

**SECURING ACCESS TO JUSTICE THROUGH  
ENVIRONMENTAL COURTS AND TRIBUNALS: A CASE IN  
DIVERSITY**

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## INTRODUCTION

Domestic courts throughout the world share the common challenge of developing procedures and institutional mechanisms that maximize access to justice. Access to justice, which emphasizes the “means for achieving acceptable . . . results rather than the content of the final decisions,”<sup>1</sup> was historically viewed as a primarily procedural concern. As such, scholarly attention to substantive human rights and environmental issues has often overshadowed the realities of the legal system that affect the “ability, in practice, of a party to recognize [their] legal rights and to defend them adequately.”<sup>2</sup>

Recently, however, scholars have highlighted access to justice as an important standalone right.<sup>3</sup> Additionally, many have emphasized access to justice as an important mechanism for promoting fuller realization of other rights, and for facilitating their extension to historically disenfranchised populations.<sup>4</sup> As a result, it is valuable to consider how various legal institutions<sup>5</sup> and actors<sup>6</sup> may enhance access to justice.

Accordingly, this paper examines one class of domestic judicial institutions that aims to enhance access to justice and efficacy in the disposition of legal disputes: specialized environmental courts and tribunals. Its analysis examines the following question: how effectively do specialized courts provide access to justice to historically disadvantaged classes? Accordingly, it first briefly introduces indigenous rights and environmental justice—two issues that states have sought to address by enhancing access to justice. Second, it introduces the phenomenon of

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1. Jonas Ebbesson, *Comparative Introduction*, in ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE EU 1, 8 (Jonas Ebbesson ed., 2002) (emphasis omitted).

2. Mauro Cappelletti et al., *Access to Justice: Comparative General Report*, 40 THE RABEL J. COMP. & INT’L PRIV. L. 669, 671 (1976) (emphasis omitted).

3. Ernst-Ulrich Petersmann, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 LOY. L.A. L. REV. 407, 445 (2003).

4. UNITED NATIONS DEVELOPMENT PROGRAMME, ACCESS TO JUSTICE: PRACTICE NOTE 3, 4 (2004) [hereinafter UNDP], [http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice\\_PN\\_En.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf) [https://perma.cc/EL9U-C9QM].

5. See Stephen Wizner & Jane H. Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 997 (2004) (arguing that law schools have some obligation to enhance access to justice through law school clinics).

6. Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City’s Housing Court*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 659, 667 (2006).

judicial specialization, and surveys the comparative courts and judicial politics literature to characterize the establishment of specialized courts and tribunals. In doing so, it emphasizes establishment of specialized environmental courts and tribunals (“ECTs”) as an important development within the broader trend of judicial specialization.

Having laid this analytical foundation, the paper next presents the research design, which employs a comparative-courts lens to survey the provision of access to justice among specialized courts. In so doing, it identifies the two cases that will support analysis: the National Green Tribunal of India and New Zealand’s Environment Court. Next, it evaluates the ways these courts address indigenous populations in the context of two components of access to justice: (1) the initial standing determination, when the right to bring a claim to court is granted; and (2) the outcomes that manifest in judicial opinions.

Through this analysis, the paper argues that ECTs can provide access to justice that differs demonstrably from justice afforded by more traditional courts. Specifically, it urges that specialized ECTs are of interest to comparative environmental governance scholars for two reasons: (1) they provide a potential mechanism for translating international environmental norms into discrete policy questions at the national or substate level; and (2) their emphasis on equity between diverse classes of litigants affords a framework for better considering intergenerational equity.

## I. ACCESS TO JUSTICE AND PRESSING SOCIETAL ISSUES

As noted, access to justice is important both as a standalone right and as a mechanism for securing additional rights.<sup>7</sup> For example, the United Nations notes that “access to justice is . . . closely linked to poverty reduction,” and argues that “[I]ack of access to justice limits the effectiveness of poverty reduction and democratic governance programmes by limiting participation, transparency and accountability.”<sup>8</sup> Access to justice is also closely linked to environmental concerns, and to the sustainability of livelihoods and lifeways that depend on environmental health.<sup>9</sup>

Despite this flourishing theoretical interest, access to justice remains uneven in practice. Even in developed countries with robust judicial systems, access to justice is a widely violated legal principle. Within the

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7. *Supra* INTRODUCTION, ¶ 2.

8. UNDP, *supra* note 4, at 3.

9. Julian Agyeman et al., *Exploring the Nexus: Bringing Together Sustainability, Environmental Justice and Equity*, 6 SPACE & POLITY 77, 77–90 (2002).

United States, for example, roughly “four-fifths of the civil legal needs of the low-income . . . remain unmet.”<sup>10</sup> Similarly, even those citizens living “above poverty thresholds are . . . priced out of the civil legal process for the vast majority of their legal concerns.”<sup>11</sup>

The challenges associated with securing access to justice are further magnified in developing countries. There, access to justice can fulfill an important rights-based role, helping “people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.”<sup>12</sup> Highlighting access to justice can also emphasize important systemic issues and raise considerations of inclusivity, showing how “disadvantaged groups are marginalized or stigmatized by the law when it does not recognize their legal status or [traditional] practices,” including “indigenous peoples’ usage of land and natural resources.”<sup>13</sup>

An access to justice paradigm “search[es] for . . . ways to overcome . . . difficulties or obstacles which make civil and political liberties non-accessible to so many people” by considering context-specific barriers to uniform protection of rights.<sup>14</sup> While many obstacles may hinder access to justice, structural aspects of domestic judicial institutions can present particularly potent barriers.<sup>15</sup> Accordingly, international organizations (“IOs”)—including the World Bank—emphasize the importance of structural changes. They underscore the need to “eliminat[e] laws with a distinctly anti-poor component”; afford “greater access for individuals and NGOs acting in the public interest”; and offer “judicial training and support.”<sup>16</sup> All judicial institutions may be structured in ways that enhance access to justice. However, some domestic legal institutions explicitly seek to do so, including the ECTs evaluated in this article.

While access to justice is a pressing issue in its own right, it interacts synergistically with other social issues. Access to justice can help to address those issues when robust, and can hinder their resolution when constrained. Accordingly, this paper briefly introduces indigenous rights and

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10. Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1785 (2001); Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 *GEO. J. LEGAL ETHICS* 369, 377 (2004) [hereinafter *Connecting Principles to Practice*].

11. *Connecting Principles to Practice*, *supra* note 10, at 373.

12. U.N. DEV. PROGRAMME, *PROGRAMMING FOR JUSTICE: ACCESS FOR ALL; A PRACTITIONER’S GUIDE TO A HUMAN RIGHTS-BASED APPROACH TO ACCESS TO JUSTICE* 5 (2005).

13. *Id.* at 39.

14. Mauro Cappelletti, *Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-to-Justice Movement*, 56 *MOD. L. REV.* 282, 283 (1993).

15. Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 *J. PEACE RES.* 407, 409 (2007) (emphasizing effect of domestic structural challenges in constraining access to justice in certain states).

16. MICHAEL R. ANDERSON, *ACCESS TO JUSTICE AND LEGAL PROCESS: MAKING LEGAL INSTITUTIONS RESPONSIVE TO POOR PEOPLE IN LDCs* 25–26 (1999).

environmental justice, two issues which are directly affected by access to justice.

