

Specialized Environmental Courts & Tribunals: Improved Access to Justice for Those Living in Poverty

by

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Executive Summary

A first-ever global multidisciplinary comparative study of specialized environmental courts and tribunals (ECTs) is in process at the University of Denver.³ The study is designed to evaluate how ECTs can improve access to information, public participation, and justice for those involved in environmental disputes, as prescribed by the Aarhus Convention, Rio Declaration, and many other international legal authorities.⁴

The result will be an analytic framework and summary of best practices to guide governments interested in establishing (or reforming) an ECT. The research methodology has involved in-depth literature review, court observation, and on-site interviews with over 100 ECT-involved judges, prosecutors, private attorneys, government officials, non-governmental organizations (NGOs), and academics in 21 countries representing some 35 different ECT models. The study identifies 12 operational elements or “building blocks” which contribute to the success of ECTs in addressing fundamental issues such as access to justice, sustainable development, protection of human rights and the environment, the prevention, precautionary, and polluter-pays principles, and environmental impact assessment.⁵

For this first public presentation of the study-in-progress, given this IUCN/AEL symposium topic, we focus on ECTs and poverty. The study finds ECTs which incorporate particular ones of the 12 building blocks do enhance environmental justice for those living in poverty – who may be the most

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³ The study website and authors' CVs are at <http://www.law.du.edu/index.php/ect-study>.

⁴ George (Rock) Pring & Susan Y. Noé, “The Emerging International Law of Public Participation Affecting Global Mining, Energy, and Resources Development” in *Hunan Rights in Natural Resources Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (eds Donald Zillman, Alastair Lucas, and George (Rock) Pring, Oxford University Press) (2002) 11-76.

⁵ See Ved P. Nanda & George (Rock) Pring, *International Environmental Law & Policy for the 21st Century* (Transnational) (2003) 17-62.

vulnerable and impacted by environmental harm yet least empowered to protect themselves.

Introduction to ECTs and the Study

Specialized “environmental” courts and tribunals for resolving disputes (ECTs)⁶ have existed since the early 1900s.⁷ For example, Denmark created a Nature Protection Board in 1917, and Sweden created specialty Water Courts in 1918. The 1970s “environmental movement” generated new environmental, natural resources, and public health laws around the world, and many countries, states, and local jurisdictions created specialty 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. At least 30 countries have ECTs today – on every continent, in every major legal system, and in developed as well as least developed nations.⁸

Governments create specialized 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 mentioned in the literature⁹ and confirmed through the study interviews 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.

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.

⁷ The Scottish Government, “Environmental Courts – Experience in Other Countries,”

<http://www.scotland.gov.uk/Topics/SustainableDevelopment/envcourts>,

<http://www.scotland.gov.uk/Resource/Doc/921/0017251.doc> (2005).

⁸ Interestingly, the US has resisted creating an environmental court at the national level. Scott C. Whitney, “The Case for Creating a Special Environmental Court System” [1973] *William and Mary Law Review*, vol. 14 at 473. 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 (Vermont), and numerous city-level ECTs (such as New York City and Memphis, Tennessee, USA).

⁹ See, e.g., footnotes 13-16 infra.

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, collaborative planning and decisionmaking, 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 decisionmaking 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: The creation of an ECT with reasonably open standing can result in the executive branch being more thorough and transparent in making decisions which affect the environment, because the decisions are open to scrutiny and legal challenge.

Naturally, there are counterarguments against specialized courts. While a minority view, counterarguments include the existence of other fields with legal and factual complexity, resistance to fragmenting the judicial system, reluctance to set environmental law apart ("in the closet"), preference for incremental reforms in the general judicial system, concerns about sufficient caseload, added costs, etc.

Interest in specialty ECTs has grown dramatically during this decade, and a number of jurisdictions are now exploring the creation of an ECT or the reformation of their existing court structure. For example, the UN Environment Programme (UNEP) 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 High Court judicial system"¹⁰ and called for the expansion of jurisdiction to include "the built environment, indigenous peoples rights, development planning issues and land tenure."¹¹ UNEP, in the past, has

¹⁰ United Nations Environment Programme (UNEP), "Experts Group on Access to Environmental Justice in the Caribbean SIDS: Conclusions" (Barbados, 10-11 December 2007), para 6 (copy with authors).

