

# ASIAN JUDGES, GREEN COURTS, AND ACCESS TO ENVIRONMENTAL JUSTICE: AN ASIAN JUDGES NETWORK ON THE ENVIRONMENT

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## Introduction

Asia is distinguished by unique ecological diversity. Asian countries collectively possess 20% of the world's biodiversity,<sup>1</sup> 14% of the world's tropical forests,<sup>2</sup> 34% of global coral resources,<sup>3</sup>

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1. ASEAN Center for Biodiversity, ASEAN's Rich Biodiversity, [http://www.aseanbiodiversity.org/index.php?option=com\\_content&view=article&id=79&Itemid=98](http://www.aseanbiodiversity.org/index.php?option=com_content&view=article&id=79&Itemid=98).

2. See generally FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS [hereinafter FAO], GLOBAL FOREST RESOURCES ASSESSMENT 2010 (noting also that Asia has had a net forest gain of more than 2.2 million hectares per year from 2000-2010. This was due mostly to China's afforestation program which served to counter the net loss in South and Southeast Asian countries).

3. David Obura & Gabriel Grimsditch, *Coral Reefs, Climate Change and Resilience: An Agenda for Action from the IUCN World Conservation Congress in Barcelona, Spain* 33-34 (Int'l Union for the Conservation of Nature, Working Group Paper No. 6, 2009); See also LAURETTA BURKE & MARK SPALDING, WORLD RES. INST., REEFS AT RISK IN SOUTH EAST ASIA (2002).

and the greatest number of fish and aquaculture in the world.<sup>4</sup> However, over the last thirty years environmental changes in Asia have been dramatic. These changes are fueled by consistently growing populations<sup>5</sup> coupled with rapid economic and industrial development to accommodate their needs. As a result, many of Asia's developing economies are now struggling to deal with desertification, deforestation, water scarcity, natural resource exploitation, air and water pollution, and hazardous waste contamination.<sup>6</sup> Moreover, Asia's contribution to global climate change will significantly increase over the next twenty years,<sup>7</sup> and the impacts of climate change will be sharply felt in Asia, worsening almost all other preexisting environmental problems. All such environmental problems significantly impact the quality of life of the people of Asia.<sup>8</sup>

The lack of effective environmental governance is central to most environmental problems in Asian countries. Governance failures occur at many levels — regional, sub-regional, national, provincial, and local. Most Asian countries have adopted some environmental laws, but many environmental challenges have not been sufficiently addressed by legislation. Countries may adopt laws, but fail to implement rules and regulations at national, provincial, and local levels. Or, effective implementation, enforcement, and compliance may, nonetheless, continue to present challenges.

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4. David Lymer, et al., *Status and Potential of Fisheries and Aquaculture in Asia and the Pacific*, ASIA PACIFIC FISHERIES COMMISSION 14 (2008) (The region is also identified as one of the highest fished in the world). Eighty-six percent of the world's fishers and fish farmers also live in the region. FAO, *THE STATE OF THE WORLD FISHERIES AND AQUACULTURE* 7 (2009).

5. Noeleen Heyzer, Undersecretary General of the United Nations and Executive Secretary of the Economic and Social Commission for Asia and the Pacific (ESCAP), Statement made on the occasion of the International Day for Disaster Risk Reduction and the ASEAN DAY for Disaster Management (Oct. 13, 2010) (where she notes that "the urban population in Asian cities would reach 2.3 billion by 2025 from the current 1.6 billion, with nearly half of the world's urban population living in the Asia-Pacific region.").

6. See generally WORLD BANK, *ENVIRONMENT STRATEGY FOR EAST ASIA AND THE PACIFIC xv-4* (2005).

7. Toufiq Siddiqi, *The Evolving Role of Asia in Global Climate Change*, 3 EWC INSIGHTS 1 (2008) (Noting that Asian countries are among the highest contributors of greenhouse gases, particularly CO<sub>2</sub>, due to rapid industrialization and population growth. It was further observed that 4 out of 10 of the countries with the highest CO<sub>2</sub> emissions are in Asia, with China ranking second, India fourth, Japan fifth and South Korea seventh. Developing countries such as the Philippines and Indonesia also contribute via burning of biomass and changes in land use.)

8. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [HEREINAFTER IPCC], IPCC FOURTH ASSESSMENT REPORT: CLIMATE CHANGE 2007, at 10 ES.

Importantly, those who exploit forests, minerals, or marine resources often do so illegally. National institutions dealing with the environment are weak and fragmented and do not coordinate well. Many institutions lack the fiscal and technical capacity to discharge their mandate. Many citizens lack the capacity to know what is environmentally wrong or when they have the right to bring a legal claim. Corruption is present throughout the process of industrial production, the provision of basic energy and water services, the exploitation of natural resources, and environmental enforcement.

Making environmental law work requires achieving effective compliance and enforcement.<sup>9</sup> The entire enforcement chain — environmental officials, legal prosecutors, civil society professionals, and members of the judiciary — need to perform their roles effectively, and interact with all other actors in an integrated way. Without law enforcement officials effectively apprehending and prosecuting civil and criminal offenders, the judiciary will be impotent. If members of civil society (including public interest environmental lawyers) do not have the capacity, or the legal right, to bring civil or administrative cases, few environmental cases will come to the attention of the courts.

However, enforcement officers and civil society need to be confident that the outcomes of filing cases in court will be worth the time and expense if they are to effectively play their role. They, and the community as a whole, need to perceive their national judiciary as possessing the integrity and skills to effectively dispose of environmental cases.

In this commentary, we explain ongoing work to improve one aspect of the chain of environmental enforcement: the judiciary. Chief justices and the senior judiciary lead the legal profession in their respective jurisdictions in shaping normative interpretations of legal and regulatory frameworks. They also issue rules and directions to lower courts that affect their priorities. They often play a role in judicial education. Thus, their influence is both direct and indirect. All these influences affect not only the courts, but also the way the legal system operates, stakeholder perceptions of the rule of law, and

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9. Durwood Zaelke, Matthew Stilwell & Oran Young, *What Reason Demands: Making Law work for Sustainable Development*, in MAKING ENVIRONMENTAL LAW WORK: ENVIRONMENTAL COMPLIANCE AND SUSTAINABLE DEVELOPMENT (Durwood Zaelke et al. eds., 2005).

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, all this affects private sector investment in related sectors.

Thus, while the judge's role in enhancing environmental governance and the rule of law depends upon other actors in the environmental compliance and enforcement chain, the judiciary retains a unique and distinct leadership role. We believe strengthening the capacity of Asian judges to decide environmental cases is a key part of improving environmental law enforcement and increasing access to environmental justice in Asia.

Part I of this commentary presents a historical overview of the judiciary in environmental governance at the international level. In Part II, we paint the landscape of environmental jurisprudence within key Asian jurisdictions. In some Asian countries, a growth in public interest environmental litigation has led to more judges with interest and expertise in environmental law and to an innovative and expanding body of environmental jurisprudence. This trend has also led to environmental courts (ECs) in Bangladesh, the Philippines and Thailand, and environmental tribunals (ETs) in India, Pakistan, South Korea, and Japan. But, we argue, substance and form will not necessarily coincide: the existence of an EC or ET, alone, is not evidence of effective environmental decision-making. In some Asian jurisdictions, an EC and/or ET may potentially improve environmental decision-making but a new EC or ET may not always be possible. Nor will it necessarily be the best way of improving environmental adjudication. Without more, it will not be sufficient. Access to environmental justice, path-breaking environmental jurisprudence, and effective routine environmental decision-making and environmental dispute resolution can (or may need to) be facilitated by a range of institutional forms. It affects how and where donors and development partners direct scarce resources to improve environmental adjudication. Part III describes the idea of an Asian Judges Network on the Environment, launched at the Asian Judges Symposium, hosted by the Asian Development Bank (ADB) and the United Nations Environment Programme (UNEP) and supported by participating Asian Judges.<sup>10</sup> Part IV concludes this commentary.

