

Pace Environmental Law Review

Volume 29

Issue 2 Winter 2012

*Environmental Courts and Tribunals: Improving
Access to Justice and Protection of the Environment
Around the World*

Article 3

January 2012

Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India

Domenico Amirante
Naples II University

Follow this and additional works at: <http://digitalcommons.pace.edu/pelr>

Recommended Citation

Domenico Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*, 29 Pace Envtl. L. Rev. 441 (2012)
Available at: <http://digitalcommons.pace.edu/pelr/vol29/iss2/3>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

ARTICLE

Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India

DOMENICO AMIRANTE*

I. INTRODUCTION

Environmental law is undoubtedly a pillar of environmental protection, but after many decades it is still suffering in most of the world due to poor implementation. As a result, the organization of the courts and their environmental sensibility, as well as the national systems of access to justice, have become crucial issues in the implementation of both environmental law and the principle of sustainable development. In this perspective, especially in developing or recently developed countries, the current trend has been to build up specialized courts and tribunals to deal with environmental cases and to make the access to justice easier for citizens, NGOs, and disadvantaged groups. This article discusses the “pros” and “cons” of the establishment of green tribunals in the Indian context, from a comparative perspective. It begins by analyzing the European and American experience – generally more favorable to general courts and tribunals – and comparing it to recent trends indicating a strong preference towards specialized jurisdictions. The article continues by fully examining the case of India in its regional context, considering that specialized judicial institutions must be designed according to their specific legal culture (and constitutional/administrative system) and the particular environmental and developmental needs of each country or region. In this perspective the “green tribunals” appear to be very useful tools to satisfy the growing needs of environmental

protection and sustainable development in the Asian region, in terms of efficacy and social legitimacy of a “sustainable law.”

II. **THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL LAW: SUBSIDIARY BUT ESSENTIAL**

As it has been noted, “almost all nations, including developing ones, have basic environmental protection laws in place, but an enormous gap exists between the letter of the law and what is actually happening on the ground.”¹ Often the executive powers, unable to enforce the law, tend to successfully abdicate their responsibilities to the judiciary, regardless of the effectiveness of the penalties concerning environmental infringements, crimes, and the level of expertise of the judicial bodies concerned. As a result, the way courts have been organized, as well as their environmental sensibility and the national systems of access to justice, have become crucial issues in the implementation of both environmental law and the principle of sustainable development.

This evidence was emphasized in the 2002 Johannesburg Principles on the Role of Law and Sustainable Development, which affirmed that:

[A]n independent Judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional, and global levels are crucial partners for promoting compliance with, and the implementation and enforcement of international and national environmental law.²

* Full-time professor of Public and Comparative Law at Naples II University, Faculty of Political Science and Director, Master in Environmental Law and Policies, Naples II University, Faculty of Political Science.

1. Paul Stein, *Why Judges are Essential to the Rule of Law and Environmental Protection*, in *JUDGES AND THE RULE OF LAW: CREATING THE LINKS: ENVIRONMENT, HUMAN RIGHTS AND POVERTY* 57 (Thomas Breiber ed., 2006).

2. *WSSD: Johannesburg Principles on the Role of Law and Sustainable Development*, DEPARTMENT OF FOREIGN AFFAIRS, REPUBLIC OF SOUTH AFRICA (2002), <http://www.dfa.gov.za/docs/2002/wssd0828a.htm>.

In the same declaration it was also stressed that “the fragile state of the global environment requires the Judiciary as the guardian of the rule of law, to boldly and fearlessly implement and enforce applicable international and national laws, which in the field of environment and sustainable development will assist in alleviating poverty.”³ Certainly, judges cannot replace the legislative and executive branches of government, who are in charge, respectively, for the creation of environmental laws and regulations, and for their administrative implementation in the light of ‘preventive principles’ still constituting the foundation of any legal environmental protection.⁴

To state that the optimal implementation of environmental law must rest on a balance between comprehensive legislation, active administration, and vigilant jurisdiction may be regarded as a “truism,” but if the historical development of environmental law within the last fifty years is considered, it becomes apparent that the enforcement of the vast and articulated normative corpus of environmental legislation appears to be more important than the creation of new laws. In fact, in the first stage of the environmental law construction process the constitutional and legislative effort was essential to lay down the foundations of the discipline and to rationalize the often random and uncoordinated interventions based on laws of “emergency.” In the situation of a

3. *Id.* This document contains two other principles linked to the topic of the present study:

We agree that the Judiciary has a key role to play in integrating Human Values set out in the United Nations Millennium Declaration: Freedom, Equality, Solidarity, Tolerance, Respect for Nature and Shared Responsibility into contemporary global civilization by translating these shared values into action through strengthening respect for the Rule of Law both internationally and nationally,

We express our conviction that the Judiciary, well informed of the rapidly expanding boundaries of environmental law and aware of its role and responsibilities in promoting the implementation, development and enforcement of laws, regulations and international agreements relating to sustainable development, plays a critical role in the enhancement of the public interest in a healthy and secure environment. *Id.*

4. On the founding role of environmental principles, and particularly of the preventive principle, see NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES (Susan Leubusher trans., 2002).

“normative vacuum” an important role of the judiciary was unjustified and highly controversial. In contrast, at the end of the Twentieth Century it was clear that the good environmental legislation, already produced and ratified, was encountering great difficulties being implemented at the political and administrative levels, especially in the Western World, because of the significant impact it had on established economic activities and old administrative habits. To the contrary, in developing countries, environmental law was often not considered as a “second comer” (like in the west) and was developed more organically, being introduced as a pillar of the constitutional order since its beginning (e.g. in Brazil), or through overarching constitutional reforms (e.g. in India).⁵

At the present stage there are two main factors favoring the relevance of the Judiciary in environmental matters. On the one hand, the normative autonomy achieved by environmental law is guaranteed by the consolidation of principles which, coming from the international level (which produced mainly soft law), has moved to the national level; building a constitutional environmental order that represents the ground for the creation of environmental courts. The affirmation of environmental law as a “law of principles” makes it capable of guiding legislative and administrative powers, but especially the judicial power, both in the interpretation of environmental law and in the application of principles to practical cases.

While in the first stage of development the affirmation of a specialized Judiciary was hindered by the risk of an excessive expansion of judge-made law in a normative vacuum. Presently, environmental judges have become essential actors for the implementation of an extraordinary vast corpus of environmental law, which encounters the risk of remaining unapplied. From this perspective the debate on judicial activism appears outdated, because environmental courts – far from being substitutes for

5. See CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.) (“All persons are entitled an ecologically balanced environment, which is an asset for the people’s common use and essential to healthy life, it being the duty of the Government and of the community to defend and preserve it for present and future generations.”). See also INDIA CONST. arts. 48 & 51(g), amended by The Constitution (Forty-second Amendment) Act, 2007.

legislative powers – provide authority to the environmental legislation through judicial enforcement and interpretation, ensuring consistency and stability to environmental framework. Moreover, the stability guaranteed by a dedicated judiciary will facilitate the administration (often reluctant to apply new environmental norms or principles) and also private actors, from both sides (economic actors, on which environmental law is having an increasing impact, and civil society organizations, pursuing the dissemination of environmental values, through easy access to environmental litigation).

