# Environmental Courts and Tribunals in Asia-Pacific

10 August 2022, 2-5.30pm SGT

Asia Pacific Centre for Environmental Law (APCEL), Asian Development Bank (ADB), Asian Research Institute for Environmental Law (ARIEL)

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## SESSION 1

### Speech 1: The Role of ECTs in Delivering Environmental Justice: Theory and Practice (*Justice Brian Preston*)

In the first section of his speech, Justice Preston highlights that an ECT aims to provide environmental justice. He first identifies what environmental justice consists of. Then, he moves to identify strategies to determine whether said justice has been achieved.

Section 1: What is environmental justice?

Environmental Justice consists of three aspects: distributive, procedural and recognition justice.

#### *Distributive justice*

- Concerned with the distribution of environmental goods (or benefits) and environmental bads (or burdens)
- It involves substantial justice in that it is concerned with the environmental benefits and burdens that are received by members of the community of justice.
- Environmental law establishes the legal framework within which distributions of environmental benefits and burdens occur.

Access to distributive justice involves giving and upholding substantive rights to members of the community of justice. Achieving distributive justice depends on the content of the laws themselves and how the laws are applied in practice.

#### *Procedural Justice*

Procedural justice is concerned with the ways in which decisions (such as the distribution of environmental benefits and burdens) are made, and who has influence over those decisions. Procedural justice is a prerequisite for distributive justice as it involves setting the stage of broad, inclusive and democratic decision-making.

Access to procedural justice involves giving procedural rights to members of the community. Some examples raised were the access to environmental information, participation in environmental decision making and reviewing procedures before a court or tribunal to challenge decision making.

#### *Recognition Justice*

There are three forms of the lack of recognition:

- Non-recognition: ignoring certain groups or communities, rendering them invisible
- Misrecognition: insulting, degrading or devaluing groups or communities
- Malrecognition: malignantly recognising certain groups or communities

The lack of recognition leads to an inhibited participation in the polity (procedural injustice) and inequalities in the distribution of environmental benefits and burdens (distributive injustice).

Give recognition, preventing and remedying misrecognition and malrecognition.

Section 2: How can Environmental Justice been achieved by ECTs?
Justice Preston emphasises that successful ECTs seek to respond to the environmental challenges of the time and to deliver environmental justice.

To evaluate whether they have achieved those functions, Justice Preston proposes two modes of analysis: 1) Three Core Attributes and 2) Three Analytical Frames.

The three core attributes that ECTs that would enable them to deliver environmental justice.

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| Roles of ECTs | ● Resolve disputes equitably, efficiently and effectively<br>● Facilitate interest representation in environmental decision-making<br>● Provide a forum for public discourse<br>● Explain and uphold values underpinning environmental laws<br>● Implement the purposes of environmental laws in resolving disputes. |
| Competencies of ECTs | ● **Constitutional competences**: Normative assessment of the proper role of institutions in a democracy<br>○ Notably, ECTs are hybrid bodies which often exhibit functions of the three arms of government. Therefore, the assessment of their role is more complex.<br>● **Institutional competencies:** Practical evaluation of the capacity of this institution to carry out its functions |
| Expertise of ECTs | ● **Contributory expertise:** sets of skills, knowledge and experience which are needed to contribute to 1) environmental law itself and 2) legal institutions administering environmental law<br>● **Interactional expertise:** interacting with other disciplines to assist ECTs in understanding environmental problems and their resolution<br><br>For ECTs, the incorporation of both types of expertise come in the form of decision-making by both judges (contributory expertise) and technical expert members (interactional expertise). |

The three analytical frames are:

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|---|---|
| **Function**<br>*What is the functional role of the ECT in contributing* | ● Overarching function of ECTs is the adjudication of disputes that come before an ECT.<br>● How adjudication is carried out depends on the legal nature of proceedings and the jurisdiction of the ECT. |

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| *to environmental law and environmental justice?* | |
| **Doctrine**<br>*What has been the ECT's contribution to doctrinal development of environmental law and environmental justice?* | ● ECTs can develop doctrine on environmental law and environmental justice.<br>● The extent to which development takes place depends on factors such as:<br>○ The sources of law an ECT can draw on;<br>○ The decision-making methods the ECT uses to develop doctrine; and<br>○ The type of doctrines developed (substantive law or procedural law) |
| **Process**<br>*What processes does the ECT use to resolve environmental disputes?* | ● The processes performed by ECTs depend on the function they are exercising<br>● In general, ECTs should adopt the appropriate dispute resolution means to match the forum to the fuss. |

**Speech 2: Rules of Procedures in Environmental Courts and Tribunals in Asia Pacific (*Matthew Baird*)**

Mr Baird, through his experience aiding countries build up their environmental courts, recommended some Framework Rules and Practices for ECTs (Fundamental Elements of an effective ECTs):

- Operationally independent
- Involvement of non-state actors
- Relaxed rules of standing
- Provisional and interim measures
- Locally appropriate methods of dispute resolutions
- Provisions against strategic lawsuits against public participation (SLAPPs)
- Core Environmental Law Principles to be applied by the ECT
- Special rules of procedure for environmental cases

Mr Baird brought up China, Pakistan, Philippines, New Zealand, India, Indonesia and Australia as countries who currently practice good rules of procedure and practices.

He provides the example of the Ethiopian Environmental Tribunal, who borrowed key elements from other countries to develop their own tribunal. In particular, he brings up the tribunal rules of procedure.