### A. Indigenous Rights

Within national and international legal systems, traditional indigenous rights approaches have transitioned toward increasingly nuanced and multifaceted regimes.<sup>17</sup> These shifts have moved courts toward recognizing and acknowledging “the need to protect [indigenous] groups['] right to autonomy.”<sup>18</sup> The effort to preserve indigenous populations’ autonomy has been defined to encompass their rights to distinct nationalities, self-government, and self-determination.<sup>19</sup> Additionally, recent emphases have shifted toward linking indigenous interests to environmental sustainability, thus highlighting the complex and interactive challenge of securing indigenous rights.<sup>20</sup>

### B. Environmental Justice

Mirroring the enhanced global attention accorded to indigenous rights, legal practitioners and scholars have focused extensive scholarship upon the concern of recognizing and securing environmental justice (“EJ”). EJ acknowledges that “environmental hazards are closely linked to race and poverty.”<sup>21</sup> Accordingly, it emphasizes not only the “distribution of risks and hazards, but also the struggle for recognition of those subject to hazards.”<sup>22</sup> The foundation of the EJ paradigm was laid in the United States during the 1980s and 1990s, where toxic contamination issues unmasked environmental inequities on a domestic scale.<sup>23</sup> However, with time, the concept has adopted an international dimension and come to focus upon the interaction between environmental justice and the concerns of

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17. Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 649 (1988).

18. Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739, 740 (1990).

19. G.A. Res. 61/295, U.N. Doc. A/61/L.67, at art. 3–6, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

20. See, e.g., UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, LEAFLET NO. 10: INDIGENOUS PEOPLES AND THE ENVIRONMENT 1 (2001) (noting that “many of the areas of highest biological diversity are inhabited by indigenous peoples”).

21. NEIL CARTER, *THE POLITICS OF THE ENVIRONMENT: IDEAS, ACTIVISM, POLICY* 157 (2d ed. 2007).

22. JOHN S. DRYZEK, *THE POLITICS OF THE EARTH: ENVIRONMENTAL DISCOURSES* 213 (3d ed. 2013).

23. Stella M. Capek, *The “Environmental Justice” Frame: A Conceptual Discussion and an Application*, 40 SOC. PROBS. 5, 5 (1993).

disenfranchised populations.<sup>24</sup> In so doing, the emphasis on equitable distribution of environmental harms has highlighted North-South tensions and effects upon developing countries and poor populations.<sup>25</sup>

## II. SPECIALIZED COURTS: AN INSTITUTIONAL MECHANISM FOR ENHANCING ACCESS TO JUSTICE?

In an attempt to address substantive issues including indigenous rights and environmental justice more comprehensively, expeditiously, and accurately, nations have increasingly embraced an institutional solution: the establishment of specialized courts. While judicial specialization may refer to bounding the geographic scope of a court's jurisdiction, more commonly it refers to narrowing the scope of issues that a court or its individual judges will hear.<sup>26</sup> Historically, judicial specialization has been advocated in various instances, including cases in which "the subject matter [is] complex due to the difficulty of the underlying law," or complex due to "the technical nature of the facts."<sup>27</sup> Specialized courts have also been advocated due to their potential for relieving "caseload pressures on existing courts," "develop[ing] judicial expertise," and providing "uniformity in the interpretation of the law."<sup>28</sup>

Despite these many strengths, researchers have highlighted several potential pitfalls of judicial specialization. For instance, the insights of specialized judicial institutions may be dampened by their "loss of the generalist perspective."<sup>29</sup> Likewise, in some issue areas, specialized justice might diminish a court's prestige if opinions are meted out through an "assembly line" approach.<sup>30</sup> Moreover, the prestige and status of the courts may help to determine the success they enjoy, as "many of the successful ECTs enjoy a more comprehensive jurisdiction than their unsuccessful

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24. See generally, DAVID SCHLOSBERG, *DEFINING ENVIRONMENTAL JUSTICE: THEORIES, MOVEMENTS, AND NATURE* (2009) (noting distinctions between American and international conceptions of environmental justice).

25. See, e.g., Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L.J. 1, 18 n.75 (2005); Carmen G. Gonzalez, *Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology*, 19 GEO. INT'L ENVTL. L. REV. 583, 590, 593 (2007).

26. Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1671-72 (2009).

27. Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1117 (1990).

28. Lawrence Baum, *Judicial Specialization, Litigant Influence, and Substantive Policy: The Court of Customs and Patent Appeals*, 11 LAW & SOC'Y REV. 823, 824 (1977).

29. Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 ADMIN. L. REV. 329, 331 (1991).

30. *Id.*

counterparts.”<sup>31</sup> Likewise, some have suggested that judicial specialization more meaningfully supports improved outcomes at lower levels of the judiciary, since it is the locus of technical fact-finding.<sup>32</sup> Accordingly, scholars have urged careful examination of the effects of specialization.<sup>33</sup>

The environmental realm presents one issue area where further study of the implications of judicial specialization is particularly valuable. There, scholars have noted a proliferation of ECTs, with more than 350 ECTs authorized by 2009, and a further increase to more than 500 ECTs authorized by 2012.<sup>34</sup> This expansion appears to mirror the “justice cascade” phenomenon Lutz, Sikkink, and others describe, whereby individuals “engaged in a common policy enterprise with recognized expertise and competence in the particular domain” transmit common norms within that realm.<sup>35</sup> With regard to ECTs, a number of international organizations affiliated with the United Nations have appeared to foster this diffusion, advocating establishment of environmental judiciaries in developing regions such as Southeast Asia and Africa.<sup>36</sup>

This geographically expansive diffusion of a norm favoring ECTs has yielded tremendous institutional diversity; ECTs exist across a range of countries and at all decisional levels.<sup>37</sup> Across this diversity of institutions, however, scholars have observed that ECTs are united by the promise of the benefits they can provide. Those benefits include access to justice for vulnerable populations such as indigenous groups, and improved recognition of human rights and their interconnection with environmental issues.<sup>38</sup> Nevertheless, scholars have also noted that despite abundant information on individual ECTs, there is a surprising lack of “comparative

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31. Brian J. Preston, *Characteristics of Successful Environmental Courts and Tribunals*, 26 J. ENVTL. L. 365, 367 (2014).

32. See Arti K. Rai, *Specialized Trial Courts: Concentrating Expertise on Fact*, 17 BERKELEY TECH. L.J. 877, 878 (2002) (stating that specialization is better suited to the trial court level); Revesz, *supra* note 27, at 1166 (noting the fact-finding role of trial courts, not appellate courts, as justification for judicial specialization).

33. Baum, *supra* note 26, at 1667, 1683–84.

34. George W. Pring & Catherine G. Pring, *21st Century Environmental and Natural Resource Dispute Resolution: There Is an ECT in Your Future*, 33 J. OF ENERGY & NAT. RESOURCES 10, 10–11 (2015).

35. Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHI. J. INT'L L. 1, 2 (2001).

36. Sheila Abed de Zavala et al., *An Institute for Enhancing Effective Environmental Adjudication*, 3 J. CT. INNOVATION 1, 3–5 (2010).

37. GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS 1 (2009) [hereinafter GREENING JUSTICE].

38. *Id.* at 2; see Nicholas A. Robinson, *Ensuring Access to Justice Through Environmental Courts*, 29 PACE ENVTL. L. REV. 363, 372–73 (2012) (arguing that countries have an expectation to protect human rights due to the interconnectedness of the biosphere and that environmental courts are a means to achieve this).

analysis of the different ‘models’ of ECTs now existing.”<sup>39</sup> Accordingly, this paper advocates a comparative approach, and represents an initial effort at comparatively analyzing ECTs.

### III. METHOD AND CASES

To analyze how ECTs may bear upon the access to justice afforded to sensitive populations, this paper employs a comparative analytical method. Comparative environmental politics seeks to “resist [a] facile holism . . . yet provide a medium for meaningful comparison of . . . complexities.”<sup>40</sup> Moreover, a comparative analysis permits consideration of domestic institutions as they address global issues.<sup>41</sup> Finally, comparative analysis of environmental governance situates issues and institutions within a global context. The study of multiscale governance “includes governing bodies and institutions at various levels of government.”<sup>42</sup>

To heighten explanatory power, the comparative method seeks to hold as many factors constant as possible while observing the resulting variation.<sup>43</sup> Accordingly, to explore variation in the access to justice that ECTs afford, this analysis constrains examination to two cases, both representing national-level ECTs. By doing so, it explores the differing approaches to indigenous rights and access-to-justice issues that a developed and a developing country ECT have pursued.

