3rd SOUTH ASIA JUDICIAL ROUNDTABLE ON ENVIRONMENTAL JUSTICE FOR SUSTAINABLE GREEN DEVELOPMENT
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COLOMBO, SRI LANKA

BACKGROUND PAPER

Abstract

The 3rd South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development brings together Chief Justices, senior judges, legal practitioners, the academe, members of civil society, and experts from various fields to consider common environmental challenges in the region, share experiences, and discuss opportunities for cooperation between judiciaries to enhance environmental adjudication and enforcement, and the promotion of environmental justice. It will also have the participation of senior judges and jurists from other regions of the world.

In support of the Roundtable discussions, this paper provides the following: i) an overview of key environmental challenges across South Asia in the context of each country’s economic and social status; ii) outlines environmental laws and institutions in place; iii) highlight instances where judiciaries have expanded the environmental mandate; and iv) describes the basis of the discussions that will take place at the Roundtable.

The views expressed in this paper are those of the author and do not necessarily reflect the views and policies of 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.
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1. Introduction

1.1. Document Outline

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

This paper adopts the literature of the earlier Roundtables. The paper is presented on the basis that the 3rd Roundtable is a logical continuation of the work already done under the 1st and 2nd Roundtables.

1.2. Initiative Background

1.2.1. Environmental challenges and the role of the Judiciary

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

Law is one of the key instruments of social regulation. This is achieved through the establishment of norms of conduct and the creation of the required machinery for ensuring that such norms are effectively complied with. In the field of environmental management, national

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1 Adopted from Bacow, S. Lawrence & Wheeler, Micheal; “Environmental Dispute Resolution”; Plenum Press; New York - London; 1987
and international legislation have been extensively applied in the past thirty years or so, to promote the triple goals of environmental management: pollution control; natural resource conservation and use; and protection of the cultural and aesthetic environment. Since the 1992 United Nations Conference on Environment and Development gave legitimacy to the concept of sustainable development, these goals are no longer viewed from a purely environmental perspective but in the context of the integration of environment and development. Thus, a fourth dimension of environmental regulation is added to the sphere of environmental law, namely, the integration of environment in development decision-making.

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

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

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

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

Based on the discussions, several initiatives were proposed to enhance the efficacy of the justice sector towards improving environmental safeguards. One of the key proposals was the establishment of the Asian Judges Network on Environment (AJNE) to be the forum for diffusion of knowledge and experiences in dealing with environmental rule of law matters in the region. It

is in this background that in December 2010, ADB approved a regional technical assistance project entitled “Building Capacity for Environmental Prosecution, Adjudication, Dispute Resolution, Compliance, and Enforcement in Asia”, to initially support two sub-regional groups in South Asia (South Asia Association for Regional Cooperation, or SAARC) and South East Asia (Association of South East Asian Nations, or ASEAN).  

1.2.3 South Asian Roundtable on Environmental Justice

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

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

This was followed by the second roundtable held in Thimpu, Royal Kingdom of Bhutan in August 2013, where the Thimpu Declaration was adopted which focused on enhancing understanding of shared environmental challenges within South Asia, sharing challenges and successes in environmental adjudication experienced by different countries in the region, and furthering the cooperation between South Asian judiciaries by advancing the Bhurban Declaration.  

It was also in Thimpu that the participants approved the draft MoU and agreed to sign the same during the next Roundtable.

The focus of both Roundtables was on judiciaries of South Asia through participating senior justices. The deliberations among the justices were enriched by many legal practitioners, technical experts from various fields and disciplines, academics, and civil society members sharing their knowledge, experiences, perspectives, and opinions. As a result, the Roundtable provided a forum through which the judges benefited by interacting with a wide group of

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5 Ibid.
6 Thimpu Declaration on enhancing environmental justice in South Asia; Royal Kingdom of Bhutan; 2013
stakeholders from different sectors, which would not be possible solely through Court processes, due to inherent limitations in procedural and evidentiary rules.

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

The 3rd South Asia Judicial Roundtable on Environmental Justice for Sustainable Green Development will be held in Colombo, Sri Lanka organized by the Supreme Court of Sri Lanka and ADB. This roundtable will essentially follow the format of the earlier Roundtables and provide a forum for the chief justices and other senior judges of the region to continue the dialogue on environmental justice. Being the 3rd Roundtable, the emphasis would, to a certain degree, shift in assessing the progress made so far by presenting for deliberations country status reports by the attending judges, in addition to new discussions of environment and development. At the conclusion of the Roundtable, there will be the drafting of practical action ideas to be implemented thereafter.

The 3rd Roundtable will also focus on areas that are of immediate significance to the region. The main areas to be discussed include: i) “Taking Stock” under which recent developments in environmental law and environmental justice will be discussed; ii) “Environment and Development” under which, ecosystems services and natural capital, green considerations in urban planning, tourism and urban development, gender issues affected by the environment, and judicial response to community forest issues would be discussed; and iii) “Environmental Adjudication”, a session which will discuss the strengths and weaknesses of court-based environmental adjudication and open for discussion the appropriateness of prioritizing alternative dispute resolution mechanisms, such as mediation, to deal with environmental conflicts which, by their very nature presents a unique set of challenges in furthering justice.

