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RUTGERS INTERNATIONAL LAW AND HUMAN RIGHTS JOURNAL

REMOVING BARRIERS TO JUSTICE IN ENVIRONMENTAL LITIGATION[*]

John E. Bonine[**]

ABSTRACT

A myriad of obstacles exists in all the avenues of environmental activism. The legal system, a fundamental avenue, is no exception. Countries around the world have instituted barriers in their judicial systems that are detrimental to equal justice. Defenders of the environment are obstructed from protecting it, while access to the courts is easier for those whose activities are keen on destroying it.

This article focuses on the direct and indirect barriers that create this unequal access to justice. The first barrier discussed is standing to sue, which is a direct barrier. The others are financial barriers, which are indirect barriers that discourage plaintiffs from even filing a lawsuit due to the high costs of litigation and court fees. This article also discusses solutions to these barriers, such as creative litigation, explicit provisions in environmental treaties, and one-way attorney fees principles that could ease the path for citizens or NGOs to sue the government or those harming the environment.

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[*] This essay is adapted from a lecture given at Rutgers Law School.

[**] John E. Bonine is the B.B. Kliks Professor of Law at University of Oregon School of Law. He is co-author of two textbooks, *The Law of Environmental Protection* and *Human Rights and the Environment*. His scholarship often focuses on public participation, access to information, and access to justice in environmental decision-making. While pursuing an academic life, he has been involved in creating several institutions and networks including the world's first law school Environmental Law Clinic, the Environmental Law Alliance Worldwide, the Western Environmental Law Center, the annual Public Interest Environmental Law Conferences, and ENVLAWPROFESSORS, the primary discussion list for environmental law professors around the world. The author thanks Professor Patrick D. McGinley of West Virginia University, whose meticulous efforts at improving one's diction seem tireless and always clarify and improve one's writing. For more information on the civil right to counsel, visit the National Coalition for a Civil Right to Counsel at http://civilrighttocounsel.org.

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INTRODUCTION

The natural and human environment is under increasing assault. One reason is that access to the courts is relatively easy for those whose activities would despoil our planet and ultimately render it uninhabitable for future generations. Yet, in most of the world, defenders of the environment are met with unscalable barriers in trying to protect it in court.

In the 19th century, Anatole France ironically commented on "the majestic equality of the laws, that forbid the rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread."[1] In similar fashion, in the 21st century, legal systems allows both well-financed corporations and ordinary citizens alike to hire high-priced lawyers to protect their interests from adverse governmental actions. Two international examples make the true state of imbalance clear, however. In Germany, a study of legal cases filed in administrative courts during a five-year period revealed that out of 10,000 cases, only fifteen cases were filed by citizen organizations seeking to protect the environment.[2] The same study reported that Belgium's Council of State, the nation's highest court, decided about 30,000 cases. Environmental organizations brought only 101 of those cases.[3]

Why is this a problem? Government officials often seek to avoid conflict. If they feel pressure from only one side of a policy choice or controversy, they are likely to adjust their decisions to avoid controversy and potential lawsuits. The achievement of important environmental goals can thus be thwarted by corporate lobbying and corporate litigation, while the inability of environmental groups to call government agencies to account results in policies that are warped in favor of more destructive interests. Making access to justice more equal can improve the objectivity of decision making. Public officials are more likely to make decisions affecting the environment with integrity if those wanting to protect the environment have as much access to the courts as those whose actions would harm it.

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[1] In the original French, the poet-novelist remarked about "la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain." The observation was a statement expressing the view of Monsieur Choulette in ANATOLE FRANCE, LE LYS ROUGE, Chapitre VII.

[2] Nicolas de Sadeleer, Gerhard Roller, & Miriam Dross, Access to Justice in Environmental Matters, ENV.A.3/ETU/2002/0030 Final Report 4-5 (2002).

[3] *Id.* at 5.

Below, I focus on the issue of unequal access to justice. This essay seeks to highlight and analyze some of the inequities in environmental litigation around the globe and to suggest several possible solutions. Part I briefly discusses one important barrier to equal justice in environmental litigation: standing to sue. I call standing a "direct barrier." Part II describes significant financial barriers that diminish or prevent equal justice. I refer to these as "indirect barriers." They include limited funding for litigation, the small numbers of salaried public-interest lawyers, and the negative effect of the "loser pays" rule in many countries. Part III discusses and proposes possible remedies to the problem of financial barriers to equal access to justice.

I. DIRECT BARRIERS TO EQUAL ACCESS TO JUSTICE—STANDING

Direct barriers to equal justice include restrictions on standing to sue for environmental advocates, doctrinal limits on issuance of injunctions, overly strict doctrines on exhaustion of administrative remedies, and other impediments. One notion that particularly seems to inhabit (and inhibit) the minds of law students, lawyers, and judges is that restrictions on standing to sue, or *locus standi*,[4] are essential to a properly operating judicial system. They are not.

A. *Standing in National Law*

An oft-heard warning is that restrictions on standing to sue are needed to prevent opening of "floodgates" of litigation, which otherwise would cause courts to be awash in frivolous or unimportant environmental litigation by the unwashed masses. In this view, well-heeled troublemakers are eager to finance such frivolous litigation.[5] An opposing view is that "the Supreme Court's standing doctrine establishes differential barriers to court access, which has the effect of favoring the views of regulated entities over the views of regulatory beneficiaries."[6] Despite this belief, however, I am unaware of empirical studies addressing whether the

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[4] "Standing to sue" is a doctrine imposed by courts (or sometimes legislators) on *who* is entitled to file lawsuits. *Locus standi* is the Latin term, loved in some countries.

[5] The arguments in the U.S. context have been examined in some depth in Marin K. Levy, *Judging the Flood of Litigation*, 80 UNIV. CHI. L. REV. 1007 (2013).

[6] Karl S. Coplan, *Ideological Plaintiffs, Administrative Lawmaking, Standing, and the Petition Clause*, 61 ME. L. REV. 377, 466 (2009).

restrictive standing doctrine of the Supreme Court *actually* prevents lower courts from hearing many environmental cases. On the ground, my colleagues in the public interest bar are often successful in navigating around whatever obstacles the Court has erected to prevent judicial review of environmental claims, by including clients who meet the Court's restrictive tests. Nonetheless, unnecessarily narrow thinking is dominated by focusing on the U.S. Supreme Court. Several states recognize no constitutional restriction on standing. In such states, legislatures are free to grant standing to anyone they choose. The Supreme Court of Oregon, for example, has stated, "We are aware of no qualification on the legislature's authority in the Oregon Constitution that would restrict the legislature from authorizing any member of the public to initiate litigation concerning the validity of administrative rules . . . ."[7]

One might ask which nations have courts that fear this "flood" of litigation so much that those courts interpret their national *constitutions* to restrict standing. The answer appears to be limited to just one: The United States of America.[8] As far as I have been able to determine, the U.S. is the only country in the world that denies the national legislature or courts the right to decide who can file a lawsuit. Outside the U.S., despite the lack of constitutional bars, barriers to public-interest standing do continue to exist, but in the form of legislation or as aspects of hoary judicial tradition. Restrictions may come from decades of court decisions or from explicit legislation.[9] Even this is changing, however.[10]

Not every court agrees that judicially created standing rules are needed. More than 30 years ago, in *Ogle v Strickland*, Justice Murray Wilcox of the Federal Court of Australia wrote that "[t]he idle and whimsical plaintiff, a dilettante who litigates

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[7] Kellas v. Dep't. of Corr., 145 P.3d 139 (Or. 2006).

[8] An oft-cited case is Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). It is problematic that American law students are led to believe that standing is an inevitable and essential principle of judicial economy and indeed one of constitutional dimension. They carry that perspective into their practice of law. Exposing them to international and state cases in the U.S. could help to open their minds to broader possibilities.

[9] More than 20 years ago, I gave a lecture containing a rough survey of standing in several countries on various continents, but it can hardly be considered definitive (or up-to-date). *See* John E. Bonine, Standing to Sue: The First Step in Access to Justice (1999) (transcription available: http://www2.law.mercer.edu/elaw/standingtalk.html).