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10. The Access Initiative of the World Resources Institute, The Asian

## PART I: The Judiciary in International Environmental Governance

Judges play a key role in environmental enforcement and compliance. They can protect environmental rights expressly or impliedly enshrined in a constitution.<sup>11</sup> They can introduce international environmental law into national law, and they can make decisions that prevent environmental harm or provide remedies to compensate for it.<sup>12</sup>

Recognizing the judiciary's key role, the UNEP convened the largest gathering of senior judges from around the world at the Global Judges Symposium in Johannesburg, South Africa, in 2002. At this symposium, more than 120 participating judges committed to the Johannesburg Principles on the Role of Law and Sustainable Development ("Principles"). Those Principles saw judges agree to: use the judicial mandate for sustainable development and uphold the Rule of Law and democratic processes;<sup>13</sup> recognize an urgent need for regional and sub-regional initiatives to educate and train judges on environmental law;<sup>14</sup> and collaborate within and across regions to improve environmental enforcement, compliance, and implementation.<sup>15</sup>

Commentators and international organizations have also recognized the important role of the judiciary in environmental governance and sustainable development at the regional level.<sup>16</sup> In the lead-up to this symposium, UNEP had convened regional meetings of judges around the world, including in Asia.<sup>17</sup> To continue

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Environmental Compliance and Enforcement Network, The Philippines Supreme Court, and The U.S. Environmental Protection Agency (USEPA) were also supporting development partner hosts.

11. See, e.g., Lal Kurukulasuriya, Chief, Env'tl Law Program, UNEP, *The Role of the Judiciary in Promoting Environmental Governance and the Rule of Law, Global Environmental Governance: the Post-Johannesburg Agenda*, New Haven, U.S., Oct. 23-25, 2003.

12. *Id.*

13. *The Johannesburg Principles on the Role of Law and Sustainable Development*, Principle 1 (2002) (adopted at the Global Judges Symposium, held in Johannesburg, South Africa on Aug. 18-20, 2002), available at <http://www.unep.org/law/Symposium/Documents/RESOLUTION%201-FINAL%2020%20AUGUST.doc>, princ. 1.

14. *Id.*, princ. 3.

15. *Id.*, princ. 4.

16. See, e.g., Brian Preston, *The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific*, 9 ASIA PAC. J. OF ENV. L. 109, 113-14 (2005).

17. Meeting for countries in South Asia, organized in collaboration with the

the momentum, in 2004, four European judges established a European Union Forum of Judges for the Environment to share experiences on environmental law.<sup>18</sup> In Asia, the World Bank Institute, and the Asian Environmental Compliance and Enforcement Network (AECEN) supported several regional judges meetings, enlisting their support for protecting the environment.<sup>19</sup> However, despite some important bilateral work,<sup>20</sup> progress towards implementing the principles on the ground has not been rapid. Nor has there been broad regional-cross fertilization of environmental ideas or information amongst Asian judiciaries.

However, in June 2010, the world's largest gathering of judges and other legal stakeholders since the 2002 Global Judges Symposium, was held in Manila, Philippines, at the Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice.<sup>21</sup> Convened by the ADB and UNEP, over 110 judges,

South Asia Co-operative Environment Programme (SACEP), held in Colombo, Sri Lanka, in July 1997. The meeting for judges from the Southeast Asian countries was held in Manila, Philippines, in March 1999, while a meeting for judges from Pacific Island States was held in February 2002 in Brisbane, Australia. UNEP Executive Director's Background Paper to the Global Judges Symposium on Sustainable Development and the Role of Law, Aug. 18-20, 2002, Johannesburg, South Africa.

18. EU FORUM OF JUSTICES FOR THE ENVIRONMENT, <http://www.eufje.org/> (last visited Nov. 8, 2010).

19. In June 2004, the World Bank Institute convened a gathering for Southeast Asian countries on the Role of the Judiciary in Promoting Sustainable Development, Bangkok, Thailand, (see PAUL STEIN, REPORT ON BANGKOK AND KATHMANDU (2004), available at [http://weavingaweb.org/pdfdocuments/LN230704\\_Bangkok\\_Nepal.pdf](http://weavingaweb.org/pdfdocuments/LN230704_Bangkok_Nepal.pdf)). Subsequently, the Philippines Supreme Court and the Philippine Judicial Academy convened an Asian Justices Forum on the Environment in Manila in July 2007; John Paul P. Galang, *SC Hosts Asian Justices Forum on Environment*, BENCHMARKONLINE 2007, <http://sc.judiciary.gov.ph/publications/benchmark/2007/07/070703.php> (sponsored by AECEN, U.S. Agency for International Development (USAID), U.S. EPA, Asia Pacific Jurist Association (APJA), and the Supreme Court Program Office). A follow-up Forum on Environmental Justice was convened in 2009. Kala Mulqueeny & Sherielysse Bonifacio, *Asian Judges, Green Courts and Tribunals and Environmental Justice*, L. & POL. REF. BRIEF No. 1 (Apr. 2010).

20. AECEN has been instrumental. It established the Asian Justices Forum on the Environment in partnership with the United States Environmental Protection Agency (USEPA), UNEP, the Economy and Environment Program for Southeast Asia (EEPSEA) and the Asia Pacific Jurists Association (APJA). See Asian Environmental Compliance and Enforcement Network, *Strengthening Asian Judiciaries*, <http://www.aecen.org/strengthening-asian-judiciaries> (last visited Nov. 8, 2010).

21. Participants of the Symposium included judges, environmental officials and decision-makers, and civil society representatives from Australia, Bangladesh, Belgium, Brazil, India, Indonesia, France, Japan, Korea, New Zealand, Pakistan,

environmental ministry officials, and civil society participants from Asia, Australia, the United States and Brazil sought to continue where past events had left off.

Prior to this Symposium, in 2009, several senior Asian judiciaries had asked us for information on what judges in other jurisdictions were doing to strengthen their capacity to decide environmental cases and to develop an environmental jurisprudence. The next section sketches a broad response.

## **PART II: The Asian Landscape of Environmental Jurisprudence**

Two key features mark the Asian landscape of judicial and quasi-judicial decision-making on environmental and natural resource issues. First, in many Asian countries, superior courts have developed a relatively sophisticated environmental jurisprudence. For example, judges in South Asia and the Philippines have, expressly or impliedly, interpreted their respective constitutions as affording citizens a right to a healthy environment.<sup>22</sup> They have also handed down landmark decisions introducing principles of international environmental law from the Stockholm and Rio Declarations<sup>23</sup> (such as "inter-generational responsibility,"<sup>24</sup> "the precautionary principle"<sup>25</sup> and "the polluter pays principle"). Such principles have been used to preserve cultural heritage like the Taj Mahal and natural heritage like the Ganges River.<sup>26</sup> Notable cases have also introduced innovative

the People's Republic of China, the Philippines, the United States, Sri Lanka, and Thailand who convened to share cutting edge experiences on the evolution of environmental jurisprudence and adjudication in their respective jurisdictions, and learn from prior successes and failures in facing the challenges of achieving effective environmental decision-making. It was supported by key development partners including the UNEP, USEPA, The Access Initiative of the World Resources Institute, the Asian Environmental Compliance and Enforcement Network (AECEN) and the Supreme Court of the Philippines.

