The Role of Environmental Courts and Tribunals – International Experience and Lessons Learned

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Why create Environmental Courts and Tribunals (ECTs)?

• 1992 Rio Declaration on Environment reaffirmed the 1972 Stockholm Declaration of the Human Environment and that “environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”

• SDG Goal 16 – “to provide access to justice for all and build effective, accountable and inclusive institutions at all levels”.
Why create Environmental Courts and Tribunals (ECTs)?

• Environmental Pollution, Climate Change and Ecological Harm, including biodiversity loss, are the greatest challenges of this century.
• Need for Judges with knowledge and special training to promote sustainable development.
• Interaction between the environment and administrative law, civil law and criminal law.
• Need for interim or injunctive relief is important in environmental cases.
Constitution of Kingdom of Cambodia

Article 59:
The State shall protect the environment and balance of abundant natural resources and establish a precise plan of management of land, water, air, wind, geology, ecological system, mines, energy, petrol and gas, rocks and sand, gems, forests and forestry products, wildlife, fish and aquatic resources.

Article 70:
Any offense affecting cultural artistic heritage shall carry a severe punishment.
The ASEAN Charter included one of its purposes:

– To promote sustainable development so as to ensure the protection of the region’s environment, the sustainability of its natural resources, the presentation of its cultural heritage and the high quality of life of its people. (Emphasis added.)

ASEAN Charter Article 1(9)
What is sustainable development?

The original concept of sustainable development articulated in *Our Common Future* is of “development that meets the needs of the present without compromising the future of generations to meet their own needs.” WCED, 1987.
• Sustainable development is “development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends”.
The consequences of failing to protect the environment – PRC
Environmental issues

• Environmental Harm (including harm to human health and animals) can be difficult to prove.
• Evidence is required, including scientific evidence and direct evidence of causation and responsibility.
• Liability of legal entities, directors and owners
Red dyed river Jian River Luoyang
Specialized Environmental Court

• Expertise to understand environmental issues
• Specialized Procedures to deal with environmental case
  – 90% should be dealt with in 2 years.
• Punishment can fit the crime:
  – Fines – Imprisonment – Daily Penalties
  – Publication Notices
  – Restorative Justice – Clean Up Notice
  – Compensation for harm
  – Pay the costs of the investigation/prosecution
Specialized Environmental Courts

• In 2016, there are over 1,200 ECTs in 44 countries at the national or state/provincial level, with some 20 additional countries discussing or planning ECTs.

• There are many different models of ECTs around the world. ECTs can be either courts (judicial branch) or tribunals (executive or ministerial branch).
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<th>Country</th>
<th>Environmental Chamber/Divisions</th>
<th>Training for Judges</th>
<th>Special Procedures for Environmental Cases 2010</th>
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<tr>
<td>Cambodia</td>
<td>Environmental Chamber</td>
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<td>Thailand</td>
<td>Environmental divisions in all levels (21 total) both Supreme Court and Supreme Administrative Court</td>
<td>Training for judges in Australia</td>
<td>Special Procedures for environmental cases 2010</td>
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<tr>
<td>Malaysia</td>
<td>Environmental courts established at Federal and some State level courts.</td>
<td>Training provided for green judges.</td>
<td>95 lowers courts for environmental crime</td>
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<td>Indonesia</td>
<td>No environmental court established. Benches have trained environmental judges.</td>
<td>Training and certification of environmental judges since 1992</td>
<td>Forestry courts and Fish courts deal with these matters.</td>
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<tr>
<td>Myanmar</td>
<td>None</td>
<td></td>
<td>Mentioned in new draft Environmental Policy 2017</td>
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<tr>
<td>Country</td>
<td>Court Description</td>
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<td>Philippines</td>
<td>Special Courts created in 2008. Supreme Court has taken on some jurisdiction for important cases.</td>
<td>Judges all are trained lawyers.</td>
<td>117 regional and municipal courts. Special Rules for the Supreme Court in environmental cases. Special procedures 2010.</td>
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<td>Pakistan</td>
<td>250 trial and high courts designated as Green Benches</td>
<td>Chief Justice of Province nominates judges.</td>
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<td>Bangladesh</td>
<td>3 environmental courts and a national appellate EC</td>
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Specialized Environmental Courts

• 2016 UNEP Report identified some key issues for the effectiveness of ECTs
  – Lack of knowledge by Judges and Members of International Environmental Law and National Environmental Laws
  – Delay in the ECTS procedure and determination of environmental cases.
  – High costs for parties before the ECT
  – Lack of prioritization of environmental cases
  – Insufficient remedies
  – Traditional win-lose approach
  – Inflexible rules and procedures for environmental cases.
Specialized Environmental Courts

• 2016 UNEP Report recommends that can be designed to:
  – promote the environmental rule of law at the national level and international levels and ensure equal access to justice (SDG target 16.3)
  – develop more effective, accountable and transparent institutions at all levels (SDG target 16.6)
  – ensure responsive, inclusive, participatory and representative decision-making at all levels (SDG target 16.7)
  – ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements (SDG target 16.10) and
  – especially promote and enforce non-discriminatory laws and policies for sustainable development (SDG target 16.b).
Specialized Environmental Court

Judges Lynch and Stein of the EAB identified factors for the success of an ECT. These factors included (but not limited to):

• Professional judges who understood environmental law and science;
• A ban on ex parte contacts and conflicts of interest;
• Clear written rules;
• All case filings and decisions publically available online;
• Availability of mediation on request;
• Training and collaborate exchanges.
Specialized Environmental Court

Preston CJ of the Land and Environment Court on NSW has identified 12 characteristics of successful ECTs:

• Status and authority;
• Independent from government and impartial;
• Comprehensive and centralized jurisdiction;
• Judges and members are knowledgeable and competent;
• Operates as a multi-door courthouse;
• Provides access to scientific and technical expertise;
Specialized Environmental Court

- Facilitates access to justice;
- Achieves just, quick and inexpensive resolution of disputes;
- Responsive to environmental problems and relevant;
- Develops environmental jurisprudence;
- Underlying ethos and mission;
- Flexible, innovative and provides value-adding function.
Environment Prosecution Authority

• Independent
  – To prepare cases in accordance prosecution guidelines.
  – To focus on major cases for trial
    • Corporations
    • Company Directors
  – Administrative sanctions for smaller cases
  – Sufficiently resourced to have scientific assistance for testing and proving causation and harm.
Conclusions and observations

• Specialized ECTs help resolve environmental disputes. These must fit the needs of the jurisdiction.
• Special rules and need to promote quick and just resolution of environmental cases, including interim orders to protect the environment.
• Judges need to be trained in environmental law and procedures
• Decisions need to be public and have some precedential value to inform governments and other stakeholders
• Mediation should also be part of the process.
• Broad standing should be allowed to ensure that there is always someone representing the environment in the ECT.