PART V

The role of environmental courts in the fight against poverty and environmental degradation
11. The ‘greening’ of justice: will it help the poor?

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Improving, facilitating and expanding individual and collective access to law and justice supports economic and social development. Legal reforms give the poor the opportunity to assert their individual and property rights; improved access to justice empowers the poor to enforce those rights. Increasing accessibility to courts lessens and overcomes the economic, psychological, informational and physical barriers faced by women, indigenous populations, and other individuals ... New legislation, subsidized legal services, alternative dispute resolution, citizen education programs, court fee waivers and information technology are other means to improve access. (The World Bank, 2011)

‘Greening’ – the integration of environmental, social and cultural values into financial enterprises, industry, communities, markets and other institutions – is a central goal of sustainable development (Werksmann, 1996; World Bank, 2000; Nanda and Pring, 2003, pp. 22–27). Now, in numerous countries around the world, another important institution is greening – the judiciary.

Specialized environmental courts and tribunals (ECTs) are springing up in dozens of countries. These are judicial and administrative bodies specifically authorized to adjudicate and decide disputes primarily concerning the environment, natural resources, land use and/or related issues. The University of Denver Environmental Court and Tribunals (ECT) Study, as of the start of 2012, has identified over 465 ECTs in 46 different nations and over 50 per cent of these have been created in just the last five years. This first-ever global multidisciplinary comparative study of ECTs examines how they can improve access to justice for those involved in environmental disputes, as prescribed by the Rio Declaration, Aarhus Convention, and other international legal instruments (Pring and Noé, 2002, pp. 44–50).

The ECT Study published its findings in Greening Justice: Creating and Improving Environmental Courts and Tribunals (Pring and Pring, 2009, hereafter Greening Justice; see also Pring and Pring, 2010; Pring and Pring, 2011). The book is based on interviews with over 200 ECT experts – justices, judges, prosecutors, government officials, private-sector attorneys, non-governmental
organizations (NGOs) and academics. It identifies the 12 ‘building blocks’ which control the success of ECTs and the ‘best practices’ for ECTs in providing access to justice (Greening Justice, 2009, pp. 19–87).

The UN Millennium Development Goals (MDG) have made eradicating poverty the world’s top development priority. Given the MDG and this IUCN-AEL book’s timely focus on poverty, one must ask the question: Can specialized ECTs really help the poor? The answer is a qualified ‘Yes’. The study finds ECTs which incorporate six particular building blocks out of the 12 do enhance environmental justice for those living in poverty, better than the general courts have or can. This is a crucial finding, since the poor are typically the most exposed to and most impacted by environmental harm, yet least empowered to protect their own health, welfare and future sustainability or to seek justice (UNDP, 2005). This chapter first provides an overview of the ECT phenomenon, then outlines the 12 ECT building blocks and concludes by analyzing the six which have the most relevance for providing access to justice for the poor.

11.1 OVERVIEW OF ECTS

Specialized ‘environmental’ adjudication bodies first appeared in the early 1900s. For example, Denmark created a Nature Protection Board in 1917 and Sweden created specialty Water Courts in 1918, but few followed. The 1970s ‘environmental movement’ generated new environment, natural resources and public health laws around the world, and some countries, states and local jurisdictions created specialized ECTs as part of this reform. The next wave of ECTs came in the 1990s and 2000s, prompted in large part by increasingly complex environmental laws and issues.

ECTs can now be found on every inhabited continent; in every major legal system; in large countries and small; and in developed, developing and even least developed nations (see the list in Greening Justice, 2009, pp. 106–109). Belgium, Chile, China, England and Wales, India, Kenya, Peru and South Africa have all authorized ECTs since Greening Justice was published in 2009. Other jurisdictions have been busy reforming and improving the ECTs they already have. Historically, Australian states and New Zealand have been the leaders in ECT creation, but in the last decade ECTs have spread in South and East Asia, Africa, Western and Eastern Europe, Latin America and North America.

Governments create ECTS in response to internal and/or external pressures. The pressures can come from NGOs, academics, judges, government officials, or the media. Generally, a charismatic, credible advocate takes the lead in urging the creation of an ECT. The most frequent reasons found in the ECT
Study (Greening Justice, 2009, pp. 13–16) and mentioned in the literature⁹ are:

1. **Efficiency**: Decrease time necessary for decisions.
2. **Economy**: Decrease costs for all concerned with more efficient handling of cases.
3. **Expertise**: Obtain higher quality decisions from judges more expert in complex environmental laws, scientific-technical questions and value-laden issues than general jurisdiction judges.
4. **Access to justice**: Improve access to justice for business, government and the public by having an identified forum to handle environmental complaints.
5. **Case processing**: Improve case processing and reduce backlog of undecided cases in the general court system.
6. **Commitment**: Demonstrate government’s commitment to protection of the environment, sustainable development, compliance with international treaties and agreements, etc., by creating a visible court symbolic of that commitment.
7. **Flexible solutions**: Open up more flexible ways to solve environmental problems, including alternative dispute resolution (ADR), collaborative planning and decision-making, hybrid civil-criminal prosecution, creative sentencing and enforcement options, court appointed special commissions and facilitated settlement agreements.
8. **Public Participation**: Encourage greater public participation and support for the decision-making process through more open standing, use of community expert committees, etc.
9. **Public confidence**: Increase public confidence in the government’s environmental and sustainable development efforts by having a transparent, effective, expert decisional body.
10. **Increase administrative accountability**: Make the government more conscientious and transparent in making decisions which affect the environment, because government’s decisions are open to scrutiny and legal challenge.

