

ENVIRONMENTAL RULE OF LAW

First Global Report





5. Justice

A fair, transparent justice system that efficiently resolves natural resource disputes and enforces environmental law is a critical element in establishing lasting environmental rule of law. The types of adjudication discussed in this chapter include (1) private party versus private party disputes (for example, a community opposing a company's actions); (2) private parties petitioning or suing the government (for example, a company challenging a permit decision); and (3) the government suing or penalizing a private party (for example, an agency enforcing the law against a violator). The ability to resolve such actions quickly, affordably, peacefully, and effectively are key elements of successful implementation of environmental law. ***Many countries are finding innovative ways to ensure fair, transparent, and reliable environmental adjudication, as discussed below.***

Dispute resolution and enforcement in environmental matters often involve a complex intersection of social, economic, and political interests. Compared to dispute

resolution in other areas, environmental matters can be particularly difficult because they often involve natural resources that are the basis for economic development and implicate traditionally disadvantaged populations. It can be difficult for such communities to gain access to dispute resolution mechanisms and government enforcement proceedings, though, and there are many barriers to protecting resources, which cannot defend themselves.

This chapter reviews "justice" broadly and discusses disputes over resources, the impact of resource use and pollution on communities and the environment, and government enforcement of environmental laws. Often, the terms "dispute resolution" and "adjudication" are used in their broadest senses to refer to all three types of situations where questions of justice for environmental harms and violations are considered. A related term is "environmental justice," which has many different meanings depending on the context and country: sometimes, it refers to differential impacts

of pollution on disadvantaged communities; sometimes, it refers more broadly to justice in environmental matters.

There are many implementation challenges to establishing justice systems for environmental issues, including lack of access to justice, a lack of skilled judges and advocates, and scarce government resources, among others. Disputes that are not resolved fairly and transparently often contribute to environmental harm, lasting conflict, and even social disintegration. Between 40 and 60 percent of civil wars over the past 60 years have been associated with natural resources.¹ And all but 3 of the 34 civil wars in Africa related to disputes over land.² ***Just as poorly handled disputes can fuel conflict, environmental disputes that are handled well can help establish the groundwork for meaningful dispute resolution in a country and become a basis for broader rule of law.***

The benefits of a robust environmental justice system go far beyond the environment by defusing conflict, increasing social cohesion, and broadening social inclusion. For example, in a landmark decision in 2013, the Supreme Court of India peacefully resolved an increasingly acrimonious dispute between indigenous communities and the government over a proposed 670-hectare bauxite mine planned to be developed on lands considered sacred by Dongria Kondh indigenous communities.³ There had been much latent violence, with threats to harm members of the communities who were protesting and campaigning against the environmental clearance and mining operation. The Supreme Court ruled that the rights of the indigenous communities must be taken into account in deciding whether to proceed with the mining project. All 12 tribal villages voted against the

project, and, in January 2014, the Ministry for Environment and Forests decided to prevent the mining project from proceeding. By upholding the right of free, prior, and informed consent (a right under international law that is discussed at length in Section 4.3.2) on matters related to natural resource extraction in tribal regions of India, the Supreme Court both resolved the dispute at hand and sought to prevent future disputes from emerging.⁴

After a brief overview of the core concepts, benefits, and implementation challenges (Section 5.1), this chapter discusses the path to effective environmental adjudication, illustrated in Figure 5.1.

Figure 5.1: Path to Effective Environmental Adjudication



First, parties must be able to avail themselves of the law and its protections and sanctions (Section 5.2). Next, the dispute resolution or enforcement process itself needs to be fair, capable, innovative, and transparent, as well as marked by trustworthiness and integrity (Section 5.3). Finally, remedies available through the process must address the harms and grievances raised (Section 5.4). The chapter concludes with a consideration of key opportunities for improving justice in environmental cases. ***Perhaps the most succinct message regarding justice in environmental matters is that the goal is a “just, quick, and cheap resolution of the real issues in the proceedings.”***⁵

1 UNEP 2009.

2 Fearon and Laitin, 2003, 77.

3 Orissa Mining Corporation v. Union of India (2013) 6 SCR 881, April 18 (India Supreme Court).

4 For more information on mining in Orissa and resistance by indigenous people, see Padel and Das 2006.

5 2005 New South Wales (Australia) Civil Procedure Act, sec. 56.

5.1 Introduction

This section reviews the core concepts of access to justice and of environmental adjudication. It then considers the benefits of and obstacles to achieving justice in environmental cases.

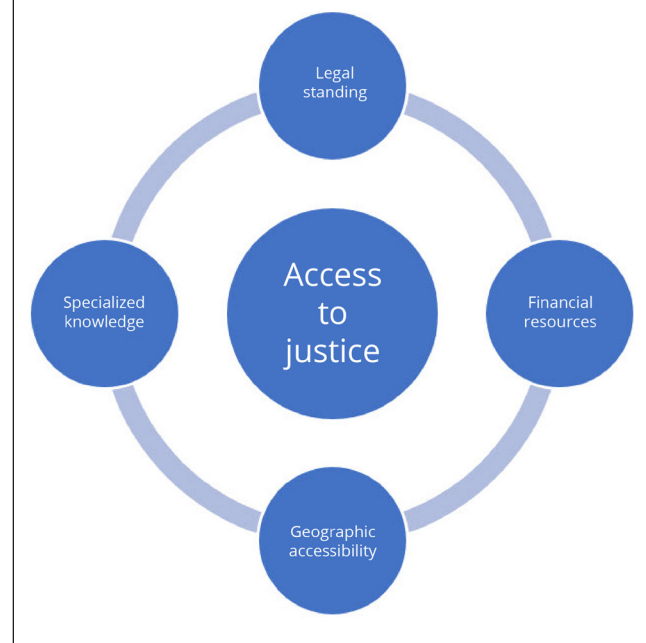
5.1.1 Access to Justice

Courts and tribunals are of little use if they are not readily available to all aggrieved parties.⁶ As shown in Figure 5.2, there are four common barriers to accessibility: legal standing, financial resources, geographic remoteness, and lack of specialized knowledge.

Environmental matters present special challenges because legal rules may make it difficult to seek to protect resources, places, and communities in court. In order to file a case in court, the party must meet the jurisdiction's requirements of "locus standi" or "standing," which means having sufficient connection to the dispute to bring or participate in the court case. Standing requirements may range from the most restrictive (requiring the parties seeking to bring a case to show that they have already suffered actual harm from the actions at issue), to the most open (allowing any party to bring a case on behalf of the public good, the environment, or future generations).⁷ A narrow interpretation of standing focusing on individualized economic harm can prevent communities from going to court to protect shared resources, such as a national park, a forest, or a scenic view because no one can demonstrate a sufficiently close connection to the resource or the harm has yet to

happen. This can also make it impossible to pursue suits seeking to prevent harm, such as stopping a development project that violates the law, or seeking to address harm to persons other than the person suing, such as a nongovernmental organization suing on behalf of a community.⁸

Figure 5.2: Elements of Effective Access to Justice



Many courts and legislatures have established broad or even universal standing to facilitate access to courts and tribunals for environmental cases. India and the Philippines, for example, both allow broad standing for individuals and organizations in environmental cases extending even so far as to unborn citizens in the Philippines.⁹ The

6 As a general matter, courts are within the judicial branch of government, and tribunals are within the administrative branch. These terms are often used interchangeably, however.

7 See generally Dorn 2010; Martin 2008.

8 See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

9 Gill 2012; Bonine 2008, 17; Republic of the Philippines Supreme Court, Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (2010): 11-12 (Rule 2, Section 5).

Supreme Court of the Philippines recognizes the injury element of standing, but in the *Oposa* case,¹⁰ the Court gave it a more liberal interpretation with regard to environmental claims. The Court held that representatives suing on behalf of succeeding generations had standing based on an “intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned.” The doctrine of standing in Philippine jurisprudence, although groundbreaking, was the catalyst of a greater concept: public participation as one aspect of justice in environmental enforcement. If the people’s rights related to the environment are to have effect, they must be enforceable and the legal system must give the people an avenue to protect these rights. And some countries in Latin America recognize very broad notions of standing, such as Costa Rica, which allows individuals and even minors to submit writs of *amparo* to protect constitutional rights.¹¹

Indeed, as of 2017, more than 130 countries have provided that citizens may bring suit based on their environmental legislation or constitutions, and the vast majority of these recognize a broad range of protected interests beyond economic interests (including recreation, research, and cultural interests).¹² Figure 5.3 shows the growth in countries providing for citizen suits in environmental matters. Many countries and sub-national jurisdictions allow any citizen to bring an environmental claim in the public interest; allow cases that address potential future harm; and allow persons to sue on behalf of communities or places with which they have no direct economic or other connection. This approach has also spread to enforcing environmental laws—some countries allow citizens to bring suit against private parties

for noncompliance with environmental laws in so-called “citizen suits,” especially if the government fails to act.¹³

Financial requirements can also impede access to justice. Courts and tribunals can impose high court costs to bring and pursue a case, and attorneys’ and experts’ fees can be prohibitively expensive. In civil law countries, these can deter bringing a case. In common law countries, procedural requirements can be problematic, for example requiring a party who seeks a court order temporarily stopping development while its legality is being argued in court to post a bond. ***Solutions include lowering bonding requirements in public interest cases and encouraging free representation for those without adequate resources by skilled legal counsel and legal clinics using students supervised by qualified professionals.***

Many courts and tribunals are in the capital city or regional capitals. Getting to court from remote locations poses a significant hurdle due to the time, cost, and distance involved. To remedy this, ***some courts hold sessions in remote locations, use technology to allow virtual hearings in lieu of in-person hearings, and collaborate with nearby jurisdictions to provide one judge to serve several jurisdictions.*** For example, some countries send one judge to a remote location to hear cases when the remote location is more accessible than the capital where the court sits. Specialized buses are used in Guatemala and the Philippines to hear cases in remote regions, and the Philippines Supreme Court sent one such bus to the Visayas region to hear and mediate environmental cases.¹⁴ Similarly, the Brazilian State of Amazonas’ Court of Environment and Agrarian Issues sends judges to locations without traditional courtrooms to hear cases and, as discussed

10 G.R. No. 101083 July 30, 1993. http://www.lawphil.net/judjuris/juri1993/jul1993/gr_101083_1993.html.

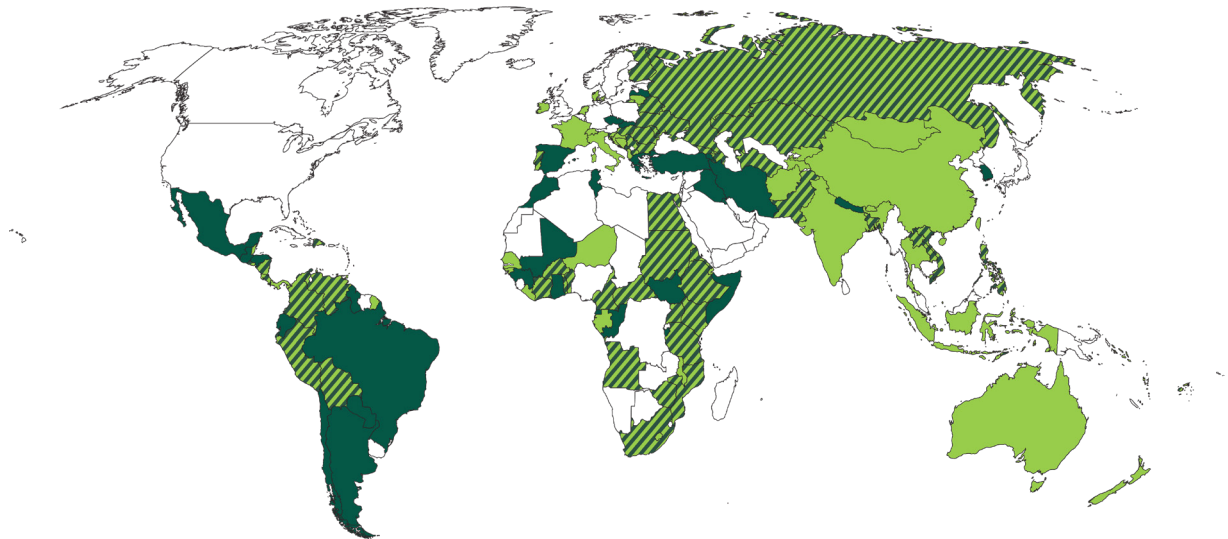
11 Saulino and Torres Asencio, 176.

12 Bonine 2008.

13 May 2003; Nemesio 2014.

14 Pendergrass 2012, 249.

Figure 5.3: Protection of Environmental Standing (2017)



- Countries that have constitutional provisions allowing for citizen suits:**
 Argentina, Armenia, Brazil, Burundi, Chile, Congo, Czech Republic, Ecuador, Equatorial Guinea, Ghana, Greece, Guatemala, Guinea, Guyana, Honduras, Iran, Iraq, Republic of Korea, Kuwait, Latvia, Maldives, Mali, Mexico, Monaco, Morocco, Nepal, Paraguay, Sao Tome and Principe, Seychelles, Slovakia, Somalia, South Sudan, Spain, Tunisia, Turkey

- Countries that have provisions in their environmental framework laws allowing for citizen suits:**
 Afghanistan, Albania, Antigua and Barbuda, Australia, Belize, Bhutan, Bosnia and Herzegovina, China, Croatia, Denmark, Djibouti, France, Gabon, Guinea-Bissau, India, Indonesia, Ireland, Italy, Kiribati, Kyrgyzstan, Lesotho, Liberia, Lithuania, Malawi, Marshall Islands, Mauritius, Mongolia, Netherlands, New Zealand, Niger, Palau, Panama, Saint Kitts and Nevis, Samoa, Senegal, Solomon Islands, Switzerland, Tajikistan, Thailand, Trinidad and Tobago, Vanuatu

- Countries that have provisions allowing for citizen suits in both their constitutions and their environmental framework laws:**
 Angola, Azerbaijan, Bangladesh, Belarus, Benin, Bolivia, Bulgaria, Burkina Faso, Cabo Verde, Cameroon, Central African Republic, Colombia, Costa Rica, Côte d'Ivoire, Timor-Leste, Dominican Republic, Egypt, El Salvador, Ethiopia, Fiji, Finland, Georgia, Hungary, Kazakhstan, Kenya, Laos, Republic of Moldova, Montenegro, Mozambique, Nicaragua, Pakistan, Peru, Philippines, Portugal, Romania, Russia, Serbia, Slovenia, South Africa, Sudan, Tanzania, The former Yugoslav Republic of Macedonia, Togo, Turkmenistan, Uganda, Ukraine, Venezuela, Viet Nam, Zimbabwe

Source: Environmental Law Institute, based primarily on data from Bruch, Coker, and VanArsdale (2007), Constitute Project (2018), ECOLEX.org, Environmental Democracy Index (2015), European Commission (2018), FAOLEX.org, ILO (2018), and WIPO (2018).