2 Regional Context

2.1. State of the environment

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

During the last decade or so, the region has experienced change in many spheres, including population growth, rapid urbanization, economic development, and improvements to infrastructure facilities. The 5th Report of the Intergovernmental Panel on Climate Change
(IPCC)\textsuperscript{7} has identified major environmental challenges that South Asia will continue to face: warming trends and increasing temperature extremes; water scarcity; decline in food productivity; threats faced by both fresh and sea water maritime systems due to rising sea levels; and high incidence of extreme climate events. In addition, South Asia is also facing multiple stresses caused by rapid urbanization, industrialization, and economic development. The report predicts that climate change will affect the sustainable development capabilities of most Asian developing countries by aggravating pressures on natural resources and the environment.

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

2.1.2 SAARC response

In this background, the environment has been considered as an issue of regional importance by the South Asian countries, through SAARC. Heads of State or governments of SAARC at successive Summits have reiterated the need to strengthen and intensify regional cooperation to preserve, protect, and manage the diverse and fragile eco-systems of the region, including the need to address the challenges posed by climate change and natural disasters. SAARC initiatives include: the \textit{Regional Study on the Causes and Consequences of Natural Disasters and the Protection and Preservation of the Environment} (1991) followed by \textit{Green House Effect and Its Impact on the Region} (1992); establishment of a Technical Committee on Environment (1992); Special Session of the Environment Ministers in the aftermath of the Indian Ocean Tsunami (Malé - 2005); SAARC Ministerial Meeting on Climate Change (Dhaka - 2008); Delhi Statement on Cooperation in Environment (2009); and common SAARC position on Climate Change (2010).\textsuperscript{8} Furthermore, Regional Centers such as the SAARC Coastal Zone Management Centre in the Maldives, the SAARC Forestry Centre in Bhutan, the SAARC Disaster Management Centre in India, and the SAARC Meteorological Research Centre in Bangladesh constitute a framework of SAARC institutions which address diverse aspects of environment, climate change, and natural disasters.\textsuperscript{9}

2.1.2 Social Indicators of South Asia

South Asia is the home to 1.6 billion people with unique social and economic indicators. The region, having inherited one of the largest river systems in the world, has an estimated 60% of

\textsuperscript{7}http://www.ipcc.ch/report/ar5/wg3/

\textsuperscript{8}SAARC Secretariat (http://saarc-sec.org/areaofcooperation/cat-detail.php?cat_id=54)

\textsuperscript{9}Ibid.
the population dependent on agriculture as their livelihood,\textsuperscript{10} making both land and irrigation water vital resources. The region has experienced steady economic growth with the per capita GNI at US$1,474 in 2013 and life expectancy at birth reaching 67 years.\textsuperscript{11} The CO2 emissions of South Asia is at 1.5 mt per capita while the world average is at 4.9 mt per capita (2010).\textsuperscript{12}

Globally, 1.2 billion people (22 percent) live on less than $1.25 a day; and in South Asia 44.4 percent of the population, around 730 million people, live on $1.25–$2.50 a day.\textsuperscript{13} Approximately 20\% of the global population lives in the region with expectations for this figure to go up 25\% by 2025.\textsuperscript{14} According to the UN’s Millennium Development Poverty Index,\textsuperscript{15} South Asia is the second poorest region in the world after Sub-Saharan Africa.\textsuperscript{16} The human development Index measures three basic dimensions of human development: healthy life, knowledge, and a decent standard of living measured through health, education levels, and income. Of the South Asian countries, only one is considered to have a high level of human development (Sri Lanka), three are at the medium level (Maldives, India, Bhutan), and four have a low level of human development (Bangladesh, Nepal, Pakistan, and Afghanistan).\textsuperscript{17}

The Human Development Report of 2014, in assessing the risks faced due to climate change, has assessed small island states, coastal cities, and smallholder farmers as “those standing to lose most from climate change”, and identifies smallholder farmers in South Asia as particularly vulnerable.\textsuperscript{18}

2.2 South Asian environmental law background

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

\textsuperscript{11} World Bank Group; Data Sources; http://data.worldbank.org/region/SAS (accessed on 27 July 2014)
\textsuperscript{12} ibid. http://data.worldbank.org/topic/environment
\textsuperscript{14} UNEP, 2009. South Asia Environmental Outlook, Nairobi
\textsuperscript{15} The human development Index measures three basic dimension of human development, notably a long and healthy life, knowledge and a decent standard of living measured through health, education levels, and income.
\textsuperscript{17} Gawel, Antonia; “Background Paper - 2nd South Asia Judicial Roundtable on Environmental Justice”; Asian Judged Network on Environmental; www.asianjudges.org ; 2013
\textsuperscript{18} Ibid.
multilateral environmental agreements, legal instruments, and important judicial pronouncements.