Certainly, there are counterarguments against specialized courts, although the Study found this a minority view. Anti-ECT arguments include the existence of other fields with legal and factual complexity, resistance to fragmenting the judicial system, reluctance to set environmental law apart from other relevant issues, preference for incremental reforms in the general judicial system, doubts about sufficient caseload, concerns about added costs, etc. (Greening Justice, 2009, pp. 17–18).

Interest in specialized ECTs has grown dramatically in the last 10 years and
a number of jurisdictions are now considering establishing an ECT or reforming their existing general court structure to provide such specialization. The United Nations Environment Programme (UNEP) has been a leader in promoting ECTs. As an example, UNEP’s Experts Group on Access to Environmental Justice in the Caribbean noted in 2007 that ‘consensus [has] emerged on the need for the establishment of specialized and independent courts or specialized environmental divisions of the ... judicial system’.

What was found lacking, at the start of the ECT Study in 2007, was any in-depth comparative analysis of all the different existing ECT models or any practical guidance on how to create (or improve) an ECT. Some individual ECTs had been analyzed in depth, including the well-known examples in Australia’s State of New South Wales and in New Zealand (Birdsong, 2002), but their models were not necessarily appropriate for all jurisdictions. There also were studies assessing the desirability of establishing ECTs in particular jurisdictions, such as England (Woolf, 1992) and Scotland. However, these too focused primarily on English common law and European examples, not necessarily appropriate for all jurisdictions.

A multidisciplinary decision-making framework that could work for a broad range of legal cultures was needed, focused on national and subnational ECTs. What emerged from the several years of library, media and online research and the worldwide interviews was a logical framework of design factors that result in an effective and efficient ECT.

11.2 THE ECT ‘BUILDING BLOCKS’

Twelve design factors for ECTs – ‘building block’ decisions – were identified as a result of the Study. The options or alternatives within each factor should be evaluated by any jurisdiction considering creating or reforming a specialized ECT. Not all 12 factors have a direct impact on access to environmental justice for those living in poverty, but six certainly do. This section describes the 12 factors, with an asterisk by those directly and positively affecting the poor. The following section discusses how those six asterisked factors can make a profound difference in the environmental justice that an ECT provides those living in poverty.

11.2.1 Type of Forum

ECTs can be structured in many ways, varying chiefly in independence, jurisdiction, competence and cost:

1. **Specialized Court:** This model is an actual ‘court’ in the judicial branch of
government, with judges expert in environmental law. It is created by legislation, is independent of the executive and legislative branches of government, has a separately identified budget and gives judges security of tenure. Typically, these judges do not hear other types of cases (examples include New South Wales, Australia; New Zealand; State of Vermont, USA).

2. Specialized Green Chamber: A general judicial court can designate within itself a chamber, panel, or bench consisting of a judge or judges assigned to hear environmental cases. This ‘green bench’ can be formally designated or an ad hoc assignment. It does not require special legislation to be created or a separate budget (Netherlands, Finland, Thailand).

3. Tribunal: This catch-all term covers options that are not judicial branch courts yet are specialized bodies in the executive or administrative branch of government empowered to make binding decisions in environmental cases. Tribunals are usually created by authorizing legislation, have approved annual budgets and may or may not have enforcement powers. Their membership can include a mix of judges, lawyers and laypersons, even in some cases all laypersons (Ireland). Tribunals’ independence varies but there are basically three models, ranging from most to least independent as follows:
   • Independent Tribunal – answerable directly to the head of government, not housed inside another executive branch agency and definitely operating outside of the environment agencies whose decisions, permits, plans and actions they are reviewing (Ontario, Canada; Tasmania, Australia; New York City, USA);
   • Quasi-independent Tribunal – housed in an executive branch agency, but a different one from the agencies it is reviewing (such as an Attorney General’s Office, or the Office of Administrative Law Judges serving the US Environmental Protection Agency (USEPA));
   • `Captive’ Tribunal – housed within the environmental regulating agency whose decisions they review (Austria, the USEPA’s Environmental Appeals Board, Kenya National Environmental Tribunal).

4. Other Dispute Resolution Bodies: In addition to the court-tribunal adjudicative models, there are other types of government entities that function as environmental dispute resolution bodies. Examples include:
   • Environmental Prosecutors – Environmentally trained prosecutors and technical staff can significantly improve efficiency, competence, coverage and credibility of the enforcement process. Some countries provide environmental prosecutors with civil power in addition to traditional criminal power, particularly useful in juris-
dictions where NGOs and other potential citizen/community groups are weak or unlikely to bring ECT cases (Brazil).

