



# PROCEEDINGS OF THE THIRD SOUTH ASIA JUDICIAL ROUNDTABLE ON ENVIRONMENTAL JUSTICE FOR SUSTAINABLE GREEN DEVELOPMENT

Colombo, Sri Lanka | 8-9 August 2014

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

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Printed in the Philippines.

ISBN 978-92-9257-058-3 (Print), 978-92-9257-059-0 (e-ISBN)  
Publication Stock No. RPT157563-2

#### Cataloging-In-Publication Data

Asian Development Bank.

Proceedings of the third South Asia judicial roundtable on environmental justice  
for sustainable green development.  
Mandaluyong City, Philippines: Asian Development Bank, 2015.

1. Environmental Law    2. Environmental Justice    3. Environmental Rule of Law    4. South Asia
5. Asian Judges Network on Environment    I. Asian Development Bank.

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# FOREWORD

The Asian Development Bank (ADB) was honored to partner with the Supreme Court of Sri Lanka for the Third South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development. ADB supported this important meeting—comprising judges, members of the legal profession, and experts and partners—to find ways of developing important aspects of environmental adjudication and governance.

South Asia continues to face many environmental challenges that hinder its economic growth and poverty alleviation, such as climate change; food, water, and energy security; and managing urbanization. These challenges show that each country in South Asia must ensure compliance with national environmental laws and regional cooperation on the environment. This process can be strengthened through the leadership, dedication, and commitment of the judiciary.

ADB is dedicated to addressing environmental challenges through its strategic commitment to environmental sustainability and combating climate change, along with support for good environmental governance, including environmental enforcement. This commitment is found in its Strategy 2020, which includes environmentally sustainable growth, along with inclusive growth and regional integration, as a long-term strategic agenda. Its commitment is also reflected in the ADB Governance Policy (2002) and Safeguards Policy Statement (2009). In Environmental Operational Directions, 2013–2020, ADB has identified key approaches for transitioning to a “green growth” model to help Asia and the Pacific conserve its “natural capital” and ensure the provision of vital ecosystem services that are essential for reducing poverty, increasing resilience, and making green economies a reality.

This roundtable was an important opportunity to identify common challenges; continue the dialogue, learning, and exchange of ideas; and develop specific, cooperative measures for South Asian judiciaries to work toward environmental justice. It also sends a strong signal to other branches of government and the public that judiciaries and ADB are committed to a shared vision of sustainable green development and environmental justice in the region. ADB looks forward to continue working with judges and legal professionals of South Asia for the protection and preservation of the environment for the benefit and development of all peoples.



**Bruce L. Davis**

Vice-President

Administration and Corporate Management

Asian Development Bank

June 2015

The judiciaries' role as regards environmental law cannot be understated. As early as 2001, the United Nations Environment Programme's Montevideo Programme III identified the judiciary as one of the key target groups for capacity building for the implementation and enforcement of environmental law. The following year in 2002, 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. More recently, the Johannesburg Principles were affirmed in the Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability. The members of the judiciary, as well as those contributing to the judicial process at the national, regional, and global levels, were seen as crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law.

ADB's Office of the General Counsel continues to work with Asian judiciaries, as well as other key stakeholders, to promote environmental justice and ensure that judges find ways to play their part for the environment. Our Law, Justice and Development (LJD) program focuses on legal development through strengthened policy, legal, judicial, and regulatory systems. It recognizes that the judiciary in Asia plays a key role in protection of environment and promotion of sustainable development by influencing how legal and regulatory frameworks are interpreted and enforced.

ADB has been supporting roundtables on environmental justice both in South and Southeast Asia since 2010. Previous roundtables have been held in Bhurban, Pakistan in 2012 and Thimphu, Bhutan in 2013. Bhurban saw the start of the judiciary's efforts at enhancing and improving environmental justice in the region. The Bhurban Declaration noted the pivotal role of the judiciary in resolving environmental issues while equally recognizing the role of other stakeholders in relation to enforcement and giving effect to judicial orders and resolutions. In Thimphu, issues like climate change, environment and health, tools such as environmental impact assessment and alternative dispute resolution, and constraints faced by the judiciary were discussed. Through the Thimphu Declaration, the judges recognized the specialized nature of environmental issues that warrants specialized treatment.

During the Third Roundtable in Colombo, Sri Lanka, we took another step forward and showed a renewed commitment from the judiciaries of South Asia for the continued protection of nature and the promotion of environmental justice. Sustainable green development was given strong emphasis, highlighting the need to strike a balance between economic progress and protecting ecosystems and the environment. Through the Colombo Action Plan, South Asia's judiciaries have agreed to concrete steps and actions toward environmental justice.

ADB's support for the Colombo Roundtable is a testament to its strong commitment to environmental sustainability and good governance. We recognize the need to protect South Asia's environment, and the need to build the capacity of the judiciary in addressing these challenges, given their critical role in environmental enforcement and environmental justice. ADB will continue to be your partner in this worthwhile and important endeavor.



**Ramit Nagpal**

Deputy General Counsel  
Office of the General Counsel  
Asian Development Bank  
June 2015

# ACKNOWLEDGMENTS

First, gratitude is extended to all of the participants from the various judiciaries of South Asia who made the Third South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development a resounding success. Thank you for sharing your country's perspective and experiences, fostering discussion and participation, and pushing forward concrete action on environmental justice. The continued success of this project, and the realization of declarations and plans of action, relies on your dedication to the protection of the environment.

The success of the event would also not have been possible without the support and generosity of the Supreme Court of Sri Lanka, led by Chief Justice Mohan Peiris, whose active participation as chair of the sessions steered the roundtable to worthwhile, engaging discussions. Appreciation is also extended to the Chief Justice's team, led by Amal Randeniya, who helped organize the event and make it a success. The people of Sri Lanka and its President, Mahinda Rajapaksa, must also be thanked for the warm hospitality extended to the participants.

Appreciation is also extended to the resource speakers and panelists from South Asia and beyond, whose insights ensured a thought-provoking, interesting event.

From the Asian Development Bank, Bruce L. Davis, vice-president; Ramit Nagpal, deputy general counsel; and Sri Widowati, country director, Sri Lanka Resident Mission are acknowledged 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 Mahallah Adalia, Maria Imelda T. Alcala, Gregorio Rafael P. Bueta, Harsha Fernando, and Ma. 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
ADR	– alternative dispute resolution
AJNE	– Asian Judges Network on Environment
ASEAN	– Association of Southeast Asian Nations
GDP	– gross domestic product
km	– kilometer
km <sup>2</sup>	– square kilometer
NEA	– National Environmental Act
SAARC	– South Asian Association for Regional Cooperation
UNEP	– United Nations Environment Programme

# EXECUTIVE SUMMARY

This report records the proceedings of the Third South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development held from 8–9 August 2014 in Colombo, Sri Lanka, hosted by the Supreme Court of Sri Lanka and the Asian Development Bank (ADB). The roundtable concentrated on (i) judicial training and capacity enhancement, (ii) regional integration and cooperation, (iii) enhancing the efficacy of the judicial system for environmental justice, and (iv) application of alternative dispute resolution methods such as mediation for better environmental dispute management and enhancing justice. In addition, it expanded the scope of the discussion by including specific issues relating to urban development, “natural capital,” gender, community forest management, and tourism within the overall sustainable green development concept.

**Chief Justice Mohan Peiris**, Sri Lanka began the roundtable by welcoming the participants. After discussing issues such as “soft-law” instruments and problems of compliance and enforcement, the Chief Justice stated that the roundtable was an opportunity to discuss and debate these issues and find a way forward. Welcoming the participants on behalf of ADB, **Vice-President Bruce L. Davis** reaffirmed ADB’s commitment to work with the judiciaries of the region and noted that it was encouraging to see the commitment of the legal profession to environmental justice through the roundtable.

**President Mahinda Rajapaksa**, Sri Lanka noted that the judiciary plays a decisive role in establishing a delicate balance among competing interests of the three dimensions of sustainable development: environment, development, and social progress. After elaborating on the importance of having consistency in the application of international and national laws and on judicial capacity building, the President said that Sri Lanka has marched forward with an economic and social development program founded on the principles of sustainable development.

**Elizabeth Mrema**, director, Division of Environmental Law and Conventions, United Nations Environment Programme discussed various issues and concepts on environmental compliance and enforcement, rule of law, and the importance of sustainable development goals, helping set the tone for the roundtable.

**Irum Ahsan**, counsel, ADB talked about ADB’s initiative of establishing the Asian Judges Network on Environment and how the network has evolved and developed through national programs and regional meetings like this roundtable.

Day 1, Session 1 comprised country reports given by representatives of each member country. **Justice Abdul Malik Kamawi**, Afghanistan noted the challenges faced by his country, particularly the effects of war on the environment. **Chief Justice Md. Muzammel Hossain**, Bangladesh said that an integrated approach to environmental justice is needed involving all concerned, with effective laws and a truly sensitized judiciary to ensure environmental justice and to address climate change, which strongly impacts his country. **Justice Tshering Wangchuk**, Bhutan recalled his country’s hosting of the second roundtable and noted various efforts undertaken by the judiciary. **Justice Adam Mohamed Abdulla**, the Maldives discussed the various environmental laws and policies of his country, noting that the 2008 Constitution prompted judicial activism. **Justice Om Prakash Mishra**, Nepal said that courts should have a holistic approach to rights and not just environmental rights, with courts promoting a harmonious relationship between these rights. **Justice Sarmad Jalal Osmany**, Pakistan talked about the different environmental laws and policies in his country, and discussed recent developments such as the work of the Committee for

Enhancing Environmental Justice. **Justice Saleem Marsoof**, Sri Lanka noted how Sri Lanka shares a strong environmental background and rich jurisprudence with its neighbors in South Asia.

Day 1, Session 2 featured Taking Stock: Where We Are on Environmental Justice. **Sanjay Upadhyay**, India highlighted key challenges faced by member countries of the South Asian Network on Environmental Law. He talked about issues of regulatory mechanisms for compliance with environmental laws, capacity building on both substantive and procedural aspects, and the role of environmental law in corporate governance. He then recommended strengthening networks of environmental lawyers and judges in the region, cooperating on shared regional concerns, and enhancing the capacity of first-level courts and judiciaries to deal with environmental issues. **Bharat Desai**, India provided insights on current developments in international environmental law, particularly on enforcing “soft-law” international instruments and judicial activism. **Sarah Khan**, Pakistan subsequently presented her film, *Harvesting Hope*, highlighting the critical issue of pesticides affecting female cotton farmers in the region.

Day 2, Session 1 focused on Environment and Development. **Chetan Agarwal**, India talked about the concept of “natural capital,” stating that economic and financial activity exists in a web of nature and ecology. He emphasized that an understanding of ecosystem services can aid in decision making. **Saima Amin Khawaja**, Pakistan discussed several issues, including the rapid development of megacities in South Asia. She recommended using existing tools and principles such as environmental and strategic impact assessments, adherence to the precautionary and polluter-pays principles, use of commissions and experts, engagement of the public, and resolving disputes through mediation. **Nayana Mawilmada**, Sri Lanka discussed the concept of sustainable tourism and how tourism benefits the economy as a whole. He noted that a strategic approach to sustainable tourism development is necessary for success. **Justice Ananda Mohan Bhattarai**, Nepal discussed the community forest management program in his country and suggested promoting collaboration and more inclusive participation among all stakeholders, including the courts, with judges being more proactive than reactive.

Day 2, Session 2 discussed Developments in Environmental Adjudication. **Ritwick Dutta**, India talked about the nature of environmental conflicts and their resolution. He noted that there is a clear role for the judiciary in the resolution of environmental conflicts and that this will take place if there is respect for people’s voices. **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 environmental cases. On innovations in environmental justice and judicial leadership, **Justice Syed Mansoor Ali Shah**, Pakistan said that judges must understand environmental science, moving away from traditional inquisitorial proceedings toward a solution-based approach. He added that judges are not the only trustees of the environment.

Day 2, Session 3 focused on the Colombo Action Plan. **Justice Syed Mansoor Ali Shah**, Pakistan first provided a brief recap of the two previous roundtables. During the breakout sessions, participants were divided into two smaller groups and were asked to deliberate and propose a minimum of five action points under each of the following categories: judicial training and capacity enhancement, regional integration and cooperation, enhancing the efficacy of the judicial system for environmental justice, and use of alternative dispute resolution for better environmental dispute management and enhancing justice. The action points were then compiled to form the Colombo Action Plan.

Delivering his closing remarks, **Ramit Nagpal**, deputy general counsel, ADB noted that through the efforts and conviction of the participants, environmental justice has been brought to the forefront of sustainable development. **Sri Widowati**, country director, Sri Lanka Resident Mission, ADB thanked the chief justices and judges. She added that the participants will encourage other branches of the government, and other judiciaries of the world, to realize the extent of environmental degradation. **Justice Marsoof** ended the roundtable by saying that progress has been made from the first two roundtables with the formulation of the Colombo Action Plan—to benefit future generations.



# I. INAUGURAL SESSION









## INTRODUCTION: PREVIOUS ROUNDTABLES ON ENVIRONMENTAL JUSTICE AND THE ASIAN JUDGES NETWORK ON ENVIRONMENT

Environmental law and environmental justice are new concepts that judiciaries, lawyers, the academe, and civil society are trying to incorporate into traditional justice systems. Different legal jurisdictions have started the debate on issues like climate change, right to a healthy and clean environment, and access to environmental justice. There is now strong recognition of the role and responsibility of the justice system in conserving the environment and the public's right to this. As one international jurist stated, the increased sophistication in appreciating risks to the environment, and the irreversible damage that may be caused by human activity, has resulted in a conscious effort, both by governments and nongovernment organizations, to invoke legal protection of the environment.<sup>1</sup>

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 Asian Judges Symposium on Environmental Decision-Making, the Rule of Law, and Environmental Governance was held in 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 called for an Asian judges' network on the environment, a more permanent framework of judicial cooperation. From this idea grew various ongoing and evolving partnerships.<sup>2</sup>

The chief justices of Indonesia and Pakistan offered to host regional events, which led to roundtables and conferences for member countries of the Association of Southeast Asian Nations (ASEAN) and South Asian Association for Regional Cooperation (SAARC). 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 the agreement to continue convening the roundtable. The Second South Asia Judicial Roundtable on Environmental Justice was hosted by Bhutan on August 2013 and led to the adoption of the Thimphu Declaration. Alongside these efforts, ASEAN judges and judiciaries held annual conferences and roundtables. After the inaugural session in Indonesia, Malaysia, Thailand, and Viet Nam hosted events in 2012, 2013, and 2014, respectively.

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 ADB in December 2013. AJNE is an information- and experience-sharing arrangement among senior judges in member countries of ASEAN and SAARC. This informal, transgovernment network is committed to providing a dynamic forum for judicial capacity building and multilateral exchanges on environmental adjudication.<sup>3</sup> AJNE helps build the capacity of judges through collaboration with a like-minded support group, introduction of innovative ideas, and technical education. It has also brought stakeholders together and provided a neutral platform to conduct frank discussions without any pressures

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

<sup>2</sup> AJNE. Environmental Justice Program, 2011–2013. <http://www.asianjudges.org/environmental-justice-program-2011-2013/>

<sup>3</sup> AJNE. Overview. <http://www.asianjudges.org/about-ajne/>

or biases. AJNE established a website that contains laws, rules, regulations, and case law of several Asian countries.<sup>4</sup>

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

## B

# WELCOME REMARKS

**MOHAN PEIRIS**, Chief Justice, Supreme Court of Sri Lanka

**Chief Justice Mohan Peiris** began by welcoming the participants and thanking them, especially President Mahinda Rajapaksa, for gracing the event, which he described as a momentous occasion. He said that the roundtables on environmental justice have proven to be effective platforms for forging symbiotic relationships with appellate courts in South Asia, thanks to ADB's sustained initiative of building capacity for environmental prosecution, adjudication, alternative dispute resolution (ADR), compliance, and enforcement in Asia. The chief justice added that as the judiciaries of the region begin to assimilate the normative interpretation of environmental law that each country has undertaken in their respective jurisprudence, they seek to accomplish a common understanding of the role of the judiciary in environmental governance vis-a-vis development. He noted that the development of common judicial ethos in environmental adjudication helps strengthen judicial solidarity.



The chief justice went on to note the challenges faced by South Asia due to climate change, including water scarcity, declining food productivity, threats to freshwater and seawater resources, and a high incidence of extreme climate events, which require a coordinated and comprehensive approach using various policies and tools. However, he stated that international environmental law suffers from the absence of a robust adjudicatory mechanism, as seen in the scarcity of decisions rendered by international courts and tribunals. He added that most international environmental instruments are considered “soft-law,”<sup>5</sup> which may include the declarations of the previous roundtables. Citing several authorities and decisions, the chief justice noted that such instruments may create binding legal obligations that may eventually be translated into treaties or actions.

Another issue touched upon by the chief justice was compliance and enforcement of environmental norms, which he cited as a challenge. He pointed out that environmental disputes may be best settled by domestic courts and tribunals, taking into account the monist or dualist traditions of a state.

In conclusion, Chief Justice Peiris said that he raised the above topics because they provoke debate, and the roundtable can provide a venue to discuss them. After outlining the agenda of the event, the chief justice noted that the 2 days of deliberations will be of immense benefit to all, and wished everyone a fruitful discussion.

<sup>4</sup> See AJNE. <http://www.asianjudges.org>

<sup>5</sup> “Soft law” are so-called rules that are not binding per se but which in the field of international environmental law have played an important role; they point to the likely future direction of formally binding obligations, by informally establishing acceptable norms of behavior, and by ‘codifying’ or possibly reflecting the rules in customary law. (P. Sands. 2003. *Principles of International Environmental Law*. Cambridge: Cambridge University Press.)



■ President Rajapaksa (center) with the heads of delegation from the judiciaries of South Asia, ADB representatives, and other distinguished guests.

## C OPENING REMARKS

**BRUCE L. DAVIS**, Vice-President, Administration and Corporate Management, ADB

After welcoming the participants on behalf of ADB and thanking the Supreme Court of Sri Lanka for hosting the roundtable, **Vice-President Bruce L. Davis** noted that the event was another opportunity to discuss, share insights and experiences, and find ways of expanding and developing important aspects of environmental adjudication and governance in the region. He went on to provide a brief recap of previous roundtables and other developments under a regional technical assistance project, which led to the creation of AJNE. Mr. Davis then cited some of South Asia's environmental challenges, which include climate change; food, water, and energy security; and urbanization. Worsening the vulnerability of the region are the high poverty incidence, poor governance, weak institutions, and the lack of necessary infrastructure. To address these, the judiciary, together with the legal profession, can play a key role through leadership, dedication, and commitment.



Mr. Davis outlined how ADB has responded to the environmental challenges of the region. He noted that ADB has made a strategic commitment to environmental sustainability and combating climate change, along with support for good environmental governance, including environmental enforcement. ADB's new midterm agenda highlights scaling up financial and technical support to reduce vulnerability to environmental degradation and enhance resilience to climate change. Also, to complement the roundtables, he cited several environmental programs that ADB supports, both in South and Southeast Asia.

In closing, Mr. Davis said that it was inspiring to see the commitment of the legal profession to environmental justice through the roundtable. It encourages ADB to constantly support these initiatives and to continue to build partnerships for the environment in the region. ADB also sees the roundtable as an important opportunity to work on identifying common challenges; continuing the dialogue, learning, and exchange of ideas; and developing specific measures for South Asian judiciaries toward environmental justice. This sends a strong signal to the other branches of the government and the public that South Asian judiciaries are committed to a shared vision of sustainable development and environmental justice in the region.





■ President Rajapaksa giving his remarks to the participants of the roundtable and Sri Lankan government officials.

## D REMARKS

**MAHINDA RAJAPAKSA**, President, Sri Lanka

**President Mahinda Rajapaksa** began by welcoming the participants and by thanking ADB for taking the lead in facilitating judiciaries in South Asia to engage in promoting environmental justice and sustainable “green development” in Asia. Discussing the theme of the roundtable, the President said that the judiciary plays a decisive role in establishing a delicate balance among the competing interests of the three dimensions of sustainable development: environment, development, and social progress. On environmental justice, he said that this notion comprises a complex, interlinked bundle of fundamental ideas and principles including equality before the law, access to legal process, accountability, transparency, equity, fairness, and justice.