[10] *See* John E. Bonine, *The Public's Right to Enforce Environmental Law*, chapter 3 in HANDBOOK ON ACCESS TO JUSTICE UNDER THE AARHUS CONVENTION (Regional Environmental Center for Central and Eastern Europe, 2003), https://unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/handbook.final.pdf.

for a lark, is a specter which haunts the legal literature, not the courtroom."[11] Later, the Australian Law Reform Commission concluded in a study that there was no flood of litigants in danger of being released.[12] Thus, courts do not need doctrines on standing to restrict litigation.[13] Subsequently, in the *Truth Against Motorways* case where legislation had granted standing on a particular issue, allowing anyone to sue without restriction, Australia's highest court rejected an attempt to interpret a phrase in the Australian Constitution to restrict standing.[14] The court first stated that the language of Australia's Constitution differs from that of the U.S. Constitution. [15] The court then went out of its way to examine American jurisprudence and explicitly refused to follow the analysis by Justice Antonin Scalia in *Lujan*.[16]

Rules regarding standing can be relaxed in court decisions, legislation, and national constitutions.[17] The Constitution of Portugal creates an unrestricted "*actio popularis*" (people's action), abolishing restrictions on standing for certain issues, including "the preservation of the environment." [18] The Promotion of Administrative Justice Act, No. 3 of 2000, in South Africa provides, "Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action." [19] In the Republic of Malawi, the Environmental Management Act of 2017 provides:

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[11] *Ogle v Strickland* [1987] FCA 36 (13 February 1987) (*quoting* Kenneth E. Scott, *Standing in the Supreme Court: A Functional Analysis*, 86 HARV. L. REV. 645, 674 (1973), http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1987/36.html.

[12] Australian Law Reform Commission [ALRC], Beyond the Door-Keeper – Standing to Sue for Public Remedies, ALRC Report 78 (1996), http://www.austlii.edu.au/au/other/lawreform/ALRC/1996/78.html.

[13] *Id.*

[14] *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd*, [2000] HCA 11; 200 CLR 591; 169 ALR 616; 74 ALJR 604 (9 March 2000).

[15] *Id.*

[16] *Id.*

[17] Broadened (or even wide-open) standing can be granted in various ways. Countries vary widely in this regard. A survey in 2008 for the European Union had a good summary. *See* Esther Pozo Vera, *An inventory of EU Member States' measures on access to justice on environmental matters* (Milieu Ltd, 2008), https://ec.europa.eu/environment/aarhus/pdf/conf/milieu.pdf. An interesting discussion of Scottish law and the origins of standing doctrines in American law can be found in James E. Pfander, *Standing to Sue: Lessons from Scotland's* Actio Popularis, 66 DUKE L. J. 1493 (2017).

[18] PORT. CONST., art. 52, § 3(a), https://dre.pt/part-i.

[19] Promotion of Administrative Justice Act [No. 3 of 2000], §6(1) (S. Afr.). The legislation was adopted pursuant to section 33(3) of the Constitution of South Africa, which provides: "National

> (4) In furtherance of the right to a clean and healthy environment . . . *any person* interested in enforcing the right to a clean and healthy environment shall be entitled to bring an action . . . .
>
> (5) *Any person* proceeding under subsection (4) shall have the capacity to bring an action *notwithstanding* that the person cannot show that the defendant's act or omission has caused, or is likely to cause, him any personal loss or injury . . . .[20]

In some Latin American countries, legislation provides for a "popular action," that allows broad standing. In Brazil, such a claim is called an *ação populare*. Such suits are often called *acciones populares* or *acciones difusas* in other countries.[21] In Colombia, for example, the Popular Actions Act provides that standing to sue is open to any person whose claim would advance the public interest.[22]

Liberalized standing can also be provided through judicial action. For example, in Britain, where restrictions on standing had been judge-made, a seminal case established the principle that any organization, seriously dedicated to an issue, has standing to sue without more.[23]

B. *Creative Constitutional Litigation to Enlarge Environmental Standing*

In some countries existing restrictions on standing, statutory or judge-made, have been challenged by parties citing, as authority, a constitutional right to protect the environment. For example, in Chile, a group of lawyers residing in the nation's capital of Santiago sought to protect a spectacularly beautiful place—Lake

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legislation . . . must provide for the review of administrative action . . . ." S. AFR. CONST. § 33. It remains to be seen whether this actually liberalizes standing as much as the words seem to indicate.

[20] Environment Management Act (No. 19 of 2017)(emphasis added). In the view of a Malawian law professor, this provision brings "much needed certainty" to the law of standing. "It will also open up opportunities for environmental NGOs and public-spirited individuals to use their competences and expertise to promote good governance and the rule of law in the environmental sector." Chikosa Banda, *Administrative Justice, Environmental Governance and the Rule of Law in Malawi*, 34 MD. J. OF INT'L LAW 20, 46 (2019).

[21] *See. e.g.,* GERMAN SARMIENTO PALACIO, LAS ACCIONES POPULARES EN EL DERECHO PRIVADO COLOMBIANO (2006).

[22] L. 472, agosto 5, 1998, DIARIO OFICIAL [D.O.] (COLOM.).

[23] R. v. H.M. Inspectorate of Pollution ex parte Greenpeace (No 2) [1994] 4 All ER 329, 351.

Chungara (Lago Chungará), located in the high Altiplano. A mining company's construction of a dam threatened the lake. Although the lawyers had never visited the lake, they decided to file a lawsuit to protect it. Chilean legislation did not grant standing to persons in their situation. However, Chile's Supreme Court held that because citizens have the right to a protected environment and nature,[24] any citizen has the right to sue for environmental objectives.[25] In other words, the Constitution was used, not to *bar* standing—as in the U.S.—but to *grant* it affirmatively, overturning legislative restrictions on standing.

The Supreme Court of the Philippines in a 2006 case known as *Minors Oposa v. Factoran* held that children have standing to sue even on behalf of *future* generations yet unborn.[26] In fact, the Court went further. It said that no civilized society can exist without a protected environment.[27] Therefore, even if environmental rights had not been stated explicitly in the constitution, the Court would nevertheless have recognized them.[28]

Subsequently, the Philippines Supreme Court issued rules for environmental cases that include two provisions enshrining procedures to facilitate broad standing. Rule 2 of the Rules of Procedure for Environmental Cases provides that, "Any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental

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[24] "La Constitución asegura a todas las personas: . . . 8º El derecho a vivir en un medio ambiente libre de contaminación. Es deber del Estado velar para que este derecho no sea afectado y tutelar la preservación de la naturaleza." [The Constitution assures to all people: . . . 8º The right to live in an environment free of contamination. It is the duty of the state to ensure that this right is not affected and protect the preservation of nature.] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 19.

[25] Corte Suprema de Justicia [C.S.J.] [Supreme Court of Justice], 19 de diciembre de 1985, "Palza, Humberto, Comité de Desarrollo de Putre y CODEFF c. Ministro de Obras Publicas y otros," Rol de la causa: 824, Recurso de Proteccion. REVISTA DE DERECHO Y JURISPRUDENCIA Y GACETA DE LOS TRIBUNALES [R.D.J. & G.T. t. LXXXII No. 3, Sección 5 (Septiembre- Diciembre 1985). Although the legislation of Chile restricted standing, the court decided that the constitutional guarantee to "every person" of a safe environment meant that any citizen in the nation must be allowed to bring court cases in defense of the environment. *See* Rafael Asenjo, *Innovative Environmental Litigation in Chile: The Case of Chañaral*, 2 GEO. INT'L ENVTL L. REV 99 (1989).

[26] Minors Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792 (S.C., Jun. 30, 1993) (Phil.) [hereinafter *Oposa v. Factoran*].

[27] *Id*.