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

### 2.2.1 Afghanistan

Afghanistan has primarily an agricultural economy with close to 80% of the population relying directly on the country’s environmental resources. As a result, the environmental capital of Afghanistan is under severe pressure impacting livelihoods, health, and poverty levels. These are also constraining Afghanistan’s post-conflict reconstruction and development efforts. Some of the current environmental problems include: unequal distribution of water resources leading to scarcity in some regions; deforestation combined with livestock grazing and water scarcity leading to increased soil erosion; desertification and reduced fertility and ecosystem services; floods, mudslides and rapid water drainage during the wet season; land degradation and resource scarcity; and existing chemical contamination of some air, soil, and water resources.20

Afghanistan’s constitution requires the State’s commitment to adopt “necessary measures to protect and improve forests as well as the living environment”. With the passage of the 2007 Environmental Act, Afghanistan introduced a legal and institutional framework for environmental management. The law provides for the environmental rights and obligations of the Afghan people and imposes obligations on the Government. The National Environmental Protection Agency is the lead in environmental management, with other institutions at the national, provincial, and local levels providing support. The legislation provides for pollution control and waste management and obligates the Government to: apply the fundamental principles of environmental management; involve the public in relevant environment-related decision-making; develop policies, laws and regulatory instruments which seek to conserve and restore the environmental resource base of the country; implement the international environmental conventions of which Afghanistan is a member; monitor environmental indicators and collect and make available environmental information; and enforce environmental laws. The management of natural resources is generally a function of the line ministries, especially the

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19 Constitutional analysis in this section based on work included in Dr. Parvez Hassan, 2012. Environmental Jurisprudence from Pakistan: Some Lessons for the SAARC Region. South Asia Conference on Environmental Justice.


ministry of Agriculture, Irrigation and Livestock, with the exception being the management of certain aspects of biological diversity, including protected areas management and species protection, mandates shared by the National Environmental Protection Agency.22

2.2.2 Bangladesh

Bangladesh mostly consists of low and flat land with hilly regions in the northeast and southeast of the Country. While there has been significant progress in poverty reduction, per capita Gross Domestic Product (GDP) in Bangladesh remains in the bottom quintile of the nations of the world, indicating that it has limited resources for adapting to climate shocks. Bangladesh covers an area of 147,570 sq. km and is one of the most densely populated countries in the world. The total population of the country in 2009 was estimated at 146.6 million, with a population density of 993 per sq. km.23 Bangladesh is recognized to be one of the most susceptible countries in the world, highly vulnerable to climatic manifestations (short-term and long-term impacts of climate change) due to its unique geographic location, hydro-geological characters like dominance of floodplains, low elevation from the sea, and socio-economical characters.24

The Constitution of Bangladesh highlights that, “The State shall endeavor to protect and improve the environment and to preserve and safeguard the natural resources, bio-diversity, wetlands, forests, and wildlife for the present and future citizens”.25 The Environment Conservation Act of 1995, Environmental Court Act of 2000, and the Environment Conservation Rules make up the key legislative provisions in the country. The Environmental Court Act granted jurisdiction to deal with cases concerning environmental issues and the 2010 amendment permits any person to file for compensation against an offending organization. The Government of Bangladesh, by adopting the National Environmental Policy, International Environmental Law and Policy, and National Water Policy has set up a robust policy framework to address its environmental concerns. Formal responsibilities for the overall environment sector are vested with the Ministry of Environment and Forest. However, many other institutions, directly and indirectly, are involved in managing or shaping the different aspects of the environment.

2.2.3 Bhutan

Bhutan is a landlocked country in the Eastern Himalayas of South Asia. It is home to a population of just under 700,000 within a landmass of 38,394km². The glaciers in the North of the country, and significant altitude differential between North and South over a short distance

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22 ibid
of 140km, has also provided Bhutan with one of its more important natural resource endowments: glacial fed rivers that flow down the country and into bordering India. The development of these glacial rivers for hydropower production is a core economic development strategy for Bhutan. Bhutan is home to a diverse ecosystem, ranked amongst the top ten countries with the highest species density in the world and recognized as a global biodiversity hotspot. Bhutan has the highest proportion of land in Protected Areas, with five national parks, four wildlife sanctuaries and a nature reserve, covering an area of 16,396.4 km², or 42.7% of the country. Additionally, Bhutan has the highest proportion of forest cover of any Asian country, currently maintaining 72% forest cover, with a Constitutional requirement that at least 60% of the country remain covered by forest for all time.\textsuperscript{26}

Bhutan’s 2008 constitution outlines that, “Every Bhutanese is a trustee of the Kingdom’s natural resources for the benefit of present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation, and rich biodiversity of Bhutan and prevention of all forms of ecological degradation including noise, visual, and physical pollution through the adoption and support of environment friendly practices”.\textsuperscript{27} The National Environment Protection Act, 2007 sets the overarching legal framework for environmental protection and management in Bhutan. Under this Act, the National Environment Commission is the overall apex authority of developing environmental policies and regulations, monitoring their implementation, and designating ‘Competent Authorities’ with the responsibility and mandate to develop and implement relevant regulations under the Act. With this as a guiding framework, a number of issue and sector-specific Acts for waste management, water, mines and minerals, forest and nature conservation, environmental assessment, biodiversity and labor, supported by regulations and guidance documents have also been developed.