The President elaborated on the importance of having consistency in the application of international and national laws. He emphasized that there cannot be double standards in the application and interpretation of laws by courts and international organizations, especially on matters relating to the environment and sustainable development, such as climate change and sustainable use of natural resources. The consequences of such unfair actions can only be the negation of justice and the rule of law, and loss of faith in international law. He added that the roundtable is a timely opportunity to deliberate these matters and set up a mechanism to establish generally acceptable rules to compel consistency in the application of international and national laws. The President also noted that all countries have a role to play in sustainable development, citing the concept of common but differentiated responsibility.

President Rajapaksa also pointed out that judges and others engaged in the making and enforcing of laws need to be familiar with emerging legal concepts and principles, as well as the terminology concerning the environment, ecology, and related scientific disciplines. There is an urgent need for measures to strengthen the capacity of judicial officers on the relatively new body of environmental law, interpreted within the broader framework of sustainable development, and the rule of law. Toward this end, the President offered to provide start-up institutional and financial support to establish a small but efficient entity in the Office of the Chief Justice of Sri Lanka to work with the United Nations Environment Programme (UNEP), ADB, and other organizations to initiate and coordinate judicial capacity-building activities within SAARC on environmental justice and the rule of law.

President Rajapaksa ended by noting the progress and peace that Sri Lanka enjoys today, owing to the end of the civil war in 2009. The country has marched forward with an economic and social development program founded on the principles of sustainable development on a scale and spread never seen before in the country. He added that the new face of Colombo signals sustainable urban development in the country.

## E

# KEYNOTE ADDRESS

**ELIZABETH MREMA**, Director, Division of Environmental Law and Conventions,  
United Nations Environment Programme

**Elizabeth Mrema** began by recalling UNEP's role as one of the organizing partners for the first roundtable in Bhurban, Pakistan in 2010. She noted that it was greatly satisfying to see the work started in Pakistan continue through the leadership of the Chief Justice of Sri Lanka.

Ms. Mrema cited key environmental challenges in South Asia, such as climate change, poor air and water quality, inadequate solid waste disposal, degraded natural resources, and natural disasters. In facing these challenges, people everywhere view environmental rights, environmental law and jurisprudence, environmental governance, and the role of the judiciary as increasingly central to resolving problems of environmental justice. With UNEP at the forefront of legal and institutional developments, environmental law can indeed make a significant contribution to forging an enduring partnership between environmental protection and a development approach founded on the three pillars of sustainable development (i.e., environmental, economic, and social). Ms. Mrema also noted that many national constitutions and legislation incorporate environmental rights, like the Constitution of Sri Lanka. However, judiciaries are still faced with the challenge and intrinsic value of balancing environmental protection and national development goals.

She stated that despite positive developments in environmental law and jurisprudence in Sri Lanka and other South Asian countries, issues of compliance and enforcement remain critical. To address implementation gaps, efforts at all levels increasingly concentrate on environmental law. She pointed out that environmental law needs to be backed by a strengthening of the entire chain of enforcement, which



is generally weak in many parts of the world. The judiciaries' role in this aspect was underscored by the World Congress on Justice, Governance and Law for Environmental Sustainability in 2012, which was driven by the outcome of the Johannesburg Global Judges Symposium on Sustainable Development and the Role of Law in 2002. In particular, during the Johannesburg symposium, one of the principles adopted was "collaboration among members of the judiciary and others engaged in the judicial process within and across regions as essential to achieve a significant improvement in compliance with, implementation, development and enforcement of environmental law." She added that building of subregional, regional, and global networks of judiciaries on environmental law, as well as sharing of jurisprudence and databases, are crucial to ensuring environmental justice.

Ms. Mrema then cited the importance of including environmental rule of law in the Sustainable Development Goals and the Post-2015 Agenda,<sup>6</sup> without "reinventing the wheel" but building on existing commitments. She added that the international community will rely on the judiciaries across the globe to reinforce the Sustainable Development Goals and the Post-2015 Agenda. Judges can ensure integration and mainstreaming of legal frameworks through their judgments for environmental sustainability.

She also cited the United Nations Environment Assembly in June 2014, where the Global Symposium on Environmental Rule of Law was held to raise awareness on the role of environmental law as an indispensable tool to achieving sustainable development and a "green economy." She added that the world's chief justices, attorneys general, judges, chief prosecutors, auditors general, and all relevant stakeholders must continue their dialogue on environmental rule of law to increase cooperation and the broad ownership of environmental rule of law measures. In conclusion, Ms. Mrema said that UNEP is committed and ready to work with partners, such as ADB, to make environmental rule of law a reality for all.

## F

# ASIAN JUDGES NETWORK ON ENVIRONMENT AND ADB'S ROLE IN STRENGTHENING ENVIRONMENTAL GOVERNANCE

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

**Irum Ahsan** began by thanking Chief Justice Peiris for his leadership and guidance in making the roundtable possible. She proceeded with a background on the establishment of AJNE, noting that discussion of the network began during the Asian Judges Symposium on Environmental Decision-Making, the Rule of Law, and Environmental Governance held in July 2010. The judges noted the lack of a network for the judiciary, despite many forums and bodies for the executive and other branches of government. As a response, ADB prepared a technical assistance project for the establishment of AJNE,

<sup>6</sup> One of the main outcomes of the Rio+20 Conference was the agreement by member states to launch a process to develop a set of Sustainable Development Goals, which will build upon the Millennium Development Goals and converge with the post-2015 development agenda. It was decided [to] establish an "inclusive and transparent intergovernmental process open to all stakeholders, with a view to developing global sustainable development goals to be agreed by the [UN] General Assembly" (See <https://sustainabledevelopment.un.org/topics/sustainabledevelopmentgoals>).



covering SAARC and ASEAN member countries. ADB supported AJNE because of its strategic framework, which identifies good governance and capacity development as a driver of change and environment (including climate change) as a core operational area. To translate this strategic framework into context, ADB developed its Safeguards Policy Statement (2009) to promote the sustainability of ADB-funded project outcomes by protecting the environment and people from projects' potential adverse impacts.



On working with judges, Ms. Ahsan discussed the Office of the General Counsel's Law, Justice, and Development program, which focuses on legal development through strengthened policy, legal, judicial, and regulatory systems. It recognizes that the senior judiciary in Asia plays a key role in environmental enforcement, as judges influence the entire legal system and how legal and regulatory frameworks are interpreted and enforced, thus affecting private sector investment in related sectors.

Ms. Ahsan then continued to detail AJNE, which was formally launched at ADB on December 2013. Described as an information- and experience-sharing arrangement among senior judges in SAARC and ASEAN member countries, the network started to form through subregional meetings and was strengthened by common resolutions and action plans. She added that AJNE strengthens judges' capacity, provides them with a like-minded support group, introduces innovative ideas, provides economic and technical information, and brings together all stakeholders (i.e., prosecutors, lawyers, judges, regulators, and civil society). "Champion-judges" were identified to draw support for ongoing efforts and initiatives on environmental law. She also noted the AJNE website, which serves as a knowledge- and information-sharing platform for judges.

She concluded by discussing the theme of the roundtable, Environmental Justice through Sustainable Green Development. She stated that Sri Lanka is the best country to discuss such a topic because of its ongoing postconflict reconstruction, growth, and development. The aim is to bridge the disconnect between environment and development. For the judiciary, the agenda of the roundtable can help shape the context and framework used for the resolution of environmental disputes.

■ Malaysian Chief Justice Tun Arifin Bin Zakaria giving remarks to the participants.



## II. DAY 1, SESSION 1: COUNTRY PRESENTATIONS

A representative from each country was invited to make a short presentation on developments and trends on environmental justice in his or her respective country.

## A

# AFGHANISTAN

**ABDUL MALIK KAMAWI**, Justice, Supreme Court of Afghanistan and Chief, Public Security Tribunal

**Justice Abdul Malik Kamawi** began with a discussion on the environment, noting that both humans and other living creatures need the environment to survive. He cited several factors in the destruction of nature, such as poverty, lack of public awareness, war, drought, lack of coordination among institutions with respect to environmental protection, and increasing population. He then cited factors to improve the environment, one of which is addressing the effects of war. Afghanistan was ravaged by war for more than 30 years, which has unfavorably affected all aspects of life, including the environment. There is thus a grave need to strengthen and improve a national environmental protection agency in Afghanistan. Dr. Kamawi then cited the roles and functions of the said agency. Legal support for environmental protection is also needed, citing the Constitution as a basis. He then noted several laws on environmental protection in the country. In conclusion, Dr. Kamawi said that groundwater and air are Allah's greatest blessings, and everyone has a duty to deliver this divine blessing to future generations.

## B

# BANGLADESH

**MD. MUZAMMEL HOSSAIN**, Chief Justice, Supreme Court of Bangladesh

**Chief Justice Md. Muzammel Hossain** began by noting that Bangladesh is one of the most affected countries by climate change, despite its minimal greenhouse gas emissions. He then discussed the environmental challenges facing the country. An integrated approach is needed for all concerned, with effective laws and a truly sensitized judiciary to ensure environmental justice and to address climate change. Chief Justice Hossain then discussed the various government agencies dealing with the environment, as well as specific provisions in laws and in the Constitution on natural resources and environmental protection. A short discussion on the court structure and procedures of Bangladesh then followed. The chief justice also cited a specific case where the concept of *locus standi* for environmental matters was given effect by the court. In many other cases, the Supreme Court has ruled in favor of the environment for its protection and preservation. The chief justice also cited the settlement of a maritime dispute among Bangladesh, India, and Myanmar, which has led to the improved protection and conservation, and well-planned utilization of sea resources.





## C

## BHUTAN

**TSSHERING WANGCHUK**, Justice, Supreme Court of Bhutan

**Justice Tshering Wangchuk** began by thanking the Supreme Court of Sri Lanka and ADB for hosting the event. He noted that it was an honor for Bhutan to host the second roundtable. Justice Wangchuk said that Bhutan's kings and leaders have always been aware that the Bhutanese people need to be surrounded by a healthy natural environment, and its people are equally aware of the importance of the environment. He added that the environment is important to sustain hydropower projects, a major source of revenue for his country. Based on the tenets of Buddhism, Bhutan has followed a "middle path" of development, consciously attempting to strike a balance between development and environmental conservation. Justice Wangchuk also noted that Bhutan does not have a law school, and efforts are currently underway to establish one in the country, with a specific curriculum on environmental law. A "green bench" in the High Court is also set to be created, in commemoration of the King's birthday.



## D

## MALDIVES

**ADAM MOHAMED ABDULLA**, Justice, Supreme Court of the Maldives

**Justice Adam Mohamed Abdulla** began by noting significant progress in the new Constitution (2008). The Constitution gives considerable importance to the preservation of the environment, highlighting the obligation to respect the environment as well as the state's fundamental duty to protect and preserve the environment for the benefit of present and future generations and for fostering ecologically balanced sustainable development. The Constitution also states that every individual has a duty to consciously preserve natural resources, biodiversity, and abstain from all forms of pollution and ecological degradation. Justice Abdulla subsequently discussed various laws and regulations on the protection of the environment, as well as multilateral environmental treaties to which the Maldives is a party. He added that the Constitution prompted judicial activism, whereby all courts can hear environmental disputes and public interest litigation cases.



## E

## NEPAL

**OM PRAKASH MISHRA**, Justice, Supreme Court of Nepal

**Justice Om Prakash Mishra** began by reading a letter from the Chief Justice of Nepal, thanking ADB for its continued support to regional efforts on environmental justice. Justice Mishra noted that the judiciary in Nepal is addressing issues of environmental concern. He discussed various judicial pronouncements on the right to environment and environmental protection, as well as the legal framework on the environment and natural resources in Nepal. In the handling of environmental cases, he noted that the Supreme Court is primarily guided by the Constitution. The court also looks at various international treaties to which Nepal is a party, as well as international principles such as the polluter-pays principle, precautionary principle, and intergenerational equity. Justice Mishra then noted that there are common regional environmental challenges that call for an integrated approach among the judiciaries and other stakeholders in the region. Judiciaries must be informed of scientific and technological innovations, with clear links to research and development institutions. Courts should take a holistic approach to rights, not just environmental rights, with the courts promoting a harmonious relationship among these rights. The judiciaries of the region should also encourage their respective governments to review their laws to remove barriers to bilateral and regional cooperation. Lastly, capacity building of judges should be undertaken.

## F

## PAKISTAN

**SARMAD JALAL OSMANY**, Justice, Supreme Court of Pakistan

**Justice Sarmad Jalal Osmany** began with a discussion of the various legislative instruments in Pakistan dealing with the environment and natural resources. Of particular importance are the environmental protection acts enforced both at the federal and provincial levels. These laws have created environmental protection agencies and require an environmental impact assessment to be conducted before a project can begin. However, Justice Osmany believes that these environmental protection agencies are not effective; therefore, the burden of environmental protection has been placed on the courts. He cited several cases decided by the courts on environmental protection and the granting of environmental rights. Citing the Bhurban Declaration, Justice Osmany discussed the creation of the Committee for Enhancing Environmental Justice, which has led to initiatives such as the establishment of “green benches” and proposing an environmental law curriculum in judicial academies and law colleges.



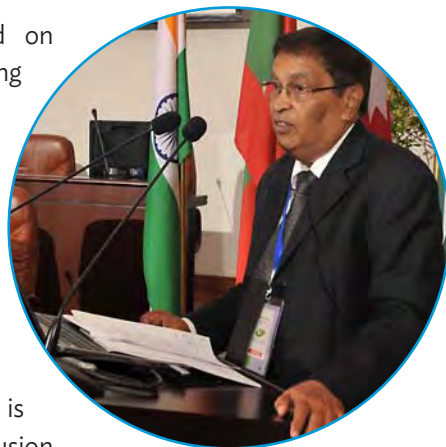


■ Justice Clifford Wallace, senior judge, United States Court of Appeals for the Ninth Circuit, giving comments on environmental justice and the concept of separation of powers.

## G SRI LANKA

**SALEEM MARSOOF, P.C.**, Justice, Supreme Court of Sri Lanka

**Justice Saleem Marsoof** began with a brief background on Sri Lanka's environment. He noted that Sri Lanka shares a strong environmental background and rich jurisprudence with its neighbors in South Asia. Justice Marsoof then discussed the role of the judiciary in interpreting the law for the protection of the environment, citing several cases and decisions of the Supreme Court. Judges have interpreted statutes in a very liberal and ecofriendly manner. In some cases, the courts pointed out that there is a need to balance development with environmental protection. Justice Marsoof also noted that Sri Lanka does not have a permanent "green bench," but there is a specialized bench that receives environmental cases. In conclusion, quoting Dr. C. G. Weeramantry, he stated that if consumption is not controlled and there is no care for the environment, humankind will not live to see the 22nd century.



## H INDIA

The delegation from India was due to arrive on the second day of the roundtable; therefore, no country report was delivered.





■ Bakary Kante (L), Africa Sustainability Centre, giving his comments after the country presentations. With him are (L-R) Justice Sarmad Jalal Osmany, Pakistan; Chief Justice Peiris; Chief Justice Tun Arifin Bin Zakaria, Malaysia; and C. Scott Fulton, United States.

## I COMMENTS BY PANELISTS

**Bakary Kante**, chair, Africa Sustainability Centre stated that he was part of the beginning of the process of getting the judiciary involved in environmental matters. Judges should take action because the world is at a crossroads in terms of sustainability, as extraction, production, and consumption patterns cannot continue. Unorthodox players, such as judges, lawyers, and justices should be brought on board. Dr. Kante added that cooperation and partnerships are important for sustainability.

**Lal Kurukulasuriya**, director-general, Centre for Environmental Research, Training and Information noted that the world is running out of time in dealing with environmental issues. Expeditious action is needed to galvanize support from different stakeholders, including judiciaries. The judiciary is in a position to bring “soft-law” environmental principles into “hard law” status. South Asian jurisprudence on the environment should be nurtured and give legal effect to environmental principles.

**C. Scott Fulton**, former deputy minister and general counsel, United States Environmental Protection Agency, giving the perspective from a “consumer” country, noted that similar challenges in terms of curbing consumption patterns are faced by developed countries. Rapid development in the developing world leads to the same appetite for similar consumption trends in developed countries. On a more positive note, Mr. Fulton noted the significant development of substantive environmental law in the past decades. However, implementation of these laws is still inadequate, calling for a need for an integrated approach from all sectors of society. He added that judges are not only keepers of the law but also catalysts for the rule of law.



■ C. Scott Fulton, formerly of the United States Environmental Protection Agency, gives his take on environmental justice.

**Chief Justice Tun Arifin Zakaria**, Federal Court of Malaysia noted that activities like the roundtable allow concerned stakeholders to identify the weak points in the environmental law enforcement chain. The event also presents an opportunity to discuss transboundary and regional environmental issues and problems, such as the haze from slash-and-burn farming in Southeast Asia. The chief justice also noted that Southeast Asian judiciaries look to the developed environmental jurisprudence of South Asia in deciding their own environmental disputes. Despite the absence of a constitutional provision on the environment, the Malaysian courts have extended the right to life to the right to a healthy life and clean environment. Responding to a question, the chief justice discussed the establishment and development of environmental courts in Southeast Asia, particularly in Indonesia, Malaysia, the Philippines, and Thailand.

Providing additional inputs, **Lord Robert Carnwath**, judge, Supreme Court of the United Kingdom said that he was impressed with the developments and progress made by South Asian judiciaries in dealing with environmental matters. He echoed the statement that there is not enough time, and immediate action is needed. Despite numerous “soft-law” instruments, the real challenge is to translate these into real, effective cross-border actions.

Offering words of caution, **J. Clifford Wallace**, senior judge, United States Court of Appeals for the Ninth Circuit stated that democracy and the concept of separation of powers should be respected in dealing with environmental matters, and the judiciary should not act alone. A judge should be an impartial arbitrator and not the rule maker.



■ Justice Syed Mansoor Ali Shah, Pakistan,  
giving comments during the panel discussions.



### III. DAY 1, SESSION 2: TAKING STOCK: WHERE WE ARE ON ENVIRONMENTAL JUSTICE



# A

## INTRODUCTION

South Asia has inherited a rich, diverse ecosystem and a climate characterized by wet summers (monsoons) and dry winters. It is bordered to the north by the Himalayas, to the southeast by the Bay of Bengal, to the southwest by the Arabian Sea, and to the south by the Indian Ocean. It is composed of mountains, plateaus, deserts, river basins, wetlands, and a 10,000-kilometer stretch of coastline between Pakistan and Bangladesh. It is also home to about 1.5 billion people, nearly one-third of whom are still living in poverty. The region is facing a major challenge in achieving rapid economic growth to reduce poverty and attain other Millennium Development Goals in an era of accentuated risks posed by global climate change.<sup>7</sup> The impacts and consequences of climate change for the region include sealevel rise in Bangladesh, India, the Maldives, and Sri Lanka; melting Himalayan glaciers in Bhutan, India, and Nepal; and increased frequency of typhoons, particularly in Bangladesh.<sup>8</sup> While greenhouse gas emission in South Asia is historically low, rapid urbanization and industrialization are pushing it toward a more carbon-intensive development path.<sup>9</sup>

According to a recent ADB study:

“Countries in the greater Himalayan region—which includes Bangladesh, Bhutan, northern India, and Nepal—are facing increased frequency and magnitude of extreme weather events resulting in flooding, landslides, damage to property and infrastructure, devastation of agricultural crops, reduction of hydropower generation, and negative impact on human health. The coastal areas of Bangladesh, India, the Maldives, and Sri Lanka are at high risk from projected sealevel rise that may cause displacement of human settlements, saltwater intrusion, loss of agricultural land and wetlands, and a negative impact on tourism and fisheries.<sup>10</sup>”

<sup>7</sup> ADB. 2014. *Assessing the Costs of Climate Change and Adaptation in South Asia*. Manila.

<sup>8</sup> ADB. 2013. *Economics of Reducing Greenhouse Gas Emission in South Asia: Options and Costs*. Manila.

<sup>9</sup> Footnote 8.

<sup>10</sup> Footnote 7.

Other environmental issues include reduction of biodiversity, increasing scarcity of potable water, urban air pollution, soil degradation and deforestation, industrial pollution and increases in hazardous waste, natural disasters, deforestation, beach erosion, and degradation of the marine habitat. Some of the common causes include high population density, high rates of urbanization (mostly unplanned), deficit urban infrastructure, industrial effluent and vehicle emissions, agrochemicals, unplanned and poorly regulated tourism, and industrial activity.

