

Asian Judges: Green Courts and Tribunals, and Environmental Justice

Asia and the Pacific has experienced dramatic environmental change over the last 10–20 years. While developing member countries (DMCs) began adopting environmental policy and regulatory frameworks beginning in the early 1970s, many environmental challenges have still not been sufficiently addressed in policy and regulatory frameworks. Many DMCs have accepted international obligations under new or amended international environmental laws, yet these have not been sufficiently reflected in national legislation or translated into implementing rules and regulations at national, provincial, and

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local levels. Even where DMCs have appropriate policy, legal, and regulatory frameworks, effective implementation, enforcement, and compliance continue to pose challenges. The judiciary plays an important role in meeting these environmental enforcement and compliance challenges.¹

In response to this need, ADB has approved a regional technical assistance (TA) on the Strengthening of Judicial Capacity to Adjudicate upon Environmental Laws and Regulations (RETA 7474). Under the regional TA, ADB will conduct a broad study of the experience of environmental courts and tribunals (ECTs) and their jurisprudence in Asia and several developed countries. It will focus on presenting case studies of ECTs in different countries, including Indonesia, the Philippines, and Thailand, to determine how judges can determine environmental and natural resource cases most effectively. ADB will also conduct a regional symposium, which will include participants from New South Wales (NSW) and Queensland (Qld), Australia; the People’s Republic of China (PRC); India; Indonesia; the Philippines; Thailand; and the United States (US) Environmental Appeals Board. ADB is also helping certain DMCs institutionalize environmental expertise within their judiciaries, including in Indonesia (through a certification program for judges in environmental law) and the Philippines (through assistance on their environmental rule of procedure). This study is

expected to inform the work of other DMCs in establishing and/or strengthening ECTs and national environmental jurisprudence. This work will build on past ADB work in capacity building for environmental law. It will also capitalize on work conducted by development partners in strengthening environmental compliance and enforcement.

ADB’s Work in Environmental Law Capacity Building

ADB has done considerable work in building the capacity of judiciaries to adjudicate environmental law cases. In 2002, and again in 2003, ADB published a compendium on Capacity Building for Environmental Law in the Asian and Pacific Region. This compendium reproduced a set of materials that had been used for “train the trainers” workshops for academics and members of the legal profession in the region (not directed at or limited exclusively to judges).² In 2004, ADB funded a Judges’ Forum on Environmental Protection in the Philippines.

In 2005, ADB partnered with the United States Agency for International Development (USAID) to launch the Asian Environmental Compliance and Enforcement Network (AECEN). AECEN addresses the need for increased enforcement and compliance with environmental law in Asia and the Pacific. Among other activities, AECEN has been supporting environmental agencies to improve environmental compliance and enforcement, create environmental courts and court divisions, and train judges to adjudicate in these courts.

In addition, ADB and the US Environmental Protection Agency (EPA) have been collaborating on work related to RETA 7474 and recently signed a funding arrangement under an ADB–EPA Memorandum of Understanding (MOU), which provides a vehicle for funding EPA expert involvement in these activities. EPA in-kind contributions

Box 1: Design Summary

Impact	To improve implementation of environmental law in selected DMCs by developing plans to institutionalize the capacity of judges to apply environmental law and regulations effectively.
Outcome	Studies on the operation of environmental courts to support or inform possible follow-up technical assistance.
Output	Assessments of good practices of environmental courts and judiciary in selected DMCs, including Indonesia, the Philippines, and Thailand.

¹ For example, the 2008 Philippine Supreme Court decision requiring cleanup of the Manila Bay, and the 1996 Indian Supreme Court interpretation of the Forest Conservation Act.

² Donna G. Craig, Nicholas Robinson, and Koh Kheng-Lian, eds. 2003. *Capacity Building for Environmental Law in the Asian and Pacific Region: Approaches and Resources*. Vol.1, Second Edition. Manila: ADB.

can include training materials and legal, enforcement, and judicial expertise. ADB has also coordinated with other development partners, including USAID, the Vermont Law School (financed by USAID), and the European Union.

Challenges Faced

Environmental laws and regulations need to be better and more efficiently implemented, enforced, and complied with. The compliance aspect of this process begins with the inspector collecting water samples, or the forest official apprehending illegal loggers (the upstream phase), and extends to the environmental regulator or public interest litigator starting legal action, and to judges adjudicating these cases (the downstream phase). The process of compliance and enforcement of environmental laws and regulations—in both its upstream and downstream phases—needs attention.

