquet européen, à la justice environnementale et à la justice pénale spécialisée (1) 2020). Less complex cases will continue to be handled by the local first instance courts. These environmental courts will have trained, specialized prosecutors, investigating judges and trial judges. Training is provided to both prosecutors and judges so that they can better understand environmental matters, particularly the valuation and importance of ecological damage and the causal links related to the environmental offence (France, Ministère de la Justice 2021). The French Minister of Justice has asked the General Inspectorate of Justice to conduct a support mission (*mission d’appui*), to pilot such environmental courts in Amiens, Bordeaux and Coutances (Delbos 2021).

Other countries with environmental courts that are decisionally independent despite being part of a general court system are:



- Argentina, which has an Environmental Trial Secretariat (la Secretaría de Juicios Ambientales) and Environmental Justice Office created in 2015 by the Supreme Court of Justice.
- Ghana, which has 16 environmental courts which form part of the Land and Environmental Divisions of the High Court.
- Pakistan, which has 250 green benches, one for each court (including the state-level High Courts and its Supreme Court).

C. Mix of law-trained and science-trained judges – multidisciplinary decision-making

A number of environmental courts (and environmental tribunals) 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 environmental courts and environmental tribunals and in both the operationally independent and decisionally independent models above. They are highlighted separately here because of their unique “partnership approach” to adjudication, combining the analysis and decision-making of judges who are either trained in law or in science. Judges with different yet complementary expertise hear the cases as co-judges.

Most 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 analyse expert testimony on these issues – this partnership approach has the potential to deliver more rational, sophisticated and comprehensive decisions.

The Land and Environment Court in Sweden is an example of a decisionally independent environmental court with a multidisciplinary judicial approach. When Sweden’s environmental courts 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 (UNEP 2016).

Sweden has five regional Land and Environment Courts at District Court level, and one Land and Environment Court of Appeal in Stockholm responsible for the whole country, that are part of the general court system. Their jurisdiction covers all kinds of decisions made pursuant to the Environmental Code and acts and ordinances relating to the

Code, including European Union environmental law. The jurisdiction of the courts includes planning and building, as well as real estate. They are also competent in cases concerning environmental damages and compensation, as well as private actions against hazardous activities. They do not have jurisdiction in relation to environmental crimes.

The regional environmental courts function both (i) as trial courts (first instance) on permits for hazardous activities, water developments and environmental damage claims made by individuals, groups, NGOs or Government; and (ii) as appellate courts (second instance) for appeals of decisions by local and regional bodies on environmental permits, disposal of waste and clean-up orders. The Land and Environment Court of Appeal hears appeals of cases from the regional environmental courts. Its first instance decisions can be appealed to the Supreme Court, while its second instance decisions are usually final.

The Swedish Environmental Code provides that each of the regional environmental courts is to have a panel consisting of one law-trained judge, one environmental technical expert (with a scientific or technical education) and two lay expert members in cases of environmental permitting (with a science or technical education, appointed by industry and national public authorities). The law-trained regional judge and technical expert are full-time employees of the court, and the two lay experts are assigned depending on the expertise(s) required in the respective case. All four



Administrative Court of Vaasa, Finland conducting a site visit.

members of the panel are equals in the decision-making process. The technical judges must have a long experience and good scientific and technical education. They must also be familiar with judicial interpretation and the procedural code (Sweden, The Swedish Environmental Code 2000; UNEP 2016).

The Land and Environment Court of Appeal consists of three law-trained judges and one technically trained judge. 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 environmental court (UNEP 2016).

The use of technical judges has improved the quality of environmental judgments in Sweden. The collective panel achieves a better understanding of the parties' expert reports, including environmental impact assessments, and can therefore "ask the right questions" in hearings. This allows for equal weighting of information and considerations at hearings, and also improves adjudicative transparency. As a result, this hybrid panel assesses the environmental effects in the cases better and faster than a exclusively law-trained panel (Schultz 2019). Especially given the ever-changing nature of scientific knowledge, the hybrid panel with its experts offers sharper, up-to-date knowledge of relevant environmental standards for and scientific methods (Schultz 2018). It should also be

noted that in Sweden's Land and Environmental courts and Supreme Court, reporting clerks (i.e. judges without tenure) who specialize in environmental law will prepare and present case briefs for judges deciding environmental cases. This serves as another method for achieving environmentally sound decisions.

In the words of the late J. Eklund, former Technical Judge of the Vaasa Administrative Court in Finland:

In Finland and Sweden, science is brought into Court by technical judges on the bench who participate in the preparation, resolution and wording of the case. This eliminates the difficulty of translation from scientific language into legalese, as technical judges soon learn both. The drawback of (external) expert opinions is that you must be an expert to understand what the expert says and, especially, what he chooses not to say. The drawback of (external) experts is that, usually, they are not legally trained and have difficulties in understanding the processual restraints on a case. (Eklund 2018)

Environmental courts in Chile are another good example of multidisciplinary decision-making. In 2012, the Chilean National Congress authorized three substantially autonomous environmental courts, with multidisciplinary panels of judges, and made them independent of the





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administration and not directly part of the existing judicial system, but under the administrative, policy and financial review of the Supreme Court. This took place in the context of a major reform of the Environmental Law, which provided for the creation of the Ministry, the Environmental Assessment Service and the Environmental Superintendencia. The Ministry has executive and policy powers, the Servicio de Evaluación Ambiental grants environmental permits, and the Superintendencia oversees compliance with environmental permits and regulations. The Courts were created as a counterbalance to the powers of the Superintendencia, in the administrative field (Perez Niklitschek, 2021).

The law authorized the First Environmental Court (Primer Tribunal Ambiental) to be located in the country's northern city of Antofagasta, the Second Environmental Court (Segundo Tribunal Ambiental) in Chile's centrally located capital Santiago, and the Third Environmental Court (Tercer Tribunal Ambiental) in the southern city of Valdivia. The Second Environmental Court began hearing cases in 2013, the Third Environmental Court in 2014, and the First Environmental Court in 2017.

The authorizing law in Chile specifies that the environmental courts will each have three judges – two of them must have a law degree, have practiced the profession

for at least 10 years and have excelled in professional or academic activity in the field of administrative or environmental law. The third judge must hold a Bachelor of Science with a specialization in environmental matters and at least 10 years of professional practice. Each environmental court also has two substitute or alternate judges, one with a law degree and the other with a Bachelor of Science. The same requirements apply to these alternate judges, but eight years of professional practice suffices. They are chosen through a four-step political selection process: (i) names are proposed by the Chilean civil service recruitment department to the Supreme Court; (ii) the Supreme Court selects nominees from that list to recommend to the President; (iii) the President selects nominees from that pool; and (iv) the final nominees are ratified by the Senate (UNEP 2016).

Contrary to the other courts, the judges of the environmental courts are appointed for a limited time (six years) and the grounds for termination include voluntary resignation and inability to hold office. This is different to the process for career judges who are protected by law, appointed for their whole career and have guarantees of their independence. Therefore, independence for the environmental courts is a recurring challenge (Perez Niklitschek, 2021).

The environmental courts complement the competence of the Courts of Appeal and the Supreme Court, which have jurisdiction to hear constitutional claims under the *recurso de protección*, which guarantees the right to live in an environment free of contamination. The *recurso de protección* is applicable to acts and omissions coming from an authority or a private party. The competence of the environmental courts is more specific and restricted. The *recurso de protección* provides a simpler way of access to the enforcement of environmental rights for the majority of the population (there is no need to hire a lawyer or present the private reports of specialists) than starting a plea before the environmental courts (Perez Niklitschek, 2021).

Considered thus, the aforementioned multidisciplinary approach acknowledges that environmental adjudication is becoming increasingly complex. It continues to be based on scientific and technical projections that will also impact social, economic and environmental conditions. Law-trained judges generally do not have the scientific or

technical training to analyse expert testimony on these issues. Involving scientific and technical judges in the decision-making process adds value to all stages of the dispute resolution process. This helps to ensure a “just, quick and cheap” solution that benefits both parties and the adjudicators. Not only does this improve access to justice, it also makes the legal system more efficient on the whole (UNEP 2016).

As shown by the preceding discussion, there are several ways to incorporate environmental science into legal decision-making. The first and most commonly adopted model is to have science-trained judges who will judge alongside law-trained judges in environmental cases. The second model is to have an external panel of scientific experts that a court (or parties) may consult if a particular case requires such expertise.

Box 7: The Foundation of Independent Court Experts in Environmental and Planning Law, the Netherlands

Rather than having science-trained judges, a court may direct specific scientific or technical questions to specialized regional or national authorities. The Foundation of Independent Court Experts in Environmental and Planning Law (Stichting Advisering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening, “STAB”, now called *Gerechtelijke Omgevingsdeskundigen*) of the Netherlands is an example of this alternative approach.

Through STAB, judges may request expert opinions regarding environmental and planning cases, from the independent and impartial expert employees of STAB (STAB 2021a). Generally, STAB experts can handle almost all the expertise needed in these cases (STAB 2021b). Expert opinions are provided for free, are delivered quickly within an average period of three months and are of good quality (STAB 2021a).

STAB is an independent and impartial institution financed by the Ministry of Justice of the Netherlands (Backes 2018), with 40 experts with diverse expertise. STAB experts are bound by the STAB Code of Conduct, the Code of Conduct for Judicial Experts of the Council of State, and the Code of Conduct for Judicial Experts in Civil and Administrative Law Matters (STAB 2021a).

STAB experts can provide general information about a case, such as the facts and circumstances of the case, the relevant legal framework, and explanations of technical and/or technical-legal issues. They may also provide case-specific information – for example, in a case concerning traffic noise, this may entail pinpointing the correct acoustic report that correctly explains, and can be permitted as scientific evidence on, the effects of a new highway on traffic movement (Backes 2018).

In addition, STAB experts conduct site visits and interview all the parties involved. Thereafter, STAB experts may compose a report to which parties can respond (STAB 2021a). This report will also be subjected to a second expert’s quality review, who can accompany the experts to the hearing (Gilhuijs 2021).

STAB facilitates the administration of justice, as it saves time on sourcing for reliable expert opinions (Backes 2018). Not only do STAB experts know the applicable legal framework and its interactions with the technical issues at hand, their impartiality and independence are legally assured and verified (STAB 2021a). These expert opinions have increased the quality of adjudication and caselaw. This method also sidesteps the potential obstacle of a deadlock between experts engaged by the parties (Backes 2018). Therefore, it is unsurprising that the courts of the Netherlands are increasingly engaging with STAB experts (Backes 2018; Gilhuijs 2021).



The Court of First Instance of Ghent, Belgium: criminal chamber hearing environmental cases, pronouncing judgment in a complex case of waste and food safety.

In Bhutan, the green bench in the High Court was created in commemoration of the sixtieth birth anniversary of the fourth King of Bhutan and is still operational today (Wangchuk 2018). This green bench specializes in the adjudication of environmental disputes, and is aimed at “bringing about uniformity, accuracy, precision and predictability in judgments and informed interpretation of environmental laws” (Wangchuk 2018). Even though this green bench was formed with existing judges, it has adopted its own procedures to provide speedy, fair, and just adjudication of environmental disputes. Some of the more notable features of such procedures include:

- the liberalization of locus standi rules such that public interest litigation can be pursued, either against the State or public authority, by any person in Bhutan;
- the shift in the burden of proof, specifically to the person or body interfering with ecology to prove that there is no adverse impact; and
- the ability of the bench to be assisted at its discretion by scientific or technical experts (*amicus curiae*) to deal with various aspects of environmental problems (Bhutan, Judiciary of Bhutan, no date).