Note: In addition to the countries shown above, many countries provide for citizen suits through resource-specific and media-specific environmental laws, as well as laws governing public administration broadly.

below, often sends judges on visits to the site of the dispute.

Environmental matters often involve highly technical issues that involve, for example,

scientific uncertainty, specialized knowledge about natural resources, and engineering questions. Proponents of a project often have this specialized knowledge and may have more knowledge than any other party,

including the government. As a result, ***it is critical that specialized knowledge be made available to all parties in an environmental matter*** so that the decisions made are well informed and not subject to surprises when information is learned at a later date. And, as discussed below, it is critical that the judges have a sufficient education and resources to allow them to hear cases involving specialized knowledge.

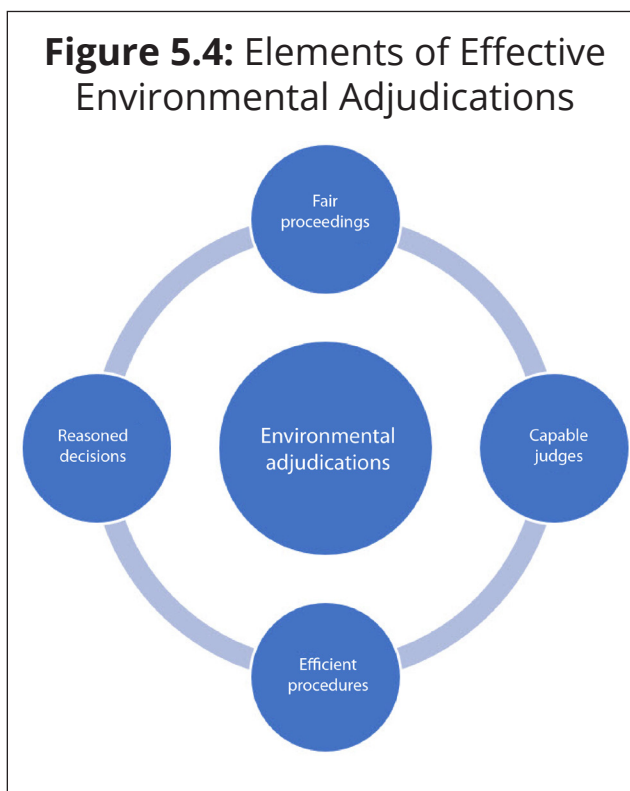
Given the unique technical, legal, and political aspects of environmental cases, many countries have established specialized environmental courts and tribunals to hear environmental disputes.¹⁵ These courts and tribunals may have their own rules regarding standing, costs, and geographic accessibility that are tailored to the needs of environmental matters. They often also have relaxed procedural requirements and provide technical and legal assistance to the parties, which enhance access to justice. These specialized courts are discussed further in Section 5.3.3.

5.1.2 Effective Environmental Adjudication

The way that cases are managed will determine whether parties have confidence in the environmental rule of law.

If adjudications are marked by a real or perceived lack of independence on the part of the judiciary, unskilled judges, or extremely slow processes, then the chances are high for mistrust and disillusionment with the dispute resolution and enforcement system. Figure 5.4 highlights those elements of

environmental adjudication that are central to delivering justice.



The proceedings of a court or tribunal must be perceived as fair in order to be considered legitimate by users of the judicial system. Parties should be able to present their evidence and be heard fully using procedures that are clear and balanced. Justice may be undermined and the legitimacy (and thus effectiveness) of the court harmed when cases go unheard by a judge for extended periods of time or take a long time to reach a decision after being heard. ***An increasing number of countries direct environmental litigants to alternative dispute resolution before considering a case.***¹⁶ Alternative dispute resolution can speed resolution of a matter at lower cost. Although costs can vary widely

15 At least 50 countries have national environmental courts and tribunals (see Figure 5.10), with approximately 140 countries relying on their national courts of general jurisdiction to hear environmental cases. Some federal countries also have environmental courts or tribunals at the provincial or subnational level.

16 Ansari, Bin Ahmad, and Omoola 2017.

depending on the type of alternative dispute resolution used, many surveys find these methods can cost approximately half as much as litigation and take much less time.¹⁷ It can also look at the broader context—beyond the specific legal issues being contested that a court can address—and attempt to resolve broader conflicts underlying an environmental dispute.¹⁸ A survey in Serbia found that 93 percent of participants in mediation said this process increased their confidence in the legal system.¹⁹ Care must be taken, however, to ensure that alternative methods are conducted professionally and in a manner to protect weaker parties.

Corruption and lack of judicial independence are a threat to all judicial systems. Strong judicial ethics may be maintained by ensuring adequate pay, independence of the judiciary, a strong prohibition on ex parte communication (and disclosure on the record of any such communication), and vibrant oversight mechanisms to investigate and resolve claims of malfeasance, as discussed in Chapter 2.

Judges and lawyers may have been educated before environmental law became a major area of law. Thus, ***educating lawyers about environmental law and ensuring broad understanding of environmental law within the judiciary helps ensure that judges are ready and willing to hear environmental cases.*** For example, in Uganda, training all the judges and magistrates on the basics of environmental law empowered the judiciary to hear and decide cases that had previously been lagging, as discussed in Case

Study 2.6. Many organizations—including UN Environment and the Environmental Law Institute—have long-standing programs to support judicial education on environmental law and international judicial cooperation. Because environmental matters can be so complex and technical in nature, many countries give some judges specialized training to hear these cases or create specialized courts and tribunals for environmental cases.

Decisions reached in an environmental matter are most effective when they are reasoned, documented, and publicly available. Documenting a decision allows the parties and the public to examine the reasoning applied, which helps those not involved in the case better understand the law and how courts and tribunals apply the law, even if these decisions do not act as precedent for other cases. Unfortunately, most countries leave it to the discretion of the courts whether to publish their decisions, although legislation in Hungary, Honduras, and Mexico, among other countries, requires courts to publish their decisions.²⁰ Some courts do not release their decisions or charge high fees for copies, which limits broader understanding of environmental law and its application in the real-world context. Even if decisions are delivered orally, providing transcripts at low or no cost increases transparency, access to information, and public awareness.

5.1.3 Benefits

Fair and transparent adjudication provides environmental, social, and economic benefits. It is the primary method for ensuring implementation of environmental law and achievement of the environmental results promised by the law. By identifying

17 Love 2011, 2.

18 McGregor 2015; Menkel-Meadow 2002; Cappelletti 1993. The ability of alternative dispute resolution to address the broader context depends on the nature of the specific mechanism. For example, arbitral tribunals generally address only those issues that the parties agree to have the tribunal address.

19 IFC 2010, 32.

20 Navratil 2013, 190.

and addressing social conflicts that may underlie environmental disputes, effective environmental adjudication may increase social cohesion and promote sustainable development. It also provides a peaceful means for resolving disputes, which is particularly important for countries emerging from conflict where large segments of the population may have become accustomed to resolving disputes through violence.

Environmental enforcement and dispute resolution seek to provide accountability and consistency in environmental law. Governments usually rely on enforcement after harm has occurred as the primary method to ensure compliance with the law. Parties that are aggrieved by environmental pollution or resource use can peacefully hold government, companies, and others accountable for environmental harms they have suffered. In a number of instances, governments, citizens, and nongovernmental organizations can seek to prevent environmental harm before it happens. For example, in the landmark U.S. case *Tennessee Valley Authority (TVA) v. Hill*, the U.S. Supreme Court held that the Endangered Species Act prohibited the completion of the Tellico Dam, where operation of the dam would jeopardize the existence of the snail darter, an endangered species, even though the dam was virtually completed.²¹ ***A well-functioning legal system provides accountability and relief for both actual and pending environmental harms.*** This creates consistency and predictability and establishes a strong deterrent effect in discouraging future harmful behavior.²²

Many environmental issues arise from externalities, where use of the common air or water resources to dispose of emissions is free to the emitter but imposes costs, such

as health effects or diminished property values, on third parties. Environmental adjudication offers corrective social action to account for such externalities. Disadvantaged parties often have no other recourse than the remedies offered by the law. As such, ***adjudication is a key ingredient in avoiding civil strife over pollution and resource management.*** Disputes over resources that go unaddressed can turn violent. This has happened at the local level and occasionally at the national level, as illustrated by disputes over water privatization and pricing in Cochabamba, Bolivia, disputes between pastoral and agrarian communities over water and land rights in Afghanistan and Kenya, and disputes over the environmental effects of mining in Bougainville, Papua New Guinea.²³ A robust system of accountability that is trusted by all parties provides a peaceful outlet for resolving conflict.

Ensuring that those responsible for violations of environmental law are brought to justice also deters noncompliance with environmental laws and builds respect for law. ***A strong and independent judicial system where environmental law can be enforced is essential to creating a culture of compliance, preventing environmental harm before it occurs rather than only addressing it after the fact.*** In addition, robust judicial systems that are accessible and transparent, as discussed below, provide justice for all people, regardless of their economic or social status.

5.1.4 Implementation Challenges

There are three predominant challenges to providing adequate environmental adjudication across the globe: access to justice, human capacity, and government material resources.

21 *TVA v Hill*, 98 S.Ct. 2279 (1978).

22 For statistics on the deterrent effect, see Section 2.6.

23 Bruch, Muffett, and Nichols 2016.

High court fees, complex procedures, geographically distant courts, and legal bars to bringing cases all pose significant barriers to achieving justice. Many communities and individuals that are aggrieved by environmental harms lack the resources to bring a court case. The legal principle of standing, which governs who has the right to appear in court to challenge certain actions (whether it be the issuance of a permit, illegal dumping of hazardous waste, or poaching), can greatly narrow who can seek redress for environmental harms, thereby denying access to justice. Even if the dispute resolution system has been well designed, it is of little use if access to it is not timely, inexpensive, and fair.

The capacity of lawyers and technical experts to bring and of judges to hear and consider environmental cases remains a significant concern. Environmental cases often have many law and science linkages, and the frequency with which these linkages arise grows as our technologies and scientific understanding grow. Many countries do not have a sufficient cadre of environmental law and science experts who can pursue the legally and scientifically complex aspects of environmental cases. A 2010 symposium of Asian judges identified capacity building, including on environmental litigation techniques and dispute resolution, as a key need for implementing environmental law.²⁴

A lack of government material resources devoted to promoting transparency, as well as the slow pace of some court proceedings are also significant implementation challenges. Decisions of courts and tribunals need to be made widely publicly available to educate stakeholders and to have a deterrent effect. The public must be aware of the availability of environmental dispute resolution to take advantage of it. And cases,

once filed, need to move quickly to resolution or else time will weaken the effect of the ultimate decision. Matters that languish for many years create mistrust of the system and cause parties to look elsewhere for relief.

The benefits of and challenges to improving environmental adjudication are summarized in Figure 5.5.

The rest of this chapter reviews three main areas in which improvements can be made to ensure justice in environmental enforcement and environmental dispute resolution: by ensuring access to justice; by implementing effective adjudication; and by providing effective remedies.

Figure 5.5: Benefits of and Challenges to Improving Environmental Adjudication

Benefits
Realization of environment-related rights
Reduction in harm from pollution and resource extraction
Increased accountability and consistency in the application of environmental law
Avoidance of civil strife over natural resources and pollution
Enhanced culture of compliance
Challenges
Inaccessibility of dispute resolution due to financial, geographic, and jurisdictional barriers
Lack of capacity and accessibility of judges, lawyers, and technical experts
Lack of government material resources to invest in rule of law infrastructure

24 Asian Development Bank 2011.

5.2 Access to Justice

Justice is predicated on having access to those fora that hear environmental disputes and enforce environmental laws.

“Access” means that those seeking relief (1) have knowledge of, or can easily find, the mechanisms available to them; (2) can utilize these mechanisms without undue delay or prohibitive cost; and (3) can access skilled technical assistance necessary to pursue their claims. Often, there are barriers to access in each of these areas, thereby undermining the delivery of justice. These challenges, and how countries are addressing these challenges, are considered in turn.

As an initial matter, because parties cannot seek redress and representation unless they know they are entitled to it, ***it is critical that all citizens know their rights and how to protect them.*** Publicizing the existence of environment-related rights and availability of institutions is the first step. In addition, developing environmental nongovernmental organizations, legal clinics and outreach programs from universities, and community organizations (such as the one highlighted in Case Study 5.2) support advocates for the public interest to fill this educational role.

5.2.1 Jurisdictional Accessibility

In order to bring or participate in a court proceeding, a party must satisfy certain requirements, known as standing or *locus standi*. These requirements are set forth in law (including statutes and constitutions), court rules and procedures, and court decisions. These standing requirements apply to cases brought under statutory and constitutional claims alike, including those involving a constitutional right to a healthy environment. Standing seeks to ensure that a case will be effectively litigated and to prevent unnecessary litigation by limiting the power to

sue to those individuals and entities who are actually aggrieved or have a specific interest in a matter.²⁵ Standing requirements are intended to prevent cases from being brought by uninterested persons who may not be sufficiently motivated to launch the strongest case, or worse, who may collude with the defendant. In some instances, standing qualifications require persons to suffer actual harm to their person or property or to show evidence of having participated in earlier proceedings before they can seek redress.

Standing requirements may create undue barriers to seeking relief for environmental harms. Where a person is specifically and uniquely harmed (for example by someone cutting down their trees or dumping waste on their land), there is usually no question they have standing. However, where an environmental harm is shared by many people (for example, in a region harmed by air pollution that violates the legal standards), many courts initially interpreted statutes to mean that it was the government’s prerogative and responsibility to bring suit. In some instances, however, a government may be unable (due to limited enforcement resources) or unwilling to enforce (because it does not want to harm or embarrass businesses). But when applied to environmental matters, these standing rules can prohibit an individual from suing to protect a natural resource upon which he or she relies even when the government fails to act, thus foreclosing access to justice. These standing rules also meant that people could not protect their health, where others were also being harmed. Similarly, a requirement that *actual* harm have occurred makes it impossible to bring suits to *prevent* harm.