The effectiveness of these actions depends on a solid foundation of environment laws, regulations, and implementing mechanisms, such as permits. These should impose enforceable requirements that are sufficiently precise to enable the regulated entity to understand what is required. It then requires ensuring these requirements are complied with and/or the law is enforced.

For example, Indonesia faces many significant environmental problems. These include deforestation through illegal logging; the illegal trade in wildlife; and endangered species; air and water pollution; and excess groundwater extraction leading to subsidence; overfishing; vanishing biodiversity; and overexploited natural resources. The need to adapt to climate change and the need to reduce Indonesia’s contributions to global climate change—by constraining emissions from deforestation and forest degradation—are also key issues.

Similarly, the PRC provides an example of significant environmental problems stemming from rapid economic development. These problems include air and water pollution, significant greenhouse gas emissions, desertification (particularly in the western provinces), and water scarcity. The PRC has responded rapidly with many framework environmental laws. However, the PRC has not been as effective in adopting regulations that would lead to efficient local implementation of these environmental laws. Thus, yet to be developed implementing regulations, legal frameworks, and institutions that implement and enforce these frameworks will play a critical role in enhancing environmental quality and controlling pollution. Ensuring that these are complied with and enforced is essential.

Global Developments

At the global level, over the last 10 or so years, there has been considerable movement toward strengthening environmental implementation, compliance, and enforcement—including by establishing ECTs and strengthening the capacity of the judiciary to handle environmental cases. In 2002, a Global Judges’ Symposium was held at the World Summit for Sustainable Development in Johannesburg, South Africa, to define and promote the role of judges in securing sustainable development. Since then, the number of ECTs has increased. Worldwide, over 350 specialized ECTs authorized in

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41 countries have been identified.

ECTs are seen as one way to concentrate expertise to ensure that judges deciding on environmental and natural resource cases fairly and transparently balance the conflicts between protecting the environment and

promoting development; manage environmental and natural resource cases efficiently and effectively; and support more public information, participation, and access to justice and for achieving informed and equitable decisions.³

Regional Developments

In Asia and the Pacific, ECTs have been established in Bangladesh, the PRC, India, Japan, the Republic of Korea, Malaysia, Pakistan, Philippines, and Thailand.⁴ These courts are listed in Table 1. Further details are provided below.

Bangladesh	<ul style="list-style-type: none"> • Environmental Court of Dhaka • Environmental Court of Chittagong
China, People’s Republic of	<ul style="list-style-type: none"> • Guangdong Province <ul style="list-style-type: none"> ◦ Guangzhou Maritime Court • Guizhou Province <ul style="list-style-type: none"> ◦ Guiyang Environmental Court in the Guiyang Intermediate People’s Court (Guiyang Municipality appellate) ◦ Qianxi County Environmental Collegiate Panel ◦ Qingzhen Environmental Court in the Qingzhen People’s Court (Guiyang Municipality—trial) • Hebei Province <ul style="list-style-type: none"> ◦ Jinzhou Environmental Court in the Jinzhou City People’s Court (Shijiazhuang Municipality—trial) • Hubei Province <ul style="list-style-type: none"> ◦ Wuhan Maritime Court • Jiangsu Province <ul style="list-style-type: none"> ◦ Jianye Environmental Court in the Jianye District People’s Court (Nanjing Municipality—trial) ◦ Wuxi Environmental Court in the Wuxi Intermediate People’s Court (Wuxi Municipality—trial/appellate) ◦ Xinbei Environmental Court in the Xinbei District People’s Court (Changzhou Municipality—trial) • Liaoning Province <ul style="list-style-type: none"> ◦ Dongling Environmental Court in the Dongling District People’s Court (Shenyang Municipality—trial) ◦ Tiexi Environmental Court in the Tiexi District People’s Court (Shenyang Municipality—trial) • Yunnan Province <ul style="list-style-type: none"> ◦ Chengjiang Environmental Court in the Chengjiang County People’s Court (Chengjiang County, Yuxi Municipality)

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³ G. Pring and C. Pring. 2009. *Greening Justice: Creating and Improving Environmental Courts and Tribunals*. USA: The Access Initiative.

