

ASEAN CHIEF JUSTICES' ROUNDTABLE ON ENVIRONMENT

THE PROCEEDINGS

EDITORS

KALA K. MULQUEENY
FRANCESSE JOY CORDON

The logo for the Asian Development Bank (ADB), consisting of the letters "ADB" in white serif font on a dark blue square background.

ADB



INAUGURAL ASEAN CHIEF JUSTICES' ROUNDTABLE ON ENVIRONMENT

THE PROCEEDINGS

EDITORS

KALA K. MULQUEENY

FRANCESSE JOY J. CORDON



© 2013 Asian Development Bank

All rights reserved. Published in 2013.
Printed in the Philippines

ISBN 978-92-9254-333-4 (Print), 978-92-9254-334-1 (PDF)
Publication Stock No. RPT136114-3

Cataloging-in-Publication Data

Mulqueeny, Kala K. and Francesse Joy J. Cordon, eds.
Inaugural ASEAN Chief Justices' Roundtable on Environment: The proceedings.
Mandaluyong City, Philippines: Asian Development Bank, 2013.

1. Environmental jurisprudence. 2. Courts. 3. Southeast Asia. I. Asian Development Bank.

The views expressed in this publication are those of the authors and do not necessarily reflect the views and policies of the Asian Development Bank (ADB) or its Board of Governors or the governments they represent.

ADB does not guarantee the accuracy of the data included in this publication and accepts no responsibility for any consequence of their use.

By making any designation of or reference to a particular territory or geographic area, or by using the term "country" in this document, ADB does not intend to make any judgments as to the legal or other status of any territory or area.

ADB encourages printing or copying information exclusively for personal and noncommercial use with proper acknowledgment of ADB. Users are restricted from reselling, redistributing, or creating derivative works for commercial purposes without the express, written consent of ADB.

Note:

In this publication, "\$" refers to US dollars.

6 ADB Avenue, Mandaluyong City
1550 Metro Manila, Philippines
Tel +63 2 632 4444
Fax +63 2 636 2444
www.adb.org

For orders, please contact:
Public Information Center
Fax +63 2 636 2584
adbpub@adb.org

 Printed on recycled paper

Contents

iv	Dedication
v	Foreword
vii	Acknowledgments
ix	Abbreviations
x	Executive Summary
1	Roundtable Highlights
43	Appendixes
43	1 Background Paper
73	2 Program Agenda
81	3 List of Resource Persons
83	4 List of Participants
89	5 A Common Vision on Environment for ASEAN Judiciaries

Dedication

The Asian Development Bank dedicates these proceedings to Deputy Chief Justice Professor Paulus Effendie Lotulung, one of the first-generation environmental judges, who advanced the principle of environmental standing in which an environmental organization may file a lawsuit in the interest of environmental protection. He also spearheaded Indonesia's judicial certification program on environmental laws and other judicial reforms in Indonesia. Professor Lotulung will be warmly remembered as one of Indonesia's champions of environmental justice and one of the forces behind the initiation of the Association of Southeast Asian Nations Chief Justices' Roundtable on Environment, where he participated energetically, as these proceedings record.

Foreword

The Association of Southeast Asian Nations (ASEAN) region faces numerous environmental challenges such as climate change, habitat destruction, natural resource depletion, deforestation, illegal logging, illegal wildlife trade, ocean destruction, illegal fishing, rapid urbanization, and air and water pollution. These challenges are daunting but could be surmountable. The first step in addressing them is recognizing that they are the common concern of all countries in the region, and that they can only be resolved by making a concerted effort to raise awareness of the problem. Strengthening national environmental enforcement is needed, as is transboundary cooperation on environmental protection and transgovernment enforcement efforts.

The Asian Development Bank (ADB) is committed to strengthening public institutions involved in environmental enforcement. In this regard, ADB has recognized the judiciary's unique role in environmental protection. Chief justices and the senior judiciary are responsible for developing environmental jurisprudence and interpreting principles of environmental law. As primary guardians of the rule of law, they can raise awareness throughout the entire legal profession of the region's and their nation's common environmental challenges, the importance of environmental law and enforcement, and the role of the legal community in environmental protection.

In hosting the Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice at ADB headquarters in Manila on 28–29 July 2010, ADB recognized the importance of the judiciary's role in environmental law enforcement. At the symposium, Indonesian Chief Justice Harifin Tumpa invited all ASEAN Chief Justices for a roundtable on environment in Jakarta in 2011. This roundtable aimed to strengthen and reinforce the role of the judiciary in protecting the environment, as well as provide a public forum for the senior judiciary to establish common ground and forge linkages for future environmental initiatives.

Participants of the roundtable were able to learn from each other's experiences and identify best practices in environmental adjudication. In considering areas for future cooperation, chief justices and the senior judiciary agreed on A Common Vision on Environment for ASEAN Judiciaries. This Common Vision presents a clear plan for ASEAN judicial cooperation on environment and is an important step towards strengthening environmental enforcement.

ADB has recorded the proceedings of the roundtable in this volume. The following pages record the ideas and experiences of the participants, forming a strong foundation for future discussions and implementation of the Jakarta Common Vision on Environment. ADB views this roundtable as the initial step in future efforts to consolidate cooperation among ASEAN judiciaries in the area of environmental protection for Asia and the Pacific.

Christopher L. Stephens
General Counsel
Office of the General Counsel

Acknowledgments

Many dedicated and hardworking individuals at the Asian Development Bank (ADB) and its development partners deserve credit for making the Association of Southeast Asian Nations (ASEAN) Chief Justices' Roundtable on Environment a success and preparing the publication.

ADB appreciates the spirit of partnership and support resulting from its relationship with the United Nations Environment Programme (UNEP) throughout the development and holding of the roundtable. In particular, ADB acknowledges the strong institutional support provided by Dr. Young-Woo Park, the dedicated participation and support of Dr. Bakary Kante, and the contributions of Dr. Wanhua Yang.

ADB and the Supreme Court of Indonesia established an important and valuable partnership for the roundtable. Chief Justice Harifin Tumpa provided the vision and guiding inspiration for the ASEAN Chief Justices' Roundtable on Environment and gave the first keynote address. ADB also thanks the rest of the Supreme Court of Indonesia for providing key operational support.

Special thanks are in order for those who graciously agreed to chair and/or facilitate a roundtable session: Deputy Chief Justice Paulus E. Lotulung, Deputy Chief Justice Widayatno Sastro Hardjono, and Justice Takdir Rahmadi from the Supreme Court of Indonesia; Mas Achmad Santosa, member of the Presidential Task Force to Eradicate Corruption in the Legal System (Presidential Anti-Judicial Mafia Task Force), environmental law and governance specialist and senior advisor for human rights, legal and justice social reform programme from the United Nations Development Programme—Indonesia; Dr. Tint Lwin Thuang, executive director at the RECOFTC—The Center for People and Forests; Clarissa C. Arida, director of the ASEAN Centre for Biodiversity's Programme Development and Implementation Division; Azrina Abdullah, former senior social consultant, Environmental Resources Management and Regional Director of TRAFFIC Wildlife Trade Monitoring Network—Southeast Asia; Nazir Foead, conservation director at the World Wildlife Fund; Antonio Oposa, president of the Laws of Nature Foundation and a Ramon Magsaysay Awardee; Dr. Wanhua Yang, officer in charge of the UNEP Environmental Law in Asia and the Pacific Division; Patricia Moore, international legal expert and former head of the International Union for Conservation of Nature's Regional Environmental Law Programme (Asia) Division and Ecosystems and Livelihoods Group (Asia) Division; Rosa Vivien Ratnawati, head of the Bali and Nusa Tenggara Environment Office of the Indonesian Ministry of Environment; Thomas Robert Panella, principal water resources specialist at ADB's Indonesia Resident Mission; Simon Tay, chair of the Singapore Institute of International Affairs and senior consultant at Wong Partnership; and Dr. Kala Mulqueeny, senior counsel at the ADB Office of the General Counsel.

From ADB, Jon Lindborg (country director, Indonesia Resident Mission) helped open the roundtable. Members of ADB's Office of the General Counsel were instrumental in putting the entire event together. Dr. Kala Mulqueeny, senior counsel, convened the roundtable and provided an overview of the event, with Sherielysse Bonifacio and Mark Alain Villocero of the Office of the General Counsel providing unparalleled assistance. Jacqueline Espenilla gave valuable research assistance in compiling an initial collection of the summaries, presentations, and proceedings. The Office of Administrative Services helped with the travel requirements, while the Department of External Relations aided this publication and the various publication requirements of this proceedings.

ADB also acknowledges the invaluable support of Chanokporn Prompinchompoo, Mohd Aizuddin Zolkeply, and Thaw Dar Sein in collating and confirming the materials of the resource persons.

Kala K. Mulqueeny and Francesse Joy J. Cordon prepared and edited this record of proceedings.

Abbreviations

ADB	Asian Development Bank
AJNE	Asian Judges Network on the Environment
ASEAN	Association of Southeast Asian Nations
ASEAN-WEN	Association of Southeast Asian Nations Wildlife Enforcement Network
ASEP	ASEAN Subregional Environmental Programme
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
EADR	environmental alternative dispute resolution
EIA	environmental impact assessment
IUCN	International Union for Conservation of Nature
Lao PDR	Lao People's Democratic Republic
RECOFTC	The Center for People and Forests
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme

Executive Summary

The Asian Development Bank (ADB), the Supreme Court of Indonesia, and the United Nations Environmental Programme (UNEP) jointly hosted the Association of Southeast Asian Nations (ASEAN) Chief Justices' Roundtable on Environment in Jakarta on 5–7 December 2011. The roundtable was first conceptualized during the Asian Judges Symposium on Environmental Decision Making, the Rule of Law and Environmental Justice held at ADB headquarters in Manila on 28–29 July 2010. As a follow-up initiative to the symposium, the roundtable further highlights the role of the senior members of the judiciary in promoting the rule of law and environmental justice, developing environmental jurisprudence, and inspiring a cooperative attitude toward environmental protection among the judiciary and the legal profession.

More than 20 chief justices and members of the senior judiciary from Cambodia, Indonesia, the Lao People's Democratic Republic (Lao PDR), Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam, as well as representatives from various government agencies, nongovernment organizations, and civil society groups came together to discuss the common environmental challenges of the ASEAN region and the areas in which judiciaries could review their role in environmental protection.

In Session 1—Common Challenges for ASEAN Justices: Key Legal and Evidentiary Challenges in Deciding Environmental Cases—**Mas Achmad Santosa** enumerated the following six legal and evidentiary challenges, which had been identified during the 2010 Asian Judges Symposium: (i) *locus standi* or legal standing, (ii) expert evidence, (iii) evaluating environmental damages, (iv) sanctions and penalties, (v) enforcement of judicial decisions, and (vi) environmental alternative dispute resolution (EADR). He then suggested means of addressing some of these challenges and concluded by urging policymakers to enact laws providing appropriate remedies to environmental harm and permitting wider judicial discretion in providing, determining, and innovating upon relief.

In Session 2—ASEAN Environmental Law Challenge No. 1: Deforestation and Illegal Logging—**Tint Lwin Thaung** highlighted how irresponsible forestry practices endanger the world's forests and the wildlife and people dependent on them, and identified (i) a flawed policy and legal framework, (ii) minimal enforcement capacity, (iii) insufficient data and information about forest resources and illegal operations, (iv) corruption in both private and public sectors, and (v) the high demand for cheap timber as key drivers of illegal logging, which is, in turn, a major cause of rapid deforestation in Southeast Asia. To reduce deforestation as a result of illegal forest activities, judicial professionals can improve the legal framework of their respective countries, exemplify right conduct and moral ethics, promote information exchange with other stakeholders, and lobby for responsive and adaptable structures.

The next speaker, **Djoko Sarwoko**, justice of the Supreme Court of Indonesia, traced deforestation in Indonesia to planned and unplanned forest conversion, illegal logging, forest fires, and farming land expansion. He also identified other factors driving deforestation and illegal logging in Indonesia and opined that judges can tackle environmental cases by exercising judicial activism and fostering cooperation in dealing with deforestation cases. **H.E. Khampha Sengdara**, deputy chief justice of the People's Supreme Court of the Lao PDR, emphasized that the profitability of illegal logging, and the prevalence of weak forestry law enforcement and monitoring mechanisms, pose as poor deterrence to illegal logging. Thus, strong environmental legislation is vital in addressing deforestation and pollution problems. Lastly, **Tan Sri Arifin Zakaria**, chief justice of the Supreme Court of Malaysia, then discussed Malaysia's legal framework concerning forestry and identified the demands of agricultural and industrial development, shifting cultivation, forest fires, and logging—legal and illegal—as drivers of deforestation in Malaysia. Malaysia's efforts to prevent illegal logging include (i) a potential amendment of its forestry law to provide for stiffer penalties for violations; (ii) regular monitoring and reporting; (iii) using modern technologies in tracking forest encroachment activities; (iv) formulating and implementing a national action plan; (v) establishing special prosecution and enforcement divisions to strengthen law enforcement mechanisms; (vi) identifying hot spots of illegal logging activities; and (vii) increasing surveillance of forest activities and efforts aimed at curbing illegal logging activities, encroachment, and timber theft.

In Session 3—ASEAN Environmental Law Challenge No. 2: Biodiversity and the Illegal Wildlife Trade—**Clarissa C. Arida** specified climate change, large-scale mining, population growth, poverty, pollution, and overexploitation of natural resources as the main drivers of biodiversity loss. Given the tremendous benefits associated with rich biodiversity, biodiversity loss undoubtedly endangers nature's capacity to provide food, shelter, and medicines to humans. While ASEAN member states have undertaken and supported several initiatives to promote biodiversity protection and conservation, much remains to be done. To this end, Ms. Arida urged the participants to consider the key issues and challenges on biodiversity, engage stakeholders, enhance the capacity of environmental authorities, and recognize the ecosystems services and economic values of biodiversity, including the connection between science-based information and policies and legal evidence.

Azrina Abdullah, the second session facilitator, stressed that the illegal wildlife trade in the region is a product of people's demand for food, traditional medicine, clothing, pets, collections, trophies, decorations, luxury items, wild meat, and timber, just a few of the many uses for the region's rich biodiversity. Challenges in terms of protecting this biodiversity abound. Worse, inadequate financial and human resources, corruption, insufficient legislation and political will, online wildlife trading, low judicial awareness, and transnational wildlife trade pose grave threats to effective law enforcement. Indeed, while all ASEAN member states are signatories to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), it appears that no serious and concrete action has been taken to address the issue of trade in illegal wildlife.

Thereafter, **Kidngarm Kongtrakul Li**, associate research judge of the Supreme Court of Thailand, **H.E. Mya Thein**, judge of the Supreme Court of the Union of Myanmar, and **Dang Xuan Dao**, chief judge of the Economic Court of the Supreme People's Court of Vietnam,

discussed the state of biodiversity loss and the illegal wildlife trade and the efforts made to address these issues, including having stronger legislation and wildlife conservation areas. Notably, all three delegates admitted that their respective countries have weak law enforcement mechanisms, characterized by poor and inconsistent sanctions being imposed for violations, and inept prosecutors and judges. They also recommended that an effective legal framework and criminal justice system, coupled with international cooperation, is indispensable in dealing with the illegal wildlife trade.

In Session 4—ASEAN Environmental Law Challenge No. 3: Ocean Destruction, Illegal Fishing and Marine Pollution—both facilitators, **Nazir Foead** and **Antonio Oposa**, highlighted the region’s bountiful marine biodiversity crowned by the Coral Triangle, or the “Amazon of the Seas.” Further, Mr. Foead noted that some of the challenges confronting the Coral Triangle include illegal, unreported, and unregulated fishing; overexploitation of marine resources; inadequate law enforcement efforts; ecosystem disintegration and/or destruction; and uncoordinated policies between local and national governments and between states. He then urged the participants to consider (i) the negative impact of overexploitation of marine resources on food security and economic development, (ii) the character of fish stocks as the common property of states that need to be regulated and shared, and (iii) the benefits of having strong regional coordination among ASEAN members. Mr. Oposa then emphasized the need for swift, painful, and public law enforcement, as well as creative penology, and concluded by urging the participants to switch their economic development model and recognize that, while the people’s ideals may not be achieved within a single lifetime, the journey itself should be enjoyed.

Thereafter, **Takdir Rahmadi**, justice of the Supreme Court of Indonesia, observed that while marine pollution and coastal destruction is a serious concern in Indonesia, very few cases are being filed with respect to this issue, probably because it is hard to establish the causal link between the suspected polluting activities and the resulting environmental harm, and the fact that sources of pollution are usually contributors to state income. Thus, the government should carefully balance the economic benefits with ecological interests. Fortunately, Indonesia has been more successful in enforcing fishery laws given the relative ease of proving the causal link between the pollutants and the consequential damages.

During the **question and answer time**, the participants also discussed the problem of having foreign diplomats intervening in a country’s environmental law enforcement, especially in the arrest, prosecution, and conviction of fishers caught engaged in illegal fishing within another country’s national waters. Moreover, having a cohesive legal framework for dealing with environmental crimes and effective law enforcement is indeed the concern of all branches of government. Notwithstanding this, the judiciary can still lead in promoting a strong rule of law system.

In Session 5—Judicial Reforms to Respond to Environmental Challenges: Institutionalizing Environmental Expertise Through Specialization and Environmental Courts—**Wanhua Yang** framed the session taking into consideration the need to address varied environmental challenges, increased environmental litigation, and complex scientific and technical issues. **Presbitero J. Velasco Jr.**, associate justice of the Supreme Court of the Philippines, discussed the structure of the environmental court system, the special Rules of Procedure for Environmental Cases and the resulting *locus standi* flexibility, the streamlined litigation

process, writ of continuing *mandamus* (or writ of continuing mandate) and writ of *kalikasan* (or writ of nature), and the restatement of the precautionary principle. He also stressed the need for a cohesive, well-functioning criminal justice system. **Paulus E. Lotulung**, deputy chief justice of the Supreme Court of Indonesia, described the judicial certification system in Indonesia and the use of law-finding (*rechtsvinding*) skills in achieving environmental justice, and expressed his utmost hope that the new generation of justices in Indonesia will have the competence, awareness, and commitment to protect the environment. **Winai Ruangsri**, senior research justice of the Supreme Court of Thailand, discussed the Thai Supreme Court's strategy in enforcing environment laws that had been focused on three things: (i) strategic organization of the green courts, (ii) capacity building of the judges, and (iii) judicial empowerment through improved procedural rules and practices for environmental adjudication. He ended by calling on each judiciary to establish their green court structure, rules of procedure, and/or judicial training program based on the specific circumstances affecting their country.

During the **question and answer time**, **Dang Xuan Dao** shared that, although Viet Nam does not yet have a specialized environmental court or judicial training, the country encounters no problems in terms of appointing judges to hear and decide environmental cases. Each court's chief judge takes care of creating a special hearing panel, which should include a trained and/or experienced judge on environmental adjudication, to resolve these cases. The main problem is with respect to appointing people's assessors who are sufficiently aware of environmental issues.

In Session 6—ASEAN Environmental Law Challenge No. 4: Development Planning and Environmental Impact Assessment—**Patricia Moore** identified the issues relating to conducting an environmental impact assessment (EIA) in terms of legal, procedural, and substantive adequacy and emphasized that all possible consequences and risks of a proposed project should be identified and considered as soon as possible and before major decisions have been made. **Rosa Vivien Ratnawati**, the second session facilitator, explained the EIA process in Indonesia and referred to certain cases which reveal weaknesses in the EIA process: (i) inconsistent decisions leading to confusion as to whether an EIA decision is an administrative decision or simply a recommendation; (ii) unenforceability of EIA decisions; and (iii) unclear criteria on which businesses, and to what extent required businesses, must conduct EIAs.

Thereafter, **Yang Arif Tan Sri Abdull Hamid Embong**, justice of the Federal Court of Malaysia, discussed Malaysia's Environmental Quality Act in relation to EIAs and concluded with a presentation of the issues faced by Malaysia with respect to EIA implementation and enforcement, and the number and types of EIA reports received by the Department of Environment during 2001–2010. **Manewon Phromnoi**, judge of the Supreme Administrative Court of Thailand, discussed Thailand's Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992), which governs the conduct of EIAs; cited relevant administrative cases; and critiqued EIA claiming that (i) it is very time-consuming to gather information, arrive at a consensus during each public hearing, and/or resolve any conflict; (ii) members of affected communities are often given short notice of public hearings, forcing them to attend public hearings unprepared or unaware of potential adverse impacts of a given project, and thereby hindering effective public participation; and (iii) lack of financial and human resources that constrain EIAs. Hence, in Thailand,

poor enforcement of applicable laws and regulations renders the conduct of EIAs useless in improving environmental conditions.

In Session 7—ASEAN Environmental Law Challenge No. 5: Fresh Water, Pollution, Floods and Climate—**Thomas Robert Panella** enumerated and suggested solutions to the major challenges faced in relation to the Citarum River and other water resources: (i) population growth and urbanization; (ii) watershed degradation, erosion, and sedimentation; (iii) flooding and water-related disasters; (iv) excessive groundwater exploitation; (v) water pollution consisting of industrial, domestic, organic, and solid waste; (vi) coastal degradation; and (vii) water allocation, infrastructure, and climate change. **Associate Justice Velasco** elaborated on the writ of continuing *mandamus*, which the Philippine Supreme Court issued in the landmark case of Metropolitan Manila Development Authority, et al. versus Concerned Residents of Manila Bay, et al. (G.R. Nos. 171947-48, 18 December 2008). Lastly, **Prapot Klaisuban**, judge of the Central Administrative Court of Thailand, cited cases involving freshwater devastation and illegal fishing that showed how Thai courts have ruled in favor of environmental protection. In the Klity Creek Case, the Thailand Administrative Court found the Pollution Control Department remiss in performing its official duty of rehabilitating the contaminated creek and demanding financial compensation from the mining company for the environmental damage the company has caused, while in the Breeding Zone Case, the court upheld the subject regulations issued by the Fishing Department and Ministry of Agriculture and Cooperatives as “essential measures” with benefits to the public outweighing the cost to the complaining fishers.

In Session 8—ASEAN Environmental Law Challenge No. 6: Urbanization and Air Pollution—**Simon Tay** highlighted the difficulty in proving the causal link between the source of air pollution and the cost of environmental damage, and the need for governments to reflect on their policy and technology choices. Thereafter, **Philip Nalliah Pillai**, judge of the Supreme Court of Singapore, noted that while judges seemingly acknowledge the significance of environmental protection and preservation, the fact remains that no plan or concrete action advancing environmental protection is materializing. He then shared Singapore’s story of how it rose from being a “typical third-world city” to the progressive global city it is now through its founding fathers’ political will and good governance. **Kim Sathavy**, justice of the Supreme Court of Cambodia, meanwhile, urged everyone to contribute to the management of air pollution, population growth, and traffic, and resolution of conflicts between polluters and their victims. She concluded on a positive note by describing Cambodia’s present national strategy as integrating the needs of biodiversity conservation, socioeconomic development, and natural resources conservation, in cooperation with neighboring countries.

In Session 9—Common Challenges for ASEAN Justices: Key Capacity and Governance Issues—**Patricia Moore** raised key issues, specifically on increasing the capacity of judges to adjudicate environmental cases, encouraging the filing of environmental cases, and improving governance and integrity mechanisms, that have not yet been discussed. A video of **Adalberto Carim Antonio**, trial judge of the Court of the Environment and Agrarian Issues of the State of Amazonas, was then played to share to the participants how the state of Amazonas developed a model of an environmental court. It began with the process of helping the local communities appreciate the importance of Brazilian

environmental legislation through comic books and other educational materials, and was followed by the introduction of alternative sentencing of convicted felons to better reintegrate them into society.

In Session 10—UNEP’s World Congress on Justice, Governance, and Law for Environmental Sustainability: The Role of the Judiciary—**Bakary Kante**, director of the Division of Environmental Law and Conventions of the United Nations Environment Programme (UNEP), discussed the United Nations Conference on Sustainable Development, which is also known as Rio+20, Rio 2012, or Earth Summit 2012. The event is a follow-up to the United Nations Conference on Environment and Development and the 2002 World Summit on Sustainable Development in Johannesburg and is geared toward having heads of state and representatives from all sectors come up with a focused political instrument on poverty alleviation, social equity advancement and environmental protection, and institutionalizing sustainable development. In line with this convention is the World Congress on Justice, Government and Law for Environmental Sustainability, which gathered attorneys general, chief prosecutors, auditors general, chief justices, senior judges, and other legal practitioners to advance the Rio+20 goals.

In Session 11—An ASEAN Vision on Justice, Governance, and the Rule of Law for Environmental Sustainability Led by ASEAN Chief Justices—**Deputy Chief Justice Hardjono, Mas Achmad Santosa, and Kala Mulqueeny** served as session facilitators. A video of **Antonio Herman Benjamin**, justice of the Tribunal Superior de Justicia (High Court of Brazil), was played to convey the Brazilian perspective on the judiciary’s role in advancing economic development and poverty alleviation, while protecting the environment: the judiciary spectator model compared to the active judiciary model. Justice Benjamin also discussed the arguments against judges ruling on environmental conflicts and stressed the expansion of the judiciary’s role in the environmental debate arena.

By the close of the roundtable, the participants were able to formulate A Common Vision on Environment for ASEAN Judiciaries statement, in which the senior judges committed to go back to their national judiciaries and help strengthen the environmental enforcement chain. The common vision for action also includes the following:

- Developing an action plan for enhancing the environmental adjudication and enforcement process.
- Strengthening and/or establishing specialized environmental courts, tribunals, benches, and specialization programs (such as environmental certification).
- Implementing special rules of procedure for environmental cases where these already exist and considering developing and implementing them where they do not yet exist, which may include a flexible approach to legal standing, special rules of evidence for environmental cases, expediting cases, special remedies, injunctive relief, and other innovative environmental processes.
- Training new and junior judges and all other judges adjudicating environmental cases on environmental legal issues, including through national judicial institutes, and sharing among themselves information on different ways to impart this training.

Roundtable Highlights

Opening Session

Opening and Welcome Remarks

Widayatno Sastro Hardjono, deputy chief justice for Development of the Supreme Court of Indonesia, welcomed all 29 judges and justices participating from Cambodia, Indonesia, the Lao People's Democratic Republic (Lao PDR), Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam, and 30 speakers and resource persons representing various government agencies, nongovernment organizations, and international organizations to the First Association of Southeast Asian Nations (ASEAN) Chief Justices' Roundtable on the Environment. The roundtable reflects the continuing effort of ASEAN judiciaries to do their share in protecting the environment. Deputy Chief Justice Hardjono hailed the gathering as a unique avenue for broadening judicial networks, and for sharing and recording best practices for the effective and efficient management of environment cases.

Welcome Remarks

Jon Lindborg, country director for the Asian Development Bank (ADB) Indonesia Resident Mission, delivered his opening remarks on environmental justice in the region. He credited Chief Justice Tumpa of Indonesia with spearheading the ASEAN Chief Justices' Roundtable on the Environment and challenging ASEAN judiciaries to address issues relating to environmental adjudication and enforcement. He also stressed that chief justices and their senior judiciary play a critical role in improving environmental enforcement, not only by developing a body of environmental jurisprudence but also by leading the rest of the legal profession through credible rule of law systems and promoting environmental justice.

Mr. Lindborg proposed three main points for discussion during the roundtable. First, he emphasized that various environmental law challenges confronted Southeast Asian countries as a result of unsustainable economic development. While the region's advancement had improved living standards for many, the significant environmental cost of such growth could ultimately erode any economic gains. He also cited, in particular, the worsening effects of global climate change in terms of exacerbating the region's exposure to extreme weather events, as well as its effects on regional agricultural output due to changes in rainfall patterns. Citing an ADB study, he said that climate change in Indonesia, Thailand, the Philippines, and Viet Nam could result in losses equivalent to 6% of gross

domestic product annually by 2010.¹ Furthermore, the ASEAN region suffers from a lack of commitment to the enforcement of national environmental laws, as demonstrated by the fact that 75% of Southeast Asia's fish stocks are endangered because of illegal fishing, thereby threatening the livelihood of 120 million Southeast Asians who depend on coastal resources. Moreover, the region generates billions from the illegal wildlife trade, which threatens roughly 40% of the region's plant and animal species.

Second, Mr. Lindborg highlighted ADB's consistent support to judicial institutions in relation to these environmental challenges. He noted that ADB has maintained its commitment to environmental sustainability and climate change mitigation. In fact, the attainment of environmentally sustainable growth, together with inclusive growth and regional integration, is one of ADB's three long-term strategic objectives under its Strategy 2020.² This goal is also reflected in ADB's Governance Policy (1995) and Environment Policy (2002), as superseded by its Safeguard Policy Statement (2009), and Social Safeguard Statement (2009), which guide all of its investments throughout Asia and the Pacific.³ Moreover, ADB partners with a number of Southeast Asian countries in addressing these environmental challenges. For example, ADB supports the Coral Triangle Initiative, which links six countries to use regional cooperation to protect environmental and economic resources in the Coral Triangle. The initiative covers Indonesia, Malaysia, the Philippines, Papua New Guinea, Solomon Islands, and Timor-Leste, an area that some call the "Amazon of the Seas." ADB also supports regional cooperation for biodiversity protection in the Greater Mekong Subregion. In Indonesia, ADB collaborates with the Ministry of Forestry on issues that relate to reforestation and illegal logging. ADB also supports the Coral Reef Management and Rehabilitation Program of Indonesia's Ministry of Marine Affairs and Fisheries that includes partnering with local governments, the police, and the navy to ban illegal fishing, among other things. Finally, ADB has supported the Philippine judiciary by providing more than \$300 million for the country's judicial sector reform program, and by providing technical assistance in formulating the Rules of Procedure for Environmental Cases. All of ADB's separate programs on the environment and judiciary underpin its support to the Asian Judges Network on the Environment (AJNE), which has been initiated under a \$1 million technical assistance program as a result of the consensus achieved at the Asian Judges Symposium in 2010.

