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Greetings and Introductions

PROFESSOR ROBINSON: Good morning, friends, ladies and gentlemen, your excellencies, judges, professors, and colleagues all, in our effort to develop a better understanding of environmental adjudication around the world. I am Nicholas Robinson, a professor of law here at Pace Law School, and it's my privilege to moderate the program today.

And let me begin by inviting our vice dean for academic affairs, Mr. Messner, and a former dean of the law school, who has done a great deal to support judicial continuing education, the former judge of the Iowa Court of Appeals, the Honorable Janet Johnson.

JUSTICE JOHNSON: Thank you.

Our full dean, not the vice dean -- I hope that doesn't give you any indication of the matters with which I deal. We welcome you on behalf of the law school community, from President Friedman to Dean Simon, to our faculty, and our students.

I can only say we wish you a warm

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welcome to White Plains for this international symposium on environmental adjudication.

First I want to say that the law school community is so proud of our students. They worked for 18 months to put together this inaugural gathering, and we want to support them. Let's thank them. I know Professor Robinson is a task master, but he is a very effective task master, and we appreciate that.

It is indeed an honor to all of us to have you to come spend this day deliberating together on the remarkable new phenomena, so many nations independently deciding to establish dedicated environmental courts and tribunals and judicial chambers on environmental matters.

It is, of course, encouraging evidence that nations take the implementation of their environmental law seriously. The priority given to environmental law adjudication reflects a maturing of national environmental laws, but also the legitimate national

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concerns about the gathering global crises of polluted drinking water, transboundary air pollution, growing extinction of species, and the rising sea levels, disruptive weather patterns associated with climate change.

But for our legal profession the emergence of environmental courts resonates on an even more fundamental level. Human rights have broadened to include a recognized right to the environment.

We see this in the constitution of many nations, such as Brazil, that expressly include the right to the environment. We see it in several Supreme Courts' interpretations of their national constitutions that find the environmental right is implicit of the right to life, as in India and the Philippines.

If these rights once recognized are to have effect, there must be meaningful judicial remedies for their vindication. In fact, I think it is fair to say that if there is no remedy, there is no right.

This is where the emergence of the new environmental courts is so important. Judges

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of these courts can provide a thorough and consistent judicial understanding of the environmental sciences, and ensure careful adjudications of disputes presented to them. Their expertise facilitates building a clear record that enables judicial review by appellate courts to focus clearly on legal issues.

From my own service as an appellate judge, I understand the very important need of having a clear and complete record of the law. That's the only way we can have effective review by appellate courts.

But even more fundamental than these important aspects is the contribution that environmental courts make to affirming and reaffirming the rule of law itself. The new courts are restoring public confidence in the judiciary.

Most countries do not allocate sufficient resources for the judiciary. Because of their environmental concern for matters that are brought to them, these courts operate in a very transparent way.

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And because they are new, they are not burdened with the encumbrances and the deficiencies that accumulate to afflict and infect older court systems.

It is not an overstatement to say that sustaining and enhancing the work of the judiciary in enforcement of these laws could not be more compelling.

Pace Law School is proud to work in partnership with the New York State Judicial Institute on assuring the best quality of continuing judicial education for judges in New York and, hopefully, in the world.

We are honored to be a member of the institution -- excuse me -- be a member of the institution of the IUCN and to work in extending this mission to courts in other nations in the realm of an environmental adjudication.

We have been pleased to have Pace law professors serving as directors in the Environmental Law Institute, David Sive, Jeff Miller, Ann Powers, Nick Robinson. Professor John Nolan has published several of his books

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through the Environmental Law Institute.

And we can think of no better partner for international continuing environmental judicial education than the Environmental Law Institute. The Pace community wishes you well in your historic and crucial deliberations today. Thank you.

PROFESSOR ROBINSON: We're now privileged to have from Blonde in Switzerland the message of the director general of IUCN from Julia Marton-Lefevre. She has served in IUCN with distinction as director general, and we'll now have her in virtual reality with us, and for those of you on the web cast, you will meet her in a minute.

(The following presentation on the video screen)

MS. MARTON-LEFEVRE: It is my great pleasure and honor to welcome you to the symposium on environmental adjudication, convened by the IUCN Commission on Environmental Law.

The principles of justice and environmental responsibility as articulated

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in the U.N. World Charter for Nature, and several other landmark documents, requires strong courts for their vindication.

Courts are important to ensure national implementation of the obligation that states solemnly have accepted under international environmental treaties. Without strong courts, it's self-evident that environmental laws will not be consistently implemented or enforced.

Today we see differences in judicial capacity in all nations, which weaken the effectiveness of environmental laws. Through its environmental law program, IUCN has worked to build judicial capacity worldwide to cope with the expanding body of environmental legislation and rules.

(Pause)

PROFESSOR ROBINSON: Chris, I think we'll go on now, and that was a wonderful closing caption, unless it can quickly come back.

MS. MARTON-LEFEVRE: -- and rules. This symposium convened at the Judicial Institute

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of the State of New York is a direct outgrowth of the effort that IUCN has dedicated to continuing judicial environmental legal education and strengthening the capacity of the courts for environmental adjudication.

IUCN will follow closely your deliberations today, as they promise to make significant contributions to understanding how states can meet their obligations under Principle 10 of the Rio declaration on environment and development.

This is extremely timely as we are preparing for the Rio 2012 conference that will take stock of the progress in the 20 years since the Rio summit, and set priorities for the future.

Giving force to environmental laws is clearly one priority world leaders should embrace. I congratulate two IUCN member organizations, the Environmental Law Institute and the Pace University Center for Environmental Legal Studies, for their initiative in convening this symposium in

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partnership with IUCN's Commission on Environmental Law.

I would also like to thank the Judicial Institute of the State of New York for hosting the event, and for its own work in continuing judicial education. I note that next week, quite independently of this event, the New York Judicial Institute will host a course for judges on scientific evidence in environmental criminal cases.

IUCN welcomes this very sort of capacity building for environmental law. I wish you a very successful conference. And I'm so sorry that I cannot be with you in person, but I will be following your deliberation via the web cast along with, I'm sure, many other people from around the globe.

PROFESSOR ROBINSON: Well, thank you, Julia, for that spirited welcome. And we are appreciative of the work that IUCN is doing globally to advance environmental law.

It's now my privilege to introduce to you the dean of the New York State Judicial Institute, Judge Juanita Bing Newton. She

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has been the deputy chief administrative judge for justice initiatives here, and we at Pace are honored to be her collaborator in helping to build up our programs for the State of New York. It's great to be here.

JUSTICE NEWTON: Thank you, Professor Robinson. Good morning and welcome to the Judicial Institute.

The Judicial Institute as an idea is the educational arm of the New York State Unified Court System. And the Judicial Institute as a building is a great example of our collaboration, isn't it, Professor Robinson? Because it is through the efforts of New York State, the judiciary, and Pace Law School that this wonderful physical building that is ecologically designed, even though that means sometimes it's hotter and it's colder, we're getting it right eventually, to maximize education of all of the judges, attorneys, students who come here to seek to be edified and to be educated.

I am delighted to join in this additional collaboration with Pace. We do a

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lot of interesting things together, and apart from coming together this morning, we also have the wonderful new, on a disk instead of on paper, law journal, that the center of -- journal of innovation that we produce together with the faculty and the students of Pace, who, once again, do an outstanding job.

You may have heard this year that we have a difficult budget year, and as you know, one of the places budget cutters want to go to at first is education.

And I want to particularly thank you for joining here, because you add to the importance of our existence as a place where judges, lawyers, students, people who want to initiate change for the greater good depend -- come together and learn from each other internationally.

So I thank you, Pace, I thank you, IUCN, I thank you, Professor Robinson, for working with us so diligently to bring this wonderful program to you. If there's anything we can do to make your stay with us over the next few hours more comfortable, please do not

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hesitate to join us. Your presence edifies us and justifies our existence even more and more and more. Thank you and welcome.

PROFESSOR ROBINSON: Thank you very much. It's a wonderful thing to live on this campus with all the judges of the State of New York coming in and out over the years.

Our next speaker could not be with us. She wanted to be here. Dr. Sheila Abed is the chair of the commission on IUCN. But she has sent written greetings, and Ann Powers, can I invite you to come to the podium to read Sheila's greetings to the participants.

MS. POWERS: I say my own personal welcome to everybody. Glad to have you here. I will not try to imitate Dr. Abed's verve and elan here, but I am pleased to read her statement.

Greetings. It is my pleasure to have been invited to give a few remarks for the working symposium on environmental adjudication around the world.

As chair of IUCN's Commission on Environmental Law, I celebrate and

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congratulate the inauguration of a new space for legal reflection, the first of its kind, in which the excellence and effectiveness of environmental judicial decisions from around the world are promoted.

Sustainable development can only be attained within the framework of legal security. Thus, it is imperative that judges who must decide environmental cases have the knowledge and the deep understanding of the rules and principles of environmental law that are necessary to deliver good decisions.

Additionally, a space for debate and knowledge creation, such as the one that will be promoted by the International Judicial Institute for Environmental Adjudication, is ideal to building bridges of understanding and harmonization of these decisions that often represent different legal systems and different traditions.

Currently the discussion over how to obtain decisions that respect the universal principle of fundamental justice, protect the functionality of ecosystems in our

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environment, all while allowing for sustainable development, is very necessary.

Within this discussion, the role of the judiciary is key, particularly with regards to legislatures and administration, when addressing the complex issues of guaranteeing people's rights to a good quality of life.

These issues have extremely high social, political, and economic impacts that have only just recently had the judiciary as a leading figure.

This prominence is mostly due to the growing expansion of the spectrum of people's rights and obligations with regard to the environment, rights and obligations that often have their genesis in an erroneous political perception that may never be applied but that the judicial system must still guarantee.

This is why the International Judicial Institute for Environmental Adjudication will have a crucial role in the development of a solid foundation for this phenomenon, which requires judges with a delicate sensibility

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to position themselves before the social reality.

Thus I wish you a very successful meeting, and please know that you have the full support of the Commission of Environmental Law in this important initiative.

PROFESSOR ROBINSON: Thank you, Ann. Thank you, Sheila, for that message.

Our other sponsoring organization here is the Environmental Law Institute, which for over 17 years has been a leader in providing continuing judicial education on environmental law, and I'm pleased to introduce J. Pendergrass, who will give greetings from ELI.

MR. PENDERGRASS: Thank you, Nick. And it's indeed a pleasure to welcome everybody on behalf of the Environmental Law Institute, and our president, Leslie Carothers, who couldn't be here, but will be shortly joining as a faculty member of Pace Law School. We're sorry that she will be leaving ELI, but it's time for her to move on to other things.

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And I just wanted to echo all of the things that have been said about the importance of an environmental adjudication, and everyone has been much more articulate about it than I can.

I just wanted to note that we have some of the pioneers of education of judges who will be with us and speaking today, from Justice Antonio Benjamin, who first partnered with ELI in the early '90s to train judges in Brazil, Judge Donald Kaniaru, Judge Merideth Wright.

This is something that has been an effort that many people have been working on for many years in an unfortunately uncoordinated manner, and we're very pleased that Nick and others have spearheaded the wonderful idea of finally coordinating our efforts and bringing it all together.

I just would note that ELI first got involved in educating judges as a result of a challenge. In 1989 we gave our annual award to Judge Arnold, from the Second Circuit. And in his acceptance speech he noted that

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judges -- he was referring to judges in the United States -- knew little about environmental law, and that it was a critical subject, and challenged ELI and the Bar to educate judges about environmental law.

Our president at the time, Bill Futrell, took up the challenge immediately, said that we would spend our time and resources on that, and we began looking for resources to work on it. And we started in the United States, and -- and then expanded to other countries.

But no one organization can reach all of the judges, and we need to bring all of these efforts together, and we have so many people to reach, so we're looking forward to collaborating with everyone.

I wanted to thank Pace Law School and the New York State Judicial Institute for hosting this, and we're very happy to be working together on it. Thank you.

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H.E. Antonio Herman Benjamin

PROFESSOR ROBINSON: Thank you.

Well, thanks to all of you who have opened our program today. I would like to invite Justice Antonio Herman Benjamin to come up as the panel relinquishes the front of the room, and we'll begin our program.

The way we're going to handle the questions, because of the web cast, is if -- you have a pad and paper, if you have a question you want to address to one of the speakers this morning, or in the afternoon panels, just raise your -- your question, and one of our Pace students will pick it up and bring it up to the moderator so that the questions can be read. In this way your question will get out quickly to those on the web cast, and we really have a consistent process for handling the questions.

We will have an open discussion at the end of the day in which all of you are invited to speak, and that will be broadcast directly, also, and we'll have a microphone for you to come up front and address each

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other that way.

But let me welcome Antonio Benjamin. His introduction is in your materials. To most of you in the room he needs no introduction, but he has been one of the seminal thinkers in environmental law, someone that all of us who work in this field look up to, and have enjoyed our collaboration with for many years, and we hope for many years to come.

JUSTICE BENJAMIN: Thank you. Good morning, everyone. It's an honor to open this international symposium on environmental courts and tribunals.

Let me first thank this symposium's organizers, especially Pace University School of Law and Professor Nicholas Robinson in particular, the International Judicial Institute for Environmental Adjudication, the Environmental Law Institute, and I see here our colleagues from ELI and other institutions involved with putting forward this timely and important initiative.

I attribute my invitation to speak here

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today to the fact that my country, Brazil, notwithstanding the serious environmental degradation and enormous deforestation of the past 50 years, continues to be both our planet's richest reserve of biodiversity, and simultaneously an experimental laboratory with new and creative models of environmental policy and legislation both in terms of policy design as well as compliance and enforcement of the laws that we have put in place.

I will begin with the obvious and perhaps an environmental cliché, the common ground for us being here. We live in an era of rapidly disappearing species and ecosystems, a scenario made more worrisome by the uncertainties associated with climate change.

And I say the obvious, because we tend to forget the obvious. So my clerks come to the big cases and they start saying, "Justice Benjamin, let's skip the obvious." I say, No, no, no, start with the obvious, because we judge need to be reminded of the obvious.

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The very basis of life is under threat. It's obvious again. This observation has, in my view, repercussions for the theme that I have been asked to analyze today, judges and the environment.

Judges have had the final word on how social interactions affect our lives -- the beginning, the termination of life, family life, life in the marketplace, emotional life, and so on. We have never questioned the intervention of courts in these diverse fields of social interaction.

The intellectual task here, then, is to investigate the role of judges in the protection of the basis of life itself, the judicial concern with the a priori, with the natural foundations that precede and sustain our everyday life.

Logical reasoning suggests that if it is the judge's responsibility to preserve life in the examples that I have just alluded to, then it must also be up to the judiciary to ensure whatever is necessary to maintain all living beings, ourselves, and all others, the

foundations of life. It sounds logical.

Nevertheless, we know that judicial intervention in environmental matters, despite some success stories around the world, still does not exist in many countries.

In some legal systems courts have merely rhetorical or symbolic participation in the implementation of environmental laws. In others, their role is questioned, and we are going to get back to this. In still others, courts are incapable of reducing, much less stopping, the extinction of species and the irreversible loss of precious ecosystems and biomes.

It is within this context that I intend to analyze, first, models of judicial participation of courts -- or judicial participation in environmental governance; two, concrete forms, at least two, of judicial action in resolving environmental conflicts; three, the challenge to judicial practice in this area; and fourth, the prospects for the near future, a reflection

that, of course, will stem from my experience as a Brazilian.

Although it is somewhat of an oversimplification, I believe it's possible to identify two broad basic models based on the types of roles courts play in environmental governance.

On one side is the spectator judiciary. It sounds much better in Portuguese, I have to say. It makes an -- a lot of sense in Portuguese. Once it's translated, it loses part of this touch with the language and the culture of -- of Brazil.

On one side is the spectator judiciary, an institutional non-actor or peripheral actor in responding to the environmental crisis. This is the environmental laissez-faire approach, in which law and judges continue to be seen as tools of the state, used primarily for the protection and enforcement of property, contracts, and family law. It might sound awkward, but this is in effect pervasive around the world.

The rest, including the protection of

the environment, is reserved for public policy and administrative discretion, a prohibited territory for judicial exploration, except in very limited situations which are by definition exceptional. Of course, we will find no law that says expressly or openly that judges must keep away from environmental conflicts.

The judicial system reached this result indirectly by maintaining the same legal patterns, both substantive and procedural, that have guided judicial practice for centuries.

There are various arguments, political and technical, put forward to suggest that courts should employ this hands-off approach in dealing with the environmental crisis. It is said that the environmental conflicts raise legal issues that are too complex (take, for example, industrial pollution, groundwater contamination, or difficulty of establishing causation in a specific case of species extinction).

The judiciary, goes the argument, does

not have the necessary resources nor the experience to deal with such a high level of scientific and technical complexity.

Proponents of this spectator judiciary further point out that the environmental disputes do not always present themselves in a crystallized manner so as to fit perfectly in existing legal modes.

That, it is argued, could force judges to enter into the murky and judicially prohibited waters of political confrontation and policymaking, which are the exclusive province of other state actors, namely those elected directly by the people, which cannot be labeled -- as judges can, in countries like mine, we are not elected -- as democratically illegitimate.

Finally, environmental conflicts require quick action or response, which is incompatible with the slow pace of the court system, which, due to its bureaucracy and technical rituals, eventually becomes an obstacle to effective protection of the environment, even more important to economic

progress.

In my view, none of these arguments in defense of the spectator judiciary hold water. Judges, in the course of their traditional duties, often deal with complex social and technical questions. Nowadays, judges are confronted, for example, with all sorts of technical and technological difficulties while solving or resolving intellectual property disputes.

But here the complexity is not a barrier to judicial intervention. One might ask, do we have a double standard here? If it's for the protection of property rights, then complexity is not a barrier. But if it is to control or to make property rights responsible to the environmental crisis, then complexity becomes a problem.

To decide well, a judge need not transform her chambers into a university or specialized research institute. It is precisely for this reason that judges have the power to appoint experts or special masters to conduct studies. Even the most

sophisticated ones require cooperation among various academic fields.

On the other hand, the slow pace of the judicial process, while undeniable, can be corrected or improved with legal and management innovations. I see courts around the world doing exactly that, in my country, in Australia, in Kenya, in the United States. It should not be taken as an argument to distance courts from the one single type of conflict, environmental.

Undoubtedly, we expect judges, especially civil law judges, to respect the fine line between the legal and the political, but this again presents no obstacle for the courts. Here we should distinguish between their application of legislative public policy and the judicial creation of public policy. This is a very important distinction.

This distinction was highlighted in a decision of the High Court of Brazil, in appeal that came from the Supreme Court of the State of Santa Catarina. And I quote the

Court, "In Brazil, unlike other countries, courts do not create obligations for environmental protection. They spring forth from the law, after having passed through Parliamentary analysis. Therefore, we do not need activist judges, for the activism is done by the law and by the constitutional text. Fortunately, our judiciary is not confounded by a sea of gaps or a festival of legislative half words." You can see a carnival of half words. "If a gap exists, it's not due to the lack of the law, nor even a defect in the law; it is because of the absence of or a deficiency in administrative and judicial implementation of the unequivocal environmental duties established by the legislator."

As I look around, I believe that, in environmental governance, we are increasingly living in the era of the protagonist judiciary. Again, it has lost all the meaning that it has in Portuguese. And I cannot find a word in English that would reflect what I intended to say. It's the

closest. Or at least moving toward -- moving toward the protagonist judiciary.

This is a result of a series of political and legal developments beginning with the Stockholm Conference in 1972. First treaties and international documents began requiring its states to legislate -- and legislate effectively -- on environmental protection. As we know well, laws are enacted so that they may be enforced -- including judicially -- when violated.

In addition, many countries in the world have "greened" their constitutions, raising the statute of environmental protection and transforming it from a legal into a constitutional paradigm.

This is absolutely crucial in understanding the judicial developments in countries that have greened their constitutions. It's not just the legal paradigm, the regulatory paradigm, an administrative paradigm, it's a constitutional paradigm.

This is not and should not be a merely

cosmetic legal change. Lastly, since the Rio Conference in 1992, the international community's emphasis has moved in the direction of compliance and enforcement of environmental policies and law. And nowadays, we have a whole institution dedicated to this, i.e., the International Network for Environmental Compliance and Enforcement.

Currently, many national constitutions expressly recognize the right to a clean and safe environment. The specific terminology and language varies significantly among those different constitutional texts, some going further to attribute an ecological function to property rights, as in the case of Brazil and Colombia.

Even in countries that only recently embraced democracy and the rule of law after decades of military or civil dictatorship, it is considered unacceptable to recognize rights without connected duties, and, more importantly, without agreeing, at least in theory, to the legitimacy of judicial

intervention in guaranteeing those rights.

So if rights are recognized, they should not be only cosmetic. It's implicit in the constitutional language protecting the environment that judges should play a role in enforcing those rights and duties. Furthermore, in the modern world it is impossible to separate the environment from the protection of traditional rights and goods such as health and property.

Nor can we forget that in the new constitutionalism, the rule of law occupies a central place, and the true rule of law cannot exist without ecological sustainability. We could add, without an independent judiciary. We could add, without a judiciary that is not taken by corruption. We could add, a judiciary that is open to litigation in which the debate is about the very foundation of life.

All this to stress the fact that an environmental hands-off court system not only contradicts the needs of our times but fundamentally plays against a sort of

judicial disobedience of the constitutional and legal framework put in place.

I believe we should keep in mind that an activist judge, the worst form of activism is when a judge decides against the new paradigm, keeping the status quo. So you can have -- you can be -- a judge can be terribly activist in keeping the status quo that has been completely changed by a new constitutional and legal paradigm.

It becomes clear, then, that the critique of the judicialization of environmental conflicts should have other, deeper roots that are perhaps unspoken or less transparent.

I should begin with possibly the most fundamental and controversial aspect of this debate: Environmental protection redistributes ecological value, and by doing so, redistributes economic value as well, and reorganizes property rights. This is the redistributive function of environmental law, that is quite often put aside when we write on the subject and try to avoid such a

complicated issue.

Think about how the equation of negative environmental externalities is reversed when its statutes and quotes begin to require a polluter to install emissions control equipment. It sounds like a technical innovation but, in fact, we are changing entirely the legal, economic, and, I would say, ethical, paradigm of how the marketplace works; or when environmental law, as in Brazil, prohibits rural landowners in the Amazon from cleaning 80 percent of the area of their property. Basically, what the legal system is stating here is that there is an ecological function to property rights.

In that respect, the High Court of Brazil, my court, again, as it interpreted the Brazilian Forest Code of 1965, held the following, and I quote: In contemporary judicial -- constitutional regimes, real properties -- rural or urban -- serve multiple ends (private and public, including ecological), which means that their economic utility is not exhausted on one single use or

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the best use, let alone the most lucrative use. The Brazilian constitutional-legal order does not guarantee property and business owners the maximum possible financial return on private goods and on activities undertaken on real property. Unquote.

And the Court added, in the same decision, "Requiring individuals to comply with certain environmental duties in the exploitation of their property is not discriminatory, nor does it interfere with the principle of equality, principally because nothing can be confiscated that does not properly belong to someone by title or ownership." This is a case from -- originally from the State Supreme Court of Panama.

And I finish the quote in the Court here.

There is an additional change occurring that affects traditional judicial practice. The growth of collective access to justice, which implies procedure recognition of new

actors that by their nature or quantity are less susceptible to manipulation or embarrassment by environmentally degrading state or powerful vested economic interests.

Collective adjudication reconfigures the individuality of environmental harms, bringing not only the diffuse and intergenerational components of degradation into play, but also making sure that Nature itself will not rest without protection and, if you will, compensation.

When we speak of judicial action in environmental protection, we, in fact, have two things in mind which should be clearly identified and separated.

The more common and less controversial function of the courts in environmental law is to decide questions of respect, particularly from the state, for the former procedures provided by law.

Here the judge's mission is fundamentally to ensure reform of environmental due process, which includes, for example, reviewing the appropriateness of

environmental license or permits, the completeness of environmental impact statements, the holdings of public hearings, and the very steps and formalities in the process of creating protected areas. This is formal judicial control, and as such, it's shallow from an ecological perspective.

More difficult, one could say, is when a court is called on to undertake substantive environmental judicial control of development projects in which the judge is expected to -- within the background of the constitution and the laws, to weigh options and internalize environmental costs.

What are the challenges for us judges in the near future? And I'm coming to my conclusion. One clear challenge is handling the weight of legislative sources, international, national, increasingly, municipal.

And I'm just citing three levels. Some countries have five, like Italy. Imagine the difficulties of an Italian judge in having to combine all those levels and interaction of

different levels of laws that are increasingly complex, heterogeneous, and fluid.

Environmental law is comprised of a number of concepts that challenge the very tradition of Western law, based on certainty and security, to begin anew with the term "environment."

And it's irrelevant if the parliament defines environment. It seems that the role of the court -- or the difficulties, it would be less, but in fact, we have -- it's even more problematic in countries like mine, in which parliament has done exactly that.

In addition to this conceptual uncertainty, judges must adapt the static character of law to their always evolving nature of science. Let's take one example. In the context of climate change, is it reasonable to look at legal rules for environmental licensing or permitting in the usual way?

Conducting an environmental impact statement in respect to a beach resort, are

we going still with the same laws? Are we going to do the same way as we did ten years, twenty years ago?

Another respect to be considered is the still embryonic principle of non-regression, a response to the fact that nowadays environmental legislation, in many countries, including mine, is waning, or is -- suffers from the risk of waning.

There is a global struggle to maintain the gains of 40 years of legislative development. I personally see the principle of non-regression as a general principle of environmental law.

In this sense, a recent decision by my court, the High Court of Brazil, made this point very clearly, even though it was stated in obiter dictum, and I quote:

"If progress, as the key concept of modernity and of the very process of civilization, exercises an irresistible influence -- even a dogma -- over the political institutions and judicial instruments that give it support, to the

point that we consider, for evident reason, the mere possibility of falling standards of income, employment, or consumption (the sin of decline) to be an aberration, it is only fair that legislative controls and mechanisms for preserving our natural heritage for future generations also benefit from this same idea of 'walking only forward.'

And the Court continues:

"Although we do not find it expressly established in the Constitution, nor in infraconstitutional norms, and despite its imprecision, the non-regression principle is a general principle of environmental law, which may be invoked when evaluating the legitimacy of legislative initiatives designed to reduce the level of legal protection for the environment, especially those that would affect essential ecological processes, ecosystems that are fragile or on the brink of collapse, or species threatened with extinction."

And the quote continues:

"Therefore, to intend to reduce the

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level of legal protection of the forests" -- that was the issue in this case -- "in an era of rapid habitat destruction and of scientifically proven threats to the survival of thousands of species, would be nothing other than to turn back the wheel of time on investments made in the dialogue between economic growth and natural conservation, which is no longer the exclusive province of natural science, economics, and politics, having become intertwined in the mesh of the constitution."

So in other words, don't do it, because you'd be messing not with a statute but with the Constitution, or the concretization of constitutional provisions, protecting them -- the environment.

"At a minimum, this ought to illustrate the perplexity of any initiative along this line that seeks to direct the path toward material progress and the path toward protection of essential ecological process, (the natural foundations of life) in opposite directions with different degrees of judicial

guarantee.

"In this latter context, it is unimaginable for us to accept as possible, ethical, or sustainable, any material progress in human life without an equal guarantee of progress in the level of protection for the natural foundations of life -- all life -- but particularly for essential ecological process."

The Court concluded:

"It would go against common sense to allow the possibility of retreating legislation when, for many species and ecosystems on the path to extinction or already extinct, the dangerous boundary line -- the red flag of minimal ecological necessity -- has been ignored, if not irreversibly crossed. In one case or another, to use the colloquial expression, we cannot cut in any closer."

In Portuguese, "nao mais ha gordura para queimar."

"Of course, we are not attempting here to ascribe an absolute character to the

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non-regression principle. Giving legislators unrestricted authority would be as much of an exaggeration as it would be, given the extent of their legislative autonomy, to prohibit them entirely from maintaining a certain degree of power to revise the laws they develop and enact." Unquote.

The courts, however, will not be able to protect the environment unless there is a strong cultural desire to do so as well. I see this every day in my country.

Changing the law is one thing, but transforming centuries-old, deeply-rooted cultural traditions would be challenging for any judicial regime or nation. This point did not go unnoticed in another precedent of my court from the federal board of appeals from the first district. And I quote:

"In Brazil, 'to knock down' and 'to replace the old with the new' have always been the order of the day, in the city and in the fields. In the spirit of the Brazilian, carved out over 500 years of historical conquests of the natural and of the old,

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progress becomes synonymous with denying the value and legitimacy of the past and the future, such that our 'immediate-ism' only allows us to recognize the identity, legitimacy, and necessities of the present. As such, the natural tendency is to reject, disbelieve, or obstruct any legal regime that stands in the way of tractors, cranes, dynamite, chain saws," unquote.

I conclude by paraphrasing another precedent of the High Court of Brazil, in this case an appeal coming from the Supreme Court of the State of Sao Paulo, the richest state, and the most -- the largest Supreme Court in number of justice in the country, in which the main issue was the validity of private conservation easement clauses put in building contracts at the beginning of the 20th Century. And why -- I'm just paraphrasing here, because this was an urban planning environmental case. And I finish with those words:

Although courts do not manage the nature around them, that does not mean they cannot

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do anything for it. No matter how great her interest in, knowledge of, or ability in the art of natural conservation -- no judge will take upon herself anything beyond the simple role of engineer of the legal discourse.

And as you know, nature will not rise or evolve with words alone, but words spoken by judges can indeed encourage destruction or legitimize conservation, endorse speculation or guarantee environmental quality, consolidate the errors of the past, repeat them in the present, or enable a sustainable future. Thank you very much.

PROFESSOR ROBINSON: Thank you, Antonio. It's my privilege to -- on behalf of our colleague, Professor Oliver Houck, who has written a wonderful book called "Taking Back Nature," a story -- eight stories of environmental cases that changed the world, so thank you for your fine keynote address. I present you with an autographed copy of Oliver's book.

JUSTICE BENJAMIN: Thank you so much.

PROFESSOR ROBINSON: The cover of this

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book has a picture of Storm King Mountain on it, and Storm King Mountain was the site of a major environmental law fight, and series of judicial decisions, but a very important one in the Second Circuit of our federal court of appeals, in which Judge Paul Hays actually wrote some of the things you just spoke about.

He talked that judges cannot be just the spectator judge here. You can't just be a judge, as he put it in his opinion and in American metaphor, U.S. metaphor, a blindly -- boldly calling balls and strikes -- "blandly calling balls and strikes," was the words he used.

You are not just an umpire who sits up there and lets the people fight back and forth. You've been given a mandate by the legislature in the statute to see that the environmental protection norms are implemented.

And in this case the Federal Power Commission was instructed to go back and do it again to protect this mountain, which then

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inspired the modern development of our environmental laws in the United States.

But we now have time for some questions, and so I ask you to write them down. I think we'll sit down for the questions. And I want just to repeat one other theme, as you're collecting your questions. We are having this meeting one day after a very important meeting in Belgium, that the European Union judge -- Forum of Judges and the Catholic University of Louvain have been holding on the question of Natura 2000, the protected parks provisions in the EU, and the role of the judge.

And Luc Lavryson, who is a current chair of the European Forum of Judges on Environmental Law, and someone who worked very closely with the United Nations environment program in the development of continuing judicial education, was the principal speaker from the judiciary at this conference.

And in -- I echo it not only to pay tribute to all the judges in Europe that as

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of yesterday were holding this meeting, but also to point out that when the judge deals with seeing that the protected area laws are properly observed, this is not the spectator judge.

This is the judge accepting that there is an important role for the courts in seeing that the legislative and administrative decisions to establish nature preserves are adequately recognized and not encroached upon or allowed to deteriorate.

And I echo that, I'm thought to echo that, because of what Justice Benjamin has said about the principle of non-regression.

If you think about the principle of non-regression, no one would say, Well, you see a park, let the poachers come. You see a park, let the road go through it. I mean, that's a kind of regression which is constantly rejected by courts around the world, or the determination to create protected areas means nothing.

And if we extend that concept to other areas, not just nature conservation, but

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questions of protecting the public health by carefully managed -- managing how chemicals are taken care of, and carefully taken care of, so that they are not allowed to break loose into the food chain and bio-accumulate in you and me, well, that's not too far removed from thinking about the role of protecting a protected area. The membranes of humans have to be protected as well as the membranes of nature.

But let's see what questions people have. If you've got some questions, we'll bring them up and pose them.

(Reading) How important is it to have prosecutors bidden to the ministerial publico -- and you might explain the ministerial publico -- to the success of the environmental courts in Brazil and courts generally in promoting the effective implementation of Brazilian environmental laws?

JUSTICE BENJAMIN: I can trace back this question. I know I have five candidates in the audience that I'm sure one of them asked

the question.

In the past 20 years we have been training judges in environmental law. But it's important to know this, that except in very -- not to know this, but to remind all of us, that except in very few countries, like India and Pakistan, perhaps Sri Lanka too, judges do not have suo moto jurisdiction, so we judges have to be provoked, so to speak, by those that have standing to sue.

And this means that if you set up an environmental court, or even if you provide for standing to sue for environmental groups, public prosecutors, or other actors, but you do not have those actors highly trained, the judges will not be able to use the knowledge that they -- they acquire through those courses conducted by the Judicial Institute or the judicial schools.

So it's very important, in my view, to not forget the whole circle of compliance and enforcement, and making sure that countries understand that it's not enough to empower

judges to decide environmental cases if there are not enough environmental cases to be decided because they are not brought to the courts.

So that's the reason why I think the model in Brazil has been successful, because we have hundreds, if not thousands, of both civil and criminal cases brought by the Office of the Attorney General. And the environmental part of prosecutors, they are highly independent, so judges can decide all those complex issues, some of them I alluded in my talk.

So in sum, I think it's important that we keep in -- in doing the work that we have been doing, we do not forget that other actors of the compliance and enforcement circle, if any of those pieces does not function properly, the whole system will collapse.

Can also be the opposite. You have outstanding environmental groups, prosecutors, environmental agencies doing their jobs, but if the court system doesn't

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work, it's not capable, both technically but also ethically, of dealing with those cases, then, again, the system will collapse.

PROFESSOR ROBINSON: The next question is: Are green constitutions necessary for finding environmental rights?

Teleologically, constitutions ensure and protect the sustainability of individuals, society, and the government. Does this not inherently include environmental rights?

JUSTICE BENJAMIN: Excellent question. And there has been studies conducted. One that comes to mind is an article called -- co-written by Carl Brook, from the Environmental Law Institute, on constitutional provisions protecting the environment in Africa.

Those studies have not addressed this question, whether it makes or it doesn't make a difference to have a constitutional provision protecting the environment and granting a clear right to a clean and safe environment.

The argument is that, just look at the

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United States. You don't have in the U.S. constitution any provision protecting the environment.

And the situation is even worse because in this country the police power is not shared by all levels of government. So at the federal level Americans have to fight a sort of shortcut, in fact two shortcuts, one within the commerce clause and the other one the treaty-making clause in order to make up for the lack of police power. But everything that is done under this model shortcuts would fit in our countries within the police power.