The environment has been considered an issue of regional importance by South Asian countries through SAARC. Heads of governments of SAARC at successive summits have reiterated the need to strengthen regional cooperation to preserve, protect, and manage the diverse and fragile ecosystems of the region, including the need to address the challenges posed by climate change and natural disasters. SAARC initiatives include the Regional Study on the Causes and Consequences of Natural Disasters and the Protection and Preservation of the Environment (1991), followed by Green House Effect and Its Impact on the Region (1992), establishment of the Technical Committee on Environment (1992), Special Session of the Environment Ministers in the Aftermath of the Indian Ocean Tsunami (2005), SAARC Ministerial Meeting on Climate Change (2008), Delhi Statement on Cooperation in Environment (2009), and common SAARC positions on climate change (2010).<sup>11</sup> Furthermore, regional centers, such as the SAARC Coastal Zone Management Centre in the Maldives, SAARC Forestry Centre in Bhutan, SAARC Disaster Management Centre in India, and SAARC Meteorological Research Centre in Bangladesh, constitute a framework of SAARC institutions that address diverse aspects of environment, climate change, and natural disasters.<sup>12</sup>

## B

# STATUS OF THE ENVIRONMENT

**SANJAY UPADHYAY**, Managing Partner, Enviro Legal Defence Firm, India

**Sanjay Upadhyay** began by discussing the various constitutional positions on the environment in South Asian countries. Significantly, all eight countries have some mention of the environment in their respective constitutions. He then went on to discuss key environmental challenges affecting the region. Issues surround the different regulatory mechanisms on compliance with environmental laws, particularly with environmental impact assessments or the use of cumulative and strategic impact assessments. Related issues include the conduct of public hearings, monitoring of environmental clearance conditions, unregulated growth in urban centers, and the need for regulating flood plains. Another issue for the region relates to institutional perspectives.



Mr. Upadhyay noted developments with the judiciaries in India and Pakistan, although there is weak appellate jurisdiction in India due to its statutory basis. Related to this is the issue of capacity building

<sup>11</sup> SAARC Secretariat. Areas of Cooperation. [http://saarc-sec.org/areaofcooperation/cat-detail.php?cat\\_id=54](http://saarc-sec.org/areaofcooperation/cat-detail.php?cat_id=54)

<sup>12</sup> Footnote 11.



on both substantive and procedural environmental laws. He noted the need to train and establish institutions for the executive branch, judiciary, and the legal profession, supported by the development of curriculum for environmental teachers. Another regional issue is the role of environmental law in corporate governance. Environmental concerns should be brought into boardrooms, creating a sense of corporate environmental responsibility.

Mr. Upadhyay then cited significant environmental concerns affecting some countries in the region, which include saving critical habitats, transboundary wetlands, and ecologically sensitive areas. He then presented environmental challenges identified by members of the South Asian Network on Environmental Law, or SANEL, such as climate change, urbanization, waste management, conservation of biodiversity and ecosystems, regional cooperation and information sharing, and establishing and strengthening institutions to transfer knowledge of the environment to first-level judiciaries.

In conclusion, he outlined several recommendations to address the issues discussed, among them strengthening networks of environmental lawyers and judges in the region, cooperating on shared regional concerns, and enhancing the capacity of first-level courts and judiciaries to deal with environmental issues.

## C

# CURRENT TRENDS AND DEVELOPMENTS IN ENVIRONMENTAL PRINCIPLES AND JURISPRUDENCE

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

**Bharat Desai** began by saying that the roundtable is the kind of process needed by judges to come together to share ideas on environmental law and justice in the region. Landmark cases across different jurisdictions are the product of mutual learning among the South Asian judiciaries. Dr. Desai then discussed the effectuation of international environmental law at the national level. There is a need to know the exact nuances of an issue to avoid a “half-baked” decision or a wrong interpretation, with the Convention on Biological Diversity cited as an example. He added that the convention is one with a “soft belly” since it needs a domestic implementing law to be enforced in a particular country.



Dr. Desai also discussed the need for a judge to widen his or her horizon to include an understanding of the environment. This will, in turn, lead to innovations in decisions and judgments. Environmental law is law of sensitivity, that is, how much empathy one should feel for a fellow human being. Thus, a judge should have this sensitivity and use the “grey areas” of law for some latitude in deciding cases. On judicial activism, he asked the judges present how they view this, whether in its usual sense of disrupting a system, or pushing for the active enforcement and implementation of a statute. Discussing precedence



in jurisprudence, Dr. Desai suggested that judges should not refuse a judgment in the absence of a precedent and should attempt to use existing cases by analogy.

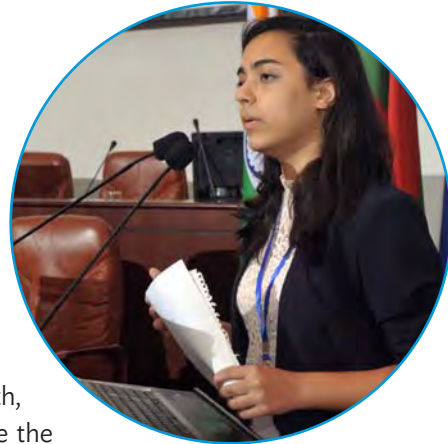
In conclusion, Dr. Desai stated that as a judge sits on the bench, he or she is set to leave a mark in history and on the people at large.

## D

# IMPACTS OF ENVIRONMENTAL ISSUES ON WOMEN

**SARAH KHAN**, Pakistan

**Sarah Khan** gave a special presentation of her film, *Harvesting Hope*. It focuses on health complications caused by chemical pesticides on female cotton farmers in Pakistan. She began by presenting some global figures and statistics on the number of acute pesticide poisoning per year, with Africa having the most with about 11 million deaths. Some of the ill effects of chemical pesticide exposure include skin, respiratory system, reproductive health, and children's health issues. Skin exposure can cause death, deformity, loss of nails, blisters, and open wounds, and increase the risk of cancer. Respiratory issues include asthma, lung fibrosis, and chronic bronchitis. Reproductive health is also affected through miscarriages, premature births, low birth weight and limb reduction, other birth defects, and infertility. Some of the impacts on children cited include skin problems, attention deficit hyperactivity disorder, brain cancers, and permanent impacts on a child's biological system.



Ms. Khan said that the women affected go through a cycle, which starts with the need for money compelling them to start picking cotton. As a result, they face various health problems, which make them spend their meager earnings on medicines. This then results in their need to continue working on cotton farms, repeating the cycle.

One solution she presented was to go back to organic farming, which is inexpensive and effective through the use of natural pesticides, such as neem. Benefits for cotton farmers include working without health risks, ability to save money, continuous soil health, and minimal damage to the environment. Ms. Khan then talked about three initiatives that represent best practices for cotton farmers (i.e., Better Cotton, Lok Sanjh, and Navdanya).

## E

# PANEL DISCUSSION

**Camena Guneratne**, professor, Open University of Sri Lanka, responding to a query on how the judiciary can work with the legislature, said that judges have to work with the constitutional framework within their respective countries. She added that judges must not only look at environmental rights but must also



■ Panelists sharing a light moment. From L–R: Prof. Camena Guneratne, Sri Lanka; Justice Syed Mansoor Ali Shah, Pakistan; Chief Justice Mohan Peiris, Sri Lanka; Lord Robert Carnwath, United Kingdom.

consider developmental rights. Providing inputs on how women are affected by environmental issues, Dr. Guneratne noted that according to a recent climate change report, the phenomenon will aggravate existing discrimination against women. Laws should consider women’s developmental, social, and economic rights to empower them to contribute to sustainable environmental development.

**Justice Syed Mansoor Ali Shah**, judge, Lahore High Court, Pakistan shared some of his thoughts on environmental justice. He noted that as a judge, the concept of environmental justice should be revisited, as judges are trustees of the planet. However, the judiciary is not the only trustee, as other stakeholders also have a role in protecting the environment. He cautioned over exemplifying the role of judges in environmental protection, as institutional development should be prioritized. Commenting on executive inaction on environmental impact assessments, Justice Shah said that one problem is that assessments are prepared by a consultant who is paid by the project proponent, then reviewed by an executive agency that often lacks capacity.

**Lord Carnwath** noted that the film *Harvesting Hope* brought the participants back down to the reality of environmental issues.

**Mr. Fulton**, answering a query if judges are “on their toes” on environmental issues, answered affirmatively, but added that judges need to understand the gravity of the environmental issue involved. Courts need an appreciation of the relevance of the environmental issue to other matters before the court.

Providing inputs on the proceedings of the day, **Deputy Chief Justice Adel Omar Sherif**, Supreme Constitutional Court of Egypt noted that striking a balance between environmental protection and development is not an easy thing to do.



■ Chief Justice Peiris leading the panel discussions.



## IV. DAY 2, SESSION 1: ENVIRONMENT AND DEVELOPMENT

Hon. H.L. Dattu  
Justice, Supreme Court  
India





# A

## INTRODUCTION

The nexus between environment and development begins with an understanding of the concept of sustainable development. The term “sustainable development” is generally considered to have been coined by the 1987 Brundtland Report, which defined it as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.<sup>13</sup> One publication identified several elements that comprise this concept: (i) the integration of environmental protection and economic development, (ii) the right to development, (iii) sustainable utilization and conservation of natural resources, (iv) intergenerational equity, and (v) inequity between existing economic systems.<sup>14</sup> Particularly, Principle 4 of the 1992 Rio Declaration on Environment and Development stated that environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Looking at South Asia, its economy has seen considerable strides toward growth and development. Powered by the dynamic growth of India’s economy, it is one of the fastest-growing areas in the world, economic growth has contributed to significant reduction in poverty in the region, and the potential for sustained growth is high.<sup>15</sup>

<sup>13</sup> P. Sands. 2003. *Principles of International Environmental Law*. Cambridge: Cambridge University Press.

<sup>14</sup> Footnote 1.

<sup>15</sup> Footnote 7.





The region, having one of the largest river systems in the world, has an estimated 60% of the population dependent on agriculture as their livelihood,<sup>16</sup> making both land and irrigation water vital resources. It experienced steady economic growth, with a per capita gross national income of \$1,474 in 2013 and life expectancy at birth reaching 67 years.<sup>17</sup> The carbon dioxide emissions of South Asia measured 1.5 tons per capita, while the world average was 4.9 tons per capita in 2010.<sup>18</sup>

Notwithstanding the high rates of economic growth and the steady progress in poverty reduction, nearly half of the world's poor are in the region, and climate change impacts are emerging as significant risks to sustained growth.<sup>19</sup> According to the Millennium Development Poverty Index,<sup>20</sup> South Asia is the second-poorest region in the world after sub-Saharan Africa.<sup>21</sup> Of the population in this region, around 730 million people (44.4%) live on \$1.25–\$2.50 a day.<sup>22</sup> Of the South Asian countries, only one is considered to have a high level of human development (Sri Lanka), three are at the medium level (Bhutan, India, and the Maldives), and four have a low level of human development (Afghanistan, Bangladesh, Nepal, and Pakistan).<sup>23</sup>

Poverty and developmental challenges will continue to be exacerbated by the impacts of climate change. Climate change projections made by the Intergovernmental Panel on Climate Change for South Asia as a whole showed that warming is likely to be above the global mean. Climate change is projected to affect the main systems that shape the region's climate, including the strength and timing of the Asian monsoon, and the retreating Himalayan glaciers that are believed to be speeding up climate warming in the region

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<sup>16</sup> South Asia Co-operative Environment Programme. <http://www.sacep.org/>

<sup>17</sup> World Bank. Data: South Asia. <http://data.worldbank.org/region/SAS>

<sup>18</sup> Footnote 17.

<sup>19</sup> Footnote 7.

<sup>20</sup> The Human Development Index measures three basic dimension of human development: a long and healthy life; knowledge; and a decent standard of living measured through health, education levels, and income.

<sup>21</sup> United Nations Development Programme (UNDP). Human Development Index. <http://hdr.undp.org/en/statistics/hdi/>

<sup>22</sup> UNDP. 2014. *Human Development Report 2014—Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience*. New York. <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf>

<sup>23</sup> A. Gowel. 2013. Background paper prepared for the Second South Asia Judicial Roundtable on Environmental Justice. Thimphu, Bhutan. 30–31 August.

due to the alteration of the overall albedo and surface energy balance.<sup>24</sup> With changes in the global climate system likely to span into the next century, geography, high population density, and immense poverty will continue to make South Asia especially vulnerable—human health, biodiversity, agricultural production, food security, water, energy, and coastal settlements will be imperiled, as natural disasters worsen and migration grows—intensifying stresses on major cities.<sup>25</sup>

## B

# ECOSYSTEM SERVICES AND NATURAL CAPITAL

**CHETAN AGARWAL**, Forest and Environmental Services Analyst, India

**Chetan Agarwal** began by stating that economic and financial activity exists in a web of nature and ecology. He also discussed the Millennium Ecosystem Assessment, which is an effort to map the health of the planet through an integrated assessment of the consequences of ecosystem change for human well-being and an analysis of options available to enhance the conservation of ecosystems and their contributions to meeting human needs. He also introduced the concept of ecosystem services, which are the benefits people obtain from the ecosystem in the form of provisioning, regulating, supporting, and cultivating services. He noted that ecosystem services have a direct impact on human well-being and poverty reduction since through such services, a person gets basic material for a good life, health, good social relations, security, and freedom of choice and action.



Mr. Agarwal then pointed out that an understanding of ecosystem services can aid in decision making. Ecosystem services are considered in addition to scientific knowledge and existing mechanisms such as laws and public and private actions. Nature can also be seen as an ecological asset, or “natural capital;” thus, an analogy can be made with one’s interest from financial capital, taking into account factors such as ownership, rate of return, risk, audit, standards, and enforcement.

He then noted the issue of multiple demands on landscapes for goods and services, which leads to synergies and trade-offs. To remedy this, concepts, principles, and tools evolved in the last 50 years to try and address emerging concerns, identify and quantify impacts on the environment, and ultimately bring them into decision making. These include the precautionary principle, the concept of carrying capacity, intergenerational equity, polluter-pays principle, “green accounting,” and compensation and net-present value.

<sup>24</sup> Footnote 7.

<sup>25</sup> ADB. 2010. *Climate Change in South Asia: Strong Responses for Building a Sustainable Future*. Manila.

## C

# GREEN CONSIDERATIONS IN URBAN PLANNING AND DEVELOPMENT

**SAIMA AMIN KHAWAJA**, Partner, Progressive Advocates and Legal Consultants, Lahore, Pakistan

**Saima Khawaja** began her presentation with a discussion of urbanization, noting that in 2010, more than 50% of the world's population lived on 2% of the planet's surface. By 2030, 65% of the global population is expected to be living in urban areas, and 90% of this rapid urbanization is to take place in developing countries. As for megacities, 17 are found in Asia, with 5 in South Asia; by 2025, 9 cities in South Asia are expected to have more than 10 million people. She then noted the economic outlook for South Asian countries, which all takes place in contrasting kinds of urban development.



Ms. Khawaja subsequently discussed several issues affecting South Asian cities and urban centers, such as air pollution, transport and traffic management, water pollution, green area conversion, waste management, and natural calamities. Citing a 2014 World Bank report, she noted that outdoor air pollution alone causes more than 80,000 hospital admissions and almost 5 million cases of lower respiratory cases in children under the age of 5 years. Transport and traffic management are a growing concern for South Asian cities due to rapid urbanization, an example of which are the challenges brought by the increasing number of vehicles in Pakistan. Water pollution and waterborne illnesses account for 60% of child deaths in Pakistan, exacerbated by the absence of proper sanitation facilities in most cities. Numerous open and green spaces are being converted to give way to high industrialization, high rises, and roads. Further, increasing populations in urban centers present new waste management challenges. Urban centers are put at more risk to natural calamities such as earthquakes, floods, and even droughts.

To address these issues in light of rising and rapid urbanization in South Asia, Ms. Khawaja recommended using existing tools and principles such as environmental and strategic impact assessments, adherence to the precautionary and polluter-pays principles, use of commissions and experts, engagement of the public, and resolving disputes through mediation.

## D

# TOURISM AND THE ENVIRONMENT

**NAYANA MAWILMADA**, Urban Development Specialist, Founder and Managing Director, Total Management Solutions, Sri Lanka

**Nayana Mawilmada** began his presentation by noting the many values that the tourism industry creates, from trip arrangements,





transport, and lodging, to shopping, activities, and excursions provided by locals and small and medium-sized enterprises. Tourism is a key driver of the world economy, contributing 9.5% of global gross domestic product, 101 million jobs, 4.4% of total investments, and 5.4% of world exports in 2013. He noted that tourism is a major contributor to South Asian economies, contributing almost \$150 billion to the region's gross domestic product in 2013, driven by 15.2 million tourist arrivals that same year.

Tourism has many positive benefits, such as increased employment, support for local services, and ability to bring tangible economic value to cultural and natural resources, and can act as a force for intercultural understanding and peace. However, it can also have consequences such as unintended social impacts and dislocation of traditional societies, and can be a vulnerable and unstable source of income, sensitive to perceived changes to environmental and social conditions. Tourism's environmental impact includes depletion of natural resources, pollution, and destruction of ecosystems. He then discussed challenges posed by a growing tourism industry in several Sri Lankan towns and cities.

Mr. Mawilmada discussed the concept of sustainable tourism, that is, tourism that takes full account of its current and future economic, social, and environmental impacts, addressing the needs of visitors, the industry, the environment, and host communities. It denotes taking these impacts and needs into account in the planning, development, and operation of activities. It unleashes the industry's unique ability to benefit local communities, economically and socially, and to raise awareness and support for conservation of the environment. He added that sustainability is the responsibility of all, but governments need to take the lead to achieve significant progress. There needs to be a strategic and planned approach to sustainable tourism development. In closing, he noted that development and environmental protection should not be seen as opposing forces, particularly in the case of tourism; they should be pursued together as aspirations that are mutually reinforcing.

## E

# COMMUNITY FOREST MANAGEMENT IN NEPAL AND THE JUDICIARY

**ANANDA MOHAN BHATTARAI**, Acting Chief Judge, Court of Appeal, Nepal

**Justice Ananda Mohan Bhattarai** began by noting that community forestry is a successful natural resources management tool in Nepal, which began as a pilot program in the middle hills in the late 1980s, and is now in all but one district of Nepal. Over 1.7 million hectares of national forest (over 30% of the total forest cover) has been handed over to communities, with 18,324 forest users' groups throughout the country engaged in the program. The Forest Act of 1993 and its 1995 rule, as well as the National Parks and Wildlife Act 1973, Environment Protection Act 1997, and Local Self-Governance Act 1998 and its related rules provide the legal framework for the program. A background on how the program is implemented based on the laws and rules was also given.





Justice Bhattarai discussed the judiciaries' role in the forest program. Although the court's role is largely peripheral, it becomes involved when disputes arise between users of the forests, between users and the Forest Department, and when illegal acts and crimes involving violations of forestry laws are committed. Some of the disputes include governance of the community organizations; unwarranted intervention by the government; cancellation of registration of the community organizations; crimes such as encroachment, deforestation, and smuggling; and illegal quarrying in community forest areas.

Looking forward, Justice Bhattarai suggested promoting true collaboration and more inclusive participation among all stakeholders, including the courts. The judiciary is often reactive and only becomes a part of forest management when cases are brought before it. He also suggested other actions that can be undertaken, including wealth accounting; capacity building for community organizations; and ensuring respect for economic, social, and cultural rights. In conclusion, he said that honest action of the Government of Nepal as trustee of natural resources, and its abidance to the dictates of economic, social, and development rights of the people, herald a new age of participatory natural resources management in the Himalayan region.

## F

## PANEL DISCUSSION

**Justice H. L. Dattu**, Supreme Court of India was invited by Chief Justice Peiris to share his thoughts on how environmental problems should be approached and how to move forward. Recalling stories of himself as a teacher before becoming a lawyer and judge, Justice Dattu said that one must have a positive attitude that environmental issues and problems can be solved. A basic approach should be to educate children and students about the environment and how to protect it, since they will be the ones with the capacity to do so in the future.