[28] *Id*.

laws."[29] Rule 7 further creates a special writ of "*kalikasan.*"[30] The writ provides non-governmental organizations, public interest groups, and others wide-open standing-to-sue:

> The writ is a remedy available to a natural or juridical person, entity authorized by law, people's organization, non-governmental organization, or any public interest group accredited by or registered with any government agency, on behalf of persons whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health, or property of inhabitants in two or more cities or provinces.[31]

This legal tool has been described by the judge who decided the *Minors Oposa v. Factoran* case as involving "nothing less" than "life and the sources of life of the earth: land, air, and water, or LAW." That last capitalized mnemonic, he said, was inspired by the student organization that organizes the annual Public Interest Environmental Law Conferences[32] at the University of Oregon.[33] The PIELCs have, for thirty-nine years, been planned and administered by the student environmental organization: Land Air Water (LAW). As described by Judge Hilario Davide, the writ of *Kalikasan* provides for an expeditious and low-cost hearing:

> The writ is issued by either the Supreme Court or the Court of Appeals within three days after the filing of the application. Hearing of the matter is set within sixty days. No docket or filing fee is required upon the filing of the complaint or petition. The proceedings terminate within sixty days

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[29] Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (S.C., April 13, 2010) (Phil.), Rule 2, § 5, https://lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html.
[30] *Kalikasan* is the Tagalog term for nature.
[31] Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC, Rule 7, § 1.
[32] Public Interest Environmental Law Conference, http://www.pielc.org. The present author, along with Professor Mike Axline and the students of the student organization Land Air Water, created the first PIELC in 1983. It started with 15 speakers and 75 attendees. Today the PIELC normally has over 200 speakers and approximately 2,000 participants.
[33] Hilario G. Davide, Jr., *The Environment as Life Sources and the Writ of* Kalikasan *in the Philippines*, 29 PACE ENVTL. L. REV. 592, n.1 (2012).

from application.[34]

C. *Expansion of Standing by Regional Treaties*

Standing has been addressed in some regional treaties. The Aarhus Convention[35] entered into force in 2001, establishing several procedural rights for the public regarding the environment.[36] Among them are provisions on access to justice. Forty-seven governments in Europe, the Caucuses, and Central Asia have ratified the Aarhus Convention,[37] binding themselves to its terms. Article 9.1 guarantees standing to sue for all "persons" who wish to challenge denials of their requests for information.[38] The broad term "persons" includes both natural and *legal* persons, such as a registered nonprofit organization or a corporation.[39] Article 9.2 of the Aarhus Convention ensures standing for legal challenges to decisions involving public participation.[40] The most difficult (and unresolved) questions concern Article 9.3, which broadly applies to violations of all sorts of environmental laws and obligations of both public and private persons (including entities). Governments, courts, the Aarhus Compliance Committee, environmental

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[34] *Id.* at 597.

[35] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *adopted* Jun. 25, 1998, 2161 U.N.T.S. 447 (entered into force Oct. 30, 2001) [hereinafter *Aarhus Convention*]. The author was among the "citizen diplomats" who participated in the negotiations that drafted the Convention. The informal name of the convention is based on the city in Denmark where the convention was signed by European environment ministers at the conclusion of their negotiations.

[36] The Administrative Procedure Act in the U.S. covers similar topics. 5 U.S.C. § 551 *et seq*. (2018) [hereinafter *APA*]. For example, the APA provides for freedom of information, *Id.* at § 552, public participation in rulemaking processes, *Id.* at § 553, party participation in agency adjudications, *Id.* at § 554, and a cause of action for judicial review, *Id.* at § 704. Public participation is also provided in regulations that carry out the National Environmental Policy Act. *See, e.g*., 40 C.F.R. § 1506.6 (2021).

[37] *See* U.N. ECON. COMM'N FOR EUR., ENVIR, POL. PROG., *Map of Parties*, https://unece.org/environment-policy/public-participation/aarhus-convention/map-parties (last visited Mar. 5, 2021).

[38] Aarhus Convention, *supra* note 35, art. 9, ¶ 1.

[39] Consequently, environmental organizations are explicitly granted standing. A "legal person" is an entity with rights and obligations that is not a "natural" (i.e., human) person. The Aarhus Convention addresses rights and obligations of both kinds of persons. (For example, the definition in Article 2 uses the two terms regarding both the public and public authorities.) Where the Convention restricts its application to only humans, it uses the narrower term "natural person." *See, e.g.*, art. 4, ¶ 4(f).

[40] Aarhus Convention, *supra* note 3535, art. 9, ¶ 2.

lawyers, and commentators have taken a variety of positions regarding how much Article 9.3 of the Aarhus Convention broadens legal standing in such situations.[41] Article 9.3 states:

> [E]ach Party shall ensure that, where they meet the criteria, if any, laid down in its national law, *members of the public* have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities, which contravene provisions of its national law relating to the environment.[42]

Some Parties to the Aarhus Convention have remained notably resistant to broadening legal standing in their national courts. The European Union, which itself is a Party to the Convention,[43] has been one of the most recalcitrant. The EU and its Court of Justice have resisted an expansive reading of Article 9.3 that would make it easier for nongovernmental organizations and natural persons to get into its courts. In 2017, the Compliance Committee of the Aarhus Convention made a finding that

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[41] *See, e.g.*, Klimentina Radkova, Has the Adoption of the Aarhus Convention Advanced the Legal Standing of NGOs, When Exercising the Right of Access to Justice Granted to Them by Article 9(3)? (January 2020) (LL.B. thesis, University of Oslo), https://www.researchgate.net/publication/339339055_Has_the_adoption_of_the_Aarhus_Convention_advanced_the_legal_standing_of_NGOs_when_exercising_the_right_of_access_to_justice_granted_to_them_by_Article_93; *Case Law Related to the Convention*, U.N. ECON. COMM'N FOR EUR., https://unece.org/environment-policy/public-participation/tfaj/case-law-related-convention (last visited Mar. 5, 2021); ANDRIY ANDRUSEVYCH ET AL., CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004-2014) (3rd ed. 2016), https://unece.org/fileadmin/DAM/env/pp/compliance/CC_Publication/ACCC_Case_Law_3rd_edition_eng.pdf; European Commission, *Study on EU Implementation of the Aarhus Convention in the Area of Access to Justice in Environmental Matters*, 07.0203/2018/786407/SER/ENV.E.4 (Sept. 2019), https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implemention_environmental_matters_2019.pdf.

[42] Aarhus Convention, *supra* note 35, art. 9, ¶ 3 (emphasis added).

[43] U.N. ECON. COMM'N FOR EUR., ENVIR, POL. PROG., *Map of Parties*, https://unece.org/environment-policy/public-participation/aarhus-convention/map-parties (last visited Mar. 20, 2021) (The EU is itself a Party to the Aarhus Convention, in addition to individual nations throughout Europe that are Parties).

> the Party concerned [the EU] fails to comply with article 9, paragraphs 3 and 4, of the Convention with regard to access to justice by members of the public because neither the [EU's] Aarhus Regulation,[44] nor the jurisprudence of the [Court of Justice of the European Union][45] implements or complies with the obligations arising under those paragraphs.[46]

The Compliance Committee acts after receiving complaints (titled "communications") concerning alleged non-compliance by a Party (countries that have ratified the Convention plus the European Union, which also ratified it as a separate body). Such complaints emanate overwhelmingly from the public. Despite the committee's stirring statement in the case involving the EU, the most authoritative body for interpretation of the Articles of the Aarhus Convention is not the committee, but the Meeting of the Parties (MOP), held every three years. The Sixth MOP in 2017 refrained from taking action that would endorse the Compliance Committee's action regarding the European Union, giving the EU time to decide how to respond. The matter will be taken up again at the Seventh MOP in October

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[44] The European Parliament and the Council of the European Union adopted the "Aarhus Regulation" in 2006. Regulation No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community Institutions and Bodies, 2006 O.J. (L 264) 13 (EC).

[45] The Court of Justice of the European Union was established in 1952, by the 1951 Treaty Instituting the European Coal and Steel Community. Treaty Establishing the European Coal and Steel Community, Apr. 18,1951, 261 U.N.T.S. 140 (entered into force Jul. 23, 1952).

[46] U.N. Econ. Comm'n for Eur., *Findings and Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2008/32 (Part II) Concerning Compliance by the European Union*, U.N. Econ. and Soc. Council, ECE/MP.PP/C.1/2017/7 (Jun. 2, 2017), https://unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ece.mp.pp.c.1.2017.7.e.pdf. The Findings and Recommendations of the Compliance Committee, an independent body under the Aarhus Convention, are forwarded to the Meeting of the Parties (MOP), held every three years, for potential action. The Sixth MOP, held in Montenegro in 2017, did not take action on the recommendation of the Compliance Committee, although the MOP did take actions regarding 11 States Parties to the Convention. *See* U.N. Econ. Comm'n for Europe, *Report of the Sixth Session of the Meeting of the Parties, Addendum: Decisions Adopted by the Meeting of the Parties*, U.N. Econ. and Soc. Council, ECE/MP.PP/2017/2/Add.1 (Jan. 10, 2018), https://unece.org/fileadmin/DAM/env/pp/mop6/Documents_aec/ECE.MP.PP.2017.2.Add.1_aec.pdf.