It is important to note that the Bhutan green bench was not established due to a rise in environmental cases. Rather, its establishment was in anticipation of a rise in environmental litigation given the increasingly pronounced challenge in balancing developmental requirements and environmental considerations. Training is therefore conducted to ensure environmental court judges have the specialized knowledge and skill required in the adjudication of environmental disputes (Wangchuk 2018).

In Malaysia, prior to 2016, 42 Session Courts and 53 Magistrates’ Courts were designated as environmental courts that heard criminal cases only. In 2016, all High Courts, Magistrates Courts and Sessions Courts in all 13 states were assigned as specialized environmental courts that can also hear civil environmental cases (Kamaruddin 2017). This increased the total number of environmental courts from 95 to 134 today. The implementation of this nationwide system of environmental courts aims at ensuring access is available to the population at large to lodge grievances or file claims seeking redress for a range of complaints (Mustafa 2020). These include cases of non-compliance of licenses, air pollution, water pollution, industrial effluence and offences related to wildlife conservation. The majority of cases are filed in Johor and Selangor (Kamaruddin 2017).

To facilitate the functioning of the environmental courts and bolster the practice of environmental law, the Environmental Rules of Court are currently being drafted in Malaysia and are set to be implemented in the future (Inns of Court Malaysia 2017). The purposes of the Environmental Rules of Court are to:

- provide a simplified, efficient and inexpensive procedure for the enforcement of environmental laws and disposition of environmental cases;
- facilitate the advancement of constitutional rights for a healthy and pollution-free environment; and
- ensure effective enforcement of remedies (Mustafa 2020).

In the meantime, certain procedures were implemented in tandem with the establishment of the environmental courts to improve the courts' efficacy. This includes a target of a six-month timeline to dispose of environmental cases, which Malaysia has commendably met – the rate of disposal within this six-month period was 99.5 per cent from 2012 to 2017 (Mustafa 2020).

It should be reiterated that no new environmental courts per se were created in the past five years in Malaysia – rather, the courts' jurisdiction was expanded to hear environmental cases. Nevertheless, this development is still significant. Members of the public are now allowed to bring civil actions to remedy breaches of environmental law (Mustafa 2020), which provides an additional means to access justice for environmental harm.

Notwithstanding the lack of an independent and formal environmental court in California, it still is worth highlighting that the California Supreme Court adjudicates upon a significant number of environmental cases per year. The California Environmental Quality Act, along with how it has become interpreted and applied, presents one of the most prominent tools used by litigants there (Gray 2021). However, this has been observed to have had a double-edged effect in recent times, as some projects challenged under the California Environmental Quality Act, such as public service and infrastructure plans, are the same types of projects plans that current environmental and climate policies seek to promote (Hernandez 2018). In 2020 alone, there were 34 appellate cases that related to the California Environmental Quality Act, while in 2019 there were 45 (Latham & Watkins LLP 2021). Judges in the California Supreme Court are, therefore, presumably well acquainted with the adjudication of environmental law disputes given the frequency with which they deal with them. However, it is unclear whether it is mandated that these designated judges have any form of interest, training or experience in environmental law.

The model adopted in California may be representative of the trend that might soon prevail in the United States of America. Experts interviewed indicate that moving forward, it is unlikely that the United States of America will see the development of stand-alone, specialized ECTs. Rather, the model adopted by California and Hawaii will be indicative of the future for environmental courts – somewhat specialized general judges, dedicated green judges or green benches will be the alternative to expensive, separate, and legislatively created environmental courts. Future environmental courts will also be characterized by features such as “clustering” and cross-cutting jurisdictions. Since environmental cases are so complex and touch on so many areas of law, shifting panels of judges and commissioner experts may be required based on the issues raised by individual cases. In this way, trained judges and experts with environmental expertise will be empanelled to sit on cases that need their specific knowledge (Pring and Pring 2021a)

This model may be an attractive “middle ground” approach to the establishment of environmental courts, should budget restrictions or limited political and judicial resources will prevent the development of stand-alone and fully dedicated environmental courts. In some instances, having an environmental court in which general court judges are assigned environmental cases may provide better access to justice and build judicial expertise in environmental law better, especially as a stand-alone environmental court may be less accessible or well resourced.

States and countries that have adopted a similar model include Hawaii, where 22 existing judges at the general judicial system district (small claims) and circuit (larger claims) courts are designated as environmental court judges; Pakistan, where there are 250 judges at both the Trial and High Courts, though the practice of creating green benches has apparently been discontinued (Zaman 2021); the Philippines, where there are 117 courts; and Thailand, where there are 21 environmental courts across all levels of its Courts of Justice and Administrative Courts (UNEP 2016).

Finally, it should be noted that the effectiveness of such a model is highly dependent on judicial expertise in environmental law. For instance, the Philippines, which was mentioned in the UNEP 2016 ECT Guide as a successful example of an environmental court's model of incrementalism (UNEP 2016), is increasingly less effective due to insufficient judicial expertise on environmental law. This can be attributed to the lack of judicial training on environmental law at all levels of the court. Training is not mandatory and spans only a few hours. Further, experts interviewed revealed that judges themselves shy away from environmental cases as they are not trained enough to handle environmental cases (Ramos and Gutierrez 2021). Thus, while a total of 117 environmental



courts exist in the Philippines, this high number does not necessarily correspond to the actual effectiveness of these environmental courts.

E. General court judges trained in environmental law

There are several reasons that countries should, and for which some do, train their general court judges in environmental law.

Firstly, due to various causes, a country may not have an operational ECT to handle environmental cases. In such cases, these countries train their general court judges in environmental law instead of establishing an ECT. We see this is Indonesia, where judges have been given environmental law training and certification since 2011 (Haba, Yunus and Risal 2020; Mulyono 2021). Indonesian experts think that establishing an ECT unnecessarily complicates matters because establishing an ECT requires amendments to the current civil, criminal and administrative codes, and each of the respective procedural codes. In effect, this means overhauling the country's entire legal system. However, they also think that environmental cases in developing countries, like Indonesia, must be specifically managed by a court that understands the urgency of environmental and natural resources protection (Mulyono 2021).

WHY GENERAL COURT JUDGES ARE TRAINED IN ENVIRONMENTAL LAW

1. The country does not have any operational ECTs, but is handling many environmental cases.
2. Environmental issues are frequently argued in non-environmental cases.
3. Judges should know how to recognize and deal with SLAPP cases.

Secondly, even in countries with operational ECTs, environmental issues have surfaced in non-environmental cases. Therefore, even general court judges inevitably have to grapple with environmental law and science. Furthermore, contemporary environmental issues have arisen in classic types of environmental law claims. This highlights the intersectional, multidisciplinary nature of environmental issues, particularly obvious in contemporary issues such as climate change, gender inequality and

disproportional environmental impacts on women, equity and sustainability, environmental degradation by private corporations, and the COVID-19 pandemic.

In Mexico, which has one authorized but not established ECT, the environmental liability claims are filed with administrative district judges under General Rule 27/2015 of the Federal Judiciary Council. However, environmental law is treated as a *sui generis* legal area, covered by extensive and complex regulation (Valenzuela Rendón 2021).

This inherent complexity makes the analysis of evidence a difficult task for judges, even more so for those who are not environmentally trained. Judges must understand the evidence thoroughly to recognize the objects, subjects, and causal links between them. For example, when calculating environmental damages, the main elements of the environment must be clearly identified so that the judgment can properly identify who is responsible for remedying the harm, how remedial efforts are to be executed and when they must be implemented. Moreover, as compensation can be ordered only when restoration is impossible (such as the extinction of a species, or a flood or landslide that has destroyed a village), judges must have sufficient understanding to determine and come up with a solution. Determining these elements, even with the help of expert members of the court, is a highly complex procedure. Therefore, training as many general court judges as possible in environmental law should be considered, even if the country already has an ECT.

Thirdly, strategic lawsuits against public participation (SLAPPs) are being brought to non-environmental courts. SLAPPs can take the form of criminal or civil lawsuits, and are brought to intimidate, financially cripple and silence environmental advocates and activists (Business & Human Rights Resource Centre 2021). As SLAPPs can have a chilling effect on environmental advocacy, this tactic is often used by powerful actors, including corporate entities and governments, to prevent people from raising concerns about their practices and speaking out against abuse. These SLAPP lawsuits are an outright abuse of the justice system and, when allowed, they amount to judicial harassment (Business & Human Rights Resource Centre 2020b). The British case of *McDonald's Corporation, McDonald's Restaurants Ltd. v. Helen Marie Steel and David Morris* (1997) illustrates how SLAPP lawsuits have a chilling effect on environmental advocacy efforts. In that case, McDonald's sued two members of London Greenpeace for remarks printed on a factsheet distributed by the organization, including the allegation that McDonald's destroys 800 square miles of forest a year for its packaging. The case is widely regarded as a SLAPP because the aim of McDonald's was seen as silencing its critics via a heavy-handed claim for damages that they can never expect to recover from the impecunious defendants (Hilson 2016).



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According to the Business & Human Rights Resource Centre (2021), at least 355 SLAPP cases were filed from 2015 to 2021; 224 of these involved criminal charges, most of which were for libel or other defamation charges. This reflects how the SLAPP is becoming an increasingly common and globalized tactic taken by influential actors who can afford to initiate and sustain legal action. Though SLAPP lawsuits are not aimed only at environmental defenders, the latter are increasingly being targeted.

SLAPP lawsuits are usually brought by claimants on non-environmental grounds, meaning that these cases would be heard in general courts. Therefore, if general court judges are not privy to environmental issues, they would fail to connect the genuine environmental concerns that the non-environmental lawsuit seeks to overshadow. This failure to identify an environmental SLAPP case means that it is not dismissed for injustice. Not only does this failure lead to dangerous and traumatic consequences for the environmental defenders charged, but it also substantially impedes environmental justice and protection (UNEP and Sabin Center for Climate Change Law 2020).

Though both legislation and the judiciary are crucial defences against SLAPP injustices, legislation is foundational. Some countries, such as Indonesia, the Philippines and Thailand, have implemented statutory provisions against SLAPP cases.

Indonesia's Law Concerning Protection and Management of Environment enshrines, inter alia, "environmental education, access to information, access to participation and access to justice in fulfilling the right to a good and healthy environment" (Indonesia, Environmental Protection and Management Law 2009, article 65(2)). Moreover, any person "who fights for the right to a good and healthy environment shall not be prosecuted based on criminal and civil lawsuits". In practice, however, these articles are difficult to enforce (Jong 2018). As a prime example, the Indonesian Supreme Court had rejected anti-SLAPP laws in *PT Bumi Sukses Indonesia v. Heri Budiawan* ("Budi Pego") (2018). The Court found that Budi Pego was practically

the leader of the protesters based on several interactions during the protest against Bumi Sukses Indonesia, and convicted him on grounds of anti-communism laws for the use of communist symbols painted on the protest banners and publicity materials. Further, the Court held that that the anti-SLAPP articles in the Environmental Protection and Management Law do not extend to protesters who conduct demonstrations in violation of the Freedom to Express Opinion in Public Law 1998, which requires written notification to the Indonesian National Police before such gatherings are conducted. Thus, he was sentenced to 10 months' imprisonment (Business & Human Rights Centre 2020b). However, on a more hopeful note, in August 2021, a High Court in Indonesia acquitted six villagers in a dispute against a tapioca factory, ruling that the criminal charges, allegedly brought at the behest of the company, were frivolous and could not be used to silence criticism of environmental violations (Jong 2021). This signifies the first win against SLAPP in Indonesia.