- **Environmental Ombudsman** – An ombudsman is an office or individual empowered by law to investigate environmental complaints, intercede with the government or private sector on behalf of complainants and advocate for their rights. Some are even given standing and funding to bring lawsuits in court (Austria, Hungary) while, at the other extreme, some are given little to no power to make a difference (Kenya).

- **Environmental Commissions** – Special commissions or committees can be appointed by a court to investigate environmental problems and make recommendations to the court. Some are purely advisory (Philippines), while others are given virtually judge-like power (India).

- **Environmental Mediation Bodies** – Some countries appoint environmental tribunals and give them limited or no decision-making or enforcement power, relying on them instead to use forms of ADR to seek solutions to environmental problems (Japan, South Korea).

### 11.2.2 Legal Jurisdiction

A crucial factor is what laws are placed under the ECT's jurisdiction or control. The majority of ECTs deal primarily with environmental laws and issues such as pollution permits, environmental quality and natural resources development. Some expand beyond these to include endangered species, parks and recreation, health and safety, etc. Some provide an even fuller range of issues, adding land use, sanitation, building codes, noise, transportation, fire regulations and so on. (New York City). Some deal only with land use laws and not environmental laws (Ireland). Still others may deal with only one issue, such as environmental impact assessments (Kenya National Environmental Tribunal). Naturally, the more comprehensive the ECT's jurisdiction, the better 'problem solver' it can be.

### 11.2.3 Court Level and Appeals

ECTs can exist at any step in the adjudication ladder – the internal agency level, trial court, intermediate appeals court and/or the supreme court level.

1. **Internal Agency ECT** - An ECT can be placed inside the environmental or other regulatory agency. There it can serve either as (a) the body that makes the agency’s initial decision (to issue a permit, enforce a violation, approve a plan and so on) or, more often, (b) the body to which such a
bureaucratic decision can be appealed inside the agency (USEPA, for example, has both tiers). This ‘first instance’ ruling usually can be appealed to a judicial branch trial or appeals level court for a ‘second instance’ review.

2. Trial Court ECT: Most common is an ECT at the trial level. These can be either of two kinds: (a) second instance review, where the ECT hears appeals of agency decisions and rulings, with appeals of this going to an intermediate appeals court for a final ruling (third instance review), but typically not on to the supreme court; or (b) first instance fact-finding, where the ECT hears new case filings that are not appeals of agency decisions, such as one neighbor suing another for pollution, property damage, noise, etc., with appeals also going to an intermediate appeals court (second-instance review), then possibly the supreme court (third instance).

3. Appeal Court Level ECT: In a few instances, an agency decision can be appealed directly to the intermediate appeals court, bypassing the trial court level. This usually occurs only when the agency is viewed as having a very trustworthy, competent and objective internal adjudication process that is as good as a trial court could provide (USEPA).

11.2.4 *Geographic Coverage*

If the ECT jurisdiction is large or travel is difficult, its geographic coverage needs careful evaluation. Distance can easily disenfranchise the poor. ECTs have responded to this challenge of distance by creating online filing procedures (New South Wales), traveling courts (Brazil; Queensland, Australia; the Philippines), on-site hearings (Vermont), testimony by teleconferencing and video conferencing (New Zealand).

11.2.5 Case Volume

Legal jurisdiction (11.2.2 above) and court level (11.2.3 above) primarily control the caseload of the ECT. We found volume as low as six or seven cases per year (Trinidad & Tobago) – making it difficult to justify a specialist court – to over 700,000 per year (New York City), requiring hundreds of administrative law judges (ALJs).

11.2.6 *Standing*

Standing (*locus standi*, the legal rules controlling who can file or participate in a case) is a critical factor. Standing rules vary widely in ECTs and can be a very significant barrier to anyone’s access to justice, but particularly for the
poor. Standing is designed to limit court relief to those with a 'personal stake' in a controversy 'capable of judicial resolution'. That is, it is a policy decision that access to the courts should be limited to those who have a genuine interest, prejudiced by the opposing side, which a court order can redress.

Standing can make the courthouse doors range from very open to extremely narrow. At the least, ECTs should have powers to dismiss groundless or frivolous lawsuits. However, care must be taken not to exclude important constituencies with a real stake (such as the poor, indigenous peoples, communities, NGOs and so on) or important societal values (such as endangered species, protection of old growth timber, climate change, etc.). Interestingly, ECTs with the most open standing (Canada, India, New South Wales, the Philippines, Queensland) have had very few problems with frivolous lawsuits because judges have power to dismiss cases and because litigation is expensive. These jurisdictions have found that suppressing the filing of legitimate grievances can be counter-productive, leading to societal distrust and unrest and that open access to justice is a good safety valve.