Finally, Mr. Lindborg discussed the areas for potential cooperation among the roundtable participants. ADB saw the roundtable as an important opportunity to fulfill Chief Justice Tumpa's initial vision of providing ASEAN judiciaries with a concrete opportunity to identify common challenges and come up with a plan as to how these judiciaries could cooperate in addressing common environmental challenges. This vision could serve not only as an important contribution to addressing the region's environmental challenges but also as an important precedent for other regions to come up with inputs in the global process of cleaning the world.

¹ Asian Development Bank (ADB). 2009. *The Economics of Climate Change in Southeast Asia: A Regional Review*. Manila.

² ADB. 2008. *Strategy 2020: The Long-Term Strategic Framework of the Asian Development Bank, 2008-2020*. Manila.

³ ADB. 1995. *Governance: Sound Development Management*. Manila; ADB. 2002. *Environment Policy*. Manila; ADB. 2009. *Safeguard Policy Statement*. Manila.

Bakary Kante, director of the Division of Environmental Law and Conventions of the United Nations Environment Programme (UNEP), first expressed his appreciation to Chief Justice Tumpa for spearheading this roundtable, and to the Supreme Court of Indonesia and ADB for hosting the event. From subregional dialogues to the Global Judges Symposium on Sustainable Development and the Role of Law (held on the eve of the United Nations World Summit on Sustainable Development in Johannesburg in 2002), UNEP has been actively engaging the judiciaries around the world on various fields of environmental law. Dr. Kante stressed the role of the judiciary in promoting environmental law enforcement and serving on the forefront of innovative perspectives on how law can advance sustainable development. He also observed that countries in ASEAN are among the wealthiest in the world in terms of human capital, forests, biodiversity, and ocean resources, and their leaders have already understood the importance of investing in this wealth as part of development and human progress. The first preparatory meeting for the World Congress on Justice, Governance and Law for Environmental Sustainability, held in Kuala Lumpur in October 2011, for instance, culminated in the Kuala Lumpur Statement, which contains guidelines on how to further the justice and governance dimensions of environmental sustainability. On this note, Dr. Kante acknowledged the pivotal role that the government and judiciary of Malaysia play in advancing the world congress objectives.

Dr. Kante concluded by pointing out the challenges threatening the environment, including climate change, deforestation, biodiversity loss, the illegal wildlife trade, the deterioration of coastal resources, and various forms of pollution. He called on senior members of ASEAN judiciaries to (i) arrive at a common vision for cooperation on environmental issues to ensure environmental protection and sustainable development, (ii) encourage judiciaries from other regions to contribute to safeguarding environmental sustainability as the foundation for human well-being, (iii) voice the need for radical reforms in environmental governance, and (iv) mobilize the international community to give a more adequate response to increasingly complex environment problems.

First Keynote Address

Harifin A. Tumpa, chief justice of the Supreme Court of Indonesia, began by lauding this event as vital in supporting the commitment of governments to encourage sustainable development as a shared goal. Southeast Asian nations experience similar environmental problems such as climate change, deforestation and illegal logging, biodiversity loss, the illegal wildlife trade, sea devastation, unsustainable fishing, and air and water pollution. Thus, a clear policy framework, under which all Southeast Asian countries will engage in strategic collaborative measures to address these problems, should be in place.

Chief Justice Tumpa affirmed the Supreme Court of Indonesia's strong commitment toward ensuring Indonesia's sustainable economic development through enhanced environmental law enforcement human resources, particularly judges, who are better equipped to handle environmental cases. Since 1999, approximately 800 judges have participated in specialized environmental law training and skills enhancement programs. Judges that have undergone this training are considered certified judges in environmental adjudication. However, Indonesia's certification system varies greatly from the environment courts or green benches found in neighboring countries, such as Australia, New Zealand,

and the Philippines in that, instead of having new courts created or designated as special environment courts, judges of existing general civil and criminal courts and of state administrative courts are specifically trained to handle environmental cases. He ended by acknowledging the fact that Indonesia's certification system is still a work in progress. Nonetheless, he hoped that the roundtable would serve as a forum for gathering inputs from the senior judges from other countries, as well as an avenue for learning and sharing for all participating judiciaries in respect of their own endeavors in upholding environmental justice.

Introduction of Participants

At this point, a member of each delegation introduced himself or herself, as well as the other members of his or her delegation.

Southeast Asia: The State of the Environment *Saving ASEAN's Natural Treasures (video)*

A video, entitled *Saving ASEAN's Natural Treasures*, was presented to the audience. It showcased Southeast Asia's rich biodiversity, the need to protect this biodiversity, and its dismal present state as a consequence of the choices humans make in using natural resources and the unwise introduction of invasive alien species into ecosystems, among other things. In addition to food insecurity, climate change, management of protected areas, lack of funding, and other critical support issues, biodiversity loss is among the biggest threats to the people of Southeast Asia.

To meet the population's ever-growing demands with the ever-shrinking natural resources, the ASEAN member states have started to collaborate to protect their biodiversity in various ways, including becoming signatories to various international instruments, including the Convention on Biological Diversity; becoming members of several conservation programs; and establishing their own networks of protected areas. This recognition of the shared responsibility in protecting the region's biodiversity led to the establishment of the ASEAN Regional Centre for Biodiversity Conservation, which bridged the conservation efforts of the various ASEAN governments and those of ASEAN with the European Union. The regional center promoted the adoption of common standards, best practices, and sound policies in all matters of biodiversity management, and helped revitalize the concept of ASEAN heritage parks to generate greater awareness, appreciation, and conservation of the region's rich natural heritage.

During the 9th Informal ASEAN Ministerial Meeting held on 27 September 2005, the ASEAN Centre for Biodiversity was launched as a continuation of the ASEAN Regional Centre for Biodiversity Conservation. The ASEAN Centre for Biodiversity contributes to (i) enhancing the region's collaboration efforts, (ii) strengthening the capacities of ASEAN member states and biodiversity stakeholders, (iii) developing programs and formulating policies, (iv) developing human and institutional capacity, (v) managing biodiversity information, and (vi) raising public and leadership awareness of biodiversity values and sustainable financing mechanisms based on the principle of equitable and sustainable sharing of the

ASEAN biodiversity for the common economic, social, and environmental well-being of the member states.

While ASEAN nations have begun to collaborate in conserving the region's rich biodiversity, much remains to be done and everyone's support is vital in this endeavor.

Overview: Imagine 2020: Justice, Governance, and the Rule of Law for Environmental Sustainability

Kala Mulqueeny, senior counsel at the Office of the General Counsel of ADB, began by providing the background to the 2010 Asian Judges Symposium and how ADB started this work at the request of the Indonesian Supreme Court for technical assistance in relation to (i) establishing judicial certification on environment, and (ii) learning more about how other judiciaries from other parts of the world have handled environment issues. In 2010, ADB invited 110 judges and environment officials from around Asia to Manila for the Asian Judges Symposium. She explained the roundtable as a natural extension of the earlier 2010 symposium, because the chief justice of the Supreme Court of Indonesia invited ASEAN chief justices to convene in Jakarta for an inaugural roundtable of chief justices and members of the senior judiciary to discuss common environmental challenges.

Dr. Mulqueeny then outlined the coverage of the roundtable:

- (i) challenges to the environment and environmental law in Southeast Asia, including
 - (a) climate change;
 - (b) deforestation and illegal logging;
 - (c) biodiversity and the illegal wildlife trade;
 - (d) ocean destruction, illegal fishing, and marine pollution;
 - (e) planning and environmental impact assessment;
 - (f) freshwater pollution, floods, and climate; and
 - (g) urbanization and air pollution; and
- (ii) challenges to the judiciary in particular.

She also invited the participants to reflect on the judiciary's role particularly in shaping environmental law and the means by which its capacity to decide environmental cases can be increased. The sessions were also to be based on topics stemming from discussions during the Asian Judges Symposium, including parallel judicial authority on the environment, legal standing, the burden of proof and the precautionary principle, expert and scientific evidence, damages, remedies, penalties and sanctions, court dockets on environmental cases, and environmental law enforcement.

Dr. Mulqueeny highlighted the challenge of upgrading the capacity and preserving the integrity of the judiciary within the environmental enforcement chain by inviting the audience to contemplate having sufficient trial court capacity to make environmental justice accessible to the poor. She ended by identifying this roundtable as an opportunity

to arrive at a common vision for the environment—a concrete statement or action plan and a means by which everyone can cooperate in addressing environmental challenges.

Introductory Statement by each Head of Delegation

At this point, both Paulus E. Lotulung, deputy chief justice of the Supreme Court of Indonesia and the morning session's chair, and Dr. Mulqueeny encouraged the participants to comment on the video presentation and/or Dr. Mulqueeny's overview, share their own personal observations on the state of the environment and on environmental jurisprudence in their respective countries, and speak on whatever they would like to discuss during the roundtable.

The Philippines

Delivering the statement of Chief Justice Corona, **Presbitero J. Velasco Jr.**, associate justice of the Supreme Court of the Philippines, noted that the Philippine Supreme Court has responded to the call to remove barriers in the judicial system and increase access to courts to guarantee the effectiveness of environmental law enforcement. The Philippine judiciary has, in fact, designated 117 green courts to hear, try, and decide environmental cases, of which 137 are pending. The Philippine Supreme Court promulgated the Rules of Procedure for Environmental Cases, which took effect in April 2010. As opposed to the usual “no injury, no suit” or “injury in fact” standard in courts in the United States, these rules adopted the liberal legal standing rule first espoused in the landmark case of *Oposa versus Factoran* (G.R. No. 10108, 30 July 1993) that allowed parents to sue on behalf of their children and of generations yet unborn. These rules also include provisions on citizens' suits, consent decrees, environmental protection orders, the writ of *kalikasan* (or writ of nature), the writ of continuing *mandamus* (or writ of continuing mandate), anti-strategic lawsuits against public participation, and the precautionary principle. To familiarize judges, prosecutors, and officers of quasi-judicial agencies with these rules, the supreme court conducted a nationwide capacity building initiative and multisector training.

Indonesia

Chief Justice Tumpa shared the experiences of Indonesia's judiciary on environmental law by citing examples of Indonesia's environmental legislation, landmark decisions, significant class actions against government officials for mismanagement of natural resources resulting in unfortunate events such as landslides and tremendous damage to property, and tort actions in relation to industrial pollution and environmental law. He emphasized the need for certified judges, with special training on environmental law, to hear and decide environmental cases requiring the presentation of scientific evidence and knowledge on special concepts or legal principles. The Decree of the Chief Justice No. 134 of 2011 instituted the Green Bench Program on the certification of judges to handle environmental cases.

Viet Nam

Dang Xuan Dao, chief judge of the Economic Court of the Supreme People's Court of Vietnam, cited a few examples of Viet Nam's environmental legislation and issues, which Vietnamese courts face in terms of dealing with environmental cases. Highlighting one recent class action, wherein the parties arrived at a mediated settlement as to the amount of damages the plaintiffs sustained and the appropriate compensation due to them, Chief Judge Dao explained that Viet Nam's judiciary must deal with several problems, including proper assessment of environmental damage and compensation, evidence collection, and judicial training.

Singapore

Philip Nalliah Pillai, judge of the Supreme Court of Singapore, discussed how Singapore's unique common law system and constitution, which are very similar to those of Malaysia, shape the structure and functioning of its judiciary. He said that to better grasp capacity building of ASEAN judiciaries, one must first understand how each country's legal system and judiciary functions. He ended by stating that, because of Singapore's small size, the country patrols its borders well, thereby preventing it from becoming a hub for the illegal trade of endangered species.

At this juncture, **Associate Justice Velasco** added that each country's constitution, judiciary, correctional system, and community are vital components of law enforcement. ASEAN countries have adequate environmental legislation, so the problem really lies in how to effectively enforce it. He then described environmental law enforcement in the Philippine context, and pointed out several key issues for consideration, such as

- (i) the inadequate number of law enforcers, hence the need for the support of the officials of the barangay (the smallest local government unit in the country) who are in the best position to identify any violation of environmental laws;
- (ii) the need for "clean" prosecutors, who are not only dedicated to eradicating the illegal trade in endangered species and timber but who are also capable of gathering the correct evidence to facilitate the speedy disposition of environmental cases;
- (iii) lax enforcement of environmental and customs laws, which makes the Philippines an attractive illegal trade stopover; and
- (iv) international cooperation in curbing the demand for, and consequently the supply of, endangered species and stolen timber.

Malaysia

Tan Sri Arifin Zakaria, chief justice of the Supreme Court of Malaysia, related that Malaysia's judiciary views the problem more as a question of education; of the need to make people—and especially those in remote areas—understand environmental issues to take an active role in environmental protection and preservation. Fortunately, there have been indigenous peoples in Sabah and Sarawak who have begun fighting for their native customary rights as well as their right to livelihood. There is a pressing need to empower

these peoples to litigate and claim the land that is lawfully theirs to begin with. On the other hand, balancing urban demand with the need to preserve the environment is a matter for the policy makers.

Chief Justice Zakaria interestingly pointed out that the obligation of preserving the environment must also be shouldered by developed countries, so that nature becomes an international heritage, and the purpose for which one commits what is readily perceived to be an environmental crime should be considered in determining whether that person should be prosecuted. This is especially so given that an indigenous person who cuts timber to satisfy a personal need for food or shelter will not destroy the entire area. Regrettably, insofar as the judiciary is concerned, evidence is sorely lacking to prosecute those truly guilty of committing environmental crimes. It's only the poor workers who are caught and punished, and they refuse to disclose the identity of their employers, i.e., the masterminds.

Chief Justice Zakaria ended by sharing an anti-wildlife-trading advertisement in Malaysia, which states, "When the buying stops, the killing will stop." As other delegates have conveyed, demand drives the killing of wildlife. He then thanked the Supreme Court of Indonesia and ADB for the invitation and expressed his commitment to improve their efforts at protecting the environment.

Dr. Mulqueeny then reiterated the role of the judiciary in the enforcement chain, summarized what had been discussed so far, and called for other comments. Chief Justice Zakaria then added that environmental crimes committed in one country have implications for and in other countries. The tremendous effect of such crimes should therefore be considered in the penalty to be imposed.

Thailand

Winai Ruangsri, senior research justice of the Supreme Court of Thailand, shared two developments in Thailand's judicial system: (i) the resolution of the overlapping jurisdiction of Thai administrative courts and the courts of justice; and (ii) the expansion of legal standing to file environmental cases, although a question now arises as to the extent of such expansion in order to prevent a deluge of environmental cases. He then referred to the Australian judiciary's preconditions to the filing of environmental cases as guides for the Thailand Supreme Court's drafting of its new procedural rule on standing. For instance, the plaintiff must come to court with "clean hands" (or be free of fault) and with a strong legal argument.

Maneewon Phromnoi, judge of the Supreme Administrative Court of Thailand, reported the launching in August 2011 of new environmental divisions of its administrative courts to particularly hear and decide environmental cases. Presently, the Supreme Administrative Court of Thailand is contemplating coming up with special rules of procedure to expedite environmental adjudication, and to allow the filing of class actions and/or representative suits.

At this juncture, **Chief Judge Dang Xuan Dao** informed the participants that Viet Nam's judicial system is structured such that under the Supreme People's Court of Vietnam are

the district and provincial people's courts; military tribunals; and administrative, economic, and labor courts. Each court must apply the pertinent rules of procedure, and citizens can file their complaint in accordance with which court has jurisdiction over the dispute.

Civil and economic courts decide environmental cases with an economic court exercising jurisdiction whenever the defendant is an economic enterprise; otherwise, it is the civil court which should exercise jurisdiction. Any conflict as to which of these two courts should decide a particular case is settled by the chief justice of the Supreme People's Court.

Lao People's Democratic Republic

Khampha Sengdara, deputy chief justice of the People's Supreme Court of the Lao PDR, reported that the Lao PDR does not yet have a special environmental court. The issue of which court should exercise jurisdiction over a particular environmental case is settled by ascertaining the extent of the impact, the amount of damage caused, and the limit of the judge's authority to adjudicate cases.

Cambodia

Kim Sathavy, justice of the Supreme Court of Cambodia, likewise identified law enforcement as the judiciary's problem when it comes to addressing environmental challenges. In Cambodia, the Court of Justice exercises general jurisdiction over civil, criminal, commercial, administrative, and labor cases. Thus, it is very important to have judges who specialize in various fields of law. Justice Sathavy concluded by informing the participants of Cambodia's institution, which trains judges and prosecutors.

ASEAN Regional Cooperation on Environment

Ilyas Asaad, deputy minister for environmental communication and public participation of Indonesia's Ministry of Environment, presented an overview of ASEAN cooperation on the environment. Mr. Asaad gave numerous statistics recognizing ASEAN as one of the most ecologically diverse regions in the world. However, rapid population and economic growth, combined with existing region-wide social inequities, have resulted in the unsustainable consumption of natural resources and triggered the occurrence of common or transboundary environmental issues, including (i) air, water, and land pollution; (ii) urban environmental degradation; (iii) transboundary haze pollution; and (iv) depletion of natural resources, particularly biodiversity.

To foster sustainable development and regional integration, ASEAN member countries have, since 1977, worked together and focused on 10 priority areas of regional importance, as reflected in the ASEAN Socio-Cultural Community Blueprint, which was endorsed by ASEAN leaders at the 14th ASEAN Summit in March 2009 in Thailand. The blueprint—combined with the ASEAN Political-Security Community Blueprint, the ASEAN Economic Community Blueprint, and the Initiative for ASEAN Integration Work Plans—serves as the plan towards the establishment of the ASEAN community by 2015. Specifically, the aforementioned priority areas for ASEAN cooperation are as follows:

- (i) Addressing global environmental issues and managing and preventing transboundary environmental pollution.
- (ii) Managing and preventing transboundary environmental pollution including transboundary haze pollution and transboundary movement of hazardous wastes through the creation of communication mechanisms and development of an online inventory of available firefighting resources in case of emergency, and the establishment of the Panel of ASEAN Experts on Fire and Haze Assessment and Coordination for deployment during impending crises, among others.
- (iii) Promoting sustainable development through environmental education and public participation in accordance with the ASEAN Environmental Education Action Plan, 2000–2005, as amended by the ASEAN Environmental Education Action Plan, 2008–2012. Notably, the action plans serve four purposes: (a) formal education, (b) nonformal education, (c) capacity building, and (d) networking and partnership. During the initial implementation of the education action plan, the focus should be on (i) establishing an ASEAN network of green or eco-schools, (ii) conducting an ASEAN environmental education for sustainable development training program for key target groups such as government officials, parliament members and other elected officials, media and communication professionals, youth, and women; (c) promoting and managing the ASEAN Environmental Education Inventory Database as the central platform for environment information exchange, dissemination, and learning; (d) development of the ASEAN youth for a sustainable environment network; and (e) setting up the youth action for sustainable development program.
- (iv) Promoting environmentally sound technology through the use of greener production processes and technology and establishment of the ASEAN network on environmentally sound technologies as a forum for sharing experiences and information.
- (v) Promoting quality living standards in ASEAN cities and urban areas through the ASEAN Initiative on Environmentally Sustainable Cities, which focuses on addressing urban environmental challenges, and the ASEAN Environmentally Sustainable City Model Cities Programme, which recognizes exemplary efforts to keep cities clean, green, and livable.
- (vi) Harmonizing environmental policies and databases under the purview of the ASEAN Working Group on Multilateral Environmental Agreements and the regular publication of ASEAN state of the environment reports and the ASEAN Report to the World Summit on Sustainable Development.
- (vii) Promoting the sustainable use of coastal and marine environment by adopting the (a) Marine Water Quality Criteria for the ASEAN Region, which prescribes the parameters for the protection of aquatic life and human health; and (b) the ASEAN Criteria for National Marine Protected Areas and the ASEAN Criteria for Marine Heritage Areas both of which contain benchmarks for the proper designation and management of new and/or existing protected areas and marine heritage areas. ASEAN also adopted and published the ASEAN Marine Water Quality Management Guidelines and Monitoring Manual as a guideline for coordinating marine water quality management policies and monitoring approaches within each country and between countries.

- (viii) Promoting sustainable management of natural resources and biodiversity with the establishment of the ASEAN Centre for Biodiversity and ASEAN Heritage Park Program to bridge efforts at conserving natural resources and generate legal awareness of, and pride and appreciation for, ASEAN's rich natural heritage, among other things.
- (ix) Promoting the sustainability of freshwater resources with the formation of the ASEAN Working Group on Water Resources Management and other strategies for water resources conservation.
- (x) Responding to climate change and addressing its impacts by developing ASEAN Climate Change in Asia as a consultative platform to advance regional efforts in dealing with climate change.

Second Keynote Address

Professor Dr. Emil Salim, head of Indonesia's Presidential Advisory Council and sustainable development expert, delivered the second keynote address on the environmental law challenges prevailing in Southeast Asia and the judiciary's role in dealing with these challenges, particularly climate change. A record of his presentation is not available.

Session 1

Common Challenges for ASEAN Justices: Key Legal and Evidentiary Challenges in Deciding Environmental Cases

Mas Achmad Santosa, a member of the Presidential Task Force to Eradicate Corruption in the Legal System (or Presidential Anti-Judicial Mafia Task Force), environmental law and governance specialist and senior advisor for human rights, legal and justice sector reform at the United Nations Development Programme (UNDP)—Indonesia, facilitated the session. He framed the session by first referring to the legal and evidentiary challenges in environmental adjudication, as identified during the 2010 Asian Judges Symposium: (i) standing or the right to sue, or *locus standi*; (ii) expert evidence; (iii) evaluating environmental damage; (iv) sanctions and penalties; (v) enforcement of judicial decisions; and (vi) environmental alternative dispute resolution (EADR).

Mr. Santosa then noted three major challenges in obtaining expert evidence: (i) difficulty in evaluating two conflicting items of expert evidence, (ii) the high cost of obtaining expert evidence, and (iii) scarcity of experts in various technical fields. To address these challenges, he suggested that the judiciaries

- (i) have the experts discuss the case for the purpose of eliciting an objective dialogue on points of conflict and simplifying the issues,
- (ii) draft internal guidelines on the proper assessment of the experts' credibility to assist the judges in focusing on their expertise,
- (iii) appoint an independent committee of experts to study the case and give a recommendation to the court,
- (iv) prepare a register of experts from the scientific and technical institutions of the government that could be asked to act as experts,
- (v) convene and brainstorm on the kinds of questions the experts could be asked,
- (vi) work with the academic and scientific community to tap scientists and researchers as experts in legal proceedings,
- (vii) include scientific and technical matters relating to the environment as part of the judges' continuing professional education, and
- (viii) appoint in-house technical experts who would advise the courts on technical matters.

Mr. Santosa also observed several factors lacking in the use of EADR. For one, he noted that EADR is underutilized as a means of settling environmental disputes. There are few skilled mediators and facilities to conduct an in-court or out-of-court EADR session, and there is a lack of incentive for the more dominant parties to undergo mediation. Unequal bargaining power of the disputing parties also prevents mediation from being successful. To resolve these issues, he recommends the use of neutral EADR mediators and/or facilitators with appropriate training and experience in resolving environmental disputes and sensitivity to any imbalance of power between the disputing parties, and equipping

courts with the necessary means to allow them to offer court-assisted EADR or access adequately resourced external EADR services.

The damages caused by environmental pollution are not only often hidden and cumulative but their effects are also delayed, making the task of quantifying the risks and damages of environmental pollution more complex. Worse, most jurisdictions lack environmental remedies or legal means by which they could tackle environmental problems.

For the participants' guidance, Mr. Santosa asked them the following questions:

- (i) What are the key challenges and successes different national judiciaries have faced in achieving effective environmental adjudication?
- (ii) How does the jurisdiction deal with standing?
- (iii) What are the challenges faced in the use of expert and scientific evidence?
- (iv) What methods ensure the courts have access to unbiased experts?
- (v) What remedies, including special environmental remedies, exist and are possible for environmental cases in different jurisdictions?
- (vi) What were the challenges to the enforcement of judicial decisions on environment?
- (vii) What are the key challenges and successes different national judiciaries have experienced for EADR? How can Association of Southeast Asian Nations (ASEAN) courts most effectively use EADR?

Mr. Santosa concluded by advising policy makers to pass new laws, providing for appropriate remedies to manage environmental harm and giving judges wider latitude in imposing remedies in environmental disputes, and by challenging judges to be creative in imposing remedies.

Session 2

ASEAN Environmental Law Challenge No. 1: Deforestation and Illegal Logging

Tint Lwin Thaug, executive director of RECOFTC—The Center for People and Forests, began by playing a video that shows that the absence of responsible forestry severely threatens the world's forests, as well as the wildlife and the people that depend on them. Primarily caused by the need to clear land for agriculture and cattle raising, deforestation contributes significantly to biodiversity loss, climate change, and forest fires. Poorly managed forests also lead to increased fuel and wildlife conflict, and degraded watersheds, rivers, streams, and soils, and adversely affect local communities through lost livelihoods, forced resettlement, landslides, and flooding. Illegal logging also deprives governments of tax revenue of \$10 billion–\$15 billion a year. In the United States alone, the timber industry loses more than \$1 billion a year because of illegal logging abroad.

Dr. Thaug then updated the participants on the state of the world's forests, the factors contributing to continuous deforestation in ASEAN, and the repercussions of such deforestation, especially for climate change. Among illegal forest activities, illegal logging

is considered a major cause of rapid deforestation in ASEAN, and its prevalence has been attributed to five major factors: (i) flawed policy and legal framework, (ii) minimal enforcement capacity, (iii) insufficient data about forest resources and illegal operations, (iv) corruption in both private and public sectors, and (v) high demand for cheap timber. Significantly, increased requirements for setting up a business enterprise increases multiple corruption indicators. The economies of Cambodia, Indonesia, the Lao People's Democratic Republic (Lao PDR), Malaysia, and Myanmar are forest dependent, and Singapore, Thailand, and Viet Nam are also known as wood processing centers of more developed countries. When this is coupled with the fact that ASEAN countries have varied political structures, further challenges are posed for their judiciaries, especially for those facing economic hardship.

Citing the best practices for improving law compliance in the forest sector,⁴ Dr. Thaug enumerated the four strategic elements for better legal compliance. First, the underlying causes of illegal forest activities should be carefully assessed to address the root causes of deforestation. Second, remedial actions should be prioritized. Third, the impact of these remedies should be carefully examined in terms of economic flexibility and social acceptability. Finally, strong participation of the stakeholders should be solicited and maintained to ensure the success of any and all remedial actions taken. In other words, law compliance can be promoted and strengthened by improving levels of data; increasing law enforcement capacity, transparency, and anticorruption efforts; and rationalizing the policy and legal framework.

Evidently, ASEAN legal institutions, especially judicial professionals, can lead in reducing deforestation due to illegal logging and other illegal forest activities through reform, collaboration, and use of a holistic approach. Specifically, they can (i) improve the legal framework of their respective countries to make the same more transparent, simpler, and more participatory in correcting their flawed policy and legal framework; (ii) serve as role models for right conduct and moral ethics for other relevant agencies such as law enforcement and other local authorities; and (iii) promote information exchange with other stakeholders and lobby for responsive structures capable of coping with changing circumstances. Of course, the judiciaries must be free from external control in tackling illegal forest activities and be updated on factors affecting their countries' economic development, political dynamics, and social justice. Most importantly, by networking, building their capacities, and maintaining a high sense of morality and professional conduct, judicial professionals can be in the forefront of stopping illegal forest activities.

At this juncture, representatives from Indonesia, the Lao PDR, and Malaysia were invited to share their experiences in dealing with forest law enforcement, the role of law, and the challenges their judiciaries face in adjudicating upon such cases.

Indonesia

Justice Sarwoko, justice of the Supreme Court of Indonesia, presented the law enforcement outlook of deforestation and illegal logging activities in Indonesia. Justice Sarwoko first

⁴ Food and Agriculture Organization. 2005. Forestry Paper No. 145. *Best Practices for Improving Law Compliance in the Forestry Sector*. Rome.

described the state of Indonesia's forests, stressing that Indonesia has a total land area of about 187,787 million hectares (ha), 132,399 million ha of which are forested. The average deforestation rate varies greatly, varies—from 1.87 million ha annually from in 1985–1987; rising sharply to 3.51 ha annually from in 1997–2000; dropping to 1.08 million ha annually from in 2000–2005; and rising again to 1.17 million ha annually from in 2003–2006. Based on such data, Indonesia's deforestation rate was projected to be around 1.125 million ha annually. Citing data from the Ministry of Forestry of Indonesia, Forest Watch Indonesia, and the United Nations Environment Programme (UNEP), Justice Sarwoko informed the participants that such deforestation in Indonesia has four principal drivers: planned and unplanned forest conversion, illegal logging, forest fires, and farming land expansion. Sadly, illegal logging triggers more forest degradation as degraded forests are easier to clear, while forest fires are more often intentional.