22. See, e.g., *Oposa v. Factoran*, G.R. No. 101083 (S.C., July 30, 1993) (Phil.); *M.C. Mehta v. Union of India*, A.I.R. 1988 S.C. 1037, 1045 (1987) (Kanpur Tanneries case); *Farooque v. Bangladesh*, Civil Appeal No. 24 of 1995, 17 B.L.D. (AD) 1, 1-33 1997.

23. Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), U.N. Doc. A/Conf.48/14/Rev. 1(1973), *reprinted in* 11 I.L.M. 1416 (1972); Rio Declaration on Environment and Development (Agenda 21), UN Doc. A/CONF.151/26 (vol. I) *reprinted in* 31 I.L.M. 874 (1992).

24. *Oposa*, *supra* note 22.

25. *Mandalawangi case* (2003), Indonesian Supreme Court.

26. *M.C. Mehta v. Union of India* (Taj Trapezium case), A.I.R. 1988 S.C. 1037;

remedies, such as the writ of continuing mandamus (which compels government agencies to clean up pollution and gives the court ongoing jurisdiction to monitor them).<sup>27</sup> The doctrine of public trust (whereby the government holds natural resources for the benefit of the public, and preserves their use), has been adopted in Sri Lanka and several other Asian jurisdictions.<sup>28</sup> Worth noting is that while many superior courts have begun to develop path-breaking environmental jurisprudence, most trial courts struggle with excessive dockets and the need for increased technical, fiscal, and human capacity in all areas of legal adjudication, making it difficult to direct particular resources to strengthening their capacity to decide environmental and natural resource cases. Second, since the late 1990s, several Asian countries have formally adopted one or more ECs or ETs and this trend seems to be continuing. ECs and ETs are one way of achieving effective environmental adjudication and dispute resolution, and have many advantages.<sup>29</sup> In developing Asia, a key advantage is that resources for capacity building and environmental law expertise may be concentrated in a smaller number of judges who are specifically selected for their integrity and expertise.

However, the experience of several Asian ECs and ETs shows that they are not a panacea. Environmental jurisprudence — or the case law reflecting the thinking or ideology behind environmental decision-making — is not synonymous with the institutional form of the decision-making body. Path-breaking environmental jurisprudence can result from generalist courts. To date, general courts, environmental divisions of general courts ("green benches"), ECs, ETs, and grass-roots alternative dispute resolution, or grass roots legal aid outreach, all demonstrate possible ways of adjudicating or resolving environmental disputes and expanding access to environ-

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M.C. Mehta v. Union of India (Ganges Pollution case), A.I.R. 1988 S.C. 1115.

27. Vineet Narain v. Union of India, A.I.R. 1996 S.C. 3386 (India); Bandhua Mukti Morcha v. Union of India, A.I.R. 1984 S.C. 802 (India); Concerned Residents of Manila Bay v. M.M.D.A., G.R. Nos. 171947-48, (Dec. 8, 2008) (Phil.).

28. Bulankulama v. Secretary, Ministry of Industrial Development (Eppawela case) Application No. 884/99, Supreme Court of Sri Lanka 243 (Apr. 7, 2000).

29. See GEORGE PRING & CATHERINE PRING, GREENING JUSTICE: CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS (THE ACCESS INITIATIVE 2009), at 14-16, available at <http://www.accessinitiative.org/resource/greening-justice> and <http://www.law.du.edu/ect-study> (available free of charge electronically at both websites).

mental justice. Establishing ECs and ETs may not be possible in certain jurisdictions or may not be necessary. In any event, alone these courts cannot adequately adjudicate or resolve environmental issues.<sup>30</sup> The importance of determining the most effective intervention to promote environmental specialization in a particular context is that it affects how and where donors direct scarce resources.

We provide a brief sketch of environmental jurisprudence and modes of environmental specialization in selected Asian developing countries below. The sketch does not purport to be comprehensive, but it provides a sample of the issues arising in these jurisdictions.

## (1) South Asia

### *a. India*

The Supreme Court of India has decided many environmental cases using unique and novel judicial innovations that have served as both national and international landmark precedents. Over the past twenty-five years, it has protected individual rights and the public's interest in environmental protection under the constitution.<sup>31</sup> It has interpreted the constitution's guarantee of a right to life expansively as including a right to a wholesome and pollution-free environment.<sup>32</sup>

Many environmental lawyers remark upon many Indian Supreme Court decisions as progressive and path-breaking. Indian environmental jurisprudence is also marked by relaxing procedural barriers for public interest litigants to facilitate their access to the courts.<sup>33</sup> And the Supreme Court of India has integrated international

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30. For example, the European Union has generally not used environmental courts, but has developed a system of environmental jurisprudence and decision-making that is notable. Similarly, the United States rejected the idea of a national environmental court, but has developed strong environmental case law without one (although the Environmental Appeals Board of the USEPA, which reviews appeals on water and air pollution cases, has served as the principal environmental tribunal for these matters, with litigants rarely seeking to appeal its decisions to federal courts.)

31. Geetanjoy Sahu, *Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence*, 4 L. ENV. & DEV. J. 1 (2008), available at <http://www.lead-journal.org/content/08001.pdf>.

32. *M.C. Mehta v. Union of India*, A.I.R. 1988 S.C. 1037, 1045 (1987) (Kanpur Tanneries case).

33. *See, e.g., M.C. Mehta v. Kamal Nath*, A.I.R. 1997 S.C. 388 (the court taking judicial notice of environmental news to initiate a case); *Rural Litigation and Entitlement Kendra v. State of Uttar Pradesh*, A.I.R. 1988 S.C. 2187, 2189 (allowing litigants to petition the court through a simple letter); *T.N. Godavarman*

environmental law principles into its decisions.<sup>34</sup> Yet critics charge that such decisions are "contrary to the traditional legalistic understanding of the judicial function."<sup>35</sup> In any event, these decisions evidence a court that, although not being a specialist EC, is responsible for innovative environmental jurisprudence.<sup>36</sup>

India has also established several ETs. In 1995, the National Environment Tribunal was established to handle hazardous waste cases.<sup>37</sup> In 1997, the National Environment Appellate Authority was created to deal with public challenges to environmental clearances issued to the private sector.<sup>38</sup> Neither body is currently operating; critics claim that neither of these bodies was ever functional.<sup>39</sup>

Against that backdrop, in October 2010, India established a National Green Tribunal (NGT),<sup>40</sup> with broad jurisdiction to expeditiously dispose of civil environmental cases.<sup>41</sup> The Tribunal requires petitioners to come before it prior to going to court.<sup>42</sup> The Tribunal also restricts those who may file claims,<sup>43</sup> introduces a five year time-bar from the start of an environmental problem within which to bring a claim,<sup>44</sup> and does not allocate responsibility for

Thirumulkpad v. Union of India, W.P. No. 202 of 1995 (Continuing mandamus by providing ongoing supervision of environmental clean-up post decision).

34. See, e.g., *Narmada Bachao Andolan v. Union of India* A.I.R. 2000 S.C. 2751, 3804 (defining "sustainable development"); *Indian Council for Enviro Legal Action v. Union of India*, A.I.R. 1996 S.C. 1446 (adopting the polluter pays principle); *Vellore Citizens Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715, 821[37]-[39] (declaring that the precautionary principle is part of the law of India).

35. Sahu, *supra* note 31, at 4.

36. In 2000, however, the Supreme Court asked the Law Commission of India to consider establishing a specialist environmental court. *A.P. Pollution Control Board v. M.V. Nayudu*, 2001 2 S.C.C. 62. The Law Commission responded in its 186<sup>th</sup> report with a recommendation to constitute environmental courts. Ishwer Singh, *The National Green Tribunal Act, 2010 - A Step Forward in Environmental Adjudication in India*, available at <http://www.scribd.com/doc/36957172/Ishwer-Singh-The-National-Green-Tribunal-Act-2010-A-Step-Forward-in-Environmental-Adjudication-in-India>.