#### A. India

As a developing country, India is experiencing the pressures that result from the interaction of environmental and population growth pressures. India’s population surpassed 1 billion in 1999 and, with a forecast population growth of 1.2 percent, reached 1.23 billion by 2012.<sup>44</sup> Along

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39. George Pring & Catherine Pring, *Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment*, 11 OR. REV. INT’L L. 301, 311–12 (2009); GREENING JUSTICE, *supra* note 37.

40. Paul F. Steinberg & Stacy D. VanDeveer, *Comparative Environmental Politics in a Global World*, in COMPARATIVE ENVIRONMENTAL POLITICS: THEORY, PRACTICE, AND PROSPECTS 3, 7 (Paul F. Steinberg & Stacy D. VanDeveer eds., 2012).

41. *Id.* at 13–15.

42. Henrik Selin & Stacy D. VanDeveer, *Federalism, Multilevel Governance, and Climate Change Politics Across the Atlantic*, in COMPARATIVE ENVIRONMENTAL POLITICS, *supra* note 40, at 348.

43. Philippe C. Schmitter, *The Nature and Future of Comparative Politics*, 1 EUR. POL. SCI. REV. 33, 53 (2009).

44. *India Becomes a Billionaire: World’s Largest Democracy to Reach One Billion Persons on Independence Day*, U.N. POPULATION DIVISION (2000), <http://www.un.org/esa/population/pubsarchive/india/ind1bil.htm> [https://perma.cc/98WV-6HUA] (last

with India's rapid population growth, the country has witnessed extensive urbanization, with a nearly five-fold expansion of its urban population during the past thirty years.<sup>45</sup> The number of Indian megacities is also projected to double between 2008 and 2021.<sup>46</sup>

India's rapid growth has introduced new environmental challenges to the Indian regulatory landscape.<sup>47</sup> In particular, increasing industrial and vehicular activity has increased air pollution, toxic releases, and associated challenges.<sup>48</sup> These urban environmental issues have added to existing challenges found in India's rural regions. In those rural regions, air pollution and deforestation resulting from biomass combustion, and declining soil fertility and freshwater availability due to unsustainable agricultural practices, have threatened health and welfare.<sup>49</sup>

In addition to India's diverse spectrum of environmental threats, a diversity of distinct groups and populations that demand consideration complicate the ability to regulate the environment. In India, "461 ethnic groups are recognized as [s]cheduled [t]ribes" or indigenous peoples.<sup>50</sup> Collectively, these people comprise 8.2% of the total population and suffer from a variety of land and environment challenges beyond those experienced by non-indigenous citizens; these include land alienation and challenges in gaining the necessary recognition to share the benefits from natural resources.<sup>51</sup>

Because of this diversity of challenges, and also the associated "pressures on equity and ecosystems," the Indian state sought institutional approaches to bolster environmental governance.<sup>52</sup> In 1996, India's Supreme Court acknowledged the limitations of its existing judicial system

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visited Jan. 29, 2016); Country Profile: India, UN DATA (2016), <http://data.un.org/CountryProfile.aspx?crName=India> [<https://perma.cc/ZH64-Y78R>].

45. Hannes Taubenböck et al., *Urbanization in India—Spatiotemporal Analysis Using Remote Sensing Data*, 33 ENV'T & URB. SYS. 179, 180 (2009).

46. *Id.*

47. TIM DYSON ET AL., TWENTY-FIRST CENTURY INDIA: POPULATION, ECONOMY, HUMAN DEVELOPMENT, AND THE ENVIRONMENT (2005).

48. See Milind Kandlikar & Gurumurthy Ramachandran, *The Causes and Consequences of Particulate Air Pollution in Urban India: A Synthesis of the Science*, 25 ANN. REV. OF ENERGY & ENV'T 629, 676 (2000) (concluding that increases in vehicular and industrial pollution are problematic but difficult to measure).

49. Kirk R. Smith et al., *Air Pollution and Rural Biomass Fuels in Developing Countries: A Pilot Village Study in India and Implications for Research and Policy*, 17 ATMOSPHERIC ENV'T: 2343, 2350 (1983); Bina Agarwal, *Gender, Environment, and Poverty Interlinks: Regional Variations and Temporal Shifts in Rural India, 1971–91*, 25 WORLD Dev. 23, 24 (1997).

50. *Indigenous Peoples in India*, INT'L WORK GRP. FOR INDIGENOUS AFFAIRS, <http://www.iwgia.org/regions/asia/india> [<https://perma.cc/R5YX-UKCL>] (last visited Jan. 30, 2016).

51. *Id.*; U.N. DEVELOPMENT PROGRAMME, ENVIRONMENTAL JUSTICE: COMPARATIVE EXPERIENCES IN LEGAL EMPOWERMENT 13 (June 2014).

52. U.N. DEVELOPMENT PROGRAMME, *supra* note 51.

and “abuse of the process of law,” and advocated establishment of dedicated green benches.<sup>53</sup> The Court cited the “work-load” of lower courts, the lack of “proper appreciation of the significance of the environment [sic] matters,” and concluded that, “[a]ll this points to the need for creating environment courts which alone should be empowered to deal with all matters, civil and criminal, relating to environment.”<sup>54</sup> For India’s common law system, these shortcomings represented a challenge to the effective disposition of individual cases, to India’s judicial emphasis on “social welfare,” and to “empower[ing] the weakest members of the society.”<sup>55</sup>

Accordingly, in 2010, India’s Parliament passed the “National Green Tribunal Act,” which authorized establishment of a national-level green court.<sup>56</sup> Structurally, India’s National Green Tribunal (“NGT”) is vested with broad authority, possessing discretion over “all civil cases where a substantial question relating to environment . . . is involved.”<sup>57</sup> Moreover, the enabling legislation granted it appellate jurisdiction over environmental matters, with immediate appeal from the NGT to India’s Supreme Court.<sup>58</sup>

Compositionally and procedurally, the NGT is also unique. In a divergence from more traditional legal systems, NGT panels are not composed solely of traditional justices; instead, they also include “Expert Members,” who are evaluated not on their legal credentials, but rather their possession of considerable scientific training and practical experience.<sup>59</sup> Additionally, in order to provide more case-appropriate and expansive access to justice, the NGT is “not . . . bound by the Code of Civil Procedure” or “the rules of evidence,” and instead possesses the “power to regulate its own procedure,” “guided by the principles of natural justice.”<sup>60</sup> Under this extraordinary grant of discretion, the NGT has rendered hundreds of judgments to date.<sup>61</sup> Moreover, the NGT has laid the

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53. Indian Council for Enviro-Legal Action and Others v. Union of India (UOI) and Others, (2011) 8 SCC 161 [1], [6] (India).

54. *Id.* at [6].

55. *Brief History of Law in India*, BAR COUNCIL INDIA (2016), <http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom/> [<https://perma.cc/584G-EXMJ>] (last visited Jan. 29, 2016).

56. The National Green Tribunal Act, No. 19 of 2010, INDIA CODE (2010) [hereinafter INDIA CODE].

57. *Id.* § 14(1).

58. *Id.* §§ 16, 22.

59. *Id.* § 5(2).

60. *Id.* § 19(1)–(3).

