



# PROCEEDINGS OF THE SECOND SOUTH ASIA JUDICIAL ROUNDTABLE ON ENVIRONMENTAL JUSTICE

*Thimphu, Bhutan | 30–31 August 2013*

*Prepared by Irum Ahsan and Gregorio Rafael P. Bueta*

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# FOREWORD

Environmental justice has been brought to the fore by many judiciaries in the Asia and the Pacific region, especially those of the South Asian Association for Regional Cooperation (SAARC) and Association of Southeast Asian Nations (ASEAN) member countries. In support, the Asian Development Bank (ADB) has taken the lead in starting the dialogue and fostering regional cooperation and collaboration on environmental law in the region. ADB has emphasized its strategic commitment to environmental sustainability, combating climate change, and good environmental governance through various strategic documents, including Strategy 2020, its Governance Policy, and Safeguard Policy Statement.

Toward this goal, the Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Governance was held at ADB headquarters, Manila, Philippines, in July 2010. Around 120 senior judges, environment ministry officials, members of civil society, and experts in environmental law discussed ways to promote the protection of the environment through effective environmental adjudication and law enforcement. Under the auspices of this Asia-wide symposium, the chief justices of Indonesia (for ASEAN) and Pakistan (for SAARC) endeavored to create concrete subregional action plans on how judiciaries can cooperate to address common environmental challenges. For the SAARC region, the First South Asia Judicial Roundtable on Environmental Justice was held in Pakistan in March 2012, followed by the Second South Asia Judicial Roundtable on Environmental Justice in Bhutan in August 2013.

On 31 August 2013, this Second South Asia Judicial Roundtable on Environmental Justice resulted in the Thimphu Declaration, which recognizes critical environmental challenges confronting the region as well as the important, unique role of the judiciary in ensuring environmental protection by upholding environmental rights and providing fair and consistent adjudication of issues in environmental cases. Participants also agreed to enhance collaborative efforts among judiciaries in the region through a draft memorandum of understanding for cooperation among South Asian judiciaries, focusing on knowledge-sharing among judiciaries, capacity building, and strengthening the judiciaries' focus on environmental issues.

Three key messages emerged from this roundtable. First, we were made more aware of the pressing environmental challenges that threaten sustainable growth in South Asia. The region continues to experience intense and extreme weather events, putting great stress on the region's water supply and subsistence systems, as well as endangering human safety, livelihoods and economies. Ecosystems and wildlife are threatened, while deforestation continues to degrade the region's once lush forest resources. Further, air and water pollution and mismanagement of waste are negatively impacting human health. These dangers threaten not only current and future sustainable economic development, but jeopardize progress already achieved through investment of human and resource capital in so many areas.

Second, we identified key challenges that South Asian judiciaries face in resolving environmental disputes. Existing legislation does not comprehensively capture environmental impacts, limiting the extent to which the judiciary and the environmental enforcement chain can address these environmental issues. Other limitations in legal systems were noted, such as access to environmental justice, adequate court remedies to address violations of environmental rights, as well as capacity constraints faced by judges and justices in the region.

Third, concrete judicial cooperation and knowledge-sharing on matters of environmental adjudication in the region is crucial. The sharing of knowledge and best practices is vital for judiciaries, because it enables each judiciary to learn and explore ways to strengthen environmental adjudication in their respective countries. Thus, this judicial network on the environment is key to attaining a unified approach for better environmental enforcement in the region.

This roundtable was a very encouraging step toward greater collaboration and coordination; the participants' commitment to the event is a significant milestone in itself. It gave judges an opportunity to share best practices, discuss developing case law, and find ways toward a common understanding of environmental justice in the region. It also provided South Asian judiciaries the opportunity to work concretely on identifying common challenges and specific cooperative measures to address them. Countries now have an important opportunity to fulfill the real potential that was agreed upon at the First South Asia Judicial Roundtable through the Bhurban Declaration.

This report records the proceedings of the second roundtable. It is our wish that readers will find this publication helpful in understanding the continuing development of the concept of environmental justice in South Asia. The need to protect South Asia's environment is unquestionable, as is the need to build the capacity of the judiciary in addressing these challenges.



**Christopher H. Stephens**

General Counsel

Office of the General Counsel

Asian Development Bank

January 2015

# ACKNOWLEDGMENTS

First, gratitude is extended to all of the participants from the various judiciaries of South Asia who made the Second South Asia Judicial Roundtable on Environmental Justice a success as well as an enlightening and enriching activity for all. Thank you for sharing your insights, taking time to engage and participate, and bringing environmental justice one step closer to the people in the region. The continued success of this project relies on your dedication and commitment to the protection of nature and the environment.

The success of the event would also not have been possible without the support and generosity of the Royal Court of Justice of Bhutan, led by its Chief Justice, Lyonpo Sonam Tobgye. Special appreciation is extended to the Chief Justice's team, especially Tshering Dorji, who helped organize the event and made it a success. The people of Bhutan must also be thanked for warmly welcoming all of the participants to their beautiful country.

Appreciation is also extended to the resource speakers from development partners in the region, especially Syed Mansoor Ali Shah from Pakistan and Dhananjaya Chandrachud from India, whose dedicated participation and invigorating discussions made the conference an interesting, interactive experience.

From the Asian Development Bank, Bruce Lawrence Davis, Vice-President, and Christopher H. Stephens, General Counsel, are thanked for their support. The event would also not have been possible without the dedication of the team from the Asian Development Bank, led by Irum Ahsan, comprising Antonia Gawel, Rita Marie Mesina, and Maria Celeste Grace A. Saniel-Gois.

Irum Ahsan and Gregorio Rafael P. Bueta prepared and edited the record of these proceedings.

# ABBREVIATIONS

ADB	– Asian Development Bank
AJNE	– Asian Judges Network on Environment
ASEAN	– Association of Southeast Asian Nations
EIA	– environmental impact assessment
GDP	– gross domestic product
GNH	– Gross National Happiness
IUCN	– International Union for Conservation of Nature
UNDP	– United Nations Development Programme
UNFCCC	– United Nations Framework Convention on Climate Change
WHO	– World Health Organization



# EXECUTIVE SUMMARY

This report records the proceedings of the Second South Asia Judicial Roundtable on Environmental Justice held from 30–31 August 2013, in Thimphu, Bhutan, hosted by the Asian Development Bank (ADB) and the Royal Court of Justice of Bhutan. Key objectives of the roundtable were to (i) develop an enhanced understanding of shared environmental challenges within South Asia, (ii) share experiences about environmental adjudication challenges and successes in various South Asian countries, and (iii) further the cooperation among South Asian countries by advancing the Bhurban Declaration and agreeing to a memorandum of understanding for cooperation.

**Chief Justice Lyonpo Sonam Tobgye** of Bhutan opened the conference, stating that the presence of the participants reaffirms their effort to preserve and protect the sacred environment. **Christopher H. Stephens**, ADB then recalled previous and ongoing initiatives in Asia on environmental justice. Subsequently, **Haripriya Gundimeda**, Indian Institute of Technology the keynote speaker, discussed the unifying factors and environmental problems of the countries in the region. She stated that more steps are needed to appreciate and respond to the value of nature, through the use of various tools for an alternative development path. **Irum Ahsan**, ADB discussed ADB's environment policy, including the technical assistance project for the establishment of the Asian Judges Network on Environment. **Justice Syed Mansoor Ali Shah**, Judge, Lahore High Court then provided a recap of the First South Asia Judicial Roundtable on Environmental Justice, describing the event as a landmark that set the tone for the enhancement of environmental justice in the region.

Plenary sessions on regional environmental challenges discussed issues such as climate change; conservation of natural resources and biodiversity; and environment, human health, and its economics.

Of all of the environmental issues that have emerged in the past few decades, global climate change is the most serious and the most difficult to manage because of the severity of harms that it may bring. **Malik Amin Aslam**, International Union for Conservation of Nature (IUCN) provided some background on climate change in South Asia, starting with a discussion of the impacts of the phenomenon on his country. Regarding the issue of glacial lake outburst floods, **Archana Vaidya**, Indian Environment Law Offices noted that such floods are a regional problem that pose a threat to lives and property. She called for improved and increased management in the region through mitigation and adaptation measures. **Sanath Ranawana**, ADB then looked at climate change and its impact on food security. He noted that the judiciary has a potential role to play in promoting the rights of the poor and marginalized in regard to access and to advocate for global climate financing to reach developing countries. As for the work of the United Nations Development Programme (UNDP), **Karma Raptan** spoke about its initiatives and programs on climate change.

International law for the conservation of biological diversity is relatively well developed, with a large number of bilateral and regional treaties that incorporate new approaches. **Sanjay Upadhyay**, Enviro Legal Defence Firm discussed judicial intervention in India in the forestry sector, recalling the Godavarman case as an example of judicial activism. On biodiversity and conservation in Bhutan, **Tashi Yangzome**, National Biodiversity Centre, Ministry of Agriculture and Forests discussed the country's legal and policy framework for the environment, as well as issues that they face. Discussing transboundary water issues, **Hamid Sarfraz**, IUCN noted that many transboundary watersheds around the world lack the necessary treaties for proper management. He detailed the availability of judicial solutions and how countries like

India and Pakistan should move toward a more cooperative water management framework. Taking a more international perspective, **Bharat H. Desai**, Jawaharlal Nehru University talked about several international treaties, agreements, and instruments for the conservation of biological diversity.

Environment, health, and its economics were then discussed along with the right to a clean and healthy environment, which is fast being recognized in many jurisdictions as a basic right. **Haripriya Gundimeda** discussed the issue of water and health in India. After presenting a case study on tanneries, she cited various instruments for correcting negative externalities, such as standards, bans, and permits, which can be used to improve the environment. For Pakistan, **Justice Syed Mansoor Ali Shah** proposed rethinking the scope of environmental justice, saying that the judicialization of human health and health care is essential and an inseparable part of environmental dispute resolution. **Scott Perkin**, IUCN then gave a presentation on the decline of the vulture population in South Asia due to a drug used on cattle, highlighting the importance and dependence of human health and well-being on biodiversity and a healthy ecosystem.

Next, plenary sessions on challenges for effective environmental adjudication and enforcement discussed issues on limitations on environmental policies and laws, environmental impact assessments (EIAs), access to environmental justice and alternative dispute resolution mechanisms, and capacity constraints. The development of laws, policies, and cooperation has led to the proliferation of laws, rules, regulations, and policies on the environment, both at the international and domestic levels, which are meant to address some of South Asia's most pressing environmental problems, yet issues and challenges still remain.

**Dasho Ritu Raj Chhetri** of the Parliament of Bhutan began by recalling Bhutan's spiritual closeness to the environment and the political will at the highest levels as reasons for Bhutan's scenic environment. He, however, cautioned that despite the existence of policies, laws, and other advantages, the country is not free from problems. Talking about Nepal, **Justice Ananda Mohan Bhattarai**, Appellate Court of Nepal discussed the environmental problems and issues facing his country, noting the unique geomorphological features that Himalayan countries share. He added that there is a need to evolve comprehensive policies and laws on vital natural resources and for topographical sensitivity through a local, people-first approach. **Matthew Baird**, ADB on behalf of Bharat H. Desai, discussed the gradual "greening" of international law. **Rizwana Hasan**, Bangladesh Environmental Lawyers Association presented her country's perspective, discussing its legal and policy framework and several issues affecting the environment. She, however, noted that the judiciary has kept hope alive through liberal rules on standing, giving rights to the common people, and establishment of "green courts." Representatives from Afghanistan, Sri Lanka, the Maldives, and Pakistan then gave their perspectives on the limitations on environmental policies and laws in their countries.

EIAs are now an established international and domestic legal technique for integrating environmental considerations into socioeconomic development and decision-making processes. **Ugyen Tshewang**, National Environment Commission, Bhutan presented the EIA processes and procedures in his country, noting once again the country's environmental conservation ethics. Providing a critique of EIA in Pakistan, **Saima Amin Khawaja**, Progressive Advocates and Legal Consultants said that the system merely provides for a definition of EIA but fails to explicitly state what the EIA is for and when it should be done. **Matthew Baird** then presented key principles of EIAs, noting that the primary aim of EIAs is to achieve sustainable development and create sustainable societies through public participation and decisions based on the best available information. **Sanjay Upadhyay**, Enviro Legal Defence Firm said that the EIA is a contentious topic in his country, despite several amendments and improvements of the regulations through the years.

Access to environmental justice and alternative dispute resolution mechanisms are developing concepts in the field of environmental law. Providing a perspective from India, **Justice Dhananjaya Chandrachud**, High Court of Bombay said that alternative dispute resolution could be understood not as a substitute, but as a supplement for the courts where it is desirable. **Justice Mirza Hussain Haider**, Supreme Court Division of High Court of Bangladesh suggested that alternative dispute resolution be seen as “active or appropriate dispute resolution.” Discussing environmental justice and alternative dispute resolution, **Justice Syed Mansoor Ali Shah** stressed that alternative dispute resolution has to be cautiously applied to environmental cases since mutual agreements between the parties cannot overshadow or marginalize the adverse effects on the environment. **Harsha Fernando**, ADB provided an extensive discussion on conflict management and resolution processes, offering a framework for the use of alternative dispute resolution in handling cases.

Common capacity constraints in South Asian judiciaries is another important topic that needs a regional approach, considering the role of law, as well as that of law enforcement, for the protection of the environment. **Chief Justice Md. Muzammel Hossain**, Supreme Court of Bangladesh noted that despite the continuing development of environmental justice in Bangladesh, the judiciary still faces several constraints. **Justice Priyasath Dep**, Supreme Court of Sri Lanka said that despite his country having adequate laws and a good legal framework for the protection of the environment, including updated laws in line with international obligations, issues still remain. Noting Bhutan’s constitutional provisions and philosophy for environmental protection, **Justice Sangay Khandu**, High Court of Bhutan said that he could not identify any constraints facing his country currently, but cautioned that the country cannot take things for granted and be complacent because of the transboundary nature of issues. **Justice Dhananjaya Chandrachud** provided suggestions on how to conduct environmental adjudication and identify the doctrines of environmental law to help judges in their efforts to protect nature. Speaking about Nepal, **Justice Ananda Mohan Bhattarai** stressed the importance of capacity building, especially at the early stages in law schools, given the constraints faced not only by the judiciary but also by the entire justice system.

The Draft Memorandum of Understanding for Co-operation Amongst the South Asia Judiciaries was circulated to the representative judges of the member countries, which is scheduled to be approved and adopted at the Third South Asia Judicial Roundtable on Environmental Justice to be held in Colombo, Sri Lanka in August 2014.

During the closing remarks, **Justice Tshering Wangchuk**, Supreme Court of Bhutan stressed that he is a firm believer that with the growth of roughly comparable judicial institutions across the region and the world, there is much to be learned from the judicial solutions adopted by other countries. **Bruce Lawrence Davis**, ADB cited three key messages that emerged from the roundtable: (i) the participants were made more aware of the pressing environmental challenges that imperil sustainable growth in South Asia, (ii) the different judiciaries were able to identify key challenges that they face in resolving environmental disputes, and (iii) there was recognition of a clear need for concrete judicial cooperation on environmental adjudication in the region.



# I. INAUGURAL SESSIONS



■ Traditional Bhutanese Ceremony to start the Roundtable.  
SOURCE: Royal Court of Justice of Bhutan.

## BACKGROUND: PREVIOUS CONFERENCES AND ASIA-WIDE EFFORTS ON ENVIRONMENTAL JUSTICE

Different legal jurisdictions around the world have begun the debate on issues such as climate change, right to a healthy and clean environment, and access to environmental justice; accordingly, there is now strong recognition of the role and responsibility of the justice system in conserving and protecting the environment. The increased sophistication of appreciating risks to the earth's environment, and the irreversible damage that may be caused by human activity, has resulted in a conscious effort to invoke legal protection of the environment, both by governments acting collectively and by nongovernment organizations.<sup>1</sup>

Environmental law and environmental justice are new concepts in the region, which judiciaries, lawyers, academia, and civil society are trying to incorporate into traditional justice systems. In Asia and the Pacific, the Asian Development Bank (ADB) has taken the lead in starting the dialogue and fostering regional cooperation and collaboration for the environment. Toward this goal, the First Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Governance was held at ADB headquarters, Manila, Philippines, in July 2010. Around 120 senior judges, environment ministry officials, members of civil society, and experts in environmental law discussed ways to promote the protection of the environment through effective environmental adjudication and law enforcement. During this event, the participants also called for a judges' network on the environment—a more permanent framework of judicial cooperation—and from this idea grew various ongoing and evolving partnerships. Moreover, the chief justices of Indonesia and Pakistan offered to host other regional events, which led to roundtables and conferences featuring member countries from the South Asian Association for Regional Cooperation (SAARC) and the Association of Southeast Asian Nations (ASEAN).

The First South Asia Judicial Roundtable on Environmental Justice was held in Bhurban, Pakistan, in March 2012, which resulted in the adoption of the Bhurban Declaration and an agreement to continue convening the roundtable. These events led to the creation of the Asian Judges Network on Environment (AJNE), which was formally launched during the Second Asian Judges Symposium on Environment: Natural Capital and the Rule of Law, held at the ADB headquarters in December 2013. AJNE is an information- and experience-sharing arrangement among senior judges of ASEAN and SAARC, committed to providing a dynamic forum for judicial capacity building and multilateral exchanges on environmental adjudication.<sup>2</sup> AJNE helps build the capacity of judges, through collaboration with a like-minded support group, introduction of innovative ideas, and technical education. It also brings all stakeholders together and provides a neutral platform to conduct frank discussions without biases. AJNE has also led to the establishment of a website that contains laws, rules, regulations, and case law of various Asian countries (footnote 2).