**Speech 3: Training and Networking for Environmental Courts and Tribunals in Asia Pacific (*Briony Eales*)**

Broadly speaking, Eales talks about how the ADB has supported and will continue to support judicial education and training regarding the world climate crisis.

The following summary consists of 1) Why the ADB supports judicial training and education, 2) How the ADB has supported judicial training and education, 3) The success of ADB's work thus far and 4) ADB's future plans to improve on and expand their programs.

1. ***Why does the ADB support judicial training and education?***

Eales explains that the ADB supports judicial training and education due to two main reasons. Firstly, ADB recognises the importance of judges in making decisions which influence national laws and the rights of citizens affected by the climate crisis. The rule of law is essential for promoting equal access to justice, sustaining development momentum and ensuring that the benefits of growth are equitably and widely shared in society. Secondly, despite the importance of judicial training, most developmental work has been concentrated on supporting the executive arm of countries and not the judicial arm. ADB seeks to keep judges involved and informed through presenting them with opportunities to engage in training and judicial exchanges on global environmental law.

2. ***How has the ADB supported judicial training and education?***

So far, the ADB has implemented the Judicial Capacity Building Program which has three separate branches - the environmental and climate change branch, the gender-based violence branch and the commercial cases branch. For the purposes of the talk, Eales focused on the first branch.

Under the environmental and climate change branch, some major contributions that the ADB has carried out are:

- Supported courts to establish green or environmental benches or courts
- Assisted judicial in creating certification programs on environmental law
- Provided expert assistance in drafting environmental court procedures
- Convened key regional conferences to promote regional judicial dialogue and knowledge sharing
- Run online workshops on emerging areas of law such as Ecocide and Financial Institutions and Climate Risk
- Supported the creation of the Asian Judges Network on the Environment (www.ajne.org)

3. ***How successful has ADB's work been thus far?***

Eales acknowledges the difficulties in measuring the outcomes and impacts of judicial education. Nonetheless, he refers to several landmark judgments which were written by

judges who have attended ADB's training courses[1], and a judgement which referenced ADB's climate law report series, describing it as a leading resource[2]. Successful incorporation of ADB's work was also seen in the 'Stockholm +50' event[3], where judges were recognised as stakeholders in the UN Environmental Summit for the first time.

### *4. What are ADB's future plans?*

Broadly speaking, ADB seeks to do more research into:

1. How ADB can support ECTs in Asia and the Pacific to be more effective;
2. How ADB can expand their scale of impact; and
3. New and diverse perspectives as to how to educate judges in the area of environmental climate justice.

On a more tangible level, some of the upcoming works ADB plans to embark on are:

- Judicial education programs embedded in national judicial institutes
- Supporting regional bodies with judicial education
- Partnering with development partners (UNEP, IUCN, APCEL, GJIE, EUFJE, Client Earth) including for regional judicial networking events
- Supporting female judges
- Judicial masterclass series
- Additional knowledge products—model environmental law remedies
- Assessing prospects for Pacific regional green dispute resolution

[1] Cases cited were: *Leghari v. Federation of Pakistan* (2018) (Pakistan), *Shrestha vs Prime Minister and Office of Council of Ministers and Others* (2018) (Nepal), *Morua v China Harbour Engineering Co (PNG) Ltd* (2020) (Papua New Guinea).

[2] Case cited was: *Farooq v. Government of Punjab & Others* (2021).

[3] 'Stockholm +50' was jointly organised by ADB, the Global Judicial Institute on Environment and the International Association of Judges.

## Session 1 Q&A Segment

Question 1

There is a reluctant approach toward engaging with climate law, justice and/or policy in their respective countries. Why do you think this is the case for ECTs? Is climate change too contentious an issue to be dealt with in the ECTs?

Answer 1

Justice Preston: No, it is not too contentious. Climate change raises all three issues of environmental justice, in particular, distributive justice. ECTs do need to tackle this issue head on.

Question 2

How can regional ECT mechanisms in Pacific Island nations be improved, especially in regards to environmental and social impacts on indigenous communities in land and deep seabed mining and exploration and exploitation projects?

Answer 2

Baird: The main problems faced by the environmental courts are its jurisdiction and resources. In terms of jurisdiction, the Pacific Islands have traditionally allowed for foreign judges to assist in their courts due to the recognition of the need for other external knowledge to assist in decision-making. In the Caribbean, several states have come together to resolve some multi-jurisdictional issues. Nonetheless, it is important to recognise the indigenous communities and engage in greater public participation. For instance, Fiji now has a new climate change legislation and progress ought to be made to decide how the courts can implement these new rules. Notably, setting up a regional tribunal is a possible idea to solve the issue of mechanism shortfalls in the Pacific.

Eales: It is important to envision future problems, such as rising sea levels, resources and oceans in the Pacific. These problems tend to be transboundary and/or include multinational corporations. Therefore, it would be beneficial to implement a centralised regional mechanism to deal with these issues, to engage in voluntary dispute resolution. There is also the need for treaties and judiciaries to be on board. However, what is currently restraining the Pacific is the lack of resources. Nonetheless, the Pacific has been calling for this for over 20 years, and there is hope that there will be steps made toward the achievement of environmental justice.

Justice Preston: There is a potential for mobile ECTs to be used in the Pacific. However, each country has to give it jurisdiction to resolve disputes. Nonetheless, this has the benefit of reducing financial and human resource burdens with the increase in access to environmental justice.