So it seems -- it's also interesting to analyze how American courts and courts that have clear provisions protecting the -- and countries that have clear provisions in the constitution protecting the environment, how they deal with the issues of regulatory takings. Compare that -- take, for example, the approach that you see in Colombia, in Brazil, or even Portugal, the precedents in Portugal.

So I have met mixed feelings in respect

to how powerful a constitutional provision can be, but I still believe that they are very important for other reasons.

First, because those constitutional provisions tend to be quite explicit and detailed. It's exactly the opposite of what you have in the U.S. constitution.

In some of those constitutional provisions you have, for example, a requirement for an environmental impact statement. You might say, This should not be in a constitution. It should be in laws passed by Congress.

But it is exactly this provision that has enabled the courts to block any change that would dilute or completely, you know, make it -- the instrument just play, how do you say in English, lip service to its objective, when especially state legislators have decided to weaken those type of instruments.

So there is a value there, but I think we do need -- it would be interesting to have a comparative analysis, not just at the

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theoretical level but at the judicial level, to see what a difference those constitutional provisions do make.

PROFESSOR ROBINSON: And --

JUSTICE BENJAMIN: And if I may add, there is one more benefit. I know that there is a colleague, a diplomat from Belgium here with us. Those countries, like mine, that have a constitutional court, if you have the right to a clean and safe environment in the constitution, you immediately and you automatically open the door of the constitutional court to this type of litigation.

If not, it would be difficult to advocate that it should go -- also, in addition to my court, to go to the constitutional court.

PROFESSOR ROBINSON: Thank you.

Further questions. I have one here:
(Reading) Can the non-regression principle be linked to national security or to international security? Can we shift the paradigm of international security in some

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way to integrity of the environment,
environmental protection?

JUSTICE BENJAMIN: The 1981 National Environment Policy of Brazil was enacted during a dictatorship. And I -- anything that had to do with the dictatorship of 1964 would -- I would immediately read with sort of, not a hands-off approach, but very carefully.

And for many years we completely overlooked a provision in this act that linked directly national security with the protection of the environment.

And nowadays we are revisiting this -- this provision because -- just look around, all the -- the main and very complex environmental issues that we're facing in the courts, they do resonate with national security.

The risk is to go too far, as Justice Holmes would say, in analyzing a takings case. Why too far? Because sovereignty has been diluted and should be diluted under international law in protecting the

environment.

So national security, by its name, it's national. But we have to understand that when we talk about the climate system and the planet's biodiversity, those cannot be seen as values that fit precisely and exclusively within the boundaries of a single state. To advocate -- and there are those that advocate otherwise -- in my view, would be -- would defeat everything we have done since 1972.

So again, it is important to make this connection. In some countries national security and the protection of the environment is entrenched in the statutory law, but at the same time we have to keep in mind that the protection of the environment is something that can be addressed only at the global scale, at the international level, with the support -- and I repeat -- with sovereignty preserved of the countries.

It's important to stress this. We don't need to take away any part of any country in order to protect the natural resource there. So again, as I said, it plays both ways.

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PROFESSOR ROBINSON: The final questions I'll combine here, because they're very similar. But in your experience when we're seeing these new court systems or a court system just starting to confront or deal with environment degradation, what are the initial messages that that court system has to have in its mind, and what are the range of remedies available to environmental courts, and how creative can judges be in shaping remedies?

JUSTICE BENJAMIN: It seems to me that it depends where you are in the common law system or whether you are in the civil law system, so the answer would slightly vary.

Because in common law systems, courts have had more freedom to innovate than in civil law countries. This feature, however, has changed completely in the last 20 years. And in civil law countries, even the civil procedure codes now make a point of giving judges a lot of discretion in -- in managing cases or -- or remedies.

Let me -- since this is the last

question, let me say that an environmental court will not be much better than the country it is located or the people that it's supposed to serve.

It would be a utopia to think that in such a complex area such as the environment you would be able to set up a sort of niche court in which it would function completely different from the rest of the system. If that's the case, if it were to function completely different, it would not survive. It would disappear very fast.

So we should be, as we are, in the environmental law context, ambitious, but we should also understand that judicial protection of the environment depends on legal and political institutions.

They depend on the rule of law. They depend -- or they are directly related to an independent judiciary, whatever this means. And of course, they are related to judicial efficiency.

If a case, an environmental case, takes, you know, ten years, twenty years, to be

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solved, the judiciary might be there just as sort of green washing, judicial green washing. That I suppose is not something we want.

This is not a pessimistic tone. It's a realistic tone. So the test that we have ahead is not the single one. It will vary from country to country, and we should respect those variations. We should not have one single model for all the countries, because they will not work.

And I finish, Nick, with the example of the American class action system. That has been important, or let me -- not just class action, in a broader sense the public interest litigation system of the United States that has been imported by many countries in the world, and in several of those countries you have not seen a single case brought to the courts.

Why is that? Because as everything in law, this is a legal instrument, reflects and is a reflection of the cultural, historical, and legal traditions you have in that

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country. And the conditions for public interest litigation are present in this country for that particular type of model.

And when transplanting this to other countries, we want to make sure that we make the necessary adjustments in order to take into consideration all those various and -- difficulties that vary from country to country. Thank you.

PROFESSOR ROBINSON: Well, thank you very much. And on the question of remedies, we're going to have a -- during our coffee break, for those on the Web cast, we're going to have a presentation by Amy Mehta about ten different courts.

And you have all been given this diskette of primary source materials, which discusses a lot of the remedies that courts have been using and innovating around the world.

So I want to remind you that Justice Benjamin will be here throughout the day. There are more questions people have to pose to him, but you'll have a chance over lunch

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and the coffee breaks and the reception to do that. I want to thank him very much again.

And we'll now have a short break while we -- those who want to see the film and on the Web cast see the presentation of our research on primary source materials for environmental adjudication. And thank you very much for this splendid presentation.

JUSTICE BENJAMIN: Thank you.

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Honorable Justice Brian J. Preston

PROFESSOR ROBINSON: I apologize for intervening in your spirited discussions over coffee. And for those of you who saw the little video on the commentaries and primary source materials, I understand from the Web cast, we already have phone calls asking for copies of this to be sent.

You can also e-mail the environmental law program at Pace for copies, and we will be posting them online through our law library, so they'll go live shortly after the symposium.

We have a -- continuing with our plenary presentations, we have a reservoir of extraordinary experience in Justice Brian Preston.

The court, the Land and Environment Court of New South Wales was the first of these specialized environment courts and tribunals. It has built a body of case law that is just extraordinary.

Judge Paul Steen, when he was elevated to the appeals court in New South Wales, it

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was a -- an indication by the judiciary of that state that a judge in the environment court is just as important as a judge in any other court, really, sent out a great message to the importance of environmental adjudication as a specialized kind of true judicial adjudication.

The point that Justice Benjamin made that some critics of environmental courts think they just must be activist green courts, when, in fact, they are and have proven to be true courts.

Brian organized a symposium, which Judge Merideth Wright and others attended, on the 30th anniversary of the courts in New South Wales, and it's a great honor and privilege to invite him to take the podium for this next presentation.

JUSTICE PRESTON: It was so pleasing to see the coming of age of courts dealing particularly with environmental matters.

What I intend to do is to break my speech into two parts. The first is to give you an outline of the Land and Environment

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Court, to set the basis for those of you who don't know the court and what it does.

But secondly, I want to reflect upon what we have learned over the last 30 years, and I've picked this, for want of a better number, a dozen benefits, and that's -- those of you who have been around for a while in environmental law, you might remember a campaign in America where they, the EPA, targeted the dirty dozen. This is the desirable dozen. So, 12 benefits.

So first, let me just give you an outline of the court.

Australia is a federal system. So we have a number of states. New South Wales is the most populous and economically important state in Australia, although not necessarily the largest in land mass. And the Land and Environment Court is a state court within it.

It's important to understand in Australia, the federal powers in relation to environmental law are reasonably restricted, more so than in the United States. There is an overarching Environmental Protection

Biodiversity Conservation Act, which gives the national government, the federal government, power to implement, for example, international treaties and other matters of national environmental significance.

But, overwhelmingly, it is at the state level where the environment needs to be regulated. So the state courts are the most important courts that are dealing with environmental matters.

The Land and Environment Court is a specialist statutory court. It has a very wide jurisdiction in environmental planning, land law, mining, natural resource matters.

What's important to understand about the Land and Environment Court, and this makes it unique in the world, is that it's established as a Superior Court of record.

The Land and Environment Court judges have the same rank, title, status and precedence as a judge at the Supreme Court of New South Wales, which is our highest court.

Furthermore, and this -- not only is that a recognition of the importance, which I

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think 30 years ago was a really big step to be done, because no other court had ever been established at that level.

But in the last few years, the reputation of the court is such that it's -- we've had a few more accolades put on it. One is that the chief judge of the court, an omnipresent incumbent of that office, is also an additional judge of our Court of Appeal and our Court of Criminal Appeal. And I sit on those bodies.

It's also such that we are now able to, with the consent of the chief justice of New South Wales and the chief judge of the Land and Environment Court, sit as Supreme Court judges in Supreme Court matters. So it shows the coming of age of the judges.

So, coming to the -- just explain the judicial hierarchy in Australia. We, as I said, our state courts, have a state system, so, the -- going from the lowest level, we have the local courts, or the magistrate level. That then -- the next level up is the district courts. Both the district court and

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local court are classified as inferior courts.

From there, you go up to the Supreme Court of New South Wales and the Land and Environment Court, which are the same level, and that's also a division within the Supreme Court is that Court of Appeal and the Court of Criminal Appeal, and that's the end of the state level.

From there, there is, by special leave, an appeal to what we call our High Court of Australia, and the reason it's called a High Court of Australia is because we federated rather late in life, and the words Supreme Court had already been taken by each of the state's courts. So our constitution says there shall a Supreme Court in Australia, but we'll call it the High Court of Australia.

That's very few cases, only about 70 a year, go up there. They're very selective as to which cases go up. Some environmental cases go up, but for the most part, it is the Court of Appeal which will decide the fate of litigation.

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Now, the Land and Environment Court was set up, as I said, by statute. It is the Land and Environment Court Act 1979. It was assented to by the governor in 21 December 1979, but it didn't come into force until the 1st of September 1980, and that's why 1st of September last year, we had our 30th anniversary.

Importantly, it was part of a package of environmental law reform. One of the critical acts was called Environmental Planning Assessment Act 1979. And that implemented, for the first time, statutory EIA, it was based on -- Part 5 of that act was based on NIPA, in Vericat. The open standing provisions were based on the Michigan Environment Protection Act, Judge Sax's work, which allowed any person to bring proceedings for remedy with respect to breaches of the law.

There was a lot of innovation there, and that's quite important to understanding why it is that the Court thought that -- I'm sorry, the Parliament thought that they

needed the specialist court.

Let me come to that. It's always complex to try to look at what drove the parliamentarians at the time, but I think we can identify two main objectives. One is rationalization and the second is specialization.

What particularly there was a desire for was to have, to put a colloquial expression, a one-stop shop for environmental planning and land matters.

Now, dealing with rationalization, the problem, and I think you probably can recognize this in your own systems, if you don't have a specialist court, is that you have environmental matters, viewed broadly, dealt with by a range of different courts and tribunals, or boards, and it's -- you can never get the whole of an environmental dispute resolved in one place. And that certainly was the position in the '70s in Australia.

Importantly also that the -- what we think of today as environmental law hadn't

really been developed. The -- one of the catalysts was that act I talked about, the Environmental Planning Assessment Act, which brought EIA in, and public interest litigation, but a lot of other acts hadn't come into it, Threatened Species Act, Biodiversity Acts, they had not come in at that point.

So, more modern pollution acts also were not there, which is implementing the polluter pays principle. So that's coming at a later point.

So in the early days, they were a little more focused on some pollution media, specific laws, some planning, some valuation matters, land matters, and those spread amongst a variety of courts.

So the establishment of the Land and Environment Court allowed all of these different diverse jurisdictions to be rationalized into one court. Subsequently, as I said, the legislature has added jurisdiction to the Land and Environment Court.

The other aspect about -- or objective of setting up the court was specialization. It was to be given this wide environmental planning and land jurisdiction. It was to be exclusive, so no other court tribunal can deal with it. The court personnel, the judges and assessors who were to be appointed to the court needed to have knowledge and expertise in the jurisdiction. In some of the early days for the judges, they didn't have that, but they certainly developed it. These days, people who are appointed normally have expertise in that area.

Now, specialization was not seen to be an end in itself. It was a means to an end. The belief was that a specialist court would better understand the science and the environmentally relevant knowledge, and ensure that decisions are scientifically and environmentally literate.

It was thought that the court would be more ably -- able to deliver consistency in decision making, that there will be a decrease in the delays, because of a better

understanding of the characteristics of environmental disputes and the urgency in which they need to be treated, and also, and very importantly, it would facilitate the development of environmental law policies and principles.

It was felt that traditional courts were not going to be able to do that. They hadn't in the past, and with these new environmental laws that parliament was passing, they didn't want to vest them in an unknowing and sort of unsympathetic traditional court system.

And I think that has proved to be correct, that the Land and Environment Court, certainly through its 30 years, has developed environmental law in a way which wouldn't have been done if it had been left with the traditional courts.

So the background, let me just quickly give you an overview of the range of jurisdiction. One thing I think you'll find with the Land and Environment Court is that it has the widest jurisdiction of any specialist environmental court in the world.

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We not only have a tribunal, tribunal type function, where we are able to review on the merits the decisions of government in relation to environmental matters and make a fresh decision, but which also have a civil jurisdiction to deal with all range of different civil disputes concerning trees and mining, although mining awards have been abolished, and we have a very significant mining jurisdiction.

We have the equitable jurisdiction of a court of chancery. We can issue equitable injunctions, declarations for civil enforcement actions. That's where any person can enforce the law civilly.

We have the property powers of the Superior Court, so we are able to judicially review government action and subordinate legislation.

We have a powerful criminal enforcement, very important criminal penalties, up to seven years imprisonment for actors, \$5 million fines, plus many other orders that we can make.

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We have an appellate jurisdiction, so appeals from local courts in relation to environmental crime comes through to the Land and Environment Court, and because we also have these lay commissioners or assessors, we also have appellate function, where decisions, their decisions, can be reviewed on questions of law by the judges in court, instead of going to a court of appeal.

So that gives you a reasonably wide range of matters. Just to give a few illustrations of some of those, in our tribunal-type function, where we do merits review, the ones that you would probably be familiar with are anything to do with development control, where there's decisions of local government or state government about whether a development should be allowed to proceed or not and on what conditions, those appeals can come through the court.

Similarly, in relation to pollution license, any type of license under pollution laws, that can be appealed to the Court and the Court can make a fresh decision.

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And, with our -- just want to talk a little bit about the civil enforcement and judicial review. It is a very wide jurisdiction that we have.

One of the key features is that the court and the legislation that the court administers has -- is the ability of the public to participate and have access to justice. We have open standing provisions so that any person can bring proceedings, they don't even need to be an Australian citizen, to come and remedy a breach of the statutes.

So if you're passing by Sidney one day, and haven't got anything to do, you can, by all means, come to the court and commence proceedings for the greater good.

And we have taken that seriously, and we've come up with a lot of practice and procedure which tries to facilitate the public interest litigation.

The other aspect which I think is unique for a specialist environmental court around the world is we have a very significant criminal enforcement jurisdiction. We don't

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sit with juries, so it's summary proceedings. So we're both judge and jury for those matters.

But what the recognition is is that environmental crime has its own unique characteristics, and this demands special consideration. And so by reason of having a specialist environment court, the court is better able to achieve principal sentencing for environmental crime, and we've published a lot on this.

And one of the things that we've done is established a well first, which is a sentencing database for environmental crime. So you're able to search through all different types of crime, environmental crime and run the crime and see what sentences go to the actual remarks upon sentencing and see what innovations as far as all the penalties that can be done.

And we also, because we have a criminal appellate function, we're able to make a difference to the local courts. So we've noticed, since we've been publishing

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materials on principal sentencing and the factors to take into account, how to analyze environmental crime, having the environmental crime sentencing database, that the sentences from the local court have gone up between 10 and 20 times what it used to be.

And that's if you look at some of the literature around the world, one of the recurring themes is that environmental crime is not taken seriously, and the penalty has been far too low. That is being remedied by the Court's work.

We also have that ability to have the appellate review of commissioner decisions, and that's important to keeping our lay commissioners on the straight and narrow as far as the aspects of law.

So just turning to that now, the courts personnel, we have judges, we have six judges, including myself. We have then these commissioners, and I'll explain more their role, but we have nine permanent commissioners and we have 16 part-time commissioners.

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We have two registrars, both ... and trained and we have about 20 registry staff.

The judges are all very experienced lawyers. Three of us are Queens counsel, which is the highest rank you can be at the bar in New South Wales.

We have another barrister as well as two solicitors.

As far as these lay commissioners, they have to have knowledge and experience. They don't need to have a master's, as I saw, and was noting for the Indian green tribunal, but, in fact, many do, and we put up their qualifications on the Web site, but they are from local government, town country environmental planning, environmental science, arboriculture, horticulture, land valuation, architecture, engineering, surveying, management of natural resources, aboriginal land rights and disputes involving aborigines, which is one of our jurisdictions, urban design and heritage and law. So it's a huge range of different areas.

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And by having our both permanent and part-time members, we're able to cover all of those relevant disciplines.

And so we're able to put together panels which will deal with all the different issues, and that's the way we do it.

Now, when we allocate matters for hearing, we try to match the issues involved with the skill sets of the decision makers.

So if we have biodiversity issues, we'll pick up one of the environmental science commissioners; heritage matters, somebody with heritage background. So we match them together.

Now, coming to how do we resolve disputes, one of the ways in which the Court sort of approaches this is to think of itself as a multi-door courthouse. This is a dispute resolution center.

Now, we say we have our main court office in Sidney, but we actually -- our circuit court will go anywhere in New South Wales, into other courtrooms, or we'll actually conduct matters in the field. We

don't need to go to a courthouse.

But if you think of it figuratively, as a dispute resolution center, where a matter comes through, we diagnose that particular dispute, and we then try to match the particular dispute resolution service to the particular dispute. And we refer to that particular dispute.

And we offer a whole variety of certain dispute resolution processes. So we obviously have adjudication, the traditional one that courts do in all matters. We offer conciliation, and that is particularly used in all of our sort of more tribunal functions, those merits review functions.

We offer mediation in all classes of civil matters. We offer early mutual evaluation, where there's an evaluation of the strengths and weaknesses of a particular case and advice given to the parties, and they can see if they can settle it in the light of that advice.

So there's a variety of different mechanisms that we offer.

We try to encourage these alternative dispute resolution mechanisms through both pre-action protocols, sort of core convincing proceedings, there are various things that parties have to do; or post-action protocols, immediately after they commence proceedings, and before they first have their first return before the Court, they have to fill in certain forms and talk about and turn their minds to the different dispute resolution mechanisms they need to write for their dispute.

That is now supported by some statutory ADR protocols, which have been formulated in consultation with us and partly because of a result of the experience that we have had with pre-action protocols.

All courts these days do management of their case flow, we're no different, but perhaps we take it a little higher. There's a duty on all court to facilitate the just, quick and cheap resolution of real issues in the matters. And the Land and Environment Court actively case manages every matter in

the court.

What we do is we have differential case management in recognition not only for the different types of jurisdiction we have that I've outlined, but also the different nature of matters within any particular class of jurisdiction.

So we produce practice notes that are organized not by a particular event in the case management of a dispute, but by the particular type of dispute. So if it's a mining matter, it's a tree matter, if it's a planning matter, we have a particular case note. So it's a one-stop shop for people looking at the case management for that particular type of dispute.

Now, in those practice notes, there is a template litigation plan that we give, and so we tell people what we expect to happen to make sure that the matter moves through quickly, and we help them as to what those steps are going to be.

And what we're looking at is to try and assure proportionality to the importance of

the case and costs.

We've been quite innovative in the way in which we do hearings, both at the prehearing stage and at the hearing stage.

For prehearing, we always -- we can have in-court directions hearings, where people come to the court, but increasingly, we are using other mechanisms. One is telephone directions hearing, a specially set up court, which does conference calls throughout anywhere in New South Wales, and these days, with the advent of the mobile phone, that means people don't even have to be in the office. They can be anywhere at all in order to do that.

We also have pioneered E-court, where, if you're familiar with sort of, you know, chat rooms and other things, we can have E-courts, where people post various entries and communicate with the registrar and other court officers.

For the hearings, we have court hearings so -- that can be in the courtrooms in Sidney or in any other courtroom around New South

Wales.

We also have on-site hearings. That is where the whole hearing is conducted on the site of the dispute. We take evidence there and look at the site, local people, give their evidence on site.

If experiments need to be undertaken, they are done there as well, and often a judgment is given there as well.

Or we can mix and match. We can have partially on-site hearing, which is normally starts the proceedings on site, and then adjourn to a courtroom afterwards.

We also use video conferencing extensively, and we take evidence from all over the world from experts through video conferencing.

All courts have to follow the -- and implement the objectives of court administration. In basic terms, they are equity, effectiveness and efficiency. We take those very seriously, and we analyze what it means for a court to deliver equity, effectiveness and efficiency.

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We have a mission to achieve best practice worldwide. In fact, we seek to exceed that. We've adopted many quantitative and qualitative performance indicators to measure our achievement, and we report on that.

And we benchmark ourselves against comparable courts in New South Wales nationally and internationally.

Online, if you would look at our Web site, all of our annual reports are there. They are the most extensive reports of any court, where we try to analyze such critical aspects as what it means to give access to justice and how effectively has the court delivered access to justice at the end of the year as compared to previous years. We do that through quantitative and qualitative measures.

One of the innovations that the court has done is that we have the first court in the world to implement the international framework for court excellence, and we're published on what we've done in that respect,

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and we've become a bit of a model for other courts, not just environmental courts, but other courts to come and see what we're doing.

Now, we -- as I said, we publicly report on our performance in our annual review, and that ensures transparency and accountability.

All right. With that sort of overview of the court, let me come to look at the desirable dozen, and I'll give you my 12 headings as I run through.

The first, and I'll come back to as one of the objectives, and that was the rationalization of the jurisdiction.

So, rationalization and centralization of jurisdiction has resulted in an integrated and coherent environmental jurisdiction. It also results in a critical mass of cases, and that's really important.

In some of the courts I look around the world, they do not have that critical mass of cases, and it has meant that they have -- they are foundering, because they haven't got the critical mass. It's very important to

get that integrated, coherent mass of cases.

The next, of course, is that you get economic efficiencies for users and public resources in having this one-stop shop.

You lower transaction costs by having to go to all the different courts to try and deal with all the different aspects of the environmental disputes.

It also results in better quality and innovative decision making in both substance and procedure by cross-fertilization between the different classes of jurisdiction.

More generally, the court becomes a focus of environmental legal decision making. This leads to increased awareness of environmental law, policy and issues, by users, government, environmental NGOs, civil society, legal and other professions, and educational institutions.

Now, once you increase the awareness, that flows through to increasing enforcement of environmental law, and if you increase the enforcement, then that's a critical aspect of improving good governance, which is a

critical element in achieving ecologically sustainable development.

A second benefit, then, is specialization. Environmental issues and legal and policy responses demand special knowledge and expertise.

We have judicial education. The judges need to be educated about and attuned to environmental issues and the legal and policy responses.

We are unique in having a compulsory continuing professional development program for all of the judges and commissioners of the court. They have to do five days of continuing education, and we provide that not only with a court conference, but we have a twilight seminar series which updates all of the judges and commissioners. We also require them to continue their education in specialist areas.

We have -- specialization also has technical experts. So we -- decision-making quality, the effectiveness and efficiency is enhanced by the availability within the court

of technical experts.

Now, these technical experts can undertake the role of an assessor, which advises and assists judges in matters. In certain cases, they can determine the case themselves, or they can also be used in the ADR processes, particularly conciliation, where having technical expertises are advantage.

The other aspect about it is that we all know that you don't get good at something unless you continue practicing it. The problem with traditional courts is it's -- environmental matters become dissipated amongst the judges of the court. They may only deal with a few matters a year. Therefore, they don't build up the expertise.

We have about 2,000 matters going through the court. And so if all you do is environmental law, you get very good at it, as you -- one of the advertisements in Australia says about a particular matter.

So that is something, practice does make perfect by going through the -- facilitate by

specialization.

The other aspect is that specialization leads to the decisions of the court being scientifically and environmentally literate, which is important.

The third benefit, then, is the multi-door courthouse. So rationalization, specialization and the availability of a range of technical expertise facilitates alternative dispute resolution.

The rationalization aspect means that the Court has jurisdiction to deal with multiple facets of an environmental dispute. And that, of course, enhances the remedies that are going to be available. So the options you open, you widen the cake, so to speak.

The specialization facilitates a better appreciation of the nature and characteristics of environmental disputes, and the selection of the right dispute resolution mechanism for each dispute.

The availability of technical experts within the court enables their use in

conciliation and mutual valuation as well as improving the quality, effectiveness and efficiency of adjudication.

It also resolves in the court being able to resolve a whole dispute much quicker and at a lower cost.

My fourth benefit is the Superior Court of record. So, by being a Superior Court of record, we have an enlarged jurisdiction, and that means that we can deal with all of the different aspects of a dispute, and we have much larger remedies.

So, for example, we can deal with judicial review, all the equitable remedies, we have criminal matters, the appellate review, as well as the traditional merits review that comes from being a tribunal.

But being a Superior Court of record also leads to a high status and reputation, and that is greater than it would be if it was an inferior court, or a tribunal.

There's a public acknowledgment, by setting the court up as a Superior Court of record, of the importance of environmental

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issues and environmental law. And there's also a public pronouncement of the importance of the court and the decisions.

It is also, and we shouldn't forget this, that it leads to better quality judicial appointments. A Superior Court is better able to attract and keep high caliber persons for judicial appointments.

My fifth one is independence from government. Establishing an environmental court as a court, rather than as an organ of the executive arm of government, and as a Superior Court of record, rather than an inferior court or tribunal, enhances independence.

The sixth one is, then, responsiveness to environmental problems. An environmental court is better able to address the pressing, pervasive and pernicious environmental problems that confront society, such as climate change and loss of biodiversity.

New institutions and creative attitudes are required to deal with these environmental problems.

Specialization enables use of special knowledge and expertise of both the process and the substance of resolution of these problems. And rationalization enlarges the remedies that are available to respond to those problems.

Seventh benefit is that it facilitates access to justice, and access to justice, of course, includes access to environmental justice.

Now, a court can facilitate access to justice by its substantive decisions, its practice and procedure, and addressing inequality of arms. Let me just deal with each of those and try to show you just some of the benefits that have come from the court.

The first dealing with substantive decisions. The court's substantive decisions can uphold fundamental, constitutional, statutory and human rights of access to justice.

The Land and Environment Court, through its decisions, has upheld statutory rights of

public access to information, rights to public participation in legislative and administrative decision making, including requirements for public notification, exhibition and submission, and requirements for environmental impact assessment.

The Land and Environment Courts upheld public rights to review and appeal legislative, administrative decisions and conduct.

And so through its decision -- substantive decisions, the court has upheld the rule of law, and that, in turn, promotes public trust and confidence in the rule of law and in the court system.

Next, the -- the Court's practice and procedure can facilitate access to justice by -- this is what the Court has done -- removing barriers to public interest litigation, allowing parties to appear by various means, and not only by legal representation but also by agent, in writing or in person, facilitating access to information, for example, requiring discovery

of documents, we require reasons for decisions by government agencies, government agencies to produce documents to people litigating in court.

We also facilitate the just, quick and cheap resolution of proceedings, and thereby ensure that the rights of citizens to review and appeal decisions relating to environmental matters are not merely theoretical, but are actually available.

The Court can also address inequality of arms between parties. Specialization and the availability of technical experts redresses, in part, the inequality of resources and access to expert assistance in evidence.

It can assure access for persons with disabilities. It can assure access to help and information. Exemple, Land and Environment Court works very hard, through its Web site, to provide a whole variety of information for people.

We have specialist Web pages on areas of environmental law like biodiversity and heritage and mining, for example.

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We also have facilitate access to the Court's decisions. Every court decision is published on the Web site. We also are innovative in that we now produce a quarterly judicial newsletter, which is about 50 pages of summaries of cases, not only in the court, but in the Court of Appeal, the High Court and internationally. They are all hyperlinked and available, so you get full text retrieval if you want to. The summaries are there, and access to all the legislation, as well as other things.

No court in Australia, or that I know of in the world, produces such a newsletter.

We provide access for unrepresented litigants with special fact sheets, as well as other sources of self-help. We ensure geographic accessibility by use of electronic court, telephone conferences, video conferencing, contract hearings, on-site hearings and taking evidence on site.

We facilitate access to alternative dispute resolution to reduce cost and make more accessible to processors than the former

adversarial trial.

My eighth item, then, or benefit, is the development of environmental jurisprudence. The Land and Environment Court has shown that an environmental court of the requisite status has more specialized knowledge, has more cases and, therefore, opportunity, and is more likely to develop environmental jurisprudence.

Land and Environment Court's decisions have developed aspects of substantive, procedural, restorative, therapeutic and distributive justice. Can't go through all of those, but I'll just give you some headlines.

For substantive justice, the Court has given decisions in relation to ecologically sustainable development, the integration principle, the precautionary principal, inter- and intra-generational equity, conservation of biological diversity and ecological integrity, and the internalization of external environmental cost, including the polluter pays principle.

I don't think there's a court in the world that has led the way as much as the Land and Environment Court on these matters.

Other decisions in relation to environmental impact assessment, in relation to the concept of the public trust, and, as I've said, sentencing for environmental crime.

In relation to procedural justice, access to justice includes removing barriers to public interest litigation. The court has done that in relations to its decision in relation to standing, interlocutory injunctions, security for costs, latches and cost of litigation.

And then turning to some other aspects of justice. For distributive justice, the Court has given decisions in relation to inter- and intra-generational equity, the polluter pays principle, and balancing public and private rights and responsibilities.

For restorative justice, the Court has led the way in Australia in relation to victim offender mediation or conferencing in

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environmental crime, and also in the polluter pays principle.

For therapeutic justice, the Court adopts practice and procedures to try and improve the welfare of litigants and improve accessibility.

My ninth benefit, then, is better court administration.

The Land and Environment Court model has facilitated the better achievement of the objectives of court administration, of equity, effectiveness and efficiency. The Land and Environment Court has, relative to other courts in New South Wales, or indeed, Australia, minimal delay in backlog, and high clearance rates and productivity.

For example, in some of our jurisdictions in relation to, for example, tree disputes and the smaller residential appeals, we have targets and we achieve, of, from filing to finalization, and that means orders of the Court, within three months. So, no court can better that.

You've all heard the maxim that justice

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delayed is justice denied, and environmental justice depends upon having an equitable, effective and efficient court, and the Land and Environment Court aims to do that.

My tenth one is the unifying ethos and mission. The rationalization and specialization gives an organic coherence to the Court and its work. The nature of environmental law itself also gives a unifying ethos and mission.

There is an esprit de corps of an environmental court. The Land and Environment Court personnel believe the Court and its work are important and are making a difference to the world. They view themselves as part of a team, not as individuals working independently.

And this has an effect, so that users, legal representatives, and experts who come through the court also share in this spirit and this mission.

My 11th one is a value-adding function. The Land and Environment Court's decisions have worked, have generated value apart from

the particular case or task involved. There is, as I've said, an upholding, interpreting and explicating of environmental law and values. And that is an important aspect.

We think of many environmental statutes, they are skeletal. What the Court can do, through its decisions, is add flesh to that skeleton. And that's a very important part.

In our merits review appeals, our tribunal function, the court's decisions add value to administrative decision making. The court extrapolates principles from the cases and publicizes them. The principles can be used and are used by government agencies in future decision making.

In fact, many government agencies now bookmark the Court's principles and incorporate them into their policy documents and decision making.

The Land and Environment Court has also been an innovator and a national leader in court practices and procedures. We have been an innovator in E-court, case management. We've been an innovator in dealing with

expert evidence, including court-directed joint conferencing and report, the requirement for experts to give their evidence concurrently in court, and the use of single experts by the parties.

The Court has been an innovator in the use of on-site hearings and taking evidence on site, taking the Court to the people.

And as I've said, the Court is the first court in the world to implement the international framework for court excellence.

And the Court has established the world's first environmental crimes sentencing database.

And my last one, the 12th one, is flexibility and innovation. Large, established courts can be conservative and have inertia. Change is slow and resistant.

The fact that the Land and Environment Court is a separate court has enabled flexibility and innovation. Changes to practice and procedure can be and have been achieved quickly, and with wide support within the institution.

So, in conclusion, the Land and Environment Court is undoubtedly a model of a successful environmental court. It's now long established, 30 years. It has a preeminent international and national reputation.

It has received many favorable reviews and has been a basis for recommendations for environmental courts in other jurisdictions. It has a very high standard for judicial adjudication.

However, the Land and Environment Court or, indeed, any court, can't rest on its laurels. An excellent organization is one that is continuously looking, learning, changing, and improving towards the concept of excellence it has set itself. Excellence is more of a journey than a static destination.

The court recognizes this need for adaptive management. It continues to monitor its performance against objectives of court administration of equity, efficiency and effectiveness. It adjusts its procedural and

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substantive goals and performance in response to the monitoring data.

And so it is continuing to adapt to meet the environmental challenges of the future.

Thank you.

(Applause)

PROFESSOR ROBINSON: Well, thank you for an extraordinary introduction to the long-time success of the Land and Environment Court of New South Wales, and on behalf of all of us at the conference, I want to also provide you with Oliver Houck's book and the case studies he has presented therein. And thank you so much.

We'll be glad to now take questions. I'm sure a number of you have questions. The brilliance -- part of the brilliance of what you've just heard is that you can always go online to this court and get answers to all your questions, because they have been anticipated, and they are there, waiting for you to log on and do your own reading.

But while we have Justice Preston here, I'm sure a number of you will have thoughts

that you want to inquire.

One of the interesting things that has come in the United Nations Stockholm conference in 1972, for instance, was the beginning of articulating of principles of environmental protection.

We had the polluter pays principle in the 1970s get its development, and become well established, and then we had the -- in 1992, among the other principles that Rio de Janeiro put in place, we have the precautionary principle. No one would doubt the polluter pays principle anymore, but it's not observed universally.

There are still some who doubt the precautionary principle, and it is observed in a number of places, but, again, not universally. And now we have, coming up to the Rio+20, principles like the non-regression principle that Justice Benjamin spoke about.

And, for these principles to have meaning, they have to have utility in the adjudication process for actual disputes.

And as I've read the cases from New South Wales, one of the things that really is a great thing for a law professor to study and learn from, is how those principles are not abstract. They're not just soft law in some U.N. declarations. They're actually used and become rules of decision. And that progressed toward rules of decision is very important.

And I thought, just to start the questions, I'd ask, how do you view the development of principles in that way, the elaboration, if you will, from the skeletal to the embodied?

JUSTICE PRESTON: Well, I think that's the -- a central part of a specialist environmental court. If it's not doing that, it's not bringing these principles from being grand strategy to landing them on the ground, then I don't think it's achieving its charter.

So we try to do that. It's not easy to take some of these abstract principles and apply them, but it's an essential part of

what the court should be doing.