37. The National Environmental Tribunal Act, No. 27 of 1995.

38. The National Environmental Appellant Authority Act No. 22 of 1997.

39. Armin Rosencranz et al., *Whither the National Environment Appellate Authority?*, 44 INDIA ENVTL. PORTAL 10 (2009), available at <http://www.indiaenvironmentportal.org.in/content/whither-national-environment-appellate-authority>.

40. The National Green Tribunal Act, No. 19 of 2010. The Act was approved in April, and notified by the President in October 2010.

41. *Id.* §§ 3, 14(1), 16, and 22.

42. *Id.* § 22.

43. *Id.* §§ 16, 18.

44. *Id.* § 15(3).

compensation if damage is established.<sup>45</sup> The government establishes its rules and the Supreme Court can hear appeals.<sup>46</sup>

Critics contend the NGT undermines advances made by the Supreme Court in environmental protection and conserving natural resources.<sup>47</sup> Some allege that the government sought to constrain the Supreme Court's expansive environmental jurisprudence; other critics argue that the formal rules will make it harder for the poor to bring claims under the NGT because of additional procedural hurdles.<sup>48</sup> In short, if the NGT makes it harder for petitioners to access environmental rights, it will be a set-back not a step forward, irrespective of its green label.

### *b. Bangladesh*

Innovations in environmental jurisprudence in Bangladesh have occurred in non-specialist courts. As in India (and Pakistan), the Bangladesh courts have interpreted the "right to life" under the constitution to include the "right to protection and preservation of the ecology" and the "right to have a pollution free environment."<sup>49</sup> It has liberalized standing rules,<sup>50</sup> and has also given decisions that incorporate the international environmental law principles of sustainable development,<sup>51</sup> the polluter pays,<sup>52</sup> and precaution<sup>53</sup> within its jurisprudence.

As of September 2010, Bangladesh was set to establish new environment courts in sixty-four districts under proposed amend-

45. *Id.* § 15(4).

46. *Id.*

47. Armstrong Vaz, *How Green Will Be the Green Tribunal?*, DIGITAL JOURNAL (Nov. 7, 2010, 9:15PM), <http://www.digitaljournal.com/article/287989>; Meena Menon, *How Green is My Tribunal?*, THE HINDU (Nov. 7, 2010, 9:20PM), <http://www.thehindu.com/opinion/op-ed/article503099.ece?css=print>.

48. Vaz, *supra* note 47; Menon, *supra* note 47.

49. Jona Razzaque, *Access to Environmental Justice: Role of the Judiciary in Bangladesh*, 4 BANGL. L.J. 1 (2000).

50. Mohiuddin Farooque v. Bangladesh, Civil Appeal No. 24 of 1995, 17 B.L.D. (AD) 1, 1-33 1997.

51. *Id.*

52. *Id.*; Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh, Writ Petition No. 1430 of 2003 (pending for hearing).

53. *Id.*; Bangladesh Environmental Lawyers Association (BELA) v. Bangladesh, Writ Petition No. 2224 of 2004 (The High Court division issued a stay order and injunction protecting and conserving the Sunderbans against a development order) (pending).

ments to an existing Environmental Courts Act adopted in 2000.<sup>54</sup> The existing act provides for three types of ECs. First, Special Magistrate Courts for sixty-four Districts Magistracy and five Metropolitan Magistrates to try petty cases like air pollution by motor vehicles;<sup>55</sup> second, a divisional EC with jurisdiction over major environmental offenses and disputes,<sup>56</sup> and third, an EC for appeals from the ECs.

Divisional ECs have been established and are operational in Dhaka (the national capital) and Chittagong (a regional capital). In Sylhet, a judge has been assigned to hear environmental cases that arise in that area.<sup>57</sup> Although from 2003 to July 2010, the Dhaka EC disposed of 238 of 372 cases filed,<sup>58</sup> the existing act is not regarded as generally successful. Under that act, citizens are required to file a case with the Ministry of Environment and seek its approval for filing before proceeding against polluters.<sup>59</sup> The new amendments will remove this requirement: if the ministry does not act within sixty days, then the aggrieved citizen could go to court. However, the amendments will allow the ministry to seek to mediate any case filed before the courts.<sup>60</sup> Critics claim this right could still be used to defeat the purposes of filing.<sup>61</sup> Hence, Bangladesh illustrates a jurisdiction that has begun to develop an environmental jurisprudence in its superior courts, but does not have a good track record with its ECs. For the new ECs to change that, significant resources will need to follow the formal structural change.

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54. The Environment Court Act, 2000 Act No. 12 of 2000 (Bangl.).

55. *Id.* arts. 5 B, 5 C.

56. *Id.* art. 5.

57. Interview with Fowzul Azim, Judge, Dhaka Divisional Environment Court, November 12, 2010.

58. Personal Communication, Fowzul Azim to Sherielysse Bonifacio, July 22, 2010.

59. Gurumia.com, Strong Laws for Safe Climate: Bangladesh to Establish 64 Environment Courts, <http://gurumia.com/tag/bangladesh-environment-courts/>. On July 20, 2010, Bangladesh announced the approval by cabinet and prime ministers of a bill to establish a new environmental court, which would soon be put to Parliament. *Bangladesh plans environment court to jail polluters*, WORLD BULLETIN, [http://www.worldbulletin.net/news\\_detail.php?id=61538](http://www.worldbulletin.net/news_detail.php?id=61538).

60. BD CAN, The Environment Court (Amendment) Bill 2010, <http://desheralo.com/news.details.php?news=638> (Aug. 16, 2010).

61. *Id.*

*c. Pakistan*

As in India and Bangladesh, the Pakistan Supreme Court has expansively interpreted its constitution to include certain environmental rights. In 1992, the Supreme Court appointed a judge to hear environmental public interest cases.<sup>62</sup> Two years later, the Supreme Court held that the constitution's fundamental right to life included the right to a clean and healthy environment.<sup>63</sup> Thereafter, starting with this landmark precedent and under the leadership of the chief justice, an important environmental jurisprudence has begun to evolve.<sup>64</sup> By way of example, the Pakistan Supreme Court has moved to eliminate procedural barriers to public interest environmental cases<sup>65</sup> and to reflect international environmental law principles within national law.<sup>66</sup>

In addition, the 1997 Pakistan Environmental Protection Act (1997 Act) established first-instance ETs to handle serious civil and criminal environmental complaints filed by government or individuals (including public interest cases) and to hear appeals against orders of the national or local Environmental Protection Agencies. Appeals from these tribunals go to the High Court and then to the Supreme Court. The 1997 Act, which was adopted in response to civil society and international organization pressure, was not implemented until 1999, when the Supreme Court directed that the ECs and ETs be established.<sup>67</sup> In Sindh, it was not until 2007 that the EC became operational.

The 1997 Act also established an "environmental magistrate" with jurisdiction to hear criminal and other related offenses at the

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62. Jona Razzaque, *Environmental Human rights in South Asia: Towards stronger participatory mechanisms* 4 fn.26, Roundtable on Human Rights and the Environment (Geneva, Mar. 12, 2004), organized by Geneva Environment Network available at [http://www.cleanairnet.org/caiasia/1412/articles-58293\\_Jona.doc](http://www.cleanairnet.org/caiasia/1412/articles-58293_Jona.doc).