**Sanith de Silva Wijeyeratne**, chief executive officer, Carbon Consulting Company, Sri Lanka responding to a query on involving the industries to preserve the environment, said that a triangle of incentives, demands, and regulation needs to be put in place. Incentives will spur industries to work for sustainability, naturally generating demand coupled with proper government regulation. Currently, carbon-trading mechanisms are an area where industries and businesses can get involved.

Discussing conservation from a religious perspective, **C. G. Weeramantry**, Sri Lanka said that faith and religion are fundamental to all environmental law activities. Historically, international law traces its roots to a time of ongoing religious wars in the 1600s, which led to its division from religion. However, today, Dr. Weeramantry noted that the reservoir of religion must be tapped to find a basis to protect the environment, citing examples from Buddhism, Christianity, Hinduism, Islam, and Judaism.

**Dr. Kante** said that many experts are “full cups,” unable to accept continuous learning and new ideas. The lack of humility, he stated, is the worst enemy of environmental experts.

Talking about Gross National Happiness in Bhutan, **Justice Wangchuk** said it has as its pillars sustainability and protection of the environment. The Bhutanese people believe they have a responsibility to hand over a better, or at least the same, environment to the next generation.

■ Justice Ashfaque Islam, Bangladesh,  
providing insights as panelist.

A photograph of two men in professional attire. The man on the left, Justice Ashfaque Islam, is wearing a grey suit, a light blue shirt, and a patterned tie. He has a mustache and is wearing black-rimmed glasses. He is looking slightly to his right. The man on the right is wearing a dark suit, a white shirt, and a dark tie. He is also wearing black-rimmed glasses and is looking down, possibly at a document or a microphone. A microphone is visible in the foreground on the right side of the image. The background is a wooden panel wall.

## V. DAY 2, SESSION 2: DEVELOPMENTS IN ENVIRONMENTAL ADJUDICATION

# INTRODUCTION

There is growing international recognition that the courts have a role to play in the environment movement, as recognized in the concepts of environmental justice and access to justice.<sup>26</sup> Many recent international declarations and statements have noted the judges' role in environmental protection through the orders and decisions that they render. For example, in the 2002 Johannesburg Principles on the Role of Law and Sustainable Development, the participants in the Global Judges Symposium agreed to "a full commitment to contributing toward the realization of the goals of sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process." Likewise, in the Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability, it was stated that

“[a]n independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and members of the Judiciary, as well as those contributing to the judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and enforcement of, international and national environmental law . . . . [j]udges, public prosecutors and auditors have the responsibility to emphasize the necessity of law to achieve sustainable development and can help make institutions effective.”

One study noted two global explosions in environmental jurisprudence occurring in the first decade of the 21st century. First, there was a rapid growth of a new type of environmental governance institution, the specialized environmental court or tribunal, authorized specifically to resolve disputes concerning environmental, natural resources, land use, and related issues. As of July 2014, over 350 of these specialized forums for resolving environmental disputes exist, spanning across every region throughout the world.<sup>27</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>28</sup> The second was the escalating number of climate change lawsuits being brought in courts around the world.<sup>29</sup>

As Dr. Weeramantry stated

“Judges, as guardians of the rule of law, are uniquely positioned to give environmental law force and effect. They can bring integrity and certainty to the process of environmental protection, and help to ensure environmental responsibility and accountability within the government and the private sector. Judges also advance the development of environmental law by their traditional task of interpreting and filling the gaps in the legal texts.”<sup>30</sup>

<sup>26</sup> C. Redgwell. 2007. National Implementation. In D. Bodansky, J. Brunnée, and E. Hey, eds. *The Oxford Handbook of International Environmental Law*. Oxford: Oxford University Press.

<sup>27</sup> B. J. Preston. 2014. Characteristics of Successful Environmental Courts and Tribunals. *Journal of Environmental Law*. 26, p. 365.

<sup>28</sup> B. J. Richardson and J. Razzaque. 2006. Public Participation in Environmental Decision Making. In B. J. Richard and S. Wood, eds. *Environmental Law for Sustainability*. Oxford: Hart Publishing.

<sup>29</sup> G. Pring and C. Pring. n.d. Specialized Environmental Courts and Tribunals: The Explosion of New Institutions to Adjudicate Environment, Climate Change, and Sustainable Development. <http://www.law.du.edu/documents/ect-study/Unitar-Yale-Article.pdf>

<sup>30</sup> C. G. Weeramantry. 2005. Introduction in *Judicial Handbook on Environmental Law*. Nairobi: UNEP.

## B

# THE NATURE OF ENVIRONMENTAL CONFLICTS AND THEIR RESOLUTION

**RITWICK DUTTA**, Legal Initiative for Forest and Environment, India

**Ritwick Dutta** began by noting that environmental conflict is deeply rooted in India due to large dams, thermal power plants, mining, and other infrastructure projects. These conflicts occur over protection of trees, birds, and animals as well as livelihoods, the right to life, one's culture, way of life, identity, and the rule of law and democracy. He stated that at the root of the conflict is poor environmental governance. Compliance with environmental laws is an empty formality—seen by the government, project proponents, and the courts as directory rather than mandatory. Environmental laws are seen as inferior or subordinate to other laws, and as bottlenecks or “green hurdles” to development projects. As a consequence, environmental defenders are victimized, jailed, harassed, and sometimes killed. Environmental principles are also viewed as mere words with no corresponding action and impact.



Taken in this context, Mr. Dutta said that there is a clear role for the judiciary in the resolution of environmental conflicts. Judiciaries should work to establish and strengthen environmental courts and tribunals to serve as a safety valve, establishing effective access to justice. The judiciary should also review the balancing role of the courts, and appreciate the true meaning of sustainable development. The true yardstick to decide whether a project is sustainable is to see whether it is strictly in compliance with environmental laws and regulations.

Mr. Dutta added that proper resolution of conflicts will take place if there is respect for people's voices. He cited several cases in which the courts reminded government agencies to ensure proper, effective public hearings so that people affected by projects can truly voice their concerns. He then questioned whether environmental activism impacts growth. He noted that in the history of environmental litigation in India, only four environmental clearances for projects have been quashed, and more than 995 projects went on without any challenge. In conclusion, Mr. Dutta left the audience with these words: “when we destroy something created by man, we call it an act of vandalism; when we destroy something created by nature, we call it development.”

## C

# ENVIRONMENTAL CONFLICTS AND ALTERNATIVE DISPUTE RESOLUTION

**HARSHA FERNANDO**, Attorney, Consultant Trainer, Sea-Change Partners of Singapore on Mediation and Negotiation, and Consultant, ADB

**Harsha Fernando** began by talking about the ability of the courts to make timely, informed, and balanced decisions, and their ability to confine themselves to appropriate areas of intervention and effectively address complex issues. He then discussed environmental conflicts, an area where courts are called





on to make decisions. He noted that a total “sea change” is needed to deal with environmental disputes, changing one’s view from environmental conflict to environmental justice. As a response, courts have come up with principles and tools such as the polluter-pays principle, standing in public interest litigation, the precautionary principle, and specialized courts. All of these are being done by courts in a traditional system, which uses the adversarial system with limitations on the rules of evidence.

He then presented the Continuum of Conflict Management and Resolution Process, where he emphasized that parties should try to resolve disputes at the earliest possible opportunity and where private decision-making through informal discussions and problem solving, negotiations, and mediation can help end a conflict. He also presented an operational framework for mediation, which can help parties create a shared 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 each other. It is also important to look at the parties as stakeholders in the process, and not as parties to the conflict, to arrive at a shared vision.

In conclusion, Mr. Fernando suggested a “middle path,” where judges “coerce” the parties to undergo mediation to resolve the issue. This approach, essential to achieving environmental justice, marks a shift from ADR to “environmental dispute resolution.” Interventions should be done early, and this should be institutionalized in the whole environmental decision- and policy-making process. As a final thought, Mr. Fernando quoted one author by saying that transformative empathy is among the most significant and important ways of grounding justice and moving people to new places.

## D INNOVATION IN ENVIRONMENTAL JUSTICE AND JUDICIAL LEADERSHIP

**SYED MANSOOR ALI SHAH**, Judge, Lahore High Court, Pakistan

**Justice Syed Mansoor Ali Shah** began by saying that a judge today must be conscious of the beauty and magnificence of nature, interconnectedness of life systems on this planet, and interdependence of ecosystems. A judge must also have an understanding of environmental science, looking at an environmental case not merely as a localized issue, and moving away from the traditional inquisitorial proceedings toward a solutions-based approach. He added that a judge must take a nature-centric approach, while upholding environmental rights and weaving concepts of sustainable development, the precautionary principle, and intergenerational equity with other fundamental rights.

He also pointed out some tools, steps, and measures that judges can use to uphold the environment. Judges can begin with a green interpretation of statutes or a pro-environment interpretation of its provisions. Using the right to information, appointing commissions, and *amicus curiae*, and involving the public and



all stakeholders will also make judges more environmentally friendly and conscious. Training of judges and media awareness are also important steps. Justice Shah then discussed some cases where judicial leadership was exemplified, particularly in the River Ravi case. The worsening pollution of the river prompted the court to take measures such as appointing *amicus curiae*, rolling review, continuing mandamus, and constituting the River Ravi Commission. One significant output of the commission was the biomediation project based on the concept of a constructed wetland.

In conclusion, Justice Shah pointed out that the judiciary is not the only trustee of the environment; the executive branch, the legislature, nongovernment organizations, and the media are equally responsible. He added that the handling of an environmental case depends on an individual judge's approach. Not all matters come to the court, yet hundreds of environmental cases are dismissed, and there is an absence of critical assessment. Lastly, he pointed out that jurisprudence or precedents will have to be checked against existing realities.

## E

## PANEL DISCUSSION

Providing his insights on the River Ravi case, **Justice Md. Ashfaqu Islam**, High Court of Bangladesh said that enforcement of environmental laws needs paramount consideration. The solution is the awareness of the people of the need to protect the environment, which can be achieved through motivation. Citing a recent decision of the Supreme Court of Bangladesh, he noted that the right to life includes the protection and preservation of a healthy environment.

**Justice Ananda Mohan Bhattarai**, acting chief judge, Court of Appeal, Nepal responding to a question on the timeliness of judgments and the use of negotiation, noted that it would depend on the complexity of the case, which is usually what happens in an environmental dispute.

On a statement that environment is an integral part of a person's life, **Mr. Kurukulasuriya** noted that an environmental case before a court is not simply one based on the laws but is one with an environmental dimension. There is therefore a need to have a judicial mind-set to have empathy for sustainability and the environment in deciding such cases.

Asked by Chief Justice Peiris about what steps should be taken to move forward, **Dr. Desai** said that there are no ready-made solutions, and thus the role of the judge becomes pivotal. Environmental law thus becomes a law of sensitivity.

■ Chief Justice Md. Muzammel Hossain (L), Bangladesh, sharing his comments. Listening are (L-R) Justice T.S. Thakur, India; Justice H.L. Dattu, India; and Justice Saleem Marsoof, Sri Lanka.

A photograph showing four men, likely judges, seated in a conference room. They are wearing suits and ties. The man in the foreground is speaking into a microphone. The other three men are listening attentively. The room has wooden paneling and microphones on the table.

## VI. DAY 2, SESSION 3: MOVING FORWARD— BREAKOUT SESSIONS ON THE COLOMBO ACTION PLAN



## RECAP OF PREVIOUS ROUNDTABLES AND BREAKOUT SESSIONS

Justice Shah provided a brief recap of what transpired during the previous roundtables held in Bhurban, Pakistan and Thimphu, Bhutan to serve as a guide for the breakout sessions.

In Bhurban, the participants recognized that the judiciaries in the region should play a role in sustainable development and the protection of the environment. They also agreed to hold the roundtable annually on a rotational basis among South Asian judiciaries and to draft a memorandum of understanding for cooperation on the environment. As part of postroundtable activities, the Committee for Enhancing Environmental Justice in Pakistan was constituted and has been working actively to advance environmental justice. “Green benches” were also established in all courts of the country. In addition, an environmental law curriculum was prepared for the judicial academies as a compulsory subject. Lastly, a research paper was published, *Development of Environmental Law and Jurisprudence in Pakistan*.

At the roundtable in Thimphu, the agenda concentrated on understanding common environmental challenges within the region, sharing environmental adjudication experiences, and developing further cooperation between South Asian judiciaries. All judges from Bhutan, including those from the district judiciary, received training at the roundtable. As a follow-up publication, the *Review and Compendium of Environmental Law and Policy in Bhutan* was published, to be used as a “green book” by all prosecutors and judges in Bhutan. Bhutan also agreed to support the institutionalization of the South Asia Judges Network on the Environment within the South Asia Association for Regional Cooperation in Law (SAARCLAW). Lastly, a draft memorandum of understanding on cooperation among South Asian judiciaries was created, providing for increased collaboration on information exchange, capacity building, and strengthening the judiciaries’ focus on environmental issues.

During the breakout sessions, the roundtable participants were divided into two smaller groups and asked to deliberate and propose a minimum of five action points under each category: judicial training and capacity enhancement, regional integration and cooperation, enhancing the efficacy of the judicial system for environmental justice, and use of ADR for better environmental dispute management and enhancing justice. The action points were then compiled to form the Colombo Action Plan.



## VII. FINAL SESSION: WAY FORWARD

## PLENARY PRESENTATIONS ON THE RESULTS OF THE BREAKOUT SESSIONS AND THE COLOMBO ACTION PLAN

After the breakout sessions, the participants met again to share their discussions and to finalize the draft of the Colombo Action Plan.

The first group discussed judicial training and capacity enhancement, and regional integration and cooperation. The group agreed that judicial training is necessary, with a specific component on environmental science. Specific programs in judicial training academies should be developed, in addition to cross-country training programs between the different jurisdictions and other regions, such as ASEAN. An exchange program can be developed for this purpose, with online and video-linked training. There is also a need to continuously update information, such as laws and jurisprudence, through platforms such as AJNE and ECOLEX. A panel of experts from SAARC can also be developed to assist judges in their decisions.

On regional integration and cooperation, a regional approach to decision making can be agreed upon. Harmonization of laws among South Asian countries can also be explored. On transboundary issues, the same can lead to an opportunity for cooperation among the countries involved.

The second group talked about enhancing the efficacy of the judicial system for environmental justice and the use of ADR for better environmental dispute management and enhancing justice. There were many discussions on formulating rules and procedures on how the courts work. Procedural rules and regulations need to be improved for better handling of environmental cases. Another point discussed was the lack of judicial capacity in understanding environmental cases, resulting in the need for training for judges. Access of the people was also highlighted, which will give weight to environmental justice. Another issue was access to information, as courts must improve their procedures to be able to provide the appropriate information to the public. On continuous mandamus, the group agreed that this needs to be enforced until the court is satisfied that the executive branch can deliver. The need for an adequate number of judges was also discussed, aside from designating specific courts for environmental cases.

On the use of ADR, the group noted that while mediation is a good idea, court-supervised mediation should also be encouraged. Care should be taken to ensure that any agreement in mediation takes into account the larger concerns of the environment. Prefiling mediation can be explored but may not necessarily be mandatory. Separate mechanisms to orient judges on mediation techniques should be conducted. Lastly, any settlement should be within the parameters set by the courts and should not prejudice other parties.

Based on the comments and discussions above, the Colombo Action Plan was approved by the participants of the roundtable. A copy of the action plan is attached as an appendix to this publication.



## B

## CLOSING REMARKS

**RAMIT NAGPAL**, Deputy General Counsel, ADB

**Ramit Nagpal** began by citing the Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability, which recognized environmental law as essential for the protection of natural resources and ecosystems. The declaration added that a strong, independent judiciary and judicial process are vital for the development and enforcement of environmental law. He then said that through the efforts and conviction of the participants, environmental justice has been brought to the forefront of sustainable development. Mr. Nagpal noted that ADB finances development to support economic growth, which is both inclusive and environmentally sustainable, while recognizing the need to help the judiciary address these issues. He thanked the strong support of the judiciary in Sri Lanka for the success of the event.



Mr. Nagpal recalled the previous roundtables held in Bhurban and Thimphu. Here, at the third roundtable in Colombo, he noted that another step forward has been taken in continuing the work and dialogue previously started. The 2-day event exemplified a renewed commitment from the judiciaries of South Asia to the continued protection of nature and the promotion of environmental justice, also highlighting the need to strike a balance between economic progress and protecting the environment. He also cited the adoption of the Colombo Action Plan and encouraged the judges present to consider concrete steps in moving forward.

In conclusion, Mr. Nagpal thanked all those who made the roundtable a success, particularly Chief Justice Peiris and the teams from the Sri Lankan judiciary and ADB. With efforts like this, he said, the legal fraternity can provide hope for a greener and more sustainable tomorrow.

## C

## CLOSING REMARKS

**SRI WIDOWATI**, Country Director,  
Sri Lanka Resident Mission, ADB

**Sri Widowati** began her speech by thanking Chief Justice Peiris for hosting the roundtable, noting that the success of the event would not be possible without his leadership and dedication. She added that the support and cooperation, which the Supreme Court has shown, bodes well for ADB's work in Sri Lanka. She also thanked the chief justices and judges who attended, who took time out of their busy schedules to share ideas and to continue the dialogue for a "greener" South Asia. Their active participation serves as encouragement for the other branches



of government, and other judiciaries of the world, to realize the seriousness of environmental degradation. Appreciation was also given to the expert resource speakers and panelists, and ADB's organizing team and the support of the management.

Ms. Widowati then recalled the provisions of the Constitution of Sri Lanka, which calls on the state to protect, preserve, and improve the environment for the benefit of the community. Equally important is the provision reposing on all Sri Lankans the duty to protect nature and preserve its riches. She concluded that these provisions highlight that environmental justice and the conservation of nature are not just the concerns of government or of the judiciary, but is a responsibility and a call for each and every one to become good stewards of nature.

## D

# CLOSING REMARKS

**SALEEM MARSOOF**, Justice, Supreme Court of Sri Lanka

**Justice Saleem Marsoof** noted that in the roundtable, the participants have been able to engage in productive, useful deliberations on wide-ranging issues relating to environmental protection and preservation. Progress has been made from the first two roundtables and culminated in the formulation of the Colombo Action Plan for the protection of the planet for future generations. He added that it was the consensus of the participants that the judiciary was not the only one responsible for preserving the environment, but the courts are looked upon as the last resort when other stakeholders do not discharge their duty as trustees of natural resources. There is a need to carry forward the action plan and make it a reality through forging friendships and continuing mutual assistance. Common problems and challenges compel the participants to find similar solutions. Justice Marsoof then thanked ADB, Chief Justice Peiris, and his team for making the roundtable a success.



