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## Ensuring Access to Justice Through Environmental Courts

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## INTRODUCTION

### Ensuring Access to Justice Through Environmental Courts

NICHOLAS A. ROBINSON\*

#### I. INTRODUCTION

One popular use of the term “grass roots” denotes social movements emerging spontaneously at the local level. These movements draw their primary sustenance from being grounded locally, directly serving constituencies with which they are associated, and depending little on higher orders of social decision-making. When applied to the world-wide emergence of environmental courts and tribunals during the past score of years, “grass roots” seems apt. More than 350 environmental courts and tribunals have been established in more than forty-one countries. The exact numbers remain to be determined, since there is no census of these courts and no international organization charged with sustaining the role of the judiciary in each nation. Most civic organizations concerned with sustainable development focus on national or local issues, and they too have

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largely ignored the extraordinary growth of local courts charged with ensuring observance of environmental laws. Nonetheless, by establishing such courts independently and repeatedly, nations are acknowledging that they have a duty to provide access to justice for environmental decision-making. This duty is grounded in the mandates of *justice*, as a general principle of international law – the state obligation of providing access to justice through environmental adjudication has become a customary norm of international law.

The symposium provided here by the *Pace Environmental Law Review* explores the phenomenon of environmental adjudication and the roles of environmental courts and tribunals.<sup>1</sup> These analyses offer unique insights into how access to environmental justice can be enhanced and professionalized. The symposium inaugurates the scholarly and professional study of environmental courts and tribunals, and promises to launch a new chapter in environmental legal scholarship.<sup>2</sup> This issue of the *Pace Environmental Law Review* builds upon a related set of articles on “The Role of the Environmental Judiciary,” published jointly by Pace Law School and the New York State Judicial Institute in their *Journal of Court Innovation*.<sup>3</sup> Both publications grew out of Pace Law School’s conference examining environmental adjudication, which brought judges and scholars from around the world to the New York State Judicial Institute in April of 2011.<sup>4</sup> Together, these symposia provide empirical confirmation about how States recognize and observe their duty to provide access to justice. Their articles independently corroborate the analysis of other comparative reviews of

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1. Symposium, *International Symposium on Environmental Courts & Tribunals*, Pace Univ. Sch. Of L. (2011) (transcript available at [www.pace.edu/school-of-law/international-judicial-institute-environmental-adjudication-ijiea](http://www.pace.edu/school-of-law/international-judicial-institute-environmental-adjudication-ijiea)) [hereinafter *International Symposium on Environmental Courts & Tribunals*].

2. *Id.*

3. 3 J. CT. INNOVATION 1 (2010), available at [http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI\\_Winter10a.pdf](http://www.courts.state.ny.us/court-innovation/Winter-2010/JCI_Winter10a.pdf).

4. *International Symposium on Environmental Courts & Tribunals*, *supra* note 1.

environmental adjudication.<sup>5</sup> The import of the articles published in both scholarly publications is not so much the substance of the actions taken, but a demonstration of the worldwide customary acknowledgement that States are duty-bound to provide judicial access for environmental law matters.

Customary law emerges through oft-repeated decisions to adhere to norms because they are deemed to be just.<sup>6</sup> Custom is not the result of formal written agreements; unlike the more concrete observation of statutes or treaties,<sup>7</sup> there is no recourse to a single text to verify the legality of a customary practice. Custom can reflect observance of fundamental principles or time-honored practices. Internationally, custom builds incrementally over time, acquiring legitimacy as more and more jurisdictions accede to the custom and acknowledge its binding character. The practice of States to provide a judicial forum for environmental adjudication is today a rule of constant and uniform usage; this State practice exists because States acknowledge their legal requirement to do so.<sup>8</sup>

Access to justice to vindicate environmental legal rights has become a customary norm, which was restated as Principle 10 of the Rio Declaration on Environment and Development.<sup>9</sup> In some

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5. See, e.g., *THE ROLE OF THE JUDICIARY IN ENVIRONMENTAL GOVERNANCE: COMPARATIVE PERSPECTIVES* (Louis J. Kotzé & Alexander R. Paterson eds., 2009) [hereinafter *THE ROLE OF THE JUDICIARY*].

6. *Definition of key terms used in the UN Treaty Collection*, UNITED NATIONS, [http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1\\_en.xml](http://treaties.un.org/Pages/Overview.aspx?path=overview/definition/page1_en.xml) (last visited March 7, 2012).

7. For example, in line with the agreement that each State Party to the Convention on the International Trade in Endangered Species (CITES) shall have a scientific authority, the Washington Convention of 1973 provides that each State Party must have a scientific authority to rule on the export or import of endangered species, and national statutes or regulations to set up such authority. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 14,537, available at <http://treaties.un.org/pages/showDetails.aspx?objid=0800000280105383>.

8. See *TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW* 9 (Nicholas A. Robinson & Lal Kurukulasuriya eds., 2006).

9. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*]. Principle 10 of the Rio Declaration provides:

regions, such as the European Union, this legal obligation of States to provide access to justice is expressly reaffirmed by treaty.<sup>10</sup> In others, the custom of ensuring access to courts for environmental adjudication is evidenced by individual national, state, or provincial decisions to establish environmental courts and tribunals, and procedures to ensure public access to justice for environmental claims.<sup>11</sup>

Declaring that access to justice for environmental claims is a customary international law norm carries consequences. States that deny access to justice for environmental claims violate this customary duty, and are thus in violation of international law. This is the case whether the State deliberately prevents judicial recourse for environmental claims, does so because the rule of law is so lacking that there is no effective judicial recourse, or does so obliquely, for example where the court itself may prevent access to justice by imposing barriers.<sup>12</sup> It may be argued that strict rules for judicial standing – narrow *locus standi* provisions – violate the customary duty under international law to provide access to environmental justice.

Acknowledging access to environmental justice as a customary duty also carries benefits.<sup>13</sup> Substantively, courts can

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Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. *Id.*

10. Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447, available at <http://treaties.un.org/doc/publication/UNTS/Volume%202161/v2161.pdf>.

11. See Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191 (2001).

12. See Patricia Kameri-Mbote, *Towards Greater Access To Justice in Environmental Disputes in Kenya: Opportunities for Intervention* 9 (Int'l Env'tl L. Res. Centre, Working Paper No. 2005-1, 2005).

13. See, e.g., THE ROLE OF THE JUDICIARY IN THE IMPLEMENTATION AND ENFORCEMENT OF ENVIRONMENTAL LAW (Amedeo Postiglione ed., 2008)

enforce and ensure observance of the environmental laws, thereby securing the remedial objectives of environmental statutes and norms. Without such adjudication, the rule of law is weakened. As environmental protections are lost, the quality of the environment deteriorates, and the public and nature are harmed. Procedurally, there are also benefits. Advocates for environmental remedies can press for recourse in the courts, and acknowledging the customary duty affords litigants significant authority to withstand challenges to their standing or to the juridical character of environmental claims.<sup>14</sup> Where a State fails to provide access to environmental justice because it lacks the capacity or suffers from insufficient judicial procedures, international assistance should be provided for establishing systems for access. The general principle of international law that States must cooperate affords a justification for providing such assistance.<sup>15</sup>

It has become evident throughout the world that access to environmental justice is essential to averting environmental degradation. It is further becoming apparent that sustainable development cannot be realized without ensuring that the “environmental protection pillar” is strengthened.<sup>16</sup> Inadequate

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(surveying the positive European and comparative law judicial experiences since 1992).

14. See KAREN MORROW, *The Courts and Public Participation in Environmental Decision-Making in ENVIRONMENTAL LAW AND SUSTAINABILITY AFTER RIO 138-57* (J. Benidickson et al. eds., 2011) (discussing the role that the duty to ensure access to environmental justice played in the United Kingdom in moving courts toward more liberal standing rules).