11.2.7 Costs

The costs of litigation are perhaps the biggest barrier to environmental justice. Costs add up quickly for court fees, lawyers' fees, expert witness expenses, security of costs for injunctions, risk of countersuits, and the loss of time, employment, income and other out-of-pocket expenses. An even bigger economic chilling factor is the so-called 'English Rule' that the unsuccessful party must pay all of the litigation costs of the winner ('costs follow the event'), regardless of how meritorious the action was. Australian citizen groups, communities and environmental NGOs are reluctant to bring litigation in the general courts because they apply the English Rule. The Environmental Defense Organization (EDO) in Sydney reports that a community non-profit organization lost a legitimate law-reform case and had to declare bankruptcy to avoid hundreds of thousands of dollars of debt. The 'American Rule' is the reverse: US judges have no power to engage in such cost-shifting without special legislation (for example penalizing 'groundless-frivolous' litigation). To counteract this chill of bankrupting costs, several Australian ECTs by rule make it clear that they do not follow the English Rule, realizing its negative impact on access to justice.

11.2.8 Expert Evidence

Environmental principles and problems are becoming increasingly complex, requiring expert scientific and technical expertise in addition to legal understanding. ECTs have been particularly innovative in assuring that they have
the needed scientific-technical expertise available. Some ECTs hire and rely
on their own independent experts using budgeted judicial funds (Ontario,
Canada), while others rely solely on the expert witnesses presented by the
parties (the so-called ‘battle of the experts’) (USEPA, Vermont); or on experts
working for the government agency (New York City); or solely on the record
of the preceding decision maker or court (Tasmania, Australia; Finland; most
appeellate level courts).

There are ECTs that appoint scientists and other technically trained special-
ists as actual judges or decision makers, with equal weight given to their op-
inions as to the legal judges on the panel (Sweden has a lawyer and a chemical
engineer as judges on one panel). Others maintain lists of volunteer experts in
various disciplines in academia, think tanks, consulting firms and so on, on
whom the ECT can call (Denmark, Belgium) and still others appoint special
commissions of experts to investigate and report their recommendations back
to court (India).

To avoid the bias experts paid by the parties can have, several ECTs make
them swear to take no instructions from the parties or their lawyers, to be
objective and to serve as ‘officers of the court’ not advocates for a party – or
be found in contempt of court (New South Wales). That same ECT also
requires parties’ experts to focus only on issues of professional disagreement,
possibly putting both sides’ experts on the witness stand together and having
them respond directly to each other’s points of disagreement (New South
Wales). A few employ ‘trial de novo,’ starting over with testimony repeated
from the same or different experts (Vermont). In ECTs where the decision
makers can rely on objective testimony from their own experts or can effect-
ively manage the parties’ experts, access to justice is more affordable and reli-
able and decisions do not rest on which party can pay for the most persuasive
or voluminous expertise.

11.2.9 *Alternative Dispute Resolution (ADR)*

ADR is the cutting-edge trend in ECTs, particularly those that define their role
as ‘problem solving’, rather than only applying the legalistic ‘rule of law’ like
an uncreative umpire. Mediation is most widely used – a trained, neutral facili-
tator to support communication and develop acceptable options between the
parties (Tasmania, Vermont, New Zealand). Restorative justice is a new
approach being seen in some criminal cases – cooperative sessions engaging
not just the accused and the victims, but community representatives as well
and focused on the harm to the victims and society rather than just penalizing
the wrong-doer (New Zealand). Ombudsmen are utilized in some jurisdictions
(Austria, Hungary, Kenya) – individuals or commissions separate from the
ECT and the agency who negotiate the interests of the public and may have
standing to represent concerned parties in court. Jurisdictions with a more traditional focus on ‘rule of law’ (Sweden, Finland, Denmark) generally do not use ADR, except for judge-supervised settlement conferences. Reversing that, the ECTs in a few countries (Japan, South Korea) appear to use mediation almost exclusively rather than adjudication.

11.2.10 Judicial Competence

ECT judges range from those with no specialized environmental law training or interest to judges with extensive environmental law training, expertise and commitment. They can range from those assigned without choice to those who are carefully selected based on their competence and willingness to serve. Some jurisdictions have an insufficient number of cases to justify a specialized judge, so they use generalist judges for the ECT, sometimes holding it on a set day of the week. Generally, those interviewed felt that judges who were highly trained, experienced and motivated and who served full time were clearly preferable. A trained decision maker can provide informed decisions and faster decisions, resulting in shorter trials and reduced costs.

11.2.11 *Operational Tools*

Many ECTs have developed and employ new operating tools for increasing their effectiveness and efficiency, some quite alien to the traditional court system. These include:

1. *Case Management*: Rigorous case management is a hallmark of some ECTs. Case management is accomplished by a combination of (a) an assigned staff case manager who is the initial and on-going point of contact for the litigants during the adjudication process plus (b) a computer data management system (see 11.2.11(2) below). The case manager explains court processes, reviews the case record, may recommend or actually conduct mediation, may have the power to hold scheduling (directions) hearings, assures that parties are noticed in advance on all deadlines, monitors filings with the ECT and may draft decisions for the judge(s). The scope of authority given the case manager depends on the judge and the training and expertise of the case manager. Lawyers or non-lawyers can act as case managers, depending on scope of authority assigned.