PROFESSOR ROBINSON: Okay. We have several questions now that have come up.

"How does the alternative dispute resolution function as part of your multi-door or courthouse?"

JUSTICE PRESTON: So, the -- I mentioned the different ways we can refer matters, and it will depend on the type of dispute as to which matter we send it to. But, for example, conciliation, it's a hybrid scheme.

It's a conciliation, sort of adjudication. The first aspect is the parties, with the assistance of an expert commissioner -- expert in the nature of the issues that are the subject of the dispute -- sit down and try to negotiate an outcome.

If they reach agreement on those outcome, the terms of the decision, because the conciliator is also a member the Court, then a decision can be made to implement the parties' agreement. However, there is a check there.

It must be one which is lawful, and that

is within power, and so if the parties were to, unfortunately, agree to something that is outside the environmental statutes, then that can't be implemented. But if it's within power, then that can be implemented.

If the parties don't agree, they can, however, move to the next phase and ask for the adjudication. And that can either be done by the particular conciliator, and in some cases, it has to be done by that person, but other times it can be returned to the hub, the central registry for reallocation to a new person, who can make that decision, and that can be done very shortly thereafter.

So that would be conciliation. And that's used very extensively now.

We also have mediation, in certainly all the judicial functions, we can use mediation. That's done. All of the persons who act as mediators have to be nationally accredited mediators, the highest standard that you can have. They've got to go through a long course, and have their mediation assessed. That's a quality control aspect that we

ensure.

We also use neutral evaluation, although that's not used that extensively.

The consequence of this is that, depending on the class of jurisdiction, but it's up to about 75 percent of matters, will be able to be resolved without adjudication through using some of these alternative mechanisms. That also improves access, because it reduces delay, reduces cost, and, therefore, makes more access to justice.

PROFESSOR ROBINSON: Question about the appointment of judges to the court. "Is the appointment more political than the appointment of judges to courts of general jurisdiction?"

JUSTICE PRESTON: It has had -- the Court's been around 30 years, so we've gone through a few governments in that time. There has been concerns that certain of the appointments may be of persons who would not otherwise have been appointed, for example, to the Supreme Court. That's not true today, and hasn't been true since at least seven

years ago.

I was five years ago.

And so the government has been very mindful of making sure that the persons who are appointed are of very high caliber, and are persons who would have been appointed to the Supreme Court.

But it is a risk that if you marginalize the court, then there is a risk that politics will intervene and you get appointments that you should not otherwise have.

We try to ensure, by living up to the status that we have, the reputation, that we keep being seen to be sort of mainstream and a professional court, so that acts as a bit of a restraint on politicians appointing those with political favors.

PROFESSOR ROBINSON: What is the relationship of the Court with the administrative agencies?

JUSTICE PRESTON: The Court is entirely independent, and I think that's very important.

I know there are models, including the

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EPA board here, which is part of the executive arm of government. That's not a model I favor.

I think it's very important that it be independent from the executive arm of government, and we make sure that's so.

So they are just one of the litigants in court. They are represented on our court user group, but they are just one of many stakeholders in the system. They don't have any priority or status. Indeed, the Court often clashes with the government, because we set aside their decisions reasonably regularly, and that leads to some good political coverage.

PROFESSOR ROBINSON: Related questions that have come in. "What standard of review do you use in reviewing land use decisions, and what backlash when you reverse or revise local approvals?"

JUSTICE PRESTON: We have two types of review.

For -- I'm using this sort of tribunal-type function, where we exercise the

administrative power. Then our decision becomes final and binding on the government as to that.

Now, that's not for all persons, don't have the right to come up that way. It's mainly the developer, and certain larger developments there, subjectives, who can come up through that mechanism.

Otherwise, it's judicial review, and you're familiar with that through all the different countries around the world. So that's the standard that we use.

Yes, there is backlash. We -- this government, which has just changed last weekend, didn't fare very well with the Court. A number of decisions they made have been set aside with regular -- regularity.

The consequence is that Parliament is sovereign. If they don't like our decision, apart from, like, an appeal, of course, the Court of Appeal, but if that doesn't work, they can pass legislation, and they have in the past passed legislation to overturn the court's decisions.

Very occasionally, they pass legislation to actually stop the proceedings, but I'm pretty philosophical about that. I believe that Parliament is sovereign. It can do that. And as Justice Sax said in his book from 1970, *Defending the Environment*, that what this does, by having this litigation through the courts, is actually an essential part of the democratic process, and it puts it onto the agenda of the legislature, and if they then decide to do that, it has to be debated in Parliament, it's open to scrutiny, and they're answerable, ultimately, at the ballot box for their decisions.

And, indeed, one of the reasons for the government changing last weekend was the fact that the public got actually very tired of the government's decisions in relation to environmental and planning matters.

PROFESSOR ROBINSON: You've mentioned Professor Joseph Sax is one of the inspirations for the Court.

There's a broad question. "Where else have you gotten your guidance, inspiration

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and motivation for these reforms?"

JUSTICE PRESTON: From a personal basis, tort, and I practiced environmental law for very many decades.

And I think keeping up to date with what's happening in environmental law, and seeing, reflecting, so it's reflective thinking about how it could be used, how we can make a principle such as access to justice real, is very important.

So, you can get inspiration from a whole variety of different places.

We try and benchmark ourselves by looking at what other courts have done. So whether it be the Vermont environment court or the New Zealand Environment Court or England's or other court. Where I find an idea, I'll take it back. I don't think I ever come back from any of these conferences without any ideas. I always come up back with one, and I see how might I implement it.

So, it's that continual sort of reflection which gives rise to innovation. But you've got to keep your information base

large to keep yourself educated.

PROFESSOR ROBINSON: A technical question. "How much have average litigation costs of parties dropped over time with your reforms?"

JUSTICE PRESTON: That would be a good question.

One of our projects that we're working on is to get quantitative data in relation to costs. All courts have talked about the problem of the cost of litigation, and they are all trying to reduce the cost of litigation, and we are no exception.

However, what I've found is that no court has ever done a quantitative analysis to see whether any particular innovation and practice, procedure, or case management has actually reduced the cost of litigation.

That is something that was a current project that we've got, where we're going to look at the cost of different types of litigation. We're going to break it up by stages within the litigation. We're going to get information from the cost assessors.

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These are people who when there's an order for costs, assess the costs.

We'll publish this, by the way, which won't improve our standing with the lawyers.

We're also going to look at the cost to the public resources, what it is for the cost of allocation of judges and commissioners to particular steps.

That will give us a base data from which we can then measure the changes in -- we're hoping that will help us. But even without that data, we can know that there are certain things that you can do to improve efficiency without sacrificing justice. And we certainly have been doing that. So in a qualitative sort of intuitive way, we know, but I can't give you the quantitative data, and I think that would be necessary.

PROFESSOR ROBINSON: Two final questions before our next speaker.

"Can courts like yours and national or state courts adequately address global problems like climate change, or do we need an international court for the environment?"

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And how would you envision that?"

JUSTICE PRESTON: Starting with the second, I think it would be a good move to have an international court for the environment, where you could consolidate many of the adjudicative functions that other bodies have. For example, the WTO has a certain adjudicative body; obviously, the ICJ has some. The head of environmental containment, I don't know works gone through it, but -- so there are ones there.

And under conventions where there's sort of adjudicative mechanisms, perhaps that could also be a jurisdiction given to an environmental court, an international court environment.

There's been work originally by Justice Amodeo Castiglioni from Italy who did a lot of work, perhaps some ten years ago or so, on pushing for that. More recently, Stephen Hockman from the Queen's Counsel from the English bar has been writing and pushing in relation to international court environment. So I think it's a good move.

Can a national court do something, or a state court? Yes. But we have to recognize our limitations.

We are not able to make decisions of grand policy as to what should be done.

Nevertheless, and I'm going to return to what Justice Sax said, that courts can be a catalyst for thinking and action by other arms of government, by the executive and the legislature.

So, for example, I -- the Land and Environment Court gave a decision in relation to the requirement in the environmental impact assessment for the executive arm of government to take into account Scope 3 emissions. That is sort of the downstream effects of burning coal, for example. So a coal mine, you could have a Scope 1 and 2 emissions, which are the actual emissions that come from mining the coal, but Scope 3 is where the coal is exported and burned in a power station. That will be the emissions that happen there.

And the Land and Environment Court said

that that was an impact that needed to be evaluated by the decision maker.

Consequently, the executive arm of government then responded with coming up with particular, you know, a particular subordinate legislation dealing with mining, actually requiring, then, that future decision makers take into account Scope 3 emissions.

Another decision of the Land and Environment Court said that climate change induced sea level rise and storm events and flooding needed to be taken into account when determining the impact, environmental impact, on approving a residential coastal development.

Although the government initially appealed that decision, they subsequently have enacted subordinate legislation which requires all decision makers at both state level and local government level to take into account the very things that the Land and Environment Court has done.

So in this way it can be a catalyst. So

individually, it's only one decision, but what it can do is open up what could be done.

One more. The court, we talked about precautionary principle, I gave a decision in 2006 on the precautionary principle, and also elucidated and explicated the other aspects of sustainable development principles.

What we see in subsequent judicial review cases is that government takes those decisions and implements them in their decision making. So we're actually seeing them using our explanation of those principles in future decision making.

And so it's an iterative process. We inform and improve the quality of the administrative decision making.

PROFESSOR ROBINSON: Well, thank you very much. Let me ask you to join me in congratulating Justice Preston for the depth and scope of his marvelous presentation.

And I'll invite Judge Kaniaru to come up to the front and we'll change places.

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Justice Donald Kaniaru

PROFESSOR ROBINSON: The presentation we're about to have is going to be a wonderful one. Those of you who do not know Donald Kaniaru should know him, because he is one of the great fathers and progenitors of environmental law across nations.

He worked in the United Nations' environment program for many years, and helped build up the initial courses for continuing judicial education and environmental law. They did not come out of Europe or North America, or some other place. They came out of Africa. And the African courts have been quite forthright in developing environment law.

In addition, he was very much involved with convening the UNEP Global Judges Symposium on the eve of the United Nations World Summit On Sustainable Development in Johannesburg in 2002.

So it's with great pleasure that I invite him here. This time, he is a new incarnation. He is inaugurating a new court

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and will speak to us about the challenges and opportunities of the creation of the

Justice Donald Kaniaru

environment court of Kenya. Donald.

JUSTICE KANIARU: Thank you. What an exemplary session. These introductory remarks, and as well an opportunity to be here, and to meet some old friends and certainly new friends.

It is a great opportunity to have the young before us. That is the future, and, therefore, we are investing in them, is what I want to pass as a message of an encouragement to them to do much better where we have done less.

Environmental courts and tribunals are a fact of life today. And the chapter is not closed for such new courts in different regions of the world.

How such courts are established depends on the circumstances of each country, and including the capacity inherent in the country and its extent of land use, urbanization, commitment to sound

environmental governance, and the existence of -- to sound environmental governance, and process of implementing the principle of sustainable development.

The Rio+10 in the World Summit for Sustainable Development, 2002, was preceded by the Global Judges Symposium in Johannesburg, South Africa. That symposium later spurred regional and national judiciaries to harness their appetites for settling environmental disputes.

These efforts present further opportunities to develop capacity-building systems that can and will be the basis of future courts and tribunals.

Regular reviews and exchanges of pertinent effort by environmental courts and tribunals will play an important part in the ongoing development of environmental law, as has already been articulated by the two previous speakers, Judge Antonio Benjamin and Judge Brian Preston, just minutes before me.

In this symposium, such material has been unveiled on the operations, eminence,

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laws and regulations governing environmental courts and tribunals. In fact, many of us taking part in this symposium are living testimony of courts and tribunals that have, over the years, engaged in environmental issues.

The uniqueness of this assembly is its ability to inspire new momentum to work together, to share information, mobilize resources, and galvanize government and other players to create follow-up structures geared to engage the Rio+20 United Nations Conference to be held in Brazil next year. And our judge here should play an important role in that respect.

In my remarks entitled "A New Environmental Court: Challenges and Opportunities," I outline challenges and opportunities facing Kenya as it launches an environmental court.

The Court's creation is mandated under Kenya's new constitution, promulgated in August 2010. This is the constitution, the document which is green in respects, and

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known previously in the country, and so it introduces and strengthens the environmental processes, and so this is an important challenge that is before us.

The details of the Court's jurisdiction and operations are to be worked out in national legislation to be enacted by Kenya's parliament in the course of this year.

So I talk about the birth of an environmental court, and this is a vivid welcome event in family and community, nation, and region. When it is founded on the constitution of a nation, like is the case in Kenya, such joy is not an exception, either.

In Africa it is the most imminent environmental court, in the Superior Court category, established by Article 162, paragraph (2)(b), which is that the Parliament shall establish court with the status of the High Court, to hear and determine disputes relating to (b), the environment and the use and occupation of, and title to land.

So its own title will probably be changing as Parliament enacts that law.

Before Kenya's new constitution came into force on August 27, the court structure was as follows: The Court of Appeal and the High Court, as the superior courts, and the subordinate courts and tribunals of a quasi-judicial nature as subordinate courts. Appeals from the subordinate courts and tribunals, as decided by law, would then go to the High Court, and, as a point of law, might reach the Court of Appeal.

And environmental courts were heard by the land and environment division of the High Court, which, as a division, is not structured in accordance with the law, but in accordance with the administrative properties, as introduced by the chief justice of the day.

Over time, two critical problems afflicted Kenya's courts: One, corrupt practices that created the perception that justice was for sale. Very unfortunate.

And a backlog of unheard cases that ran

into thousands. In fact, as of the last year, in 2009, 2010, estimated 1 million cases backlogged. And for a small country, that is a major setback.

The new constitution established a different structure of courts, to introduce a Supreme Court, retained the Court of Appeal and the High Court, and two superior courts of equivalent status to the High Court, namely an Environment Land and Titles Court and an Employment and Labour Court.

All three newly established courts, the Supreme Court, the Environmental Court and the Employment and Labour Court, are pending legislative action to bring them into being.

The High Court is excluded from jurisdiction over matters falling under the Environment and Land and Titles Court and the Employment and Labour Court respectively.

We had struggled, in the High Court, to accept broader jurisdiction on these matters from tribunals, and even when legislation was passed saying in environment and other areas the question of limiting access to the

tribunal and to the courts should not be done, the High Court had great difficulty in accepting such an approach.

As a consequence, the court was denied jurisdiction in these matters in the constitution, so they are excluded from the jurisdiction of the High Court.

And therefore, it itself contributed, by donating two new courts, which are the Superior Court, for the record equivalent to it, which was not the case before.

However, under the Constitution's transitional provisions and schedules, the High Court and the Court of Appeal continue to have jurisdiction over environment and employment issues until the new courts come into operation.

The new constitution itself set an ambitious schedule of implementation having new legislation brought in before Parliament and passed in time. 50 such or more legislations are slated in a period of one year to 18 months. Quite an enormous load. And for those of you who have been studying

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Kenya's politics, and so would have noted that our media have enjoyed unprecedented freedom, you will probably think nothing good happens, because there is so much dialogue and back and forth, the political divisions and so on. You are surprised that it would be working. But that itself impacted upon the speed with which some of these legislations would have passed.

And so the provisions expect this legislation, and the legislation is extensive, because while the executive has been structured and the Parliament given a certain leeway and liberty to organize its own calendar and pass issues that judicially was more extensively bashed in this process.

And, so, the new Judicial Service Commission, Chief Justice with the limited title to either leave, as he chose to do, or, if he doesn't leave, then he would accept to go to the Court of Appeal, where having been the head of the judiciary, this type of branch of governance there for eight years, to then suddenly have to either go down or

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leave, it doesn't surprise any one of you that he chose to leave.

And that in itself has meant, then, there was not a chief justice, and therefore, some of the progress that should have been made in certain areas, it slowed down, because the Judicial Service Commission, when established, itself decided, Well, maybe then, you know, it would wait, do small, small things, and so on, until the Chief Justice is in place.

And because they're first team, Chief Justice mentioned and another three senior officials, attorney general and the director of public prosecutions, and the controller of budget, Parliament said, No, we cannot accept these, there are implications, and so on, and those were withdrawn.

Subsequently, those positions of Chief Justice, Deputy Chief Justice, and those others, Controller and Director of Public Prosecutions, were advertised. As I left my lobby to come this way, there was a note in the press saying that, for example, the

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Director of Public Prosecutions, there had been no applicant as of that date. What that means is anybody's guess, because this is the first time the office of the Attorney General was split between the Attorney General and the office of Director of Public Prosecutions, so they were together.

So the Judicial Service Commission is in place, but you can also understand that under the structure of who moves what, the Chief Justice was directed to do the draft of the legislation regarding these courts, and in that task force would have been included both the ministries from which the court would come, that is, environment and mineral resources, and the labor ministry, plus the two courts that are acting as tribunals, which were there before, the National Environment Tribunal, which I have headed for the past six years, and the Industrial Court, under the other task.

Meantime, those tribunals have invoked a task force, and of course the ministries concerned with those in the task force to

develop this particular process.

What is happening, there have been another set of several tribunal -- what task forces, to develop aspects of legislation that is or near altogether working on this.

I'm heading, as chairman, a task force to operationalize the environment provisions in the country, and so from that perspective, we are actually holding together an approach that can then be fed into the other more formal process as soon as the Chief Justice can set that in motion.

So it is, you can see, then, why we're not celebrating a new court right now, because of these technicalities and these difficulties unforeseen, even though the people who are involved should have known their country.

So the issue to be noted that under transitional provisions and schedules the existing courts continue with issues of the -- until the new courts are in place.

Thus the High Court and the Court of Appeal are still exercising a traditional

jurisdiction, as before.

In the one environmental matter that went to the High Court not so long after the constitution was put in place, to a three-judge bench, it was interesting that they overruled the national environment tribunal, which I chair, and is a judge level -- a High Court judge level position, and so they overruled it, and did not agree, our having decided that the appellant had jurisdiction to come to the tribunal.

Interestingly enough, this ruling was made in September, some three weeks after the Constitution came into force.

The three-court bench did not refer to the Constitution whatsoever. And therefore they ignored that, and in subsequent discussion, one senior advocate, who practices before the Environment Tribunal, wrote a scathing attack on this particular ruling, and said it should not be followed as precedent, because it was contrary to law at this point in time.

So you can see why the High Court has

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some of these difficulties with the application of the law.

The environmental provisions in the new constitution have culminated in the acknowledgment of an environmental right, in the Constitution, Article 42, which is part of the Bill of Rights. It includes the right to a clean and healthy environment, which previously found expression in Environmental Management and Coordination Act Number 8 of 1999, which in fact had preceded and pointed the way in the constitutional review process, and thanks to that, a new gift has been given us in this new, new role.

Assigning leadership to the various ministries, and so on, will mean that we have to watch the situation very closely, be articulate, so that those favoring the old situation where the jurisdiction local standard was denied do not unduly frustrate the advancement of progress in the area of environment.

And by rooting the Environmental Court in the Constitution, frivolous challenges

that previously thwarted hearing of environmental issues will be avoided, because the situation has really changed, and environmental court would have original jurisdiction, of course judicial review, appellate jurisdiction from subordinate courts and tribunals.

So these, perhaps, then, might move in the direction that the Chief Judge of New South Wales, the Land and Environment Court was mentioned.

We watched the developments in that court very carefully, as well as other environmental courts and practices, such as outlined by Judge Antonio Benjamin, and the Supreme Court of India, by the Philippines, and all that. So I bless them.

The challenges and the opportunities of the Environment Court that Kenya would have to contend with. One of them is developing environmental law in the country. The Court has a tremendous opportunity to apply the application of the principle of sustainable development, which already finds expression

in Article 10, paragraph (2)(d), as one of Kenya's national environments, which everyone, the government, the county governments, every public officer, has to apply, and to address, in their work, in the whole country, so it's a major responsibility.

The court will also have the chance to harmonize interpretation and direction of different statutes on the environment and land use, and environmental impact in Kenya, and to rationalize inconsistencies in policies, and to facilitate the application of environmental treaties, which have changed direction from the commonwealth traditional way, where there would have to be domestication, to the position currently that any treaty that is ratified by Kenya is an integral part of the country.

So, there would have to go in the direction Brazil has gone, is going, as Judge Benjamin was mentioning, regarding the application of the heritage convention in that country.

Two, determining the scope of the Court's jurisdiction, and land titles, and use and titles.

A major challenge will be on the extent of its jurisdictional land use and titles. Land is of deep cultural significance. In Kenya, as elsewhere, land was at the root of Kenya's struggle for independence. The colonial experience defined and ordered systems of land tenure. Kenya's many land use and related statutes date back to 1900 or earlier, and the legal regime incorporates English law and India law from the 1800s.

And these are very complex. Several land-related statutes established cause of judicial tribunals. There have been numerous land commissions and recommendations on land issues, as well as a multiplicity of policies adopted by parliament. Disputes over alleged illegal allocation of land date back to the emergency days in 1952 to 1961, and since independence in 1963.

The backlog of matters pending in the jurisdiction system doubtless includes a

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significant number of land disputes, which obviously arise because for a long time we had expatriate judges on contracts, and where they misunderstood or did not appreciate these laws, cases were ended.

So you have a situation of where, you know, one has to play, you know, if a tribunal comes into being and wants to play sit, it could be very dangerous, because if these things don't move fast, then people will be blaming environment over some of these historical misfortunes, and this must be avoided at any cost.

All these factors call for legislation defining jurisdiction, carefully. How far back claims in lands shall be adjudicated and whether matters of fact will be separated from matters of law with the former being addressed by commissioners integrated in the court, such as was explained by our senior colleague minutes ago, and there are several High Court stations currently in existence in Kenya, some 18 stations, and of course those handle everything that comes, and this

station, the new legislation that established the Judicial Service Commission, and vetting, contemplates a High Court in every county, and 47 of them have been introduced.

And if that is the case, then you have a certain element of difficulty there, because how many judges would there be for the new court? That has to be determined, and their spread, and the opportunities given, and who actually then receives all these cases, or who sorts them out and is able to pass these up, so it is quite an issue.

Whether issues of fact should be determined separately, as I've just mentioned, is another way. And of course, one opportunity is for Kenya to take advantage of courts such as New South Wales' Land and Environment Court, the Environment, the -- the New Zealand Environment Court, and even tough practices, in types of rules of procedures, for example, from the Supreme Court of the Philippines, which has been very innovative in that particular area, and certainly, the rules, rules of procedure,

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that apply to the High Court in Kenya, will not just be taken and applied to the new court. They must be revisited, even though they just came to force just the other day.

And third, streamlining and re-evaluating the role of the judiciary, court and judiciary tribunals, is another challenge. Kenya is replete with quasi-judicial tribunals, to such an extent that almost every other statute incorporates a tribunal; a committee, which is appellate; a board, which is appellate, or other such mechanism.

The legal framework governing such an extent of multiplicity in this area is a challenge in itself, and a position would have to be made, quite quickly, you know, how to proceed on these.

I give you a quick example that, for example, in Environmental Management Coordination Act, I mentioned already, it establishes the national environment tribunal. And Judge Antonio Benjamin attended one of the sessions, and

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participated, and saw how flexibly we handled this, and was -- you know, was -- the advocate there were very happy to see a Supreme Court judge from another country, you know, adding value to their own institution. So that is that.

It's also an administrative -- it is also the tribunal, for -- on forestry issues, because the forestry is not an environment anymore, it's in a different area. Then appeals, administrator appeals from the National Environmental Management Authority, by the director general of that authority, by committees that relate to that, and there are several, act at the local level district, and the promotion of the state level involved, and standards committees, you know, reviewing the legal notices that subsidiary legislation, that applies different aspects, because the act itself, EMCA, is a framework law.

That is one area. In the non-area, there are several others. Land Control Act, the Physical Planning Act, so that there is a

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committee there, the Water Act has a water board, which has also an appellate mechanism, and the Energy Act has a tribunal as well. So we have these, and each tribunal has someone qualified, either as chairman or as an assessor, qualified in law. And the other, other people.

Incidentally, in my capacity as chairman in this new outfit of trying to streamline the role, I was sandaled with appeal, before Parliament 2009, and was told it's very -- should be looked at before it goes to Parliament. On its only review it was not ready. It hardly has taken into account all these issues, and in addition, it proposes another tribunal on my name, so I think we need to borrow a leaf, at least, from the New South Wales Land and Environment Court, where mining issues are already integrated with these others, and you can imagine that, you know, natural resource, which require to be sorted out, Article 71 of this constitution, an agreement sorted out and passed on to Parliament. Who will do that? This is what

we're having to wrestle with at this point in time.

So these, some of these, are policy matters, issues, which really don't belong to the task force that would be headed by the Chief Justice, but surely these other task forces that we are dealing with have to address this before we go forward.

And fourth, effective management of the High Court and Environmental Court, and you see how the new court and the high court are at the same level. The difference is that there are a long backlog of cases which would have to be decided, and the jurisdiction to move them to this other one, you know, and -- when you go to the stations out there, you will find that the Chief Justice is a quite -- and the principal judge there have an enormous problem with, these are the files, or where they really go, and, you know, whether you have an initial list, and so on. And you can immediately see, in this kind of area, where the World Bank, for example, the African Development Bank or

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somebody, could catch in the moment and say, Look, they need help, let us sort out, rapidly, put electronic and all the available material, so that when you pass them on, you pass them in an orderly fashion, rather than introduce dispute thereafter.

But you can see, it's a challenge. Nobody, perhaps, is saying, they are no, but on the other hand, no ordinary process of doing it, whether you bring all these into Nairobi and Nairobi then distributes this, and -- and what are the number of judges. That is, really, quite a challenge, and we expect there will be co-location of these judges, at a given point.

But I think besides, you know, jurisdiction corresponding to the lower court, so that the other processes of judicial review, then, would, at that point, you would decide whether one goes to the High Court or goes to the Land and Environment Court, because the High Court is denied jurisdiction, in these matters, from the lower courts that issued the supervising, so

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you can see, joint supervision between this court and the other court, so that things, again, are in an orderly fashion. And having strong individuals as registrars, there, who say, No, this belongs here, and if there is a dispute, then the two principal judges, even before going to the deputy chief justice or the others, handles the particular matter.

Then, you know, I see a very important process that Judge Brian Preston mentioned, that he is sitting in several courts at the same time.

And I think I can see the need for cooperation between the High Court and the Land and Environment Court, because -- and you know, with the possibility of assigning, in consultation with the Chief Justice and the principal judges, a judge where there may be no judge at all for a long while, so one might be gazetted to say, All right, you have to deal with these issues, but when you're handling these issues, you are really not a judge of the High Court, you are a judge of the court that you're assisting in. And this

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would be gazetted to avoid confusion, because I can imagine my own people saying, Well, is -- you see, the constitution says No, and these people are fixing these other people in the same place, what are they doing, are they defeating the process of justice or not?

So these are issues that I think we will be having an opportunity to review, and I am hoping that we are able to borrow, quite substantially, from the courts, such as are now older courts, which have been tried and not found wanting, to try to settle -- sort for us out.

I want to say, since we are not celebrating the establishment of the Court right now, but rather that there are other problems and issues that need to be considered, I want to conclude by saying that for over a decade and a half, some of us, and certainly we have been with Professor Nicholas Robinson from those days, from -- a symposium, colloquium in 1997, when we had the first salvation presented, a very solid paper, and from there on, we were partners in

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Manila in 1998, went to Mexico, and ... and we were in Johannesburg, from Johannesburg I'm glad to see Charles, who just came in, another partner in the process. In London, to Kuwait, and all this, handling this particular process.

So I think we've been engaged on the issues of sensitizing ordinary courts and judges in different fora, regions and countries, on these matters, and -- I am -- can state, without fear or any contradiction whatsoever, that I think we -- it has not been in vain for those over 15, 16 years.

So, this symposium itself is a very important opportunity, and I do hope that when the Kenya process is in the consultations, when you -- you will be invited, you will give us, you will be available, so that you can share this tremendous experience that we are -- have this today, and will be hearing during the course of this moment, of this symposium, so that we can learn more, and we can have an environmental court that will stand the test

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of time, and that will stand up, really, to the executive. In these many years that I have been chairing the Environment Tribunal, it's interesting that nobody ever called me to say, What's going on, what -- how are you doing this?

I think they quickly started, who the person was, where he has been, and what he's done, and were content to say, you stand absolutely no chance of bending any rules at all.

Early in the tribunal, I remember, an appellant with a matter before the tribunal coming and asking to see the chairman. It was a person who had tried to move back, and his daughter and one of my daughters were together, and they thought they should pursue that and go to reach me.

I was told by the secretary that, "You have someone here," and I said, "Wait until there are about ten or so people left, and tell me." When there were about ten or so people, came and opened the door a little bit, and said, "Who wants to see the

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chairman?" And they said, Yes. I said, "You have a matter before us, you want to see me? Come and hear the parties. You, you know, see me that date."

They left, I didn't see any one of them. And nobody ever came to wait to see the chairman thereafter in those many years. I think they got the message, and that was that.

So, it would -- this, I consider to be an important call, to anchor future cooperation between the older courts, environmental courts, and those that I imagine now, and I think with the possibilities, Professor, that you are intent to put in place, it would be very useful mechanisms, and I think further discussions with Charles, who came in the nick of time, in terms of this valuable thing might make the whole difference to the teams, and an opportunity of modifying these courts.

So I'm glad you have included me in this process.

It's always good to renew advance in

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view of such an important body, so I thank you, sir, for inviting me, and look forward to comments and issues that my colleagues might put across. Thank you very much.

PROFESSOR ROBINSON: Let me again also present you with the case studies that Oliver Houck has prepared in the environmental battles, and I want to congratulate you on the new Constitution and its provision for having the Environmental Bill of Rights.

As we face, you know, this awesome moment in which a country like Egypt is literally, as we sit here, rewriting its Constitution, trying to figure out how to structure a new kind of government, going through the same kinds of difficulties that the constitutional revisions in Kenya have had to go through, figuring out what kind of clause to put into the Constitution on the environment, it's a seminal moment for us all, and the guidance that Kenya gives us in this exercise will be very useful, as indeed the provision for the constitution in Brazil and other leading jurisdictions is useful.

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And the story of implementing the legislation in Kenya reminds me of the battle to get the Green Tribunal Act implemented in India, and in this disk we have a lot of materials and commentaries on the challenges that India faces. But its backlog of cases is also enormous.

I want to congratulate you as we get questions coming up for you from the participants in writing, ask you about the real challenge of creating an electronic database for this. I saw how every one of the case files, rather enormous number of case files, in Brazil, was turned into an electronic database, so that they could no longer work with paper, even for old decisions.

And so I think we need to look at how to take that software, and that process, and replicate it in countries with big backlogs by Kenya, or India, which is even larger.

We don't need to reinvent the wheel. We need to quickly transfer some of these tools to courts around the world that need them,

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and this is an area where I think coming out of the -- of the next year's deliberations for sustainable development at Rio+20, as you quite rightly point out, is an area where we could really achieve some leveraging.

But on to the questions.

"Do you have alternative dispute mechanisms involving environmental issues that come before your tribunal?

JUSTICE KANIARU: Not explicitly, but what happens when parties want an opportunity to resolve the matters before the tribunal, we allow it, and they can come, like -- and -- file with us an agreement, and we have normally allowed that to go forward. Nothing has been illegal, or anything has been within the law.

But I think when the Court is in place, these are matters that will be more explicitly included than was the case in the context of the National Environment Tribunal which was 31st -- 35, 30 provisions, but 12, 125 Section 125 through 126, did not include that explicitly.

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PROFESSOR ROBINSON: You have a question here on the cultural setting. Do tribal cultures have inherently differing land use rights in Kenya, and how will they, or are they, integrated into the environmental courts?

JUSTICE KANIARU: The customary laws are part of the new legal process. And unless they are incompatible with the Constitution, they have a place. And so, I think the customary law aspects have come in place. The statutes, the laws will not interfere unless there is something that is really not right, and I think the -- also, we have very strong land policy that says -- seems to lead the way. So between that and the new commission, land commission, that has been put in as a constitutional commission, to regulate land use and other practices, I think that the situation may well be under control, yeah.

But I think opportunity there has to rise for careful application of a culture for practices and so on.

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Incidentally, in the act that we are revising now, Environmental Management and Coordination Act, the way sustainable development, principles of sustainable development, are defined include cultural practices as well.

PROFESSOR ROBINSON: Question on one of your last points.

"You mentioned corruption. Could you elaborate on the role specialized environmental courts can play in overcoming that problem?"

JUSTICE KANIARU: Well, I think one usefulness is that you have a number of people involved in the matter. The National Environment Tribunal, the court is three, at least three. Chairman and another, and the other two members. So it's not one individual who handles this.

More times than not, I had more than the three, because the process of training the people when, some be, because it's structured in a manner where some three-year terms, maybe when you come to a new law, maybe five,

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but -- the some, some term expires ahead, and so on.

So you have to do adequate training of the people so that when these leave, then those who are left are able to move forward quickly.

So, I think the numbers are such that you eliminate the possibility of an individual being isolated.

I think the next question is certainly the process of appointment itself, being careful so that you are putting forth only the people whose integrity is unimpeachable. And I think this process is on the record, and the Judicial Service Commission is advertising posts. You probably have seen them, by the way. Anyone from the commonwealth is also eligible to be appointed by judge, in Kenya, so it doesn't -- one does not have to be a Kenyan.

So, I think there is a process of transparency, the list is also put in the media and in the official gazette, and there is a process of confirmation, by Parliament,

and therefore, scrutiny is there, which was not the case before.

So I think one probably doesn't have to worry too much about the past. Nobody wants to live by the past. They want the future to be there.

PROFESSOR ROBINSON: We have two related questions which we will ask before we all go up to lunch.

"What were the motivations, the main motivations for Kenya to want to launch this new, specialized environmental court, and are you aware of other initiatives in Africa along those lines?"

JUSTICE KANIARU: I think the -- I did hint at the situation, the High Court handled itself in a manner that was extremely limiting, and I think inflexibly, and the consequence really was that, then the country, this constitutional process was carried throughout the country, so the country would not agree to proceed in that direction, and therefore, had to really set up these other mechanisms. And with the

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corrupt practices, and the issues of land and land use, and land grabbing by individuals, carting pieces of forest and dishing them to friends and the personalities and so on, was such that there was really no chance to proceed that way.

So I think the motivation is simple, to really streamline things once and for all.

PROFESSOR ROBINSON: Great. Well, I want to thank you again for opening our eyes to some of the extraordinary challenges the judiciary faces as we set up these new courts. It's not going to be so easy, but if we persevere, it will succeed.

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H.E. Hilario G. Davide, Jr.

PROFESSOR ROBINSON: We are going to begin with the video by Chief Justice Davide, which he was able to tape for us in the Philippines. Chief Justice Davide, for those of you who know, one of the leading early cases in environmental law, Oposa versus Factoran, found, in writing that opinion, in the Philippine Constitution, in the duties of the state, the obligation to protect the environment.

So it was not in the Bill of Rights, but it was actually in why does the government exist? Obviously, to maintain the integrity of the environment, and not just for the government, but for the people, for nature, for the indigenous people, and so on.

He in fact embedded that in a right which he said preceded the existence of states, because the environment precedes the existence of states, so it's in creation.