Generally speaking, at this stage of consolidation of environmental law, “the all-important role Courts play in (re)shaping the environmental governance landscape” is reaffirmed.⁶ Keeping this in mind, it is unsurprising that in developing or recently-developed countries, the current trend has been to build up specialized courts and tribunals to deal with environmental cases and to grant easy access to justice for citizens, NGOs, and disadvantaged groups. The first decade of the Twenty-First Century has witnessed an astonishing growth of environmental courts and tribunals. A recent comprehensive and updated study found that as of September 2010, there were approximately 360 environmental courts and tribunals in place all around the world, with the majority of them created in the last five years.⁷

6. Louis J. Kotze & Alexander R. Paterson, *THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES* 23 (2009).

7. See George Pring & Catherine Pring, *Specialized Environmental Courts and Tribunals: The Explosion of New Institutions to Adjudicate Environment, Climate Change, and Sustainable Development at the Confluence of Human Rights and the Environment* (2010), at 3, <http://www.law.du.edu/documents/ect-study/Unitar-Yale-Article.pdf>. According to the authors, the more recent examples are Kenya, Brazil, Chile, England, and India. Kenya’s 2010 Constitution requires “Parliament to ‘establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.’” Brazil has just added four new federal ECs in the four Amazon Basin states, and Chile’s legislature is currently considering a bill to create an ET Green Tribunal. England just created its first ET on April 6, 2010, and India’s Parliament passed a “National Green Tribunal” bill on May 1, 2010, in part to counteract the activist “Green Benches” of its Supreme Court. *Id.*

The Asian continent is not an exception to this tendency, with the recent creation of environmental courts or local environmental tribunals in China, India, the Philippines, and Thailand. In the 2010 Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice, it was reported that “in developing Asia, a key advantage is that resources for capacity building and environmental law expertise may be concentrated upon a smaller number of judges who are specifically selected for their integrity and environmental expertise.”⁸ In this perspective the case of the new National Green Tribunal of India is of great importance, considering also the leading role that the Indian Union can play in the Asian context as a sixty years-old democracy.

III. JUDGES AND THE ENVIRONMENT: GENERAL JURISDICTIONS, GREEN BENCHES, ENVIRONMENTAL COURTS AND TRIBUNALS

A general view of the way environmental matters are treated by judiciaries all over the world shows a vast quantity of different options, with each country having its own, specifically related to its legal system, history, and assignment in the national normative order (constitutional relevance of the environment *versus* simple legislative status, federal relations conveying unitary or fragmented competences, etc.). To simplify, it is possible to classify them in three categories: first, systems handing over environmental matters to general jurisdictions; second, systems relying on “internal specialization” of the judicial bodies (the creation of green benches or green judges without a formal change of the judicial structure); and third, systems creating innovative “Environmental Courts or Tribunals.”

The first system is widespread in western countries, especially in Europe and the United States, where courts dedicated to the environment are an exception and environmental litigation is normally covered by traditional courts, following a

8. ASIAN JUDGES SYMPOSIUM ON ENVIRONMENTAL DECISION MAKING, THE RULE OF LAW, AND ENVIRONMENTAL JUSTICE 9 (2010), *available at* <http://www.adb.org/documents/events/2010/asian-judges-symposium/asian-judges-symposium-background-paper.pdf>.

scheme of allocation of environmental cases to the different judicial bodies (civil, criminal, administrative, or constitutional courts), depending on the specific matter treated in each case. The reasons for maintaining environmental litigation in traditional courts are somehow “systemic;” the development of environmental law as a new and ancillary discipline with a limited degree of autonomy, the absence of environment in the original framework of constitutions, and the reluctance towards a complete reassessment of the judicial system that would be required by the creation of new courts. In addition to these features, the European and North American judicial systems share “the myth of the generalist judge,” resulting in “a deep-seated aversion to specialization.”⁹

The second system, the establishment of “green benches” (or single green judges), is an intermediate solution easier applied to countries already having a consolidated and “heavy” judicial system, and relatively similar to those used in Europe and the U.S. (sometimes there is a trend of informal specialization of specific sections of courts, like for example certain benches of the administrative courts in civil law countries). George and Catherine Pring noted:

[T]his model allows the court to manage a caseload where the number and complexity of environmental cases fluctuates, and still ensure that the workload of the court is spread evenly among all the judges. It does not require the public to file in a separate court, which may be in a different location, and it does not require special community education about what constitutes an environmental case. Nor does it necessarily require appointment of judges who are trained in or even interested in environmental law.¹⁰

9. See Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 521 (2008). According to Cheng, “the romantic view of the generalist federal judge, however, is not without its costs. Obsession with the generalist deprives the federal judiciary of potential expertise, which could be extremely useful in cases involving complex doctrines and specialized knowledge,” like in environmental law. *Id.* at 524.

10. George Pring & Catherine Pring, GREENING JUSTICE, CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS 23-24 (2009), *available at*

The third model is based on the constitution of environmental courts or tribunals, as courts specializing in only environmental cases. This is widespread in the rest of the world, according to the increasing number of new courts indicated by studies on this subject quoted above. Of course, the environmental courts present several advantages: speed in judgments, efficiency, and trained and specialized judges accustomed to dealing with non-judicial experts from the field. Normally this model is easier to apply to new democracies based on recent (or very much revised) constitutions, where the legal system can be organized on the basis of a structural involvement of the environment within the constitutional rights or the fundamental values.

It is important to note that the three models are not totally alternative to one another, but may coexist. Consider for example that in countries having a judicial review of laws or a Constitutional Court, there can be some environmental courts at the base and some superior courts having green benches within them (this will be the case of India, after the implementation of the reform analyzed in a later section).