¹¹ Ibid., para 8.

been a leader in promoting ECTs, through recommendations, publications,¹² and judicial training.¹³ Jurisdictions as diverse as England, Abu Dhabi, and Hawaii, among others, are currently examining the potential for an ECT.

It was apparent that an in-depth comparative analysis of the different existing ECT models and practices would be useful to jurisdictions considering creating an ECT. A literature review found no such helpful study existed. Some individual ECTs have been analyzed in depth, including the well-known examples in Australia's State of New South Wales¹⁴ and New Zealand,¹⁵ but their models were not necessarily appropriate for all jurisdictions. There have also been studies assessing the desirability of establishing ECTs in particular jurisdictions, such as England¹⁶ and Scotland.¹⁷ However, these have focused primarily on English common law and European examples, not necessarily appropriate for all jurisdictions. A decisionmaking framework that could work for a broad range of legal cultures is needed.

For this symposium on "Poverty Alleviation and Environmental Protection," we have drawn out of the study the ECT characteristics and best practices directly resulting in improved access to environmental justice for those living in poverty. The UN Millennium Development Goals¹⁸ have made eradicating poverty the world's top development priority, in part in recognition that those in poverty, whether living in urban or rural areas, are often the most environmentally vulnerable and impacted and least empowered to protect their health, welfare, and future sustainability.¹⁹

¹² E.g., UNEP, *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements* (200-), Guideline 41(o).

¹³ E.g., Earlier this decade, UNEP Headquarters in Nairobi sponsored a number of relevant programs, publications, and conferences, including training programs in environmental law for judges from Kenya, Uganda, and Tanzania, following which Kenya implemented three specialized environmental forums and Tanzania passed legislation authorizing an environmental court, which has not yet been implemented. Dinah Shelton & Alexandre Kiss, *Judicial Handbook on Environmental Law* (UNEP) (2005), http://www.UNEP.org/Law/PDF/JUDICIAL_HBOOK_ENV_LAW.pdf.

¹⁴ E.g., Paul L. Stein, "Down Under Perspective of the Environmental Court Project" [2000], http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_stein_270600; Brian J. Preston, "The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse" [2007], http://lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_speeches_and_papers#preston.

¹⁵ E.g., Bret Birdsong, "Adjudicating Sustainability: New Zealand's Environment Court" [2002] *Ecology Law Quarterly* vol. 29 at 1.

¹⁶ E.g., Lord Justice Sir Harry Woolf, "Are the Judiciary Environmentally Myopic?" [1992] *Oxford University Journal of Environmental Law*, vol. 4 at 1; Richard Macrory with Michael Woods, "Modernising Environmental Justice: Regulation and the Role of the Environmental Tribunal" [2003], <http://www.ucl.ac.uk/laws/environment/tribunals>.

¹⁷ Scottish Executive Environment and Rural Affairs Department Environment Group, "Strengthening and Streamlining: The Way Forward for the Enforcement of Environmental Law in Scotland" [2006], <http://www.scotland.gov.uk/Publications/2006/11/22152827/0>.

¹⁸ UN, *Millennium Development Goals: A Gateway to the UN System's Work on the MDGs*, <http://www.un.org/millenniumgoals>.

¹⁹ See "The Poverty Question: What Does Poverty Mean for Conservation?" [Spring 2008] *Nature Conservancy Magazine*, <http://www.nature.org/magazine/spring2008/features/art23458.html>.

Methodology

The study focuses on national and sub-national ECTs,²⁰ defined as government judicial or administrative entities empowered to hear and resolve environmental, natural resources, land use, and related disputes. The researchers in this Law and Society-type study – George (Rock) Pring, a professor of law, and Catherine (Kitty) Pring, a professional mediator and alternative dispute resolution (ADR) consultant – bring a multidisciplinary focus to the work.

