

AN INSTITUTE FOR ENHANCING EFFECTIVE ENVIRONMENTAL ADJUDICATION

*Sheila Abed de Zavala, Antonio Herman Benjamin, Hilario G. Davide Jr., Alexandra Dunn, Parvez Hassan, Donald W. Kaniaru, Richard Macrory, Brian John Preston, Nicholas A. Robinson and Merideth Wright**

The first decade of the twenty-first century has witnessed escalating environmental degradation and a burgeoning human population.¹

*Dr. Sheila Abed de Zavala is Chair of the International Union for Conservation and Nature (IUCN) Commission on Environmental Law; H.E. Antonio Herman Benjamin is a Supreme Court Judge in Brazil; Prof. H.E. Hilario G. Davide Jr. is former Chief Justice of the Supreme Court of the Philippines and former Philippine Ambassador to the United Nations; Alexandra Dunn is the Executive Director of the Association of State and Interstate Water Pollution Control Administrators; Dr. Parvez Hassan is former Chair of the IUCN Commission on Environmental Law; Donald W. Kaniaru is Chairman of the Environment Tribunal of Kenya; Prof. Richard Macrory is Director of the Centre for Law and the Environment at the Faculty of Laws, University College London; Hon. Brian John Preston is Chief Judge of the Land and Environment Court of the State of New South Wales (Australia); Prof. Nicholas A. Robinson is former Chair of the IUCN Commission on Environmental Law; Hon. Merideth Wright is Judge of the Environmental Court of the State of Vermont (USA).

1. See generally Intergovernmental Panel on Climate Change, *4th Assessment Report, Climate Change 2007: Synthesis Report* (2007).

Yet, this decade also boasts the worldwide emergence of new judicial systems of environmental courts and tribunals.² No treaty or international agreement mandates the establishment of these many new environmental courts and tribunals around the world. Rather, independently and successively, judicial authorities in all regions have determined that without providing more specialized environmental judicial authority, environmental legislation is too randomly applied and enforced. We concur.

The remedial objectives of environmental legislation require an understanding of ecology and the environmental sciences, and demand an openness to admit to judgment a range of hitherto unfamiliar claims, for instance those concerning disrupted food chains, bioaccumulation of chemicals, species threatened with extinction, pollution of water bodies shared in common by many persons, and degradation of sacred sites and sites of exceptionally beautiful cultural and natural heritage. Not all environmental courts today have the competence to hear the full range of pressing environmental claims, but through comparative legal analysis of judicial experience in different nations, trends toward a common set of competencies, procedures and remedies can be discerned.³

The articles in this issue of the *Journal of Court Innovation* are singularly important, for they illuminate several aspects of environmental judicial practices that recur in courts around the world. Counter-intuitive though it may seem, it is not surprising that the growing volume of environmental adjudications worldwide is giving rise to specialized environmental courts and tribunals. First, ever since the 1972 United Nations (U.N.) Stockholm Conference on the Human Environment, nations have been enacting environmental legislation, promulgating the regulations to implement the legislation, and

2. See U.N. ENVIRONMENT PROGRAMME, GLOBAL JUDGES PROGRAMME (2005), available at www.unep.org/law/PDF/UNEP_Global_Judges_Prog_New.pdf; GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

3. See, e.g., JUDGES AND THE RULE OF LAW: CREATING THE LINKS: ENVIRONMENT, HUMAN RIGHTS AND POVERTY, IUCN ENVIRONMENTAL POLICY AND LAW PAPER 60 (Thomas Greiber ed., 2006) (based on the Commission on Environmental Law's Symposium at the 4th World Conservation Congress in Bangkok, Thailand, 2004.)

establishing environmental ministries and agencies to apply and enforce these norms. Chapter eight of “Agenda 21,” adopted at the U.N. Conference on Environment and Development (UNCED) in Rio de Janeiro, called on all nations to elaborate and complete their environmental statutes;⁴ many nations adopted their own local “Agenda 21s,” and more than eighty nations have amended their constitutions to provide a right to the environment.⁵ Furthermore, more than 300 environmental treaties and multilateral environmental agreements (MEAs) are now in force around the world, and nations are implementing their provisions.⁶ Inevitably, and appropriately, many of the new legal questions associated with this new volume of legislation require judicial interpretation or enforcement. As a result, in many nations the field of criminal environmental law has emerged, as has administrative environmental law.