2021.[47] It is worth noting the tensions that erupted at the Sixth MOP in Montenegro as explained in this report of the Meeting by the Aarhus Secretariat:

> The Meeting saw a strong stand against the European Union's efforts to prevent the MOP adopting [the] decision endorsing findings that the European Union was in non-compliance with the Convention for its failure to allow members of the public to have access to justice . . . . Faced with a situation that could have seriously jeopardised the authority of the MOP and the integrity of the Convention's compliance mechanism, the strong resistance by several Parties together with environmental NGOs and other stakeholders ultimately saw the United Nation's spirit of consensus prevail and the discussion on the decision on compliance by the European Union has been postponed until the next ordinary session of MOP. Norway, Switzerland and the NGO Client Earth, also speaking on behalf of the European ECO Forum, expressed their deep regret to the position taken by the European Union.[48]

Subsequently, the EU decided that it could finesse the issue – avoiding the broadening of access to courts by drafting a revised EU Regulation governing EU bodies that will broaden standing for NGOs in *administrative* appeals, but not in *judicial* review.[49] The EU's position is that because Article 9.3 of the Aarhus Convention requires "access to administrative *or* judicial procedures,"[50] it can continue to resist broader standing to judicial procedures.

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[47] *See Commission Proposal for a Regulation of the European Parliament and of the Council on Amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community Institutions and Bodies*, COM (2020) 642 final (Oct. 14, 2020), https://ec.europa.eu/environment/aarhus/pdf/legislative_proposal_amending_aarhus_regulation.pdf [hereinafter *Proposal for a Regulation*].

[48] *Sixth Session of the Meeting of the Parties to the Aarhus Convention, Third Session of the Meeting of the Parties to the Protocol on PRTRs, their Joint High-Level Segment and Associated Meetings*, U.N. Econ. Comm'n for Europe, https://unece.org/environmental-policy/events/sixth-session-meeting-parties-aarhus-convention-third-session-meeting.

[49] Proposal for a Regulation, *supra* note 47, at 7. As might have been expected in the process of proposing revisions to EU law, "Responses submitted by environmental organisations, including NGOs and individuals showed a dissatisfaction with existing means of redress against EU acts and called for action. On the other hand, responses submitted by businesses, business associations and public authorities showed mainly a positive perception of the current situation." *Id.* at 11.

[50] Aarhus Convention, supra note 35, art. 9, ¶ 3 (emphasis added).

The MOP did take action in 2017 regarding parsimonious NGO standing by some nation-state Parties, such as Austria.[51] Previous MOPs and Compliance Committee recommendations have had some effect in other countries as well,[52] but the struggle to expand standing for ordinary citizens in Europe looks to be a long one.

Perhaps the issue will fall on more fertile ground in Latin America and the Caribbean. Countries there have not suffered floods of litigation despite having policies that provide for widespread standing. In this region, representatives of twenty-four nations recently negotiated a new treaty—the Escazú Agreement.[53] The treaty came into full effect in April 2021, when the required minimum number of eleven ratifications was achieved.[54] This treaty addresses many of the same concerns as Europe's Aarhus Convention. Regarding standing, it provides: "To guarantee the right of access to justice in environmental matters, each Party shall have, considering its circumstances: . . . (c) broad active legal standing in defence of the environment, in accordance with domestic legislation."[55] Of course, the phrase "considering its circumstances" could be interpreted to allow narrow domestic legislation on standing. However, the better view would be that domestic

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[51] Austria was ruled to have inadequate provisions for standing by non-governmental organizations, or NGOs. U.N. Econ. Comm'n for Europe, *Rep. of the Sixth Session of the Meeting of the Parties, Addendum, Decisions Adopted by the Meeting of the Parties*, ECE/MP.PP/2017/Add.1, at 37 (Jan. 10, 2018), https://unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_2_Add.1_E.pdf.

[52] *See, e.g.*, U.N. Econ. Comm'n for Eur., *Findings and Recommendations with Regard to Communication ACCC/C/2015/135 Concerning Compliance by France*, ECE/MP.PP/C.1/2020/9 (Sept. 14, 2020), https://unece.org/fileadmin/DAM/env/pp/compliance/CC-68/ece.mp.pp.c.1.2020.9.e.pdf.

[53] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Mar. 4, 2018, U.N. Doc. LC/CNP10.9/5 (entering into force Apr. 22, 2021) [hereinafter *Escazú Agreement*], https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf. It was negotiated under the auspices of La Comisión Económica para América Latina (CEPAL) (United Nations Economic Commission for Latin America and the Caribbean, ECLAC).

[54] By April 2021, twelve nations had ratified the Agreement. *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean*, OBSERVATORY ON PRINCIPLE 10 IN LATIN AMERICA AND THE CARIBBEAN, https://observatoriop10.cepal.org/en/treaties/regional-agreement-access-information-public-participation-and-justice-environmental (last visited April 21, 2021).

[55] Escazú Agreement, *supra* note 53, art. 8.

legislation must follow the requirement of "broad active legal standing." How this will work in practice is an open question of course.

II. INDIRECT BARRIERS TO EQUAL JUSTICE —FINANCIAL

Conditions and policies that do not constitute *direct* barriers to access to justice may indirectly prevent access to justice from being equal. Among these "indirect barriers," the most significant may well be economic ones. Whether barriers like restrictions on standing exist or are relaxed or removed, a lawsuit cannot be filed without some level of financing for the lawyers. If the filing of the case also exposes the plaintiff to financial risk in the case of a loss, this discourages access to justice even more. There is no opportunity for justice if a case never makes it to court. The lack of money for litigation is therefore a major problem that needs to be solved.

Numerous financial barriers to justice exist: high court filing fees,[56] a requirement to pay a bond as a condition of obtaining an injunction,[57] suppressive legal actions brought by industry or government,[58] the high costs of paying a lawyer, and the need to pay lawyers again if there is an appeal. This section focuses on the low number of salaried public interest lawyers, inadequate legal aid, the myth of significant *pro bono* help, and the adverse effects in many countries of the "loser pays" ("fee-shifting") rule.

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[56] For example, in the former Soviet Union, Ukraine, Belarus, Russia, and other places, if the case involves a business, it may go to the commercial courts, and if it does, the filing fee has been a percent of the cost of the case, which can be quite high if challenging a business. A significant change in the law in Ukraine has dramatically reduced this. *See* Baker Mackenzie, *New Calculation of Court Fee under Ukraine's New Law*, U.S.-UKRAINE BUSINESS COUNCIL, (Jan. 12, 2016), https://www.usubc.org/site/recent-news/new-calculation-of-court-fee-under-ukraine-rsquo-s-new-law. In Spain, there are no filing fees for nonprofit organizations and for nongovernmental organizations. *Cost of proceedings - Spain,* EUROPEAN E-JUSTICE (Aug. 11, 2019), https://e-justice.europa.eu/content_costs_of_proceedings-37-es-en.do?member=1.

[57] This principle has long been followed in the United States. Some of the earliest cases were Env't. Def. Fund, Inc. v. Corps of Eng'rs of the U.S. Army, 331 F. Supp. 925, 927 (D.D.C. 1971) ($1 bond); Nat. Res. Def. Council, Inc. v. Morton, 337 F. Supp. 167, 168-69 (D.D.C. 1971) ($100 bond); and Friends of the Earth, Inc. v. Brinegar, 518 F.2d 322, 323 (9th Cir. 1975) ($1,000 bond). The doctrine has become widespread in cases under the National Environmental Policy Act. *See, e.g.*, Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002).

[58] These are known as "SLAPP suits," cases brought against somebody who is pursuing the public interest: often those who are seeking to inform the public of an environmental problem. *See* George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3 (1989).

A. *The Dearth of Full-Time Public Interest Litigators*

In most countries, very few public-interest litigators are paid a regular salary to bring environmental cases. Taking Europe as one example, there appear to be no more than forty to forty-five such lawyers in an area of 500 million people.[59] Fewer than ten litigating lawyers work for the non-governmental organization (NGO) Client Earth, a nonprofit environmental law firm in Belgium and the United Kingdom. A similar small number of salaried litigators work for the public interest NGO Frank Bold Society in the Czech Republic and Poland. Five lawyers are employed by the Ukrainian NGO Environment-People-Law. These atypical organizations receive donations, grants from charitable foundations, bequests, and sometimes, funding from government bodies.[60] Beyond these three NGOs, a few small organizations employ one or two litigating lawyers. Sometimes, citizen groups can accumulate funds to pay a lawyer in a private law firm on a one-off basis, or such a firm might work on a contingency basis.[61] Neither occurs at large scale across Europe, however.