Thailand enacted its anti-SLAPP provisions in 2019, in response to international criticism and as part of Thailand's National Action Plan on Business and Human Rights (United Nations, Office of the High Commissioner for Human Rights 2018). Specifically, articles 161/1 and 165/2 were added to the Criminal Procedure. Article 165/2 provides that the court may dismiss a case if it is satisfied that the case was filed in bad faith or was intended to take undue advantage of a defendant. Though this is a positive step in the right direction, these provisions remain inadequate against SLAPP lawsuits (Rawski 2020). Both only apply to criminal cases filed by a private complainant, meaning that they cannot be used to dismiss SLAPP suits that are public prosecutions or civil cases. This leaves a problematic loophole, especially given the historical tendency of both the Government and private corporations to constrain public participation through these two types of SLAPP lawsuits.

The Philippines has gone a step further by defining SLAPP cases in their Rules of Procedure for Environmental Cases (the Rules) in 2010. Following this, anti-SLAPP provisions are in place, such as rule 19, section 1, which allows defendants of a criminal prosecution to file a motion to 'dismiss the Criminal action [as] a SLAPP'. This motion is not permitted for civil SLAPP cases, in which the SLAPP defence may be raised only through an answer (Philippines, Supreme Court of the Philippines 2010).

As theoretically promising and significant as they may be, these provisions are not bulletproof. In *Hotchkiss et. al v. Hon. Ridgway Tanjili*, the defendants struggled to get judges to recognize the new anti-SLAPP rules due to the lack of precedent on how they should be applied, with some judges recusing themselves from the case. One trial court judge asserted that the Rules applied only to environmental courts and not regular courts, even though there is no such restriction under the Rules. The



SLAPP defence was not recognized by the lower court and the case was allowed to continue. When the case subsequently reached the Court of Appeal, the case was finally dismissed, albeit six years after the SLAPP case had been filed. Because this case had been so protracted – and for some, because of fear of further attacks by the plaintiff company – a substantial number of environmental litigants and witnesses withdrew from the case. Though this did not materially disadvantage the ultimate outcome, it demonstrates the broader fact that environmental lawsuits are extremely intensive in terms of time, money and effort, which can exert significant pressure on the less advantaged parties.

SLAPP cases are not easy to identify if the judge is not familiar with environmental law and the related cases behind the SLAPP. In these examples, we can see that judges' training and the knowledge of jurisprudence are just as important as getting the rules in place. Judicial training gives judges knowledge and confidence in handling environmental issues outside ECTs; how to identify, connect the dots to environmental issues; and creating environmental law jurisprudence for protection of the people's justice.

3.3. ENVIRONMENTAL TRIBUNALS

The UNEP 2016 ECT Guide identified three different types of environmental tribunals based on their decision-making independence.

ENVIRONMENTAL TRIBUNAL MODELS (UNEP 2016)

- A. OPERATIONALLY INDEPENDENT ENVIRONMENTAL TRIBUNAL (separate, fully or largely independent environmental tribunal)
- B. DECISIONALLY INDEPENDENT ENVIRONMENTAL TRIBUNAL (under a government agency's supervision, but not that whose decisions they review)
- C. CAPTIVE ENVIRONMENTAL TRIBUNAL (within the control of the agency whose decisions they review)

A. Operationally independent environmental tribunals

Two very different environmental tribunals illustrate the diversity of operationally independent environmental tribunals – that is, environmental tribunals that in general control their own operations, rules and (most importantly) decisions (UNEP 2016).

In Mauritius, the Environment and Land Use Appeal Tribunal (ELUAT) was established under the Environment and Land Use Appeal Tribunal Act 2012 to hear appeals relating to land use and environmental matters with a mandate to provide environmental justice (Mauritius, ELUAT Act 2012, section 3(1)). Its mission is “to dispense effective environmental justice, to promote environmental rule of law and to ensure proper regulation of land use and planning norms”, and “To ensure the fair, consistent and effective resolution of cases involving the environment; Endeavour to achieve expeditious disposal of cases; Endeavour to resolve environmental and planning disputes through mediation; [and] Providing an avenue in cases of urgency and where there is a threat to the environment” (Mauritius, ELUAT, no date a).

As an environmental tribunal, ELUAT is a quasi-judicial body operating independently from the executive. However, it falls under the office of the Prime Minister as concerns the budget and staffing (Bhadain 2021a). ELUAT can develop its own rules and procedures, subject to the executive promulgating them through the Minister's regulations (Bhadain 2021b). The permanent positions of chairperson and vice-chairperson are appointed by an independent commission (Mauritius, ELUAT Act 2012, section 3(1)(a)). The other members of ELUAT do not have to be barristers, and are appointed by the Attorney General, after consultation with the Ministers for Environment, Housing and Local Government, on an ad hoc basis and for such a period as considered necessary (Mauritius, ELUAT Act 2012, sections 3(1)(c), 3(3)(a)).

The Tribunal members bring the specialist input and must be independent (Bhadain 2021b). Where the subject matter of an appeal relates to a technical field, the Attorney General may, on the recommendation of the chairperson, enlist the services of a suitable expert in the field, to act as member of the Tribunal on an ad hoc basis for such a period as they consider necessary (Mauritius, ELUAT Act 2012, section 3(4)).

ELUAT has jurisdiction over the entire island of Mauritius, adjudicating on the environmental decisions of the Minister of Environment, and the land use or planning decisions of local authorities (Mauritius, ELUAT Act 2012, section 4(1)). ELUAT handles 200 cases per year (Mauritius, ELUAT, no date b), and its caseload continues to increase. Apart from adjudication, ELUAT is also empowered to conduct mediations that would encourage amicable settlements between parties (Mauritius, ELUAT, no date c). ELUAT can order restoration and compensation of environmental damage (Mauritius, Environment Protection Act 2002, article 54(3)). Its orders are enforceable in the same manner as a District Court order (Bhadain 2021a). Persons can appeal against decisions of ELUAT before the Supreme Court of Mauritius on points of law (Mauritius, ELUAT Act 2012, section 5(10)(b)). However, since 2012 there have been several amendments geared towards restricting the



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categories of persons that can appeal against administrative decisions on permits and environmental impact assessments (Bhadain 2021b).

In Japan, the Environmental Dispute Coordination Commission, also known as the Kouchoi, is an external agency of the Ministry of General Affairs. It is modelled different from other relatively independent environmental tribunals, as it emphasizes a “settlement system” based on investigations and alternative dispute resolution conducted by its members, “instead of adversary proceedings” (UNEP 2016).

The national Pollution Dispute Coordination Commission is an administrative commission that facilitates the settlement of environmental pollution disputes through conciliation and adjudication. This is done through the Environmental Dispute Settlement System. In addition, it also coordinates mining, quarrying and gravel-gathering industries, and other industries including agriculture and forestry, in the general public interest (Japan, Ministry of Internal Affairs and Communications, no date).

The Pollution Dispute Coordination Commission has one chairperson and six commissioners, all of whom are qualified legal professionals and experts in various fields. They are appointed by the Prime Minister with the consent

of the National Diet, the Parliament of Japan, for a term of office of five years. In particular disputes, an academic expert may be appointed to conduct a specialized investigation. Overall, this structure ensures neutrality and independence of decisions, and encourages their harmonization with wider social interests (Japan, Ministry of Internal Affairs and Communications, no date).

There are also subnational or provincial versions of the Pollution Dispute Coordination Commission, called Prefecture Pollution Examination Commissions, established in Japan’s 47 prefectures. In addition, at the local government/municipal level, there are consultation services for environmental complaints, which, according to one report, handle some 100,000 applications per year, employing a total of over 11,000 staff (UNEP 2016).

The Environmental Dispute Coordination Commissions 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 industrial pollution and development (with the Government largely paying the compensation rather than the violator). A substantial benefit for those filing complaints is that there are no filing fees and the entire investigation process is paid for by the



Environmental Dispute Coordination Commissions. It is viewed as just, quick and cheap for the limited jurisdiction it has (UNEP 2016).

B. Decisionally independent environmental tribunals

Another type of environmental tribunal is one under the supervisory and operational control of another governmental entity or agency, and are therefore not stand-alone environmental tribunals per se. However, such environmental tribunals are still substantively independent in the sense that their decisions are independent and not reviewed by their supervisory governmental entities.

In Costa Rica, the Environmental Administrative Tribunal was formed pursuant to the Organic Law on the Environment 1995 and is a decentralized agency under the Ministry of the Environment and Energy. However, the Tribunal has exclusive authority and functional independence for the performance of its responsibilities. Their rulings are of the highest administrative order. Any resolutions it makes cannot be appealed and must be complied with (Costa Rica, Organic Law on the Environment 1995, article 103).

The Tribunal comprises three standing members and three substitutes that have experience in environmental matters

(Costa Rica, Organic Law on the Environment 1995, article 104). Members of the Tribunal must be professionals in environmental areas (which may not be law-related), and one standing member and their respective substitute must be a lawyer (Costa Rica, Organic Law on the Environment 1995, article 105).

The Tribunal has jurisdiction to hear complaints for violations of all environmental laws across the country (Organisation for Economic Co-operation and Development 2020). However, the Organic Law does not authorize the Tribunal with any power to make its own rules. Instead, under article 106 of the Organic Law, the Tribunal is required to comply with the procedures and rules for operation established in the Organic Law and the General Public Administration Law.

The Tribunal has a wide range of remedies at its disposal. It can impose fines and administrative sanctions for the elimination or mitigation of damage that has been caused. It can also take interim measures of protection according to the precautionary principle (Environmental Rights Database, no date). The Tribunal can order environmental remediation measures in the second instance if the initial administrative decision is appealed against (Organisation for Economic Co-operation and Development 2020). The Tribunal's actions are not limited to legal remedies.



For instance, in response to the use of agrochemicals by Costa Rica's pineapple industry, the Tribunal decided to develop a training programme including scientific and legal instruction on the environmental impacts of pineapple processing (Gro Intelligence 2017). This helped to increase awareness and support for changing practices in the industry to protect the environment (Environmental Rights Database, no date).

Cases filed with the Environmental Administrative Tribunal are increasing, at a rate of almost double each year (González Ballar 2021; Quesada 2021). However, Tribunal rulings are not always effectively enforced. A recent investigation published by the University of Costa Rica, found that a pineapple plantation in a wildlife refuge in northern Costa Rica which the Tribunal had ordered to shut down in 2010 remained in operation in the following year (Zúñiga 2011).

In this example, the tribunal is under a separate government entity, which could also be a ministry of justice or other ministry. However, there is another variation of decisionally independent environmental tribunal, whereby the environmental tribunal is part of a "super-tribunal" that amalgamates a number of smaller tribunals under it. Some examples include the Environmental Review Tribunal in Ontario, Canada, and the Victorian Civil and Administrative Tribunal and Western Australia State Administrative Tribunal in Australia. Such a model has been seen to have a number of benefits, including flexibility in judicial assignment, decisional consistency, and savings in staff and budget.

C. Captive environmental tribunals

Captive environmental tribunals are those under the administrative, fiscal and policy control of an agency whose decisions the environmental tribunal reviews (UNEP 2016). They are therefore presumed to not be independent of the policies, judgments and political agendas of their parent agency. The UNEP 2016 ECT Guide noted that although the "captive" label carries a negative connotation, this is not the case in all instances. The Environmental Appeals Board in the United States of America is a notable example of a captive environmental tribunal that is regarded as independent, professional and respected, showing that this type of environmental tribunal can operate effectively.

In the United States of America, the Environmental Appeals Board in the Environmental Protection Agency (EPA) serves as the appellate adjudicator of administrative cases arising under all environmental laws administered by the EPA (United States of America, EPA 2021a). It was created in 1992 and generally hears appeals against first instance decisions by the EPA Office of Administrative Law Judges or permit decisions by the EPA Regional Offices (UNEP 2016). In 2020, the EPA published a rule streamlining the procedure to permit appeals (United States of America, EPA 2020). Although the 2020 rule was intended to expedite

appeals by imposing deadlines and limits on extensions, it would also limit the Environmental Appeals Board's authority by preventing it from reviewing EPA decisions. Subsequently, in 2021, the EPA published a new rule that reversed the 2020 rule and reaffirmed the Environmental Appeals Board's independence from the EPA and authority to issue final decisions (United States of America, EPA 2021b; United States of America, EPA 2021c).