IV. THE RETICENCE OF EUROPE AND THE UNITED STATES TOWARDS ENVIRONMENTAL COURTS *VERSUS* THE “AUSTRALASIAN MODEL”

In Europe and the U.S., whose legal understanding may be considered the cradle of environmental law, specialized environmental tribunals or courts are exceptions. This is due to the “systemic” reasons listed above (the development of environmental law as a new and ancillary discipline, the absence of environmental protection in the original framework of constitutions, and the reluctance towards a reassessment of the judicial system) that have prevented the establishment of new judicial bodies and favored patterns of informal specialization of single judges or benches.

www.accessinitiative.org/sites/default/files/Greening%20Justice%20Final_31399_WRI.pdf

In a fully comprehensive study on European judges and the environment, Luc Lavrysen notes that in countries having “a dual structure in terms of jurisdiction in disputes, the administrative courts are developing a certain degree of specialization in environmental law, since the settlement of virtually all disputes between citizens and public authorities in environmental matters fall within their remit.”¹¹ Some exceptions to this trend may be found, for instance, in Sweden and Austria. Sweden is the first European country to create an environmental code, which they did in 1999 (followed by France in 2000),¹² complemented by the creation of environmental courts at first and second instance (five environmental courts that are attached to five civil districts and one court attached to a civil court of appeal). According to George and Catherine Pring, “Sweden’s Environmental Courts are an excellent example of first and second instance courts where the decision-makers include non-lawyer, scientific-technical experts, with full judicial powers” where “[t]echnical expertise is required because the Swedish system assumes that the burden of investigation rests with the decision-making body, which takes an inquisitorial approach.”¹³ The Austrian system, the Independent

11. Luc Lavrysen, *The Role of National Judges in Environmental Law*, INT’L NETWORK FOR ENV’T’L COMPLIANCE AND ENFORCEMENT 6 (2006), available at <http://www.inece.org/newsletter/12/lavrysen.pdf>. The author also specifies that in these countries environmental disputes account for a substantial portion of the administrative disputes which leads to a certain kind of specialization as those cases are consistently referred, whether or not on the basis of a legal rule to the same court division or divisions (in Finland one third of the cases of the Supreme Administrative Court concern environmental matters; in Belgium nearly a quarter of the ordinary cases before the Council of State). *Id.* at 10.

12. For a discussion on the French environmental code, see Domenico Amirante, *Codification and Technical Rules in Environmental Law: Reflections on the French Experience*, in SCIENTIFIC EVIDENCE IN EUROPEAN ENVIRONMENTAL RULE-MAKING: THE CASE OF THE LANDFILL AND END-OF-LIFE VEHICLES DIRECTIVES 99 (Andrew Biondi et al. eds., 2003).

13. Pring & Pring., *supra* note 10, at 56. Interestingly, the authors note that:

[T]he Swedish Environmental Code lays out general principles, policies, and goals rather than incorporating detailed and specific language . . . , so having technical expertise on the bench is especially important when trying to apply a general law to the technical aspects of cases. Having science-technical expertise on the decision-making body also ensures that weaker parties are not entirely dependent upon technical consultants and lawyers in order to achieve fair, equitable, and affordable remedies.

Environmental Senate, which is based on a specialized environmental court and composed of ten judges and thirty-two legal specialists, is less interesting because its jurisdiction is confined to cases concerning the Environmental Impact Assessment Act and its caseload is very limited.¹⁴

In Europe, the choice to create specialized environmental courts is left to the occasional initiative of single member-states, far from being stimulated by a common concern over the necessity for green jurisdictions.¹⁵ It is worth noting that in the European Forum, organized in 2008 by the European Commission and the French *Conseil d'Etat*, concerning the application of the European Union's environmental legislation by national judges all over the old continent, the subject of specialized courts was not treated at all, even if two sections of the Forum were respectively dedicated

Thus, Sweden has science-technical experts at each court level below the Supreme Court. Expert judges (Environmental Court of Appeal) or technical advisers (Environmental Court) can have a wide variety of backgrounds, although most are chemical engineers, water engineers, or biologists. The lay experts who act as judges are appointed based on a background in industry or environmental management.

Id. at 56-57 (citations omitted). For a study on environmental courts in northern Europe, see generally Helle Tegner Anker et al., *The Role of Courts in Environmental Law, A Nordic Comparative Study*, NORDIC ENVTL. L.J. 9 (June 2009), available at <http://www.nordiskmiljoratt.se/haften/NMT%202009.pdf>.

14. For more information about the Austrian system, see Luc Lavrysen & Lien De Geyter, *Summary Report - Part III of the Questionnaire: Organization of the Courts and Tribunals and Prosecution Policy in the Area of Environmental Crime*, EU Forum of Judges for the Environment, The Hague, at 6 (Dec. 3, 2004), available at <http://www.eufje.org/uploads/documentenbank/dc7fdaabc5f9924b0fc1ffc92e42c544.pdf>.

15. The recent creation of new environmental courts and tribunals in England and Wales can be considered an exception to the general trend because, as Richard Macrory observed, their institution is due to “unexpected alignments” and “paradoxically, the two main drivers for change providing the opportunity for establishing the environmental tribunals were not environmental factors. Rather, the new tribunal system was established as a result of a general recognition that the existing tribunal system could be run more efficiently and with greater flexibility.” Richard Macrory, *Environmental Courts and Tribunals in England and Wales: A Tentative New Dawn*, 3 J. OF CT. INNOVATION 61, 77 (2010).

to the needs of expanding access to environmental courts and to improve the training of judges in environmental matters.¹⁶

The United States has not played a leading role, having only one environmental court (The State of Vermont Environmental Court) and a cluster of quasi-judicial institutions disseminated in different states. The Environmental Court of Vermont is quite an established model of green jurisdiction, having extended powers (such as *de novo* appeals on a considerable number of environmental statutes), and is competent to appoint independent experts responsible to the court.¹⁷

While Europe and the U.S. showed a considerable reticence in establishing independent green judges, the first models of environmental courts came from Oceania, with the experience of the Land and Environment Court of New South Wales, Australia (established in 1979), and the New Zealand Environmental Court (1996). The “Australasian model” is very relevant to the study of the recent development of green justice in India because “both the Supreme Court and the Law Commission of India, which described these experiments as ‘*ideal*’, have relied heavily on them to define the proposed Environmental Courts system.”¹⁸

The Land and Environment Court of New South Wales (established under the Land and Environment Court Act of 1979)¹⁹ is a “mixed” model composed of judges and expert members (nine technical and conciliation assessors). It is a court of record (comparable to the Supreme Court of New South Wales), having a jurisdiction that combines appeal, judicial review, and enforcement functions within the specific field of environmental

16. See *Le juge en Europe et le droit communautaire de l'environnement*, REVUE JURIDIQUE DE L'ENVIRONNEMENT 11, 11-15 (2009).

17. This means that the Court may decide the merits of the decisions it reviews on evidence that is adduced anew before the court, rather than on the evidence showed in the first degree of jurisdiction. According to Pring et al., “this is a feature criticized by both business and environmental interests because of its additive costs and lack of predictability. Conversely, some appellate courts are limited to review of the record of the lower court and do not take any additional facts into consideration, except in rare instances.” Pring & Pring, *supra* note 10, at 30.

18. See Raghav Sharma, Note, *Green Courts in India: Strengthening Environmental Governance?*, 4 L. ENV'T & DEV. J. 61, 61 (2008), available at <http://www.lead-journal.org/content/08050.pdf>.