Justice Sarwoko then identified the main factors that drive deforestation and illegal logging in Indonesia. First, the structural factor, or the government's orientation to economic growth, leads to overexploitation of natural resources. Second, there is a huge problem in Indonesia's substantive laws, which overlap with each other and can be interpreted in different ways (e.g., there is no clear distinction between the definition of "forest" and "legal timber"). Third, much improvement is needed in terms of strengthening the capacity and awareness of law enforcement officials, as well as in encouraging cooperation among government agencies. Lastly, the culture on law enforcement and forest management should be improved.

Thirdly, Justice Sarwoko provided the actual status of forest law enforcement in Indonesia. He said that according to the annual report of the Attorney General Office in 2009, there were 92 cases of illegal logging that had reached sentencing following appeal. However, of the 205 verdicts in 2005–2008, only 17.2% of these involved the mastermind(s) of the illegal activity. Moreover, 137 of these decisions resulted in acquittals, 44 resulted in imprisonment of less than a year, 14 resulted in imprisonment for 1–2 years, and only 10 resulted in imprisonment for more than 2 years. These figures show that current forest law enforcement measures serve as poor deterrent.

Citing several forest law cases, Justice Sarwoko emphasized that Indonesia's judiciary has learned how to (i) apply the doctrine of corporate criminal liability, which was taught during the environmental law and enforcement training for judges conducted by the Supreme Court, in cooperation with the Indonesian Center for Environmental Law; as well as (ii) use scientific evidence. They have also realized that a major part of the deforestation problem is linked to corruption. Lack of understanding in the proper handling of forest and environmental cases also weakens the criminal justice system.

Justice Sarwoko concluded his presentation by discussing how he perceives that judges can prevent and handle deforestation and illegal logging cases by playing their role as (i) guardians of justice, establishing legal certainty in these cases; (ii) legal reform agents, exercising judicial activism in rendering decisions that manage ambiguities in substantive laws and norms; and (iii) parts of Southeast Asian legal communities, promoting cooperation in handling deforestation cases.

Lao People's Democratic Republic

H.E. Khampha Sengdara, deputy chief justice of the People's Supreme Court of the Lao PDR, began by describing the geography of Lao PDR and highlighted hydropower and timber as their main natural resources. He then identified logging, land settlement, forest management practices, and shifting cultivation as key drivers of deforestation in Southeast Asia. The adverse effects of illegal logging is aggravated by the fact that illegal logging is a more lucrative business than legal logging, and weak forestry law enforcement and monitoring mechanisms fail to deter further illegal logging.

Deputy Chief Justice Sengdara observed that deforestation and pollution are of three kinds: community pollution, agricultural pollution, and industrial pollution. In this regard, he stated that strong environmental legislation, among others, is crucial in solving deforestation and pollution problems.

Malaysia

Honorable YAA Tan Sri Arifin Zakaria, chief justice of the Supreme Court of Malaysia, presented the statistics on the forested areas in Malaysia and thereafter discussed Malaysia's National Forestry Act (1984), the principal legislation governing forest matters and including provisions on the Constitution and classification of permanent reserved forests. Stressing the need to preserve the forests, Chief Justice Zakaria then discussed the various international environmental treaties and conventions to which Malaysia is a party. These agreements include the United Nations Forum on Forest, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Wetlands of International Importance (or the Ramsar Convention on Wetlands), and the International Timber Trade Agreement. He also discussed the various national environmental laws on forest management and preservation. Existing legislation aims to penalize, and deter the commission of, forestry-related offenses including deforestation, documents fraud, illegal logging, licensed area offenses, small forest produce theft, gold and/or mineral mining, and unlicensed factory operation. Deforestation in Malaysia has been traced to the demands imposed by agricultural and industrial development, shifting cultivation, forest fires, and logging (legal and illegal).

Chief Justice Zakaria then outlined the decreasing trend in the number of illegal logging cases in Peninsular Malaysia as a result of increased government efforts to arrest illegal loggers and improved legislation, among others. Nonetheless, Malaysia still faces numerous challenges in enforcing forestry laws:

- (i) It is difficult to constantly survey huge tracts of Malaysia's forests.
- (ii) Law enforcers lack good rapport with the local communities, preventing them from soliciting their assistance and participation as witnesses in environmental cases.
- (iii) Needed competency, discipline, and integrity in enforcing the law can still be disputed.
- (iv) Offenders have a well-planned, arranged, and commercialized modus operandi.

- (v) There is a shortage of well-trained forest management personnel.
- (vi) The complex federal–state government structure of Malaysia complicates the legal framework of environmental management, with each state empowered to enact its own set of laws on land use, natural resource management, and forestry and reluctant to renounce control over issues pertaining to land, mines, and forests to the federal government nor acquiesce to the application of federal legislation.
- (vii) The identity of the actual offenders, especially the masterminds, remains unknown.

Chief Justice Zakaria also discussed the various steps being undertaken to detect illegal logging, including interagency-coordinated efforts at raising public awareness, monitoring compliance and inspecting wood-based industries, more active patrolling in forests, examination of licenses, and publication of cases involving illegal logging and other illegal forest activities. He then concluded by enumerating the initiatives taken to reduce and prevent illegal logging activities. These include (i) the prospective amendment of the National Forestry Act (1984), which was first amended in 1993, to provide for higher penalties for violations; (ii) regular monitoring and reporting activities; (iii) using remote sensing technology and geographic information systems to track and monitor forest encroachment activities; (iv) formulating and implementing the National Action Plan for Combating Illegal Logging, 2011–2015; (v) establishing a new Division of Legal and Prosecution and strengthening the existing Forest Enforcement Division of the Forestry Department Peninsular Malaysia; (vi) identifying hot spots with potential incidence of illegal logging activities throughout Peninsular Malaysia; and (vii) surveillance of forest activities by the police and armed forces and efforts at curbing illegal logging activities, encroachment of forest activities, and timber theft.

Session 3

ASEAN Environmental Law Challenge No. 2: Biodiversity and the Illegal Wildlife Trade

Clarissa C. Arida, director of the Program Development and Implementation Division at the ASEAN Centre for Biodiversity, discussed the state of the illegal wildlife trade and the key drivers of biodiversity loss in Southeast Asia, specifically climate change, large-scale mining, population growth, poverty, pollution, and overexploitation of natural resources. She cofacilitated the session with **Azrina Abdullah**, former senior social consultant at Environmental Resources Management and regional director of TRAFFIC Wildlife Trade Monitoring Network—Southeast Asia.

Ms. Arida said that illegally traded wildlife from the region’s remaining tropical forests supplies a global market worth an estimated \$10 billion–\$20 billion annually. Indonesia, Malaysia, and Myanmar have been noted as major targets, with smugglers frequently caught utilizing transport links through Thailand and Viet Nam. Ms. Arida said that these wildlife products are used for a variety of purposes, including food, medicines, clothing, bags, shoes, and jewelry. She observed that in addition to overharvesting of plant and animal species, widespread habitat destruction, introduction of invasive alien species,

pollution, and climate change threaten at least 2,517 species out of the 47,915 species assessed by the International Union for Conservation of Nature (IUCN) in the region. In 2008, TRAFFIC International reported that Cambodia, Indonesia, the Lao PDR, and Viet Nam had already experienced drastic declines in populations of species with high commercial value such as tigers, elephants, rhinos, pangolins, freshwater reptiles, tortoises, and wild orchids and other plants. Such biodiversity loss jeopardizes nature's capacity to provide medicines for humans, particularly the 500 million people in Southeast Asia who depend on biodiversity for food, medicine, and shelter.

On a positive note, Ms. Arida observed that ASEAN countries are beginning to strengthen interagency and international cooperation on law enforcement to address illegal trading of wildlife species, including incorporating provisions of the United Nations Convention on Biological Diversity and other multilateral environmental agreements as part of national laws. She pointed to ASEAN-WEN as one of the key regional institutions leading the regional response in Southeast Asia to address the illicit transnational trade in protected species. In addition to ASEAN-WEN, the United States Agency for International Development, FREELAND Foundation, TRAFFIC International, and the ASEAN Centre for Biodiversity facilitate continued training and capacity development of individuals and institutions, including the police, customs, and environmental agencies, involved in combating the illegal wildlife trade at the national level. She also reported that ASEAN has committed to sustainably manage its natural resources and biodiversity and undertake several transboundary initiatives: (i) the Heart of Borneo Initiative, (ii) the Turtle Islands Heritage Protected Area, (iii) the Sulu–Sulawesi Marine Ecoregion Program, (iv) the Greater Mekong Subregion Biodiversity Corridor Initiative, (v) the Coral Triangle Initiative on Coral Reefs Fisheries and Food Security, (vi) the 30 declared ASEAN heritage parks, and (vii) ASEAN-WEN.

Ms. Arida also identified other key areas which ASEAN member states have addressed but which may still require intensified effort, including

- (i) improving critical areas and ecosystems;
- (ii) bringing biodiversity into the mainstream of national development processes;
- (iii) connecting biodiversity management with climate change efforts;
- (iv) building on current efforts and political commitments in designing future efforts;
- (v) recognizing the links between ecosystem degradation and persistence of rural poverty, e.g., saving and restoring the fisheries industry;
- (vi) promoting better understanding and quantitative measurement of biodiversity and ecosystems, such as the use of payment for ecosystem services valuation, and the economics of ecosystems and biodiversity;
- (vii) saving and restoring fisheries industries;
- (viii) using science-based indicators systematically;
- (ix) expanding the capacity in ecosystem assessment and management of species, habitat, and human consumption interaction;

- (x) assisting the translation of issues, current and emerging threats, and experiences into sound and locally viable policies at all levels;
- (xi) supporting the preparation of environment and biodiversity management plans and properly communicating these to all stakeholders; and
- (xii) encouraging the use of sound science as reference for conservation plans and measures.

Ultimately, ASEAN member states should intensify law enforcement efforts by actively engaging all public sectors—from policy makers to rural villagers—to tackle the aforementioned drivers of biodiversity loss, restore ecosystem services, and nurture human well-being.

Ms. Arida encouraged participants to further think through the key issues and challenges on biodiversity, engage stakeholders, enhance the capacity of environmental authorities, and recognize the ecosystems services and economic values of biodiversity, including the connection between science-based information and policies and legal evidence.

On the other hand, Ms. Abdullah began by discussing with the delegates the concept of wildlife trade, its significance, and the state of the wildlife trade in Southeast Asia. Notably, the region serves as a wildlife trade hot spot, functioning as producer, consumer, and transit point. The trade is propelled by people's demand for food, traditional medicine, clothing, pets, collections, trophies, decorations, luxury items, wild meat, and timber. Legal wildlife trade is valued at \$10 billion, while illegal trade is approximately four times that. A large proportion of this trade—legal and illegal—crosses international boundaries and is within the scope of CITES. The region presents the most challenges in terms of wildlife trade management, especially considering its biodiversity and accessible transport links which facilitate cross-border illegal trade. Light penalties imposed by judges on smugglers under their respective wildlife laws, limited awareness of the impacts of the illegal wildlife trade, and growing affluence and thus demand for wildlife trade worsen the problem.

Ms. Abdullah identified several challenges to effective law enforcement: inadequate financial and human resources, corruption, insufficient legislation and political will, online wildlife trading, low judicial awareness, and the transnational character of the trade. Regional cooperation and prioritization of the problem of the illegal wildlife trade are lacking. While all 10 ASEAN member countries are signatories to CITES, none of them have taken the issue of illegal wildlife trade seriously, despite the establishment of ASEAN-WEN. In fact, wildlife trade is not even a priority under the ASEAN Blueprint, 2009–2015, even though other transnational environmental crimes, such as illegal disposal of toxic waste and air pollution caused by illegal burning, are addressed. For Ms. Abdullah, it is imperative that states realize the connection between the illegal wildlife trade on the one hand, and huge economic losses and threats to human and environmental health and to regional security on the other hand. Further, the support and commitment of ASEAN's decision makers, including the judiciary, on combatting the illegal wildlife trade should be ensured. Specifically, the role of ASEAN judges and prosecutors must be enhanced, and they should recognize illegal wildlife trade as a serious crime (although it appears to have no victim) and impose appropriate penalties to deter further crime. Essentially, a more

thorough understanding of the seriousness of the illegal wildlife trade should be made a priority as part of the judiciary's capacity building.

In an effort to drive her messages across, Ms. Abdullah also played two short videos: (i) Environmental Crime: Our Planet, Our Problem, highlighting the fact that environmental crime is a transnational organized crime, perpetrated by humans against humans and having various consequences, including increased conflict and suffering, intensified climate change, and extinction; and (ii) another video featuring Jackie Chan as an advocate of wildlife protection and reminding the viewers that wildlife trade is driven by demand, hence "when the buying stops, the killing can too."

Thailand

Kidngarm Kongtrakul Li, associate research judge of the Supreme Court of Thailand, presented an overview of the wildlife trade in Thailand. Government efforts to protect wildlife include having (i) pertinent legislation, such as the Wildlife Reservation and Protection Act of 1992, which penalizes trade and trafficking in wildlife, as well as possessing, hunting, or attempting to hunt, harm, and/or move wildlife without permit; (ii) 44 wildlife preservation areas; (iii) 54 wildlife sanctuaries; (iv) 49 wildlife checkpoints covering all exits from the country; (v) 18 wildlife breeding stations to accommodate abandoned wildlife; (vi) 18 wildlife preservation promotion units to disseminate information to young people and the public to raise awareness on wildlife preservation; and (vii) three wildlife research stations to study wildlife in its natural habitat. The main drivers of wildlife decline in Thailand have been traced to inadvertent acts, illegal poaching, encroachment on forest areas, use of chemicals and pesticides, and profit.

Judge Li noted that there are two ways to cope with the wildlife trade problem—law enforcement and crime prevention. She opined that the maximum penalties, especially pecuniary ones, prescribed by this decades-old wildlife preservation law are too low and clearly cannot deter the committing of any wildlife crime, which is extremely profitable to violators. The gap in the law, which allows people with licenses to own wildlife and carcasses in some cases, gives offenders an excuse by concealing prohibited wildlife with those licensed. On another note, Judge Li also observed that the judicial sentences issued may also slightly vary from region to region because of the distinctions among the regions, the defendant's personal circumstances, and other aggravating or mitigating circumstances surrounding the crime. However, the Sentencing Guideline (or Yee-Tok) issued by the Supreme Court may (i) help judges to exercise their discretion and render decisions which are more consistent nationwide; and (ii) deter future commission of environmental crimes, even though until now not too many illegal wildlife cases have been appealed in the Supreme Court. She also believed that the establishment of green benches in all court levels helps to build the capacity of judges to handle environmental cases, and thus ensures that the specific or technical aspects of a case will be prudently considered. Moreover, the Court of Justice of Thailand trains judges on environmental adjudication, providing them with the necessary knowledge on specific matters. Since prosecutors also play a key role in the law enforcement mechanism, they must also have wide scientific knowledge on matters such as DNA, forensics, specimen identification, and expert witnesses in order to successfully prosecute offenders and hence fulfill their duty of proving the guilt of the accused in a criminal case.

Judge Li ended her presentation by recommending (i) the enactment of new legislation or amendment of existing laws to include higher penalties, especially fines, and make the act of engaging in any aspect of illegal wildlife trade more difficult, dangerous, and less rewarding to reduce prospective violators' eagerness and opportunity to commit the crime; (ii) the placement of transnational wildlife crime prevention on the same priority level as drug or other organized crime by increasing the authorities' financial and human resources to effectively enforce the law; (iii) the establishment of an effective legal framework; and (iv) the promotion of public awareness on the wildlife trade issue. She also said that while the judiciary is at the end of the enforcement chain, the collaboration of all stakeholders is essential in achieving the goal of wildlife preservation.

Myanmar

H.E. Mya Thein, judge of the Supreme Court of the Union of Myanmar, discussed Myanmar's national law regarding the illegal wildlife trade and the challenges the judiciary has faced in enforcing the law. Judge Mya Thein first informed the participants about Myanmar's biophysical and geographical features, temperature and climate, and biodiversity reservoirs, which serve as home to numerous endemic wild flora and fauna. The country's wildlife resources have been centrally managed through four key mechanisms:

- (i) The Nature Conservation National Park Project was jointly launched by UNDP and the Government of Myanmar.
- (ii) The Nature and Wildlife Conservation Division takes charge of nature conservation and protected areas. There are 36 protected areas, six of which have been recognized as ASEAN heritage parks, and three are wildlife sanctuaries: (a) Indawgyi Lake Wildlife Sanctuary is mainly for various evergreen forests, mammals, birds, amphibians, butterflies, and fish species; (b) Inlay Lake Wildlife Sanctuary is for birds, snails, fish, and medicinal plants; and (c) Meinmahla Kyun Wildlife Sanctuary contains mangroves which serve as refuge for estuarine crocodiles, birds and butterflies, medicinal plants, mammals, fish, prawns, crabs, snakes, turtles, and dolphins.
- (iii) The National Commission for Environmental Affairs was formed in 1990 to coordinate environmental matters across ministries, develop the National Environmental Policy, and liaise with foreign countries and nongovernment organizations regarding environmental concerns.
- (iv) In 1994, the Protection of Wildlife, Wild Plants and Conservation of Natural Resources Law, which mandated the protection of wild flora and fauna, their habitats, and representative ecosystems, was enacted. Different forms of violations of the law and pertinent regulations may merit a fine and/or jail term corresponding to the gravity of the offense committed, along with confiscation of the wildlife involved, as well as the vehicles, vessels, animals, and other machinery or implements involved in the offense.

Judge Mya Thein also discussed Myanmar's law enforcement strategies for controlling the wildlife trade. The National Wildlife Law Enforcement Task Force, consisting of several government organizations led by the Forest Department, was set up to facilitate the measures aimed at curbing domestic and transboundary illegal wildlife and wild plant trade. Similarly, the country's CITES Management Authority has been working with the

Ministry of Commerce, the Customs Department, and National Police Force to strengthen wildlife trade regulations.

At the international level, Myanmar became a signatory to CITES and a member of ASEAN-WEN; conducted the National Tiger Survey in 1991, the Vertebrate Fauna Survey in 1999, the National Elephant Survey in 2005, and the Herpetological Survey in 2008–2010; designated the Hukaung Tiger Reserve; and participated in the Myanmar–Japanese Cooperative Inventory and Research Programme of the Useful Plants of Myanmar in 2008, in cooperation with the Makino Botanical Garden.

To end, Judge Mya Thein related the challenges Myanmar's judiciary faces in enforcing environmental legislation, including the proper imposition of the appropriate sanction, submission of evidence, and treatment of expert opinion. He concluded that a sound criminal justice system and international cooperation are vital in combating the illegal wildlife trade.

Viet Nam

Dang Xuan Dao, chief judge of the Economic Court of the Supreme People's Court of Vietnam, talked about the state of biodiversity and wildlife trade in Viet Nam. Judge Dao described Viet Nam as one of the most biologically diverse countries in the world. However, in recent years, the number of the country's flora and fauna species that have been classified as threatened or critically endangered has been increasing. This is mainly due to habitat loss and fragmentation, illegal logging, illegal wildlife trade, and environment pollution.

Judge Dao mentioned that Viet Nam has embarked on a number of conservation activities, such as the establishment of a system of nature reserves, parks, and landscape protection areas, and conservation efforts such as the setting up of experimental forests, medicinal plant gardens, and seed banks. Moreover, after Viet Nam became a signatory to CITES, its wildlife conservation efforts shifted from being primarily focused on the prevention of illegal hunting and exploitation of natural resources to proper management of captive breeding and artificial propagation initiatives. Despite these efforts, however, illegal wildlife trading in Viet Nam is still rampant. During 2006–2011, 456 cases involving violations of the regulations on the protection of precious and rare wild animals and one case of violation of the special protection of nature reserves were filed in court.

Judge Dao also discussed the three main weaknesses of his country's wildlife trade policy: (i) the policy focuses only on wildlife protection and law enforcement when it should also develop the legal utilization of wildlife; (ii) the policy lacks appropriate consultation with and participation of relevant stakeholders; and (iii) the prosecution and punishment mechanism needs updating. He then recommended improving the policy to ensure its efficiency, applicability, and comprehensiveness; further developing captive breeding and artificial propagation endeavors; raising public awareness on the issue; and promoting international and regional cooperation on addressing the illegal wildlife trade.

Session 4

ASEAN Environmental Law Challenge No. 3: Ocean Destruction, Illegal Fishing and Marine Pollution

Together with **Antonio Oposa**, president of the Laws of Nature Foundation and a Ramon Magsaysay Awardee, **Nazir Foead**, conservation director of the World Wildlife Fund Indonesia, facilitated this session and began by reminding the participants that the region is home to the Coral Triangle, so called because it refers to the nearly 6 million square kilometer triangular area of tropical marine waters of Indonesia, Malaysia, Papua New Guinea, the Philippines, Solomon Islands, and Timor-Leste. Also called the Amazon of the Seas by some, it is the most biodiverse marine region on earth, with 75% of global coral reefs and more than 3,000 species of reef fish. The World Wildlife Fund's Coral Triangle Network Initiative covers five of these countries: Indonesia, Malaysia, Papua New Guinea, the Philippines, and Solomon Islands, and works closely with neighboring countries where trade and species migration routes necessitate more comprehensive transboundary action.

Mr. Foead said that some of the challenges faced within the Coral Triangle are illegal, unreported, and unregulated fishing in the exclusive economic zones and the high seas; overexploitation due to an increase in consumer demand for seafood; lack of law enforcement; ecosystem disintegration and/or destruction; and uncoordinated policies between local and national governments and among states. Because of the migratory nature of many marine species, the fishery issue clearly goes beyond national jurisdiction. Hence, to resolve any form of fishery protection problem, it is imperative for countries to commit to mutual international collaboration and engage in broader transboundary action. To end, Mr. Foead encouraged ASEAN member states to come up with a law or policy similar to the Lacey Act, a conservation law enacted in the United States in 1900, which criminalized commerce involving illegally taken wildlife, fish, and plants. He asked the member states to consider three reasons why regional cooperation is crucial in addressing this issue: (i) illegal, unreported, and unregulated fishing and overexploitation of marine resources endanger food security and economic development; (ii) fish stocks have to be seen by countries as common properties that need to be regulated and mutually used; and (iii) strong regional coordination among ASEAN countries will increase the ability to influence the international market and policies.

Mr. Oposa, the second session facilitator, began by explaining the concept of environment as being about life and the sources of life—land, air, and water. He then highlighted how the Indo–Malay Philippine Archipelago—comprising most of Indonesia, Malaysia, and the Philippines and sometimes called the East Indies Triangle of Biodiversity—is the center of marine wealth on earth and with the Philippines as the heart of this biodiverse region. Manila Bay, which is at the very core of marine biodiversity on earth, became polluted because of lack of political will to maintain and even enhance its marine wealth, until after the Supreme Court itself ordered its cleanup. He also presented news clippings of seizures of huge amounts of dynamite, explosives, and other illegal fishing paraphernalia, as well as pictures and news clipping of perpetrators being arrested and prosecuted. This was to stress that law enforcement must be swift, painful, and public, and should encourage the use of creative penology, such as converting illegal fishers into fish wardens.

Mr. Oposa emphasized that governments are only curing the symptoms and not addressing the problem of how humans perceive the world. Instead, humans should have a law, policy, and paradigm shift and realize that the environment is not just about the birds and the bees and the flowers and the trees but about life and the sources of life. Once people understand that, they will then do everything within their power to protect and restore it. He also asked the participants to change their economic development model and stop simply consuming the world's finite resources. Rather than looking at industrialized countries as developed countries, they should be perceived as high- or overconsuming countries, while developing countries should be viewed as low-consuming countries. He concluded by encouraging everyone to contemplate the idea that anything that is worth doing cannot necessarily be done in a lifetime; people may follow the path to their ideals and just enjoy the journey, even without having arrived at their destination and fulfilled their ideals.

Indonesia

Takdir Rahmadi, justice of the Supreme Court of Indonesia, gave a presentation on the status of coastal destruction and marine pollution in Indonesia. He began by briefing the delegates on the regulatory instruments related to marine environment protection. He acknowledged that even though marine pollution and coastal destruction is a serious problem in Indonesia, very few cases relating to this issue have been filed in courts. He said that this situation may be due to unresolved difficulties in proving the causal effect between the suspected polluting activities and the actual damage. Many polluting activities are also linked to industries that contribute to state income. Hence, in many of these marine pollution cases, there is a need to balance economic and financial benefits with ecological interests.

Justice Rahmadi also discussed the Indonesian judicial structure, which does not have a separate category for environmental cases, and there is no special division—whether in the courts of first instance or in the Supreme Court—dealing exclusively with environmental cases in general. Nonetheless, Indonesia has achieved some success in enforcing fishery laws because it is relatively easier to prove causation between polluting activities and consequential damage. In fact, under Fisheries Law No. 31/2004 (2004), the government created special fishery courts in north Jakarta, Medan (north Sumatra), Pontianak (west Kalimantan), Bitung (north Sulawesi), Tual (Maluku), Tanjung Pinang, and Ranai. These dedicated divisions of the general civil and criminal courts are authorized to hear cases concerning violations of the criminal provisions under the Fishery Law. As of 2011, these fishery courts had heard and decided 47 cases.

During the **question and answer time**, Dr. Mulqueeny asked the delegates, particularly those from the Philippines, about their experiences in dealing with the issue of cross-jurisdictional, unsustainable, and illegal fishing. Concurring with Mr. Oposa's comment on the diplomacy issue, **Associate Justice Velasco** responded that, while forfeiting the vessels is one sanction which Philippine courts can impose on illegal fishers, often the authorities simply release arrested illegal fishers without imposing any sanction because of the use of diplomatic channels. For instance, ambassadors of foreign countries negotiate with the secretary of justice to release these suspects. Associate Justice Velasco added that the Philippines also lacks fast and efficient patrol boats to apprehend violators, as well as a coordinated government structure serving as an effective deterrent to further violations of environmental laws. The legislature should enact new laws or amend existing

ones to impose stiffer penalties for such violations and disallow probation, pardon, parole, and plea bargaining. The executive department, on the other hand, must lead the law enforcers and fund a special incorruptible team to target the syndicates violating environmental laws. Finally, the judiciary should ensure that judges are properly applying the rules of procedure and expediting trial and adjudication.

Dr. Mulqueeny acknowledged Associate Justice Velasco's concern that effective environmental law enforcement is the concern of all branches of government. Nonetheless, she emphasized that, while this issue is a chicken-and-egg scenario, the judiciary's active participation in this endeavor is crucial given that there are very few convictions of perpetrators of environmental crimes. She then suggested that the judiciary can still assert leadership in certain areas, notwithstanding the limitation on its powers in accordance with the government structure. Indeed, as Professor Dr. Salim said, strong rule of law is needed to promote sustainable development.

Session 5

Judicial Reforms to Respond to Environmental Challenges: Institutionalizing Environmental Expertise Through Specialization and Environmental Courts

Wanhua Yang, officer in charge of UNEP's Environmental Law in Asia and the Pacific Division, discussed the need to develop judicial specialization to address varied environmental challenges, including increased environmental litigation and the complexity of issues that require expertise on environmental science and domestic and international environmental laws. There are more than 380 environmental courts and/or tribunals and green benches around the world, with Asia and the Pacific leading the way in terms of judicial innovation and dynamism. Dr. Yang then framed the session by asking the delegates, especially the speakers from the Philippines, Indonesia, and Thailand, to share their experiences in institutionalizing environmental expertise, the challenges they face and how they have dealt with them, the lessons they derived from their respective country's experiences, and their advice to other countries wishing to undertake judicial reform.

The Philippines

Presbitero J. Velasco Jr., associate justice of the Supreme Court of the Philippines, described the environmental court system in the Philippines. Believing that creating and/or selecting environmental courts is needed to gain expertise in environmental adjudication, on 28 January 2008 the Philippine Supreme Court designated 33 municipal trial courts (first-level courts) and judges, as well as 84 regional trial courts (second-level courts) and judges, as green courts or environmental courts. Thus, a total of 117 of the Philippines' existing trial courts have been specifically designated to handle civil, criminal, and special civil actions involving 24 environmental laws and 14 or more related laws.

He said that the green court system features three notable aspects: capacity building, case flow management, and case monitoring. The Supreme Court selects the green

court judges, who must then undergo further training and capacity building on various environmental laws and issues, to be conducted by the Philippine Judicial Academy, the Supreme Court's education arm. To expedite the disposition of environmental cases and therefore limit the adjudication of simple cases to 6 months and complex cases to 1 year, green court judges are also required to follow a case flow management strategy. Specifically, these judges must prepare a monthly report on the status of their pending environmental cases for submission to the court administrator of the Supreme Court. If the administrator finds that the resolution of a case is unduly delayed, a judicial supervisor assigned to the green court will bring this to the attention of the judge and recommend corrective measures. To further ensure that environmental cases are decided on time, specific periods are allotted for various stages of litigation.

Associate Justice Velasco also noted that, on 29 April 2010, the Philippine Supreme Court issued the Rules of Procedure for Environmental cases to (i) protect and advance the constitutional right of Filipinos to a balanced and healthful ecology; (ii) provide a simple, speedy, and inexpensive procedure for the enforcement of environmental rights; (iii) introduce and adopt innovations and best practices; and (iv) enable the courts to exact compliance with its orders and judgments in environmental cases.