Other examples of captive environmental tribunals include the Office of the Appeals Convenor Environment Council in Western Australia (Western Australia, Environmental Protection Act 1986, section 107A), the Advisory Committee in the Solomon Islands (Solomon Islands, The Environment Act 1998, section 32) and the Environment Council in Papua New Guinea (Papua New Guinea, Environment Act 2000, section 17).

3.4. ENVIRONMENTAL OMBUDSMEN, PROSECUTORS AND COMMISSIONS

Environmental ombudsmen, prosecutors' offices and human rights commissions can make major contributions to resolving environmental conflicts, though they are not strictly ECTs (UNEP 2016).

A. Environmental ombudsmen

There are specialized environmental ombudsmen, deputy ombudsmen or environmental divisions of ombudsman offices in several countries including Austria, Greece, Hungary, Kenya and New Zealand (UNEP 2016). An ombudsman typically receives complaints from the public against a 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 European Union 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 a lack of expertise can lead to superficial, drawn-out investigations with no expert outcomes.

From 2007 to 2011, Hungary had the most comprehensive, powerful environmental ombudsman in the world – the Office of the Parliamentary Commissioner for Future Generations. It was unique because the office could issue binding resolutions for environmental problems (UNEP 2016) However, the legislature abolished the office after only four years, and merged it into a newly created Office of Hungarian Commissioner for Fundamental Rights (Hungary, Office of the Commissioner for Fundamental Rights of Hungary, no date a). The Ombudsman for Future Generations was transformed into a deputy



commissioner. At present, the Hungarian Ombudsman for Future Generations has the power to, inter alia, review and comment on national and local legislative proposals, and monitor policy developments and legislative proposals to ensure that they do not pose a severe or irreversible threat to the environment, thus causing possible harm to the interests of future generations. Furthermore, the Ombudsman has investigative powers and is authorized to produce official evaluative reports on the actions of and recommendations for public authorities. When necessary, the Ombudsman may also intervene in any public administrative court cases (Hungary, Office of the Commissioner for Fundamental Rights of Hungary, no date b). Though the powers of the Ombudsman have been reduced, the fact that this position exists is exceptional in itself – it is rare for any public institution in the world to centre its activities around environmental human rights and the rights of future generations.

Austria has Environmental Ombudsman (Umweltanwaltschaft) offices located in each of its nine *länder* or states, with the duty to represent the interests of nature conservation and the environment. They have all the usual powers and are also authorized in certain cases to bring cases complaints before Austria's administrative courts (UNEP 2016).

The Austrian Environmental Ombudsman has standing rights in fields pertaining to, inter alia, environmental impact assessments, waste management or nature protection (European Union e-Justice Portal 2016). As a formal party to the procedure, the task of the Ombudsman is to claim the observance of objective environmental law. In this capacity, the Ombudsman is competent to challenge administrative decisions in the abovementioned areas. However, the Austrian Ombudsman does not have standing in environmental liability procedures that are decided by the administrative courts, neither they can file complaints with the Constitutional Court (European Union e-Justice Portal 2016). In addition, they cannot issue enforceable decisions, unlike those issued by an ECT.

New Zealand has an independent, very active environmental ombudsman, the Parliamentary Commissioner for the Environment. This body has the power to investigate Government environmental efforts and environmental problems, compel the production of information whether public or not, summon people under oath, and report to and advise the House of Representatives and recommend law reforms. Like all ombudsman offices, the Parliamentary Commissioner for the Environment can reach conclusions and make recommendations, but does not have enforcement powers (UNEP 2016).

Kenya has a National Environmental Complaints Committee, which replaces the former Public Complaints Committee. It aims to improve public access to environmental justice by providing a forum for environmental conflict resolution

and contributing to environmental policy. Thus, it facilitates alternative dispute resolution for environmental disputes and can issue recommendations to the Cabinet Secretary (Kenya, National Environmental Complaints Committee, no date).

On a regular basis, the National Environmental Complaints Committee investigates complaints or allegations regarding the condition of the environment in Kenya and suspected cases of environmental degradation. Pursuant to this, it has conducted investigations throughout the country and issued recommended solutions that are tailored to each locality. It is also empowered to bring public interest litigation environmental claims on behalf of civil society (Kenya, National Environmental Complaints Committee, 2018).

Environmental ombudsman offices are attractive because they are paid for by governments 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's requirements for access to justice (UNEP 2016).

B. 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. The International Network for Environmental Compliance and Enforcement develops and implements practical and innovative activities that strengthen environmental compliance and enforcement



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at all levels of government. The Network includes environmental regulators, investigators, prosecutors, judges, and employees of international environmental and development organizations.

In several countries, there are specialized environmental prosecutors assigned exclusively to environmental laws and cases. For example, most countries in Latin America, both with and without ECTs, have specialized environmental prosecution offices (UNEP 2016).

Environmental prosecutors in both Latin America and in Europe have created networks, respectively the Rede Latino-Americana de Ministerio Público Ambiental or REDEMPA, and the European Network of Prosecutors for the Environment, to exchange information and experiences, build capacity, hold training programmes, and plan joint activities (UNEP 2016).

Brazil has exemplary environmental prosecutors to investigate and prosecute criminal and civil complaints on behalf of the people and the environment. 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. Violation of this agreement can result in possible media exposure and court filing/proceedings. In these cases, the prosecutors act very much like an ECT, because they are deciding the outcome of an environmental case. As the process takes place outside the public eye and without judicial oversight, a caution is that it could lead to inconsistencies between regions (more cases in one area depending on the personal

proactivity of the prosecutor), suboptimal agreements (faster than the regular judicial case, but not as effective), or using the power of prosecution to gain personal visibility.

The United States of America also has specialized environmental prosecutors at both federal and state levels. For example, the Department of Justice has an Environmental Crimes Section with 43 full-time environmental prosecutors that bring criminal cases against private and public parties for violating the nation's laws protecting the environment (UNEP 2016). From 1 October 1998 to 30 June 2021, the Environmental Crimes Section had concluded criminal cases against more than 1,787 individuals and 552 corporate defendants, leading to an overall issuance of 1,117 years of incarceration and \$4.24 billion in criminal fines and restitution (United States of America, Department of Justice 2021). These cases have set the contemporary standards for natural resources damages and funding for ecological restoration.

C. Human rights commissions

National human rights institutions

A human rights commission is a national or subnational government body set up to investigate abuses of, hold hearings on and protect human rights. Some human rights commissions cover environmental rights, particularly if the country's constitution includes a right to a healthy environment or right to life.

As noted in the UNEP 2016 ECT Guide, though human rights commissions may operate like quasi-courts by holding hearings, most only have the power to make recommendations. Moreover, they do not specialize in environmental issues. Thus, these human rights commissions cannot be considered as ECTs. However, since human rights commissions can move to resolve environmental problems, they do provide a valuable service in situations where environmental enforcement agencies and courts are weak or inactive, and where there is no ECT in the country.

There are also national human rights commissions addressing environmental issues, for instance the Comisión Nacional de los Derechos Humanos in Mexico (UNEP 2016).

The Zimbabwe Human Rights Commission has powers to investigate and give recommendations on human rights violations, and includes a Thematic Working Group on environmental rights (Zimbabwe Human Rights Commission 2020a). Some of the tasks of the Zimbabwe Human Rights Commission include the following:

- receiving complaints of human rights abuses and taking appropriate action;
- protecting people against abuse of power and maladministration by the State, public institutions and officials of those institutions;





- making recommendations to Parliament on the best ways of observing, promoting and protecting human rights and freedoms;
- investigating the conduct of any authority or person suspected of violating any of the human rights provided in the Constitution's Declaration of Rights; and
- taking necessary action to assist victims of human rights violations to receive justice (Zimbabwe Human Rights Commission 2020b).

The Commission has produced one investigative report on violations of environmental rights, in the case of *Mazvihwa Community v. Murowa Diamonds (Pvt) Ltd.* (2017). Two hundred households living near the Murowa diamond mine complained about their houses cracking due to the blasting at the mine, about dust emissions and noise pollution. After desk research, interviews and on-site inspection, the Commission recommended Murowa Diamonds to facilitate the relocation of the affected households and to engage an independent consultant to assess and monitor the effects of blasting and dust emissions to the houses and the health of the community (Zimbabwe Human Rights Commission 2020c).

International human rights treaty bodies

International human rights treaty bodies play an important role in monitoring implementation of international human rights law, making recommendations to State parties, and providing legal decision on individual cases or complaints filed to them. In recent years, treaty bodies have received several environment and climate change-related complaints and issued a decision. These bodies, although not the same as national courts, often issue landmark decisions on environmental issues.

Regional human rights bodies

The Inter-American Commission on Human Rights, Inter-American Court of Human Rights and African Commission on Human Rights are notable examples of regional

commissions that address the relationship between environmental protection, human rights and Indigenous Peoples rights (Inter-American Commission on Human Rights 1983; Inter-American Commission on Human Rights 1985; Social and Economic Rights Action Center and the Center for Economic and Social Rights 2002; Inter-American Court of Human Rights 2017).

For example, on 6 February 2020, the Inter-American Commission on Human Rights handed down its unprecedented judgment for the Indigenous Communities of the Lhaka Honhat Association (*Our Land*) v. Argentina. In this case, the claimants comprised several communities of Indigenous People of the Province of Salta. They sought recognition and protection of their lands from illegal logging and cattle ranching because these activities have compromised forest resources, biodiversity and their access to food and water. Pursuant to article 26 of the American Convention on Human Rights, the Inter-American Court of Human Rights considered the rights to a healthy environment, adequate food, water, and cultural identity. The Court held that Argentina had in fact violated the claimants' collective property rights, political rights and judicial guarantees, and economic, social, cultural and environmental rights. These human rights underpin the Indigenous populations' rights to, inter alia, resettlement and access to adequate productive lands. The Court ordered Argentina to delimit, demarcate and title 132 Indigenous communities, and relocate the Creole population outside the Indigenous territories (Inter-American Court of Human Rights 2020).





CONCLUSION



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4. CONCLUSION

In contrast to the rapid increase of ECTs observed in the UNEP 2016 ECT Guide, the current trend of ECTs is steady growth, 67 countries now have operational ECTs (appendix A). Among other reasons, this more steady growth of ECTs is due to the increased effectiveness of existing ECTs; the prioritization of environmental issues in the general courts, the presence of judges who are well versed in environmental matters, and the increase in the number of environmental cases in general courts, as more people become convinced that environmental justice can be achieved through existing court systems.

Our research indicated that the documentation of both ECTs and environmental cases is still weak across the world. Thus, there is an urgent need to enhance documentation efforts, which are crucial to track the development and performance of ECTs. Such data should also be made easily accessible to the public. Under the coordination of UNEP, stakeholders can work together to fulfil these needs and increase public participation through methods such as research, meetings, workshops and seminars.

ECTs play an important role in providing access to justice and remedies. ECTs that are more accessible and flexible, such as the mobile courthouses used in some countries, may help mitigate the lack of access to justice. ECTs also strengthen judicial systems and ensure legal accountability. Not only do ECTs explain the workings of environmental law to the public, but they also provide the capacity for the legal exploration and resolution of environmental issues,

especially with a view of providing a coherent and sound solution. In some cases, ECTs have spurred innovation and legal reform.