15. For example, the Environmental Law Institute (ELI) has been providing continuing judicial environmental legal education and capacity-building for environmental adjudication for some twenty years. See ENVIRONMENTAL LAW INSTITUTE, <http://www.eli.org> (last visited Feb. 29, 2012). In Brazil, many Judicial Institutes provide capacity-building to equip their courts for handling environmental adjudication. See, e.g., ESCOLA NACIONAL DE FORMACAO E APERFEICOAMENTO DE MAGISTRADOS DO TRABALHO, [www.enamat.gov.br](http://www.enamat.gov.br) (last visited Feb. 29, 2012). It must be acknowledged that many judges never had the opportunity to study environmental law in their legal education, since the emergence of the field of environmental law is relatively recent. See generally, Jeffrey G. Miller, *A Generational History of Environmental Law and Its Grand Themes: A Near Decade of Garrison Lectures* (Pace Univ. Sch. of L. Faculty Publications, Working Paper No. 245, 2002).

16. The Johannesburg Declaration of 2002 provided that sustainable development rested on three pillars. United Nations World Summit,

access is not just a denial of some plaintiffs' narrow interests; rather, it results in widespread ecological and social degradation.<sup>17</sup> A growing world-wide awareness of this reality has stimulated the emergence of the customary practice of access to justice.<sup>18</sup>

Publications such as the Millennium Ecosystem Assessment,<sup>19</sup> the several assessments of the Intergovernmental Panel on Climate Change,<sup>20</sup> and reports by the European Environment Agency,<sup>21</sup> assemble empirical studies and data confirming that States have failed to halt the deterioration of environmental quality across most regions of the earth. In response, governments are recognizing that access to environmental justice is fundamental to securing the observance of environmental norms. One recent survey has reported that more than 350 independent courts now exist world-wide to enforce environmental law.<sup>22</sup>

Since States are not required by treaty to establish these courts, the "grass roots" decisions at national or sub-national levels to create them reaffirms the rule of law, and indicates State practice acknowledging the duty to ensure access to environmental justice. These new courts and tribunals serve growing local demands for effective environmental protection as

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Johannesburg, S. Afr., Aug. 24-Sept. 4, 2002, Johannesburg Declaration on Sustainable Development, U.N. Doc. A/CONF.199/20 (Sept. 4, 2002), *available at* [http://www.johannesburgsummit.org/html/documents/summit\\_docs/131302\\_wssd\\_report\\_reissued.pdf](http://www.johannesburgsummit.org/html/documents/summit_docs/131302_wssd_report_reissued.pdf) [hereinafter Johannesburg Declaration on Sustainable Development].

17. Kameri-Mbote, *supra* note 12.

18. Kalas, *supra* note 11.

19. *See Guide to the Millennium Assessment Reports*, MILLENNIUM ECOSYSTEM ASSESSMENT, <http://www.maweb.org/en/index.aspx> (last visited Feb. 29, 2012).

20. *See Reports*, IPCC, [http://www.ipcc.ch/publications\\_and\\_data/publications\\_and\\_data\\_reports.shtml](http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml) (last visited Feb. 29, 2012).

21. The European Environment Agency in Copenhagen assesses ambient environmental conditions and adherence to environmental standards across the European Union. *See Publications*, EUR. ENV'T AGENCY, [http://www.eea.europa.eu/publications#%c9=all&c14=&c12=&c7=en&c11=5&b\\_start=0](http://www.eea.europa.eu/publications#%c9=all&c14=&c12=&c7=en&c11=5&b_start=0) (last visited Feb. 29, 2012).

22. GEORGE (ROCK) PRING AND CATHERINE (KITTY) PRING, WORLD RES. INST., GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS, at v (2009).

environmental problems are compounded, not least with the migrations and expansion of the human population.<sup>23</sup> It is noteworthy that both China and India, with their growing populations, have acted in the past five years to establish and expand their systems of environmental courts and tribunals.<sup>24</sup> The needs of a growing human population put incremental stresses on natural systems, giving rise, in turn, to a larger volume of environmental conflicts.<sup>25</sup> Orderly resolution of these conflicts and securing protection and restoration of environmental quality is seen as increasingly important. Throughout the coming years, courts will become increasingly more valuable to societies world-wide for resolving environmental conflicts and enforcing environmental safeguards.

Global support for sustainable development is premised on strengthening the foundations for Principle 10 of the Rio Declaration and ensuring effective access to environmental justice.<sup>26</sup> Many of the new environmental courts, such as those in China, do not yet have the experience with fashioning or effectuating environmental remedies of older courts, such as the court in New South Wales. There is an urgent need to employ comparative law techniques to exchange judicial experience in order to ensure that all environmental courts and tribunals can effectively serve the objectives of sustainable development. Where the rule of law is weak, there is a correlative need to

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23. In May of 2011, the United Nations Secretariat's Population Division revised its estimates on population growth, indicating that there will be over 9 billion people by mid-century, increasing to over 10 billion by 2100, up from nearly 7 billion expected by the end of 2011. See Press Release, U.N. Dep't of Public Info., Press Conference to Launch 'World Population Prospects: The 2010 Revision' (May 3, 2011).

24. See, e.g., The National Green Tribunal Act, No. 19 of 2010, India Code (2010) vol. 25, available at <http://moef.nic.in/downloads/public-information/NGT-fin.pdf> (establishing a Tribunal to expedite environmental justice); see also *China resolves pollution case, avoids suit*, WASH. TIMES, Sept. 20, 2009, <http://www.washingtontimes.com/news/2009/sep/02/china-resolves-pollution-case-avoids-suit/> (discussing the Qingzhen Municipal People's Court, an environmental court established to face "growing public concern about the health effects of widespread pollution stemming from China's rapid economic growth").

25. See, e.g., UN POPULATION INFORMATION NETWORK, POPULATION AND LAND DEGRADATION (1995), available at <http://www.un.org/popin/fao/land/land.html>.

26. See *Rio Declaration*, supra note 9, at Principle 10.



strengthen the procedures and institutions that sustain a robust rule of law tradition. This will require international cooperation, which thus far is slow in emerging. International support for national judicial capacity-building will not come easily, since States' foreign ministries and international aid agencies generally do not include judicial capacity-building in their programs.<sup>27</sup> If avowed priorities about importance of the rule of law and sustainable development are to be realized, it is past time for establishment of an international judicial institute to build capacity for effective environmental adjudication.

The rationale for establishing an international judicial institute or center to further interstate cooperation in building national capacity to ensure access to justice for environmental adjudication needs to be examined and better understood. This article offers a preliminary statement of the case for this new dimension of cooperation in international law.

## II.      **LIVING IN A BIOSPHERE UNDER HUMAN SIEGE**

For most of human history, living conditions around the world were conducive to stable agriculture, trade, and industrialization. In the twentieth century, the rates of industrialization, consumption of resources, and human population growth escalated, impacting all of Earth's natural systems. Human behavior incrementally produced degradation in the planet's natural resources, and despite remedial measures,

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27. The UN Environment Programme (UNEP) ended its capacity-building symposia in 2006, and the World Bank has provided inconsistent and inconsequential support for environmental judicial capacity-building. Only the Asian Development Bank has provided consistent programming for nations to build the rule of law and environmental adjudication, but its programs are not financed well enough to provide for sustained and widespread capacity-building. See Nicholas A. Robinson, *Enforcing Environmental Norms: Diplomatic and Judicial Approaches*, 26 HASTINGS INT'L & COMP. L. REV. 387, 408 (2003). Patterns of international capacity-building for sustainable development have not yet included the courts or access to justice in their programs. See *Asian Judges: Green Courts and Tribunals, and Environmental Justice*, ASIAN DEVELOPMENT BANK, <http://beta.adb.org/publications/asian-judges-green-courts-and-tribunals-and-environmental-justice> (last visited Feb. 29, 2011); see also *International Symposium on Environmental Courts & Tribunals*, *supra* note 1.

the pace of change has continued to escalate. Governments acknowledge that stronger environmental law regimes are needed if “sustainable development” is to be attained.<sup>28</sup>

Curbing greenhouse gas emissions, coping with sea level rise, abating pollution, safeguarding biodiversity amidst growing species extinctions, and attaining sustainable development for Earth’s growing population: these objectives alone would tax the capacity of governments everywhere. Although most States have enacted environmental laws that address these issues, few enforce their laws adequately. While access to justice is recognized as an international principle, which is of critical importance to the rule of law and sustainable development,<sup>29</sup> in a number of nations where the rule of law itself is lacking, this principle has yet to be observed.