So we'll now have -- and this court in the Philippines has just issued an extraordinary new Writ of Kalikasan, the writ

of Nature, going beyond the writ of habeas corpus and the other writs from the time of the Magna Carta to be a writ for our age, a writ of Nature, with a special access to justice that's been provided, and all those materials are available in the CD that Amy Mehta put together, this little one that you've all been given, so you can see how the Philippine court actually wrote its decree. And now we'll hear from Justice Davide himself.

JUSTICE DAVIDE: Ladies and gentlemen, let me begin by expressing my gratitude to Professor Nick Robinson, for inviting me to this symposium, and to take up with you, as specially requested by him, the importance of environmental adjudication in the Writ of Kalikasan on the Philippines and on why we need more support for capacity building of environmental court in terms of the challenges we face for sustainable development.

Due to time constraints and prior commitments in my home country, I cannot come

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to New York for the symposium. Professor Nick agreed that my message would just be videotaped. To save time, I will not read the footnotes of my written message.

Redefining the meaning of environment. The word "environment" is often taken to mean as something referring to natural surroundings, and not about us, about people. Because of this notion, environment has been taken much for granted, and relegated as just a marginal concern. Sadly, it is treated as a low priority in many countries.

If we must be able to face the catastrophic crises the rapid and uncontrolled changes in the global climate have brought to humankind today, we need to redefine the word "environment," to make it fully understandable and real to all countries and all peoples in our shrinking world.

The environment is not about the birds and the bees, and the flowers and the trees. It is nothing less than about life and the sources of life of the earth: The land, air,

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and water -- or LAW, for brevity -- the elements of life and the vital organs of the earth.

The trees and the forests are the heart and the lungs of life. The land and the soil are the skin and the flesh of the earth, from whence all food comes. And the sea and the rivers are the blood and bloodstreams of life on earth. Destroy any one of them and we destroy life itself.

These classic pronouncements are lifted from the writings and thoughts of Attorney Antonio Oposa, Jr., of the Philippines, an international figure in environmental law, a holder of a masters degree in environmental law from the Harvard Law School, and a 2009 Roman Magsaysay awardee for his unparalleled work to protect the environment and empower the people to save the earth.

Thus, from now on, we will not use the word "environment." Rather, we will use the word "life sources." For the people of the Philippines, that beautiful country in Asia with 7,107 islands, the word "environment" is

inseparable from the concept of nature. In fact, in their language, the word "nature" is kalikasan. Nature (Kalikasan) and the natural elements of life of land, air, and water, are to them interchangeable. They are all the life sources that enable all life to survive and thrive in this little colorful marble of life we call the earth.

Now that we have redefined the word "environment" to mean life sources, our efforts to conserve, protect, and restore the land, the air, and the water (LAW) will acquire a new meaning, and its protection and conservation imbued with an invigorated sense of purpose and urgency.

With this as the backdrop, it is easy to take a tour of the judicial horizon of the Philippines and its effort to protect the country's life sources. It is also easier for us to understand the context of the Philippines Writ of Kalikasan, or Writ of Nature.

Right to a balanced and helpful ecology.

The Philippines is the first country in

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the world to enshrine in its Constitution the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature and the correlative duty of the State to protect and advance that right.

Section 16 of Article II of the Philippine Constitution of 1987 provides, "The state shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." It was my honor to be a member of the Constitutional Commission of 1986 which adopted this constitution.

This lofty idealism was put to an extreme test in a now-famous Children's Case of the Philippines. To recall the facts, some 43 children from all over the Philippines, acting on their own behalf, on behalf of children of their generation and of children of generations yet unborn, filed an audacious legal action to stop all logging in the Philippines. Seeking judicial intervention to cancel all the logging

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concessions granted by the Philippine government, the children alleged that at the rate the virgin tropical rain forest of the Philippines were being logged and deforested, nothing would be left to them and for the future generations of Filipinos.

The trial court dismissed the case outright without even a hearing, allegedly for failure of the plaintiffs-children to state a cause of action and for the further reason that they have no right or legal personality to initiate this unprecedented case.

They then brought the case on certiorari to the Supreme Court. In its landmark decision of 30 July 1993, the Supreme Court granted the petition. It held that the children have the right and the legal personality to take action on their own behalf and on behalf of the children of their generation and the children of generations yet unborn.

Their personality to sue on behalf of the succeeding generations is based on the

concept of intergenerational responsibility, insofar as it concerns the right to a balanced and healthful ecology in accord with the rhythm and harmony of nature. It says that every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology.

Expounding further, the Court declares, "Such a right belongs to a different category of rights altogether for it concerns nothing less than the right to self-preservation and self-perpetuation ... the advancement of which may even be said to predate all governments and constitutions ... These basic rights need not even be written in the Constitution, for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because ... unless it is written in the Constitution itself, the day would not be too far when all else would be lost, not only for the present generation but also for those to come -- generations which

stand to inherit nothing but a parched earth incapable of establishing life."

This interpretation by the Philippine Supreme Court of the constitutional principle gives constitutional and legal imprimatur to the statement that to the Philippines and perhaps to the other more nature-based people of the world, the right to the environment is nothing less than the right to life itself, and to the sources of life on the earth -- the land, air, and water.

This pronouncement of the Supreme Court of the Philippines rang true in 1993, when the decision was rendered. Today, and in the years to come, especially with the global catastrophic, devastating effects and consequences of climate change, the pronouncement will ring even more real and true.

It was another honor for me to write for the Court this decision.

Judicial intervention. When the right to life is threatened, and the executive department tasked to protect it fails or is

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wanting in political will to enforce said right, it is the duty of the Court, in an appropriate case, to step in. The 1987 Constitution of the Philippines has expanded the judicial power of the Courts of the Philippines. Section 1 Article VIII thereof on the Judicial Department provides, "Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government."

The courts have a ready yardstick. I repeat, the courts have a ready yardstick, the measurements according to the standard of the rule of law and the overarching principles of justice.

This sense of justice must include justice for the sources of life on earth -- the land, the air, and the water. That justice must be done though heaven should

fall. *Fiat justitia ruat caelum.*

The Philippine Supreme Court, however, has gone beyond simply adjudicating cases involving the threat to life sources. In 2009, it crafted inspired procedural rules to enhance and enforce these rights to the life sources in a court of law. I refer to its rules of procedure for environmental cases which took effect on 29 April 2010.

The rules govern the procedure in civil, criminal, and special civil actions in the course of the first and second levels involving enforcement or violations of environmental and other related laws, rules, and regulations.

Among the procedural innovations introduced in said rules, are:

1: A citizen suit -- giving the right to ordinary citizens to initiate legal action to enforce their right to the life sources, or environmental right.

2: Consent decree.

3: Temporary Environmental Protection Order, or TEPO, in cases of threat of serious

damage to the environment, or our life sources.

4: Writ of Kalikasan.

5: Writ of Continuing Mandamus.

6: Protection against harassment countersuits, or the strategic lawsuits against public participation.

And 7: The adoption of the precautionary principle.

What is especially notable about the new Rules of Procedure for Environmental Cases are the two special civil actions that it adds to the existing Rules of Court in the Philippines, namely the Writ of Kalikasan, or the writ of nature, and the Writ of Continuing Mandamus.

The Writ of Kalikasan. The Writ of Kalikasan, or the writ of nature, is available when the environmental damage is of such magnitude that it prejudices the life, health, or property of inhabitants in two or more cities or provinces. The writ is issued by either the Supreme Court or the Court of Appeals within three days after the filing of

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the application. Hearing of the matter is set within 60 days. No docket or filing fees is required upon the filing of the complaint or petition. The proceedings terminate within 60 days from submission of the original application.

Note the emphasis on the enforcement of the right to life. Note also the availability of the legal remedy where the damage is of such magnitude as to threaten the life and health of inhabitants in two or more cities or provinces.

In said cases, the petitioner, or affected parties, can immediately take recourse to the higher courts -- the Court of Appeals and the Supreme Court -- and seek relief in summary proceedings.

The first test case of the Writ of Kalikasan was filed by a group of citizens known as the Global Legal Action Against Climate Change. The group sought to enforce a long-forgotten law, Republic Act Number 6716, requiring all local governments down to the barangay level to put up rain catchment

ponds and rainwater collectors. The barangay is the smallest territorial and political subdivision in the Philippines. This law, approved in March 1989, had never been implemented.

The group alleged in its complaint that the implementing this law is one effective way to face the adverse impacts of rapid climate change and the recurrent events of torrential floods and intense dry spells.

The national government agencies sued by the group, particularly the Department of Public Works and Highways and the Department of Interior and Local Government, the latter having jurisdiction over the 43,000 local government units in the Philippines, are now preparing a work plan for the construction of rainwater catchments (collectors) throughout the country.

The second test case involving the Writ of Kalikasan was issued by the Supreme Court in a case involving an oil leak in the pipeline that traversed from the Province of Batangas south of Manila more than 100

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kilometers away to the Pandacan oil depot in the City of Manila. In this case, the Supreme Court issued an injunction for the oil pipeline operator to cease and desist from operating said pipelines until the leaking has been stopped.

The Writ of Continuing Mandamus. The new Rules of Procedure for Environmental Cases also integrates another procedure that was adopted by the Supreme Court in the Manila Bay case in its decision of 18 December 2008.

In this case, a group of citizens won a court action to compel the Philippine government to clean up Manila Bay. The Philippine Supreme Court, after ten years of litigation by the petitioners, starting from the lower court, ordered 12 national government agencies to prepare a plan of action to clean Manila Bay.

The "continuing mandamus" is an extensive, persistent, and continuing order of the Court to implement the action plan to remedy the environmental degradation and

restore the Manila Bay to the once productive state of its marine resources.

To ensure the continuing efficacy of its order, the respondent government agencies were required to submit to the Supreme Court every 90 days, every 90 days, written reports of the progress of the cleanup.

Three weeks ago, Justices of the Supreme Court, including the Chief Justice himself and the ponente of the en banc decision -- Justice Presbitero J. Velasco, Jr. -- took an unprecedented tool and ocular inspection of the Manila Bay. During the briefing on land after the judicial ocular inspection, the Court was updated of the progress of the clean-up by the lead agency and respondent Department of Environment and Natural Resources.

It may also be stressed that to encourage citizens to enforce their environmental rights by way of class suits, they are not required to pay filing fees upon commencement of the action. Payment is deferred until after judgment.

For some detailed discussion on the Writ of Kalikasan and the Writ of Continuing Mandamus, you may read the article of Environmental Law Professor Gloria Estenzo Ramos, of the University of Cebu in the Philippines, entitled, Innovative Procedural Rules on Environmental Cases in the Philippines: Ushering in a Golden Era for Environmental Rights Protection, published and issued 2011(1) of the eJournal of the IUCN Academy of Environmental Law. Or, for the full text of the Rules of Procedure for Environmental Cases, you may visit the Web site of the Supreme Court of the Philippines, at <http://sc.judiciary.gov.ph>.

There exists no constitutional or statutory obstacle for the Supreme Court of the Philippines to promulgate the new rules of procedure for environmental cases. Under the 1987 Constitution of the Philippines, it has the power to promulgate rules concerning the protection and enforcement of constitutional rights. And Article 8 of the Civil Code of the Philippines provides:

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"Judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines."

Let me now conclude. I started with a redefinition of the term "environment" to mean life itself and the sources of life of the earth -- the land, the air, and the water. LAW.

All of a sudden we see the change in the thrust and in the entire context of the debate on the environment. It now assumes a more direct, and, in fact, more real, relevance to our lives. After all, no life is possible without the food from the soil, without the air that we breathe, and without the water that we drink. The health and well-being of these vital organs of the earth -- its heart and lungs, skin and flesh, blood and veins -- must be conserved, protected, and restored at all costs. Lest we forgot, without them life as we know it will simply cease to exist. All peoples and all governments of the world must faithfully assume the role of conservator, protector,

and restorer of life and the sources of life of the earth.

Let me hasten to add that the sources of life -- L-A-W, yes, L-A-W, may have been the inspiration in the original crafting of the word "law," L-A-W, to generally refer to that which is laid down, ordained, or established, and which must be followed by citizens subject to sanctions or legal consequences.

The Law is humanity's thinking tool and, in a manner of speaking, is the architecture of civilization. The will, the force, and the power of the Law must be used in a way that seeks to breathe life. It must do so not only to the seemingly stale provisions of the Law, but more importantly, to breathe life back to the moribund sources of life of land, air, and water, up to a horizon of reasonable perpetually.

The consequences of our pyromaniacal propensity -- our reckless burning of our fossilized energy sources -- are beginning to unravel today in the form and shape of a rapidly changing climate. We must face this

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reality, and to the extent possible, cease and desist from our continuing acts of pleasantry arson.

May there be not only more environmental laws, but more courts to try and decide cases involving the environment or the sources of life. May such courts have the activism and dynamism of the Supreme Court of the Philippines.

It is my prayer and hope that the matter of environmental adjudication should now be given utmost priority. A global response is a must. May this symposium serve as a strong impetus in this regard, especially in the creation of the International Judicial Institute for Environmental Adjudication.

I close with an expression that of special gratitude to Professor Nick Robinson. He may not be aware of it, but he was responsible for inspiring the principal petitioner and lead counsel of the Manila Bay case I mentioned earlier, Attorney Antonio Oposa, Jr., and for giving the latter encouragement and guidance to the Global

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Legal Action on Climate Change which initiated the Rainwater Catchment case in the Philippines.

For inspiring me no speak, I salute you all, participants in this symposium. Good day, and may God, the supreme author of life, bless us all. Thank you very much.

Professor George Pring and Catherine Pring

PROFESSOR ROBINSON: Well, Chief Justice Davide, as an ambassador to the United Nations, was very influential in the development and promotion of sustainable development at the UN while he was here in New York, and he met very often with Judge Merideth Wright and I and Professor Richard Macrory in thinking through some of these ideas. So come up to the podium, and we'll begin the next panel.

But the fascinating developments in the Philippines are that the court system has, in fact, built up a very substantial case law now, and they have created a series of lower environmental courts to give specialized access, and the whole concept of environmental adjudication is growing across the Philippines as a way to make it effective.

What Rock Pring and Kitty Pring, our next speakers, have figured out in a really wonderful international study, empirical study, in which they've traveled around the

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world and met many of these judges -- and you went to the Supreme Court of the Philippines.

They have put together for the World Resources Institute's International Access Project a study, which is online and many of you have read, about the 350 courts and tribunals they studied in 50 nations.

So you've now had a sampling of the courts of Kenya, the courts of Brazil, the courts of New South Wales, and the courts of the Philippines, and let's elaborate that into a quick tour of the horizon, a tour de raison of all of the other courts. So over to you.

MS. PRING: We've already heard from some of the greats.

PROFESSOR ROBINSON: Well, you can fast forward, then.

PROFESSOR PRING: Thank you.

Thank you very much, Nick, and thanks to all of you for inviting us to join you in this exciting symposium on environmental adjudication.

We'd like very much to congratulate Pace

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University Law School, the New York Judicial Institute, the IUCN, and ELI for assembling these distinguished jurists, these environmental leaders, and, best of all, the next generation of environmental lawyers, that's going to save us all.

We also would congratulate you on initiating this incredibly wonderful, new, first-ever global institute to look at and do things for environmental adjudication.

So what Kitty and I would like to do, provided we all don't go to sleep in the dark here, is to share with you our comparative study and findings on environmental courts and tribunals, or ECTs as we may abbreviate them from time to time, and how they can improve access to environmental justice and sustainable development around the world.

Now, the explosion of ECTs in just the past decade results from probably three major shifts in judicial systems internationally. Today courts are being reinvented in ways that are strikingly different from the 20th Century.

The first shift, as our own National Institute for Justice has just reported, is the move to specialized courts on countless subjects, from drugs to domestic violence to, yes, even the environment. And our small state of Colorado just documented 50, 5-0, specialized courts just within its borders.

The second shift is judges becoming -- and we love Justice Benjamin's distinction about the protagonist judge, we might -- to avoid that activist judge politically incorrect statement -- although I, quite frankly, think all nine justices in our Supreme Court are activists, just in a different way, we might think of them as proactive, proactive as judges, and becoming problem solvers, crafting decisions that actually fix major problems, not just call the balls and strikes between the parties, as Professor Robinson mentioned from the Storm King case, or being a spectator judiciary, as Justice Benjamin has mentioned.

And instead, a respond to the public demand, this third shift, for accountability,

transparency, and accessibility in judicial decision making and government in general.

MS. PRING: So those three shifts we're seeing across the judiciary around the world. In the environmental arena in particular, we see these trends being driven by the increasing complexity of environmental law, by the overloaded general court systems. We've heard about the number of cases that are backed up in India, that's not unusual.

By increasing reliance and dependence on scientific and technological expertise, which courts are ill equipped to deal with, general courts, and by the escalating costs, dollars and cents, of complex litigation that may drag on for a decade or more.

We see the opportunity for specialized, problem-solving environmental courts and tribunals to spread beyond the nations where they are now to more nations and to the international level.

We need ECTs to deal with this century's big issues of climate change, water supply, sustainable development, and other

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trans-boundary and global challenges.

Hopefully this audience can use our observations on current and developing ECT models to make this happen locally, regionally, nationally, and internationally in the years to come. We see these changes continuing.

Today -- and I think we've heard this acknowledged by the speakers before us -- the world's problem is not that we lack good environmental laws. Most countries have them, in fact. Rather, it's the lack of fair and effective enforcement of these laws that presents our biggest challenge today.

PROFESSOR PRING: For many, the vision of a court devoted to environmental justice, with broad jurisdiction and enforcement, with judges trained in environmental law and the sciences, where the nightmare battle of the experts is under control, and where cases are really just quick and cheap, as Justice Preston has reminded us is the actual quote out of New South Wales law, this may sound idealistic, even impossible, but many of you

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in this room know it's true, this vision is not only possible but is happening today.

We have so far documented over 370 specialized ECTs in some 43 different countries, and the list keeps growing, every part of the world, all major legal systems, and in poor countries as well as rich ones. Here's a quick rundown of just the last year, the last one year.

MS. PRING: That we know about.

PROFESSOR PRING: Countries with no ECTs are creating them, in Chile, in Peru, in England, and Wales. Countries that actually disestablished, got rid of their ECTs, are now reestablishing them, like South Africa.

Countries that have ECTs are reinventing them. Japan is an example, British Columbia, and Canada. Countries that have ECTs are sometimes expanding them. China is an example. Bangladesh is an example. And of course, four new ones in the Amazon, in Brazil, in just the last year. And countries that have not even considered up till now a specialized environmental court or tribunal

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are now starting to think of them, like Mexico.

Many of you participating in this symposium come from countries that have taken steps towards this vision, Brazil, Kenya, Philippines, Australia, England, and Wales, and the United States, state of Vermont, right.

Your jurisdictions have created ECTs, all different models, none that meet all of the 12 elements of the vision we're going to talk with you about, but some that come very close, and are working on perfecting that vision.

So we'd like to tell you what we found out about them, so perhaps you'll take this vision with you, and massage it and use it to create or improve a specialized environmental court.

MS. PRING: We started this project back in 2007, which now seems like a very long time ago. And we've traveled the globe, we visited 24 countries, I think, now, and we spent a lot of time on the Internet learning

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about all the -- not maybe all, but a lot of the variations of the ECT vision. We found them at all levels, in cities, states, nations, and even at the international level.

We found them through interviewing over 200 experts, and the number keeps growing. We have met some new people here today. We've interviewed environmental justices, judges, prosecutors, government officials, development attorneys, just to get the balance, NGOs, and academics to learn what the experts think are the very best practices for a specialized ECT.

It boils down in our analytic structure to 12 factors, and the threads are the same that you have heard from the speakers before us, 12 building blocks.

As we discuss in our book, which thanks to the World Resources Institute Access Initiative Project, was printed for free and is available on the Internet, Greening Justice, Creating and Improving Environmental Courts and Tribunals.

What we found is, if you analyze and

make decisions about using these 12 building blocks, you can create something that works, and then you can improve it over time.

The first criteria, the first building block we looked at, is what type of forum do you want? What type of institution do you want to create?

Judges, in the judicial branch, typically have considerably more power than tribunals that are quasi-judicial bodies in the executive or the administrative branch, but either type can work, if, and that's the important thing, it has sufficient jurisdiction, independence, and -- that critical word -- budget.

Australia's eight states and territories have a mix of environmental courts and environmental tribunals that are successful to varying degrees. Chile is in the final stages, maybe today, of creating a national environmental tribunal, as is Peru.

Brazil has just created four new environmental courts in the Amazon. As you've heard from Donald Kaniaru, Kenya's

brand-new constitution creates a national level environmental court in addition to the very successful national environmental tribunal that Donald has led and chaired for six years.

Rather than creating out of whole cloth a brand-new ECT, some countries have taken a first step by creating a green chamber at the judicial level, a green bench, or even just a single green judge who knows and loves environmental law and is willing to take on the complexity of the cases.

You can do this formally, with legislation, or you can do it informally, as England has done, for instance, where the -- the government created a master tribunal, and within that the chief of the tribunal said, Ah, yes, we need the environmental tribunal, too. And so now the environmental tribunal exists by fiat in England and Wales, without supporting necessarily legislation.

You can do this -- I should mention, I'm on the advisory board for the new group, that the new environmental tribunal in England is

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called Macrory Court, that's what its local name is, in honor of Richard, who worked for ten years? Long time to make it happen.

You've heard about, from Justice Davide, the wonderful court rule in the Philippines, first that created by judicial fiat 117 new local environmental courts at the local and trial level, regional and trial level.

Their green judges are being trained by perhaps one of the most exciting and impressive judicial training institutes in the world, the Philippines Judicial Academy. And they may -- those judges, although they are now green, will have to handle other cases as well, as their caseload is distributed evenly.

In the State of Queensland, Australia, there is an environmental court that's an integral part of the District Court, and efficiently shares the general court's budget and staff and judges.

PROFESSOR PRING: Number 2, and then they will start going faster, the more laws you give to an ECT -- jurisdiction, the more

laws you give to an ECT, the more effective it can be. Having all three jurisdictions, as you've heard mentioned this morning, civil, administrative, and criminal, is best, works best, and avoids the issues in the same case having to be heard in multiple different courts.

Some countries, though, limit their ECT to just, say, land use laws, like Ireland, but then it can't deal with wildlife issues or climate change issues. Some do the reverse and then can't deal with land use development issues.

In Colorado, and in some countries such as Namibia, there are specialized water courts whose jurisdiction is limited to just adjudicating water issues, as if water were not the thing that connects all of us and all the rest of the world.

Trinidad and Tobago are now struggling to expand the jurisdiction of their excellent but very underutilized environmental court. Thailand is struggling with how to handle cases that can be heard in both the civil

support system and the separate administrative court system.

And comprehensive, integrated jurisdiction works best for environmental problem solving. The challenge, of course, is to decide what cases should be filed in the specialized courts, and what cases are better adjudicated in a court of general jurisdiction.

MS. PRING: The third building block we identified for decision is at what level do you want your environmental court or tribunal to operate?

It can be at the initial agency level, say, issuing -- reviewing permits. It can be at the trial level. It can be at the appellate level. Or as in Kenya, it can even be at the Supreme Court level.

Thailand is working top down, starting with the highest courts in the land and then moving down to regional and trial courts. Other countries green up from the bottom as a first step. The key question is, what levels do you want your expert decision makers, your

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judges that are trained, to operate at?

The U.S. is far, in this arena, from being a global leader on environmental courts and tribunals. Sorry, Tim. The majority of ours are -- the ones in the United States are at the local level in cities and counties.

Some meet only a single evening a month, and they deal with issues like garbage, noise, graffiti, park protection. Our only state level environmental court is the one that Judge Merideth Wright chairs in Vermont.

Hawaii has been struggling for, I think, eight or nine years to create a specialized environmental court, and it still hasn't gotten it done.

At the national level we do have environmental tribunals in the United States, within EPA and the Department of the Interior, to adjudicate their environmental cases, but we have no truly national scope, wide jurisdiction environmental court that can take on an issue like climate change.

Other nations, such as Australia, and we have representatives here today, Brazil,

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Canada, New Zealand, the Philippines are far ahead in providing access to environmental justice through the judicial system.

PROFESSOR PRING: Number 4, geographic area, and you've heard about this one already, accessibility is the key here. ECTs should cover a sufficient area both ecologically, practically, and politically, but then you need to make special provision for access.

And as Justice Preston just reminded us, bring justice to the people. Don't make the people come for justice. ECTs can do this by being local and regional, such as you heard Donald Kaniaru talking about the 47 possible different regions within Kenya that would have to be taken care of.

Traveling ECTs is another way. Brazil does this. The Philippines does this. You can have courtrooms on wheels. You can have -- Australia's huge State of Queensland, for example, has flying -- Queensland is twice the size of Texas, so they have flying justices, like The Flying Nun.

Electronic filing you've heard mention of, and the whole concept of having access to technology, which may be a big problem in countries that can't afford it. And yet if you don't, then you end up with something scary like what India is going to have to face with its new green tribunal in one of the largest countries and largest populations in the world, do you make everybody come to New Delhi?

MS. PRING: Case volume is our Number 5 building block. The decision you need to make is based on careful analysis of what kinds of environmental cases and how many of them are being brought. Do you have enough to justify the creation of an ECT?

In Australia's New South Wales you have thousands of cases a year. One in New York City handles not thousands but hundreds of thousands of cases a year.

Excellent ECTs, however, like the one in Trinidad and Tobago, carefully thought out, chaired by a visionary justice, only gets a few cases a year, I think seven last year,

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making it very hard to justify the expense and the brain damage of creating such an institution.

If you build it, they may come, is maybe a useful maxim in the sports arena field, but not necessarily for ECTs. Perhaps starting with a green bench, or just a green judge, is a better way to begin until you can assess how much volume, until you can assess the public's willingness to use the courts to bring environmental cases.

You have to have that educated and trained attorney core, you have to have some public interest, possibility for standing in order to make the ECT really viable.

PROFESSOR PRING: At Number 6 is standing, locus standi. You heard Donald Kaniaru talking about it, the right to bring a case. It's one of the biggest barriers that we found to access to justice all around the world.

Embarrassingly, the U.S.A. has just about the most rigid, nonsensical, and unnecessary standing rules of any country on

Earth, at least in the federal system. On the other hand, the Philippines, which you've heard Chief Justice Davide just mention, in 2009 adopted the most open standing rule we've ever encountered for the Philippines.

And I quote, they give environmental lawsuit standing to, quote, any person or group themselves or in representation of others, including generations yet unborn. That's -- boy, that's as good as it gets, I think.

On the contrary, Sweden's restrictive rules limiting the participation of environmental NGOs to bring a lawsuit to -- for an NRDC to bring a lawsuit in Sweden, Number 1, it has to be in existence for three years, and Number 2, it has to have over 2,000 members; and that qualified exactly two environmental groups in the entire country met that standard.

Fortunately the European Court of Justice just last year struck down that rule as violating the European conventions guarantee of access to justice.

MS. PRING: We should mention that Chief Justice Puno, in the Philippines, who followed Chief Justice Davide onto the court, was heard to mutter about whether or not the new environmental rules actually provided standing for porpoises, and it was one of those things contemplated.

PROFESSOR PRING: And why not?

MS. PRING: So you need to know that some people worry that the Philippines may have gone too far. In any case -- including those that have been on the court.

Number 7 is the costs of bringing litigation or the issue to a public forum. The expense of litigation we found is a huge barrier to environmental justice. When you add up attorneys' fees, expert witness fees, filing fees, security bonds for injunctions, lost time in employment, and perhaps worst of all, the British rule of the costs follow the event.

The translation of that is that the loser pays all the winner's expenses, potentially millions of dollars, which can

bankrupt an organization, and has in some parts of the world, even if the case was a legitimate environmental grievance.

ECTs need to be affordable. In Brazil, the prosecutor's office brings many -- perhaps most of the environmental cases, often working with citizens and the NGOs. Although we heard at our lunch today that maybe they're not quite as aggressive as we thought.

In New Zealand there's a fund to support public interest litigation. In Australia ECTs do not apply the general court principle of the loser pays except in abusive cases, and they have reduced filing fees and developed special rules to help keep costs down.

We looked at ENGOs, they have their plates full in all nations, and cannot afford to bring all the important cases that come to their attention. Pro bono attorneys, law school environmental clinics, can only litigate a handful of cases a year.

The most successful ECTs we found in the

world have developed a variety of tools to reduce the cost for parties and the courts, including aggressive use of alternative dispute resolution.

PROFESSOR PRING: Number 8, how you handle experts. One of the biggest failures of the general courts we found is that -- the decision makers lack of easy access to the best scientific and technical expertise, or the most truthful.

The ideal ECT has science-trained judges sitting with law-trained judges, as Sweden does, or commissioners with various areas of expertise as in New Zealand, Tasmania, Denmark, and New South Wales.

Anti-science judges are a big problem. As our U.S. Supreme Court Justice Antonin Scalia illustrated during the 2006 oral argument in the Massachusetts versus EPA climate change case, here is the dialogue. I'll be Justice Scalia. Kitty can be the poor Massachusetts attorney fighting for some kind of climate change regulation. Are you ready?

Justice Scalia: But I always thought an air pollutant was something different from a stratospheric pollutant. And your claim here is not that the pollution of we normally call air is endangering health. Your assertion is that after pollution leaves the air and goes up into the stratosphere, then it's contributing to global warming.

MS. PRING: Respectfully, Your Honor, it's not the stratosphere. It's the troposphere.

PROFESSOR PRING: Troposphere, whatever. I told you before, I'm not a scientist. That's why I don't want to deal with global warming, to tell you the truth.

End quote.

MS. PRING: Came out of the record.

PROFESSOR PRING: ECTs need persons who understand and appreciate scientific evidence, even if they're not scientists, and they need them on the bench, as well as in the witness chair.

They need special rules for making experts who do testify, do so objectively as

experts for the court -- and truthfully, as Queensland and New South Wales have excellent rules for handling -- rather than have the experts do as we do, a battle for the client who's paying them the most.

MS. PRING: Number 9, my favorite, is the use of alternative dispute resolution. What we found is that aggressive use of alternative dispute resolution tools, whether it's conciliation, mediation, arbitration, and restoring justice, are hallmarks of the very best ECTs in the world.

The Australian Island of Tasmania, for those of you that don't know, that's way down under, makes mediation a mandatory first step before you can ever see a judge.

The best ECTs provide trained in-house mediators and experts for the parties who need them, paid for with grants, filing fees, or directly by the court's budget.

Another approach are the ombudsmen. Hungary, for instance, has perhaps the most aggressive and full-blown environmental ombudsmen program in the world, along with

Greece. Kenya has one that is not quite as effective, Donald.

The multi-door courthouse, that Brian Preston talked about, in New South Wales will offer complainants a variety of options, including a variety of alternative dispute resolution mechanisms under one roof, perhaps even including social services.

PROFESSOR PRING: Number 10 is competence, and you have heard mention of this. The outstanding ECTs have judges and decision makers who are truly competent, truly independent, and incorruptible. They are appointed by a neutral process, trained in environmental law.

They have security of tenure. They receive a sufficient salary, and protection from retaliation, and they're dedicated to the rule of law. Also, choosing to be an environmental judge should not be a dead end to promotion, but a potential stepping stone.

MS. PRING: For those of you who are keeping track of this, we're up to 11 out of 12. 11 is case management. Case management,

I have found in looking, is the best key to making litigation quick.

ECTs need to have effective, efficient management of cases from the very initial screening for ADR or for what door is appropriate, to tracking cases through the system so they don't get lost, to very tight court-imposed deadlines for filing and for response, and to respect the public and the parties' right to information on an ongoing basis.

Australia, from our perspective, seems to have the most advanced case management tools, probably in New South Wales we've found the best, including the creation of a sentencing database so that judges can rely on history before they hand out a sentence.

PROFESSOR PRING: Last, certainly not least, you've heard a lot this morning about enforcement. The wider the range of enforcement powers that you give to an ECT, and the more flexibility it has to craft created remedies, the more justice will be served.

Problem solving is key, but innovation, flexibility is also. Our best example of this is a marvelous environmental court judge in Brazil's Amazonas state. Let me tell you what Judge Adimoto Carimontonio does.

He, number 1, sentences environmental offenders to a month-long environmental night school. Better yet, he created the night school using fines, alternatives to fines, imposed on violators.

He sentences poachers to work for wildlife protection NGOs. He makes illegal loggers plant trees in parks. And he requires polluting companies, in lieu of fines, to pay for anti-pollution ads on buses, environmental comic books for K through 12 school students, and to build recycling centers.

MS. PRING: In Colorado we would call him a cowboy of the wild west in terms of judicial practice.

Ongoing evaluation, which Brian talked about, of the success of the 12 factors is necessary for the effective ECT.

Alternately, we don't have this yet, we need to design a methodology that enables us to measure over time whether or not ECTs do, in fact, provide just, quick, and cheap outcomes, and even more important, contribute positively to environmental protection and sustainable development over the long term, because ultimately that's the measuring stick we have to hold environmental courts and tribunals up to.

PROFESSOR PRING: Now, let's take a global view, which I know will be one of the big issues of this new institute, the International Judicial Institute for Environmental Adjudication. Can ECTs also contribute to the multinational and global environmental issues that are facing us in the 21st Century?

We don't have a true international ECT yet, but there are calls for it, as you've heard. And there are some interesting starts in that direction but none that meet all 12 of the -- of the criteria.

Just to give you a few examples, the

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International Court of Justice in the Hague, it's like the old saying, they gave a party and nobody came. In 1993 they established the, and I'm quoting, permanent chamber for environmental matters. If you're in the U.N., you never put "permanent" on the front of anything, trust me.

However, no countries took advantage of it, and -- in the 1990s, and preferring the standard ECJ -- excuse me, ICJ process, and it has been disbanded.

The PCA, the Permanent Court of Arbitration, I wish them well, also in the Hague, a decade ago developed elaborate rules for environmental adjudication and disputes, and they have not been used to date.

The ECJ, the Environmental -- excuse me, the European Court of Justice, on the other hand, makes significant environmental decisions. Did you realize the European Court of Justice, 25 percent of all of their decisions are basically environmental law decisions? They do that without a formal green bench but they use an informal

assignment process that gets the right cases to justices with the right interest.

You've heard the World Trade Organization, WTO, mentioned. The dispute settlement body of the WTO has handled environmental cases where they clash with free trade, and it's been justly criticized for its lack of expertise and its bias against the environment, and in favor of trade at all costs.

MS. PRING: Another international free trade, but not really international, the Commission for Environmental Cooperation, which is a part of NAFTA's agreement between Canada, Mexico, and the USA has issued some environmental decisions, but at this point in time they're only recommendory -- recommendations. Recommendatory? They don't have enforcement power.

International financial institutions, huge players in the developing world, like the World Bank, Asian Development Bank, the African Development Bank, the European Bank in recent years have created inspection

panels.

These review situations, particularly upon complaint. They take evidence. They file written reports on the environmental impacts of bank's controversial projects like dams. A number of these reports have been influential in greening these mega-million dollar public lenders.

Another model for international environmental dispute resolution are the International Water Basin Commissions that -- that have been created on many multinational water courses like the South African Development Community, the Makong, the Upper Bongo, the U.S./Canada border, and others.