ECTs embody several good practices that make them the most suitable avenue to provide environmental justice. Although commendable efforts have been made to provide environmental justice by assigning environmental cases to general courts, and training judges from general courts on environmental law, these are still insufficient to perfectly replicate the adjudication that an ECT provides. Among other gaps, general courts may not be able to provide the same levels of independence and flexibility, alternative dispute resolution support, and diverse pool of expert decision makers. Thus, ECTs still provide an edge given that a variety of complex, multidisciplinary issues constitute the crux of environment-related cases, including climate change, economic changes, political shifts and resource insecurities. That said, ECTs and general courts alike must be prepared to face these challenges. Therefore, it is crucial for ECT good practices to be shared and adapted in the design and operation stages.

Finally, judicial training and networking should not be overlooked. These efforts can develop adjudicators' perspectives towards environmental cases. Since the UNEP 2016 ECT Guide was published, more judicial networks have been established globally. This has made judges more aware of the demands, impacts and visibility of their work, thereby spurring them to increase their environmental law capabilities. Apart from enhancing the quality of environmental law jurisprudence at both national and transnational levels, the presence of more competent judges is also cause for increased public trust and participation in environmental justice.



APPENDICES



Appendix A: Number of operational ECTs

Country	Environmental courts	Environmental tribunals
Antigua and Barbuda	0	2
Argentina	1	0
Australia	7	5
Austria	11	0
Bangladesh	4	0
Belgium	16	0
Belize	1	0
Bolivia	9	0
Botswana	0	4
Brazil	73	27
Bulgaria	1	0
Burundi	1	0
Canada	0	32
Chile	3	0
China	1,353	0
Denmark	0	3
Dominica	0	1
El Salvador	4	0
Fiji	0	2
Finland	2	0
France	54	0
Gambia	1	0
Germany	1	0
Ghana	16	0
Grenada	0	1
Guyana	0	2
Iceland	1	0
India	0	5

Country	Environmental courts	Environmental tribunals
Ireland	1	3
Italy	1	0
Jamaica	0	3
Japan	0	48
Kenya	27	2
Kiribati	1	0
Lesotho	1	0
Madagascar	3	0
Malaysia	134	0
Malta	0	1
Marshall Islands	1	0
Mauritius	0	1
Nauru	0	2
Netherlands	1	0
New Zealand	2	1
Nigeria	12	1
Niue	1	0
Pakistan	0	5
Palau	1	0
Papua New Guinea	1	1
Peru	0	4
Philippines	117	0
Republic of Korea	0	17
Saint Kitts and Nevis	0	2
Saint Lucia	0	2
Saint Vincent and the Grenadines	0	1
Samoa	0	1
Sierra Leone	1	0
Solomon Islands	0	1



Country	Environmental courts	Environmental tribunals
South Africa	0	1
Spain	1	0
Sweden	6	0
Tonga	1	1
Trinidad and Tobago	1	0
Tuvalu	1	0
United Kingdom of Great Britain and Northern Ireland	5	0
United States of America	3	39
Vanuatu	1	0
Zambia	0	11
TOTAL	1,884	232
	2,115	

Appendix B: Pending/potential ECTs

Country	Pending/potential ECTs
Belgium	Three potential environmental courts: chambers specializing in criminal environmental cases in the First Instance Courts of East Flanders, Henegouwen and Limburg.
Burkina Faso	Possible environmental court (<i>ole judiciaire spécialisé</i>) or specialization of general court judges.
Ethiopia	Five environmental tribunals discontinued – zonal benches were discontinued due to financial and human resource constraints.
Ireland	One potential environmental court: Planning and Environmental Law Court as a separate list in the High Court.
Kenya	Pending plans to have at least one environmental court in all 47 counties.
Mauritius	Regulatory Authorities Appeal Tribunal for appeals against regulatory decisions in the supply of water.
Turkey	Plans to develop environmental courts have been announced.
Zimbabwe	Officials are lobbying the Judicial Service Commission to establish a specialized branch within the Magistrate Court system which will be focused on environmental law.



Appendix C: List of authorized but not established ECTs

Country	Authorized but not established ECTs
Gambia	Two environmental courts announced for Magistrates' Courts (Banjul and Brikama) are authorized but not established.
Lesotho	Environmental Tribunal (Lesotho, Environment Management Act 2008) and Water Tribunal (Lesotho, Water Act 2008) are authorized but not established.
Liberia	A 2002 law authorized both an Environmental Administrative Court (trial) and an Environmental Court of Appeal (appellate); both are authorized but not established.
Malawai	The Environmental Management Act 2017 established an Environmental Tribunal. The Act has entered into force, but the Environmental Tribunal is authorized but not established. The Water Resources Act No. 2 of 2013 introduced a Water Tribunal, but it is unclear whether this has been established.
Mexico	One ECT is authorized but not established.
Namibia	A Water Tribunal is planned (Namibia, Water Resources Management Act 2013), authorized but not established.
Niger	Thirty-six Rural Land Tribunals (Tribunaux du Foncier Rural), one for each district of Niger, were announced in 2004, but are authorized but not established.
Panama	Two environmental courts are authorized but not established.
Portugal	Administrative courts may be split into specialized jurisdiction sections to handle public procurement sections and urbanization and building, environment and spatial planning sections (Portugal, Lei No. 114/2019 de 12 de setembro [2019], article 9(5)), but this has not yet been implemented.
Rwanda	An environmental tribunal was authorized by legislation in 2003, but is still not established.
Uganda	One environmental tribunal is authorized but not established.
United Arab Emirates	One ECT is authorized but not established.
United Republic of Tanzania	A National Environment Appeals Tribunal was authorized by legislation in 2004, but is still not established.

Appendix D: List of discontinued ECTs

Country	Discontinued ECT(s)
Austria	One environmental court or Umweltsenat was designated for environmental impact assessment cases until 2014.
India	Five zonal benches which were environmental tribunals have been discontinued due to financial and human resource constraints.
South Africa	Two low-level criminal environmental courts operated successfully, mostly on fisheries cases, in Hermanus (2003–2006) and Port Elizabeth (2004– 2009), but were discontinued.
Sudan	While online sources between 1997 and 2010 confirmed the existence of a State Environmental Court in Khartoum State and two other states, no subsequent information can be found. <i>Sudan: First State of Environment and Outlook Report 2020</i> (UNEP and the Higher Council for Environment and Natural Resources in Sudan 2020) does not mention these courts, which are thus believed to have been discontinued.



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Appendix F: Research scope and methodology

This UNEP 2021 ECT Guide is intended to update the data on ECTs around the world published in the UNEP 2016 ECT Guide. It resulted from an empirical and normative study focusing on the development of ECT institutions in various jurisdictions, countries and regions around the world. The study covered relevant developments in 197 countries from 1 January 2016 to 1 August 2021.

This study was organized by UNEP, which assigned the main research components to the Asia-Pacific Centre of Environmental Law at the National University of Singapore. The University of Ghent was assigned to assist in the study of Europe and Africa, while the Asia-Pacific Centre of Environmental Law covered all other regions.

Based on the 1972 Stockholm Declaration on the Human Environment, “the environment” was defined as natural and man-made physical surroundings upon which humanity is entirely dependent in all its activities. An “environmental case” was defined as any case relating to the natural and man-made physical surroundings upon which humanity is entirely dependent in all its activities.

This study was conducted in four phases:

The first phase, which focused on data collection, took place from February to June 2021. This process made use of primary sources: an online questionnaire, interviews, legislation and other policy documents. Respondents for the questionnaire and interviews are listed in appendix E: Contact list of ECT and access to justice experts.

A. Questionnaire

The online questionnaire was designed by the Asia-Pacific Centre of Environmental Law, with inputs from the University of Ghent, UNEP, and George Pring and Catherine Pring. The questions varied according to the type of ECT a country had: operational ECT(s), pending or potential ECT(s), authorized but not established ECT(s), discontinued ECT(s), or no ECT(s). An example of the questionnaire can be found <https://bit.ly/3muMZyQ>.

Our researchers contacted various legal practitioners and experts on environmental law, a portion of whom completed the questionnaire. A link and short set of instructions were shared with those respondents willing to take part. Fifty-five direct responses to the questionnaire were used for this guide.

B. Online interviews

Semi-structured interviews were conducted using guiding questions based on the questionnaire. Our researchers contacted various legal practitioners and experts on environmental law, a portion of whom agreed to participate in online interviews. Due to the COVID-19 pandemic, all the interviews were held online over Zoom.

Data was also collected from secondary sources, including scholarly literature published between 2016 and 2021. For this, thorough desktop research was conducted by our researchers, who then compiled their findings according to the structure of the questionnaire. Desktop research yielded data for 102 countries.

The second phase, which focused on analysing data, took place from June to August 2021. Different data sets from the collection phase were triangulated to synthesize specific conclusions. The UNEP 2016 ECT Guide was used as a template for data analysis methods.

The third phase took place from July to September 2021, during which time the report was written. Our findings were compiled and presented in various forms (i.e. a narrative, tables, graphs and diagrams) to enhance the readability and comprehensiveness of the study.

The final phase of the study took place in September 2021. During this phase, two drafts of the report were reviewed by the review board, one after the other, with a week-long editing period between.



Appendix G: List of interviews

Date	Name	Current Designation or Affiliation
4 April 2021	Heather Gibbs	Chief Review Officer, Environmental Protection Tribunal of Canada
7 April 2021	Delphine Agoguet	International Relations Officer, General Inspectorate of Justice, Ministry of Justice, France
12 April 2021	Jan Van den Berghe	Vice-President, Court of First Instance of East Flanders
20 April 2021	Syed Mansoor Ali Shah	Former Chief Justice, Supreme Court of Pakistan
22 April 2021	Irum Ahsan	Asian Development Bank, Asian Judges Network on Environment
23 April 2021	Thomas S. Durkin	Presiding Judge, Environmental Division of the Vermont Superior Court
26 April 2021	Mark Haddock	Former attorney for the British Columbia Forest Practices Board (retired)
29 April 2021	Marc Clément	Administrative Court of Lyon
30 April 2021	Guy Kalasi	Kinshasa University; United Nations Development Programme Programmes Officer in Democratic Republic of the Congo
5 May 2021	Mohamed Ali Mekouar	Centre International de Droit Comparé de l'Environnement, Africa
9 May 2021	Laurie Newhook	Former Chief Judge of the Environment Court of New Zealand (retired)
9 May 2021	Michael Rackemann	Planning and Environment Court of Queensland
10 May 2021; 4 July 2021	Merideth Wright	Distinguished Judicial Scholar, Environmental Law Institute
11 May 2021	Darrell Le Houillier	Chairperson, Environmental Appeal Board, Forest Appeals Commission; Oil and Gas Tribunal of British Columbia
12 May 2021	Jerry V. DeMarco	Commissioner of the Environment and Sustainable Development, Canada
12 May 2021	Paul Muldoon	Former Vice-Chair of the Environmental Review Tribunal of Ontario; Associate Chair of the Assessment Review Board of Ontario; Adjunct Professor of Environmental Law, University of Toronto
13 May 2021	Ricardo Cintra Torres de Carvalho	State of São Paulo Court of Justice
14 May 2021	Kathie A. Stein	EPA Environmental Appeals Board, United States of America

