Kuzu zangpo la
Kia ora mai tatou – our New Zealand greeting
Kia Ora,

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Environmental Professional 40+ Years, incl:

- Environment Commissioner, (12 Years) Environment Court of New Zealand.

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New Zealand
Aotearoa ("Land of the Long White Cloud")
Training Session 1 (Day 3):

Managing Environmental Cases; Environmental Courts & Tribunals Best Practices.

Workshop on Environmental Adjudication for the Green Bench Judges of Bhutan.
18 – 20 July 2018
Le Meridien Hotel
Thimphu, Bhutan.

ADB; UNE.
Outline

1. Recap Day 2 – Climate Change (CC) & the Law
2. Sustainable Development (Bhutan’s Constitution, Article.5.2(d))
3. Judicial Context: Environmental Decision-making
4. Relevance of Science – e.g. Water Cycle & Pollution
7. What next?
Laws
Climate Change & the Law:

- **Nature of CC** = complex, interrelated scientific, technical, social, human rights and legal components.
- **Requires** = Understanding Ecosystems & the Science
- **Scope of CC** = Affects the Whole of Society
- **Basic Rights** = Everyone (Everything) has the right to life; & to a clean & healthy environment.

“Access Rights” to information, public participation & justice in environmental matters = the “3 Pillars” of environmental rule of law.
The Greenhouse Effect

Some energy is reflected back out to space.

Earth's surface is heated by the sun and radiates the heat back out towards space.

Solar energy from the sun passes through the atmosphere.

Greenhouse gases in the atmosphere trap some of the heat.
Climate change & health WHO 2009

“Climate Change and Human Health, Global Environmental Change”
“Sustainable Development (SD) is development that meets the needs of the present without compromising the ability of future generations to meet their needs”

(From “Brundtland Report”, 1987.)
SD often modelled as:
3 Interdependent Pillars of **Sustainable Development**: Environment, Social & Economic.
Judicial Context:

Legal Decision-making:
Put simply, there are 3 steps:

1. Fact finding
2. The applicable law
3. Overall Judgment
Environmental Legal Decision-making:

Unlike most areas of law, it often relates to the future and to uncertainty, and includes an extra step involving more value judgments than Courts are usually entrusted with:

1. Fact finding
2. Risk predictions: assessing the probabilities of (adverse) effects/events and their consequences
3. The applicable law
4. Overall assessment/Judgment
Is Environmental Legal Decision-making different?  

Ans: Yes & No

• Yes - Unlike most other areas of judicial work, environmental decision-making is often required to make an informed assessment of what will happen in the future – predictions, risk analysis & risk management.  
(e.g. Environmental Clearances)

• No - The Court’s role remains constant – to hear and determine the issues fairly and impartially.  
Principled assessment according to the law is the lodestar of judicial responsibility.
Water or Hydrologic **Cycle** = the science
Water and Pollution Cycles = why we need to understand the science
ECTs* / Green Bench
International Best Practices

Reference documents:

• Bhutan’s - Draft Green Bench Book (Draft GBB)

* ECTs = Environmental Courts & Tribunals (includes Green Benches).
ECTs* / Green Bench – Best Practices

4.1. Design Stage
1. Independence
2. Flexibility
3. Non-law Decision Makers
4. Selection of Adjudicators
5. ADR
6. Comprehensive Jurisdiction
7. Standing
8. Remedies
9. Enforcement Powers
10. Evaluation Procedures
11. Adequate Resources

4.2. Operating Stage
1. Public Outreach
2. User Friendly
3. Case Management Services
4. Management of Experts
5. Cost Control
6. Professional development
7. Commitment to Continuous Improvement

* ECTs = Environmental Courts & Tribunals (includes Green Benches).
4.1.2. Flexibility

• To develop own rules, procedures & remedies.
• Freeing the Green Bench from the limitations of the general court system’s rules about standing, evidence, management of expert witnesses, cost awards, orders, penalties, etc.
• In GBB Rules & Procedures – provide flexibility (where appropriate) by carefully choosing when to use the words – “the Court may:”
• This is why we are here today!
  Starting point is the Draft Green Bench Book

Suggest = add more flexibility & options in some areas of Draft GBB
4.1.3. Non-Law Decision Makers

- Including law trained & science-technical decision makers (e.g. scientists, engineers, economists, planners, community specialists, etc).
- Recognises that environmental legal decision-making is multidisciplinary – not just about the law.
- Several ways to access experts:
  - Appointed to the Court (Judicial Officers) (Full-time or part-time) (e.g. NZ Environment Commissioners).
  - Amicus curiae
  - Advisors to the Court
  - Independent Expert Witnesses called by the Court