The findings are based on (1) extensive literature review, (2) court observations, and (3) over 100 in-depth interviews with experts from a cross-section of representative examples from the diverse range of ECT types in the world. The ECTs studied represent

- national, state/provincial, and municipal jurisdictions;
- all 6 inhabited continents;
- developed and developing nations from the richest to the poorest;
- common law, civil, and religious legal systems;
- Christian, Islamic, Hindu, and Buddhist cultures;
- civil, criminal, combined civil-criminal ECTs;
- stand-alone ECTs as well as “green benches” in general courts;
- models from purely adjudication to adjudication-mediation to purely mediation;
- countries with cutting-edge environmental laws (such as the precautionary principle) to those applying more traditional laws; and
- “problem solving” ECTs to those applying only “the rule of law.”

ECTs can now be found in more than 60 jurisdictions. Additional jurisdictions are considering creating such a specialty judicial forum, and most of

²⁰ 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 several important environmental cases. “International Court of Justice” (para 1.2), *Wikipedia*, http://en.wikipedia.org/wiki/International_Court_of_Justice. The Permanent Court of Arbitration, an intergovernmental organization (IGO) of over 100 member states, has developed a “unified forum” for arbitrating environmental and natural resources disputes, <http://www.pca-cpa.org>; Dane Ratliff, “The PCA Environmental Arbitration and Conciliation Rules” [2003], http://www.gasandoil.com/ogel/samples/freearticles/roundup_12.htm. See also, the NGO International Court of Environmental Arbitration and Conciliation, <http://iceac.sarenet.es>. Canada, Mexico, and the USA have created a Commission for Environmental Cooperation (CEC) under the North American Agreement on Environmental Cooperation (The North American Free Trade Agreement (NAFTA) “Environmental Side-Agreement”), and that international body is authorized to hear citizen submissions on NAFTA governments’ failures to enforce environmental laws, but it has no enforcement powers. CEC, “Citizen Submissions on Enforcement Matters,” <http://www.cec.org/citizen/index.cfm?varlan=english>. There are many articles and calls for the creation of an International Environmental Court; see, e.g., the International Court of the Environment Foundation, <http://www.icef-court.org>.

those who have developed one are in the process of some change and reform. Multinational organizations of ECT judges are developing.²¹ ECT research thus involves a “moving target,” which is dynamic and evolving. Some jurisdictions, such as England, Hawaii, and Abu Dhabi, are currently investigating the development of an ECT, while other jurisdictions, such as Austria and Finland, are discussing eliminating such specialization. Many nations with ECTs are analyzing ways to make them effective in dealing with cutting-edge issues, such as climate change.

During 2008, we conducted face-to-face interviews in 21 different countries, representing 35 ECTs on 6 continents. ECT-involved judges, prosecutors, private attorneys, government officials, NGOs, and academics were interviewed, using our basic building-block-factors format to ensure comparable data. Individual interviews ranged from 45 minutes to over 5 hours (!). The interview data is being analyzed for similarities and differences, and the 12 critical elements are being validated as the analytic framework and the focus for determining best practices.

The complete study is being prepared for publication in 2009 and will include more in-depth analysis of existing practices and alternatives within each element.

Framework of Factors

Twelve distinct factors or “building block” decisions for ECTs were identified as the research framework. The options or alternatives within each factor should be evaluated by any jurisdiction considering creating or reforming an ECT. Not all of the factors have a direct impact on access to environmental justice for those living in poverty, but a significant number do. This section lists the 12 factors (to be discussed in detail in the final study), with an asterisk by those positively affecting the poor. The next section discusses in more detail those asterisked factors affecting those in poverty.

1. **Type of Body:** ECTs can be structured in many ways, varying chiefly in independence, competence, jurisdiction, and cost:

(1) **Specialized Court:** This model is an actual judicial branch “court,” with trained, expert judges. It is independent of the executive and legislative branches of government, has a separately identified budget, and gives judges security of tenure (life, to a specific age, or term of years). Typically, these judges do not hear other types of cases (examples include New South Wales, Australia; New Zealand; State of Vermont, USA).

