

GREENING JUSTICE

CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS

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To Create a Specialized ECT or Not?

Whether or not to create specialized courts and tribunals can be a hotly debated topic among judges, legislators, government administrators, NGO advocates, academics, and civil society. Although various types of specialized forums or judicial chambers exist in most countries, it has only been in the past few years that specialized environmental courts and tribunals have mushroomed. Based on the data, a growing number of countries have decided the positive arguments outweigh the negative and have established ECTs, including 170 in 2008 and 2009 alone. On the other hand, the US government considered establishing a national ECT in the 1970s and decided against it (Judicial Conference of the US), Scotland's Executive recommended against one in 2006 (Scottish Executive), and Finland and Austrian officials advised us that they are considering dissolving their ECTs. South Africa recently dissolved its environmental court in the Western Cape; however, there are talks underway at the ministerial level to reestablish this court. India is in the process of creating a new National Green Tribunal and repealing legislation that created the National Environment Tribunal in 1995 and the National Environment Appellate Authority in 1997.

Several ECTs appear to have stopped functioning or communicating, including Bahamas, Guyana, and Jamaica. Several have been authorized by legislation but not yet implemented, such as Tanzania, Fiji, and India. However, other jurisdictions are currently considering establishing an ECT, as mentioned above. Of the known countries that have explored ECTs, only a few have decided not to proceed with implementation.

However, there are compelling reasons given by both sides of the pro-con debate – both in the survey interviews and in the ECT literature. The following arguments for and against can all be found in the extensive ECT literature on the debate (see particularly Macrory & Woods, 18-21, 38-39; Preston 2008, 386; Kaniaru; Whitney 1973a, 1973b; The Environmental Court Proposal, 677-686; Rajamani; Vempalli; Scottish Executive, 35-41; Stephens, et al., part 3; Rottman; Administrative Conference of the U.S.; Judicial Conference of the U.S., vol. I, part IV.A; Royal Commission, 67-68; Law Commission of India, 1-18).



Environmentalists demonstrating for access to justice in front of a court house in Golden, Colorado, USA.

Credit: www.CityMtnViews.com

2.1 ECT Proponents' Arguments

The proponent view is summed up by Justice Brian Preston, Chief Judge of the New South Wales, Australia, Land and Environment Court, the first ECT established as a superior court of record in the world:

“The judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations. . . .Increasingly, it is being recognised that a court with special expertise in environmental matters is best placed to play this role in the achievement of ecologically sustainable development.” (Preston 2008, 386.)

The proponents' arguments include:

1. **Expertise:** The reason most often given for creating an ECT is the need for decision-makers who are knowledgeable experts about national and international environmental law. Generalist judges in ordinary courts usually do not have sufficient experience with the complex laws and principles that make up environmental law and may not be comfortable with the highly technical expert testimony that is often required to balance anticipated environmental harm and economic benefit. Specialized ECTs usually require that decision-makers have a background and experience in environmental law and related fields of expertise, and provide ongoing training. Even countries which have not yet developed an ECT, such as Indonesia, may require that environmental cases be assigned only to judges with environmental law training (Foti / TAI-WRI, Box 3.9 on 70, photo on 68). In addition, some ECTs – both courts and tribunals – include non-lawyers who have planning, technical, or scientific knowledge to hear cases in their areas of expertise, either on panels or alone. This creates an opportunity for multi-disciplinary decision-making.
2. **Efficiency:** Many generalist trial and appellate courts are suffering from a crippling backlog of cases, requiring plaintiffs and defendants to wait years before receiving a hearing. Delay can be extremely costly for governments and private interests who may have invested huge sums in planning programs or developments – “time is money” being a frequent justification for speedy proceedings. And delay can be detrimental to environmental or community parties by allowing a project to move ahead, inflicting environmental damage, absent a hearing or injunction. Moving environmental cases from the general court docket to an ECT can allow them to be fast-tracked and handled more efficiently.
3. **Visibility:** Globally, governments are being pressured both internally and externally to be responsive to the demand for environmental protection and improved access to environmental justice. Internal pressures come from civil society, business interests, and others seeking to ensure protection of human and environmental health for current and future generations. External pressures come from IGOs, NGOs, and other sources supporting good governance and related missions. Creating an ECT

is one way to visibly show identifiable progress in those directions.