Incrementally, governments have begun to correct this deficiency and provide access to justice in environmental matters through their national or state environmental courts and tribunals. Virtually no international or United Nations support exists for these courts, however, and their national support remains minimal.<sup>30</sup> There is a need for exchange of experience,

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28. At the U.N. Conference on Economic Development in Rio de Janeiro, 130 countries signed the Convention on Climate Change and the Convention on Biodiversity, indicating a realization that stronger environmental regimes are needed to attain “sustainable development.” See STEPHANIE MEAKIN, THE RIO EARTH SUMMIT: SUMMARY OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT BP-317E (1992), available at <http://www.publications.gc.ca/collections/Collection-R/LoPBdP/BP/bp317-e.htm>.

29. See Rio Declaration, *supra* note 9.

30. Over the past two decades, the International Union for the Conservation of Nature and Natural Resources (IUCN), through its Commission on Environmental Law, and the United Nations Environment Programme (UNEP) have conducted judicial symposia to assess the effectiveness of and needs for enhancing national environmental adjudication. See, e.g., Symposium, *Global Judges Symposium on Sustainable Development and the Role of the Law*, UN Env’t Programme (2002) (transcript available at [http://www.unep.org/law/Symposium/Judges\\_symposium.htm](http://www.unep.org/law/Symposium/Judges_symposium.htm)) [hereinafter *Global Judges Symposium*]. The Asian Development Bank, too, has recently facilitated national measures to enhance the work of environmental tribunals. See KALA MULQUEENY & SHERIELYSSE BONIFACIO, ASIAN JUDGES: GREEN COURTS AND TRIBUNALS, AND ENVIRONMENTAL JUSTICE (2010), available at <http://beta.adb.org/sites/default/files/pub/2010/2010-Brief-01-Asian-Judges.pdf>. Some national governments, such as the United Kingdom through the British Commonwealth Office, and the United States through the EPA and the United States Agency for International

building the capacity for best judicial practices, and lending collective support for realizing the rule of law. Efficient means to provide continuing judicial education and programs to build judicial capacity can be found through collaboration among the national and sub-national judicial institutes and administrative offices of the courts in each region.

Following the meeting of judges convened at the New York State Judicial Institute in April 2011, the Environmental Law Institute (ELI), the International Union for Conservation of Nature (IUCN)'s Commission on Environmental Law, and Pace University's School of Law launched a series of international consultations to explore establishing such an institute or center. IUCN, together with the United Nations Environment Programme (UNEP), have convened meetings of national judges to compare environmental adjudication for nearly twenty years, and other groups such as ELI have taught environmental law to courts around the world during this same period. Therefore, there exists experience sufficient to provide the continuing environmental judicial education and capacity-building required.

Effective compliance with environmental laws entails both enforcement through courts and access to judicial remedies whenever laws are violated or damage occurs. Just as expectations exist around the world that States have an obligation to provide honest criminal law enforcement,<sup>31</sup> and measures of fair and just criminal procedure are congruent in most nations, so there is now an expectation that there should be accepted judicial practice for environmental laws across nations. This is not only because nations are expected to make honest efforts to ensure due process of law and the protection of fundamental human rights, but also because all of earth's natural systems are linked together in the biosphere, and if one nation

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Development (US AID) have provided bilateral programs for building judicial capacity in environmental decision-making. See, e.g., *Climate Change Funding*, USAID, [http://www.usaid.gov/our\\_work/environment/climate/funding.html](http://www.usaid.gov/our_work/environment/climate/funding.html) (last visited March 8, 2012).

31. See e.g., United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000); United Nations Convention Against Transnational Organized Crime, U.N. Doc A/55/383 (Sept. 29, 2003), available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-12.en.pdf>.

fails to protect the environment within its territory, inescapably the environment in other nations will be impaired.

Although most nations have enacted similar laws for conservation of natural resources, control of pollution, and measures to promote “sustainable” development, most nations lack a coherent and consistent approach to ensuring access to environmental justice. There are too few environmental courts today<sup>32</sup> to effectively serve the growing national and transnational demands for access to environmental justice.<sup>33</sup> It is not enough for national and provincial or state governments to set up environmental courts and tribunals. Incremental decisions by different countries’ courts are still merely ad hoc measures, which collectively will take too many decades to mature into fully effective world-wide practice. It took centuries to shape comparable criminal justice norms.<sup>34</sup> Protection of the biosphere’s environmental systems requires a rapid progression of environmental courts to match the pace and scale of environmental degradation.

The acceleration of environmental degradation requires more focused and deliberate establishment of “best practices” for environmental adjudication. The several UNEP and IUCN symposia on environmental adjudication over the past fifteen years have acknowledged the unmet need for a deliberate exchange of tested judicial procedures to ensure access to justice and frame of remedies. The Land & Environment Court of New South Wales has refined such procedures over three decades, and has offered its experiences for use world-wide. The newest environmental courts, such as those in China, will benefit from

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32. There are forty-one countries with environmental courts and tribunals. PRING, *supra* note 22. The forty-one countries contain 354 jurisdictions with environmental courts and tribunals. *Id.* One hundred and seventy of those courts and tribunals have been created since 2005. Gabriel Nelson, *Study: Last Decade Saw Boom in Environmental Courts, Tribunals*, N.Y. TIMES, Apr. 20, 2010, available at <http://www.nytimes.com/gwire/2010/04/20/20greenwire-study-last-decade-saw-boom-in-environmental-co-74053.html>.

33. See generally Kalas, *supra* note 11.

34. U.N. OFFICE ON DRUGS & CRIME, COMPENDIUM OF UNITED NATIONS STANDARDS AND NORMS ON CRIME PREVENTION AND CRIMINAL JUSTICE (2006), available at [http://www.unodc.org/pdf/compendium/compendium\\_2006.pdf](http://www.unodc.org/pdf/compendium/compendium_2006.pdf) (discussing the development of criminal norms over the last 60 years).

the opportunity to enhance their effectiveness through capacity-building; this will afford them recognition for their professionalism within each nation.<sup>35</sup> Continuing judicial education courses and symposia will build their capacity, and will engender support for an international cooperative program to build up the strength of, and respect for, environmental adjudication.

Judicial capacity-building is best undertaken by judges and for judges. Courts supervise their own continuing judicial education, and thereby ensure their independence, autonomy, and credibility with all parties that appear before the courts. Neither the legislative nor executive branches should provide this training, nor should international agencies such as UNEP, because they are instructed by foreign ministries which are guided by the executive branches of their governing nations. What is needed is a consortium of national or sub-national judicial institutes or court administrative offices. The courts could collaborate through an international institute for environmental adjudication, or an "International Environmental Judicial Institute." States could constitute this body via a treaty instrument, and a small secretariat would serve this autonomous network of the courts engaged in training other courts, in order to sustain judicial integrity and independence. Over time, national judicial institutes will incorporate environmental adjudication programs within their own programs.

### III. ENVIRONMENTAL COURTS EMERGE

Environmental law, as a distinct field of law, emerged worldwide following the 1972 UN Conference on the Human Environment at Stockholm. Fewer than a score of environmental ministries existed before 1972.<sup>36</sup> Building on the nineteenth

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35. Justice James Allsop, President of the New South Wales Court of Appeal, discussed the importance of professionalism in the practice and administration of law at the Australian Academy of Law's 2009 symposium series. Symposium, *Professionalism and Commercialism: Conflict or Harmony in Modern Legal Practice?*, Australian Acad. L. (2009) (transcript available at [http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/vwFiles/allso050509.pdf/\\$file/allso050509.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/allso050509.pdf/$file/allso050509.pdf)).