61. Search Judgment by Party Name, NAT’L GREEN TRIBUNAL, <http://164.100.107.74/party-wise-judgment.php> [<https://perma.cc/9V32-8ABX>] (in the “Party Name” box, click the space bar once and then click submit).

framework for “the world’s largest network of local environmental tribunals, expected to increase citizen access to environmental justice.”<sup>62</sup>

### B. New Zealand

As demonstrated above, India represents a large developing country. Its rapid population growth and expanding array of environmental challenges spurred the relatively recent establishment of an ECT with a broad grant of jurisdictional and discretionary powers. In contrast, New Zealand, which also established a national ECT, represents a small, highly developed country. In 2013, its Human Development Index (“HDI”) rating placed its population of roughly 4.5 million “in the very high human development category”—sixth out of 187 countries and territories.<sup>63</sup>

While New Zealand differs from India in many core structural and compositional respects, it also demonstrates some key similarities. For instance, the impact of urbanization in New Zealand has been profound. Approximately eighty-five percent of New Zealand’s population is concentrated in urban areas, making the nation “one of the most highly urbanised countries in the world.”<sup>64</sup> While the development of “peri-urban” areas has blurred the distinction between urban and rural regions in New Zealand,<sup>65</sup> like India, New Zealand’s population largely remains divided between urban and rural areas. New Zealand’s rural populations contribute substantially to the country’s economy through traditional agriculture, fishing, and forestry.<sup>66</sup>

Also, like in India, the presence of New Zealand’s indigenous populations contributes additional tension to the urban-rural dichotomy. As of 2013, approximately 14.9 percent of New Zealand’s population identified as Māori.<sup>67</sup> Impressively, research has suggested that HDI rankings of the Māori population have increased more rapidly than the general population, “closing the gap in human development.”<sup>68</sup>

62. U.N. DEVELOPMENT PROGRAMME, *supra* note 51.

63. U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2013: NEW ZEALAND HDI VALUES AND RANK CHANGES IN THE 2013 HUMAN DEVELOPMENT REPORT (2013), <http://hdr.undp.org/sites/default/files/Country-Profiles/NZL.pdf> [https://perma.cc/4PBB-6PL9].

64. *Statistics New Zealand, Historical Context*, NEW ZEALAND GOV’T (2014), [http://www.stats.govt.nz/browse\\_for\\_stats/people\\_and\\_communities/Geographic-areas/urban-rural-profile/historical-context.aspx](http://www.stats.govt.nz/browse_for_stats/people_and_communities/Geographic-areas/urban-rural-profile/historical-context.aspx) [https://perma.cc/CT8M-QKG7].

65. *Id.*

66. *Id.*

67. *Statistics New Zealand, 2013 Quick Stats: About Māori*, NEW ZEALAND GOV’T (2013), <http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-maori-english.aspx> [https://perma.cc/87FX-GPMB].

68. Martin Cooke et al., *Indigenous Well-Being in Four Countries: An Application of the UNDP’s Human Development Index to Indigenous Peoples in Australia, Canada, New Zealand, and the*

Nevertheless, like other indigenous populations, the Māori “economy is disproportionately invested in climate-sensitive primary industries . . .” and the Māori are “disproportionately exposed to adverse social and economic conditions.”<sup>69</sup>

In addition to issues of indigenous equity, New Zealand faces a variety of environmental challenges. For instance, in New Zealand’s urban areas, including Christchurch, air pollution raises environmental justice considerations, with different levels of ambient air pollution leading to “higher exposure . . . among groups of lower social status.”<sup>70</sup> Like India, New Zealand also faces pressing environmental challenges in its rural areas, including loss of biodiversity.<sup>71</sup>

Ultimately, like in India, these various pressures led New Zealand to seek institutional responses to its environmental and development challenges. Like India, New Zealand is a common law state,<sup>72</sup> and resolving environmental law disputes requires the ability to apply expertise to individual disputes. Accordingly, nineteen years before the passage of India’s NGT Act, New Zealand adopted the Resource Management Act of 1991 (“RMA”). The RMA sought to “promote the sustainable management of natural and physical resources.”<sup>73</sup> It embraced an expansive conception of resource management, acknowledging “social, economic, and cultural well-being,” recognizing the diverse communities within New Zealand, and emphasizing the need to consider “the reasonably foreseeable needs of future generations.”<sup>74</sup>

Additionally, the RMA provided for establishment of New Zealand’s Environment Court, which replaced the preexisting Planning Tribunal, and granted the Environment Court authority over “virtually every important mechanism for environmental management . . . including regional policy statements, regional and district plans, resource consents and water

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*United States*, BMC INT’L HEALTH & HUM. RTS., Dec. 20, 2007, at 8-9, <http://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/1472-698X-7-9> [<https://perma.cc/XF4N-LVNY>].

69. Rhys Jones et al., *Climate Change and the Right to Health for Māori in Aotearoa/New Zealand*, 16 HEALTH & HUM. RTS. J. 54, 55–56 (2014).

70. Jamie Pearce et al., *Every Breath You Take? Environmental Justice and Air Pollution in Christchurch, New Zealand*, 38 ENV’T & PLAN. A 919, 921 (2006).

71. See, e.g., David A. Norton & Craig J. Miller, *Some Issues and Options for the Conservation of Native Biodiversity in Rural New Zealand*, 1 ECOLOGICAL MGMT. & RESTORATION 26, 27–33 (2000) (suggesting ways to conserve native biodiversity in rural New Zealand that is being greatly affected by humans).

72. *Sources of Law*, TE ARA – ENCYCL. N.Z. (A.H. McLintock, ed., 2009), <http://www.teara.govt.nz/en/1966/legal-system> [<https://perma.cc/B9P5-ZG4Z>] (last visited Jan. 29, 2016).

73. Resource Management Act 1991, pt 2, s 5(1) (N.Z.).

74. *Id.* at pt 2, s 5(2)(a).

conservation orders.”<sup>75</sup> To equip the Court for this range of matters, the body is composed of two classes of individuals: environment judges and environment commissioners.<sup>76</sup> Eligibility in the first class is determined on the basis of traditional judicial qualifications, while the latter seeks to ensure that the “court possesses a mix of knowledge and experience in matters coming before the court,” including economics, planning, surveying, and indigenous concerns.<sup>77</sup>

In conducting its activities, the court diverges from more traditional common law courts in important ways. While its authority to render judgments is clearly constrained by the enabling statute, the Environment Court is also empowered to render policy declarations, even on “abstract issues or issues not adequately framed by specific facts and argument.”<sup>78</sup> In this fashion, the institution is uniquely empowered to adjudicate in advancement of New Zealand’s sustainable management.<sup>79</sup> Through this expansive grant of authority, the Environment Court in New Zealand has addressed hundreds of environmental disputes, receiving 392 new registrations during the twelve most recent months for which such statistics are available.<sup>80</sup>

#### IV. ANALYSIS

As the foregoing sections demonstrate, India and New Zealand present vastly different political and cultural settings in which the issues of access to justice, indigenous rights, and environmental justice have manifested. Nevertheless, in both instances, governments have elected to authorize and establish ECTs in response to these multiple challenges. Accordingly, in this section, this article undertakes a comparative analysis of the performance these countries’ ECTs provide in practice, aiming to highlight variation between the two cases. First, this section presents a characterization of the procedural access to justice that each court has provided in practice, giving special attention to their treatment of historically disenfranchised and indigenous populations. Second, this section examines the judicial outcomes that these institutions have yielded.

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75. *Id.* at pt 11, s 247; Bret C. Birdsong, *Adjudicating Sustainability: New Zealand’s Environmental Court*, 29 *Ecology L.Q.* 1, 28 (2002) (outlining scope of competence of New Zealand Environment Court).

76. Resource Management Act 1991, pt 11, s 248.

77. *Id.* at pt 11, ss 249(1)–(2), 253(a)–(e).

