Introduction to Commentaries on Primary Source Materials from Environmental Courts

By Amy Mehta[1]

There has been a flourishing of environmental courts in the last thirty years and in particular in the last decade. In fact, there are now more than 380 environmental courts and tribunals that have developed throughout the world.[2] With the proposal for a new International Judicial Institute on Environmental Adjudication (devoted to studying and improving environmental courts and tribunals around the world) and the April 1st 2011 international symposium on Environmental Adjudication held at Pace University School of Law to explore the scope of such a new institution, it is appropriate to evaluate ten of the many jurisdictions where these courts are in existence. While these ten jurisdictions are only a sampling of the entire universe of environmental courts and tribunals, they represent courts from Asia, Australia, the Caribbean, Europe, and North America. Although a relatively small number of authors have written about the development and the opening of such court systems, this comparative analysis across countries and regions using the same criteria offers an initial evaluation. The analyses of these commentaries use the same criteria to evaluate a variety of what countries have endeavored in the commentaries that follow. Following an abbreviated summary of the countries that have been considered, there will be a brief discussion of the criteria used to compare the regions that have been considered.

Jurisdictions Considered in the Written Commentaries

The jurisdictions chosen for the commentaries are New South Wales in Australia, Ontario in Canada, England and Wales, India, Kenya, New Zealand, the Philippines, Sweden, Trinidad

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[2] George and Catherine Pring, Greening Justice: Creating and Improving Environmental Courts and Tribunals (2009, The Access Initiative, housed within the World Resources Institute in Washington D.C.).

and Tobago and Vermont in the United States. They are all unique in their own way and each have their own benefits and drawbacks. There are also jurisdictions which have developed environmental courts and tribunals which are not included in this first set of comparative commentaries. Some of the other jurisdictions which have environmental courts and tribunals that are not discussed include Argentina, Austria, Bangladesh, Belgium, Brazil, Chile, China, Costa Rica, Denmark, Fiji, Finland, Greece, Guyana, Hungary, Indonesia, Ireland, Jamaica, Japan, Liberia, Malawi, Malaysia, Mauritius, Netherlands, Nigeria, Pakistan, Nigeria, Paraguay, South Africa, South Korea, Spain, Sudan, Tanzania, Uganda. Some of the states within the United States which also have courts and tribunals addressing environmental issues include Alabama, Arkansas, Colorado, Georgia, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Tennessee, and Virginia. The indigenous nations, such as tribes in North America, also have their own tribunal addressing environmental issues.

Criteria Used to Evaluate the Environmental Courts and Tribunals

Seven criteria were considered when writing these commentaries. They are 1) Access to the Courts/Standing to Sue, 2) Scientific Knowledge, 3) Effectiveness, 4) Procedural Elements, 5) Access to Information, 6) Traditional Measures, and 7) Historical Information. Prior to discussing any of the factors above, in each commentary, there is an introductory paragraph which introduces the legislation, act or statute which contains the rules that govern the environmental court or tribunal in that particular area. In order to provide context, the factors are explained herewith.

Access to the Courts/Standing to Sue

This is the issue of how the legislation creating the environmental court and/or tribunal will enhance access to the courts (and justice). The first clause of Principal 10 of the Rio Declaration on Environmental and Development[3] provides that "Environmental issues are best handled with the participation of all concerned citizens at the relevant level". Standing or locus standi, can either openly provide access to courts or narrowly constrain it. The environmental courts are often established to ensure wider access to justice.

Scientific Knowledge

The criteria entitled "scientific knowledge", addresses the question of whether the primary source material facilitates the application of environmental science to decision-making. In order to evaluate the application of environmental science to decision-making, many of the commentaries explored the backgrounds of the judges and/or justices of the environmental courts and tribunals that were evaluated and whether or not the judges and/or justices were required to have or had expertise, training or skills in the sciences and particularly environmental science. In the event that the judges and/or justices did not have a strong background, it confirms the need for proposed programs of the International Judicial Institute of Environmental Adjudication which address the training of judges. For example, the New York State Judicial Institute will host a seminar for judges on scientific evidence in environmental criminal law cases on April 7-8, 2011 to address this very important skill—the application of environmental science-- that must be incorporated into decision-making. Since 1994, the Environmental Law Institute (ELI), an independent professional organization, has provided a Judicial Education Program, directed by

[3] http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en

John Pendergrass. As invited, and with special grants, ELI has provided continuing judicial education courses for more than 1,000 judges from 20 countries including Bolivia, Brazil, Cameroon, Chile, Colombia, Costa Rica, Ecuador, Haiti, Honduras, Hungary, India, Jamaica, Liberia, Paraguay, Peru, Russia, Tanzania, Uganda, Ukraine, and the USA.