36. See PRING, *supra* note 22, at 11.

century laws for nature conservation, legislatures began to enact laws addressed to escalating problems of industrial pollution and natural resource degradation. By the 1992 UN Conference on Environment and Development at Rio de Janeiro, there was urgent consensus that environmental legislation and administrative implementation was required if the objectives of “sustainable development” were to be realized. Chapter 8 of the resulting Agenda 21 action plan called for building the capacity to structure national environmental protection systems.<sup>37</sup> In response, nations negotiated treaties and enacted substantial legislation addressing environmental challenges. IUCN’s Commission on Environmental Law established the first worldwide program whereby universities collaborated to provide environmental legal education via the IUCN Academy of Environmental Law (with a secretariat located at the University of Ottawa, Canada).<sup>38</sup> UNEP, together with the Environmental Law Programme of the IUCN, provided consulting services to assist nations in establishing and refining their environmental legislation.<sup>39</sup> National overseas development assistance programs did the same. Professional organizations, such as ELI, have also provided capacity-building programs for judges in environmental adjudication. By the 2002 UN World Summit on Sustainable Development at Johannesburg, much environmental protection had been accomplished within nations and globally, but the goal of “sustainable development” appeared still distant. Environmental laws remained unenforced, or weakly observed, in too many countries.

Over a two-decade period, from late 1985 to 2008, UNEP and IUCN convened a series of regional gatherings of judges to deliberate about how courts acknowledged and enforced environmental legislation. These meetings provided continuing judicial education about environmental law – a subject which

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37. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Agenda 21, U.N. Doc A/CONF.151/PC/100/Add. 1 (1992) [hereinafter Agenda 21].

38. See IUCN ACAD. OF ENVTL. LAW, <http://www.iucnael.org> (last visited Feb. 15, 2012).

39. See, e.g., *Advancing Connectivity Conservation through Law*, IUCN (Feb. 28, 2012), [http://www.iucn.org/about/work/programmes/environmental\\_law/?9282/Advancing-Connectivity-Conservation-through-Law](http://www.iucn.org/about/work/programmes/environmental_law/?9282/Advancing-Connectivity-Conservation-through-Law).

none of the judges had studied in their legal education since the field did not yet exist – and exchanged views about best practices in enforcing environmental laws. The programs also inventoried what judges in each region identified as the priorities for additional capacity-building measures to further the implementation, observance and enforcement of environmental law. By this time, many of the national laws were also being used to implement the several new multilateral environmental agreements (MEAs) such as those for protection of the stratospheric ozone layer, biodiversity, or climate change.

UNEP began conducting symposia for judges in East and Central Africa in the 1980s, with important environmental decisions compiled by Prof. Charles O. Okidi, serving on secondment to UNEP from the Law Faculty at the University of Kenya. Thereafter, judicial meetings were convened in South Asia on the initiative of Lal Kurukulasuriya of UNEP and the South Asian Cooperative Environmental Programme. South Asia was a fruitful venue since the Supreme Courts of India, Bangladesh, Pakistan, Nepal, and Sri Lanka had each established rulings which recognized a constitutional right to the environment and decisions enforcing such rights. Thereafter, the Supreme Court of the Philippines, under Chief Justice Hilario G. Davide, Jr., and UNEP convened a meeting for judges of the Supreme Courts of South-East Asia in Manila. IUCN subsequently convened meetings in Kuwait for the supreme courts of the Arab States, and in London (United Kingdom) and in L'viv (Ukraine) for western and eastern European national supreme courts, for which UNEP served as a cosponsor. France convened a subsequent meeting of European judges, which launched the European Conference of Environmental Judges. UNEP convened subsequent meetings in Argentina for South America, and IUCN did so in North America at Pace University School of Law in New York, cosponsored by both the New York State Judicial Institute and UNEP. In South America, Brazil subsequently convened symposia of the Supreme Courts of Mercosur, led among others by Justice Antonio Herman Benjamin. Steps have been taken since the meetings in Brazil to convene an international association of judges on environmental law.

While these meetings were being held, UNEP hosted a Global Symposium of Supreme Court and High Court Judges in Johannesburg on the eve of the 2002 World Summit on Sustainable Development.<sup>40</sup> South Africa's Chief Justice reported the recommendations to the Summit and to the UNEP Governing Council. Bakary Kante, Lal Kurukulasuriya, and Donald Kaniaru, now a judge for the Environment Court of Kenya, led UNEP's work and Professor Nicholas A. Robinson led IUCN's work. Both Dr. Parvez Hassan, past Chair of IUCN Commission on Environmental Law, and then-current chair, Professor Robinson, served as resource specialists for the Johannesburg judicial symposium. In a parallel undertaking, Justice Amedeo Postiglioni of Italy had established a foundation for an international environmental court (ICEF) and convened several important international symposia in Rome for judges regarding national and transnational environmental adjudications, most recently in 2010. International tribunals also have entered into environmental adjudication; the Permanent Court of International Arbitration and the International Court of Justice each established their own special chambers for hearing environmental claims.<sup>41</sup>

Since 1994, ELI has provided national courts in developing nations with Judicial Education workshops directed by John Pendergrass, upon request.<sup>42</sup> To date, ELI has provided continuing judicial education courses for more than 1,000 judges from sixteen countries.<sup>43</sup> For example, in 2008, ELI's Judicial Education Program – together with the Centro Mexicano de Derecho Ambiental – provided courses for Mexican Judges on

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40. *Global Judges Symposium*, *supra* note 30.

41. See *Environmental Dispute Resolution*, PERMANENT COURT OF INT'L ARBITRATION, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1058](http://www.pca-cpa.org/showpage.asp?pag_id=1058) (last visited March 8, 2012).

42. See *ELI Research in Action: Educating the Judiciary around the Globe*, ENVTL. LAW INST., [http://www.eli.org/pdf/success\\_judicial.pdf](http://www.eli.org/pdf/success_judicial.pdf) (last visited March 2, 2012).

43. These nations include Bolivia, Brazil, Cameroon, Chile, Colombia, Costa Rica, Ecuador, Haiti, Honduras, Hungary, India, Jamaica, Liberia, Paraguay, Peru, Russia, Tanzania, Uganda, Ukraine, and the United States. See, e.g., *Judicial Education Program*, ENVTL. LAW INST., [http://www.eli.org/Program\\_Areas/judicial\\_education.cfm](http://www.eli.org/Program_Areas/judicial_education.cfm) (last visited March 2, 2012).



environmental laws and adjudication relating to nature conservation of the Gulf of California.<sup>44</sup> Given the endangered status of biodiversity and biodiversity hot-spots around the world, this illustrates how environmental judicial education could build capacity directly with judges in such regions.

Each of these programs by ICEF, ELI, IUCN, and UNEP have had ad hoc and non-recurring funding. The erratic financial support reflects the fact that there is not yet focused support to address the need for building judicial capacity for environmental adjudication. Currently, neither the international assistance nor environmental donor programs perceive any need for sustaining such continuing judicial education or for expanding its reach to all nations that seek such programs. ELI has addressed requests for such capacity-building programs as needed, and its board and staff have struggled to find the financial support to do so. There is virtually no alignment between regional needs for environmental compliance, as in “biodiversity hotspots” where nature conservation laws are too weakly observed, or in public health hazards where pollution is rampant and environmental human rights are routinely ignored. As an empirical matter, it should be a priority to enhance judicial capacity in such regions, but sustained funding is lacking. As nations acknowledge the growing urgency for remediating environmental problems, governments individually are devoting their own scarce domestic resources to building environmental judicial capacity.<sup>45</sup> Stimulated perhaps by the UNEP and IUCN efforts, nations, and the provinces and states within nations, have established their own environmental courts and judicial chambers to hear and enforce environmental claims.<sup>46</sup>

The 2002 UN World Summit on Sustainable Development, in its Johannesburg Declaration, unanimously agreed that environmental protection is a pillar of sustainable development.<sup>47</sup> Reflecting that consensus, many national governments have determined that environmental laws require adjudication in

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44. *ELI Research in Action: Educating the Judiciary around the Globe*, *supra* note 42.

45. *See* Agenda 21, *supra* note 37.