Some years ago, I made a similar survey for Latin America. I found only about twenty to twenty-five public interest environmental lawyers in the entire region.[62] In Africa, perhaps a dozen litigating public interest environmental lawyers are regularly funded.[63] In Asia, the Pacific, and the Middle East, I estimate the numbers

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[59] Survey conducted by author from personal knowledge and review of websites. Several organizations have "legal counsel" listed whose jobs appear rarely to involve direct litigation roles.
[60] Examples of these NGOs' financial statements can be found at CLIENT EARTH, ANNUAL REPORT AND FINANCIAL STATEMENTS FOR THE YEAR ENDED 31 DECEMBER 2019 (2020), https://www.clientearth.org/media/tibh5cls/clientearth-annual-reports-for-the-year-ended-31-dec-2019.pdf; FRANK BOLD SOCIETY, 2019 ANNUAL REPORT (Filip Gregor et al. eds., 2020), https://en.frankbold.org/sites/default/files/vyrocni_zpravy/annual_report_frank_bold_society_2019_audited.pdf; *Financial Support*, ENVIRONMENT-PEOPLE-LAW, FINANCIAL SUPPORT, http://epl.org.ua/en/finansova-pidtrymka/ (last visited Mar. 5, 2021).
[61] The most important such law firm is Leigh Day in London, *see Environmental Planning Law*, LEIGH DAY, https://www.leighday.co.uk/our-services/human-rights/environmental-planning-law/ (last visited Mar. 5, 2021).
[62] The author conducted a survey some years ago and reported this in a table. *See* John E. Bonine, *Barreras e incentivos para la participación ciudadana en la aplicación de la legislación ambiental*, in INSTITUCIONALIDAD E INSTRUMENTOS DE GESTIÓN AMBIENTAL PARA CHILE DEL BICENTENARIO, (Valentina Durán Medina, Sergio Montenegro Arriagada, Pilar Moraga Sariego Cecilia Urbina Benavides, eds.) at 427 (Universidad de Chile, Segunda edición, Santiago, Chile) (May 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1076786.
[63] Survey conducted by author from personal knowledge and review of websites.

do not exceed thirty,[64] apart from Australia. In the latter country, the Environmental Defenders Office has nearly forty lawyers and solicitors (not all litigating, however) in eight offices.[65]

The Environmental Law Alliance Worldwide is a network that brings together many of these lawyers.[66] However, the numbers of full-time, salaried public interest environmental litigators are paltry in comparison with the numbers of litigators and other lawyers available to represent businesses and corporations in environmental matters around the world.[67]

B. *The Myth of Environmental Pro Bono Representation*

Lawyers cost money. But one might ask, are lawyers not willing to work for free—*pro bono publico* (for the good of the public)—in environmental cases? For the most part, the answer is "no." The notion of widespread *pro bono* work on important litigation is a myth. Law students and business law firms may believe or assert that if one goes to work for "Big Law," it is possible to do significant *pro bono* work on the job and accomplish important societal change. Indeed, the large, business-oriented law firms may tout their devotion to *pro bono* during job interviews. If pressed, however, they may tell interviewees something like this: "We allow our associates to bill eighty hours per year for *pro bono* clients."[68] Note that if a law firm is pushing its associate lawyers to bill as many as 2,000 hours per year to paying clients, eighty hours would amount to just four percent of that.[69]

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[64] *Id.*

[65] ENV'T DEFS. OFF., https://www.edo.org.au (last visited Mar. 1, 2021).

[66] ENV'T LAW ALL. WORLDWIDE, http://www.elaw.org (last visited Mar. 1, 2021). John E. Bonine co-founded the ELAW network in 1989 and is a member of the Board of Directors of the U.S. office, which serves as the network's Secretariat.

[67] For an estimate for just the U.S., *see* text *infra* note 109.

[68] Such a statement was once made proudly by a lawyer for a business law firm who spoke at one of the annual Public Interest Environmental Law Conferences (PIELCs) held at the University of Oregon. For more information on the PIELCs, *see* PUB. INT. ENV'T LAW CONF., http://pielc.org (last visited Mar. 1, 2021).

[69] For a jaundiced view of the likelihood of significant *pro bono* work as a solution, *see* John E. Bonine, *Private Public Interest Environmental Law: History, Hard Work, and Hope*, 26 PACE ENVTL. L. REV. 465 (2009); Kenneth A. Manaster, *The Many Paths of Environmental Practice: A Response to Professor Bonine*, 28 PACE ENVTL. L. REV. 238 (2010); John E. Bonine, *The Divergent Paths of Environmental Law Practice: A Reply to Professor Manaster*, 28 PACE ENVTL. L. REV. 265 (2010) (hereinafter, *Divergent Paths*).

Furthermore, eighty hours annually is insufficient time even to initiate an important case that might have a strategic impact.

Moreover, what kind of *pro bono* cases can a young associate in a business-oriented law firm expect to handle? Mostly, they are what I call "micro *pro bono*" (*pro bono* that does not challenge or affect important economic interests). With "micro *pro bono*," lawyers can bring cases for an individual, such as a single client who has suffered racial discrimination, employment discrimination, a housing problem, or the like. But if a young lawyer in a business-oriented law firm desires to challenge local economic interests in an environmental case, he or she will probably be told "no." The law firm's partners may say something vague about "conflict of interest." But rarely is there a true *ethical* conflict of interest. Rather, this will be a "positional conflict." This is simply a fancy term for a "marketing conflict" in which the business-oriented law firm wants its moneyed clients to be assured that it always has their interests at heart.[70]

In a parallel situation, I recall a comment by Derrick Bell, who was dean in the early 1980s at the University of Oregon.[71] He tried to find help for the Black United Front in Portland.[72] He could find legal help for established, mainline civil rights organization, however, no lawyer at a big law firm would provide representation for the more militant Black United Front.[73] So much for the idea that lawyers are truly free to offer *pro bono* help. Several lawyers have related similar stories to me in the environmental context.[74]

III. MITIGATING FINANCIAL BARRIERS

Various methods could mitigate the harm done by financial barriers, including

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[70] Divergent Paths, *supra* note 69, at 273-76.
[71] Derrick Bell was African-American.
[72] The organization was active in 1979 and the 1980s. *See Portland Black United Front Oral History Project*, PORTLAND STATE UNIV. LIBRARY DIGIT. EXHIBITS https://exhibits.library.pdx.edu/exhibits/show/black-united-front-oral-histor/the-black-united-front-oral-hi.html (last visited Mar. 1, 2021); Rachel Graham Cody, *July 11, 1979: A boycott threat ends busing in Portland schools ...*, WILLAMETTE WEEK (Nov. 4, 2014), https://www.wweek.com/portland/article-23472-july-11-1979-a-boycott-threat-ends-busing-in-portland-schools.html.
[73] Statement to the author by Dean Derrick Bell.
[74] *See, e.g.*, John E. Bonine, *The New Private Public Interest Bar*, 1 J. ENV'T. L. & LITIG. xi, xv-xvi (1986).

subsidies for pro-environmental litigation (which has received widespread support in international treaties and declarations), removal of the loser-pays rule in litigation, and adopting a one-way rule for court-ordered attorney fees.

A. *Subsidizing Lawyers Who Seek to Protect the Environment*

If *pro bono* is not the solution, can ordinary citizens turn to well-funded public interest environmental lawyers for litigation? In countries with robust philanthropic traditions and membership campaigns like the U.S., nonprofit, public interest environmental law firms do exist. Few countries fit that mold. What about government provided legal aid? Is that an option? Sadly, no. Such funding for environmental cases is all but non-existent, despite numerous international legal instruments calling for broad legal aid.

To overcome this deficiency, both soft law (declarations and recommendations) and hard law (treaties, covenants, conventions, and agreements) might be mobilized to ensure funding for litigation of environmental public interest cases. To begin, one might look at Article 10 of the Universal Declaration of Human Rights of 1948, which states, "Everyone is entitled in *full equality* to a *fair* and public hearing by an independent and impartial tribunal, in the determination of his *rights* and obligations *and* of any criminal charge against him."[75] Although Article 10 mentions criminal prosecution, it is not limited by its terms to criminal proceedings. Thus, civil and administrative litigation in defense of environmental rights should also be covered. So, what is "full equality" in such environmental litigation? Surely, a court hearing is not "fair" if a citizen has insufficient money to pay a lawyer.

Forty-five years after the United Nations General Assembly proclaimed the Universal Declaration, there had been scant expansion of legal aid in Europe. However, in 1993, the Committee of Ministers of the Council of Europe recommended that its Member States should extend "legal aid . . . to all judicial instances (civil, criminal, commercial, administrative, social, etc.)" and provide this to the "very poor." The recommendation also emphasized that Members should provide "adequate remuneration" to lawyers chosen by the client, and possibly should aid non-governmental organizations helping such people.[76] It is not clear

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[75] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (emphasis added).