\textbf{2.2.4 India}

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

Article 48A of the Indian Constitution operationalizes environmental stewardship through State responsibility and individual duty by mandating both the State, to “endeavor to protect and improve the environment and to safeguard the forests and wild life of the country,”\textsuperscript{28} and the people to be responsible to “protect and improve the natural environment including forests,

\footnotesize{\textsuperscript{26}Gawel, Antonia; “Background Paper - 2nd South Asia Judicial Roundtable on Environmental Justice”; Asian Judged Network on Environmental; www.asianjudges.org ; 2013
\textsuperscript{28}Government of India, Ministry of Law and Justice, 2007. The Constitution of India. lawmin.nic.in/coi/coiason29july08.pdf.}
lakes, rivers and wild life, and to have compassion for living creatures". The Constitution also encourages environmental management through decentralized structures. Development of environmental protection policies can be seen from the early 1990s. The National Environmental Action Plan for Control of Pollution (1992) and the National Conservation Strategy (1992) can be cited as two important policy initiatives that were very much based on the constitutional environmental stewardship principles. Post 1990s, there is a policy shift towards integration of environmental considerations by harmonizing conservation, efficient management of resources, economic efficiency, and social justice. India’s legal framework include overarching laws (e.g., Environmental Protection Act), natural resource management laws, pollution control laws, environmental justice laws (e.g., Green Tribunals Act of 2010), laws dealing with decentralized governance, and laws on other issues such as consumer protection, health, and safety.

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

2.2.5 Maldives

The Maldives consists of 1,192 islands in the Indian Ocean spread over 510kms. Environmental issues in Maldives include dwindling water resources, increasing population creating sanitation and waste management problems resulting in the pollution of waters surrounding the islands, and rise in sea level due to global warming and climate change. The IPCC in its report published in 2013 stated that the issue of global warming is much more serious than their estimates in 2007. Maldives, one of the lowest lying countries in the world built on coral reefs, will be directly affected. In addition, the dependence on diesel fuel will be further aggravating

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29 Ibid., Article 51A(g).
32 Ibid.
environmental challenges.\textsuperscript{33} The Maldives lists beach erosion, coral mining, dredging, flooding due to land reclamation, population growth, solid waste and sewerage, waste oil, and soil degradation as key environmental challenges.\textsuperscript{34}

The Constitution of the Maldives highlights the duty to respect the environment, stating that, “The State has a fundamental duty to protect and preserve the natural environment, biodiversity, resources, and beauty of the country for the benefit of present and future generations.” The State is further responsible for fostering ecologically balanced sustainable development, “taking measures necessary to foster conservation, prevent pollution, the extinction of any species and ecological degradation….\textsuperscript{35} The Ministry of Planning and Environment of the Maldives adopted the National Environment Action Plan (1989), setting-up a framework for action in the area of environmental assessment and management. The Environmental Protection and Preservation Act of Maldives (1993) introduced Environmental Impact Assessments (EIAs). Overarching conservation initiatives are by the Environmental Protection Agency established under the Environmental Protection and Preservation Act, by merging the then Environmental Research Center and Maldives Water & Sanitation Authority.

\textbf{2.2.6 Nepal}

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

Article 16 of the Interim Constitution of Nepal emphasizes the right to live in a healthy environment. The Environment Protection Act of 1996 and Environment Protection Regulations of 1997 set up the core legal framework for environmental protection and management. In particular, the efforts taken under the Environmental Protection Act and the Environmental Protection Rules to curb and regulate air pollution and emissions are noteworthy. The Government of Nepal took an initiative to establish the Department of Environment under the Ministry of Science, Technology and Environment in July 2012, with a view to bring the concept of environmental management to the grass root level; to resolve the problems created by climate change due to anthropogenic factors; to coordinate between governmental, non-governmental, and private organizations; and to implement effective monitoring of environmental management.\textsuperscript{36} Nepal also has a series of policy documents that dealt with

\textsuperscript{33} The Guardian; “The Maldives is the extreme test case for climate change action”; http://www.theguardian.com/environment/damian-carrington-blog/2013/sep/26/maldives-test-case-climate-change-action

\textsuperscript{34} Mohamed Khaleel and Simad Saeed; “Environmental Changes in the Maldives: Current Issues for Management”; FAO (available at http://www.fao.org/docrep/x5623e/x5623e0r.htm#TopOfPage)


\textsuperscript{36} Nepal: Department of Environment; (available at http://doenv.gov.np/about-us-2/)

2.2.7 Pakistan

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

Pakistan has made significant progress in successfully combatting some of these challenges. The UNDP, in its 2013 Report, notes that of the seven MDG indicators (Ensuring Environmental Sustainability), Pakistan is on track to achieve four. The report further states that the country has made in-roads in relation to protecting areas for wildlife conservation, reducing sulphur content in diesel, GDP per unit energy, and access to safe drinking water. According to the Joint Monitoring Program of the World Health Organization and the United Nations Children’s Fund, access to an improved water source increased from 83% in 1990 to 91% in 2004. Furthermore, improved sanitation coverage increased from 37% to 59% within the same period.

