“The Challenges Facing Environmental Judges in the Next Decade”

Keynote address by

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I am honored to be asked by our chair, Judge Laurie Newhook, to lead off this distinguished gathering of environmental adjudicators.

My professional partner and wife, Kitty, and I are privileged to have so many of you as personal friends and expert advisors for our University of Denver Environmental Courts and Tribunals Study. It is wonderful that today’s “International Forum of Environmental Judges” includes not only specialized environmental court judges, tribunal decision-makers, and administrative staff, but also general jurisdiction judges with very substantial experience with environmental cases. Our thanks to Laurie and Professor Ceri Warnock for giving us an opportunity to help set the stage for your discussions during this IUCN/AEL Colloquium on “The Environment in Court.”

Kitty and I have been researching, writing, and publishing about specialized environmental courts and tribunals (ECTs) for 9 years now – and have enormous respect for those of you who face the challenges of adjudicating environmental conflicts. The decisions you are making are essential for sustainable development and environmental justice. We see you as leaders in ensuring our Earth can be sustained
for today’s and future generations and that the environmental, social, and economic fabric of our world is protected in a way that is, as Australian law says, “just, quick, and cheap.”

Like it or not, you are the guardians of our future. Wearing such a weighty cloak brings many judicial and personal challenges – but also opportunities – beyond those experienced by most general jurisdiction judges.

Let’s explore together some of the major challenges that environmental judges like you face. A number of you have already met some of these challenges in your courts and tribunals – and have come up with amazing, creative, even visionary solutions. For most of these judicial challenges, there is no easy answer and the best answer today may not be the best answer tomorrow, as new laws, new problems, and new scientific evidence emerge making today’s precedents no longer valid.

I’d like to look at 10 challenges we see you facing – and you’ll surely think of more. My hope is that this will inspire a lively discussion and exchange of expertise, creating more sharing of your strategies, solutions, and sagacity!

The 2 biggest challenges we see for environmental judges and decision-makers are inextricably linked – sustainability and climate change.

**Challenge 1 – Sustainability:** Sustainable development – this most basic, international principle underpinning environmental decision-making since 1992 – is an almost impossibly complex concept. Its basic definition requires us to “meet the needs of the present without compromising the ability of future generations to meet their own needs.” International agreements from the 1992 Rio Declaration to the 2015 UN
Sustainable Development Goals for now through 2030 (SDGs) make sustainability an overarching goal for institutions at the national, regional and international levels, like yours. The goals are not binding “hard” law, but they are guidelines for adjudicators in applying existing law. At least 10 of the 17 SDGs have a very direct bearing on environmental justice and cases in your court or tribunal:

- Promote sustainable agriculture, water and sanitation, energy, industrialization, and cities,
- Protect human health, oceans and marine resources, and forests, and
- Combat desertification, land degradation, biodiversity loss, and, of course, climate change.

But Sustainable Development Goal 16 is the most critical one for you – to “provide access to justice for all.”

Talk about challenges! In adjudicating what is “sustainable,” one must analyze all of the environmental, social, and economic impacts of a proposed action or development and predict the future. The former Presiding Judge of Sweden’s Environmental Court of Appeal, Ulf Bjällås, put it this way:

“I am sometimes asked, ‘What is the difference between judging an environmental case and judging a criminal case?’ I usually say that the criminal judge looks backward trying to find out what has been proved about what happened, while the environmental judge looks forward asking what will happen in the future as a result of my decision.”

Most judges have a simple task compared to those of you who are asked to predict sustainability and the future impacts of, for example:
• A new wind farm in a prime ocean fishing area
• Expanded coal mining and exports, with their greenhouse gas (GHG) potential, for a country badly needing economic growth
• Clearcutting an old-growth forest to make way for a needed airport
• New rice plantations that will end starvation, but using genetically modified organisms (GMOs) that may vastly increase GHG methane emissions, or
• A proposed dam that will destroy the life-giving lands of an indigenous people.

And you may have to do this without applicable national laws or laws that incorporate helpful international environmental law principles!