# SESSION 2: PANEL A

**Speech 1: Asia-Pacific's Regional Perspective on ECTs: the Way Forward (*Linda Yanti Sulistiawati*)**

Linda's speech focused on two main points. Firstly, she gave a brief overview of the ECTs in Asia-Pacific, with a particular focus on China, India, Pakistan, Indonesia and Thailand. Secondly, she mentions four key points on the way forward for ECTs. This summary will be similarly organised.

### *1. Overview of ECTs in Asia-Pacific*

Linda mentions the four key roles played by the ECTs in Asia-Pacific. The ECTs primary role is to provide environmental case resolutions. Beyong that, ECTs provide environmental jurisprudence, an avenue of public expression and also a platform where parties (often with unequal levels of power) can talk on equal footing.

She further mentions the comprehensive jurisdiction of ECTs in Asia Pacific. She mentions three forms of jurisdiction:

- Geographic Jurisdiction: Where ECT judges travel for site visits or in 'mobile courthouses'.
- Subject-matter Jurisdiction: allowing ECTs to adjudicate on civil, criminal and administrative areas as these areas often overlap.
- Level Jurisdiction: Creation of ECTs/Green Benches at all three levels of trial, appeal and Supreme court.

*ECTs in China*

Linda mentions that China ECTs are good examples for the rest of the world, due to the following characteristics. The China ECTs promote an integrated ecosystem approach to environmental governance. Furthermore, transparency and public participation in environmental adjudication is evident from trials being broadcast on public platforms and the involvement of public and student representatives in cases.

*ECTs in India*

Linda brings up the National Green Tribunal ("NGT") of India and its key feature being its accessibility. Three prominent features of NGT were highlighted. First, an individual can directly go to court without a lawyer. Second, one can bring a claim on behalf of a group of persons even if they have no direct connection to the matter. Third, the court has a 'suo motu' option (the court directly bringing the motion itself in a case without the involvement of parties). Furthermore, NGT has provided environmental jurisprudence in areas of impact assessments and restitution, important in Indian law.

While the number of ECTs in the world are increasing, some countries are still unable to establish them due to social, political, economic, and jurisdiction challenges.

*ECTs in Pakistan, Indonesia and Thailand*

These countries do not have ECTs, but rather place their focus on educating judges presiding over environmental related cases.

- In Pakistan, judges receive environmental law training and some green bench judges are designated to preside over specific environment-related cases.
- In Indonesia, judges receive training on environmental issues and receive certification.
- In Thailand, General Court judges engage in specific environmental training courses and often receive scholarships to study environmental law abroad.

### *2. The way forward for ECTs in Asia-Pacific to be successful*

Linda mentions four factors which would influence the success of ECTs in the future: (1) government and stakeholder support, (2) sufficient IT infrastructure, (3) guarantee/evidence of environmental legislation enforcement, (4) being sensitive to the global environmental landscape.

*Government and Stakeholder Support*

The existence, powers, budget, jurisdiction and accountability measures of an ECT is largely dependent on government and stakeholder support. What is crucial is for the ECTs to continue being supported by the government. The public and academia can play a role in pressuring the government to continue said support.

*Sufficient IT Infrastructure*

The legal world had to pivot to great reliance on technology during the Covid-19 pandemic, and will continue to do so even post-pandemic. It is noticeably harder for developing countries to make this transition due to the lack of technology and infrastructure. Hence, greater support is needed in this area.

*Guarantee of Environmental Legislation Enforcement*

Presently, although ECTs have stepped in to resolve environmental cases, enforcement of their judgement remains a problem in several parts of the world due to the lack of financial and human resources.

*Sensitive to Global Environmental Landscape*

There continue to be many environmental matters which will be constantly brought up in court cases. Being sensitive to the global environmental landscape is crucial.

**Speech 2: Legal Analysis of Japan's National Environmental Dispute Coordination Commission (*Noriko Okubo*)**

Okubo explains the use of alternative dispute resolution in resolving environmental disputes in Japan, focusing on the Environmental Dispute Coordination Commission ("EDCC").

She first talks about the advantages of ADR. In general, ADR in Japan has predictable proceedings and lower costs; benefits which are common across the board around the world. What is unique about ADR in Japan is (1) appointment of technical experts in the ADR process, (2) unique fact-finding process and (3) provision of findings as recommendations for the government in developing environmental policy.

She moves on to talk about the unique structural features of the EDCC. The EDCC is an independent body. Structurally, members of the EDCC are appointed by the Prime Minister with consent of the Japan Congress. The EDCC is also able to appoint ad-hoc expert members and its own secretariat.

The EDCC provides the following services: mediation, conciliation, arbitration and adjudication (adjudication of liability for damages and adjudication of the cause of damage). The EDCC has shown promising results, as shown by the resolution of the Teshima pollution case.

Finally, Okubo lists three future challenges which the EDCC would potentially face. Firstly, the current jurisdiction covered by the EDCC is unsatisfactory. The expansion of the jurisdiction of EDCC is a primary consideration that should be taken. Secondly, there is a need for securement of experts. Thirdly, it is necessary to establish a closer linkage between administrative ADR and judicial review. Okubo proposes that Japan learn from the systems implemented in other environmental courts in Asia, potentially having a specialisation of environmental litigation in Japan.

**Speech 3: Judicial Response to Environmental Crisis: A Study of ECTs in China (*Yuhong Zhao*)**

Zhao makes three main points in her speech which broadly touches on ECTs in China. Firstly, she talks about motivating factors behind the establishment of ECTs in China. Second, she brings up some examples of prominent ECTs in China and compares the role of ECTs and the normal Courts in China. Lastly, she briefly talks about how ECTs will continue to respond to the global climate crises.