The sharing of judicial experience as a means to enhance the efficacy of environmental law began in Africa, with several judicial seminars and conferences held in the late 1980s and early 1990s with the assistance of the U.N. Environment Programme (UNEP).⁷ Successive seminars for judges in Africa were conducted by the Environmental Law Institute (ELI),⁸ and also in Latin America,⁹ the

4. U. N., AGENDA 21: EARTH SUMMIT – THE UNITED NATIONS PROGRAMME OF ACTION FROM RIO ch. 8(B) (1993) (Resulting from U.N. Conference on Environment and Development (UNCED), Rio de Janeiro, Braz., June 3-14, 1992) (“To effectively integrate environment and development in the policies and practices of each country, it is essential to develop and implement integrated, enforceable and effective laws and regulations that are based upon sound social, ecological, economic and scientific principles.”) Agenda 21 “reflects a global consensus and political commitment at the highest level on development and environment cooperation. Its successful implementation is first and foremost the responsibility of Governments. National strategies, plans, policies, and processes are crucial in achieving this.” *Id.* at ¶ 1.3.

5. The latest such instrument is Kenya’s constitution, promulgated on August 27, 2010. See CONSTITUTION (2010) (Kenya).

6. See generally U.N. ENVIRONMENT PROGRAMME, TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW (Lal Kurukulasuriya & Nicholas A. Robinson, eds., 2006).

7. U.N. Environment Programme, Environmental Law Program, Regional Judges Symposia, http://www.unep.org/law/Programme_work/Judges_programme_e/judges_prog_regional.asp (last visited July 19, 2010).

8. See Environmental Law Institute, Africa Program: Governance, http://www.eli.org/Program_Areas/africa_governance_access.cfm#judicial (last visited July 19, 2010).

9. See Environmental Law Institute, Innovation and Governance, Training, http://www.eli.org/program_areas/innovation_governance_training.cfm (last visited July 19, 2010).

Caribbean,¹⁰ and India.¹¹ The region then with the most advanced body of environmental case law, South Asia, held a conference under the auspices of the South Asia Cooperative Environment Programme in Sri Lanka in 1997,¹² followed by one for South East Asia in Manila, Philippines, hosted by the Philippine Supreme Court in 1999,¹³ and one in Bangkok, Thailand, in 2003.¹⁴ Conferences on the role of the judiciary in environmental law followed in Latin America (with the Institute of Law for a Green Planet and the Fundación Ambiente y Recursos Naturales, in Argentina, 2000). The Caribbean (Jamaica, in 2001) and the Pacific (with University of Auckland, 2002) followed, ably organized by Lal Kurukulasuriya of UNEP. The Commission on Environmental Law, then chaired by Professor Nicholas A. Robinson, cosponsored a judicial symposium organized by the International Court of the Environment Foundation in Rome in 2003.¹⁵ The IUCN organized symposia for Western Europe in London in 2002,¹⁶ for courts of the Arab States in Kuwait in 2000 (with Kuwait University and the Arab Regional Centre for Environmental Law), for Eastern Europe and Eurasia in L'viv, Ukraine, in 2003 (with the University of L'viv Faculty of Law),¹⁷ and for North America, in cooperation with the NAFTA Commission on Environmental Cooperation (CEC) and UNEP, in New York in 2004 (with Pace University),¹⁸ and Mexico City in 2005 (with the Inter-American University). The Supreme Judicial Court of Egypt convened a further consultation among Arab nations

10. *See id.*

11. *See id.*

12. U.N. Environment Programme, Environmental Law Programme, Regional Judges' Symposia, http://www.unep.org/law/Programme_work/Judges_programme/judges_prog_regional.asp (last visited July 12, 2010).

13. *Id.*

14. *See also* U.N. Environment Programme, Environmental Law Programme, Regional Judges Symposia, http://www.unep.org/law/Programme_work/Judges_programme/judges_prog_regional.asp (last visited July 12, 2010).

15. International Court of the Environment Foundation, Programme of the Rome Symposium, http://www.icef-court.org/base.asp?co_id=44 (last visited July 19, 2010).

16. International Union for the Conservation of Nature, *Environmental Law Programme 2002: The Year in Review 12*, available at cmsdata.iucn.org/downloads/iucn_elp_year_in_review_2002.pdf.

17. International Union for the Conservation of Nature, *Environmental Law Programme 2003: The Year in Review 9*, available at cmsdata.iucn.org/downloads/elp03_iucnelprep_final2003.pdf.