Under these rules a number of key procedural innovations were introduced and adopted. First, the rules liberalized the concept of *locus standi*, or legal standing, to sue in environmental cases. Now, any Filipino can file a suit on behalf of others, including minors, generations yet unborn, and even animals, to enforce rights or obligations under environmental laws. In fact, there is a case pending in the Philippines now wherein several Filipinos filed an environmental suit on behalf of dolphins, sharks, and whales. Citizens suits, or suits wherein all citizens who are affected by a potentially environmentally harmful act or who have environmental rights similar to those which the plaintiff seeks to enforce in a pending suit, are encouraged to intervene in the case in order to protect their rights. Thus, the plaintiff must publish a digest or synopsis of the complaint in a newspaper of general circulation, inviting people to join.

Second, the rules streamlined the litigation process by (i) prohibiting the filing of certain motions; (ii) requiring the complaint and answer to be verified to deter the parties from making any false allegations in their pleadings lest they be charged with perjury; (iii) ordering that affidavits in the form of question and answer be attached to the pertinent pleadings to shorten trials; (iv) maximizing the use of pre-trials, among other things, to force the parties to clearly state their case and thus have an immediate preliminary assessment of each party's case; and (v) imposing a 1-day examination-of-witness rule.

Third, the rules codified the writ of continuing *mandamus*—a writ issued by a court in an environmental case directing any agency or instrumentality of the government or officer thereof to perform an act or series of acts as decreed by final judgment, which shall remain effective until the judgment is fully satisfied.

Fourth, the rules also introduced the writ of *kalikasan*, or the writ of nature—a writ available to a person or entity whose constitutional right to a balanced and healthful ecology is violated or threatened, and the environmental damage involved is of such magnitude as to prejudice the life, health, or property of inhabitants in two or more cities or provinces.

Finally, the rules restate the precautionary principle as an offshoot or application of the precautionary approach, which is used along with two other approaches to problem solving: (i) the curative approach, which intends to reverse, or compensate for, the damage done; and (ii) the preventive approach, which aims to prevent known risks from materializing into actual harm. On the other hand, the precautionary approach employs measures to safeguard the environment, even if the occurrence of the harm is yet uncertain or cannot be scientifically established.

Associate Justice Velasco ended by reminding everyone that, while the Philippines may have good green court judges and effective rules of procedure for dealing with environmental cases, all the pillars of the criminal justice system should still help in the effective, efficient, and expeditious adjudication of environmental cases.

Indonesia

Paulus E. Lotulung, deputy chief justice of the Supreme Court of Indonesia, discussed the judicial certification system in Indonesia. He began by explaining the court structure and historical background. Environmental cases may fall under the jurisdiction of the general courts for civil and criminal cases or under the jurisdiction of administrative courts for cases which have been decided by the executive branch. Each jurisdiction has its own set of prosecutors, organization, and manner of recruiting justices; these differences hinder the establishment of green benches or green trial courts. Hence, the Indonesia judiciary thought of setting up a judicial certification on environmental cases program for each court.

Deputy Chief Justice Lotulung added that the adjudication of environmental cases requires specific judiciary skills. To be effective, the handling judge or justice must (i) demonstrate a deep understanding of national and international environmental legal norms; (ii) apply law as an instrument in resolving environmental cases; (iii) show law-finding (*rechtsvinding*) skills, or judicial activism, in achieving environmental justice; and (iv) apply procedural laws for environmental cases in hearing and deciding these cases. Because of these specific requirements, the Indonesian judiciary recently adopted the certification system for environmental case resolution, under which all environment cases are resolved by a panel of judges chaired by a certified judge who has undergone a rigorous selection and training process.

Deputy Chief Justice Lotulung described the certification system for environmental justice as an integrated system of ensuring that judges in the court of first instance and the appeal court are competent to resolve environmental cases. The purpose of the certification system is to continuously improve the judges' awareness, knowledge, and judicial skills in terms of environmental protection. It starts with recruitment and ends in monitoring and evaluation. The system requires the participation of all working units of the Indonesian Supreme Court, i.e., the personnel group, the training group, the judicial training center, and judicial education and supervisory units.

Deputy Chief Justice Lotulung also said that the selection process is founded on four core principles: transparency, integrity, experience, and public participation. First, the process is made transparent by having open recruitment, open registration, and announcement.

Second, integrity is emphasized by having candidate judges present a statement from the court's supervisory unit attesting to the fact that these judges have no record of having merited any sanction. Third, only judges with previous training and education or those who can show a good track record in handling environmental cases can qualify for certification. Finally, the public can sue any candidate suspected of unethical conduct.

Deputy Chief Justice Lotulung informed the participants that, as Indonesia is a large country and has 7,000 judges, it may happen that there is no certified judge to chair a panel of justices hearing and deciding an environmental case. In such an instance, a *detasering* (a "flying/moving judge") can be assigned. Further, certified judges are constantly monitored and evaluated in accordance with the Supreme Court's procedures. Those who excel are rewarded with more opportunities to participate in national and international workshops, refresher courses, and comparative studies. He ended by expressing his hope that the new generation of justices in Indonesia will have the competence, awareness, and commitment, and earnestly requested the new judges of Indonesia, who are amongst the participants, to protect his cherished environment.

Thailand

Winai Ruangsri, senior research justice of the Supreme Court of Thailand, told of the Supreme Court's efforts in enforcing and advancing environmental laws, as well as what the court intends to do and what it has not yet done. Justice Ruangsri then gave a brief historical background of the establishment of green benches in Thailand, especially the Thai judiciary's partnership with other judiciaries (particularly those of Australia, India, and the Philippines), and their assessment of their judges and the courts' ability to resolve environmental cases and disputes. Having studied the weaknesses of its judiciary on environmental adjudication and the nature of environmental cases, the Thai judiciary formulated a plan focusing on three things: (i) strategic organization of the green courts; (ii) capacity building of the judges, including the conduct of judicial training in partnership with other judiciaries; and (iii) empowerment of judges to deal with environmental cases by improving procedural rules and practices for environmental adjudication. Thus, at present, Thailand has the special environmental court system with several specialized first-level or trial courts, the environmental division (or green bench) at each court of appeal, and the green bench at the Supreme Court level. Notably, Thailand implemented a top-down (or inside-out) approach, whereby the Supreme Court's green bench is tasked to generate awareness on environmental cases among the lower courts and adjust their roles to suit environmental adjudication. Although Thailand has a civil law system, it has adopted the doctrine of judicial precedent from the English common law system.

According to Justice Ruangsri, it has always been notoriously difficult to define the precise scope of an environmental case in his country. Under the Regulation of the President of the Supreme Court No. 30 BE.2547 (AD.2004), an environmental case refers to any civil and/or criminal case relating to the provisions or violations of environmental law statutes, even if the legal issues being tried relate to nonenvironmental law statutes or general rules of law. In actual practice, the green bench handles criminal law cases, which primarily deal with damage to the environment, such as illegal logging, illegal fishing, or violations of hunting regulations.

To conclude, Justice Ruangsri emphasized that the manner by which each judiciary establishes its green court structure, rules of procedure, or judicial training program is a choice it has to make in accordance with the specific circumstances affecting its country.

During the **question and answer time**, **Chief Justice Zakaria** opined that (i) speedy disposition of environmental cases is an effective means of sending the message to the public that the ASEAN judiciaries are serious about environmental protection, and (ii) the fact that there is no longer any place in the world that is safe from flooding only goes to show that international cooperation in addressing environmental challenges is now an imperative.

On the other hand, **Chief Judge Dao** noted that Viet Nam does not yet have a specialized environmental court or judicial training. Despite this, the country does not encounter any problems appointing judges to hear and decide environmental cases. The chief judge of each particular court establishes a special hearing panel, which must include a judge trained by the Judicial Academy and experienced in environmental adjudication, to resolve environmental cases. The judiciary's main problem is appointing people's assessors who are aware of environmental issues.

To close the session, Dr. Yang summarized what had been discussed and the advantages of judicial specialization and other innovations in the field of environmental adjudication in particular. Fortunately, while ASEAN judiciaries are faced with many challenges, many have formulated and implemented interesting innovations worthy of emulation.

Session 6

ASEAN Environmental Law Challenge No. 4: Development Planning and Environmental Impact Assessment

Patricia Moore, international legal expert and former head of the International Union for Conservation of Nature's (IUCN) Regional Environmental Law Programme (Asia) and IUCN's Ecosystems and Livelihoods Group (Asia), together with **Rosa Vivien Ratnawati**, head of the Bali and Nusa Tenggara Environment Office of Indonesia's Ministry of Environment, facilitated this session.

Ms. Moore gave an overview of ASEAN efforts to address environmental challenges, specifically with respect to conducting an environmental impact assessment (EIA), and framed the issues in terms of (i) the legal adequacy of each country's national regulatory regime compared with the corresponding best practices, (ii) the procedural adequacy of such regime, and (iii) substantive adequacy. For instance, existing environmental legislation or policies, such as the EIA procedure provided under the Mekong Agreement, do not provide comprehensive procedures for conducting an EIA. The conduct and submission of EIAs can also be very delayed and insufficient, with significant and/or cumulative impacts of proposed projects being disregarded, minimized, and/or improperly analyzed.

Going further, Ms. Moore cited the Asian Development Bank (ADB) Safeguard Policy Statement (2009), which details the best practices for conducting EIAs aimed at (i) avoiding adverse impacts, when possible; and (ii) minimizing, mitigating, and/or compensating for such impacts, when avoidance is impossible. Citing the ADB statement, she stressed that a proposed project should be screened at the earliest time possible and before major decisions have been made. Moreover, it is imperative to identify all possible consequences and risks if the project were to be implemented, and utilize a strategic EIA, where appropriate. Even risks imposed on biological resources, such as biodiversity loss, as well as socioeconomic issues and transboundary global impacts should be carefully examined.

Ms. Ratnawati then discussed Indonesia's experience in conducting EIAs in accordance with Act Number 32, Series of 2009 and likened the process to regular management. This process begins with identifying the potential problems presented by a proposed project. Then, the study should address utilization of available resources, control of possible outcomes, conservation of resources, project maintenance, and finally inspection and enforcement. Should the Ministry of Environment discover any violation of any environmental law or regulation, it does then try to enforce the law by filing the necessary lawsuit. She also explained Indonesia's environmental protection and management mechanism, wherein the ministry first prepares an environmental resources inventory before issuing licenses and formulating policies and plans. This is followed by a strategic environmental assessment and, thereafter, conservation. Finally, she cited several related cases in Indonesia to illustrate the problems faced in implementing EIAs, including (i) inconsistent decisions, leading to confusion as to whether an EIA decision is an administrative decision or just a recommendation which can be disputed or challenged; (ii) unenforceability of EIA decisions; and (iii) unclear criteria to determine which businesses must conduct EIAs, and how extensive must such EIA be. Unfortunately, while Act Number 32 seems to be a comprehensive piece of legislation, it nevertheless leaves the Ministry of Environment unclear as to how to properly implement it.

Malaysia

Yang Arif Tan Sri Abdull Hamid Embong, justice of the Federal Court of Malaysia, gave the historical background of how EIAs have become a legal requirement in Malaysia under the Environmental Quality Act. After having simplified the concept of an EIA through a reverse reading of the term "assessment of the impact on the environment," Justice Embong then explained that EIAs are now being conducted to (i) prevent environmental problems; (ii) ensure that all environmental problems are foreseen and addressed at an early stage; and (iii) avoid costly mistakes in project implementation. To illustrate, he narrated how three residential townhouse blocks were devastated and the residents killed when a development was done on top of a hill, stripping the jungle of its trees, leading to erosion and a massive landslide during one rainy season.

Justice Embong further explained the procedure of an EIA pursuant to Section 34(A) of the Environmental Quality Act. First, the minister prescribes activities, which may have significant environmental impact. By an EIA order, there are 19 prescribed activities.⁵

⁵ These are agriculture, drainage and irrigation, mining, power generation and transmission, fisheries, land reclamation, resort and recreational development, forestry, infrastructure, industry, water supply, ports, housing, railways, waste treatment and disposal, airport, transportation, quarries, and petroleum.

Second, anyone who intends to perform any of the prescribed activities must submit an EIA report to the director general on such activity before it is approved. Finally, the director general, after conducting the necessary inquiry, approves or denies the report and notifies the person intending to perform the prescribed activity, as well as the relevant approving authorities, of his decision. The proposed activity can only proceed once the director general has approved the report. Only those competent persons registered with the Department of Environment under the EIA Consultant Registration Scheme are authorized to conduct EIAs. Moreover, the EIA can be either preliminary or detailed, the difference primarily being that the detailed EIA creates public awareness because the public can comment on it. Justice Embong concluded by presenting the various issues faced by Malaysia with respect to EIA implementation and enforcement, as well as the number and types of EIA reports received by the Department of Environment during 2001–2010.

Thailand

Maneewon Phromnoi, judge of the Supreme Administrative Court of Thailand, first informed the participants about Thailand's National Economic and Social Development Plan, which aims to achieve national economic and social development, making Thailand an industrialized country and improving the people's well-being. Like most other countries, development comes at a price, and Thailand has faced diverse environmental problems, prompting it to implement an EIA program.

The Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992), Thailand's primary environmental protection law, governs the conduct of EIAs. EIAs are now mandatory for proposed major development projects that are likely to have significant impacts on the environment and concerned individuals and communities. Such projects may or may not require the Cabinet's approval. Currently, 34 types of project require Cabinet approval, including construction of dams or reservoirs, power plants, commercial airports, hotels or resorts, mass transit systems, expressways, mines, industrial estates, and commercial ports and harbors.

After explaining the concept of EIAs, Judge Phromnoi then cited several related administrative cases. First, in the Khon Khaen Garbage Disposal Case (Supreme Administrative Court Judgment No. 244/2553), the Thailand Supreme Administrative Court held that the construction of a waste disposal system does not require a prior EIA. The phrase "as provided by law" under Section 56 paragraph 2 of Thailand's Constitution B.E. 2540 (1997) means that the legislature should first enact a law concerning EIAs before the said provision can be enforced. Second, in the Sakom Case (Supreme Administrative Court Judgment No. 630/2551), the court ruled that existing legislation requires the prior conduct of an EIA for any construction on a water resource, and thus ordered the Marine Department to perform an EIA on the jetty construction and send the report to the Office of Natural Resources and Environmental Policy and Planning within 60 days from the date of the final order. Lastly, in the Samui Island—Mine Patent Permit Case (Supreme Administrative Court Judgment No. 333/2549), the court ordered the Ministry of Industry to revoke the mine patent permit approval previously issued over an area of Samui Island after the EIA report revealed that mining would permanently damage the hill area and adversely affect the surroundings and the tourism business.

Judge Phromnoi concluded with her critique of EIAs. First, while EIAs are important in environmental management, it is very time consuming to gather information, arrive at a consensus during each public hearing, and/or resolve any conflict. Second, effective public participation is hindered by the fact that members of affected communities are often given short notice of public hearings and are therefore unprepared or unaware of potential adverse impacts should a proposed project be implemented. Third, lack of financial and personnel resources constrain EIAs. For Judge Phromnoi, ultimately, while Thailand has a comprehensive EIA structure, poor enforcement of applicable laws and regulations renders the EIA process useless in improving environmental conditions.

Session 7

ASEAN Environmental Law Challenge No. 5: Fresh Water, Pollution, Floods, and Climate

Thomas Robert Panella, principal water resources specialist in ADB's Indonesia Resident Mission, began his presentation on the challenges posed with regard to the Citarum River, the biggest and longest river in West Java Province, and other water resources with the statistics and demographics of the Citarum River and nearby communities. Based on these, he specified seven major challenges: (i) population growth and urbanization; (ii) watershed degradation, erosion, and sedimentation; (iii) flooding and water-related disasters; (iv) excessive groundwater exploitation; (v) water pollution consisting of industrial, domestic, organic, and solid waste; (vi) coastal degradation; and (vii) water allocation, infrastructure, and climate change.

Dr. Panella proposed some solutions to these problems. First, watershed degradation, erosion, and sedimentation problems can be solved by (i) improved spatial planning, zoning regulation, and enforcement; (ii) conservation, land rehabilitation, and reforestation; and (iii) sustainable farming practices and provision of alternative sources of livelihoods. Second, severe and recurrent flooding can be controlled through canals and waterways. Third, excessive groundwater exploitation can be reduced with (i) improved groundwater regulation, licensing, and enforcement; (ii) groundwater pricing; (iii) groundwater recharge; and (iv) increased surface water supply, especially for industrial use. Fourth, industrial and domestic wastewater pollution can be addressed by (i) improved regulation, licensing, and enforcement of water quality standards; (ii) improved monitoring; (iii) industrial and domestic wastewater treatment plants; (iv) provision of sanitation facilities; and (v) low-cost water treatment technology. Organic waste water pollution can be solved by (i) organic fertilizer production to supply downstream farms, (ii) biogas generation, and (iii) improved waste management; and solid-waste water pollution can be managed through (i) improved solid-waste management regulation, zoning, and enforcement; (ii) solid-waste facilities and collection services; (iii) recycle, reuse, and reduce (3R) facilities; and (iv) changed behavior. Finally, coastal degradation can be solved by conducting (i) mangrove rehabilitation and coastal ecosystems improvement, (ii) flood control, and (iii) coastal protection through dykes and coastal infrastructure.

Dr. Panella ended with a discussion of the operations in reservoirs located in three key locations: (i) the Saguling, Cirata, and Juanda dams along the Citarum River, in which he

noted a need for greater coordination and updated flood and drought control mechanisms; (ii) Purwakarta District; and (iii) Karawang District.

The Philippines

Presbitero J. Velasco Jr., associate justice of the Supreme Court of the Philippines, elaborated on the writ of continuing *mandamus*, which the Philippine Supreme Court had issued in the landmark case of the Metropolitan Manila Development Authority, et al. versus Concerned Residents of Manila Bay, et al. (G.R. Nos. 171947-48, 18 December 2008)—a decision which he himself penned. This case stemmed from a lawsuit filed by concerned residents of Manila Bay against several government agencies, allegedly because of their failure to perform their respective tasks in maintaining the Manila Bay at its ideal level.⁶ Both the trial court and the Court of Appeals ordered these agencies to clean up the bay in accordance with a consolidated action plan. The Court of Appeals, in turn, elevated the case to the Supreme Court, questioning the propriety of a *mandamus* to compel them to perform official duties. The Supreme Court en banc decided not only to affirm the decision of the lower courts but also to order the implementation of an effective monitoring system to ensure compliance with the set completion schedules and this decision, and achieve the cleanup, rehabilitation, protection, and preservation of Manila Bay.

Specifically, the Supreme Court made the following orders:

- (i) The Department of Environment and Natural Resources was ordered to fully implement its Operational Plan for the Manila Bay Coastal Strategy for the rehabilitation, restoration, and conservation of the bay as soon as possible.
- (ii) The Department of Interior and Local Government was ordered to direct all local government units in Bataan, Bulacan, Cavite, Laguna, Metro Manila, Pampanga, and Rizal to visually inspect the banks of the river systems and waterways in their respective areas of jurisdiction that eventually discharge water into the Manila Bay, determine whether the lands abutting the bay have the mandated wastewater treatment facilities or hygienic septic tanks, and order noncompliant establishments and homes to set up the necessary facilities to prevent wastes from flowing into these river systems, waterways, and eventually the Manila Bay.
- (iii) The Metropolitan Waterworks and Sewerage System was ordered to install and maintain the needed waste water treatment facilities in Cavite, Metro Manila, and Rizal as soon as possible.
- (iv) The Local Water Utilities Administration was ordered to provide, install, operate, and maintain sewerage and sanitation facilities and efficient and safe sewage system in Bataan, Bulacan, Cavite, Laguna, and Pampanga as soon as possible.
- (v) The Department of Agriculture was ordered to improve and restore marine life in Manila Bay and assist local government units in Bataan, Bulacan, Cavite, Laguna,

⁶ These agencies include the Metropolitan Manila Development Authority; Department of Environment and Natural Resources; Department of Education, Culture and Sports (now the Department of Education); Department of Health; Department of Agriculture; Department of Public Works and Highways; Department of Budget and Management; Philippine Coast Guard; Philippine National Police Maritime Group; Department of Interior and Local Government; and the Metropolitan Waterworks and Sewerage System.

Metro Manila, Pampanga, and Rizal to develop, using recognized methods, the fisheries and aquatic resources in Manila Bay.

- (vi) The Philippine Coast Guard and the Philippine National Police Maritime Group were ordered to coordinate and apprehend violators of legislation, with the aim of preventing marine pollution in Manila Bay.
- (vii) The Philippine Ports Authority was ordered to immediately adopt measures to prevent waste discharge into Manila Bay waters from vessels docked at ports and apprehend the violators.
- (viii) The Metropolitan Manila Development Authority was ordered to dismantle all structures and encroachments built in violation of applicable laws along specified rivers and connecting waterways and *esteros* (or drainages) in Metro Manila; establish, operate, and maintain a sanitary landfill as prescribed by Republic Act No. 9003 within 1 year of this decision; and cause the apprehension and filing of appropriate criminal cases against violators of applicable laws on pollution.
- (ix) The Department of Public Works and Highways was ordered to remove all structures and encroachments built in breach of applicable laws along other specified rivers, connecting waterways, and *esteros* that discharge wastewater into Manila Bay.
- (x) The Department of Health was ordered to determine, within 1 year of this decision, whether all licensed septic and sludge companies have the proper facilities for the treatment and disposal of fecal sludge and sewage coming from septic tanks and, if not, to set up within a reasonable time the necessary facilities under pain of cancellation of their environmental sanitation clearance.
- (xi) The Department of Education was ordered to integrate lessons on pollution prevention, waste management, environmental protection, and similar subjects into the school curricula of all levels to inculcate in students, and, through them, their parents and friends, the significance of their obligation to achieve and maintain a balanced and healthful ecosystem in Manila Bay and the entire Philippine archipelago.
- (xii) The Department of Budget and Management was ordered to consider incorporating sufficient budget allocation in the General Appropriations Act of 2010 and succeeding years for the cleanup, restoration, and preservation of the Manila Bay water quality in accordance with the country's development objective of achieving economic growth while protecting, preserving, and reviving the country's marine waters.

Furthermore, the heads of the agencies were required to submit quarterly progress reports of the activities undertaken pursuant to the decision.

To end, Associate Justice Velasco highlighted that the writ of continuing *mandamus* the Supreme Court issued in this case is not time-bound but, rather, enforceable as long as something must be done in terms of cleaning, rehabilitating, and preserving the bay. However, while a committee had been formed to monitor the agencies' compliance with their respective duties, it has faced difficulties, including in hiring competent staff to

form the technical working group to verify the accomplishment reports and undertake inspections of the works decreed.

Thailand

Prapot Klaisuban, judge of the Central Administrative Court of Thailand, first explained that, because of the increase in the number of environmental cases being filed as a consequence of accelerated industrialization and urban development and the resulting environmental impacts, the Thai judiciary was constrained in setting up an environmental department in Thailand's Central Administrative Court. He then outlined the various laws comprising Thailand's environmental legislation, including the Enhancement and Conservation of National Environmental Quality Act B.E. 2535 (1992), the Wildlife Preservation and Protection Act B.E. 2535, the Public Health Act B.E. 2535, the Factory Act B.E. 2535, the Energy Conservation Promotion Act B.E. 2535, and the Non-Smokers' Health Protection Act B.E. 2535.

Judge Klaisuban gave examples of how Thai courts have ruled on cases involving freshwater devastation and illegal fishing. In the Klity Creek Case, concerned villages accused the Pollution Control Department of having failed to make the mining company pay, even though the company had discharged waste water into Klity Creek for more than 25 years. This time, the court found that, indeed, the department failed to promptly (i) demand financial compensation from the mining company for the environmental damage it caused, and (ii) perform its official duty of rehabilitating the contaminated creek. Thus, the court ordered the department to pay the plaintiffs B743,226, representing their cost of losing livelihood opportunities and their right to live in a clean environment. On the other hand, in the Breeding Zone Case, concerned local fishers sued the Fishing Department and the Ministry of Agriculture and Cooperatives which, in issuing regulations prohibiting the use of certain fishing tools in certain areas, restricted the people's right to livelihood. Eventually, the court decided that the subject regulations were "essential measures" with benefits to the general public outweighing the cost to the fishers.

To end, Judge Klaisuban discussed the flooding crisis in Thailand and showed pictures to highlight the gravity of the situation.

Session 8

ASEAN Environmental Law Challenge No. 6: Urbanization and Air Pollution

Simon Tay, chair of the Singapore Institute of International Affairs, stressed to the participants that rapid urbanization entails increasing air pollution sources, greater environmental harm, and health risks. But, how one proves the source of pollution or the cost of damage inflicted is a troublesome issue, which only worsens as one deals with transboundary haze pollution. The problem is not just about jurisdiction but also about effecting compliance, identifying the real party of interest, and following the applicable procedural rules. He ended by pointing out that governments clearly need to consider their choice of policies and technologies, given that each technology has varying impacts

on air pollution. Judicial activism has certain benefits, but Mr. Tay cautioned justices on deciding policy and technology costs.

Singapore

Philip Nalliah Pillai, judge of the Supreme Court of Singapore, noted that, while all judges apparently recognize the importance of protecting the environment and preserving it for future generations, plans and concrete actions promoting environmental protection are simply not materializing, and this is due to various factors. Some developing countries tend to adopt measures that would provide an impetus to growth with no regard for any resulting environmental harm. Second, corruption in various levels of government has diminished the effectiveness of the best intentions, laws, and policies. Many bureaucracies are also weak and ill-equipped to enforce environmental laws and take decisive action in protecting the environment and addressing potential conflict situations, and some nations are poorly governed, even with the best resources. Given the court's lack of institutional capability and resources to micromanage the enforcement part, the precise role of judiciaries in environmental stewardship remains a critical issue addressed by two conflicting approaches—judicial activism and judicial restraint. Nevertheless, what clearly seems to be the case is that good laws do not necessarily translate into effective enforcement.

Judge Pillai then shared Singapore's experience of growth. In the 1970s, Singapore was described as a "typical third-world city" with no natural resources other than its people and its location. This notion made Singapore paranoid that it may vanish at any time and shaped the country's approach to development and the environment. However, in a span of 2–3 decades, Singapore's founding fathers, including public servants at the village or micro level, were exceptionally incorruptible, educated, and competent. Through sheer political will and good governance they transformed the city into a global city by strictly enforcing the applicable laws, policies, and regulations. As manifested in their planning and pre-approval processes, Singapore's primary approach towards land use and development had always been preventive rather than remedial, with continuous monitoring and immediate correction of every infringement. Moreover, in attracting foreign investment, the country instituted sound environmental policies. The challenge, therefore, to the present generation of Singaporeans is whether and how they can continue this legacy of their forefathers. Fortunately, the new generation of Singaporeans also exhibits similar environmental awareness and concern, as they take on the challenge of deciding whether and how to achieve a better life for everyone, while balancing the trade-off between diverse economic and environmental interests.

Cambodia

Kim Sathavy, justice of the Supreme Court of Cambodia, addressed the issue of rapid urban growth in developing countries. She related that, over the last 10 years, Cambodia has experienced dramatic urban population growth as a result of both natural population growth and rural–urban migration. She noted that this phenomenon has been experienced by other major cities in the region, including Bangkok, Jakarta, Kuala Lumpur, and Manila. This rapid and unprecedented urban growth uncovered the inadequacy of public infrastructure such as roads, public transport systems, and public

sanitation facilities. Thus, there is saturation of road networks as well as an increase in air, noise, and water pollution.

Highlighting the fact that air pollution knows no boundaries, Justice Sathavy encouraged everyone to contribute to the solution, and cited examples of how air pollution is being managed in other countries. For instance, some big cities in northern Europe have implemented a number coding scheme, wherein odd and even number plates can use the roads on alternate days. Other cities and countries implement alternative transportation methods and/or ban traffic in certain places.

Given this backdrop, for Justice Sathavy the judiciaries should be more proactive in preventing and controlling air pollution and environmental degradation. They should work with the local and national governments to implement effective policies to address the underlying causes of these problems. The judiciaries, in particular, have a special responsibility to resolve conflicts between polluters and their victims, and in the process apply the polluter-pays principle. But, given the multitude of factors causing environmental problems, the resolution of these problems is never simple. Increased coordination between the judiciary and the other government agencies concerned is vital to utilizing urban management, official regulation, and adaptive legislation aimed at implementing effective and sustainable air quality management approaches. In the future, environmental conflicts will increase and the judiciaries will be called on to resolve these conflicts. Hence, judiciaries should remain open to new technologies and auxiliary scientific methods in measuring air pollution, identifying the source, and assessing damage.

Justice Sathavy ended by noting Cambodia's predominantly rural economy and the regulatory framework, including legislation, implemented to address the country's vulnerability to climate change and reconcile economic growth with environmental protection. The present national strategy integrates the needs of biodiversity conservation, socioeconomic development, and conservation of natural resources, in cooperation with neighboring countries.

Session 9

Common Challenges for ASEAN Justices: Key Capacity and Governance Issues

Patricia Moore, international legal expert and former head of the International Union for Conservation of Nature's (IUCN) Regional Environmental Law Programme (Asia) and IUCN's Ecosystems and Livelihoods Group (Asia), framed the issues relating to the key capacity and governance issues of ASEAN judiciaries by raising key issues, which have not yet been tackled:

- (i) How can environmental law be included in judicial training processes to build lower court capacity and substantive knowledge on environmental law?
- (ii) How can general governance and integrity issues be integrated into the environmental enforcement chain?