To address these problems, legislatures and courts all over the world broadened notions

²⁵ Hammons 2016; Integrated Bar of Philippines v. Zamora, G.R. No. 141284 (August 15, 2000).

of standing to ensure that aggrieved parties can bring claims and that natural resources at risk may have non-state champions in court. Recognizing that governments may lack the resources or political will to enforce environmental laws, **constitutions and environmental statutes increasingly recognize the rights of citizens to go to court to prevent and challenge environmental violations** (see Figure 5.3).

Many countries have enacted broad or universal approaches to standing for those appealing to courts to remedy environmental harms; in many instance, these broad approaches to standing are linked to the development of constitutional rights related to the environment. Like many other Latin American countries, Costa Rica's constitution enshrines the principle of *intereses difusos*, which allows individuals to bring action on behalf of the public interest, including in the interest of environmental protection.²⁶ South Africa has adopted broad statutory standing for persons acting in their own interest, on behalf of others who cannot act in their own name, in the interest of a group or class, in the public interest, and as an association acting in the interest of its members.²⁷

The Philippines is home to some of the most inclusive standing rules in the world, as Filipino law states that "Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws."²⁸ In some countries, the authority to sue extends to suits on behalf of the environment. The Constitution of Kenya as well as the country's Framework Environment Law have relaxed standing rules to give access to courts to persons seeking to protect the

environment. To this end, courts in Kenya have held that litigation aimed at protecting the environment cannot be shackled by the narrow application of the *locus standi* rule, both under the constitution and statute, and indeed in principle. Any person, without the need of demonstrating personal injury, has the freedom and capacity to institute an action aimed at protecting the environment.²⁹ India's national environmental court has also greatly expanded the notion of standing, allowing the Court itself to initiate a case,³⁰ as described in Case Study 5.1.

Questions of standing also arise in the enforcement of environmental laws. Typically, enforcement proceedings are brought by the government against the person or entity accused of violating the law. But in the face of government inaction, **some countries give individuals the right to bring so-called "citizen suits" to enforce the law.** These provisions are designed to supplement government enforcement, sometimes requiring the citizen to give notice to the government and accused party of an intent to sue prior to bringing suit so that the government has a chance to act. For example, Australia allows individuals and organizations to bring civil suits and civil enforcement actions if they have been involved in environmental matters for the prior two years,³¹ and China recently allowed certain organizations to bring public interest lawsuits.³²

The persons with standing to challenge governmental administrative action or inaction may be broadly or narrowly defined. In some systems, standing is limited to those who can show that their individual rights have been affected, while other systems allow any

26 Costa Rica Code of Criminal Procedure, art. 38; Argentina Const., sec. 43.

27 South Africa Const., sec. 38.

28 See rule 2 sec. 5 of the Kenya Rules of Procedure for Environmental Cases.

29 Joseph Leboo and 2 others v. Director Kenya Forest Services & Another [2013] eKLR.

30 See Gill 2013.

31 See Mcintosh, Roberts, and Constable 2017.

32 Environmental Protection Law (2015), People's Republic of China, art. 58; see also Zhang and Mayer 2017.



Case Study 5.1: Universal Standing in India's National Green Tribunal

India's National Green Tribunal was created in 2010 to hear civil cases that involve a substantial environmental question. The Tribunal has appellate jurisdiction over cases as well, and appeals of its decisions go directly to India's Supreme Court. The Tribunal is composed of justices as well as experts with technical and practical expertise in environmental matters.

The Tribunal's standing requirements allow very open access to the court. 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 of those living in a village or all fisher folk reliant on a certain fishery.

The Tribunal has also taken on cases on its own accord, which is called *suo motu* or *sui generis*, meaning "of its own motion" and "of its own kind." Once such case concerned the failure of the local government to provide safe public drinking water in Chennai, India.^a Upon hearing of situations that involved potential environmental harms, the Tribunal called parties before it to explain the situation.^b

- a. *Suo Motu, Tribunal of its Own Motion (Quality water to be delivered by public tap Based on letter dated 24.07.2013 of Shri Ramchandra Srivatsaav) v. The Secretary to Government, Municipal Administration and Water Supply Department, Government of Tamil Nadu et al.* (January 13, 2016).
- b. *Vimal Bhai v. The Ministry of Environment & Forests* (2011).

citizen to challenge administrative decisions or failures to act in environmental matters. New Zealand's Environment Court requires only that the person bringing a case have a greater interest in the matter than the general public, or that the person represents a relevant public interest.³³ Under European Union law, some member countries' standing regimes have been broadened to allow standing to

challenge governmental action as contrary to EU law, even when such groups have not been afforded standing to challenge such action under the country's own law. For example, under traditional Swedish procedural law, only the government can represent the public interest in court; Swedish courts, however, have applied EU law—including the Aarhus Convention, to which the European Union is a party—to allow environmental organizations

³³ Birdsong 2002.

to challenge administrative decisions that might contravene EU environmental law.³⁴

A few countries, however, limit the class of persons or organizations able to bring citizen suits. China, for example, requires that nongovernmental organizations bringing environmental suits on behalf of individuals be registered with the civil affairs departments at or above the municipal level within the district; have specialized in environmental protection public interest activities for five or more consecutive years; and have no record of violation of law.³⁵

Even if someone is precluded from bringing suit to enforce environmental laws, they may be able to participate in a lawsuit brought by another party—such as by providing a statement to be entered into evidence. For example, victims of crimes in the United Kingdom may make a Victim Personal Statement describing how they have been affected by the crime, which may be used as evidence by the Crown Prosecution Service.³⁶

Finally, **a growing number of countries recognize standing for nature or natural ecosystems.** Ecuador's constitution recognizes the rights of Nature, or "Pacha Mama."³⁷ A Bolivian statute requires the state and individuals to respect Mother Earth's rights.³⁸ In New Zealand, Te Urewera, a former national park, has been declared "a legal entity, and has all the rights, powers, duties,

and liabilities of a legal person" exercisable by a board appointed on its behalf.³⁹ And a court in New Zealand has declared a river to be a legal entity with legal rights,⁴⁰ and an Indian High Court declared the Ganges River and the Yamuna River (a tributary to the Ganges), as well as Himalayan glaciers and forests at the headwaters of these rivers, to be living entities with legal rights.⁴¹ In May 2017, the Sixth Chamber of Review of the Constitutional Court of Colombia made headlines by recognizing the Atrato River, its basin, and tributaries as having rights.⁴²

In sum, **many countries are moving to increase access to justice by broadening the notion of standing.** Most countries build upon existing notions of standing and increase the ability of citizens to sue to varying degrees. Figure 5.6 shows the variety of ways standing can be broadened to increase access to courts. This allows more citizens to access courts to act on their own behalf, on behalf of others, and on behalf of the environment.

5.2.2 Financial Accessibility

Financial barriers are among the most substantial barriers to access to the courts to protect environment-related rights and address environmental violations. There are many ways that costs could deter litigants from filing or pursuing a case—and many possible solutions.⁴³

Financial barriers to accessibility start with high court fees that are charged to bring

34 Änok; Supreme Administrative Court, HFD 2014:8 (referring to art. 2(5), art. 6(1), and 9(3)-(4)); The Kynna Wolf Case (referring to art. 2(5) and art. 9(2)-(4)); RÅ 1993 ref. 97. These cases were heard by the Supreme Administrative Court (Regeringsrätten).

35 Environmental Protection Law (2015), People's Republic of China, art. 58.

36 Ministry of Justice, Code of Practice for Victims of Crime (2015).

37 Constitution of Ecuador, October 20, 2008, arts. 71-74.

38 Law of Mother Earth (Ley de la Madre Tierra – Ley No. 300 de 15 de octubre de 2012), Plurinational State of Bolivia.

39 Te Urewera Act 2014, sec. 11.

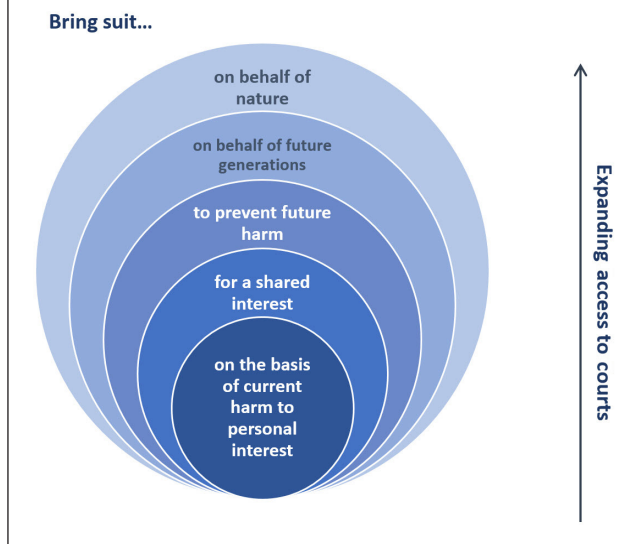
40 Roy 2016.

41 Trivedi and Jagati 2016.

42 Supreme Court of Colombia, Judgment T-622 of 2016, May 7, 2017. <https://justiciaambientalcolombia.org/2017/05/07/sentencia-rio-atrato/>.

43 An excellent overview of ways that environmental courts and tribunals have reduced financial barriers can be found in Forever Sabah 2016, 43.

Figure 5.6: Enhanced Standing to Expand Access to Courts



or sustain a case. Fees take the form of filing fees, transcription fees, and others. In Ukraine, legislation reduced court fees from five to one percent of the damage claimed.⁴⁴ However, the cost of initiating suits where damage is high can still be prohibitively expensive. For example, due to court fees one group of Ukrainian villagers living near a mine was unable to bring a case related to the adverse health effects of excess fluoride in drinking water on children.⁴⁵ In the United Kingdom, the Supreme Court held that a fee requirement for claims to the employment tribunals was unlawful on the grounds that the introduction of the fees effectively prevented access to justice.⁴⁶

In environmental cases, court fees can be set to ensure they are reasonable, fees can be waived or reduced, and fees can be reduced based upon income or status as a public interest litigant. In Denmark and Sweden,

44 Sferrazza 2003, 55.

45 Ibid.

46 UNISON v. Lord Chancellor, [2017] UKSC 51 (July 26).

for example, there are no filing fees for environmental cases in environmental courts and tribunals.⁴⁷ In the Philippines, low-income plaintiffs are exempted from paying court fees and are granted free legal counsel,⁴⁸ filing fees are reduced, simplified and inexpensive procedures are available, and the time period for adjudication is limited.⁴⁹

When litigants ask a court to stop another person from acting, such as seeking to stop a bridge from being built, they do this by requesting a preventive or temporary restraining order, as discussed in Section 5.4.1. Courts often require those seeking such an order to post a financial security bond. The bond is meant to ensure parties are not bringing frivolous suits, and if they are found to have acted in bad faith, they may forfeit some or all the bond. Australia, the United States, and a number of other countries provide that ***bonds for injunctions and temporary restraining orders can be waived or greatly reduced in environmental cases involving the public interest or persons of limited means.***⁵⁰ For example, in Georgia, article 29 of the Administrative Procedure Code serves as an automatic injunction for many environmental cases as it suspends the relevant administrative act for the time of the case, thereby suspending the “requisite legality of the activity” being challenged. While this is not a direct waiver of a bond, it essentially eliminates the need for a security bond.⁵¹

Pursuing a case can be expensive due to the costs of lawyers and experts. Many countries allow litigants to represent themselves, although this can put these litigants at a distinct disadvantage. Countries such as

47 Pring and Pring 2016.

48 Nardi 2007.

49 International Commission of Jurists 2010, 16.

50 Riesel 2005, 26.

51 Administrative Procedure Code of Georgia, <https://matsne.gov.ge/ru/document/download/16492/48/en/pdf>.

the Philippines appoint lawyers and experts to represent or advise litigants. In some countries, law schools or law firms may provide *pro bono* (free) representation to certain clients as well. In Brazil, law schools must provide a Center for Legal Practice for students to operate as litigators supervised by professionals,⁵² and in a limited number of cases, this service is free to those with specific economic limitations.

In many jurisdictions, the losing party must pay the court fees and litigation costs of the winning party.⁵³ This can be risky and may deter needed litigation, especially when an individual or small organization challenges corporations or the government. For example, in a case in Australia, an environmental organization unsuccessfully challenged the government's decisions regarding two coal mines and their potential impacts on climate change.⁵⁴ A commentator noted that the "case [only] occurred because the client was prepared to risk their organisation to run the litigation."⁵⁵ When the organization lost the suit, it went bankrupt and was dissolved.

The prospect of facing such costs (and personal liability) in the event of a loss can deter public interest and other parties from bringing a case. As a result, in some countries each party bears its own costs regardless of outcome, absent clear abuse or misconduct (the so-called "American rule"), or costs may be capped.

Some countries seek to encourage public interest environmental litigation by providing for the award of attorneys' fees if a party sues successfully on behalf of the public.

For example, interpretive guidance issued by China's Supreme People's Court on the 2015 Environmental Protection Law allows the winning party to recover attorneys' fees; additionally, the losing plaintiffs can claim awards from the Supreme People's Court on the basis of inspection and ecological restoration and other necessary costs.⁵⁶ In South Africa, the Constitutional Court held that where a public interest litigant is "substantially successful" in vindicating constitutional claims (in that case, access to information) that the party was entitled to an award of costs.⁵⁷ And most environmental laws in the United States provide that plaintiffs that substantially prevail can claim attorneys' fees.⁵⁸

Relaxing procedural requirements and holding more informal hearings can help reduce the burdens on litigants without representation, and many environmental courts and tribunals adopt such strategies.

As discussed in Section 5.3.4, many courts encourage parties to use alternative dispute resolution processes to avoid the cost and time involved in complex litigation. Although it is not guaranteed that such processes will be cheaper than traditional litigation, this is usually the case. In other instances, government provides financial support for indigent parties or public interest litigants. Figure 5.7 illustrates some of the easiest ways that countries can reduce financial barriers in environmental cases.

52 Brazil Ministry of Education, High Education Chamber of the National Board of Education (Câmara de Educação Superior do Conselho Nacional de Educação), Resolution CNE/CES 09/2004, art. 7(1).

53 See generally Vargo 1993.

54 Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc. v. Minister for the Environment and Heritage [2006] FCA 736.

55 Ibid.

56 Finamore 2015.

57 Biowatch Trust v. Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009).

58 May 2003; Percival et al. 2018.

5.2.3 Geographic Accessibility

Just as cost can be a barrier to justice, so too **“geography alone can diminish access to justice.”**⁵⁹ Courts, tribunals, and government agencies tend to be in population centers and so are only readily accessible to those who are already there or who have the means and the time to travel there.

