

Environmental Governance and the Courts in Asia

An Asian Judges Network on the Environment

Asia has an amazing wealth of ecological diversity. Asian countries collectively hold 20% of the world's biodiversity, 14% of the world's tropical forests, and 34% of global coral resources and the greatest number of fish and aquaculture in the world.¹ Significant improvements in the standards of living for its people have been seen, with 521 million people being lifted from extreme poverty through industrial and agricultural production.²

However, environmental changes in the region have been dramatic. These changes have been fueled by growing populations and coupled with rapid economic and industrial development to service the needs of burgeoning populations. Degraded natural resources and threatened ecosystems, natural disasters, water stress and scarcity, air and water pollution, and vulnerability to climate change are pressing challenges faced by the region (footnote 2).

Many of the developing member countries (DMCs) of the Asian Development Bank (ADB) have accepted international obligations under new or amended international environmental laws. However, these commitments have not been translated into national legislation. Even if there are national laws, effective implementation and enforcement are still lacking.

Central to many of Asia's environmental challenges is weak environmental governance. Institutions dealing with the environment are often weak, lack financial and human resources, and do not coordinate well. Institutions involved in upholding the rule of law (law enforcement officers, prosecutors, and courts at all levels) lack sufficient knowledge on environmental and natural resource problems. Poor management of natural resources and corruption throughout law enforcement systems have a large destructive impact on the region's ecological systems: deforestation caused by illegal logging, illegal wildlife trade, and illegal, unreported, and unregulated fishing all reflect rule of law breakdowns in the context of the environment and natural resources.

ADB and Environmental Governance

ADB's long-term strategic framework, Strategy 2020, recognizes the environment as a core operational area, and good governance and capacity development as drivers of change. Moreover, ADB has committed to "strengthen the... legal, regulatory, and enforcement capacities of public institutions on environmental considerations."³

Chief justices and the senior judiciary shape normative interpretations of environmental law. They can also issue precedent-setting decisions, or rules and directions to lower courts that change the way those lower courts carry out their role. The senior judiciary also plays a role in influencing the direction of judicial education. Thus, the judiciary influences the courts, the way the legal system operates,

and the way that environmental and natural resource lawyers, the private sector, and the public understand the legal framework and how it should be enforced.

ADB has also recognized the unique and distinct leadership role the judiciary plays in the environmental enforcement chain. Based on this recognition, ADB has conducted work at the regional level (in Asia), the subregional level (in Southeast Asia and South Asia), and at the national level (in Indonesia, Pakistan, the Philippines, and Thailand, as well as starting work in Malaysia).

Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice

In 2010, in response to requests from several of its DMCs, ADB approved a technical assistance grant to provide information on developments and good practices on environmental adjudication and governance in Asian and developed countries.⁴ ADB conducted research investigating environmental jurisprudence, and environmental courts and tribunals in Indonesia, the Philippines, Thailand, and several other countries to provide lessons for other countries in the region.

In addition, the Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice was held in Manila in July 2010 in cooperation with the United Nations Environment Programme (UNEP) and other development partners. It brought together 110 judges, environmental ministry officials, and civil society representatives from Asia, Australia, Brazil, and the United States. It is understood to be the largest gathering of judges and legal stakeholders since the 2002 Global Judges Symposium on Sustainable Development and the Role of Law in Johannesburg, South Africa.

At the symposium, judges discussed innovations in environmental jurisprudence in Asia. Several Asian jurisdictions had introduced international environmental law principles from the Stockholm and Rio declarations and other innovative approaches, including the precautionary principle (Indonesia), intergenerational equity and the writ of continuing mandamus (Philippines), and the public trust doctrine (Sri Lanka). Judges also discussed improving environmental decision making and different approaches to environmental specialization within the judiciary: environmental benches within generalist courts, specialized environmental courts, environmental tribunals, and certification that judges have specialist environmental expertise.

At the final session of the symposium, the Chief Justice of the Philippines and senior judges from Bangladesh, Sri Lanka, and Thailand gave a call to establish an Asian Judges Network on the Environment (AJNE). They also agreed that judges play a key role in the environmental enforcement chain and that regular meetings were needed to enable

¹ K. Mulqueeny, S. Bonifacio, and J. Espenilla. 2011. Asian Judges, Green Courts, and Access to Environmental Justice: An Asian Judges Network on the Environment. *Journal of Court Innovation*. 3(1). pp. 277–303.