- (iii) What can the judiciary do to encourage prosecutors and lawyers to bring environmental cases?
- (iv) What are the key innovations that help open access to judicial institutions for environmental disputes?
- (v) What special measures are needed to increase access to justice for the poor, marginalized groups, and indigenous peoples?
- (vi) How can the formal justice system recognize resolutions of disputes by informal systems to increase access to justice?

Thereafter, a short video presentation of **Adalberto Carim Antonio**, trial judge of the Court of the Environment and Agrarian Issues of the State of Amazonas, was played to highlight the Amazonian experiences in developing a model of an environmental court. Judge Antonio started by describing the historical context of establishment of an environmental court in the middle of the Amazon. In 1997, as the country was experiencing one of the strongest manifestations of El Niño (severe drought coupled with lack of electricity and reduced visibility because of the smog produced by the burning of trees), the Tribunal of Judges of the state of Amazonas realized the need to accomplish their constitutional mandate to protect the environment for the benefit of present and future generations. The tribunal commissioned Judge Antonio, who has devoted his life to the practice of environmental law, to build an environmental court in the middle of the Amazon—a mission which for him was both a blessing and a curse. While there was no model which Judge Antonio could study and follow in fulfilling his mission, he took it as an opportunity to find means to solve their ecological problems. His process involved two key steps for attaining environmental justice in the area:

- (i) Judge Antonio tried to have the local communities assimilate Brazilian environmental legislation through comic books and other educational materials, which would help both the youth and adults appreciate the importance of their role in the integration of the environmental court in their communities. This initial step was imperative given that most of them were under the impression that all of the natural resources around them are infinite.
- (ii) Judge Antonio understood that most environmental criminals and delinquents have a different profile to other criminals, i.e., they are just ordinary people believing that what they do may benefit others. Thus, he introduced alternative sentencing of convicted felons to better reintegrate them into society. Instead of paying fines or serving a jail term, infractors can opt to engage in community service and/or financially support environmental protection and conservation efforts, in addition to attending a mandatory environmental night school, a 2-week night course with a diploma awarded upon completion. To merit this alternative sentence, infractors must present technical evidence to the court that they are able to mitigate or resolve the environmental problem they have caused. Further, to illustrate the effectiveness of alternative sentencing, Judge Antonio cited the case of (a) a large petroleum company which was involved in a major oil spill in the Amazon and thus ordered to do a cleanup and build a school, water system, health facility, and social center in the affected community; and (b) a bus company causing noise and air pollution being ordered to pay for and put up posters about environmental crimes on the back of its 500 buses. Interestingly,

instead of paying fines or going to jail, infractors are more willing to fund the publication of materials on environmental legislation and other environmental education materials, rehabilitation of degraded areas, construction of recycling centers, and/or contribute to the establishment of a center for re-education of environmental criminals.

Finally, Judge Antonio expressed his sincere hope that what he has done in the state of Amazonas can inspire other judges to find their own ways to effectively assimilate environmental legislation into the local communities and make the communities understand the significance of such laws and their own role in environmental protection.

Justice Lotulung encouraged the participants to participate and share experiences. He pointed out that the law can sometimes be outdated as compared to social advancements, and judges are then compelled to develop the law. There are also instances where good laws are rendered meaningless by poor implementation, and it can be better to simply have bad laws but with good judges. The issue therefore turns to integrating general governance into the entire environmental law enforcement chain. Finally, he asked the participants to think of ways to increase access to justice for the poor, the marginalized, and indigenous groups, especially considering that these groups are the ones most suffering from the effects of environmental degradation.

Judge Pillai raised more questions and referred to the Indian judiciary's example of judicial activism. Notably, India's Constitution provides for public interest litigation, allowing anybody to go to the Supreme Court on any legal issue, as well as the right to clean air and clean water, among others, as a basis for giving the courts a basis for intervention. Unfortunately, the same does not hold for other countries; either there simply is no basis or there is insufficient basis for judicial intervention. For Justice Lotulung, administrative courts can then come into the picture should any public officer or government agency refuse to perform any legally mandated duty. Judge Phromnoi, however, noted that even if public officers or government agencies might be doing their job, unforeseen circumstances might cause things to go beyond the government agencies' control.

Session 10

UNEP's World Congress on Justice, Governance, and Law for Environmental Sustainability: The Role of the Judiciary

Bakary Kante, director of the Division of Environmental Law and Conventions of UNEP, discussed the United Nations Conference on Sustainable Development, also known as Rio+20, Rio 2012, or Earth Summit 2012. Hosted by Brazil in Rio de Janeiro during 13–22 June 2012, Rio+20 is the third international conference on sustainable development. As a follow-up convention to the United Nations Conference on Environment and Development and the 2002 World Summit on Sustainable Development in Johannesburg, Rio+20 is aimed at having heads of state and representatives from all sectors arrive at a focused political instrument on poverty alleviation, social equity advancement, and environmental protection, and at institutionalizing sustainable development on all fronts. Specifically,

Rio+20 targets seven priority areas: decent jobs, energy, sustainable cities, food security and sustainable agriculture, water, oceans, and disaster readiness.

Dr. Kante then explained the World Congress on Justice, Governance and Law for Environmental Sustainability, which was scheduled on 17–20 June 2012 in line with Rio+20. The world congress sought to convene attorneys general, chief prosecutors, auditors-general, chief justices, and senior judges and other legal practitioners to help in furthering the goals of Rio+20 by formulating a common vision and principles on translating ideas into action and using justice, law, and governance as a tool for promoting sustainable development.

Notably, the Kuala Lumpur Statement, which resulted from the preparatory meeting in Kuala Lumpur on 12–13 October 2011, and the Buenos Aires Statement, which resulted from the preparatory meeting in Buenos Aires on 23–24 April 2012, were subsequently affirmed and referred to in the Rio+20 Declaration on Justice, Governance, and Law for Environmental Sustainability.

Session 11

An ASEAN Vision on Justice, Governance, and the Rule for Law for Environmental Sustainability Led by ASEAN Chief Justices

Widayatno Sastro Hardjono, deputy chief justice for development, of the Supreme Court of Indonesia; Mas Achmad Santosa, a member of the Presidential Task Force to Eradicate Corruption in the Legal System (or Presidential Anti-Judicial Mafia Task Force), environmental law and governance specialist and senior advisor for human rights, legal and justice sector reform at UNDP—Indonesia; and Kala Mulqueeney, senior counsel at the Office of the General Counsel of ADB, facilitated the session.

The video presentation of **Antonio Herman Benjamin**, justice of the Tribunal Superior de Justicia (High Court of Brazil), was played to show the participants the Brazilian perspective on the judiciary's role in furthering economic development and poverty alleviation, while ensuring environmental protection. Justice Benjamin began by discussing two models of viewing the judiciary's role in environmental protection: the judiciary spectator and the active judiciary. The judiciary spectator model, which for Justice Benjamin should be rejected, is based on the following rationale: (i) environmental conflict issues, which are highly complex and require technical expertise, should be settled by congress and the administration, and not by the judiciary, which is ill-equipped to handle such issues; (ii) judges, not having been elected by the public and thus considered nondemocratic state agents, should not make policy decisions on behalf of society; and (iii) judges are unable to speedily adjudicate environmental cases. The active judiciary model, on the other hand, is anchored first and foremost on the Constitution, which expressly provides for the people's right to a clean and safe environment and the correlative duty of the state's institutions, the judiciary included, to protect such right, and legitimizes the judiciary's intervention in this sphere. Besides, the promotion of ecological sustainability is a legal role, which judges must serve.

Justice Benjamin also discussed the various criticisms leveled at judges ruling on environmental conflicts. First, environmental conservation as a limitation on private property can be perceived as an illegitimate state intrusion, regardless of the constitutional mandate authorizing the intrusion. Second is that environmental laws serve a redistributive function in terms of values and interests as such legislation determines state assets and limits their functions. Third, access to environmental justice is increased by legal provisions and procedural rules that relax the *locus standi* requirement to file environmental cases. Lastly, when judges decide cases at the trial court level and the losing parties elevate their cases to appellate courts, local issues are brought to the forefront and become national concerns.

Finally, while judges are undoubtedly latecomers in the environmental debate arena, Justice Benjamin observed that the judiciary's role in this arena has been greatly expanded. He expressed his hope of being physically present the next time he is invited to the ASEAN chief justices and senior judiciaries roundtable and of having such distinguished participants present in one of the meetings frequently organized by the judiciaries in Latin America.

Discussion on Draft Common Vision

Before closing the session, the delegates finalized and agreed on the plan they will be following in promoting regional cooperation in promoting environmental justice in Southeast Asia—A Common Vision on Environment for ASEAN Judiciaries.

After further deliberations on the Jakarta Common Vision's wording, the next roundtable, which would be hosted by Malaysia, was set down for December 2012.

Closing Remarks

Bakary Kante, director of the Division of Environmental Law and Conventions of UNEP, reminded the delegates of their enormous responsibility to promote environmental justice. Next year, the Rio+20 summit shall thrash out three issues: (i) economic development; (ii) the institutional framework for sustainable development; and (iii) emerging issues, including those which are likely to arise within the next 2 decades. Dr. Kante stressed that the delegates have been very conservative during this roundtable, and more mavericks are needed in the field of environmental law enforcement. More environmental litigation could be expected; the implementation of policies relating to climate change, biodiversity, chemical conventions, and other related issues would certainly entail the filing of cases of a national, subregional, and regional scale. On behalf of UNEP, Dr. Kante offered his assistance in this endeavor.

Tan Sri Arifin Zakaria, chief justice of the Supreme Court of Malaysia, was then called to help in distributing tokens of appreciation to the organizers and resource speakers.

Kala Mulqueeny, senior counsel at the Office of the General Counsel of ADB, reminded the delegates of the challenges ahead and conveyed her appreciation of the roundtable's

conclusion of a common vision statement—a legacy of Chief Justice Tumpa and a plan for moving forward. Moreover, she expressed ADB's support for convening the roundtable again in December 2012 and appreciation for the Federal Court of Malaysia for having taken the baton from the Supreme Court of Indonesia.

At this juncture, **Tan Sri Arifin Zakaria**, chief justice of the Supreme Court of Malaysia, graciously welcomed everyone to Malaysia the following year.

Dr. Mulqueeny thanked the Supreme Court of Indonesia and Chief Justice Tumpa for leading the efforts to make this roundtable possible; the organizing committee, Sherielysse Bonifacio, and her team; and their partners, UNEP, and Dr. Bakary Kante; and everyone who supported them.

Harifin A. Tumpa, chief justice of the Supreme Court of Indonesia, thanked everyone, including Chief Justice Zakaria, ADB and Dr. Mulqueeny, UNEP and Dr. Kante, and the entire Indonesian judiciary, and urged everyone to promote environmental justice.

Background Paper

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

Background Paper

*Prepared as Background for the ASEAN Chief Justices'
Roundtable on Environment*

Mandarin Oriental Hotel, Jakarta, 6–7 December 2011

Kala Mulqueeny, senior counsel, and Sherielysse Bonifacio, legal research
consultant, Asian Development Bank

ABSTRACT

The Association of Southeast Asian Nations (ASEAN) Chief Justices' Roundtable on Environment is directed toward considering the common environmental and environmental law challenges Southeast Asian countries collectively face, as well as the corresponding challenges for Southeast Asian judiciaries. This paper seeks to provide an overview of these key challenges and issues to provide background for understanding these challenges, and for using the roundtable as an opportunity to bridge those challenges and begin to consider cooperative solutions.

Many commentators and practitioners have recognized the critical judicial role in environmental justice and sustainable development.

The chief justices and senior judiciary lead the legal profession in their respective jurisdiction in shaping normative interpretations of legal and regulatory frameworks. They also issue rules and directions to lower courts, which affect their priorities, and often play a role in judicial education. Thus, their influence is direct and indirect. All these influences affect not only the courts, but the way the legal system operates, and the way that sector lawyers, such as environmental, water, and energy lawyers, understand the legal and

regulatory frameworks and how they should be enforced. Moreover, this affects private sector investment in related sectors.¹

At the roundtable, delegates will be asked to consider objectives for future cooperation and the benefits of maintaining the ASEAN chief justices' roundtable. The idea is to agree upon a common vision for the way forward.

¹ K. Mulqueeny, S. Bonifacio, and J. Espenilla. 2010. Asian Judges, Green Courts, and Access to Environmental Justice: An Asian Judges Network on the Environment. *Journal of Court Innovation*. Winter 2010. New York: PACE University.

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

Background Paper

*Prepared as Background for the ASEAN Chief Justices'
Roundtable on Environment*

Mandarin Oriental Hotel, Jakarta, 6–7 December 2011

Kala Mulqueeny, senior counsel, and Sherielysse Bonifacio, legal research consultant, Asian Development Bank²

Southeast Asia contains many of the world's most biodiverse regions. It possesses 5% of the world's forests,³ 20% of the world's biodiversity,⁴ 34% of coral reefs,⁵ and produces 17% of fish resources. The region has 52,000 square kilometers of mangrove forests and 25 million hectares of peatland constituting 60% of the world's tropical peatland.⁶ Southeast Asian forests are the oldest rainforests on earth, and have a biological richness unequaled by the Amazon or African rainforest.⁷

In recent years, Southeast Asia has seen improvements in standards of living for its people. However, 78 million Southeast Asians still lack access to potable water,⁸ while 187 million lack access to sanitation (footnote 8), and 160 million lack access to energy;⁹ 93 million people live below the \$1.25-a-day poverty line.¹⁰ Moreover, Southeast Asia, like the rest of Asia, has experienced significant environmental change over the last 30–40 years, which threatens to reverse the economic improvements that have taken place.

² The views expressed in this paper are those of the author and do not necessarily reflect the views and policies of the Asian Development Bank (ADB) or its Board of Governors or the governments they represent. ADB does not guarantee the accuracy of the data included in this paper and accepts no responsibility for any consequence of their use. Use of the term "country" does not imply any judgment by the authors or ADB as to the legal or other status of any territorial entity. Many thanks to Wanhua Yang for contributions to Section C.i.; Patricia Moore for her contribution on Development Planning and Environmental Impact Assessment; and Jacqueline Lam on her excellent research assistance, including compiling the table.

³ <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/EXTAPREGTOPENVIRONMENT/0,,contentMDK:21093295~pagePK:34004173~piPK:34003707~theSitePK:502886,00.html>

⁴ See http://e-news.aseanbiodiversity.org/acb_eweb_feb09/index.htm

⁵ See <http://www.climateshifts.org/?p=5111>

⁶ Association of Southeast Asian Nations (ASEAN) Secretariat. 2009. *Fourth ASEAN State of the Environment Report*. Jakarta. Available at <http://www.aseansec.org/publications/SoER4-Sum.pdf>

⁷ See http://www.blueplanetbiomes.org/se_asian_rnfrst.htm

⁸ United Nations Children's Fund (UNICEF)–World Health Organization (WHO). 2008. *A Snapshot of Drinking Water and Sanitation in Southeast Asia and Pacific*. Available at: http://www.wssinfo.org/fileadmin/user_upload/resources/1251452757-A_Snapshot_of_Drinking_Water_in_SEA_Pacific_Final.pdf

⁹ See <http://talkenergy.wordpress.com/2011/07/09/rural-electrification-in-southeast-asia/>

¹⁰ ADB. 2009. *The Economics of Climate Change in Southeast Asia: A Regional Review*. Manila. Available at <http://www.adb.org/Documents/Books/Economics-Climate-Change-SEA/PDF/Economics-Climate-Change.pdf>

The key environmental challenges for the region are now climate change, deforestation, and illegal logging; biodiversity loss and the illegal wildlife trade; ocean destruction and illegal and unsustainable harvesting of fisheries; urbanization and the resultant problems of air pollution, water pollution, a lack of fresh water, and flooding; and uncontrolled development planning without adequate environmental impact assessment. These areas suggest the importance of appropriate legal and regulatory frameworks, and law enforcement, throughout the full environmental enforcement chain.

Southeast Asian countries began to adopt environmental policy and regulatory frameworks from about the time of the 1972 Stockholm Conference on the Human Environment in 1972.¹¹ With the assistance of the United Nations Environment Programme (UNEP), in 1977 Association of Southeast Asian Nations (ASEAN) member states prepared the first ASEAN Environment Program, which was adopted by the ASEAN Experts Group on the Environment in the following year. In 1989, the group was elevated to the ASEAN Senior Officials on the Environment Meeting, which annually meets to review its working groups on nature conservation and biodiversity, coastal and marine environment, and multilateral environmental agreements, as well as the subregional haze technical taskforce.¹²

The momentum for adopting environmental policy and regulatory frameworks continued after the 1992 United Nations Conference on Environment and Development, and the 1992 United Nations Framework Convention on Climate Change. In 1997, ASEAN member states adopted Vision 2020, which called for “fully established mechanisms for sustainable development to ensure the protection of the region’s environment, the sustainability of its natural resources and the high quality of life of its peoples.”¹³

More recently, further momentum for Southeast Asian countries to adopt new national policies and law has increased, with a recent wave of Asian regulatory reform, resulting in many countries adopting regulatory frameworks on renewable energy and energy efficiency (footnote 12).

However, national, regional, and global environmental change continues to worsen. These changes are likely to be further exacerbated by climate change, leaving many environmental challenges insufficiently covered in existing policy and regulatory frameworks. Even where environmental challenges are covered under legal frameworks, they often have not been further specified in implementing rules and regulations. Even if Southeast Asian countries have adequate legal and regulatory frameworks, effective implementation, enforcement, and compliance usually present challenges.

Effective compliance and enforcement of environmental law requires the entire environmental law enforcement chain to work and to collaborate. Environmental, forest, and marine enforcement officials, police, and investigators must detect and apprehend environmental criminals and violators of law. Prosecutors and public interest litigators

¹¹ United Nations General Assembly. 1972. *Report on the United Nations Conference on the Human Environment*. Stockholm.

¹² Footnote 1.

¹³ See <http://www.asean.org/news/item/asean-vision-2020>

(where possible) need to be able to bring cases to courts. The judiciary must be empowered and able to hear such cases.

However, without law enforcement officers apprehending and prosecuting civil and criminal offenders, the judiciary has no cases to hear. If public interest lawyers and administrative enforcement officers have limited capacity, or no rights to bring civil or administrative cases, only a few environmental cases may be brought before the courts. Moreover, for enforcement officers and civil society to effectively play their role, they need to see the benefits of filing cases in court: they, and the community as a whole, need to consider the entire judiciary as having the integrity and skills required to dispose of environmental cases effectively. Hence, effective judicial participation in enhancing environmental justice and the rule of law depends upon the entire environmental enforcement chain. The judiciary plays a unique and distinct leadership role in that chain. We have previously explained:

The Chief Justices and senior judiciary lead the legal profession in their respective jurisdiction in shaping normative interpretations of legal and regulatory frameworks. They also issue rules and directions to lower courts which affect their priorities, and often play a role in judicial education. Thus, their influence is direct and indirect. All these influences affect not only the courts, but the way the legal system operates, and the way that sector lawyers, such as environmental, water, and energy lawyers, understand the legal and regulatory frameworks and how they should be enforced. Moreover, this affects private sector investment in related sectors (footnote 12).

Many commentators and practitioners have recognized the critical judicial role in environmental justice and sustainable development (footnote 12). In August 2002, this critical role led UNEP to convene more than 120 senior judges from around the world, including many from Asia and the Pacific, at the Global Judges Symposium on the Rule of Law and Sustainable Development, which occurred immediately prior to the World Summit on Sustainable Development in Johannesburg. Delegates at the 2002 Global Judges Symposium committed to the Johannesburg Principles on the Role of Law and Sustainable Development. In those principles, judges made a full commitment to using their judicial mandate to realize sustainable development to implement, develop, and enforce the law, and to uphold the rule of law and democratic processes.¹⁴ They also agreed that judicial education and training on environmental law through regional and subregional initiatives is urgently needed,¹⁵ and that judges need to collaborate within and across regions to improve enforcement, compliance, and implementation of environmental law.¹⁶

In the lead up to the Global Judges Symposium, UNEP held several judges' meetings in different regions around the world, including a meeting for judges from Southeast Asian countries in Manila in March 1999.¹⁷ In June 2004, the World Bank Institute convened

¹⁴ The Johannesburg Principles on the Role of Law and Sustainable Development. Adopted at the Global Judges Symposium, held in Johannesburg, South Africa on 18–20 August 2002. Principle 1. <http://www.unep.org/law/Symposium/Documents/RESOLUTION%201-FINAL%2020%20AUGUST.doc>

¹⁵ See The Johannesburg Principles (footnote 14), Principle 3.

¹⁶ See The Johannesburg Principles (footnote 14), Principle 4.

¹⁷ UNEP Executive Director's Background Paper to the Global Judges Symposium. Global Judges Symposium on Sustainable Development and the Role of Law. Johannesburg, South Africa, 18–20 August 2002.

a gathering for Southeast Asian countries on the Role of the Judiciary in Promoting Sustainable Development in Bangkok. Subsequently, in July 2007, the Supreme Court of the Philippines and the Philippine Judicial Academy convened an Asian Justices Forum on the Environment in Manila,¹⁸ and a follow-up event was convened in 2009. In addition, the Asian Development Bank (ADB) and UNEP convened the Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice, cosponsored by the Supreme Court of the Philippines, which was the largest gathering of Asian judges and other legal stakeholders in Asia since the Johannesburg Global Judges Symposium, with about 50 judges and 110 participants. At the symposium, attending members of the senior judiciary, including the chief justices of Indonesia and the Philippines, recognized they had much to gain by sharing experience that would lead to improvements in the quality of environmental adjudication on environment and natural resource cases, and for improving access to environmental justice. At the symposium, establishment of a pan-Asia network—the Asian Judges Network on Environment (AJNE)—was proposed. In December 2010, ADB approved technical assistance to support the AJNE, the ASEAN Chief Justices’ Roundtable on Environment, and a parallel initiative in South Asian countries led by the chief justice of Pakistan. Also at that event, the chief justice of Indonesia, Harifin Tumpa, announced the vision for the ASEAN Chief Justices’ Roundtable on Environment to be held in Indonesia in 2011.

Regional judicial meetings contribute further momentum for further work on the judiciary’s role in enforcing and developing environmental law. In recent years, public interest litigation in courts in Southeast Asia has increased, leading to evolving environmental jurisprudence. An increase in environmental cases has led to a demand for environmental specialization, which has generally taken two forms: green benches in generalist courts, or specialized environmental courts or tribunals. Environmental specialization has also led to the establishment of environmental rules of procedure, or judicial training in environment, as a way to institutionalize environmental law procedures. Despite advancements, more work needs to be done in institutionalizing environmental adjudication, including building capacity of Asian judges in resolving environmental disputes and ensuring all appropriate environmental cases get to court and contribute to the evolution and strengthening of environmental law.

The ASEAN Chief Justices’ Roundtable on Environment presents the opportunity for the chief justices and designates of the supreme courts of Southeast Asia to develop a common vision for ASEAN judicial cooperation on the environment. The roundtable is supported by ADB and UNEP. The Indonesian Supreme Court seeks to lead the 2-day roundtable in a series of highly interactive discussions of common challenges the judiciary in ASEAN countries face in adjudicating environmental cases, as well as championing environmental justice and the rule of law throughout the legal profession and law enforcement community. While the roundtable is considered an end in itself, it also has the potential to play a path-breaking role as an input towards a wider global process.

¹⁸ <http://sc.judiciary.gov.ph/publications/benchmark/2007/07/070703.php> (sponsored by the Asian Environmental Compliance and Enforcement Network [AECEN], United States Agency for International Development [USAID], United States Environmental Protection Agency [US EPA], Asia Pacific Jurist Association, and the Supreme Court Program Office).

In June 2012 in Rio de Janeiro, UNEP, in conjunction with other development partners, will convene the World Congress on Justice, Governance, and Law for Sustainability, immediately prior to the Rio+20 Earth Summit. UNEP convened a preparatory meeting for the world congress in Kuala Lumpur in October 2011, chaired by the prime minister of Malaysia. During that meeting, participants developed the Kuala Lumpur Statement¹⁹ as an input to the world congress preparatory process. Asian judges have embarked upon important and path-breaking work on the environment in Asia in general, and in some Southeast Asian countries in particular. Concrete examples from this work, and the ASEAN Chief Justices' Vision on Environment, could set a desirable precedent for other regions to provide inputs into the global process at the world congress.

The background paper is set out as follows. Part A presents ASEAN's environmental challenges—climate change; deforestation and illegal logging; biodiversity and the illegal wildlife trade; ocean destruction, illegal fishing, and marine pollution; development planning and environmental impact assessment; fresh water, pollution, floods, and climate; and urbanization and air pollution. These issues will be discussed in Sessions 2–8 of the roundtable. Part B describes past efforts at ASEAN environmental cooperation. Part C identifies common challenges for justices of Southeast Asian countries, which will be discussed in Sessions 9 and 11 of the roundtable. Part D discusses considerations in preparing a common vision for cooperation on environment among the senior judiciaries of ASEAN countries.

A. ASEAN Environmental Law Challenges

ASEAN Environmental Challenge: Climate Change

Southeast Asia is highly vulnerable to climate change, and is increasingly a significant contributor to global greenhouse gas emissions. A 2009 ADB study reported that mean temperature increased at 0.1–0.3° Celsius per decade between 1951 and 2000, rainfall declined during 1960–2000, and sea levels have risen 1–3 millimeters per year.²⁰ Heat waves, droughts, floods, and tropical cyclones have been more intense and frequent, causing extensive damage to property, other assets, and human life. The number of recorded floods and storms has risen dramatically, particularly in the Philippines, rising from just under 20 during 1960–1969 to nearly 120 during 2000–2008 (footnote 20). Climate change is expected to worsen all pre-existing environmental problems within Asian countries, with Southeast Asia being especially vulnerable to climate change because of the concentration of its population along coastlines, dependence on agriculture for livelihood, and high poverty levels.²¹ Moreover, the 563 million Southeast Asians living along the region's coastlines are exposed to rising sea levels. The projected 40 centimeter sea-level rise by 2080 would result in the resettlement of 21 million Southeast Asian people, including about 10% of residents along the Mekong Delta (footnote 20). Sea-level

¹⁹ See <http://www.unep.org/dec/worldcongress/docs/klstatement.pdf>

²⁰ ADB. 2009. *The Economics of Climate Change in Southeast Asia*. Manila. Available at <http://www.adb.org/Documents/Books/Economics-Climate-Change-SEA/PDF/Economics-Climate-Change.pdf>

²¹ ASEAN Secretariat. 2009. *Fourth ASEAN State of the Environment Report*. Jakarta. Available at <http://www.aseansec.org/publications/SoER4-Sum.pdf>

rise will also threaten freshwater supplies for drinking and irrigation because of saltwater intrusion into coastal and groundwater resources (footnote 20).

The ASEAN region's 115 million hectares (ha) of agricultural land is threatened by the droughts, floods, and tropical cyclones associated with warming. The region is the largest producer of palm oil and natural rubber in the world, with the agriculture sector as a whole accounting for 43% of total employment in 2004 and contributing 11% of gross domestic product in 2006 (footnote 20). Increasing heat and water stresses, extreme weather events, and climate-associated pests and diseases have all contributed to the decline in agricultural production potential in many parts of the region (footnote 20). By 2100, the projected higher temperatures are expected to cause the decline of rice yield potential by 50% compared to 1990 levels. This decline would prompt the conversion of even more land to agriculture, to compensate for the decreased agricultural productivity (footnote 20). Increased food demand would also compound the issue (footnote 20). Aside from agriculture, the fisheries sector is also threatened by climate change as rising temperatures lead to a reduction in fish production (footnote 20). Southeast Asia supplies 17% of the world's fish and marine resources and more than 120 million people living within coastal communities in the Coral Triangle depend on local and marine coastal resources for their income, livelihood, and food security (footnote 20).

Southeast Asia's high poverty incidence is also significant as the poor are most vulnerable to climate change. Thus, 93 million Southeast Asians living below the \$1.25-a-day poverty line are at risk from its effects.

Legal Issues and Questions:

Each delegation can share potential climate change and related legal issues in their country, including the following:

- (i) How significant is the issue of climate change for ASEAN countries?
- (ii) What legal issues does it present for the courts?
- (iii) How many cases involving issues related to climate change have reached the courts in each country?
- (iv) The potential impacts of climate change on property rights are significant. To what degree does national jurisprudence provide guidance on how cases may be resolved?

ASEAN Environmental Challenge No. 1: Deforestation and Illegal Logging

Deforestation and illegal logging presents a critical environmental challenge to most Southeast Asian countries. Deforestation is driven by conversion of forests to agriculture, such as rubber and palm oil and shrimp fishing; infrastructure development, particularly roads; and population growth.²² Illegal logging also remains a significant cause of deforestation.

²² UNEP. <http://www.unep.org/vitalforest/Report/VFG-15-The-forests-of-southeast-asia.pdf>

Southeast Asia is one of the world's more densely forested areas (footnotes 21, 54), with forest cover of about 203 million ha, which is 5.2% of the global total²³ and equivalent to a country the size of Indonesia or 12 times the size of the Lao People's Democratic Republic (Lao PDR). Tropical rainforests amount to about 60% of this total, with mangrove forests and freshwater and peat swamp forests also existing (footnote 22).

However, the region has one of the highest deforestation rates of any tropical region.²⁴ From 1990 to 2000, 42 million ha of Southeast Asia's forests were lost, amounting to 8% of total land, which is an area the size of Viet Nam (footnote 24). Although deforestation rates improved after the turn of the millennium (a reduction to 0.7 million ha from 2.4 million ha per annum in the 1990s), the rates again accelerated in 2005 to about 1.0 million ha per annum (footnote 24). The deforestation rate was 0.5% per annum during 2005–2010, compared to 0.3% in 2000–2005. In the 10 years 2010–2020, 16 million ha of forest cover, an area the size of Cambodia, is expected to be lost (footnote 24).