46. Nelson, *supra* note 32 (citing PRING, *supra* note 22).

47. Johannesburg Declaration on Sustainable Development, *supra* note 16.

special courts.<sup>48</sup> In some instances this is because their traditional courts lack the knowledge of complex environmental laws and science. In other instances, it is because traditional courts were compromised by shortcomings in the rule of law. Nations, states, and provinces have found that these newly established environmental courts can bypass the problems evident in traditional courts, and provide access to environmental justice.<sup>49</sup>

Environmental courts and tribunals facilitate speedier environmental adjudications and foster consistent rulings across time and the wide range of environmental law cases. Judges in environmental courts become well versed in environmental science, which is the foundation of environmental legislation, MEAs, and other treaties; this helps to ensure that judicial rulings are scientifically literate. These judges and court administrators come to have a sound understanding of environmental law itself, despite never having the opportunity to study it in their own legal education. Environmental ministries and non-governmental organizations alike find professionalism and independence in these environmental tribunals. These specialized courts ensure that States can meet their obligation to provide access to justice in accordance with Principle 10 of the Rio Declaration.

Without a strong and independent judiciary, public interest litigation cannot proceed. At a time of growing court dockets across all fields of law, the establishment of courts and tribunals focused on environmental cases ensures that environmental law enforcement is not neglected. Equally impressive, by starting new courts, governments set the stage for rigorous respect for the rule of law, unimpeded by entrenched problems of corruption, cronyism, favoritism, or gross inefficiency in judicial procedures

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48. *International Symposium on Environmental Courts & Tribunals*, *supra* note 1.

49. *See, e.g., National Green Tribunal (NGT)*, INDIA MINISTRY OF ENV'T & FOREST, <http://moef.nic.in/modules/recent-initiatives/NGT/> (last visited March 8, 2012) (discussing how the Green Tribunal will be guided by traditional notions of justice, as opposed to the Code of Civil Procedure, in an effort to overcome problems evident in traditional courts).

and court administration.<sup>50</sup> Setting a high standard for adjudication in one special field serves to enhance respect for the courts in all fields.

Since in all regions the objectives of environmental legislation and international agreements are far from being attained, environmental enforcement is urgently needed. In 2011, IUCN collaborated with the International Network for Environmental Compliance and Enforcement (INECE) to create an international consortium of attorneys general and environmental prosecutors. INECE's work is described in Kenneth Markowitz and Jo Gerardu's article in this special edition.<sup>51</sup> The work of public interest prosecutors and plaintiffs requires a competent judicial forum wherein their claims can be heard. Without strengthening the courts and rule of law, public health and environmental security will continue to erode.

Regional measures to enhance judicial environmental law practices have been successful, if sporadic. The North American Commission on Environmental Cooperation (CEC), in conjunction with IUCN and UNEP, held judicial symposia for judges from Canada, Mexico, and the United States of America in 2004 and 2005, in Mexico City and New York, respectively.<sup>52</sup> The Asian Development Bank (ADB) convened representatives from courts and governments for a symposium in Manila, designed to strengthen the rule of law in the region.<sup>53</sup> The symposium expressly examined the role of specialized environmental courts

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50. There are many critiques of rule of law deficits and the courts. One recent study focuses on the role of lawyers and the challenges of building the rule of law in post-colonial Asia (but does not discuss environmental law). See generally YVES DEZALAY & BRYANT G. GARTH, *ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE* (2010). If traditional judicial practice in commercial law, family law, or criminal law has problems, the difficulties are even more acute for the new field of environmental law. As the environment degrades, arguably the stakes becomes even higher when environmental law is neglected.

51. Kenneth Markowitz & Jo J. A. Gerardu, *The Importance of the Judiciary in Environmental Compliance & Enforcement*, 29 *PACE ENVTL. L. REV.* 537 (2012).

52. *International Symposium on Environmental Courts & Tribunals*, *supra* note 1.

53. See *Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice*, Asian Dev. Bank (2010) (transcript available at <http://www.adb.org/documents/events/2010/asian-judges-symposium/program.pdf>).

and tribunals seeking to strengthen judicial capacity to apply environmental and natural resources law and regulation.<sup>54</sup>

Beyond the 350 courts surveyed for the Access Initiative,<sup>55</sup> informal estimates suggest that more than 400 environmental courts and tribunals are functioning around the world.<sup>56</sup> Some are very well established, such as the Environment Court of New South Wales, which has over thirty years of experience.<sup>57</sup> Greece has long had an environmental chamber in its highest court and Sweden, Norway, Finland, and Denmark have had established environmental courts for several years.<sup>58</sup> Within the United States, Vermont has an environmental court of long standing,<sup>59</sup> Massachusetts has a land court,<sup>60</sup> and New York has state administrative environmental tribunal within their Department of Environmental Conservation.<sup>61</sup> At the federal level in the

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54. *Id.*

55. The Access Initiative study focuses on environmental courts and tribunals in Australia, Austria, Bangladesh, Belgium, Bolivia, Brazil, Canada, Chile, China, Costa Rica, Denmark, Fiji, Finland, Greece, Guyana, Hungary, India, Indonesia, Ireland, Jamaica, Japan, Kenya, Liberia, Malawi, Malaysia, Mauritius, Netherlands, Nigeria, Pakistan, Philippines, South Africa, South Korea, Spain, Sudan, Sweden, Tanzania, and the United States. It includes many of the states and provinces within federal nations and their subdivisions, such as the courts and tribunals within Alabama, Arkansas, Colorado, Georgia, Indiana, Mississippi, Missouri, New York, North Carolina, Ohio, Oklahoma, Tennessee, and Virginia. It also includes quasi-judicial bodies, such as the Environmental Ombudsman Offices in the 9 Länder of Austria. *See generally* PRING, *supra* note 22.

56. TUN LIN ET AL., GREEN BENCHES: WHAT CAN THE PEOPLE'S REPUBLIC OF CHINA LEARN FROM ENVIRONMENT COURTS OF OTHER COUNTRIES? 12 (2009), available at [www.adb.org/documents/Books/Green-Benches/Green-Benches.pdf](http://www.adb.org/documents/Books/Green-Benches/Green-Benches.pdf).

57. LAND AND ENVIRONMENT COURT, [www.lawlink.nsw.gov.au/lec](http://www.lawlink.nsw.gov.au/lec) (last visited Feb. 29, 2012).

58. *See* Ulf Bjallas, *Experiences of Sweden's Environmental Courts*, 3 J. CT. INNOVATION 177, 180-82 (2010), available at [www.courts.state.ny.us/court-innovation/Winter2010/jciBjallas.pdf](http://www.courts.state.ny.us/court-innovation/Winter2010/jciBjallas.pdf).

59. *Vermont Superior Court Environmental Division*, VERMONTJUDICIARY.ORG, <http://www.vermontjudiciary.org/gtc/environmental/default.aspx> (last visited Feb. 15, 2012); VT. STAT. ANN. tit. 4, § 1001 (2010).

60. Administrative Office of the Trial Court, *The Massachusetts Court System*, LAND CT. DEP'T, [www.mass.gov/courts/courtsandjudges/courts/landcourt/](http://www.mass.gov/courts/courtsandjudges/courts/landcourt/) (last visited Mar. 7, 2012).

61. *See generally Enforcing Environmental Laws*, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION (last visited Mar. 7, 2012), [www.dec.ny.gov/regulations/391.html](http://www.dec.ny.gov/regulations/391.html); *see also, e.g., Office of Hearings and Mediation Services: A Brief History*, NEW YORK STATE DEP'T OF ENVTL.

United States, there are specialized tribunals in the U.S. Environmental Protection Agency (EPA) and the Department of the Interior (DOI).<sup>62</sup>

Others, such as the fifty new provincial courts in fourteen Provinces of China, are very new and are now being tested for the first time.<sup>63</sup> In 2010, Brazil established four federal courts for law enforcement in the Amazon region, and several Brazilian States have their own environmental courts. For example, the State of Sao Paulo's Supreme Court has an environmental chamber that issues more than 1,000 decisions annually. England and Wales, too, established an Environment and Land Tribunal at the end of 2010.<sup>64</sup> Finally, India established a national system of environmental courts with the passage of The National Green Tribunal Act of June 2, 2010, which benefitted from the many environmental law decisions of the Indian Supreme Court.<sup>65</sup>

Innovations in court practice follow as environmental courts are established. Effective April 29, 2010, the Supreme Court of the Philippines established its Rules of Procedure for Environmental Cases, which created the "Writ of *Kalikasan*," an extraordinary new means to vindicate the public's environmental rights.<sup>66</sup> Direct appeal to the highest court to redress similar

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CONSERVATION, <http://www.dec.ny.gov/about/46886.html> (last visited Mar. 7, 2012); *New York State Freshwater Wetlands Appeals Board Members*, NEW YORK STATE DEP'T OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/about/707.html> (last visited Feb. 15, 2012).