² ADB. 2011. *Environment Program: Greening Growth in Asia and the Pacific*. Manila.

³ ADB. 2011. *Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice: The Proceedings of the Symposium*. Manila.

⁴ ADB. 2009. *Technical Assistance for Strengthening of Judicial Capacity to Adjudicate Upon Environmental Laws and Regulations*. Manila.

judges to share environmental law experience. The then Chief Justice of Indonesia, Harifin Tumpa, extended an invitation to the chief justices of the member states of the Association of Southeast Asian Nations (ASEAN) to come to Jakarta in 2011 for the first ASEAN Chief Justices' Roundtable on Environment. The Chief Justice of Pakistan, Iftikhar Mohammad Chaudhry, offered to host a South Asian event.

ASEAN Chief Justices' Roundtable on Environment: Towards a Vision on Environment for the Judiciary in Southeast Asia

Southeast Asia has suffered the greatest losses in biodiversity over the last 50 years compared to any tropical region in the world.⁵ It has the lowest remaining forest cover, the highest rate of deforestation, and the highest human population densities among all major tropical regions. A total of 42 million hectares (an area the size of Viet Nam) of Southeast Asian forests were lost in 10 years, and 16 million hectares more (an area the size of Cambodia) are expected to be lost during 2010–2020.⁶ Southeast Asian marine resources are also overexploited and abused: 88% of Southeast Asia's coral reefs are threatened by human activity, of which 50% are considered "highly" or "very highly" threatened. Climate change makes these challenges worse. Environmental governance challenges, and weak implementation, compliance, and enforcement compound these threats.

Based on initial work with the Indonesian judiciary conducted prior to the symposium, ADB worked with the Chief Justice of the Supreme Court of Indonesia and his colleagues, and partnered with UNEP in convening the *ASEAN Chief Justices' Roundtable on Environment* in Jakarta, Indonesia, on 6–7 December 2011. The roundtable brought together chief justices and senior members of the judiciary from the member states of ASEAN with leading civil society leaders to consider the region's rich natural resources and the environmental challenges it faces in combating the threats to these resources. The judiciary discussed pressing environmental challenges in Southeast Asia, with expert resource persons providing both environmental and legal contexts for these challenges: deforestation and illegal logging; biodiversity and illegal wildlife trade; ocean destruction, illegal fishing, and marine pollution; development planning and environmental impact assessment; freshwater, pollution, floods; and urbanization and air pollution, with climate change being considered as a concern which cuts through all of these challenges. Aside from regional environmental challenges, issues faced by judges in resolving environmental cases were also discussed: legal and evidentiary issues like *locus standi*, evidence, and evaluating environmental damages; and capacity and governance issues like access to environmental justice, resilience against threats to integrity, and strengthening of judicial capacity on the environment. While some of the senior judiciaries present had already embarked on their own environmental law programs, several judiciaries were new to environmental and natural resource issues. Therefore, one key objective was to give an understanding of their national and shared environmental challenges.

To do so, ADB brought together some of the region's leading public interest environmental lawyers, who have led and shaped Southeast Asian environmental law, together with representatives from key environmental nongovernment organizations. They included Tint Lwin Thauang (Myanmar) of the Regional Community Forestry Training Center – The Center for People and Forests; Azrina Abdullah (Malaysia), formerly from Trade Records Analysis of Flora and Fauna (TRAFFIC) Wildlife Trade

Monitoring Network; Clarissa Arida (Philippines) of the ASEAN Centre for Biodiversity; Nazir Foead (Indonesia) from the World Wildlife Fund (WWF); Antonio Oposa (Philippines); Simon Tay (Singapore); and Mas Achmad Santosa (Indonesia). Indonesia's former environment minister and environment doyen, Emil Salim, gave an energetic keynote address, which challenged justices to take action on integrating environmental sustainability and the rule of law.

After much discussion, the chief justices and senior justices present concluded the Common Vision on Environment for ASEAN Judiciaries to chart an agenda for the rule of law and environment in Southeast Asia going forward. The common vision included consensus on continuing the roundtable. The new Chief Justice of Malaysia, Tan Sri Arifin Zakaria, announced that the Supreme Court of Malaysia would host the next roundtable in December 2012 and indicated that Malaysia may take ideas from the roundtable forward in the interim.