19. *Land and Environment Court Act 1979* (N.S.W.) s 20(2) (Austl.).

and planning law. Access to the court is very easy and open to anyone alleging violations of statutes related to environmental and planning law. According to Judge Paul Stein, the main results achieved by this experience are decreases in the quantity of environmental litigation, an important reduction in the costs of environmental actions, and a greater degree of certainty in development projects and environmental impact evaluation of the projects.²⁰

The New Zealand Environment Court is more recent, being established under the Resource Management (Amendment) Act of 1996.²¹ Like the New South Wales Court, it is an independent specialized court, composed of judges and environmental commissioners, nominated by the government as technical experts.²² The functions and powers of this court are more extended than in Australia, covering not only appeals (on a *de novo* basis),²³ but also power to make declarations of law²⁴ and

20. See Paul L. Stein, Judge. N.S.W., Court of Appeal, *New Directions in the Prevention and Resolution of Environmental Disputes – Specialist Environmental Courts*, Speech at the South-East Asian Regional Symposium on the Judiciary and the Law of Sustainable Development (Mar. 6, 1999), ¶ 11, available at http://www.bocsar.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_060399a.

21. *Resource Management Amendment Act 2006* (N.Z.). This Act amended the 1991 Resource Management Act, and the Environmental Court replaced the former Planning Tribunal.

22. In appointing the Judges and Commissioners, the Governor-General must give regard to the need to ensure a mix of knowledge and experience – including commercial and economic affairs, local government, community affairs, planning and resource management, heritage protection, environmental science, architecture, engineering, minerals, and alternative disputes resolution processes.

23. See generally MINISTRY FOR THE ENV'T, AN EVERYDAY GUIDE TO THE RESOURCE MANAGEMENT ACT (2009), available at <http://www.mfe.govt.nz/publications/rma/everyday/court-guide/your-guide-to-the-environment-court.pdf>. Appeals are on: resource consents, proposed district and regional plans, proposed regional policy statements, designations, heritage orders, recommendations for water conservation orders. *Id.* at 2-3.

24. *Id.* As the website explains, “[t]he Environment Court can be asked to define or clarify a matter associated with the operation of the RMA. This is called a declaration. For example, a council may apply for a declaration that an activity is not allowed by the RMA or by a council plan. Individuals can also seek a declaration, such as in cases where they consider that they have existing use rights. The Court can declare that a person must adopt the best option to avoid or minimise adverse effects on the environment.” *Id.* at 9.

power to issue enforcement orders directing a person or an organization that is causing a nuisance or environmental problem to fix it. The enforcement powers make the Court very effective, and are considered a great advantage because “the Court itself hears cases relating to enforcement and views breaches of environmental legislation seriously . . . it can impose and does impose significant fines – enforcement is not at the discretion of the local authorities, as it is in the UK.”²⁵ In the perspective of broadening the access to environmental justice, two more features of this system are noted by the Law Commission of India Report: the right of appeal and the powers of mediation. Concerning the right of appeal to the environmental court, we must remember that it extends to any person who makes a submission on resource-consent decisions (i.e. to third parties) and to applicants;²⁶ third parties may also apply to the Court for an order to enforce the Resource Management Act against anyone else.²⁷ The function of mediation is very broad, because, as it has been noted,

[W]ith the consent of the parties, at *any* time after proceedings are lodged, the Court may ask one or more of its Environment Commissioners to conduct mediation or reconciliation to resolve the dispute. The mediation service of the Court is regarded as “innovative” and cost-effective, as its own technically oriented Commissioners act as mediators.²⁸

It is interesting to note that the New Zealand Court, with reference to this power has been defined as the “adjudicator of sustainability.”²⁹

25. LAW COMM'N OF INDIA, 186TH REPORT ON PROPOSAL TO CONSTITUTE ENVIRONMENT COURTS 66 (2003), *available at* <http://lawcommissionofindia.nic.in/reports/186th%20report.pdf>.

26. *Id.* at 65.

27. *Id.*

28. Sharma, *supra* note 18, at 63 (emphasis added). *See also* Stephen Higgs, *Mediating Sustainability: The Public Interest Mediator in the New Zealand Environment Court*, 37 ENVTL. L., 61 (2007).

29. Bret C. Birdsong, *Adjudicating Sustainability: New Zealand's Environment Court*, 29 ECOLOGY L.Q. 1, 38 (2002).

V. **THE ORIGINS OF THE NATIONAL GREEN TRIBUNAL OF INDIA: THE CENTRALITY OF THE SUPREME COURT IN A JUDGE-DRIVEN REFORM**

The creation of the National Green Tribunal of India (NGT) has followed a long and faceted process and was determined by several factors. The first element to emphasize is the constitutional background, showing a gradual evolution from the initial lack of principles for environmental protection (in the original text of the Constitution, in effect since 1950), to the development of a panoply of legal instruments and judicial actions concerning the environment. These achievements were based on the constitutional amendments of 1976,³⁰ on the one hand, and on a proactive role played by the Supreme Court of India in green issues, on the other. The constitutional amendments require the commitment of both the State (art. 48(A)) and of the citizen (art. 51(A)(g)) to environmental protection because they contain “a constitutional pointer to the state and a constitutional duty to the citizen not only to protect but also to improve the environment and also to preserve the forest, the flora and fauna, the rivers and lakes and all the other water resources of the country.”³¹ This constitutional reform paved the way to a deep involvement of judges in environmental matters. As explained, “[T]he real growth in the field of environmental law took place in the exercise of the original jurisdiction of the Supreme Court of India under Article 32 of the Constitution by way of enforcement of the right to a clean environment as a facet of the right to life itself.”³² Gradually, the

30. INDIA CONST. art. 48 & art. 51(g), *amended by* The Constitution (Forty-second Amendment) Act, 2007. The amendment inserted a “green article,” stating that “the State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country.” *Id.* at 48(A). But the amendment also imposed a fundamental duty to every citizen of India “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.” *Id.* at 51(A)(g).

31. GURDIP SINGH, ENVIRONMENTAL LAW IN INDIA 69 (2011).

32. Harish Salve, *Justice Between Generation: Environment and Social Justice*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOR OF THE SUPREME COURT OF INDIA 360, 366 (B.N. Kirpal, Ashok H. Desai, Gopal Subramaniam, Rajeev Dhavan & Raju Ramachandran eds. 2000).

Indian Supreme Court developed a vast body of environmental principles through an original application of another important judicial instrument, the Public Interest Litigation, by expanding the rules for standing and determining “a significant departure from traditional judicial proceedings.”³³

Another relevant “background factor” to take into account is the attention paid by both the coalitions in power during the first decade of the third millennium (the NDA, guided by the BJP, in the first part of it and UPA, led by the Congress Party, later). Notably the “green turn” in the policy of the UPA government, resulting in the National environment policy, a comprehensive environmental plan approved with great emphasis by the Manmohan Singh Cabinet in 2006.³⁴ The establishment of new environmental judges was also suggested by the necessity to remedy the previous failures of other institutions designed for the enforcement of environmental legislation (like the National Environmental Tribunal, created in 1995 but never implemented, and the National Environmental Appellate Authority, nearly unemploye).³⁵ An ulterior element to bear in mind is the influence of the international movement towards the creation of environmental courts, in response to the ever-growing need to facilitate access to environmental justice to the average citizens, imposed also by the Aarhus convention.