One strategy to address such problems of geography is to hold initial and preliminary proceedings close to the location of the dispute. Another is to make it possible for the parties to participate by telephone or other remote link instead of requiring their presence in a courtroom. If technology is used to hold proceedings, it is of course important that the technology be available to all parties.

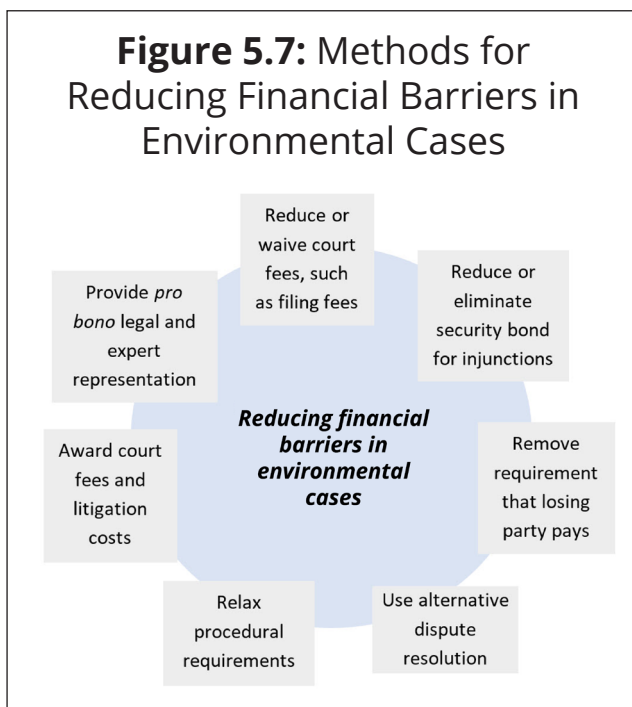
When in-person hearings are necessary, **the court may be able to go to the location of the dispute.** In New South Wales, Australia, the judges of a specialized land and environmental court located in the capital have adopted a number of innovations:

- Land and Environment Court documents can be filed at any Local Court in New South Wales. There are over 150 Local Court courthouses across the state.
- Directions hearings and other preliminary court proceedings are usually conducted by telephone or by using the Court’s secure online forum for filing, listings, directions, and communication between parties.
- Final hearings are often conducted at the site of the dispute.
- The Land and Environment Court often sits in country courthouses located near the parties.
- Parties and their legal representatives can communicate with the Court by email or registered users can communicate through eCourt.⁶⁰

The judges of several other specialized environmental courts and tribunals, including the State of Amazonas Environmental Court in Brazil, travel great distances— by airplane, boat, or a bus specially equipped as a courtroom—to hold hearings near the location of the dispute.⁶¹

As well as the advantage to the litigants of not having to travel to a central hearing location, holding hearings near the site of the dispute enables the court to make a site visit, with the parties and any lawyers present, prior to or during the hearing. This

Figure 5.7: Methods for Reducing Financial Barriers in Environmental Cases



59 Pring and Pring 2009, 31.

60 Land and Environment Court 2015.

61 Pring and Pring 2009, 31.

may allow the court to better understand the evidence and to place the dispute in its real-world context. For example, the judges of the Vermont (U.S.) environmental court conduct site visits in almost every case that goes to trial, because seeing the location is so useful in fully understanding the parties' testimony, plans, and photographs.⁶² Depending on the available time and nature of the case, the site may be visited on the day of the trial, or may be conducted separately in advance of or after the trial. In some cases, it may even be helpful to take two site visits in different seasons of the year, for example, to see the appearance of a site when leaves are present on deciduous trees, and also when the trees are bare.



5.2.4 Access to Specialized Knowledge

Individuals are unlikely to seek remedies for environmental harms or violations if they are unaware of available environmental remedies and of the forums in which to pursue the claims and if they do not have access to legal and technical expertise to pursue

those remedies. Even if courts and tribunals are available in principle, **many people and communities lack the legal and technical knowledge and skills to effectively bring their cases to court or present them.**

As discussed above, cost may be a barrier to accessing lawyers and technical experts. But even before cost is considered, the very existence of well-trained lawyers and technical experts who can recognize and pursue environmental claims is necessary. The number of environmental lawyers and experts remains relatively small, particularly in developing economies. In many developing economies, there are only a few (often fewer than five) practicing environmental attorneys. Judge Samson Okong'o of Kenya's Environment and Land Court noted the difficulties facing the Court because of the "lack of expertise and experience both at the bench and the bar particularly on environmental law."⁶³ Thus, the teaching of environmental topics in law and scientific education is important to make access to justice possible.

Access to experts does not have to mean access to those with advanced educational degrees. Experience with environmental matters is the critical skill—people who are aware of environment-related rights and the various avenues available to redress environmental harms are essential. Many community activists and nongovernmental organizations fulfill this need, as demonstrated in Case Study 5.2. In fact, **the existence of environmental nongovernmental organizations is often a key element in identifying environmental harms, bringing attention to environmental issues in disadvantaged communities, and helping people find the necessary expertise.** As a result, laws and policies that allow nongovernmental organizations to exist

62 Wright 2010, 211

63 Okong'o 2017.

Case Study 5.2: Lake Turkana Community Trust Protects Community Rights

Development of dams along Ethiopia's Omo River may reduce water flow into Lake Turkana, the largest alkaline lake in the world that also supports several indigenous communities and a World Heritage Site. Much of Lake Turkana lies within Kenya. The Lake Turkana Community Trust is a grassroots organization that fosters social, economic, and environmental justice in the Lake Turkana Basin. When the Kenyan government entered into a power purchase agreement to buy 500 megawatts of electricity from Ethiopia, the Trust sued on behalf of the communities seeking information about the power purchase agreement.

Kenya's Environment and Land Court found that the government has "a duty to establish that no environmental harm arises from the [electricity] agreements" and projects with the Ethiopian government. Further, "as trustees of the environment and natural resources [the Kenyan government] [owes] a duty and obligation to the [communities] to ensure that the resources of Lake Turkana are sustainably managed, utilized and conserved, and to exercise the necessary precautions in preventing environmental harm that may arise from the agreements and projects entered into with the Government of Ethiopia in this regard."^a

The Court ordered the government and power purchasers to disclose all relevant information and to take all steps necessary to ensure that the resources of Lake Turkana are used sustainably and conserved in any agreements with the government of Ethiopia regarding the purchase of electricity.

- a. Lake Turkana Community Trust v. Attorney General, Republic of Kenya Environment and Land Court, No. 825 of 2012.

and thrive are key components of access to justice.⁶⁴

Some countries with specialized environmental courts and tribunals appoint experts and lawyers to assist environmental claimants not otherwise represented (for example, New Zealand has a system to pay for attorneys or experts for non-profit organizations).⁶⁵ In addition, they may have

simplified procedures or collect evidence themselves. These approaches can help overcome knowledge and skill barriers to access to justice as well as resource barriers.

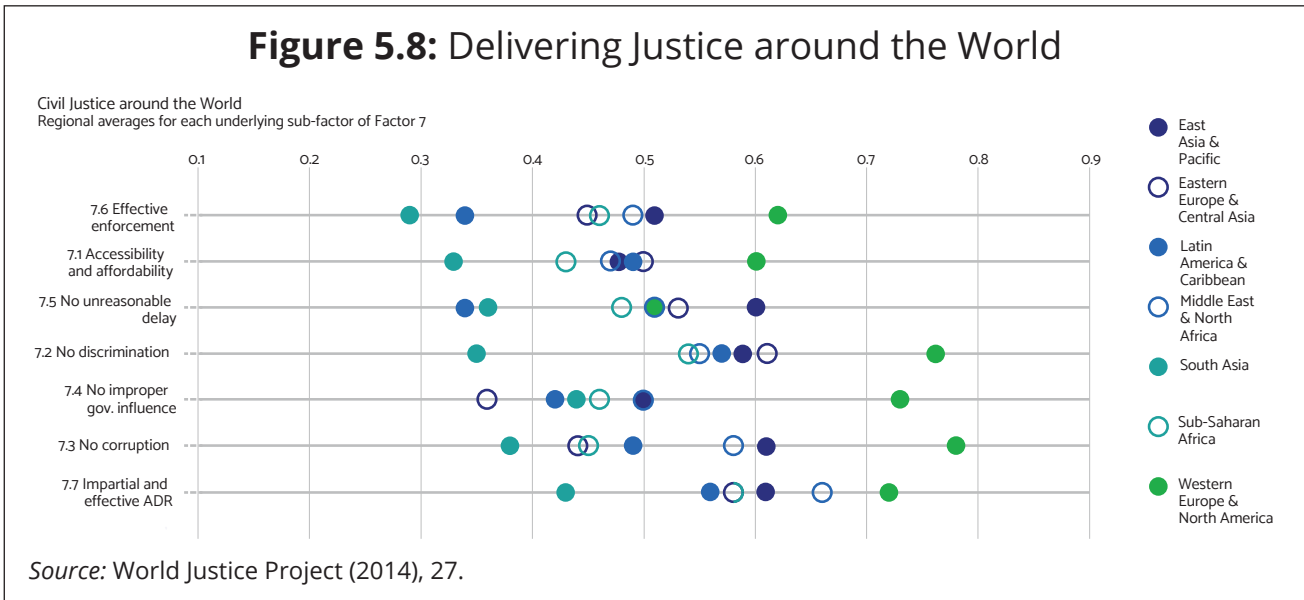
5.3 Adjudications

Fair and transparent judicial and tribunal proceedings are a key element in delivering justice. When courts, tribunals, commissions, or other bodies adjudicate an environmental case, ***it is critical that the proceedings be conducted by capable and impartial***

64 Straughan and Pollak 2008, 9; Kameri-Mbote 2005, 3-4.

65 Preston 2014; Ministry of the Environment, New Zealand 2017.

Figure 5.8: Delivering Justice around the World



adjudicators using efficient procedures that result in reasoned and transparent decisions.

These elements, which are discussed below, increase the likelihood that there will be accountability for environmental violations and that harms to environment-related rights will be addressed, that parties will meet their environmental responsibilities, and that parties who violate environmental law will be held accountable. Further, these elements increase public confidence in the tribunals, their decisions, and rule of law in general. However, as Figure 5.8 shows in the broader rule of law context, successfully delivering all of these elements of justice is a challenge around the world.

5.3.1 Fair Proceedings

Fair proceedings are an essential characteristic of effective adjudication. Even if the ultimate decision is correct as a matter of law, without parties perceiving that the process was fair and equitable, the decision may not be respected or followed, and respect for the rule of law may be undermined.

A large body of research shows that **when citizens perceive officials (particularly law enforcement officials) to be acting fairly, the public is more likely to cooperate and comply with the legal system.**⁶⁶ To ensure the judicial system is seen as fair, parties to a proceeding must have the opportunity to present their evidence and arguments; decisions must be made on a reasoned basis and based on the law; and proceedings must be free from undue influence and corruption.⁶⁷ The substantive law and the procedural rules must be applied equally to all participants, without regard to their position or wealth. When these steps are not followed, the results may arouse public protest and lack of trust in the legal system.

For example, in South Africa, the development of a “One Environment System” with shared decision-making authority between the local environmental regulator and the local mining licensing agency led to lax oversight. This allowed the owners of the Tormin mine, represented by MRC,

66 Murphy 2009.

67 See Burke and Leben 2007; Rottman 2007; Cramton 1971; Tyler 1984.

a holding company, to change their mining methodology as it suited them.

MRC moved the main mine processing zone above a cliff, so heavy utility vehicles had to haul sand from the beach. MRC received permission from the local mining licensing agency to construct an illegal jetty and expand the processing plant, although evidence suggests the mining company had already been expanding before securing approval. For the transportation of the mineral sand from Tormin to local ports, the transportation department allowed MRC to opt for truck transport rather than a much more efficient rail system; MRC exceeded its 4-trucks-a-day permit by over 100. Not long thereafter a substantial portion of the cliff underneath the processing plant collapsed. After the regional environmental regulator inspected the mine, MRC sued the environmental regulator claiming the inspection constituted an illegal raid without a legitimate search warrant.⁶⁸ Further, a subsidiary of MRC filed a defamation suit against two attorneys from the Center of Environmental Rights and another activist for US\$1.25 million.⁶⁹ This attempt to intimidate and disable organizations protecting the environment and local communities by burdening them with heavy legal costs and risk has caused further unrest, weakening public faith in the fairness of the regulatory system.⁷⁰

5.3.2 Capable Judges Acting with Integrity

Effective environmental adjudicators are both capable and fair-minded. One of the four universal principles of rule of law, according to the World Justice Project, is that **“Justice is delivered timely by competent, ethical, and**

independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.”⁷¹ For judges to act with integrity and be unprejudiced, it is important for them to be able to operate independently and without fear of retribution for their decisions. As discussed in Chapter 2, ensuring judges receive adequate pay, have a mandate for independent operation, abide by ethics policies, and are subject to other corruption deterrents can reduce the risk of corruption and undue influence. Successful courts are insulated from political manipulation by having their budgets protected from political interference, their judges paid commensurately with other professions, and salary levels set by independent bodies, not politicians.⁷²

For example, the Environmental Review Tribunal of Ontario, Canada, operates as a decisionally independent body.⁷³ The role of the tribunal is to decide on cases relating to 11 environmental and planning statutes—primarily the Environmental Assessment Act, the Environmental Protection Act, the Ontario Water Resources Act, the Nutrient Management Act, the Safe Drinking Water Act, the Waste Management Act, and the Pesticides Act.⁷⁴ Operating under the Ministry of the Attorney General, rather than the environmental agency, enables the Tribunal to have independence when reviewing cases relating to other governmental entities.⁷⁵

Due to the complexity and technical nature of many environmental matters, it is particularly important that judges be knowledgeable and competent regarding environmental law. Lack of understanding of

68 Open Society Foundation for South Africa 2017.

69 Business and Human Rights Resource Centre n.d.

70 Bruce 2017.

71 World Justice Project 2014, 4.

72 Pring and Pring 2009, 75.

73 See <http://elto.gov.on.ca/tribunals/ert/about-the-ert/>.

74 Ibid.

75 Pring and Pring 2016, 36.

the many unique aspects of environmental cases, ranging from standing requirements to substantive law, is a common problem. This is particularly true in small jurisdictions, which may have only a single judge with only general judicial training. The importance of judicial training in environmental law and procedure is illustrated by Case Study 5.3.