Regrettably, no one is omniscient and many of you have limited resources to help make these tough decisions. However, there are some valuable “expert resources” some ECTs have developed to overcome this, including having their own scientific and technical advisors and having special procedures for managing the parties’ often nonobjective experts.

You can find strategies for experts and other challenges in both of our books – (1) our 2009 book Greening Justice: Creating and Improving Environmental Courts and Tribunals published by the World Resources Institute and (2) our new book for the UN Environment Program, tentatively titled Environmental Courts and Tribunals: A Guide for Policy-Makers, now at the publishers. We hope these books and this conference help you to share and enhance the strategies you are currently using.

**Challenge 2 – Climate Change:** A related challenge for both specialized and non-specialized courts is climate change litigation. The milestone Paris Climate
Change Agreement of 2015 sets forth international goals for lowering GHG emissions. While it lacks legally enforceable requirements so far, it does lay a foundation of national responsibility and action that will increasingly bring climate change cases to your doorstep.

The earliest climate change lawsuit we’ve found was in 1994 in the Land and Environment Court of New South Wales, Australia, where an environmental NGO sued to block a proposed coal-fired power plant because it would increase CO2 emissions. The court held that – at that time – the law did not restrict the development for that reason and dismissed the case. The next 2 climate change cases were brought in 2002 in Judge Newhook’s Environment Court of New Zealand.

The early climate change lawsuits tended to be dismissed for lack of “law.” However, scientific evidence of the relationship between human-caused GHGs and climate change increased, and litigation increased. Some 20 countries have now experienced climate lawsuits, including Argentina, Australia (a hotbed of climate litigation), Belgium, Canada, Czech Republic, EU, France, Germany, Greece, Ireland, Netherlands, New Zealand, Nigeria, Pakistan, Philippines, Spain, Ukraine, UK, Uruguay, and the USA, most since 2012.

For those interested in the growing field of this litigation, we refer you to the excellent website of the Sabin Center for Climate Change Law at the Columbia Law School (www.law.columbia.edu/centers/climatechange).

The grounds for climate litigation have also increased. Today, they are being filed against both governments and private parties (notably energy companies) both to take action and to stop action. Grounds have included violation of climate change
control laws where they exist, but also general laws such as clean air and water acts, endangered species laws, environmental impact assessment requirements, biodiversity statutes, as well as the public trust doctrine, negligence, and human rights violations.

Most significantly, last year plaintiffs suddenly began to win, with landmark decisions being handed down by courageous, visionary judges. Three key cases (all known to you, I’m sure) are worthy of mention.

In 2015, Urgenda Foundation v. Netherlands became the first case in which a court ordered a country to lower its GHG emissions (without climate change legislation). The Dutch ENGO and nearly 900 co-plaintiffs sued the Netherlands for the tort of negligence for failing to act, and the Hague District Court agreed. Its 3 judges ruled that the state has a duty under both constitutional and international law to take climate change mitigation measures. The court cited

- The Dutch Constitution’s requirement for environmental protection
- EU targets
- The European Convention on Human Rights
- The “no harm” principle of international law
- The sustainability principle in the UN Framework Convention on Climate Change
- The precautionary principle in international law, and
- The prevention principle in EU law.

Its reliance on human rights, I predict, will be a key in future cases, as will the Paris Climate Change Agreement.

The second 2015 landmark climate decision is that of the Green Bench of the High Court of Lahore, Pakistan, in Ashgar Leghari v. Pakistan. The case was a public
interest lawsuit against the government for failing to implement already-passed climate
control legislation. However, the remedies fashioned by Judge Syed Mansoor Ali Shah
are groundbreaking and visionary. He looked to “continuing mandamus” actions in India
and the Philippines and ordered the establishment of a national Climate Change
Commission, appointed government, NGO, and technical experts to it. He also ordered
the reluctant ministries to appear before him and explain why no action had been taken,
requiring them to name officers to be responsible to the court for action and reporting.