Pakistan’s legal and institutional framework has made significant progress with the enactment of the first consolidated environmental legislation, the Pakistan Environmental Protection Ordinance of 1983. It created the Pakistan Environmental Protection Council as a high level policy-making body together with a number of federal and provincial environmental protection agencies. Consequent to attending the Earth Summit in 1992, Pakistan became a signatory to many international and regional environmental conventions. The National Conservation Strategy (NCS) was prepared in 1992 followed by Environmental Quality Standards in 1993. The Pakistan Environmental Protection Act (PEPA) was enacted in 1997, repealing the Pakistan Environmental Protection Ordinance, 1983. The PEPA provides the framework for implementation of NCS, establishment of Provincial Sustainable Development Funds, protection and conservation of species, conservation of renewable resources, establishment of Environmental Tribunals and appointment of Environmental Magistrates, Initial Environmental Examination (IEE), and EIA. Recently Pakistan enacted the Environmental Tribunal Procedures and Qualification Rules (2000), Environmental Tribunal Procedures and Qualification Rules (2001), and Pakistan Trade Control of Wild Fauna and Flora Act (2012). Due to a recent Constitutional Amendment, the environment has become a provincial subject and the provinces are now in the process of enacting and adopting provincial environmental acts. Following the Bhurban Declaration of 2012, environmental “Green Benches” have been established in the
courts of Pakistan dedicated to adjudicate upon environmental disputes. The judiciary of Pakistan has also introduced many important environmental concepts through judge made law.

2.3 South Asian judicial action to enhance environmental protection

The Judiciary in South Asian countries has played an important role over the past 20 years in upholding fundamental rights and taking progressive decisions in favor of environmental protection. The UNEP, in a 2004 publication has compiled the contributions that South Asian Judiciaries and some other jurisdictions outside the region, have made towards environmental rule of law. They include the following:

i) The **principle of sustainable development** (Supreme Court of India in *Vellore Citizens Welfare Forum v Union of India*, (AIR 1996 SC 2715), a case involving the environmental pollution caused by tanneries (this case also involved the Polluter Pays Principle and the Precautionary Principle). The principle has also been discussed extensively by the International Court of Justice in the separate opinion of Vice President Weeramantry of Sri Lanka in the *Case Concerning the Gabcikovo-Nagymaros Project* (1997 General List No. 92, 25 September 1997).

ii) The **polluter pays principle** has been cited in many South Asian environmental law cases, for example in *Indian Council for Enviro-Legal Action v Union of India*, Supreme Court of India, (1996) 3 SCC 212, a case involving the pollution by toxic waste water from chemical plants.

iii) The **precautionary principle** has been applied in the Supreme Court of Pakistan in *Ms Shehla Zia & Others v Wapda, Human Rights Case No. 15K of 1992*, which was a case involving the electromagnetic field created by the high voltage transmission lines at a grid station and the serious health hazard posed.

iv) The **Intergenerational Equity principle and the Locus Standi principle** have been applied by a Full Bench of the Philippine Supreme Court in *Juan Antonio Oposa and Others v the Honorable Fulgencio S. Factoran and Another*, G.R. No. 101083 Supreme Court.

v) **Environmental Impact Assessment** has been declared by the Supreme Court of Sri Lanka as being pivotal to sustainable development decision-making in *Bulankulama and six others v. Ministry of Industrial Development and seven others - S.C. Application No 884/99 (F.R).*

vi) **Continuous mandamus in the corpus of international and national law; invocation of the extraordinary jurisdiction of the Supreme Court in environmental matters**;

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38 UNEP; “COMPRENDIUM of SUMMARIES of JUDICIAL DECISIONS IN ENVIRONMENT RELATED CASES”; 2004
public participation, including substantive and procedural matters relating to public interest litigation have all been extensively discussed and applied by the Supreme Courts of South Asian countries, including in the following - MC Mehta v Union of India & Others, AIR 1988 Supreme Court 1037; Rural Litigation and Entitlement Kendera v State of UP, AIR 1988 SC 2187; The Environmental Foundation Limited & Others v The Attorney General & Others, Supreme Court of Sri Lanka SC, Application No 128/91.

vii) The erga omnes character of environmental matters and the problem of applying inter partes procedures in environmental dispute resolution has been given judicial recognition in the ICJ Case concerning the Gabcikovo-Nagymaros Project.

viii) The limits of the concepts of “aggrieved person” and “locus standi” in regard to environmental damage were given a new direction in Dr Mohiuddin Faroque v Bangladesh, Represented by the Secretary, Ministry of Irrigation, Water Resources & Flood Control & Ors: 48 DLR 1996, Supreme Court of Bangladesh.