The Second South Asia Judicial Roundtable on Environmental Justice was held from 30–31 August 2013, in Thimphu, Bhutan, hosted by ADB and the Royal Court of Justice of the Kingdom of Bhutan.

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<sup>1</sup> I. Brownlie. 2003. *Principles of Public International Law*. Oxford: Oxford University Press. p. 273.

<sup>2</sup> Asian Judges Network on Environment. <http://www.asianjudges.org/about-ajne/>

The proceedings discussed below are the continuation of the ongoing dialogue on environmental justice in South Asia and the region.

## B

# OPENING REMARKS

**CHIEF JUSTICE LYONPO SONAM TOBGYE**, Supreme Court of Bhutan

**Lyonpo Sonam Tobgye** began by welcoming “towering legal giants, led by the chief justices, legal luminaries, and activists who have been the saviors of the planet and hope of the future,” adding that it was a privilege for Bhutan to host the event. He noted that “green” awareness has moved from the level of dreamers to larger segments of the population. In particular, at the regional level and through the South Asia Association for Regional Cooperation in Law (SAARCLAW), numerous workshops, seminars, and conferences have been convened to create awareness and combine legal and social factors on environmental issues. He added that landmark judgments from SAARC have reverberated in the political, social, economic, and legal arenas, and future generations are thus ensured a safer planet.



At the national level, the chief justice said that Bhutan has accorded high priority to environmental protection, conservation, and advancement. In particular, he noted that (i) Bhutan has signed and ratified major international agreements, such as the United Nations Framework Convention on Climate Change (UNFCCC) and the Convention on Biological Diversity; (ii) 51% of the country’s areas are protected through a network of national parks, protected areas, and biological corridors; and (iii) the Constitution mandates that 60% of Bhutan’s national surface area is to be maintained as forest cover in perpetuity, and that every Bhutanese is the owner and trustee of the country’s biological resources and wildlife. The chief justice added that the bases of the government’s national development strategy are the concepts of Gross National Happiness (GNH) and sustainable development through the prudent use of natural resources.

Looking at environmental justice from a religious perspective, Chief Justice Tobgye stated that the protection of nature is a moral and spiritual mandate, and that sages espoused peaceful coexistence with the natural world. He noted that nature has inherent checks and balances that should never be stifled. Different environmental measures are still chanted in prayers, exhibited in art, and displayed in dances.

The chief justice concluded by citing ADB’s excellent leadership in strengthening the participants’ resolve for environmental justice. He stated that the presence of legal luminaries reaffirmed “our undying faith in nature, unyielding human endeavor, and enduring effort to preserve and protect the sacred environment.” This also serves as a reminder of an Indian proverb: we have not inherited this Earth from our fathers, but borrowed it from our children.



# 2<sup>nd</sup> South Asia Judicial Roundtable Environmental Justice

30-31 Aug 2013

■ Inaugural Session: Keynote Speaker Haripriya Gundimeda, Chief Justice Lyonpo Sonam Tobgye, ADB General Counsel Christopher H. Stephens, and Justice Syed Mansoor Ali Shah of Pakistan.

SOURCE: Royal Court of Justice of Bhutan.

## C

## WELCOME REMARKS

**CHRISTOPHER H. STEPHENS**, General Counsel, ADB

**Christopher H. Stephens** welcomed the participants and said that ADB was honored to partner with the Royal Court of Justice of Bhutan for another opportunity to discuss important aspects of environmental adjudication and governance. He noted the Bhutanese judiciary's willingness to host the event after the first judicial roundtable in Bhurban, Pakistan, as well as its active participation in the ADB symposium on wildlife crime held in Thailand in March 2013.

He proceeded to give a brief background on the event, starting with the First Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Governance held in Manila, Philippines in July 2010, and leading up to the First South Asia Judicial Roundtable on Environmental Justice in Bhurban, Pakistan in March 2012. This meeting in Pakistan concluded with the adoption of the Bhurban Declaration, establishing "green benches" across the country and calling for regional collaboration in educating judiciaries, introducing specialized courts, and cooperating regionally to achieve environmental justice. Mr. Stephens also mentioned that similar efforts are occurring in ASEAN as well, with roundtables already held in Indonesia, Malaysia, and Thailand.

Mr. Stephens noted that while economic development has increased living standards for many people in South Asia, it has come with a significant environmental cost that threatens to erode economic gains. He cited significant threats from climate change, deforestation, and urban pollution, which are causing serious impacts on human health that will severely affect the long-term sustainability of economic opportunity and growth, as well as near- and long-term public health. These challenges show that South Asian countries have every reason to ensure compliance and enforcement of national environmental laws, require the entire environmental law enforcement chain to work, and support regional cooperation on the environment.



■ ADB General Counsel Christopher H. Stephens delivering his Welcome Remarks.  
SOURCE: Royal Court of Justice of Bhutan.

He then cited ADB’s strategic commitment to environmental sustainability and combating climate change, along with support for good environmental governance, including environmental enforcement. This can be found in Strategy 2020, Policy on Governance, and Safeguard Policy Statement (2009). Further, ADB has supported various environmental programs in South Asian countries (e.g., establishing the “green benches” in Pakistan, and the publication of a bench book on environmental laws, rules, and regulations in Bhutan).

Mr. Stephens concluded by saying that the participants’ commitment to join this roundtable is a significant milestone in itself, and will provide the opportunity to work on identifying common challenges and coming up with specific cooperative measures for South Asian judiciaries to address them.

## D

## KEYNOTE ADDRESS

**HARIPRIYA GUNDIMEDA**, Associate Professor, Department of Humanities and Social Sciences, Indian Institute of Technology

**Haripriya Gundimeda** began her presentation by highlighting that South Asian countries have many things in common. To illustrate, she presented charts on key indexes in the region: population growth rates, Human Development Index trends, gross domestic product (GDP) growth versus GNH, carbon dioxide emissions, and health indicators. Based on these, it would seem that development always results in the destruction of the environment, as evidenced by the corollary rise of GDP with carbon dioxide emissions. Therefore, there is a need to bring environment and development together to ensure sustainable development and the judicious use of the environment.



She emphasized several environmental problems common to the countries in the region, such as access to safe drinking water, water stress, air pollution, deforestation and habitat loss, loss of natural species, solid and hazardous waste, and e-waste. These, she said, are due to the failure to recognize the contribution of nature and what people are getting in return from the services that it provides. The benefits of the environment are not explicitly recognized, because the focus is on economic development, and its services are not explicitly visible and tangible. Other reasons include fragmented decision-making processes, lack of communication among stakeholders, and absence of a common vision for the region. As a result, the “GDP of the poor” is most adversely affected by environmental devastation, as seen in examples from Indonesia, India, and Brazil.

To mainstream nature’s value, Dr. Gundimeda suggested the use of the economics of ecosystems and biodiversity approach: (i) recognize that nature has value, (ii) demonstrate the value of nature, and (iii) capture the value demonstrated. To do this, laws, mechanisms, and markets for the environment are needed. In addition, environmental indicators, “green” public procurement, local biodiversity strategies and action plans, and strategic and environmental impact assessments (EIAs) may be used.

She then presented three examples of payments for environmental services and other benefits of the environment:

- (i) **Satoyama landscapes.** White storks almost went extinct in Japan in 1971 due to changes in land-use practices and use of pesticides, among others. Subsidies from the Government of Japan resulted in a 75%–100% reduction in the use of pesticides, traditional winter-flooding rice farming was adopted, and “white stork rice” and other certified products began to be sold as premium products. Today, white storks have returned, the area has become a tourist attraction, and municipal income has increased.
- (ii) **Financing of biodiversity conservation through the sale of high-value forest products in Northwest Nepal.** Land was awarded to the local community to produce high-value essential oils with negotiated sales by organizations in the partnership. This disincentivized the use of low-value raw produce, such as fuel wood, and highlighted the importance and value of community-based initiatives.
- (iii) **Innovative financing to save elephants in Sri Lanka.** Crop raiding by elephants in densely populated areas resulted in a conflict between humans and animals: humans created defenses to protect their crops, which resulted in serious injury or death to elephants. Surveys showed that those affected were willing to accept compensation, and there was willingness among other citizens to pay for the conservation of the elephants. As a result, an insurance company proposed a small charge to be added to premium payments for life and vehicle insurance, which was used to compensate affected farmers and families.

Dr. Gundimeda then suggested that for sustainable development to occur, there must be a yardstick to determine what our needs are today and in the future. To create this, she suggested the use of the nondeclining natural capital approaches, the precautionary principle, Daly’s operational principles, and the 33 indicators of the GNH index, among others.

In conclusion, more steps are needed to appreciate and respond to the value of nature. It is less expensive to preserve what exists than to restore what has been destroyed. Tools for an alternative development path that may be used include better regulation, schemes for payment for ecosystem services, economic incentives, sustainable consumption, investment in natural capital, and “green” infrastructure.

## E

# ADB'S ROLE IN STRENGTHENING ENVIRONMENTAL GOVERNANCE AND RULE OF LAW

**IRUM AHSAN**, Counsel and Project Leader, ADB

**Irum Ahsan** began her presentation by discussing ADB's long-term strategic framework, Strategy 2020, which identifies good governance and capacity development as a driver for change. In addition, a core operational area is environment, which includes climate change.

The goal of ADB's Safeguard Policy Statement (2009) is to promote the sustainability of project outcomes by protecting the environment and people from projects' potential adverse impacts. It ensures mitigation of environmental and resettlement impacts and effect on indigenous on indigenous peoples through (i) environmental assessment, (ii) environmental planning and management, (iii) information disclosure, (iv) consultation and participation, (v) grievance redress mechanisms, and (vi) monitoring and reporting. She added that ADB will not finance projects that do not comply with its safeguard policy statement, nor will it finance projects that do not comply with the host country's social and environmental laws and regulations.

■ General Counsel Stephens, Vice-President Davis, and Chief Justice Tobgye sharing a light moment at the sidelines of the Roundtable.  
SOURCE: Royal Court of Justice of Bhutan.



Ms. Ahsan subsequently discussed the Office of the General Counsel (OGC) Law, Justice and Development Program. The program's focus is on legal development through strengthened policy, legal, judicial, and regulatory systems, in addition to good governance and strengthened rule of law. Under this program, the OGC assists ADB member countries in improving their legal, regulatory, and enforcement capacities with regard to environmental considerations. Accordingly, considering the important role of Asian judiciaries, ADB prepared a technical assistance project for the establishment of AJNE. This recognized the fact that judges influence the entire legal system and the interpretation and enforcement of legal and regulatory frameworks, which in turn affects private sector investment in related sectors.

She concluded by discussing the structure and themes of this roundtable, and by identifying its two overarching goals: (i) identification of the role of the judiciary in shaping environmental law and building capacity to decide environmental cases; and (ii) identifying the role and nature of South Asia judicial cooperation for strengthening cooperation in areas of mutual benefit, including ensuring continuity of involvement among the judiciary.

## F RECAP OF THE BHURBAN DECLARATION ON ENVIRONMENTAL JUSTICE

**JUSTICE SYED MANSOOR ALI SHAH**, Judge, Lahore High Court, Pakistan, and Member, Committee for Enhancing Environmental Justice

**Justice Syed Mansoor Ali Shah** first acknowledged ADB's initiatives on identifying the need to strengthen and enhance environmental justice. He cited the Committee for Enhancing Environmental Justice as responsible for the implementation of ADB's initiatives in his country.

He described the First South Asia Judicial Roundtable on Environmental Justice held in Bhurban, Pakistan, as a landmark, setting the tone for the enhancement of environmental justice in the region. He gave the following key points of the Bhurban Declaration: (i) collaboration of judges within SAARC; (ii) dissemination of information, experience, and case law within SAARC; (iii) strengthening of environmental training of judges and enhancement of the capacity of judges on environmental issues; (iv) creation of "green benches" within the existing court structure; and (v) recommendation that the right to a clean and healthy environment be made a fundamental right in the Constitution.

Justice Shah said that in Pakistan, 133 "green benches" have been established, and 3,000 new cases have been filed since March 2012 as a result of the declaration. The Committee for Enhancing Environmental Justice has brought all of the high courts of Pakistan together for the development of a national judicial environmental policy, identifying how to deal with "green" matters within the courts, and development of uniform jurisprudence. He added that the "green benches" have sent a strong message to the public and to civil society organizations that the judiciary is interested in the environment. He described this as the first judicial environmental movement in Pakistan's history.

He then cited the need to further develop collaboration in the region. He noted the requirement for more robust collaborative efforts, interim measures for regular meetings, and the use of technology to develop more efficient and interactive arrangements within SAARC.

Justice Shah subsequently invited judges and justices from other South Asian countries to share insights on post-Bhurban initiatives in their countries.

**Justice Dhananjaya Chandrachud** of India said that specialized tribunals with statutory jurisdiction have been established in his country. In addition, high courts have been given broader constitutional jurisdiction. He added that the “green benches” have led to the proliferation of environmental litigation, greater awareness, and involvement of civil society organizations and local communities. He cited the participation of civil society organizations and experts as a positive development.

**Judge Aisha Shujune Muhammad** of the Maldives noted that the country drafted a new Constitution in 2008, which contains a provision on the right of the people and of future generations to a sustainable environment as a civil right. She stated that Maldivians are more conscious of the environment, with various laws and regulations to protect nature. Very few environmental cases reach the courts, less than five a year, due to the public’s environmental consciousness and knowledge of how the environment impacts everyday life. She also noted that the Maldives is at risk due to rising sea levels. However, the most pressing problems for the island-nation is the issue of garbage and the difficulty of monitoring foreign vessels in the country’s territory. Judge Muhammad concluded by saying that more things can be done, and the Maldives is partnering with neighboring countries to address these issues.

**Justice Kalyan Shrestha** of Nepal noted that he had reservations on the use of the term “environmental law” and instead prefers the use of “environmental justice,” but the initial discussions on environmental justice gave him a better understanding of the concept. He then noted that Nepal had conducted capacity building for the judiciary on environmental justice even before the Bhurban Declaration, through the support of the International Union for the Conservation of Nature (IUCN) and other civil society bodies. Justice Shrestha then cited several issues that Nepal is facing, such as glacial lake outburst floods and the melting of the Himalayas, aspects of which have all been referred to the court system. Nepal has no “green benches,” but there is public interest litigation jurisdiction under its Constitution, as well as the right to environment and health. He also noted the interface between environmental science and the law, compliance with judgments, and the lack of English translations of judicial decisions as problems for judges. Justice Shrestha thus asked ADB to assist the Nepali judiciary in translating these decisions.

**Justice Priyasath Dep** of Sri Lanka stated that environmental cases are handled by regular courts in Sri Lanka, since there are no special tribunals for that purpose. He also cited the country’s constitutional provisions on the conservation and protection of the environment and other laws enacted before its independence in 1948. Justice Dep then described several environmental problems plaguing Sri Lanka, such as pollution due to urbanization, conflicts between humans and wildlife due to increasing population, and health concerns. On a positive note, he stated that through judicial activism, those who file environmental cases have been granted standing to sue. In addition, he referred to efforts of the government to balance human development and the protection of the environment, and regular workshops for the judiciary and prosecutors to improve their capacity.

**Chief Justice Lyonpo Sonam Tobgye** of Bhutan first congratulated Pakistan for the historic venture it has undertaken within a short period of time, worthy of emulation. He then noted Bhutan’s constitutional duty to protect the environment and its strong environmental office, which results in no cases going up to the courts, despite jurisdiction. The chief justice then implored the intellectuals around the world, particularly in SAARC, that not only judicial remedies are required but much more at the philosophical and spiritual level. He noted the philosophy that the environment has enough for everyone, which has



resulted in the destruction of the environment. Chief Justice Tobgye added that the logic of economics and mathematics should be counterbalanced by the logic of human well-being through the establishment of normative values and composite action.

**Abdul Baset Majumder** of Bangladesh thanked ADB for inviting the judiciary to participate in the event. He noted that environmental justice is an important area for the Bangladeshi judiciary, citing the common challenges in SAARC. Mr. Majumder stated that the roundtable served as an opportunity for convergence to address common issues and to learn from the other participants.

Justice Shah then concluded the session by saying that a judge has to have love and respect for nature to understand environmental justice. He added that collaborative efforts need to be strengthened through the designation of focal judges for more frequent meetings, and the establishment of a “cross-fertilization” program for the training of judges in different jurisdictions. In addition, the development of a compendium of the case law in SAARC can be pursued for a cohesive environmental jurisprudence in the region that brings in a multidisciplinary aspect.

## II. PLENARY SESSIONS ON REGIONAL ENVIRONMENTAL CHALLENGES



# CHALLENGE 1: CLIMATE CHANGE

## 1. BACKGROUND

Of all of the environmental issues that have emerged in the past few decades, climate change is the most serious, and the most difficult to manage because of the severity of harm that it may bring.<sup>3</sup> It does not just affect people directly; it also affects all other environmental and ecological processes, including many not recognized as related, such as the economy and finance systems (footnote 3). Climate change will become harder to address because the activities causing it—mainly the burning of fossil fuels for energy—are a more essential foundation of world economies, and are less amenable to simple technological corrections than other environmental problems.<sup>4</sup>

Climate change refers to any change in climate over time, whether due to natural variability or because of human activity.<sup>5</sup> The UNFCCC defined the term as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.”