# APPENDIX 1

## AGENDA



# THIRD SOUTH ASIA JUDICIAL ROUNDTABLE ON ENVIRONMENTAL JUSTICE FOR SUSTAINABLE GREEN DEVELOPMENT

Colombo, Sri Lanka  
8–9 August 2014

## AGENDA

### THURSDAY, 7 AUGUST 2014

8 a.m. onward	Guest check-in: The Kingsbury Hotel, Colombo, Sri Lanka
7 p.m.–9:00 p.m.	Welcome dinner hosted by the Asian Development Bank (ADB): The Kingsbury Hotel, Colombo, Sri Lanka

### DAY 1 FRIDAY, 8 AUGUST 2014

8:30 a.m.–9 a.m.	Registration: John Exter Conference Hall, Central Bank Building, Colombo, Sri Lanka
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### DAY 1: INAUGURAL SESSION

9 a.m.	Arrival of VIPs
9:30 a.m.	Arrival of the chief guest, President Mahendra “Mahinda” Rajapaksa, Sri Lanka
9:35 a.m.–9:45 a.m.	National anthem and lighting of the traditional oil lamp
9:45 a.m.–10:10 a.m.	Opening remarks: Mohan Peiris, chief justice, Sri Lanka
10:10 a.m.–10:25 a.m.	Welcome remarks: Bruce L. Davis, vice-president, ADB
10:25 a.m.–10:45 a.m.	Remarks: President Rajapaksa, Sri Lanka
10:45 a.m.–10:55 a.m.	Group photo
10:55 a.m.–11:15 a.m.	Tea break
11:15 a.m.–11:45 a.m.	Keynote address: Elizabeth Mrema, director, Division of Environmental Law and Conventions, United Nations Environment Programme
11:45 a.m.–12 noon	Asian Judges Network on Environment and ADB’s role in strengthening environmental governance: Irum Ahsan, project leader and counsel, ADB
12 noon–1 p.m.	Lunch

### DAY 1, SESSION 1

1 p.m.–3:15 p.m.	<p><b>Presentations by chief justices (10 minutes each)</b></p> <ul style="list-style-type: none"> <li>Each chief justice (or a nominee judge) will make a 10-minute presentation in the form of a country report</li> </ul> <p><b>Comments:</b> C. Scott Fulton, former general counsel, United States Environmental Protection Agency; Bakary Kante, chair, Africa Sustainability Centre; Lal Kurukulasuriya, director-general, Centre for Environmental Research, Training and Information, Sri Lanka; and Tun Arifin Zakaria, chief justice, Federal Court of Malaysia</p>
3:15 p.m.–3:30 p.m.	Tea break

DAY 1, SESSION 2 “Taking Stock”: Where We Are on Environmental Justice	
3:30 p.m.–5 p.m.	<ul style="list-style-type: none"> <li>• <b>Presentation 1 (15 minutes):</b> <i>Status of the environment, highlighting specifically some of the key challenges impacting the SAARC region:</i> Sanjay Upadhyay, managing partner, Enviro Legal Defence Firm, India</li> <li>• <b>Presentation 2 (15 minutes):</b> <i>Current trends and developments in environmental principles and jurisprudence:</i> Bharat Desai, International Law and Jawaharlal Nehru chair in International Environmental Law, Jawaharlal Nehru University, India</li> <li>• <b>Special presentation and video screening (20 minutes):</b> <i>Impacts of environmental issues on women, Harvesting Hope:</i> Sarah Khan</li> <li>• <b>Panel discussion:</b> Lord Robert Carnwath, judge, Supreme Court of the United Kingdom; C. Scott Fulton, former general counsel, United States Environmental Protection Agency; Camena Guneratne, professor, Open University of Sri Lanka; and Syed Mansoor Ali Shah, judge, Lahore High Court, Pakistan</li> <li>• <b>Q &amp; A</b></li> </ul>
5 p.m.	<b>Signing of the regional cooperation memorandum of understanding</b>
7 p.m.–9:30 p.m.	<b>Dinner hosted by President Rajapaksa, Sri Lanka</b>
DAY 2 SATURDAY, 9 AUGUST 2014	
DAY 2, SESSION 1 Environment and Development	
9 a.m.–10:30 a.m.	<ul style="list-style-type: none"> <li>• <b>Presentation 1 (15 minutes):</b> <i>Ecosystem services and natural capital:</i> Chetan Agarwal, forest and environmental services analyst, India</li> <li>• <b>Presentation 2 (15 minutes):</b> <i>Green considerations in urban planning and development:</i> Saima Amin Khawaja, partner, Progressive Advocates and Legal Consultants, Pakistan</li> <li>• <b>Presentation 3 (15 minutes):</b> <i>Tourism and the environment:</i> Nayana Mawilmada, urban development specialist, founder and managing director, Total Management Solutions, Sri Lanka</li> <li>• <b>Presentation 4 (15 minutes):</b> <i>Community forest management in Nepal and the judiciary:</i> Ananda Mohan Bhattarai, acting chief judge, Court of Appeal, Nepal</li> <li>• <b>Panel discussion:</b> Bakary Kante, chair, Africa Sustainability Centre; Sarmad Jalal Osmany, justice, Supreme Court of Pakistan; Tshering Wangchuk, justice, Supreme Court of Bhutan; and Sanith de Silva Wijeyeratne, chief executive officer, Carbon Consulting Company, Sri Lanka</li> <li>• <b>Q &amp; A</b></li> </ul>
10:30 a.m.–10:50 a.m.	Tea break
DAY 2, SESSION 2 Developments in Environmental Adjudication	
10:50 a.m.–12:30 p.m.	<ul style="list-style-type: none"> <li>• <b>Presentation 1 (15 minutes):</b> <i>Nature of environmental conflicts and their resolution:</i> Ritwick Dutta, Legal Initiative for Forest and Environment, India</li> <li>• <b>Presentation 2 (15 minutes):</b> <i>Environmental conflicts and alternative dispute resolution:</i> Harsha Fernando, attorney and consultant trainer, Sea-Change Partners of Singapore on Mediation and Negotiation, and consultant, ADB</li> <li>• <b>Presentation 3 (15 minutes):</b> <i>Innovation in environmental justice and judicial leadership:</i> Syed Mansoor Ali Shah, judge, Lahore High Court, Pakistan</li> <li>• <b>Panel discussion:</b> Ananda Mohan Bhattarai, acting chief judge, Court of Appeal, Nepal; Bharat Desai, International Law and Jawaharlal Nehru chair in International Environmental Law, Jawaharlal Nehru University, India; Md. Ashfaul Islam, justice, Supreme Court of Bangladesh; and Lal Kurukulasuriya, director-general, Centre for Environmental Research, Training and Information, Sri Lanka</li> <li>• <b>Q &amp; A</b></li> </ul>
12:30 p.m.–1:30 p.m.	Lunch

DAY 2, SESSION 3 Moving Forward: Colombo Action Plan	
1:30 p.m.–3:15 p.m.	<ul style="list-style-type: none"> <li>• <b>Recap of Pakistan and Bhutan roundtables and introduction to breakout sessions</b></li> <li>• <b>Breakout sessions</b></li> <li>• Deliberate and propose a minimum of five action points under each of the following categories: <ul style="list-style-type: none"> <li>(i) judicial training and capacity enhancement,</li> <li>(ii) regional integration and cooperation,</li> <li>(iii) enhancing the efficacy of the judicial system for environmental justice, and</li> <li>(iv) use of alternative dispute resolution for better environmental dispute management and enhancing justice.</li> </ul> </li> </ul>
3:15 p.m.–4 p.m.	Tea break
FINAL SESSION Way Forward	
4 p.m.–5 p.m.	<b>Plenary presentations (10 minutes each)</b> Each of the four groups, through an assigned rapporteur, will present to the plenary their recommended action points together with the basis of their discussions. The 10 most important points will be selected for implementation as action ideas.
5 p.m.–5:30 p.m.	<b>COLOMBO ACTION PLAN</b> The participants will <ul style="list-style-type: none"> <li>(i) adopt the 10 action ideas as the Colombo Action Plan, and</li> <li>(ii) resolve to report back at the next roundtable the progress made in respect of the memorandum of understanding and plan.</li> </ul>
5:30 p.m.–6 p.m.	<ul style="list-style-type: none"> <li>• <b>Closing Remarks: Ramit Nagpal, deputy general counsel, ADB</b></li> <li>• <b>Closing Remarks: Sri Widowati, country director, Sri Lanka Resident Mission, ADB</b></li> <li>• <b>Closing Remarks: Saleem Marsoof, Justice, Supreme Court of Sri Lanka</b></li> </ul>
7 p.m.–9:30 p.m.	Dinner hosted by Chief Justice Peiris, Sri Lanka
END OF ROUNDTABLE	
SUNDAY, 10 AUGUST 2014	
8 a.m.–12 noon	Delegates depart



APPENDIX 2  
CONCEPT PAPER

# THIRD SOUTH ASIA JUDICIAL ROUNDTABLE ON ENVIRONMENTAL JUSTICE FOR SUSTAINABLE GREEN DEVELOPMENT

Colombo, Sri Lanka  
8–9 August 2014

## CONCEPT PAPER

### A. BACKGROUND

The protection, conservation, and proper utilization of the environment are considered key challenges faced by the world today. South Asia, a region that is historically endowed with ample “natural capital” but increasingly facing the effects of climate change, has to effectively respond and successfully deal with the challenges produced by changing climatic conditions.

South Asia is home to 1.6 billion people with unique social and economic indicators. During the last decade, the region has experienced change in many spheres, including population growth, rapid urbanization, economic development, and improvements to infrastructure facilities. The Intergovernmental Panel on Climate Change, in its fifth report, identified major environmental challenges that South Asia will continue to face, including warming trends and increasingly extreme temperatures, water scarcity, decline in food productivity, threats faced by both freshwater and seawater maritime systems due to rising sea levels, and high incidence of extreme climate events. The report predicted that climate change will affect the sustainable development capabilities of most Asian developing countries by aggravating pressures on natural resources and the environment. This situation requires a coordinated, comprehensive approach using the full miscellany of policies and tools available covering economic, social, developmental, legal, and other aspects.

Social progress through economic development alone comes with significant costs to the environment. Recognizing this, legal and institutional frameworks that are environment-focused have been set up. However, even in instances where adequate policy, legal, and regulatory frameworks have been introduced, there is much room for improvement to ensure effective implementation, enforcement, and compliance. Strategy 2020 of the Asian Development Bank (ADB) calls on ADB to strengthen environmental regulatory frameworks and enforcement capacities of public institutions. Against this background, South Asian judiciaries are very important and play a significant role in shaping the environment-related legal and policy dialogue in the region through normative interpretation of legal and regulatory frameworks, issuance of rules and directions that affect lower court priorities, and their role in judicial adjudication and education.

In this context, ADB is leading an initiative—Building Capacity for Environmental Prosecution, Adjudication, Dispute Resolution, Compliance, and Enforcement in Asia. South Asia is one of the subregions under this initiative, and two roundtables have already been organized in partnership with the supreme courts of two South Asian countries.

The first roundtable was held in Bhurban, Pakistan, organized by the Supreme Court of Pakistan and ADB, in collaboration with the International Union for the Conservation of Nature and the United Nations Environmental Programme (UNEP). This resulted in the Bhurban Declaration of 2012, where

South Asian judiciaries agreed to a range of activities. This was followed by the second roundtable in Thimphu, Bhutan, organized by the Royal Court of Bhutan and ADB, which concentrated on understanding common environmental challenges within the region, sharing environmental adjudication experiences, and developing further cooperation between South Asian judiciaries. The Third South Asian Roundtable on Environmental Justice for Sustainable Green Development to be held in Colombo, Sri Lanka on 8–9 August 2014 is corollary to the above initiatives.

## **B. THIRD ROUNDTABLE: ENVIRONMENTAL JUSTICE FOR SUSTAINABLE GREEN DEVELOPMENT**

The third roundtable will continue to concentrate on the following key themes: (i) judicial training and capacity enhancement, (ii) regional integration and cooperation, (iii) enhancing the efficacy of the judicial system for environmental justice, and (iv) application of alternative dispute resolution (ADR) methods such as mediation for better environmental dispute management and enhancing justice. In addition, this roundtable will expand the scope of discussion by including specific issues relating to urban development, “natural capital,” gender, community forest management, and tourism within the overall sustainable green development concept.

### **1. Day 1, Session 1: “Taking Stock”—Country Status**

The roundtable will commence with the sharing of the status of environmental adjudication and evolution of jurisprudence in each South Asian country. This session will highlight challenges that courts face when confronted with environmental conflicts, and how the courts have responded to these challenges while contributing, in the long term, to the preservation and protection of the environment. The forum will also discuss developments in jurisdictions outside of South Asia while respecting the principle that for sustainable efficacy, legislative and institutional responses and strategies should be within each country’s context.

### **2. Day 1, Session 2: “Taking Stock”—Where Are We on Environmental Justice?**

The roundtable will “take stock” of the situation in three ways.

First, the speakers will discuss the status of the environment and climate change against the background of key environmental challenges that South Asia is confronting. This reality will enhance the quality and relevance of subsequent deliberations and the discussion of legal principles in a realistic, practical manner.

Second, this session will discuss important legal and jurisprudential benchmarks set both regionally and internationally, enabling the assessment of South Asian jurisprudence. The discussion will enhance the scope of jurisprudence to include not only judge-made law but also the wider institutional, legal, and policy framework with special emphasis on innovative approaches.

Lastly, recognizing the impact of climate change as universal and pervasive, this session will discuss impacts on one of the key vulnerable groups: women. Women still have relatively less influence to shape decisions made on climate change adaptation. This is in spite of the fact that women, especially those in developing countries, are more affected by climate change. Moreover, food, water, and fuel for cooking is still considered a primary responsibility of women. Incorporating gender into the climate change dialogue is essential to minimize risks to women and children and to making adaptation efforts more sustainable.



### **3. Day 2, Session 1: Environment and Development**

With rapid development, the demand for goods, public services, jobs, and housing by South Asians has greatly increased. Societies expect a minimum quality of life level, which includes infrastructure, utility services, and other modern conveniences. With economic development, the perception of what constitutes this minimum has expanded. Environmental consciousness has forced decision makers and development professionals to consider the environment as a key factor in view of short- and long-term consequences. Environmentalism and advocacy have brought the environment to the forefront of development decision-making, resulting in a high rate of environmental conflicts brought to the judiciary and legal system. This session will highlight “development versus environment” through the angle of urban development, tourism, economic value of “natural capital,” and community forest issues, and attempt to reach further consensus in a “green development” paradigm.

Since this session is core to the theme of the roundtable, it includes four presentations. The first highlights “natural capital” for developing, mainstreaming and attempting to economically value services that the environment offers (e.g., natural decomposition of waste and water purification by wetlands). This is important because the region (which has seven of the largest megacities, that is, urban areas of over 10 million people) has to cope with the increase in its rate of urban development, putting further pressure on already strained natural resources. Failure to view “natural capital” as an economic resource has resulted in degradation and unsustainable use of limited resources.

The second presentation will highlight green considerations in urban planning and the need to arrest negative impacts of rapid urbanization. Urban planners have to respond to the increasing need for basic resources essential for human well-being such as land, housing, water, and energy. They also have to deal with the resulting rise in land prices, depletion of canopy cover, and loss of urban wetlands due to urban sprawl, decreasing land-human ratio, and congestion. Issues such as solid waste management and sewerage disposal, industrial waste, pollution (i.e., site, air, water, and noise), destruction and encroachment of urban wetlands, and natural disasters (e.g., flash floods) faced by urban planners and administrators and resultant conflicts will be highlighted.

The third presentation will deal with green tourism and urban development. Tourism is a key economic activity and a viable means of economic support for poor communities. Tourism, if properly planned, can easily harmonize environmental interests with economic interests of visitors and host communities. This sector is one area where the gap between the environment and development can be bridged and where the two concepts can harmoniously coexist using the framework of sustainable green development.

The final presentation will discuss increasing community forest issues in Nepal and important decisions that have been taken by the courts in that country. This session will be an example of how the issue arises and what approaches are taken by judges to deal with such situations, keeping in mind the importance of sustainable development and the needs of the local people who rely on the forests for their daily needs and livelihood. Community forest management can also bridge the gap between the environment and development.

### **4. Day 2, Session 2: Developments in Environmental Adjudication**

Environmental rule of law calls for adherence to environmental laws and emphasizes the need to establish robust, effective frameworks of justice, governance, and law for environmental sustainability. The judiciary

is a crucial partner in bringing about a balance between environmental and developmental considerations and in promoting a culture of compliance with legal norms and standards. The first presentation will emphasize that environmental conflicts are multifaceted, complex, and unique. They include moral questions (e.g., does the present generation owe anything to the next generations?), policy considerations (e.g., should a particular development initiative proceed?), and economic indicators. The implications are far-reaching and costly. The inherent limitations in the adversarial system, procedural and evidentiary laws, and principle of binding judicial precedents will limit the outcomes that courts can achieve. This session will assess the suitability and sufficiency of the court processes as practiced now in the region and evaluate the efficacy of the present system and processes in providing the required response to environmental conflicts.

The outcome of a conflict depends both on substance and processes, with the latter having a significant impact. Of the several ADR processes, mediation and negotiation have been used to successfully deal with environmental conflicts. Many judicial officers encourage parties to negotiate, and they act more as mediators than adjudicators, with rules of procedure for mediation by judges included in many systems. The second presentation will highlight mediation as a better method to deal with most environmental conflicts.

Conflicts, if properly managed, enable the reframing of issues, empowering parties to look at new ways of engagement. The judiciary has to provide leadership in this process. South Asian judiciaries have provided leadership in environmental jurisprudence by pronouncing judgments incorporating environmental principles and innovative remedies to deal with environmental issues. The judiciary can contribute to enhancing the environmental agenda by (i) using creative adjudicatory methods, (ii) developing new principles of law, and (iii) providing leadership in synergizing the entire legal system. The third presentation will highlight this unique judicial leadership role.

## **5. Day 2, Final Session: Way Forward**

This roundtable will assess the progress made so far from the first and second judicial roundtables. The first roundtable produced the Bhurban Declaration of 2012 for a common vision on environment for South Asian judiciaries, agreeing to share experiences and knowledge, improve judicial training and education on the environment, and take specific innovative steps (e.g., create “green benches”).

Continuing this theme, the second roundtable in Bhutan sought to promote a common understanding and a shared vision of the environmental challenges within South Asia, and finalized a draft memorandum of understanding to foster cooperation among South Asian judiciaries.

At the end of the third roundtable, it is proposed that this memorandum of understanding will be signed and adopted. In addition, four thematic areas will be specifically deliberated: (i) judicial training and capacity enhancement, (ii) regional integration and cooperation, (iii) enhancing the efficacy of the judicial system for environmental justice, and (iv) use of ADR for better environmental dispute management and enhancing justice. These discussions will lead to the formulation of action ideas, which will be adopted as the Colombo Action Plan for postroundtable execution.

## C. PARTICIPANTS

The roundtable is for chief justices and senior judges of South Asian countries. At least 2–4 senior judges will participate from each country and will have seats at the roundtable. To enrich the discussion and to highlight environmental issues, the roundtable will benefit from a panel of internationally reputed legal, environmental, urban planning, and development experts, and jurists from other parts of the world such as Brazil, Egypt, Malaysia, the United Kingdom, and the United States. There will also be institutional representations from the UNEP, civil society, academia, and experts from other fields and disciplines.

## D. APPROACH

The 2-day roundtable will assess the progress made so far and continue to build on the work already done or in progress consequent to the first and second roundtables. Each session will comprise expert presentations followed by deliberations and discussions with the guidance of a panel of experts. It is expected that as the core concentration is on the judges of the roundtable, the atmosphere will encourage frank deliberations on key issues from each country. The signing of the memorandum of understanding will further consolidate the progress made, and the Colombo Action Plan will encourage taking of concrete and practical steps by each of the participating judiciaries.

## E. OUTPUTS

The roundtable will result in (i) consolidation of the progress made so far; (ii) crafting of practical and actionable ideas; (iii) enhanced understanding of the specific issues relating to urban development, “natural capital,” gender, community forest issues, and tourism; (iv) further networking and collaboration among South Asian judiciaries; and (v) sharing and exchange of ideas among judges. In addition, knowledge products through compilation of the papers submitted and uploaded to the Asian Judges Network on Environment website will occur. ADB will also, in collaboration with the Supreme Court of Sri Lanka, engage in postconference activities such as judicial training.

## F. PARTNER

Supreme Court of Sri Lanka

## G. CONTACTS

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# APPENDIX 3

## BACKGROUND PAPER

# THIRD SOUTH ASIA JUDICIAL ROUNDTABLE ON ENVIRONMENTAL JUSTICE FOR SUSTAINABLE GREEN DEVELOPMENT

Colombo, Sri Lanka  
8–9 August 2014

## BACKGROUND PAPER

### 1. INTRODUCTION

#### 1.1 Document Outline

This paper provides a background to the proposed agenda and discussions of the Third South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development. Part 1 talks about the judiciary and environmental justice initiatives. Part 2 provides an overview of the status of the environment in South Asia and the judiciary's role in environmental protection. Part 3 introduces Sri Lanka's environmental status, laws, and judiciary structure. Part 4 reviews common environmental adjudication and enforcement challenges throughout the South Asian region, as specific input to the various sessions. Lastly, Part 5 elaborates on the roundtable agenda.

This paper adopts the literature of the earlier roundtables. The third roundtable is a logical continuation of the work already done under the first and second roundtables.

#### 1.2 Initiative Background

##### 1.2.1 Environmental Challenges and the Role of the Judiciary

During the last 3 decades, attitudes about development have significantly changed, with widespread acceptance that only a few of the benefits of development come without significant environmental costs.<sup>1</sup> This understanding has led to the emergence of the concept of sustainable development in relation to poverty eradication, environmental protection, job creation, security, and justice. The Millennium Development Goals include the following relevant provisions on environmental sustainability: (i) integrate the principles of sustainable development into country policies and programs, and reverse the loss of environmental resources; (ii) reduce biodiversity loss, and achieve by 2010 a significant reduction in the rate of loss; (iii) halve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation; and (iv) achieve, by 2020, a significant improvement in the lives of at least 100 million slum dwellers.<sup>2</sup> The emphasis that each country places on each of these elements at different stages of its development process differs, at times significantly.<sup>3</sup> Irrespective of the emphasis, all countries have noted sustainable environmental protection as a key priority. Development dialogue now includes new concepts such as “green development” and “green economics.”