⁴ *Ibid.*

Table 1 continued

China, People's Republic of <i>(continued)</i>	<ul style="list-style-type: none"> ◦ Kunming Environmental Court in the Kunming Intermediate People's Court (Kunming Municipality) ◦ Tonghai Environmental Court in the Tonghai County People's Court (Tonghai County, Yuxi Municipality) ◦ Yuxi Environmental Court in the Yuxi Intermediate People's Court (Yuxi Municipality)
India	<ul style="list-style-type: none"> • Supreme Court—informal Green Bench • National Environment Appellate Authority (NEAA) • National Environment Tribunal (legislatively authorized, not operating) • National Green Tribunal (legislation pending in 2009) • Regional environmental courts reported
Indonesia	<ul style="list-style-type: none"> • Only environmental law trained “green” judges hear environmental cases
Japan	<ul style="list-style-type: none"> • National Environmental Dispute Coordination Commission (Kouchou) • 47 prefecture-level Environmental Dispute Coordination Commissions
Korea, Republic of	<ul style="list-style-type: none"> • National Environmental Dispute Resolution Commission • 16 regional Environmental Dispute Resolution Commissions
Malaysia	<ul style="list-style-type: none"> • Planning Appeal Board of State of Penang • 2 additional State Planning Appeal Boards • National Environmental Quality Appeal Board (authorized)
Pakistan	<ul style="list-style-type: none"> • National Environmental Tribunal • Environmental Tribunal Punjab • Environmental Tribunal Northwest Frontier Province • Environmental Tribunal Sindh • Environmental Tribunal Balochistan
Philippines	<ul style="list-style-type: none"> • 117 municipal and regional trial courts designated as environmental courts (Jan. 2008)
Thailand	<ul style="list-style-type: none"> • Supreme Court, Environmental Law Division

Source: *Greening Justice*, footnote 3, p.106.

Indonesia. Since 1998, Indonesia has trained 20% of its judiciary in environmental law. However, to further strengthen the judiciary's capacity to adjudicate environmental cases, the Ministry of Environment has entered into an MOU with the Supreme Court. This MOU would establish a program to certify judges as “environmental judges” after they have completed a series of training and subject to ongoing conditions to retain their environmental expert status. If the conditions are breached, the ultimate sanction would be for the certificate to be revoked. This environmental judicial certification scheme would seek to strengthen the capacity of the judiciary in handling environmental cases, by institutionalizing environmental training and ensuring that only trained (expert) judges decide environmental and natural resource cases. The training should establish a cadre of judges qualified to adjudicate natural resources and environmental quality cases. The scheme will also enlist the Supreme Court to establish new rules of court with procedures for handling environmental cases. In March 2010, a High Level Task force, including senior members of the judiciary and senior officials from the Ministry of Environment, was established to oversee the certification program and development of the new rules. ADB is assisting with this process.

The Philippines. In January 2008, the Philippine Supreme Court designated 117 municipal and regional trial courts across the country as environmental courts. The Philippine Judicial Academy has also conducted environmental training of judges and the 117 trial



Philippine Supreme Court

environmental courts would capitalize on and create further demand for such training.

In April 2009, the Philippine Supreme Court, together with other development partners including the USAID, the US EPA, and AECEN, conducted a Forum on Environmental Justice held simultaneously in the cities of Baguio, Davao, and Iloilo with videoconference facilities. This videoconference forum allowed the Supreme Court to receive direct input on how the courts can help protect and preserve the environment, from stakeholders in the different jurisdictions. In early 2010, the Philippine Supreme Court requested ADB assistance with their environmental program, which ADB has started by assisting the Supreme Court with its new Rule of Procedure for Environmental Cases (Rule) adopted in April 2010.

The Rule features many best practices in environmental adjudication. These best practices include provisions preventing Strategic Legal Actions Against Public Participation (known as “SLAPP” suits); a statement adopting the Precautionary Principle, which advises precaution when human actions could lead to threats of serious and irreversible damage to the environment but full scientific certainty cannot be achieved in evaluating evidence; and an Environment Protection Order, which empowers a court to direct or enjoin any person or government agency to perform an act to protect, preserve or rehabilitate the environment, or stop performing an act that causes it harm.

The Rule also provides for a Writ of Continuing Mandamus and a Writ of Kalikasan (which means nature). The Writ of Continuing Mandamus allows the court to compel the performance of an act specifically required by law, and to also retain its jurisdiction after judgment in order to monitor compliance with the decision it issues.