²¹ The several multinational and regional organizations of environmental judges include the EU Forum of Judges for the Environment (EUFJE) (<http://www.eufje.org>) and the Australasian Conference of Planning & Environment Courts and Tribunals (ACPECT).

(2) Specialized Court Chamber: This is a general judicial court with a specialized chamber of judges set up within it to hear environmental cases. This “green bench” or chamber may be formally designated or an ad hoc assignment of a judge volunteering to take environmental cases. It does not require special legislation to create or a separate budget (Netherlands, Finland, Kenya Supreme Court).

(3) Tribunal: This term covers a number of options that are not judicial branch courts but are still specialized government bodies empowered to make binding decisions in environmental cases. Tribunals usually are 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 lay persons, even in some cases all laypersons (Ireland). Tribunals’ independence varies but there are basically four models:

- Independent tribunals – answerable to the head of government and operating outside the executive branch environment agency whose decisions, permits, plans, and actions they are reviewing (Ontario, Canada; New York City, USA);
- “Captive” tribunals – housed within the environmental regulating agency (Austria, US Environmental Protection Agency (USEPA) Environmental Appeals Board, Kenya National Environmental Tribunal);
- Quasi-independent tribunals – housed in a different agency (such as the Attorney General’s Office);
- Administrative law judges (ALJs) – an independent agency in the executive branch that provides personnel (usually lawyers) to serve as specialized decisionmakers in the cases of other agencies (Office of Administrative Law Judges for USEPA).

(4) Other specialized forums: Include entities such as Special Commissions appointed by a court to investigate and make recommendations to the court (India), wholly non-judicial bodies relying on mediation and other forms of ADR with no decisionmaking or enforcement power (Japan, South Korea), and special environmental Ombudsmen with standing and funding to represent complainants in court (Kenya, Austria).

2. **Legal Jurisdiction**: What laws and issues will the ECT cover? 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, etc. (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).

3. **Court Level and Appeals:** ECTs can be created at any level in the adjudication hierarchy – the internal agency level, trial court, intermediate appeals court, and/or the supreme court level.

(1) **Internal Agency ECT:** An ECT inside the environmental or other regulatory agency can be either of two kinds:

(a) It can be the forum that makes the agency’s initial decision to issue a permit, enforce a violation, approve a plan, etc.

(b) More often, it is an internal forum to which such initial agency decisions can be appealed (USEPA).

Appeals of this “first instance” ruling then typically go out to a trial or appeals level court in the judicial branch for a “second instance” review.

(2) **Trial Court Level ECT:** Most common is an ECT at the trial level, and these can be either of two kinds:

(a) **Second-instance Review:** Hearing appeals of agency decisions and rulings, with appeals of this going to an intermediate appeals court for a final ruling (third instance review), but not on to the supreme court typically.

(b) **First-instance Case:** Hearing 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).

4. ***Geographic Coverage:** Geographic coverage is an important consideration for countries that have large jurisdictions and where travel is difficult. ECTs have responded to this challenge of distance by creating “easy” filing procedures (such as on-line), traveling courts (Brazil), holding hearings at the site of the proposed development (Vermont), permitting testimony by teleconferencing and video conferencing (New Zealand),

5. **Case Volume:** The choices of legal jurisdiction (2 above) and court level (3 above) primarily control the caseload of the ECT. We found volume as low as

17 cases per year (Bangladesh) – making it difficult to justify a specialist court – to over 700,000 per year (New York City), requiring hundreds of ALJs.

6. ***Standing:** Standing (who can file or participate in a case) is a critical factor covering a huge spectrum from very open to extremely limited, with all ECTs having some limits to prevent frivolous lawsuits. Care must be taken not to exclude important constituencies with a real stake (such as the poor, indigenous peoples, communities, NGOs, etc.) or important societal values (such as endangered species, protection of old growth timber, climate change, etc.). Interestingly, ECTs with the most open standing (Canada, USA, Australia, India) 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 unrest, and that access to justice is a good safety valve.