Date	Name	Current Designation or Affiliation
17 May 2021	Brian Preston	Judge, LECNSW
17 May 2021	George W. Pring and Catherine Pring	University of Denver
18 May 2021	Gloria Estenzo Ramos and Ron Gutierrez	Attorney; Professor, both based in Philippines
20 May 2021	Jonathan Liljeblad	Professor, College of Law, Australia National University
20 May 2021	Kars J. de Graaf	Professor, Public Law and Sustainability, University of Groningen
20 May 2021; 23 June 2021	Matthew Baird	Asian Research Institute for Environmental Law
20 May 2021	Nathaniah Jacobs	International Institute for Environment and Development
21 May 2021	César Rodríguez-Garavito	School of Law, New York University
23 May 2021	Gregorio Rafael P. Bueta	Asian Development Bank
24 May 2021	Jolene Lin	Associate Professor, National University of Singapore
27 May 2021	Anton Mingzhi Gao	National Taiwan University
3 June 2021	Zhao Yuhong	Chinese University of Hong Kong
16 June 2021	Khaled Hesham Elaiat	Ministry of Justice, Egypt
4 July 2021	Ritwick Dutta	Legal Initiative for Forest and Environment, India
9 July 2021	Caiphas Brewsters Soyapi	Senior Lecturer, Faculty of Law, North-West University, South Africa
24 July 2021	Bambang Mulyono	Head of the Judges Education and Technical Training Centre, Legal and Court Training Agency, Supreme Court of Indonesia
23 August 2021	Suntariya Muanpawong	Chief Judge of the Justice Research Division; Environmental Law Division, Supreme Court of Thailand
18 October 2021	Françoise Thonet and Caroline Henrotin	Judges in Belgium



Appendix H: Review board members

Name	Position	Email
Anders Bengtsson	Former Senior Judge, Land and Environment Court of Växjö	judge.bengtsson@telia.com
Ben Boer	Professor Emeritus, School of Law, University of Sydney	ben.boer@sydney.edu.au
Beatriz Garcia	Senior Lecturer, School of Law, Western Sydney University	b.garcia@westernsydney.edu.au
Catherine Pring	Director, Global Environmental Outcomes LLC (GEO)	kittypring1@gmail.com
George W. Pring	Emeritus Professor, University of Denver	rpring@law.du.edu
Qin Tianbao	Professor, Director of the Research Institute of Environmental Law; Associate Dean for School of Law, Wuhan University	fyqtb@whu.edu.cn
Yacouba Savadogo	Technical Adviser of the Ministry of Environment, Green Economy and Climate Change, Burkina Faso; Coordinator of the African Network of Francophone Environmental Lawyers	savadogoy7@gmail.com
Laode M. Syarif	Executive Director of the Partnership for Governance Reform in Indonesia	syariflaw@gmail.com

Appendix I: Networks of environmental judges

Region	Network
Global	Global Judicial Institute on the Environment (https://www.iucn.org/commissions/world-commission-environmental-law/our-work/global-judicial-institute-environment)
	International Network for Environmental Compliance and Enforcement (https://inece.org/)
Africa	Africa Judicial Educators Network on Environmental Law
Asia, including South-East Asia	Asian Judges Network on Environment (https://www.ajne.org/)
Europe	EnviCrimeNet (https://www.envicrimenet.eu/)
	European Union Forum of Judges for the Environment (https://www.eufje.org/)
	European Union Network for the Implementation and Enforcement of Environmental Law (https://www.impel.eu/)
	European Network of Prosecutors for the Environment (https://www.environmentalprosecutors.eu/)
	French Society of Judges and Prosecutors for Environmental Law and Environmental Health Law



Appendix J: Regional report summaries

1. Africa

Country	Environmental courts	Environmental tribunals
Benin	0	0
Botswana	0	5
Burundi	1	0
Cabo Verde	0	0
Cameroon	0	0
Egypt	0	0
Eswatini	0	0
Gambia	1	0
Ghana	16	0
Ivory Coast	0	0
Kenya	27	2
Lesotho	1	0
Madagascar	3	0
Mali	0	0
Mauritius	0	1
Mozambique	0	0
Nigeria	12	1
Rwanda	0	0
Sierra Leone	1	0
South Africa	0	1
Sudan	0	0
Zambia	0	11
TOTAL	62	21
Algeria, Angola, British Indian Ocean Territory, Central African Republic, Chad, Comoros, Congo, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, French Southern Territories, Gabon, Guinea, Guinea-Bissau, Liberia, Libya, Malawi, Mauritania, Mayotte, Morocco, Niger, Réunion, Saint Helena, Sao Tome and Principe, Senegal, Seychelles, Somalia, South Sudan, Togo, Tunisia, Uganda, United Republic of Tanzania, Western Sahara		No response; 0 assumed

Important updates since 2016

Country	Update
Botswana	An Appeals Committee for appealing decisions made by the Department of Environmental Affairs was established in 2019.
Burundi	A Special Environmental Court for Land and Other Property existed in 2016, but was not reported.
Ethiopia	A new environmental tribunal has been proposed and is expected to be operational in 2023. This environmental tribunal has been inspired by others in India, Kenya and New South Wales. There is an emphasis on efficiency and practical provisions such as alternative dispute resolution, interim relief, the use of electronic communications and simple rules of procedure.
Gambia	The two environmental courts announced for other Magistrates' Courts (Banjul and Brikama) remain authorized but not established.
Ghana	Sixteen Land and Environmental Divisions of the High Court in Ghana existed in 2016, but were not reported in the 2016 study. They mainly handle land matters.
Kenya	Since 2016, the number of Environment and Land Courts in the Kenyan counties increased from 15 to 26. The number of its judges increased from 34 (2017) to 51 (2021). Kenya has also subsumed the National Environment Tribunal (NET) under its judiciary.
Lesotho	The Land Division of the High Court existed in 2016, established through section 74 of the Land Act 2010, but was not reported.
Madagascar	Since 2016, there has been a Special Court for the Fight against Rosewood and/or Ebony Trafficking in Madagascar, governed by Law No. 056 of 2015 and two Anti-Corruption Poles, created by Law No. 021 of 2016, that handle some environmental offences.
Malawi	The Environmental Management Act 2017 established an Environmental Tribunal. The Act has entered into force, but the Environmental Tribunal is still not established.
Nigeria	Nigerian Urban and Regional Planning Tribunals existed in 2016, but were not reported. Furthermore, in 2016, five mobile courts were inaugurated in Lagos state to handle environmental and traffic offences "on the spot", including imposing fines. Since then, some of these mobile courts seem to have become non-functional due to logistical and funding problems.
Sierra Leone	The Lands, Property and Environment Division was created pursuant to the Constitutional Instrument No. 4 of 2019 and a High Court Division Order.
Zambia	The Lands Tribunal Act 2010 established the Zambian Planning Appeals Tribunals and Land Tribunal.
Zimbabwe	The Environmental Management Agency is lobbying with the Judicial Service Commission to establish, albeit administratively not by legislation, a specialized branch within the Magistrates Court system which will focus on environmental law. The Zimbabwe Human Rights Commission has powers to investigate and give recommendations on rights violations, including environmental rights. The number of violations has increased as offenders take advantage of the need for new investment, as well as limited enforcement resources, to carry out illegal activities.

**Prominent ECT type(s) in the region**

From the case law examined and respondents' comments, it appears that the prominent environmental concerns in Africa include waste, illegal mining, water pollution, inadequate environmental impact assessments for infrastructure projects, illegal logging, and wildlife trafficking. However, most African countries do not yet have ECTs

Where present (even in Kenya, which is lauded as having the most developed ECT systems in the continent), the recurring pattern seems to be that the institutions and/or their staff are not managing environmental cases adequately. A lack of political will has been cited as the root cause, leading to problems including corruption and inadequate institutional funding that hinder the development of environmental jurisprudence, investigation and enforcement efforts on the ground. The general lack of funding and resources continues to be a major problem, which has been exacerbated by the economic ills of the COVID-19 pandemic.

2. The Caribbean

Country	Environmental courts	Environmental tribunals
Antigua and Barbuda	0	2
Bahamas	0	0
Barbados	0	0
Cuba	0	0
Dominica	0	1
Dominican Republic	0	0
Grenada	0	1
Haiti	0	0
Jamaica	0	3
Saint Kitts and Nevis	0	2
Saint Lucia	0	2
Saint Vincent and the Grenadines	0	1
Trinidad and Tobago	1	0
TOTAL	1	12

Important updates since 2016

Country	Update
Antigua and Barbuda	The Appeals Committee established a second environmental tribunal under the Environmental Protection and Management Act 2019.
Trinidad and Tobago	The Environmental Commission's jurisdiction in subject matter was widened by Planning and Facilitation of Development (Amendment) Bill 2018. Theoretically, it handles appeals of certain decisions of the planning authority, but the sections expanding jurisdiction as such had not entered into force even in 2019, the date of the most recent available information. This embodies the larger problem that although the Environmental Management Act has a built-in mechanism for expanding the jurisdiction of the Commission, efforts in this regard have not been forthcoming. For example, there are numerous sectoral statutes on the environment over which the Commission has no jurisdiction, such as legislation relating to oil pollution. Judicial review of government action towards the environment is also not within the purview of the Commission. Neither, it appears, does the Commission have jurisdiction over environmental offences.

Prominent ECT type(s) in the region

Environmental tribunals are the most common type of ECT in the Caribbean region. However, more research is needed to uncover the reason behind the preference for environmental tribunals over environmental courts.

Poor enforcement of environmental primary legislation in numerous Caribbean countries is worth noting. In Saint Lucia, many of the environmental laws do not have supporting regulation; when existent, they may be inadequate for the effective implementation or enforcement of primary legislation. Enforcement problems due to the lack of financial and human resources have also been reported in Haiti, Saint Vincent and the Grenadines, and Jamaica. In Jamaica, enforcement against entities that manage facilities such as sewage treatment plants is even more challenging – even if they are poorly managed, shutting them down would result in greater environmental degradation. Although environmental laws do not directly

relate to the internal organization and functioning of ECTs, they still have a palpable effect on environmental adjudication in ECTs because they either form or qualify the merits of environmental cases. Thus, the (lack of) proper operationalization and enforcement of environmental laws should also be considered when examining ECT activity in the Caribbean.

Apart from ECTs, alternative dispute resolution is encouraged in Antigua and Barbuda. The Environmental Protection and Management Act obliges the Department of Environment to facilitate cooperation among various stakeholders, including the encouragement and use of alternative dispute resolution to avoid or expeditiously resolve disputes. This would allow more disputes to be settled outside the courtroom, thereby reducing the caseload for the environmental courts.



3. Central America

Country	Environmental courts	Environmental tribunals
Belize	0	1
Costa Rica	0	1
El Salvador	4	0
Guatemala	0	0
Honduras	0	0
Panama	0	0
TOTAL	4	2

Important updates since 2016

Country	Update
El Salvador	The environmental courts that were previously reported in the UNEP 2016 ECT Guide as being authorized but not established have since been established. According to our contact, in 2017, the Second Instance Environmental Court and two First Instance Environmental Courts (Juzgado Ambiental de Santa Ana and San Miguel) began to operate.
Guatemala	Specialized environmental courts and an environmental prosecutor's office were allegedly created as part of an environmental justice reform project by USAID between 2015 and 2017, whereby USAID provided significant funding to develop the legal system at both the court and prosecutorial level. Programmes to train prosecutors and judges on environmental matters, and systems to increase transparency and accountability, were also set up. A 2017 USAID report demonstrated promising results, with increased sentencing of environmental crimes (USAID 2017). However, desktop research yielded no evidence of this. Furthermore, contact with the law firm Mayora & Mayora indicated that there is in fact no specialized ECT; it seems that all (criminal) judges and general courts have jurisdiction over environmental matters, since those issues are prosecuted under the regular courts. That said, environmental cases are on the rise, particularly after the 2017 USAID project.

Prominent ECT type(s) in the region

Most countries in this region do not have ECTs.

Belize and Costa Rica are the only two countries with environmental tribunals, although they are starkly different from each other. The Belize Environmental Tribunal is arguably weaker in both power and jurisdiction: it cannot award remedies or order enforcement measures. It may only be convened when a developer has submitted a written appeal to the Minister against the decision of the Department that a project or activity cannot proceed.