63. Shehla Zia v. W.A.P.D.A., P.L.D. 1994 SC 693.

64. Parvez Hassan, *Environmental Protection, Rule of Law and the Judicial Crisis in Pakistan*, International Congress on Environmental Law (Rio de Janeiro, Brazil, May 22-24, 2007) (in tribute to Professor Charles O. Okidi).

65. General Secretary, West Pakistan Salt Miners Labour Union v. The Director, Industries and Mineral Development, 1994 S.C.M.R. 2061; In re: Human Rights Case (Environment Pollution in Balochistan), P.L.D. 1994 S.C. 102 (taking notice of news items revealing hazardous waste).

66. See Zia, *supra* note 63 (the precautionary principle).

67. Ashraf Jahan, *Pakistan Country Case Studies for Environmental Courts and Tribunals* (Paper delivered at the Asian Judges Symposium on Environmental Decision-Making, the Rule of Law and Environmental Justice at the Asian Development Bank, Manila) (July 28-29, 2010) (on file with authors).

district court level. All four High Courts in the provinces of Pakistan have empowered environmental magistrates whose decisions can be appealed to the Court of Sessions (the primary criminal trial court) and then to the High Court and the Supreme Court.

## (2) People's Republic of China

The People's Republic of China's (PRC) constitution recognizes the state's responsibility to protect and improve the living and ecological environment; to prevent and control pollution and other public hazards; and to organize and encourage forest protection and afforestation.<sup>68</sup> However, the PRC has experienced significant environmental problems stemming from rapid economic development, which has led to a growing number of environmental disputes, most of which are resolved through the administrative process.<sup>69</sup>

The number of environmental cases filed in courts of general jurisdiction (people's courts) has been steadily increasing. China has a four-level court system: Basic Courts, Intermediate Courts, Provincial High Courts and the Supreme Peoples' Court (SPC). In 2005, the number of environmental disputes heard in the general people's courts reached a record of nearly 700,000, and the average number of environmental disputes has increased by 25% each year since 1998.<sup>70</sup> Moreover, while public interest litigation is not widespread, the Center for Legal Assistance to Pollution Victims (CLAPV) has had some notable, successful environmental cases.<sup>71</sup> A 2010 ADB report suggested that the efficient and effective resolution of environmental disputes within the general people's courts is hampered by the fact that judges often lack training in environmental laws, refuse to accept environmental cases, or make decisions inconsistent with other precedent.<sup>72</sup>

Given the foregoing, much foreign and local attention has been placed on the potential for specialist courts in the PRC.<sup>73</sup> Established

68. XIANFA art. 26 (1982) (China).

69. Kala Mulqueeny & Sherielysse Bonifacio, *supra* note 19, at 4.

70. TUN LIN ET AL., GREEN BENCHES: WHAT CAN THE PEOPLE'S REPUBLIC OF CHINA LEARN FROM ENVIRONMENT COURTS OF OTHER COUNTRIES? 5 (2009) (hereinafter GREEN BENCHES, 2009).

71. Wang Canfa, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VER. J. OF ENV. L. 159, 178-183 (2006).

72. GREEN BENCHES, 2009, *supra* note 70, at 9-10.

73. The Supreme Peoples' Court has formally recognized specialist maritime

mostly within the last five years and mainly in response to serious environmental pollution accidents, twelve ECs have been created at the city level in three Chinese provinces: Guizhou, Jiangsu, and Yunnan. These courts determine administrative, civil, and criminal cases. Some provinces have further plans for new ECs.<sup>74</sup> Environmental public interest litigation is not yet widespread in the PRC, meaning that some of these courts may have very limited dockets and may be required to justify their continued existence.

Until July 2010, the Supreme People's Court (SPC) had not authorized these ECs but tolerated them as an experiment. Thus, the ECs' legal power and authority was unclear, and they risked being shut down.<sup>75</sup> However, in July 2010, the SPC made an announcement encouraging the creation of lower ECs. Subsequently, in November 2010, Beijing's first environmental court opened in Yanqing district.<sup>76</sup>

At least in the short term, however, the impact of these ECs will be localized and limited. The general people's courts will continue to be relevant to the resolution of environmental disputes.

### (3) Southeast Asia

#### *a. Philippines*

The Philippines Supreme Court has handed down internationally recognized landmark judgments<sup>77</sup> based upon innovative

courts and forest courts. It held two conferences on judges and water pollution in 2008 and 2009 respectively and called for courts to accept public interest water pollution cases. The Asia Water Project: China, Green Courts: a new case for the environment, <http://www.asiawaterproject.org/regulatory-trends/litigation/>.

74. GREEN BENCHES, 2009, *supra* note 70, at 2. Alex Wang & Jie Gao, Environmental Public Interest Litigation in China, paper prepared for Asian Judges Symposium on Environmental Decision Making, the Rule of Law, and Environmental Justice, ADB (Manila, Philippines, July 28-29, 2010) (hereinafter Wang & Gao, 2010).

75. Personal Communication, Xiaohua Peng, Lead Counsel, Asian Development Bank, to author, June 2, 2010 (suggesting that there is no concept of green bench or environmental courts or tribunals under SPC guidance); *see also* Wang & Gao, 2010, *supra* note 74.

76. China Green News, Beijing Opens First Environmental Protection Court, <http://eng.greensos.cn/ShowArticle.aspx?articleId=591>.

77. The starting point for the court is the Philippine's Constitution which recognizes a right to the environment: "[T]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature." CONST. (1987), Art. II, § 16 (Phil.).

petitions filed by public interest environmental lawyers.<sup>78</sup> The Court famously recognized the standing of several minors to sue on their own behalf and on behalf of "generations yet unborn" — the first court worldwide to do so.<sup>79</sup> In 2008, it borrowed from Indian environmental jurisprudence, in recognizing the remedy of "continuing mandamus," which obliged eleven government agencies to clean up a polluted Manila Bay and allowed the court to continue to monitor the implementation of its decision through a committee.<sup>80</sup>

Specialist courts have been formally adopted. Forestry courts had been designated, but they were never fully operational. In January 2008, the chief justice designated 117 municipal and regional trial courts across the country as ECs (including forty-five former forestry courts).<sup>81</sup> These ECs also retain their general jurisdiction. Presiding judges need not have environmental law expertise. Hence, expansive dockets and limits to technical and resource capacity, present significant challenges to any real advances in trial level environmental decision-making based specifically upon these ECs.

In April 2009, the Philippine Supreme Court initiated work on Rules of Procedure for Environmental Cases (the Rules), which it adopted in April 2010.<sup>82</sup> The Rules include provisions preventing Strategic Legal Actions Against Public Participation, the Precautionary Principle; a Writ of Continuing Mandamus and a Writ of Kalikasan (or "nature"), which seeks to protect constitutional environmental rights by directing a respondent to perform an act or stop an unlawful act involving certain types of significant environmental damage. The rules also have provisions to expedite hearings, including a one-year period for judges to conclude an environmental case.

The Philippines also has two ETs: the Pollution Adjudication

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78. *Director of Forestry v. Munoz*, G.R. No. L-24796 (S.C., June 28, 1968); *Tan v. Director of Forestry*, G.R. No. L-24548 (Oct. 27, 1983); *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120 (March 16, 1994).

79. *Oposa v. Factoran*, G.R. No. 101083 (S.C., July 30, 1993) (Phil.).

80. *Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay*, G.R. No. 171947-48 (S.C., Dec. 18, 2008) (Phil.).

81. Leila Salaverria, *SC Designates 117 Environmental Courts*, PHIL. INQ. NET., Jan. 14, 2008, [http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080114-112156/SC\\_designates\\_117\\_environment\\_courts](http://newsinfo.inquirer.net/inquirerheadlines/nation/view/20080114-112156/SC_designates_117_environment_courts).