7. ***Specialized 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 jurisdictions where NGOs and other potential citizen/community groups are weak or unlikely to bring ECT cases (Brazil).

8. ***Expert Evidence:** ECTs take many different approaches to assure needed expert testimony. For example, some ECTs:

- Hire their own independent experts using budgeted judicial funds (Ontario, Canada);
- Rely solely on the expert witnesses presented by the parties, the so-called “battle of the experts” (USEPA, Vermont);
- Rely on experts working for the government agency (New York City);
- Appoint experts (scientists, engineers, etc.) as judges, with equal weight given to their opinions as to the legal judges on the panel (Sweden has a lawyer and a chemical engineer as judges on one panel);
- Keep lists of volunteer experts in various disciplines in academia, think tanks, consulting firms, etc., on whom the ECT can call (Denmark, Belgium);
- Make parties’ experts swear to represent only the court, not the parties (although the parties are paying the experts) or be in contempt of court (New South Wales);

- Require 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 others' points of disagreement – so-called “hottubbing” (New South Wales);
- Utilize site visits to see, evaluate, and make informed judgments (Ireland, Brazil, Vermont);
- Appoint special commissions of experts to investigate and report their recommendations back to court (India);
- Rely completely on the record of the preceding decisionmaker or court for expert testimony (Tasmania, Australia; Finland; appellate level courts);
- Employ trial de novo, starting over with testimony from the same or different experts (Vermont).

9. **Enforcement Tools:** An ECT must have effective enforcement powers to ensure justice and compliance. The majority of ECTs in our 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, required remediation and closure, etc. ECTs with criminal powers can employ these 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.

10. ***Alternative Dispute Resolution:** Alternative dispute resolution (ADR) is the cutting-edge trend in ECTs, particularly those that define their role as “problem solving,” rather than only applying the “rule of law” like an umpire. Some examples:

- Mediation is most widely used – a trained, neutral facilitator to support communication and develop acceptable options between the parties (Tasmania, Vermont, New Zealand);
- Restorative justice in criminal cases – cooperative sessions focused on the harm to the victims and society rather than just penalizing the wrongdoer (New Zealand);
- Ombudsmen are utilized in some jurisdictions (Austria, 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 more focused on “rule of law” (Sweden, Finland, Denmark) generally do not use ADR, except for judge-supervised settlement conferences. Reversing that, a few countries (Japan, South Korea) appear to use only mediation, not adjudication, in their ECTs.

11. **Judicial Expertise:** ECT judges range from those with no specialized environmental law training or interest to judges with extensive environmental law training, expertise, and commitment 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 competent generalist judges for the ECT. Generally, those interviewed felt that judges who were highly trained, experienced, and motivated and who served fulltime were clearly preferable.

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

(1) ***Case Management:** Perhaps the most significant operational innovation in ECTs is the use of rigorous case management. Case management is accomplished by a combination of (a) an assigned staff person(s) who is the initial contact for the litigants and who maintains contact with them during the entire adjudication process plus (b) a sophisticated computer data management system that supports the case manager and the litigants (see 12(2) below). The case manager explains court processes, reviews the case record, may recommend or actually conduct mediation, may have the power to hold directions (scheduling) hearings, assures that parties are noticed in advance on all deadlines, monitors filings with the ECT, and may draft decisions for the judge(s). In at least one jurisdiction, the case manager also monitors compliance with judicial orders. 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):** Sophisticated computer data management systems are being developed by ECTs that can track 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 teleconferencing 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 on-

line and provide websites giving the public access to information about procedures, costs, and decisions.

(3) Directions Hearings: To prevent delay, some ECT judges regularly require directions (scheduling) 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: In order to make the environmental court easily 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.

(5) *Simplified Rules of Procedure: Streamlining the court process, using simplified rules of procedure, is also being explored by a number of courts. The rules regarding 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.