As discussed in Section 5.3.3, creation of specialized environmental courts and tribunals is one way of ensuring that adjudicators have the requisite skills to decide environmental cases. Some courts and tribunals address this need by having technically-trained judges decide cases or have technical experts who are not judges hear cases with judges. For example, each of Sweden's five regional Environmental Courts features a panel made up of a judge with legal training, a technical advisor on environmental issues, and two lay experts. The Swedish Environmental Court of Appeals also substitutes a technical expert for a legally trained judge in some cases.⁷⁶

Countries, including Brazil, Indonesia, and South Africa, are undertaking to educate judges about environmental law and cases. The serious, international need for judicial education on environmental law motivated the formation of the Global Judicial Institute on the Environment in 2016, which seeks to enhance the capacity of judges around the world to decide environmental cases.⁷⁷

5.3.3 Specialized Courts and Tribunals

As environmental law has proliferated globally, so have new ways of resolving environmental disputes and violations. Historically, courts have struggled with

Case Study 5.3: Case Dismissed in Ecuador

Ecuador has one of the strongest constitutional provisions protecting the rights of nature. An environmental nongovernmental organization and community members brought an action to prevent the establishment of a pine tree plantation in sensitive native grassland. The judge ruled that the claimants could not bring the lawsuit because they themselves had not been harmed, because the harm had not yet occurred, and because the evidence had not been presented as required in criminal cases.^a The judge was not aware of the constitutional provision allowing any person to bring a suit on behalf of nature, including those not personally harmed; that a constitutional claim allows preventive action before harm is committed; or that constitutional claims may be brought based on written affidavits.

a. Boyd 2017.



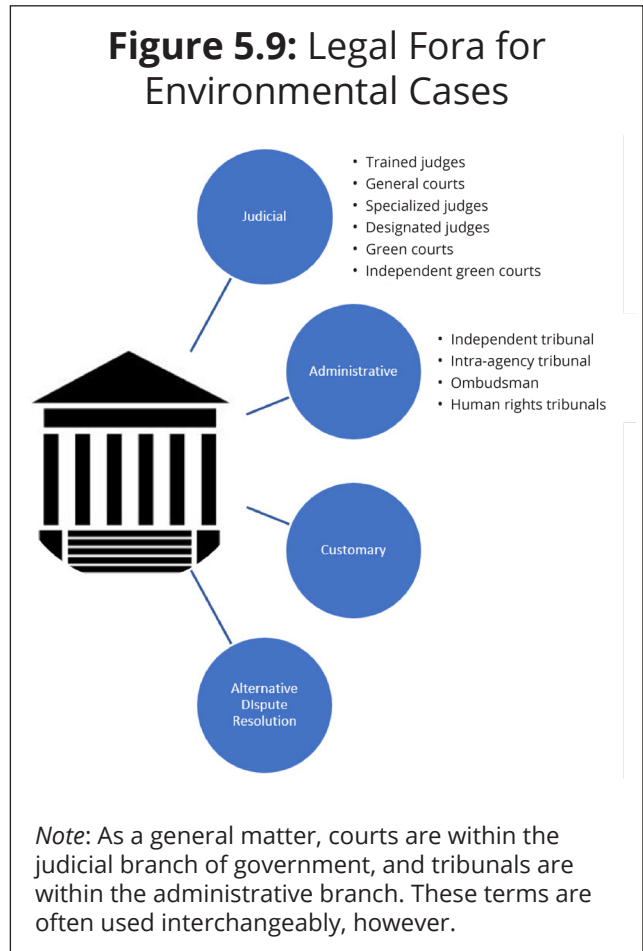
⁷⁶ Ibid., 27.

⁷⁷ IUCN 2016.

the complexity of environmental statutes and the scientific and technical issues they raise, and some judges avoid such cases. Then-U.S. Supreme Court Justice Antonin Scalia famously complained about the technical aspect of an environmental case saying “I told you before, I’m not a scientist. That’s why I don’t want to have to deal with global warming, to tell you the truth.”⁷⁸ Unfortunately, this is not an isolated sentiment. It highlights both the need for judges to become more scientifically literate to understand and rule on environmental cases, and the opportunity to create specialized bodies with appropriately trained judges to hear environmental cases.

Over 40 countries and many subnational jurisdictions have established specialized procedures, courts, and tribunals for hearing environmental disputes in an attempt to ensure swift and efficient justice in environmental matters. Figure 5.9 illustrates a wide range of legal bodies that countries have created to resolve environmental disputes.

Virtually all countries provide for resolution of environmental cases within a judicial court system. Providing judicial education about environmental law is important in ensuring that the general court system can manage environmental matters, otherwise judges will likely be ill-equipped to hear environmental cases. Another important approach to understanding environmental science is to receive briefs from qualified individuals and organizations as amici curiae (“friends of the court”) who may not qualify for party status in the proceeding. For example, the U.S. Supreme Court has addressed the criteria for admission of scientific and other technical evidence in civil litigation, and on two occasions essentially adopted the views



advanced by organizations representing the scientific community as amici curiae.⁷⁹

Some countries train specialized judges in environmental law or designate certain judges to act as environmentally-specialized judges. The range of approaches varies dramatically, with some countries designating judges as “green” yet providing no specialized environmental training (for example, Brazil); others providing training but not directing environmental cases to these judges (for example, the State of New York in the United States of America); and others both training judges and assigning environmental cases

78 U.S. Supreme Court Oral Argument, Nov. 29, 2006.

79 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael 526 U.S. 137 (1999).

to them (for example, judges interested in adjudicating environmental cases in Indonesia are required to participate in a Judge Certification Program).⁸⁰ Some countries (such as Sweden and New Zealand) allow technical experts to hear environmental cases with law-trained judges. And others may appoint “special masters” to hear environmental cases. These approaches can improve the ability of general courts to handle environmental cases, provided the judges and experts are prepared to hear the cases and the cases are assigned to those judges and experts.

As of 2017, 26 countries have created special national environmental courts to manage specific environmental disputes (see Figure 5.10). This understates the frequency of environmental courts, though, as some countries have environmental tribunals and even more countries have subnational environmental courts and tribunals, as shown in Figure 5.11: **as of 2016, there were over 350 environmental courts or tribunals in over 40 countries around the world including those established at the regional, provincial, or state level.**⁸¹ Operationally independent environmental courts are free-standing courts that are separate from the general courts. The New South Wales Land and Environment Court in Australia is one such example, described in Case Study 5.4. Decisionally independent environmental courts are specialized courts within the general court system that have the power to make their own procedures, rules, and decisions. These courts also provide the kind of specialized attention that can result in better informed and faster resolution of disputes. The Environmental Division of the Vermont Superior Court (USA) represents one example of a decisionally independent court.⁸²

80 Pring and Pring 2016, 11, 24.

81 Ibid., xiii. For example, Vermont and Hawaii (in the United States), Amazonas (Brazil), and New South Wales (Australia).

82 Ibid., 25.

In June 2014, China’s Supreme People’s Court established the Environmental and Resource Tribunal, and instructed the courts in all regions to enhance the establishment of judicial organs for environmental and resource cases.⁸³ As of April 2017, the courts in all regions had established 956 tribunals, collegiate panels, and circuit courts for environmental and resource cases; in addition 18 higher people’s courts, 149 intermediate courts, and 128 grassroots courts have established environmental and resource tribunals.

Countries frequently provide for environmental adjudication within government environment ministries and agencies. This allows for a level of administrative review before appeal to the judicial system. These environmental tribunals can help to resolve disputes and address violations more quickly, cheaply (for both parties), and with more technical expertise than the general court system. There are different models for such environmental tribunals. Some environmental tribunals, such as Kenya’s National Environment Tribunal (see Case Study 5.5), are fully independent of the agency whose decisions they review. They may be housed within the same ministry or agency or be housed in an agency other than the one whose decisions they review. Other environmental tribunals are intra-agency, meaning they are under the control—fiscally, administratively, and with regard to policy—of the same agency whose decisions they review, although the tribunals may still retain significant decisional independence.

In some countries, such as Timor-Leste and Afghanistan,⁸⁴ customary and traditional courts and dispute resolution methods operate in tandem with statutory judicial and administrative systems. This situation is

83 Supreme People’s Court 2017.

84 Miyazawa 2013; Sait 2013; see generally Meinzen-Dick and Pradhan 2016.

Case Study 5.4: The New South Wales Land and Environment Court

In operation since 1980, the Land and Environment Court of New South Wales, Australia, was the first specialist environmental court established as a superior court of record. It has exclusive jurisdiction over civil and criminal environmental, land planning, building, and mining matters. Its decisions are reviewed by the civil and criminal appeals courts and the Australian High Court, but its operations and decisions are largely independent. It has six law judges, 22 science-technical commissioners, and a registrar with far-reaching administrative and quasi-judicial powers. The Court is renowned for many procedural innovations tailored to environmental cases, many of which are discussed in this chapter, and it has become a model for other States in the creation of their own environmental specialist courts and their own environmental jurisprudence.

The Honorable Justice Brian J. Preston, then Chief Judge of the Court, has identified twelve benefits of the Court.^a One of the biggest benefits (and one of the original goals of the Court) is that the judges have been able to acquire specialist expertise. This not only facilitates a better understanding of the complex nature of environmental disputes, but also allows the Court to provide a wide variety of dispute resolution mechanisms.^b Additionally, the Court has developed a large body of case law in a number of key areas such as open standing provisions for public interest litigation and the principle of polluter pays. For example, in the 1997 case of *Environment Protection Authority v. Gardner*, the Court imposed the maximum penalty (12 months imprisonment and AU\$250,000 in fines) for extensive environmental pollution that was perpetrated in a deliberate and dishonest manner. This decision saw widespread media coverage and became a deterrent for individuals and industry.^c In its almost 40 years of existence, the Court has been an influential factor in raising the government's, industries', and the public's awareness of environmental law issues in general.^d The Court decided 83 cases from January through August 2017 alone. Finally, while large, established courts can be conservative, leading to slow change that is heavily-resisted, the flexibility and innovation accorded this specialized court allows it to achieve quick practical and procedural changes.^e

- a. Preston 2008, 25.
- b. *Ibid.*, 26.
- c. Pearlman 2000, 398-399.
- d. *Ibid.*, 406.
- e. Preston 2008, 30.



(Pictured from left): New South Wales Environmental Defender's Office solicitor Sarah Roebuck, Barristers Jason Lazarus and Josie Walker, and Friends of Tumblebee President James Ryan at New South Wales Land and Environment Court in Sydney



Members of Kenya's National Environment Tribunal meeting with Hon. Justice Augustino Ramadhani (at right), President of the African Court on Human and Peoples' Rights

Case Study 5.5: Kenya's Specialized Environmental Court and Tribunal

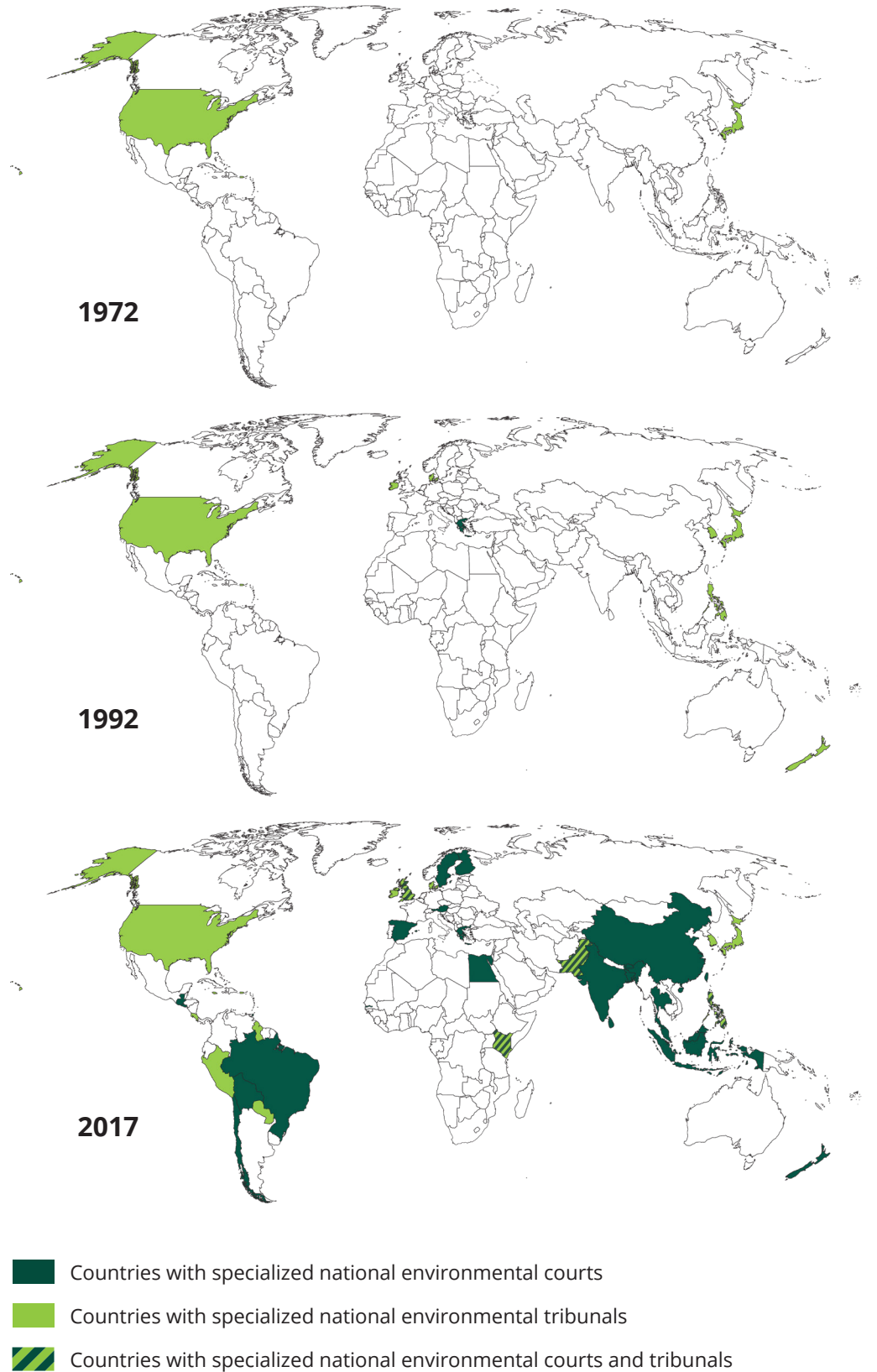
Kenya has two specialized fora for adjudicating environmental matters: the Environment and Land Court and the National Environment Tribunal. The Environment and Land Court is a superior court with the same status as Kenya's High Courts. It hears and decides disputes relating to the environment and the use, occupation of, and title to land. Appeals against its decisions lie with the Court of Appeal.