There is robust evidence that the world is warming and that the sea level is rising, and that these are due to human activity (in particular, the emission of greenhouse gases).<sup>6</sup> In 1988 and 1989, the United Nations General Assembly determined that “climate change is a common concern of mankind,” and urged governments and intergovernment and nongovernment organizations to collaborate in a concerted effort to prepare, as a matter of urgency, a framework convention on climate change.<sup>7</sup>

The above discussion points to an issue of global importance and significance, which countries in SAARC, particularly its judiciaries, cannot choose to ignore. A clearer understanding of this phenomenon will lead to judicial decisions and a justice system sensitive to one of the greatest challenges of the present day and of future generations.

## 2. CLIMATE CHANGE—SHIFTING THE REGIONAL NARRATIVE IN SOUTH ASIA

**MALIK AMIN ASLAM**, Global Vice President, International Union for Conservation of Nature; Former Minister of Environment, Government of Pakistan; and Climate Change Adviser, United Nations Development Programme

**Malik Amin Aslam** began with a background on Pakistan and climate change, citing a recent book that described climate change as the most potent threat to the stability of the country. He noted that Pakistan is in the top 10 of the most vulnerable countries to climate change despite being one of the lowest per capita emitters, at 0.5% of global greenhouse gas emissions. He added that the spate of natural disasters and various environmental pressures in Pakistan is not surprising, with 9 of the 10 top natural disasters

<sup>3</sup> A. E. Dessler and E. A. Parson. 2006. *The Science and Politics of Global Climate Change*. Cambridge: Cambridge University Press. p. 1.

<sup>4</sup> Footnote 3, p. 2.

<sup>5</sup> United Nations Development Programme (UNDP). 2011. *Catalyzing Climate Finance*. New York. p. 2.

<sup>6</sup> J. Wilson and S. Law. 2007. *A Brief Guide to Global Warming: A Straightforward Guide to the Most Important Issue of Our Age*. London: Robinson. p. ix.

<sup>7</sup> United Nations General Assembly Resolution nos. 43/53 (1988) and 44/207 (1989).

triggered by climate change. The cost associated with these events is expected to rise, made worse by the absence of planning strategies. It is estimated that Pakistan will spend \$6 billion–\$14 billion annually to address the impacts of climate change, emphasizing the fact that it is not only an environmental issue but an economic and a social one as well.

He noted that climate change is a shared challenge, as its effects do not recognize human-made boundaries. It has led to massive displacement and an increase in climate refugees. For example, Pakistan, Nepal, Bhutan, India, and Bangladesh are all located within the glacial melting zones of the Himalayas. The climate and water linkages between these countries are unavoidable, which sometimes creates a problem of having “too much or too little water, at the wrong place at the wrong time.” He then recalled the Uttarakhand disaster of 2013, which was an example of the high cost of avoiding regional cooperation, since there was poor exchange of meteorological and hydrological data resulting in the tragedy.

Mr. Aslam then stated that regional cooperation is inevitable; it is not a luxury anymore, but something that the region must undertake. He cited the need for regional research and sharing of data on glacial melting, coastal cyclonic activity, flood early-warning systems, monsoonal shifts, and hydrological and meteorological information. Water security is also a central issue, especially for neighboring countries India and Pakistan.

Mr. Aslam concluded by saying that climate change has forced the region to face the unavoidable threats together, to suffer together, and to have an opportunity for cooperation. Unlike the global climate change actors, SAARC should stop talking and start acting.

### 3. GLACIAL LAKE OUTBURST FLOODS

**ARCHANA VAIDYA**, Managing Partner, Indian Environment Law Offices

**Archana Vaidya** began by saying that the Hindu Kush Himalayan region contains the largest area covered by glaciers and permafrost in the world, and is often referred to as a “third pole.” Often called the “water towers of Asia,” the region has more than 15,000 glaciers feeding all of the major rivers of the continent. However, this region is susceptible to a whole range of hydrometrological, tectonic, and climate-induced disasters. The rate of warming in the Himalayas is higher than in the rest of the world, and is becoming an increasingly bigger threat to the sustainability of Himalayan glaciers by the day.

She then discussed moraines, material left behind by a moving glacier, usually a mass of rocks and sediment deposited as ridges at its edges or extremity. The phenomenon constituting a sudden discharge of a huge volume of water from glacial lakes created by a moraine is known as a glacial lake outburst flood. Ms. Vaidya noted that there are over 7,653 glacial lakes in the Himalayas, with 125 identified as risks due to such floods.

Only Nepal conducts a mandatory risk assessment of glacial lakes as part of the planning process for hydropower plants. Ms. Vaidya posited that a similar approach needs to be followed by other countries in the region to minimize the adverse impacts of such events. Glacial lakes need to be monitored and tracked on a continuous basis, and the impact of climate change on Himalayan glacial melting dynamics needs to be understood in multiple scenarios.





■ Snow-capped mountains of the Himalayas in Bhutan.  
SOURCE: Randall Krantz.

In conclusion, Ms. Vaidya stated that there is a need for improved glacial lake outburst flood management in the region through mitigation and adaptation measures. These can include (i) a regional collaborative research and development facility, (ii) a sound and reliable data exchange and sharing mechanism, (iii) establishment of an early warning system, and (iv) preparation of a collective management plan and a regulatory framework for regional cooperation.

#### 4. CLIMATE CHANGE AND ISSUES OF FOOD SECURITY

**SANATH RANAWANA**, Senior Natural Resources Specialist, ADB

**Sanath Ranawana** started with a definition of food security, stating that according to the Food and Agriculture Organization of the United Nations, “[f]ood security is achieved when all people, at all times, have physical and economic access to sufficient, safe, and nutritious food to meet their dietary needs and food preferences for an active and healthy life.” He then described the three aspects of food security: availability, access, and use. However, he noted that the irony of food security is that it should not be a problem at all—it is estimated that 1.3 billion tons of food, or one-third of all food in the world, is lost or wasted every year at a cost of \$1 trillion. He added that wars disrupt supply, and famine follows war. Food insecurity is also a result of climate change-induced events, such as extreme weather, prolonged droughts, more frequent storms and hurricanes, rising sea levels, and increasing temperatures.

Mr. Ranawana then discussed the three dimensions of sustainable food security: connectivity, resilience, and productivity. Connectivity is affected by storms, which destroy infrastructure. Resilience is the ability to adapt to changes, with global cost for adaptation amounting to \$70 billion–\$100 billion annually for developing nations. Productivity is projected to decrease by 5%–25% by 2050 due to climate change, which will impact rice production and calorie intake.

He cited justice, equity, and social considerations as reasons why climate change and food security issues should be a concern of the judiciary. Mr. Ranawana concluded by saying the judiciary has a role to promote the rights of the poor and marginalized in regard to access, to advocate for global climate financing to reach developing countries, and to ensure appropriate beneficiary targeting in food security-related laws and programs.

## 5. CLIMATE CHANGE AND THE UNITED NATIONS DEVELOPMENT PROGRAMME'S RESPONSE

**KARMA RAPTEN**, Head, Energy and Environment, Assistant Resident Representative, United Nations Development Programme, Bhutan

**Karma Rapten** stated that climate change is not just an environmental issue, but also a development issue, as it affects the ability of the United Nations to meet the Millennium Development Goals. He then discussed the three strategic priorities of the United Nations Development Programme (UNDP)—promote early adaptation, attract and drive private investments toward a low-carbon economy, and seek community-level solutions to global problems—and gave a brief background on the organization's delivery mechanisms.

He then noted UNDP's climate change-related efforts and initiatives in Bhutan, where one of the five key national priorities is the enhancement of environmental sustainability and disaster management. Several priority projects for Bhutan include adaptation and mountain issues, mitigation as a national action, reduction of emissions due to deforestation plus (REDD+), prioritization of vulnerability conditions, and national climate financing.

Mr. Rapten presented two UNDP projects in Bhutan: (i) the first climate change adaptation project in the world on the prevention of glacial lake outburst flood disasters in the Punakha-Wangdi and Chamkhar districts; and (ii) the largest climate change adaptation project in the world, amounting to \$11.5 million, on enhancing the national and local capacity for effective actions to address the risks of climate-induced disasters.

## B

# CHALLENGE 2: CONSERVATION OF NATURAL RESOURCES AND BIODIVERSITY

## 1. BACKGROUND

The role of law in the conservation of biodiversity, which includes flora, fauna, the variety among living organisms, and the ecological communities that they inhabit, dates back to the creation of Yosemite National Park in California as the world's first protected area.<sup>8</sup> Since then, legal rules have been adopted at the local, national, bilateral, regional, and global levels to halt what is now considered by some members of the scientific community to be a crisis that leaves biodiversity more threatened than at any time in

<sup>8</sup> P. Sands et al. 2003. *Principles of International Environmental Law*. 2nd ed. Cambridge: Cambridge University Press. p. 499.

the past 65 million years (footnote 8). Threats to biodiversity include tropical deforestation, direct and indirect human activities, and the destruction and loss of habitats (footnote 8). A recent paper cited deforestation and land degradation as one of Asia's "wicked" environmental problems.<sup>9</sup> One author noted that the costs are not purely ecological, as they extend to economic, medical, and agricultural losses, and have profound moral and aesthetic implications.<sup>10</sup>

International law for the conservation of biological diversity is relatively well developed, with a large number of bilateral and regional treaties that incorporate new approaches, which have emerged from a variety of sources like the 1972 Stockholm Declaration,<sup>11</sup> the 1982 World Charter for Nature,<sup>12</sup> and Chapter 15<sup>13</sup> of Agenda 21.<sup>14</sup> One of the hallmarks of this movement is the 1992 Convention on Biodiversity.

The reasons for conserving nature and biodiversity are threefold: (i) biodiversity provides an actual and potential source of biological resources (including food and pharmaceutical and other material values that support fisheries, soil conditions, and parks); (ii) it contributes to the maintenance of the biosphere in a condition that supports human and other life; and (iii) it is worth maintaining for nonscientific reasons of ethical and aesthetic value.<sup>15</sup>

The discussions and presentations below demonstrated how some countries in South Asia are tackling the issue of biodiversity within their respective jurisdictions. In addition, a look at this issue from a regional and international perspective was given.

## 2. JUDICIAL INTERVENTION AND CONSERVATION OF FORESTS IN INDIA

**SANJAY UPADHYAY**, Advocate, Supreme Court of India, and Managing Partner, Enviro Legal Defence Firm

**Sanjay Upadhyay** started by discussing the 1996 Indian Supreme Court decision known as the Godavarman case. He described the case as one that "changed the face of Indian forestry," owing to the fact that before Godavarman, there was no definition of "forests" in the country. It was the single biggest judicial intervention in the administration of forests, which has resulted in 4,500 interventions and 800 related orders to date. The case has gone to other aspects of forests and made an impact on other areas such as trade, transit, and mining in forest areas.

The case also resulted in the creation of the Central Empowered Committee, the administrative face of Indian forestry, responsible for overseeing the implementation of related court orders within the country. The importance of the amicus curiae was also highlighted. He then discussed several recent important rulings (e.g., the Lafarge case, Ajay Dubey [tiger tourism], and the Orissa [now known as Odisha] mining

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<sup>9</sup> S. Howes and P. Wyrwoll. 2012. Asia's Wicked Environmental Problems. *ADB Institute Working Paper Series*. No. 348. Tokyo: ADBI.

<sup>10</sup> Footnote 8, p. 499

<sup>11</sup> Principle 4: "Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperiled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development."

<sup>12</sup> Paragraphs 2 and 3 state: "the genetic viability on earth shall not be compromised; population levels of all life forms must be at least sufficient for their survival; and necessary habitats shall be safeguarded; special protection shall be given to unique areas, to representative samples of all different types of ecosystem, and to the habitats of rare and endangered species."

<sup>13</sup> It addresses the conservation of biological diversity.

<sup>14</sup> Footnote 8, p. 501.

<sup>15</sup> Footnote 8, p. 500.



judgment). Godavarman and these recent cases have shown that an overactive judiciary is a sign of a weak executive. Mr. Upadhyay stated that it is time for judges to strengthen the executive branch and to take a more proactive role in promoting transparent decision making so that conflicts do not need to reach the courts.

### 3. BIODIVERSITY AND CONSERVATION IN BHUTAN

**TASHI YANGZOME**, Program Director, National Biodiversity Centre, Ministry of Agriculture and Forests, Bhutan

**Tashi Yangzome** began by giving a background on Bhutan's conservation history, beginning with the establishment of the Royal Manas National Park in 1966, which some describe as the "conservation showpiece of the kingdom." There are 10 national parks with a system of biological corridors connecting them, comprising 51.3% of the country's total land area. She added that this system of protected areas is one of the most extensive in the world.



■ Traditional mode of transport in the mountains of Bhutan.  
SOURCE: Randall Krantz.

Aside from Bhutan's existing policies and legal framework, factors enabling such conservation of the country's environment include leadership, especially of the beloved kings; the GNH philosophy; the constitutional provision on forest cover requirements; and the belief of living in harmony with nature. Some of the issues impacting Bhutan include balancing conservation and development, adapting to climate change, human and wildlife conflict, people-centric conservation, and lack of utilization of rich resources, which makes Bhutan one of the global biodiversity hotspots in the Eastern Himalayas.

Dr. Yangzome concluded by saying that although the current leadership and policy and legal frameworks are addressing the environmental issues facing Bhutan, challenges remain, such as inadequate funding

and human resources, inability to generate tangible benefits from conservation, the lack of valuation of ecosystem services, a need to find a balance between conservation and development, and the difficult terrain of the country.

#### 4. TRANSBOUNDARY WATER ISSUES AND JUDICIAL SOLUTIONS

**HAMID SARFRAZ**, International Union for Conservation of Nature, Pakistan

**Hamid Sarfraz** started with a discussion on transboundary watersheds, there being 263 worldwide that cover 45.3% of the earth's land surface. These areas affect about 40% of the world's population and account for 60% of global river flow, highlighting the importance of transboundary water issues. He added that 60% of international basins lack any type of cooperative management framework, and of the ones with water institutions for management, two-thirds have three or more riparian states, but more than 80% have only bilateral agreements as governing frameworks.

He then discussed several new realities affecting transboundary water issues today: climatic variability and uncertainty in river flows (i.e., climate change is not among the issues included in some treaties that affect the environment); rapid population growth, industrialization, and urbanization resulting in high demand for energy; environmental flows; high rate of groundwater extraction; regionalism versus bilateralism (i.e., countries prefer bilateral treaties); and the proliferation of democracy, with governments becoming more accountable to the people.

Mr. Sarfraz noted the availability of judicial solutions, especially international tribunals (i.e., the Permanent Court of International Justice, International Court of Justice, and the Permanent Court of Arbitration), and how cases have moved from purely technical grounds and merits to a recognition of the environmental aspects and tools available today.

He cited the 1960 Indus Waters Treaty between India and Pakistan, noting that it has survived several conflicts and has remained largely unaltered despite its failure to take into account climatologic extremes and to mention the word “environment” in any of its provisions. He concluded with a recommendation for the two countries to move toward establishing a cooperative water management framework and the ratification of the United Nations Watercourses Convention.

#### 5. CONSERVATION OF BIOLOGICAL DIVERSITY—SOME REFLECTIONS ON THE LEGAL FRAMEWORK

**BHARAT H. DESAI**, Professor, International Law and Jawaharlal Nehru Chair in International Environmental Law, Jawaharlal Nehru University, India

**Bharat Desai** noted that biodiversity is a global problem needing a global solution. Thus, the conservation agenda is an integral part of the development of international environmental law. He then discussed “soft law” (e.g., 1980 World Conservation Strategy, 1982 World Charter for Nature, 1991 Caring for the Earth: A Strategy for Sustainable Living, and 1992 Forest Principles) and “hard law” instruments (e.g., 1971 Convention on Wetlands, 1972 World Heritage Convention, 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979 Convention on the Conservation of Migratory Species of Wild Animals, 1992 Convention on Biological Diversity, and 1994 United Nations Convention to Combat Desertification), which reflect the gradual “greening” of international law.

Dr. Desai then discussed the relevant provisions of the various international instruments cited above. He noted that the World Charter for Nature was a remarkable initiative undertaken by the United Nations General Assembly prescribing normative obligations on the part of governments despite the document not being a treaty. With regard to the Convention on Biodiversity, he stated that it is a treaty with “a hard shell and a soft belly,” given the need for governments to take further action to implement the provisions of the Convention. He added that some argue that if the convention were enacted earlier, there would be no need for the current fragmented approach as reflected by the numerous international instruments on conservation.



