United Nations Environment Programme (UNEP)

Judges Ad Hoc Planning Meeting for the Development of A Plan of Work as a follow-up to the Global Judges Symposium Relating to Capacity Building of Judges, Prosecutors and Other Legal Stakeholders

Statement of

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On behalf of the

International Union for the Conservation of Nature and Natural Resources (IUCN)

Observer Participant

Chief Justice Chaskalson, Honorable Judges, Colleagues:

May I thank you for this opportunity to contribute briefly to the deliberations of this meeting on behalf of the Commission on Environmental Law of the International Union for the Conservation of Nature and Natural Resources (IUCN). IUCN has a long-standing interest in ensuring that the rule of law, and the fundamental role of the judiciary in securing the rule of law, are sustained and enhanced. The remedial objectives of Environmental Law can succeed without a strong and independent judiciary.

It was my privilege and honor to have participated in, and helped organize, a number of the regional symposia on the role of the courts in environmental law. I was pleased to deliver a lecture and participate in the forum of South Asian judges in 1997 in Colombo, Sri Lanka, with Justice Weeramantry, in the forum of judges from the regional of Association of South East Asian Nations (ASEAN) in 1999 with Chief Justice Davide, in the extraordinary Global Judges Symposium in Johannesburg, South Africa, in 2002, with Chief Justice Chaskalson, in the Western European 200 under Chief Justice Chaskalson, in the Western European Judges symposium in London with Lord Woolf, and in the Conference on the Role of the Judiciary in the Development of Environmental Law in the Arab Region, in Kuwait with Chief Justice Abdulla Al-Essa.

The discussions at these symposia, with their rich sharing of comparative judicial experience, have been genuinely historic. Together with the other symposia convened by UNEP, in Africa, South America, and the Caribbean, a foundation is being laid for the international community of nations to understand and, in turn, help sustain the critical contribution that courts make with respect to environmental law. IUCN has been honored to have been a partner with UNEP in convening these meetings, which are the first ever convened in each region and internationally. These gatherings serve to facilitate cooperation to strengthen the role of the courts.

IUCN has had an interest in strengthening legal systems, within nations and internationally, since its founding. IUCN's Commission on Environmental Law established its environmental law programme in 1965. The States, expert conservation ministries and societies that established IUCN at a diplomatic conference convened by the Republic of France in Fontainebleau in 1948, understood from the outset that unless laws for nature protection and natural resources management were strengthened, there would be irreparable loss to species, ecosystems and public health. IUCN's members initially constituted a Commission on Environmental Legislation, which focused on assisting its member States with the drafting of legislation and expert assistance in preparation of new treaties. With experience, the IUCN Members reconstituted the original Commission on Legislation, mandating it to assist with all aspects of environmental law. Today, IUCN has grown to be the largest of the intergovernmental organizations with Observer Status in the United Nations, with over 75 State members. IUCN has a unique constitution to fulfill its expert obligations to further nature conservation. In addition to its State members, IUCN's membership includes some 120 ministries and 470 international and nation non-governmental organizations. Several university based law centers and professional environmental law organizations are members of IUCN. IUCN's members convene every three years in a World Conservation Congress, at which they review the work of the Union's several expert commission, including the Law Commission.

IUCN's Commission on Environmental Law includes among its members nearly 800 individual legal experts (including lawyers, law professors, judges, legislators, and administrators, at national and international levels) in 130 different nations. Each of these legal specialists serves as a volunteer, in their personal capacity. The Commission's membership is structured in regional groupings, parallel to those of the United Nations, and is guided by a Steering Committee with one Vice Chair per region. Officers donate 20-60% of their time, *pro bono publico,* to implement the Environmental Law Programme. In addition, IUCN has a small legal Secretariat located in Bonn, Germany. John Scanlon, the Head of the IUCN Environmental Law Programme, will discuss the practical steps that IUCN has taken to assist the courts with legal research, sharing of experience and continuing judicial education. IUCN is privileged to call upon its legal experts to provide assistance in every part of the Earth. My colleague, Prof. Svitlana Kravchenko, will share with you prospects for IUCN cooperation with UNEP in support of the courts of Eastern Europe, the Caucuses, and Central Asia (EECCA).