### *1. Motivating Factors behind Establishment of ECTs in China*

ECTs were established in China with the overarching aim of building China's environmental governance. Other reasons behind the establishment of ECTs include, (1) the dissatisfaction of the Chinese population with their worsening environment, and (2) the inefficacy of the old court system in resolving environmental-related disputes.

Academics and practitioners recommended the establishment of ECTs in China to combat the above mentioned difficulties. ECTs have the further benefit of (1) utilising the knowledge of experts in the field to resolve environmental-related matters and (2) to address liabilities from different areas of law (civil, criminal and administrative) which the traditional Chinese courts are not primed to carry out.

### *2. Comparison of ECTs and Normal Courts*

Zhao mentions some notable ECTs which have been set up to address the local water pollution crisis - ECTs were set up in Guiyang, Qingzhen, Wuxi and Kunming. She then brings up the main differences between ECTs and normal courts in China.

- Jurisdiction - traditionally, each court in China deals with one jurisdiction (civil, criminal or administrative). However, ECTs combine all three jurisdictions into one court.
- Rules regarding Standing - ECTs have relaxed rules relating to standing, allowing statutory bodies, NGOs, EPDs, local environment protection bureaus, and procuratorate to file cases or public interest litigation cases.
- Passionate Judges - several ECT judges directly involve themselves in evidence procurement in cases.

### *3. ECTs in China - Moving Forward*

Currently, there are some ECTs which are more successful than others in China. China is in the process of strategically developing their environmental courts. For example, China is reducing the number of environmental courts but establishing courts of different levels so as to develop a centralised system of adjudication.

Zhao ends by recognising the need to continue filling in the gaps in environmental legislation, and has confidence that the continued development of ECTs in China would have a great impact on environmental adjudication.

**Speech 4: Environmental Adjudication in New Zealand: Past, Present, and Future (*Alan Webb* in replacement of *Laurie Newhook*)**

Webb speaks of two broad points in his speech - how the New Zealand environment courts are organised and operated, as well as some challenges faced by these courts.

The New Zealand environmental court is statutorily created, whereby an Act sets out its composition and jurisdiction. It lacks an inherent jurisdiction, and hence it can only adjudicate on proceedings brought before it and cannot initiate actions against a party.

While there is only one environmental court in New Zealand, it has several bases across the country. Judges are appointed by the Attorney-General in New Zealand, and there are up to 10 permanent judges in the environmental court. While judges often comprise the bench in court, there are often two other commissioners, people who are experts in a particular discipline.

The environmental court operates as an appellate jurisdiction and carries out the four following roles. Firstly, the court often hears appeals on resource consent applications which have been rejected by a territorial council (for example, the Auckland council). Resource consent applications often involve the request for making alterations to a particular piece of land. The Resource Management Act ("RMA") sets out measures which the environment court should consider when contending with a resource consent application appeal. Secondly, the environmental court also hears appeals on New Zealand's district plans. Every 7 years, each district in New Zealand has to propose a district plan which sets out the rules in which everyone has to act. If there is a general dissatisfaction with it, then persons can bring forth specific provisions to appeal in the environmental court. Thirdly, the environmental court has an enforcement role. It can issue orders to prevent activities from going on if it goes against procedural rules. Lastly, the court has authority to issue out charges for breaches of the RMA.

Webb emphasises that the benefit of the New Zealand environmental court is its specialisation. The environmental court only hears issues related to the environment, and it has its own special set of procedures and rules of evidence.

However, a critique of the New Zealand environmental courts is its inefficiency. A long amount of time is required before a formal decision is announced, and often for matters which involve the improvement of infrastructure in the country. Hence, new legislation (besides the RMA) is to be introduced to New Zealand, making the rules and regulations in regards to procedure fundamentally different.

**Q&A Segment (Session 2 Panel A)**

Question 1

There are so many ECTs in China; are there indicators for how ECTs are termed (are they administrative-based, or more ecological-region based?)

Answer 1

Yuhong: Broadly defined, ECTs include environmental and resource divisions, formally established within four levels of courts. They also include specialised environmental collegiate panels, and environmental circuit courts established at the basic level. Therefore, this is a broad definition. However, even basic level courts can cover several counties and cities. This is in response to the lessons learned from the first phase of development.

# SESSION 2: PANEL B

**Speech 1: ECTs in the Philippines: Legal Analysis (*Grizelda Mayo-Anda*)**

Professor Grizelda is Executive Director at the Environmental Legal Assistance Centre (ELAC) and Professorial Lecturer at Palawan State University (PSU) College of Law. Prof Grizelda began by sharing that the Philippines is fortunate to have had progressive contributions in the field of climate justice, with active participation of local communities and indigenous people. Particularly, the country has seen developments such as (1) rules of procedure for environmental cases, (2) public interest law groups, (3) capacity building programs by the Supreme Court, Asian Development Bank and other institutions.

Moving to the legal and policy framework in the Philippines, Prof Grizelda emphasised that there have been cases in the Supreme Court which emphasized the Constitution, the Philippines' special laws and also rights. In terms of actual protection of the environment, there is accountability of local governance, decentralisation, and mandated institutions to enforce every law. Although there may be overlaps and challenges, at least if remedies are sought, laws and procedure are able to serve their appropriate functions.