## CHALLENGE 3: ENVIRONMENT, HEALTH, AND ECONOMICS

### 1. BACKGROUND

The right to a clean and healthy environment is quickly being recognized as a basic right. Thus, the link between the environment and health, and its impacts, is a cause of concern for many, including the judiciary. Environmental health addresses all of the physical, chemical, and biological factors external to a person, and all of the related factors impacting behavior; it encompasses the assessment and control of those environmental factors that can potentially affect health; and it is targeted toward preventing disease and creating health-supportive environments.<sup>16</sup>

The environmental problems and issues faced by local and international communities have added to the list of challenges faced by human and environmental health and well-being. The environment influences human health in many ways, through exposures to physical, chemical, and biological risk factors, and through related changes in behavior in response to those factors.<sup>17</sup> As the World Health Organization stated, current development patterns, and individual behavioral choices, are bringing a range of new challenges to public health, and many of the most important relate to environmental changes.<sup>18</sup> The accumulation of greenhouse gases in the atmosphere, driven mainly by the use of fossil fuels, is increasing temperatures and exposing populations to more frequent and intense weather extremes, as well as undermining environmental determinants of health, such as clean water and adequate nutrition (footnote 18). The World Health Organization has cited the following emerging environmental challenges: heat stress, ultraviolet radiation, pollens, and air pollution.<sup>19</sup>

A study by the European Environment Agency noted that disadvantaged groups are often disproportionately affected by the cumulative impacts of overall degraded environments, and lack financial, educational, and cultural capacities to avoid such exposure.<sup>20</sup> Poor environmental conditions tend to be spatially correlated with social stressors, although little is known about the combined and potentially synergistic health effects of stress and pollution (footnote 20). The study added that socioeconomic and demographic inequalities in exposure to environmental hazards often represent inequities, which are avoidable and unjust.<sup>21</sup>

<sup>16</sup> World Health Organization. Health Topics: Environmental Health. [http://www.who.int/topics/environmental\\_health/en/](http://www.who.int/topics/environmental_health/en/)

<sup>17</sup> World Medical Association. Health and Environment. <http://www.wma.net/en/20activities/30publichealth/30healthenvironment/>

<sup>18</sup> World Health Organization. 2012. *Atlas of Health and Climate*. Geneva. p. 39.

<sup>19</sup> Footnote 18, pp. 40–55.

<sup>20</sup> European Environment Agency. 2013. *Environment and Human Health*. Copenhagen. p. 14.

<sup>21</sup> Footnote 20, p. 15.

The discussions below presented how environmental issues affect the health and well-being of people and ecosystems in South Asia.

## 2. WATER, HUMAN HEALTH, AND DEVELOPMENT— PERSPECTIVE FROM INDIA

**HARIPRIYA GUNDIMEDA**, Associate Professor, Department of Humanities and Social Sciences, Indian Institute of Technology

**Haripriya Gundimeda** started by noting the reality of deteriorating environmental quality, particularly due to the rising levels of air and water pollution and poor sanitation. She stated that Delhi, Chennai, and Mumbai, all in India, are among the top 10 most polluted cities in the world. Further, none of the rivers in India are meeting the required quality standards. She then presented a chart on the environmental burden of disease for selected risk factors in South Asian countries (i.e., water, sanitation, and hygiene; and indoor and outdoor air). Some of the diseases affecting the region include diarrhea, respiratory infections, malaria, cancers, and cardiovascular diseases.

The professor then presented a case study of health impacts near tanneries in Kanchipuram District, Tamil Nadu, India. The area targeted 450 households living near highly polluted areas. The study found that contaminated water quality, coupled with the lack of precautionary measures and good nutrition, affected children's health, with higher impacts in areas nearer to the tanneries. It stated that income was not a determining factor, since everyone was affected by the bad water quality, the only difference being that income allowed those affected to seek remedial measures and other treatment. Dr. Gundimeda then noted that pollution is difficult to control because people only care about the marginal private costs and not the social costs associated with their polluting activities.

Dr. Gundimeda discussed various instruments for correcting negative externalities, such as standards, bans, and permits. She also noted Indonesia's Program for Pollution Control, Evaluation and Rating, or more commonly known as PROPER, which involves a color-coded rating scheme to grade a factory or industry's performance against regulatory standards. Because of this system, Indonesia has noted an increase in compliance, and a decrease in those without any pollution control mechanisms.

## 3. PERSPECTIVE FROM PAKISTAN

**JUSTICE SYED MANSOOR ALI SHAH**, Judge, Lahore High Court, Pakistan, and Member, Committee for Enhancing Environmental Justice

**Justice Syed Mansoor Ali Shah** first presented World Health Organization statistics, which state that 13 million deaths annually are attributable to preventable environmental causes. He added that the environmental burden of disease is 15 times higher in developing countries than in the developed world. Thus, there is no dispute on the relation between health and the environment. He discussed several environmental health issues in Pakistan, including the incidence of hepatitis B and C; floods that cause gastroenteritis, respiratory infections, malaria, and dermatologic conditions; dengue fever; and unsafe drinking water and poor sanitation.

As a judge on a "green bench" of Lahore, Justice Shah recounted several environmental cases concerning contamination of freshwater sources, urban water supply and sanitation, air pollution, and land use

and urbanization. He noted that these cases show the responsibility of the judge to bridge the gap between environmental health and the public health system. He then proposed rethinking the scope of environmental justice, where the right to human health is recognized as a fundamental right, or as an integral part of the right to life and the right to a clean and healthy environment. He added that safeguarding human health can be viewed also as a fundamental right. A judge must map the adverse impacts of environmental degradation on health since losses due to environmental issues are generally not addressed. Courts should address economic issues of health cases, particularly who pays for the damage and health remediation and cure costs.

Justice Shah concluded by saying that the judicialization of human health and health care is an essential, inseparable part of environmental dispute resolution. Environmental justice needs to be broadened to discuss the right to human health, health care, and the economics of an appropriate remedy.

#### 4. PERSPECTIVE FROM BHUTAN

**DAGO TSHERING**, Research Coordinator, Royal Society for the Protection of Nature, Bhutan

**Dago Tshering** was unable to present due to unforeseen circumstances.

#### 5. VULTURES, VETERINARY DRUGS, AND HUMAN HEALTH—THE UNEXPECTED NEXUS

**SCOTT PERKIN**, Head, Biodiversity Conservation Programme, Asia, International Union for Conservation of Nature

**Scott Perkin** described his presentation as a “detective story, [with] mystery, intrigue, death, unexpected twists, heroes, and villains.” It concerned the sudden decline in the last 2 decades of three vulture species in South Asia (i.e., white-rumped vulture, Indian vulture, and slender-billed vulture). All three are listed as critically endangered on the IUCN Red List and face extinction in the wild.

In 2003, it was proven that the cause of the death of the animals was diclofenac, a nonsteroidal anti-inflammatory drug used to treat livestock. The drug led to renal failure and death of the vultures. The loss of the vultures was severely impacting critically important ecosystem services, and linked health costs were estimated at Re71 billion–Re78 billion annually. Additional impacts included groundwater contamination, loss of income for farmers unable to use fields due to rotting carcasses, and social impacts affecting the culture and traditions of the Parsis.

As a response, diclofenac manufacturing bans were implemented, and vulture “safe zones” and breeding centers were established. A South Asia declaration on vultures was adopted by Bangladesh, India, Nepal, and Pakistan, which called for an increase in conservation efforts and enhanced regional cooperation. To date, Dr. Perkin noted that the ban appears to be working, and vulture numbers are stabilizing.

Dr. Perkin concluded by identifying what the case study highlights: (i) dependence of human well-being on biodiversity and healthy ecosystems, (ii) difficulty of predicting the impacts on biodiversity and ecosystems, (iii) the speed at which ecological changes can occur, (iv) the key role that legislation plays in conservation, and (v) the role of science to inform decision making.



### III. PLENARY SESSIONS ON CHALLENGES FOR EFFECTIVE ENVIRONMENTAL ADJUDICATION AND ENFORCEMENT



# CHALLENGE 1: LIMITATIONS ON ENVIRONMENTAL LAWS AND POLICIES

## 1. BACKGROUND

The connection between the environment and law cannot be denied, and the development of the two concepts side by side is an ongoing process. The environment has always posed a serious challenge to traditional legal thinking, throwing many established norms and principles into question with its unique set of legal demands.<sup>22</sup> The increased sophistication in appreciating the risks to the environment, and the irreversible damage that may be caused by human activity, has resulted in a conscious effort, both by governments acting collectively and also by nongovernment organizations, to invoke legal protection of the environment.<sup>23</sup>

The growth of international environmental issues is reflected in the large body of principles and rules of international environmental law that applies bilaterally, regionally, and globally, showing international interdependence in a globalizing world.<sup>24</sup> Local issues have been thus recognized to have transboundary, then regional, and ultimately global consequences.<sup>25</sup> More importantly, it is now widely recognized that the planet faces a diverse and growing range of environmental challenges that can only be addressed through international cooperation.<sup>26</sup>

This recognition has led to the proliferation of laws, rules, regulations, and policies on the environment, both at international and domestic levels. International environmental law has only recently been developed, with its beginnings traced back to the 1972 United Nations Conference on the Human Environment. From this emerged the 1972 Stockholm Declaration, which became the starting point for the development of international environmental law as a separate and youngest field of international law.<sup>27</sup> It comprises substantive, procedural, and institutional rules of international law that aim to protect the environment.<sup>28</sup>

South Asia has also seen developments in environmental law. As early as 1992, a study on the greenhouse effect and its impact on the region, conducted by the SAARC Secretariat, stated:

Environmental legislation in SAARC countries is in a state of evolution, with several countries having enacted environmental laws, many of which have been amended to reflect changing needs and the experience of implementation. In the same period, a variety of environmental institutions have come into existence in the region, with high-level environmental institutions emerging in different countries. These perform the tasks of formulating environmental policy and the monitoring of environmental phenomena and activities that affect them. Finally, in most SAARC member countries, efforts have begun to try and influence the public in their interaction with the environment.<sup>29</sup>

<sup>22</sup> R. R. Gutierrez. 2009. Improving Environmental Access to Justice: Going Beyond Environmental Courts. *Ateneo Law Journal*. 53 (4). p. 916.

<sup>23</sup> Footnote 1, p. 273.

<sup>24</sup> Footnote 8, pp. 3–4.

<sup>25</sup> Footnote 8, p. 4.

<sup>26</sup> Footnote 8, p. 3.

<sup>27</sup> P. Malanczuk. 1997. *Akehurst's Modern Introduction to International Law*. 7th ed. London: Routledge. p. 241.

<sup>28</sup> Footnote 8, p. 15.

<sup>29</sup> SAARC. n.d. Legal Framework for Environmental Protection and Measures for Implementation. Kathmandu. <http://www.saarc-sec.org/userfiles/Large%20Publications/RSGEIOR/10RSGEIORChapterIV-LegalFrameworkforEnvironmentalProtectionandMeasuresforImplementation.pdf>

These developments in law and policy are meant to address some of South Asia's most pressing environmental problems: land degradation and desertification, loss of biodiversity, freshwater depletion and degradation, solid waste management, degradation of air quality, environmental health issues, degradation and depletion of coastal and marine resources, and natural disasters and their consequences.<sup>30</sup>

## 2. PERSPECTIVE FROM BHUTAN

**DASHO RITU RAJ CHHETRI**, Member of Parliament, Bhutan

**Dasho Ritu Raj Chhetri** began by recalling the spiritual closeness to the environment by the Bhutanese. He cited, as an advantage, the presence of political will at the highest level, as reflected in Bhutan's constitutional and legal provisions on the environment, the adoption of regulations for the conduct of strategic environmental assessments, and the establishment of the Bhutan Trust Fund for Environmental Conservation. However, he cautioned that despite the existence of policies, laws, and other advantages, the country is not free from criticisms and problems. In addition, Bhutan is unable to take part in multilateral environmental agreements due to a lack of human and financial resources, resulting in few linkages with other countries.

Mr. Chhetri said that in addition to the issues and problems the country is facing, some key institutions for the continued preservation of Bhutan's forest cover are not in place, and there is a lack of an environmental laboratory and other facilities at par with international standards to ensure compliance with standards. He added that the Bhutan Trust Fund for Environmental Conservation only covers the "green" sector and not the "brown" sector, for which there is a clear need to address major issues. The impacts of transboundary issues were also cited, in particular the effects of glacial lake outburst floods and the loss of groundwater, which could affect sources of drinking water and hydropower generation.

Mr. Chhetri discussed other issues and limitations affecting Bhutan, including (i) rising youth unemployment and deteriorating workers' health; (ii) importation of goods that do not comply with existing environmental laws and standards (e.g., a national plastic bags ban); (iii) human and wildlife conflicts; (iv) expensive "green" technology and limited capacity to access financing; (v) vehicular emissions; and (vi) the impacts of climate change.

## 3. PERSPECTIVE FROM NEPAL

**JUSTICE ANANDA MOHAN BHATTARAI**, Acting Chief Judge, Appellate Court of Nepal

At the beginning of his presentation, **Justice Ananda Mohan Bhattarai** described Thimphu as a "perfect setting to discuss environmental and conservation policies and laws or their inadequacies or contradictions that impact the people and environment of the Himalaya region." He stated that the story he was going to present was not just that of Nepal but of the Himalayan region due to its people having similar livelihood patterns. He then described some unique geomorphological features of the Himalayas: tectonically disturbed bedrock, steep slopes, high altitudinal variation over a short horizontal distance, and heavy monsoon rains resulting in mass wasting and landslides. Recently, he stated, the whole region has been witnessing a multitude of human-induced problems such as degradation of resources; biodiversity loss; and social, economic, institutional, and political unrest.

<sup>30</sup> South Asia Co-operative Environment Programme. Regional Overview: Environmental Issues. [http://www.sacep.org/html/regional\\_environment.htm](http://www.sacep.org/html/regional_environment.htm)



Dr. Bhattarai discussed environmental problems and challenges facing Nepal, a country feeling the brunt of climate change. The phenomenon has caused glacial lake outburst floods, thinning and receding glaciers and snowlines, shifting of vegetation, degradation of alpine pastureland due to increased evaporation, biodiversity loss, and conversion of less vegetative stretches into highland deserts. Border conflicts have resulted in cross-border pasturing, affecting the nomadic pastoralist culture of some Nepalese. He also noted the loss of agricultural productivity due to political conflicts and migration of people to the lowlands and urban centers, with 17% of Nepalese now living in cities.

Environmental laws in Nepal have not provided solutions, as the laws are vague, parochial, and bureaucratic. He cited the problems of land fragmentation, lack of a law on conversion of agricultural lands to other uses, reckless expropriation of property, and securing tenurial rights. All of these have made the livelihoods of the people more precarious.

In conclusion, Dr. Bhattarai stated that there is a need to evolve comprehensive policies and laws on vital natural resources such as land, water, forests, and biodiversity, focusing on rejuvenation of livelihoods, conservation of soil and fertility of land, checking fragmentation, and securing and protecting tenurial and use rights on agricultural lands and common property resources (e.g., village pastures, water, and river strips). Conservation and pollution control policies and laws work well when they are topographically sensitive, taking a “local people-first approach.” He added that there is a need to devise adaptive mechanisms for addressing unanticipated challenges and to create strong, yet collaborative, institutional mechanisms that inspire all actors and stakeholders to work together with a common vision. There is a clear need to look beyond national borders to strengthen implementation and improve regional cooperation.

#### 4. INTERNATIONAL PERSPECTIVE: EFFECTUATION OF INTERNATIONAL ENVIRONMENTAL LAW IN NATIONAL POLICY AND LAW

**BHARAT H. DESAI**, Professor, International Law and Jawaharlal Nehru Chair in International Environmental Law, Jawaharlal Nehru University, India (Presented by **MATTHEW BAIRD**, ADB)

The presentation began by recalling that the process of laying down international legal restraints upon the behavior of countries on environmental problems has led to a sound body of multilateral environmental agreements. This gradual “greening” of international law has, however, remained ad hoc, piecemeal, and sectoral in nature; it has merely been dictated by “trigger events.” It was further noted that key environmental law principles that can be applied to judgments (e.g., the precautionary principle, intergenerational equity, and the Aarhus Convention principles) are not in place in SAARC, regional bodies, or domestic law. Despite this, several regional organizations (e.g., the South Pacific Regional Environment Programme, South Asia Cooperative Environment Programme, and SAARC) have developed their own regional environmental programs and action plans. In addition, countries in South Asia have undergone significant behavioral changes regarding the need to protect the environment, and are not lagging behind in domestic measures for environmental protection.

Further, the member countries of SAARC are closely knit together, giving much more justification for extending cooperation on a regional basis. For instance, floods, droughts, earthquakes, cyclones, and other natural disasters frequently ravage member countries. Thus, mountain ecosystems and watershed management are important areas of cooperation. Moreover, all members of SAARC, except Bhutan and Nepal, are littoral states of the Indian Ocean, whose fragile marine ecosystem also requires regional cooperation for protection.

The discussion then focused on various international environmental treaties and instruments, and the considerable growth in terms of governance structures in the region. He noted that South Asia holds the distinction in terms of innovative judicial approaches to public interest issues in general and environmental issues in particular. In countries such as Bangladesh, India, Nepal, Pakistan, and Sri Lanka, access to justice has been greatly facilitated due to the liberalization of the rules on standing.

In conclusion, legal developments in SAARC have kept pace with both domestic necessities as well as efforts to comply with international environmental commitments. Geographic proximity gives all of the countries of the region an incentive to learn from, as well as to cooperate with, each other to combat common environmental problems and natural disasters. Regional cooperation will facilitate arriving at a common understanding to chart an appropriate development path to uplift the people of the region from poverty in the 21st century.

## 5. PERSPECTIVE FROM BANGLADESH

**RIZWANA HASAN**, Advocate, Supreme Court, and Chief Executive, Bangladesh Environmental Lawyers Association

Starting with a discussion on Bangladesh's legal structure, **Rizwana Hasan** noted that the country inherited a colonial legal system that promoted feudal ownership with absolute rent fixing in the forestry and fishery sectors. This was abolished in 1950, but government agencies became "feudal" in the management of public resources, tending to be use-oriented to maximize economic benefits.