62. See generally EPA, [www.epa.gov](http://www.epa.gov) (last visited Mar. 7, 2012); DEP'T OF INTERIOR, [www.doi.gov](http://www.doi.gov) (last visited Mar. 7, 2012).

63. See generally Minchun Zhang & Bao Zhang, *Specialized Environmental Courts in China: Status Quo, Challenges and Possible Way Out* (Nov. 7, 2011), abstract available at [papers.ssrn.com/so13/papers.cfm?abstract\\_id=1955987](http://papers.ssrn.com/so13/papers.cfm?abstract_id=1955987).

64. *Environment Tribunal Guidance*, JUSTICE, <http://www.justice.gov.uk/tribunals/environment> (last visited Feb. 15, 2012); see also Richard Macrory, *Environmental Courts and Tribunals in England and Wales – A Tentative New Dawn*, 3 J. CT. INNOVATION 61 (2010), available at [www.courts.state.ny.us/court-innovation/Winter-2010/jciMacrory.pdf](http://www.courts.state.ny.us/court-innovation/Winter-2010/jciMacrory.pdf).

65. The National Green Tribunal Act, 2010, No. 19, Acts of Parliament, 2010 (India), available at [moef.nic.in/downloads/public-information/NGT-fin.pdf](http://moef.nic.in/downloads/public-information/NGT-fin.pdf).

66. See RULES OF PROCEDURE FOR ENVIRONMENTAL CASES, A.M. No. 09-6-8-SC (Phil.), available at [http://www.lawphil.net/courts/supreme/am/am\\_09-6-8-sc\\_2010.html](http://www.lawphil.net/courts/supreme/am/am_09-6-8-sc_2010.html).

environmental rights are found in New York's Constitution;<sup>67</sup> the states of Montana, Pennsylvania, Hawaii, North Dakota, Minnesota, and Wisconsin also have constitutional provisions related to environmental recourse.<sup>68</sup>

Environmental adjudication to enforce environmental law is a phenomenon that cuts across all common, civil, and socialist legal systems, and is found in developing and developed nations alike.<sup>69</sup> Data and analysis of these courts and environmental adjudications remains relatively recent, scarce, and difficult to access. The various research efforts and capacity-building programs have been financed through small, separate, and non-recurring grants, and are not part of any sustained programs.<sup>70</sup> What can be anticipated is that each distinct jurisdiction will come to establish its own judicial institute to provide ongoing programs on best practices for judges handling environmental law cases in their courts. This has begun; for example, the New York Judicial Institute in 2011 hosted a seminar for judges on scientific evidence in environmental criminal law cases.<sup>71</sup> Such programs, however, remain the exception and not the rule. Globally, there is an impasse – environmental courts are needed, and these courts need continuing judicial environmental legal education and exchange of best judicial practices, but these needs are largely unrecognized.

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67. N.Y. CONST. art. IX, § 1 (establishing the “forever wild” Forest Preserve).

68. See MONT. CONST. art. IX, § 1; PA. CONST. art I, § 27; HAW. CONST. art. IX, § 8; N.D. CONST. art. XI, § 27; MINN. CONST. art. XI, § 14; WIS. CONST. art. X, § 7.

69. Professors George (Rock) Pring and Catherine (Kitty) Pring of the University of Denver Sturm College of Law conducted the world's first empirical survey of many of these new courts, traveling to several countries to do in-person interviews with judges and court personnel. See generally PRING, *supra* note 22.

70. See generally *U.S.-China Partnership for Environmental Law*, VT. L. SCH., [http://www.vermontlaw.edu/Academics/Environmental\\_Law\\_Center/Institutes\\_and\\_Initiatives/US-China\\_Partnership\\_for\\_Environmental\\_Law/News.htm](http://www.vermontlaw.edu/Academics/Environmental_Law_Center/Institutes_and_Initiatives/US-China_Partnership_for_Environmental_Law/News.htm) (last visited Mar. 7, 2012).

71. See generally Symposium, *Judges Science School on Technologies for Detection of Environmental Crimes*, N.Y. State Judicial Inst. (2011).

**IV.      AN IMPASSE: HOW TO CONTINUE TO BUILD ENVIRONMENTAL JUDICIAL CAPACITY?**

Few of the existing environmental courts know much about each other. There is no routine way for judges and court administrators to exchange views and practices on environmental adjudication. In other fields of law, such as intellectual property, international trade, and criminal law, bar associations and special interests groups promote exchanges of experience on judicial practice. These sectors have many publications and professional societies that promote best practices and facilitate comparative learning. So far, bar associations have largely ignored the need for judicial capacity-building in environmental adjudication. Environmental law, being a new field covering a vast range of topics, provides courts with few opportunities for judge-to-judge guidance. The continuing efforts of IUCN and UNEP are too modest to meet needs, and national efforts like EPA's or ELI's are so limited in scope that they assist only a small fraction of the judges who could benefit from such education.

Despite the fact that nearly all courts report an urgent need to learn about how to frame more effective remedies and handle environmental cases, there is little opportunity to do so. National court budgets invariably are limited to the operation of the courts, and virtually never provide for travel to conferences outside the region. There are no print or electronic tools for judges about how best to enforce the environmental laws. Other than the European forum of judges on environmental law, and the occasional regional ADB, CEC or Mercosur meetings, there are no regular and routine means for the systematic exchange of information about best practices of environmental adjudication. National judicial institutes exist in India and in many civil law nations, but they have little to no experience with environmental court systems and offer few programs for judges or environmental courts. Further, some national courts resist external offers of assistance, preferring autonomy to ensure their national sovereignty. In order to respect national judicial integrity, there is a need for a "neutral" international authority to coordinate and deliver continuing judicial environmental education and capacity-building programs for national courts. When judges are able to

work directly with other judges, best judicial practices can advance. The role of an independent international authority is to help with coordination and convening. States will come to have confidence in this facilitating role, which will then mitigate the perception that foreign interests are affecting judicial national practice.

At the inter-governmental level, neither UNEP nor IUCN has the funding or staff to continue building the capacity of these environmental courts and tribunals. On the academic level, neither Denver University nor Pace University, nor any other school within the IUCN Academy of Environmental Law have more than nominal resources devoted to publications and research about environmental courts, although individual scholars undoubtedly will undertake research about the courts, their practices, and their conclusions. ELI has the longest experience in conducting capacity-building programs for courts and judges on environmental adjudication, remedies, and enforcement, but each of its training courts has been funded through ad hoc grants and from largely non-recurring sources. Among donors, there is no recognition that this new phenomenon of environmental courts is deserving of support. Since courts advance the rule of law, environmental protection, and sustainable development, is it not remarkable that the many intergovernmental, non-governmental, and State agencies that work for sustainable development have ignored the role of environmental adjudication? This blind spot weakens their work.

Since nations have already decided to create these courts, the political will and readiness to participate in capacity-building programs does exist. The UN General Assembly has decided to devote the highest priority to strengthening the rule of law at the national and international levels.<sup>72</sup> The American Bar Association (ABA)'s Rule of Law program has included environmental law and civil society in its conference in Vienna,<sup>73</sup>

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72. See G.A. Res. 64/116, ¶ 1, U.N. Doc. A/RES/64/116 (Dec. 16, 2009).