2. *Information Technology (IT)*: Computer data management systems are being developed by ECTs that can track and time every step in the cases by filing date, type, assigned judge, specific dates and deadlines, time to a final decision, outcome (including sentencing details), court costs and compliance with court orders. In addition, IT is used to support video tele-
conferencing of hearings and off-site expert testimony (New South Wales), immediate transfer of verbal testimony on the record via a Word document to a judge in another locality (New Zealand), historical analysis of sentencing for violations to establish sentencing guidelines when they are not set by statute and to evaluate court performance over time. It can allow filings to be made online and provide websites giving the public access to information about procedures, costs and decisions. Needless to say, only the best funded ECTs reach this level.

3. **Scheduling Hearings:** To prevent delay, some ECT judges regularly require scheduling (directions) hearings to establish and monitor firm court filing and hearing deadlines. Directions hearings keep cases moving and prevent inaction and routine requests for postponement.

4. **Traveling Courts:** To make the ECT more accessible for litigants and the public and to allow judges to see the physical sites in issue, many courts travel out of the court seat for investigations and hearings. One creative judge in the Amazonas State of Brazil has a van with a miniature courtroom in the back, complete with judge’s bench, witness chair, counsel table and seating.

5. **Simplified Rules of Procedure:** Streamlining the process, using simplified rules of procedure, is also being done by a number of ECTs. Rules of evidence in particular are being analyzed to improve the quality of the fact record, focus only on the issues in dispute and to save court, litigant and expert witness time and expense.

**11.2.12 Enforcement Tools**

Without adequate powers to enforce its decisions, an ECT cannot ensure compliance with its decisions. The majority of ECTs in the Study were civil, non-criminal courts and their enforcement tools included settlement conferences, mediation, monetary penalties, cease and desist orders, community service, new permit conditions, remand back to the agency for reconsideration and/or required remediation and closure. ECTs lacking cease and desist powers, that is preliminary or temporary injunction power at the outset of the case, often could not prevent the environmental harm or damage from happening during the pendency of the case.

ECTs with criminal powers can employ these non-criminal enforcement tools as well as prison sentences and fines (even for government officials who are found negligent (Costa Rica)). Criminal enforcement is most effective in cultures where there is a great social stigma attached to a person or corporation accused of crimes (Belgium, Brazil). The size of the fine permitted by law is also an important consideration; if the fine is not large enough to act as a strong deterrent, it is wholly ineffective.
11.3 ECT 'BUILDING BLOCKS' INCREASING LOW-INCOME ACCESS TO ENVIRONMENTAL JUSTICE

While all 12 ECT 'building block' factors described above have bearing on improving access to environmental justice for the poor, six in particular stand out as crucial. The six are (4) geographic coverage, (6) standing, (7) costs, (8) expert evidence, (9) alternative dispute resolution, and (11) operational tools.

11.3.1 Geographic Coverage

The distance between the ECT and a plaintiff's community, particularly a rural community, can be a nearly insurmountable barrier to access to justice for those who cannot afford to travel long distances or to pay the expenses of a stay in the ECT's city or to take time off from work, children and other responsibilities. The solution is simple: Take justice to the people.

One solution is to have multiple ECTs that are regionally distributed. Where this is not possible budgetarily or where this would still not provide proximity in large jurisdictions, ECTs have developed creative ways to bring the court to the people. The judge of the environmental court in the huge Brazilian state of Amazonas has a 'travelling courtroom' housed in a bus in which he commutes to remote areas of the Amazon. Planning and Environment Court judges in Queensland, Australia, faced with thousands of miles between the site of a conflict and the state capital, take to the air and fly to court hearings in remote sites. In Ireland, hearings are often held in local hotels and halls at the site in issue, providing access to those most affected by the decision. In the small US state of Vermont, the two environment court judges have 'divided' the state and use a variety of other courthouses and halls to hold hearings in addition to the main ECT outside the state capital. New York City's ECT has offices and hearing rooms in each of the city's five districts, and the Philippines has designated 117 environmental courts throughout the nation, again bringing the court to the people. Other techniques for making environmental justice more physically accessible include night courts, tele-conference or video-conferencing testimony and arguments, even written or email submissions.