The National Environment Tribunal is established under Kenya's Framework Environment Law to receive, hear, and decide appeals arising from decisions of the National Environment Management Authority on issuance, denial, or revocation of environmental impact assessment licenses, among other issues. The tribunal was established out of the realization that cases of environmental degradation were rampant, yet ordinary courts were taking relatively long to decide them, during which period the affected parties and the environment itself suffered, sometimes to a point beyond repair. Moreover, there needed to be a more flexible dispute resolution mechanism to encourage parties with environmental disputes to seek justice to allow sustainable development to take place. Further, while ordinary citizens had been legally endowed with environment-related rights to be protected, court processes were often expensive. The Tribunal sought to ensure that citizens could have effective access to justice.^a The tribunal decides its own operating rules and procedures and functions like a court of law with broad authority to approve, overrule, or modify the Authority's decisions. The Tribunal may issue environmental impact assessment licenses or enjoin a project if it overrules the Authority's decision. The Tribunal can appoint experts to assist it in deciding cases, and it makes its own rules of procedure "simple and precise ... to ensure the proceedings are informal and people-friendly." Its fees are lower than the courts to ensure accessibility to all in need. The Tribunal has decided over 140 cases since 2005.^b

a. Ministry of Environment & Forestry. n.d.

b. Kaniaru 2011-2012; Pring and Pring 2016, 33.

Figure 5.10: Countries with National Environmental Courts and Tribunals (1972, 1992, and 2017)

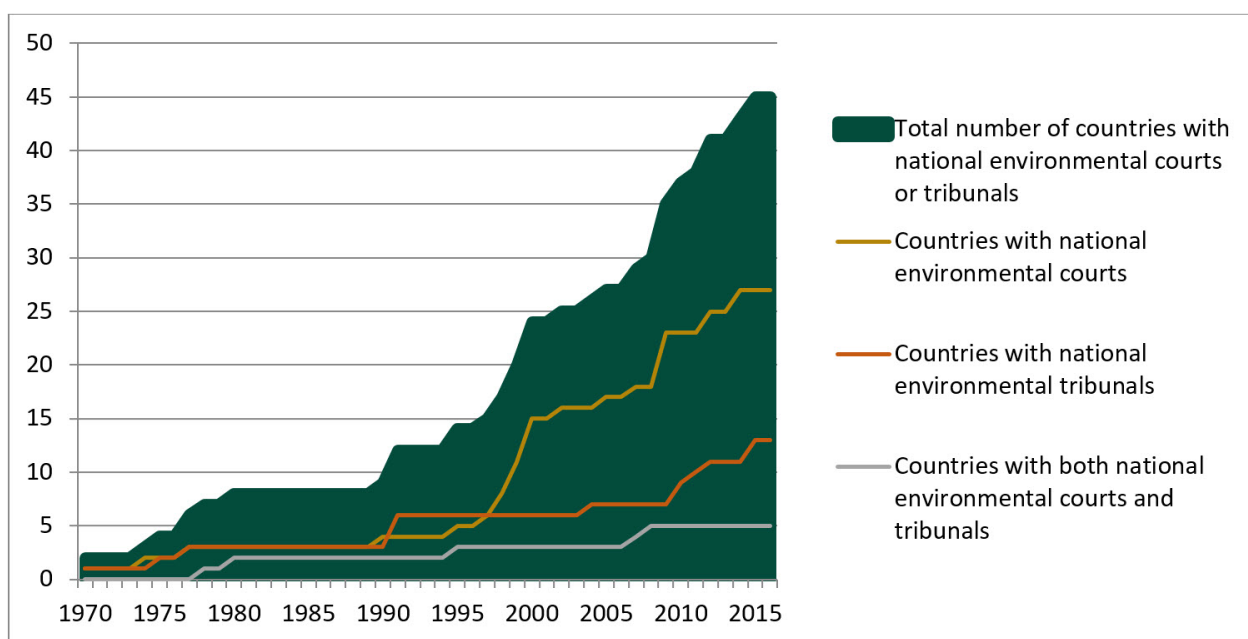


Year	Countries with specialized national environmental courts	Countries with specialized national environmental tribunals	Countries with specialized national environmental courts and tribunals
1972		Japan, United States	
1992	Greece	Denmark, Ireland, Japan, New Zealand Philippines, Republic of Korea, United States	
2017	Austria, Bangladesh, Bhutan, Bolivia, Brazil, Chile, China, Egypt, El Salvador, Finland, Gambia, Greece, Guatemala, India, Indonesia, Malaysia, New Zealand, Spain, Sri Lanka, Sweden, Thailand, Trinidad and Tobago	Antigua and Barbuda, Costa Rica, Denmark, Guyana, Ireland, Jamaica, Japan, Malta, Mauritius, Paraguay, Peru, Republic of Korea, Samoa, United States	Kenya, Pakistan, Philippines, United Kingdom

Note: Precursors of environmental courts and tribunals such as land courts and water courts were not included in this map. The map highlights countries with confirmed, operational national environmental courts and tribunals and does not include those that have been authorized but are not yet operational. Some countries have multiple national environmental courts and tribunals.

Source: Environmental Law Institute, based on data in Pring and Pring (2009) and Pring and Pring (2016).

Figure 5.11: Expansion of Environmental Courts and Tribunals



Source: Based on data from Pring and Pring (2016).

referred to as “legal pluralism.” If customary law applies to a local dispute over water rights, for example, a traditional court may resolve the dispute using customary rules. Such customary courts are usually much more accessible, as they are inexpensive, fast to decide, and do not involve the procedures and processes of the judiciary. Moreover, people are often more familiar with customary courts, which thereby enjoy more popular legitimacy. These courts’ decisions are often referred to and reviewed by relevant agencies and courts to ensure there is not a conflict with statutory and judicial law and process.

Other fora are available for environmental dispute resolution, including environmental ombudsman and human rights commissions. Ombudsmen often investigate complaints and report to other authorities, which may follow up with enforcement or other action. For example, Wales and Hungary have the Future Generations Commissioner⁸⁵ and Commissioner for Fundamental Rights,⁸⁶ respectively, which oversee the rights of future generations, while the Philippines has an environmental ombudsman who oversees environmental infractions by public officials.⁸⁷ Human rights commissions are often involved because of the intersection between human rights and environmental issues, as discussed in Chapter 4.

It is important to consider how the various courts, tribunals, and other fora may relate to one another in addressing environmental matters. When dealing with enforcement of environmental laws, whether enforcement can be pursued through criminal, civil, administrative, customary, or alternative dispute resolution mechanisms affects the perceived severity of the violation and the remedies available. While criminal

proceedings and sanctions should be reserved for the most serious violations, many countries have yet to adopt administrative enforcement procedures and penalties for minor environmental violations. The lack of civil and administrative remedies may cause enforcement authorities to avoid bringing criminal charges for cases that arise from less egregious infractions, that have modest environmental impacts, and that would incur modest penalties. Similarly, directing minor violations to administrative, not judicial, proceedings helps conserve prosecutorial and judicial resources for the most egregious infractions. Moreover, violators may feel that while they may have broken a particular environmental law, they are not “criminals” and they are more likely to vigorously fight criminal charges. For these reasons, **a growing number of countries are adopting administrative enforcement systems to address environmental violations.** For example, Liberia is developing administrative notice, hearings, and penalties for minor violations—namely, those violations that did not result in physical injury to any person, significantly harm the interests of a local community, result in more than USD 10,000 in damage to the environment or forest resources, or rise to the level of a felony.⁸⁸

In sum, countries are actively developing various fora for environmental adjudication that fit their specific contexts. Many competing factors must be balanced to provide swift, fair, inclusive, and inexpensive resolution of environmental disputes and violations. A best practices guide released in 2016 offers a summary of experiences from across the globe that can be useful in weighing the options and their respective merits and trade-offs.⁸⁹

85 Future Generations Commissioner for Wales n.d.

86 (Hungary) Office of the Commissioner for Fundamental Rights n.d.

87 Office of the Ombudsman 2017.

88 Liberia Forestry Development Authority, Regulation No. 109-07 (Regulation on Penalties). <http://www.ecolex.org/details/legislation/regulation-on-penalties-fda-regulation-109-07-lex-faoc160088/>.

89 See Pring and Pring 2016.

5.3.4 Innovative and Efficient Procedures

Many courts struggle with large caseloads and significant case backlogs. In the worst cases, it can take years for a case to reach trial, years for a decision to be delivered, years for the appeals process to run its course, and then years later to actually receive compensation. For example, litigation relating to the 1989 Exxon Valdez oil spill did not end until 2015, 26 years later.⁹⁰ Legal procedures themselves are intended to provide fairness and predictability by setting clear ground rules, but the legal axiom that “justice delayed is justice denied” can be particularly apt in environmental cases where delay may mean that a project moves forward, harming resources, or that communities continue to be exposed to harmful conditions, damaging their health. Innovative countries have adopted several strategies to tackle this pervasive issue.

As noted above, **many specialized environmental courts have streamlined procedures.** These allow cases to move more swiftly than those on a conventional court docket. Rule 1 of the Vermont Rules for Environmental Court Proceedings, for example, states that the rules are to be interpreted and administered to “ensure ... expedited proceedings consistent with a full and fair determination in every matter coming before the court.”⁹¹ The Environmental Division of the Vermont Superior Court (USA) holds conferences with the parties soon after a case is filed to establish an appropriate sequence and schedule tailored to the needs of each case.⁹² The Land and Environment Court of New South Wales (Australia) appoints

a registrar to monitor reports from the parties to make sure that the schedule is followed.⁹³ This court also provides the registrar with special powers usually reserved to judges, such as waiving rules in particular cases and referring cases to mediation or arbitration.

Because court procedures can be cumbersome, **many courts encourage parties to seek alternative dispute resolution, such as arbitration or mediation, or refer the cases to these processes before allowing the court cases to proceed.** Such procedures can result in swifter dispute resolution. For example, the National Environment Dispute Resolution Committee was established by the Republic of Korea in 1991 under the Ministry of the Environment to provide “rapid, fair, and economical” “adjustment” of disputes.⁹⁴ Adjustment is defined as “settlement through conciliation, mediation, and arbitration.” The Committee has reviewed more than 2,400 disputes involving the government (at any level) as a party and disputes that involve two or more cities. In addition, local dispute resolution commissions hear cases involving local disputes valued at less than approximately USD100,000.

Alternative dispute resolution is often used in conjunction with both general and environmental courts and tribunals.⁹⁵ Alternative dispute resolution allows parties to resolve, rather than litigate, disputes using processes like conciliation, facilitation, mediation, fact finding, mini-trials, arbitration, and ombudsmen. Alternative dispute resolution can often address issues that are outside the legal jurisdiction of a court or agency but that may be at the center of the dispute between parties.⁹⁶

90 Alaska News 2015.

91 Vermont Rules for Environmental Court Proceedings, rule 1.

92 Pring and Pring 2009, 77; Vermont Rules for Environmental Court Proceedings, rule 2(d).

93 Ibid.

94 Asian Development Bank 2011.

95 See O’Leary and Raines 2001; Siegel 2007.

96 See UNGA 2011 (on Strengthening the role of mediation in the peaceful settlement of disputes, conflict prevention and resolution).

Through the Resource Management Act, New Zealand created an Environmental Court that embraces the use of alternative dispute resolution by providing Environment Commissioners specifically trained for this purpose. Upon reaching a resolution to the dispute, the Environmental Court approves the outcome making it legally operative.⁹⁷ Japan provides for a similar process through the use of an Environmental Dispute Coordination Commission.⁹⁸

These mechanisms usually have less rigid and less costly procedures and processes than courts and tribunals, which can make them more accessible to all parties. Alternative dispute resolution usually does not result in a decision or outcome document that can be reviewed and relied upon by parties that were not involved in the dispute. Thus, unlike formal court or tribunal proceedings in common law countries that result in formal decisions, the outcomes of these alternative proceedings usually do not explicate the law and how it is applied in various contexts.

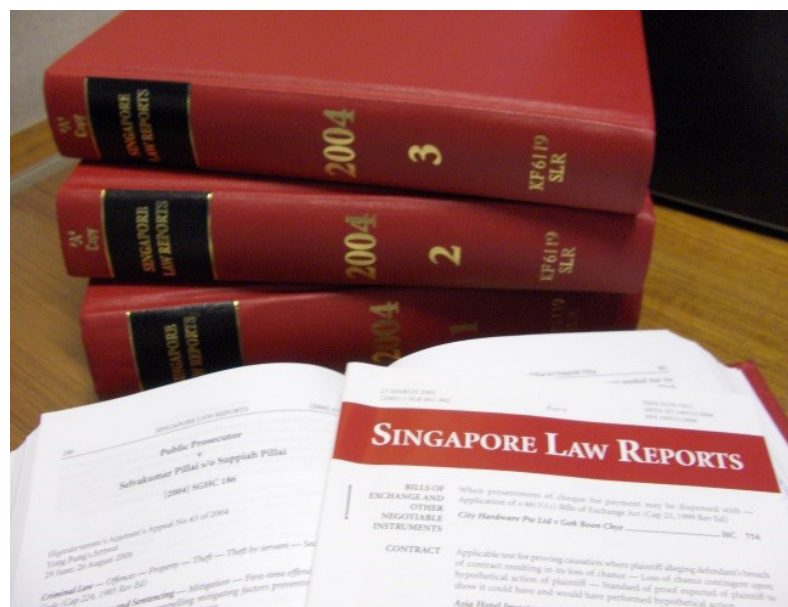
5.3.5 Reasoned and Transparent Decisions

The end result of an environmental adjudication should be a fair, reasoned, and transparent decision. Decisions are subject to scrutiny and criticism by those aggrieved as well as those prosecuted, reviewing courts, politicians, and the public; absent sound and transparent reasoning, the adjudicator may be unable to defend the result reached.