Having considered all these elements, it must be noted that the main factor of the entire process for the establishment of the National Green Tribunal of India should be indicated in the judiciary itself, affirming – notably by several interventions of the Supreme Court of India – the relevance and necessity of a system of specialized environmental courts. It is very revealing that the political origin of this process, the 186th Report of the Law

33. A. H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOR OF THE SUPREME COURT OF INDIA 158, 158 (B.N. Kirpal, Ashok H. Desai, Gopal Subramaniam, Rajeev Dhavan & Raju Ramachandran eds. 2000).

34. GOV'T OF INDIA, MINISTRY OF ENV'T & FORESTS, NATIONAL ENVIRONMENT POLICY (2006), available at <http://moef.nic.in/downloads/about-the-ministry/introduction-nep2006e.pdf>.

35. On the National Environmental Tribunal and the National Environmental Appellate Authority, see A.K. Tiwari, ENVIRONMENTAL LAWS OF INDIA 165 (2006).

Commission of India, "Proposal to Constitute Environment Courts," states in its opening remarks that the proposition was prepared "pursuant to the observations of the Supreme Court of India in four judgments."³⁶ This was followed by "reference . . . made to the idea of a 'multi-faceted' Environmental Court with judicial and technical/scientific inputs."³⁷ Without underscoring the weight of political will and the merits of the Parliamentary majority voting the NGT Act in 2010, we could define the establishment of a Green Tribunal in India as a "judge-driven reform." This peculiar feature of the Indian reform is very important because the new green courts were designed according to the needs indicated by the judiciary (and the Supreme Court is undoubtedly one of the leading Indian institutions in the protection of the environment)³⁸ and not on abstract models, even if the reference to comparative law has guided the Indian legislator.

As already noted, Indian scholars have highlighted the role of the Supreme Court in the foundation and the consolidation of environmental protection in India,³⁹ but what is really peculiar is that the Court has been quite innovative, indicating new methods to implement environmental legislation and to resolve environmental disputes in India.⁴⁰ A non-comprehensive list of them would include:

[E]ntertaining petitions on behalf of the affected party and inanimate objects, taking *suo motu* action against the polluter,

36. LAW COMM'N OF INDIA, *supra* note 25, at 2. The Law Commission explicitly quotes the cases *Mehta v. India*, (1986) 2 S.C.C. 176 (India); *Indian Council for Env'tl-Legal Action v. India*, (1996) 3 S.C.C. 212 (India); *A.P. Pollution Control Board v. Nayudu*, (1999) 2 S.C.C. 718 (India); *A.P. Pollution Control Board v. Nayudu*, (2001) 2 S.C.C. 62 (India).

37. LAW COMM'N OF INDIA, *supra* note 25, at 2.

38. Significantly, some critics have defined the judges of the Supreme Court as the 'Lords of Green Bench' or 'Garbage Supervisor.' See S.S. Prakash & P.V.N. Sarma, *Environment Protection vis-a-vis Judicial Activism*, 2 SUP. CT. J. 56 (1998).

39. Among others, it is worth mentioning the "classic" handbook of Shyam Divan & Armin Rosencranz, *ENVIRONMENTAL LAW AND POLICY IN INDIA* (2001) and S.C. Shastri, *ENVIRONMENTAL LAW* (2008). On this specific topic, see also M.A.A. BAIG, *ENVIRONMENTAL LAW AND JUSTICE* (1996).

40. M.K. Ramesh, *Environmental Justice: Courts and Beyond*, 3 INDIAN JO. OF ENVTL. L. 20(2002).

expanding the sphere of litigation, expanding the meaning of existing Constitutional provisions, applying international environmental principles to domestic environmental problems, appointing expert committee to give inputs and monitoring implementation of judicial decisions, making spot visit to assess the environmental problem at the ground level, appointing *amicus curiae* to speak on behalf of the environment, and encouraging petitioners and lawyers to draw the attention of Court about environmental problems through cash award.⁴¹

It is worthwhile to report some of the cases that have pointed the legislators towards the path to follow to guarantee an open, accessible, technically fit environmental justice to Indian citizens, as indicated also by the Law Commission in its 186th Report.

The first case dates back to 1986 and refers to the need to involve non-legal experts drawn from the scientific field in the solution of environmental litigation. In *Mehta v. India*, the Court suggests:

[T]o the Government of India that since cases involving issues of environmental pollution, ecological destruction and conflicts over natural resources are increasingly coming up for adjudication and these cases involve assessment and evolution of scientific and technical data, it might be desirable to set up Environmental Courts on a regional basis with one professional Judge and two experts drawn from the ecological sciences research group keeping in view the nature of the case and the expertise required for adjudication. There would of course be a right of appeal to this court from the decision of the Environment Court.⁴²

Reacting to this and other substantial judgments the Central Government apparently took the challenge of the Supreme Court and created the National Environment Tribunal (with an Act passed in 1995, but never implemented) and the National Environment Appellate Authority (NEAA, created with an act passed in 1997) for the limited scope of revision of the administrative decisions on environmental impact assessment.

41. Geetanjoy Sahu, *Implications of Indian Supreme Court's Innovations*, 4 L. ENVTL. & DEV. J. 3, 4 (2008), available at <http://www.lead-journal.org/content/08001.pdf>.

42. *Mehta v. India*, (1986) 2 S.C.C. 176, 345 (India).

Unfortunately, as stated by the Report of the Law Commission, both “these Tribunals are nonfunctional and remain only on paper.”⁴³ The Supreme Court had somehow foreseen this result and already observed in 1999 that:

[I]t appears to us from what has been stated earlier that things are not quite satisfactory and that there is an urgent need to make appropriate amendments so as to ensure that at all times, the appellate authorities or tribunals consist of Judicial and Technical personnel well versed in environmental laws. Such defects in the constitution of these bodies can certainly undermine the very purpose of those legislations.⁴⁴

In the same decision the Court recommends a model, identified in the Land and Environment Court of New South Wales (Australia), because “its jurisdiction combines appeal, judicial review and enforcement functions . . . such composition in our opinion is necessary and ideal in environmental matters.”⁴⁵

The Court emphasized, through several cases, the need for stable involvement of experts in judicial cases concerning the environment. In these cases it appointed some expert committees to use a scientific basis to apply the preventive or the precautionary principle, but the choice to involve such committees was discretionary. An example of the application of the precautionary principle, quoted by the Report of the Law Commission, is *A.P. Pollution Control Board vs. Nayudu*,⁴⁶ where the Supreme Court set aside a judgment of the High Court (based

43. LAW COMM’N OF INDIA, *supra* note 25, at 6.

44. *A.P. Pollution Control Board v. Nayudu*, (1999) 1 S.C.C. 140, 156 (India), http://www.delhi.gov.in/DoIT/DOIT_Pollution/ap-loc.pdf.