About 70% of the \$100 billion global timber trade industry is illegally sourced.²⁵ Illegally sourced timber is cheaper than legally sourced products and reportedly undercuts world prices for legally sourced products by 16% (footnote 24). Thus, the impact of the illegal timber trade is massive, causing global market losses of more than \$10 billion per year and government revenue loss of about \$5 billion annually. According to the Australian Institute of Criminology, East and Southeast Asian countries trade \$2.3 billion worth of illegally sourced timber each year, with Cambodia, Indonesia, and Malaysia identified as major sources (footnote 25). Malaysia and Singapore have also been identified by civil society organizations as hubs for smuggled timber, particularly ramin and merbau, from Indonesia.²⁶ Countries with the greatest natural forest resources, such as Brazil and Indonesia, also have the highest level of illegal logging (footnote 25). Differentiating between legally and illegally sourced timber is difficult, but some estimates suggest that 73% of timber from Indonesia and 35% from Malaysia is illegally sourced (footnote 25).

Illegal logging is not addressed under international instruments or mechanisms. However, all 10 member countries of ASEAN are signatories to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which covers limited timber products listed as endangered. In the ASEAN region, in November 2010, the ASEAN ministers of agriculture and forestry adopted the ASEAN Criteria and Indicators for Legality of Timber as a regional reference framework for the legality of timber in ASEAN member states. The criteria and indicators are the agreed upon reference for the adaptation of country-specific timber legality standards under the Phased-Approach to Forest Certification.²⁷

²³ ADB. 2011. *Environment Program: Greening Growth in Asia and the Pacific*. Manila.

²⁴ Food and Agriculture Organization (FAO). 2010. *Southeast Asia Subregional Report: Asia Pacific Forestry Sector Outlook Study II*. Bangkok. Available at <http://www.fao.org/docrep/013/i1964e/i1964e00.pdf>

²⁵ A. Schloenhardt. 2008. The Illegal Trade in Timber and Timber Products in the Asia Pacific Region. *Research and Public Policy Series*, No. 89. Canberra: Australian Institute of Criminology. Available at: <http://www.aic.gov.au/documents/B/D/4/%7BBD4B2E50-33B4-47F1-815E-901C0ACC7A43%7Drrp89.pdf>

²⁶ http://www.illegal-logging.info/approach.php?a_id=100

²⁷ A. Hinrichs. 2009. Briefing Note on ASEAN Criteria and Indicators for Legality of Timber. ASEAN German REFOP Briefing Paper. Myanmar.

Legal Issues and Questions:

Each roundtable delegation can share deforestation and illegal logging problems and related legal issues in their country, including the following:

- (i) How extensive is the issue of deforestation and illegal logging in the particular ASEAN country?
- (ii) What legal challenges are there to its proper enforcement in the courts?
- (iii) Is there a need for regional cooperation for combating illegal logging and timber trading and what will be the role of the judiciary?
- (iv) How many cases involving the illegal timber trade have reached the courts in each country? What was the final adjudication and what was the legal basis for the decision in each case ?
- (v) How could ASEAN standards such as the Criteria and Indicators for Legality of Timber help Southeast Asian judiciary in adjudicating cases involving illegal timber?

ASEAN Environmental Challenge No. 2: Biodiversity and the Illegal Wildlife Trade

Biodiversity

Biological diversity (biodiversity), or the variability of life on earth, is the key to ensuring that the interdependence of life continues the way we know it.²⁸ It includes the variability of plants, animals, and other organisms; the genetic differences between species; and the variety of and within ecosystems.²⁹

Southeast Asia is one of the most biodiverse regions in the world. It occupies only 3% of the earth's surface but contains 20% of all known plant, animal, and marine species, a large number of which cannot be found elsewhere in the world (footnote 21). Three countries in the region are "mega diverse" — Indonesia (17,157 species), Malaysia (21,914 species), and the Philippines (18,535 species) (footnote 21). The Mekong Delta, where fish species diversity per unit area of catchment is three times higher than in the Amazon River, is home to 1,200–1,700 species.³⁰ Species endemism in the region is also high, with 26,268 endemic species recorded in 2008 (footnote 30). Globally, the Philippines holds the fifth-highest number of endemic mammals and birds (footnotes 30, 53).

²⁸ "Goods and services" provided by ecosystems include (i) provision of food, fuel, and fiber; (ii) provision of shelter and building materials; (iii) purification of air and water; (iv) detoxification and decomposition of wastes; (v) stabilization and moderation of the earth's climate; (vi) moderation of floods, droughts, temperature extremes, and the forces of wind; (vii) generation and renewal of soil fertility, including nutrient cycling; (viii) pollination of plants, including many crops; (ix) control of pests and diseases; (x) maintenance of genetic resources as key inputs to crop varieties and livestock breeds, medicines, and other products; (xi) cultural and aesthetic benefits; and (xii) ability to adapt to change. See Secretariat of the Convention on Biodiversity. 2000. *Sustaining Life on Earth: How the convention on Biodiversity Promotes Natural and Human Well-Being*. Available at: <http://www.cbd.int/iyb/doc/prints/cbd-sustain-en.pdf>

²⁹ See Secretariat of the Convention on Biodiversity (footnote 28).

³⁰ D. Coates. Biodiversity and Fisheries Management Opportunities in the Mekong River Basin. Available at: <http://www.unep.org/bpsp/Fisheries/Fisheries%20Case%20Studies/COATES.pdf>

Southeast Asia contains four of the 25 identified global biodiversity hot spots, and one of these—the Sundaland hot spot (which covers Malaysia and Indonesia as far east as Borneo and Bali)—contains about 25,000 plant species, 15,000 of which are endemic, as well as many mammals, birds, reptiles, and amphibians. It was observed that countries with high diversity and endemism also have the highest number of endangered species (footnote 21). Hundreds of species in the region are considered threatened, putting its biodiversity at risk (footnote 21).

Biodiversity is in decline globally, and in December 2010 UNEP reported that Asia and the Pacific contributed significantly to the global decline (footnote 23); 90% of the world's terrestrial biodiversity is contained in forests, particularly tropical forests. Hence, with Southeast Asia's deforestation rate as one of the highest in the world,³¹ it stands to lose 75% of its primary rainforests by 2100 and up to 42% of its biodiversity.³²

Threats to biodiversity include climate change and habitat destruction due to deforestation, the introduction of nonnative and invasive species into an ecosystem, the illegal wildlife trade, pollution, and population growth. Of these causes, climate change is considered the dominant threat to biodiversity (footnote 21). The Fourth Intergovernmental Panel on Climate Change reported that 50% of Asia's biodiversity would be at risk by the end of the century (footnote 21).

Through Resolution 65/161 (adopted on 20 December 2010), the United Nations General Assembly declared 2011–2020 as the United Nations Decade on Biodiversity, as biodiversity is seen as a key contributor to achieving the Millennium Development Goals.

Following the 1992 adoption of the Convention on Biological Diversity, most Southeast Asian countries established or updated laws protecting biodiversity. However, even where such laws are present, they are widely unenforced. As a response to reducing the rate of biodiversity loss, ASEAN instituted the ASEAN Heritage Parks Program, which supports and complements national efforts to protect forest in the ASEAN region (footnote 21). The ASEAN Declaration on Heritage Parks was signed by all ASEAN environment ministers in December 2003.³³ Threats—both legal and illegal—to Southeast Asian biodiversity continue.

Illegal Wildlife Trade

The illegal trade in endangered species in Southeast Asia is one significant driver of biodiversity loss (footnote 23). The illegal trade includes both flora and fauna such as timber (hardwoods and softwoods), rare plants, animals (zoo exhibits and pets), and animal parts (as ingredients for traditional medicine, as an aphrodisiac, and as wild meat) (footnote 21).

³¹ In the mid- and late 1990s, Southeast Asia lost 1.2% of its forests, followed by South America (0.08%), and Africa (0.70%). See http://www.brookings.edu/papers/2011/03_illegal_logging_felbabbrown.aspx

³² N. Sodhi et al. 2004. Southeast Asian Biodiversity: An Impending Disaster. *Trends in Ecology and Evolution*. 19 (12). December.

³³ See http://old.aseanbiodiversity.org/index.php?option=com_content&view=article&id=611&Itemid=232

The most traded mammal is the pangolin and there is also significant trade in large cats (such as the endangered Asian tigers) and their body parts, reptiles, birds, and illegal timber (footnote 21). The People's Republic of China has high demand for a range of species for aphrodisiacs, Chinese medicine, and food, and this demand threatens many species. For example, the People's Republic of China imports 13,000 tons of marine freshwater turtles shipped from Southeast Asia, which has resulted in three-quarters of the region's freshwater turtle populations being designated as threatened (footnote 21). If trends continue unabated, scientists estimate that up to 42% of Southeast Asia's animal and plant species will become extinct within this century.³⁴

Several factors drive illegal wildlife and flora trade—food, cultural medicine, religion, collections—but the primary driving factor is simply economic.³⁵ The value of the illegal wildlife trade is \$10 billion–\$20 billion per year (footnote 34). It involves small-scale traders to major profit-oriented businesses or conglomerates such as marine fisheries and logging companies (footnote 35). The trade involves intermediaries as well, such as specialists involved in storage, handling, transport, manufacturing, industrial production, marketing, and the export and retail businesses (footnote 35). Small-scale traders usually receive only a fraction of the financial rewards received by these intermediaries and profiteers. While arrests and interceptions are on the rise, they expose only a small fraction of this underground criminal activity (footnote 21).

CITES is the main international instrument seeking to control the trade in endangered wildlife, including products derived from it.³⁶ All ASEAN countries are parties to CITES, and accordingly are required to criminalize any illicit trade in species listed under the convention (footnote 25).

All Southeast Asian countries are affected by the illegal wildlife trade in some way. Indonesia, Malaysia, and Myanmar are particularly targeted and smugglers often use transport links via Viet Nam and Thailand to transport wildlife to markets in the United States, the People's Republic of China, and Europe (footnote 34). High regional biodiversity, increasing affluence, and accessible transport links juxtaposed against generally weak enforcement, low penalties, and lack of enforcement have resulted in a rampant illegal wildlife trade across the region (footnotes 21, 64). However, increasing efforts are under way to improve enforcement. Cambodia, the Lao PDR, and Viet Nam have increased bilateral efforts to combat the illegal trade. In July–September 2010, for example, 110 major or model wildlife law enforcement actions were reported, leading to 57 arrests and 13 convictions across five Southeast Asian countries. Authorities seized 11,390 live animals and 5,006 dead animals, their parts, or derivatives, which in total had a minimum black market value of at least \$2.16 million.³⁷

³⁴ ASEAN Wildlife Enforcement Network (ASEAN-WEN). *Illegal Wildlife Trade in Southeast Asia Factsheet*. Available at: http://www.asean-wen.org/index.php?option=com_docman&task=doc_download&gid=5&Itemid=80

³⁵ Trade Records Analysis of Flora and Fauna in Commerce (TRAFFIC). <http://www.traffic.org/trade/>

³⁶ See <http://www.cites.org/eng/disc/what.php>

³⁷ ASEAN-WEN. http://www.asean-wen.org/index.php?option=com_docman&Itemid=96

Legal Issues and Questions:

Each roundtable delegation can share biodiversity and illegal wildlife trade problems and related legal issues in their country, including the following:

- (i) How extensive is the issue of biodiversity loss, encroachment, and poaching in the particular ASEAN country?
- (ii) What legal challenges are there to its proper enforcement in the courts?
- (iii) Is there a need for regional cooperation in combatting illegal wildlife trading and what is the role of the judiciary?
- (iv) Does each country's legislation adequately reflect its obligations under CITES? If not, what role could the courts play in bringing national law into compliance with CITES?
- (v) How many cases involving enforcement of CITES have reached the courts in each country? Were the issues involved procedural or were they questions of whether the species being traded was actually protected in the country?
- (vi) How many cases of domestic trade in species protected under national law reach the courts in each country? How have these cases been adjudicated and what was the basis for the decision in each case?

ASEAN Environmental Challenge No. 3: Ocean Destruction, Illegal Fishing, and Marine Pollution

Southeast Asia is endowed with some of the world's richest and most diverse marine resources (footnotes 21, 64). Coastal and marine resources are especially important to the region, as 563 million of its human population live along 173,000 kilometers of coastlines (footnote 20) and depend on the resources the sea provides. The region possesses 34% of the world's coral reefs, and abundant marine biodiversity, particularly surrounding Indonesia, Peninsular Malaysia, and the Philippines.³⁸ Maintaining healthy coral reefs has important economic and development benefits, as they support livelihoods, food security, tourism, medical research, and coastal protection (footnote 21). Moreover, according to the ASEAN State of the Environment Report, well-managed Southeast Asian coral reefs have a potential economic value of \$12.7 billion, representing 40% of the estimated global value (footnote 21). Further, Indonesia, the Philippines, Thailand, and Viet Nam are among the top 10 fish-producing countries in the world,³⁹ while the region also supplies 17% of the world's total marine fish (footnote 39). However, this will not continue if the region's reefs and fisheries are not sustainably managed.

Unsustainable and Illegal Use of Marine Resources

Southeast Asia's marine resources have been overexploited and abused. In 2002, 85% of Malaysia's reefs and 90% of reefs in Cambodia, the Philippines, Singapore, and Viet Nam were threatened (footnotes 21, 47). Eighty-eight percent of Southeast Asia's coral reefs are

³⁸ See <http://www.climateshifts.org/?p=5111>

³⁹ M. Williams. 2007. *Enmeshed: Australia and Southeast Asia Fisheries*. Sydney: Lowy Institute for International Policy. Available at: <http://www.illegal-fishing.info/uploads/Lowry-Inst-Enmeshed.pdf>

threatened by human activity and 50% of these reefs are considered highly or very highly threatened.⁴⁰ Only 12% of reefs are at low risk (footnote 40). Destruction of coral reefs is worsened by unsustainable and illegal fishing practices, including harvesting, which uses nets to trawl the ocean floor for anything in its path; dynamite blasting; and using cyanide to stun or kill fish.

Overfishing and illegal fishing also adversely affect many Southeast Asian countries more directly. Illegal, unreported, and unregulated fishing is increasing and poses a serious threat to the sustainability of fish stocks. In 2003, the Food and Agriculture Organization (FAO) of the United Nations reported that 75% of global fish stocks were fully exploited, overexploited, or depleted.⁴¹ Catch trends in Southeast Asia that generally show consistent increases in catch size may be masking underlying fishing effects such as “fishing down the food web”—large and more valuable species (groupers, snappers, sharks, and rays) are relatively less abundant whereas species of small fish (cardinal fish, squid, and octopus) have increased.⁴² This trend can be seen in the South China Sea and the Philippines (footnote 42). Moreover, the overexploitation of other important marine resources essential to healthy ocean ecosystems, such as turtles, sharks, and rays, has the potential to contribute to the collapse of ocean ecosystems. Indonesia has the world’s fourth-largest fish production yet its resources are expected to be fully and overexploited within a decade because of illegal, unreported, and unregulated fishing (footnote 39). The Government of Indonesia is also losing half of the estimated \$4 billion fishing revenue to illegal, unreported, and unregulated fishing.⁴³ The density of fish in the Gulf of Thailand, the country’s most important fisheries location, has declined by 86% in 30 years (1961–1991) (footnote 39). In Viet Nam, fish catch merely doubled despite a tripling in the capacity of the fishing fleet (footnote 39). By the 1980s, Philippine marine fisheries were considered overfished and the country now has “a catch rate as low as 10% of rates when these areas were lightly fished” (footnote 39). In a 2005 regional study done by the World Fish Center, it was projected that, by 2020, Southeast Asia fish trade will decline in relative importance against East Asia (the People’s Republic of China) and South Asia (India and Bangladesh) (footnote 39). Southeast Asia’s 2005 fish exports were expected to decline from 52% to 37% because of the growth in other Asian regions (footnote 39).

Illegal, unreported, and unregulated fishing usually occurs in the context of poor fishery management and control. Thus, increasing governance, including improving the rule of law, alongside education and improving livelihoods, are commonly proposed solutions to the problem.⁴⁴ Moreover, it highlights the importance of improving implementation of and compliance with existing laws and schemes for law enforcement.

⁴⁰ L. Burke, L. Sellig, and M. Spalding. 2002. *Reefs at Risk in Southeast Asia*. Washington, DC: The World Resources Institute. Available at: <http://www.wri.org/publication/reefs-risk-southeast-asia>

⁴¹ JALA Advocacy Network for Fisherfolk North Sumatera-Environmental Justice Foundation. *When Fishing Turns Deadly: The Environmental and Social Impacts of Illegal Trawling in North Sumatra*. Available at: <http://www.illegal-fishing.info/uploads/JALAstoptrawlenglish.pdf>

⁴² Asia-Pacific Fishery Commission. 2010. *Status and Potential of Fisheries and Aquaculture in Asia and the Pacific*. Available at <http://www.apfic.org/uploads/2010-17.pdf>

⁴³ D. Prasodjo. 2011. Fighting Illegal Fishing is a Net Gain. *The Jakarta Post* online. 12 September. <http://www.jakartapost.com/news/2011/09/12/fighting-illegal-fishing-a-net-gain.html>

⁴⁴ D. Agnew et al. 2009. *Estimating the Worldwide Extent of Illegal Fishing*. <http://www.plosone.org/article/info:doi/10.1371/journal.pone.0004570>

Southeast Asian states have taken two regional measures to improve the sustainability of marine management. First, in 2002, ministers adopted the ASEAN Criteria for Marine Heritage Areas and Criteria for National Marine Protected Areas, which designates and manages protected areas. The criteria ensure concerted national action to protect the shared marine waters of ASEAN.⁴⁵ Second, in May 2009, Indonesia, Malaysia, the Philippines, and three Pacific countries signed on to the Coral Triangle Initiative on Coral Reefs, Fisheries, and Food Security, intended to safeguard the region's marine and coastal biological resources for the sustainable growth and prosperity of current and future generations.⁴⁶

Unregulated Coastal Development and Marine Pollution

Marine biodiversity is also threatened by the increase in coastal development, agricultural run-off, and discharge of untreated sewage into the near-shore waters.⁴⁷ Increases in coastal development, often without proper coastal development plans, lead to a variety of marine pollutants and the release of enormous amounts of nutrients into the sea and coastal zones. Pollution threats include land-based sources such as transport, tourism, and industrial activities, which include oil spills, discharge of untreated industrial effluents and sediments, untreated sewage, heavy siltation, and heavy metals from mine tailings and other sources. Many such pollution discharges are formally regulated but, in practice, unenforced. Other pollution threats include eutrophication (nutrient enrichment), invasive species, persistent organic pollutants, acidification, radioactive substances, marine litter, overfishing, and destruction of coastal and marine habitats (footnote 47). Aquaculture activities along the coastline, such as prawn aquaculture, are also a pollutant source (footnote 21).

In Southeast Asia, a major concern is the discharge of nitrogen into oceans. More than 600,000 tons of nitrogen is discharged annually from major rivers. These numbers may increase as coastal populations are predicted to increase from 77 people per square kilometer to 115 people per square kilometer in 2025 (footnote 47). Other sources of ocean pollutants are ship- and sea-based activities, which include oil spills, sludge disposal, and mining in coastal areas; and offshore petroleum and gas exploration (footnote 21). These pollution threats, coupled with the expected changes resulting from climate change—an increase in sea temperature and changes in salinity—will severely affect marine life and its ability to recover from extreme climactic events. The productivity of coastal ecosystems to supply livelihoods and basic food will be compromised (footnote 21).

Legal Issues and Questions:

Each roundtable delegation can share ocean destruction, illegal fishing, and marine pollution problems and related legal issues in their country, including the following:

- (i) How extensive is the issue of illegal fishing and destruction of marine resources in the particular ASEAN country?

⁴⁵ ASEAN. <http://www.aseansec.org/14541.htm>

⁴⁶ Coral Triangle Initiative. <http://www.cti-secretariat.net/about-cti/about-cti>

⁴⁷ UNEP. <http://www.grida.no/publications/rr/our-precious-coasts/page/1292.aspx>

- (ii) How extensive is the issue of land-based marine pollution?
- (iii) What legal challenges are there to its proper enforcement in the courts?
- (iv) Does each country have legislation governing the coastal zone and marine area? How many cases involving enforcement of these laws have reached the courts in each country? On what basis were these cases adjudicated?
- (v) How could the ASEAN criteria for managing coastal and marine areas be of use in adjudicating a case involving violations of national law in the coastal zone and marine areas?
- (vi) How could such standards help Southeast Asian judiciaries in adjudicating marine pollution cases?

ASEAN Environmental Challenge No. 4: Development Planning and Environmental Impact Assessment

Since the economic crisis of 2008–2009, the regional economy has rebounded and is growing (although the 2011 economic crisis threatens to widen and affect Asia). However, for now, development resulting from this growth continues to come with an environmental cost—particularly increases in carbon and pollution emissions—in most countries of the region, and in rates of deforestation⁴⁸ as well as loss of agricultural land.

The environmental impact assessment (EIA) emerged in the late 1960s and early 1970s as a response to the failure of development planning processes to take adequate account of the negative impacts of economic development activities.⁴⁹ The earliest legislative initiatives to introduce EIAs in ASEAN countries began in the 1970s (Malaysia, 1974; Philippines, 1978) and continued in the 1990s (Thailand, 1992; Indonesia, 1993; Viet Nam, 1994; Cambodia and the Lao PDR, 1999). Legal requirements for strategic environmental assessment have also been adopted by Viet Nam in 2005 and Indonesia in 2009.

The purpose of an EIA or strategic environmental assessment is to gather, analyze, and provide information to decision makers and the public about the environmental implications of proposed actions before decisions are made. In practice, however, “...the biggest single constraint on the effectiveness of EIA is the timing of the assessment in the development project cycle” (footnote 49, 13-1). EIAs should be carried out as early in the development planning process as possible. However, in practice, many EIAs are, in fact, carried out as add-ons, rather than as contributions to development decision-making processes, and are produced only after major planning decisions have been made, such as site selection and securing investment. In such cases, “any EIA findings that may result in delays, major project modification, or outright cancellation are difficult to accept” (footnote 49, 13-1). Implementation of EIA processes in most ASEAN countries has improved, particularly over the past decade; however, many challenges remain.

⁴⁸ ADB. 2011. *Key Indicators for Asia and the Pacific 2011*. Online: <http://beta.adb.org/key-indicators/2011/main>

⁴⁹ B. Lohani et al. 1997. *Environmental Impact Assessment for Developing Countries in Asia. Volume 1—Overview*. Manila: ADB. Available online: http://www.adb.org/documents/books/environment_impact/env_impact.pdf

Because of the sensitivity of the timing of requiring an EIA in development decision making, it is often the procedural aspects of the impact assessment process—timing of carrying out an EIA, timing of project approval—that are likely to be challenged in court. Substantive issues that may be challenged include the adequacy of the environmental impact statement; the competence of the review of the environmental impact statement; and the sufficiency of terms and conditions attached to project approval to avoid, mitigate, or offset negative impacts. The EIA process should also involve public participation in this decision-making process, and failure to include public participation in decision making would be challengeable in courts.

Legal Issues and Questions:

Each roundtable delegation can share development planning and EIA problems and related legal issues in their country, including the following:

- (i) What are the challenges each delegation faces in handling EIA cases and how could these be resolved?
- (ii) To what degree is the national regulatory regime for EIA consistent with best practice in the field?

ASEAN Environmental Challenge No. 5: Fresh Water, Pollution, Floods, and Climate Change

Southeast Asia is endowed with abundant freshwater resources. In 2007, it had a total capacity of 5,675 billion cubic meters of renewable freshwater resources (footnotes 21, 33), with Brunei Darussalam, the Lao PDR, and Malaysia having the highest per capita water resource availability. Despite regional abundance, there are dry spells in certain regions of countries, and raw water limitations occur because of pollution. In the region, 487 million people have access to safe drinking water sources (footnote 8) but only 32% of the region's population has piped water connected in their premises (dwelling, plot, or yard) (footnote 8). Other water sources in the region include groundwater, which is becoming a major source for agriculture irrigation in some Asian countries.⁵⁰ However, overextraction might lead to negative effects such as the permanent lowering of the water table, deterioration of water quality, and saline intrusion in coastal areas.⁵¹ In Indonesia, for example, overextraction of groundwater has led to a yearly 1–3 meter water-level drop in the last 10 years, leading to significant problems of land subsidence.⁵² Overextraction has also resulted in groundwater salinization due to seawater intrusion and land subsidence in Jakarta (footnote 52).

⁵⁰ International Water Management Institute. 2007. *Water for Food, Water for Life: A Comprehensive Assessment of Water Management in Agriculture*. London: Earthscan, and Colombo: International Water Management Institute. Available at: <http://www.iwmi.cgiar.org/assessment/Water%20for%20Food%20Water%20for%20Life/Chapters/Chapter%2010%20Groundwater.pdf>

⁵¹ H. Zaisheng et al. 2006. *Transboundary Aquifers in Asia with Special Emphasis on [the People's Republic of] China*. Beijing: United Nations Educational, Scientific and Cultural Organization (UNESCO). See <http://unesdoc.unesco.org/images/0014/001483/148390e.pdf>

⁵² N. Colbran. 2009. Will Jakarta be the Next Atlantis? Excessive Groundwater Use Resulting from a Failing Piped Water Network. *Law, Environment and Development Journal*. 5(1). p. 18. Available at <http://www.lead-journal.org/content/09018.pdf>

The region is home to several unique freshwater ecosystems, such as the Tonle Sap in Cambodia, Lake Toba in Sumatra (footnotes 21, 41), and the Mekong River System, which spans “three provinces of [the People’s Republic of] China, continuing into Myanmar, Lao PDR, Thailand, Cambodia, and Viet Nam before emptying into the South China Sea.”⁵³ Freshwater ecosystems are a source of raw water supply, as well as a food source since they are biologically rich in fish, amphibians, invertebrates, and aquatic plants (footnotes 21, 41). Cambodia, Indonesia, and Viet Nam have notably high numbers of freshwater fish species (footnotes 21, 41).

However, water resources in the region are currently under threat. Increases in population and economic activity have resulted in increased water use, with the agriculture sector consuming 85.5% of freshwater resources, the industry sector consuming 7.8%, and domestic sectors consuming 6.6%.⁵⁴ Because of increased industrial activity, water quality has also suffered, particularly from nitrate contamination resulting from dumping untreated domestic waste and heavy metals into freshwater sources (footnote 23). In 2009, ASEAN reported that there was a general decline in river water quality in countries in the region (footnotes 21, 39). Indonesia reported that 54% of 33 rivers monitored in 2008 were polluted (footnotes 21, 39). In Thailand, there was an increase in the number of rivers classified as poor, from 29% in 2007 to 48% in 2009 (footnotes 21, 39). Such pollution affects the region’s food and energy production, ecological needs, and health and livelihood of its human and wildlife populations (footnote 23).

Legal Issues and Questions:

Each roundtable delegation can share freshwater, pollution, floods, and climate change problems and related legal issues in their country, including the following:

- (i) How extensive is the issue of water pollution and illegal extraction of groundwater or use of water in the particular ASEAN country?
- (ii) What legal challenges are there to the proper enforcement of water law in the courts?
- (iii) Rights to use water are often closely linked to rights to land, and the potential impacts of climate change on property rights are significant. How does national jurisprudence provide guidance on the resolution of cases involving violations of rights to water because of pollution?
- (iv) What percentage of disputes that reach the courts in each country involve rights to water resources? What laws do judges in each country use as a basis for adjudicating such cases?

ASEAN Environmental Challenge No. 6: Urbanization and Air Pollution

Urbanization presents further environmental challenges for Southeast Asia. The percentage of people living in urban areas has increased dramatically during the past half century.⁵⁵ In

⁵³ Mekong River Commission. <http://www.mrcmekong.org/the-mekong-basin/physiography/>

⁵⁴ UNEP. 2009. *Freshwater Under Threat: Southeast Asia*. Available at: http://www.unep.org/pdf/SEA_Water_report.pdf

⁵⁵ See <http://www.unfpa.org/swp/1996/ch3.htm>

Southeast Asia, 245 million people (41.8% of its population) live in urban areas, compared to 15.4% in the 1950s.⁵⁶ Six of the world's 10 megacities (defined as having a population of more than 10 million) are in Asia,⁵⁷ and two—Manila and Jakarta—are in Southeast Asia. The urban population of Southeast Asia is expected to grow by 2.2% during 2010–2015 (footnote 56), and will reach 49.7% by 2025. The growth of urban cities translates to 44 million people being added to cities every year, or 120,000 people each day.⁵⁸ This influx of people in cities requires construction of 2,000 new dwellings, 250 kilometers of new roads, and infrastructure needed to supply more than 6 megaliters of potable water every day (footnote 58).