To illustrate how the High Court underscored the Constitution and the importance of Philippine laws, Prof Grizelda introduced the case of the ***Resident Marine Mammals of the Protected Seascape TanonStrait, et al. (represented by NGOs) v. DOE Secretary Angelo Reyes, et al.*** **(2015)** where two lawyers and fisherfolk tried to prevent continued oil exploration in a protected area, the Tañon Strait. This is one important case where constitutional rights and special environmental law provisions were emphasised. It was also important that the Court decided to emphasise the nature of the service contract even though it was already terminated because it was unlawful, it was not signed by the President, and it was not authorised by a general law and reported to Congress pursuant to Philippine laws on protected areas.

The Rules of Procedure for Environmental Cases were a response to the long felt need for more specific rules that could sufficiently address the procedural concerns peculiar to environmental cases. The Supreme Court issued these rules after conducting a series of workshops, focus discussions and conferences to respond to the difficulties in the environment. The rules were passed as a landmark opportunity to enable citizens to litigate, plus it relied on the Constitution. The rules aimed to facilitate and provide an enabling environment for the community and civil society groups to pursue environmental litigation.

Here, Prof Grizelda emphasised how one does not need direct injury; for example, an NGO could intervene or be part of a civil action that would want to stop mining in protected areas. Also, the writ of Kalikasan is another instrument which provides immediate relief or remedy to person/s whose constitutional right to a balanced and healthful ecology is violated, or threatened with violation by an unlawful act or omission of a public official or employee, or private individual or entity, involving environmental damage of such magnitude as to prejudice the life, health or property of inhabitants in two or more cities or provinces.
The objective of these developments is to enable the concerned groups to assert the rights to their target to protect their actual sources and to compel government agencies to implement their mandates and to also seek damages.

Ending with the challenges in the Philippines, Prof Grizelda emphasised that more lawyers are still needed to provide laypeople with access to justice. Availability of experts is still a challenge, plus funding for environmental litigation. Having explained all the opportunities, we also must make sure that there are people and citizens who are able to take advantage of these policies.

**Speech 2: National Green Tribunal of India: Quo Vadis? (*Professor Gitanjali Nain Gill*)**

Professor Gitanjali Nain Gill is a Professor of Environmental Law at Northumbria University Law School. She began by emphasising how India is a huge country with different sorts of challenges. The principal bench was created in New Delhi, which covers the northern part of India, whereas the regional benches cover throughout India, covering the Southern, Western, Central and Eastern parts of the country.

Since the time it was established, NGTs have come into existence in three phases: the first phase was from 2010 to 2012, the second phase from 2012 to 2018 and the third phase is the present phase which started from 2018 till the present. At the start, the body established benches, but there was a lot of hesitancy from the Government or from the state governments in relation to the real establishment of this strategy, and probably the reason for this was essentially that the administration or the Executive failed to appreciate that there were funding issues or environmental issues that needed adjudication.

Consequently, there were issues about resource understaffing, infrastructure facilities and eventually the Supreme Court of India had to intervene into the body by saying it's an utterly disgusting situation. Acknowledging that there was a need to address environmental issues, an NGT had to be established. The second they started from 2012 to 2018, this was a golden phase of the national green tribunal. The reason why I say that it is a golden phase is there was both this substantive expansion as well as procedural innovation in terms of dispensing environmental justice.

In terms of dispensing environmental justice, the substantive features include this tribunal, which was the first of its kind, dedicated only for civil cases where it related to adjudicating the enforcement of environment and legal rights. The preamble of the (National Green Tribunal) Act and the judicial decisions recognise the right to environment as a part of right to life. The setting up of the “fast track court” also meant that within six months, the matter had to be sorted.

This standing by the NGT was given a very liberal interpretation following the concept of public interest litigation which the Supreme Court of India had initiated and there were two reasons which were given: most of the people who go to the courts belong to rural communities; their inability to travel to the courts and inability to have access because of resources and electricity was a challenge. Now, however, anyone on their behalf, anyone who is directly or indirectly affected, can approach the court.

Another interesting feature is that the Constitution of India mandates a fundamental duty of the citizens to protect and improve the natural environment. Another means of substantive expansion included in-house expertise, judicial and scientific members sitting together on the bench. These experts were considered central and not marginal in the decision-making process. So what we saw during that time was beautiful judgments coming up which clearly showed a symbiotic relationship, which I term it as scientifically legal judgments.

Section 20 of the Act also discusses the application of fundamental principles: (1) precautionary principle, (2) polluter pays principle, and (3) sustainable development. These three principles are considered as mandatory in relation to deciding environmental disputes.

Importantly, this tribunal was given the power of merit review, allowing in-depth scrutiny which involves not only law, but also the technical evaluation underpinning a decision. The reason again is environmental matters are so complex and so scientific that you need that sort of expertise to investigate the matter and this helped within the judicial application of the fundamental principles, particularly the precautionary principle and the polluter-based principle.

The third stage is the present stage. From 2018, the focus is now on the enforcement of NGT orders. A lot of substantive environmental jurisprudence developed from 2012 to 2018, but the question was how are we going to enforce these orders; there are issues of governance and implementation, and therefore there is a need to find solutions to implementation problems.