Pollution control laws, about 210 relating to the environment, became recent enactments, in addition to 60 policies, strategies, and action plans. Despite these, Ms. Hasan stated that substantive principles such as environmental justice, sustainable development, and biodiversity have no express recognition in domestic law. However, a conceptual and functional interpretation of existing laws can provide an equitable environmental order through the judiciary. She then discussed the Bangladesh Environment Conservation Act of 1995, citing its provisions on conservation and pollution control through standards setting, monitoring, and declaration of critical and protected areas.

Ms. Hasan then identified several issues affecting environmental protection in Bangladesh: lack of political commitment, institutional weakness, lack of a mechanism for impartial assessment, limited scope for participation in decision making, culture of impunity and no accountability, nonrecognition of traditional rights and practices, and eroding confidence in the system. She added that tanneries are still polluting, EIAs for major projects are being approved without public participation, promises to promote urban wetlands have not been met, and salinity has intruded into rivers and farmland. Forest laws and policies are also faulty, resulting in a reduction of forest cover from 16% in 1970 to just 6% in 2006.

Despite this, she stated, the judiciary has kept hope alive. It has liberally construed standing and the rules, giving rights to the common people. Environmental courts have also been established, which has led to decisions ordering the restoration of wetlands, establishment of the National River Protection Commission, regulation by the government of powerful industries, and closing down of persistent polluters.

## 6. PERSPECTIVES FROM OTHER JUDICIARIES

At this point, the facilitator invited representatives from other judiciaries to give their perspectives on limitations and challenges on environmental law and policies that they are facing in their respective countries.

**Chief Justice Abdul Salam Azimi** of Afghanistan prepared a paper on environmental issues in his country. He noted that the country is still “in-war,” which is bad for the environment because forests are cut down, irrigation facilities are being destroyed, and drinking water is a problem. More needs to be done for Afghanistan, and the international community’s help is crucial. The chief justice then thanked the international community and ADB for their continued support of Afghanistan.

**Justice Eva Wanasundera P.C.** of Sri Lanka said that her country has all of the environmental laws, policies, and regulations in place. As for environmental cases, they can go all the way up to the Supreme Court. She noted that the people know of their rights and environmental laws and issues. Educated people and lawyers bring the cases to the courts to bring environmental issues to the attention of the public. However, one problem is that the law or judgment is insufficient and often implemented too late.

**Judge Aisha Shujune Muhammad** of the Maldives recalled the fundamental legal framework for environmental protection in her country. She cited Article 68 of the Constitution, which allows access to United Nations mechanisms for the implementation of international treaties and obligations. She then restated the country’s problem with garbage. She added that the country is dependent on fuel for energy, but is looking at wind and solar power for more renewable sources. Lastly, she noted the concern over the depletion of fish resources due to the entry and lack of monitoring of foreign vessels.

**Saima Amin Khawaja** of Pakistan said that her country also has many laws, rules, and regulations in all areas of the environment. However, aside from capacity, resources are an issue in terms of political will and the amount of money going into the Ministry of Environment for the implementation and enforcement of laws. She noted that political will and prioritization of the environment, coupled with financial resources, are needed to protect nature. Ms. Khawaja stated that, unlike those in India and Bangladesh, Pakistan’s social sector and nongovernment organizations have been very weak in pressing the courts on environmental issues. She concluded that the major issues now are those created by climate change, and these need to be addressed at the political level.

## B

# CHALLENGE 2: ENVIRONMENTAL IMPACT ASSESSMENTS

## 1. BACKGROUND

EIAs emerged internationally after the 1972 Stockholm Declaration, although the document itself made no specific reference to the process. However, the rationale and basis underlying EIAs can be identified in Principles 14<sup>31</sup> and 15<sup>32</sup> of the declaration. EIAs are now an established international and domestic legal technique for integrating environmental considerations into socioeconomic development and decision-making processes.<sup>33</sup> The most sophisticated legislation on EIAs can be found in Canada, the European Union, and the United States, but the practice is increasingly common in Eastern Europe and in a significant

<sup>31</sup> Principle 14: “Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment.”

<sup>32</sup> Principle 15: “Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all. In this respect, projects which are designed for colonialist and racist domination must be abandoned.”

<sup>33</sup> Footnote 8, pp. 799–800.

number of developing states, particularly in Asia.<sup>34</sup> Internationally, EIAs are required under numerous international conventions, in the requirements of various multilateral development banks, and in various nonbinding instruments adopted at the regional and global level.<sup>35</sup>

EIAs have been defined as “the need to identify and predict the impact on the environment and on man’s health and well-being of legislative proposals, policies and programs, projects, and operational procedures, and to interpret and communicate information about the impacts.”<sup>36</sup> The United Nations Economic Commission for Europe in 1991 defined EIAs as “an assessment of the impact of the planned activity on the environment,”<sup>37</sup> while the United Nations Environment Programme defined them as an examination, analysis, and assessment of planned activities with a view to ensuring environmentally sound and sustainable development.<sup>38</sup> EIAs have also been described as “a process...that examines the environmental consequences of developmental action [where the] emphasis, compared to many other mechanisms for environmental protection, is on prevention,”<sup>39</sup> as well as a procedure for evaluating the likely impact of a proposed activity on the environment.<sup>40</sup> Some functions include (i) providing decision makers with information on the environmental consequences of proposed activities, programs, policies, and their alternatives; (ii) requiring decisions to be influenced by that information; and (iii) providing a mechanism for ensuring the participation of potentially affected persons in the decision-making process.<sup>41</sup>

The following presentations highlight some key principles of EIAs, in addition to specific experiences and examples of how the tool is used, or unused, for environmental protection as well as provided a critique of current EIA trends and formulations.

## 2. PERSPECTIVE FROM BHUTAN

**UGYEN TSHEWANG**, Secretary, National Environment Commission

**Ugyen Tshewang** began by discussing the environmental conservation ethics of Bhutan, noting the strong political commitment from the throne to protect the environment. He then discussed the various environmental laws and regulations in the country, one of which is the Environment Assessment Act of 2000. Relating the EIA process to sustainable development, the secretary said that sustainable management and development determine the environmental well-being and security of livelihood of the people. Population pressure, industrialization, adverse impacts of climate change, and the indiscriminate exploitation and use of resources have all made sustainable development difficult to attain. However, through the use of tools such as EIAs, sustainable development and GNH have been achieved.

Dr. Tshewang went on to discuss the various institutional arrangements and processes for the conduct of EIAs in Bhutan. In particular, he cited the central role of the National Environment Commission in the

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<sup>34</sup> P. Birnie and A. Boyle. 2002. *International Law and the Environment*. 2nd ed. Oxford: Oxford University Press. p. 131; and R. K. Jain et al. 1993. *Environmental Assessment*. New York: McGraw-Hill. p. 177.

<sup>35</sup> Footnote 8, p. 800.

<sup>36</sup> J. Glasson et al. 1999. *Introduction to Environmental Impact Assessment*. London: UCL Press. p. 4.

<sup>37</sup> Footnote 35, p. 4.

<sup>38</sup> United Nations Environment Programme Governing Council/Dec/14/25 (1987).

<sup>39</sup> Footnote 36, p. 4.

<sup>40</sup> Footnote 34, p. 130; and J. B. Tuyor et al. 2007. *The Philippine Environmental Impact Statement System: Framework, Implementation, Performance and Challenges*. Washington, DC. p. 7. “Environmental Assessment is the general term used to refer to the process of systematic analysis, evaluation, and management of the potential environmental and social effects of a proposed action before a decision is made to proceed or not with its implementation.”

<sup>41</sup> Footnote 8, p. 800.

implementation of this tool. Activities and projects of a serious nature may require the development of terms of reference. Projects that require prior environmental assessment before implementation include hydropower projects; those within protected areas or other areas of national significance; mines and quarries; and megaprojects such as high-tension transmission lines, education cities, urban development, industrial estates, and national highways. Noncompliance with the required environmental clearance and the terms of reference are penalized by the Act.

Some challenges for EIAs in Bhutan include (i) nonconformity with the terms of reference and original EIA report; (ii) provisions of different acts and regulations; (iii) climate change; (iv) lack of financial, technical, and human resources; and (v) stakeholder participation and ethics. To address these, Dr. Tshewang recommended an analysis of the carrying capacity of Bhutan's ecosystem. Effective laws and regulations are needed, and existing ones may require amendments.

Further, strategic environmental assessments should be conducted instead of pocket EIAs. The secretary added that regional cooperation and integration in South Asia through the harmonization of laws and regulations should be prioritized. Lastly, he recommended the capacity building of technical experts and the use by the judiciary of the polluter-pays principle at all levels.

### 3. CRITIQUE ON ENVIRONMENTAL IMPACT ASSESSMENTS, THEIR LEGAL PROVISIONS, PRACTICES, AND JUDICIAL INTERPRETATIONS AND INTERVENTIONS IN PAKISTAN

**SAIMA AMIN KHAWAJA**, Advocate, High Court, and Managing Partner, Progressive Advocates and Legal Consultants, Pakistan

After providing a brief background on the EIA processes and procedures in Pakistan, **Saima Amin Khawaja** critiqued the system and laws for failing to explicitly state what the EIA is for and when it should be done. Instead, these merely provide for a definition of EIA but not its purpose and goals. She added that the public does not know how an EIA is made, by whom, and for whom. Unless the core of the EIA is examined, Ms. Khawaja stated that it only accumulates documents. She cited the United States and United Kingdom's laws on EIA, which explain why the assessment is needed, and the importance of taking the planning stage of the project into account in the decision-making process.

Going back to Pakistan's EIA process, Ms. Khawaja noted that public participation is only at the review stage of the completed report prior to construction. The public has no ownership of the EIA since the process does not provide for the consideration of the people's inputs during the preparation stage. Expert committees are not interested in replying due to the lack of funds and manpower. In addition, she added that there are no guidelines on who will draft the EIA in Pakistan, and most government projects do not file an assessment report.

Ms. Khawaja concluded by discussing various judicial interpretations of EIA in Pakistan. In the Doongi Ground case concerning the conversion of a public park in Lahore into a cineplex, the court stopped construction, ruling that an EIA was needed and that construction without one was grossly illegal. In the Model Town case also involving a public park, the court discussed EIA principles, but ruled that the petition was premature because no conversion was being planned. In several other cases, the courts seemed to have ruled differently: the court did not require an EIA for a multistory residential building; in another instance, the courts did not stop construction of a bridge project despite the absence of an EIA.



## 4. KEY PRINCIPLES OF ENVIRONMENT IMPACT ASSESSMENT AND EXAMPLES OF REAL-WORLD APPLICATION

**MATTHEW BAIRD**, Barrister, Environmental Counsel; and Consultant, ADB

**Matthew Baird** began by providing a brief discussion on the concept of sustainable development and the Rio Declaration, citing several principles of the declaration that form the basis for the conduct of EIAs, in particular principles 10, 14, and 16. EIAs are a way to gather evidence so that a decision maker can make the most informed decision about a project and any requirements to mitigate or avoid potential adverse impacts. He added that private companies are aware of EIA principles, and they can be held accountable and responsible for upholding them.

According to Mr. Baird, the key aim of EIAs is to achieve sustainable development and create sustainable societies. EIAs allow public participation at each stage and decision makers to make decisions based on the best available information. In addition, a key principle of EIAs, as embodied in Principle 10 of the Rio Declaration, is the “democratization of the environment,” where a developer must ensure that society is not burdened with the cost of making a profit. This can be done through public participation, access to information, transparency in the process, and effective compliance and enforcement. Related to this are some mechanisms to achieve the goals of EIAs, including the precautionary principle; intergenerational and intragenerational equity; conservation of biological diversity and ecological integrity; improved valuation, pricing, and incentive mechanisms; and reliance on participatory approaches. He then discussed the Aarhus Convention and its principles on access to information and public participation in the decision-making process and the International Association of Impact Assessment principles of EIA.

Mr. Baird noted that EIAs are a valuable tool to assist decision making on a local, national, and regional level. This can be done through regional impact assessments, strategic environment assessments, and cumulative impact assessments. He then discussed EIA litigation by citing recent cases from Australia, Pakistan, and a potential case in Sri Lanka involving a World Heritage Site. He then concluded by citing other international documents with relevance to EIAs, including the Equator Principles (i.e., guiding principles for the financial industry) and the United Nations Global Compact (which asks companies to embrace, support, and enact, within their sphere of influence, a set of core values in the areas of human rights, labor standards, the environment, and anticorruption).

## 5. ENVIRONMENT IMPACT ASSESSMENTS IN INDIA—CHALLENGES FOR ENVIRONMENT AND DEVELOPMENT

**SANJAY UPADHYAY**, Advocate, Supreme Court of India, and Managing Partner, Enviro Legal Defence Firm

**Sanjay Upadhyay** began by stating that an EIA is a “hot potato” in India—some say that it is responsible for the falling Indian rupee because it has stopped major infrastructure projects in the country, leading to the creation of the Cabinet Committee on Infrastructure to fast track the approval process. He provided a brief background on India’s EIA system, followed by an identification of numerous amendments up to 2006 with new terms and approaches, most notable of which are the exemption from public hearings of activities such as offshore exploration, mining projects in lease areas up to 25 hectares, and units located in export processing and special economic zones.

Mr. Upadhyay then proceeded to identify several gaps in the system. The quality of EIA reports is questionable, and those who prepare them can be blacklisted for doing a poor assessment. There is a lack of social assessment, and the use of the “box-ticking” approach needs to end. In addition, using the size of the project and its pecuniary impacts as a basis for exemption from the EIA should be reconsidered. Public consultation methods are not a public consent-gathering process, as the process is ad hoc, and clear guidelines on what information must to be given to the public are needed. Lastly, EIAs are merely a notification and therefore a weak legal instrument. He then cited several specific examples in India involving road right-of-way projects, special economic zones, and hydropower and river projects.

As for the role of the court, Mr. Upadhyay noted that an overzealous judiciary that focuses on the micromanagement of environment issues fails to take into account its impact on local communities (e.g., removal of slums, hawkers, and demolition of unauthorized colonies). Cumulative impact assessments are not considered by the courts and rely mostly on political statements. In addition, a dangerous situation arises when the judiciary decides not to interfere because it is a matter of national policy.

In conclusion, the speaker suggested that there is a need for a law on EIAs in India, as notifications will not suffice. India must go beyond EIAs and expand the concept of environmental due diligence as a preventive measure that will, in turn, reduce the cases in court. He added that there must be a focus on land use and land categories, including formal titles, nonformal claims, and impacts on livelihoods and the land.

## **C** CHALLENGE 3: ACCESS TO ENVIRONMENTAL JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION

### 1. BACKGROUND

The term “environmental justice” first rose to prominence through the environmental justice movement in the United States, which began in the 1970s.<sup>42</sup> Its origin is also often traced back to the struggles for equal rights and recognition of the minority populations in the United States and South Africa, where some civil rights organizations focused their attention on the issue of perceived discrimination in environmental decision making.<sup>43</sup> It has been described as “the goal of achieving adequate protection from the harmful effects of environmental agents for everyone, regardless of age, culture, ethnicity, gender, race, or socio-economic status.”<sup>44</sup> The United States Environmental Protection Agency defines environmental justice

<sup>42</sup> K. Bosselman. 2006. Ecological Justice and the Law. In B. Richardson and S. Wood, eds. *Environmental Law for Sustainability*. Oxford: Hart Publishing. p. 131.

<sup>43</sup> S. Bell et al. 2008. *Environmental Law*. Oxford: Oxford University Press. p. 77.

<sup>44</sup> F. Liu. 2000. *Environmental Justice Analysis: Theories, Methods, and Practice*. Boca Raton: CRC Press. p. 12; and A. Harding. 2007. Access to Environmental Justice: Some Introductory Perspectives. In A. Harding, ed. *Access to Environmental Justice: A Comparative Study*. Leiden: Brill. Harding states that the definition of environmental justice is elastic:

This book ... involves an elastic definition of environmental justice, but since the principal concerns are the use of ‘legal gateways’ for ‘access[.]’ in practice the definition is procedural rather than substantive; in the same way ‘access to justice’ is usually concerned with issues surrounding how disadvantaged people are enabled to use the legal system, rather than issues surrounding the substantive justice of the results obtained. ‘Access to environmental justice’ can thus be interpreted in two slightly different ways, viz., as a means of entering the legal process for raising and resolving environmental disputes; or as the securing of environmental decisions that are made equitably as between different interests or communities (p. 4).

as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.<sup>45</sup>

Its focus is primarily “on the unjust distribution of benefits and burdens in the context of environmental use and protection,”<sup>46</sup> and on how the burdens of environmental harms and regulations are allocated among individual groups within society.<sup>47</sup> It champions democratic decision making as a way to ensure social equity in the distribution of the environmental costs and benefits of policy decisions.<sup>48</sup> In addition, central to the environmental justice argument is the claim that every person has a basic right to a healthy environment and that minorities should not be discriminated against when it comes to the quality of environments in which they live.<sup>49</sup>

Environmental justice is closely related to the concept of access to justice in environmental law. Principle 10 of the Rio Declaration states that “[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” This is also one aspect of facilitating public participation in environmental law, by ensuring that there is adequate access to a means of enforcing environmental law or seeking redress in resolving environmental disputes.<sup>50</sup>

Related to access to environmental justice is the concept of alternative dispute resolution, which has long been used by opposing parties around the world, especially in commercial disputes. There is also a growing trend among judiciaries to use nonjudicial alternative methods of settling cases. One author noted the following essential elements before mediation can take place: identification of parties, representation of parties by each interest, crystallization of issues, the incentive factor, and the implementation factor.<sup>51</sup>

More recently, nonjudicial conflict resolution methods are being used to settle environmental cases before courts. In the international arena, alternative dispute resolution has also been given due recognition in environmental cases. As one author put it, “disputes before international courts and tribunals [are] problematic...which means that non-legal routes are generally preferred, but if international disputes need to be resolved formally, they tend to be settled by arbitration.”<sup>52</sup> Some commentators have perceived a greater role for adjudication since the mid-1990s: “[T]he adjudicative function has assumed increasing importance in interpreting and applying—and even developing—the rules of international law in the field of environment” (footnote 52). Another author stated that the role for mediation in terms of environment dispute resolution “lies in the area of pre-hearing consultation directed primarily at the scoping of and/or settling of issues in dispute among the parties involved...provided the criteria necessary to undertake mediation are present and the parties are willing, a mediation process may assist in narrowing the issues that must be dealt with at a public hearing.”<sup>53</sup>

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<sup>45</sup> United States Environmental Protection Agency. Environmental Justice. <http://www.epa.gov/environmentaljustice>

<sup>46</sup> K. Bosselman. 2006. *Ecological Justice and the Law*. In B. Richardson and S. Wood, eds. *Environmental Law for Sustainability*. Oxford: Hart Publishing. p. 131.