Indonesia

ADB began working with the Indonesian Ministry of Environment and the Supreme Court of Indonesia on its environmental judicial certification program in late 2009. It was Indonesia's desire to better understand other regional and nonregional efforts in environmental jurisprudence and environmental courts and tribunals that spawned the ADB program.

Indonesia is seeking to improve the capacity of its judges to decide environmental cases by having only judges who are certified as experts in environmental law to decide environmental law cases. It had considered other modes of environmental specialization—green benches of generalist courts and specialist environmental courts—but decided that certifying "environmental judges" was the best possible approach given that Indonesia's constitution established the court structure without envisaging environmental courts or benches. Then Chief Justice Tumpa signed a decree crystallizing the process of establishing the environmental-certified judges, but the scheme will be operational no earlier than 2013.

ADB is continuing to work with the Ministry of Environment and the Supreme Court of Indonesia under their program, which seeks a One Roof Enforcement System (ORES). The objective of ORES is for the Ministry of Environment to coordinate with (i) the Supreme Court and the judiciary; (ii) the state police; (iii) the attorney general and prosecutors; (iv) civil environmental investigators; and (v) civil society groups, including nongovernment organizations, public interest environmental lawyers, faith-based groups (e.g., Muhammadiyah and Nahdlatul Ulama), and the media in enforcing and ensuring compliance with and implementation of environmental law. Pilot projects have been chosen in East Kalimantan (Balikpapan City); West Java; and Riau (Sumatra). The ORES pilots will involve judges and other stakeholders in all of these groups through capacity-building activities to raise awareness of legal rights and responsibilities, and strengthen public participation in environmental compliance and enforcement.

Philippines

Since 1993, Philippine courts have long been progressive leaders in the development of environmental jurisprudence—from accepting the principle of intergenerational equity in *Oposa vs. Factoran* to applying the principle of continuing mandamus to ensure cleanup of Manila Bay⁷ and more recently considering the case of *Dolphins vs. Reyes*,⁸ whereby

⁵ University of Adelaide. 2011. Biodiversity 'lost in Southeast Asia.' 15 September. Available at www.adelaide.edu.au/news/news48301.html

⁶ K. Mulqueeny and S. Bonifacio. 2011. ASEAN Chief Justices' Roundtable on Environment : Towards a Vision on Environment for the Judiciary in Southeast Asia. Background paper presented at the ASEAN Chief Justices' Roundtable on Environment in Jakarta, Indonesia, 6–7 December.

⁷ *Metro Manila Development Authority vs. Concerned Residents of Manila Bay*. G.R. 171947-48. 18 December 2008.

⁸ *Dolphins vs. Sec. Reyes, et al.*, SC-G.R. 180771.

a suit was filed on behalf of marine mammals (dolphins) whose habitat has been affected by underwater blasting and drilling.

In the Philippines, then Chief Justice Reynato Puno designated 117 first-instance generalist courts environmental courts in January 2008. While significant capacity-building work will continue to be required, the Philippine Judicial Academy has given judicial training on environmental law for these judges. As part of Chief Justice Puno's legacy, just before his retirement, the Supreme Court of the Philippines also adopted the Rules of Procedure for Environmental Cases, which seek to improve the ability of plaintiffs and prosecutors to file environmental cases and have them determined. The rules feature many best practices in environmental adjudication, including the adoption of the precautionary principle, provisions preventing Strategic Action Against Public Participation (SLAPP) suit, the writ of continuing mandamus (institutionalizing the rule earlier used by the Supreme Court to clean up Manila Bay), and the writ of *kalikasan* (or the writ of nature, which allows individuals or groups to file an action compelling the performance of lawful act(s) or preventing an unlawful act involving environmental damage of such magnitude that it prejudices the life, health, or property of inhabitants in two or more cities and provinces). The Supreme Court very recently issued a writ of *kalikasan* preventing the field trials of genetically modified eggplants in the Philippines.⁹ ADB assisted with development of the Rules by facilitating their review by ADB experts, the United States Environmental Appeals Board, and the Queensland (Australia) Planning and Environment Court. Moreover, ADB has conducted research in relation to the developments in the Philippine judiciary as a foundation to assist other countries considering further work on environment.

Thailand

The Supreme Court of Thailand has established environmental divisions (or green benches) at the supreme court, the appellate court, and the trial court level. The Thai Supreme Administrative Court has also established green benches at all levels—nine at the trial court level, and one each at the Central Administrative and Supreme Administrative Court. Both courts adopted special rules for the environmental divisions which provide for the use of the precautionary principle and expert evidence.