ix) Inter-generational and intra-generational equity; court commissions to ascertain facts and an authoritative assessment of the scientific and technical aspects of environment and development issues; interpretation of constitutional rights including right to life and right to a healthy environment were among the key rationales of the judgments in MC Mehta v Kamal Nath & Ors, Supreme Court of India (1997) Supreme Court Cases 388; SC Amarsinghe & three others v The Attorney General and three others, SC SPL No. 6/92, Supreme Court of Sri Lanka.

x) Public’s right to information and obligation for continuous environmental impact assessment were discussed and applied in Kajing Tubek & Ors v Ekran BHD & Ors, Originating Summons No. 55 (21 June 1995) High Court Kuala Lumpur; Movement Social de Petit Camp/Valentina v Ministry of the Environment and Quality of Life, Mauritius Environment Appeal Tribunal (Cause No. 2/94).

xi) Application of the public trust doctrine in regard to natural resources and the environment were highlighted in MC Mehta v Kamal Nath & Ors, Supreme Court of India (1997) Supreme Court Cases 388.

xii) Corporate responsibility and liability in environmental matters were further elucidated in Charan Lal Sahu v Union of India (Bhopal Case II) AIR 1990 Supreme Court 1480.

xiii) Approaches to judicial reasoning in environment related matters including the importance of traditional values and ideas, and the importance of promoting public awareness and environmental education at secondary and tertiary levels were given a fresh impetus in MC Mehta v Union of India & Ors, Supreme Court of India, Writ Petition Civil No 860 of 1991.
3. Sri Lanka’s Environmental Legal and Institutional Framework, it’s Judiciary, and Related Challenges

3.1 The Context

Sri Lanka is an island situated in the Indian Ocean with a landmass of 65,525 sq. kms. It has a population of approximately 19 million and documented history that spans over 3000 years. Sri Lanka lies on the Indian tectonic plate South West of the Bay of Bengal. According to mythology, a land bridge existed between India and Sri Lanka in the Gulf of Mannar. Today it is only a chain of limestone shoals remaining above sea level. The island consists mostly of flat to rolling coastal plains, with mountains rising only in the south-central part. The climate is tropical and warm, moderated by ocean winds. The monsoon winds from the Indian ocean and Bay of Bengal influence rainfall patterns, based on which, a “wet zone” (receiving up to 2,500 millimeters/98.4 inches of rain each month) and a “dry zone” (between 1,200 and 1,900 mm/47 and 75 inches of rain annually)\(^\text{39}\) is visible. The east, southeast, and northern parts of the country comprise the dry zone. The country has 103 inland rivers, an exclusive economic zone extending 220 nautical miles, rich marine ecosystems, and 198,172 hectares of wetlands. The country is rich in minerals and extraction attempts of petroleum products in the Gulf of Mannar are also underway.

Sri Lanka is also one of the 25 bio-diversity hot spots,\(^\text{40}\) with the highest bio diversity density in Asia with 23% of the flowering plants and 16% of the mammals endemic to the island.\(^\text{41}\) Sri Lanka has 24 declared wild reserves which houses several native species including the Asian elephant, small loris, purple faced langur, leopards, sloth bear, and 250 types of resident birds.

In 2014, Sri Lanka’s yearly gross domestic output was US$71 billion,\(^\text{42}\) and recorded an annual real GDP growth of 7.3% in 2013.\(^\text{43}\) Although during independence Sri Lanka inherited a predominantly plantation economy, the main economic sectors at present include garments, tourism, tea exports, rice and agriculture products, with overseas employment contributing substantially to foreign exchange earnings. Sri Lanka’s economy comprises of, as a percentage of the GDP: 10.8% agriculture, 30.4% industry, and 58.1% services. The per capita income of Sri Lanka has doubled since 2005. More than 90% of the households are electrified and close to 90% of the population have access to safe drinking water. In 2010, the New York Times listed Sri Lanka at the top of its list of 31 places to visit, giving a boost to the tourism sector. Sri Lanka has a life expectancy of 77.9 years at birth and infant mortality is on par with developed countries.

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\(^{41}\) Environment Lanka; [http://www.environmentlanka.com](http://www.environmentlanka.com)

\(^{42}\) International Monetary Fund

\(^{43}\) Central Bank of Sri Lanka; “Annual Report”; 2013
3.2 Sri Lanka’s key environmental challenges

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

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

The Government’s post-2010 development strategy envisages “an economy with a green environment and rapid development.”44 The Government continues to make investments to reduce the infrastructure gaps across the full range of transport, energy, water, sanitation, and irrigation sectors. In the areas of energy and ports, a considerable front-based investment has taken place. Thus, while many investments will have good returns, a careful cost-benefit analysis (in which economic, social, and environmental costs are all taken into account) will have to be undertaken in planning for the future.45 Environment as a cross cutting theme is emphasized in the sectoral development plans. The degree to which those ideals would be implemented will decide the degree of success of the initiatives.