Decisions that fail to explain their reasoning and are not transparent have greatly limited usefulness. **Decisions help to inform the parties and the public how the applicable law is to be interpreted and applied.** This

is particularly important in a relatively new area like environmental law where the law has yet to be fully articulated, understood, or mainstreamed. By explaining the decision in detail and describing the facts and circumstances at issue, the decision can be used to inform future circumstances and cases. The decision can help the regulated community understand its obligations as well and can reassure the public that the decision is not based on undue influence. This helps to build predictability of law and confidence in legal process and institutions. As such, transparent and reasoned decisions are important in both civil law and common law systems.

In many countries, court rulings have traditionally not been made public or not been made widely publicly available. Many rulings are made orally and may not include the legal reasoning used to reach the decision. Recording rulings in writing and making them widely publicly available educates stakeholders about the law, increases predictability of outcomes, and allows other courts to understand the ruling. For example, Kenya publishes the rulings from its Court of Appeal and Supreme Court



97 Mediators Beyond Borders n.d.

98 Access Facility 2013.

Figure 5.12: Remedies Needed for Environmental Adjudication and Enforcement

Remedy	Effect
Preventive and injunctive relief	Maintain the status quo; stop harmful behavior
Declaratory relief	Provide clarity as to what the law says and means
Fines and money penalties	Remove economic incentive; punish noncompliance
Compensation	Make harmed parties whole
Corrective orders	Require parties to act to correct harm
Imprisonment and other criminal sanctions	Punish noncompliance; deter future violations
Administrative penalties	Punish noncompliance for minor violations
Supplemental environmental projects	Provide direct environmental benefits

on the judiciary's repository website (www.kenyalaw.org). InforMEA, the UN Information Portal on Multilateral Environmental Agreements, and ECOLEX, an information service on environmental law operated jointly by UN Environment, the Food and Agriculture Organization of the United Nations, and the International Union for the Conservation of Nature, are global resources that collect and disseminate judicial decisions (see Chapter 3). For courts generally, if rulings are made orally, transcripts can be made available to the public, ideally for a nominal or no fee.

5.4 Effective Remedies

Courts and tribunals need to be able to order remedies that can effectively address the harm and violation before them and deter future violations. Without sufficiently high fines and adequate powers to order specific actions, courts are left toothless. Environmental cases present unique

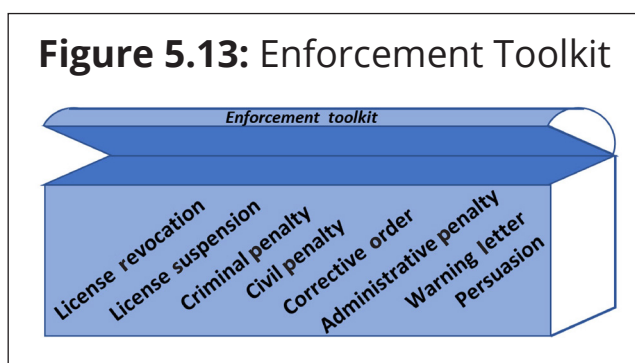
challenges that may make traditional forms of relief insufficient.

Courts and tribunals must be able to grant meaningful legal remedies in order to resolve disputes and enforce environmental laws. As shown in Figure 5.12, legal remedies are the actions, such as fines, jail time, and injunctions, that courts and tribunals are empowered to order. For environmental laws to have their desired effect and for there to be adequate incentives for compliance with environmental laws, **the remedies must both redress the past environmental harm and deter future harm.**

It is important to bear in mind that the type of proceeding being brought (e.g., criminal, civil, or administrative) affects the type of remedy that will be available. For example, fines are usually sought by governments in enforcement actions against violators of a statute, while private parties harmed in an environmental incident usually seek compensation to be made whole.

In seeking sanctions in an enforcement action, many consider the enforcement toolkit shown in Figure 5.13. It demonstrates that agencies and prosecutors generally prefer to encourage the regulated community to comply with environmental regulations through education and persuasion and escalate to sanctions through warning letters, administrative penalties, civil penalties, criminal penalties, license suspension, and, as a last resort, license revocation. Many countries' laws, however, may not give enforcement agencies all of these options—some countries only allow criminal prosecution of environmental law violations.

Similarly, *when adjudicators hear environmental disputes, they need a variety of remedies and tools to use to address the issues at hand.* If a court or tribunal cannot order a party to compensate another party for the environmental harm done or to restore a resource to its previous state, then justice may not be served.



Too often, in both enforcement and adjudications, courts and tribunals have authority to hear and adjudicate cases, but their ability to take meaningful action once they have reached a decision is constrained. They may be empowered to levy fines that are less than the benefits that accrue from continued noncompliance; they may lack

authority to enjoin a harmful behavior; or they may not be able to monitor whether their orders are implemented. Courts and tribunals need a toolkit with a complete set of remedies, ranging from preventive orders, to fines, compensation, corrective orders, imprisonment, and various innovative approaches, as discussed below.

5.4.1 Preventive and Declaratory Orders

The ability to prevent environmental harm before it occurs or while a case is pending is an essential remedy. This can take the form of preventive orders, such as injunctions, temporary restraining orders, or other orders to maintain the status quo, cease harm, or take immediate preventive action. This capability is so important that in 2015 the Supreme People's Court of China found that China's 2014 Environmental Protection Law provides jurisdiction not only to address past and ongoing harm but also to address actions that "have a great risk of harming the public interest" in the future.⁹⁹

These remedies are particularly important in environmental matters where a new project may be on the verge of impacting a protected resource or an existing project may be causing ongoing public health harm. Courts are typically asked to issue a preventive or precautionary order in a short timeframe and based upon limited evidence. Some countries create high barriers for obtaining such orders, such as requiring a showing of imminent actual

⁹⁹ Lin and Tuholske 2015; Supreme People's Court of China 2016.

harm before issuing an order.¹⁰⁰ As discussed in Section 5.2.2, most countries require the party seeking such an order to post a security bond that acts as a guarantee that the party is acting in good faith and to compensate the other party if it is wrongfully harmed by the preventive order.¹⁰¹ These bonds can be substantial, which poses an effective bar to many environmental plaintiffs. Thus, one study called the ability to issue a temporary restraining order without a security bond “the most important remedy for sustainability.”¹⁰² As a result, ***in environmental cases some courts reduce the bond amount or do not require a bond.*** For example, Kenya’s Environment and Land Court held that the Kenyan Civil Procedure Rules requirement of furnishing a security when seeking an injunction would not apply in cases for the enforcement of a right to a clean and healthy environment.¹⁰³

Declaratory relief is a somewhat similar remedy. In an action for declaratory relief, the petitioner requests the court or tribunal to state what the law is and what it requires. In these instances, the court gives the claimant legal clarity about an issue, but typically does not require any action by the responding party nor any payment of compensation

100 See Summers et al. v. Earth Island Institute et al., 555 U.S. 488 (2009) (“To seek injunctive relief, a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.”).

101 For example, in Mexico, the *amparo* action can include a temporary preventive order pending the final judicial decision. Under the Amparo Law, the judge can require the plaintiff to post a bond sufficient to compensate the defendant for losses if the *amparo* remedy is not granted (art. 132). A counter-bond may also be required of the defendant (art. 133).

102 Pring and Pring 2016, 52.

103 Fadhila S. Ali v. National Housing Corporation (2012).

or fines. For example, a claimant may ask a court to determine that a particular discharge violates the law or causes harm, without asking for compensation or fines. This remedy allows courts to clarify what the law is without having to commit additional resources to ordering a remedy in a specific instance.

5.4.2 Fines and Other Monetary Penalties

Environmental law relies heavily on monetary fines and penalties to remedy noncompliance. Criminal fines are available in most legal systems for environmental violations, and a growing number of legal systems are providing for civil and administrative money penalties. These cases are usually brought by the state prosecutor, justice ministry, or environmental agency. As noted in Section 5.2.1, some systems enable citizens to bring enforcement actions in the civil courts independently of whether the government has acted or only specifically when the government fails to act.

In order to be effective, fines and penalties should not only punish past illegal behavior, but also deter future illegal behavior.

Many penalties are set at fixed amounts per infraction or set at a maximum amount. If these are set too low, it may be more profitable for parties to continue not to comply. ***The fines must be set sufficiently high to both deter and punish illegal behavior.*** In the United States, for example, federal criminal penalties for water and waste violations can be as high as US\$250,000 per day of violation and 15 years imprisonment, while air violations can be as high as US\$1 million per day.¹⁰⁴

An effective method for countering this problem is for the money penalty to—a

104 USEPA 2017a, 2017b, 2017c.

minimum—recapture the economic benefit or profit obtained from any violation. Companies that make the effort to comply with the law should not be at a competitive disadvantage to those who do not comply. Accordingly, when courts are deciding on penalties, statutes or regulations may require them to consider how much money a violator made or saved through the violation. Agencies publish guidance on calculating the economic benefit of noncompliance to help guide enforcement officials and courts in making these calculations. For example, South Australia’s penalty policy contains a chapter on how to recoup economic benefit when calculating environmental penalties.¹⁰⁵ Similarly, Step Five of the United Kingdom’s *Environmental Offences Definitive Guidelines* directs that penalties be calculated to “[e]nsure that the combination of financial orders (compensation, confiscation if appropriate, and fine) removes any economic benefit derived from the offending.”¹⁰⁶ To deter companies from “taking their chances” on a “wait and see” approach to complying with environmental requirements, in general penalty amounts should exceed the compliance costs avoided.

If a violation is proven, penalties can also include the state’s expenses of investigation and enforcement and court costs and legal fees of the agency or citizen bringing the charges. In most instances, penalties are paid into the national treasury, not to the enforcing agency. ***Some countries are directing all or a portion of the penalty payments to the agency that oversees the statute that was violated or to supplemental environmental projects***, discussed below. For example, the province of Ontario, Canada, created the Ontario Community Environment Fund, which is funded by penalties collected from environmental violations in local watersheds. Organizations, communities, schools, and

conservation authorities can apply for grants from the Fund to support community-based environmental remediation projects, capacity building to prevent or manage spills, and environmental research, education, and outreach activities.¹⁰⁷ Similarly, fines and penalties collected under the United States Clean Water Act for oil and hazardous substances spills to water are directed to the Oil Spill Liability Trust Fund, which is used to remediate oil spills.¹⁰⁸

Some statutes allow violators to conduct supplemental environmental projects in lieu of or in addition to monetary payments when cases are settled by consent. These are environmentally beneficial actions undertaken by a party that cost as much as or more than the money penalty that would otherwise be assessed. For example, a company that violates an air permit condition could agree to install air pollution control equipment to reduce emissions beyond the amount required by law or to provide health monitoring to nearby communities. Some statutes also require that communities be involved in identification of potential supplemental environmental projects so that the projects benefit the communities harmed by the violation and so that disadvantaged populations have an option to identify supplemental environmental projects that would benefit them.¹⁰⁹

5.4.3 Compensation

Monetary compensation may be awarded in cases where there has been harm to individuals, communities, or private or public

105 South Australia 2015.

106 Sentencing Council 2014.

107 Government of Ontario 2017.

108 26 U.S.C. sec. 9509.

109 See, e.g., California A.B. 1071, 2015–16 Leg., Reg. Sess. (Cal. 2015), sec. 2 (requiring a public solicitation of potential supplemental environmental projects from “disadvantaged communities” before the potential project can be approved).

resources.¹¹⁰ ***In environmental adjudication, compensation is a common remedy because it can help to “make whole” a person or organization who has suffered harm—that is to say, compensation seeks to replace the loss suffered.*** Examples of compensable injuries include losses related to health or life, livelihoods, enjoyment of one’s property, and the resource itself. The party seeking compensation must prove it was harmed and that the harm was attributable to the party from which compensation is sought. A calculation of the fair money compensation is based on the money it would take to make the harmed parties whole or restore them to where they would have been absent the harm. For injuries to public natural resources, the United States and the European Union have framed compensation claims as restoration plans, with separate components to restore or replace the injured or destroyed resources and ecosystem services and to compensate for the interim losses from the time of injury until the resources and ecosystem services return to their baseline levels.¹¹¹

Compensation can be complex to calculate, particularly if it addresses non-economic or emotional harm or potential future effects. For example, courts have struggled with how to set a value on a human life or on the fear of developing cancer, if a chemical exposure has increased the likelihood a claimant will develop cancer.¹¹²

Courts, legislatures, and agencies have developed innovative policies to monetize these harms in environmental cases and to otherwise provide innovative remedies. For

example, after the Bhopal, India, tragedy, the Indian court ordered the government to use settlement proceeds to purchase medical insurance for 100,000 persons who might develop symptoms in the future and encouraged the responsible company to fund construction of a local hospital, which it did.¹¹³ Compensation can be combined with remedial orders; for example, courts have ordered medical monitoring of communities exposed to potentially toxic chemicals and mandated reporting of any health impacts attributable to chemical exposure.¹¹⁴

Monetary compensation is most often called for in a civil claim when a private party or community proves that another party caused harm in which the environment played a major role. For example, if a company polluted a public drinking water system with a solvent, a person who drank the contaminated water and developed cancer could seek monetary compensation. This is distinct from a fine or money penalty for violation of a statute, such as an agency seeking to enforce an environmental law relating to release of solvents to water, which is discussed in Section 5.4.2.

The common law also allows for money payments to be assessed in excess of actual compensation, called “punitive damages,” in some instances. As the name implies, punitive damages may be imposed in a private lawsuit to punish the transgressor for extreme misconduct, especially when the actual compensation fails to reflect the nature of the harm or misconduct or fails to provide adequate relief. Punitive damages also seek to deter future misconduct by the transgressor and others.

110 Some common law countries refer to monetary compensation as “money damages”; this term is distinct from the environmental or individual harm or damage that may be the issue in the case. To avoid confusion, this report avoids using the term “damages.”