The role of Thai courts in environmental law has evolved over the past 20 years as the Thai government enacted environmental legislation and passed constitutional amendments recognizing individual and community rights to participate in the management and preservation of the environment. The Thai Administrative Court decided the controversial *Map Tha Phut* case, which found that the constitutional requirement of sufficiently rigorous environmental impact assessment had not been complied with. In doing so, it granted an injunction on 65 of 76 industrial development projects in the *Map Tha Phut* industrial estate. Politicians challenged that the decision raises a range of development versus environment issues, and threatened to have it overturned. However, the decision currently stands.

ADB has completed a study investigating Thailand's environmental adjudication and the establishment of its green benches, which is currently being prepared for publication.

Malaysia

In late 2011, the Chief Justice of Malaysia indicated his intention to establish green benches. They would cover cases that fall within the jurisdiction of subordinate courts and would be established in states with numerous environmental cases. Malaysia also plans to hold an

environmental workshop for judges in the third quarter of 2012 and to further investigate the appropriateness of green benches or courts. Malaysia is hosting the roundtable in December 2012, and ADB is supporting its environmental programs.

South Asia Conference on Environmental Justice

South Asia also possesses significant ecological diversity and natural resources—but that diversity is significantly under threat, with weak governance and law enforcement as a key factor. The Indian Ocean is perhaps the world's most poorly protected coastline: UNEP gave South Asia the lowest ranking among regions worldwide in terms of marine and coastal protected areas.¹⁰ About 6% of the world's coral reefs are found in South Asia, including the world's most complex reef system in the Maldives. South Asia's threatened bird and mammal species have increased in number, despite an increase in the number of protected areas. The illegal trade in wildlife is one cause for the significant loss of wild fauna and flora: no custom controls or trade policy deal with the export of endangered wildlife and illegally harvested timber (footnote 10). South Asia has a range of other environmental and natural resource challenges that affect development, including water scarcity and contamination, land degradation, and food and energy security.

Given the significance of South Asia's environmental and environmental governance challenges, ADB agreed to support the offer by Pakistan's Chief Justice Chaudhry to host a chief justices' round table for South Asia. As planning for the roundtable evolved, the Pakistan judiciary's commitment was significant enough to enlarge the work, and so the South Asia Conference on Environmental Justice was convened, as a combined effort of ADB and the Supreme Court of Pakistan, supported by UNEP and the International Union for Conservation of Nature. The Chief Justice of Pakistan constituted the Committee for Enhancement of Environmental Justice (CEEJ). The CEEJ consists of two judges from the Supreme Court and one judge from each provincial high court. The Chief Justice's vision was to continue the work begun during the conference to ensure that environmental adjudication and enforcement is strengthened enough to deal with all environmental issues. The conference was held in Bhurban, Pakistan, on 24–25 March 2012. It brought together chief justices and judges from supreme courts and high courts of Afghanistan, Bangladesh, Bhutan, Brazil, Jordan, the Maldives, Nepal, Pakistan, and Sri Lanka, as well other stakeholders from the South Asian legal community.

At the conference, about 150 national¹¹ and 30 international participants discussed challenges relating to environmental justice, and specifically the role of the judiciary in promoting environmental justice. The sessions covered environmental law and policy, environmental education and capacity building, and the environmental challenges shared by South Asian countries: biodiversity loss and deforestation; climate change and floods; and urbanization. The conference concluded with joint recommendations and actions which were laid down in the Bhurban Declaration 2012, adopted by the conference, including proposals to change the Constitution of Pakistan to recognize the right to a healthy environment as a fundamental right, and establishing green benches at all levels of judiciary. The South Asian judiciaries in attendance also agreed to sign a memorandum of understanding for the coordination and collaboration on enhancing environmental justice in the region, which is expected to take place at the next conference, which the Chief Justice of Bhutan agreed to host.

⁹ See Greenpeace Philippines. 2012. Writ of Kalikasan granted against Bt Talong field trials. Available at www.greenpeace.org/seasia/ph/press/releases/Writ-of-Kalikasan-granted-against-Bt-Talong-field-trials/; The Philippine Star. 2012. SC issues writ vs. GMO eggplant. Available at www.philstar.com/Article.aspx?articleId=807126&publicationSubCategoryId=68

¹⁰ United Nations Environment Programme and Development Alternatives. 2008. *South Asia Environment Outlook 2009*. Nairobi.

