CONCEPT NOTE

Background

The protection, conservation, and proper utilization of the environment is considered as the key challenge faced by the world today. South Asia, a region that is historically endowed with ample natural capital but increasingly facing the effects of climate change, has to effectively respond and successfully deal with the challenges that changing climatic conditions are producing. South Asia is home to 1.6 billion people with unique social and economic indicators. During the last decade, the region has experienced change in many spheres, including population growth, rapid urbanization, economic development, and improvements to infrastructure facilities. The Intergovernmental Panel on Climate Change, in its 5th Report, has identified major environmental challenges that South Asia will continue to face including 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. 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. This situation requires a coordinated and a comprehensive approach using the full miscellany of policies and tools available covering economic, social, developmental, legal, and other aspects.

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

In this context, ADB is leading an initiative on Building Capacity for Environmental Prosecution, Adjudication, Dispute Resolution, Compliance, and Enforcement in Asia. South Asia is one of the sub-regions under this initiative and two Roundtables have already been organized in partnership with the Supreme Courts of two South Asian Countries.
The first roundtable was held in Bhurban, Pakistan, organized by the Supreme Court of Pakistan and ADB, in collaboration with the International Union for the Conservation of Nature and United Nations Environmental Program (UNEP). This resulted in the Bhurban Declaration of 2012 where South Asian judiciaries agreed to a range of activities. This was followed by the second roundtable in Thimpu, Bhutan, organized by the Royal Court of Bhutan and ADB, which concentrated on understanding shared environmental challenges within the region, sharing environmental adjudication experiences, and developing further cooperation between South Asian judiciaries. The Third South Asian Roundtable on Environmental Justice for Sustainable Green Development (3rd Roundtable) to be held in Colombo, Sri Lanka on 8-9 August 2014 is corollary to the above initiatives.

3rd Roundtable: Environmental Justice for Sustainable Green Development

The 3rd 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.

Day 1: Session 1: “Taking Stock”: Country Status

The Roundtable will commence with the sharing of the status of environmental adjudication and evolution of jurisprudence in each South Asian country. This session will highlight challenges that Courts face when confronted with environmental conflicts, and how the 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.

Day 1: Session 2: “Taking Stock”: Where are we on Environmental Justice

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

First, the speakers will discuss the status of the environment and climate change 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.

Day 2: Session 1: 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 cities\(^1\)) has cope with the increase in its rate of urban development, putting further pressure on already strained natural resources. Failure to view natural capital as an economic resource has resulted in degradation and unsustainable use of limited resources.

The second presentation will further highlight green considerations in urban planning and the need to arrest negative impacts of rapid urbanization. Urban planners have to respond to the increasing need for basic resources essential for human well-being such as land, housing, water, and energy. They also have to deal with the resulting rise in land prices, depletion of canopy cover and loss of urban wetlands due to urban sprawl, decreasing land-man ratio, and congestion. Issues such as solid waste management and sewerage disposal, industrial waste, pollution (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.

\(^1\) Defined as areas of continuous urban development of over 10 million people.
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.

**Day 2: Session 2: Developments in Environmental Adjudication**

Environmental rule of law calls for adherence to environmental laws and emphasizes the need to establish robust 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.

**Day 2: Final Session: 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.

Participants

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

Approach

The two-day Roundtable will assess the progress made so far and continue to build on the work already done or is in-progress consequent to the 1st and 2nd Roundtables. Each session will comprise of expert presentations followed by deliberations and discussions with the guidance of a panel of experts. It is expected that as the core concentration is on the judges of the Roundtable, the atmosphere will encourage frank deliberations on the key issues of each of the countries. The signing of the MoU will further consolidate the progress made and the Colombo Action Plan will encourage taking of concrete and practical steps by each of the participating judiciaries.

Outputs

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