**Monitoring Committees**

At present there are more than 180 monitoring committees that have been established; they review, monitor and implement the environmental group reports, prepare suitable time-bound plans, and they are then submitted to the tribunal for implementation. In addition, there is the use of technology which is in the form of e-filing. You can go through e-filing, that will be taken up by the NGT for evidence purposes, followed by video conferencing. The NGT assessment seems to be a role model particularly for the developing countries, and has had an international reputation because it was all about the best interest of the people, the public, and the environment. It's trying to maintain access to justice, fairness, impartiality, and over years now it's been 12 years on 1st of October. NGT will be completing its 12 years; it has really gained public confidence and recognition and that's where I'm really going to focus.

**Challenge 1 (Bench Membership)**

But there are challenges: 12 years is a long time for an institution, and no system is perfect. You make it better, and what we've seen in these 12 years is that over this span of time there have been challenges. The first challenge is bench membership, and this has to be fully addressed. Section four of the NGT Act says that there should be minimum of 10 but maximum of 20 of both the expert members as well as judicial members. The availability of a spectrum of scientific knowledge reflects a wide ranges of cases that can be heard by the NGT and a balanced bench is fundamental in dispensing away with environmental justice. On the one hand, too many judges can really stifle the process, but on the other hand, the limited number can have an impact on environmental decision-making.

What we are seeing now is a limited bench. Since 2017, there has been a limited number of judges. In 2021, there were only five judicial members and four experts, and as of today there are only seven judicial members and six experts. This sort of limited expertise is having an impact on the delivery of environmental justice; we need a balanced bench in order to provide a scientific perspective that generates hypotheses about environmental events and processes and provides an evaluated statement to compare possible options to support environmental decisions. What we find instead, is a limited bench which is unable to handle these kind of matters and this is one of the challenges that has to be addressed for the success of the functioning of the NGT.

**Challenge 2 (Exercise of Jurisdictional Power)**

The second challenge is in the exercise of jurisdictional power. I think the effectiveness of the NGT is getting affected because the judgments are lax, unsophisticated and open to question. There is an increasing non-application of mind, no reasoned orders are being passed, there is an increase in appeals to the Supreme Court, and time and again the Supreme Court has criticized the NGT on its decision-making.

For example, in our case in 2019 the NGT did not exercise its merit review and the Supreme Court said it has failed to discharge its essential function; similarly again in the Tamil Nadu case, it exceeded its jurisdiction and it did not apply its mind. Time and again this is coming up, where they are saying that they are not properly using their mind or providing reasons for example in condemnation of delay, they do not give any reasons they just dismissed the applications without providing reasons to the common person and that is where the questions about effectiveness of justice come up.

Exercise of suo motu powers: This has been talked about as a good practice, and Prof Grizelda agrees it provides proceedings with flexibility and tries to deal with environmental exigencies, but there is a caveat that it also opens doors to the dangers of jurisdictional overreach. There are questions that may be included about the laxity of the media source, the criteria for the selection of the case, the recognition required of the judges to become activist judges. Furthermore, how do you define as to what is a public interest or an environmental interest or where the rights of the people are getting affected? For example, my research shows that from January 2020 to October 2021 in the Southern bench there were 66 out of the 66 cases of suo motu, 23 cases came from one national newspaper which kept on fighting the cases. What was the basis on that?

**Challenge 3 (Inconsistent Application of Fundamental Principles)**

Similarly, the number of suo motu petitions are coming up so high. Where do you draw the line? No doubt it is a good practice, but it has to be exercised with caution. Lack of clarity about fundamental principles is such a huge problem because the understanding of, appreciation and the application of fundamental principles is so inconsistent and unpredictable.

For example, if you read the judgments, Indian judges are very fond of applying the precautionary principle and polluter pays principle without really understanding what these principles mean. If you read the judgments, you would find there is there is conflation of precaution and prevention. When do you say it is scientific uncertainty, when do you say it's a harm or a serious harm? Similarly for the polluter pays principle, the words are being used overlapping, which have gotten very different connotations.

This sort of misapplication introduces subjectivity which has got an impact on the environmental rights, well-being and economic development of the society. The overuse of this principle stifles economic rule and the under application of the principles has a detrimental effect on the environment. Overall, the NGT is a good institution, but it has to really ask very difficult questions about the real effectiveness of decision-making, which requires a refreshing approach to respond to challenges.

**Speech 3: ECTs in Trans-Regional Environmental Governance: China's Experiences and Lessons (*Shang Peixuan*)**

Shang Peixuan is a PhD student at the Tsinghua University School of Law. She began by sharing that China has four layers of its administrative divisions, which is the basis for China's judicial system. You have the national Supreme Courts, the Higher People's Court, the intermediate People's Court and you have the most basic Local People's Courts.

As a geographically grand country with a great population, there is increasing interconnectivity among different administrative divisions and there are more and more environmental problems and disputes taking place. In one environmental dispute, it may involve civil, criminal and administrative elements, which makes solving the trans-regional environmental disputes in China more complicated.

Before 2014, there was severe protectionism in local governments and there was a prioritisation of GDP growth, sacrificing environmental protection. The environmental courts and tribunals could not play a very active role in solving trans-regional problems. 2014 marked the transition of the concept of environmental justice and the role of the court in China, because Article 20 of the 2014 amendment of the Environmental Protection Law established a coordination mechanism across administrative regions for the joint prevention and control of pollution.

Importantly, the legislation acknowledged the integrity of the environmental system and also it noticed the importance of trans-regional environmental governance and also this law gave social groups the legal standing to bring cases to the People's Court. It also has provisions regarding public participation, access to information and also enhances responsibility and increases the penalty for environmental damages.