45. *Id.*

46. It is interesting to report the description of this case made by the Law Commission :

[I]n *A.P. Pollution Control Board vs. M.V. Nayudu* 1999(2) SCC 718, the Court proceeded to have the claims of the party tested by experts. There the question was whether the industry was a hazardous one and whether, in case it became operational, the chemical ingredients produced would sooner or later percolate into the substratum of the earth, get mixed up with the underground waters which flow into huge lakes which are the main sources of drinking water to two metro cities.

LAW COMM’N OF INDIA, *supra* note 25, at 15-16.

on the expertise provided by the industry itself) and an order of the NEA Authority given under section 28 of the Water Act, refusing permission to an industry to operate, after consideration of a different opinion. For the Commission, this case was “a clear example of the benefit of extensive scientific investigation: if this scientific investigation was not done, the life of millions of citizens in the two cities could have been endangered.”⁴⁷ The Commission considers that the precautionary principle is clearly applied here:

[B]ecause the Appellate Authority and the High Court did not have the benefit of the opinion of any scientific bodies to test the correctness of the report of the single scientist whose report alone was there available to the appellate authority and the High Court, the decision went in favor of the Industry. But, as the Supreme Court had the benefit of the Reports of these institutions, it could arrive at a different conclusion.⁴⁸

Considering that in this – like in many other cases – the appointment of an expert body by the Courts was completely discretionary, the Law Commission concludes that “instead of leaving it to the discretion of the Courts to refer or not to refer scientific issues to independent experts, we propose to provide a statutory mechanism to provide scientific advice to the Court concerned.”⁴⁹

As we have previously observed, another important contribution of the Supreme Court to environmental protection concerns the enlargement of the access to environmental justice through an original development of the public interest litigation consisting mostly in a liberalization of the traditional rules of *locus standi* in environmental matters. This gave massive opportunities to NGOs and civil society-at-large to approach the Court in public interest cases where the aggrieved persons were disadvantaged or difficult to ascertain. The approach of the Court in such cases has emphasized that “any member of the public having sufficient interest may be allowed to initiate the

47. LAW COMM'N OF INDIA, *supra* note 25, at 17-18.

48. *Id.* at 18 (the case referred to is A.P. Pollution Control Board v. Nayudu, (2001) 2 S.C.C. 62 (India)).

49. *Id.*

legal process in order to assert diffused and meta-individual rights in environmental problems.”⁵⁰ Relying on this open approach by the Court, public interest litigation has increased enormously, leading to severe criticisms on the misuse of this instrument and the risk of engulfing Courts and stopping governmental action.⁵¹ In response to such criticism, the Court used corrective mechanisms, gradually restricting the access. In relation to environmental protection this recent trend of the Court is resulting in “judicial restraint towards environmental litigations especially challenging infrastructure projects.”⁵² Like in the case of the appointment of expert members, the creation of environmental courts open to public interest litigation is aimed at reducing the judiciary’s discretionary powers in accepting these actions and to discharge the Supreme Court of a heavy burden of public interest cases that will go (in another form) to the new jurisdiction, also making these action more accessible to the public.

50. Sahu, *supra* note 41, at 5.

51. On the debate concerning public interest environmental litigation and the leading role of India in Asia, see JONA RAZZAQUE, *PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN AND BANGLADESH* (2004). For a general overview of public interest litigation in India, see P.M. BAKSHI, *PUBLIC INTEREST LITIGATION* (1998).

52. Sahu, *supra* note 41, at 7. Regarding the opinion of this author about the relations between environmental jurisprudence and development projects:

The subordination of environmental interests to the cause of development was also evident in Supreme Court’s judgment in the PILs [public interest litigations] challenging the construction of Tehri Dam and the construction of power plant at Dahanu Taluka in Maharashtra, where the government’s own expert committee had given an elaborate report pointing out a series of violations of the conditions on which environmental clearance to the projects had been given by the Ministry of Environment and Forests. In such nature of environmental litigations challenging infrastructure projects, the Court held that in case of conflicting claims relating to the need and the utility of any development project, the conflict had to be resolved by the executive and not by the Courts.

Id. at 8. See also Videh Upadhyay, *Changing Judicial Power*, 35 *ECON. AND POL. WKLY.* 43, 43-44 (2000).

VI. OUTSTANDING FEATURES OF THE NATIONAL GREEN TRIBUNAL

The 186th Report of the Law Commission did not result immediately in the approval of the reform, but was implemented only in 2009 by the freshly re-elected UPA government. Through the Environment and Forest Minister Jairam Ramesh, the government introduced the Lok Sabha on July 29, 2009, the National Green Tribunal Bill.⁵³ The Bill was debated diffusely within the Parliament and by the public opinion, receiving several critiques, concentrated mostly on its “promotional” character and its narrow scope. For instance, a report from the Access Initiative-India emphasized that “the narrow and limited scope of jurisdiction, and the narrow scope of remedial orders . . . would confine the Tribunal’s powers” and that it contained “crippling limitations on the claims that can be litigated.”⁵⁴

Substantial changes were produced during the Parliamentary debate (through the introduction of several amendments), widening the access to the Tribunal, assuring appeal to the Supreme Court against its decisions, and specifying the number of technical experts involved as well as the criteria for qualification of members (both judicial and technical). The text was passed in June 2010 and published as The National Green Tribunal Act.⁵⁵

The National Green Tribunal is a federal judicial body whose specific mission is “the effective and expeditious disposal of cases relating to environmental protection and conservation of forest and other natural resources.”⁵⁶ Considering that for a comprehensive assessment of this institution it is necessary to wait for some practice to be carried on, this discussion is limited to analyzing three of the more interesting features of the new ‘green judge,’ including: the vast range of its jurisdiction (original

53. See The National Green Tribunal Bill, no.63 of 2009, <http://moef.nic.in/downloads/home/national-green-tribunal-bill-2009.pdf>.

54. THE ACCESS INITIATIVE - INDIA COAL., HOW GREEN WILL BE THE GREEN TRIBUNAL? vi (2009), available at <http://www.elaw.org/system/files/How+Green+Will+be+the+Green+Tribunal.pdf>.

55. The National Green Tribunal Act, No. 19 of 2010, INDIA CODE (2010), vol. 19 (2010).

56. *Id.* at pmb1.

and appellate), its composition (integrating judicial members and technical experts) and the open access it will allow to the individuals and the public at large.