4. **Cost:** Cost is a huge barrier to access to justice. Environmental cases in particular can be extremely expensive for all parties as well as the judicial system. Expenses include attorneys, expert witnesses, time to trial and time in trial, transcription of lengthy testimony, travel distances, filing fees, lost employment, and the possibility of a losing party being ordered to pay the expenses of the winning party. Faster, more efficient forums reduce costs for themselves and all parties. Specialized ECTs can be given distinct powers to adopt rules and procedures that dramatically reduce costs for the parties, in ways not available to or feasible for large general court systems.
5. **Uniformity:** The need for consistency in decisions and uniform precedent is another justification advanced for the creation of ECTs. Opinions by trained, knowledgeable decision-makers who are familiar with the law and with other decisions in the field are more likely to be uniform and consistent. This uniformity gives parties and their attorneys predictability – precedent upon which they can rely. At least one court is analyzing and computerizing sentencing data to allow consistent sentences for environmental crimes (Preston 2007a, 2007b). Uniformity in decisions can also prevent “forum-shopping” (parties picking forums they think more likely to give them a favorable judgment).
6. **Standing:** The single biggest barrier to the first step of access to justice is the issue of standing – the credentials required to open and get through the door of justice. Specialist ECTs may be empowered to define standing more broadly or in ways not legally or politically feasible for the general courts, opening the door to public-interest litigation (PIL), interested third parties, and class actions aimed at protecting public rights and the rights of future generations, not just individual or adjacent property owner rights.
7. **Commitment:** The same advocates who are demanding an easily accessible, visible forum for environmental justice are also demanding that governments be more environmentally responsible and demonstrate their commitment to environmental protection. The creation of an ECT is a demonstrable commitment to environmental justice, particularly when supported by open and transparent access to information and opportunities for public participation.
8. **Government Accountability:** One motivation for creating an ECT is to provide strong oversight and accountability for executive branch agencies, particularly Departments of the Environment, which may not be effective in environmental regulation, enforcement, and conflict resolution. Government can become more accountable to the public when environmental conflict is overseen by an independent ECT. Government agencies are more liable to act in a transparent and responsible manner if they have an informed judiciary looking over their shoulders, holding them accountable for both process and outcomes.
9. **Prioritization:** In an ECT, urgent cases can be prioritized or fast-tracked, while in regular (nonspecialized) courts the cases are usually considered in the order in which they are filed, so less urgent cases may be heard well in advance of a case dealing with immediate harm to the environment. Moreover, judges tell us, a regular court judge may be tempted to postpone complex, difficult cases — as environmental cases often are — in favor of deciding easier, smaller ones in order to show a high case turnover.
10. **Creativity:** Many ECTs have adopted flexible rules of procedure and evidence, employ informal, less intimidating proceedings, and have introduced a number of other creative approaches that would not be possible in an ordinary court. Many of those innovations have been introduced specifically to remove barriers to access to justice, including standing, costs, requirements for complex scientific and technical expertise, need for an attorney, need to travel to the court, length of the proceeding, and readily available information about how to access the ECT and ECT decisions.
11. **Alternative Dispute Resolution (ADR):** Over half of the ECTs studied have embraced the use of alternative dispute resolution, including conciliation, mediation, third-party neutral evaluation, arbitration, and even restorative justice (see chapter 3.9). The use of ADR, when appropriate, tends to produce a high settlement rate as well as innovative solutions to problems, potentially resulting in better outcomes for the parties and for the environment and reducing the number of cases which must have a full hearing. In addition, ADR can increase pub-

lic participation and access to justice by including interested stakeholders in collaborative decision-making or mediation prior to a judicial decision, and can reduce costs to the parties and the courts.