[76] Council of Europe, Committee of Ministers, Recommendation No. R (93) 1 on Effective Access

that this recommendation has made further headway, at least in environmental matters, beyond the cited hortatory words of the Declaration.

A number of binding international legal instruments contain provisions that specifically recommend legal aid or can be interpreted to require such aid.[77] For example, paragraph 1 of Article 14 of the International Covenant on Civil and Political Rights, ratified[78] by 173 countries,[79] states, "All persons shall be *equal before the courts and tribunals*. In the determination . . . of . . . rights and obligations in a suit at law, everyone shall be entitled to a *fair* and public hearing by a competent, independent, and impartial tribunal established by law."[80] How can such equality be insured in court proceedings if one party has no chance of obtaining competent professional legal representation? What constitutes a "fair" judicial hearing in such a situation? Is there sufficient room for a persuasively broad judicial interpretation of Article 14?

Article 45 of the Charter of the Organization of American States was adopted in 1948 and subsequently ratified by thirty-five nations. It states in relevant part, "The Member States . . . agree to dedicate every effort to the application of the following principles and mechanisms: . . . (i) Adequate provision for all persons to have *due legal aid* in order to secure their *rights*."[81] What rights might those be? And what does it mean to have "due legal aid?" We could spend time analyzing these provisions and coming up with reasons why they would *not* work. But that is for a court to decide. Instead, it is better to think about whether one *could* use these treaty terms to get rid of financial barriers and to get financial support. Constitutions and courts around the globe have already determined that people have environmental rights. If they have insufficient resources to vindicate their rights, shouldn't the Article 45 promise of "*due legal aid* in order to secure [a person's] *rights"* apply to them?

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to the Law and to Justice for the Very Poor, http://euromed-justiceii.eu/files/repository/20090123123822_recR(93)1e.pdf (January 8, 1993).

[77] *See, e.g.*, Yolanda Vanden Bosch, *Right to Legal Aid in the International and EU law* (Vilnius, November 2017), http://qualaid.vgtpt.lt/sites/default/files/07796870015123377745.pdf.

[78] The term "ratified," includes acts of ratification, accession, and succession.

[79] *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION (Jan. 3, 2021, 11:16:38 AM), https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

[80] International Covenant on Civil and Political Rights art. 14, ¶ 1, Dec. 19, 1966, 999 U.N.T.S 171 (emphasis added).

[81] Charter of the Organization of American States art. 45(i), Dec. 13, 1951, 119 U.N.T.S. 3 (emphasis added).

The American Convention on Human Rights, applicable in most of the Americas (although not in the United States), also contains relevant language in Article 1.1, Obligation to Respect Rights: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and *full exercise of those rights* and freedoms . . . ."[82] Furthermore, Article 8.1 of the American Convention, titled Right to a Fair Trial, states in pertinent part that "Every person has the right to a hearing, with *due guarantees* . . . for the determination of his rights and obligations of a *civil* . . . or any other nature."[83] Can these provisions be said to guarantee "full exercise" of an environmental right if one does not have the financial resources to vindicate it in court? What guarantees should be considered "due" when one seeks to have one's rights vindicated in a civil or administrative court?

In the European Convention on Human Rights and Fundamental Freedoms, Article 6.1, Right to a Fair Trial, provides: "In the determination of his civil rights and obligations . . . everyone is entitled to a *fair and public hearing* within a reasonable time by an independent and impartial tribunal established by law."[84] How much may be read into the word "fair" in Article 6.1? Surely, it is reasonable to argue that a fair hearing must include a level playing field between parties to a dispute in litigation where one side has manifestly greater financial resources to support its legal case.

The Aarhus Convention, ratified by forty-five European nations, has been in force for nearly two decades. It is a specific treaty that was adopted to enhance and guarantee public participation, access to information, and access to justice in environmental matters. Article 9.3 declares that "each Party shall *ensure* that . . . members of the public *have access* to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."[85] What do words, such as "ensure," "access," and "members of the public" require of the forty-five nations that are subject to Article 9.3?

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[82] Organization of American States, American Convention on Human Rights art. 1, ¶ 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (emphasis added).
[83] *Id*. at art. 8, ¶ 1 (emphasis added).
[84] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, ¶ 1, Sept. 3, 1953, E.T.S. No. 5, 213 U.N.T.S. 221 (emphasis added).
[85] Aarhus Convention, *supra* note 35 (emphasis added).

Article 9.5 of the Aarhus Convention states that "each Party . . . shall consider the establishment of *appropriate assistance mechanisms* to remove or reduce financial and other barriers to access to justice."[86] Notably, parties are obligated to "consider" such mechanisms. While such language is mandatory ("each Party shall"), to what potential "mechanisms" does it refer?

The Escazú Agreement among nations of Latin America and the Caribbean requires financial support for equal access to justice, as follows in Article 8:

> 4. To facilitate access to justice in environmental matters for the public, each Party shall establish:
>
> (a) measures to *minimize or eliminate barriers* to the exercise of the right of access to justice. . .[87]
>
> 5. In order to give effect to the right of access to justice, each Party shall . . . [establish] support mechanisms, including, as appropriate, *free* technical and legal assistance.[88]

International and national courts, tribunals, and implementation committees have a long history of creatively interpreting the meanings of environmental rights and obligations stemming from treaties and constitutions.[89] I suggest that these other

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[86] *Id.* (emphasis added).
[87] Escazú Agreement, *supra* note 53 (emphasis added).
[88] *Id*. (emphasis added). This requirement for free legal help is more directive than Article 9.5 of the Aarhus Convention, which requires only that its Parties "consider" the establishment of assistance mechanisms. An explanation of the process leading to the Escazú treaty, along with the text, can be found at https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf.
[89] *See, e.g*., López Ostra v. Spain, 303 Eur. Ct. H.R. (ser. A) (1994) (interpreting the right to "private and family life" in Article 8 of the European Convention on Human Rights to apply to environmental pollution); Claude Reyes v. Chile, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶ 101 (2006) (interpreting the right to "receive" information in Article 13 of the American Convention of Human Rights to require governments to adopt laws needed to *provide* information to requesters); Social and Economic Rights Action Center v. Nigeria, Case No. ACHPR/Comm/A044/1, Decision Regarding Comm. No. 155/96, ¶ 53 (2001) (interpreting the right in the African Charter of Human and Peoples' Rights to a "general satisfactory environment" to require governments to provide for independent monitoring of the environment, provide for impact studies, and provide for public participation); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the U.S. Constitution establishes a "right to privacy" as an unenumerated right, overturning state law prohibiting married couples from having access to contraception); Oposa v. Factoran, *supra* note 26; Shehla Zia v. WAPDA, (1994) PLD (SC) 693 (Pak.) (holding that the "right to life" in Pakistan's Constitution includes an unwritten

provisions be examined for possible use in future litigation seeking to overturn financial barriers as well.

Sometimes, litigation has been successful. A famous example of creative litigation relating to the provision of legal aid is the "McLibel case," formally known as *McDonald's Corporation v. Steel & Morris*.[90] Two resourceless Greenpeace activists, Helen Steele and David Morris, published and handed out brochures containing words such as McDeadly, McMurder, McCancer, McDollars, McProfits, McDisease. The McDonald's Corporation filed a defamation lawsuit against the activists. McDonald's spent ten million British pounds litigating this matter against these two Greenpeace activists,[91] who could not afford lawyers and experts. The British Legal Aid scheme provided assistance in other cases, but not for libel. Consequently, the activists had to defend themselves *pro se* (although with some free advice on the side from lawyers). It was the longest judicial trial in English history. Steele and Morris eventually lost in the British national court.[92]

The Greenpeace activists challenged Britain's refusal to provide legal aid for defense in libel cases in an appeal to the European Court of Human Rights in Strasbourg. Their claims focused on the European Convention on Human Rights and its promise that "[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . ."[93] In *Steel & Morris v. United Kingdom*, the court ruled that "the disparity between the respective levels of legal assistance enjoyed by the applicants and McDonald's . . . could not have failed, in this exceptionally demanding case, to have given rise to unfairness . . . ."[94] The

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right to a safe environment); Montana Environmental Information Center v. Dep't of Environmental Quality, 296 Mont. 207, 988 P.2d 1236 (1999) (holding the environmental right in the state constitution to hold state legislation unconstitutional).

[90] McDonald's Corporation v. Steel & Morris [1997] EWHC (QB) 366.