Beyond the assistance that IUCN has already provided to facilitate meetings of judges to share experiences regarding the role of the courts with respect to environmental law, IUCN's Commission on Environmental Law can serve the interests of the judiciary by three further undertakings: (a) scholarly research to better understand how courts do, in practice, handle different types of environmental cases; (b) compilation of legal references and comparative documentation on judicial procedures and practice rules for dealing with questions of scientific evidence, burdens of proof, and fashioning of remedies appropriate to the range of environmental claims arising in courts; and (c) preparation of legal treatises and standard reference books, for use by courts, lawyers, law students, and administrators. A useful example of the latter is the book on Environmental Law in The Philippines, which, as Chief Justice Davide has advised us, The Supreme Court of Philippines is distributing nationally as a legal for each court in The Philippines. This national book is complemented by a two-volume set of regional references that IUCN CEL members prepared on ***Capacity Building for Environmental Law in the Asia and Pacific Region,*** published last year by the Asian Development Bank (ADB), and sponsored by ADB, IUCN and UNEP. Another useful example is the books prepared by the Administrative Office of the Courts for the federal judiciary in the USA, is the *Handbook for Judges on Environmental Science,* which I noted in my address to the Global Judges Symposium in Johannesburg last August, 2002.

IUCN's governing Council and Congress have approved a proposal by the Commission on Environmental Law that will facilitate IUCN's own capacity to provide for each of these three undertakings. In late October, 2003, IUCN will launch an International Academy of Environmental Law. Five years in preparation, this Academy is a consortium of the leading environmental law programs in university law schools and law faculties around the world. The Academy's initial research program is currently being outlined. Research projects each will be structured on an inter-regional basis, teaming up researchers from universities in two-three regions on the same research questions. The professors addressing the initial research agenda will examine several research themes that have been identified in this meeting as well as in the past judicial symposia convened by UNEP and IUCN.

IUCN invites you and your colleagues to identify themes or questions that might benefit from such a legal research program. In preparing the scope of the research for the IUCN Academy of Environmental Law, the study of judicial decision-making is included. For instance, among the many questions that might be studied, we can identify those within the following six themes:

(1) *Eco-catastrophes in courts* - In line with the recommendation of Chief Justice Cavinet in his intervention in the discussions of this meeting yesterday, empirical studies and meta-analysis usefully could be undertaken regarding how courts respond in the wake of ecological incidents or catastrophes. Examples of topics include: (a) oil spill liability and remediation of coastal environments, as in the cases of accidents involving oil tankers; (b) dispute resolution under legislation requiring the remediation of soils contaminated with industrial, or

other, hazardous chemicals (Japan is just now implementing its new soils clean-up legislation, and comparative analysis of judicial experiences in the USA under its "Superfund" law or the UK remediation legislation is timely); (c) effective enforcement of laws regulating fishing, hunting, mining or forestry practices when habitats of rare or endangered species are harmed.

(2) *Judicial approaches to scientific risk* - Comparative analysis can be made as to how courts assess scientific risk and deal with the inevitable issues of scientific uncertainty. In practical terms, this could include: (a) studies of judicial review of environmental impact assessment in different countries (annually thousands of essentially the same administrative and scientific assessments are made, and subjected to judicial review, in nations as diverse as France, Canada, the USA, the Russian Federation, Brazil, and over 150 other jurisdictions); (b) studies of claims of human health injuries, or the threat of future health impairment, from present exposure to hazardous chemicals, such as the pesticides now banned under the Stockholm Convention on Persistent Organic Pollutants (POPs) and under national legislation; (c) judicial protection of the quality of underground drinking water reserves from contamination by remote sources of contamination.

(3) *Judicial Remedies* - Evaluation can be made of judicial remedies appropriate for the restoration of damaged natural resources or ecosystems, and the remediation of polluted areas. Issues which might be studied could include: (a) how courts have ordered and overseen the restoration of salt water coastal marshes or freshwater inland wetlands; (b) characteristics of structural injunctions to address long-standing patterns of industrial or municipal contamination of surface waters; (c) judicial remedies used in cases of transboundary air or water pollution.

(4) *Criminal Environmental Law* - Comparative criminal law studies could provide important analysis of how courts apply environmental penal sanctions. There are wide variations among nations in the levels of fines and jail sentences that are assessed for essentially the same type of environmental crimes. Topics that might be considered include: (a) since the actual effects of the criminal conduct often are felt in more than just the jurisdiction in which the law is being enforced, how do these discrepancies produce unintended negative social and scientific implications; (b) moreover, since commerce is increasingly global, what are the implications for deterrence or punishment when the same conduct harmful to the environment by the same company or individual are not subjected to the same sanctions in the same proportions; (c) under what circumstances, if any, should

penal sanctions include imposition of a sentence obliging the criminal to make reparations to repair the damage causes to the environment?