11.3.2 Standing

Some ECTs' standing rules are much more restrictive than necessary to assure non-frivolous litigants and, as a result, are particularly exclusionary for low-income persons. For example, some ECTs give standing solely to those owning real property within a prescribed distance (possibly only a few hundred meters) of the activity complained of (Ireland). Some limit standing
to those who can prove actual impacts on their own property, lives, or health. Other ECTs reject those who did not participate in the administrative proceedings leading up to the lawsuit, regardless of lack of notice or insufficient funding (a problem in administrative law in the US). Sweden’s environmental law, for a time, disqualified NGOs from having legal standing to appeal government decisions affecting the environment unless they had over 2000 members, a requirement met by only two NGOs in the country. In 2009 the European Court of Justice (ECJ) ruled this violated EU law.\textsuperscript{28} Still more outrageous, Bangladesh allows litigants access to its ECT only after they have applied for and received permission to sue from the national environmental agency (even when that agency’s decisions are the subject of the lawsuit)! Excessively strict or illogical standing requirements have a disproportionately exclusionary effect on the poor, who lack funds to participate in the first rounds of agency decision-making, or to hire lawyers to challenge standing requirements in court, or to pay for experts to prove their injuries. Such a ‘closed court house door’ also excludes issues that may be of great importance and have a disproportionate impact on those living in poverty, such as slum conditions, water and air pollution, toxic dumping, public health and physical security.

Countries with a constitutional provision that provides a right to a healthy environment (such as Austria, Belgium, Brazil, Finland, India) have more open standing than countries that rely on environmental legislation, which can be interpreted restrictively by the courts (USA). India is at an extreme, allowing any person to complain of a violation of his/her constitutional right to a healthy environment and to do so without a lawyer, merely by sending an email or letter to India’s highest court! Thousands take advantage of this ease of access, resulting in an overburdened Supreme Court attempting to hear factual cases as if it were a trial court, a standing approach that goes too far the other way.

Providing standing for environmental NGOs (ENGOs), whose lawyers are familiar with the courts, procedures and issues, increases access to justice for some poverty groups. However, the historical mission of ENGOs has generally not been the protection of the disadvantaged, but the protection of the environment. Only recently have some ENGOs taken on the mantle of ‘environmental justice’ and human rights, in addition to environmental protection. ENGOs all suffer from financial constraints and staffing limitations, requiring them to carefully choose cases based on the ability to establish an important precedent, to make a major impact on the environment and to be ‘marketable’ for fundraising, so that they can raise the money required for the very expensive costs of litigation that may go on for years. Environmental attorneys willing to serve the poor for free (such as law school clinics) contribute to environmental justice for the poor, but they are few and far between.
11.3.3 Costs

The costs of litigation are the biggest deterrent to seeking justice for everyone, especially for the poor. Court fees are just a small part of the expense of litigation, but recognizing that even these can be prohibitive for low-income litigants, some ECTs have substantially reduced filing fees and other court costs (even providing ‘no-cost’ filing) or created a fund to assist litigants below the poverty level with their court costs. A truly intimidating and unnecessary economic deterrent, however, is the so-called ‘English Rule’ or ‘loser pays’, discussed above, which requires the losing side to pay all of the expenses of the winning side in litigation. Australian citizen groups, communities and environmental NGOs are frankly reluctant to bring litigation in the general courts because they apply the English Rule. To counteract this chill of bankrupting costs, several Australian ECTs by rule make it clear that they do not follow the English Rule (except for groundless or abusive lawsuits), realizing its negative impact on access to justice. Establishing a legal principle that parties each bear their own costs of litigation, absent gross misconduct or groundless-frivolous actions, protects low-income litigants from the risk of huge legal awards in the event they do not prevail in court.

Jurisdictions with strong specialized environmental prosecutors, such as Brazil, also help hold costs down for low-income and NGO plaintiffs. Prosecutors can increase access to justice by aggressively pursuing actions that negatively impact communities or groups who are often too impoverished and unempowered to represent themselves. These legal challenges have no direct cost for the impacted individuals because the prosecutors are paid government employees. For example, in Brazil, the Parana State environmental prosecutor’s office has pursued litigation against the government itself, challenging its plans to construct a dam that would wipe out the homes and livelihoods of hundreds of people living in and adjacent to the dam site. In Amazonas State, prosecutorial actions have been brought against the timber industry and wildlife poachers.

However, environmental prosecutors are not a panacea for protecting low-income communities, as Brazil also illustrates. With some of the strongest environmental protection legislation in the world, but a huge landmass and some of the worst environmental problems, the prosecutors are hampered by size of caseload, lack of sufficient investigative and monitoring personnel, lack of aggressive local enforcement once verdicts have been handed down and lack of both sufficient prosecutors and judges to handle all the violations. In addition, some prosecutors feel their existence discourages the development of NGOs that could bring environmental actions.
11.3.4 Expert Evidence

Scientific and technical expert studies, field work, evidence and testimony are necessary in many ECT cases, constituting another of the prodigious cost barriers to access to justice. The need to retain experts can make litigation wholly prohibitive for low-income individuals and groups, if not represented by a prosecutor or NGO with access to free or reduced-fee experts. ECTs are experimenting with many different approaches for overcoming the ‘experts hurdle’ for impoverished litigants. In the New South Wales ECT, experts are sworn in as ‘friends of the court’ and instructed by the judge to testify as if they were not paid by a particular side, on penalty of perjury. They also may be instructed to discuss their testimony together, identify those issues where they are in professional disagreement and then present to the court only evidence that is in professional contention (New South Wales). In the words of Michael Rackemann, Judge for the Planning and Environment Court of Queensland, ‘the management of experts from [an early stage] assists in narrowing the scope of the trial reports and testimony and in improving the quality and helpfulness of the analysis. These approaches save court time and reduce costs for all parties’.29