12. **Issue Integration:** ECTs can be specifically empowered to take a more integrated approach to dealing with separate environmental laws collectively, in ways general courts may not. For example, while there is a trend toward integration of environmental and land use laws, few nations or jurisdictions have fully integrated both sets of laws. However, most appreciate that the two areas are greatly interdependent. In creating ECTs, legislators and policy makers can break through this segmentation and combine these issues in one forum. Thus, an ECT may be given authority to review simultaneously all of the permits a development needs (zoning, building, public health permits; air, water, waste permits; EIAs; ecological preservation requirements; native rights, and pre-historical, historical, and cultural preservation — rather than have such decisions strung out before different decision-makers, at different times, with different (sometimes conflicting) outcomes.
13. **Remedy Integration.** Another type of integration which has been used effectively in ECTs combines civil, criminal, and administrative law jurisdictions in one forum. Judges can then select the most effective remedy or combination of enforcement orders when deciding a case, a spectrum of sanctions typically unavailable in a single general court. (“Civil” jurisdiction – not to be confused with the “civil law” legal jurisdictions – typically deals with private controversies between individuals, businesses, and others on issues such as personal injury, property damage, and contracts, where the public is not ordinarily a party. “Criminal” jurisdiction deals with violations of the government’s laws defining criminally prohibited conduct and meting out punishment such as incarceration and/or monetary fines. “Administrative” jurisdiction typically deals with claims by or against the government; it is merged with the civil jurisdiction courts in some countries, such as the United States, and a separate court system in others, such as civil law countries. (See chapter 3.12 for further discussion.)
14. **Public Participation:** The flexibility and transparency of some ECTs (although not all) has allowed greater public participation through web-based information, open standing, and publicly accessible hearings. Allowing both open third party standing and class actions expands opportunities for public knowledge and participation in the decision-making process. ADR, when used by an ECT, can allow a fuller range of interested or affected persons to participate in community-based problem-solving.
15. **Public Confidence:** Closely tied to the issues of accountability, commitment, and expertise is the concept of maintaining public confidence in the environmental conflict resolution process. Generally, the public has more confidence and trust in a process which is visible, easily accessed, and easily monitored. This transparency is a typical and desirable characteristic of highly regarded ECT models.
16. **Problem Solving:** Resolving complex environmental issues and achieving sustainable development often requires a multi-faceted approach that goes beyond traditional legalistic decision-making, and may include use of mediation and other forms of ADR, participation of a broad group of stakeholders in collaborative decision-making, development of non-traditional remedies, and/or creative sentencing. Judges who view themselves as “problem solvers” look beyond the narrow application of the rule of law and the simplistic right-or-wrong determination and craft creative new options that will maximize both short- and long-term outcomes for the parties and for the environment. An example, given to us by a Queensland ECT judge, is that instead of simply ruling to affirm or reverse an agency decision on a development permit, he will sit down with the parties and the development plan and discuss physical changes that satisfy both parties (“like moving the parking to the rear of the building”). The “right” long term solution may not be contemplated or incorporated in existing law or precedent. Or there may be no clear right or wrong, and the decision-maker is required to shape the approach and remedies to really solve the problem, rather than being limited to pre-determined remedies.
17. **Judicial Activism:** Given the mandate to balance environmental and economic rights to achieve sustainable development, and the freedom to be creative problem solvers, many judges have become activist advocates for protection of the environment.

2.2 ECT Opponents' Arguments

In spite of the many arguments in favor of creating a specialized ECT, there are opponents – including, interestingly, avid environmental advocates. The majority of the arguments against ECTs, however, are arguments that have been used to oppose any form of judicial specialization, and are not specific to ECTs. Opponents' arguments include:

1. **Competing Areas Needing Expertise:** Why create an expert forum for the environment, when there are so many other areas of the law that have equal or greater fact and law complexity (health and employment for example)? Environmental law is not so different from other types of law and benefits from a generalist perspective.
2. **Marginalization of Environmental Cases:** Some environmentalists feel that separating environmental cases from the mainstream will result in their getting less attention, less-qualified decision-makers, and inadequate budgets, thus crippling the ECT's effectiveness. One Italian general court judge who is very interested in environmental cases even told us it was "ghettizzazione" ("ghetto-ization"). In at least several ECT jurisdictions, these fears have been realized.
3. **Fragmentation:** There is resistance to fragmenting the judicial system, potentially isolating both judges and subject matter from the mainstream.
4. **Reform from Within:** The effort required to create an ECT is more difficult than incremental reform from within the general court or agency. If knowledge of environmental law is critical, then all decision-makers should be given an opportunity to be trained, and then cases can be informally directed to those who are particularly interested or experienced in that area of law. A recent empirical study of US Court of Appeals judges shows that these "generalist" judges in fact routinely engage in "opinion specialization" (Cheng). This informal-assignment approach to environmental cases has certainly worked in some jurisdictions including Belgium and Finland.
5. **Insufficient Caseload:** In some jurisdictions, doubts are raised about there being sufficient environmental cases to support a separate ECT. Clearly an ECT will require a caseload of sufficient size and complexity to warrant the time and expense. When there are few cases, it does not make good administrative sense to develop a separate forum, resulting in judicial down-time and uneven workloads compared with the rest of the judiciary. In Bangladesh, where the Environmental Ministry controls whether a case can go to the Environmental Court, so few cases do that the Environmental Judge has to take on a substantial non-environmental caseload or his career prospects will suffer.
6. **Cost:** Creating an entirely new agency or court can entail substantial additional budget for judges, staff, space, equipment, training, and oversight, which may not be justified or possible. Diluting the existing budget for an already underfunded or overburdened judiciary or administrative agency may actually reduce access to justice and is not good management.
7. **Public Confusion:** The public may not understand the law and jurisdiction of the ECT, and therefore be confused about where to file a complaint. This is a problem in jurisdictions where zoning, land use, building, environmental permits, water use, nuclear issues, fishing, agriculture, and natural resources are not integrated but are covered by different laws with different enforcement provisions in different courts or tribunals—not all under the jurisdiction of the ECT.
8. **What's "Environmental"?:** Environmental cases can involve non-environmental issues and non-environmental cases may have a subsidiary environmental issue. As one European generalist judge queried us, how do you decide whether these "mixed" cases go to an ECT or the general courts? ECT opponents argue that only a regular court generalist judge can address all the non-environmental issues in a case effectively, so that the case is not required to be filed in multiple forums to be resolved.
9. **Capture:** Special interests – be they developers, government agencies, or environmental advocates – can more easily influence and control a small ECT than the general court system. The "capture syndrome" is well-known in agencies where powerful groups can control the appointments process, political pressure, career advancement, tenure, salaries, and budgets. There is evidence of this in jurisdictions where the ECT judges or officials are actually appointed by the very Minister or Department of the Environment whose decisions the ECT reviews and who determines their salary and tenure.

10. **Judicial Bias:** Prior knowledge of and experience with environmental law may prejudice the decision-maker so that decisions are not neutral, “too environmental,” and therefore objectionable. Some of the sitting ECT judges and decision-makers have, in fact, come from a background of environmental advocacy and are not trusted by development or political interests to be fair.
11. **Talent Gap:** Effective ECTs need environmentally trained and experienced judges and decision-makers, as well as access to scientific and technical experts in various disciplines. Many countries lack such highly qualified professionals.
12. **Judicial Activism?:** As problem-solving decision-makers, ECT judges and decision-makers may – and often do – go beyond narrow application of the “rule of law” and develop jurisprudence unique to the case. This approach has been frowned upon as making policy – an arena typically vested in the executive and legislative branches. In some instances, ECTs have been accused of “substituting their judgment” for that of the responsible government agency. Professor Lavanya Rajamani observes that judicial activism by the Supreme Court in India has restricted the growth of a responsible and independent bureaucracy (Rajamani, part 6).
13. **Judicial Careers:** Assigning judges to a specialized court or chamber can limit their professional growth and advancement to higher courts that may not be specialized (Calendaria & Ballesteros, 2). It will therefore be difficult to attract and retain the most qualified decision-makers.

14. **Creation of an “Inferior” Court:** Some advocates and judges fear that a specialized environmental court will be viewed as non-mainstream and inferior and not adequately respected, resourced, or supported. This “step-child” perception has indeed been reported as happening in at least several ECTs.

As a coda to this chapter, one should reflect on “the generalist ideal” for judges. A ground-breaking empirical study of US Court of Appeals judges discloses that this “generalist” ideal is in part “a myth” and that substantial informal specialization occurs even on regular courts, with certain judges being assigned particular types of cases in which they have some expertise (Cheng). The study’s author concludes (providing ammunition to both the pro and con sides of the ECT debate):

“Not only does opinion specialization [on general courts] increase judicial expertise and efficiency, but it also does so without many of the costs that often attend specialized courts. . . . To be sure, opinion specialization does not capture the benefits of specialization as cleanly as specialized courts. Most notably . . . opinion specialization does not guarantee an expert on every panel, and whenever nonexperts handle specialized cases, they incur expertise and efficiency costs. . . . Dispelling the myth [of the generalist judge] could therefore liberate jurists and reformers alike from their traditional boxes.” (*Id.* at 561-562.)