73. Symposium, *World Justice Forum II*, World Justice Project (2009), available at [http://worldjusticeproject.org/sites/default/files/WJF\\_program\\_FINAL\\_4.pdf](http://worldjusticeproject.org/sites/default/files/WJF_program_FINAL_4.pdf).



but has not yet recognized the existence or importance of the environmental courts and tribunals.<sup>74</sup>

If nations are to abate pollution, conserve nature and natural resources, protect public health, and curb transnational hazardous waste dispersion, the courts need to be more effective. As the UN has repeatedly observed in the Millennium Development Goals, the Rio Declaration, and the Johannesburg Declaration of 2002, sustainable development fails without effective environmental protection. Protected areas, whether in public parks or privately established nature preserves, cannot persist without the rule of law to protect their designations. More urgently, if nations are to establish and enforce effective rules to address climate change by reducing and eliminating greenhouse gas emissions and by adapting to sea level rise and hydrologic changes in patterns of flooding and droughts, these mechanisms will require judicial enforcement. It is not enough to adopt environmental laws; until non-governmental organizations or public prosecutors can seek judicial enforcement of these laws and public environmental rights, the legislation and treaties languish merely as good intentions. An honest and effective judicial program is essential to the realization of environmental protection.

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74. Pace Law School nominated judges and lawyers to participate in the ABA Rule of law conference in Vienna. Pace also has consulted with the ABA, EPA, ELI, the World Resources Institute (WRI) and the Access Initiative, and others, about the phenomenon of environmental courts and tribunals at WRI in Washington, D.C., on July 15, 2010. Participants at this meeting agreed that international cooperation among environmental courts and tribunals should be encouraged and facilitated. Thereafter, in November of 2010, Pace conferred with Dr. Bakary Kante of UNEP, who has also encouraged the efforts to establish an international judicial environmental institute. Professor Durwood Zaelke and the International Network for Environmental Compliance and Enforcement (INECE), which works primarily with public prosecutors and civil society to bring environmental enforcement actions, also sees the need for an international environmental judicial institute. Enforcement and compliance, of course, depends upon a strong and independent judiciary. None of the above organizations, with the exception of ELI, are in a position to undertake these capacity-building efforts.

## V. BUILDING ENVIRONMENTAL JUDICIAL EFFECTIVENESS

Courts require well-educated judges and a professional support team of administrative court officers. They need a well-defined set of proven procedural rules and a well-understood set of remedies to apply. For instance, the Supreme Court of the Philippines has implemented structural injunctions under writs of mandamus (such as for nation-wide forest protection or abating pollution in Manila Bay)<sup>75</sup> and under the new Writ of Nature (*Kalikasan*).<sup>76</sup> This experience needs to be shared with courts in other nations. Similarly, courts in Canada have created innovative rules to place corporations on probation in criminal cases, to ensure that these corporations reform their operations and obey environmental law in the future. Such innovations were then enacted into legislation in Canada, and yet the judicial enforcement of these rules is little known outside of Canada. This sort of effective court practice deserves wider analysis and use. Additionally, Brazilian rulings on environmental law are far reaching, but little known. The article by Nicholas Bryner in this edition of the *Pace Environmental Law Review*, about the decisions of the Brazilian Supreme Judicial Tribunal, is one of the few commentaries in English about the jurisprudence of the High Court of Brazil.<sup>77</sup> The environmental courts in New Zealand and Australia, too, have a wealth of experience in facilitating cases by civil society that is little known beyond their territory.

While all nations share the same MEAs and environmental treaty obligations, and most have enacted similar environmental legislation, their courts have limited means to learn from other nations about how to enforce these environmental laws. For example, China is promoting recourse to environmental courts to assist in enforcing environmental law, and the experience gained

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75. See, e.g., *Metro. Manila Dev. Auth. v. Concerned Citizens of Manila Bay*, G.R. 171947-48 (S.C. Dec. 18, 2008) (Phil.).

76. See, e.g., *Global Legal Action Against Climate Change v. Phil.*, G.R. 191806 (S.C. Oct. 18, 2011) (Phil.); *West Tower Condo. Corp. v. First Phil. Indus. Corp.*, G.R. 194238 (S.C. Mar. 29, 2011) (Phil.).

77. Nicholas S. Bryner, *Brazil's Green Court: Environmental Law in the Superior Tribunal de Justiça (High Court of Brazil)*, 29 *PACE. ENVTL. L. REV.* 469 (2012).

by affording access to justice can do much to enhance other judicial practices over time. Until the experiences of Brazilian civil law courts are translated into Chinese, the environmental courts in China cannot learn from Brazil's leading examples. Similarly, until examples across the courts of the *Francophonie* are gathered and translated, the courts of the British Commonwealth will not know of their examples, and vice versa. There is much shared administrative environmental law between common law and civil law nations, yet very little sharing of how the courts approach comparable issues, even under the same treaties and legislation. Until this world-wide practice is made accessible to judges in the United States in English, or to judges in the Arab world in Arabic, it will be largely ignored.

Within nations, there already exist administrative offices of the courts and Judicial Institutes that provide continuing judicial education to judges, and work with judges to streamline and enhance court rules and remedies. However, very few of these national judicial authorities know how to provide continuing education for judges on environmental adjudication, and fewer still do so on a comparative law basis. No comparable service for courts exists internationally; some services exist where special tribunals exist, such as for the World Trade Organization or the International Court of Justice.<sup>78</sup> It is evident that national environmental adjudication needs are left unaddressed.

It would be possible to enlist these national Judicial Institutes and court offices in an international consortium to be the instruments that provide ongoing capacity-building for environmental courts and tribunals. Indeed, if there is to be consistent enforcement of MEA treaty obligations across all nations, it is essential to encourage such judicial cooperation. If civil society is to have access to justice across all regions, the courts need to be open, available, honest, and effective. Without the rule of law, there will be inconsistent and thus ineffective observance of environmental laws, climate change mitigation rules, and nature conservation norms. As the Bruntlund Commission noted in *Our Common Future*, "the Earth is one, but

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78. See *International Court of Justice*, UNEP, <http://www.unep.org/dec/onlineManual/Compliance/NegotiatingMEAs/DisputeSettlementProvisions/Resource/tabid/661/Default.aspx> (last visited Mar. 8, 2012).

the world is not.”<sup>79</sup> The world has a sound system of environmental treaties and each nation has a sound regime of environmental legislation, but these nations lack a shared approach for their judiciaries to enforce agreed-upon norms and meet their obligation under international law to provide access to environmental justice.

## VI. HOW TO PROCEED?

The many intergovernmental consultations of IUCN and UNEP arrive at the same conclusions as do the professional and scholarly environmental law consultations of Pace Law School, ELI, ICEF, and others: there should be constituted an international judicial institute for environmental adjudication. National governments should be encouraged to work toward the establishment of such an international, intergovernmental institute. Professional and independent expert bodies should be encouraged to provide courses on a routine basis. The continuing work of ELI could be the incubator for best judicial environmental education practices and lay a systematic foundation for institutional work. IUCN and UNEP should continue their consultations with their member States to undertake the establishment of an international environmental judicial institute. These future consultations need to envision what such an institute could look like.

The role of facilitating exchanges among judges does not require a large secretariat; most judicial institutes at the national level have small administrative staffs. Initially, the new international body would be a “virtual” institute, with a small secretariat to organize continuing judicial education courses and workshops around the world, cosponsored by the existing judicial institutes or court administrative offices in each region. The secretariat would arrange with the local judicial institutes to translate materials into the national languages of the various courts. Information about best practices and innovative procedures or remedies would be exchanged so that national courts could adapt and use those aspects that they find

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79. See generally WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE (1987).

appropriate. The aim would be to use and enhance national judicial offices, not to compete or duplicate their work.

A small steering committee of judges would guide this process, perhaps convened initially under the auspices of the IUCN Commission on Environmental Law. The small secretariat would coordinate the initial courses and sharing of knowledge in symposia. Over time, the new international environmental judicial institute might become an autonomous international body with independent regional partnerships. As national judicial institutes and administrative offices of courts become familiar with the capacity-building work of this institute, they could begin to budget the modest sums needed to cover the costs of participating in this international cooperative work. Eventually, one or more such judicial institute in each area might provide a secretariat for regional activities. This would be logical in terms of environmental similarities, judicial traditions, languages and non-judicial environmental cooperation programs already established in each region.