These International Basin Commissions, focused on water basins, can have nonjudicial dispute resolution mechanisms which could be expanded into full-blown ECTs with more jurisdiction.

Now, my favorite amongst the international players -- we're coming to an end, Nick -- is the International Tribunal on the Law of the Sea, operates in Hamburg,

began operating in 1996 to adjudicate disputes between countries who are parties to the U.N. Convention on the Law of the Sea.

It has had only 18 cases but its opinions are respected, has 21 highly trained judges who know what they're doing, and it meets many of the 12 attributes necessary, we believe, for environmental justice.

PROFESSOR PRING: So in conclusion, what does the future hold for the resolution of international environmental disputes? You've heard Justice Preston mention this. You've heard Professor Nick Robinson mention it.

We recommend the creation of a new international ECT. Yes, it's idealistic to say that, but we need one competent to deal with such issues as climate change, trans-boundary air and water pollution, multinational enterprise development, migratory wildlife, toxic waste dumping, and nuclear contamination.

The ICJ's and PCA's experience makes one wonder if sovereign states will submit to such a tribunal. To overcome that, we really

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need to rewrite and revise treaties to make an international environmental court or tribunal the first stop after negotiation fails in a dispute resolution. Another could be to expand the jurisdiction of some of the other ones we've mentioned.

So we're excited to be working with Pace University Law School in creating their new International Judicial Institute for Environmental Adjudication because it's the first global -- fully global worldwide network of environmental judges and environmental experts, and it has so much to contribute to the future. Time will tell what happens, but thank you very much for your attention.

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The Rule of Law and Environmental Adjudication

PROFESSOR ROBINSON: Let me bring the -- Taking Back Eden, environmental case studies, invite Merideth and her panel to come up. We've been running over, so I think what we'll do is, we'll take questions at the end of the two panels, and get your tour of the horizon in that. No. No. You were just great. So I appreciate everything you did.

And I'm going to relinquish the chair to Judge Wright, who will carry on, and this panel, and then we'll have another panel right after that, so.

JUSTICE WRIGHT: Hello. We'll get Charles, hopefully he will be back by the time we come around to his part of this.

I'm Judge Merideth Wright, one of the now two judges in the -- well, what is now called the Environmental Division of the Unified Vermont Superior Court.

I'm joined on the panel by Charles Di Leva from the World Bank, by Professor Robert Percival from the University of Maryland School of Law, and by Kenneth

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Markowitz from the International Network on Environmental Compliance and Enforcement.

We've agreed to each talk for a limited amount of time, about seven minutes, and we have students to -- showing us when we have five minutes left and one minute left, so we'll leave it to each of the speakers to keep an eye on that. We did that so as to leave half of our time for questions and discussion, and we urge you to be thinking of those as we go.

I'm going to set the stage with a few ideas for our discussion of the place of environmental courts and tribunals in promoting the rule of law and the corresponding need for the rule of law in environmental adjudication.

This isn't about the Vermont court particularly, but I will be happy to discuss with anyone questions about it during breaks and the reception.

Environmental adjudication stands at the intersection of environmental protection, sustainable development, and basic human

rights, including access to justice.

Specialized environmental courts, tribunals, and green benches can provide basic fairness and transparency in this area of the law, and it is important to recognize that we're not just talking about environmental enforcement after the fact of environmental harm, but perhaps even more importantly, the process of establishing conditions, permanent conditions for development beforehand to assure future compliance. This is the so-called level playing field so important to achieving sustainable development.

Having specialized courts does not mean that the judge takes an inappropriate advocacy role. This is a question that seems to be peculiar to the environmental field.

Consider the following analogy. We do not ask our criminal court judges whether they are neutral on the subject of murder. Are they for it or against it? We do not ask our family court judges to be neutral on child abuse.

We have taken a strong societal policy against murder, against child abuse, and we ask judges who handle these cases to become educated on the law and on the science, such as DNA analysis, needed to decide such cases fairly. This is the rule of law, and it is equally applicable to environmental and land use matters.

Another concept, some courts have scientific experts available to the courts or sitting on the courts as judges, but judges sitting on these courts do not necessarily have to have a science background. Rather, they need to be able to understand scientific and technical evidence when it is put before them.

This is having the aptitude and the interest to become knowledgeable, just as to be a connoisseur of art and to be able to understand or distinguish good art from bad art doesn't mean that you have to be able to paint a good painting. It is a facility with the subject, a kind of environmental literacy, as it has been called.

The final thought that I'd like to place on the table here is the importance to the rule of law of having decisions in environmental matters give reasons, not just a result, and correspondingly, for them to be published so as to be available beyond the parties to the particular case.

This is as true in civil law jurisdictions as it is in the common law. Having to give reasons in an online -- or available online decision increases transparency in the entire system and creates a very public anti-corruption incentive.

There is actually not so much difference between the civil law and the common law systems in environmental law. For all of us, environmental policy is made by the legislature and is found in statutes, or in some places in constitutions.

We, as judges, apply or implement those statutes and related administrative regulations. But what we can do in our decisions is to discuss the underlying principles and create a useful body of

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persuasive commentary, regardless of the question of whether it is precedent for anybody.

Thank you. Now I'll turn the floor over to Charles Di Leva from the World Bank.

MR. Di LEVA: Thank you, Merideth. Thanks to Pace and ELI and the IUCN Law Commission for organizing this terrific conference.

And let me touch on just a little bit of what we're done in the World Bank with our current system for dealing with dispute resolution, where we're going, let me mention some project activities that are relevant, and then some partnerships.

Kitty Pring just mentioned that international financial institutions have accountability mechanisms. And indeed, ours celebrated its 15th anniversary last year, and has handled some major environmental disputes. Some of them include issues relating to the -- the Chad-Cameroon Pipeline, Hudrigali large hydro project, and recently some environmental NGOs in South

Africa challenged a project that, in fact, was the largest loan ever in the history of the bank to South Africa for the construction of some large thermal power plant construction in that country.

And it's interesting because the -- the claim refers to the climate change treaty, and of course the recent decisions that came out of Cancun.

So international financial institutions have come a long way in 15 years from rejecting civil society's rights to challenge the types of project activities that they undergo to almost universally now having these accountability mechanisms in place, with broad standing ability.

Only two or more people need to raise a claim that they may have been affected by -- may have been adversely affected by a project financed by the bank and its failure to adhere to those policies.

But we've recognized that we need to do more in terms of dispute resolution. The independent evaluation group of the bank

found last year that in only 28 percent of the projects that they sampled had a strong grievance mechanism been in place in the country dealing with the project per se.

In other words, people that had concerns about the projects would raise a complaint all the way to Washington, but we hadn't done enough at the project level to give people access to grievance mechanisms.

So we're putting in place mechanism to -- to ensure that we increase grievance mechanism at the project level but we are also increasing our ability as a management unit to respond to grievance claims.

So that instead of people coming to the bank and not being able to find a responsible entity and searching amongst our 10,000 employees for who's really in charge here, we have a mechanism to really deal with that project at the management level.

At the project level, we have done a lot, I think, to increase our ability to work on environmental enforcement, and the truth is that it's sometimes difficult for -- to

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get governments who are dealing with major development crises to be willing to borrow money from a bank for an environmental court.

Things may change, but it's been relatively rare that we've done that. We have loaned funds from time to time for rebuilding courts in countries in conflict, but never anything specifically on environmental courts.

Nevertheless, what I think we're seeing is, recognizing the strong impact between environmental damage and poverty impact, we are increasing our enforcement support activities.

And so nine countries in West Africa that have had severe problems with illegal fishing are now getting support for the bank for marine surveillance, monitoring, vessels to go out and capture illegal fishers, and then to support the prosecutors to be able to prosecute these kind of cases.

Our president last October, in Nagoya, signed a letter of understanding between the bank, Interpol, World Customs Organization,

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UNODC, and Sidens (phonetic) to pledge coordination on wildlife crime effort.

And we are now negotiating a first-time-ever project in South Asia in which funding will go directly to support the South Asia Wildlife Enforcement Network, including dealing with tiger range states to try to address illegal poaching through bank support. These are things that -- that we have never really done before.

We have dealt with training with prosecutors in the state of Minas Gerias, I think Judge Benjamin is familiar with that. And we've also been looking at ways to support international treaty enforcement provisions with GEF funding.

Finally, I'll just mention a couple partnerships that I think are relevant. You can't have real environmental enforcement unless you understand environmental damage. One thing the bank can certainly bring to this equation, if not enforcement, because we're not an enforcement agency, we can bring good economic evaluation of environmental

damages.

So following on UNEP's study on biodiversity evaluation, we've launched a multi-donor trust fund. A number of countries have given us the funds to start valuing ecosystem service loss. What we're going to do is then try to incorporate that in national wealth accounts, and then use that kind of information to try to limit environmental damage -- damaging activity.

We also have just finished, really, our contribution to the access initiative. The bank was a funder through the development grant facility for several years dealing with the access initiative and -- and Principle 10.

The World Bank Institute worked with the International Network for Environmental Compliance and Enforcement for a number of years, generating some trust funds to do that.

And then the last thing I'll mention is that last year we supported a program linked to the Barcelona Convention to support

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prosecutors in the Mediterranean Sea area to enhance prosecution dealing with illegal fishing and other marine pollution.

And we really hope to increase our work on marine pollution, illegal fishing, illegal forest, including by bringing into the equation our anti-money laundering expertise in the bank to deal with trafficking and the illegal money laundering in that area. Thank you.

JUSTICE WRIGHT: Thank you. We next turn to Ken Markowitz.

MR. MARKOWITZ: Good afternoon, everybody. I'm Ken Markowitz, the managing director of the International Network for Environmental Compliance and Enforcement.

And for those of you who are not familiar with INECE, we are a trans-governmental network, over a hundred countries around the world actively participate in INECE, and we involve all the key stakeholders in the compliance continuum.

So the parliamentarians, the inspectors, the program managers, the prosecutors, and

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the judges, we need all of them to have the capacity, the skills, and the tools necessary to assure compliance with environmental laws and to enforce judgments.

INECE -- I'm honored today because two of our key stalwarts in the network, our co-chair Antonio Herman Benjamin, from Brazil, and Donald Kaniaru, from Kenya, have been instrumental in INECE and its activities throughout the reaches of the world, including engaging a strong judiciary and showing the commitment that's necessary to empower judges with the political will, which is a great challenge all over the world, to enforce the law and uphold judgments.

Without compliance, laws are just words on paper. And without a credible threat of enforcement, there is no compliance. We like to believe in INECE, the International Network, that compliance and enforcement form the foundation for the rule of law, as Justice Wright was talking about before.

Without the rule of law, it's impossible to govern. And if we can't govern, how can

we meet our environmental and sustainable development objectives? They become nothing more than dreams.

Each aspect of the compliance continuum, though, must be strong. We need good laws. We need good institutions to implement and oversee the compliance promotion and enforcement activities related to making those laws work.

But we also need prosecutors who are properly trained and skilled in environmental violations and harms, and the judges. INECE works with all of these communities to build capacity, to raise awareness, and to foster what we call enforcement cooperation.

This is all critical. We need everybody to work together if as a collective society we are to respond to the most pressing environmental challenges that we face today, climate change with all of its social, economic, and environmental harm, water quantity, quality, scarcity, those issues, we need to uphold the laws.

And right now INECE is working on

special projects related to the trans-boundary movement of hazardous waste, working with port operators and some of the other stakeholders that Charles just mentioned, the customs officers, UNOV, and the secretary from the Basel Convention to assure that waste is not going from developed countries to less developed countries.

In particular right now we're focusing on electronic waste, and our obsession with electronics creates huge amounts of hazardous waste that winds up being disposed of often in developing countries without the technical capable skills to handle it properly.

We operate through regional networks and government to government from across borders but also within borders. One of the challenges that we find with assuring compliance with environmental laws is based on so many stakeholders, even within a national government, have responsibilities but there's often lack of communication and coordination. INECE works to bring these stakeholders together at all levels of

governance.

This year we are launching a special initiative in conjunction with the IUCN Commission on Environmental Law that will focus on building capacity of public prosecutors and attorneys general across the globe, who have often been an underappreciated component of the environmental compliance and enforcement chain.

We build capacity through -- through inspector training, through principles of environmental enforcement court that have been delivered to over 4,000 practitioners around the globe.

But we also operate to look at things like performance measurement. How do we do the best we can with limited resources in our arsenal to maximize the level of compliance. We've developed a methodology for using these indicators to help make hard choices and apply resources to what is working.

With regards to judiciary right now, our efforts are focused on bringing the best

practices for judicial capacity building. Together we will be doing a special event at our international conference in June, this year up in Canada, that will focus on judiciary and establishment and sustainability of green courts around the world.

And we are an umbrella organization, so there are a lot of good judicial training programs out there. We want to be able to bring those together and eliminate inefficiency in the process.

Finally, you know, in the collective -- we, in the collective, will only assure compliance with environmental laws at all levels of governance through strong enforcement of our existing laws.

To do this effectively, judges, like the other stakeholders in the continuum, need to possess knowledge of the issues, and have -- be empowered with the political will to uphold the law and enforce judgments.

This will only -- the only way to send proper deterrence messages out to those who

may willfully and knowingly break laws, they need have to credible threats of enforcement, and that involves each practitioner along this compliance continuum to work together.

INECE is looking to be a home to those in the judiciary looking to build upon your collective wisdom and strengths. Thanks for the opportunity.

JUSTICE WRIGHT: Thank you.

And now, Professor Robert Percival.

PROFESSOR PERCIVAL: I used to do a lot of appellate argument so I take time limits very seriously. So I am programming my iPhone, when my seven minutes is up, a loud alarm is going to ring and stop me.

The theme of my presentation is to look at the history of how the U.S. Article 3 Federal Judiciary has dealt with scientific issues in environmental cases. Because -- my basic argument is that we really have no choice but to have environmental courts, whether we call them that or not.

This morning Judge Kaniaru told us that environmental courts are a fact of life

today, and that's because environmental disputes have been a fact of life for centuries. They have to be resolved some way, and the question is: Do we have a specialized agency for doing that?

If you look back at the Anglo-American common law tradition, for centuries courts in Britain held that based on the sic utere principle, people have a right to use their property as they like so long as they don't cause foreseeable significant harm to others. And that's been a principle that our federal judiciary has always embraced.

If you go back to the early days of the 20th Century, there were major trans-boundary pollution disputes argued in the U.S. Supreme Court's original jurisdiction, disputes over smelter pollution, sewage disposal, garbage dumping.

The U.S. Supreme Court actually wrote air pollution injunctions, required the City of New York to build its first garbage incinerator, and required the City of Chicago to build its first sewage treatment plant.

In those cases the courts realized they didn't have a lot of environmental expertise. They would appoint masters to gather evidence and to recommend remedies, and based on those recommendations they would act.

As decades went on and these disputes continued in the days before we had comprehensive national environmental regulation, the Court kept arguing that maybe it would be better if the states would just work this out through negotiations themselves.

And in 1971, the state of Ohio applied to the Court to have a massive proceeding to deal with mercury pollution in Lake Erie. In the Wyandotte Chemical case, the Court said, no, this is beyond our capabilities.

One of the papers I found, in researching Justice Marshall's papers in the Supreme Court archives, said that Chief Justice Burger had warned the Court if you vote in favor of this, we'll have to appoint three special masters because the science is so complicated.

In response to that decision, where the Court basically said, take it to state court, Congress in October of 1972 formally asked the President to study the feasibility of creating an environmental court system.

And in 1973, the U.S. Attorney General proposed three alternatives, creating an actual federal environmental division of the federal courts, or creating more limited jurisdiction to review agency orders that affected the environment or the orders of specific agencies.

In 1976, President Ford's advisory group on anticipated advances in science and technology recommended the idea of having some kind of science court, but that was then abandoned when he lost the presidential election in 1980.

In the meantime, as courts had to deal with -- now that we had comprehensive environmental regulations, the first generation of those regulations by EPA in the early 1970s, we had some major decisions.

I think perhaps the most overlooked yet

most important environmental decision in the history of the U.S. judiciary is the Ethyl Corporation decision, where a three-judge panel initially struck down EPA's regulations limiting the amount of lead in gasoline.

But then when the case was taken on bond by a five to four vote, the Court, in a very strong endorsement of the precautionary principle, said, We must defer to these expert agencies. This isn't the old common-law standard, where you have to show that it's more probable than not that someone has caused specific injury.

Because of that, probably the most important public health success for the history of EPA regulation was allowed to survive, and eventually we were able to phase all lead out of gasoline.

Then the Supreme Court in 1984, in the Chevron case, enunciated a rule that courts should defer to the decisions of expert administrative agencies when they interpret their statutory authorities.

When I went through the Marshall papers,

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I was surprised to discover Justice Stevens was recorded at the conference discussion of this case as saying, This case is so complicated, I don't understand it. When I get so confused, I just say go with the agency. And that's essentially been the rule that we follow.

Now, we have created -- Congress has created some exclusive venue in the D.C. Circuit to hear Clean Air Act cases and cases involving the Federal Hazardous Waste Legislation, and I think they acquired a fair amount of knowledge about how to review those appeals, and that seems to have worked.

We do have some specialized courts in the area of intellectual property. The Federal Circuit was created in 1982. And Article 3 judges occasionally appoint environmental experts.

I was actually appointed in a superfund case as a special master to make recommendations on who should be liable and have to pay how much. I ended up presiding over a two-and-a-half-week trial in federal

court.

Fortunately, one of the sides declared bankruptcy when I was about to write my decision, so I got the fun of playing federal judge for two weeks without having to actually write a decision.

Yet there's still considerable ignorance in our federal judiciary about the importance of enforcing the environmental laws that's indicated in cases like the Rapanos case, where there was intentional criminal violations defying court orders, and the judge only gave a slap on the wrist criminally by saying, What's the big deal, he was just moving around some dirt on his property, when he was destroying a wetland.

In conclusion, as we said many times before, the U.S. lacks an environmental champion on our Supreme Court. We don't have any Antonio Benjamin or William O'Douglas there anymore, and as a result the environment usually loses.

A rare exception recently was the Massachusetts versus EPA case. But if you

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compare the majority to the dissent in that case, it's incredible, they're completely different visions of the significance of climate change and its ultimate future effects.

On April 19 another climate change case is going to be argued in the Supreme Court, and this case involves the question of whether states can bring nuisance law actions against coal fire electric utilities.

It's very dangerous, because Judge Sotomayor had to recuse herself from the case, so the best the environmentalists will be able to do is a four-to-four split, and that will determine whether courts continue to play their historical role of protecting plaintiffs against significant foreseeable harm when the other branches fail to do so. Thank you.

JUSTICE WRIGHT: That's an impressive alarm.

We have intentionally left a good chunk of time for questions, and I don't know how you would like to handle the planned break,

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whether we're just shifting everything. But certainly there's time for questions, and I -- are -- are you going to -- are you asking people to come up to these?

PROFESSOR ROBINSON: I think that we will take written questions, unless you want to use the mics. I don't know if they're on yet.

JUSTICE WRIGHT: Written questions are fine, if someone would come around and collect them. And meanwhile, let me just get started by asking each of the other panel members what you see as the most important feature for rule of law in the various types and jurisdictions of environmental courts that you've heard talked about. That is, what is the feature of the courts that you would most like to see established?

Who wants to go first?

PROFESSOR PERCIVAL: Well, I actually think that the reason environmental courts have been so beneficial is not because their decisions have necessarily been demonstrably better, but rather the very fact of their

creation signals that countries are taking the environmental rule of law very seriously.

You can have jurisdictions that don't have environmental courts but that have an excellent independent judiciary that respects the rule of law and takes environmental cases very seriously.

As it has generally been true, at least in the early history of implementing the environmental laws in the U.S., where almost all the major regulatory programs were only implemented after successful citizen suits against EPA.

So you don't have to have environmental courts to have a good environmental judiciary, but where you have them it signals that that jurisdiction takes seriously the importance of enforcing and implementing environmental law.

MR. MARKOWITZ: I'll just throw out one thing, which is the political will of the nation state that creates the environmental court, courts may do all the good work, and hear -- you know, render good decisions, but

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those decisions need to be upheld and enforced as well, which takes the will possibly beyond those committed judges to the environment. So it's a step.

MR. Di LEVA: I think when you listen to Professor Percival, or Fran or articles that Jeffrey Toobin has written about the Supreme Court, or you listen to Judge Davide, you realize that the personal views are inescapable at some level.

And so from the World Bank side, I think education is key to rule of law. Unless you have somebody educated in the value of the wetlands or the value of carrying out this economics for the future generational impact, you don't get the right decisions. I would say education is a key.

JUSTICE WRIGHT: Thank you.

MR. KASS: Good afternoon. My name is Stephen Kass. I'm an environmental litigator. And I appreciate the importance and need for environmental courts and tribunals for all the reasons that have been recited and demonstrated so powerfully, but I

do think there's another side that we also have to think about, and there's caution here.

In fact, the reference to the Chevron decision really emphasizes it. If you read Justice Breyer's recent discussions about Chevron, he really emphasizes the importance of courts of general jurisdiction, if you will, not becoming themselves captive to administrative determinations, and not permitting Chevron to be an abdication of some judicial review.

There's also been some reference to internationally specialized tribunals. And for example, the WTO dispute settlement panels were mentioned. But they illustrate the problem.

And there's no reason really to think that we environmentalists are really going to be so immune as well. WTO panels, particularly at the lower level, have tended to view the balancing of environmental and trade union as a forgone conclusion. Only the appellate body has brought any balance at

all to that.

So one does have to think about two or three things. One, there are other interests in our society that do have to be balanced against environmental, and somebody has to do that.

Two, judges trained in science are fallible. There were certain ecclesiastical courts that were trained in science once, too, and I'm not sure that I want a judge who learned science five or ten or fifteen years ago reviewing my argument that a new technology or a new methodology is now more appropriate. So there's got to be some humility and some balance.

And finally, Judge Learned Hand was right. He said that in the final analysis we have to have some love for constitutional values in the society, not just in our courts.

And so putting it all in specialized tribunals without any role for larger appellate review by courts of general jurisdiction doesn't seem to be -- present

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some questions which have to be addressed.

And I just wanted your take on it all. Thank you.

JUSTICE WRIGHT: Thank you. Because we have an international audience on the Internet as well as the people here in the room, let me just point out that many courts around the world have different ways of approaching the issue of what in some places is called administrative courts or administrative review, and that not all of them do have the deference to the agency action that -- that the speaker was just referring to.

In fact, at least in New South Wales and in the Vermont court, most of the Court's work is what's called -- what they call merits review, and what we call de novo action, taking the decision -- taking evidence on the decision all over again.

So I'm just wanting to point out before we continue that discussion that throughout the world there are different ways of doing -- of approaching this issue. Thank

you.

PROFESSOR PERCIVAL: With respect to Chevron, it certainly has, at Justice Breyer's behest, been modified quite a bit in its application by subsequent decisions like the Meade decision, which have Justice Scalia quite upset.

And I think there's been a tendency that it's -- just seems at times to be a label. If a court wants to go with the agency, it says Chevron. If it doesn't like what the agency does, it's says, Well, it's clear that they were wrong because Congress was absolutely clear in defining words like solid waste, they claim they're unambiguous.

On the WTO, I think the problem is environmentalists, what they want is a level playing field, and they didn't have that initially with the WTO. You had panels who cared not a whit about the environment deciding major issues.

Under the leadership of Pascal Lamy, he's talked about greening the WTO, and I think that's had some impact, the fact that

they would agree that asbestos is so harmful that it's okay to ban it, despite trade complaints, is at least a positive sign.

But it would be great if we had, you know, a powerful body that was combining both the possibility of authorizing trade sanctions with being able to hear specifically environmental disputes, that would be much better for the global environment.

And as Judge Wright said, you know, I think in most of these schemes there's always ultimately the possibility of review by courts of general jurisdiction, just at least on due process grounds, to make sure that there hasn't been a miscarriage of justice even by these specialized courts.

In fact, a classic example of that is the Federal Circuit. The reason it was created was so that we would have uniformity in interpreting the patent and copyright laws. And next to the Ninth Circuit, it's probably the most reversed circuit by the Supreme Court because they often don't like

the way they -- it made uniform interpretations of those laws.

JUSTICE WRIGHT: Thank you.

The two written questions that we have received so far were both very specific to the World Bank, so we'll take those now, but please continue to ask questions.

MR. Di LEVA: So two questions, one is: "Would the World Bank promote and finance monetary incentives to developing countries in order not to pollute or cut down trees from forests?"

And the other, somewhat related: "In your project to assess the value of ecosystem services, are you assuming a certain price on carbon, and what discount rate, if any, you can place that on?"

Okay. Let me say that in dealing with this issue of incentives to protect valuable natural resources, that we have several categories for the ways to look at it.

First, certain areas we do not go, critical natural habitat. So if it's a forest critical natural habitat, we have a

provision to say it's a no-go area.

If it is an area where there can be activity in a natural habitat, in forests, then it has to be done in conjunction with our safeguard policies, which include environmental impact assessment, plants that get the community support of indigenous people in those communities before the project can be processed, something that's not always commonly known about our policies.

And that it has to be in compliance with applicable national law and the borrower's obligation under environmental treaties. So that would be another set of categories.

Then if there are activities that go forward in forest areas, cutting down trees, it would have to be done in a project that would use internationally accepted certification systems.

So in other words, what we're saying is that if we are doing anything where trees were going to be cut, it's got to be under something like a forest stewardship council, sustainable forest management approach.

Then on the positive incentive side, since 1999 we've been running, now it's up to about \$2 1/2 billion worth of carbon finance activities linked through the Kyoto protocol through the development mechanism. That's not always been incorporating forest incentives, but we do have forest carbon funds and a bio-carbon fund.

And in these projects, even if they're not Kyoto certified projects, we are trying to create incentives to protect the forest, and hopefully there will be a red plus mechanism that will be endorsed under the UNFCCC Kyoto system going forward, but we're prototyping it now.

On ecosystem services, price of carbon in our carbon finance activities, we look at different kinds of markets, the EU being the dominant one, to see what kind of carbon price they are putting on carbon.

And then when we're involved in our carbon finance negotiations between countries that want to buy carbon offsets, countries that want to sell carbon offsets, there are

those various prices, not one fixed price, that's used as part of that negotiation for setting a carbon price. Discount rating, I think, will be part of this valuation system that we go forward to determine the appropriate way of doing that.

JUSTICE WRIGHT: Thank you.

One question that I would like to hear Ken's thoughts on, to start with, is the experience of the network of INECE in -- with civil removal of economic benefit remedies, separately from the question of calculating some kind of economic damage.

In other words, the problem with criminal cases frequently is that the amount of a fine available in many countries for a particular violation can be treated as a cost of doing business.

And it -- an element of -- to bring us back in the rule of law is bringing it so that the effects in the different country systems can be as effective as each other. So I'm curious about your experience with that.

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MR. MARKOWITZ: Thanks, Judge Wright.

I have to come to this with an American perspective. I'm a U.S. based lawyer and got my background in the U.S. EPA as an enforcement attorney.

And really, from our experience with the network, the only thing that works as far as penalties, in terms of -- you have to remove the economic benefit of the harm as well as some form of punitive measure. And if the collective sum of those is less than the value of breaking the law, we have very little chance of deterrence.

It's something that countries around the world we find are more and more interested in actually learning from the U.S. model, and this will be a specific workshop that we're going to be doing on this subject, is to look at setting proper penalty policies to create the right deterrents.

Specifically we're looking at this right now in the emissions trading context in Europe and how to assess proper fines for a host of different varieties and schemes that

are gaming the system in the emissions trading.

This has been an issue that was raised to us recently by Germany, so we'll be looking in that context, but helping countries establish proper penalty authorities and enforcing those authorities is really central to the challenges that we're facing, because our system here is the extreme in a lot of respects, in the sheer dollar value of penalties and enforcement. And I think we could have one case for illegal dumping and see that could bring a \$36 million penalty with it, that may be more than the whole U.K. does for a -- across the board for the whole year.

And, you know -- and this is, you know, a -- while we may have a much larger country, you know, the magnitude of our fines do seem to have that kind of deterrence.

JUSTICE WRIGHT: Thank you.

Another question is, I think for perhaps each of us: Do you each see advantages to improving the rule of law for sustainable

development through environmental courts? Or not, I suppose. And --

PROFESSOR PERCIVAL: Yes.

JUSTICE WRIGHT: -- and what are they?

PROFESSOR PERCIVAL: Well, let me give you an example. When I was teaching in China three years ago, a court decision came down where NRDC had sued the U.S. Navy to enjoin its testing of a new SONAR system, and the Court had issued an injunction that then was affirmed in part by the Ninth Circuit.

And the Chinese students were like astonished that -- the Chinese military is a separate branch of government -- in the U.S. that a private group could go to court and that the rule of law was so important that the most powerful military in the world would have to change the way it was testing what they said was a vital weapon system in order to protect marine mammals. They just -- it was just unthinkable that there was that much support for the rule of law.

Now, I said, Wait, it could get reversed by the Supreme Court. And it ultimately was

reversed by the Supreme Court. But it was such a great lesson, and if you take protection of marine mammals seriously and allow it to stop how the military does business, you really have a very advanced legal system where judges are more important than the most powerful military in the world.

MR. Di LEVA: We see legislation from around the globe in our office, the Environmental Law Office of the World Bank, and what's evident, and you can hear it, I think, in Bob's remarks about where the U.S. courts were and where they are today is that there's more advance on sustainable development outside of the U.S. in many ways than there is inside, which is really unfortunate as a U.S. national.

But it's -- if you look at what South Africa is doing with its legislation and its courts, Kenya, Colombia, we have requests even now at -- with -- despite the turmoil that Nick -- Professor Robinson mentioned earlier in the Middle East, these countries are still trying to work with us on the

environmental projects that they have.

They see the value. The countries understand the scarcity of water. They understand the irreparable damage to natural resources in a way that seems to have lost in some of the consciousness of the U.S. So sustainable development is a concept I think is very strong in many parts of the world, and perhaps needs to be restrengthened here.

MR. MARKOWITZ: Yes, the courts do add strong value to the rule of law. It's evident in the countries that have adopted these courts or are moving towards these courts, where we see progress.

And I'll use the Philippines as an example, and Kenya, we're working closely with a host of agencies in Kenya right now. And by having the Court itself, it creates an atmosphere of that will, it's a commitment by the government to address these issues.

And that's a key component of this. I know I keep coming back to it, but it's really one of the greatest challenges across the globe is to raise the proper awareness of

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the importance of these issues, and give it respect so that it can change behavior across society.

JUSTICE WRIGHT: Anything else?

PROFESSOR ROBINSON: Go ahead.

AUDIENCE MEMBER: I was going to write down the question but I'll ask it, and that actually follows up on something that Bob Percival mentioned.

Back in the 1970s -- actually, early 1970s, just after EPA was created, the federal government, the Justice Department specifically, Attorney General, actually studied the feasibility or the desirability of creating an environmental court.

A big survey was done. They surveyed all the federal agencies, including NGOs, and that possibility -- the options that -- that you mentioned, Bob, were -- those options were unanimously rejected.

And what I thought -- found remarkable was, if you go back -- it was a very thick report that was generated by the Attorney General, that you can find in the bowels of

the Justice Department.

But what's remarkable is that even then, not only -- you know, not only was there not seen to be a need by the federal agencies but even the NGOs didn't think that it was actually desirable.

I wonder whether you could react or reflect on that, you know, possibly -- you know, how -- you know, whether this might be the same case today, and, you know, how -- what -- you know, what kind of lesson we might learn actually from that. Thanks.

MR. Di LEVA: I think that if we go back to the 12 building blocks, that at least on my side, when I was looking at this when I was at the Justice Department, prior to joining the World Bank, and there was a concern that you might water down the efforts to deal with the existing judiciary by creating a separate environmental tribunal.

Or that -- I think a lot of the environmental issues that we were looking at were also quite wrapped up in the tort concept, and it wasn't very clear to me at

the time how we would segregate those two.

And I know that a lot of my colleagues who were dealing with environmental enforcement at the time had that same reservation, that why not deal with the judiciary we have rather than try to deal with another?

I mean, we were getting many good district court discussions on our superfund cases at the time. Which if those had gone to an environmental court, I'm not sure.

So are we in part looking at that because we've started to become disappointed with the outcome that we're getting? I mean, I think that's one question I would have wanted to put to the -- the Prings.

And I think that's -- that issue is still there, but that's just my personal view, though. It's certainly not a professional view anymore.

PROFESSOR ROBINSON: Well, we're going to come back to that question in the panel at the very end. You are the panel, everyone here can raise these questions, and we'll get

Rock and Kitty back up to defend themselves.

But I want to thank this panel, and give you each a copy of Oliver Houck's wonderful book for you to -- he's inscribed it to you to reflect upon as you go forward. And I would like to have you join me in thanking this panel for a spirited --

(Applause.)

PROFESSOR ROBINSON: We now take a 15-minute coffee break, during which time those of you who want to see the film describing the journal of court innovation, this two volume -- this is two books in here, edited over the last 18 months, on court practice around the world, two of our students have taped a description of the lower view that will be shown on the Web. And there are more copies of this, if you didn't get it, out front. Now we'll take a coffee break for those of you who are here.

Thank you very much.

The Rule of Law and Environmental Adjudication

PROFESSOR ROBINSON: Let me bring the -- Taking Back Eden, environmental case studies,

invite Merideth and her panel to come up. We've been running over, so I think what we'll do is, we'll take questions at the end of the two panels, and get your tour of the horizon in that. No. No. You were just great. So I appreciate everything you did.

And I'm going to relinquish the chair to Judge Wright, who will carry on, and this panel, and then we'll have another panel right after that, so.

JUSTICE WRIGHT: Hello. We'll get Charles, hopefully he will be back by the time we come around to his part of this.

I'm Judge Merideth Wright, one of the now two judges in the -- well, what is now called the Environmental Division of the Unified Vermont Superior Court.

I'm joined on the panel by Charles Di Leva from the World Bank, by Professor Robert Percival from the University of Maryland School of Law, and by Kenneth Markowitz from the International Network on Environmental Compliance and Enforcement.

We've agreed to each talk for a limited

amount of time, about seven minutes, and we have students to -- showing us when we have five minutes left and one minute left, so we'll leave it to each of the speakers to keep an eye on that. We did that so as to leave half of our time for questions and discussion, and we urge you to be thinking of those as we go.

I'm going to set the stage with a few ideas for our discussion of the place of environmental courts and tribunals in promoting the rule of law and the corresponding need for the rule of law in environmental adjudication.

This isn't about the Vermont court particularly, but I will be happy to discuss with anyone questions about it during breaks and the reception.

Environmental adjudication stands at the intersection of environmental protection, sustainable development, and basic human rights, including access to justice.

Specialized environmental courts, tribunals, and green benches can provide

basic fairness and transparency in this area of the law, and it is important to recognize that we're not just talking about environmental enforcement after the fact of environmental harm, but perhaps even more importantly, the process of establishing conditions, permanent conditions for development beforehand to assure future compliance. This is the so-called level playing field so important to achieving sustainable development.

Having specialized courts does not mean that the judge takes an inappropriate advocacy role. This is a question that seems to be peculiar to the environmental field.

Consider the following analogy. We do not ask our criminal court judges whether they are neutral on the subject of murder. Are they for it or against it? We do not ask our family court judges to be neutral on child abuse.