<sup>47</sup> J. Salzman and B. H. Thompson. 2007. *Environmental Law and Policy*. 2nd ed. New York: Foundation Press. p. 38.

<sup>48</sup> B. J. Richardson and J. Razzaque. 2006. Public Participation in Environmental Decision Making. In B. Richardson and S. Wood, eds. *Environmental Law for Sustainability*. Oxford: Hart Publishing. p. 173.

<sup>49</sup> Footnote 43, p. 77.

<sup>50</sup> Footnote 43, p. 336.

<sup>51</sup> M. Jeffery. 1988. Environmental Mediation: Its Proper Role within Existing Adjudicative Assessment and Approval Processes. In D. Craig et al., ed. 2002. *Capacity Building for Environmental Law in the Asian and Pacific Region*. Manila: ADB. p. 244.

<sup>52</sup> Footnote 43, p. 155.

<sup>53</sup> Footnote 51, p. 244.

The following discussions provide perspectives on how some South Asian countries use alternative dispute resolution to settle environmental cases and disputes.

## 1. PERSPECTIVE FROM INDIA

**JUSTICE DHANANJAYA CHANDRACHUD**, Judge, High Court of Bombay, India

**Justice Dhananjaya Chandrachud** opened with the statement that alternative dispute resolution is not music to the ears of contemporary judges, as it appears as an alternative to the courts and seeks to substitute the magistrates. He then posited that alternative dispute resolution exists because litigation has its drawbacks: there are usually delays, and regular court proceedings result in an adversarial proceeding leading to the breakdown of harmony and relationships. With regard to environmental justice, traditional court proceedings have other limitations, including the scientific and technical uncertainty of the data assessed, lack of scientific training for judges, procedural standing, jurisdiction, and bar of limitation.

Given this, alternative dispute resolution and mediation can build consensus among key stakeholders (i.e., the community, the project proponent, and the regulator and agency of the government) to address all areas of concern in a holistic manner and develop innovative responses to environmental challenges. It is a voluntary, nonbinding, and facilitative process for dispute resolution. Justice Chandrachud then stated that international law has carved out a role for mediation in environmental adjudication citing the 1987 Montreal Protocol, Agenda 21, and the Convention on Biological Diversity. However, this has not been adequately tapped and realized.

According to Justice Chandrachud, alternative dispute resolution and mediation are important because they promote the autonomy of stakeholders and give voice to marginalized communities, thereby promoting personal empowerment and dialogue. They also provide minimal procedural and evidentiary requirements as well as a harmonious, as opposed to a confrontational, setting. He added that there is a need to establish mediation monitoring committees and promote mediation training for all stakeholders. Mediation awareness programs can also be undertaken for the community as well as for members of the judiciary. Mediation between the regulator and the polluter can also be explored to ensure voluntary compliance with norms and rules, and ensure that the needs and interests of the community are protected.

Justice Chandrachud concluded by providing a revised definition of alternative dispute resolution as “appropriate dispute resolution”—it is not meant as a substitute, but as a supplement for the courts where mediation and alternative dispute resolution are desirable.

## 2. PERSPECTIVE FROM BANGLADESH

**JUSTICE MIRZA HUSSAIN HAIDER**, Supreme Court of Bangladesh

**Justice Mirza Hussain Haider** began his presentation by recalling some public interest litigation cases started by the Bangladesh Environmental Lawyers Association, of which he was a pioneer. He noted one case wherein the Bangladesh Environmental Lawyers Association was able to stop an election because it would cause an environmental hazard. In another case, the Supreme Court ordered doctors on strike to return to work on the basis of the constitutional right to life, since denying health care to the people was a violation of the said right.

He then went on to discuss provisions on environmental justice found in the Constitution and in other relevant laws. In particular, on alternative dispute resolution, the Bangladesh Environment Conservation Act of 1995 allows the director general to hold public hearings, or take other measures, in resolving disputes or issues, such as mediation. On the three environmental courts in Bangladesh, Justice Haider said that 1,123 cases have been filed since 2009: 424 have been disposed of and 699 are still pending. The issues tackled by the courts include the manufacture and sale of polyethylene, discharge of excessive environmental pollutants by industries, industries and brick kilns operating without environmental clearances, cutting of hills, vehicle emissions injurious to the environment, illegal and unplanned construction, and noise pollution.

Finally, Justice Haider said that factors impeding environmental justice include legal and judicial issues, as well as political, social, and economic ones. He noted that the environment is “still a footnote,” due to poverty and inequality of parties, lack of clear rules and access to information, lack of organization by communities, limited scientific and technical expertise and understanding, restrictive interpretation of legal provisions, and issues of enforcement. In conclusion, the justice suggested that alternative dispute resolution be interpreted to mean as “active or appropriate dispute resolution.”

### 3. PERSPECTIVE FROM PAKISTAN

**JUSTICE SYED MANSOOR ALI SHAH**, Judge, Lahore High Court, and Member, Committee for Enhancing Environmental Justice

**Justice Syed Mansoor Ali Shah** started by recalling the discussions during the First South Asia Judicial Roundtable on Environmental Justice, wherein the difference between the conventional notion of justice and environmental justice was highlighted. He noted that “nature” is the silent necessary party in court, but nobody represents nature. An understanding of legal principles is not enough, and there is a need to use environmental science and other topics in deciding environmental cases. The justice then pointed out that judicial philosophy requires re-setting; that is, it is not simply granting relief to one party or the other, but about protecting nature and the environment and considering its impact on the communities affected. Thus, there is a need to begin institutionally developing environmental justice.

After the Bhurban Declaration and upon the directive of the Chief Justice of Pakistan, Justice Shah noted that “green benches” were established in all 5 high courts and 133 district and session courts of Pakistan, which were in addition to the environmental tribunals constituted under the law. As a result, an increase in access to environmental justice can be gauged from the cases filed in Punjab since the declaration. He added that during Fridays, the whole structure of his court in Lahore changes because it has been earmarked as a “green day” to hear only environmental cases.

Justice Shah subsequently discussed suggestions on how to take environmental justice to the next level. “Green judges” have to be provided with constant training to build their expertise, and must have an appreciation of nature and an environmental conscience. Mandatory, structured, and meaningful public hearings should be undertaken in addition to efforts to develop effective environmental governance and capacity building of environmental protection agencies. He emphasized the need to balance environment and development and taking a preventive rather than a reactive approach. Regional cooperation in SAARC should be fostered and improved through specialized training of judges, exchange of innovative judicial techniques and case law, and establishment of a judicial “green portal” or discussion group.



On alternative dispute resolution, the justice pointed out that he is opposed to the concept as applied to the environment, viewing it as “adverse” dispute resolution. He noted that alternative dispute resolution in environmental cases is broader and can take the form of public hearings and consultations, free access to information, alternative solutions, negotiations, and appointment of commissions by the courts. He stressed that alternative dispute resolution has to be cautiously applied to environmental cases since mutual agreements between the parties cannot overshadow or marginalize the adverse effects on the environment. The mediated solutions must pass the sustainability test or meet the goals of sustainable development. Environmental inequity cannot be promoted, and disproportionate environmental solutions cannot be encouraged.



#### 4. ENVIRONMENTAL JUSTICE—FROM CLAIMING TO CREATING THROUGH ALTERNATIVE DISPUTE RESOLUTION

**HARSHA FERNANDO**, Attorney at Law and Consultant Trainer, Sea-Change Partners, and Consultant, ADB

**Harsha Fernando** stated that a total “sea change” is needed to deal with environmental disputes. The traditional way of diagnosing conflict is not enough if sustainable results in the environment are to be achieved. He added that there are no winners in environmental cases; all parties lose and suffer a loss. However, he pointed out that if one shows the parties that there is a way, there is a will.

Mr. Fernando presented a continuum of the conflict management and resolution process. He emphasized that parties should try to resolve disputes at the earliest possible opportunity. Private decision making through informal discussions and problem solving, negotiations, and mediation can help end conflict. He also presented an operational framework for mediation, which can help parties share a vision. The framework takes into account various aspects of mediation concerning communications, relationships, interests, criteria, options, commitments, and alternatives. Communication is needed to provide all information (both factual and emotional) and to enable both parties to understand the other, and not merely to hear one side. It is also important to look at the parties as stakeholders in the process, and not as parties to the conflict. This will help get to the real interests of all and allow the formulation of options based on the criteria of equity more than that of rule of law. The speaker emphasized that the process is critical in achieving this framework for mediation.

Mr. Fernando stressed that mediation is a different approach and not just an alternative process, able to provide interventions at various levels before it is too late. He added that alternative dispute resolution is a substitute, complement, or parallel to court processes although it involves different dynamics.

On environmental justice, the speaker noted that the debate is about the very foundation of life, and the quicker this is realized, the quicker environmental justice will be achieved. He noted some of the courts’ responses to this debate, such as the polluter-pays principle, standing in public interest litigation, use of the precautionary principle, intergenerational equity and trust, principles of nonregression, innovative remedies, judicial activism, and specialized courts. However, challenges still remain, especially that the

environment is still seen as a public policy issue outside of the sphere of the judiciary. The scientific and technical complexity of environmental cases also make it difficult for judges to offer injunctive reliefs and quick responses and decisions. There is also the challenge of addressing how environmental law is skewed as compared to the civil and political rights sphere, where instead of the minority being protected from the actions of the majority, environmental rights protect the majority from the actions of the few. Lastly, problems of regulatory capture exist in relation to conflicts between the executive and judicial branches.

In conclusion, Mr. Fernando suggested a new paradigm for environmental justice. There should be a focus and emphasis on intergenerational equity. It should also be made clear that in an ecosystem, everything is connected to everything else, and have global implications, as the entire world is affected by the changing environment and climate. As for mediation, he said that a good diagnosis and a good process will lead to environmental justice.

## D

# CHALLENGE 4: CAPACITY CONSTRAINTS

## 1. BACKGROUND

The role of law, as well as that of law enforcement, in the protection of the environment assumes a significant dimension, although one cannot deny the limitations of law to deal with the wide-ranging complexities that underlie environmental issues, the socioeconomic and political dynamics that can turn law into an instrument of domination in the hands of vested interests, and the very formalistic structure of the legal system that can deter the victims of environmental injustice from seeking legal remedies.<sup>54</sup> As for the judiciary, its role in the implementation and enforcement of international environmental law was recognized in the United Nations Environment Programme's Montevideo Programme III, adopted in 2001, which identified the judiciary as one of the key target groups for capacity building.<sup>55</sup> In addition, the Johannesburg Principles on the Role of Law and Sustainable Development affirmed “that an independent judiciary and judicial process [are] vital for the implementation, development, and enforcement of international environmental law.” (footnote 55)

Corollary to the development of the principles above came the growth of specialized environmental courts, often referred to a “green benches.” Environmental courts, as well as tribunals with expertise in environmental matters, have been increasingly recognized for their accomplishments and further potential in promoting ecologically sustainable development.<sup>56</sup> The different environmental courts around the world focus on resolving environmental, natural resources, land use and development, and other related issues.<sup>57</sup> This is a testimony to the growing trend of establishing specialized judicial and quasi-judicial institutions to provide access to justice in environmental matters.<sup>58</sup> The rationale for special environmental courts is that, because many environmental issues are assumed to be highly complex and technical, they require specialized institutions for evaluation of claims and evidence.<sup>59</sup>

<sup>54</sup> M. Chander. 1997. Making the Law Work for the Environment. *Asia Pacific Journal of Environmental Law*. 2 (4), pp. 349–359.

<sup>55</sup> C. Redgwell. 2007. National Implementation. In D. Bodansky et al., eds. *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press. p. 931.

<sup>56</sup> T. Lin, et al. 2009. *Green Benches: What Can the People's Republic of China Learn from Environment Courts of Other Countries*. Manila: ADB. p. 1.

<sup>57</sup> G. Pring and C. Pring. 2009. *Greening Justice: Creating and Improving Environmental Courts and Tribunals*. Washington, DC: The Access Initiative. p. 1.

<sup>58</sup> Footnote 57, p. xi.

<sup>59</sup> Footnote 48, p. 187.

Despite the positive developments in the judiciary, challenges and problems remain. To highlight the need to continuously develop and improve institutions, a 2005 ADB report noted that to reap the full benefits of sustained economic growth, countries must address long-standing issues of governance and strengthen their legal and institutional frameworks.<sup>60</sup> One judge stated that environmental law is perhaps the most challenging area facing the world's judiciary today, yet it is one of the areas of the administration of justice with which the judiciary is least familiar and least equipped to handle, whether by way of concepts, procedures, background information, or access to relevant materials.<sup>61</sup> Particular challenges that may need to be addressed include dealing with scientific issues, managing uncertainty, sustainable development, diversity of issues and setting, individuals and society, economics, and retroactive effects.<sup>62</sup>

The speakers and presenters below discussed the different capacity constraints faced by their respective judiciaries. They also presented ongoing and future plans and programs to address these issues.

## 1. PERSPECTIVE FROM BANGLADESH

**CHIEF JUSTICE MD. MUZAMMEL HOSSAIN**, Supreme Court of Bangladesh

**Chief Justice Md. Muzammel Hossain** stated that although Bangladesh has made little contribution to climate change, yet it is the most climate-vulnerable. The country's high population and poverty rate have aggravated the situation, and the environmental conditions of the country are at deteriorating at an alarming rate. On this note, the chief justice discussed the Johannesburg Principles on the Role of Law and Sustainable Development and the Rio Declaration. The principles stress the vital role of the judiciary and environmental law in the enhancement of public interest in a healthy and secure environment, and the declaration reasserts the importance of access to judicial and administrative proceedings to the promotion of sustainable development.

Emphasizing once more Bangladesh's climate change vulnerability, the chief justice noted that a 1-meter rise in sea level will inundate one-third of the country, resulting in mass migration and cumulative pressure on limited resources. This is exacerbated by Bangladesh being one of the most densely populated countries in the world, with a population of 140 million on a land surface area of only 143,998 square kilometers. Also, five major environmental issues indicate the deteriorating environmental conditions of the country: land degradation, water pollution and scarcity, air pollution, biodiversity, and natural disasters.

Chief Justice Hossain cited Bangladesh as a signatory of almost all international conventions and treaties on the conservation of the environment and the promotion of biodiversity, and the country has updated its national legal framework on the environment, in particular through amendments to the Constitution and the creation and designation of environmental courts. However, the environmental justice system is developing and needs significant work before coherence is ensured, judicial principles are settled, and the system responds adequately to steadily increasing demand.

Despite the continuing development of environmental justice, the chief justice cited several constraints that the judiciary faces. There is a lack and ambiguity of substantive legislation and the problem of overlapping jurisdictions. The judiciary also has to deal with a backlog of cases; inadequacy of remedies, sanctions, and enforcement mechanisms; and procedural limitations. There are also knowledge and information gaps on

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<sup>60</sup> ADB. 2008. *Report from the ADB Symposium on Challenges in Implementing Access to Justice Reforms*. Manila.

<sup>61</sup> United Nations Environment Programme. 2005. *Judicial Handbook on Environmental Law*. Geneva. p. xvii

<sup>62</sup> Footnote 61, pp. xxi–xxii.

scientific and public health issues, and judges need training for relevant skills and specializations. There is a lack of sensitivity to environmental issues from the bar and assistance from government legal officials, in addition to the inadequate capacity and expertise of government agencies responsible for environmental administration. The country also needs an integrated approach among all branches of government.

Chief Justice Hossain stated that there are ongoing efforts to address these constraints. The Judicial Administration Training Institute provides training for judges on the environment, environmental law, and justice. More importantly, the Supreme Court of Bangladesh is highly sensitized about the importance and necessity of conservation and the court's important and proactive role in combating activities detrimental to ecological balance and the environment. The chief justice ended by saying that active environmental citizenship is the need of the day.

## 2. PERSPECTIVE FROM SRI LANKA

**JUSTICE PRIYASATH DEP**, Supreme Court of Sri Lanka

**Justice Priyasath Dep** started his speech by stating that Sri Lanka has numerous acts and ordinances on conservation and the protection of natural resources and the environment. Primary among these laws is the National Environment Act No. 47 of 1980, which provides for the protection, management, enhancement, maintenance, and regulation of the environment; prevention, abatement, and control of pollution; and the creation of the Central Environment Authority. This law is complemented by other laws such as the Forest Ordinance, Flora and Fauna Protection Ordinance, Conservation Act, and Marine Pollution Prevention Act.