The tribunal's jurisdiction is determined by section 14 of the Act, which states that the NGT covers "all civil cases where a substantial question relating to environment (including enforcement of any legal right relating to the environment) is involved and such question arises out of the implementation of the enactments specified in Schedule I."⁵⁷ The meaning of "substantial question relating to environment" is specified at section 2(m), and determines a wide spectrum of application of the Act. In fact, there are two groups of instances to access the NGT. The first is when

[T]here is a direct violation of a specific statutory environmental obligation by a person by which the community at large other than an individual, or group of individual is affected or likely to be affected by the environmental consequences, or the gravity of the damage to the environment or property is substantial or the damage to public health is broadly measurable.⁵⁸

Here the references to "public at large" and "damage to public health" indicate the openness of the new system to public access to environmental litigation, which is in connection with the development of public interest litigation accomplished by the Supreme Court. The second option concerns cases where "the environmental consequences relate to a specific activity or a point source of pollution."⁵⁹ It must be specified that the Act applies only to civil cases, excluding criminal offences.⁶⁰ The National Green Tribunal will also act as an appellate jurisdiction, a faculty

57. Schedule I lists the main environmental laws of the Indian union: (1) The Water (Prevention and Control of Pollution) Act, 1974; (2) The Water (Prevention and Control of Pollution) Cess Act, 1977; (3) The Forest (Conservation) Act, 1980; (4) The Air (Prevention and Control of Pollution) Act, 1981; (5) The Environment (Protection) Act, 1986; (6) The Public Liability Insurance Act, 1991; and (7) The Biological Diversity Act, 2002. See The National Green Tribunal Act, No. 19 of 2010, INDIA CODE (2010), vol. 19.

58. The National Green Tribunal Act § 2(m)(i).

59. *Id.* § 2(m)(ii).

60. This is the supposed reason why the Wildlife Act is not included in Schedule I.

that will strengthen its role and power; at the same the time it must be noted that section 22 provides that “any person aggrieved by any award, decision or order of the Tribunal may file an appeal to Supreme Court, within ninety days from the date of communication of the award, decision or order of the Tribunal.”⁶¹

A serious limitation is represented by section 14(3), which restricts applications to the Tribunal “within a period of six months from the date on which the cause of action for such dispute first arose”⁶² (limit to be extended of a further 60 days period if requested for a valid motivation). According to the first commentaries of the Act, “[t]his time-limitation clause appears to be unduly restrictive in certain situation[s] relating to health and pollution”⁶³ because the effects of pollution may take years to produce and, mostly, to be perceivable by the victims. Nevertheless, it must be noted that in the case of “application for grant of any compensation or relief or restitution of property or environment,”⁶⁴ the period is of five years from the date the cause for such compensation or relief arose.

The most interesting feature of the new Green Tribunal is probably its composition. In fact, the NGT Act meets the demand, illustrated by the Supreme Court in the cases quoted above, for a court constituted both of judicial members and experts from the scientific and technical disciplines. Indeed the minimum composition of the Tribunal, as per section 4, will vary from 21 to 41 members: a chairperson (judicial), 10 to 20 full-time judicial members, 10 to 20 expert members, all chosen by the Central Government.⁶⁵ In the Tribunal there will be a balanced mix of judges and technical experts, with strict qualifications. The “green judges” have to be holders of a Master in Science with a Doctorate Degree (in the fields of physical sciences and life sciences) or a Master of Engineering or Technology, and must have, as per section 5(2)(a) of the Act, a minimum of fifteen years of experience in a relevant field, including five years of practical

61. The National Green Tribunal Act § 22.

62. *Id.* § 14(3).

63. Gitaniali Nain Gil, *A Green Tribunal for India*, J. ENVTL. L., 461, 470 (2011).

64. The National Green Tribunal Act § 15.

65. *Id.* § 4.

experience in the field of environment and forest.⁶⁶ The experts may also come from the administrative field, with the requirement of “administrative experience of fifteen years including experience of five years in dealing with environmental matters in the Central or a State Government or in a reputed National or State level institution,” also including members from civil society organizations (NGOs and others).⁶⁷ The limited scientific expertise in the field of science, engineering, or technology deserves some criticism, because as rightly observed, “environmental issues are broad and the issue with respect to ‘substantial questions with respect to the environment’ cannot be regarded as the sole domain of the technologists and engineers,” and maybe the criteria for selection could have been broadened.⁶⁸ It is interesting to note that section 4(2) also provides for additional integration of the Tribunal to be decided on a case-to-case basis by the Chairperson having the power to “invite any one or more person having specialized knowledge and experience in a particular case before the Tribunal to assist the Tribunal in that case.”⁶⁹

The last feature to be mentioned in this preliminary illustration is the quite open *locus standi* established by section 18, which achieved the objective of creating accessible environmental justice. In fact, the rules of access seem to be as extensive as public interest litigation before the Supreme Court, admitting not only the persons directly concerned by the dispute, but also a wide number of subjects included in clauses (e) and (f) of section 18(2). Clause (b) grants the ability to approach the Tribunal to “any person aggrieved, including any representative body or organization,” leaving ample space for NGO’s to intervene.⁷⁰ This clause will probably relieve the Supreme Court

66. *Id.* § 5.

67. *Id.* § 5(2)(b).

68. ACCESS INITIATIVE, *supra* note 47, at 8. The authors propose “to include social scientists and specifically sociologists, qualified social workers, ecologists and environmentalist” and suggest that “[t]he criteria used for selection of non-official members to the Forest Advisory Committee (FAC) may be adopted. It should specifically mention disciplines such as Hydrologist, Ecologist, Wildlife Scientist etc.” *Id.*

69. The National Green Tribunal Act § 4(2).

70. *Id.* § 18(2)(b).

of the burden of public interest litigation concerning the environment, but at the same time it will not reduce the possibility for disadvantaged subjects (having until now access only through PIL) to approach a jurisdiction that would likely be at a more convenient level.⁷¹

VII. COMPARATIVE HINTS AND SUGGESTIONS FROM THE INDIAN EXPERIENCE

The establishment of the National Green Tribunal confirms the commitment of the Indian legal system to environmental protection, creating a long-term commitment of the State (through several constitutional reforms and a panoply of legislative acts),⁷² and of the judiciary. The Supreme Court, especially, has played a proactive role in the protection of the environmental rights enshrined in the Constitution through an expansive jurisprudence that has resulted in a significant growth in the access of Indian citizens to environmental justice.

In the Asian context, India has a leading role to play being “the world’s largest democracy” and able to influence positively not only the other States of the sub-continent but Asian democracies as a whole. With reference to the judicial enforcement of environmental law – which as we have seen should be considered an important condition not only for sustainable development but also for the sustainability of the legal environmental order – the National Green Tribunal of India seems to be the most comprehensive and promising among the specialized environmental Courts created in Asia over the last decade.⁷³

71. The Act does not require the establishment of a regional or state tribunal, as requested by the 186th Report of the Law Commission, but when the Act was passed Minister Jairam Ramesh assured the Parliament (as it is reported by the press) that issues regarding access would be addressed by the government following a “circuit” approach for the benches of the Tribunal, i.e., the benches would travel around the area of their jurisdiction to hear complaints.