We have taken a strong societal policy against murder, against child abuse, and we ask judges who handle these cases to become

educated on the law and on the science, such as DNA analysis, needed to decide such cases fairly. This is the rule of law, and it is equally applicable to environmental and land use matters.

Another concept, some courts have scientific experts available to the courts or sitting on the courts as judges, but judges sitting on these courts do not necessarily have to have a science background. Rather, they need to be able to understand scientific and technical evidence when it is put before them.

This is having the aptitude and the interest to become knowledgeable, just as to be a connoisseur of art and to be able to understand or distinguish good art from bad art doesn't mean that you have to be able to paint a good painting. It is a facility with the subject, a kind of environmental literacy, as it has been called.

The final thought that I'd like to place on the table here is the importance to the rule of law of having decisions in

environmental matters give reasons, not just a result, and correspondingly, for them to be published so as to be available beyond the parties to the particular case.

This is as true in civil law jurisdictions as it is in the common law. Having to give reasons in an online -- or available online decision increases transparency in the entire system and creates a very public anti-corruption incentive.

There is actually not so much difference between the civil law and the common law systems in environmental law. For all of us, environmental policy is made by the legislature and is found in statutes, or in some places in constitutions.

We, as judges, apply or implement those statutes and related administrative regulations. But what we can do in our decisions is to discuss the underlying principles and create a useful body of persuasive commentary, regardless of the question of whether it is precedent for anybody.

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Thank you. Now I'll turn the floor over to Charles Di Leva from the World Bank.

MR. Di LEVA: Thank you, Merideth. Thanks to Pace and ELI and the IUCN Law Commission for organizing this terrific conference.

And let me touch on just a little bit of what we're done in the World Bank with our current system for dealing with dispute resolution, where we're going, let me mention some project activities that are relevant, and then some partnerships.

Kitty Pring just mentioned that international financial institutions have accountability mechanisms. And indeed, ours celebrated its 15th anniversary last year, and has handled some major environmental disputes. Some of them include issues relating to the -- the Chad-Cameroon Pipeline, Hudrigali large hydro project, and recently some environmental NGOs in South Africa challenged a project that, in fact, was the largest loan ever in the history of the bank to South Africa for the construction

of some large thermal power plant construction in that country.

And it's interesting because the -- the claim refers to the climate change treaty, and of course the recent decisions that came out of Cancun.

So international financial institutions have come a long way in 15 years from rejecting civil society's rights to challenge the types of project activities that they undergo to almost universally now having these accountability mechanisms in place, with broad standing ability.

Only two or more people need to raise a claim that they may have been affected by -- may have been adversely affected by a project financed by the bank and its failure to adhere to those policies.

But we've recognized that we need to do more in terms of dispute resolution. The independent evaluation group of the bank found last year that in only 28 percent of the projects that they sampled had a strong grievance mechanism been in place in the

country dealing with the project per se.

In other words, people that had concerns about the projects would raise a complaint all the way to Washington, but we hadn't done enough at the project level to give people access to grievance mechanisms.

So we're putting in place mechanism to -- to ensure that we increase grievance mechanism at the project level but we are also increasing our ability as a management unit to respond to grievance claims.

So that instead of people coming to the bank and not being able to find a responsible entity and searching amongst our 10,000 employees for who's really in charge here, we have a mechanism to really deal with that project at the management level.

At the project level, we have done a lot, I think, to increase our ability to work on environmental enforcement, and the truth is that it's sometimes difficult for -- to get governments who are dealing with major development crises to be willing to borrow money from a bank for an environmental court.

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Things may change, but it's been relatively rare that we've done that. We have loaned funds from time to time for rebuilding courts in countries in conflict, but never anything specifically on environmental courts.

Nevertheless, what I think we're seeing is, recognizing the strong impact between environmental damage and poverty impact, we are increasing our enforcement support activities.

And so nine countries in West Africa that have had severe problems with illegal fishing are now getting support for the bank for marine surveillance, monitoring, vessels to go out and capture illegal fishers, and then to support the prosecutors to be able to prosecute these kind of cases.

Our president last October, in Nagoya, signed a letter of understanding between the bank, Interpol, World Customs Organization, UNODC, and Sidens (phonetic) to pledge coordination on wildlife crime effort.

And we are now negotiating a

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first-time-ever project in South Asia in which funding will go directly to support the South Asia Wildlife Enforcement Network, including dealing with tiger range states to try to address illegal poaching through bank support. These are things that -- that we have never really done before.

We have dealt with training with prosecutors in the state of Minas Geras, I think Judge Benjamin is familiar with that. And we've also been looking at ways to support international treaty enforcement provisions with GEF funding.

Finally, I'll just mention a couple partnerships that I think are relevant. You can't have real environmental enforcement unless you understand environmental damage. One thing the bank can certainly bring to this equation, if not enforcement, because we're not an enforcement agency, we can bring good economic evaluation of environmental damages.

So following on UNEP's study on biodiversity evaluation, we've launched a

multi-donor trust fund. A number of countries have given us the funds to start valuing ecosystem service loss. What we're going to do is then try to incorporate that in national wealth accounts, and then use that kind of information to try to limit environmental damage -- damaging activity.

We also have just finished, really, our contribution to the access initiative. The bank was a funder through the development grant facility for several years dealing with the access initiative and -- and Principle 10.

The World Bank Institute worked with the International Network for Environmental Compliance and Enforcement for a number of years, generating some trust funds to do that.

And then the last thing I'll mention is that last year we supported a program linked to the Barcelona Convention to support prosecutors in the Mediterranean Sea area to enhance prosecution dealing with illegal fishing and other marine pollution.

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And we really hope to increase our work on marine pollution, illegal fishing, illegal forest, including by bringing into the equation our anti-money laundering expertise in the bank to deal with trafficking and the illegal money laundering in that area. Thank you.

JUSTICE WRIGHT: Thank you. We next turn to Ken Markowitz.

MR. MARKOWITZ: Good afternoon, everybody. I'm Ken Markowitz, the managing director of the International Network for Environmental Compliance and Enforcement.

And for those of you who are not familiar with INECE, we are a trans-governmental network, over a hundred countries around the world actively participate in INECE, and we involve all the key stakeholders in the compliance continuum.

So the parliamentarians, the inspectors, the program managers, the prosecutors, and the judges, we need all of them to have the capacity, the skills, and the tools necessary to assure compliance with environmental laws

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and to enforce judgments.

INECE -- I'm honored today because two of our key stalwarts in the network, our co-chair Antonio Herman Benjamin, from Brazil, and Donald Kaniaru, from Kenya, have been instrumental in INECE and its activities throughout the reaches of the world, including engaging a strong judiciary and showing the commitment that's necessary to empower judges with the political will, which is a great challenge all over the world, to enforce the law and uphold judgments.

Without compliance, laws are just words on paper. And without a credible threat of enforcement, there is no compliance. We like to believe in INECE, the International Network, that compliance and enforcement form the foundation for the rule of law, as Justice Wright was talking about before.

Without the rule of law, it's impossible to govern. And if we can't govern, how can we meet our environmental and sustainable development objectives? They become nothing more than dreams.

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Each aspect of the compliance continuum, though, must be strong. We need good laws. We need good institutions to implement and oversee the compliance promotion and enforcement activities related to making those laws work.

But we also need prosecutors who are properly trained and skilled in environmental violations and harms, and the judges. INECE works with all of these communities to build capacity, to raise awareness, and to foster what we call enforcement cooperation.

This is all critical. We need everybody to work together if as a collective society we are to respond to the most pressing environmental challenges that we face today, climate change with all of its social, economic, and environmental harm, water quantity, quality, scarcity, those issues, we need to uphold the laws.

And right now INECE is working on special projects related to the trans-boundary movement of hazardous waste, working with port operators and some of the

other stakeholders that Charles just mentioned, the customs officers, UNOVC, and the secretary from the Basel Convention to assure that waste is not going from developed countries to less developed countries.

In particular right now we're focusing on electronic waste, and our obsession with electronics creates huge amounts of hazardous waste that winds up being disposed of often in developing countries without the technical capable skills to handle it properly.

We operate through regional networks and government to government from across borders but also within borders. One of the challenges that we find with assuring compliance with environmental laws is based on so many stakeholders, even within a national government, have responsibilities but there's often lack of communication and coordination. INECE works to bring these stakeholders together at all levels of governance.

This year we are launching a special initiative in conjunction with the IUCN

Commission on Environmental Law that will focus on building capacity of public prosecutors and attorneys general across the globe, who have often been an underappreciated component of the environmental compliance and enforcement chain.

We build capacity through -- through inspector training, through principles of environmental enforcement court that have been delivered to over 4,000 practitioners around the globe.

But we also operate to look at things like performance measurement. How do we do the best we can with limited resources in our arsenal to maximize the level of compliance. We've developed a methodology for using these indicators to help make hard choices and apply resources to what is working.

With regards to judiciary right now, our efforts are focused on bringing the best practices for judicial capacity building. Together we will be doing a special event at our international conference in June, this

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year up in Canada, that will focus on judiciary and establishment and sustainability of green courts around the world.

And we are an umbrella organization, so there are a lot of good judicial training programs out there. We want to be able to bring those together and eliminate inefficiency in the process.

Finally, you know, in the collective -- we, in the collective, will only assure compliance with environmental laws at all levels of governance through strong enforcement of our existing laws.

To do this effectively, judges, like the other stakeholders in the continuum, need to possess knowledge of the issues, and have -- be empowered with the political will to uphold the law and enforce judgments.

This will only -- the only way to send proper deterrence messages out to those who may willfully and knowingly break laws, they need have to credible threats of enforcement, and that involves each practitioner along

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this compliance continuum to work together.

INECE is looking to be a home to those in the judiciary looking to build upon your collective wisdom and strengths. Thanks for the opportunity.

JUSTICE WRIGHT: Thank you.

And now, Professor Robert Percival.

PROFESSOR PERCIVAL: I used to do a lot of appellate argument so I take time limits very seriously. So I am programming my iPhone, when my seven minutes is up, a loud alarm is going to ring and stop me.

The theme of my presentation is to look at the history of how the U.S. Article 3 Federal Judiciary has dealt with scientific issues in environmental cases. Because -- my basic argument is that we really have no choice but to have environmental courts, whether we call them that or not.

This morning Judge Kaniaru told us that environmental courts are a fact of life today, and that's because environmental disputes have been a fact of life for centuries. They have to be resolved some

way, and the question is: Do we have a specialized agency for doing that?

If you look back at the Anglo-American common law tradition, for centuries courts in Britain held that based on the sic utere principle, people have a right to use their property as they like so long as they don't cause foreseeable significant harm to others. And that's been a principle that our federal judiciary has always embraced.

If you go back to the early days of the 20th Century, there were major trans-boundary pollution disputes argued in the U.S. Supreme Court's original jurisdiction, disputes over smelter pollution, sewage disposal, garbage dumping.

The U.S. Supreme Court actually wrote air pollution injunctions, required the City of New York to build its first garbage incinerator, and required the City of Chicago to build its first sewage treatment plant.

In those cases the courts realized they didn't have a lot of environmental expertise. They would appoint masters to gather evidence

and to recommend remedies, and based on those recommendations they would act.

As decades went on and these disputes continued in the days before we had comprehensive national environmental regulation, the Court kept arguing that maybe it would be better if the states would just work this out through negotiations themselves.

And in 1971, the state of Ohio applied to the Court to have a massive proceeding to deal with mercury pollution in Lake Erie. In the Wyandotte Chemical case, the Court said, no, this is beyond our capabilities.

One of the papers I found, in researching Justice Marshall's papers in the Supreme Court archives, said that Chief Justice Burger had warned the Court if you vote in favor of this, we'll have to appoint three special masters because the science is so complicated.

In response to that decision, where the Court basically said, take it to state court, Congress in October of 1972 formally asked

the President to study the feasibility of creating an environmental court system.

And in 1973, the U.S. Attorney General proposed three alternatives, creating an actual federal environmental division of the federal courts, or creating more limited jurisdiction to review agency orders that affected the environment or the orders of specific agencies.

In 1976, President Ford's advisory group on anticipated advances in science and technology recommended the idea of having some kind of science court, but that was then abandoned when he lost the presidential election in 1980.

In the meantime, as courts had to deal with -- now that we had comprehensive environmental regulations, the first generation of those regulations by EPA in the early 1970s, we had some major decisions.

I think perhaps the most overlooked yet most important environmental decision in the history of the U.S. judiciary is the Ethyl Corporation decision, where a three-judge

panel initially struck down EPA's regulations limiting the amount of lead in gasoline.

But then when the case was taken on bond by a five to four vote, the Court, in a very strong endorsement of the precautionary principle, said, We must defer to these expert agencies. This isn't the old common-law standard, where you have to show that it's more probable than not that someone has caused specific injury.

Because of that, probably the most important public health success for the history of EPA regulation was allowed to survive, and eventually we were able to phase all lead out of gasoline.

Then the Supreme Court in 1984, in the Chevron case, enunciated a rule that courts should defer to the decisions of expert administrative agencies when they interpret their statutory authorities.

When I went through the Marshall papers, I was surprised to discover Justice Stevens was recorded at the conference discussion of this case as saying, This case is so

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complicated, I don't understand it. When I get so confused, I just say go with the agency. And that's essentially been the rule that we follow.

Now, we have created -- Congress has created some exclusive venue in the D.C. Circuit to hear Clean Air Act cases and cases involving the Federal Hazardous Waste Legislation, and I think they acquired a fair amount of knowledge about how to review those appeals, and that seems to have worked.

We do have some specialized courts in the area of intellectual property. The Federal Circuit was created in 1982. And Article 3 judges occasionally appoint environmental experts.

I was actually appointed in a superfund case as a special master to make recommendations on who should be liable and have to pay how much. I ended up presiding over a two-and-a-half-week trial in federal court.

Fortunately, one of the sides declared bankruptcy when I was about to write my

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decision, so I got the fun of playing federal judge for two weeks without having to actually write a decision.

Yet there's still considerable ignorance in our federal judiciary about the importance of enforcing the environmental laws that's indicated in cases like the Rapanos case, where there was intentional criminal violations defying court orders, and the judge only gave a slap on the wrist criminally by saying, What's the big deal, he was just moving around some dirt on his property, when he was destroying a wetland.

In conclusion, as we said many times before, the U.S. lacks an environmental champion on our Supreme Court. We don't have any Antonio Benjamin or William O'Douglas there anymore, and as a result the environment usually loses.

A rare exception recently was the Massachusetts versus EPA case. But if you compare the majority to the dissent in that case, it's incredible, they're completely different visions of the significance of

climate change and its ultimate future effects.

On April 19 another climate change case is going to be argued in the Supreme Court, and this case involves the question of whether states can bring nuisance law actions against coal fire electric utilities.

It's very dangerous, because Judge Sotomayor had to recuse herself from the case, so the best the environmentalists will be able to do is a four-to-four split, and that will determine whether courts continue to play their historical role of protecting plaintiffs against significant foreseeable harm when the other branches fail to do so. Thank you.

JUSTICE WRIGHT: That's an impressive alarm.

We have intentionally left a good chunk of time for questions, and I don't know how you would like to handle the planned break, whether we're just shifting everything. But certainly there's time for questions, and I -- are -- are you going to -- are you

asking people to come up to these?

PROFESSOR ROBINSON: I think that we will take written questions, unless you want to use the mics. I don't know if they're on yet.

JUSTICE WRIGHT: Written questions are fine, if someone would come around and collect them. And meanwhile, let me just get started by asking each of the other panel members what you see as the most important feature for rule of law in the various types and jurisdictions of environmental courts that you've heard talked about. That is, what is the feature of the courts that you would most like to see established?

Who wants to go first?

PROFESSOR PERCIVAL: Well, I actually think that the reason environmental courts have been so beneficial is not because their decisions have necessarily been demonstrably better, but rather the very fact of their creation signals that countries are taking the environmental rule of law very seriously.

You can have jurisdictions that don't

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have environmental courts but that have an excellent independent judiciary that respects the rule of law and takes environmental cases very seriously.

As it has generally been true, at least in the early history of implementing the environmental laws in the U.S., where almost all the major regulatory programs were only implemented after successful citizen suits against EPA.

So you don't have to have environmental courts to have a good environmental judiciary, but where you have them it signals that that jurisdiction takes seriously the importance of enforcing and implementing environmental law.

MR. MARKOWITZ: I'll just throw out one thing, which is the political will of the nation state that creates the environmental court, courts may do all the good work, and hear -- you know, render good decisions, but those decisions need to be upheld and enforced as well, which takes the will possibly beyond those committed judges to the

environment. So it's a step.

MR. Di LEVA: I think when you listen to Professor Percival, or Fran or articles that Jeffrey Toobin has written about the Supreme Court, or you listen to Judge Davide, you realize that the personal views are inescapable at some level.

And so from the World Bank side, I think education is key to rule of law. Unless you have somebody educated in the value of the wetlands or the value of carrying out this economics for the future generational impact, you don't get the right decisions. I would say education is a key.

JUSTICE WRIGHT: Thank you.

MR. KASS: Good afternoon. My name is Stephen Kass. I'm an environmental litigator. And I appreciate the importance and need for environmental courts and tribunals for all the reasons that have been recited and demonstrated so powerfully, but I do think there's another side that we also have to think about, and there's caution here.

In fact, the reference to the Chevron decision really emphasizes it. If you read Justice Breyer's recent discussions about Chevron, he really emphasizes the importance of courts of general jurisdiction, if you will, not becoming themselves captive to administrative determinations, and not permitting Chevron to be an abdication of some judicial review.

There's also been some reference to internationally specialized tribunals. And for example, the WTO dispute settlement panels were mentioned. But they illustrate the problem.

And there's no reason really to think that we environmentalists are really going to be so immune as well. WTO panels, particularly at the lower level, have tended to view the balancing of environmental and trade union as a forgone conclusion. Only the appellate body has brought any balance at all to that.

So one does have to think about two or three things. One, there are other interests

in our society that do have to be balanced against environmental, and somebody has to do that.

Two, judges trained in science are fallible. There were certain ecclesiastical courts that were trained in science once, too, and I'm not sure that I want a judge who learned science five or ten or fifteen years ago reviewing my argument that a new technology or a new methodology is now more appropriate. So there's got to be some humility and some balance.

And finally, Judge Learned Hand was right. He said that in the final analysis we have to have some love for constitutional values in the society, not just in our courts.

And so putting it all in specialized tribunals without any role for larger appellate review by courts of general jurisdiction doesn't seem to be -- present some questions which have to be addressed. And I just wanted your take on it all. Thank you.

JUSTICE WRIGHT: Thank you. Because we have an international audience on the Internet as well as the people here in the room, let me just point out that many courts around the world have different ways of approaching the issue of what in some places is called administrative courts or administrative review, and that not all of them do have the deference to the agency action that -- that the speaker was just referring to.

In fact, at least in New South Wales and in the Vermont court, most of the Court's work is what's called -- what they call merits review, and what we call de novo action, taking the decision -- taking evidence on the decision all over again.

So I'm just wanting to point out before we continue that discussion that throughout the world there are different ways of doing -- of approaching this issue. Thank you.

PROFESSOR PERCIVAL: With respect to Chevron, it certainly has, at Justice

Breyer's behest, been modified quite a bit in its application by subsequent decisions like the Meade decision, which have Justice Scalia quite upset.

And I think there's been a tendency that it's -- just seems at times to be a label. If a court wants to go with the agency, it says Chevron. If it doesn't like what the agency does, it's says, Well, it's clear that they were wrong because Congress was absolutely clear in defining words like solid waste, they claim they're unambiguous.

On the WTO, I think the problem is environmentalists, what they want is a level playing field, and they didn't have that initially with the WTO. You had panels who cared not a whit about the environment deciding major issues.

Under the leadership of Pascal Lamy, he's talked about greening the WTO, and I think that's had some impact, the fact that they would agree that asbestos is so harmful that it's okay to ban it, despite trade complaints, is at least a positive sign.

But it would be great if we had, you know, a powerful body that was combining both the possibility of authorizing trade sanctions with being able to hear specifically environmental disputes, that would be much better for the global environment.

And as Judge Wright said, you know, I think in most of these schemes there's always ultimately the possibility of review by courts of general jurisdiction, just at least on due process grounds, to make sure that there hasn't been a miscarriage of justice even by these specialized courts.

In fact, a classic example of that is the Federal Circuit. The reason it was created was so that we would have uniformity in interpreting the patent and copyright laws. And next to the Ninth Circuit, it's probably the most reversed circuit by the Supreme Court because they often don't like the way they -- it made uniform interpretations of those laws.

JUSTICE WRIGHT: Thank you.

The two written questions that we have received so far were both very specific to the World Bank, so we'll take those now, but please continue to ask questions.

MR. Di LEVA: So two questions, one is: "Would the World Bank promote and finance monetary incentives to developing countries in order not to pollute or cut down trees from forests?"

And the other, somewhat related: "In your project to assess the value of ecosystem services, are you assuming a certain price on carbon, and what discount rate, if any, you can place that on?"

Okay. Let me say that in dealing with this issue of incentives to protect valuable natural resources, that we have several categories for the ways to look at it.

First, certain areas we do not go, critical natural habitat. So if it's a forest critical natural habitat, we have a provision to say it's a no-go area.

If it is an area where there can be activity in a natural habitat, in forests,

then it has to be done in conjunction with our safeguard policies, which include environmental impact assessment, plants that get the community support of indigenous people in those communities before the project can be processed, something that's not always commonly known about our policies.

And that it has to be in compliance with applicable national law and the borrower's obligation under environmental treaties. So that would be another set of categories.

Then if there are activities that go forward in forest areas, cutting down trees, it would have to be done in a project that would use internationally accepted certification systems.

So in other words, what we're saying is that if we are doing anything where trees were going to be cut, it's got to be under something like a forest stewardship council, sustainable forest management approach.

Then on the positive incentive side, since 1999 we've been running, now it's up to about \$2 1/2 billion worth of carbon finance

activities linked through the Kyoto protocol through the development mechanism. That's not always been incorporating forest incentives, but we do have forest carbon funds and a bio-carbon fund.

And in these projects, even if they're not Kyoto certified projects, we are trying to create incentives to protect the forest, and hopefully there will be a red plus mechanism that will be endorsed under the UNFCCC Kyoto system going forward, but we're prototyping it now.

On ecosystem services, price of carbon in our carbon finance activities, we look at different kinds of markets, the EU being the dominant one, to see what kind of carbon price they are putting on carbon.

And then when we're involved in our carbon finance negotiations between countries that want to buy carbon offsets, countries that want to sell carbon offsets, there are those various prices, not one fixed price, that's used as part of that negotiation for setting a carbon price. Discount rating, I

think, will be part of this valuation system that we go forward to determine the appropriate way of doing that.

JUSTICE WRIGHT: Thank you.

One question that I would like to hear Ken's thoughts on, to start with, is the experience of the network of INECE in -- with civil removal of economic benefit remedies, separately from the question of calculating some kind of economic damage.

In other words, the problem with criminal cases frequently is that the amount of a fine available in many countries for a particular violation can be treated as a cost of doing business.

And it -- an element of -- to bring us back in the rule of law is bringing it so that the effects in the different country systems can be as effective as each other. So I'm curious about your experience with that.

MR. MARKOWITZ: Thanks, Judge Wright.

I have to come to this with an American perspective. I'm a U.S. based lawyer and got

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my background in the U.S. EPA as an enforcement attorney.

And really, from our experience with the network, the only thing that works as far as penalties, in terms of -- you have to remove the economic benefit of the harm as well as some form of punitive measure. And if the collective sum of those is less than the value of breaking the law, we have very little chance of deterrence.

It's something that countries around the world we find are more and more interested in actually learning from the U.S. model, and this will be a specific workshop that we're going to be doing on this subject, is to look at setting proper penalty policies to create the right deterrents.

Specifically we're looking at this right now in the emissions trading context in Europe and how to assess proper fines for a host of different varieties and schemes that are gaming the system in the emissions trading.

This has been an issue that was raised

to us recently by Germany, so we'll be looking in that context, but helping countries establish proper penalty authorities and enforcing those authorities is really central to the challenges that we're facing, because our system here is the extreme in a lot of respects, in the sheer dollar value of penalties and enforcement. And I think we could have one case for illegal dumping and see that could bring a \$36 million penalty with it, that may be more than the whole U.K. does for a -- across the board for the whole year.

And, you know -- and this is, you know, a -- while we may have a much larger country, you know, the magnitude of our fines do seem to have that kind of deterrence.

JUSTICE WRIGHT: Thank you.

Another question is, I think for perhaps each of us: Do you each see advantages to improving the rule of law for sustainable development through environmental courts? Or not, I suppose. And --

PROFESSOR PERCIVAL: Yes.

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JUSTICE WRIGHT: -- and what are they?

PROFESSOR PERCIVAL: Well, let me give you an example. When I was teaching in China three years ago, a court decision came down where NRDC had sued the U.S. Navy to enjoin its testing of a new SONAR system, and the Court had issued an injunction that then was affirmed in part by the Ninth Circuit.

And the Chinese students were like astonished that -- the Chinese military is a separate branch of government -- in the U.S. that a private group could go to court and that the rule of law was so important that the most powerful military in the world would have to change the way it was testing what they said was a vital weapon system in order to protect marine mammals. They just -- it was just unthinkable that there was that much support for the rule of law.

Now, I said, Wait, it could get reversed by the Supreme Court. And it ultimately was reversed by the Supreme Court. But it was such a great lesson, and if you take protection of marine mammals seriously and

allow it to stop how the military does business, you really have a very advanced legal system where judges are more important than the most powerful military in the world.

MR. Di LEVA: We see legislation from around the globe in our office, the Environmental Law Office of the World Bank, and what's evident, and you can hear it, I think, in Bob's remarks about where the U.S. courts were and where they are today is that there's more advance on sustainable development outside of the U.S. in many ways than there is inside, which is really unfortunate as a U.S. national.

But it's -- if you look at what South Africa is doing with its legislation and its courts, Kenya, Colombia, we have requests even now at -- with -- despite the turmoil that Nick -- Professor Robinson mentioned earlier in the Middle East, these countries are still trying to work with us on the environmental projects that they have.

They see the value. The countries understand the scarcity of water. They

understand the irreparable damage to natural resources in a way that seems to have lost in some of the consciousness of the U.S. So sustainable development is a concept I think is very strong in many parts of the world, and perhaps needs to be restrengthened here.

MR. MARKOWITZ: Yes, the courts do add strong value to the rule of law. It's evident in the countries that have adopted these courts or are moving towards these courts, where we see progress.

And I'll use the Philippines as an example, and Kenya, we're working closely with a host of agencies in Kenya right now. And by having the Court itself, it creates an atmosphere of that will, it's a commitment by the government to address these issues.

And that's a key component of this. I know I keep coming back to it, but it's really one of the greatest challenges across the globe is to raise the proper awareness of the importance of these issues, and give it respect so that it can change behavior across society.

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JUSTICE WRIGHT: Anything else?

PROFESSOR ROBINSON: Go ahead.

AUDIENCE MEMBER: I was going to write down the question but I'll ask it, and that actually follows up on something that Bob Percival mentioned.

Back in the 1970s -- actually, early 1970s, just after EPA was created, the federal government, the Justice Department specifically, Attorney General, actually studied the feasibility or the desirability of creating an environmental court.

A big survey was done. They surveyed all the federal agencies, including NGOs, and that possibility -- the options that -- that you mentioned, Bob, were -- those options were unanimously rejected.

And what I thought -- found remarkable was, if you go back -- it was a very thick report that was generated by the Attorney General, that you can find in the bowels of the Justice Department.

But what's remarkable is that even then, not only -- you know, not only was there not

seen to be a need by the federal agencies but even the NGOs didn't think that it was actually desirable.

I wonder whether you could react or reflect on that, you know, possibly -- you know, how -- you know, whether this might be the same case today, and, you know, how -- what -- you know, what kind of lesson we might learn actually from that. Thanks.

MR. Di LEVA: I think that if we go back to the 12 building blocks, that at least on my side, when I was looking at this when I was at the Justice Department, prior to joining the World Bank, and there was a concern that you might water down the efforts to deal with the existing judiciary by creating a separate environmental tribunal.

Or that -- I think a lot of the environmental issues that we were looking at were also quite wrapped up in the tort concept, and it wasn't very clear to me at the time how we would segregate those two.

And I know that a lot of my colleagues who were dealing with environmental

enforcement at the time had that same reservation, that why not deal with the judiciary we have rather than try to deal with another?

I mean, we were getting many good district court discussions on our superfund cases at the time. Which if those had gone to an environmental court, I'm not sure.

So are we in part looking at that because we've started to become disappointed with the outcome that we're getting? I mean, I think that's one question I would have wanted to put to the -- the Prings.

And I think that's -- that issue is still there, but that's just my personal view, though. It's certainly not a professional view anymore.

PROFESSOR ROBINSON: Well, we're going to come back to that question in the panel at the very end. You are the panel, everyone here can raise these questions, and we'll get Rock and Kitty back up to defend themselves.

But I want to thank this panel, and give you each a copy of Oliver Houck's wonderful

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book for you to -- he's inscribed it to you to reflect upon as you go forward. And I would like to have you join me in thanking this panel for a spirited --

(Applause.)

PROFESSOR ROBINSON: We now take a 15-minute coffee break, during which time those of you who want to see the film describing the journal of court innovation, this two volume -- this is two books in here, edited over the last 18 months, on court practice around the world, two of our students have taped a description of the lower view that will be shown on the Web. And there are more copies of this, if you didn't get it, out front. Now we'll take a coffee break for those of you who are here.

Thank you very much.

Capacity of the Environment Courts in China

PROFESSOR ROBINSON: I'll turn the panel over to Tim Epp, who will be the moderator for this session.

MR. EPP: Thank you. Well, this session is on China and environmental courts at the local level, or provincial level, in China. China has become known as the world's manufacturer, and it is the experienced -- and it is experiencing the pollution consequences that are commonly associated with largely unregulated industrialization.

China realizes it has a significant pollution problem, and China has been looking around the world at what others have done, and what others are doing, to address environmental degradation. As Rock and Kitty Pring have pointed out, environmental courts are being created by governments all over the world, a virtual explosion of environmental courts.

This symposium has gathered together experts who have been leaders in that movement. And China is beginning to join

that wave. In recent years it has created specialized environmental courts as part of Capacity of the Environment Courts in China its strategy for addressing its pollution problems.

With the sheer magnitude of its pollution problems, and with its national commitment to address them, backed by significant financial resources and a strong government organization, China is an important case study on courts' role and function in addressing environmental problems.

Of course, what China is doing is uniquely Chinese, as they will point out.

We have assembled together a panel of folks who have had extensive involvement in China, or represent an organization that has had an extensive involvement.

I'm going to ask everybody to introduce what they have been doing in China first, and then what we're going to do is we're going to convert to a -- quickly convert to a question and answer format, where I'll ask some

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questions and folks will pick up and answer as they see fit. So let's start here with Tseming.

PROFESSOR YANG: Actually, I thought we were going to start with Vivian.

MS. WANG: Works for me. Thanks. Thank you to the organizers of this symposium. I'm a legal fellow at the Natural Resources Defense Counsel, and I appreciate the invitation to participate on this panel, on behalf of my colleagues, who work at NRDC's China Beijing office, so as an overview of what NRDC has been doing in China, been working in China for the past 15 years and opened an office in Beijing in 2007. NRDC collaborates with local partners there to address environmental challenges by developing a legal tool box for environmental protection. The project bridges the environmental legal communities by providing expertise in four major areas.

The first is clean air legislation and legal tools for governance. The second is environmental health management and

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regulation. The third, information transparency and civil society engagement. And the fourth is the development of public interest litigation and the court system.

Some of the partners that we work with include the Ministry of Environmental Protection, the Supreme People's Court, the Supreme People's Protectorate, the Chinese Research Academy of Environmental Sciences, as well as local grass-roots NGOs around the country, university legal clinics and academic research institutions.

We share us, NRDC's U.S. legal perspective and experience, through research reports, through advocating for stronger world law, and also through workshops, because right now, there is an urgent need for training in the sense that most of the judges working on the environmental courts in China don't receive a systematic education on environmental laws or environmental science, so the need for training is below the, sort of the rapid development of the environmental courts, and so NRDC and its Chinese partners

have organized training courses for judges and lawyers in China.

As an example of some of our most recent work, in September and October of last year, NRDC and the All China Environmental Federation conducted a field survey of various environmental courts around the country and published a report on the current status of environmental protection courts analyzing the barriers that exist in environmental public interest litigation and the necessity and feasibility of promoting further public interest litigation there. This report was discussed at a January 2011 conference organized in Beijing.

And the Chinese-language version of that report has been published. The English-language version is forthcoming.

And just to mention two other forthcoming publications, there's a special issue of the UCLA's China law and government journal that was edited by my colleague Alex Wang and Jie Gao, which includes some translated laws and policy documents that are

relevant to China's environmental courts and public interest litigation.

And we also have a forthcoming article in the Pace journal, "Development of Environmental Public Litigation In China."

MR. PERCIVAL: I first went to China as a tourist in 1981, when it had first opened up to tourism. They had the huge steam locomotives, and everywhere you went a crowd gathered, because they had rarely seen foreigners, but almost all my work there has been since 2005. I think I counted, I've been there over 20 times since then. I worked on projects with the National People's Conference, spoken at a couple of their conferences. The China Council on International Cooperation on Environment and Development. Next project with the state Environmental Protection Agency to do a comparative study of environmental law. I've arranged for Maryland to host visiting Chinese scholars every year, and I've led two students trips of Maryland students to China, and we're going back next March, and we've

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sent some of our students to work with some of the public interest environmentalists there, like Wang Canfa Center for Legal Assistance to Pollution. I must say, NRDC has done a great job in China, particularly with working with grass-roots organizations, and I'll be going back to China as soon as classes end next month to visit Shandong University and Ningbo University.

MR. EPP: If I might say, Professor Jingjing Liu, after we're done with giving our introductions here, will give a somewhat longer description of the status of environmental courts, so that we all have a baseline, for starting.

PROFESSOR LIU: I'm Jingjing Liu, from Vermont Law School. A couple years ago Vermont Law School received a grant from USAID to conduct an extensive program on promoting China's environmental governance and rule of law. And through the couple -- last couple years we have built a solid relationship with China law schools and government agencies and research

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institutions, to achieve our goal.

The specific activities we do under a grant including bringing Chinese scholars, government officials, students coming to Vermont Law School, for an academic residency for different periods of time. And right now, given there's a need for training in China's environmental court judges, so we're considering bringing judges from China to Vermont Law School for academic residency.

And we also do a lot of workshops and symposiums, seminars, conferences, focusing on U.S. China environmental law issues in both U.S. and China.

The events that are specifically related to environmental court include a peer-to-peer judge exchange experience type of a symposium we did back in May 2009, and in fact, we brought Justice Preston, Judge Merideth Wright from Vermont Environmental Court to China to meet with Chinese environmental court judges face to face and discuss important issues.

At that time, there was only a handful

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of environmental courts in China, but now there are over 50 of them across the country. It's quite an amazing development.