(6) *Filing and Other Costs: In an effort to make access to environmental justice more affordable for low-income litigants, local communities, and NGOs, some ECTs have reduced filing fees substantially and even made filing possible online and adopted rules against cost shifting to the losing party.

ECT Factors Increasing Low-Income Access to Environmental Justice

A number of the 12 factors summarized above have a very direct impact on access to environmental justice for those living in poverty, including (6) standing, (7) specialized prosecutors, (8) expert evidence approaches, (10) alternative dispute resolution, (12(1)) case management, (12(4)) traveling courts, (12(5)) simplified rules of procedure, and (12(6)) reducing or eliminating costs.

Standing: Standing rules vary widely in ECTs and can be a very significant barrier to anyone's access to justice, but this is particularly true for the poor. The stated purpose of standing, in the words of a famous U.S. Supreme Court precedent, is to assure a litigant has "such a 'personal stake in the outcome of the controversy'...as to ensure that the dispute...will be presented in an adversary context and in a form...capable of judicial resolution."²² That is, access to the courts should be limited to those who have a genuine injury, caused by the opposing side, which a court order can redress. Some ECTs' standing rules are much more restrictive than necessary to assure non-frivolous litigants and are particularly exclusionary for low-income persons. For example, some ECTs only give standing to those owning real property within a prescribed distance (very short) of the activity complained of (Ireland). Some only allow

²² *Sierra Club v. Morton* [1972] 405 U.S. 727, 732.

standing for those with demonstrable impacts on their property or health. Others reject those who did not participate in the administrative proceedings leading up to the lawsuit, regardless of lack of notice or insufficient funding. Sweden, of all places, disqualifies NGOs unless they have been operating for 3 or more years and have over 2,000 members (only 2 NGOs in the country reportedly meet those requirements). 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 (whose 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 agency actions or to challenge standing requirements in court. Such a “narrow court house door” also excludes issues that may be of great importance to those living in poverty, such as slum conditions, water and air pollution, public health, and security.

Countries with a constitutional provision that provides a right to a healthy environment (such as Finland, Belgium, Austria, India) have more open standing than countries that rely on individual environmental protection acts, 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 appellate court attempting to hear factual cases de novo, 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 is generally not the protection of the disadvantaged, but the protection of the environment. Only recently have some ENGOs taken on the mantle of “environmental justice,” sustainability, and human rights, in addition to environmental protection. In addition to mission and donor constraints, ENGOs all have 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” so that they can raise funds for the very expensive costs of litigation that may go on for years. Environmental attorneys willing to serve pro bono and law school clinics – especially environmental, indigenous, or human rights clinics – also are major contributors to access to environmental justice, with or without ECTs

Special Prosecutors: Jurisdictions with strong specialized environmental prosecutors, such as Brazil, increase access to justice by aggressively pursuing actions that negatively impact communities of people who are often impoverished and unempowered to represent themselves. These legal challenges have no direct cost for the most impacted communities because the prosecutors are government employees. For example, the Parana State environmental

prosecutor's office has pursued litigation against the government 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 who could bring environmental actions.

Expert Evidence: Expert studies, evidence, and testimony are required in many ECT cases, presenting a major expense factor. This is one of the most important barriers to access to justice, and can be wholly prohibitive for low-income individuals and groups who are not represented by a prosecutor, attorney, or NGO with access to pro bono 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 (referred to as "hottubbing"), 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 Environment and Land 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.

Other ECTs have science and engineering experts serving as co-judges (Sweden), call on experts from the environmental agency (NYC and many others), call on panels of experts in the community (Denmark), use professors and researchers as volunteer experts on behalf of the court (Belgium), or have 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 funds were scarce and 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” can have a direct positive impact on the problems of expert evidence for litigants, particularly 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. One of the “most far-reaching” agreements achieved at the 1992 Rio Conference was acceptance of the “precautionary principle”²³ in Principle 15 which provides: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” This 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 onus of proof on appeal is always on the developer, whether it is a developer appeal against a refusal or a submitter 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.