111 Jones et al. 2015; Jones and DiPinto 2017.

112 Brändlin and Benzow 2013.

113 Union Carbide Corporation 2017.

114 See, e.g., <http://www.c-8medicalmonitoringprogram.com/index>.

5.4.4 Corrective Orders

The ability to remedy past environmental harm is critically important, and monetary compensation is often insufficient to remedy the harm done—especially when fines and other monetary payments to the government go into the nation’s treasury, rather than being used to restore the environmental harm. ***Courts and tribunals need the power to order parties to take corrective action (such as ordering a party to clean up contamination from a leak of toxic materials) and restorative action (such as returning a damaged ecosystem to its original condition).***

Ordering monetary compensation may not be adequate or desirable in some instances, so courts also rely on corrective orders. Corrective action orders are common in environmental enforcement proceedings. When environmental contamination or destruction of a resource occurs, courts often order the party causing harm to correct the harm caused or to refrain from particular behaviors in the future. This is usually in conjunction with fines and other remedies. For example in India, the National Green Tribunal ordered an interim cessation of unsafe, environmentally harmful “rat hole” mining in the autonomous state of Meghalaya.¹¹⁵ It created a committee, composed mainly of Meghalaya officials, and assigned them the tasks of reporting illegal coal extractions, monitoring the legal removal of already-extracted coal, and recommending better mining guidelines.¹¹⁶ The Tribunal held that miners or transporters caught illegally extracting or transporting coal are liable for royalties paid to the state of Meghalaya,

and that these royalties are to be used for restoration of the environment.¹¹⁷

Restorative actions, by contrast, call for parties to restore the environment to its condition before the harm was inflicted. For example, Rule 5 of the Philippine Rules of Procedure for Environmental Cases allows the court to “require the violator to submit a program of rehabilitation or restoration of the environment, the costs of which shall be borne by the violator....”¹¹⁸ In other countries, courts and agencies can require companies to clean up contaminated areas to remove discharges of toxic materials even if the discharge occurred in the distant past.

Courts may lack the authority to monitor implementation of their corrective orders, which results in an implementation gap in environmental law when oversight of the remedies that a court orders is left to private parties or the government. If the remedy is not implemented, a new proceeding may have to be commenced. Courts in both civil law and common law countries have authority to make sure that their orders are carried out, although such authority may have to be exercised in innovative ways. Some common law countries, such as the Philippines, refer to this oversight authority as a “writ of continuing mandamus” (mandamus is Latin for “we order”). Civil law countries generally have similar judicial power to ensure court orders are carried out. Other countries consider such authority to be inherent in the judicial power to issue remedial orders. Court oversight can be particularly useful in environmental remediation and restoration cases to ensure complete and effective implementation of the remedy. To effectively

115 Strokke 2017.
116 Ibid.

117 All Dimasa Students Union Dima Hasao Dist. Committee v. State of Meghalaya & Ors.; Impulse NGO Network v. State of Meghalaya & Ors., National Green Tribunal, India 2015.

118 Supreme Court of the Republic of the Philippines 2010, Rule 5.

supervise a remedy, a court may appoint a commission or special observer to periodically report back to the court on progress. For example, the Philippine Supreme Court used a continuing mandamus order to create a committee to oversee and report to it on compliance with its prior decision requiring thirteen government agencies to rehabilitate Manila Bay.¹¹⁹ A series of other innovative uses of this remedy in both civil law and common law countries is described in Case Study 5.6.

Courts may be reluctant to use a supervisory order if the legal duty is not sufficiently clear. In one case from the Philippines, the Supreme Court dismissed a petition seeking mandamus because, even though the defendant may have violated the fundamental right to clean air, the legislature had not specifically required the use of natural gas and so the court could not require it by way of mandamus.¹²⁰

Other countries have adopted a broader view of judicial power to ensure that court orders are carried out.¹²¹ In these countries, the power may come from the court's inherent authority in certain cases or it may come from the mandatory language of a statute. In India, the Supreme Court compelled a municipal council to carry out its duties to the community by constructing sanitation facilities pursuant to clear and mandatory statutory authority. The Court ordered the municipality—under penalty of imprisonment of its officials—to construct the drains and fill up cesspools and other pits of human and industrial waste, notwithstanding that the municipality claimed to be financially

exhausted.¹²² And in an Argentine case, the Supreme Court ordered that the province of Mendoza, together with the province of La Pampa, to reallocate water flow in the Atuel River within 30 days to restore the ecosystem affected by the Los Nihuiles dams.¹²³ The court ordered the two provinces and the national government to submit a work plan allocating the Atuel's waters.

5.4.5 Imprisonment and Probation

In many countries, laws permit only criminal sanctions for environmental violations. This can seriously limit the ability of prosecutors and enforcement agencies to obtain sanctions that are appropriate for the violation. In countries with a range of available remedies, criminal prosecution is generally reserved for cases where it can be shown defendants intended to engage in illegal conduct or were grossly negligent. Thus, it is harder to successfully prosecute violators when seeking criminal remedies rather than civil or administrative remedies.

Criminal penalties tend to carry the highest weight with individual defendants, who can face time in prison, or extended probation undergoing supervision by a court or other agency. Criminal sanctions often have additional impacts, as those convicted of serious crimes may face loss of voting privileges and other civil rights. The social stigma of being a convicted "criminal" can be a

119 Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay 2008.

120 Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay, G.R. Nos. 171947-48 (Supreme Court of Philippines, December 18, 2008).

121 In common law countries, this is referred to as the writ of mandamus.

122 Municipal Council, Ratlam v. Vardhichand, No. 1980 AIR 1622, 1981 SCR (1) 97 (Supreme Court of India, 29 July 1980).

123 Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 243/2014 (50-L), Province of La Pampa v. Province of Mendoza on the Use of Water (Arg.). <http://www.cij.gov.ar/nota-28698-Conflicto-Río-Atuel--la-Corte-orden-a-lasprovincias-de-La-Pampa-y-Mendoza-la-presentación-de-un-programa-deobras-con-la-participación-del-Estado-Nacional.html>. 2017. See also Lorenzetti 2018.

Case Study 5.6: Courts Ordering and Overseeing Long-term Remediation in Watersheds

The courts in the following three examples from Colombia, Argentina, and Pakistan each considered cases involving an entire watershed and created unique solutions to supervise the long-term cleanup and restoration of the river systems.

The Colombia Consejo de Estado, the country's highest administrative appeals court, issued a judgment in 2014 against companies, government agencies, and municipalities that caused or failed to prevent the degradation of the Bogotá River watershed.^a The Court developed a remedial plan based on the evidence of technical experts and established requirements for the treatment of wastewater, the control of livestock, and the siting of mines, among other regional activities. To coordinate the rehabilitation of the entire watershed, the Court ordered the creation of a committee and central funding source to monitor and support the completion of the Court's plan to rehabilitate the river.

In 2008, Argentina's Supreme Court issued a ruling in an action filed by residents against private companies, the national government, and the provincial and municipal governments of Buenos Aires asserting that their constitutional right to a healthy environment had been violated by pollution of the Matanza-Riachuelo river basin.^b The Court ordered the river basin authority to oversee the restoration of the river basin's components and the improvement of the local community's quality of life. The plan mandated transparency by requiring the creation of a website to centralize up-to-date information on the plan's execution, and it ordered the authority to establish an emergency health plan to monitor and treat the medical needs of the local population.

In response to a 2012 public interest litigation petition regarding the discharge of untreated municipal and industrial wastewater into the River Ravi, the Green Bench of the Lahore High Court in Pakistan ordered the establishment of the River Ravi Commission to manage the river's restoration.^c The Commission, comprising experts and government and nongovernmental representatives, was given the task of finding local and low-tech solutions for controlling pollution in the River Ravi. The Commission developed a bioremediation project using wetlands to treat wastewater. The Lahore High Court held periodic hearings on the progress of the Commission's work and, in 2015, ordered full-scale implementation of the bioremediation project.^d

a. Sentencia No. 25000-23-000-2001-90479-01(AP), Consejo de Estado (Colombia) 2014.

b. Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza - Riachuelo), Corte Suprema de Justicia de la Nación (Argentina) 2008.

c. W.P. No. 9137/2012, Lahore High Court, 2012.

d. W.P. No. 9137/2012, Lahore High Court, 2015.



Buenos Aires neighborhood involved in Argentina watershed case

substantial deterrent. Corporate officials can be criminally prosecuted for their decisions and other actions, and companies themselves can be convicted of criminal violations. Although a company cannot be imprisoned, it can face heavy sanctions, including debarment from government contracts and even loss of its license to operate, as well as probation supervising its corporate behavior.¹²⁴

The possibility of imprisonment stands as a strong deterrent in environmental law.

While businesses may be able to write off fines and compensation as a “cost of doing business,” especially if the amounts are less than the profit gained, the prospect of a corporate official serving prison time can change corporate culture. Probation can also deter noncompliance. As such, it is an important remedy for those who enforce environmental law to have at their disposal. But because it can be difficult to prove criminal cases and because people accused of criminal violations often fight the charges vigorously, civil and administrative powers should also be available.

Courts have developed innovative programs that offer criminal violators a chance to avoid going to prison. For example, violators might be allowed to participate in educational

or community service programs that teach the environmental and social consequences of what they have done or remedy the harms they have done. The Court of Environment and Agrarian Issues of the State of Amazonas (Brazil) offers a night school for environmental law violators, after which the level of recidivism is reported to be very low.¹²⁵ In one case before the Court, Judge Adalberto Carim Antonio offered a convicted poacher of Amazonian manatees the choice between a prison sentence and a year of service at a manatee rehabilitation center. The defendant elected to volunteer at the center, and emerged as a strong advocate of manatee protection.¹²⁶

Over 100 countries are also experimenting with restorative justice in criminal cases.¹²⁷ With restorative justice, the perpetrator, the victim, and the community come together to address the wounds caused by the crime.¹²⁸ It is critical that these approaches be protective of the most vulnerable parties and not result in further harm. This remedy has been used, for example, in Australia to address harm to a community’s cultural resources and illegal removal of trees on private property.¹²⁹

5.4.6 Administrative Enforcement

Increasingly, countries are looking to administrative enforcement mechanisms to avoid the cost and delays inherent in many criminal and civil judicial proceedings. ***Administrative enforcement allows agencies to address infractions that are less serious or more routine, usually by using notices of violation, corrective orders, or restorative orders.*** Many countries have adopted administrative sanctions for environmental

¹²⁵ Pring and Pring 2016.

¹²⁶ Asian Development Bank 2016.

¹²⁷ Van Ness 2005.

¹²⁸ Braithwaite 2002; Zehr 2015.

¹²⁹ See Preston 2011.

¹²⁴ South and Brisman 2013.

violations, including Austria, Belgium, China, Colombia, France, Finland, Germany, Italy, Mexico, the Netherlands, Portugal, Spain, Sweden, the United States, and Viet Nam.¹³⁰

For example, a series of studies determined that a lack of administrative penalties caused some authorities of the United Kingdom not to bring charges for relatively minor infractions for which criminal sanctions were too strict (termed a “compliance deficit”) and others to seek criminal sanctions for violations that were not criminal in nature (termed “disproportionate enforcement”).¹³¹ To address the situation, the United Kingdom enacted the Regulatory and Enforcement Sanctions Act to create administrative remedies with quicker and simpler proceedings that reduce the burden on enforcement authorities and allow them to focus on more egregious cases.¹³²

For administrative actions that are fairly minor, there may be no appeal of the agency’s enforcement action. Most countries, though, provide that administrative actions can be appealed to and reviewed by an independent administrative tribunal or judicial court to ensure parties have redress in case an agency is acting unfairly.

In sum, effective responses to environmental disputes and violations are facilitated when adjudicators are empowered with a variety of remedies they can tailor to address the case at issue. Countries are creating new administrative, civil, and criminal remedies that are proportionate, fair, and efficient, and that help ensure delivery of justice and strengthen environmental rule of law.

5.5 Opportunities and Recommendations

States have made great strides in creating fair and innovative adjudication practices to deliver justice in environmental matters. However, court and tribunal proceedings may not deliver justice if there are barriers to accessing the forum, lack of environmental expertise among judges, delays in handing down decisions, and insufficient remedies to address the harms and violations at issue. While progress has been made, many opportunities exist to expand and deepen these innovations to help provide justice, give voice to underserved communities, hold government accountable, and establish a strong compliance ethic.

Creating specialized environmental courts and tribunals may allow broader access to courts and more efficient and meaningful environmental adjudication. These specialized venues can reduce costs, offer technical and legal expertise and assistance, and speed resolution of disputes that might fester into broader social conflict. With over 40 countries using these specialized fora at the national level and dozens more at the subnational or regional level, many case studies and best practices are available to consult.

Cumbersome, undifferentiated court procedures can cause minor offenses to consume as much time and resources as major infractions. **Administrative enforcement processes can be much more efficient at handling minor offenses.** Use of administrative enforcement orders, administrative consent orders, administrative tribunals, and modest fines can speed the resolution of less serious infractions. This can reduce burdens on courts and other tribunals, freeing them to focus on more serious violations.

Without swift and fair redress for environmental harm and enforcement against

130 Fourie 2009, 7; Vella 2016.

131 Fourie 2009, 9.

132 Ibid.; Macrory 2014.

environmental law breakers, environmental rule of law cannot take firm root. A government can make clear its commitment to environmental law and related rights by **taking swift and transparent action against environmental infractions**. By publicizing this action, a government can encourage a culture of compliance and educate the public about the actions it is taking on the public's behalf, thus increasing confidence in government and government institutions.

With technological advances, **making court decisions publicly available** is easier and less costly than ever. Decisions are proof that environmental harms can be and are, in fact, actually being redressed, and putting them in written form made freely available helps assure consistent and transparent justice. Public websites for distribution of court decisions are being created in many countries. Transcriptions of oral decisions can also be made available, ideally for little or no cost. Making court decisions widely publicly available helps set norms of behavior among the regulated community and reasonable expectations of justice in the public.

Investing in **environmental education for the bar and judiciary** is critical so they can effectively handle complex, often unfamiliar environmental claims and disputes. Raising **environmental awareness** in primary and secondary schools is an important start by ensuring future citizens understand their rights and responsibilities related to the environment, and to spark young people's interest in becoming environmental professionals. Law schools, scientific schools, government agencies, nongovernmental organizations, and lawyers' associations can work together to raise awareness of environmental laws and the attendant remedies and duties that flow from them. Investing in a robust judicial education program ensures a judiciary ready to implement these laws and defend these rights.

Tailoring legal remedies to the harm and benefit derived from the harm both deters misconduct and instills a sense of fairness in the environmental rule of law in general. Many courts handling environmental cases have developed innovative remedies that go beyond mere punitive measures to seek to restore harmed resources and restore relationships between those who do harm and those harmed. Environmental disputes offer the opportunity to use innovative processes and remedies to facilitate dialogue and reduce conflict, thereby strengthening societies and the environment upon which they depend.

Successful implementation of environmental law depends on the ability to quickly and efficiently resolve environmental disputes and punish environmental violations. Providing environmental adjudicators and enforcers with the tools that allow them to respond to environmental matters flexibly, transparently, and meaningfully is a critical building block of environmental rule of law.



Engaging diverse actors is key to strengthening environmental rule of law. For more information, see Section 6.2 (p.229).