82. Republic of the Philippines Supreme Court, *Rules of Procedure in Environmental Cases*, Effective April 29, 2010, <http://sc.judiciary.gov.ph/Rules%20of%20Procedure%20for%20Environmental%20Cases.pdf>. The authors provided support for this work.

Board (PAB)<sup>83</sup> and the Mines Adjudication Board (MAB),<sup>84</sup> which are both housed within the Department of Environment and Natural Resources (DENR). The PAB is co-equal with a regional trial court<sup>85</sup> and has original jurisdiction over air and water pollution cases.<sup>86</sup> The MAB can hear appeals from Panels of Arbitrators in DENR Regional Offices related to mining disputes.<sup>87</sup> Like the PAB, the MAB can bring any acts before it if they relate to a pending case and could cause grave or irreparable damage to the parties or seriously affect social and economic stability.<sup>88</sup> Critics charge these ETs with being intolerably slow; some cases have been pending for up to ten years. In short, progressive Supreme Court environmental jurisprudence has led to important structural and procedural reforms. But to make the structural reforms establishing ECs work will require significant investments in capacity building and civil society.

### *b. Thailand*

The Thai Supreme Court of Justice and the Thai Supreme Administrative Courts have both contributed to environmental decision-making. Thailand has four different court systems: the Supreme Courts of Justice, the Supreme Administrative Courts, the Constitutional Court, and the Military Court.

The Thai Supreme Court is the highest court of appeal for civil cases between private entities. Recognizing the increase in environmental litigation, and a need for judicial expertise in the area, it has established eleven green benches. In 2005, it established the first one at the Supreme Court level. Subsequently, in 2007, it established ten

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83. Providing for the Organization of the Department of Environment, Energy and Natural Resources; Renaming it Department of Environment and Natural Resources and for Other Purposes, Exec. Ord. 192, Sec.19 (1987).

84. See Panel/MAB Rules – Significant Provisions, <http://www.mgb.gov.ph/Files/Policies/Significant%20Provisions.pdf> (last visited Nov. 21, 2010).

85. Pollution Control Law, And for Other Purposes Rep. Act No. 3931, Pres. Dec. No. 984, § 7 (d) (1976).

86. An Act Creating the National Water and Air Pollution Control Commission, Rep. Act No. 3931 (1964); An Act Providing for a Comprehensive Water Quality Management and for Other Purposes, Rep. Act. No. 9275 (2004); An Act Providing for a Comprehensive Air Pollution Control Policy and for other purposes, Rep. Act No. 8749 (1999).

87. An Act Instituting a New System of Mineral Resources Exploration, Development, Utilization, and Conservation, Rep. Act No. 7942, Sec. 78 (1995).

88. *Id.*, § 79(c)(2).

green benches at the Courts of Appeal level. Green benches at the trial court level are currently being considered. The Thai Supreme Court is also in the process of developing procedural rules for the environment to address standing, evidence, and alternative dispute resolution.

The Thai Supreme Administrative Court's jurisdiction includes environmental cases relating to administrative actions of government officials. It has established one green bench at the trial court level in the Central Administrative Court in Bangkok and has recently established eighteen environmental chambers. The court is also considering a proposal to establish an environmental bench at the Supreme Administrative Court level. The green benches established under the two court systems follow more flexible procedures than ordinary courts and may conduct site visits and on-site fact finding.

Because Thailand is a civil law jurisdiction, judges' interpretations of the constitution and Thai legislation, rather than evolving environmental jurisprudence, are determinative in environmental decision-making. Thailand's constitution lays the framework for broad environmental governance and the individual rights of participation and environmental quality.<sup>89</sup> During the 1990s, and 2000s, public interest environmental lawyers litigated cases in the Supreme Court<sup>90</sup> and the administrative courts giving effect to these protections.<sup>91</sup> The Supreme Administrative Court has given effect to principles of "liberalized standing,"<sup>92</sup> "direct applicability and enforceability of constitutional rights,"<sup>93</sup> and "prevention,"<sup>94</sup> and to applying technical rules flexibly where it would afford substantive justice.<sup>95</sup>

### *c. Indonesia*

The Indonesian judiciary could play a significant role in assisting with the enforcement and compliance of natural resource and

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89. Constitution of the Kingdom of Thailand (B.E. 2540) [Thailand], art.67, B.E. 2540 (1977)

90. See, e.g., Klity Creek Judgment, Victory for Local Residents in Kilty Creek Case, <http://www.angkor.com/2bangkok/2bangkok/forum/showthread.php?t=3558>

91. *Id.*

92. Sridhavaravadi Group Case (Order 247/2552 of the Supreme Administrative Court) (Thai).

93. Map Ta Phut Case, Central Administrative Court Ruling, Red Case No. 1352/2553), available at [http://www.thia.in.th/download/05\\_01\\_hia\\_news/Constitution67\\_decision\(02-09-53\).pdf](http://www.thia.in.th/download/05_01_hia_news/Constitution67_decision(02-09-53).pdf).

94. *Id.*

95. Sakhom Canal Mouth Case, Songkla Administrative Court Order, Black Case No. 16/2551.

environmental laws and has decided some important cases. For example, in the 2003 landmark *Mandalawangi* case, the Supreme Court affirmed the application of the precautionary principle.<sup>96</sup> However, despite judicial recognition of this key principle of international environmental law, Indonesia continues to have significant environmental problems, with the judiciary currently playing a limited role in environmental protection.

Since about 1998, public interest lawyers, donors, and members of the Ministry of Environment, have sought to foster and develop environmental law specialists. From 1998 to 2005, the Indonesia Center for Environmental Law (ICEL) played an important part in providing short courses on environmental law and training for members of the legal profession, including judges.<sup>97</sup> Over 1,500 people and about 600 judges received specialized environmental legal training. However, despite apparently successful environmental training, most trained judges are not currently deciding environmental cases.<sup>98</sup> Neither the court nor donors established a system to ensure that they would be applying their new skills.<sup>99</sup>

The Indonesian constitution conclusively established Indonesia's court structure without an EC, thus preventing an EC being added to the court structure.<sup>100</sup> However, since the early 2000s, ICEL has actively helped the Supreme Court and the Ministry of Environment consider alternative ways of achieving environmental specialization within the judiciary. As a first step, in late 2009, the Ministry of Environment and the Supreme Court entered into a Memorandum of Understanding with two objectives: First, to establish a program to certify judges with environmental law expertise; and second, to develop rules on the handling of environmental cases. As a result, in March 2010, the Chief Justice established a High Level Taskforce

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96. Indonesia Supreme Court Verdict No. 1974 K/Pdt/2004 jo.; Bandung High Court Verdict No. 507/Pdt/2003/PT Bdg jo.; Bandung District Court Verdict No. 40/Pdt.G/2003/PN. Bdg jo.

97. AusAID funded these programs.

98. Windu Kisoro, Draft Report to the Asian Development Bank on Judicial Certification, Sept. 2010 (on file with authors).

99. *Id.*

100. Article 24(2) of the Indonesian Constitution 1945. (The judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court. General (Administrative and civil/criminal), Religious, Military Courts).

comprised of members of the Supreme Court and senior members of the judiciary and the Ministry of Environment to oversee the program. The group was tasked with developing a program and reporting back by the end of 2010.

The judicial certification scheme seeks to strengthen the capacity of the judiciary to handle environmental cases by certifying judges trained in environmental and natural resource law as experts. Under a technical assistance program, ADB is supporting the certification program and working with the Supreme Court in seeking to institutionalize the systems to ensure that judges trained and certified with environmental expertise actually decide environmental cases.<sup>101</sup>

ADB's current work is examining the Indonesian judiciary's pre-existing certification programs to determine an appropriate model. Programs already exist for forestry, fisheries, commercial law, anti-corruption, and other specialist areas. Under the environmental certification program, the Supreme Court would certify judges as possessing environmental expertise after they have completed environmental training. Continued certification would be subject to ongoing conditions to retain environmental expert status. If a certified judge breached those conditions, certification could be revoked.