Alternative Dispute Resolution (ADR): ADR techniques are a significant, creative, cutting-edge development in ECT practice. ADR can enhance access to justice for all parties, and particularly for the impoverished, by reducing costs, speeding the process, developing better solutions than are available from the judge, and assuring a more “level playing field.”

The ADR process most widely employed is mediation – use of a trained, neutral to serve as a nonjudgmental catalyst who assists the parties in developing and agreeing on a solution. A mediator enhances 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, 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 water supply, schools, hospitals, employment, and other infrastructure for the residents that would improve living conditions and support positive sustainable outcomes.

²³ Nanda & Pring, note 5 supra, at 38-39.

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% of parties chose to mediate and 50% 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% 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 \$1,500 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 fulltime attorney-mediator who mediates cases that are court-ordered to mediation based on initial judicial review of the allegations. In Tasmania, the ECT registrar is a highly trained and effective mediator who decides as cases are filed whether or not to mediate them; this has been so effective that they are planning to train lay members of the ECT as mediators and to make mediation mandatory. 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 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 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 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 decisionmaking” (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 and negotiating alternatives before permits are granted.

“Restorative justice” (RJ) is another ADR process being experimented with in at least one criminal jurisdiction ECT (New Zealand); 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. Standard negotiation between parties, without a formal neutral intermediary, is still relied on extensively by ECTs and can still produce surprising “win-win” outcomes; for example, on an island in Fiji, 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 was strongly opposed in the 1970s by U.S. environmental groups, including the Sierra Club, who felt that compromise was an inappropriate outcome in environmental conflicts and that many issues were not amenable to mediation. Many advocates still have these concerns, which have been partially ameliorated in some jurisdictions by ECTs carefully analyzing the appropriateness of each case for ADR handling as opposed to trial.

Case Management: Courts which have adopted strong case management tools help increase access to justice, especially for poorer or unrepresented parties, by assuring 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 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.

Traveling Courts: The distance between the ECT and a plaintiff’s community, particularly a rural community, can constitute a formidable barrier to access to justice for those who can not afford to travel long distances or who can not afford to take time off from work. ECTs in many jurisdictions have developed creative ways to bring the court to the people. A judge in Manaus, Brazil, has a “traveling courtroom,” housed in a bus in which he commutes to remote areas of Amazonas State. Judges in Australia, faced with thousands of miles between the site of a conflict and the provincial capital, take to the air and fly to court hearings in remote sites. In Ireland, hearings can be held in local hotels and halls at the site in issue, providing access to those most affected by the decision. In the small state of Vermont, two 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 5 boroughs, again bringing the court to the people. Other techniques for making environmental justice more physically accessible include night courts and video- and tele-conferencing testimony and arguments.

Simplified Rules of Procedure: ECTs that simplify filing, discovery, and hearing procedures and evidence rules greatly improve access to justice, particularly for the less empowered. For example, some provide simple forms, allow filings online, and 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.

Court Costs: The costs of litigation are a huge factor, perhaps the biggest barrier to environmental justice. Court fees are just a small part of the overall costs of litigation, but recognizing that even these can be prohibitive for low-income litigants, some ECTs have reduced filing fees and other court payments substantially (even “no-cost” filing) or created a fund to assist litigants below the poverty level with their court costs. A bigger chill factor is the rule in some jurisdictions that the loser pays the winner’s full costs (court costs, attorneys fees, expert fees, discovery costs, research studies, etc.), which can be hundreds of thousands of dollars. The UK and many common law countries apply this so-called “English Rule” that the unsuccessful party pays 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 nonprofit lost a 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 common law right 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. 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.

Conclusion

The University of Denver ECT Study finds that these bodies can enhance access to environmental justice for the impoverished, whose health, livelihood, living conditions, and future may be most impacted by development and who may be least able to protect themselves, their families, and their communities. Those ECTs that appear to have had the largest positive impact in this arena do

so by incorporating the factors of open standing, specialized prosecutors, innovative treatment of experts, ADR, case management, traveling courts, simplified rules of procedure, and a focus on reduction of litigants' costs.