Urbanization across Southeast Asia varies. The economically advanced countries—Brunei Darussalam, Malaysia, and Singapore—have urbanization levels above 65%. The economically least-developed countries—Cambodia, the Lao PDR, and Myanmar—have levels below 34% (footnote 57). Eighty percent of future new economic growth is expected to be generated in urban economies, where most jobs and opportunities are located.⁵⁹

Urbanization places stress on existing urban infrastructure and services which, in most developing countries, are not even adequate for the current urban dwellers. Hence, in the face of rapid urbanization, policy makers and urban planners face the challenges of poorly maintained infrastructure, unplanned growth, scant livelihood opportunities, and susceptibility of poor populations to ill health.⁶⁰

Increasing urban wealth has not trickled down to all of Southeast Asia's urban population. Half of the world's slum dwellers live in Asia, while 28 million people in Jakarta and 23 million people in Manila live in informal settlements. Urban slum dwellers are vulnerable to natural and health hazards, and crime.⁶¹ They often lack security of land tenure and access to basic services such as adequate water supply and sanitation. A range of environmental problems stem from the combination of urbanization and poverty—water supply and sanitation, mass production resulting in greenhouse gas emissions, and mass consumption resulting in solid waste (footnote 56).

Urbanization also places immense stress on transport and mobility, and significantly increases air pollution. Asian cities have the highest air pollution levels in the world. Air pollution threatens the health and quality of life of people living in cities, with the World Health Organization reporting that half a million premature deaths can be attributed to air pollution (footnote 23). About 80% of air pollution in Asian cities can be attributed to transport (footnote 56). Motor vehicle fleets double every 5–7 years, which leads to road congestion and air pollution (footnote 59). For example, in Indonesia,⁶² air pollution is estimated to cost the national economy \$400 million per year and this figure is expected

⁵⁶ Institute of Southeast Asian Studies. 2009. *Urbanization in Southeast Asian Countries*. Available at: [http://www.iseas.edu.sg/aseanstudiescentre/UrbanSEAsia-prelim\(asof13Jul10\).pdf](http://www.iseas.edu.sg/aseanstudiescentre/UrbanSEAsia-prelim(asof13Jul10).pdf)

⁵⁷ J. Cochrane. 2010. Urban Planning Laboratory. *Development Asia*, Year III, No. 6, Jan–March. Available at: <http://development.asia/PDF/issue-06/urbanplanning-devasia6.pdf>

⁵⁸ ADB. 2006. *Urbanization and Sustainability in Asia*. Manila.

⁵⁹ ADB. <http://beta.adb.org/sectors/transport/key-priorities/urban-transport>

⁶⁰ ADB. <http://beta.adb.org/features/urbanization-asia-clean-green-competitive-cities>

⁶¹ ADB. 2010. *Access to Justice for the Urban Poor*. Manila.

⁶² In Indonesia, the number of vehicles more than doubled, from 10.2 million in 1992 to 35.0 million in 2005.

to grow tenfold in the absence of pollution control (footnotes 21, 70). In Thailand, the number of vehicles increased from 600,000 in 1980 to more than 5 million by the end of 2007 (footnote 21). Road traffic decreases productivity because of lost time and high transport costs, and this costs Asian economies 2%–5% of gross domestic product annually (footnote 21).

Haze caused by uncontrolled land and forest fires is another source of air pollution affecting several Southeast Asian countries. The El Niño phenomenon has aggravated these fires, traditionally used to clear forest for the cultivation of plantation crops, since it causes drier weather conditions in the region (footnote 21). Eight ASEAN member states have ratified the ASEAN Agreement on Transboundary Haze Pollution, which was signed in 2002 to attempt to manage this problem. The Haze Agreement entered into force in November 2003. The aim of this agreement is to address land and forest fires and minimize transboundary haze pollution in the region (footnote 21).

Legal Issues and Questions:

Each roundtable delegation can share urbanization and air pollution problems and related legal issues in their country, including the following:

- (i) How extensive is the issue of urbanization and air pollution in the particular ASEAN country?
- (ii) What legal challenges are there to its proper enforcement in the courts?
- (iii) What would be the effect, in each country, of the Haze Agreement on the adjudication of a case involving injury or damage resulting from haze?
- (iv) How many cases involving damages or disputes involving the effects of lack of basic urban infrastructure reach the courts in each country? On what basis do judges adjudicate such cases? Or on what basis would judges be likely to adjudicate such cases, if they were to reach the courts?

B. ASEAN Environmental Cooperation⁶³

Environmental cooperation was not a tenet of ASEAN's mandate when it was established in 1967, but has been an element of ASEAN's programs since the first meeting of the ASEAN Experts Group on the Environment in 1978.⁶⁴ The first ASEAN Ministerial Meeting on the Environment was convened in 1981 and produced the Manila Declaration on the ASEAN Environment.⁶⁵ This serves as a broad framework for regional cooperation on environmental issues, including sustainable development, resource conservation, related education and training, as well as exchange of environmental information. It also endorses

⁶³ Material in this section is taken principally from K. Mulqueeny. 2004. Regionalism, Economic Integration and Legalization in ASEAN: What Space for Environmental Sustainability. *Asia Pacific Journal of Environmental Law* 1.

⁶⁴ D. Rothwell, B. Boer, and R. Ramsay. 1998. *International Law in the Asia Pacific*. London: Kluwer Law International. p. 226.

⁶⁵ Manila Declaration on the ASEAN Environment, 1981, on ASEAN Secretariat website <http://environment.asean.org/manila-declaration-on-the-asean-environment/>

the scope of work laid out in the first ASEAN Subregional Environmental Programme (ASEP I).

In the years that followed, ASEAN developed the successor environmental plans ASEP II (which covered 1982–1987), ASEP III (which covered 1998–1992), and later the ASEAN Strategic Plan of Action on the Environment (1994–1998). At the broader regional level, ASEAN Vision 2020 and the current Vientiane Action Program 2004–2010, the successor to the Ha Noi Plan of Action 1999–2004, has further elaborated 12 strategies and 55 program areas and measures to achieve the twin objectives of promoting environmental sustainability and sustainable natural resource management. The need for cross-sector cooperation on sustainable development initiatives has been a recurring theme in the ministerial meeting on environment discussions, of which the impact has yet to be fully realized by other ASEAN constituencies, including the trade and economic coordination committees.

The following are key issues that have been on the regional environmental agenda for regulatory reform:

- (i) **Harmonization of regulatory frameworks and standards**, as seen in the ASEAN Agreement on Nature Conservation, 1985.⁶⁶ This is a progressive agreement on sustainable development, providing for disputes to be “settled amicably by consultation and negotiation.”⁶⁷ The agreement was signed by the six initial ASEAN member states, but ratified only by Indonesia, the Philippines, and Thailand.
- (ii) **Harmonization of environmental quality standards**, first appeared on the agenda of the 4th ASEAN Ministerial Meeting on the Environment in 1990 and recorded in the Kuala Lumpur Accord on Environment and Development.⁶⁸ To date, only ASEAN Harmonized Environmental Quality Standards for Air and Water Qualities have been adopted, while other prescribed initiatives in the Framework to Achieve Long-Term Environmental Goals for Ambient Air and River Water Quality for ASEAN⁶⁹ are still in the process of implementation after more than a decade.
- (iii) **Concerted efforts toward sustainable forestry practices**, under the purview of the ASEAN Ministers on Agriculture and Forestry, recognize a regional consensus

⁶⁶ Koh Kheng-Lian. 2003. ASEAN Agreement on the Conservation of Nature and Natural Resources, 1985: A Study in Environmental Governance. Paper delivered at World Parks Congress 2003, 8–17 September 2003. (Discussing the 18-year history of the ASEAN agreement and considering its current relevance.)

⁶⁷ Article 30 of the ASEAN Agreement (footnote 66).

⁶⁸ The ASEAN environment ministers agree to initiate efforts leading towards concrete steps pertaining to: “environmental management, including:...1. b. the harmonization of environmental quality standards, c. the harmonization of transboundary pollution prevention and abatement practices, d. the undertaking of research and development and the promotion of the use of clean technologies....2. a. the harmonization of approaches in natural resource management programmes....c. the development and harmonization of procedures aimed at obtaining a better reflection of the state of natural wealth in the context of the System of National Accounts: Kuala Lumpur Accord (1990) available at <http://www.aseansec.org/6082.htm> (accessed 4 June 2004).

⁶⁹ At their Third Meeting in Singapore, 20–22 March 1995.

that current forestry law enforcement must be reviewed to combat illegal logging and its associated trade.⁷⁰

- (iv) **Cooperation on transboundary pollution** under the ASEAN Cooperation Plan on Transboundary Pollution⁷¹ was adopted in 1995. This document encompassed a broad scope of cooperation, and in recent years there has been added regional focus on transboundary haze. The ASEAN Agreement on Transboundary Haze Pollution⁷² was signed in June 2002, and entered into force in November 2003, which can be considered timely implementation of an ASEAN environment agreement in relative terms.

The ASEAN Strategic Plan of Action on the Environment had earlier listed several initiatives as priority actions. These are contained in the following table, which also lists their current status.

Progress on environmental issues has been limited to the “soft” initiatives as implemented by environment sector officials and ministers. Based on the statement issued by the 13th ASEAN Ministerial Meeting on the Environment in October 2011,⁷³ regional environmental efforts lean toward being cooperation initiatives such as exchange of information on national environment policies, promotion of environmental awareness among the public, and generic discussions on global climate change. Implementation of these soft initiatives has been slow, and environmental enforcement has been particularly weak. Further cooperation on environmental enforcement, including among the judiciary, is needed.

⁷⁰ 28th ASEAN Ministers on Agriculture and Forestry Meeting Joint Statement, November 2006. <http://www.asean.org/18951.htm>

⁷¹ ASEAN. 1995. The ASEAN Cooperation Plan on Transboundary Pollution <http://www.aseansec.org/8926.htm> (accessed 1 June 2004).

⁷² ASEAN. 2002. ASEAN Agreement on Transboundary Haze Pollution, 10 June, at <http://www.haze-online.or.id/docs.php?PATH=%2F%21Others&F=AseanAgreement.pdf> (accessed 1 June 2004).

⁷³ Joint Statement from the 13th ASEAN Ministerial Meeting on the Environment Meeting, October 2011, Phnom Penh. <http://www.asean.org/26689.htm>

ASEAN Environment—Summary and Update (November 2011)

	Priority initiative	Status update
1	Fully implement the ASEAN Cooperation Plan on Transboundary Pollution emphasizing the Regional Haze Action Plan by 2001	On track, regular working meetings have been held, with Singapore in charge of monitoring fire and haze pollution under the Regional Haze Action Plan put in place in December 1997, as well as immediate action plan field training exercises undertaken in hot spots such as Kalimantan and Sumatra
2	Strengthen the ASEAN Specialized Meteorological Centre by 2001	On track, regular activities undertaken by Meteorological Centre under the ASEAN Science and Technology cooperation track, including quarterly reports on studies and research
3	Establish the ASEAN Regional Research and Training Centre for Land and Forest Fire Management by 2004	Pending further action at working level
4	Strengthen the ASEAN Regional Centre for Biodiversity Conservation by 2001	Work in progress. The center, established in 1999, has continued to focus on networking and institutional building initiatives, including training, research and development, and database management. One of the key policy deliverables is the Framework Agreement on Access to Genetic and Biological Resources, which is still being drafted by ASEAN Senior Officials on the Environment (ASOEN)
5	Promote regional coordination for protection of the ASEAN heritage parks and reserves	On track, recent AMME saw two additional parks in the Philippines and Singapore added to the list of heritage parks and reserves, making it a total of 30 ASEAN parks on the conservation list
6	Develop a framework and improve regional coordination for integrated protection and management of coastal zones by 2001	Work in progress. The ASEAN Working Group on Coastal and Marine Environment is developing a specific action plan to focus on marine life conservation, management of solid and liquid waste, ecotourism, and coastal erosion.
7	Strengthen institutional and legal capacities to implement Agenda 21 and other international environmental agreements by 2001	Work in progress, under the purview of the ASOEN, reporting to AMME (no updates available)
8	Harmonize the environmental databases of member countries by 2001	Work in progress, undertaken by ASOEN in conjunction with ASEAN Heads of Statistical Offices Meeting (AHSOM). The regular publication of the state of environment report every 3 years has created a comprehensive compilation of environmental statistics in the region, funded by external sources
9	Implement an ASEAN regional water conservation program by 2001	Developed in 2005 with AusAID funding, the ASEAN Strategic Plan of Action on Water Resources Management features access to safe, adequate, and affordable water for food security, sanitation, and economic growth, as well as protection of water environment
10	Establish a regional center or network for the promotion of environmentally sound technologies by 2004	Work in progress, undertaken by ASOEN with support from dialogue partners such as the US and Japan in feasibility studies

continued on next page

Table *continued*

	Priority initiative	Status update
11	Formulate and adopt an ASEAN protocol on access to genetic resources by 2004	Work in progress, to be undertaken by ASOEN
12	Develop a regional action plan for the protection of the marine environment from land- and sea-based activities by 2004	Work in progress, undertaken by the ASEAN Working Group on Coastal and Marine Environment
13	Implement the Framework to Achieve Long-Term Environmental Goals for Ambient Air and River Water Qualities for ASEAN Countries	Work in progress, undertaken by the ASEAN Working Group on Environmental Management, with a proposal for a draft framework submitted to ASOEN for discussion
14	Enhance regional efforts in addressing climatic change	Work in progress, requires cross-sector coordination and overseen by ASEAN leaders' summit on regional climate change issues
15	Enhance public information and education in awareness of and participation in environmental and sustainable development issues	Work in progress, undertaken by ASOEN

C. Common Challenges for ASEAN Justices

Common Challenges for ASEAN Justices: Key Legal and Evidentiary Challenges (Session 1)

The discussion will seek to obtain contributions from all participants on the particular successes and challenges in different jurisdictions, as well as obtain a deeper understanding on the resources and capacity building needed to overcome these challenges, that could be included in the ASEAN Vision.

The judiciary is one of the key institutions of government needed to ensure the effectiveness of environmental law. However, environment cases, resolving environmental disputes, and applying and interpreting environmental laws present key legal and evidentiary challenges to judicial decision making. Justices at the 2010 Asian Judges Symposium, and other judges, have identified these challenges to include the receipt of expert and scientific evidence and testimony; the evaluation and determination of damages, sanctions, and penalties; the issuance and award of sometimes unconventional remedies;⁷⁴ ensuring *locus standi* or appropriate standing rules; ensuring reasoned judicial decisions; and enforcing the judgments.

Standing (Right to Sue or Locus Standi)

Traditional standing rules require a plaintiff to have a sufficient or personal stake in the outcome of a case, traceable to the defendant, to distinguish the individual from other persons or the public at large. However, many jurisdictions now expand legal standing provisions to include nongovernment organizations and the public on the basis of

⁷⁴ D. Shelton and A. Kiss. 2005. *Judicial Handbook on Environmental Law*. Nairobi: UNEP.

defending the public interest, even if they are not directly affected by the alleged action. Some Southeast Asian courts have innovative ways of interpreting this.

Evidence

Understanding scientific and expert evidence, and weighing and evaluating such complex evidence, is another key challenge encountered by judges in their judicial decision making. Long delays in trials often result from failure to grasp scientific and expert testimony.

Evaluating Environmental Damages

Understanding how to evaluate environmental damages in different circumstances is another key challenge faced by judges. The damages caused by environmental pollution are often hidden and cumulative, and the effects of pollution are delayed. This poses problems in quantifying the risks and damages of environmental pollution.

Sanctions and Penalties

Courts are the most prevalent formal institutions for penalizing the violation of environmental laws and regulations and ensuring compliance with such laws. Penalizing environmental violations should have the effect of deterring future environmental crimes but, in reality, the sanctions currently being imposed are often not significant. In some Southeast Asian countries, an additional challenge lies in ensuring consistency in applying sanctions among trial courts that are geographically dispersed and that do not always have access to information on decisions made by other courts in similar cases.

Enforcement of Judicial Decisions

Judicial authorities face noncompliance with judgments. When this happens, courts should have the power to hold noncomplying parties in contempt. The court's power to hold parties in contempt is essential for upholding the integrity of environmental laws and the judgments rendered under them, and fosters societal respect for the rule of law. Nevertheless, judicial enforcement may be difficult to implement and administer.

Alternative Dispute Resolution in Environmental Cases

Alternative dispute resolution mechanisms are being more widely used to resolve environmental disputes. Alternative dispute resolution is not ideal for all types of environmental disputes. However, different Southeast Asian courts have considered (and are implementing) different ways to use alternative dispute resolution to resolve environmental disputes.

Key Questions for Discussion:

- (i) What are the key challenges and successes different national judiciaries have faced in achieving effective environmental adjudication?
- (ii) How does the jurisdiction deal with standing?
- (iii) What are the challenges faced in the use of expert and scientific evidence?
- (iv) What methods ensure the courts have access to unbiased experts?

- (v) What remedies exist and are possible for environmental cases in different jurisdictions, including special environmental remedies?
- (vi) What were the challenges to the enforcement of judicial decisions on environment?
- (vii) What are the key challenges and successes different national judiciaries have experienced for environmental alternative dispute resolution? How can Asian courts most effectively use alternative dispute resolution in environmental cases?

Common Challenges for ASEAN Justices: Key Capacity and Governance Issues (Session 9)

Southeast Asian generalist and environmental judges and courts are likely to be concerned with increasing the ability of citizens to have access to environmental justice, strengthening judicial capacity to decide environmental cases, and increasing the extent that judges are able to resist threats to the integrity of the judicial process. Addressing these issues is critical to ensuring an effective judiciary and effective environmental decision making and dispute resolution. Relatedly, maintaining a sufficient number of skilled judicial staff, both judges and court staff, is also important because the threats to integrity are greater when there is less judicial staff available to oversee cases.

Increasing Access to Environmental Justice

Access to environmental justice is one of the key pillars of environmental governance contained in Principle 10 of the Rio Declaration, and includes transparency, inclusiveness, and accountability. To achieve these elements, access to justice needs to involve at least expanding access to the formal justice system and administrative justice, and expanding informal ways to resolve disputes and achieve fairness and equity.

Ensuring access to justice is often conceptualized as expanding the ability of citizen access to courts, and expanding the rights of public-interest litigants to bring cases to courts. In other words, access to justice is often conceived as access to the formal legal system and the poor are often challenged in obtaining access.

Key Questions for Discussion:

- (i) What are the key innovations that help open access to judicial institutions for environmental disputes?
- (ii) What special measures are needed to increase access to justice for the poor, marginalized groups, and indigenous peoples?
- (iii) How can the formal justice system recognize resolutions of disputes by informal systems to increase access to justice?

Strengthening Judicial Capacity on Environment

Capacity is the ability of people, organizations, and society as a whole to manage their affairs successfully.⁷⁵ The judiciary must have the financial and human resources

⁷⁵ ADB follows the Organisation for Economic Co-operation and Development definition of capacity. See ADB. 2010. *Governance and Anticorruption in Project Design*. p. 37. Manila.

consistently and sufficiently available to effectively discharge its mandate.⁷⁶ Moreover, the judiciary needs judges who can demonstrate leadership. It must also have access to, or the ability to mobilize and manage, adequate financial resources that are predictable and stable over time, and the ability to attract and maintain a sufficient number of judges with sufficient competence to perform their duties (footnote 76). This competence includes the professional skill, knowledge, and experience, or the possibility to obtain the skills and knowledge through continuing legal education (footnote 76). Minimum competence requirements should apply to the general judiciary and, given the complexity of some environmental cases, environmental judges should have expertise in environmental and natural resource law.

Judicial education in Asia should require institutionalized forms of environmental law training, together with training on the techniques of environmental litigation and dispute resolution. Curricula will need to be designed for (i) cadre or candidate judges, (ii) continuing legal education, and (iii) environmental law specialist judges. Indonesia, the Philippines, and Thailand each have judicial training institutions that govern the training of their civil law judges and through which all institutionalized training programs need to be carried out. Environmental law training programs for judges need to be institutionalized into the pre-existing fabric of legal education through regularized and repeated training sessions, and should be conducted as part of an institutionalized ongoing scheme, including monitoring, evaluation, feedback, and retraining. This discussion seeks to better understand the pre-existing generalist judicial training schemes and programs being implemented in Indonesia, the Philippines, and Thailand in addition to any environmental training they have initiated, in order to generate a discussion on the appropriate entry points for further judicial training on environmental compliance and enforcement in Southeast Asia. In this discussion, the roundtable may consider challenges on the ground in building capacity for environmental decision making within Southeast Asian judiciaries and ways to overcome them.

Key Questions for Discussion:

- (i) What challenges and successes have national judiciaries faced in building capacity in environmental and natural resource law? How are environmental and natural resource cases any different from other cases?
- (ii) What are the generalist training requirements for new candidate judges? Do these training requirements include environmental law training? How much and in what form?
- (iii) What specialist environmental law training is provided?
- (iv) How many judges and/or other environmental legal practitioners were trained and are they using their expertise to decide environmental and natural resource cases? How is the impact of this environmental law training monitored, evaluated, and measured?
- (v) What institutional mechanisms ensure that judges trained in environmental law get to decide environmental cases?
- (vi) What transjudicial networking and sharing on environmental law have been conducted?

⁷⁶ K. Mulqueeny. 2010. *Attaining Access for All: Pro-Poor Policy and Regulation for Water and Energy Services*. Manila: ADB.

Increasing Resilience against Threats to Integrity

Many of the common environmental problems discussed above involve the lack of integrity, i.e., the presence of corruption, or crimes such as illegal logging, illegal mining, and illegal fishing that go unenforced for a range of reasons including bribery. Integrity within the entire chain of environmental enforcement and within the justice system in general is critical to ensuring effective environmental enforcement. Justice will be thwarted if there is corruption anywhere throughout those systems.⁷⁷ A clean judiciary is critical, but it is also embedded within the broader system of the rule of law and is influenced by wider social attitudes on integrity and corruption (footnote 77).

In an effort to promote integrity, in 2000, senior judges from several African and Asian countries formed the Judicial Group on Strengthening Judicial Integrity. Under the auspices of the Global Program Against Corruption of the UN Office of Drug Control and Crime Prevention, they developed the Bangalore Principles of Judicial Conduct.⁷⁸ Widely regarded as the international norm, these principles highlight independence, impartiality, integrity, propriety, equality, competence, and diligence as key values. In November 2002, chief justices from several major traditions convened at the Round Table Meeting of Chief Justices held at the Peace Palace at The Hague in November 2002. The principles express normative values and recognize that judges are active players in upholding the rule of law and ensuring a justice system that promotes integrity and fairness.

Key Questions for Discussion:

- (i) What challenges and successes have different national judiciaries faced in promoting integrity in environmental and natural resource cases? Are environmental and natural resource cases any different from any others?
- (ii) How common is it for judges to be offered bribes in deciding environmental and natural resource cases? How have judges dealt with such offers?
- (iii) Have any judges reported threats, intimidation, or interference regarding the outcomes of environmental cases either from the private sector or the government? What happened when they did?
- (iv) How can judges best deal with threats to integrity and independence?

D. A Common Vision for ASEAN Chief Justices on Environment

The countries of ASEAN have shared environmental challenges. Chief justices and senior judiciary have the potential to develop a common vision for addressing common environmental law concerns and areas of potential cooperation between the judiciaries of individual ASEAN countries.

⁷⁷ Transparency International. 2007. *Global Corruption Report 2007: Corruption in Judicial Systems*. Executive Summary. Cambridge: Cambridge University Press.

⁷⁸ G. Mayne. 2007. *Judicial Integrity: The Accountability Gap and the Bangalore Principles*. *Global Corruption Report 2007: Corruption in Judicial Systems*. Cambridge: Cambridge University Press.

The ASEAN Chief Justices' Roundtable on Environment, a subregional group of the broader Asian Judges Network on Environment (AJNE), was proposed in June 2010 at the Asian Judges Symposium. An AJNE and the ASEAN Chief Justices' Roundtable could potentially make significant contributions to the world congress in June 2012.

By way of background, Asian chief justices and judges attending the Asian Judges Symposium recognized they have much to gain by exchanging experiences and working together. Several judges pointed out that their shared judicial bond was unique and their professional ties with judges across borders would often be closer than ties with fellow nationals, given their shared issues. Given the judiciary's duty to be impartial, it would be potentially problematic for it to work together with other government offices and legal and environmental professionals regarding environmental enforcement. Thus, there was recognition that the judiciary's professional needs deserve dedicated focus.

A collective agenda was mapped on access to justice, ECs and ETs, alternative dispute resolution, capacity strengthening, and promoting integrity in an effort to achieve more effective environmental decision making while advancing the rule of law and access to justice. This generally shared agenda saw participating judges endorse an AJNE to promote environmental justice.

In a recent article, we abstracted seven main ideas raised at the Asian Judges Symposium (footnote 12). These elements are relevant to the rationale for continuing judicial cooperation in Southeast Asia, but further input from justices is needed on how to make it most relevant.

First, the simple sharing of experiences of current actions, common problems, and challenges would be an important start. Biannual meetings are the ideal, for judges to share national experiences of successes and challenges, set targets and timetables for future milestones, and accountability for set goals. Continuing communication in between meetings is important and this could be done through electronic exchange, e.g., a confidential internet portal similar to the International Union for Conservation of Nature–UNEP Judicial Portal. An ASEAN-specific section could be included in the portal if the judiciary in Southeast Asian countries required it.

Second, an AJNE can widely deploy environmental law resources and training materials. Numerous materials on environmental law and training from UNEP, ADB, TRAFFIC, and the US EPA have been developed and the AJNE could be the central clearinghouse of all these materials. ASEAN materials that focus on Southeast Asian environmental issues could be included if desired by the chief justices.

Third, an AJNE can also centralize donor assistance. A shared regional agenda would encourage donors deploying technical assistance to coordinate more closely to ensure that scarce resources are targeted to their most productive use without duplication. Different donors have different comparative advantages. Developing countries benefit when donors capitalize on these strengths. Aligning donor interests also benefits Southeast Asian countries.

Fourth, an AJNE and a subregional ASEAN grouping can also facilitate transcontinental cooperation with similar networks, such as the European Judges Forum on Environment, to share experience and learn best practices across the continent.

Fifth, an AJNE can be a way to strengthen subregional cooperation. In a region as large as Asia, an AJNE would be instrumental in promoting specific activities at subregional and national levels. The ASEAN and South Asian subregional roundtables could inspire chief justices to induce their respective legal professionals to forge common subregional agendas within a group of countries whose contexts are even more alike.

Sixth, an AJNE can be a venue for promoting more bilateral exchanges, while an ASEAN chief justices' roundtable helps to focus those exchanges on issues most relevant to Southeast Asian judiciaries. For example, in December 2009, Indonesian judges visited the Thai and Philippines judiciaries to learn about environmental courts and environmental specialization. Moreover, AECEN has connected Thai Supreme Court judges with their counterparts from the New South Wales Land and Environment Court in Australia in a twinning program to facilitate work on environmental law.

Finally, many countries in Asia are vast. An AJNE would only be effective at the regional and ASEAN level if it promoted national networks of judges on environment within large Asian countries. A regional network can lead the handful of participating judges to cross-fertilize ideas and values, but to be of greater import, those judges must widely share those ideas and values at home. Thus, a subregional network would need to promote national champions to lead and advance a national program for judges and the legal profession as a whole. Working within an ASEAN chief justices' roundtable can inspire the legal profession and other actors involved in the environmental enforcement chain within each Southeast Asian country. Chief justices and the senior judiciary play a key role in improving environmental enforcement, not only by their direct actions in making environmental decisions, developing environmental jurisprudence or establishing environmental courts but also by championing and leading the rest of the legal profession toward credible rule of law systems that have integrity and promote environmental sustainability.

The ASEAN Chief Justices' Roundtable, as a subregional grouping, focuses even more directly on commonalities between the challenges Southeast Asian countries have to face—challenges that are even more closely connected than those they share with the broader AJNE. At the roundtable, Jakarta delegates will be asked to consider objectives for future cooperation and the benefits of maintaining the ASEAN Chief Justices' Roundtable, and ideally to agree a common vision for the way forward.

Appendix 2

Program Agenda

Monday, 5 December 2011

6 p.m.–8 p.m. **Welcome Reception**, Thamrin Room, Level 3, Mandarin Oriental Hotel, hosted by Supreme Court of Indonesia

Day 1: Tuesday, 6 December 2011, Diponegoro Room, Level 3, Mandarin Oriental Hotel

8 a.m. **Registration**

Morning Session

Morning Chair: Professor Paulus E. Lotulung, Deputy Chief Justice, Supreme Court of Indonesia

8.30 a.m. **Opening Session**

- **Opening and Welcome Remarks**, Hon. Widayatno Sastro Hardjono, Deputy Chief Justice for Development, Supreme Court of Indonesia
- **Welcome Remarks**, Jon Lindborg, Country Director, Indonesia Resident Mission, Asian Development Bank (ADB)
- **Welcome Remarks**, Dr. Bakary Kante, Director, Division of Environmental Law and Conventions, United Nations Environment Programme (UNEP)

8.50 a.m. **First Keynote Address:** The Indonesian Judicial Certification Program on Environment

- **Dr. Harifin A. Tumpa**, Chief Justice, Supreme Court of Indonesia

Introduction of Participants

The morning session chair will ask each delegation member to introduce himself or herself.

9.10 a.m. **Southeast Asia: The State of the Environment** (video) entitled *Saving ASEAN's Natural Treasures*

9.40 a.m. **Overview: Imagine 2020: Justice, Governance, and the Rule of Law for Environmental Sustainability**

- **Dr. Kala Mulqueeny**, Senior Counsel, Office of the General Counsel, ADB

Introductory Statement by each Head of Delegation

The head of each delegation will be asked to share observations on the state of environment and/or environmental jurisprudence in their country and any discussion they wish to table and focus for the roundtable (10 minutes for each delegation).