18. National Judicial Institute, *Symposium: The Judiciary and Environmental Law*, available at weavingaweb.org/pdffdocuments/DEV09_JudiciarySymposium.pdf.

in Cairo (2004), and the Cour de Cassation of France convened a conference for courts from the Francophone nations (2008).

The evident progeny of these many regional judicial consultations, symposia and seminars, in which UNEP, IUCN, and ELI have been the major players, is the rapid emergence of more than 350 environmental courts and tribunals sitting in different nations around the world today.¹⁹ Brazil has just established four new federal environmental courts for the region of the Amazon,²⁰ and, as Professor Richard Macrory reports in this issue of the *Journal of Court Innovation*, England and Wales have established a specialized environmental tribunal system in 2010.²¹ India has also enacted legislation to establish new nationwide green courts.²²

The legal traditions vary across different regions, yet each of these regional judicial gatherings shared some common characteristics. For instance, the courts confront similar problems, such as pollution from misused technologies, affecting air, water, flora, fauna and public health. Nations have the same sorts of environmental conditions, just as they have similar public health concerns. Several recurring themes also have emerged. First, judges rarely have an opportunity to meet and confer across nations; their modest budgets are national or sub-national in scope and do not provide for travel outside their jurisdictions. Second, there are few, if any, judicial publications or institutions that exist to facilitate sharing environmental law judicial practices across nations. Third, upon learning about effective innovations in environmental adjudication in one nation, the judges could see for themselves ways to adapt and adjust the practice for possible use in their nations; there is an ample legal foundation in each nation's environmental legislation to make such comparisons germane. Fourth, judges agreed that their knowing the fundamentals of ecology and environmental sciences facilitated

19. The Access Initiative, *Press from Greening Justice: Creating and Improving Environmental Courts and Tribunals*, <http://www.accessinitiative.org/press/2010/04/press-greening-justice-creating-and-improving-environmental-courts-and-tribunals> (last visited July 19, 2010).

20. International Court of the Environment Foundation, *Final Recommendations from the ICEF International Conference on Global Environmental Governance* (2010), available at <http://www.icef-court.org/uploads/file/Final%20Recommendations.pdf>.

21. Richard Macrory, *Environmental Courts and Tribunals in England and Wales: A Tentative New Dawn*, 3 J. CT. INNOVATION 61 (2010).

22. The National Green Tribunal Bill, No. 63-C of 2009; India Code (2010).

environmental adjudication, in terms of understanding the issues at contest, saving time in deliberation, and fashioning effective order; they recognized a need for access to continuing judicial education about environmental sciences. Fifth, the judges called for expanding environmental law courses in law schools, noting a deficit in knowledge about environmental law among the lawyers in most regions. Sixth, because vested economic interests often wrest short-term profits from averting environmental controls, the role of the courts needs to be secured from political or economic pressures. Seventh, broad access to justice and liberal standing provisions are essential for public interest environmental litigation; the door to the courthouse must be open. Eighth, there is a need for special masters, site inspections by the courts, or supplemental fact-finding to ensure that the courts fully understand all aspects of environmental cases, and to ensure that court orders are being implemented.

As a result of the many regional symposia and seminars of judges, UNEP convened the Global Judges Symposium on Sustainable Development and the Role of Law in Johannesburg, South Africa (August 18-20, 2002).²³ The symposium enjoyed the participation of Chief Justice Hilario G. Davide Jr. and Donald Kaniaru, along with UNEP, and featured addresses by both Dr. Parvez Hassan and Professor Nicholas A. Robinson on behalf of the IUCN Commission on Environmental Law. The Global Judges Symposium adopted "The Johannesburg Principles on the Role of Law and Sustainable Development,"²⁴ and Chief Justice of South Africa, Hon. Arthur Chaskalson, shared the recommendations with the U.N. World Summit on Sustainable Development, and later the UNEP Governing Council.²⁵ UNEP subsequently published the *UNEP Judges Handbook of Environmental Law*,²⁶ supplementing both its earlier publication, *Compendium of Summaries of Judicial Decisions in Environment-Related*

23. U. N. Environment Programme, Global Judges Symposium on Sustainable Development and the Role of Law, http://www.unep.org/law/Symposium/Judges_symposium.htm (last visited July 19, 2010).

24. JOHANNESBURG PRINCIPLES ON THE ROLE OF LAW AND SUSTAINABLE DEVELOPMENT, Global Judges Symposium, Aug. 18-20, 2002, Report, Vol. 1 at 14 (UNEP 2002), available at <http://www.unep.org/dpdl/symposium/Principles.html>.