<sup>1</sup> Adapted from S. L. Bacow and M. Wheeler. 1987. *Environmental Dispute Resolution*. New York: Plenum Press.

<sup>2</sup> United Nations. Goal 7: Ensure Environmental Sustainability. <http://www.un.org/millenniumgoals/envIRON.shtml>

<sup>3</sup> International Panel on Climate Change, Working Group III. 2014. *Climate Change 2014: Mitigation of Climate Change*. <http://www.ipcc-wg3.de>

Law is one of the key instruments of social regulation. This is achieved through the establishment of norms of conduct and the creation of the required machinery for ensuring that such norms are effectively complied with. In the field of environmental management, national and international legislation have been extensively applied in the past 30 years or so to promote the goals of environmental management, pollution control, natural resources conservation and use, and protection of the cultural and aesthetic environment. Since the 1992 United Nations Conference on Environment and Development gave legitimacy to the concept of sustainable development, these goals are no longer viewed from a purely environmental perspective but in the context of the integration of the environment and development. Thus, a fourth dimension of environmental regulation is added to the sphere of environmental law: the integration of the environment in development decision-making.

All of these must be nurtured and realized within the all-pervasive paradigm of the rule of law, which has inspired the comparatively recent notion of environmental rule of law. The judiciary is a crucial partner in bringing about a balance between environmental and developmental considerations thereby promoting and ensuring sustainable development. Through their decisions, orders, and resolutions, judges can help in environmental protection and ensure that laws and principles for the conservation of nature are upheld.

#### 1.2.2 Building Capacity for Environmental Prosecution, Adjudication, Dispute Resolution, Compliance, and Enforcement in Asia

Compliance with and enforcement of international and national environmental laws are widely recognized as principal challenges facing nations in the pursuit of sustainable development. During the past 3 decades, almost all countries in the world, including those in South Asia, have enacted environmental legislation, including constitutional provisions, and have become parties to a large number of global and regional environmental conventions, agreements, and protocols. The judiciary remains a crucial partner for promoting environmental law enforcement and compliance, as well as for shaping the content of legal principles and norms.

Recognizing the potential role of judges, especially the senior judiciary, the Asian Development Bank (ADB) in collaboration with the United Nations Environment Programme (UNEP), jointly held the first Asian Judges' Symposium on Environmental Decision-Making, the Rule of Law, and Environmental Justice in July 2010. Participants agreed on several key messages: (i) ensuring effective compliance and enforcement of environmental law requires the entire environmental compliance and enforcement chain to be effective, (ii) judges play a unique role, and (iii) expanding access to environmental justice involves both the formal justice system and informal ways to resolve disputes.<sup>4</sup>

Based on the discussions, several initiatives were proposed to enhance the efficacy of the justice sector toward improving environmental safeguards. One of the key proposals was the establishment of the Asian Judges Network on Environment (AJNE) to be the forum for the diffusion of knowledge and experiences in dealing with matters on environmental rule of law in the region. It is in this background that in December 2010, ADB approved a regional technical assistance project—Building Capacity for Environmental Prosecution, Adjudication, Dispute Resolution, Compliance, and Enforcement in Asia—to support two subregional groups, the South Asia Association for Regional Cooperation (SAARC) and Association of Southeast Asian Nations (ASEAN).<sup>5</sup>

<sup>4</sup> A. Gawel. 2013. Background paper prepared for the Second South Asia Judicial Roundtable on Environmental Justice. Thimphu, Bhutan. 30–31 August.

<sup>5</sup> Footnote 4.



### 1.2.3 South Asian Roundtable on Environmental Justice

The above ADB-led initiative is anchored on the premise that environmental law has been and is undergoing a process of rapid development, often shaped by globalization, industrialization, and phenomena such as global warming and climate change. At this stage of its development, it depends heavily on the judiciary for the direction it takes with situations that are presented to the courts, often without precedent and with each case having its own nuances, paving the way for setting new standards and norms.

In 2012 and 2013, two roundtables focusing on the chief justices and senior judges of South Asia were held to encourage sharing of experiences and country jurisprudence and to develop a shared vision toward better handling of environmental conflicts. The first roundtable, held in Bhurban, Pakistan in March 2012, was organized by the Supreme Court of Pakistan and ADB, in collaboration with the International Union for the Conservation of Nature and UNEP. This resulted in the adoption of the Bhurban Declaration 2012: A Common Vision on Environment for the South Asian Judiciaries. This declaration encompassed sharing of information and experiences, noting best practices on adjudication of environmental conflicts, building capacity of the judiciaries, and encouraging education and training on the environment. The roundtable also resulted in the drafting of a memorandum of understanding to foster cooperation among South Asian judiciaries.

This was followed by the second roundtable, held in Thimphu, Bhutan in August 2013, where the Thimphu Declaration was adopted, focusing on enhancing understanding of shared environmental challenges within South Asia, sharing challenges and successes in environmental adjudication experienced by different countries in the region, and furthering the cooperation between South Asian judiciaries by advancing the Bhurban Declaration. It was also in Thimphu that the participants approved a draft memorandum of understanding and agreed to sign it during the next roundtable.

The focus of both roundtables was on judiciaries of South Asia through participating senior justices. The deliberations among the justices were enriched by many legal practitioners, technical experts from various fields and disciplines, academics, and civil society members sharing their knowledge, experiences, perspectives, and opinions. As a result, the roundtable provided a forum through which the judges benefited by interacting with a wide group of stakeholders from different sectors, which would not be possible solely through court processes due to inherent limitations in procedural and evidentiary rules.

### 1.2.4 Third South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development

The Third South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development will be held in Colombo, Sri Lanka, organized by the Supreme Court of Sri Lanka and ADB. This roundtable will follow the format of the earlier roundtables and provide a forum for the chief justices and other senior judges of the region to continue the dialogue on environmental justice. Being the third roundtable, the emphasis will, to a certain degree, shift in assessing the progress made so far by presenting for deliberation country status reports by the attending judges, in addition to new discussions of the environment and development. At the conclusion of the roundtable, practical action ideas will be drafted to be implemented thereafter.

The third roundtable will also focus on areas that are of immediate significance to the region. The main areas to be discussed include (i) “Taking Stock” under which recent developments in environmental law

and environmental justice will be discussed; (ii) “Environment and Development” under which ecosystem services and “natural capital,” green considerations in urban planning, tourism and urban development, gender issues affected by the environment, and judicial response to community forest issues will be discussed; and (iii) “Environmental Adjudication,” a session that will discuss the strengths and weaknesses of court-based environmental adjudication and open the discussion on the appropriateness of prioritizing alternative dispute resolution mechanisms, such as mediation, to deal with environmental conflicts that, by their very nature, present a unique set of challenges in furthering justice.

## **2. REGIONAL CONTEXT**

### **2.1 State of the Environment**

South Asia has inherited a rich, diverse ecosystem and a climate characterized by wet summers (monsoons) and dry winters. It is bordered to the north by the Himalayas, to the southeast by the Bay of Bengal, to the southwest by the Arabian Sea, and to the south by the Indian Ocean. It is composed of mountains, plateaus, deserts, river basins, wetlands, and a 10,000-kilometer (km) stretch of coastline between Pakistan and Bangladesh. The river systems of the region are some of the largest in the world, with the Indus River originating from Bhutan, the People’s Republic of China, and Nepal, and flowing to Bangladesh and India at a length of 3,180 km from source to sea. The Ganga River flows through a length of 2,525 km and the Brahmaputra River for 2,900 km through Bangladesh, the People’s Republic of China, and India.

During the last decade or so, the region has experienced changes in many spheres, including population growth, rapid urbanization, economic development, and improvements in infrastructure facilities. The Intergovernmental Panel on Climate Change identified major environmental challenges that South Asia will continue to face: warming trends and increasing temperature extremes, water scarcity, decline in food productivity, threats faced by both freshwater and seawater maritime systems due to rising sea levels, and high incidence of extreme climate events.<sup>6</sup> In addition, South Asia is also facing multiple stresses caused by rapid urbanization, industrialization, and economic development. The report predicted that climate change will affect the sustainable development capabilities of most Asian developing countries by aggravating pressures on natural resources and the environment.

Other environmental issues commonly faced by countries of South Asia include reduction in biodiversity, increasing scarcity of potable water, urban air pollution, soil degradation and deforestation, industrial pollution and increases in hazardous waste, natural disasters, deforestation, beach (i.e., coastline) erosion, and degradation of the marine habitat. Some of the common causes for these include high population density, high rate of urbanization, deficit urban infrastructure, industrial effluent and vehicle emissions, agrochemicals, unplanned and poorly regulated tourism, and industrial activity.

#### **2.1.1 South Asian Association for Regional Cooperation Response**

Against this background, the environment has been considered an issue of regional importance by South Asian countries, through SAARC. Heads of governments of SAARC at successive summits have

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<sup>6</sup> Footnote 3.

reiterated the need to strengthen regional cooperation to preserve, protect, and manage the diverse and fragile ecosystems of the region, including the need to address the challenges posed by climate change and natural disasters. SAARC initiatives include the Regional Study on the Causes and Consequences of Natural Disasters and the Protection and Preservation of the Environment (1991) followed by Green House Effect and Its Impact on the Region (1992), establishment of the Technical Committee on Environment (1992), Special Session of the Environment Ministers in the Aftermath of the Indian Ocean Tsunami (2005), SAARC Ministerial Meeting on Climate Change (2008), Delhi Statement on Cooperation in Environment (2009), and common SAARC positions on climate change (2010).<sup>7</sup> Furthermore, regional centers, such as the SAARC Coastal Zone Management Centre in the Maldives, SAARC Forestry Centre in Bhutan, SAARC Disaster Management Centre in India, and SAARC Meteorological Research Centre in Bangladesh, constitute a framework of SAARC institutions that address diverse aspects of environment, climate change, and natural disasters.<sup>8</sup>

### 2.1.2 Social Indicators of South Asia

South Asia is home to 1.6 billion people with unique social and economic indicators. The region, having inherited one of the largest river systems in the world, has an estimated 60% of the population dependent on agriculture as their livelihood,<sup>9</sup> making both land and irrigation water vital resources. The region has experienced steady economic growth, with a per capita gross national income of \$1,474 in 2013 and life expectancy at birth reaching 67 years.<sup>10</sup> The carbon dioxide emissions of South Asia measured 1.5 tons per capita, while the world average was 4.9 tons per capita in 2010.<sup>11</sup>

Globally, 1.2 billion people (22%) live on less than \$1.25 per day; in South Asia, 44.4% of the population, around 730 million people, live on \$1.25–\$2.50 per day.<sup>12</sup> Approximately 20% of the global population lives in the region with expectations for this figure to increase to 25% by 2025.<sup>13</sup> According to the Human Development Index,<sup>14</sup> South Asia is the second-poorest region in the world after sub-Saharan Africa.<sup>15</sup> Of the South Asian countries, only one is considered to have a high level of human development (Sri Lanka), three are at the medium level (Bhutan, India, and the Maldives), and four have a low level of human development (Afghanistan, Bangladesh, Nepal, and Pakistan).<sup>16</sup>

The Human Development Report of 2014, in assessing the risks faced due to climate change, assessed small island states, coastal cities, and smallholder farmers as “those standing to lose most from climate change,” and identified smallholder farmers in South Asia as particularly vulnerable.<sup>17</sup>

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<sup>7</sup> SAARC Secretariat. Areas of Cooperation. [http://saarc-sec.org/areaofcooperation/cat-detail.php?cat\\_id=54](http://saarc-sec.org/areaofcooperation/cat-detail.php?cat_id=54)

<sup>8</sup> Footnote 7.

<sup>9</sup> South Asia Co-operative Environment Programme. <http://www.sacep.org/>

<sup>10</sup> World Bank. Data: South Asia. <http://data.worldbank.org/region/SAS>

<sup>11</sup> World Bank. Data: Environment. <http://data.worldbank.org/topic/environment>

<sup>12</sup> United Nations Development Programme (UNDP). 2014. *Human Development Report 2014—Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience*. New York. <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf>

<sup>13</sup> United Nations Environment Programme (UNEP). 2009. *South Asia Environmental Outlook, 2009*. Nairobi.

<sup>14</sup> The Human Development Index measures three basic dimensions of human development: a long and healthy life; knowledge; and a decent standard of living measured through health, education levels, and income.

<sup>15</sup> UNDP. Human Development Index. <http://hdr.undp.org/en/statistics/hdi/>

<sup>16</sup> Footnote 4.

<sup>17</sup> Footnote 4.

## 2.2 South Asian Environmental Law Background

National legislative and institutional strategies for sustainable development and their judicial interpretation are necessarily endogenous and firmly set within each country's national milieu. The country-specific character of national environmental legislation has been repeatedly stressed in Agenda 21 and reaffirmed in the Rio Declaration on Environment and Development. Principle 11 of the declaration states: "Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries." It is also an unequivocal reaffirmation of a cornerstone of modern environmental rule of law, namely, the principle of common but differentiated responsibilities of states in the area of sustainable development. It is at the core of the concept of sustainable development and has found expression in several multilateral environmental agreements, legal instruments, and important judicial pronouncements.

Against this background, South Asian countries have progressively improved their legal and governance frameworks for environmental protection. Each of the countries has constitutionally entrenched environmental protection, in addition to other legal provisions, as well as judge-made legal principles that continue to be developed. After the 1972 Stockholm Conference on the Human Environment, new or amended constitutions of almost all South Asian countries now specifically reflect a need for environmental preservation and sustainable development.<sup>18</sup> A brief discussion of each of the South Asian countries and their environmental protection policy and framework is given below.

### 2.2.1 Afghanistan

Afghanistan has an agricultural economy, with close to 80% of its population relying directly on the country's environmental resources. As a result, the environmental capital of Afghanistan is under severe pressure, impacting livelihoods, health, and poverty levels. These are also constraining Afghanistan's postconflict reconstruction and development efforts. Current environmental problems include unequal distribution of water resources, leading to scarcity in some regions; deforestation combined with livestock grazing and water scarcity, leading to increased soil erosion; desertification and reduced fertility and ecosystem services; floods, mudslides, and rapid water drainage during the wet season; land degradation and resource scarcity; and existing chemical contamination of some air, soil, and water resources.<sup>19</sup>

The Constitution requires the government's commitment to adopt "necessary measures to protect and improve forests as well as the living environment."<sup>20</sup> With the passage of the 2007 Environmental Act, Afghanistan introduced a legal and institutional framework for environmental management. The law provides for the environmental rights and obligations of the Afghan people and imposes obligations on the government. The National Environmental Protection Agency is the lead in environmental management, with other institutions at the national, provincial, and local levels providing support. The legislation provides for pollution control and waste management, and obligates the government to apply the fundamental principles of environmental management; involve the public in relevant environment-related

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<sup>18</sup> Constitutional analysis in this section is based on work included in P. Hassan. 2012. Environmental Jurisprudence from Pakistan: Some Lessons for the SAARC Region. Background paper prepared for the South Asia Conference on Environmental Justice. Bhurban, Pakistan. 24–25 March.

<sup>19</sup> UNEP. n.d. *A Guide to the Afghanistan 2007 Environmental Law*. [http://postconflict.unep.ch/publications/afg\\_env\\_law.pdf](http://postconflict.unep.ch/publications/afg_env_law.pdf)

<sup>20</sup> Government of Afghanistan. 2004. *The Constitution of Afghanistan*. Article 15. Kabul.



decision-making; develop policies, laws, and regulatory instruments that seek to conserve and restore the environmental resource base of the country; implement the international environmental conventions of which Afghanistan is a member; monitor environmental indicators, and collect and make available environmental information; and enforce environmental laws. The management of natural resources is generally a function of line ministries, especially the Ministry of Agriculture, Irrigation and Livestock, with the exception of managing certain aspects of biological diversity, including protected areas management and species protection, which is shared by the National Environmental Protection Agency.<sup>21</sup>

## 2.2.2 Bangladesh

Bangladesh mostly consists of low and flat land with hilly regions in the northeast and southeast. While there has been significant progress in poverty reduction, per capita gross domestic product (GDP) remains in the bottom quintile of the nations of the world, indicating that it has limited resources for adapting to climate shocks. Bangladesh covers an area of 147,570 square km (km<sup>2</sup>) and is one of the most densely populated countries in the world. The total population of the country in 2009 was estimated at 146.6 million, with a population density of 993 per km<sup>2</sup>.<sup>22</sup> Bangladesh is recognized to be one of the most susceptible countries in the world, highly vulnerable to climatic manifestations (short- and long-term impacts of climate change) due to its unique geographic location, hydrogeological characteristics like dominance of floodplains, low elevation from the sea, and socioeconomic characteristics.<sup>23</sup>

The Constitution highlights that “[t]he State shall endeavor to protect and improve the environment and to preserve and safeguard the natural resources, biodiversity, wetlands, forests, and wildlife for the present and future citizens.”<sup>24</sup> The Environment Conservation Act of 1995, Environmental Court Act of 2000, and Environment Conservation Rules make up the key legislative provisions in the country. The Environmental Court Act grants jurisdiction to deal with cases concerning environmental issues, and a 2010 amendment permits any person to file for compensation against an offending organization. The government, by adopting the National Environmental Policy, International Environmental Law and Policy, and National Water Policy has set up a robust policy framework to address its environmental concerns. Formal responsibilities for the overall environment sector are vested with the Ministry of Environment and Forest. However, many other institutions, directly and indirectly, are involved in managing or shaping the different aspects of the environment.

## 2.2.3 Bhutan

Bhutan is a landlocked country in the Eastern Himalayas. It is home to a population of just under 700,000 within a landmass of 38,394 km<sup>2</sup>. The glaciers in the north, and significant altitude differential between the north and south over a short distance of 140 km, has also provided Bhutan with one of its more important natural resources endowments: glacial-fed rivers that flow down the country and into bordering India. The development of these glacial rivers for hydropower production is a core economic development strategy for Bhutan.

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<sup>21</sup> Footnote 20.

<sup>22</sup> International Food Policy Research Institute. 2013. Agriculture and Adaptation in Bangladesh: Current and Projected Impacts of Climate Change. *IFPRI Discussion Paper Series*. No. 01281. Washington, DC.

<sup>23</sup> S. Aminuzzaman. 2010. *Environment Policy of Bangladesh: A Case Study of an Ambitious Policy with Implementation Snag*. <http://monash.edu/sustainability-institute/programs-initiatives/natural-resource-management-asia/workshops/paper-salahuddin-aminuzzaman.pdf>

<sup>24</sup> Government of Bangladesh. 1971. *Constitution of Bangladesh*. Article 18A. Dhaka.

Bhutan is home to a diverse ecosystem, ranked among the top 10 countries with the highest species density in the world and recognized as a global biodiversity hot spot. Bhutan has a high proportion of land in protected areas, with five national parks, four wildlife sanctuaries, and a nature reserve, covering an area of 16,396.4 km<sup>2</sup> or 42.7% of the country. Additionally, Bhutan has the highest proportion of forest cover of any Asian country, currently maintaining 72% forest cover, with a constitutional requirement that at least 60% of the country remain covered by forest for all time.<sup>25</sup>

The Constitution outlines that

“[e]very Bhutanese is a trustee of the Kingdom’s natural resources for the benefit of present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation, and rich biodiversity of Bhutan and prevention of all forms of ecological degradation including noise, visual, and physical pollution through the adoption and support of environment friendly practices.”<sup>26</sup>

The National Environment Protection Act of 2007 set the overarching legal framework for environmental protection and management in Bhutan. Under this act, the National Environment Commission is the overall authority of developing environmental policies and regulations, monitoring their implementation, and designating competent authorities with the responsibility and mandate to develop and implement relevant regulations under the act. With this as a guiding framework, a number of issue- and sector-specific acts for waste management, water, mines and minerals, forest and nature conservation, environmental assessment, biodiversity, and labor, supported by regulations and guidance documents have also been developed.