10 a.m.

Coffee Break

10.30 a.m.

ASEAN Regional Cooperation on Environment

- Ilyas Asaad, Deputy Minister for Environmental Communication and Public Participation, Ministry of Environment, Indonesia

The resource speaker will explain the context of ASEAN cooperation on environment to date for the background of the delegations.

12.30 p.m.

Lunch, Imam Bonjol Room, Level 3, Mandarin Oriental Hotel

Second Keynote Address: ASEAN's Environmental Law Challenges and the Role of the Judiciary: Climate Change

Professor Dr. Emil Salim, Head, Indonesia's Presidential Advisory Council and Sustainable Development Expert

Afternoon Session

Afternoon Chair: Professor Paulus E. Lotulung, Deputy Chief Justice, Supreme Court of Indonesia

2 p.m.

Session 1: Common Challenges for ASEAN Justices: Key Legal and Evidentiary Challenges in Deciding Environmental Cases

Session Chair: **Hon. Takdir Rahmadi**, Justice, Supreme Court of Indonesia

Session Facilitator: **Mas Achmad Santosa**, Member, Presidential Task Force to Eradicate Corruption in the Legal System (Presidential Anti-Judicial Mafia Task Force); Environmental Law and Governance Specialist; and Senior Advisor for Human Rights, Legal, and Justice Social Reform, UNDP-Indonesia

The facilitator will share the key legal and evidentiary issues identified in the Asian Judges Statement, agreed at the Asian Judges Symposium 2010. These include

- locus standi and the role of public-interest environmental plaintiffs;
- the burden of proof and the precautionary principle;
- expert and scientific evidence;
- evaluating damages and determining remedies, and whether special remedies are appropriate and possible;
- sanctions and penalties;
- delays and the court docket; and
- enforcement of judicial decisions.

The delegations will provide their views on whether these are their key legal and evidentiary challenges when dealing with environmental cases and whether additional challenges exist. These issues will continue to be discussed when considering the case studies of ASEAN's environmental law challenges.

2.45 p.m. **Session 2: ASEAN Environmental Law Challenge No. 1: Deforestation and Illegal Logging**

Session Chair: **Professor Paulus E. Lotulung**, Deputy Chief Justice, Supreme Court of Indonesia

Session Facilitator: **Dr. Tint Lwin Thaug**, Executive Director, RECOFTC—The Center for People and Forests

- **Indonesia**
 - **Hon. Djoko Sarwoko**, Justice, Supreme Court of Indonesia
- **Lao People's Democratic Republic (Lao PDR)**
 - **H.E. Khampha Sengdara**, Deputy Chief Justice, People's Supreme Court of the Lao PDR
- **Malaysia**
 - **Honorable YAA Tan Sri Arifin Zakaria**, Chief Justice, Supreme Court of Malaysia

- **Q&A, Discussion**

The facilitator shall frame the issues. Each of the three presenting delegations will share any potential forest law and enforcement problems in their country, in particular in relation to the rule of law and the challenges their judiciaries face in adjudicating upon such cases. Thereafter, other delegations will offer comments on their experiences or ask questions.

3.30 p.m. **Coffee Break**

3.45 p.m. **Session 3: ASEAN Environmental Law Challenge No. 2: Biodiversity and the Illegal Wildlife Trade**

Session Chair: **Hon. Takdir Rahmadi**, Justice, Supreme Court of Indonesia

Session Facilitators:

- **Clarissa C. Arida**, Director, Programme Development and Implementation Division, ASEAN Centre for Biodiversity
- **Azrina Abdullah**, Former Senior Social Consultant, Environmental Resources Management and Regional Director, TRAFFIC Wildlife Trade Monitoring Network—Southeast Asia
- **Thailand**
 - **Kidngarm Kongtrakul Li**, Associate Research Judge, Supreme Court of Thailand

- **Myanmar**
 - H.E. Mya Thein, Judge, Supreme Court of the Union of Myanmar
- **Viet Nam**
 - Dang Xuan Dao, Chief Judge of the Economic Court of the Supreme People’s Court of Vietnam
- **Q&A, Discussion**

The resource person facilitators on biodiversity and on wildlife will frame the issues. Each of the three presenting delegations will share any potential biodiversity and wildlife law and enforcement problems in their country, in particular in relation to the rule of law and the challenges the judiciary faces in adjudicating upon such cases. Thereafter, the session chair will ask other delegations to offer comments on their experience, or ask questions, and the facilitators will assist the session chair in facilitating the discussion on the respective issues.

4.30 p.m.

Session 4: ASEAN Environmental Law Challenge No. 3: Ocean Destruction, Illegal Fishing, and Marine Pollution

Session Chair: **Professor Paulus E. Lotulung**, Deputy Chief Justice, Supreme Court of Indonesia

Session Facilitators:

- **Nazir Foead**, Conservation Director, World Wildlife Fund
- **Antonio Oposa**, President, Laws of Nature Foundation and Ramon Magsaysay Awardee
- **Indonesia**
 - **Hon. Takdir Rahmadi**, Justice, Supreme Court of Indonesia

Q&A, Discussion

The resource person facilitators will frame the issues and share their experiences of illegal fishing and ocean activities. Indonesia will share any potential ocean conservation and fisheries law and enforcement problems in the country, in particular in relation to the rule of law and the challenges the judiciary faces in adjudicating upon such cases. Thereafter, the session chair will ask other delegations to offer comments on their experience, or ask questions, and the facilitators will assist the session chair in facilitating the discussion on the respective issues.

5.15 p.m.

Synthesis of Day 1

- **Hon. Takdir Rahmadi**, Justice, Supreme Court of Indonesia

5.30 p.m.

Photo Session and End of Day 1

6.30 p.m.

Dinner, Imam Bonjol Room, Level 3, Mandarin Oriental Hotel

**Day 2: Wednesday, 7 December 2011: Diponegoro Room, Level 3,
Mandarin Oriental Hotel**

Morning Session

Morning Chair: Hon. Takdir Rahmadi, Justice, Supreme Court of Indonesia

9 a.m. **Session 5: Judicial Reforms to Respond to Environmental Challenges:
Institutionalizing Environmental Expertise through Specialization
and Environmental Courts**

Session Chair: Hon. Takdir Rahmadi, Justice, Supreme Court
of Indonesia

Session Facilitator: **Wanhua Yang**, Officer in Charge, Environmental Law
in Asia and the Pacific Division, UNEP

- **Philippines**
 - **Presbitero J. Velasco Jr.**, Associate Justice, Supreme Court
of the Philippines
- **Indonesia**
 - **Paulus E. Lotulung**, Deputy Chief Justice, Supreme Court
of Indonesia
- **Thailand**
 - **Winai Ruangsri**, Senior Research Justice, Supreme Court
of Thailand

*The facilitator will introduce and frame the key issues. Each presenter
will share the Supreme Court's approach to institutionalizing
environmental expertise: Thailand (Green-Bench and Green Appeals
Court), Philippines (Green Trial Courts), Indonesia (Green Judges
Certification).*

9.45 a.m. **Session 6: ASEAN Environmental Law Challenge No. 4:
Development Planning and Environmental Impact Assessment**

Session Chair: Hon. Takdir Rahmadi, Justice, Supreme Court
of Indonesia

Session Facilitators:

- **Patricia Moore**, International Legal Expert and former Head,
Regional Environmental Law Programme (Asia) and Ecosystems and
Livelihoods Group (Asia), International Union for Conservation of
Nature (IUCN)
- **Rosa Vivien Ratnawati**, Head, Bali and Nusa Tenggara Environment
Office, Ministry of Environment, Indonesia
- **Malaysia**
 - **YA Tan Sri Abdull Hamid Embong**, Justice, Federal Court
of Malaysia

- **Thailand**

- **Maneewon Phromnoi**, Judge, Supreme Administrative Court of Thailand

The facilitators will introduce and frame the key issues regarding planning and environmental impact assessment in ASEAN countries, and the delegations will share their experiences.

10.30 a.m.

- **Coffee Break**

10.45 a.m.

- **Session 7: ASEAN Environmental Law Challenge No. 5: Fresh Water, Pollution, Floods, and Climate**

Session Chair: **Professor Paulus E. Lotulung**, Deputy Chief Justice, Supreme Court of Indonesia

Session Facilitator: **Thomas Robert Panella**, Principal Water Resources Specialist, Indonesia Resident Mission, ADB

- **Philippines**

- **Presbitero J. Velasco Jr.**, Associate Justice, Supreme Court of the Republic of the Philippines

- **Thailand**

- **Prapot Klaisuban**, Judge, Central Administrative Court of Thailand

- **Q&A, Discussion**

The facilitator will introduce and frame the key issues regarding freshwater and water pollution in ASEAN countries. The Philippines will share the Supreme Court's experience in cleaning up water pollution by discussing a landmark Philippines decision in the Manila Bay case. Other delegations will be asked to comment and share their experiences, be they challenges or successes, to come to a vision of the role of the judiciary in contributing toward solving the problems of water pollution.

11.30 a.m.

- **Session 8: ASEAN Environmental Law Challenge No. 6: Urbanization and Air Pollution**

Session Chair: **Hon. Takdir Rahmadi**, Justice, Supreme Court of Indonesia

Session Facilitator: **Simon Tay**, Chair, Singapore Institute of International Affairs and Senior Consultant, Wong Partnership

- **Singapore: The Singapore Clean Green City Matrix: The Singapore Dynamic of Governance, Social Policy, Law, and Enforcement**

- **Philip Nalliah Pillai**, Judge of the Supreme Court of Singapore

- **Cambodia**

- **Kim Sathavy**, Justice, Supreme Court of Cambodia

- **Q&A, Discussion**

The facilitator will frame the discussion. The Singapore and Cambodian Supreme Courts will share their respective approaches. Other delegations will be asked to comment and share their experiences, be they challenges or successes, to come to a vision of the role of the judiciary in contributing toward solving the problems of pollution.

12.15 p.m. **Lunch, Imam Bonjol Room, Level 3, Mandarin Oriental Hotel**

Afternoon Session

Afternoon Chair: Professor Paulus E. Lotulung, Deputy Chief Justice, Supreme Court of Indonesia

2 p.m. **Session 9: Common Challenges for ASEAN Justices: Key Capacity and Governance Issues**

Session Chair: **Professor Paulus E. Lotulung**, Deputy Chief Justice, Supreme Court of Indonesia

Session Facilitator: **Patricia Moore**, International Legal Expert and former Head, Regional Environmental Law Programme (Asia) and Ecosystems and Livelihoods Group (Asia), IUCN

In this session, the chair and facilitator will frame the key capacity and governance issues identified in the Asian Judges Statement, agreed at the Asian Judges Symposium 2010, as being challenges for Asian Judges. These include

- *lower court capacity and substantive knowledge on environmental law;*
- *general governance and integrity issues within the environmental enforcement chain;*
- *a lack of environmental cases; and*
- *judicial training processes, and whether and how environmental law could be included.*

Each judicial delegation will be asked to share its experience on key capacity and governance issues in dealing with environmental cases, and whether there are additional issues. A video message on junior court innovations in environmental law will be played.

- **Adalberto Carim Antonio**, Trial Judge, Court of the Environment and Agrarian Issues of the State of Amazonas, video presentation on the experience of a first-level environmental court.

3.30 p.m. **Coffee Break**

3.50 p.m. **Session 10: UNEP's World Congress on Justice, Governance, and Law for Environmental Sustainability: The Role of the Judiciary**

Session Chair: **Professor Paulus E. Lotulung**, Deputy Chief Justice, Supreme Court of Indonesia

- **Dr. Bakary Kante**, Director of Division of Environmental Law and Conventions, UNEP

4 p.m.

Session 11: An ASEAN Vision on Justice, Governance, and the Rule of Law for Environmental Sustainability Led by ASEAN Chief Justices

Session Chair: **Hon. Takdir Rahmadi**, Justice, Supreme Court of Indonesia

Session Facilitators:

- **Hon. Widayatno Sastro Hardjono**, Deputy Chief Justice for Development, Supreme Court of Indonesia
- **Mas Achmad Santosa**, Member, Presidential Task Force to Eradicate Corruption in the Legal System (or Presidential Anti-Judicial Mafia Task Force); Environmental Law and Governance Specialist; and Senior Advisor for Human Rights, Legal and Justice Social Reform, UNDP-Indonesia
- **Dr. Kala Mulqueeny**, Senior Counsel, Office of the General Counsel, ADB
- **Hon. Antonio Benjamin**, Justice, Tribunal Superior de Justicia (High Court of Brazil), video message on the Role of the Judiciary in Protecting the Environment
- **Q&A, Discussion**
- **ASEAN Chief Justices' Roundtable Statement**
- **Discussion on Draft Common Vision**

The facilitators will explain the objectives of the session, among which are to synthesize the common challenges and potential areas of cooperation previously, and share the current program for the Asian Judges Network on the Environment. Participants will discuss objectives for future cooperation and the benefits of maintaining the ASEAN Chief Justices' Roundtable on Environment. The head of each delegation will be asked to provide their views.

5.30 p.m.

Closing Remarks

- **Dr. Bakary Kante**, Director, Division of Environmental Law and Conventions, UNEP
- **Dr. Kala Mulqueeny**, Senior Counsel, Office of the General Counsel, ADB
- **Dr. Harifin A. Tumpa**, Chief Justice, Supreme Court of Indonesia

Appendix 3

List of Resource Persons

Resource Person	Designation, Agency
Abdullah, Azrina	Former Senior Social Consultant, Environmental Resources Management and Regional Director, TRAFFIC Wildlife Trade Monitoring Network – Southeast Asia
Antonio, Adalberto Carim	Trial Judge, Court of the Environment and Agrarian Issues of the State of Amazonas
Arida, Clarissa C.	Director, Programme Development and Implementation Division, ASEAN Centre for Biodiversity
Asaad, Ilyas	Deputy Minister for Environmental Communication and Public Participation, Ministry of Environment, Indonesia
Benjamin, Antonio Herman	Justice, Tribunal Superior de Justicia (High Court of Brazil)
Dang Xuan Dao	Chief Judge of the Economic Court of the Supreme People's Court of Vietnam
Embong, YA Tan Sri Abdull Hamid	Justice, Federal Court of Malaysia
Foad, Nazir	Conservation Director, World Wildlife Fund
Hardjono, Widayatno Sastro	Deputy Chief Justice for Development, Supreme Court of Indonesia
Kante, Bakary	Director, Division of Environmental Law and Conventions, United Nations Environment Program (UNEP)
Klaisuban, Prapot	Judge, Central Administrative Court of Thailand
Li, Kidngarm Kongtrakul	Associate Research Judge, Supreme Court of Thailand
Lindborg, Jon	Country Director, Indonesia Resident Mission, ADB
Lotulung, Paulus	Deputy Chief Justice, Supreme Court of Indonesia
Moore, Patricia	International Legal Expert and former Head, Regional Environmental Law Programme (Asia) and Ecosystems and Livelihoods Group (Asia), International Union for Conservation of Nature (IUCN)
Mulqueeny, Kala	Senior Counsel, Office of the General Counsel, ADB
Oposa, Antonio	President, Laws of Nature Foundation and Ramon Magsaysay Awardee
Panella, Thomas Robert	Principal Water Resources Specialist, Indonesia Resident Mission, ADB
Phromnoi, Maneewon	Judge, Supreme Administrative Court of Thailand
Pillai, Philip Nalliah	Judge of the Supreme Court of Singapore
Rahmadi, Takdir	Justice, Supreme Court of Indonesia

continued on next page

Table *continued*

Resource Person	Designation, Agency
Ratnawati, Rosa Vivien	Head, Bali and Nusa Tenggara Environment Office, Ministry of Environment, Indonesia
Ruangsi, Winai	Senior Research Justice, Supreme Court of Thailand
Salim, Emil	Head, Indonesia's Presidential Advisory Council and Sustainable Development Expert
Santosa, Mas Achmad	Member, Presidential Task Force to Eradicate Corruption in the Legal System (Presidential Anti-Judicial Mafia Task Force); Environmental Law and Governance Specialist; Senior Advisor for Human Rights, Legal and Justice Social Reform, UNDP-Indonesia
Sarwoko, Djoko	Justice, Supreme Court of Indonesia
Sathavy, Kim	Justice, Supreme Court of Cambodia
Sengdara, H.E. Khampha	Deputy Chief Justice, People's Supreme Court of the Lao PDR
Tay, Simon	Chair, Singapore Institute of International Affairs and Consultant, Wong Partnership
Thaung, Tint Lwin	Executive Director, RECOFTC—The Center for People and Forests
Thein, H.E. Mya	Judge, Supreme Court of the Union of Myanmar
Tumpa, Harifin	Chief Justice, Supreme Court of Indonesia
Velasco Jr., Presbitero J.	Associate Justice, Supreme Court of the Philippines
Yang, Wanhua	Officer in Charge, Environmental Law in Asia and the Pacific Division, UNEP
Zakaria, Arifin	Chief Justice, Supreme Court of Malaysia

Appendix 4

List of Participants

Country/Organization	Participant
Asian Development Bank (ADB)	Jon Lindborg Country Director Indonesia Resident Mission jlindborg@adb.org
	Thomas Robert Panella Principal Water Resources Specialist Indonesia Resident Mission tpanella@adb.org
	Mohammed Nasimul Islam Water Resources Specialist Indonesia Resident Mission mnislam@adb.org
	Ayun Sundari Senior External Relations Officer Indonesia Resident Mission asundari@adb.org
	Kala Mulqueeny Senior Counsel Office of the General Counsel kmulqueeny@adb.org
	Irum Ahsan Counsel Office of the General Counsel iahsan@adb.org
	Sherielysse Bonifacio Legal Research Associate (Consultant) Office of the General Counsel sbonifacio.consultant@adb.org
	Patricia Moore Consultant, International Legal Expert and former Head, Regional Environmental Law Programme (Asia) and Ecosystems and Livelihoods Group (Asia), International Union for Conservation of Nature (IUCN) patti.moore@gmail.com

continued on next page

Table *continued*

Country/Organization	Participant
Brazil	Antonio Benjamin (via video) Justice Tribunal Superior de Justicia (High Court of Brazil)
	Adalberto Carim Antonio (via video) Trial Judge Court of the Environment and Agrarian Issues State of Amazonas
Cambodia	Kim Sathavy Justice Supreme Court
Indonesia	Harifin A. Tumpa Chief Justice Supreme Court
	Widayatno Sastro Hardjono Deputy Chief Justice for Development Supreme Court
	Paulus E. Lotulung Deputy Chief Justice Supreme Court
	Takdir Rahmadi Justice Supreme Court
	Djoko Sarwoko Justice Supreme Court
	Bambang H. Mulyono Assistant to the Vice Chief Justice for Non-Judicial Matters Supreme Court
	Balthasar Kambuaya Minister of Environment
	Ilyas Asaad Deputy Minister for Environmental Communication and Public Participation Ministry of Environment
	Sudariyono Deputy Minister for Environmental Conservation Ministry of Environment
	Rosa Vivien Ratnawati Head Bali and Nusa Tenggara Environment Office Ministry of Environment

continued on next page

Table *continued*

Country/Organization	Participant
Indonesia	<p>Cisilia Sulastri Assistant Deputy Minister Ministry of Environment</p>
	<p>Emil Salim Head, Presidential Advisory Council and Sustainable Development Expert</p>
	<p>Henri Subagiyo Indonesian Center for Environmental Law</p>
	<p>Haryani Turnip Indonesian Center for Environmental Law</p>
	<p>Windu Kisworo Indonesian Center for Environmental Law and Member, Working Group on Environmental Judges Certification</p>
	<p>Prayekti Murharjanti Indonesian Center for Environmental Law and Member, Working Group on Environmental Judges Certification</p>
	<p>Rino Subagyo Indonesian Center for Environmental Law and Member, Working Group on Environmental Judges Certification</p>
	<p>Dyah Paramita Indonesian Center for Environmental Law</p>
	<p>Feby Ivalerina Indonesian Center for Environmental Law</p>
	<p>Nommy Siahaan Chief Judge Palangkaraya High Court</p>
	<p>Yodi Martono Wahyunadi Chief Judge Jakarta Administrative State Court</p>
	<p>Minanoer Rachman Chief Judge Tuban District Court</p>
	<p>Prim Haryadi Chief Judge Depok District Court</p>
	<p>Catur Iriantoro Chief Judge Cianjur District Court</p>
	<p>lim Nurohim Chief Judge Garut District Court</p>

continued on next page

Table *continued*

Country/Organization	Participant
Indonesia	<p>Djoni Witanto Chief Judge Tembilahan District Court</p>
	<p>Arifin Marpaung Judge High Administrative State Court</p>
	<p>Andriani Nurdin Judge High Court</p>
	<p>Agus Subroto Judge High Court</p>
	<p>Marsudin Nainggolan Judge Central Jakarta District Court</p>
	<p>Sugeng Riyono Chief Judge, Gampengrejo District Court and Member, Working Group on Environmental Judges Certification</p>
	<p>Dr. Abdullah Chief Judge, Pasuruan District Court and Member, Working Group on Environmental Judges Certification</p>
	<p>Boniarti Kalalande Judge and Member, Working Group on Environmental Judges Certification</p>
	<p>Fifiiek Woelandara Mulyana Judicial Training Expert / Judicial Reform Specialist, Judicial Reform Team Office and Member, Working Group on Environmental Judges Certification</p>
	<p>Wiwiek Awiati Reform Advisor, Judicial Reform Team Office and Member, Working Group on Environmental Judges Certification</p>
	<p>Aria Suyudi Coordinator, Judicial Reform Team Office and Member, Working Group on Environmental Judges Certification</p>
	<p>Lucas Prakoso Organizing Committee</p>
	<p>Edward Simarmata Organizing Committee</p>
<p>Sri Suryati Organizing Committee</p>	

continued on next page

Table *continued*

Country/Organization	Participant
Lao People's Democratic Republic	Khampha Sengdara Deputy Chief Justice Supreme Court
	Khamxay Chittakone Senior Judge Supreme Court
	Sengsouvanh Chanthalonnavong Judge Supreme Court
Malaysia	YAA Tan Sri Arifin Zakaria Chief Justice Supreme Court
	Tan Sri Abdull Hamid Embong Justice Federal Court
	Nurul Husna Awang Registrar Supreme Court
	Zananah Asudin Permanent Mission of Malaysia to ASEAN
	Farah Rakesh Permanent Mission of Malaysia to ASEAN
Myanmar	H.E. Mya Thein Judge Supreme Court
Philippines	Presbitero J. Velasco, Jr. Associate Justice Supreme Court
Singapore	Philip Nalliah Pillai Judge Supreme Court
	Terence Tan Registry Supreme Court
	Simon Tay Chair, Singapore Institute of International Affairs and Senior Consultant, Wong Partnership
Thailand	Winai Ruangsri Senior Research Justice Supreme Court
	Manewan Phromnoi Judge Supreme Administrative Court

continued on next page

Table *continued*

Country/Organization	Participant
	<p>Prapot Klaisuban Judge Central Administrative Court</p> <p>Kidngarm Kongtrakul Li Associate Research Judge Supreme Court</p>
United Nations Development Programme (UNDP)	<p>Mas Achmad Santosa Member, Presidential Task Force to Eradicate Corruption in the Legal System (Presidential Anti-Judicial Mafia Task Force); Environmental Law and Governance Specialist; Senior Advisor for Human Rights, Legal and Justice Social Reform, UNDP-Indonesia</p>
United Nations Environment Programme (UNEP)	<p>Bakary Kante Director Division of Environmental Law and Conventions</p> <p>Wanhua Yang Officer in Charge Environmental Law in Asia and the Pacific Division</p>
Viet Nam	<p>Dang Xuan Dao Chief Judge, Economic Court Supreme People's Court</p> <p>Ha Tuan Hiep Interpreter / Translator Supreme People's Court</p>
Other Partner Agencies/ Institutions	<p>Clarissa C. Arida Director Programme Development and Implementation ASEAN Centre for Biodiversity</p> <p>Fitri Nisa ASEAN-WEN / FREELAND Foundation</p> <p>Sony Noulan International Criminal Investigative Training Assistance Program</p> <p>Tony Oposa President Laws of Nature Foundation</p> <p>Tint Lwin Thaug Executive Director RECOFTC – The Center for People and Forests</p> <p>Azrina Abdullah Former Senior Social Consultant, Environmental Resources Management and Regional Director, Southeast Asia, TRAFFIC Wildlife Trade Monitoring Network</p> <p>Nazir Foad Conservation Director World Wildlife Fund</p>

Appendix 5

A Common Vision on Environment for ASEAN Judiciaries

The Association of Southeast Asian Nations (ASEAN) Chief Justices' Roundtable on Environment, held in Jakarta on 5–7 December 2011, brought together chief justices and their designees from the highest courts of Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam, supported by the Indonesian Supreme Court, the Asian Development Bank, and the United Nations Environment Programme.

ASEAN faces common environmental challenges that require good governance to resolve. The foundation of good governance is the rule of law. Chief justices and the senior judiciary are the dedicated institutions of government that are the champions and guardians of the rule of law. Participants agree with the vision statement (below), and to developing an action plan for justice, governance, the rule of law, and sustainable development in ASEAN countries.

The roundtable had three objectives:

- (i) To share information among ASEAN chief justices and the senior judiciary on ASEAN's common environmental challenges.
- (ii) To highlight the critical role of ASEAN chief justices and the senior judiciary as leaders in national legal communities and champions of the rule of law and environmental justice, with the ability to develop environmental jurisprudence, and generate knowledge and action on ASEAN's environmental challenges among the judiciary, the legal profession, and law students.
- (iii) To develop a process for continuing the cooperation and engagement of ASEAN's senior judiciary on environmental issues.

Participants observed that the role of the judiciary in contributing solutions to these challenges is unique. But the entire environmental enforcement chain must be effective, particularly in the area of criminal enforcement where police and prosecutors play key roles. Participants agreed to go back to their national judiciaries and share the results of the roundtable, and further agreed the following:

- (i) The ASEAN judiciaries will collaborate among themselves and, as appropriate, with others engaged in the environmental enforcement processes, to significantly improve the development, implementation, and enforcement of, and compliance with, environmental law and collaborate upon an action plan to achieve it.

- (ii) The ASEAN judiciaries will share information on ASEAN countries' common environmental challenges among their own members and, as appropriate, among the legal profession, law schools, and the public.
- (iii) The ASEAN judiciaries will share information on environmental challenges and legal issues and best practices in environmental adjudication among themselves, acknowledging the differences among their respective legal systems.
- (iv) The ASEAN judiciaries will impose sanctions and penalties in accordance with their respective laws that are appropriate to the scale of environmental case or crime, and consider innovative remedies, in accordance with their respective legal systems, such as community environmental sentencing, or probation.
- (v) The ASEAN judiciaries will strengthen specialized environmental courts, tribunals, benches, and specialization programs (such as environmental certification), where they exist and consider establishing them where they do not yet exist.
- (vi) The ASEAN judiciaries will implement special rules of procedure for environmental cases where these already exist and consider developing and implementing them where they do not yet exist, which may include special rules of evidence for environmental cases, expediting cases, special remedies, injunctive relief, and other innovative environmental processes.
- (vii) The ASEAN judiciaries will implement special rules and procedures for alternative dispute resolution in environmental cases where these already exist and consider developing and implementing them where they do not yet exist.
- (viii) The ASEAN judiciaries will seek to ensure that judicial decisions on environmental cases are made available to the public and shared within the Asian Judges Network on Environment.
- (ix) The ASEAN judiciaries will ensure that timely and appropriate training on environmental legal issues is available for new and junior judges and all other judges adjudicating environmental cases, including through national judicial institutes, and will share among themselves information on different ways to impart this training, and make training a working component of the ASEAN Chief Justices' Roundtable on Environment.
- (x) The ASEAN judiciaries will encourage law schools to include environmental law in their respective curricula and legal professional associations to provide continuing legal education that includes environmental law and jurisprudence.
- (xi) The ASEAN judiciaries will seek to hold an ASEAN Chief Justices' Roundtable on Environment annually to further cooperation on environment, as a subregional grouping of the Asian Judges Network on Environment.

This statement will be shared at the upcoming Asian Judges Symposium, to be held in Manila in 2012.

Inaugural ASEAN Chief Justices' Roundtable on Environment The Proceedings

From 5–7 December 2011, chief justices and senior members of the Association of Southeast Asian Nations (ASEAN) judiciaries, and representatives from various governmental agencies, nongovernment organizations and civil society groups convened in an inaugural roundtable, in Jakarta, Indonesia, to discuss common environmental and legal challenges and the judiciary's role in championing environmental justice, developing environmental jurisprudence, and leading the rest of the legal profession towards credible rule of law systems. By the close of the roundtable, the participants were able to formulate A Common Vision on Environment for ASEAN Judiciaries statement, in which the senior judges committed to go back to their national judiciaries and help strengthen the environmental enforcement chain.

About the Asian Development Bank

ADB's vision is an Asia and Pacific region free of poverty. Its mission is to help its developing member countries reduce poverty and improve the quality of life of their people. Despite the region's many successes, it remains home to two-thirds of the world's poor: 1.7 billion people who live on less than \$2 a day, with 828 million struggling on less than \$1.25 a day. ADB is committed to reducing poverty through inclusive economic growth, environmentally sustainable growth, and regional integration.

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

Asian Development Bank
6 ADB Avenue, Mandaluyong City
1550 Metro Manila, Philippines
www.adb.org