[91] Heather Timmons, *Britain Faulted Over McDonald's Libel Case*, N.Y. TIMES (Feb. 16, 2005), https://www.nytimes.com/2005/02/16/business/worldbusiness/britain-faulted-over-mcdonalds-libel-case.html.

[92] The court assessed a £40,000 judgment against them, but the activists never paid it. Instead, they declared victory for having brought the issue to public attention. *See* Catherine Baksi, *Landmarks in law: McLibel and the longest trial in British legal history*, THE GUARDIAN (July 8, 2019), https://www.theguardian.com/law/2019/jul/08/landmarks-in-law-mclibel-and-the-longest-trial-in-british-legal-history.

[93] Convention on Human Rights and Fundamental Freedoms, *supra* note 84, at art. 6.

[94] Steel and Morris v. United Kingdom, 22 Eur. Ct. H.R. 403 (2005) ¶ 109. A documentary was made about the case. *See McLibel* (2005), https://www.imdb.com/title/tt0458425/ (last visited Mar. 5, 2021).

court awarded a judgment of €35,000 in non-pecuniary damages and €50,000 in legal expenses against the U.K. government.[95]

The McLibel case stands out in that it ordered actual financial assistance to a civil litigant, on the basis of an international treaty. If courts and tribunals become energetic in interpretation of treaties and soft law instruments to provide relief in civil cases to those without financial resources, the inequalities of access to justice could be lessened. Of course, they will only do so if lawyers bring cases to them. It is time for careful consideration of the use of "strategic impact litigation" to see how the words in the various soft and hard law sources surveyed here might be put in service of providing financial aid to improve access to justice in environmental matters.[96]

B. *Removing the "Loser Pays" Rule*

In much of the world, a huge problem faced by public interest plaintiffs, apart from funding, is that they will have to pay the *lawyers for the other* side if the case is not successful. This policy of shifting the often enormous cost of paying the prevailing party's attorney is a huge financial barrier to equal access to justice where such policies exist. In the United Kingdom and the Commonwealth, this is known as the "loser-pays rule."[97] Another phrase often used in this context is "costs follow the event."[98]

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[95] Steel and Morris v. United Kingdom, *supra* note 94, at ¶ 109, ¶ 112. The court offset the €50,000 award for legal expense by €2,688.83, because the Council of Europe had provided that amount in legal aid. *Id.* It has been said that Mr. Steel and Ms. Morris lost to McDonald's, but changed the entire British, or English, legal system with this case. Britain subsequently changed its libel and defamation laws with the Defamation Act of 2013, raising a higher standard for filing defamation suits and adding a defense of public interest. The result is that the law allows activists to express, demonstrate, and inform the public about corporations' or governments' detrimental environmental practices without the same fear of a lawsuit. These "SLAPP suits" are generally prosecuted by the larger entity against critics and other opponents to quiet their assertions, save the entity's image, and avoid making costly changes to improper practices. *See* note 58, *supra*.

[96] For an interesting recent essay on strategic impact litigation, *see* Michael Ramsden & Kris Gledhill, *Defining Strategic Litigation*, 38 CIV. JUST. Q. 407.

[97] For a useful summary of country practices regarding the loser-pays principle, *see Global Litigation Guide: Country Insight (Costs)*, DLA PIPER, https://www.dlapiperintelligence.com/litigation/insight/?t=09-costs (last visited Mar. 5, 2021).

[98] *See, e.g.*, Lee v. Horne (1993), 84 B.C.L.R. 2d 341 (Can. B.C. S.C.). The Alberta Rules of Court state, "A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party . . . ." Alberta Rules of Court, Alta. Reg. 124/2010, Rule 10.29(1) (Can.), https://www.canlii.org/en/ab/laws/regu/alta-reg-124-2010/.

If a plaintiff wins a case, he or she receives money from the other side to pay for the lawyers. Conversely, if a plaintiff loses a case, he or she must pay the fees of the lawyers of the government or the enterprise whom they sued. In some cases that could mean that losing parties would lose all of their assets and face destitution and bankruptcy. As a consequence of this "loser-pays" rule, a huge number of important and potentially successful environmental (and other) public interest cases never make it to court, even in societies with robust economies.

The onerous nature of the loser-pays rule has led to some reform in England. In 1999, the courts devised the concept of "protective costs orders" (PCOs).[99] Ten years later, the Jackson Report was issued; it provided multiple recommendations for reducing financial barriers to access to justice.[100] In 2015, Parliament enacted new legislation, changing the name of the PCO concept to "costs capping orders" (CCOs) and providing specific standards. The statute allows a court to rule at the outset of a case that if an environmental plaintiff, for example, loses the case, a limit will be imposed on how much of the winning party's attorney fees (costs) the plaintiff will be required to pay.[101] The Land and Environment Court of New South Wales, Australia, has adopted a specific court rule to allow public interest cases to

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[99] *See* the discussion in R (Corner House Research) v. Secretary of State for Trade and Industry [2005] 1 WLR 2600 (UK).

[100] RIGHT HONOURABLE LORD JUSTICE RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT (2009), https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

[101] In the U.K., attorneys' fees are called "costs." Costs Capping Orders (CCOs) are provided for judicial review actions in sections 88-90 of the Criminal Justice and Courts Act. Criminal Justice and Courts Act 2015, c. 2, §§ 88-90 (UK), https://www.legislation.gov.uk/ukpga/2015/2/section/88/enacted. Among other limiting provisions, the statute provides in section 88(6):

> The court may make a costs capping order only if it is satisfied that—
>
> (a) the proceedings are public interest proceedings,
>
> (b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and
>
> (c) it would be reasonable for the applicant for judicial review to do so.

Id. at § 88, ¶ 6. However, various limitations of the CCO regime have been criticized. *See, e.g.*, Amy Hemsworth, *'Streamlining' Judicial Review - The Independent Review of Administrative Law*, THE OXFORD UNIV. UNDERGRADUATE L. J. (Sept. 3, 2020), https://www.law.ox.ac.uk/ouulj/blog/2020/09/streamlining-judicial-review-independent-review-administrative-law.

proceed without liability for an adverse costs order if the case should be unsuccessful.[102]

In some European countries, such as Spain, one need not pay the prevailing side in unsuccessful cases against a governmental body.[103] This is also true in Mexico and in Ukraine.[104] Hungary has limitations on the opposing fees according to a published schedule. That makes it a little more palatable to file a suit that one might lose. However, these countries rarely provide funding to their citizens or NGOs that prevails in a lawsuit against a government entity.[105]

The Supreme Court of Canada has gone even further, during the pendency of a case. It ruled in 2003 that the British Columbia Minister of Forests had to pay the litigation costs of an impecunious, aboriginal band on an interim basis during the pendency of the band's litigation against the Minister.[106] The court said, "In public interest litigation[,] special considerations also come into play." It concluded that the public importance of the case required this result.[107]

Where the loser-pays rule prevails, however, much public interest environmental litigation faces an insurmountable barrier.

C. *Adopting One-Way Fee-Shifting and the "Modified American Rule"*

An approach that differs from the strict loser-pays rule is that the government could be required to pay the fees of individuals, non-profits, or environmental lawyers when they succeed in litigating a case against a public body while not

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[102] *See* Land and Environment Court Rules 2007 (NSW) Rule 4.2, https://www.legislation.nsw.gov.au/view/html/inforce/current/sl-2007-0578#pt.4.

[103] LEY DE LA REGIME JURISDICCIÓN CONTENCIOSO-ADMINISTRATIVA, B.O.E. n. 167, July 13, 1998 (Spain).

[104] *Payment of Expenses in Mexican Legal Proceedings.*, CCN MEXICO REPORT, Sept. 2007, https://ccn-law.com/ccn-mexico-report/payment-expenses-mexican-legal-proceedings/; Oksana Legka, *Litigation and Enforcement in Ukraine: Overview*, THOMSON REUTERS PRACTICAL LAW, https://uk.practicallaw.thomsonreuters.com/w-017-5098?transitionType=Default&contextData=(sc.Default).

[105] *See generally* John E. Bonine, *Best Practices – Access to Justice* (2008), THE ACCESS INITIATIVE https://accessinitiative.org/sites/default/files/best_practices_-_access_to_justice_7-0.doc.

[106] British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 S.C.R. 371, 2003 SCC 71.