#### 2.2.4 India

India, the largest country in South Asia, is facing similar challenges as other countries. With its megacities with populations of over 10 million, the country has to harmonize the twin objectives of development: to reduce poverty, and to protect the environment. Because of its the sheer size, India has to deal with additional challenges, such as it becoming a priority marketing destination for all types of products and the consequent environmental impacts (e.g., proliferation of e-waste).

Article 48A of the Constitution operationalizes environmental stewardship through government responsibility and individual duty by mandating both the government to “endeavor to protect and improve the environment and to safeguard the forests and wild life of the country”<sup>27</sup> and the people to be responsible to “protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”<sup>28</sup> The Constitution also encourages environmental management through decentralized structures.

<sup>25</sup> Footnote 4.

<sup>26</sup> Government of Bhutan. 2008. *Constitution of the Kingdom of Bhutan*. Article 5. Thimphu.

<sup>27</sup> Government of India, Ministry of Law and Justice. 2007. *Constitution of India*. Delhi.

<sup>28</sup> Footnote 27, Article 51A(g).

Development of environmental protection policies can be seen since the early 1990s. The National Environmental Action Plan for Control of Pollution (1992) and the National Conservation Strategy (1992) can be cited as two important policy initiatives that were based on the constitutional environmental stewardship principles. Post-1990s, there has been a policy shift toward integration of environmental considerations by harmonizing conservation, efficient management of resources, economic efficiency, and social justice. India's legal framework includes overarching laws (e.g., the Environmental Protection Act); natural resources management laws; pollution control laws; environmental justice laws (e.g., Green Tribunals Act of 2010); laws dealing with decentralized governance; and laws on other issues such as consumer protection, health, and safety.

Regionally, India has been at the forefront of innovations in environmental law and has demonstrated judicial activism that has taken the environmental rule of law agenda to the next level. Public interest litigation in environmental causes, applying the precautionary and polluter-pays principles, supporting decisions on the basis of intergenerational equity, and incorporating international treaties in national law are some of the significant achievements of the judiciary.<sup>29</sup> India also established the National Environmental Tribunal to deal with hazardous waste cases (1995), National Appellate Authority to deal with public challenges to environmental clearances issued to the private sector (1997),<sup>30</sup> and National Green Tribunal (2010) as a step before court-centered adjudication. While the mandate of the National Green Tribunal is to expedite civil environmental cases, critics argue that it renders civilian access to environmental justice more challenging, thereby undermining the progressive actions of the Supreme Court.<sup>31</sup>

## 2.2.5 Maldives

The Maldives consists of 1,192 islands in the Indian Ocean spread over 510 km. Environmental issues in the Maldives include dwindling water resources, increasing population creating sanitation and waste management problems resulting in the pollution of waters surrounding the islands, and rise in sea level due to global warming and climate change. The Intergovernmental Panel on Climate Change in 2013 stated that the issue of global warming is much more serious than their estimates in 2007; the Maldives, one of the lowest-lying countries in the world built on coral reefs, will be directly affected. In addition, the dependence on diesel will further aggravate environmental challenges.<sup>32</sup> The Maldives lists beach erosion, coral mining, dredging, flooding due to land reclamation, population growth, solid waste and sewerage, waste oil, and soil degradation as key environmental challenges.<sup>33</sup>

The Constitution highlights the duty to respect the environment, stating that “[t]he State has a fundamental duty to protect and preserve the natural environment, biodiversity, resources, and beauty of the country for the benefit of present and future generations.” The government is further responsible for fostering ecologically balanced sustainable development, “taking measures necessary to foster conservation, prevent pollution, the extinction of any species and ecological degradation....”<sup>34</sup>

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<sup>29</sup> Footnote 18.

<sup>30</sup> K. Mulqueeny, S. Bonifacio, and J. Esperilla. 2011. Asian Judges, Green Courts, and Access to Environmental Justice: An Asian Judges Network on the Environment. *Journal of Court Innovation*. Winter 2010.

<sup>31</sup> Footnote 30.

<sup>32</sup> D. Carrington. 2013. The Maldives is the Extreme Test Case for Climate Change Action. *The Guardian*. 26 September.

<sup>33</sup> M. Khaleel and S. Saeed. n.d. *Environmental Changes in the Maldives: Current Issues for Management*. <http://www.fao.org/docrep/x5623e/x5623e0r.htm#TopOfPage>

<sup>34</sup> Government of the Maldives. 2008. *Constitution of the Republic of Maldives*. Article 32. Malé.

The Ministry of Planning and Environment adopted the National Environment Action Plan (1989), setting up a framework for action in the area of environmental assessment and management. The Environmental Protection and Preservation Act of the Maldives (1993) introduced environmental impact assessments. Overarching conservation initiatives are done by the Environmental Protection Agency established under the Environmental Protection and Preservation Act, by merging the then-Environmental Research Center and Maldives Water and Sanitation Authority.

#### 2.2.6 Nepal

About 80% of Nepal is mountain valleys. The glaciers of the Himalayas form the main source of water for over 1.3 billion people from Myanmar to Pakistan. Glaciers melting at an increasing speed due to global warming is a key environmental challenge. Other environmental problems are largely related to deforestation, pollution of surface water bodies, air pollution due to vehicular and industrial emissions, landslides, flooding, and poor agricultural and farming practices.

Article 16 of the Interim Constitution of Nepal emphasizes the right to live in a healthy environment. The Environment Protection Act of 1996 and Environment Protection Regulations of 1997 set up the core legal framework for environmental protection and management. In particular, the efforts taken under the Environmental Protection Act and the Environmental Protection Rules to regulate air pollution and emissions are noteworthy. The government established the Department of Environment under the Ministry of Science, Technology and Environment in July 2012, with a view to bring the concept of environmental management to the grassroots level; resolve the problems created by climate change due to anthropogenic factors; coordinate among government, nongovernment, and private organizations; and implement effective monitoring of environmental management.<sup>35</sup> Nepal also has a series of policy documents that dealt with several aspects of environmental management, including the National Conservation Strategy (1988), Nepal Environmental Policy and Action Plan (1993), Tourism Policy (1995), Solid Waste Management Policy (1996), Hydropower Development Policy (2001), Nepal Biodiversity Conservation Policy (2001), National Wetland Policy (2003), and Irrigation Policy (2003).

#### 2.2.7 Pakistan

Pakistan's geographical location makes the country extremely vulnerable to many natural disasters, particularly earthquakes and floods. The country is becoming one of the most affected by global warming, with research suggesting that the Karakoram and the Himalayan mountain ranges in the north have grown wetter over the past century. Due to population growth and rapid urbanization, the country is facing other challenges such as rise in waterborne diseases due to the ad hoc disposal of solid waste and sewerage. This contamination is further aggravated due to urban industries. More recently, air pollution has increased, attracting public interest (e.g., calling for the banning of two-stroke rickshaws due to harmful emissions).

Pakistan has made significant progress in successfully combatting some of these challenges. The United Nations Development Programme (UNDP) noted that of the seven Millennium Development Goal indicators, Pakistan is on track to achieve four. The report further states that the country has made progress in relation to protecting areas for wildlife conservation, reducing sulphur content in diesel and GDP per unit energy, and increasing access to safe drinking water. According to the Joint Monitoring Programme for Water Supply and Sanitation of the World Health Organization (WHO) and the United

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<sup>35</sup> Government of Nepal, Department of Environment. <http://doenv.gov.np/about-us-2/>



Nations Children's Fund (UNICEF), access to improved water sources increased from 83% in 1990 to 91% in 2004. Furthermore, improved sanitation coverage increased from 37% to 59% within the same period.

Pakistan's legal and institutional framework has made significant progress, with the enactment of the first consolidated environmental legislation, the Pakistan Environmental Protection Ordinance of 1983. It created the Pakistan Environmental Protection Council as a high-level policy-making body together with a number of federal and provincial environmental protection agencies. Consequent to attending the Earth Summit in 1992, Pakistan became a signatory to many international and regional environmental conventions. The National Conservation Strategy was prepared in 1992 followed by Environmental Quality Standards in 1993.

The Pakistan Environmental Protection Act was enacted in 1997, repealing the Pakistan Environmental Protection Ordinance of 1983. The Act provides the framework for the implementation of the National Conservation Strategy, establishment of Provincial Sustainable Development Funds, protection and conservation of species, conservation of renewable resources, establishment of environmental tribunals and appointment of environmental magistrates, and conduct of initial environmental examinations and environmental impact assessments. Pakistan also enacted the Environmental Tribunal Procedures and Qualification Rules (2000), Environmental Tribunal Procedures and Qualification Rules (2001), and Pakistan Trade Control of Wild Fauna and Flora Act (2012).

Due to a constitutional amendment, the environment has become more of a matter within the provincial sphere, and the provinces are now in the process of enacting and adopting provincial environmental acts. Following the Bhurban Declaration of 2012, environmental "green benches" have been established in the courts dedicated to adjudicate environmental disputes. The judiciary has also introduced many important environmental concepts through judge-made law.

### 2.3 South Asian Judicial Action to Enhance Environmental Protection

The judiciary in South Asian countries has played an important role over the past 20 years in upholding fundamental rights and taking progressive decisions in favor of environmental protection.<sup>36</sup> UNEP, in a 2004 publication,<sup>37</sup> compiled the contributions that South Asian judiciaries and others have made toward environmental rule of law. They include the following:

- (i) The principle of sustainable development was cited in a case, Supreme Court of India in *Vellore Citizens Welfare Forum v. Union of India* (AIR 1996 SC 2715), involving the environmental pollution caused by tanneries, as well as the polluter-pays and precautionary principles. The principles were also discussed extensively by the International Court of Justice in the separate opinion of Vice-President C. G. Weeramantry of Sri Lanka in the *Case Concerning the Gabcikovo-Nagymaros Project* (1997 General List No. 92, 25 September 1997).

<sup>36</sup> P. Hassan. 2007. The Role of the Judiciary and Judicial Commissions in Sustainable Development Issues in South Asia. *Environmental Policy and Law*. 27 (2-3).

<sup>37</sup> UNEP. 2004. *Compendium of Summaries of Judicial Decisions in Environment-Related Cases*. Nairobi.

- (ii) The polluter-pays principle was cited in many South Asian environmental law cases, for example, *Indian Council for Enviro-Legal Action v. Union of India* (Supreme Court of India [1996] 3 SCC 212), a case involving pollution by toxic wastewater from chemical plants.
- (iii) The precautionary principle was applied by the Supreme Court of Pakistan in *Ms. Shehla Zia and Others v. Wapda* (Human Rights Case No. 15K of 1992), which involved the electromagnetic field created by high-voltage transmission lines at a grid station and the serious health hazards posed.
- (iv) The intergenerational equity and locus standi principles were applied by the full bench of the Supreme Court of the Philippines in *Juan Antonio Oposa and Others v. the Honorable Fulgencio S. Factoran and Others* (G.R. No. 101083 Supreme Court).
- (v) Environmental impact assessments were declared by the Supreme Court of Sri Lanka as pivotal to sustainable development decision-making in *Bulankulama and Six Others v. Ministry of Industrial Development and Seven Others* (S.C. Application No 884/99 [F.R]).
- (vi) Continuous mandamus in the corpus of international and national law, invocation of extraordinary jurisdiction of the Supreme Court in environmental matters, and public participation including substantive and procedural matters relating to public interest litigation have all been extensively discussed and applied by the supreme courts, including in *M. C. Mehta v. Union of India and Others* (AIR 1988 Supreme Court 1037), *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh* (AIR 1988 SC 2187), and *Environmental Foundation Limited and Others v. Attorney General and Others* (Supreme Court of Sri Lanka SC, Application No. 128/91).
- (vii) The *erga omnes* character of environmental matters and the problem of applying *inter partes* procedures in environmental dispute resolution was given judicial recognition in the *ICJ Case concerning the Gabčíkovo-Nagymaros Project*.
- (viii) The limits of the concepts of “aggrieved person” and “locus standi” in regard to environmental damage were given a new direction in *Dr. Mohiuddin Farooque v. Bangladesh, Represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others* (48 DLR 1996, Supreme Court of Bangladesh).
- (ix) Intergenerational and intragenerational equity, court commissions to ascertain facts and an authoritative assessment of the scientific and technical aspects of environment and development issues, and interpretation of constitutional rights including right to life and right to a healthy environment were among the key rationales of the judgments in *M. C. Mehta v. Kamal Nath and Others* (1997 Supreme Court of India Cases 388) and *S. C. Amarsinghe and Three Others v. Attorney General and Three Others* (SC SPL No. 6/92, Supreme Court of Sri Lanka).
- (x) The public’s right to information and obligation for continuous environmental impact assessments were discussed and applied in *Kajing Tubek and Others v. Ekran BHD and Others* (Originating Summons No. 55, 21 June 1995, High Court Kuala Lumpur) and *Movement Social de Petit Camp/Valentina v. Ministry of the Environment and Quality of Life* (Mauritius Environment Appeal Tribunal Cause No. 2/94).

- (xi) Application of the public trust doctrine regarding natural resources and the environment were highlighted in *M. C. Mehta v. Kamal Nath and Others* (1997 Supreme Court of India Cases 388).
- (xii) Corporate responsibility and liability in environmental matters were further elucidated in *Charan Lal Sahu v. Union of India* (Bhopal Case II) (AIR 1990 Supreme Court 1480).
- (xiii) Approaches to judicial reasoning in environment-related matters, including the importance of traditional values and ideas and the importance of promoting public awareness and environmental education at secondary and tertiary levels, were given a fresh impetus in *M. C. Mehta v. Union of India and Others* (Supreme Court of India, Writ Petition Civil No. 860 of 1991).

### 3. SRI LANKA'S ENVIRONMENTAL LEGAL AND INSTITUTIONAL FRAMEWORK, JUDICIARY, AND RELATED CHALLENGES

#### 3.1 Context

Sri Lanka is an island situated in the Indian Ocean with a landmass of 65,525 km<sup>2</sup>. It has a population of approximately 19 million and documented history that spans over 3,000 years. Sri Lanka lies on the Indian tectonic plate southwest of the Bay of Bengal. According to mythology, a land bridge existed between India and Sri Lanka in the Gulf of Mannar. Today, it is only a chain of limestone shoals remaining above sea level. The island consists mostly of flat to rolling coastal plains, with mountains rising only in the south-central part. The climate is tropical and warm, moderated by ocean winds. The monsoon winds from the Indian Ocean and Bay of Bengal influence rainfall patterns, based on which a “wet zone” (i.e., receiving up to 2,500 millimeters of rain each month) and a “dry zone” (1,200–1,900 millimeters of rain annually)<sup>38</sup> are visible. The east, southeast, and north parts of the country comprise the dry zone. The country has 103 inland rivers, an exclusive economic zone extending 220 nautical miles, rich marine ecosystems, and 198,172 hectares of wetlands. The country is rich in minerals, and extraction attempts of petroleum products in the Gulf of Mannar are underway.

Sri Lanka is also one of the 25 biodiversity hot spots,<sup>39</sup> with the highest biodiversity density in Asia—23% of the flowering plants and 16% of the mammals are endemic to the island.<sup>40</sup> Sri Lanka has 24 declared wild reserves that house several native species, including the Asian elephant, small loris, purple-faced langur, leopard, sloth bear, and 250 types of resident birds.

In 2014, Sri Lanka's yearly gross domestic output was \$71 billion,<sup>41</sup> and recorded an annual real GDP growth of 7.3% in 2013.<sup>42</sup> Although during independence Sri Lanka inherited a predominantly plantation economy, the main economic sectors at present include garments, tourism, tea exports, rice and agriculture products, with overseas employment contributing substantially to foreign exchange earnings. Sri Lanka's economy comprises 10.8% agriculture, 30.4% industry, and 58.1% services as a percentage of

<sup>38</sup> MySriLanka. Sri Lanka Rainfall. <http://www.mysrilanka.com>

<sup>39</sup> R. Mittermeier, N. Myers, and C. Mittermeier. 2000. *Hotspots: Earth's Biologically Richest and Most Endangered Terrestrial Ecoregions*. Arlington, VA: Conservation International.

<sup>40</sup> Environment Lanka. <http://www.environmentlanka.com>

<sup>41</sup> International Monetary Fund. World Economic Outlook Database. <https://www.imf.org/external/pubs/ft/weo/2014/02/weodata/index.aspx> (accessed 19 June 2015).

<sup>42</sup> Central Bank of Sri Lanka. 2014. *Annual Report 2013*. Colombo.

the GDP. The per capita income has doubled since 2005. More than 90% of the households are electrified, and close to 90% of the population has access to safe drinking water. In 2010, the *New York Times* listed Sri Lanka at the top of its list of 31 places to visit, giving a boost to the tourism sector. Sri Lanka has a life expectancy of 77.9 years at birth, and infant mortality is on par with developed countries.

### 3.2 Sri Lanka's Key Environmental Challenges

With the successful end of the civil war and conflict in May 2009, Sri Lanka has embarked on a rapid development drive. The environmental challenges faced by Sri Lanka demonstrate characteristics that are both unique to Sri Lanka as well as common to the region. Key challenges include deforestation, human–elephant conflict, increased solid waste generation, increase of plastic and polyethylene waste generation, air pollution, water pollution, soil erosion, and degradation of mangroves and wetlands. In addition, Sri Lanka is also facing an illegal wildlife trade, rapid urbanization, environmental issues due to tourism, and loss of biodiversity.

At the end of 2010, only 23% of the landmass of Sri Lanka consisted of forest cover. Deforestation is taking place due to expanding human settlements and bad land-use policies. Chena cultivation is also contributing to deforestation but not to a significant degree.

The government's post-2010 development strategy envisages “an economy with a green environment and rapid development.”<sup>43</sup> The government continues to make investments to reduce the infrastructure gaps across the full range of transport, energy, water, sanitation, and irrigation sectors. In the areas of energy and ports, considerable front-based investment has taken place. Thus, while many investments will have good returns, a careful cost–benefit analysis (in which economic, social, and environmental costs are all taken into account) will have to be undertaken in planning for the future.<sup>44</sup> Environment as a cross-cutting theme is emphasized in sector development plans, but the degree to which those ideals will be implemented will decide the degree of success of the initiatives.

The present natural forest cover of Sri Lanka is a little less than 25% of its land area, or about half of what the country had at independence. Deforestation has increased soil erosion, landslides, floods, fauna and flora degradation, and damage to human lives and properties. Reduction in forest cover is also increasing the human–elephant conflict. As of 2010, only 14% of the forest cover qualified as protected areas and elephant corridors under wildlife conservation. The government hopes to increase this to 25% by 2020.<sup>45</sup>

Soil erosion due to deforestation and other causes is also taking place. This has resulted in increased instances of disasters such as mud and landslides, causing damage to persons and property. This also has resulted in dam siltation, which could have an impact on the hydroelectric-generating capacity of the country. Conserving ecologically sensitive forested areas, catchment areas, and hilltops is therefore crucial.

Sri Lanka is also experiencing rapid urbanization due to the economic development and migration of economic activities from agriculture-based to that of industry- and knowledge-based sectors. This is creating a myriad of environmental challenges that are generally associated with urbanization. Key among them are the increased rate of garbage generation and trend of plastic and polythene waste generation.

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<sup>43</sup> Government of Sri Lanka, Ministry of Finance and Planning. 2010. *Sri Lanka: The Emerging Wonder of Asia—Mahinda Chintana: Vision for the Future*. Colombo.

<sup>44</sup> Footnote 43.

<sup>45</sup> Footnote 43.



As of 2010, an estimated 2,900 tons of solid waste was being collected per day. Total plastic waste collection stood at 7,200 tons. The government strategy proposes a combination of steps to deal with this situation, including economic disincentives toward importation of plastics and polythene through taxes and duties.

In addition, the government has to deal with proper urban planning to ensure that the urban environment is preserved and enhanced. Most of the urban centers of Sri Lanka have environmentally important watersheds, wetlands, and vegetation. Poorly planned urban development in the past, together with illegal encroachments, has resulted in the urban environment being threatened with gradual destruction and pollution. With the conclusion of the civil war and conflict in 2009, an ambitious plan is being implemented to improve the urban environment as well as preserve some of the environmentally critical resources within cities. A policy of encouraging industrial ventures in predesignated areas but close enough to critical infrastructure has resulted in mixed development of industrial and residential areas together. This has created human costs in the form of polluted water and air, resulting in health hazards and disease. Increased urban and industrial waste is a serious environmental problem in Sri Lanka. Almost every city in the country faces industrial waste problems, with Colombo being the most affected urban area.