The Writ of Kalikasan is a world first. It seeks to protect the constitutional right of persons to a balanced and healthy ecology by directing a private person, an entity, or a public official to perform a lawful act, or stop committing an unlawful act involving environmental damage of such magnitude as to prejudice the life, health, or property of inhabitants in two or more cities or provinces. The new rule also has provisions to expedite the hearing of environmental cases, including a 1-year period to try and decide the case.

Thailand. The Thailand Supreme Court has established green courts at the supreme and appellate level and is considering establishing green courts at the trial court level. The Thai Supreme Administrative Court is a general administrative court, whose jurisdiction includes environmental cases relating to administrative actions of government officials. The Environmental Division of the Thai Supreme Court and the appellate level green bench were established through cooperative engagement, with counterparts from Australia, India, and the US, and with AECEN.

The President of the Supreme Court of Thailand recently issued a court resolution establishing a judicial committee to prepare a draft law on improved environmental adjudication. This resolution resulted from its partnership with the NSW Land and Environment Court. In 2010, the AECEN Secretariat is expected to continue to facilitate the court-to-court partnership between Australia and Thailand to support the legal drafting of environmental adjudication procedures and mediation and expert witness rules. The Thai courts of justice intend to organize a series of consultation meetings with key senior judges and international experts, to introduce innovative environmental procedures for the adjudication of environmental cases. The Thai courts of justice plan to expand their “green benches” to all civil courts throughout the country.

India. The Supreme Court of India has long been known to have a proactive environmental judiciary and it has decided many cases that have served as precedents within India and internationally. It is a court of general jurisdiction but has interpreted the national constitution’s guarantee of a right to life, as including a right to a wholesome and pollution-free environment. A broad assessment of its role, influence, and the lessons that can be learned from this experience could benefit other fledgling environmental judiciaries in the region.

The People’s Republic of China. The PRC’s increasing environmental problems have led to a growing number of environmental disputes. In 2005, the number of recorded environmental disputes heard in the general people’s courts reached a record of nearly 700,000. There has been an average increase in the number of environmental disputes of 25% each year since 1998. While the majority of disputes are resolved through the administrative process, the amount of environmental litigation is increasing. Accordingly, there has also been some momentum to establish pilot environmental courts: 11 have so far been established,⁵ with new environmental courts under consideration. Although most of these have been established in the last 5 years, some have a longer history, with one environmental trial court in operation since 1989.

In December 2009, ADB published *Green Benches: What can the People’s Republic of China learn from environment courts of other countries*,⁶ which gave recommendations on how the PRC could promote environmental justice. It recommended that more

environment courts be established as a key action to promote an effective nationwide environmental court system in the PRC.

Moving Forward

In July 2010, ADB will host a regional symposium that will bring together 40–50 participants: judges, environmental ministry officials, and civil society participants from key DMCs, including Bangladesh, the PRC, India, Indonesia, Pakistan, the Philippines, Thailand, and Viet Nam. Experts from AECEN, the United Nations Environment Programme (UNEP), and the US EPA, and judges from the NSW Land and Environment Court and the Qld Planning and Environment Court of Australia will also be invited.

At the regional symposium, ADB will share the ECT research and country case studies conducted under the regional TA. Judges and environmental officials will share relevant experiences and discuss their need for further capacity building and an Asia Pacific Judges’ Network on the Environment, which could be established in conjunction with development partners, including ADB and AECEN, to serve as forum for further capacity building. The papers from the regional symposium reflecting the experience of regional ECTs will be recorded in an edited volume to serve as a reference on regional and international environmental adjudication, including ECTs, to inform further work on environmental adjudication in Asia and the Pacific.

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ADB’s vision is an Asia and Pacific region free of poverty. Its mission is to help its developing member countries substantially reduce poverty and improve the quality of life of their people. Despite the region’s many successes, it remains home to two-thirds of the world’s poor: 1.8 billion people who live on less than \$2 a day, with 903 million struggling on less than \$1.25 a day. ADB is committed to reducing poverty through inclusive economic growth, environmentally sustainable growth, and regional integration.

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

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For details, you may visit www.adb.org

⁵ ADB. 2009. *Green Benches: What can the People’s Republic of China learn from environment courts of other countries?* Manila.

⁶ Ibid.