And we have also worked with Maritime Court, who has responsibility in hearing water pollution cases and provide systems to them to conduct more fair and efficient adjudication of water pollution-related cases. And also, in order to promote more parties to bring environmental public interest litigation, we have been working with China's prosecutors to explore the opportunities for them to bring civil enforcement cases in court, and also we train judges on the -- we train lawyers all the time to encourage them to bring public interest litigation.

And the last set of activities we do is the Joy Student Research Project. Each year we pair one of our students with one Chinese student to conduct year-long comparative U.S. and China environmental law projects, and in fact, just as of this morning, I received a request from a Vermont Law School student

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saying he wanted to do a research project on environmental issues relating to China's military, and compare and contrast that with the U.S. practice.

So I told him that I'm not sure whether there's much materials available out there, you know, can be useful to research, and also, I'm not sure whether this is a legal question at this point. So good luck to you.

I don't know what will happen to the student. We can talk more about that later.

And one of our most recent significant developments is that we helped build China's first environmental public interest litigation law firm. And so, from this moment on, China has a special environmental public interest law group that has full-time lawyers completely devoted to promoting China's environmental public interest litigation, so going forward we are very hopeful that more and more of these type of cases will be brought.

PROFESSOR YANG: I'm Tseming Yang. I'm deputy general counsel at EPA, and I sit

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between the two people who actually have substantively talked about what I love to talk about. But I'm new to EPA. I was actually associated with the Vermont Law School China program, so I would like to associate myself with all the things that Jingjing Liu mentioned, and in my capacity at EPA I would associate myself with all the things that Tim is going to talk about, but having said that, I've been at EPA just this last summer, and so part of what I'm mentioning really is the work that the office has done for quite some time.

But also, my own interest in environmental courts in China, and in courts generally, has been really longstanding, and that is the same for my boss, Scott Fulton, who will be here shortly.

In general, I think our office's work has been primarily to facilitate the work of others, including especially the judges of the environmental appeals board in their training and capacity building work, but also, other NGOs like the World Resource

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Institute and this aqueduct course that we're trying to support. UNEP's judge's handbook.

But a primary engagement in China has probably been more broadly focused on environmental governance generally. We have a significant collaboration with the Chinese Ministry of Environmental Protection where we provide technical assistance on law reform efforts with regard to air, water, and environmental law framework statute, PRTR issues that will be likely taken up by pollution release and transfer registries, study toward, and I think one of the current projects that one of our attorneys is working on is a writing technical assistance on making permanent more effective as a mechanism. So let me leave it there and just turn over to Tim.

MR. EPP: All right. And I work for, I'm senior counsel at, the Environmental Appeals Board at EPA, which is EPA's appellate-level adjudication tribunal. We have responsibility for appeals from all penalty actions and permitting decisions, as

well as a host of other, smaller areas of jurisdiction, including certain reimbursement petitions. For those of you familiar with American law, you will probably readily recognize that that falls under the Administrative Procedure Act's formal and informal adjudication categories.

And in that capacity, the Environmental Appeals Board has received delegation from the administrator for the administrator's decision-making authority.

It's a delegation that's in the regulations, and we've been in existence since 1992, which of course places us as one of the earlier tribunals in the world. And just like Justice Preston's and Merideth Wright's courts, other courts in the country, in the -- sorry, in the world, as they have been considering creating environmental courts or have been thinking about how to strengthen their courts of general jurisdiction, have invited the EPA to come and talk.

And General Counsel Scott Fulton just

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arrived just as I was going to mention him, because quite a few years ago, when he was a judge on the Environmental Appeals Board, he participated in the Global Judges Symposium, and growing out of that, we all created sort of a standard, off-the-shelf, introductory course on environmental law for judges.

And in China, in the last number of years, three or four years, we first were invited to assist ABA rule of law initiative in partnership with NRC, down at the end of the table, to do a training with a group of environmental court judges and some general jurisdiction judges and some prosecutors, and NGO folks in Wuhan, and that has slowly started a stepping-forward process, as we have, now as we are now in conversation with the National Judicial College, along with Vermont Law School, about the National Judicial College's desire to create a curriculum for environmental courts.

And the best I understand what they're thinking about, they're looking at both the curriculum that might be appropriate for

training judges going on specialized environmental courts, or an introductory training for courts of general jurisdiction.

So that's what we've been doing, and now, Professor Liu, Jingjing, can you give us some background on where environmental courts are, in China?

PROFESSOR LIU: I actually have begged the moderator team whether I can have 15 minutes to go through the information, to go through, given the sheer volume of information, and he said decisively, No.

So I can only do it under less than -- are you counting the time?

MR. EPP: No.

PROFESSOR LIU: Less than 12 minutes. I usually prefer to start my presentation, whenever I go to a conference with a joke. And sometimes, the only thing the audience remembers from my presentation is the joke. However, today, I'm not going to have time to do that, because 12 minutes is the maximum. So I'll go strictly to the background of establishing China's environmental courts,

which is a lot boring.

In the past 30 years, China's phenomenal economic development has led to a serious and extensive environmental degradation, where there's air pollution, water pollution, solid waste, climate change, you name it.

And in order to address that, Chinese legislators started in 1979 to pass environmental laws and regulations, and they're hoping these laws and regulations will be helpful to ameliorate China's environmental law problems. And as of today, China has already developed one of the most comprehensive environmental legal frameworks in Asia.

However, there's a huge gap between law on the book and enforcement on the ground. Just like in many other countries that some of the other, previous speakers talk about.

And limited enforcement of environmental laws have been identified as one of the key environmental challenges, government's challenges, in China.

And before I go in to talk about

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developing China's environmental law, I just want to give you a very brief overview of China's government system, in particular some of its key characteristics, in order to help you put things into context.

As you may already know, you know, China has a parliamentary system, as compared to the presidential system here in the U.S.

However, what's unique about China is that its parliamentary system emphasize on efficiency, instead of on separation of power and check of balance.

In particular, historically, the purpose of China's administrative law is to ensure government efficiency, and the officials abide by law not to protect individual rights from abuse of public power.

And also, China has a unitary system, as compared to the federal system here in the U.S. But in reality there's a lot of decentralization and fragmentation at the local level, and many of the important management responsibilities have been allocated or delegated to the local

government, including the responsibility to protect the environment. And sometimes that creates a lot of conflicts.

Right now the Chinese central government is relatively progressive toward protecting the environment. However, the local governments sometimes don't buy it, because of their own pursuit of economic growth.

Also, China is a civil law system, as heavily influenced by the former Soviet Union, as compared to a common law system of the U.S. and many other countries. And therefore, the Court is considered part of the civil service system, and play relatively limited role in reviewing and rating the administrative power.

Also, the authorities of the judges is relatively limited. Other than the Supreme Court, the judges cannot make or interpret laws, and it also has no authority to strike out statutes based on legality or unconstitutionality.

In terms of case law of China, they may provide some guidance, but generally no

abiding effect and relatively limited precedential value.

There are four levels of general courts in China. Standing at the top is our Supreme Court. It rarely hears any cases in trial. It occasionally hears appeals, but its major job is to provide judicial interpretation.

According to Chinese law, Supreme Court has the authority to interpret questions out of law arising out of a specific application of law, in their adjudicative work. But in reality, our Supreme Court always went one step forward to provide detailed law judicial interpretation. Whether that's constitutional or not, I don't know, but it's very effective. You know, it's up to date, it's more detailed, and it's more enforceable. So in reality, these judicial interpretations are, obviously, much more useful than laws in China.

However, one interesting point I want to draw your attention to is that there are very limited judicial interpretation related to environmental issues in China.

So that really tells us something about it, is that there are very few cases that are litigated and tested in court, and that's why there's so few judicial interpretation issues in this area, given that Chinese environmental law is pretty generally ambiguous. The judges do have a lot of room to play with related to judicial interpretation.

And immediately below the Supreme Court is the High Court, that has authority to hear important cases in the region and also hear some appeals. And several High Courts in China are very active, at provincial level, in promoting the environmental adjudication in their own jurisdictions.

And below that is the intermediate level court, which is the major appellate review level of court at the city level.

And at the basic, at the lowest, level, is the basic people's court which is trial level court, which hear most environmental cases, including civil, administrative and criminal cases.

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So most environmental cases are heard at the lowest level, and if the parties are not happy with the result, they can appeal to the intermediate level for de novo review of both facts and law. And in fact, the environmental courts are established at the two lowest levels, so it's more like a going off approach, as some the previous speakers identified.

In addition to these general courts, we have a couple other specialized courts, and there are two of them are most relevant to our discussion today. One is the environmental court, I'm going to talk about. The other is a special kind of specialized environmental court. It's the maritime court.

There are only one level of them and a total of ten courts along Chinese port cities, and they have jurisdiction over maritime court and contract dispute. What is interesting about maritime court is that in recent years it was given jurisdiction to hear water pollution cases, and this is

pretty good, because maritime court regularly hears water-related cases, and they accumulate experience in the area, which is helpful to adjudication of these type of cases, and also because the way it's set up, maritime court is considered to be more independent, and also more technically capable.

And the jurisdiction of the maritime court are based on navigable water, instead of traditional administrative areas. So it's less likely to be subject to local protectionism.

So in recent years, in addition to environmental courts, we do see maritime courts in China play a very active role in hearing pollution cases, in particular those public interest pollution-related cases.

There are several unique features of Chinese court that either begins or undermine its effectiveness. One is that courts in China are responsible to local congress and financed by governments at the same level. So local protectionism is very true, is very

real, big concern in China.

Chinese courts commonly practice formal mediations for resolving civil cases, and including many of these environmental cases.

What is unique about the Chinese court system is that instead of having sharing for police enforce the award, Chinese courts generally enforce the award by themselves, and they have encountered enormous difficulty in enforcing their own decisions, as to make sure that only half, between half and two thirds of the civil award, are effectively enforced each year.

As Chinese citizens, the legal awareness is raising, Chinese society is becoming increasingly litigious. Many cases flood the gate, the courthouses. However, at this point Chinese courts are used overwhelmingly for commercial, or individual disputes, and rarely address in controversy social issues.

Now I want to move to talk about the element of e-court in China.

Actually, e-courts in China can go back as early as in the late '80s. But those

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courts established at that time had limited function. Between mid '90 and 2006, the environmental courts were on and off. The speed really picked up since 2007, in response to a series of devastating environmental disasters, not because of case law. And one of the best-known environmental courts in China in Wuxi was established after the very well known Ki Wu Lik Pru Algae outbreak, which deprived millions of the citizens, the city's residents, safe drinking water for several days.

As I mentioned, in May 2009, when we did our first environmental court workshop in China, it was only a handful of them at that time. But now there are over 50 environmental courts, or tribunals, or collegiate panels, established in over a dozen of provinces across China, both in developed areas and in underdeveloped areas.

And this specialized environmental court spread across three level of courts. The basic one, the intermediate one, and even the high courts. And they can hear all type of

environmental cases, civil, criminal, and administrative.

And there are a lot innovations and breakthroughs with China's environmental courts. One of the primary purposes of setting up e-court in China is to promote public interest litigation, which is not clearly authorized within the existing Chinese legal system.

According to China's current procedure laws, the plaintiff needs to have a direct interest in the case in order to bring a lawsuit.

However, these e-courts are experimenting with expense that include prosecutors, government agencies, NGOs, in one place individuals, to bring environmental public interest cases.

Also, these courts' jurisdictions are expanded, in order to more effectively handle trans-boundary pollution cases, because pollution knows no boundary. And also it's helpful to combat local protectionism.

In many of these e-courts in China

develop specialized rules, either through local legislation or internal court rules, to promote public interest litigation, to formalize procedures to hear environmental litigation, in particular with related to evidence, injunctive relief, attorney fee, setting up environmental public interest fund to support this type of litigation, et cetera.

And also, these specialized courts help advance professionalism and competence of judges in deciding technical and complicated environmental cases.

And finally, they help raise the legal awareness of the local communities, and overall contribute to the improving enforcement in the area.

However, there are still some unresolved issues with China's environmental courts, and one of them being the legal uncertainties because the courts are experimenting so many things, and they are not allowed, you know, within the Chinese existing legal framework, so on one hand you can say this is

innovation, this is breakthrough, this is great. But on the other hand, you know, this is inconsistent with national law, whether that's legal, you know, or unconstitutional, I don't want to discuss here.

So overall, there's some problems with the unclear legal basis of some of the practice of China's e-courts, so the next step is for the Supreme Court to either issue special judicial interpretation or to revise China's procedural laws to allow for those practice.

And also, the other problem the courts are facing, as I mentioned, they were established in response to environmental disasters, not because of caseload. So it's not because there's a huge need for environmental cases, so we create this court. There are more, sort of, created in response to a political need.

So what happened at this point is that although there are some decent increase of environmental cases in criminal law, and administrative enforcement cases, there are

very limited, I would say precedent-setting, landscape-changing, civil cases or public interest cases in all of the environmental courts. One particular province, Yu Nang, in southwest China, there was seven environmental courts established in that province. And in the past two years, none of the environmental courts hear any public interest cases until the end of last year.

So that really shows sort of, you know, why the courts were established in the first place, and how they play out as they developed.

Of course, there are many reasons to that. You know, environmental cases are inherently challenging, compared to most of the other cases.

But another important reason is the lack of training, environmental bar to put the court in good use, so here I do want to echo what Justice Benjamin said this morning, in terms of putting environmental legal professional community judges, prosecutors, NGOs and lawyers. They all have to work

together to really promote this.

Otherwise, if you just have the court, it will look like you just have a party but you have no guests showing up at your door.

And finally is that although there is a lot of training opportunities available to the environmental court judges, but in general, they still lack sort of more advanced peer-to-peer experience sharing or training opportunities, so more work needs to be done in that area, to help improve their general competency with related to very technical and complicated environmental cases.

So I will stop here, and look forward to the discussion later.

MR. EPP: Thank you, Professor. Now for my first question, what I want to do is contrast the seven-minute tour de force that Professor Percival went through on the last panel, where he described the extensive amount of litigation within the U.S. system, before we turn to statutory reform, where the creation of environmental law was happening

in the courts, and contrast that with what Professor Liu just described in China, and ask the question, Is it possible for China's courts to play a similar role there as the U.S. courts have played here? Or is their place within China's society just so different that we can't expect them to look at what we have accomplished here or elsewhere in the world as a model or as an example?

And, you know, in responding, think about public interest litigation, what it means there, is it like citizen suits here or not, and also, think about questions of access to information and how critical that is to court decision making.

Who would like to start?

MS. WANG: Same order as before?

MR. EPP: Sure.

MS. WANG: Although environmental courts in China are still in their primary stages of development, as Professor Liu just set forth, they're not -- because of that, they're not yet taking a leading role in environmental

protection. But we think that's, you know, important to -- they're an important avenue for promoting the use of judicial channels in general for environmental protection, for raising the profile of environmental issues, empowering public participation, and serving as a locus for building environmental expertise in the judiciary. These are all themes that you heard so far today.

So NRDC's advocacy interest in promoting the use of environmental public interest litigation includes trying to expand standing for citizens and NGOs and government agencies to bring these environmental suits, to a shift toward more plaintiff-friendly evidentiary standards. For example, that it's sufficient just to prove a violation of a pollution standard, and not necessarily have to demonstrate the exact economic or environmental harm that's -- damage that has occurred.

And also, through enabling judges and courts to have remedies that are a little bit broader, preventative injunctions rather than

just after-the-fact compensation.

But of course, we're also aware of some of the potential drawbacks of environmental courts. There's the risk of marginalization or ghettoization, in this the sense of these environmental concerns, if these courts are not well run or successful from the outset.

Some of the barriers that NRDC's recent survey of the existing environmental courts found is that, you know, that is a lack of national legislation on environmental courts, regarding their establishment, their organization, their judicial procedures, and although all the environmental courts in existence have been institutionalized through local regulations, in terms of number of judges, their operational budgets, they're not in compliance with the current China organic law of people's court.

There's also a lack of operational guidance from the Supreme People's Court, which is something that Professor Liu mentioned.

And some of the suggestions of possible

avenues for capacity building that NRDC set forth in its recent report is -- the study found that there are -- the local government environmental courts right now have been carrying out various innovative measures to try to cope with these capacity problems.

One of them is through using technical support mechanisms, in Zen Zo, the environmental court is planning to ask the local people's congress to identify sort of specially designated jurors who would learn to specialize in environmental issues, to build that technical capacity.

In Kunming we're seeing some experimentation with interagency coordination, trying to involve all the relevant governmental agencies to help provide support for the enforcement of environmental laws and regulations.

And in several cities, including Kunming and Wuxi, they're developing -- proposing development of environmental foundation, a fund to provide financial support for individual and environmental groups to file

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cases for public interest litigation, and all of these would be beneficial for the development of environmental courts.

MR. PERCIVAL: One of the big differences between China and the U.S., when the U.S. enacted its first comprehensive national regulatory system with the 1970 Clean Air Act amendments, citizen suits were written right into the statute, and they authorized not just suits against violators, but against EPA and other agencies that failed to carry out their nondiscretionary duties.

You will never see citizen suits being authorized against the central government in China. That was a major engine in the U.S. for insuring that EPA issued regulations and carried out the regulatory programs. Now, it might be as much of a problem in China, because the Ministry of Environmental Protection does seem -- the central government's very supportive of environmental regulation now, but the system is so highly decentralized that the Ministry of

Environmental Protection has about 300 employees compared to our EPA's 17,000, so I've often argued it's more like CEQ, just jawboning the local authorities where the environmental protection boards are, that have the real influence. But the larger problem is that China is not close yet to having an independent judiciary.

Word goes out from the party officials as to whether or not to take cases, and if the word is no, no matter how sympathetic the plaintiffs, as happened in the case of the tainted milk scandals, no court will touch the cases. When they do issue a good decision, like the Kunming City Environmental Court issuing a 4.3 million remedy B fine against a polluting hog farm, those are cases where you actually had the Kunming city procurate sitting at the plaintiff's table in the case, and the word was, you know, this was an okay case, so that actually seemed almost kind of arbitrary.

It's a small step in the right direction, but until China really develops a

strong tradition of respect for the rule of law and an independent judiciary, you're not really going to see the Chinese courts playing a major role.

In part because the role of the judge in China, the courts are very weak, it's not nearly as prestigious as it would be in a system with an independent judiciary, and as Jingjing said, one of the reasons why you don't see a whole lot of cases in some of these environmental courts is there's still this uncertainty, because they don't have express legislation authorizing citizen suits. Almost everything is decided at the local level, and there the polluters have a lot more influence.

PROFESSOR LIU: My understanding is sort of also in response to what Professor Percival just mentioned, in terms, a lot of the U.S. practice are statutory rights, for example citizen suits, the civil penalty, they're provided specifically in legislation. And in China, there's no, you know, in Chinese law it's pretty silent on the

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understanding, other than, I need to have a direct interest, and there's no civil penalty. What we call in China is punitive compensation, in serving product liability cases.

But some of the courts are willing to make breakthroughs, going one step forward than what the current law allows, so I think compared to the U.S. practice, I think Chinese courts' activities are even more courageous and applaudable in that sense.

And also, as I mentioned from the very beginning, in the Chinese court, and from a civil court perspective, it's very different from American court, from a common-law perspective, in that the judges have very limited authority to start with, in terms to make the law, interpret the law, in terms to strike-out statutes.

But even with the limited role, I think the Chinese judges, to the extent they can, you know, using environmental cases in environmental courts as a platform to sort of help expense standing, you know, help

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standardize the procedures, and experimenting with some sort of new mechanisms, some of them are heavily influenced with American practice, so I think all those practices are pretty amazing.

And, Tim mentioned, just now, in terms of to comment specifically on public interest litigation, as -- it's a very interesting concept, you know, in China. It was discussed a lot, and a lot of people have different opinions about it in terms of what public interest cases means and how does that compare with citizens suits in the U.S.

In my opinion, the public interest cases that have been brought up in China at this point, this sort of a combination of civil enforcement cases plus citizen suits, but of course, for the citizen suit, the procedure is not exactly the same, but has the sort of spirit, or nature, of the citizen suits.

So the court, even though they're not calling it a citizen suit, they're experimenting with it. And many of the environmental court judges constantly, I

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think, attend trainings or meet with judges from the other world, so they do know what happened in the rest of the world, and in particular in the U.S., what the practice is, and, you know, time by time and step by step they're starting to incorporate those concepts and ideas into their daily practice.

PROFESSOR YANG: I should have actually thanked Nick Robinson and Pace at first earlier, but I will not go back to that. But I think this discussion is really fascinating, I think, because the question of how much we can translate the American experience is, you know, relevant here, particularly for us, for me, to -- to a place like China, I think it is really important, because I think the same kind of questions come up in terms of trying to attempt to translate from one system to a different place.

And just before I mentioned sort of, you know, my reaction, a question of how we might be able to think about the Chinese courts' ability to play the kind of role that we have

seen here in the United States, this issue of citizen suits and suits are brought by environmental plaintiffs in China, it's important to note here that those cases are actually traditional tort cases that are brought for environmental harm. They're really not at all like our citizen suits here in the United States on the environmental statutes, that essentially allow either a private citizen to step into the shoes of the government and bring, essentially, an enforcement action, a penalties action, against the polluter, or, alternatively, force the government to take actions.

But, you know, just because they don't exist in China hasn't prevented, of course, innovative lawyers to try to fashion something with the tort claims if there's something like that, sort of looking for damages that try to look for natural resources or try to sue on behalf of a natural resource, for example.

Now, on the question of whether China's courts can play the same kind of role as the

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courts here in the United States, I mean, my reaction is that it would be quite difficult, and I say that, actually, not from a perspective of that the courts are so different. I mean, they clearly are, but I don't necessarily think of that, actually, as being the most important obstacle.

And I say that also from observation, and some of the things that we've done when I was at Vermont Law School. Jingjing mentioned workshop that we had, Judge Preston and Judge Wright, and one of the most remarkable things that I thought that occurred at the workshop, was that I think that interaction that really allowed to relate, I think, the Chinese judges to judges from other parts of the world, and I think the concerns that they had, about independence, about trying to interpret the law, about trying to adjudicate, I think they're very similar, and clearly, their position within the system is very different.

But the way they are thinking about their roles as judges, I think it's

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tremendously influenced by the experiences of judges elsewhere, in other parts of the world and what they observe, of course.

What I actually think is the more critical problem is, you know, Jingjing sort of put it, if you -- you can have a party but nobody may show up.

You know, another way to put it, maybe, is that the system is only as strong as the weakest link. And to the extent that you strengthen the courts, you have ignored other links in the chain that institutions are necessary to ensure environmental problem solving, to protect the environment, and courts can't do it alone, simply because they cannot simply take cases. You have to have a plaintiff, civil society organizations, prosecutors, and once courts have rendered their decisions, somebody has to carry them out.

The simplest cases, you know, where you simply impose a penalty or award damages, are probably not the problem. But if you have a complex problem, where you're suing to

essentially address pollution that simply doesn't put the company out of business, you have to design something that is fairly complex, and courts usually don't have that kind of expertise. They need help.

And that's sort of what regulators are for, and ultimately, the regulatory system in China is still fairly weak, the tools are still being developed.

And one last thing that I want to point out is also that our view of the courts, and especially the relationship between courts and agencies, has really grown up, has evolved in the broader context of our -- the American administrative law system, the Administrative Procedures Act, which has set up a significant set of rules, doctrines, concepts about how courts should relate to the judgments of agency, how much deference to extend, how to engage in judicial review, at what point the agency is -- you know, what kind of agency actions are subject to judicial review and the like.

And those kinds of issues are very much

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still under development in China, and so that that kind of relationship is still evolving, and it's unlikely that, you know, we will see a lot of quick progress until we see all those other things developing.

Now, the flip side, of course, I would say, and I would very much agree with what's been already said, is that one shouldn't be too pessimistic about all of this. I think these environmental courts are actually a very, very positive sign, because they are a nucleus around which improvements in the environmental regulatory system can happen, and they're really, in themselves, a catalyst for broader reforms with respect to the role of law, the judiciary and the legal system.

And even though I think it will be a slow process, I think it is an area where I think there is some real important modeling and innovation that can take place that hopefully will be of liking, and with success, will be adopted in -- not just in other geographic areas of the country but also in other institutions.

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MR. EPP: I think -- go ahead.

PROFESSOR LIU: I have a quick comment, regarding sort of the environmental tort and also the state of citizen suits in China. Exactly as what Professor Wang mentioned, you know, traditionally, many of the environmental cases in China are just tort cases. You may have a very good lawyer, you know, public interest lawyer, helping you, in which the plaintiffs are pollution victims, but the nature of the cases are still traditional tort cases in which the pollution victims are seeking damages.

However, things are changing, you know, starting from the establishment of the environmental court back in 2009, this environmental NGO, All China Environmental Federation, brought a lawsuit in Wuxi, and also, they recently brought a lawsuit in Guiyang as well, against the polluter. And what their request is for the polluter to stop the harm, and pay for attorney fee, and also pay for the case of the second fee. So they are not seeking any sort of damages --

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they're not seeking any compensation for any private individuals or any pollution victims.

So this is considered sort of more in line with the spirit of citizens suit, is that we are not seeking for private gains, you're really seeking something for the public interest.

Of course, in this case, you know, there's no 60-day notice, you know, so procedurally it doesn't really look like a citizen suit, but in terms of its concept, its idea, you know, this sort of shares some similarities with the citizen suit.

But of course, one thing interesting that needs to be pointed out for this case is that the plaintiff, the All China Environmental Federation, you know, its NGO was very strong with environmental background. So when they bring a case, it's kind of different from a regular traditional grass-roots environment NGO, so whether the case can be replicable when a much less powerful classroom NGO brings it, it's difficult to say, but at least it's a good

start.

MR. EPP: I'm going to add to that discussion two vignettes from my experience in China, to sort of highlight what I think is the ultimate picture of, it's a work in progress and we don't know what the outcome is going to be.

My first time that I was in China, we were in conversation, like I said, with judges from the environmental courts, some judge from the general jurisdiction courts, some prosecutors, and some folks from NGOs.

And, we talked, you know, a lot about our experience with such issues as standing, expanding standing, and courts expanding standing, and we also talked about the concept of recovering economic benefit as a base line to make sure that there's an equal marketplace.

And what we heard coming out of that was that within a matter of months, six months or so, there was a judge who had been there, who had incorporated some of his concepts in a written interpretation, and one of the NGOs

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that was there filed a lawsuit requesting damages, but incorporating the concept of economic benefit as a floor for the damage interpretation, and one of the courts that was represented there accepted that lawsuit.

So, you know, that suggests an openness to innovation and exploration of ideas. Then the next time I was in China I was at a conference by a maritime court, where I was largely sitting and listening. And the conversation that was happening was one about public interest litigation. But it was all about which public entity, which governmental entity, had standing to bring the damage claim.

And it wasn't which ones might bring claims on different things, it was which one could bring the claim. And that -- and their difficulty was that there was no single governmental entity that had an interest in the entire damage claim.

And so they weren't sure who -- which entity it was that should bring that public interest litigation, which, you know, doesn't

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at all look like our concept of citizens do, or openness for anybody who's been damaged to seek remedy.

So, very quickly -- we don't have much time left -- let's ask the question of the global organization network that Pace and folks are putting together here and launching, what role does it have to interface with the emerging environmental courts in China?

And as part of that, what sort of innovations have happened in courts elsewhere, that they might be the most receptive to receive or to hear about, or to translate into their system.

PROFESSOR YANG: I think I'll start, since I went last. Actually, I would say, you know, as I said earlier, I think, you know, this initiative, I think, is a very important one. I think it would be very valuable. I do think that the idea and the value of peer-to-peer sharing and the kinds of conversations, and training, and education that can be had, I think it's incredibly

useful, but I think even -- but just as useful is also just the sharing of general views and values relating to the rule of law and ideas about the environment, because ultimately, I think what is necessary, here, in part -- in this effort of translation of trying to broaden, you know, trying to translate these concepts and ideas to other legal systems, is not just the technical concepts, but I think also the values that stand behind that, and I think that is really done most effectively sort of on this kind of peer-to-peer basis.

The other thing that I would mention is probably that, apart from the judiciary, I do think also that there is value in judges engaging other institutions that are involved with the regulatory system, or the government system, in dialogues, and sort of providing a richness of dialogue that might be missing if you only had regulators, only had NGOs involved in these kinds of efforts.

PROFESSOR LIU: I want to add one thing in terms of what role international

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institutions can play is to share a variety of experience, not just the U.S. experience, but also, you know, experience from civil law countries and experience from developing law countries, because when we interact with judges and government officials in China, you know, sometimes we say this is the American practice, and they will say, This is great, but can you find out something more comparable to our developing stage, something from a civil law country, something from a developing country.

So I remember in one of the prosecutors workshop we did to help Chinese prosecutors to bring more civil enforcement cases, so I mentioned the case in Brazil, and the case in Mexico, and they find really appealing, to that sense. So it's sort of a sharing of a variety, you know, of ideas, and experience not just fully focusing on one specific country, will be helpful, and also, just the U.S. practice, I think some of the Chinese courts are already starting to the incorporate, for example, expanded standing.

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We have seen growing in environmental courts. And also, even now, it hasn't been incorporated, but Chinese judges love civil penalty. They want to be able to impose that, one day.

And that's through the sharing of experience with American counterparts, and also the criteria for deciding the amount of penalty, you know, we constantly discuss and, they're very interested in that and hope one day that they will be able to implement it as well.

MR. PERCIVAL: One thing that you quickly understand about China when you go there is foreign expertise is really highly valued, in fact it might be overly highly valued in China, but any contact that global networks can have with Chinese judiciary will help boost the stature of the Chinese judiciary, which is something that's important to do.

They also love to hear about comparative experience on the issues they care about, like enforcement.

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With respect to building and infrastructure for civil society and NGOs, one of the crucial problems is, they don't have a way of fund raising. You can't get a tax deduction for giving money to a nonprofit organization.

The World Bank actually did a great study, I think it may be as old as 2004, where they looked at tax law around the world and how it could be a model for China, adopting a system which would encourage contributions to nonprofit organizations. It didn't get a whole lot of play until the Wenchuan earthquake. Then everyone was trying to raise money for earthquake relief, and that really had an impact in starting a tradition of charitable contributions, but without the tax benefit it's not nearly as important as it is in the U.S.

And finally, I would say there are a lot of innovative things going in China now. A network of 23 Chinese NGOs just did this study of how green is the supply chains of the major multinational electronics companies

like Apple Computer and Hewlett-Packard that get a lot of their parts and supplies from China. And that got a lot of attention. Apple actually responded by admitting that they had problems with their supply chains. And so that's a good sign that even apart from, you know, litigation in the courts, some very innovative things are going on now, with increasing transparency, as a way to leverage better environmental behavior from multinational corporations, and incorporating that as part of a global network is something that could be really helpful as well, because a lot of those corporations are based in the U.S.

MR. EPP: Some -- an observation that I have is that in our conversation with judges in Wuhan, one the issues that kept coming back and kept coming back and kept coming back was their uncomfortableness in evaluating scientific and technical evidence.

And I think that's a place where those courts, those systems, that have created good models for how one evaluates competing

evidence, or uncertainty in evidence, that they would relish getting that information.

And I think what would also serve as advancing a conversation about the need for accurate information and the need for firms, businesses, to share information, and that in itself might bring about some reforms.

We may have a minute or two left. However, I am absolutely certain that if I ask another question, we'll go 15 minutes over, so I'll cede it back.

PROFESSOR ROBINSON: Well, let's thank this panel for a great --

(Applause)

PROFESSOR ROBINSON: -- and the book of Oliver Houck and his study of case studies.

PROFESSOR LIU: I have one already.

PROFESSOR ROBINSON: So let's take one minute and change musical chairs here and invite Scott Fulton to come forward.

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The Honorable Scott Fulton

PROFESSOR ROBINSON: It's a great honor for me to have the general counsel of the EPA here. Scott has been working on the question of environmental tribunals, for a long time. He's been with Donald Kaniaru at many of these UNEP meetings, and over the years has carried the dialogue, really, for the environmental courts and all of the groups in the United States that work with the environmental courts, in the international audience.

And we've had a great privilege in having the administrator of the EPA here last June. We granted her an honorary degree. So his boss is one of our alums here at Pace, which we're quite proud of. But we were especially delighted when the president and the EPA administrator brought him up to be the general counsel of EPA, because at EPA, as you've heard from Jim Epp and others, we've had our longest experience with an environmental tribunal in the United States, and I think the report that you had from Rock

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and Kitty Pring and the panel, all the speakers this morning, demonstrates that we have passed a threshold. We are no longer back in the 1970s wondering whether courts should be specialized or not. I think times have changed enormously since the attorney general's study suggested we need not have a specialized court in the federal system.

We have years of quite successful jurisprudence in the State of Vermont proving otherwise. And I think Justice Preston's presentation this morning gave you an extraordinary insight into how this body of courts can grow and enhance our ability to have both the rule of law and sound stewardship.

How we move that forward, though, is going to be a challenge. It's -- there is no clear path forward right now. We do not have a global presence for managing environmental problems through the courts. All of the more than 350 courts around the world that have developed in this way have not developed because of some international agreement that

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they should exist or any great funding. It's all coming out of the organic development of the judiciary.

So I think having a chance to reflect on this with Scott is terribly important, because there are not that many of us in the United States that have been through this progression, that we still are stuck back in an earlier period, when we thought, Oh, the federal courts or the regular courts will handle it all.

And I think the question is, in the pressure of our environmental -- global environmental degradation trends and even within the United States, is that sufficient.

So with these fairly provocative remarks, I want to welcome Scott to the podium, and look forward to sharing some thoughts with us.

JUSTICE FULTON: Well, greetings, all. I want to start by thanking the organizers of this recent, Nick and the others, for inviting me to the launch of this very important effort.

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The timing of this is, I think, excellent. It's a propitious moment for us, both to reflect on the past and to do some clear thinking about the future and to think about how new mechanisms might be useful and helpful in our pursuit of the future that we envision. And I want to thank you for your perseverance as an audience. I'm mindful of the fact that you've been at it all day and the hour grows late, so, I'll try to be brief here, and also aware that some of my friends here have traveled a good distance further than Washington, D.C. and may be struggling with travel fatigue.

You know, whenever I participate in one of these events, I take away more than I give. I'm confident of that.

And I had the benefit to listen in on the last panel, or at least part of it, and apart from the learnings that were shared about the context in China, one of my take-aways was the vehicle of the non-joke that was offered by Professor Liu, and I just want to note that I, too, have a joke, that

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is hysterically funny, that no one tells better than I, but in the interests of time I'll be moving on to the content of my talk.

As you probably know, EPA recently celebrated its 40th birthday, and as I'm sure your acutely aware, next year marks the 20th anniversary of the landmark Rio Summit on Environment and Development. Both of these milestones, I think, mark a good time for contemplation, both about what we can learn from the past and how we can collaborate, reinvigorate and reenvision efforts to advance environmental protection globally.

It's my privilege and joy to share this reflective moment with some of the world's leading experts on environmental governance, environmental rule of law, and the role of the judiciary, folks with whom I've had the pleasure and privilege of working over the past several decades on these issues.

I trust that you've, by looking at the program, you've already covered well the vital role of the judiciary as the guarantor of the protective benefits of environmental

law, and it's so true that the response of the courts to environmental problems can have a powerful transforming effect for society at large.