The IUCN Commission on Environmental Law is continuing its consultations about the establishment of an International Environmental Judicial Institute leading up to the IUCN World Conservation Congress in South Korea in September 2012. The World Conservation Congress will be invited to consider and endorse establishment of such an institute. IUCN, as an international, intergovernmental organization with Observer status in the United Nations General Assembly, is engaging its Member States at the United Nations in discussions about the need for an institute for environmental adjudication. With future grant funding, ELI, which is a Member Organization of IUCN, has agreed to contribute its expertise on judicial environmental law capacity-building to work with national environmental courts and tribunals to structure the new and ongoing continuing judicial education programs.

Judges have expressed consensus that the work of this Institute needs to begin as soon as possible; initial steps toward judicial capacity-building should not wait for funding and international participation to reach ultimately desirable levels. It will take time to align national continuing judicial education with the availability of the new International Environmental Judicial

Institutes' programs. Accordingly, this proposal must be seen as a modest beginning, as will be the provision of the initial environmental continuing judicial education programs themselves.

## VII. SCOPE OF ENVIRONMENTAL BEST PRACTICES STUDIES

Based upon past experience in judicial symposia and workshops, a generic set of some twenty themes have been identified as appropriate for judicial education modules. These generic materials should be adapted and supplemented by national or regional materials, appropriate to the area where the continuing judicial education is held. It is important to provide a core foundation in best environmental adjudication practices, but also to have symposia and courses reflect the cultural values of nature, the environment, and roles of courts that are familiar where this capacity-building takes place – one size does not fit all. At the same time, all judges need to learn about the leading practices in order to adapt and tailor such practices to their own environmental adjudications.

The initial subjects for building judicial courses might include the following generic themes:

1. Comparative procedures for public interest litigation: Amparo, citizen suit, *locus standi*, access to justice provisions, permit or EIA judicial review, Aarhus Convention, etc.;
2. Private environmental claims: civil procedure, notice, delicts, torts, contractual claims, remedies, etc.;
3. Remedies appropriate for different types of environmental civil cases: civil procedure, damages, remedial measures, restoration, structural injunctions, preliminary relief, nullification, monitoring of remedial measures, continuing jurisdiction, etc.;

4. Criminal law: criminal procedure, scientific evidence for proving environmental crimes, sanctions, probation, fines, or prison terms;
5. Evidence: types of scientific proof, burdens of proof, use of investigating magistrates or assessors or special masters, etc.;
6. Appeals from courts of first instance: records, standards of review, remands, etc.;
7. Judicial enforcement of arbitral awards: public policy constraints, environmental factors, etc.;
8. Judicial decisions: access to decisions and records, reporting decisions officially and unofficially, notice, electronic filings, etc.;
9. Special environmental measures for special courts: fiscal tribunals, administrative law tribunals, e.g. for water resources, regional air pollution tribunals, wetlands, etc.;
10. Basics of environmental science for judges, including how to measure environmental injury and the efficacy of remediation, etc.;
11. Basics of environmental economics for judges, including how to measure and value externalities and ecosystem services, etc.;
12. Environmental law and labor law disputes;
13. Judicial oversight of biodiversity habitats, migration corridors and legally protected areas;
14. Indigenous peoples and application of environmental law and international norms;

15. Overview of MEAs and international environmental law obligations;
16. Survey of national environmental laws, and updates;
17. Analysis of adaption of legal issues in property law regimes in the wake of sea level rise, and other physical changes resulting from climate change;
18. Rule of Law safeguards: judicial ethics, qualifications of ALJs and court officers, transparency, notice, fees, etc.; and
19. Scope of continuing judicial education in environmental adjudication and how to institutionalize it in national programs.

Examples of recent capacity-building programs for judges have been compiled by ELI.<sup>80</sup> Ideally, preparation of environmental judicial education materials requires compiling best practices and case studies and assembling primary source materials as examples to share with judges – Pace Law School compiled a set of illustrative materials for the Symposium on Environmental Adjudication that it convened in April 2011.<sup>81</sup> Specific courses in different regions could be designed to draw upon such general modules, and to adapt them in cooperation with national judicial institutes, court administrative offices, and national judges. Once the initial modules are prepared and used in programs in selected countries in partnership with national judicial authorities, the International Environmental Judicial Institute could envision working with countries on a sustained basis. For larger nations, this approach would need to have a sub-national and regional focus, as is appropriate in federal states or states such as Brazil, China, or India that have provincial courts responsible for

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80. See, e.g., Symposium, *Taller de Capacitacion Judicial*, Env'tl. L. Inst. (2009).

81. *International Symposium on Environmental Courts & Tribunals*, supra note 1.



environmental cases. Initially, it is unlikely that many court systems will seek continuing judicial education at the same time, so national capacity-building programs for the judiciary in specific countries could be put in place gradually by a small coordinating secretariat. ELI has done so for seventeen years, and has the requisite experience to structure such a program.

As the International Environmental Judicial Institute builds its teamwork with national judicial institutes, regional updates for each module would be developed within each region, and shared across all regions. Law schools and other professional bodies could begin to address environmental adjudication. It can be anticipated that an organic process will emerge and be self-supporting for professionalizing environmental adjudication in general and environmental courts and tribunals in particular.

### **VIII. CONCLUSION: ENVIRONMENTAL ADJUDICATION AS A CHALLENGE TO THE RULE OF LAW**

In June 2008, the United Nations estimated that four billion people live beyond the protection of the rule of law.<sup>82</sup> Even where the rule of law exists, it can be inefficient, and often lacks experience with ecology and other scientific and technical aspects of environmental law. Without special attention to environmental matters, courts will inevitably give them a low priority; judges never studied environmental law as law students, and other judicial cases inevitably take precedence. Moreover, some court systems remain unable to cope with existing caseloads, and growth in human populations will exacerbate this situation further. For example, some experts, for example, have estimated that at the current rate, it would take 350 years for the courts in Mumbai, India, to hear all the cases on their books. According to the UN Development Program, India has eleven judges for every one million people. There are currently more than thirty million cases pending in Indian courts, and cases

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82. See U.N. DEV. PROGRAMME, MAKING THE LAW FOR EVERYONE 1 (2008), available at [http://web.undp.org/publications/Making\\_the\\_Law\\_Work\\_for\\_Everyone%20\(final%20rpt\).pdf](http://web.undp.org/publications/Making_the_Law_Work_for_Everyone%20(final%20rpt).pdf).

remain unresolved for an average of fifteen years.<sup>83</sup> Restoring the rule of law is as important to democracy in India as is restoring its environmental conservation laws to ensure the public's right to potable drinking water and environmental rights. This is not a mere hope: it is the promise of India's new environmental courts.

The same can be said for every nation, as "business as usual" ends and the displacements of climate change hit home. A nation without a well-functioning judiciary to provide an ordered society, respect human rights, and implement the rule of law, becomes problematic at best. For most people on Earth today, both human and environmental rights are denied.

There is widespread consensus, across socioeconomic classes and regions, that environmental quality must be restored and maintained if sustainable development is to become a norm rather than an aspiration. World-wide, the courts, as a core branch of government, provide essential roles in the peaceful settlement of disputes. Environmental legislation and treaties need to be enforced nationally, and courts must see that this is done. Since governments establish courts to handle the growing agenda of environmental claims, government aid agencies and other public and private donors alike should recognize that this consensus represents a unique moment in time: either this new, world-wide commitment to environmental adjudication becomes more effective, or States will lose both environmental quality and the opportunity to rebuild the rule of law.

States have a customary international law duty to provide access to environmental justice. The first steps in meeting this duty are extraordinary, but these shoots from the grass roots of justice need nurture. It is time to rally support for the judiciary. Environmental adjudication is a concrete, practical, and needed means by which to do so.

We neglect this opportunity to sustain access to environmental justice at this unique moment at our collective peril.

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83. Gary Haugen & Victor Boutros, *And Justice for All – Enforcing Human Rights for the World's Poor*, FOREIGN AFF., May/June 2010, at 51.