Despite having adequate laws and a good legal framework for the protection of the environment, including updated laws in line with international obligations, issues still remain. Enforcement of laws and the lack of financial, human, and technical resources is a major issue. Authorities do not have adequate equipment to deal with and investigate matters. There is also a need to raise the standards of investigation by using modern equipment and building the capacity of prosecutors. In addition, the justice pointed out the importance of the cooperation of the three organs of government for the successful implementation of laws.

In all this, the judiciary plays an important role. Standards and judicial training must be improved, especially for the superior courts, whose judges are deemed “jacks of all trades, masters of none.” The selection process should also be transparent, and only competent officers should be recruited. This should go hand-in-hand with merits for improvement and promotions. This can add to the existing jurisprudence of Sri Lanka, where in one case the court used intergenerational equity and the common right of the public to use and benefit from a park.

Sri Lanka will host the Third South Asia Judicial Roundtable on Environmental Justice.

## 3. PERSPECTIVE FROM BHUTAN

**CHIEF JUSTICE SANGAY KHANDU**, High Court of Bhutan

At the beginning of his presentation, **Chief Justice Sangay Khandu** proudly said that Bhutan is on the “safer side” in regard to environmental issues. He could not identify any capacity constraint for

environmental protection, but cautioned that the country cannot take things for granted and be complacent because of the transboundary nature of issues. He then recalled the provisions of the Constitution making every Bhutanese a trustee of the environment, which promotes intergenerational and intragenerational equity. The justice also noted the Buddhist teachings on the coexistence between man and the environment; since all judges are Buddhists, they are thus charged with protecting life and the environment through their judgments.

The justice cited four major enemies of the environment: poverty, population pressures, nature, and human-made disasters. Given these, the judge's role is not merely to adjudicate but to explain the laws to the relevant parties. Thus, the "weapon" needed is adequate knowledge: if judges are ill-equipped on the environment, they will not be in a position to explain the laws and convince the people of environmental consequences. He noted that there are no specialized judges on the environment in Bhutan, but some have taken subjects and courses on environmental law. With rapid development taking place, he expects environmental cases to come to the courts in the future, but without adequate knowledge, this may lead to a miscarriage of justice.

To address these issues, Justice Khandu noted the following measures that Bhutan is taking to build and develop capacity: (i) establishment of the research and training bureau of the judiciary, (ii) holding of a judicial conference every 2 years, (iii) consultative meetings with relevant agencies, (iv) coordination workshops, and (v) establishment of a law college, where environmental law will be incorporated into the curriculum.

## 4. PERSPECTIVE FROM INDIA

**JUSTICE DHANANJAYA CHANDRACHUD**, High Court of Bombay, India

August is a sacred month for Hindus. They believe that when you catch and defang a snake and pour milk over its head, you will earn a place in heaven. However, in 2007, there was a petition that challenged this religious ritual because it violates the Wildlife Protection Act. The judge stalled, and the petition was struck down because outlawing this practice will conflict with the freedom of religion.

With this example, **Justice Dhananjaya Chandrachud** illustrated that there are two ends to the capacity constraint spectrum: (i) the capacity of a judge to understand that the environment cannot afford any delays due to religious grounds, and (ii) the sheer enormity of the task. Judges traditionally concern themselves with core crimes (e.g., murder, theft, and rape), with little importance for crimes against the environment. Fines are imposed for environmental violations, while life sentences are given for crimes like murder or rape. Judicial training never taught about Mother Earth and the environment in schools; therefore, there is a need for increased training from outside influences and other disciplines, including from prosecutors, lawyers, academe, and activists. Judges should also listen to the critique of the community and the public. The speaker stated that efforts should be undertaken to inculcate in judges a sense of compassion for the environment. Young judges should be taken to national parks to develop the basic values needed for judgment. Judges should also know the acceptable levels of risk and possibility of scientific uncertainty.

Justice Chandrachud then suggested how to conduct environmental adjudication and to identify the doctrines of environmental law. First, it is important for judges to investigate properly and fairly, and to ensure that there is a flow of information to the courts since in most cases, the scrutiny of the government,



the holder of the information, is at issue. Second, immediate protective measures and intervention are important to protect the environment; judges should proactively seek out cases and not wait for cases to come to them. Next, judges should structure the dialogue by identifying the key stakeholders. Further, court processes should not be abused and misused, and judges should note that the overuse of judicial authority breaks down institutional integrity. Fifth, it is important to have an action plan for intervention and to identify priorities. Sixth, regulatory agencies should be assigned specific functions. Next, judges should strive to build coalitions. Judges should then tackle specific problems and ensure that court orders are implemented. Lastly, there is a need to branch out to the systemic and not just the specific. The justice concluded by saying that the creation of remedies ensures social legitimacy, which ultimately sustains or erodes the judicial process.

## 5. PERSPECTIVE FROM NEPAL

**JUSTICE ANANDA MOHAN BHATTARAI**, Acting Chief Judge, Appellate Court of Nepal

**Justice Ananda Mohan Bhattarai** stated that an important part of capacity building should be the institution of environmental studies as a mandatory subject in law schools. According to Dr. Bhattarai, the training of judges in Nepal on environmental law started in the 1990s, even before the judicial academy was established. Since then, the academy has been providing training for environmental law and environmental justice. He noted the enormous capacity of the judiciary to streamline the course of environmental justice and laws, and give appropriate directives to stakeholders, including the government. This then creates a situation wherein the environment is secure for the people.

However, he stated, constraints are not only that of the judiciary, but of the entire justice system. The benchmark for environmental justice has not been fixed, and courts have been developing this concept to the needs of their respective societies. Courts have to look at the macro picture, the constitution, and policy instruments, and from there, begin a dialogue with the government and policy makers for the inscription of the right to a healthy environment where it is lacking.

Another difficulty encountered in environmental adjudication is created by chaotic legal frameworks. He cited the forest laws of Nepal drafted in the 1920s, which were copied after India's forestry laws that were developed for the plains. These have, however, been revised, allowing local people to decide for themselves what regulations are appropriate through community-based initiatives. The judge added that conservation laws should take a "local people-first approach" through recognizing their rights over resources, involving them in decision making and benefit sharing, and shifting the focus away from the top-down development approach. Dr. Bhattarai further stated that there is a need for sophisticated laboratories to determine the occurrence as well as the gravity of an environmental crime and not unnecessarily punish the poor, who have few alternatives, in the name of wildlife.

In conclusion, Dr. Bhattarai said that many international treaties and instruments, such as the Convention on Biological Diversity, are very abstract and need to be made concrete. Harmonization of laws must be done while keeping in mind the basic survival right of the people. A holistic approach should be used in looking at cases and issues. Finally, he recognized the capacity of the supreme courts of the region for the conservation and protection of the environment.

# IV. DISCUSSION ON THE MEMORANDUM OF UNDERSTANDING FOR CO-OPERATION AMONGST THE SOUTH ASIA JUDICIARIES



SOURCE: Royal Court of Justice of Bhutan.

The Draft Memorandum of Understanding for Co-operation Amongst the South Asia Judiciaries was circulated to the representative judges of the member countries so that they could take it back to their respective chief justices for further consultation. The draft declaration was also circulated to the participants for their review and comments. ADB collected all of the comments and incorporated them into the final draft.



# DRAFT MEMORANDUM OF UNDERSTANDING FOR CO-OPERATION AMONGST THE SOUTH ASIA JUDICIARIES

## I. THE COOPERATION PARTNERS

1. The judiciaries of the Islamic Republic of Afghanistan, the People's Republic of Bangladesh, the Kingdom of Bhutan, India, the Republic of Maldives, Nepal, the Islamic Republic of Pakistan, and the Democratic Socialist Republic of Sri Lanka (hereafter "the Judiciaries"), being equally desirous of establishing a framework for cooperation to support their role in ensuring sustainable development and protection of the environment in their countries and in the South Asia region, enter into this Memorandum of Understanding in order to significantly improve the development, implementation, and enforcement of, and compliance with, environmental law.

## II. THE AIMS AND GUIDING PRINCIPLES

2. The Judiciaries acknowledge that the great political, economic and social changes that have taken place in their countries in the recent past necessitate a common effort to assess, define and establish a framework for cooperation to improve the development, implementation and enforcement of, and compliance with, environmental law. They appreciate that the cooperation that they seek to foster will facilitate the realization of their Governments' common aim of poverty reduction and environmentally sustainable development. They recognize that, given the scale and complexity of the challenges that confront them, collaboration is essential to achieve their common aim.

3. The Judiciaries will work together to:

- (a) share information among South Asian judiciaries on South Asia's common environmental concerns and challenges;
- (b) highlight the critical role of South Asian senior judiciaries as leaders in national legal communities and champions of the rule of law and environmental justice, with the ability to develop environmental jurisprudence; and
- (c) develop a process for continuing and expanding the cooperation and engagement on environmental issues of the senior judiciaries in the Member States of the South Asian Association for Regional Cooperation (SAARC).

4. The cooperation among the Judiciaries will be guided by the following principles:

- (a) recognition that natural resources are of immense value to all South Asian countries, contributing to their economic and social well-being and the livelihoods of their peoples, and that the challenge of sustainable development and addressing the scarcity of natural resources is common to all South Asian countries and requires urgent attention by all Governments, their judiciaries, and their citizens;
- (b) determination to promote in a constructive and mutually beneficial manner the development, implementation and enforcement of, and compliance with, environmental law to support sustainable development and the conservation and sustainable use and management of the natural resources in all South Asian countries;

- (c) recognition that while the role of the Judiciaries is pivotal in resolving environmental issues, they cannot work alone and that it is equally important that they engage Attorneys General, Advocates General, prosecutors, Directors of Judicial Academies; national and sub-national environmental authorities, all government institutions, private sector entities and environmental law academicians, practicing attorneys, and environmentalists and members of civil society in environmental enforcement processes, particularly from the point of view of complying with orders and directions issued by the Judiciaries;
- (d) willingness to promote interdependent regional cooperation on environmental enforcement issues, taking into account the benefits that could be derived and the detriments that could be avoided or mitigated from such cooperation; and
- (e) acknowledgment of the necessity to provide an appropriate, efficient and functional framework for coordinating their individual and joint efforts to support natural resource conservation and sustainable development in South Asia and for sharing their efforts with the international community.

### III. ASPECTS OF THE PROPOSED COOPERATION

5. Cooperation among the Judiciaries will focus on their shared priorities for the development, implementation, and enforcement of, and compliance with, environmental law. In particular, cooperation among the Judiciaries may include initiatives to:

- (a) disseminate information on environmental challenges and legal issues, and best practices in environmental adjudication among themselves, whilst acknowledging the differences among their respective legal systems, on the website of the Asian Judges' Network on Environment;
- (b) strengthen specialized environmental tribunals and provide environmental training for the judiciary and other members of the legal fraternity;
- (c) invite members of the South Asian Judiciaries to share their respective experiences and participate in training programs for judges from the South Asia region;
- (d) implement existing rules of procedure for environmental cases and develop the same where they do not exist, which may include a flexible approach to legal standing, special rules of evidence for environmental cases, expeditious disposal of cases, special remedies, injunctive relief, and other innovative environmental processes;
- (e) ensure that judicial decisions on environmental cases are shared within the Asian Judges' Network on Environment and made available to the public;
- (f) encourage law schools to include environmental law in their curriculum;
- (g) provide environmental law training to judges through judicial academies, including making such training available for members of lawyers' professional associations;
- (h) develop a system to recognise whenever exceptional contribution is made by judges and environmentalists for the cause of environment;
- (i) promote the idea of a South Asia Convention on Environmental Justice;
- (j) establish green benches in courts for dispensation of environmental justice; and
- (k) recommend that the right to clean and healthy environment be incorporated as a fundamental right in the constitutions of their countries.

## IV. CONSULTATIONS

6. The Judiciaries recognize that it is important to arrange periodic consultations to review the progress in planning and implementing the aspects of the cooperation, nationally and regionally.

They agree to hold a South Asia Justices' Conference on Environment annually on a rotational basis to foster cooperation on environment, as a subregional group of the Asian Judges' Network on Environment, and to share the vision of this Memorandum of Understanding and the annual Conferences with members of the judiciary in their respective countries.

7. Technical staff of the Judiciaries will meet formally and informally, as required and as mutually agreed, to prepare an Action Plan to implement the cooperation described in paragraph 5 and make arrangements for its implementation.

## V. EXCHANGE OF INFORMATION

8. The Judiciaries recognize that effective cooperation depends on open, comprehensive and regular exchange of information. They agree to make appropriate arrangements to share with each other and, as appropriate, among legal professionals, law schools, and the general public, information on South Asian countries' common challenges in enforcing, and complying with, environmental law through the Asian Judges' Network on Environment.

9. The Judiciaries will, within a mutually acceptable period following the signing of this Memorandum of Understanding, prepare and share information on:

- (a) decisions of their respective courts on issues of environmental law;
- (b) elements of curricula for orientation for judges and training for prosecutors and law enforcement officers on environmental law;
- (c) elements of curricula for teaching environmental law in universities; and
- (d) rules of procedure for specialized environmental courts.

10. Consultation and exchange of information and documents pursuant to paragraphs 6–9 will be without prejudice to arrangements that may be required to safeguard the confidential and restricted character of certain information and documents. If any Judiciary regards any such information to be confidential or restricted, it will give written notice to that effect and the other Judiciaries will ensure the observance of such confidentiality and/or restricted circulation of such information.



## VI. FOCAL POINTS

11. The Judiciaries hereby designate the following focal points for all purposes associated with this Memorandum of Understanding:

- (a) for the Islamic Republic of Afghanistan:  
[insert title and contact details of the designated representative]
- (b) for the People's Republic of Bangladesh:  
[insert title and contact details of the designated representative]
- (c) for the Kingdom of Bhutan:  
[insert title and contact details of the designated representative]
- (d) for India:  
[insert title and contact details of the designated representative]
- (e) for the Republic of Maldives:  
[insert title and contact details of the designated representative]
- (f) for Nepal:  
[insert title and contact details of the designated representative]
- (g) for the Islamic Republic of Pakistan:  
[insert title and contact details of the designated representative]
- (h) for the Democratic Socialist Republic of Sri Lanka:  
[insert title and contact details of the designated representative]

12. The respective focal points will be responsible for:

- (a) establishing effective communication and liaison with the other focal points;
- (b) facilitating the implementation of all aspects of this Memorandum of Understanding;
- (c) promoting this Memorandum of Understanding and the cooperation activities undertaken under it, within their respective Judiciaries and, as appropriate, with external partners;
- (d) convening the periodic consultations that are agreed to be held in accordance with this Memorandum of Understanding; and
- (e) monitoring the implementation of this Memorandum of Understanding and jointly evaluating the cooperation activities that are undertaken among the Judiciaries.

## VII. TERM, AMENDMENT, AND TERMINATION

13. This Memorandum of Understanding shall take effect from the date it has been signed by the authorized representatives of all of the Judiciaries. It shall be effective [for [insert a period of time].

14. This Memorandum of Understanding may be amended by mutual written consent of the Judiciaries.

15. This Memorandum of Understanding may be terminated by mutual agreement of the Judiciaries, following six months' prior notification in writing by one or more focal point(s) to all of the other focal points.

## VIII. DEALING WITH PROBLEMS

16. This Memorandum of Understanding has been developed and finalized in a spirit of mutual cooperation and assistance. It will be interpreted in light of its primary purpose, which is to enable the Judiciaries to ensure the achievement of their common aim of establishing a framework for cooperation to significantly improve the development, implementation, and enforcement of, and compliance with, environmental law. Any difference of opinion concerning this Memorandum of Understanding or any of the cooperation activities required to implement it will be resolved through amicable dialogue.

## IX. GENERAL PROVISIONS

17. This Memorandum of Understanding is not intended to create legal relations between the Judiciaries or to impose formal obligations on them.

18. No provision of this Memorandum of Understanding shall be construed so as to interfere in any way with the sovereignty and independent decision-making autonomy of the Judiciaries with regard to their respective affairs.

This Memorandum of Understanding is signed by the duly authorized representatives of the Judiciaries (in English, [insert any other languages if the MoU will be translated], all texts being equally authentic. In the case of any inconsistency, the text in the English language, in which the Memorandum of Understanding was drawn up, shall prevail).

## V. CLOSING REMARKS



■ Justice Tshering Wangchuk delivering the closing remarks for the Royal Court of Justice of Bhutan.  
SOURCE: Royal Court of Justice of Bhutan.

## JUSTICE TSHERING WANGCHUK, Supreme Court of Bhutan

**Justice Tshering Wangchuk** described the conference as an engaging endeavor with a promise of environmental justice for one-fifth of the world's population and two-fifths of the world's poor who are vulnerable to calamities triggered by climate change and environmental degradation. On behalf of ADB and the Royal Court of Justice of Bhutan, he thanked all of those who participated and made the conference possible, noting that a conference only becomes a success if the resource persons, presenters, and participants arrive.

Justice Wangchuk stressed that he is a firm believer that with the growth of roughly comparable judicial institutions across the region and the world, and with ever-increasing similarity in the fundamental problems faced by all, there is much to be learned from the judicial solutions adopted by other countries and adapting them to suit the needs and circumstances existing in each nation. He added that it is very important that judges realize that the more they “step up to the plate” and lead, the more they ensure that action does not have to come from somewhere else. Justice Wangchuk ended with a line from Aristotle: “People do as they see, and do likewise—people learn by actions of their leaders, not their words.”