78. Birdsong, *supra* note 75, at 29.

79. *See* Resource Management Act 1991, pt 12, s 310(a)–(d) (giving the Environment Court the authority to make declarations on proposed plans and whether those plans are contrary to the Act as a whole).

80. REPORT OF THE REGISTRAR OF THE ENVIRONMENT COURT 10 (2015) (N.Z.).

### A. *Standing*

In any judicial system, securing access to justice requires broad recognition of standing, or the right to “make a legal claim or seek judicial enforcement of a duty or right.”<sup>81</sup> Establishing standing, or showing that a plaintiff “has a sufficient stake in an otherwise justiciable controversy,” is a gatekeeping task in environmental litigation, and one that is particularly amorphous.<sup>82</sup> The notion of standing is differentially interpreted across courts; as a result, courts can either expand access to the judicial system<sup>83</sup> or constrain it through their grants of standing.<sup>84</sup>

In both India’s NGT and New Zealand’s Environment Court, legislation was constructed to expand standing. In India, for instance, the NGT was established with an eye toward the nation’s broader trend of “relaxation of requirements of standing,” and was granted cognizance over an array of classes and causes.<sup>85</sup> Accordingly, this paper next examines whether the aspirations of broadly granting standing have manifested in practice.

#### 1. India National Green Tribunal

Turning first to India, the NGT has often demonstrated a liberal construction of standing when interpreting individual cases; this has manifested in several ways.

##### a. India: Public Interest Claims

First, the court has readily accepted public interest claims brought by individuals on behalf of broader classes of the Indian population. For instance, in *Himanshu R. Barot v. State of Gujarat & Others*, the applicant was a journalist who explicitly stated that “he has no personal interest in the litigation.”<sup>86</sup> Instead, the applicant expressed concern for residents of a

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81. *Standing*, BLACK’S LAW DICTIONARY (10th ed. 2014).

82. Michael A. Perino, *Justice Scalia: Standing, Environmental Law and the Supreme Court*, 15 B.C. ENVTL. AFF. L. REV. 135, 136–37 (1987).

83. *See, e.g.*, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 9, June 25, 1998, 2161 U.N.T.S. 447.

84. PHILIPPE SANDS & JACQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 140 (3d ed. 2012).

85. Marc Galanter & Jayanth K. Krishnan, “*Bread for the Poor*”: *Access to Justice and the Rights of the Needy in India*, 55 HASTINGS L.J. 789, 795 (2004); INDIA CODE, § 19(4)(a)–(k).

86 *Himanshu R. Barot v. State of Gujarat & Others*, NGT Application No. 109 (THC)/2013 \*3 (2014) (India).

region allegedly affected by a maize processing facility and sought “protection of the environment.”<sup>87</sup>

Granting standing to public interest claims is particularly valuable in India, where expansive land area and a tendency towards administrative centralization challenge unified enforcement of environmental statutes and regulations.<sup>88</sup> In *Rohit Choudhury v. Union of India and Others*,<sup>89</sup> a citizen plaintiff sought protection of Kaziranga National Park.<sup>90</sup> The park is a designated UNESCO World Heritage Site and home to species including the tiger, Indian rhino, and Asian elephant.<sup>91</sup> Through the case, Choudhury was able to highlight illegal, “unregulated quarrying and mining” that imperiled the Park’s existence, to emphasize the duty of India’s Ministry of Environment and Forests to provide oversight in the National Park, and to secure a judgment requiring cessation of illegal industrial activities.<sup>92</sup>

Public interest claims have been employed in multiple other instances. Individuals have brought claims on behalf of entire villages seeking environmental protections.<sup>93</sup> Likewise, plaintiffs have received standing to represent communities reliant on a shared resource, such as fishermen when development threatens their waters.<sup>94</sup> Through these actions, citizens have been able to secure recognition of environmental claims on behalf of their neighbors and fellow villagers.

#### b. India: Standing to Permit Consideration of Nonhuman Entities

Second, the court has, in certain narrow instances, appeared to grant standing that enables it to consider the plight of living organisms. Such cases are unique, and in them, the NGT does not explicitly grant standing to a nonhuman entity. Instead, the NGT has minimized its initial consideration of standing so that it can resolve a matter deemed compelling. For instance, in a 2014 opinion, the court addressed the claim that the Bhopal municipal government “had cut three old/big trees . . . and also three big Ashoka

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87. *Id.* at \*2–\*3.

88. Arun Agrawal & Noriko Yokozuka, *Environmental Capacity-Building: India’s Democratic Politics and Environmental Management*, CAPACITY BUILDING IN NAT’L ENVTL. POL’Y 239, 239–69.

89. *Rohit Choudhury v. Union of India & Others*, (2012) NGT Application No. 38/2011 (2012) (India).

90. *Id.* ¶ 2.

91. *Id.*

92. *Id.* ¶¶ 2–3, 33.

93. *See, e.g.*, *Husain Saleh Mahmad Usman Bhai Kara v. Gujarat SEIAA & Others*, Unreported Judgments 2013, 2 (India) (contesting construction of thermal power plant).

94. *See, e.g.*, *Wilfred J. v. Ministry of Environment & Forests*, Application No. 74 (2014) (India).

trees.”<sup>95</sup> The NGT opinion sidestepped consideration of standing and tree ownership and instead moved directly into resolving the substance of the dispute.<sup>96</sup> It has repeated this approach elsewhere.<sup>97</sup> Though such efforts have been limited to date, they reflect an approach for empowering the court to consider the substantive interests of trees and other natural objects. If so, this move would reflect an initial step toward an institutional approach debated by environmental lawyers since the birth of the modern environmental movement: enabling nonhuman entities to “seek redress in their own behalf.”<sup>98</sup>

### c. India: Self-Generated/*Sua Sponte* Actions

Third, the NGT has demonstrated willingness, when it deems such action necessary, to initiate legal action on its own behalf and in the absence of claims from outside parties. Such *suo motu*, or *sui generis*, actions permit the Tribunal to engage in a degree of agenda-setting not commonly associated with courts. In 2013, the Tribunal convened such an action in response to a newspaper article published in the *Times of India* that argued that mining activities were imperiling a tiger corridor.<sup>99</sup> On this basis, the Tribunal summoned nineteen respondents to ascertain the “particulars of Mining Leases . . . mentioned in the news item.”<sup>100</sup> By doing so, the NGT was able to systematically review claims set forth in the newspaper article and to identify potential violations of mining and resource protection laws for further scrutiny.<sup>101</sup>

## 2. New Zealand Environment Court

Like India’s NGT, New Zealand’s Environment Court has favored inclusivity in order to address environmental questions. Its approach to standing is made explicit through RMA section 274.<sup>102</sup> The statute

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95. *Smruti Park Tulsivan Vikas v. Municipal Corporation of Bhopal*, NGT Application No. 131/2014 (CZ) \*1 (2014) (India).

96. *Id.* at \*1–\*3.

97. *See, e.g., R.S. Bapna v. Indore Mun. Corp.*, NGT Application No. 139/2014 (CZ) (2014) (India) (skipping any standing analysis before deciding the merits of the case).

98. CHRISTOPHER STONE, *SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT* 8 (3d ed. 2010).

99. *Tribunal at its Own Motion v. The Sec’y, Ministry of Env’t & Forests & Others*, Unreported Judgments 2013, 4 (India).

100. *Id.* at 5.

101. *Id.* at 23.