Contrastingly, the Environmental Administrative Tribunal of Costa Rica is a decentralized agency under the Ministry of the Environment and Energy, with exclusive authority and functional independence for the performance of its responsibilities. Its rulings are of the highest administrative order, and any resolutions it makes cannot be appealed, and must be obligatorily fulfilled. It has authority throughout the entire country and has jurisdiction to hear complaints for violations of all laws protecting the environment and natural resources. Significantly, its decisions are final and may not be appealed. It can order environmental remediation measures and can impose fines and/or

administrative sanctions. That said, it has no power to make its own rules and its rulings may not be consistently enforced in reality.

In El Salvador, the Supreme Court of Justice must provide the support required by the Environmental Courts (i.e. environmental experts). Furthermore, Environmental Court judges have the power to request experts from public institutions and the latter shall collaborate (El Salvador, La Asamblea Legislativa de la República de El Salvador 2020, article 3). Environmental Courts have complete geographical jurisdiction and can adjudicate civil cases. They may issue preventative (i.e. suspend industrial projects for a specific period), restorative and/or compensatory orders. Appeals must be made in the Environmental Chamber (Cámara Ambiental). However, elected judges for the Environmental Courts need not have a specialization in environmental law.

As noted in the UNEP 2016 ECT Guide, the two First Instance Courts of Panama were authorized in the General Law of the Environment. However, they remain unestablished. In practice, most environmental litigation in Panama takes the form of administrative action against Government decisions, or human rights litigation.

4. North America

Country	Environmental courts	Environmental tribunals
Canada	0	32
United States of America	3	39
TOTAL	3	71



Important updates since 2016

Country	Update
Canada	The biggest development is the consolidation of environmental tribunals in Ontario Province in 2021. The Accelerating Access to Justice Act 2021 amalgamates five environmental tribunal clusters into a single Ontario Land Tribunal, revoking legislation that established other independent bodies. This is coupled with the deliberate reduction of the Tribunal panel’s experts and reducing the stringency of the panel member appointment process. These changes were motivated by the idea that adjudicators with specialized, environmental expertise are not necessary, since “a good adjudicator can adjudicate anything”. In turn, generalizing the adjudication process and reducing the number of experts involved results in cheaper, more efficient court processes. In theory, this would increase access to (environmental) justice. However, in practice, this consolidation dilutes the environmental efficacy of the tribunal.
United States of America	Some jurisdictions in the United States of America have developed and now apply one or more forms of alternative dispute resolution for environmental disputes. Vermont State mandates it in all cases. The Environmental Appeals Board offers it through a judge who is not sitting on a given case. By comparison, Canada does not use alternative dispute resolution for environmental dispute resolution.

Prominent ECT type(s) in the region

Environmental tribunals are prominent in this region.

In Canada, the federal and provincial environmental tribunals deal with only a small proportion of the environmental litigation that takes place; most cases are litigated in unspecialized regular courts as generic civil cases or criminal prosecutions. The federal Environmental Tribunal has narrow jurisdiction, only over appeals regarding administrative monetary penalties and compliance orders issued by federal agencies. However, there are other federal administrative tribunals dealing with specific environmental matters, such as the Canadian Energy Regulator and the Ontario Energy Board.

In the United States of America, the predominant environmental tribunal is the Environmental Appeals Board. It is not completely independent from the Government but strives to be an impartial decision maker on administrative appeals under all the major environmental statutes administered by the EPA; for example, it strictly prohibits ex parte communications in cases with individual parties. At any one time, the Environmental Appeals Board comprises four well-qualified and outstanding judges who have both relevant background and genuine interest in environmental protection and justice. That said, the broader Federal court system does not require prior experience or scientific training for judges.

5. South America

Country	Environmental courts	Environmental tribunals
Argentina	1	0
Bolivia	9	0
Brazil	73	27
Chile	3	0
Colombia	0	0
Ecuador	0	0
Guyana	0	2
Mexico	0	0
Paraguay	0	0
Peru	0	4
Uruguay	0	0
TOTAL	86	33

Important updates since 2016

Country	Update
Argentina	The Environmental Trial Secretariat and the Office are now operational. Theoretically, they can deal with environmental cases from any province, but the competence is too limited given that it is a court of last resort.
Chile	In September 2017, the First Environmental Court became operational (the Second and Third Environmental Courts were already operational by then). There have also been some important changes to national laws that have impacted the operation of ECTs. For example, Law No. 20920 created an extended producer liability mechanism that falls within the environmental courts' jurisdiction, allowing such claims to be brought before ECTs against the pronouncement of the Secretary of Environment.



Country	Update
Colombia	Bill No. 047 of 2020 for the creation of ECTs was proposed, but it is unclear whether it has been passed. It proposes five environmental courts domiciled in each region, the location of each determining their respective jurisdiction and territorial competence. Separately, the Special Jurisdiction for Peace was created in 2016, including a special Ethnic Commission (Comisión Étnica) and Territorial and Environmental Commission (Comisión Territorial y Ambiental). Its competence is limited to prosecuting environmental crimes as an international crime within the context of Colombian internal armed conflict.
Ecuador	Despite claims in the UNEP 2016 ECT Guide of a planned pilot environmental court, there is no evidence of such having been set up.
Guyana	The Environmental Appeals Tribunal, a court of record to hear appeals of decisions of the country's Environmental Appeals Board, is now operational.
Paraguay	Despite claims in the UNEP 2016 ECT Guide of two environmental courts, no evidence of these could be found.

Prominent ECT type(s) in the region

Environmental courts are a prominent type of ECT in the South American region. These environmental courts are typically independent from the executive, and their powers can be extensive, ranging from issuing fines to prison sentences. Chile, the State most developed in environmental justice in the region, is a prime example of this. Most environmental disputes are either over public administration (i.e. citizens' claims against the Superintendent of Environment and the Environmental Assessment Service), or civil lawsuits claiming monetary compensation for environmental damage. Significantly, there is no automatic right to appeal a decision of the ECTs in Chile, as sentences only can be reviewed in relation to specific matters via the "Recurso de Casación" mechanism. A more limited experience of specialization of environmental courts is found in Argentina. Out of 23 provinces, only Jujuy Province has an environmental court, which only has jurisdiction in that particular province.

Additionally, the specialization of environmental prosecutors is particularly common in South America (in countries both with and without established ECTs),

though this is not a new development. For example, the Argentinian Environmental Crimes Investigation Unit conducts preliminary investigations and supports ongoing investigations regarding environmental crimes.

Uniquely, Brazil has a proliferation of both environmental courts and environmental tribunals. Courts, which are independent of the executive, are divided into state and federal jurisdictions. Both types adjudicate environmental matters, depending on the parties and whether the matter is subject to federal, state or local control. Usually, environmental issues are considered matters of state justice, qualifying under federal justice when there is conflict or environmental impact involving more than one state, Indigenous People or federal government agency, or nuclear energy. Some cities have Agrarian Courts, an environmental court with competence only over criminal cases.

6. Asia (excluding South-East and West Asia)

Country	Environmental courts	Environmental tribunals
Bangladesh	4	0
Bhutan	0	0
China	1,353	0
Democratic People's Republic of Korea	0	0
India	0	5
Japan	0	48
Kazakhstan	0	0
Kyrgyzstan	0	0
Maldives	0	0
Mongolia	0	0
Nepal	0	0
Pakistan	0	5
Republic of Korea	0	17
Sri Lanka	0	0
Taiwan	0	0
Tajikistan	0	0
Turkmenistan	0	0
Uzbekistan	0	0
TOTAL	1,357	75

**Important updates since 2016**

Country	Update
China	<p>Unlike in most countries, there has been a proliferation of ECTs in China in recent years – from 456 ECTs in 2015, to 1,353 in 2019. This development is part of China’s broader effort to improve environmental governance and modernize its environmental legal framework. ECTs are given some discretionary power to customize procedural rules, and their judges are encouraged to develop their expertise in environmental law. The Supreme People’s Procuratorate has also launched a “battle against pollution” by filing thousands of lawsuits against local authorities and companies that have violated environmental laws.</p> <p>The majority of ECTs experience difficulties in securing financial support to carry out their investigative duties in environmental public interest litigation. In response, the China Environmental Protection Foundation has established a China Environmental Protection Fund, which allows any Chinese court to apply to the fund for a sum of money between 60,000 and 120,000 yuan to carry out necessary investigation in any civil EPIL.</p> <p>China has also been actively increasing access to justice. The amendments to the Environmental Protection Law have reduced the barriers for the public, particularly NGOs, to bring an action. Previously, Chinese courts had discretion to refuse to accept cases for filing. However, article 58 obliges the courts to accept lawsuits by eligible social organizations. These developments have created a more conducive atmosphere for environmental litigation to flourish.</p>
India	<p>The number of environmental cases has been declining in India over the last two to three years. It has been observed that the decrease in caseload is attributable, inter alia, to perceptions of a less receptive NGT as a result of a change in leadership, as well as litigation fatigue on the part of civil society actors.</p>

Prominent ECT type(s) in the region

There is a large variation in how jurisdiction of an ECT is decided upon. In China, the spread and jurisdiction of ECTs depends on the geographical location and its corresponding environmental concerns. Most notable ECTs are found in major cities where environmental problems are pertinent, especially from rapid industrialization (e.g. in Beijing, Guangzhou, Guizhou, Hangzhou, Jiangsu, Qinghai, Shanghai, Suzhou, Yunnan and Wuhan). Cross-border ECTs have also been established in ecological zones spanning several provinces for better environmental governance of a single ecosystem, such as the Yangtze River. In most countries, jurisdiction over environmental cases is not exclusive to ECTs.

Most ECTs are empowered to develop their own court procedures, jurisprudence and judicial training regimens. In China, the Supreme People’s Court encourages innovation and experimentation by ECTs in developing their own procedures to suit their context. In India, niche

environmental investigation procedures have been created and implemented by ECTs (although the efficiency and effectiveness can be improved).

Environmental tribunals in Japan and the Republic of Korea may also develop procedures independently. However, a majority of environmental dispute resolution institutions in these countries focus on non-litigation (i.e. mediation, conciliation and arbitration). In the Republic of Korea, all Environmental Dispute Resolution Commissions may adjudicate as per the Environmental Dispute Mediation Act, though that is not their focus. In Japan, only the National Environmental Dispute Coordination Commission may adjudicate, and there has been an obvious shift from conciliation towards litigation in recent years.

7. South-East Asia

Country	Environmental courts	Environmental tribunals
Brunei Darussalam	0	0
Cambodia	0	0
Indonesia	0	0
Lao People's Democratic Republic	0	0
Malaysia	134	0
Myanmar	0	0
Philippines	117	0
Singapore	0	0
Thailand	0	0
Viet Nam	0	0
TOTAL	251	0

Important updates since 2016

Country	Update
Malaysia	Initially, only 42 Sessions Courts and 53 Magistrates' Courts were established in 2012 as environmental courts with jurisdiction only over criminal environmental cases (though enforcement powers were wide). In 2016, the High Courts, Magistrates Courts and Sessions Courts in all 13 states were assigned as Special Environmental Courts to hear civil environmental cases as well.
Myanmar	The military coup beginning in 2020 has severely disrupted the rule of law, including environmental adjudication and enforcement (Liljeblad 2021).