The third case may be the most amazing of all since it comes from our foot-
dragging USA, many of whose politicians (including one current Presidential candidate)
are denying climate change for political reasons. Last month, the Supreme Judicial
Court of our state of Massachusetts ruled in favor of 4 young plaintiffs in Kain v.
Massachusetts Department of Environmental Protection. It held that the state
government had failed to comply with a state statute requiring reduction of GHGs and
ordered it to take action. This case is part of a symphony of climate lawsuits
orchestrated in the USA and other countries by Our Children’s Trust, an Oregon ENGO
that advocates on behalf of youth and future generations – so expect to see more such
cases.

I can’t resist mentioning a 4th case with climate ramifications – a December 2015
decision by the Supreme Court of the UK, in Trump International Golf Club Scotland
Ltd. v. the Scottish Ministers. Ah yes, that’s our hard-swinging Mr. Trump. The Trump
interests protested the Scottish government’s approval of a wind farm in Aberdeen Bay
– because it would be visible from the golf course. The UK’s top court unanimously
dismissed the suit. The World Wildlife Fund of Scotland praised it as a climate win,
“This is great news for Scotland and for all those interested in tackling climate change,” – but obviously it was not great news for a potential US President who has called climate change “a hoax”!

I would now like to briefly mention some other key challenges we see facing you today and in the years to come in judging environmental cases.

**Challenge 3 – What Is an “Environmental” Case?** If we are going to have ECTs, how do we define what cases are “environmental” and therefore under their jurisdiction instead of the general courts? If an “environmental” case has weighty non-environmental issues – and sustainability does require balancing non-environmental issues with environmental ones – is it appropriate for ECT judges to decide both types of issues? What of the environmental issues in international trade agreements, mergers and acquisitions, contracts, or zoning and land use planning cases? How comprehensive should an ECT’s jurisdiction be?

**Challenge 4 – Access to Environmental Justice:** How “open” should your courthouse doors be? Since the 1992 Rio Declaration, there has been a great increase in international and national law about the 3 environmental “Access Rights” – people’s rights of access to information, access to public participation, and access to justice in environmental matters. These are called the “3 Pillars” of the environmental rule of law. Public dissatisfaction with access to justice in the general courts is now a primary driver of new ECTs. One of the biggest challenges ECTs face is how to overcome barriers to standing (locus standi), the qualifications one must have to file or participate in a lawsuit. Standing is the most significant barrier to access to justice, and it is a “best practice” for ECTs to make it as open as possible, allowing “any person” to raise an
environmental issue. Studies – like that of the Australian Law Reform Commission – have discredited all the arguments for restricting standing. Some ECTs have even developed their own standing rules that are more liberal than used by the rest of their judiciary. Now that’s a challenge!

**Challenge 5 – ADR:** Is alternative dispute resolution (ADR) the future of environmental adjudication, as we see already in some of our most effective ECTs? If so, what does that mean for you as legally trained, but possibly not ADR-trained, judges? Should ADR be a standard feature of ECTs? Can ADR parties reach agreements not authorized by law? Should ECT judges review and approve ADR agreements or leave them to the parties? And how does an ECT ensure the enforceability of an ADR agreement, the way it does its own rulings?

**Challenge 6 – International Law:** What powers does a court have to apply principles of international environmental law – such as the precautionary, polluter-pays, or prevention principles – if those principles have not been authorized by national legislation or rules? May an ECT use a non-binding international rule as a basis for decision? The tight-rope one walks between being an ethical jurist vs. an activist advocate is a thin line at best, and easy to fall off!

**Challenge 7 – Natural Law:** There is growing discussion about a revival of “natural law,” the doctrine that human affairs should be governed by ethical principles discoverable by reason alone, rather than revelation or adopted laws. Our US Declaration of Independence begins with a clear statement of this legal philosophy, speaking of rights and duties that are “self-evident.” One can be tempted to fill in “gaps” where there is no applicable law on the books, by reasoning what the ethical solution
should be. But what is ethical to one may not seem ethical to another, so how do you draw a principled line for natural law?