[107] *Id.*

penalizing such plaintiffs if they do not prevail. This "one-way" system exists in the United States but rarely in Europe, Asia, Africa, and South America.[108]

There are 20,000 to 30,000 environmental lawyers in the U.S. who represent businesses and industries.[109] In contrast, only about 2,000 lawyers represent government entities at all levels, federal, state, and local[110] On the public interest side, there are approximately 750 lawyers who focus on representing public interest environmental clients.[111] Although the imbalance in representation is significant, it pales in comparison to the situation elsewhere in the world.[112] What accounts for this disparity? Why are there fifty times as many public interest environmental lawyers per capita practicing in the U.S. compared to the numbers practicing in Europe?

The 750 attorneys who work as public interest environmental lawyers in the U.S. are not all salaried lawyers working for well-known nonprofit law firms, such as Earthjustice or the Natural Resources Defense Council. Regional, state, and local public interest law firms also exist. Another important type of lawyer, unknown to most law school career offices, also works on the public interest side. Most law students and professors are unaware that as many as half of the 750 public interest environmental layers are "private public interest lawyers"[113]—a term that I

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[108] *See generally* John E. Bonine, *Best Practices – Access to Justice*, THE ACCESS INITIATIVE, https://accessinitiative.org/sites/default/files/best_practices_-_access_to_justice_7-0.doc.

[109] This estimate is based on the membership of the Section on Environmental Law of the American Bar Association, multiplied by three because the vast number of lawyers in the United States are not members of the ABA.

[110] Estimate calculated by author.

[111] Private and confidential census by author of plaintiffs' environmental lawyers in both nonprofit organizations and in private practice.

[112] *See* text *supra* at notes 59-65.

[113] Law students may have a hard time finding these lawyers. Generally, placement offices are reactive rather than proactive. Therefore, law students really must do a deep search to find such lawyers. A few law school placement offices have attempted to help students in this quest. *See, e.g.*, Bernard Koteen Office of Public Interest Advising at Harvard Law School (OPIA), *Private Public Interest Law and Plaintiff's Firm Guide* (2019), https://hls.harvard.edu/dept/opia/private-public-interest-law-and-plaintiffs-firm-guide/. Nonetheless, it is necessary to investigate an individual firm to discover whether its values truly align with one's own. As an example, one firm listed in this Guide stated its goals as follows: "[W]e serve as outside counsel for businesses, insurance companies, and the public sector. Our firm has deep trial experience to win motions and achieve defense verdicts." *Id.* In the end, there is no substitute for performing "due diligence" oneself. The author is aware of a dozen private public interest environmental lawyers in Oregon, for example, while the current Guide lists none.

invented in the mid-1980s to reflect the scope of their practices.[114]

The private public interest bar represents paying clients in politically compatible, ideologically consistent fields, allowing the lawyers to take environmental cases with the hope that their clients will prevail and thus, be eligible for and entitled to receive court awarded "statutory attorney fees."[115] These attorneys perform various kinds of work for clients who can afford to pay them, often not involving environmental issues. Those paying clients help to fund the expenses of a law office and provide a reliable source of income for the attorneys. Having regular costs covered in this manner allows the private public interest lawyers time to undertake representation of non-paying or low-paying clients in cases involving environmental issues. Should their clients prevail, they generally are awarded statutory attorney fees that go to their legal counsel. This form of environmental law practice is possible because, unlike the U.K. and various other countries, the U.S. has rejected the general loser-pays rule, while also implementing statutes that provide attorney fees to the winning plaintiff when the defendant is a government agency.

In contrast to the loser-pays "British Rule," the default category in the U.S. is the so-called "American Rule." That rule, applicable in most states, requires each party to cover its own legal expenses and bear its own costs. A federal case arose when environmentalists were opposing the trans-Alaska oil pipeline from being built in the early 1970s.[116] The environmental organization plaintiff successfully litigated the case, based upon its contention that the access road for equipment to be used to construct the 800-mile-long pipeline through the mountain wilderness violated a fifty-year-old law governing the width of pipeline road rights-of-way.[117] After winning the case, they argued that the losing side should pay the expenses of their lawyers. The U.S. Supreme Court ultimately denied that request, ruling that federal courts would follow the American rule prevalent in most state laws.[118] Although this result was initially thought to be a great loss by environmentalists, when the implications of the ruling were fully analyzed, it became apparent that the ruling constituted an important victory, opening the portal to litigation against

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[114] John E. Bonine, *The New Private Public Interest Bar*, 1 J. ENVTL. L. & LITIG. xi (1986).
[115] *See* text at notes 120-124, *infra*.
[116] Wilderness Soc'y v. Morton, 479 F.2d 842, 846 (D.C. Cir. 1973).
[117] *Id.* at 828; section 28 of the Mineral Leasing Act of 1920, Pub. L. No. 66-146, ch. 85, § 28, 41 Stat. 443 (Feb. 25, 1920), 30 U.S.C. § 185 (1970).
[118] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

federal agencies. Henceforth, unsuccessful environmental parties in American federal courts would not be subjected to the British Rule that has discouraged so much public interest litigation elsewhere by imposing the risk that losing litigants must pay the fees of winning litigants.

Of even greater importance, federal statutes imposed what I call the "Modified American Rule." As applied to cases against the government, numerous statutes provide for a court to grant attorney fee awards to prevailing plaintiffs, but generally such court-ordered fees are not available to a defendant government agency when it wins.[119] These statutes provide "one-way" fee shifting. Examples of such statutes include the Freedom of Information Act,[120] the Civil Rights Attorney Fees Award Act,[121] citizen suit attorney fee awards in various environmental statutes,[122] and the broadly applicable Equal Access to Justice Act of 1980.[123]

Approximately 200 federal statutes and 2,000 state statutes provide such one-way attorney fees.[124] This largely accounts for the number of public interest environmental lawyers active in litigating cases in the U.S. Should other countries adopt a similar approach, significant access to justice would be made available for citizens and environmental conservation organizations. Adopting this approach in other countries could help move the law toward more justice in environmental litigation.

CONCLUSION

In environmental litigation, an imbalance stems from a lack of equal access to justice in environmental matters. Both direct and indirect systemic barriers exist,

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[119] *See, e.g.*, Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 L. & CONTEMP. PROBS. 233, at 240-241 (Winter 1984).
[120] Freedom of Information Act, 5 U.S.C. § 552 (2006).
[121] Civil Rights Attorney Fees Award Act, 42 U.S.C § 1988.
[122] *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540; Clean Air Act, 42 U.S.C. §7604; Clean Water Act, 33 U.S.C. 1365.
[123] Equal Access to Justice Act, 28 U.S.C. § 2412 (1980).
[124] A survey in 2008 found 200 federal statutes. HENRY COHEN, CONG. RESEARCH SERV. REP. 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES (June 20, 2008), https://fas.org/sgp/crs/misc/94-970.pdf. A survey in 1984 identified 1,974 such state statures. Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 L. AND CONTEMP. PROBS. 321 (1984).

including standing doctrine and the costs of litigation, that greatly hinder the progression of environmental litigation.

Many strategies can be used to remove these barriers internationally, including creative litigation, creative interpretation, and explicit provisions in environmental treaties. Wider adoption of the principles in the Modified American Rule should be considered in legal systems other than that of the United States. If legislatures or judges elsewhere in the world could be persuaded to adopt and apply the principle of one-way attorney fees in cases when citizens or non-governmental organizations sue the government or polluters, fairness and equity would be dramatically enhanced. This would provide truly equal access to justice, while advancing societal interest in good government and environmental protection.

Is reform of policy and law possible? Perhaps looking at solutions used in a legal system that is not one's own can help promote creative solutions to unequal justice. As has been written, "What you can do, or dream you can, begin it; boldness has genius, power, and magic in it."[125]

* * *

[125] The late David Brower, a longtime mountain climber and former Executive Director of the Sierra Club, regularly ended his inspirational lectures with these words and attributed them to the German writer Goethe. He inserted the quote on the cover page of a book he edited, THOMAS F. HORNBEIN, EVEREST: THE WEST RIDGE (David Brower, ed., 1965). He acknowledged that he had gotten the quote from Scottish mountaineer W.H. Murray, who had used it in his book, THE SCOTTISH HIMALAYAN EXPEDITION (1951). Of course, Goethe, the "German Shakespeare," wrote in German, not English. Murray took the words from a very loose translation of Goethe's *Faust* by a British barrister more than a century earlier. JOHANN WOLFGANG VON GOETHE, FAUSTUS: A DRAMATIC MYSTERY; THE BRIDE OF CORINTH; THE FIRST WALPURGIS NIGHT 15 (John Anster, trans., 1835). The quotation, as translated by Anster, continues:

> Only engage, and then the mind grows heated –
> Begin it, and the work will be completed!

Id.