The seriousness of judicial attention and response can project both to the regulated community and to civil society the importance of environmental quality, the unacceptability of behaviors that jeopardize our environmental future, and the shared responsibility that environmental quality represents.

The judicial response to environmental problems is, in my view, one of the most powerful catalysts of societal movement in the direction of an environmental ethic, an ethic that, once it takes hold, can engender a sense of responsibility in all sectors of society, inspire citizens to think green and buy green and be green and encourage businesses to both respond to green consumer demand and their own emergent environmental conscience.

In short, what judges treat as important

society comes to judge as important. But we also know that the courts, as important as they are, are but one element in the delivery of environmental protection. Indeed, some describe the courts as the tail on the dog, the dog itself being environmental laws and other implementation mechanisms. That metaphor works for me only if we think of the dog as chasing its tail, with the head influencing and at times driving the head and the other organs. We'll stop with the metaphor there, although, to contextualize today's discussion and exploration and recognizing the topics that you've already been talking about and sorting through, I thought I would talk a bit about the whole dog.

And it's noteworthy that one of the organizing themes that has emerged as central to the upcoming Rio Plus 20 conference is environmental governance.

While much of the discussion thus far has centered on environmental governance modalities -- I mean international governance

modalities -- it seems inevitable that the discussion will also bring importance to the -- bring focus to the importance of effective environmental governance at the national level, for without governance at the national level none of our aspirations, international or domestic, can be realized. And without it, there can be no level playing field for international commerce, no guarantee against the creation of pollution havens.

As a general proposition, environmental governance contemplates strong environmental laws with effective implementation mechanisms, robust accountability regimes, and effective institutional arrangements.

Together, these elements provide a foundation for effective environmental protection and chart a path toward an environmental responsible future.

In the run-up to the Rio conference, justice Benjamin and I have begun collaborating in an effort to articulate some of the key precepts of an effective

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environmental governance system, principally as an assist to countries who are trying to develop or strengthen their environmental governance systems to get on top of their own environmental problems.

While countries certainly differ on particular approaches, this global diversity is, I think, undergirded by a great deal of commonality.

In the developed country context, these governance precepts are things that are often taken for granted and may even seem simplistic as this point, but in my view they've made all the difference in the forward movement that we've experienced.

In the context of developing and transitional economies, some of these ideas are still novel, or even provocative, and the discussion in the last panel, I think, stands as a testament to that.

So, again as a means of trying to round out the day's discussion, let me share some thinking regarding the broader question of environmental governance, of which the

judiciary is a vital part.

Let me mention and work through quickly seven ideas or precepts. The first is to recognize the complementarity of other organic governance notions and that environmental protection doesn't operate in a vacuum.

For example, because significant financial gains can be realized through environmental noncompliance, it is critical that anti-corruption measures be seen as an important means of reducing the potential for graft and bribery of government officials who are in the environmental protection business.

Examples of anti-corruption measures include standards of ethical conduct for government officials and strong and independent internal review mechanisms to ferret out corruption. Absolutely essential.

The second idea is that -- a very obvious one -- environmental laws must be clear, implementable, and enforceable.

Our laws here in the United States are not perfect, but they have served us well,

and in some respects are visionary, and exemplary, in that, among other things, they provide a clear road map for translation of general norms to facilitate specific requirements. They're built around the idea of prevention in the first instance, as an approach that's far superior to remediation as an afterthought.

They provide for standards review and renewal, as a means of updating requirements based on new understandings.

They have within them anti-back sliding concepts, the idea of insuring that we're moving forward with environmental protection and not backwards.

And they also include some very important implementation economizing notions, things like self reporting and monitoring, the idea of limited defenses, the idea of time limited opportunity to challenge implementing agency decisions.

And they're also, for the most part, I think, designed to accommodate some of the other precepts that I'll be mentioning.

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A third precept or idea, the importance of effective institutional arrangements that direct traffic through different levels of government and between organizations at the same level of government having overlapping authorities. So vertical and horizontal coherence, if you will.

In the United States, we have had good experience with the use of memoranda of understanding between government entities as a means of -- as a useful traffic cop, if you will, in this regard.

Fourth, the idea that environmental information should be shared with the public. Making information available to the public ensures that the public can be part of the accountability system for environmental protection and dramatically expands that accountability network beyond that which government alone can provide. I think it's been the experience that the toxics release inventory in our country, which connects with the broader notion of pollutant release and transfer registries internationally, is a

powerful and potentially transformative tool.

Such information disclosure can provide incentives for companies to eliminate waste in their production process, so that they can more favorably compete with other companies, and at the same time reduce pollution.

It also ensures a higher level of attention by company leadership, and thereby encourages positive behavioral change within the regulated community.

A fifth precept, the idea that affected stakeholders should be afforded opportunities to participate in environmental decision making. This means, of course, involvement of civil society, in terms of access to information, the opportunity to offer views, at a pre-decisional stage relating to a proposed decision, and at the post-decision stage the opportunity to challenge unprincipled government decisions.

It also means the involvement of regulated entities, who should have the opportunity to engage regulators regarding the manner in which they're being regulated

and the capacity to challenge government decision-making that is unprincipled.

Sixth, the idea that environmental decision makers, both public and private, must be accountable for their decisions.

Government must be accountable for making principled decisions, and emitters must be accountable for compliance with environmental requirements.

Some of the key accountability mechanisms include the right of affected parties to challenge government decisions; governmental enforcement actions, of course; and here, as has been noted, it's critical that violations be penalized to the point that it's sufficient to incentivize compliance or disincentivize noncompliance, and that's done by trying to remove, at a minimum, the environmental benefit of noncompliance.

And another mechanism, citizen suits against polluters, and here we're talking about direct legal action against polluters by citizens. This, in our experience, has

been one of the most important elements of a successful environmental protection program, in that it provides a backstop and a backbone, for government. It expands the resource base available to address noncompliance problems. Beyond what government alone with provide. Appear. And appear empowered citizenry, feels more this in control of its fate. And is more apt to challenge concerns about through an established and predictable legal mechanism than through extra legal and potentially less constructive means.

The seventh precept is the one that I'll stop with, and it's also where I started, which is the idea that there must be provision for fair and responsive resolution of environmental disputes.

Critical that we have principled and evenhanded administration of justice in the environmental arena, justice that produces consistent, predictable results of like cases, that pushes cost internalization, and eliminates market disparities between

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compliers and non-compliers, and as the -- as the Rio declaration from 1992 frames it, effective access to judicial and administrative proceedings, including redress and remedy.

So here are seven ideas or precepts that, in my view, greatly influenced the past, and that's a past that we've witnessed and have been part of, and even helped create. They are also, I think, a window into the future that builds on that past, learns from it, and amplifies its essential ingredients.

We hope to get input on how to further elaborate on this list, and welcome any ideas that you all have in that regard.

And in terms of thinking about how this kind of frame or awareness might be beneficial going forward, just a few thoughts in that regard.

First, this notion that we're talking about of environmental governance, including the role of the judiciary, is not new to the international community. And -- and in 1992

Principle 12 of the Rio declaration called for states to enact effective environmental legislation, the standards and priorities that reflect the applicable environmental and developmental context.

And then in 2002, the World Summit on Sustainable Development reaffirmed this notion and concluded that good governance is essential for sustainable development, and noting the importance of sound domestic policies and responsive institutions, as well as the rule of law and anti-corruption mechanisms, and called on all countries to strengthen governmental institutions, promote transparency, accountability, and the fair and administrative -- fair and administrative mechanisms and judicial processes.

But I think it's fair to say that while the international community has long recognized the importance of effective environmental governance, a framework for coordination and collaboration to strengthen this governance, at least on a scale commensurate with countries' needs, has not

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emerged and has evaded us or eluded us.

To date, despite success in some areas, and I would mention the International Network for Environmental Compliance and Enforcement as an example of -- of some meaningful important collaboration, I think it's fair to say that -- that support for the broader effort to build environmental governance capacity has largely been sporadic and isolated.

So with the 40th birthday of the EPA behind us, and the 20th anniversary of the Earth Summit before us, I think we're in an ideal moment to be reexamining these questions, and including the question of additional mechanisms that we might look to for purposes of further advances in the environmental governance quest.

I'll leave you with a couple of questions in this regard. First, how can a way to more systematically and strategically collaborate on building a national environmental governance capacity be devised? And as a corollary, what role can

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identification of core precepts of environmental governance play in inspiring and guiding such an effort?

I think the -- the initiative that is being launched today is an important expression of -- of awareness of the challenge going forward. We very much look forward to being a part of that expression. I thank you for your attention. Congratulation on your successes in the past, and wishes to you for a future that builds on those successes. Thank you.

PROFESSOR ROBINSON: We've been extending Oliver Houck's book "Taking Back Eden" to all our speakers, and on behalf of ELI and all of us, we want to thank you for coming up and being with us today.

I think the questions that Scott posed are good questions for our panel, our collective thinking that we're about to have. It should not be a surprise that many of the seven themes that you talk about have come up in all of the presentations today.

And it may be that some folks have a

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question before we want to go on to the next panel. I don't know whether your speech has any specific things.

Otherwise I'll invite J. to come up, and we can go on to the next group discussion. Maybe you want to raise your comments in the context of the group discussion, too.

Any pressing thoughts you want to -- let me ask Kitty and Rock to come up, also, because we -- we cut off their chance to get cross-examined by all of you in order to get on to the panel.

MS. PRING: That's okay, Nick.

PROFESSOR ROBINSON: And I want to give a chance to have an open discussion. We have two microphones here, and what we'd like to do is have all of you talk to each other, and talk to all of us, and see what you've drawn out of today, out of the questions about the -- that Scott Fulton has raised on how can we collaborate on capacity building, or good environmental governance.

And what about the core precepts that we need to examine with respect to government.

What about the ways in which the movement of environmental adjudication or strengthening environmental adjudication addresses these themes. So I'll turn the podium over to J. Pendergrass.

MR. PENDERGRASS: And I have to agree, I think Scott -- my observation was, you must have been here the whole time because you did an excellent job of -- of bringing everything that we've been talking about for -- for the day, bringing it all together, and -- and putting it succinctly.

Certainly the seven precepts we've been talking about, those issues, along the way, and I really thank you for -- for putting it all together for us. And your questions are exactly the ones that I had basically written down as the -- the ones to pose as part of this wrap-up.

We've had, you know, presentations from real luminaries in what I think is a -- a developing or just created field. I think our first two scholars of -- of international environmental adjudication are here and

produce the first seminal work on it.

And we heard from, you know, the -- maybe the preeminent judge who was an environmentalist first, along with the first environmental judges in various jurisdictions, and obviously the leaders in both the judicial environmental adjudication side and some of the people that practice before them.

So I do want to open it up to suggestions about how we go about building on this. How do we build the capacity? How do we do it as a virtual institute? Which I think we're -- realizes the -- the only way that this can really be done, and -- and making this truly an international effort because that's what it has to be.

So I really want to hear the ideas from the people that are here, and we can start by possibly putting Rock and kitty on the spot, in terms of now, the -- the -- you gave us the 12 building blocks, and how do we work on those?

MS. PRING: I don't think it's working

on. I think it's working with. That's the first thing. And I think -- if we've learned anything, J., it's that everybody does it different, and that what works for one country or one -- one jurisdiction doesn't necessarily work for another. So you can't just sort of pick up ideas and transplant them.

And I think what the institute can really contribute to is people being able to share perspectives on what works in certain cultures, what works in certain -- with certain kinds of environmental issues, which -- what works for certain political issues because, Lord knows, the politics of environmental jurisprudence and environmental governance are either the greatest facilitator or the greatest barrier to environmental justice.

MR. PENDERGRASS: Points well taken.

PROFESSOR PRING: Well, I could just echo that -- you would expect us to agree with each other. You'd be sadly mistaken a lot of the time.

But we have a tradition out in the wild west which I think maybe you know as the snake oil salesman. The snake oil salesman comes in a covered wagon, and he has some alcoholic concoction that he sells as a cure for everything, right?

We're not snake oil salesmen, none of us in the room are, and environmental courts are not the cure all for everything. Tseming Yang raised a question of one of our previous speakers about why when the United States studied environmental courts in the 1970s, it decided not to do it.

There is -- if you go through those voluminous reports, there is a simple answer. For an environmental court to -- or a specialized -- environmental court or tribunal to be useful in a country, this -- as Kitty said, it's not for everybody, it's not snake oil, there really have to be a series of about six factors that a country has worked its way through, from environmental problems to the recognition of environmental problems, to the legislation of

laws that deal with that, to the countries leaning towards the courts as a -- general courts as a way of taking advantage of those laws that are proliferating, and it's only -- Step 5, it's an art. It's on the disk. You'll get word soon enough. I'll stop.

It's only when the generalist courts fail to live up to public expectations in terms of being just quick and cheap, and not -- that you really get the final sixth step of a push toward environmental courts.

And so how the 12 factors help is they can help a country or a city or a province think through, is this really for us, or is this snake oil for us?

In the United States we never got past Step 5. You've heard it, but that's the answer. The satisfaction with the general court system, for all its warts and whatnot -- I mean, I was winning cases in the 1970s, I thought it was going fine, it never occurred to me that I needed a specialized environmental court.

And so that's one of the big things that

you can use our 12 factors for, to really kind of work through how good is this going to be for my jurisdiction?

MR. PENDERGRASS: I'm looking for the first person to volunteer to come down to the microphone. Come on down. In the absence of that, you get to listen to me or the -- or Nick or Scott talk a little bit more.

Just to -- if you didn't have a chance to look at the statement that we prepared and sent along with the invitations, which was a little on the long side, but we're trying to make the case for why this is all important, one of the things that we're proposing to do is -- is bringing the international community together in the -- a virtual way to collect the best wisdom both on the environmental courts and tribunals and what can be done to assist courts of general jurisdiction that will be faced with environmental cases if they don't have specialized environmental courts, or in some cases even if they do have them.

And to produce a series of helpful

materials, possibly being segments of training programs that could be given on the series of -- of topics that we think are, you know, sort of most common. And Tim already, you know, raised one of those in talking about what he saw in China of the interest in scientific evidence.

Another one has come up from several people, most recently from Scott, in the -- the issue of the economic benefit, but more generally, the economics of environmental cases. Whether it's ecosystem services or the -- the assessment of natural resource damages, economics is very important to environmental cases.

And then you get into more of the legal issues, whether it's something procedural, things that are fairly common to environmental cases, or substantive issues.

So we've -- we had proposed a beginning list of 20 such topics, but we would be looking for assistance from wherever we can get it to help with producing this and identifying material.

One of the very important things that has, I think, been raised as an issue throughout is that we do have civil common law systems, they probably have come closer together in environmental issues, but there still are some sections that we definitely need to be sharing the best practices among the civil law systems, and what they can learn from what we have in common law systems, and what common law courts can learn from the civil law jurisdictions because so much of what we are doing in environmental protection, in most common law systems, is -- is, you know, looking at the statutes anyway, so.

I finally have a taker. I will shut up.

MR. DI LEVA: Just a favor to you, J.

I think with the Environmental Appeals Board it's clear that you have a body that has a set of statutes that it's overseeing, but I think one of the reasons why sometimes there's been some difficulty with the concept of environmental courts in a broad sense is that I think increasingly cultures are having

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different definitions of what they mean by "environment."

And I think what you see now in these democracy movements, in the Middle East and other places, are essentially social movements, where they may be very concerned about their environment but the preeminent issue that they are looking at are their rights of expression, their rights of association, and then we get into the issue of human rights.

And if we have a European court of human rights, should it be addressing a right to water, or what about if we develop a right to environment, is that something that comes under a social or a human rights, or does that become something as a fundamental right that belongs to tribunals that will address everything?

So I think definitional issues are something to look at, which doesn't mean we should lose sight of the importance to educate the judiciary on the environment and the complexity, which is only becoming more

complex in a climate change world, but still I think we have some definitional issues.

MR. PENDERGRASS: And I think sort of reflecting the complexity of those definitional issues is probably something we should incorporate, and it definitely is a complex problem.

We have other comments.

PROFESSOR PRING: Well, I can comment to what Charles has said. I think it's spot on. We have, speaking of snake oil, in Chapter 2 we take on all of the arguments in favor of adopting an environmental court, and then, you know, pure academic cussedness.

Then we round out the chapter with all the reasons for not adopting an environmental court, and you can kind of pick them. That's Number 8 on the no list, and it is a very serious one.

Marginalization has been mentioned. There's a number of very sound arguments for -- even when you become, in Stage 5, frustrated with your generalist courts in a particular nation, not to -- I know it

sounded very negative, but that's one of the reasons.

And yet you have sterling examples of previous pages of -- environmental court like New South Wales that handles issues that are too complex, too holistic, too integrated for even a genius like Antonin Scalia to handle in the generalist court system.

So I think there are ways -- depending on the country or the culture and the legal system, there are ways to accommodate the definitional issues or the jurisdictional issues, if that's what the country wants to do.

PROFESSOR ROBINSON: Make a small intervention, if I may, J. I'm struck a little bit, if I can recall Justice Hilario Davide's message to us, by his grounding the concern for the environment in the environment itself.

And also, Justice Preston's discussion of the development of principles, as a principled way of developing a jurisprudence in a court.

In 2002, at the Johannesburg World Summit on Sustainable Development, the Colombian Minister for the Environment, Juan Meyer, had fought for the prior two years to put one sentence into the declaration, or into the findings of the Johannesburg Summit, and it was this: Ethics is fundamental to sustainable development.

He put it in, in the first meeting, while he was minister of the environment, and they took it out sometime between the first and the second preparatory meeting, and it happened two more times.

He got to Johannesburg, and he found it had been taken out again, just this one sentence: Ethics is fundamental for sustainable development.

And he managed to re-rally his colleagues among the sovereign states to reinsert it in the final text for the last time, and of course it now is there in the decisions of the Johannesburg World Summit documents.

But that lesson, it seems to me, is a

fundamental one, and it gets back to this definitional point that Charles raised.

Maybe we are not ready yet to have a consistent approach to the environment because we're not -- along the lines of the New South Wales tribunal, because we're not ready to accept the fundamental principles that underlie this body of environment law.

We're still too much embedded in the past of business as usual, exploit the environment, and as in the Lewis Carroll story of the tea party, the Mad Hatter's tea party, we just go on to the next meal and leave the tea party mess behind, and don't worry about it anymore.

And maybe we're going to see an inconsistent approach to the courts because even though our legislatures have adopted these environment laws, they have not been internalized as a value system yet, and not into the -- all the foreign ministries, in any event. That should get somebody upset.

PROFESSOR PRING: May I just add an amen to what Nick has just said. Realize that

environmental courts aren't always proposed by environmental interests.

We're watching Chile right now, where the -- all of the pressure for a new environmental court in Chile, which is now in the legislature, came from the business and development community.

I guess Chile had massively amended its laws last year to make it so -- it's equivalent of the EPA, much more powerful, and it was thus the development community felt that they needed a supervisory adjudicatory check on that government power.

MS. PRING: Particularly as they have now issued huge fines.

PROFESSOR PRING: And now it's blocked in the legislature because once it became clear that there were going to be some very high standards of the qualifications of the judges who would be appointed to that tribunal, suddenly the whole political dynamic shifted 180 degrees. And now it's locked up in the legislature, and, you know, all bets are not off but it would be

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interesting to see what develops.

AUDIENCE MEMBER: This may be building on some of what's been said, but the thing -- in reading about this area, one of the things that's really struck me is that in many countries you're dealing with many fundamental systematic failures dealing with governance issues generally.

And, you know, maybe with a project like this, what you want to do is be able to identify some countries that meet some -- maybe it's sort of along the lines of a set of preconditions for setting up an effective, you know, green corps, or even just an effective system that's going to support environmental regulation, and use those as sort of model programs from which to build and expand from.

Brazil is one of the countries I think of as being very effective in a developing world. So rather than being -- trying to go after everything, really trying to identify places where you think you can have a significant impact, maybe Kenya would be

another example as well, and sort of focus the program that way.

Because it seems like these are very complex institutionally, and there are multiple factors associated with them. And maybe sort of a consistent push on a smaller number of places is going to be what's most effective, and then the peer-to-peer sharing that you can obtain from that, you know, sort of center, Asia, South America, Africa maybe would be a good sort of way to approach it.

MR. PENDERGRASS: That's an excellent point, and actually, it's something that we should have talked about, that came out of the programs that Scott and -- and many other people were part of, in terms of these regional meetings that UNEP facilitated and now have been established in a number of -- of regions. And that we do want to work with those, and -- and encourage greater development of it.

And I take the -- the sort of identifying the models, and, you know, showing how they fit into the -- the -- the

various criteria, how they meet Scott's seven precepts, all could be very useful, so that's a -- an excellent point.

JUSTICE FULTON: Just a few thoughts. I want to echo the sentiment shared by the last commenter, and I think any time that we embark on this kind of initiative, we need to be careful that we not be so diffused in purpose and approach that we are unable to find the focus needed to -- to really accomplish things.

And that no -- while this idea of geographic focus may make some sense, I think just in terms of -- of the kinds of interventions that we think would be most instructive, just the -- the focus on the mechanical end of things, I think focus there would be important as well.

Just recalling that when -- after the Judges Symposium in 2002, there were a couple of fairly simple objectives that were identified at that time. We've -- we've failed to see them through, unfortunately.

But one of the objectives was to just

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make available to every judge, generalist or specialist, who might be doing environmental cases around the world a law book of some kind, a resource material, a reference material, that while perhaps not contextually perfect might be sufficiently relatable from a principle standpoint as to allow that judge something to work with and look at and consider in the course of -- of addressing environmental disputes.

And Judge Kaniaru and Judge Preston and I were part of this effort to generate this Judge's Handbook on Environmental Law. I'm sure it was not perfect, but the idea was a good idea, which was then to, at a minimum, get that book translated into all of the UN languages, and -- and have it accessible and available to judges all around the world.

But as I -- I think as we consider what the next chapter should look like, some of that -- that purposing, from a fairly simplistic standpoint, ought to be present in the calculation so that we not overshoot and end up so broad and diffuse that we don't

accomplish much.

MS. PRING: Can I add one thing quickly, J.? I know you want to move on to Tim, but one of the other things that we haven't talked about today that we've discovered, and may provide a way to focus the institute for the future, is that in almost every country where there is a successful ECT model, behind that model stands a visionary with a flag and an unbelievable commitment to changing the status quo.

And I think whether it's a Merideth Wright or whether it's a Paul Steen, who preceded Judge Preston, or whether it's again, Kaniaru -- I can't say your name right, Kaniaru -- we found those visionaries who may be the way you want to focus energy. Which is, if you haven't got somebody out on the local level that is really prepared to take risks and stand up and be counted, in large part, efforts are wasted.

You know, how I would say, you can lead a horse to water, you can get them all the books, you can put them on the shelf, but if

he doesn't want to drink, he isn't going to drink.

And I think that framework in terms of how you focus intellectual and financial and other kinds of resources is really important. It's those charismatic, visionary, committed leaders that ultimately, I think, make the difference.

MR. PENDERGRASS: Good point. Tim?

MR. EPP: Thinking about the U.S. experience, I would say that courts are at their strongest and most powerful when they lead us where we're ready to go. And when they try to lead us where we're not ready to go, they're at their weakest.

And therein is the conundrum for judges making judgments as to whether this is the right time to lead, or whether not leading is actually leading in the wrong direction. And that was sort of what Justice Benjamin was -- started us out with.

And so I think it's really wise that you focused the -- this institute on the principle of education, because it makes

available to judges the knowledge that they can use when they're ready to use it within their context. It also gives them the knowledge to advocate for what they need.

And I was -- in the China context, I was sort of suggesting that the -- I think that one of the things that the China courts will need is information, information disclosure, and that that is a cultural shift that they have to accomplish broadly.

Courts might be able to lead in that by saying, In order to accomplish what you're asking of us, which is to decide these environmental cases, we need information. And having a body of literature to turn to may help them make that argument.

I think, though, that there also needs to be regular conferences like this, or ones that -- like the Global Judges Symposium or the one that was -- was recently had by the Asian Development Bank in Asia that bring judges together to regularly share and comment.

MR. PENDERGRASS: And I think I want to

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add to that something that was David raised, that I think Justice Benjamin has been working on reviving an idea that came out of the Global Judges Symposium, and that is a mechanism for peer-to-peer exchange of information among judges.

The ICN had instituted what -- a judicial portal that made information available to judges, that then fell by the wayside. My understanding is that Justice Benjamin has -- has made an attempt to revive it, and hopefully we can take advantage of that, expand it beyond its current pilot stage in Brazil to make it worldwide. So thank you, Antonio, for once again leading the way.

And I do want to say I think certainly the judicial handbook was a great start, would be nice if it was translated into all the languages.

JUSTICE FULTON: You know, we did have a small success on that front but for purposes of the work that Tim and maybe Merideth and others were doing in China, we were able to

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get UNEP to do a Mandarin translation of the handbook, which I think is in circulation at this point over there.

MR. PENDERGRASS: And we know that they were working on a Spanish version, and I have yet to --

JUSTICE FULTON: That was a long time ago.

MR. PENDERGRASS: It's been going on for a long time. Other comments or suggestions?

PROFESSOR ROBINSON: Well, I would just like to echo one of the things that Scott Fulton raised, that here we are one year away from Rio plus 12 -- 20, I mean, the -- in 2012, we've got an opportunity here to think through how to jump start these initiatives that Scott, quite rightly, points out had consensus but not enough political support for them.

And the thing that is remarkable about the analysis that the Prings have done is to show that the political decision has been taken in, you know, nearly 50 nations or more, that they want a stronger environmental

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adjudication, and they'll commit national resources and judicial personnel to it.

So I think we've got a critical mass of states, of nations around the world who would be willing to say, Time to move forward. And that was not clear back in 2002. I don't know whether you see in INECE this growing consensus, Ken.

But I think we've got an opportunity to rebuild a stronger support for environmental adjudication in the months leading up to the -- the next United Nations Summit in Rio de Janeiro.

MR. PENDERGRASS: I guess there's one more topic that I want to raise as something about whether we should undertake it, I think it's one that's -- it's difficult, but I think we might have the -- the right resource here with Justice Preston, who mentioned how they are measuring their performance in the court.

And that that's something that I think maybe we should think about both in terms of bringing forward to the rest of the world

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what they're doing in terms of indicators of the success of what they're doing, measures of the performance as the court, but also, in terms of what we might be doing, measuring how successful we are in providing assistance to the courts.

And this is a -- a very tough issue to deal with at any level. I think it's particularly sensitive with judges because we don't want to be suggesting that we're -- that there's a result in -- that we have in mind.

But I think it's important, as we're doing this, to think about how do we demonstrate that what we're doing is -- is successful as meeting the goals that we have. So I think I certainly want to explore that further, with the example from New South Wales.

PROFESSOR ROBINSON: One of the difficulties we had in assessing the performance of courts is, we did a questionnaire for the courts, and none of these courts have adequate personnel to

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answer questionnaires, so the questionnaire goes to the bottom of the pile.

The Prings went out to each court and were physically there and could do that auditing. But until we build up the infrastructure of a resource base, self reporting and self accounting and all of that is a challenge.

The other thing which I think -- just to turn what we decided in 2002 on its head, is because there are very interesting innovations in some countries that are not translated into other languages, we don't know about them, the work in Brazil which Justice Benjamin talked about this morning, is really the tip of the iceberg of some extraordinary innovations in Brazil. But it's all in Portuguese, and we unfortunately don't speak enough Portuguese in the world, so we'll have to translate that.

But the resources for that are not there, so it's really -- if we're going to do this quest of looking around the world for best judicial practices and reporting them,

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we're going to need to come up with a -- a way to function in the mother languages of the world and vice versa.

MS. PRING: Big challenge.

PROFESSOR ROBINSON: Ken?

MR. MARKOWITZ: I want to pick up on J.'s point about performance measurement and assessment with this project, because this would be something that would be very similar to what we've done with our performance indicators for environmental compliance and enforcement agencies, and based on a lot of the same political questions, but we don't want to rate people, we want them to better measure and manage their performance in behavioral changes.

So, you know, as we move forward to the INECE conference, I know a lot of the faces here will be there, we can discuss particularly how the methodology that we've created with the INECE indicators, which was a joint effort with U.S. EPA, OECD, the World Bank, a lot of different countries from around the world participated, see how that

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methodology may be transferable to assist in performance measurement with environmental courts as well. So I think it's a very welcome and useful exercise. And if --

MR. PENDERGRASS: We appreciate the --

MR. MARKOWITZ: If we could lend our assistance --

MR. PENDERGRASS: We definitely appreciate that offer.

JUSTICE FULTON: I didn't have the benefit of listening in on the earlier conversation about this, but I do think this is an incredibly challenging area.

We looked at it some from the vantage point of the Environmental Appeals Board a couple of years ago in response to some pressure to engage in more meaningful measurement of our work.

And I don't know how this experience relates to the experience of others, but there -- there really are only two principle metrics to work with; one is timeliness of response, the other is trying to find some indicator of the -- the quality --

qualitative value of the response.

On timeliness, that's relatively easily measured. It's -- that's a -- can be an objective indicator. But even that -- even for that the devil is in the details, because a -- complex matters sometimes warrant very careful deliberation and consideration, and you don't want those things to have to chug right through the process in a way that -- that doesn't allow for full consideration.

And from a -- in terms of trying to assess the quality of judicial outcomes, you know, the -- the objective indicator might be for purpose -- for purposes of courts of first impression or intermediate courts, that the -- the frequency of appeals from those judgments and the frequency of reversals from those judgments, but those -- those also can be difficult indicators. Certainly the appeals themselves, maybe the reversals stand for something.

But the -- even that is not a perfect measure, and you certainly don't want to ever end up in a place where you're surveying the

litigants to see how they felt about the experience. That -- you can't have judges, conducting the critically important and independent role they do, thinking about how they're going to be evaluated by the litigants at the end of the process. So it's a -- it's a very difficult area I think for courts generally.

And I think we need to be careful about how we talk about it with a nascent institution like the environmental courts, so that we don't construct a set of expectations for these folks that frustrate their development, effectively.

MR. PENDERGRASS: And -- yes, and, you know, all the caveats you have mentioned are definitely important, and, you know, I think you identify the ones that we don't want to have any part of.

And the question is, you know, is there some -- even if it's limited and must be caveated, something that can be said. And just in terms of, you know, the nascent courts, yeah, I think there probably has to

be some period where you say, Yeah, there's no point in evaluating, you know, anyone's performance until they're at some level of maturity.

So, you know, this is -- as I said, this is something that we think probably has to be part of the discussion, but certainly we see lots of issues, but that's why I think -- to the extent that Justice Preston's court has been able to do some things, that we want to learn from that and see what is transferable.

Or what can be made -- put up there for -- which I think is what we are talking about, is making available information so that courts, whether in specialized courts or the courts of general jurisdiction, might want to make use of.

MR. MARKOWITZ: Can I just respectfully disagree a little bit with your last comment? That waiting till an institution matures for performance measurement we have found is not the most effective way, that we would like to build these mechanisms as the court is developing so they're part of the moral

fabric of the institution from the start.

So I would like to see as we're building, you know, new tribunals that we think about how we're going to measure and manage performance right away as opposed to looking back, and -- it just seems to get a richer set of indicators as we move forward. So --

MR. PENDERGRASS: And maybe it's that you have them but don't judge very harshly if in the first three years they don't have, you know, the most rapid decisions because people are, you know, learning the ropes and -- or teaching the litigants what the rules are, et cetera. That I think is a good point.

MR. MARKOWITZ: No disagreement there at all.

PROFESSOR PRING: I was just going to ask if I could join Ken in piling on J. and Scott on this issue. I think -- I think there's a real genius to focusing on the back end of the process. There's the steps up the courthouse steps, there's the steps through the courthouse, which are the two pieces

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we've looked at, but the steps out the back of the courthouse, and whether or not the environment, sustainable development, is really being served at all by whatever institutional arrangements are made, is, I think, critical and I don't think it needs to wait.

Not only can you do it, as Ken says, in terms of specialized environmental courts even in their nascency, but the other great argument for it is, you can do it for the generalist courts and see how well they're taking care of the environment.

And that may be the -- the precondition survey you do in terms of finding what countries might be most susceptible to specializing it.

PROFESSOR ROBINSON: I'd just like to make one further comment. One of the -- we are in the New York State Judicial Institute sitting here and broadcasting this web cast, and one of the tools, or -- or institutions that exist in most civil law countries are judicial institutes.

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Because the civil law views the -- the profession of the judge as a distinct profession in which you can have a -- a capacity building and continuing educational function to serve that specialized group of judges.

And I have found judicial institutes around the world to be quite interested in environmental law, interested in the question of science, interested in how do their judges work in this field.

And I think we need to learn from the network -- the -- these civil law institutes, and I think we need to network with them. And one of the things I didn't see happen in 2002 was building the -- the links to the places where judges themselves are getting support and capacity building.

And I think in the common law world, and I'm proud of the state of New York for doing this, we have not taken continuing judicial education as seriously as we should.

And I think if we can build up that part of it as we go forward -- one of the things

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the judicial institutes do is look at the efficiency of judicial decision making, look at the metrics, look at how to build the capacity of the courts, and that should be a routine part of the branch of justice that all our judges administer.

So I would hope as we go forward we examine and make partnerships with these judicial institutes.

MR. DI LEVA: Just thinking on what Nick said, one of the tools that I think really turned around a lot of the economists at the bank was, a few years ago, the millennium ecosystem assessment was done. Do you remember, it was around the World Summit.

One idea that you might want to pursue is these graphic kind of depictions about where we're having these acute environmental and natural resource problems that I don't think judges normally get an opportunity to see but are so powerful.

Because maybe one way to judge is, if we look at the natural resource base, the environmental base, water quality base in

different societies, and then present the trajectories to judges, it's going to be powerful.

And maybe you've done that before, but some of them don't seem to have really been presented outside of certain audiences, and I don't think the judiciary is an audience that's often benefited from those presentations, from really the class scientists, whether it's out of ITCC or MEA, or something like that, so that's one idea.

MR. PENDERGRASS: It's a very good idea. One of the issues is to be able to present that information in a way that a lay audience, judges being lay to the -- to the science, can appreciate, and probably needs to be in -- you mentioned graphical.

We certainly have found at the Environmental Law Institute that the graphical representation can be very powerful. The difficult is in doing it well and doing it accurately.

So I -- that's something that I think we need to, you know, draw on the -- the

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scientific community, and, you know identify the -- those pieces of information, and then ask for ways of presenting it in summary form, or whatever, very good.

PROFESSOR ROBINSON: Maybe we should -- as the reception hour has come upon us, let me thank J. for his chairing of our wound-up discussion with another one of our Oliver Houck books.

And I would just like -- on the second page of your program, you have a series of acknowledgments, and all the people whose names appear there are essential to the day we've just had, but one is especially essential. Judith Weinstock, who is in the front row here, I'd just like us to thank her for all her leadership and coordination.

(Applause.)

PROFESSOR ROBINSON: Without the work that Judy put in and the work of all the people who you see on that page, we would not have had the splendid program we've had today, and I'm sure we're all grateful.

And now we have the advantage of a nice

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reception outside in the atrium of the court
where we can continue our informal
discussions as long as you can talk. Thank
you so much.