102. *See Resource Management Act 1991*, pt 11, s 274(1)(a)–(f) (describing the many circumstances where a person can become a party to a proceeding in front of the Environmental Court).

articulates those classes of actors who may pursue an environmental claim.<sup>103</sup> In addition to provisions authorizing certain governmental officials to bring suits as a matter of right, the statute broadly confers standing to citizens and authorizes participation by any “person who has an interest in the proceedings that is greater than the interest that the general public has.”<sup>104</sup> However, as Pring and Pring note, the discretion justices possess in implementing procedural and statutory provisions can also greatly impact and shape environmental outcomes.<sup>105</sup> Accordingly, it is important to examine how New Zealand has employed standing provisions in practice.

a. More Formal Standing Analysis

First, the cases resolved by the Environment Court demonstrate that it construes standing more rigidly than India’s NGT. Whereas the NGT often undertakes limited formal consideration of standing, it receives frequent and explicit consideration in many Environment Court opinions. For example, the Court often parses its statutory requirement that litigants demonstrate more interest in the proceedings than that held by the general public. Such consideration emerges in two ways. The first is, when a party raises the issue of standing to the court.<sup>106</sup> This suggests that parties in New Zealand may be more likely than those in India to employ procedural, rather than purely substantive, claims in support of their positions. Second, the Court can raise standing as an issue on its own accord. In these instances, the discussion of standing generally appears to be more *pro forma* and quickly resolved in favor of permitting the claims to move forward.<sup>107</sup> Accordingly, while the Environment Court’s more rigid construction of standing could outwardly appear problematic to less sophisticated litigants, in practice, the justices seem to embrace their policy mandate of fostering inclusivity.

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103. *Id.*

104. *Id.* at pt 11, s 274(1)(d)–(da).

105. GREENING JUSTICE, *supra* note 37, at 111.

106. Trustees of Runwild Trust v. Auckland Council [2014] NZEnvC 18 at [3], [24], [25] (N.Z.).

107. Elwell-Sutton v. West Coast Regional Council [2012] NZEnvC 273 at 3-6; *see, e.g.*, West Coast Env’tl. Inc. v. Buller Dist. Council [2010] NZEnvC 332 at [7]–[9] (N.Z.) (raising the issue of standing and dismissing it quickly).

### b. More Inclusive Standing Statute

Moreover, despite the Environment Court's comparatively more formal consideration of standing, it rarely emerges as a bar to litigation since the underlying statute specifying standing is so broadly constructed. In many instances, simply filing an appeal or objection with a permitting agency is sufficient to confer standing.<sup>108</sup> Likewise, submitting an application is viewed as sufficient to demonstrate a "right in property directly affected, and not remote."<sup>109</sup> Accordingly, just as the Environment Court's more formalistic consideration of standing rarely bars access, the underlying statute favors inclusiveness.

### c. Flexible Construction of Standing

Finally, judges of the New Zealand Environment Court have demonstrated a willingness to construe statutory language and facts flexibly to favor inclusivity and equity. This flexibility has manifested in several forms.

First, many traditional courts address standing before reaching substantive claims, thus permitting standing to function as a bar to litigation. In contrast, the Environment Court has repeatedly demonstrated its willingness to evaluate the merits of a claim, even when standing is questioned or lacking.<sup>110</sup> Likewise, the Court elsewhere has simply rendered substantive opinions, permitting standing to be addressed later "if it remains an outstanding issue to be determined."<sup>111</sup>

Second, when the Court finds standing problematic, it readily invokes other grounds to reach substantive issues. For example, if one party lacks standing, the Court will seek others with standing to permit litigation and dispute resolution to continue.<sup>112</sup> Likewise, the court will seek ways to promote equity and prevent procedural defects from barring litigation. Examples have included considering overall ecosystem health, even though "neither [specific] trees nor animals have standing,"<sup>113</sup> and permitting the intervention of iwi (native populations) in a dispute, even though their

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108. See, e.g., *Royal Forest & Bird Prot'n Soc'y of N.Z. Inc. v. Canterbury Reg'l Council* [2013] NZEnvC 301 at [29].

109. *Dir.-Gen. of Conservation v. Buller Dist. Council* [2010] NZEnvC 335 [9] (N.Z.).

110. *Elwell-Sutton v. W. Coast Reg'l Council*, *supra* note 107.

111. *Trs. of the Ngati Tamaoho Tr. v. Auckland Council* [2014] NZEnvC 012 at 6 per Harland J.

112. *Yaldhurst Rural Residents Ass'n, Inc. v. Christchurch City Council* [2009] NZEnvC 119 [7] (N.Z.).

113. *Robinson v. Waitakere City Council* [2010] NZEnvC 314 at [23].

attorney technically missed a filing deadline.<sup>114</sup> As the Court itself notes, the “objective of any proceeding before the court is ultimately to promote that purpose of sustainably managing natural and physical resources while, although this is implicit, following the principles of natural justice.”<sup>115</sup>

Third, the Court has exhibited, in limited instances, its willingness to consider equity on its own accord. Its enabling statute, the RMA, deems “the protection of historic heritage from inappropriate subdivision, use, and development” and “the relationship of Maori and their culture and traditions with their ancestral [environments]” to be matters of national importance.<sup>116</sup> Accordingly, in at least one case where Maori were not officially parties, the Court considered the need to “suitably recognize . . . and provide . . . for” native populations, the land claims of various iwi groups, and the significance of various ecosystem components.<sup>117</sup>

In sum, this section has demonstrated that the structure and practice of India and New Zealand’s ECTs lead to relatively expansive conceptions of standing. These enhance procedural equity on the input side, enabling a broader slate of parties and issues to gain a toehold in the legal process. However, securing initial access to the judicial process is only one portion of the equation.

### B. Judicial Outcomes

In their 2009 evaluation of ECTs, Pring and Pring note that access to justice can be parsed into three distinct phases: access to the ECT; access to “fair, efficient, and affordable” proceedings; and issuance of orders that “provide measurable outcomes . . . [to] prevent . . . or remedy . . . environmental harm.”<sup>118</sup> While it is difficult to measure “substantive environmental outcomes” resulting from judicial decisions, an important prefatory step is to examine the judgments that courts issue. Doing so moves closer to defining how court structures can shape who gains access to justice, as well as what form that justice may take. Due to the difficulty in generalizing across the facts of individual cases, comparing judgments

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114. See generally *Whangamata Māori Comm. v. Waikato Reg’l Council* [2005] NZEnvC 202 [5], [7] (N.Z.) (indicating that a small amount of prejudice arises from a late filing because the delay will not be considered undue).

115. *Robinson*, *supra* note 113, at ¶ 23.

116. Resource Management Act 1991, pt 2, s 6(e)–(f).

117. *Heybridge Devs. Ltd. v. Bay of Plenty Reg’l Council* [2010] NZEnvC 195 at 8 per Dwyer J.

118. GREENING JUSTICE, *supra* note 37, at xiii.

across courts challenges comparative environmental law scholars, yet holds value in characterizing institutional efficacy.<sup>119</sup>

### 1. India

India's NGT statute offers little specific guidance regarding particular remedies and instead grants broad discretion to NGT panel members. The statute authorizes the NGT to render "relief and compensation to the victims of pollution and other environmental damages . . . ,” restitution for property damage, and restitution of the environment "as the Tribunal may think fit.”<sup>120</sup> Likewise, rather than prescribing specific environmental statutes that the Tribunal must consider the enabling legislation directs that the Tribunal "shall . . . apply the principles of sustainable development, the precautionary principle, and the polluter pays principle.”<sup>121</sup>

In practice, it appears that the Tribunal crafts its opinions with an eye toward broad environmental principles. For example, when addressing pollution in economically significant fishing grounds, the NGT embraced a "multipronged approach" and noted that the precautionary principle, polluter pays, and various valuation techniques should guide its opinion.<sup>122</sup> Likewise, when considering the environmental degradation of the Rohtang Pass, a highly trafficked route through the Himalayas in Himachal Pradesh province, the NGT went well beyond a simple consideration of the pollution. Instead, the Tribunal undertook lengthy examination of the region's biodiversity, impacts to the local ecosystem from partially unburnt hydrocarbons ("black carbon"), and the status of the Pass as "one of the most significant gifts of nature to mankind . . . .”<sup>123</sup> On this basis, the Tribunal cited the "Polluter Pays Principle" to justify imposing a tax on motor vehicles to help mitigate the effects of environmental degradation in the region.<sup>124</sup>

Elsewhere, the NGT demonstrates its willingness to consider linkages between human, economic, and environmental ramifications of disputes. The NGT generally appears amenable to permitting economic activity to

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119. Helle Tegner Anger et al., *The Role of Courts in Environmental Law—A Nordic Comparative Study*, 1 NORDIC ENVTL L.J. 1, 9, 10 (2009).