72. On the consolidation of the Indian environmental law, see Domenico Amirante, *Il consolidamento del diritto ambientale in India*, PROFILI DI DIRITTO AMBIENTALE. DA RIO DE JANEIRO A JOHANNESBURG 327 (2004).

73. For an overview on the access to environmental justice in developing countries, see ANDREW HARDING, ACCESS TO ENVIRONMENTAL JUSTICE: A COMPARATIVE STUDY (2007). On the new generalist judicial institutions set up

In the Far East, democracies like Japan and Korea have opted for the settlement of environmental disputes through administrative bodies (the Environmental Dispute Resolution Commissions), while China's ongoing institutional reform process has set up an articulate system of Environmental Tribunals at the regional and local levels. Other Asian States have organized systems of internal specialization in environmental matters: this is the case in the Philippines, with its extremely comprehensive system of 117 local and regional trial (environmental) courts established by the Supreme Court's rules, and in Indonesia, through its established system of informal specialization of single judges. Other countries have developed a rich and interesting environmental jurisprudence that still relies on an ordinary court system and especially on proactive Supreme Courts (this is the case in Sri Lanka, Thailand, and, to a lesser extent, Malaysia). The Indian subcontinent, having an established tradition of public interest environmental litigation,⁷⁴ appears today to be a very active area, with the Environmental Tribunal and other Environmental Courts set up in Pakistan and some reforms still going on in Bangladesh (where the government announced, in 2010, its intention to set up sixty-four Environment Courts at the local level).

In this comparative scenario the establishment of the National Green Tribunal of India in 2010 indicates some interesting achievements, raises several questions and allows us to formulate useful suggestions for the debate surrounding environmental courts. The first achievement concerns the relationship between environmental law and scientific evidence. Environmental law scholars have noted that in environmental matters, the use of technical evidence is often overshadowed by reference to its objectivity.⁷⁵ According to Romi, for instance, a major task of environmental law is the 'revelation' of this false objectivity and therefore the search for effective and transparent procedures aimed at integrating the diverse elements (scientific,

recently in Asia, see also PENELOPE NICHOLSON, *NEW COURTS IN ASIA* (Andrew Harding et al. eds. 2009).

74. See generally RAZZAQUE, *supra* note 51.

75. For a review of some legal theories on the relationship between law and science in environmental legislation, see Amirante, *supra* note 10.

political, administrative or legal, according to the public function performed) of normative and judicial decisions.⁷⁶ The trend toward making technical experts stable members of the judicial benches, meets this requirement of effectiveness and transparency. A first suggestion, thus, concerns the necessity to integrate technical experts in the judicial bodies involved in environmental matters, as permanent members. The composition of the National Green Tribunal of India, assigning to technical experts a substantial role on a 50 percent basis, appears satisfactory, even if the criteria for eligibility raises some doubts and, as it has been rightly noted, “the protocol demands that only high placed experts with eminence must access the office.”⁷⁷ Moreover, for developing countries, another important aspect to underscore is “that scientific expertise on the Tribunal itself produces an equality of arms and prevents powerful, corporate interests from outgunning claimants in producing expertise which claimants cannot match in what is often public interest litigation.”⁷⁸

Another useful lesson to draw from the Indian experience is that the creation of the new Tribunal is not a reform “imposed” on the judiciary. To the contrary, the Supreme Court itself requested it. It is likely that this judge-driven reform will not be “rejected” by the already active judicial system and that new judges will integrate themselves with other judicial authorities without major conflicts. The explicit reference to a list of environmental statutes to define the original jurisdiction of the Tribunal should avoid controversies regarding the definition of what are “environmental matters” (an argument often raised in western countries against the establishment of environmental courts) and overlapping jurisdiction. A second suggestion, therefore, concerns the necessity to fully integrate the (new) environmental judges into the existing judicial system, preferably

76. RAPHAEL ROMI, *DROIT ET ADMINISTRATION DE L'ENVIRONNEMENT* 23 (2001).

77. C.M. Jariwala, *National Green Tribunal: Wither (In)justice?* 11 (Feb. 1, 2011) (Paper presented at the University of Delhi's Workshop on the Role of Specialist Environmental Courts) (on file with author) (“[T]he non-judicial members' qualifications should be so reframed that only highly eminent experts with micro specialization are appointed rather than making mediocratic or bureaucratic justice.”).

78. Nain Gil, *supra* note 63, at 474.

taking into account the views of the judiciary in the law-making process.

It is also very important to note that the Green Tribunal of India will have the Supreme Court at the top (as a third degree judge), capable of playing the role of coordinator and supervisor of the entire system. This is another element of the integration of environmental courts in the general judicial organization. An additional suggestion would thus indicate that environmental courts and tribunals should be independent from other judicial orders (having original and appellate jurisdiction), but preferably submitted to the supreme judicial body of the country (like Supreme Courts or Constitutional Courts), in order to assure that the environmental judges do not act in contrast with generalist judges or against the constitutional principles.

Finally, the experience of environmental litigation in India points out the necessity to liberalize the rules for the access to environmental courts, as made possible by section 18 of the Act (providing standing to “any person aggrieved, including any representative body or organization”).⁷⁹ Along with the reasonably fast time-frame to conclude the judgments, section 18 justifies the conclusion that this legislation “ensures the fundamental right to speedy environmental justice.”⁸⁰ A last recommendation would thus concern the necessity to guarantee special rules of access to environmental judges in order to both make environmental litigation accessible to a large number of subjects (including NGOs and representative subjects) and to accelerate the time-frame of judicial actions concerning environmental matters.

The effective role of the National Green Tribunal of India will be fully assessed only after some actual experience and through the study of its future judgments,⁸¹ elements that will also disclose “the extent to which environmental issues can be ring-fenced from wider social and economic concerns, in an era of

79. The National Green Tribunal Act §18(2)(e).

80. Jariwala, *supra* note 77, at 22.

81. The Tribunal has been operating since summer 2011 and has its headquarters in New Delhi; according to the first Chairperson of the Tribunal, Justice Lokeshwar Singh Panta (a retired judge of the Supreme Court), the NGT will soon have circuit benches in four regions of the country.

sustainable development.”⁸² The new Indian system cannot be regarded as a “cookie cutter” or a “fit-for-all model,”⁸³ but it represents a point of reference for other Asian democracies in the perspective of the evolution of their own system of environmental enforcement, and as a challenge against the traditional attitude of Europe and the United States towards “green judges.”

82. Nain Gil, *supra* note 63, at 474.

83. Pring & Pring, *supra* note 10, at XII (noting that it is left to the political and scientific promoters of environmental courts and tribunals “to design an institution that fits the legal culture and specific environmental and developmental needs of that country or region.”). *Id.*