25. U.N. Environment Programme, Governing Council Decision 22/17/II A (2003).

26. DINAH SHELTON & ALEXANDRE KISS, UNEP JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW (2005).

Cases,²⁷ and the several volumes of cases that Prof. Charles O. Okidi (University of Nairobi) had earlier compiled for UNEP. IUCN convened a symposium at the World Conservation Congress (WCC) in Bangkok in 2004, and the WCC adopted a resolution, which encouraged further cooperation to assist in the effectiveness of environmental courts and tribunals.²⁸ IUCN established a judicial portal, through its Environmental Law Programme in Bonn, to permit access to environmental decisions posted from around the world; the portal was re-launched in Brasilia in 2009.²⁹ The Judges Ad Hoc Meeting, convened in Nairobi by UNEP in 2003, “called upon UNEP and IUCN to further develop the judicial portal for the purpose of collecting and making available widely environment-related judgments, and providing an opportunity for interaction and sharing of experiences among judges worldwide.”³⁰ UNEP also compiled recommendations from nine regional needs assessments, all of which uniformly encouraged continuing environmental law services for the judiciary.³¹ In the European Union, a European Forum of Judges for the Environment was established in 2004.³² In the cone of South America, annual conferences of the judges of Mercosur have been held on environmental law. A draft statute for an Arab Judges Union for the Protection of the Environment was drafted in 2004, but awaits further cooperative measures for its adoption.³³

ELI and other organizations continued to provide judicial capacity building seminars and courses around the world. Despite their value, the rapid growth of environmental courts and tribunals around the world has required a re-evaluation of these initial efforts to serve environmental adjudication. As more advanced national

27. U.N. ENVIRONMENT PROGRAMME, COMPENDIUM OF SUMMARIES OF JUDICIAL DECISIONS IN ENVIRONMENT-RELATED CASES (2006).

28. IUCN World Conservation Congress, Res. 3.083 (2004).

29. See ECOLEX, <http://www.ecolex.org/start.php> (last visited Nov. 23, 2010) (this database began as “ECOLEX,” a collaborative partnership of IUCN, UNEP, and the U.N. Food & Agricultural Organization.). See also IUCN – ECOLEX, http://www.iucn.org/about/work/programmes/environmental_law/elp_resources/elp_res_tools/elp_res_tools_ecolex/ (last visited Nov. 23, 2010).

30. U.N. ENVIRONMENT PROGRAMME, GLOBAL JUDGES PROGRAMME 20 (2005), available at www.unep.org/law/PDF/UNEP_Global_Judges_Prog_New.pdf.

31. See *id.* at 32-58.

32. Statute of the European Union Forum of Judges for the Environment, (adopted at the meeting for the Establishment of the EU Judges Forum for the Environment, European Court of Justice, Luxembourg, April 26, 2004).

33. U.N. ENVIRONMENT PROGRAMME, GLOBAL JUDGES PROGRAMME 66 (2005), available at www.unep.org/law/PDF/UNEP_Global_Judges_Prog_New.pdf.

judicial environmental practices emerge, more sophisticated and specialized services are needed to synthesize the new developments, explain and disseminate them, and convene judges to evaluate and enhance them. Neither UNEP nor IUCN presently have the capacity to serve these new demands.

To continue the support for environmental courts and tribunals, the mantle of capacity-building needs to shift from general inter-governmental bodies, such as IUCN or UNEP, to more specialized judicial bodies, which have independence and autonomy within the judicial branch of government. The many national judicial institutes around the world have the experience and capacity to serve the new environmental courts and tribunals. Hitherto, few have done so, in part because the demand had not yet emerged. While that demand has since manifested itself, existing judicial institutes generally lack in one or more of three key areas: (a) partnerships with environmental law experts (such as university professors or members of the IUCN Commission on Environmental Law) and environmental forensic scientists, who can bring knowledge of environmental law to the judicial institutes and, through them, to the judges; (b) a platform for inter-regional and international cooperation with other judicial institutes, enabling them to collaboratively serve the needs of courts regionally and internationally; and (c) the supplemental financial resources to provide transportation to assemble judges on specialized topics regionally at central locations, such as a host judicial institute.