The Indonesian Supreme Court will need to ensure that rules of court are adopted to ensure that certified environmental judges decide environmental cases (and so avoid a repeat of the 1998-2005 experience whereby hundreds of judges were trained in environmental law, but relatively few now decide environmental cases). If such rules of court are adopted, Indonesia would establish a system of environmental specialization and strengthen the capacity of judges to decide environment and natural resources cases that do not depend upon the adoption of ECs or ETs.

#### *d. Malaysia*

Malaysian environmental plaintiffs face many challenges in seeking relief in Malaysian Courts.<sup>102</sup> Court decisions have ruled that

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101. ADB Regional technical assistance 7474, Strengthening of Judicial Capacity to Adjudicate Upon Environmental Laws and Regulations, <http://pid.adb.org/pid/TaView.htm?projNo=43572&seqNo=01&typeCd=2> (Nov. 8, 2010).

102. But earlier this year, a high court in Sarawak, Borneo, issued an important environmental decision declaring a lease issued for palm oil agriculture illegal. *Court Voids Malaysian Palm Oil Giant's Leases on Native Lands*, ENV'T NEWS SERVICE, Apr. 1, 2010, <http://www.ens-newswire.com/ens/apr2010/2010-04-01-01>.

only persons who can demonstrate sufficient connection with or interest in the subject matter in dispute can seek a judicial remedy.<sup>103</sup> This connection or interest has not been liberally interpreted, and, accordingly, acts as a barrier to a plaintiff achieving standing.<sup>104</sup> Plaintiffs also have a high burden of proof to establish damages as well as a limited period for filing cases, both of which make it difficult for plaintiffs to seek redress.

Plaintiffs also face challenges in the specialized planning appeal boards established in three of Malaysia's eleven states. These planning boards are quasi-judicial tribunals established at the state level and appointed by state government units. They have authority over land use planning and development decisions of local planning authorities, but are not otherwise ECs or ETs.

The 1974 Environmental Quality Act established an Environmental Quality Appeal Board (EQAB) within the Department of Environment (DOE). The EQAB has been authorized to hear appeals from the DOE Director's license refusals, conditions, revocations, and related negative license decisions. Rules for this tribunal were adopted in 2003.

### PART III: An Asian Judges Network on the Environment

Over a decade of scholarly work has documented the faults and virtues of trans-governmental networks. Proposed virtues include strengthening capacity and socializing values (like integrity, justice, and environmental protection).<sup>105</sup> Trans-governmental networks are loosely structured cross-border alliances of government officials with common professional ties, which in their judicial stripe involve "interaction across, above and below borders, exchanging ideas and cooperating in cases."<sup>106</sup> They are touted as a mode of global

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html.

103. ALAN K. TAN, PRELIMINARY ASSESSMENT OF MALAYSIA'S ENVIRONMENTAL LAW. APCEL REPORT: MALAYSIA (1998), available at <http://law.nus.edu.sg/apcel/dbase/malaysia/reportma.html>.

104. See, e.g., *Kajing Tubek v. Ekran Bhd* (1996) 2 M.L.J. 388 (Malay.); *Ketua Pengarah Jabatan Alam Sekitar & Anor. v. Kajing Tubek* (1997) 3 M.L.J. 23 (Malay.).

105. Anne-Marie Slaughter & David Zaring, *Networking Goes Global: an Update*, 2 ANN. REV. L. & SOC. SCI. 211 (2006).

106. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1104 (2000).

governance that can promote environmental enforcement by promoting convergence and socialization of national and international norms, and providing a venue for technical assistance.<sup>107</sup>

In the field of environmental governance in Asia, several regional and international global networks have been contributing to improvements in environmental enforcement and compliance. For example, the Association of South-east Asian Nations — Wildlife Enforcement Network (ASEAN-WEN), the world's largest wildlife enforcement network fills in the gaps in national enforcement in Southeast Asia.<sup>108</sup> The Asia Pacific Fisheries Commission (APFIC) promotes the full and proper use of living aquatic resources around the Asia-Pacific by developing and managing fishing and aquatic culture operations.<sup>109</sup> AECEN promotes environmental enforcement through connections among environmental ministries and agencies from around Asia,<sup>110</sup> while the International Network on Environmental Compliance and Enforcement is an international network devoted to similar purposes.<sup>111</sup>

However, not all such networks have produced considerable gains. In 2001, forest law enforcement officials entered into a Ministerial Agreement on Forest Law Enforcement and Governance in East Asia (FLEG) that according to the World Bank, has facilitated a dialogue but achieved very little concrete progress.<sup>112</sup>

A few judges' networks also serve similar purposes. They share and exchange information on successes and challenges, improve national and regional jurisprudence, and serve as a forum for capacity building and bilateral exchanges. The European Union Forum of Judges for the Environment is one example.<sup>113</sup> LAWASIA also has

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107. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L. L. 1 (2002).

108. ASEAN-WEN, Action Update: Major/Model Law Enforcement Actions in Southeast Asia to Protect Threatened Flora and Fauna (Jan.-March 2010).

109. Indo-Pacific Fisheries Commission, *Agreement for the Establishment of the Asia Pacific Fisheries Commission* (Oct. 1996).

110. See generally About AECEN, Asian Environmental Compliance and Enforcement Network, <http://www.aecen.org/about-aecen>.

111. See generally International Network on Environmental, Compliance and Enforcement, <http://www.inece.org/>.

112. ARNOLDO CONTRERAS-HERMOSILLA, WORLD BANK, FOREST LAW ENFORCEMENT AND GOVERNANCE PROGRAM: REVIEW OF IMPLEMENTATION (2007).

113. European Union Forum of Judges for the Environment, <http://www.eufje.org/> (last visited Nov. 7, 2010).

similar goals, but is not exclusively focused on the environment.<sup>114</sup>

So why an Asian Judges Network on the Environment (AJNE)? What might it do? And what are the challenges to it being effective?

Asian chief justices and judges attending the Asian Judges Symposium in June 2010 have sought to continue the process of collective sharing and capacity building they began there, recognizing they have much to gain by exchanging experiences and working together.<sup>115</sup> The Philippines chief justice, for example, observed "a great willingness to create a regional network of judicial institutions" because they "share similar concerns and threats. . .which are at times borderless."<sup>116</sup> Indonesia's chief justice proposed hosting a sub-regional round-table of Chief Justices on the Environment from the Association of South-east Asian Nations (ASEAN) in Jakarta in 2011,<sup>117</sup> and South-Asian senior judiciaries proposed a similar sub-regional round-table for South-Asian Chief Justices.

Several Asian judges made the point that their shared judicial bond was unique. They offered general support for environmental work done by other arms of government (and other environmental and legal professionals), but made clear that their own professional needs deserved dedicated focus, noting that their professional ties with judges across borders would often be closer than ties with fellow nationals given their shared issues. Indeed, since many nationals appear in court with specific agendas it is sometimes challenging for judges and nationals to engage in honest shared problem-solving.

Overall, participants shared experiences on environmental jurisprudence and mapped a collective agenda 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.<sup>118</sup>

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114. Lawasia, <http://lawasia.asn.au/> (last visited Nov. 7, 2010).

115. News Release, Asian Development Bank, Asian Chief Justices, Judges Propose Network to Promote Environment Justice (July 30, 2010), <http://www.adb.org/media/Articles/2010/13293-asian-environment-justice/>.