120. INDIA CODE, § 15(1).

121. *Id.* § 20.

122. *Bhungase v. Ganga Sugar & Energy Ltd. & Others*, Unreported Judgments 2013, 18 (India).

123. *Court on Its Own Motion v. State of Himachal Pradesh*, Unreported Judgments 2014, 3 (India).

124. *Id.* at 24.

continue, provided that environmental effects are fully understood<sup>125</sup> and that there are no countervailing cultural considerations.

However, when indigenous groups and religious groups are involved, the Court exhibited sympathy toward those interests. For example, in one case, the Tribunal was called upon to examine the sufficiency of environmental impact review for an airport development that threatened both an ecologically productive river and a “declared heritage site” of great cultural importance to the Kerala people.<sup>126</sup> Ultimately, the Tribunal acknowledged awareness that “a balance has to be struck between ecology and development” but barred the project given its troubling environmental and cultural implications.<sup>127</sup>

However, the NGT does not uniformly favor traditional interests over industry. Elsewhere, the NGT has permitted industrial development despite disruption to centuries-old pastoralist grazing claims.<sup>128</sup> Likewise, it has ordered the modification of traditional manufacture processes of Hindu idols to mitigate water pollution, though it devoted extensive discussion to the need to maintain “sanctity and due respect” of the idols and not “diminish obeisance for the Gods/Goddesses.”<sup>129</sup> In brief, the NGT’s struggle to balance modernization, environmental preservation, and cultural considerations appears emblematic of the challenges facing India’s broader industrial transition.

## 2. New Zealand

A comparison of the two ECTs’ enabling legislation emphasizes that, while different, both grant expansive authority to the courts. As noted above, the RMA requires that the Environment Court take actions to preserve the natural environment, including the coastal environment, from “inappropriate subdivision, use, and development.”<sup>130</sup> At the same time, the statute requires consideration of sensitive populations, deeming “the relationship of Maori and their culture and traditions with their ancestral

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125. Punamchand s/o Ramchandra Pardeshi & Anr v. Union of India & Others, (2013), Original Application No. 10/2013 (THC) 8 (India).

126. Sreeranganathan K.P. v. Union of India & Others, (2013) NGT Appeal No. 172/2013 (SZ) \*7 (India).

127. *Id.* at \*218–19; *see also* Saldhana v. Union of India, (2014) NGT Application No. 6/2013 (SZ) (India) (concluding that the project must take environmental concerns into account and allow villagers access to agricultural lands).

128. Thervoy Gramam Munnetra Nala Sangam v. Union of India & Others, Unreported Judgments 2012, 12 (India).

129. Sureshbhai Keshavbhai Waghvankar & Others v. State of Gujarat & Others, (2013), Application No. 65/2012 (THC), ¶ 43–44.

130. Resource Management Act 1991, pt 2, s 6(a)–(b).

lands” and “the protection of protected customary rights” matters of national importance.<sup>131</sup>

In practice, the Court has repeatedly demonstrated its willingness to consider such matters. In an early opinion, it grappled extensively with how to incorporate Māori claims into the Environment Court.<sup>132</sup> After expansive legal analysis, it ultimately rendered a 249-page opinion; moreover, the Court did not merely seek a cursory examination of Māori interests, but rather “to give genuine and meaningful consideration to Maori concerns . . . consider[ing] how Maori saw [their landscape] in the context of their customary and cultural values.”<sup>133</sup>

Even the more customary opinions reflect this desire to protect the interests of indigenous populations. In several summary opinions, the Court noted that consent decrees between litigants do not “prejudice . . . any claim of tangata whenua [people of the land] to customary ownership.”<sup>134</sup> Likewise, the Court appears to believe firmly that the legal system can resolve native claims. Accordingly, it has repeatedly refused to dismiss claims involving indigenous interests because doing so would constrain its ability to review indigenous claims.<sup>135</sup>

The actions of New Zealand’s Environment Court to preserve native interests are further bolstered by a complementary institution: the Māori Land Court. The institution expressly “endeavours to assist Māori landowners to promote the retention, use, development, and control of Māori land” through assistance with registration, land claims, and “provision of proactive advisory services and initiatives.”<sup>136</sup> While examining the Māori Land Court is beyond the scope of this paper, its presence suggests that indigenous interests may receive more favorable treatment than this isolated examination of the Environment Court would suggest, given the overlapping institutional safeguards. In sum, New Zealand and its Environment Court demonstrate that developed countries, notwithstanding their highly bureaucratized legal systems, can provide institutional mechanisms to support indigenous populations.

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131. *Id.* at pt 2, s 6(e)–(f).

132. *Ngati-Rangi Tr. v. Manawatu-Wanganui Reg’l Council* [2004] NZEnvC 067 at 4.

133. *Id.* at 25.

134. *Hauraki Māori Tr. Bd. v. Auckland Reg’l Council* [2002] NZEnvC 58/2002 (N.Z.).

135. *Hauraki Māori Tr. Bd. v. Waikato Reg’l Council* [2002] NZEnvC 161 at [20]–[21].

136. *About the Māori Land Court*, N.Z. MINISTRY OF JUSTICE, <http://www.justice.govt.nz/courts/maori-land-court/about-us> [<https://perma.cc/A2VP-H9SB>] (last visited Jan. 30, 2016).

## V. DISCUSSION

The foregoing analyses demonstrate that ECTs' specialized structures can be observed through their approaches to standing and judicial orders—attributes that contribute to access to justice. As India's NGT illustrates, countries can structure ECTs to broadly grant standing to public interest claims, permit consideration of the interests of nonhuman entities, and undertake environmental inquiry on its own motions. Further, New Zealand's Environment Court demonstrates that even among ECTs with highly formalized standing analysis, an inclusive standing statute, and judges' flexible construction of that statute, can promote broad access to justice.

Moreover, the preceding case analyses demonstrate that expanded access to justice can engender tangibly different treatment for vulnerable ecosystems and indigenous populations. They illustrate the capacity of ECTs to craft orders that are sensitive to broader environmental debates and to afford detailed consideration to interrelated environmental and indigenous interests.

While such observations are noteworthy on their own, ECTs merit further scrutiny due to their close alignment with matters of theoretical interest to comparative and environmental governance scholars. This section briefly identifies two such issues and explores each in turn: (1) the ability of ECTs to serve as conduits, effectively translating international environmental law norms into actionable on-the-ground policy; and (2) the ability of ECTs to increase equity.

*A. Conduits for Translating International Norms*

First, the two ECTs examined demonstrate that specialized judicial institutions may present a mechanism for actualizing environmental norms enunciated at the international level. While international legal scholars and diplomats applaud the adoption of international environmental agreements and principles, grounding these soft norms in "hard" legal frameworks has proven challenging, particularly domestically.<sup>137</sup> Nevertheless, both ECTs surveyed demonstrate promising examples of how to accomplish this objective.