A related theme is the movement for judicial recognition of the “Law of Nature” or “Rights of Nature,” as advanced by our distinguished Justice Antonio Herman Benjamin. Does a river have a right to flow? Could marine life sue for an oil spill disaster? As a famous 1972 book argues “Should Trees Have Standing?” The Law of Nature would shift the way courts view our relationship with nature, from being property-based to being rights-based, with recognition that we humans are but a part of an interconnected earth-centered community and that nature has inherent rights to exist, thrive, and flourish. Many of today’s international law principles could be applied as “law” under this theory. Expect challenges like these arguments in your court.

**Challenge 8 – Public Trust Doctrine:** I am sure you are all familiar with the principle that certain natural and cultural resources are preserved for public use, and that the government must hold and protect these resources like a “trustee” for the public's use and benefit. Such resources can include parks, land under navigable waters, the seashore, air, and wildlife. The doctrine says they should not be privatized or developed unless it is in the interest of the beneficiaries – the public. Those of you in common-law jurisdictions, in particular, may face the challenge of cases relying on this judge-made law.

Related to the Public Trust Doctrine is the concept of Natural Resources Damages (NRD). Your jurisdiction may have legislation or judge-made law that requires money damages to be paid by parties to restore public natural resources they have injured or destroyed with toxic substances, development, or the like. The natural
resources are typically those belonging to or controlled by governments, and possible indigenous peoples, such as land, fish, wildlife, biota, air, water, groundwater, and drinking water. NRD are extremely thorny to evaluate and quantify in practice. Some of you have experience to share about these difficult decisions, as does the US Department of Justice, which has won many NRD cases.

**Challenge 9 – Is Precedent Outdated?** The law I have taught at the University of Denver for 33 years is heavily built on consistency with past precedents. Yet, in your environmental world is precedent an outdated concept – given such rapidly changing science, substantial future uncertainty, and limited remedies? Will your decisions frequently be plowing new ground, but without suitable precedents or models to apply?

**Challenge 10 – Personal Challenges:** I’m sorry to end on a downer. The challenges for environmental judges can also be very personal. We see 2 categories: “The Green Ceilings” and “The Vendettas.”

“Green Ceiling” challenges are career-oriented problems ECT judges can face. Few ECTs are superior courts of record, like Queensland and New South Wales, so may be viewed as having lesser or junior status in the eyes of the rest of the judiciary, legislature, executive, bar, and public. This could mean lesser budgets, salaries, benefits, staff, physical facilities, and caseload. Appointments can become a sinecure for the less able, retired judges, or political cronies. An ECT could become a green ceiling blocking judicial careers, as has happened. These career challenges must be prevented, or it will be impossible to attract and keep the best judges and staff, to the detriment of the ECT.
“Vendetta” challenges are the personal attacks judges face. Threats and retaliation can come from those who stand to lose from a decision (and environmental decisions often carry a heavy price-tag) – physical threats, danger to families, even murder, like the murder last year of the Philippines judge involved in drug cases and land disputes, several federal judges and family members in the USA, and a number of environmental lawyers and advocates around the world. There can also be more subtle threats – pressures on untenured ECT judges, societal black-balling, being unfairly labeled biased, or being the target of public protests. You know trouble like this can happen when Donald Trump unapologetically makes racist statements that judges are biased against him because they are, quote, “Mexican” or “Muslim”!

I invite you to discuss these challenges – and others I’m sure you will think of – this week and in the future. I hope you find helpful insights in our newest publication – **Environmental Courts and Tribunals – A Guide for Policy-Makers** – which UNEP will be publishing in a matter of weeks. The booklet contains the most current data available on the ECT explosion (over 1,200 ECTs in 44 countries today, and under consideration in a number more). It lays out the different ECT “models,” the ECT “best practices,” lists of current and potential ECTs, a contact list of ECT experts, steps for building an ECT, and thoughts for the future. Many in this room have contributed their expertise to this work and are ready to share that with you.

Standing tall and remaining fair and equitable in the face of such challenges is something we truly admire in the many environmental jurists we know personally. We applaud the work you are doing, acknowledge the importance of your job, and wish you well as you face and overcome these challenges. Thank you.