Suggest = expand Draft GBB to provide more options
4.1.5 ADR (Alternative Dispute Resolution)
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- In-house (ie. under Court management) preferable
- Non-Judges preferable
- Environmental ADR is specialised – training recommended
- Schedule ADR sessions at any time
- Range of practices: e.g.
  - Facilitated meetings/Negotiation
  - Mediation
  - Joint Fact-finding
  - Expert Witness conferencing
  - Arbitration - usually not well-suited to environment cases

Suggest = expand Draft GBB to provide more options – but provide for the Court to check that any settlement is appropriate & legal.
4.1.7 Standing (*locus standi*)

• Relates to the qualifications needed to file or participate in a case/lawsuit

• **Best Practice for Environment cases** = as broad & open as possible, including individuals, NGOs, public interest litigation, citizens suits & class action, etc.

• Permit self-representation without lawyers
4.1.8 Remedies

• Powers to order action or inaction, should be flexible to allow for creative solutions.

• Important example = temporary injunctions without a security bond to preserve the status quo pending the outcome of the case.

• Environmental cases are about:
  * Finding the “best” or correct solutions
  * A problem-solving approach – a comprehensive approach
  * They are not about “win – loose”.
4.1.9 Enforcement Powers

• To enforce decisions and remedies (appropriate, given the (potential) severity of the damage)

• Also useful is “continuing mandamus” (power for Court to continue to have jurisdiction over the case after its ruling to monitor compliance).
4.2.3 Case Management

• Judges & Court staff working together with streamlined processes to monitor progress of every case.
• “Hands-on”, active case management.
• Range of methods, e.g.
  ➢ Conferences with Judge(s) (or Registrar) to identify/clarify issues, parties, experts, manage progress (set timelines/report back), settlement.
    - Set Directions.
    - Conferences by phone, video, in-person.
  ➢ ADR (at any stage) can also be used to refine a case and prepare for hearing any unresolved matters
  ➢ Site visits by the Court are essential.

Suggest = expand Draft GBB to provide more options (eg UNEP, p.55)
4.2.4 Management of Experts

• Publish Rules and Procedures for managing experts - and testimony/ evidence.

• Provide for options e.g.
  ➢ Pre-circulation of expert witness testimony/evidence
    (Pre-reading by parties and the Court).

  ➢ Require experts on an issue to meet with a Facilitator – but without the parties or legal counsel – prepare Joint Witness Statements (areas of agreement & disagreement (with reasons)). This becomes evidence.

  ➢ Have experts participate in ADR

  ➢ Sequence the appearance of experts, e.g. by one issue at a time (eg noise)

• (NZ – Part of the Bench Book is published online as a “Practice Note”, aimed at Court users e.g. lawyers, experts, professionals (& clients)
  https://www.environmentcourt.govt.nz/about/practice-note/)

Suggest = expand Draft GBB to provide more options
4.2.6 & 4.2.7 Professional Development & Continuous Improvement

• All parts of the Court should be knowledgeable & experienced in environment law & their profession (Judges, other decision-makers & support staff)

• Monitor Court performance, review and reflect.

• Keys to a successful Green Bench are flexibility & adequate resources (all kinds).

• **Note:** International Finance Institutions (e.g. World Bank & ADB) require countries seeking financial aid to have effective institutions to resolve development & environmental disputes.
What Next?

• Future – hopefully, the Training Session will assist you to finalise the Green Bench Book by identifying the Best Practices for Bhutan – taking into account the Country’s own judicial, legal, social, economic and political circumstances.

• Today’s programme will illustrate the nature of environmental cases and environmental decision-making in Courts

➢ Prep for afternoon session - sedimentation
Prep

SEDIMENTATION

Activities such as farming, clearing forests, building roads, and mining increase the amount of sediments in the water. These sediments could carry toxic chemicals.
What causes Turbidity?

- Lots of factors natural and manmade
- Growth of phytoplankton and bacteria (in response to nutrients)
- High suspended sediment levels in storm runoff due to erosion;
- Often caused by human activities such as construction, agriculture, urbanized development, and industrial activity.
Effects of sediment pollution

- Reduces light penetration, covers aquatic organisms, brings insoluble toxic pollutants into the water, and fills in waterways.
- Makes the water turbid, which in turn decreases the light penetration.
- This in turn reduces productivity.
- Extreme turbidity reduces the number of photosynthetic organisms which in turn results in decrease in number of consumers.
- Sediments can clog gills of organisms
- Adversely affect water quality by carrying toxic chemicals.
- Disease causing agents are also transported into water via sediments.
Our Environment is Our Life
Remember - Not all parts of the Environment can Represent Themselves
Tashi Delek. Thank you. Kia ora.