Other ECTs hold down expert costs by having science and engineering experts serving as co-judges (Sweden), calling on experts from the environmental agency (NYC and many others), recruiting volunteer experts in the community (Belgium, Denmark), relying on scientific institutes (Japan), or by having a legislatively or judicially created fund to pay the expert fees of indigent litigants with legitimate claims. Ontario, Canada had such intervener funding for several years, but it was allowed to lapse when the political climate changed. Some appellate ECTs rely completely on the record of the agency below, which eliminates expert witness fees for litigants, but removes the possibility of challenging the agency experts or introducing new expert testimony. Referral to mediation, which occurs in many ECTs, can eliminate the need for expensive experts, but may result in uninformed agreements if experts are not present at the mediation.

The ‘precautionary principle’ (Nanda and Pring, 2003, pp. 38–39) can actually serve as a cost-saving device for low-income litigants. Scientific uncertainty is a major impediment in proving many environmental cases and the party with that burden of proof faces significant expense at best, or a losing case at worst. The precautionary principle can be invoked to shift the burden of proof from the complainant to the developer or other entity proposing a change in the status quo. Interestingly, in Queensland, the burden of proof is always on the developer, whether it is a developer’s appeal against a permit refusal or an environmentalists’ appeal against an approval. Thus, the developer must produce sufficient evidence to satisfy the court that its proposal
should proceed, reducing the cost burden on the party challenging the proposal.

11.3.5 ADR

ADR techniques are a very positive development in ECT practice. ADR can enhance access to justice for all parties, particularly for the impoverished, by reducing costs, speeding the process, assuring a more ‘level playing field’ and developing a wider range of creative solutions than are available from a judge.

The ADR process most widely employed is mediation – use of a trained neutral to serve as a non-judgmental catalyst who assists the parties in developing and agreeing on a solution. This can enhance access to justice for the poor in several important ways. First, mediation may allow parties to participate without expensive attorneys or experts. The danger, of course, is that unrepresented parties may not know or understand the issues, their legal rights, or the consequences of an agreement and might settle for a solution that may not be sustainable or in their long term best interests. This can be ameliorated by allowing their advocates, NGO representatives, or attorneys to participate in the mediation to assure equity and protection of the legal rights of the parties. Second, trained mediators who are also attorneys with knowledge of environmental law or who are staff or members of the ECT can help ‘level the playing field’ and assure that agreements are both fair and legal. Third, mediation allows parties to generate creative options – solutions that may not be available to the judge. For instance, a mediated agreement for the development of a mine in an impoverished rural area could include typical court-ordered modifications to location, access, size, noise, remediation, etc., but – with mediation – could also include major investments by the mining company in a safe community water supply, schools, hospitals, employment and other infrastructure for the residents that would improve living conditions and support positive sustainable outcomes.

The cost of ADR is typically much less than litigation and can be subsidized in various ways to aid low-income litigants. The Netherlands ECT received a grant to pay the costs of private mediators; while the grant was in place over 50 per cent of parties chose to mediate and 50 per cent of those were successful in reaching an agreement without court intervention. However, when funding ran out and parties had the choice of paying for mediation or going straight to court, only 10 per cent chose mediation and a majority of those did not reach a satisfactory agreement. Evaluation indicated that parties were unwilling to pay for mediation plus litigation if mediation was unsuccessful, when they could go straight to court and obtain a judicial order. In Vermont, cases appropriate for mediation are referred to private mediators in the community, who may charge up to $1500 a day, with parties splitting the
costs, which many find cost-effective in lieu of a trial. In Queensland, Australia, the ECT has hired a full-time attorney-mediator who mediates cases when the court directs based on initial judicial review of the allegations. In Australia’s island state of Tasmania, where mediation has been so successful it is now mandatory, the ECT registrar is a highly trained and effective mediator; that ECT is now training members of the ECT as mediators. In yet another approach, professors at a leading Brazil university have created a nonprofit environmental mediation center which provides mediation services free to impoverished communities – even helping villagers caught illegally manufacturing sugarcane alcohol (cachaca) to avoid criminal prosecution and receive a government license.

Another ADR approach that can enhance access to environmental justice is the ombudsman – a government-appointed official or tribunal that provides a check on government and others by investigating and acting on complaints reported by individual citizens and groups – often enhancing or replacing an ECT. In Austria, each district has an environmental ombudsman who has the authority to investigate and respond to complaints, both against the government and private business interests. The Austrian ombudsmen have standing and budget to file in court representing the complainant(s), costing the parties nothing and providing a professional evaluation of the merits of the case and the options prior to litigation. In Kenya, a Public Complaints Committee theoretically acts as an environmental ombudsman, but has no litigation authority and is very underfunded and understaffed and so is less effective.