## BRUCE LAWRENCE DAVIS, Vice-President, Administration and Corporate Management, ADB

**Bruce Lawrence Davis** began by thanking the Royal Court of Justice of Bhutan and the government and people of Bhutan for hosting the event. He also thanked the people who made the conference possible and recognized their efforts. He noted the growing interest of ADB members in this field, especially from SAARCLAW. He hoped for further engagement with SAARC, and looked forward to the establishment of a more permanent secretariat for the regional group.

He also cited three key messages that emerged from the roundtable: (i) the participants were made more aware of the pressing environmental challenges that imperil sustainable growth in South Asia, (ii) the various judiciaries were able to identify key challenges that they face in resolving environmental disputes, and (iii) there was recognition of a clear need for concrete judicial cooperation on environmental adjudication in the region.

In closing, Mr. Davis said that despite being known as an infrastructure bank, ADB wants to play a more important role in good governance and the environment, with key pillars being sustainable development and environmental issues. He hoped to continue the engagement and to welcome the participants in upcoming events in Manila and Sri Lanka.



■ VP Davis delivering his Closing Remarks.  
SOURCE: Royal Court of Justice of Bhutan.

# APPENDIX 1

## PROGRAM AGENDA





## SECOND SOUTH ASIA JUDICIAL ROUNDTABLE ON ENVIRONMENTAL JUSTICE

Taj Tashi Hotel, Thimphu, Bhutan  
30–31 August 2013

### PROGRAM AGENDA

ARRIVAL DAY: Thursday, August 29	
6:30 PM	<b>Welcome Dinner hosted by the Asian Development Bank (ADB)</b>
DAY 1: Friday, 30 August	
8:30 AM	<b>Registration</b>
INAUGURAL SESSION (Facilitator: Irum Ahsan)	
9:00–9:15 AM	<b>Opening Remarks</b> <ul style="list-style-type: none"> <li>• <b>Honorable Chief Justice Lyonpo Sonam Tobgye</b>, Chief Justice of the Supreme Court, Bhutan Royal Court of Justice</li> </ul>
9:15–9:30 AM	<b>Welcome Remarks</b> <ul style="list-style-type: none"> <li>• <b>Mr. Christopher H. Stephens</b>, General Counsel, ADB</li> </ul>
9:30–10:00 AM	<b>Keynote Address on Regional Environmental Cooperation in South Asia</b> <ul style="list-style-type: none"> <li>• <b>Prof. Haripriya Gundimeda</b>, Associate Professor, Department of Humanities and Social Sciences, Indian Institute of Technology; Member, expert committee set up by the Prime Minister to prepare a road map for green accounting for India; coordinator of the acclaimed International Project, the Economics of Ecosystems and Biodiversity for Local and Regional Policy Makers</li> </ul>
10:00–10:30 AM	<b>ADB's Role in Strengthening Environmental Governance and Rule of Law</b> <ul style="list-style-type: none"> <li>• <b>Irum Ahsan</b>, Counsel and Project Leader, ADB</li> </ul>
10:30–12:00 NN	<b>Recap of Bhurban Declaration on Environmental Justice and Introduction of the Delegates</b> <ul style="list-style-type: none"> <li>• Chair: <b>Justice Syed Mansoor Ali Shah</b>, Lahore High Court, Pakistan; Member, Committee on Enhancement of Environmental Justice</li> </ul> <p><i>Pakistan will present the Bhurban Declaration adopted at the first South Asian conference on Environmental Justice in 2012. Each delegation will make a brief introduction of members of their delegation and give brief remarks</i></p>
12:00–1:00 PM	<b>Lunch Break</b>

## PLENARY SESSIONS ON REGIONAL ENVIRONMENTAL CHALLENGES

*In each session, four experts will make their brief presentations on the related topics followed by framing of issues by the facilitator. The issues will then be presented for discussion. Participants will be invited to share their country experiences on these issues, identify problems and present possible solutions.*

1:00–2:30 PM

### CHALLENGE 1: CLIMATE CHANGE

Facilitator: **Matthew Baird**

- *Climate Change–Shifting the Regional Narrative in South Asia*, **Malik Amin Aslam**, Global Vice President, International Union for Conservation of Nature (IUCN); former Minister of State for Environment (Pakistan) and Climate Change Advisor (United Nations Development Programme [UNDP])
- *Glacial Lake Outburst Flood*, **Archana Vaidya**, Managing Partner, Indian Environment Law Offices (IELO)
- *Climate Change and Issues of Food Security*, **Sanath Ranawana**, Senior Natural Resources Specialist, ADB
- *Climate Change and UNDP's Response*, **Karma Raptan**, Head, Energy and Environment; Assistant Resident Representative, UNDP, Bhutan

*This session will focus on the broad issue of climate change and its effects in the South Asia region, with special focus on how the region is planning to cope with the challenge. Glacial outbursts, food security, water scarcity, and displacement issues will be the main areas of discussion.*

2:30–3:45 PM

### CHALLENGE 2: CONSERVATION OF NATURAL RESOURCES AND BIODIVERSITY

Facilitator: **Archana Vaidya**

- *Judicial Intervention and Conservation of Forest in India*, **Sanjay Upadhyay**, Advocate, Supreme Court of India, Managing Partner of the India's first environmental law firm, Enviro Legal Defence Firm
- *Biodiversity and Conservation in Bhutan*, **Dr. Tashi Yangzome**, Program Director, National Biodiversity Centre, Ministry of Agriculture and Forests, Bhutan
- *Transboundary Water Issues and Judicial Solutions*, **Hamid Sarfraz**, IUCN, Pakistan
- *Conservation of Biological Diversity: Some Reflections on the Legal Framework*, **Professor Dr. Bharat H. Desai**, Professor, International Law and Jawaharlal Nehru Chair in International Environmental Law, Jawaharlal Nehru University, India

*This session will focus on several issues impacting the conservation and maintenance of natural resources and biodiversity, how each country is tackling these problems and what challenges they face on the way.*

3:45–4:00 PM

### Coffee/Tea Break

4:00–5:00 PM

### CHALLENGE 3: ENVIRONMENT, HUMAN HEALTH AND ITS ECONOMICS

Facilitator: **Antonia Gawel**

- *Water, Human Health and Development: Perspective from India*, **Prof. Haripriya Gundimeda**, Associate Professor, Department of Humanities and Social Sciences, Indian Institute of Technology
- *Pakistani Perspective*, **Justice Syed Mansoor Ali Shah**, Lahore High Court, Pakistan
- *Bhutanese Perspective*, **Dago Tshering**, Research Coordinator, Royal Society for the Protection of Nature, Bhutan
- *Vultures, Veterinary Drugs and Human Health: The Unexpected Nexus*, **Dr. Scott Perkin**, Head, Biodiversity Conservation Programme, Asia, IUCN Asia

*This session will focus on the health issues directly linked with environmental degradation and how diseases are widespread due to increasing pollution and what is being done nationally and internationally to mitigate these problems.*

5:00–5:30 PM

### Photo Session

6:00 PM

### Dinner

## DAY 2: SATURDAY, 31 AUGUST

### PLENARY SESSIONS ON CHALLENGES FOR EFFECTIVE ENVIRONMENTAL ADJUDICATION AND ENFORCEMENT

*In each session, four experts will make their brief presentations on the related topics followed by framing of issues by the facilitator. The issues will then be presented for discussion. Participants will be invited to share their country experiences on these issues, identify problems and present possible solutions.*

9:00–10:30 AM

#### CHALLENGE 1: LIMITATIONS OF ENVIRONMENTAL POLICIES AND LAWS

Facilitator: **Sanjay Upadhyay**

- *Bhutanese Perspective*, Dasho Ritu Raj Chhetri, Member of Parliament, Royal Kingdom of Bhutan
- *Nepali Perspective*, Dr. Ananda Mohan Bhattarai, Acting Chief Judge of the Appellate Court, Nepal
- *Effectuation of International Environmental Law in National Policy and Law*, Prof. Dr. Bharat H. Desai, Professor, International Law and Jawaharlal Nehru Chair in International Environmental Law, Jawaharlal Nehru University, India (Presented by Matthew Baird, ADB)
- *Bangladeshi Perspective*, Rizwana Hasan, Advocate Supreme Court, Chief Executive, Bangladesh Environmental Lawyers Association (BELA)

*This session will focus on the domestic and international aspects of environmental policies, laws, regulations, standards and their limitations with special focus on administrative and regulatory institutional capacity and powers.*

10:30–10:45 AM

#### Coffee/Tea Break

10:45–12:15 NN

#### CHALLENGE 2: ENVIRONMENTAL IMPACT ASSESSMENT (EIA)

Facilitator: **Michael Peil**

- *Bhutanese Perspective*, Dr. Ugyen Tshewang, Secretary of the National Environment Commission
- *A Critique on EIA, its Legal Provisions, Practices, and Judicial Interpretations and Interventions in Pakistan*, Saima Amin Khawaja, Advocate High Court, Managing Partner Progressive Advocates and Legal Consultants, Pakistan
- *Key Principles of Environment Impact Assessment and Examples of Real-World Application*, Matthew Baird, Barrister, Environmental Counsel and Consultant, ADB
- *EIA in India—Challenges for Environment and Development—the Court’s Response*, Sanjay Upadhyay, Advocate, Supreme Court of India, Managing Partner of the India’s first environmental law firm, Enviro Legal Defence Firm

*This session will focus on this very crucial screening tool used for the enforcement of environmental law. Limitations of EIA, its judicial interpretations and case studies will also be discussed.*

12:15–1:30 PM

#### Lunch Break

1:30–3:00 PM	<b>CHALLENGE 3: ACCESS TO ENVIRONMENTAL JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS</b>  Facilitator: <b>Matthew Baird</b> <ul style="list-style-type: none"> <li>• <i>Indian Perspective</i>, Justice Dhananjaya Y Chandrachud, Judge, High Court, Bombay, India</li> <li>• <i>Access to Environmental Justice and Alternative Dispute Resolution Mechanisms—Bangladeshi Perspective</i>, Justice Mirza Hussain Haider, Supreme Court Division of High Court, Bangladesh</li> <li>• <i>Pakistani Perspective</i>, Justice Syed Mansoor Ali Shah, Lahore High Court, Pakistan</li> <li>• <i>Environmental Justice: From claiming to creating through ADR</i>, Harsha Fernando, Attorney at Law, Consultant Trainer, Sea-Change Partners of Singapore on Mediation and Negotiation; Consultant, ADB</li> </ul> <p><i>This session will focus on various judicial forums available and factors impeding environmental justice, including recourse limitations, availability of scientific and technical expertise and time constraints. This session will also present an option of alternative dispute resolution for resolving environmental disputes.</i></p>
3:00–4:30 PM	<b>CHALLENGE 4: CAPACITY CONSTRAINTS</b>  Facilitator: <b>Harsha Fernando</b> <ul style="list-style-type: none"> <li>• <i>Bangladesh Perspective</i>, Justice Md. Muzammel Hossain, Judge, Chief Justice, Bangladesh Supreme Court</li> <li>• <i>Sri Lankan Perspective</i>, Justice Priyasath Dep, Judge, Sri Lanka Supreme Court</li> <li>• <i>Bhutanese Perspective</i>, Justice Sangay Khandu, Chief Justice, High Court, Bhutan</li> <li>• <i>Indian Perspective</i>, Justice Dhananjaya Y Chandrachud, Judge, High Court, Bombay</li> <li>• <i>Nepali perspective</i>, Dr. Ananda Mohan Bhattarai, Judge of the Appellate Court, Nepal</li> </ul> <p><i>In this session, the speakers will share the judicial capacity building initiatives in their home countries and the challenges faced by the judiciary due to capacity constraints. This session will also discuss the importance of introduction of environmental law as a mandatory subject in law schools and for judicial trainings.</i></p>
4:30–4:45 PM	<b>Coffee/Tea Break</b>
4:45–6:00 PM	<b>DISCUSSION ON THE SOUTH ASIA MEMORANDUM OF UNDERSTANDING ON ENVIRONMENTAL JUSTICE AND FINALIZATION OF ROUNDTABLE DECLARATION</b>  <p><i>Bhutan will present the Draft Memorandum of Understanding Amongst the South Asia Judiciaries to promote collaboration for environmental justice.</i></p> <p><i>The session will also finalize the consensual statement integrating the key messages of the Roundtable.</i></p>
6:00 PM	<b>Closing Remarks</b> <ul style="list-style-type: none"> <li>• Honorable Justice Tshering Wangchuk, Justice of the Supreme Court, Bhutan Royal Court of Justice</li> <li>• Mr. Bruce Lawrence Davis, Vice-President (Administration and Corporate Management), ADB</li> </ul>
6:30 PM	<b>Dinner hosted by the Supreme Court of Bhutan</b>

## APPENDIX 2

# THIMPHU DECLARATION ON ENHANCING ENVIRONMENTAL JUSTICE IN SOUTH ASIA



# SECOND SOUTH ASIAN JUDICIAL ROUNDTABLE ON ENVIRONMENTAL JUSTICE

30–31 August 2013  
Thimphu, Bhutan



## Thimphu Declaration on Enhancing Environmental Justice in South Asia

The Second South Asian Judicial Roundtable on Environmental Justice, supported by the Judiciary of Bhutan and the Asian Development Bank was held in Thimphu, Bhutan on 30–31 August 2013. The Conference brought together chief justices, judges, court officials and environmental experts from Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka.

The key objectives of the roundtable were:

- (i) Enhancing understanding of shared environmental challenges within South Asia;
- (ii) Sharing challenges and successes in environmental adjudication experienced by different South Asian countries; and
- (iii) Furthering co-operation between South Asian judiciaries by advancing the Bhurban Declaration and agreeing to discuss a draft *Memorandum of Understanding* with their respective heads of judiciary.

The participants recognized a number of critical environmental challenges confronting South Asian countries. These include managing the current, and mitigating future impacts of climate change; conserving natural resources and biodiversity; and preventing pollution and its associated negative impacts on citizens of the region. Given the cross-border nature of environmental resources, it was suggested that studies should be undertaken to review the impacts of development activities on the people of the region. While the meeting acknowledged the efforts being made to address these challenges, it also discussed the significant actions that must be undertaken to ensure the effective implementation of existing environmental policies and laws.

In this regard, chief justices and judges recognized their own important and unique role in ensuring environmental preservation, by upholding constitutional rights and providing fair and comprehensive adjudication of environmental cases. This requires continued enhancement of the judiciary's capacity and knowledge on environmental issues, as well as the broader strengthening of the entire environmental enforcement mechanism.

Judges specifically recognized that the specialized nature of the subject warrants specialized treatment. Hence, there is a need to revisit the norms, values, and jurisprudence developed so far. Following from this, appropriateness of the judicial structure should be reviewed to ensure that institutional gaps within the judiciary are dealt with.

As host to this meeting, the Judiciary of Bhutan proposed to:

- (i) develop a Bench Book, compiling all national environmental acts, regulations, guidelines and cases, to facilitate adjudication of environmental cases brought before the courts;
- (ii) support capacity building of Bhutan's judiciary on environmental issues, and encourage the inclusion of environmental legal education in the legal curriculum in Bhutan;
- (iii) make specific environmental law resources available in the library of the Supreme Court of Bhutan;
- (iv) support the institutionalization of the South Asia Judges Network on the Environment within the South Asia Regional Co-operation in Law (SAARCLAW).

In addition to the above, the participants agreed to enhance collaborative efforts among judiciaries in the region. They proposed to explore the possibility of developing a regional approach for safeguarding the environment and share information on environmental justice. In particular, participants agreed to discuss the draft *Memorandum of Understanding for Co-operation between South Asian Judiciaries* with their respective heads of judiciaries. This MOU would further collaboration in areas including, but not limited to the following:

- (i) *Information Exchange*: Sharing of information on environmental judgments, challenges and legal issues, and best practices in environmental adjudication on the Asian Judges Network Website;
- (ii) *Capacity Building*: The need to build the capacity of judiciaries through judicial academies; build expertise through cross fertilization between South Asian countries by having exchange courses; and promote exchange of lessons learned between South Asian judiciaries on environmental adjudication; and
- (iii) *Strengthening the Judiciary's Focus on Environmental Issues*: Strengthen specialized environmental tribunals; establish green benches in courts where they do not exist; frame and implement rules of procedure on environmental cases where required.

Thank You & Tashi Delek







Source: Royal Court of Justice of Bhutan





PARTICIPANTS OF THE  
SECOND SOUTH ASIA  
JUDICIAL ROUNDTABLE ON  
ENVIRONMENTAL JUSTICE





## **Proceedings of the Second South Asia Judicial Roundtable on Environmental Justice**

*Thimphu, Bhutan*

*30–31 August 2013*

This publication documents the proceedings of the Second South Asia Judicial Roundtable on Environmental Justice, held on 30–31 August 2013 in Thimphu, Bhutan. It brought together chief justices, senior judges, and experts from various fields to consider common environmental challenges in the region, share experiences, and discuss opportunities for cooperation between judiciaries to enhance environmental adjudication and enforcement. The recommendations and the discussions led to the adoption of the Thimphu Declaration on Enhancing Environmental Justice in South Asia. The participants also agreed to the signing of the Memorandum of Understanding for Co-operation Amongst the South Asia Judiciaries, which aims to significantly improve the development, implementation, and enforcement of, and compliance with, environmental law.

### **About the Asian Development Bank**

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 approximately two-thirds of the world's poor: 1.6 billion people who live on less than \$2 a day, with 733 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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