The present natural forest cover of Sri Lanka is a little less than 25% of its land area, or about half of what the country had at Independence. Deforestation has increased soil erosion, landslides, floods, fauna and flora degradation, and damage to human lives and properties. Reduction in forest cover is also increasing the human-elephant conflict. As of 2010, only 14% of the forest cover qualified as protected areas and elephant corridors under wild life conservation. The government hopes to increase this to 25% by 2020.46

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

Sri Lanka is also experiencing rapid urbanization due to the economic development and migration of economic activities from agriculture-based to that of industry and knowledge economy based sectors. This is creating a myriad of environmental challenges that are

44 Mahinda Chintana Strategy Document; http://www.treasury.gov.lk
45 ibid.
46 ibid.
generally associated with urbanization. Key among them are the increased rate of garbage generation and increasing trend of plastic and polythene waste generation. As of 2010, an estimated 2900 Mts of solid waste was being collected per day. Total plastic waste collection stood at 7200 Mts. The government strategy proposes a combination of steps to deal with this situation including economic disincentives towards importation of plastics and polythene (through taxes and duties). In addition, the government has to deal with proper urban planning to ensure that the urban environment is preserved and enhanced. Most of the urban centers of Sri Lanka have environmentally important watersheds, wetlands, and vegetation. Poorly planned urban development in the past, together with illegal encroachments, have resulted in the urban environment being threatened with gradual destruction and pollution. With the conclusion of the conflict in 2009, an ambitious plan is being implemented to improve the urban environment as well as preserve some of the environmentally critical resources within the cities. A policy of encouraging industrial ventures in pre-designated areas but close enough to critical infrastructure has resulted in mixed development of industrial and residential areas together. This has created human costs in the form of polluted water and air resulting in health hazards and disease. Increased urban and industrial waste is a serious environmental problem in Sri Lanka. Almost every city in the country faces industrial waste, with Colombo as the most affected urban area.

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

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

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

Article 27(14) of the constitution of Sri Lanka provides: “The State shall protect, preserve and improve the environment for the benefit of the community.” Under Article 28 (f)A, a corresponding Fundamental Duty is reposed on every person in Sri Lanka “to protect nature and conserve its riches”.

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

In addition to this, Sri Lanka has a fairly comprehensive environmental protection framework consisting of laws, policies, and institutions. The most significant legislation on the supervision, regulation, and enforcement of the environment include the following: Fauna and Flora Protection Ordinance (conservation of plants and animals); Forest Ordinance (preservation of forests and dealing with felling and transportation of timber); Mahaweli Authority of Sri Lanka (conservation and maintenance of physical area around the Mahaweli project); State Land Ordinance (provides for allocation of state lands, rivers, and streams); Mines and Mineral’s Act (regulating mining, processing, and marketing of minerals); Irrigation Ordinance (irrigation canals); Coast Conservation Act (coastal zone regulations); Marine Pollution Prevention Act (control the pollution of territorial waters of Sri Lanka); Fisheries and Aquatic Resources Act (aquatic bio-diversity); National Heritage Wilderness Areas (protection of unique ecosystems); Soil Conservation Act (soil conservation, mitigation of erosion, and protection against flood and drought); Plant Protection Ordinance; Felling of Tress (Control) Act; Flood Protection Ordinance; Water Hyacinth Ordinance; and Control of Pesticides Act.47

In addition to the above laws, Sri Lanka has national policies that deal with biodiversity; cleaner production; climate change; disaster management; energy; environment and sustainable development; land management; marine and the coastal resources; ozone regulation; pollution and waste; resettlement; and watersheds.48

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

NEA empowered the Minister to gazette a list of state agencies as ‘project approving agencies’ and a list of projects as ‘prescribed projects’. In terms of the Act, all ‘prescribed projects’ must obtain prior approval from the relevant ‘project approving agency’ before such a project commences. A list of such ‘prescribed projects’ and a list of ‘project approving agencies’ is

48 Ibid.
found in the regulations. Both Initial Environmental Examination for projects which are likely to be less harmful and EIA for projects that may produce ‘significant’ environmental impacts are provided for in the NEA.

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

3.4 Sri Lanka: Judicial action in support of environmental preservation

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

Article 126(4) of the Constitution gives the Supreme Court a wide discretion ‘to grant such relief or make such directions as it may deem just and equitable’ in the circumstances of the case. In *M.T.M. Ashik v Bandula*, the *Noise pollution* case, when the CEA failed to formulate a set of regulations pertaining to noise emissions after several dates, the Court itself, in the exercise of its powers under Article 126(4), formulated a set of regulations and directed the Police to enforce such regulations using their powers under Section 261 of the Penal Code No. 2 of 1883 (as amended) (public nuisance) and Section 80(1) of the Police Ordinance No. 16 of 1865 (as amended) (issue of permits for loudspeakers).