¹¹ Participants from the Ministry of Environment; Attorney General; advocate generals; judges of the Supreme Court, provincial high courts, district courts, and environment tribunals; advocates; members of academia; and civil society.

Pakistan

In the past, the senior judiciary in Pakistan has decided some progressive environmental law cases. It has been decided in several cases that the constitutional right to life includes the right to a clean and healthy environment;¹² and procedural rules involving public interest environment cases are permitted liberal standing.¹³ Moreover, first-instance environmental tribunals have been established in four provinces along with an environmental magistrate who has jurisdiction to hear criminal and other offenses at the district court level.

Following the recent constitutional amendment in Pakistan, however, the environment has now become a subject over which the province has jurisdiction instead of the federal government. The previous federal-level Pakistan Environmental Protection Act (PEPA), 1997 will need to be replaced with provincial laws for each province, with the best outcome being the adoption of a uniform environmental law code in each province that starts with the laws in the PEPA but introduces new provisions to fill its gaps. The PEPA will continue until new provincial laws are enacted, but it is unclear whether new provincial laws will include all provisions of the PEPA, such as maintaining the existing tribunals.

Despite the lack of legislative clarity, the judiciary has constituted green benches at the Supreme Court level and within all provincial high courts. ADB is working on this issue with the Government of Pakistan under another technical assistance project.

In the meantime, since the mainstream judicial structure is not affected by the PEPA, ADB is working with the Pakistan Supreme Court in improving environmental adjudication by conducting a needs assessment for providing training modules for the capacity building of the judges in environmental adjudication. ADB is also assisting in enhancing judicial capacity to adjudicate on environmental issues by developing an environmental law curriculum that will be taught in judicial academies and possibly law schools, and seeking to provide some environmental training of judges.

Asian Judges Network on the Environment

Asian chief justices and judges recognize that they have much to gain by exchanging experiences with judges across borders. Their professional ties with fellow judges are often strong, given their shared professional challenges. At the symposium, the senior judiciary proposed that this common knowledge and experience be shared and exchanged through an Asian Judges Network on the Environment (AJNE).

Moreover, the judiciary's duty to be independent required the network to be professionally distinct, rather than combined with a network that included other government officials, such as legal and environmental professionals.

In late 2010, ADB approved a technical assistance to establish the AJNE, supported by work at the subregional and national levels. Moreover, the Common Vision on Environment for ASEAN Judiciaries and the Bhurban Declaration 2012 confirmed the need to continue the cooperation and engagement of judiciaries on environmental issues and to support the creation of the AJNE.

As leaders of the legal profession and champions of the rule of law, the judiciary needs to take a central role in environmental governance

in Asia. This role demands that judges at all levels become expert in environmental challenges and their solutions, and the way that the law can best be used to ensure justice—and environmental justice. ADB is continuing to support the region's judiciary in acquiring these skills and knowledge. The AJNE would be able to harness the collective judicial experience in environmental decision making in Asia—both its successes and failures—and to strengthen judicial capacity in this area of the law. The AJNE's more important contribution, however, is to encourage judges to realize that they have a shared professional mission of advancing justice that extends beyond their national jurisdiction. Judges must realize that they are not only servants or representatives of a particular government but are professionals in a profession that transcends national borders, and that they can collectively contribute even more to solving many of the region's and the world's environmental challenges.

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ADB's vision is an Asia and Pacific region free of poverty. Its mission is to help its developing member countries reduce poverty and improve the quality of life of their people. Despite the region's many successes, it remains home to two-thirds of the world's poor: 1.8 billion people who live on less than \$2 a day, with 903 million struggling on less than \$1.25 a day. ADB is committed to reducing poverty through inclusive economic growth, environmentally sustainable growth, and regional integration.

Based in Manila, ADB is owned by 67 members, including 48 from the region. Its main instruments for helping its developing member countries are policy dialogue, loans, equity investments, guarantees, grants, and technical assistance.

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For details, please visit www.adb.org

¹² *Ms. Shehla Zia and Others vs. WAPDA*. PLD 1994 SC 693.

¹³ *General Secretary, West Pakistan Salt Miners Labour Union vs. The Director, Industries and Mineral Development*. 1994 SCMR 2061.