‘Collaborative decision making’ (CDM) is a newer ADR approach that brings government and civil society stakeholders together with a facilitator to participate collectively in open discussions in which they share information and power as they take joint responsibility for making decisions, resolving issues and reaching solutions. CDM is gaining favor with US government agencies as a way to involve impacted communities in evaluating a proposed development, negotiate alternatives before permits are granted and save costs.

‘Restorative justice’ (RJ) is another ADR process being experimented with in several criminal-jurisdiction ECs (New Zealand, New South Wales). It can also benefit those living in poverty. After a guilty verdict or plea, RJ brings together the perpetrator, victims and community members in facilitated sessions that focus on repairing the harms to the victims and society, rather than just punishing the wrong-doer.

The most common ADR approach – standard negotiation between parties without a formal neutral intermediary – is still relied on extensively by ECTs and can produce ‘win-win’ outcomes. For example, on one of Fiji’s Yasawa Islands, a small resort developer successfully negotiated with the local fishing village to stop over-fishing the resort’s lagoon and dive sites in return for training and employing village residents to work at the resort, bringing tourists to
the village to participate in kava ceremonies and purchase handicrafts and providing a motorboat 'school bus' to take the village children to and from school on another island.

ADR has been opposed by some US environmental groups, over feelings that compromise is inappropriate in environmental conflicts and that many environmental issues are not amenable to mediation. Some still have these concerns, which have been partially ameliorated in jurisdictions where ECTs are known to carefully analyze the appropriateness of cases, issues and parties for ADR as opposed to trial.

11.3.6 Operational Tools

Courts which have adopted strong case management tools help increase access to justice, especially for poorer or unrepresented parties, by assuring that cases move in a timely way, that parties have access to court procedures and receive all notices, that experts are managed expeditiously, and that cases are monitored to ensure compliance with court directions. In some jurisdictions, a case manager also educates parties (particularly unrepresented parties) about how to file a case, what to expect from the judicial process, what will be required of them and what the costs will be. ECT case managers can evaluate cases for the appropriateness of mediation and can ensure that cases do not get 'lost' in the system. Introduction of sophisticated computer databases, in conjunction with case management techniques, has greatly increased both the efficiency and effectiveness of ECTs. Information technology, scheduling hearings and travelling courts, as described above, can greatly increase the effectiveness, efficiency and reach of ECTs, thereby helping hold down costs for parties.

ECTs that simplify their rules of procedure – covering such matters as filing, discovery (information exchange), hearing procedures and evidence rules – greatly improve access to justice, particularly for the less empowered. For example, some ECTs provide simple forms, allow filings online and permit testimony in writing. Some permit pro se representation (not requiring attorneys) and provide case management assistance to help litigants. Some have also introduced less formal, less intimidating court proceedings. Rules which streamline the presentation of expert testimony by requiring experts to focus testimony only on those issues in dispute simplify proceedings and reduce both time and cost for litigants.

11.4 CONCLUSION

The University of Denver ECT Study finds that creating and improving specialized ECTs can enhance access to environmental justice for the impov-
erished – the very people whose health, livelihoods, living conditions and futures may be most impacted by environmental change and who may be least able to protect themselves, their families and their communities. The ECTs that appear to have had the largest positive impact in this arena are those where the 12 building blocks have been structured with a sensitivity to the issues of poverty – in particular the six crucial factors of geographic coverage, standing, costs, expert evidence, ADR and operational tools – as described above.

NOTES

6. We use ‘court’ to indicate a true judicial branch body and ‘tribunal’ to indicate collectively all other governmental organs (typically less formal administrative bodies) that are empowered to resolve environmental disputes.
8. Interestingly, the US has resisted creating an environmental court at the national level (Whitney, 1973). Nevertheless ECTs proliferate in the US, including national environmental tribunals within executive branch agencies like the US Environmental Protection Agency and the Department of the Interior, one state environmental court (Vermont), and numerous local-level ECTs (such as New York City and Memphis, Tennessee).
11. See Stein as well as Preston, above, n. 9.
14. International or multinational ECTs are not a focus of this study, since they are presently not a particularly promising terrain. The International Court of Justice established a special chamber to deal with environmental matters in 1993, but it has not been used in the Court’s

15. For a more in-depth discussion, see Greening Justice, 2009, pp. 21–26.
17. Ibid., pp. 28–30.
19. Ibid., pp. 31–33.
23. Ibid., pp. 55–61.
24. Ibid., pp. 61–72.
25. Ibid., pp. 72–75.
26. Ibid., pp. 76–79.
27. Ibid., pp. 79–87.
29. Email from Michael Rackemann, Judge, Planning and Environment Court of Queensland, Australia, to authors (28 March 2009) (on file with authors).

REFERENCES

(For a comprehensive list of references see Greening Justice, pp. 95–105.)