The Courts have also operationalized environmental law principles, even in the absence of direct legislation. This has been done through enlightened approaches to the existing provisions of the law. For instance, non-discrimination and equal protection of the law was applied in *Bulankulama v Secretary, Ministry of Industrial Development (the Eppawela phosphate mining case) [2000] 3 Sri L.R. 243*. An environmental case that attempted to invoke the ‘right to life’ directly, on the basis that such a right is implicitly ‘recognized’ by the Constitution, even if not expressly declared, was *Deshan Harindra (a minor) v Ceylon Electricity Board*, which involved severe noise pollution from a diesel generator that was affecting very young children. As a result of the case, the Ceylon Electricity Board stopped the operation of the generator and the private

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49 Ibid.
50 Ibid
power generating company made an *ex-gratia* payment to the affected families. As the case ended in a settlement, the legal argument on the right to life was not tested.\(^{52}\)

In bringing about this development, the Courts have expanded its interventionist role from an adjudicator to that of a mediator. In H.B. *Dissanayake v Gamini Jayawickrema Perera, Minister of Irrigation and Water Management S.C.F.R. 329/2002 decided 30.09.2002* (the *Thuruwila case*), in handling the water needs of farmers and urban dwellers, the Courts, conscious of the water needs of both sectors, encouraged the parties to formulate a scheme that would look to the interests of both. An agreement was reached amongst the different parties and the settlement was endorsed by the court.\(^{53}\) In another case, *Environmental Foundation Limited v Attorney General* where, after the Court had granted leave to proceed, the CEA, in consultation with a quarry owner and the residents of the surrounding area, drew up a regime to control the times and frequency of the blasting operations. This settlement was then entered into as an Order of Court.

4. **The 3rd Roundtable**

4.1 Introduction to the Roundtable

The 3\(^{rd}\) Roundtable will continue to concentrate on the following key themes: i) judicial training and capacity enhancement; ii) regional integration and cooperation; iii) enhancing the efficacy of the judicial/justice system for environmental justice; and iv) application of Alternative Dispute Resolution (ADR) methods such as mediation/conciliation for better environmental dispute management and enhancing justice. In addition, this Roundtable will expand the scope of discussion by including specific issues relating to urban development, natural capital, gender, community forest management, and tourism within the overall Sustainable Green Development concept.

4.2 “Taking Stock”: Country Status

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

\(^{52}\)Environmental Law Foundation Ltd; “*Handbook for the Sri Lankan Judiciary*”; 2009

\(^{53}\)Ibid.
4.3 “Taking Stock”: Where are we on Environmental Justice

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

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

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

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

4.4 Environment and Development

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

Since this session is core to the theme of the Roundtable, it includes four presentations. The first highlights natural capital for development mainstreaming and attempts to economically value services that the environment offers (e.g., natural decomposition of waste, water purification by wetlands, etc.). This is important because the region (which has seven of the largest mega cities⁵⁴) has cope with the increase in its rate of urban development, putting further

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⁵⁴ Defined as areas of continuous urban development of over 10 million people.
pressure on already strained natural resources. Failure to view natural capital as an economic resource has resulted in degradation and unsustainable use of limited resources.

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

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

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

4.5 Developments in Environmental Adjudication

Environmental rule of law calls for adherence to environmental laws and emphasizes the need to establish robust and effective frameworks of justice, governance, and law for environmental sustainability. The Judiciary is a crucial partner in bringing about a judicious balance between environmental and developmental considerations and in promoting a culture of compliance with legal norms and standards. The first presentation will highlight that environmental conflicts are multi-faceted, complex, and unique. They include moral questions (e.g., do the present generation owe anything to the generations to come?), policy considerations (e.g., decision to go ahead with a particular development initiative), and economic indicators. The implications are far-reaching and costly. The inherent limitations in the adversarial system, procedural and evidentiary laws, and the principle of binding judicial precedent will limit the outcomes that Courts can achieve. This session will assess the suitability and sufficiency of the court processes as practiced now in the region and evaluate the efficacy of the present system and the processes in providing the required response to environmental conflicts.
The outcome of a conflict depends both on substances and the processes, with the latter having a significant impact. Of the several alternative dispute resolution processes, mediation and negotiation have been extensively used to successfully deal with environmental conflicts. Many judicial officers encourage parties to negotiate and they act more as a mediator than an adjudicator, with rules of procedure for mediation by judges being included in many systems. The second presentation will highlight mediation as a preeminently better method to deal with most of the environmental conflicts.

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

4.5 Way Forward

This Roundtable will assess the progress made so far through the 1st and 2nd Judicial Roundtables. The 1st roundtable produced the Bhurban Declaration of 2012 for a common vision on environment for the South Asian judiciaries agreeing to share experiences and knowledge, improve judicial training and education on environment, and taking specific innovative steps (e.g., Green Benches)

Continuing this theme, the 2nd Roundtable in the Royal Kingdom of Bhutan sought to promote a common understanding and a shared vision of the environmental challenges within South Asia and finalized the draft Memorandum of Understanding (MoU) to foster cooperation among South Asian judiciaries.

At the end of the 3rd Roundtable, it is proposed that the MoU would be signed and adopted. In addition, four thematic areas would be specifically deliberated: i) judicial training and capacity enhancement; ii) regional integration and cooperation; iii) enhancing the efficacy of the judicial/justice system for environmental justice; and iv) use of ADR (mediation/conciliation and other innovative methods) for better environmental dispute management and enhancing justice. These discussions will lead to the formulation of action ideas which will be adopted as the Colombo Action Plan (CAP) for post Roundtable execution.