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137. See, e.g., Jon Birger Skjærseth et al., *Soft Law, Hard Law, and Effective Implementation of International Environmental Norms*, 6 GLOBAL ENVTL. POLS. 104, 104–05 (2006) (proposing that implementing soft law norms may increase international acceptance as opposed to hard law, in part because domestic ratification is not necessary).

As outlined above, India and New Zealand enshrined international environmental norms and ideals in the enabling legislation of their respective environmental courts. India's National Green Tribunal Act of 2010 requires justices to consider the principles of "sustainable development, the precautionary principle, and the polluter pays principle" in their opinions.<sup>138</sup> These derive directly from the Rio Declaration, adopted in 1992.<sup>139</sup> Likewise, New Zealand's RMA requires that the Environment Court "promote the sustainable management of natural and physical resources" and ensure that natural and physical resources "meet the reasonably foreseeable needs of future generations," again echoing major international soft-law norms.<sup>140</sup>

In practice, both institutions have sought to comply with these obligations. As noted above, India's National Green Tribunal, concerned with black carbon deposition in the Himalaya, ordered the imposition of a vehicular emission tax under the polluter pays principle and regulated riparian pollution from industrial activities under the precautionary principle.<sup>141</sup> As a result, far from the rarefied meetings where such principles were first negotiated, the norms of international environmental law are given effect in discrete instances of environmental management. In doing so, ECTs move such norms closer to benefiting the vulnerable populations that their drafters envisioned.

### *B. Mechanisms for Enhancing Equity*

Second, ECTs expressly seek to enhance equity among individuals. The institutions move beyond an "equal footing" conception of citizens and toward recognition that some classes of persons have historically experienced difficulty in using the legal system. As noted previously, both the enabling legislation and resulting judicial opinions in the two ECTs acknowledge the need for special consideration of indigenous and other historically disenfranchised populations.

Such an approach is significant in two respects. First, by seeking to protect the most vulnerable populations, ECTs can exploit the link between

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138. INDIA CODE, § 20.

139. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*].

140. Resource Management Act 1991, pt 2, s 5(1), 5(2)(a); *Rio Declaration*, *supra* note 139.

141. Court on Its Own Motion v. State of Himachal Pradesh (2014), Application No. 237 (THC)/2013 at [38](1) (regulating black carbon through the polluter pays principle); *Bhungase v. Gangakhed Sugar & Energy Ltd. & Others*, Unreported Judgement 2013 (India) (applying the precautionary principle).

indigenous populations and the environment. By considering indigenous welfare, ECTs can indirectly protect the landscapes upon which those populations rely.<sup>142</sup> Second, through their attention to intragenerational equity, ECTs lay the foundation for fuller consideration of intergenerational equity, something that environmental policymakers have long identified as crucial to durable sustainability.<sup>143</sup>

#### CONCLUSION

This article has examined the concept of access to justice as it is effectuated by select environmental courts and tribunals and as it bears upon indigenous and other historically disadvantaged populations. To do so, it outlined the multiple facets of access to justice, noting that the concept implies not only initial access to a court, but also access to procedures that are equitable. It also outlined the ability to receive judicial orders that meaningfully improve outcomes. On this foundation, the article subsequently demonstrated that access to justice affects the nature of justice provided, not simply on its own, but also through the other rights that it can facilitate or bar, including indigenous rights and environmental justice.

Having defined the contours of access to justice and noted its bearing upon other human rights, this article outlined judicial specialization as an institutional approach that nations increasingly invoke in the effort to enhance access to justice and improve legal outcomes. Focusing on ECTs in particular, this article initially examined the variation such institutions provide. Using the comparative courts perspective to address the effect of access to justice on indigenous populations, it surveyed two cases: India's NGT and New Zealand's Environment Court.

Within the context of access afforded by the courts' standing provisions, the article began by surveying the notion of standing. Turning first to India's National Green Tribunal, an exemplar of a developing country's tribunal, it found that the NGT's opinions have eschewed rigid consideration of procedural standing requirements in favor of the underlying substantive claims. It further noted the court's willingness to rule in cases concerning living organisms, even when no direct impacts to

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142. See, e.g., Thomas S. O'Connor, Comment, *We Are Part of Nature: Indigenous Peoples' Rights as a Basis for Environmental Protection in the Amazon Basin*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 193, 194 (1994); Stephen T. Garnett et al., *Healthy Country, Healthy People: Policy Implications of Links Between Indigenous Human Health and Environmental Condition in Tropical Australia*, 68 AUSTL. J. PUB. ADMIN. 53, 61 (2009).

143. Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495, 564-72 (1984) (discussing how to grant standing to a representative of future generations).

humans are cited. Finally and significantly, it observed the NGT's willingness to act on its own volition to conduct hearings on matters deemed environmentally significant, even if no parties had raised those issues yet. Turning to New Zealand's Environment Court, the paper presented an instance of a developed country's ECT with a similarly broad conception of standing. Despite more formalistic standing analysis, this paper concluded that the Environment Court's enabling statute was sufficiently broad to afford standing as a matter of course to most interested parties. Moreover, it demonstrated that Environment Court justices, conscious of their mandate to advance environmental equity, frequently grant standing or sidestep its strictest interpretation when less sophisticated parties are at risk of exclusion from the legal process. Collectively, it found that the two cases underscore the promising ways ECTs can foster an inclusive legal environment.

However, the paper noted that standing in and of itself is insufficient to remedy environmental harms, and thus examined the tangible outcomes ECTs afford to sensitive populations. Within the context of India, the paper noted that the NGT has: provided a conduit for international environmental law principles, including the precautionary and polluter pays principles; issued judgments that enshrine these often amorphous concepts; and sought to reconcile development pressures with cultural and environmental preservation. Likewise, in New Zealand, the Environment Court has exhibited an ability to undertake detailed, rather than perfunctory, consideration of indigenous/Māori rights, yielding judgments uniquely sensitive to the claims of environmentalists. Collectively, both courts demonstrate that ECTs, through their expansive statutory grants of discretion and justices' eagerness to pursue environmental equity, proactively seek environmental protection.

Together, the two cases demonstrate that much of the promise perceived in ECTs may indeed exist. This includes their ability to "deal with environmental cases and make the access to justice easier for citizens, NGOs, and disadvantaged groups" and to serve as a "better forum for the adjudication of environmental, land use, and climate change claims than courts or tribunals of general jurisdiction."<sup>144</sup>

Nevertheless, further analyses are still required. While scholarly efforts, including this paper, have demonstrated that ECTs can support inclusive standing and environmental judicial orders, research has yet to systematically examine implementation and its subsequent effects to

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144. Domenico Amirante, *Environmental Courts in Comparative Perspective: Preliminary Reflections on the National Green Tribunal of India*, 29 PACE ENVTL. L. REV. 441, 441 (2012); GREENING JUSTICE, *supra* note 37.

ecosystems and livelihoods. While some scholars have challenged the feasibility of such analyses, noting the subjective nature of evaluating the “goodness” of an environmental outcome, efforts to empirically evaluate implementation are warranted. Specifically, researchers may wish to employ case study research of the outcomes resulting from specific ECT orders as a first, exploratory step towards more empirically robust analysis.<sup>145</sup>

Ultimately, this paper demonstrates a tangible link between judicial specialization and access to justice. ECTs offer a mechanism for lessening the inequities in environmental protections between developed and developing countries and between privileged and indigenous/traditionally disenfranchised populations within countries. Moreover, by connecting the sometimes atmospheric principles of international environmental law to discrete, on-the-ground issues, ECTs serve as important linkage institutions in transnational environmental governance. As development and environmental pressures intensify, these attributes will only increase in value to the nations where ECTs exist.

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145. *E.g.*, ROBERT K. YIN, *CASE STUDY RESEARCH: DESIGN AND METHODS* (3d ed. 2013).