(5) *Judicial Administration* - Court administration of environmental claims affords a wealth of comparative law experiences, little of which as yet has been studied. Topics which usefully could be studies would include: (a) under what circumstances do specialized environmental courts (such as Australia or Brazil) work best, and what procedures guide specialized chambers of supreme courts (such as Greece) or international tribunals (such as the International Court of Justice), and do their rulings effectively guide judicial decision-making by other courts; (b) what levels of administrative, financial, and informational support does courts require for effective adjudication of environmental disputes (including the use of special masters or panel of independent expert scientific consultants or assessors); (c) Under what circumstances are alternative dispute settlement methods, such as mediation or arbitration, most useful in resolving environmental disputes.

(6) *New Challenges* - New and emerging, or recurring, issues arising in the context of environmental litigation may usefully be studied so that when the problems appear in courts, judges have had an independent opportunity to study such issues and be well informed and thus well equipped to consider whatever questions a case may present. A recurring theme is *locus standi*, or the standing necessary for a plaintiff to demonstrate; as new environmental problems arise, new issues about access to justice arise. New themes include: (a) competing claims of origin of biological materials used in bio-engineering for pharmaceuticals or issues of bio-piracy (as in Brazil's criminal sanctions of bio-piracy); (b) the release of genetically modified organisms into the environment and the environmental effects beyond their intended uses (as in the rape seed from Canada used in the UK); (c) dispute resolution in the application of phyto-sanitary regulations in one State restricting trade in products from other States; (d) measurement and valuation of natural resources damages, apart from claims for the cost of restoration (e.g., comparison of the natural resource damages issues in Alaska after the Exxon Valdez oil spill in U.S. federal and state courts, to the comparable issues before the Geneva claims tribunal for oil contamination of the Gulf after the 1992 Gulf war).

There are, of course, many more issues. Comparative study of how courts examine the same doctrinal issues can be made, as for instance in the case of the public trust doctrine or the doctrines of good neighborly relations (*droit de voisinage*). Studies of the issues in these six thematic areas and others could be made available to judges and court administrators. Such studies could provide

background references for further judicial symposia. Invariably, careful studies also identify a further set of questions that could usefully be studied.

It should not come as a surprise that such a substantial set of issues remain to be studied. As a field of law, environmental law is less than 30 years old, and cases have only reached the courts relatively recently. Judges have excellent command of questions of commercial law, contracts, civil liability, or criminal responsibility because our legal systems have addressed these matters for centuries. These subjects are at the core of legal education. It is safe to say that no senior judges had the opportunity to study environmental law or ecosystem management in law school, because the instruction did not exist. Today, environmental legislation and international agreements have spawned a nearly ubiquitous system of environmental administrative law, addressing pollution control, natural resources depletion, and ecosystem disruption. Judicial dockets routinely include cases of the review of administrative decisions, and civil and penal cases, and the numbers of these cases are increasing in courts around the world.

Over the past decade, the several symposia convened by UNEP and IUCN have demonstrated that judges recognize the importance of this new body of environmental law jurisprudence, and the challenges that such cases represent. The need for judicial procedures to ensure consistent and well-informed decisions across regional land areas is recognized, and different court systems have initiated different techniques in order to cope with the environmental challenges they face. The time certainly has arrived for courts, law schools, and the legal profession generally to study together how the judiciary may most effectively address environmental disputes, while maintaining and indeed strengthening the independence and professional competence of courts in all nations and regions.

Ultimately, law reflects the norms that each society has agreed upon and the courts both reconcile conflicting interests among these norms and ensure the observance of basic norms. The environmental law norms adopted by parliaments since the time of the 1972 United Nations Conference on the Human Environment are now so elaborate and well established, that it can be said that different societies alike ascribe a high importance to environmental law. The some three hundred multilateral environmental agreements underscore this fact, and prompt enactment of further national legislation and its harmonization globally. The Courts are essential to the honest and effective implementation of this body of environmental law.

A new dimension of justice, environmental justice, is being forged.

Thank you again for the privilege of sharing these views with you. If our IUCN Commission on Environmental Law, and our new Academy of Environmental Law, can be of further service to courts around the world, it will be our privilege to do so.