116. Chief Justice Corona, *Asian Judges and the Environment, Capacity Needs and the Potential for a Network*, Asian Judges Symposium, July 28-29, 2010, available at <http://www.scribd.com/doc/37133068/Renato-Corona-Talking-Points-Asian-Judges-and-the-Environment-Capacity-Needs-and-Potential-for-a-Network>.

117. Asian Development Bank, *supra* note 115.

118. Asian Development Bank, *supra* note 115.

So, what might an AJNE do? There are five elements to the agenda abstracted from ideas raised at the Asian Judges Symposium. First, the simple sharing of experiences of current actions, common problems, and challenges would be an important start. While some communication can be through electronic exchanges, nothing substitutes for face-to-face meetings. Such meetings would have to take place at least bi-annually for judges to share national experiences of successes and challenges, set targets and timetables for future milestones, and be accountable for set goals, by having a time-table for ensuring that such goals are met. Reigniting the International Union for Conservation of Nature/UNEP Judicial Portal, a confidential internet-based way for judges to communicate and share environmental information, would be a great way to continue the contacts in between meetings.<sup>119</sup> Ultimately, a full internet portal and website could deploy information and allow communication.

Second, an AJNE can widely deploy environmental law resources and training materials, and, in fact, many resources and materials have already been developed. UNEP, ADB, TRAFFIC the USEPA, and others, long ago prepared important training materials and tomes of environmental law that can be easily shared and more widely distributed online.<sup>120</sup> As a first step, these materials have all been linked to the Asian Judges Symposium website. They would be transferred to an AJNE portal and site in the future.

Third, an AJNE with a shared 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.

Fourth, in a region as large as Asia, an AJNE would need to

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119. IUCN, JUDICIAL PORTAL FACTSHEET, [http://weavingaweb.org/pdf/documents/DEV09\\_JudicialPortalFactSheet.pdf](http://weavingaweb.org/pdf/documents/DEV09_JudicialPortalFactSheet.pdf). The portal was launched in 2002, but has not been maintained.

120. UNEP, JUDICIAL HANDBOOK ON ENVIRONMENTAL LAW CAPACITY BUILDING FOR ENVIRONMENTAL LAW IN THE ASIAN AND PACIFIC REGION: APPROACHES AND RESOURCES - VOLUMES I&II (Donna Craig, Koh Kheng-Lian & Nicholas Robinson, eds., 2002); UNEP, JUDGES AND ENVIRONMENTAL LAW: A HANDBOOK FOR THE SRI LANKAN JUDICIARY (Dinah Shelton & Alexandre Kiss, eds., 2005); UNEP, COMPENDIUM OF SUMMARIES OF JUDICIAL DECISIONS IN ENVIRONMENT RELATED CASES (2004), available at <http://www.unep.org/dec/PDF/UNEPCompendiumSummariesJudgementsEnvironment-relatedCases.pdf>.

promote specific activities at sub-regional and national levels. The proposed ASEAN and South-Asia sub-regional roundtables could inspire chief justices to induce their respective legal professionals to forge common sub-regional agendas within a group of countries whose contexts are even more alike.

Fifth, an AJNE could be a venue for promoting more bilateral exchanges. For example, in December 2009, Indonesian judges visited the Thai and Philippines judiciaries to learn about ECs and environmental specialization. Moreover, AECEN has connected Thai Supreme Court Judges with their counterparts from the Land and Environment Court, New South Wales, Australia in a twinning program to facilitate work on environmental law.<sup>121</sup>

Finally, many countries in Asia are vast in size. An AJNE would only be effective at the regional and sub-regional levels 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, an AJNE would need to promote national champions to lead and advance a national program for judges and the legal profession as a whole.

What challenges are there to establishing a functional AJNE? Three key challenges are ownership, administration, and sustainability. First, to be effective, any network needs to be demand driven: it must be strongly owned by those who would reap its benefits; its agenda needs to be determined by its owners. Donor and partner support should coalesce around that agenda. Establishing a rotating national chair of the AJNE, supported by a small stable secretariat would help resolve the ownership challenge.

Second, even with strong ownership, the capacity of owners to administer the agenda may be hampered by limited time, fiscal and/or human resources. Thus, support for a secretariat or administrative facility must be available initially from donor resources.

Third, a network must be sustainable over time and over changes in individual participants. The virtues of the network — its

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121. News Release, AECEN, AECEN Facilitates Thai and Australian Judicial Partnership on the Environment, Mar. 16, 2009, <http://www.aecen.org/aecen-facilitates-thai-and-australian-judicial-partnership-environment>.

informality, loose connections, and flexibility — could also be its downfall. A minimal level of design and structural stability together with fiscal and administrative support needs to be established to ensure its continuity.

Further, participation in an AJNE could not be confined to one or two individuals. The goals and values of the AJNE's agenda must be shared by participating superior national courts, and not just individual participating judges, in order to ensure institutional commitment over time.

Moreover, the network cannot be expensive to run. Though initial budgetary support may be donor-sourced, overtime participants need to be willing to uphold the low cost of participation for it to be self-sustaining. Similarly, administration and management needs to be initially supported, but overall, must not require significant additional administrative resources beyond contributions of time from participants and donors in the longer term.

#### **Part IV. Conclusion**

Asia will continue to experience dramatic environmental and climate change over the next twenty to fifty years. These changes in the region compel an immediate and urgent response to implement policies and strategies that will ensure a more sustainable Asia. A holistic look at environmental governance must be a key part of such policies and strategies. Any considerations of architectural redesigning of Asian environmental governance will require the architects of such policies and responses to pay attention to ensuring effective compliance and enforcement of environmental law. In turn, this will require ensuring that the complete environmental compliance and enforcement chain is effective. Judges, among others, play an important role in improving environmental enforcement and, accordingly, must be given some dedicated attention. Moreover, we have argued that the senior judiciary in Asia — as leaders of the legal profession in Asian countries — are important for improving environmental enforcement not only for their direct actions in making environmental decisions, developing environmental jurisprudence, or establishing ECs, but also for championing the cause and leading the rest of the legal profession towards credible rule of law systems that have integrity and promote environmental sustainability

Our survey of the landscape of the work of environmental

judges within key Asian jurisdictions has shown that some superior courts are making progressive and innovative environmental law. Nevertheless, there is still a long way to go before citizens have access to environmental justice and environmental protection is the norm in practice.

Our parallel review of ECs and ETs has also shown some impressive developments in establishing new environmental judicial and quasi-judicial institutions in Asia. However, some of these ECs and ETs seem not to be structured to fully promote environmental protection and citizen access (e.g. India and Bangladesh). For other ECs, courts and donors will need to deploy significant fiscal and technical resources if they are to fulfill their promise (e.g. Philippines).

The idea of an AJNE seeks to harness the collective Asian judicial experience in environmental decision-making — its successes and failures — and to strengthen judicial capacity in this area of the law in the service of improved environmental adjudication at national levels. Yet it assumes more than just shared experience and collective problems. It relies on judges viewing themselves and each other as connected by the shared professional mission of advancing justice that extends beyond their own national jurisdiction.<sup>122</sup> "It requires that judges see one another not only as servants or even representatives of a particular government or polity, but as fellow professionals in a profession that transcends national borders."<sup>123</sup> Moreover, it adds the additional core value that is "environmental" justice. Through these intangible connections, in conjunction with the more practical ones, an AJNE would be an important way to mobilize interest, support, and energy around strengthening the capacity of judges to decide environmental and natural resource cases in Asia.

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122. Slaughter, *supra* note 106, at 1124.

123. *Id.*