**Prominent ECT type(s) in the region**

The Philippines has the most developed environmental litigation system in the region. Not only has it established specialized environmental courts, but it has also developed special actions and procedures for environmental claims: relaxed locus standi requirements, the writ of kalikasan (writ of nature), the writ of continuing mandamus (i.e. an environmental protection order is converted from temporary to permanent), anti-SLAPP rules and requiring the precautionary principle (Philippines, Supreme Court of the Philippines 2010). The related judicial training institution, the Philippine Judicial Academy, is also active in conducting judicial training both domestically and bilaterally, as a form of regional cooperation. On the other hand, Malaysia's environmental courts lack similar specialized procedures and handle a far smaller caseload; Malaysian environmental jurisprudence is developing at a much slower rate.

Eight of the ten States in the region do not have environmental courts, as most prefer to deal with (civil) environmental issues through administrative action. Litigation is often a last resort, if at all – it is not uncommon for laypeople to lack environmental literacy and awareness of their environmental rights, and/or sufficient funds to pursue legal action. Administrative action is especially preferred by countries whose judiciaries are relatively less and/or lacking in environmental expertise, including Brunei Darussalam, Lao People's Democratic Republic and Myanmar. It could also be a result of a less litigious civil society, such as Singapore. Often, this option is preferred to

save time and costs, as litigation is generally a protracted and expensive endeavour. That said, the availability of the choice to avoid litigation altogether is usually only available for civil issues.

That said, Indonesia and Thailand have proven to be exceptions to the pattern. Despite the lack of specialized ECTs, they are comparatively active in environmental adjudication and the development of environmental jurisprudence. This is especially so of Indonesia, whose environmental law caseload is quantifiably comparable to that of the Philippines, which has the region's most developed environmental legal system. Thailand does not have an ECT due to administrative, logistical and bureaucratic barriers; instead, it has a green bench.

In most, if not all, countries in South-East Asia, there is a lack of standardization when it comes to classifying environmental cases. As a prominent example, when environmental crimes are committed, these are usually brought under the remit of criminal law generally, despite having a direct environmental impact. This relegates environmental issues beneath other competing priorities and affects both individual outcomes and general jurisprudential development.

It should also be noted that in all States, judicial training in environmental law and science is not mandatory.

8. West Asia

Country	Environmental courts	Environmental tribunals
Armenia	0	0
Azerbaijan	0	0
Bahrain	0	0
Cyprus	0	0
Georgia	0	0
Iraq	0	0
Israel	0	0
Jordan	0	0

Country	Environmental courts	Environmental tribunals
Kuwait	0	0
Lebanon	0	0
Oman	0	0
Qatar	0	0
Saudi Arabia	0	0
Syrian Arab Republic	0	0
Turkey	0	0
United Arab Emirates	0	0
Yemen	0	0
TOTAL	0	0

Important updates since 2016

Country	Update
Turkey	Judicial environmental training has begun.
United Arab Emirates	One ECT has been authorized but not established.

Prominent ECT type(s) in the region

The absence of ECTs is the dominant trend in the region. Some countries in this region are experiencing armed conflict and/or severe economic problems, including Afghanistan, Iran (Islamic Republic of), Iraq, Lebanon, Syria and Yemen; it is to be expected that the development of ECTs has not been a priority.

**9. Europe**

Country	Environmental courts	Environmental tribunals
Albania	0	0
Austria	11	0
Belgium	16	1
Bulgaria	1	0
Cyprus	0	0
Czech Republic	0	0
Denmark	0	3
Estonia	0	0
Finland	2	0
France	18 (+ 36 new ECTs created in 2021)	0
Georgia	0	0
Germany	6	0
Germany	0	0
Greece	1	0
Hungary	0	0
Iceland	0	1
Ireland	1	3
Italy	1	0
Latvia	0	0
Malta	0	1
Netherlands	1	0
Norway	0	0

Country	Environmental courts	Environmental tribunals
Portugal	0	0
Romania	0	0
Russian Federation	0	0
Serbia	0	0
Spain	1	0
Sweden	6	0
Switzerland	0	0
United Kingdom of Great Britain and Northern Ireland	5	0
TOTAL	70	9
Andorra, Belarus, Bosnia and Herzegovina, Kosovo, Liechtenstein, Luxembourg, Moldova, Monaco, Montenegro, North Macedonia, San Marino, Slovakia, Ukraine		No response; 0 assumed

Important updates since 2016

Country	Update
Belgium	<p>Between 2016 and 2021, the Courts of First Instance of Antwerp (Antwerp Department), Hainaut (Charleroi Department), Liège (Huy Department), Luxemburg (Arlon Department), Namur (Namur Department) and West Flanders (Kortrijk Department), have formally installed a specialized department for all criminal environmental cases of the districts. The judges who work there are do not always devote themselves exclusively to environmental cases, as they must combine environmental matters with other types of criminal cases.</p> <p>By Presidential Decree of 9 October 2021, an environmental chamber has been created in the Court of Appeal of Mons which handles civil as well as criminal environmental and town planning cases. The aim was to concentrate all environmental (in the broad sense, including environment food safety, town planning and agriculture) cases and to allow the judges to specialize. The chamber will still handle non-environmental civil cases.</p>
Denmark	<p>The Nature and Environmental Appeals Board (Natur-og Miljøklagenævnet) dealt with environmental administrative appeals until 2016, when it was replaced by the Environment and Food Appeals Board (with a jurisdiction including agriculture) and the Planning Appeals Board (with jurisdiction over plans and decisions under the Planning Act). Both boards have various permutations of panel members to suit the technicality of a case – some panel groups may be “lay configurations”, while others may be “expert configurations”. Decisions on non-compliance cannot be brought before the Appeals Boards.</p>



Country	Update
France	On 24 December 2020, a law regarding the European Prosecutor's Office, environmental justice and specialized criminal justice created 36 specialized environmental courts within the general courts. This law also allows the prosecutor to propose a corporation accused of environmental offences under the Environment Code, to conclude a Judicial Convention of Public Interest and impose a fine, regularization and/or reparation.
Ireland	The Government published a programme in June 2020, setting out commitments to establish a new Planning and Environmental Law Court managed by specialist judges. What is envisaged is not a stand-alone environmental court, but a model based on the existing Commercial Court, a separate list in the High Court.
Malta	The Environment and Planning Review Tribunal of Malta was created in 2016, but was not reported in the UNEP 2016 ECT Guide.
Portugal	In January 2020, Portugal created the Central Department of State Litigation, Collective and Diffuse Interests in the Office of the General Prosecutor of the Republic, dedicated to environmental matters.
The Netherlands	The Environmental Chamber was established on 1 January 2020, in anticipation of the entry into force of the new Environmental and Planning Act (Omgevingswet). It handles all nature, environment, and planning cases in appeal, but also in sole and last instances. The division into chambers is not laid down in law, but is determined by the chairperson of the Administrative Jurisdiction Division of the Council of State.
United Kingdom of Great Britain and Northern Ireland (Scotland)	The UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 commits the Scottish Government to publish a report and consult on whether establishing an environmental court would enhance access to justice in environmental matters and governance following Brexit.

Prominent ECT type(s) in the region

In Europe, the dominant ECT model is one of specialized chambers within the general courts and administrative courts. These were all existing in 2016, but not all described in the UNEP 2016 ECT Guide. These numbers have been stable since 2016 but will potentially increase, as there are 41 pending or potential environmental courts envisaged within various European general court systems.

An important degree of specialization has developed de facto at chamber level of supreme (administrative) and some appeal courts, because environmental cases are systematically referred to those chambers. This increases the environmental caseload and has enhanced the expertise of judges involved, through experience and/or (voluntary) technical training.

The appointment of specialized chambers is often based on a court regulation or a presidential decision. As these developments are not anchored in primary legislation, those chambers are not structurally fixed for the long term. As such, many also handle non-environmental cases, and judges can easily be moved to other courts.

Administrative courts or appeal bodies are also pertinent, though their competences are often restricted to appeals against decisions, fines or permits falling under specifically listed environmental legislation. On the whole, ECT numbers have remained stable since 2016.

Some countries (Austria, Greece and Malta) also have an ombudsman system to increase access to (environmental) justice through representation, particularly when a large group of people (100 people is the threshold in Austria) is affected by an environmental problem. Generally, an ombudsman has wider and stronger standing rights in environmental cases, including administrative issues, environmental impact assessment and waste management procedures. This is an important way to increase access to justice, because citizens do not ordinarily have these rights for lack of particular conditions or circumstances (e.g. not being directly affected by a decision). It also prevents the failure of justice where people do not or cannot take legal action (e.g. they cannot afford to do so, or lack knowledge of how to do so).

10. Oceania and the Pacific

Country	Environmental courts	Environmental tribunals
Australia (Australian Capital Territory)	7	5
Fiji	0	2
Kiribati	1	0
Marshall Islands	1	0
Nauru	0	2
New Zealand	4	1
Palau	1	0
Papua New Guinea	1	1
Samoa	0	1
Solomon Islands	0	1
Tonga	1	1
Tuvalu	1	0
Vanuatu	1	0
TOTAL	18	14



Important updates since 2016

Country	Update
Australia	<p>Firstly, the environmental divisions in the respective territorial civil administrative tribunals of the Australian Capital Territory and Northern Territory were abolished prior to the 2016 report.</p> <p>Secondly, the Land Court of Queensland and the Land Appeal Court were excluded from the 2016 report, despite having a wide jurisdiction over environmental cases. Since 2016, the Land Court of Queensland has substantially reformed its alternative dispute resolution procedures, specifically pertaining to alternative dispute resolution and expert evidence. Mediation is the primary mode of alternative dispute resolution employed. A panel of accredited and expert mediators are selected by the parties, and then screened and trained by the Land Court. This has allowed for timely resolution of cases, with 26 per cent of matters resolving before any substantial pre-hearing process. Additionally, case appraisals are conducted by a suitably qualified Convenor, who must be accredited under national mediator accreditation standards, and must also possess qualifications or experience that is relevant to the types of cases filed in the court. Since the reform, the Land Court continues to issue expert evidence practice directions to enhance procedures as necessary. Thus, better alternative dispute resolution and expert evidence practices have enhanced the impartiality and reliability of the procedures and decisions of the Land Court of Queensland.</p> <p>Moreover, the Land Court provides procedural assistance service for self-represented litigants. This is a service that observes the distinction between procedural assistance and legal advice and connects self-represented parties with suitable support services.</p>

Prominent ECT type(s) in the region

Both courts and tribunals are equally prominent. Two categories of ECTs can be identified: jurisdictions which have environmental courts with broad legal jurisdiction; and jurisdictions which have independent administrative tribunals which are largely limited to land planning/development appeals and land valuation appeals. In addition, in New Zealand, the Māori Land Court and Waitangi Tribunal have been established to specifically hear claims relating to Māori Indigenous land claims and settlements (New Zealand, Māori Land Court, no date).

In most of the jurisdictions in this region, there are land courts which hear traditional land rights claims.

However, only Fiji, Samoa and Tonga have independent environmental tribunals with a wider environmental remit. There are also captive administrative review mechanisms which ultimately report to political leaders (such as the Environment Ministers) in Papua New Guinea and the Solomon Islands. Finally, in Micronesia, Nauru and Vanuatu, no ECTs of any sort exist.

The countries and jurisdictions in this region present a patchwork of different approaches towards the provision of environmental justice. This reflects the wider diversity of legal systems in the region – all the sovereign countries in the region (including Australia and New Zealand) have received common law (in part or in full) from being former American or British colonies/territories, but Vanuatu has a mixed (civil and common law) legal system, and French Polynesia and New Caledonia are under French jurisdiction, a civil law system.

Case reports of most environmental cases are not available online, and information on ECTs in the region is also limited. However, a general sentiment in the region is an increasing interest in environmental litigation, especially climate/climate-adjacent litigation. This is unsurprising, as all the States in this region are small island developing States. Furthermore, judiciaries in the region work with research bodies (e.g. the Grantham Institute of the London School of Economics) to expand online environmental case report repositories.

Appendix K: References

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