In areas where economic activity is substantially agriculture-based, use of agrochemicals by farmers for a long period of time, without proper management, has resulted in pollution of water resources. The national health system is thus confronted with large numbers of persons suffering from chronic kidney diseases.

Sri Lanka has 1,585 km of coastal zone. During the last 2 decades, increased human activities have caused severe threats to these coastal regions. Unsustainable coastal resources utilization, such as coral mining, sand mining, and cutting of mangroves, has increased around the island. In addition, the lack of planning and management of resources has intensified pollution and erosion.

Although Sri Lanka has significant water resources, drinking-water sources are being diminished due to pollution. Deforestation, agricultural and aquaculture activities, and unplanned construction have been the main reasons for the degradation of watersheds. In recent years, mangrove resources have been drastically damaged or reduced due to various activities, particularly those by humans. This has intensified flooding and erosion in lagoon and coastal areas.

### **3.3 Sri Lanka's Environmental Law Background**

Article 27(14) of the Constitution provides that “[t]he State shall protect, preserve and improve the environment for the benefit of the community.” Under Article 28 (f)A, a corresponding fundamental duty is reposed on every person in Sri Lanka “to protect nature and conserve its riches.”

The National Environmental Act (NEA) No. 47 of 1980, as amended by Act No. 56 of 1988 and Act No. 53 of 2000, is the basic national charter for the protection, conservation, and management of the country's environment.

In addition, Sri Lanka has a fairly comprehensive environmental protection framework consisting of laws, policies, and institutions. The most significant legislation on the supervision, regulation, and enforcement of the environment include the Fauna and Flora Protection Ordinance (conservation of plants and animals); Forest Ordinance (preservation of forests and dealing with felling and transport of timber); Mahaweli Authority of Sri Lanka (conservation and maintenance of physical area around the

Mahaweli project); State Land Ordinance (provides for the allocation of state lands, rivers, and streams); Mines and Minerals Act (regulates mining, processing, and marketing of minerals); Irrigation Ordinance (irrigation canals); Coast Conservation Act (coastal zone regulations); Marine Pollution Prevention Act (pollution control for the territorial waters of Sri Lanka); Fisheries and Aquatic Resources Act (aquatic biodiversity); National Heritage Wilderness Areas (protection of unique ecosystems); Soil Conservation Act (soil conservation, mitigation of erosion, and protection against flood and drought); Plant Protection Ordinance; Felling of Tress (Control) Act; Flood Protection Ordinance; Water Hyacinth Ordinance; and Control of Pesticides Act.<sup>46</sup>

Moreover, Sri Lanka has national policies that deal with biodiversity, cleaner production, climate change, disaster management, energy, environment and sustainable development, land management, marine and the coastal resources, ozone regulation, pollution and waste, resettlement, and watersheds.<sup>47</sup>

A plethora of institutions are involved in the implementation of the above policies. The central agency that is directly responsible for the protection and management of the environment is the Central Environmental Authority, established under the NEA. The Central Environmental Authority performs multiple roles including that of regulator, standard setter, and enforcer. The NEA also provides for the conduct of environmental impact assessments.

The NEA empowers the minister to gazette a list of state agencies as project-approving agencies and a list of projects as prescribed projects. In terms of the act, all prescribed projects must obtain prior approval from the relevant project-approving agency before such a project commences. A list of such prescribed projects and a list of project-approving agencies is found in the regulations.<sup>48</sup> Both initial environmental examinations for projects that are likely to be less harmful and environmental impact assessments for projects that may produce significant environmental impacts are provided for in the NEA.

Within the court structure, environmental matters are handled at different levels. The Supreme Court is vested with the jurisdiction to hear fundamental applications and limited types of writs (e.g., dealing with urban development under the Urban Development Authority Act). The writ jurisdiction is with the Court of Appeals and the provincial high courts. In addition, significant enforcement in environmental matters is seen through the use of traditional laws (e.g., public nuisance applications) in the lower courts.

### 3.4 Judicial Action in Support of Environmental Preservation

The judiciary has significantly contributed to the development of environmental law in the country. Under Article 126 of the Constitution, any person may file action in person or by an attorney for violation of fundamental rights. Corporate bodies incorporated in Sri Lanka have been recognized as being persons and citizens for the purpose of the fundamental rights jurisdiction (e.g., in 2004 the Environmental Foundation Limited filed a case in its own name for the protection of Galle Face Green from commercial exploitation).<sup>49</sup>

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<sup>46</sup> Environmental Law Foundation. 2009. *Judges and Environmental Law: Handbook for the Sri Lankan Judiciary*. Colombo.

<sup>47</sup> Footnote 46.

<sup>48</sup> Footnote 46.

<sup>49</sup> Footnote 46.

Article 126(4) of the Constitution gives the Supreme Court wide discretion “to grant such relief or make such directions as it may deem just and equitable” in the circumstances of the case. In *M. T. M. Ashik v. Bandula*, a noise pollution case,<sup>50</sup> when the Central Environmental Authority failed to formulate a set of regulations pertaining to noise emissions after several dates, the court, exercising its powers under Article 126(4), formulated a set of regulations and directed the police to enforce such regulations using their powers under Section 261 of Penal Code No. 2 of 1883 (as amended) (public nuisance) and Section 80(1) of the Police Ordinance No. 16 of 1865 (as amended) (issue of permits for loudspeakers).

The courts have also operationalized environmental law principles, even in the absence of direct legislation. This has been done through enlightened approaches to the existing provisions of the law. For instance, nondiscrimination and equal protection of the law was applied in *Bulankulama v. Secretary, Ministry of Industrial Development* (the Eppawela phosphate mining case, 2000 3 Sri L.R. 243). An environmental case that attempted to invoke the right to life directly, on the basis that such a right is implicitly recognized by the Constitution even if not expressly declared, was *Deshan Harindra (a minor) v. Ceylon Electricity Board*, which involved severe noise pollution from a diesel generator that was affecting very young children. As a result of the case, the Ceylon Electricity Board stopped the operation of the generator, and the private power generating company made an ex-gratia payment to the affected families. Yet as the case ended in a settlement, the legal argument on the right to life was not tested.<sup>51</sup>

In bringing about this development, the courts have expanded their interventionist role from an adjudicator to that of a mediator. In *H. B. Dissanayake v. Gamini Jayawickrema Perera, Minister of Irrigation and Water Management* (the Thuruwila case, S.C.F.R. 329/2002 decided 30 September 2002), in handling the water needs of farmers and urban dwellers, the courts, conscious of the water needs of both sectors, encouraged the parties to formulate a scheme in the interests of both. An agreement was reached among the different parties, and the settlement was endorsed by the courts.<sup>52</sup> In another case, *Environmental Foundation Limited v. Attorney General* where, after the courts had granted leave to proceed, the Central Environmental Authority in consultation with a quarry owner and the residents of the surrounding area, drew up a regime to control the times and frequency of the blasting operations. This settlement was then entered into as an order of court.

## 4. THE THIRD ROUNDTABLE

### 4.1 Introduction

The third roundtable will continue to concentrate on the following key themes: (i) judicial training and capacity enhancement, (ii) regional integration and cooperation, (iii) enhancing the efficacy of the judicial system for environmental justice, and (iv) application of alternative dispute resolution methods such as mediation for better environmental dispute management and enhancing justice. In addition, this roundtable will expand the scope of discussion by including specific issues relating to urban development, “natural capital,” gender, community forest management, and tourism within the overall sustainable green development concept.

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<sup>50</sup> S.C.F.R. No. 38/2005, S.C. minutes of 9 November 2007. Reported in *Environmental Foundation Limited*. n.d. *Some Significant Environmental Judgments in Sri Lanka*. Colombo. p. 1.

<sup>51</sup> Footnote 46.

<sup>52</sup> Footnote 46.

## **4.2 “Taking Stock”: Country Status**

The roundtable will commence with the sharing of the status of environmental adjudication and evolution of jurisprudence in each South Asian country. This session will highlight challenges that courts face when confronted with environmental conflicts, and how the respective courts have uniquely responded to those challenges contributing, in the long term, to the preservation and protection of the environment. The forum will also discuss the developments in jurisdictions outside of South Asia while respecting the principle that for sustainable efficacy, legislative and institutional responses and strategies should be within each country’s context.

## **4.3 “Taking Stock”: Where Are We on Environmental Justice?**

The roundtable will “take stock” of the situation in three ways.

First, the speakers will discuss the status of the environment and climate change against the background of the key environmental challenges that South Asia is confronting. This reality will enhance the quality and relevance of subsequent deliberations and the discussion of legal principles in a realistic manner.

Second, this session will also discuss important legal and jurisprudential benchmarks set both regionally and internationally, enabling the assessment of South Asian jurisprudence. The discussion will enhance the scope of jurisprudence to include not only judge-made law but also the wider institutional, legal, and policy framework with special emphasis on innovative approaches.

Lastly, recognizing the impact of climate change as universal and pervasive, this session will discuss impacts on one of the key vulnerable groups: women. Women still have relatively less influence to shape decisions made on climate change adaptation. This is in spite of the fact that women, especially those in developing countries, are more affected by climate change. Moreover, food, water, and fuel for cooking is still considered a primary responsibility of women. Incorporating gender into the climate change dialogue is essential to minimize risks to women and children and to making adaptation efforts more sustainable.

## **4.4 Environment and Development**

With rapid development, the demand for goods, public services, jobs, and housing by South Asians has greatly increased. Societies expect a minimum quality of life level, which includes infrastructure, utility services, and other modern conveniences. With economic development, the perception of what constitutes the minimum has expanded. Environmental consciousness has forced decision makers and development professionals to consider environment as a key factor in view of short- and long-term consequences. Environmentalism and advocacy have brought environment to the forefront of development decision-making, resulting in a high rate of environmental conflicts brought to the judiciary and the legal system. This session will highlight “development versus environment” through the angle of urban development, tourism, economic value of “natural capital,” and community forest issues, and attempt to reach further consensus in a sustainable green development paradigm.

Since this session is core to the theme of the roundtable, it includes four presentations. The first highlights “natural capital” for development mainstreaming and attempts to economically value services that the environment offers (e.g., natural decomposition of waste and water purification by wetlands). This is important because the region (which has seven of the largest megacities) has to cope with the increase



in its rate of urban development, putting further pressure on already strained natural resources. Failure to view “natural capital” as an economic resource has resulted in degradation and unsustainable use of limited resources.

The second presentation will further highlight green considerations in urban planning and the need to arrest negative impacts of rapid urbanization. Urban planners have to respond to the increasing need for basic resources essential for human well-being such as land, housing, water, and energy. They also have to deal with the resulting rise in land prices, depletion of canopy cover and loss of urban wetlands due to urban sprawl, decreasing land–man ratio, and congestion. Issues such as solid waste management and sewerage disposal, industrial waste, pollution (i.e., site, air, water, and noise), destruction and encroachment of urban wetlands, and natural disasters (e.g., flash floods) faced by urban planners and administrators and resultant conflicts will be highlighted.

The third presentation will deal with green tourism and urban development. Tourism is a key economic activity and is a viable means of economic support for poor communities. Tourism, if properly planned, can easily harmonize environmental interests with economic interests of visitors and host communities. This sector is one area where the gap between environment and development can be bridged and where the two concepts can harmoniously coexist using the framework of sustainable green development.

The final presentation will discuss increasing community forest issues in Nepal and important decisions that have been taken by the courts in that country. This session will be an example of how the issue arises and what approaches are taken by the judges to deal with such situations, keeping in mind the importance of sustainable development and the needs of the local people who rely on the forests for their daily needs and livelihood. Community forest management can also be another bridge between the environment and development.

#### **4.5 Developments in Environmental Adjudication**

Environmental rule of law calls for adherence to environmental laws and emphasizes the need to establish robust, effective frameworks of justice, governance, and law for environmental sustainability. The judiciary is a crucial partner in bringing about a balance between environmental and developmental considerations and in promoting a culture of compliance with legal norms and standards. The first presentation will highlight that environmental conflicts are multifaceted, complex, and unique. They include moral questions (e.g., does the present generation owe anything to the next generations?), policy considerations (e.g., should a particular development initiative proceed?), and economic indicators. The implications are far-reaching and costly. The inherent limitations in the adversarial system, procedural and evidentiary laws, and principle of binding judicial precedent will limit the outcomes that courts can achieve. This session will assess the suitability and sufficiency of the court processes as practiced now in the region and evaluate the efficacy of the present system and the processes in providing the required response to environmental conflicts.

The outcome of a conflict depends both on substances and the processes, with the latter having a significant impact. Of the several alternative dispute resolution processes, mediation and negotiation have been extensively used to successfully deal with environmental conflicts. Many judicial officers encourage parties to negotiate, and they act more as mediators than adjudicators, with rules of procedure for mediation by judges being included in many systems. The second presentation will highlight mediation as a better method to deal with most of the environmental conflicts.

Conflicts, if properly managed, enable the reframing of the issues empowering the parties to look at new ways of engagement. The judiciary has to provide leadership for this process. South Asian judiciaries have provided leadership in environmental jurisprudence by pronouncing judgments incorporating environmental principles and innovative remedies to deal with environmental issues. The judiciary can contribute to enhancing the environmental agenda in several ways, such as (i) using creative adjudicatory methods, (ii) developing new principles of law, and (iii) providing leadership in synergizing the entire legal system. The third presentation will highlight this unique judicial leadership role.

#### **4.6 Way Forward**

This roundtable will assess the progress made so far through the first and second judicial roundtables. The first roundtable produced the Bhurban Declaration of 2012 for a common vision on environment for the South Asian judiciaries, agreeing to share experiences and knowledge, improve judicial training and education on the environment, and take specific innovative steps (e.g., creation of “green benches”).

Continuing this theme, the second roundtable in Bhutan sought to promote a common understanding and a shared vision of the environmental challenges within South Asia and finalized a draft memorandum of understanding to foster cooperation among South Asian judiciaries.

At the end of the third roundtable, it is proposed that the memorandum of understanding will be signed and adopted. In addition, four thematic areas will be specifically deliberated and these are (i) judicial training and capacity enhancement, (ii) regional integration and cooperation, (iii) enhancing the efficacy of the judicial system for environmental justice, and (iv) use of alternative dispute resolution for better environmental dispute management and enhancing justice. These discussions will lead to the formulation of action ideas, which will be adopted as the Colombo Action Plan for postroundtable execution.

## APPENDIX 4

# THE COLOMBO ACTION PLAN FOR JUDICIAL COOPERATION FOR THE ENHANCEMENT OF ENVIRONMENTAL JUSTICE FOR SUSTAINABLE GREEN DEVELOPMENT IN SOUTH ASIA

# THE COLOMBO ACTION PLAN FOR JUDICIAL COOPERATION FOR THE ENHANCEMENT OF ENVIRONMENTAL JUSTICE FOR SUSTAINABLE GREEN DEVELOPMENT IN SOUTH ASIA

**The Third South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development**, attended by participants from the Islamic Republic of Afghanistan, the People's Republic of Bangladesh, the Royal Kingdom of Bhutan, India, the Republic of the Maldives, Nepal, the Islamic Republic of Pakistan, and the Democratic Socialist Republic of Sri Lanka.

**AWARE** that the protection, conservation, and proper utilization of the environment is considered as the key challenge faced by the world today, especially by the people of South Asia, who are greatly affected by climate change.

**RECOGNIZING** the need for South Asia to immediately address major environmental challenges including warming trends and increasing temperature extremes, water scarcity, decline in food productivity, threats faced by both freshwater and seawater maritime systems due to rising sea levels, and high incidence of extreme climate events.

**REALIZING** the key role judges, especially the senior judiciaries, play as leaders of the legal fraternity for the development, implementation, enforcement of, and compliance with environmental law and the promotion of environmental justice.

**RECALLING** the proceedings and commitments made during the First and Second South Asia Judicial Roundtables on Environmental Justice held in Pakistan and Bhutan, respectively, and the goals and objectives of the Asian Judges Network on Environment (AJNE).

**IMPLEMENTING** the principles and agreements to be made in the Memorandum of Understanding for Cooperation among South Asian Judiciaries that may be signed.

**REAFFIRMING** the South Asian judiciaries' commitment to the protection, conservation, and proper utilization of the environment and natural resources, and the promotion of environmental justice with the aim of achieving sustainable green development for all peoples of South Asia.

**NOW, THEREFORE**, a consensus has been reached among the participants to the following **COLOMBO ACTION PLAN**:

## 1. JUDICIAL TRAINING AND CAPACITY ENHANCEMENT

- (i) Emphasize the importance of environmental science as a component in judicial training.
- (ii) Upgrade national judicial academies with environmental curriculum.
- (iii) Update continuously jurisprudence, case law, legal instruments, and others.



- (iv) Conduct training to focus on lower/minor/district judiciaries, as the case may be.
- (v) Develop an information technology-based (i.e., e-mail), real-time information-sharing system (e.g., training academies to work with video link or Skype facilities).
- (vi) Enhance the AJNE website to have a subject listing of case laws and to link with ECOLEX and InforMEA.
- (vii) Encourage more green judges in their respective national judiciaries.
- (viii) Focus on judicial training aspects during roundtables for better coordination.

## **2. REGIONAL INTEGRATION AND COOPERATION**

- (i) Promote a regional approach toward environmental matters.
- (ii) Promote regional integration through harmonization of laws.
- (iii) Attend to transboundary issues in consultation with relevant jurisdictions.
- (iv) Develop a common panel of experts to be utilized by the judiciary of any country.
- (v) Establish partnerships with organizations with similar objectives.

## **3. ENHANCING THE EFFICACY OF THE JUDICIAL SYSTEM FOR ENVIRONMENTAL JUSTICE**

- (i) Improve courts' procedural rules and regulations for the effective implementation of environmental laws.
- (ii) Train judges who deal with environmental matters in judicial academies or other similar institutions.
- (iii) Implement mechanisms and programs to make it easier for the general public to have access to environmental justice (e.g., easier filing and simpler information of pending cases).
- (iv) Improve procedural rules, enabling access to information that is essential for adjudication.
- (v) Explore the principle of continuous mandamus to ensure effective implementation of judicial decisions.
- (vi) Encourage more judges to deal with environmental cases.

#### 4. APPLICATION OF ALTERNATIVE DISPUTE RESOLUTION METHODS FOR BETTER ENVIRONMENTAL DISPUTE MANAGEMENT AND ENHANCING JUSTICE

- (i) Encourage court-supervised mediation.
- (ii) Explore prefilming mediation.
- (iii) Train judges on mediation techniques.
- (iv) Courts may set basic principles and parameters with regard to a mediated outcome on environment to have the “sanctity of a court order.”

#### 5. IMPLEMENTATION AND REPORTING OF OUTCOMES AND PROGRESS

- (i) Each judiciary will endeavor to submit to the AJNE Secretariat a proposed **work and implementation program** for the implementation of this action plan. Said program will contain the following: specific deliverables and actions to be taken, responsible parties, time frame for completion, and resources needed.
- (ii) Upon submission of the work and implementation program, each judiciary will submit status updates to the AJNE Secretariat.
- (iii) All work and implementation programs and status updates will be made publicly available through the AJNE website.
- (iv) Sri Lanka will endeavor to establish a dedicated unit to support the implementation of the Colombo Action Plan.



## APPENDIX 5

# THE COLOMBO ROUNDTABLE IN PHOTOS





ASIA JUDICIAL ROUNDTABLE  
ENVIRONMENTAL JUSTICE

Environmental Justice  
'Green Development'

10th AUGUST 2014  
Colombo, Sri Lanka

ADB  
Asian Development Bank







# OPENING CEREMONY







# SESSIONS













# NETWORKING







## **Proceedings of the Third South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development**

*Colombo, Sri Lanka | 8-9 August 2014*

This publication documents the proceedings of the Third South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development, held on the 8th and 9th of August 2014 in Colombo, Sri Lanka. Building on work and the discussions of the previous roundtables, key themes discussed in Colombo include judicial training and capacity enhancement, regional integration and cooperation, enhancing the efficacy of the judicial system for environmental justice, and the application of Alternative Dispute Resolution methods. In addition, the event tackled specific issues relating to urban development, natural capital, gender, community forest management, and tourism. The roundtable culminated in the adoption of the Colombo Action Plan consisting of concrete steps and measures toward the development of environmental rule of law.

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