Effectiveness

The "effectiveness" guideline evaluates the extent to which the legal process protects nature and improves the environment long-term instead of simply determining whether one particular party prevails and the other party does not. The fourth clause of Principle 10 of the Rio Declaration on Environment and Development[4] states that "effective access to judicial and administrative proceedings, including redress and remedy shall be provided".

Procedural Elements

Procedural issues with respect to the environmental courts and tribunals can be evaluated in a variety of ways. This includes general accessibility, the costs in creating environmental tribunals, the efficiency (or lack thereof) when multiple states in one country have to create environmental tribunals, the existence of an appellate system, the issue of transparency, the existence of online electronic filing systems to make access to the courts logistically easier, and global transparency as a whole. The second and third clauses of Principle 10 of the Rio Declaration on Environment and Development mention access to information and public participation in the process. Public participation with regard to procedural aspects of a law and/or act would be the ability to find information and participate electronically as much as possible.

[4] http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en

Access to Information

The concept of access to information considers the extent to which the public is given access to information that is being decided by a particular court or jurisdiction. This can include previously published opinions as well as general information on how to access the courts. The third clause of Principle 10 of the Rio Declaration on Environment and Development provides that states shall facilitate and encourage public awareness and participation by making information widely available. Support for access to information within environmental courts and tribunals can also be found in the text of the Aarhus Convention[5]. The objective of the Aarhus Convention is that in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her own health and well-being, each Party shall guarantee the rights of access to information, public-participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Traditional Measures

Traditionally, courts have been concerned with the time involved in litigation as well as the expenses and the ways in which these two components of every legal suit would prevent the matter from being adjudicated in a timely fashion or one which made it easy for a litigant to bring suit.

George and Catherine Pring, in their article for the Journal of Court Innovation entitled, *"Increase in Environmental Courts and Tribunals Prompts New Global Institute"* articulated this issue well when they wrote:

[5] http://www.unece.org/env/pp

"In response to the lack of environmental enforcement and protection, civil society in the form of environmental NGOs, advocacy lawyers, as well as public entities begin bringing their complaints to the available general courts. At this point the traditional courts disappoint expectations, failing to deliver environmental justice. They often do not provide an ideal adjudication, one that is, in the succinct words of Australian court procedural law, "just, quick, and cheap[6]."

Some of the environmental courts and tribunals have tried to address this problem and ensure that neither costs nor lengthiness of the process are barriers to potential litigants.

Historical Information

The circumstances leading to the creation of environmental courts and tribunals is also important to consider and often has played a role in the actual composition of the final outcome of the act or legislation creating the environmental court or tribunal. The historical account of each new court explains why the tribunal was established. In some cases, there were attempts at creating environmental courts and tribunals that might have failed and reflection on the historical circumstances preceding the legislation creating the court can provide insight into the which aspects of the environmental court or tribunal may be more developed as opposed to those that may require additional amendments and alterations.

Although some scholars and authors may choose to evaluate environmental courts and tribunals with other criteria, these were chosen strategically because many of them have their foundations in United Nations Declarations and Conventions, e.g., the Rio Declaration on Environment and Development and the Aarhus Convention. The information contained in the commentaries derives from that which was available until March of 2011. Since this is a

[6] Civil Procedure Act, 2005 §56(1) (N.S.W. Consol. Acts); see Hon. Justice Brian J. Preston, *Operating an Environment Court: The Experience of the Land and Environment Court of New South Wales,* 25 ENV'T & PLAN. L.J. 385, 393 (2008) cited in George Pring and Catherine Pring, Increase in Environmental Courts Prompt New Global Institute Journal of Court Innovation (2011)

relatively new and constantly evolving phenomena, amendments to procedures, laws, and rules are expected as the discipline of environmental adjudication is developed further.

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