The new International Judicial Institute for Environmental Adjudication (IJIEA) is designed to meet these three needs. IJIEA is a collaborative partnership of national judicial institutes, rather than a new or competing institution. IJIEA is not designed to be, or become, a large institution, but rather to facilitate the cooperation of courts and their own judicial institutes nationally and regionally, and to facilitate the extension of services to nations and states that do not yet have judicial institutes, to serve their growing needs for more effective environmental adjudication.

The Pace University School of Law has sponsored regional judicial symposia for federal and state judges in Mexico, Canada, and the United States with the New York State Judicial Institute (NYSJI), and will be leveraging this extensive experience to facilitate the initiatives of IJIEA. Both Pace and the NYSJI are pleased to have extended this issue of their *Journal of Court Innovation* to address

relevant questions and issues specific to environmental adjudication. The IUCN Commission on Environmental Law has extended IUCN's tradition of environmental judicial programs to include cooperation with Pace to launch IJIEA. IJIEA is constituted through memoranda of agreement by cooperating judicial institutes, and, on their behalf, is currently seeking funds to meet the expanding needs for building the capacity of courts to effectively address environmental law issues.

Ultimately, the IJIEA and the new environmental courts and tribunals serve to strengthen the rule of law around the world, while bringing environmental laws into force and effect. Applying and observing environmental law is not a mere amenity. As the "Declaration of Johannesburg at the World Summit on Sustainable Development" states, environmental protection is a pillar of sustainable development.³⁴ Without potable water, clean air, adequate sanitary services, intact forest watersheds and wetlands to recharge ground water, biodiversity whose ecosystems' services can provide pollination for crops or contain zoonotic diseases, and parklands, the needs of people and nature together would not be met. Environmental laws for adaptive coastal zone management are enabling states to cope with rising sea levels and to resettle peoples displaced by climate change. Development of eco-cities and environmental urban land use is essential to sustaining livable cities as the world's population grows, adding two billion more humans to the planet. Environmental courts and tribunals also can give a forum to hear and learn from indigenous peoples, as the U.N. General Assembly's Permanent Forum on Indigenous Issues annually makes clear;³⁵ for instance, the Gayanashagowa,³⁶ the Great Law of Peace of the Iroquois Nations, should be heard as law and environmental courts can be open to recognizing such fundamental environmental customary law.³⁷ Procedures to facilitate doing so are emerging; for

34. World Summit on Sustainable Development, Aug. 26-Sept. 4, 2002, *Report on the World Summit on Sustainable Development*, U.N. Doc. A/CONF.199/20 (Sept. 4, 2002).

35. U.N. Declaration on the Rights of Indigenous Peoples, <http://www.un.org/esa/socdev/unpfii/en/drip.html> (last visited July 19, 2010).

36. See Iroquois Nations' Constitution – Gayanashagowa, INDIGENOUS PEOPLE.NET, <http://www.indigenouspeople.net/iroqcon.htm> (last visited Oct. 20, 2010).

37. See, e.g., Preliminary Response of the Onondaga Nation to the Organization of American States Questionnaire Regarding the United States Legal System with Regard to the Land Rights of Indigenous Nations and Peoples (September 21, 2009), Special Rapporteurship on the Rights of Indigenous Peoples,

example, beyond its role of enhancing consideration of “traditional” environmental law matters, the new Writ of *Kalikasan* (Nature) in the Philippines³⁸ provides an innovative, adaptable context in which indigenous customary laws regarding nature may come to be recognized.

Without the rule of law, there can be neither sustainable development nor environmental quality adequate for healthful living conditions. Without a functioning public justice system, open to all, human rights become ephemeral and environmental degradation accelerates. The judiciary is uniquely equipped to secure public and shared rights, to safeguard individual environmental rights and to hold accountable the authorities whose primary responsibility is environmental protection. The new environmental courts and tribunals can succeed over time, case by case, but to succeed they will need the help of the traditional courts, lawyers, universities, foundations, companies, environmental governmental agencies, non-governmental organizations, and the general public. Courts are essential to delivering justice, yet they have less financial and other resources than do the legislative and executive branches of government. For the environmental courts and tribunals to succeed, all those who support the rule of law will need to become “friends of these courts.”

We welcome the emergence of the environmental courts and tribunals and the still embryonic IJIEA, and look forward to a robust debate about this issue of the *Journal of Court Innovation*. We hope that these articles will give rise to further judicial scholarship and help facilitate the expansion of environmental courts and tribunals around the world.

Inter-American Commission on Human Rights, OAS, Washington, D.C.

38. Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC (April 13, 2010) (Philippines).