**3 Key Principles**

Here, Peixuan found there were three very important guiding principles that laid the foundation for the work in handling trans-regional environmental disputes. The first is the professionalisation and specialisation of environmental justice, which includes establishing nationwide ECTs and increasing the number of professionals working on environmental trials. The next principle was that of sustainable development, which means balancing economic, social, and environmental interests, recognising the integrity of the environmental system. The most important principle in China today is the increasing delocalisation of the judicial system, separating jurisdiction from administrative divisions and preventing local protectionism and intervention by the local governments.

There are three ways in China that aim to fund and to operate the trans-regional ECTs. The first is by having trans-regional ECTs based on environmental or natural characteristics. For example, Guizhou province has an ECT system based on five ecological and environmentally protected areas. The second is trans-boundary ECTs in the economically advanced or developed areas, so in some provinces or cities. Thirdly, there are some cities that are trying to use the existing courts that already have trans-regional characteristics; for example, Beijing and Shanghai use the court for road transportation to handle the trans-regional environmental disputes.

**Trans-Regional Environmental Judiciary Institutions and Cooperative Mechanism**

The two biggest and longest rivers in China are the Yangtze River and Yellow River, and the ECT system along the Yangtze River is more mature than the yellow river because there are more than 1000 cities along the Yangtze River. There are many provincial and interprovincial collaboration frameworks that have been signed, and these agreements enable one jurisdiction to entrust another jurisdiction with the service of documents, property preservation and enforcement supervision. And among those courts along the river, they have established mechanisms for sharing information, technology and expert pools. Also, we may see the joint release of typical and guiding cases for the protection of the Yangtze River. Finally, they have established a steering group to batter facilitate the regular communication among the courts.

**Critical Gaps**

However, there are still some critical gaps; the first one is that jurisdiction is still to a large extent confined to the administrative divisions, and the second one is the lack of mechanisms for assessment and evaluation of the effectivity and the enforcement of the judgments. As there are too many cities in China, its institutions, trial standards and judgments are still very fragmented. Also, competition among the regions for economic growth still exists, so some courts in different regions are still lacking the incentives to solve trans-regional environmental issues, which may lead to interprovincial corporation mechanisms mostly based on the soft framework agreement instead of solid legislation. So we are still lacking a very solid foundation for the trans-boundary courts in China.

**Lessons for Transboundary Environmental Governance**

In closing, Peixuan shared that there are two paths which she believes can enhance transboundary or international environmental governance: the first is to build up bilateral or multilateral judicial cooperation treaties or if that's not possible, drawing up a soft instrument on environmental protection that may include the coordination of jurisdiction service of documents, sharing information and recognition and enforcement of foreign judgments. Another option would be to sign up to a bilateral or multilateral treaty on specific environmental issues or related to special environmental or ecological areas, and in that treaty build up shared objectives and stipulate uniform standards and set up common mechanisms for assessment and evaluation. Peixuan believes that these are the lessons from China's domestic experience for the future international practice with regard to solving transboundary environmental disputes.

**Speech 4: South Asian Perspectives on Environmental Courts and Tribunals: Prospects and Challenges *(Kokila Konasinghe)***

Professor Kokila is a Senior Lecturer at the Department of Public and International Law at the University of Colombo, as well as the Founding Director of the Centre for Environmental Law and Policy at the university. In her presentation titled "South Asian Perspectives on Environmental Courts and Tribunals: Prospects and Challenges", Prof Kokila shared her ongoing comparative research which aims to uncover best practices across India, Pakistan and Bangladesh, and identify gaps which still need to be addressed in the South Asian region.

Prof Kokila began her sharing with broadly discussing why ECTs are necessary from an environmental justice perspective. She opines that ECTs are valuable both in delivering environmental justice to humans and to nature by providing (1) efficiency, (2) expertise, (3) a reduction in environmental and economic cost.

Within the governance framework, ECTs help to deliver environmental justice by allowing (1) equity in the distribution of environmental risk and commitments, (2) recognition of diversity of participants and experiences in affected communities, and (3) meaningful participation in the political and governance processes.

**Rights of Nature and Legal Personhood**

As for delivering environmental justice to nature, Prof Kokila notes that although it is perhaps too early for South Asia to consider rights of nature, the Uttarakhand High Court in the case of ***Mohammed Salim v. State of Uttarakhand*** (2017) considered the rights of nature argument, declaring the rivers Ganga and Yamuna to be legal persons. Although it is relatively early to consider (1) the rights of nature and (2) recognition of legal personhood of nature, Prof Kokila believes more research can be carried out into how these 2 aspects fit within the ECT framework.

**Addressing environmental challenges in South Asia**

South Asia is a biodiversity hotspot, but faces pollution, deforestation and many other adverse impacts of climate change. Prof Kokila believes that all 3 branches of governance should align to deliver: (1) expedient solutions ranging from comprehensive legislative frameworks, (2) cognisant administrative decisions, and (3) eco-centric judicial interpretations. These approaches need to focus centrally on environmental justice.

**Comparative analysis of ECTs in India, Bangladesh and Pakistan**

Prof Kokila covered best practices in Pakistan and Bangladesh, given that Prof Gitanjali had already covered India in her earlier presentation. In Prof Kokila's view, Pakistan provides a good comparative jurisdiction as it expressly established Environmental Tribunals under s 21 of the **Pakistan Environmental Protection Act 1997**. In Bangladesh, the **Environmental Court Act 2010** and **Environmental Conservation Act 2010** have contributed to Bangladesh's success, as they confer legal jurisdiction on the environmental courts to deal with cases. The Bangladesh Supreme Court has also repeatedly demonstrated its enthusiasm for liberal interpretation and enforcement of environmental laws. The jurisdiction of the courts influences the granting of legal remedies and the likelihood of environmental justice for affected people. The challenge faced here is that although Bangladesh legislators have created environmental laws, their implementation is taking a negative turn. Prof Kokila opines that it is the responsibility of both parties to take suitable steps to speed up the process.

In closing, Prof Kokila touched on some challenges facing the implementation of ECTs in South Asia. In particular, (1) lack of resources, (2) politically independent, (3) more specific focus economic and development priorities, and (4) the lack of awareness among the public. She hopes to see these aspects improve for sustained and meaningful implementation of ECTs.

## Q&A Segment (Session 2 Panel B)

Question 1
Does the Writ of Kalikasan give courts control over an executive body, thereby breaching the separation of power?

Answer 1
Professor Grizelda: It is not supervision over what the government agency is doing, but on the way the project is being pursued. For example, laws provide that projects cannot do exploration work within protected areas; failing this, citizens may seek a Writ of Kalikasan. The writ actually has no control over what the government agency is doing but allows a review of the environmental impacts of the project. It is thus important to stress that since government agencies must implement the laws, they must be familiar with environmental impact assessments, and with protected area/fishery laws.

Prof Gita: There is certainly a tension between whether this is ultimately proactive judiciary or judicial activism. It is ultimately about the implementation, rather than directing the authorities to do it in a particular way. Prof Gita provided the example of how an NGT went beyond its prescribed power. In 2021, an NGT interpreted the **Motor Vehicles Act**, which mandates pollution under control (PUC) certificate for vehicles. The NGT went a step further, ordering that any vehicle without a PUC be refused petrol from the petrol station. The matter went before the Supreme Court, which ruled that the NGT had overstepped its limits by acting as an executive, not the judiciary. The NGT should only have gone as far as looking into whether the laws were implemented. Monitoring is a part of this, but not judicial legislation.

Question 2
Would Peixuan's chapter on "Lessons for transboundary environmental governance" be more about what China can learn from its previous experiences, or what other countries can learn from China's experiences?

Answer 2
Peixuan: The aim of this research is to draw from China's domestic lessons in solving the transregional environmental issues, especially when related to the river basins. That kind of experience can also inform China's future practice when dealing with transboundary environmental issues (e.g. shared river basins, and marine pollution issues with neighbouring countries). While some may think first about state responsibility, this is ultimately very difficult to prove and when relying on the international courts and tribunals, the entire process can be quite time-consuming. A private law perspective (how ECTs can cooperate and coordinate) can be useful and thus, the research is centred more around what China can learn from its

own domestic experience when solving transboundary environmental issues with neighbouring countries in the future.

Question 3
What is the situation in South Asian countries - which of these countries has specialist environmental courts?

Answer 3
Prof Kokila: My research mainly focuses on Bangladesh, Pakistan, and Nepal, as these are all countries with technical frameworks with ECTs. Other countries like Sri Lanka and Maldives do not have specialised courts and may instead rely on the civil and criminal courts to resolve environmental matters.

## SESSION 3

**Q&A Segment (Session 3)**
Question 1
Are we likely to soon see multilateral cooperation on a regional basis when dealing with environmental litigation? Or will this cooperation take a long time?

Answer 1
Eales: It will likely take a long time, but there is greater recognition of the need for global cooperation, since many environmental issues are transboundary, and we need new ways of addressing them. It is particularly important have multiple different stakeholders get involved. One big issue is that many disputes are arbitrated in private, without looking at environmental issues, and without making the process transparent for affected communities. Frameworks thus need to allow all parties to be part of the process.

Question 2
Do the differences between legal systems (Common, civil, hybrid (e.g., Philippines and Indonesia)) have implications on the way that tribunal courts may be structured?

Answer 2
Sroyon: It depends whether we are referring to judgements themselves or setting up the ECTs. Sroyon is of the view that the type of legal system would not greatly influence how a specialist tribunal is set up (e.g. whether the tribunal has only legally-trained judges or experts giving advice). Divisions between civil and common law are slowly collapsing, as seen with the EU. However, this is still an interesting tension to explore.

Question 3
How do we encourage countries that are currently not providing ECTs or other environmental dispute resolution mechanisms to take them up?

Answer 3
Eales: This is a good question. As a starting point, once a country has greater economic development, that is usually where environmental issues start to get looked at more seriously.

With less developed countries, one potential way of dealing with environmental issues is through supply chains and MNCs. This is because corporations are regulated by stock exchange rules, or via their home countries. Thus, they may be caught by obligations within supply chains and still need to abide by those standards.

Matthew Baird: Climate litigation is a rising tool for change, and therefore constitutional interpretation plays a large role in how environmental litigation plays out. As for corporate law, ESG advisory (which Baird sees from the safeguards point of view as opposed to a reporting standpoint) is another way forward for corporate lawyers to advise clients on more sustainable practices.

Eales: Creating a demand within the community (e.g. increasing demand on barristers for legal advice) places pressure on governments as well. In about 75% of cases, constitutions have been passed after critical UN and international treaties (ICCR/Stockholm Declaration). Constitutions have picked up on environmental/humans rights and citizens can use these rights to bring a case to whichever court has this constitutional jurisdiction. ECTs may not be there, but when people are bringing actions on the available books and there is rising demand, that puts pressure on courts to respond.