

“An Overview of Global Environmental Instruments Regional Interests”

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As the environmental treaties are to be considered from the regional perspective, I think I should first understand and consider what are the regional interests in the Asia/Pacific region for the purpose of this presentation. Some identification of the regional interests for this purpose would serve as an appropriate point of departure for a more targeted analysis of global environmental instruments.

On reading the relevant literature I found that this forum has been convened at a significant time in the process of developing the Asia/Pacific region. The notion of an Asia-Pacific community is emerging and to consider regional interests the concept of community is a necessary starting point. Senator Gareth Evans, Australia's Minister of Foreign Affairs, has argued that 1994 was a watershed year in the evolution of the Asia/Pacific community. Mr Evans has noted that the inaugural meeting of the ASEAN Region Forum and the APEC Leaders Summit, both held in 1994, marked the transition from theory to reality in the idea of an Asia Pacific community. This process can be traced back to the First Ministerial Meeting convened in 1989 by the Australian Institute.

The characteristics of the Asia/Pacific were highlighted at the APEC Leaders Summit in Bogor by the Australian Prime Minister:

- * “The region (represents) an economic body which will grow faster than any other in the world”.
- * “The commitments made by the APEC economies will see new streams of technology and capital flowing to the developing economies of APEC.”
- * “Free trade in APEC will be reached in a way which will be consistent with the GATT, will strengthen the multilateral trading systems and will promote further trade liberalisation in the world economy.”

In the Declaration of Common Resolve prepared in conjunction with the Bogor Summit, the APEC Economic Leaders” state that:

“We set our vision for the community of Asia Pacific economies based on a recognition of the growing inter dependence of our economically diverse region, which comprises developed, newly industrialising and developing economies. The Asia Pacific industrialised economies will provide opportunities for developing economies to increase further their economic growth and their level of development. At the same time, developing economies will strive to maintain high growth rates within the aim of attaining the level of prosperity now enjoyed by the newly industrialising economies. The approach will be coherent and comprehensive, embracing the three pillars of sustainable growth, equitable development and national stability”

“Effective co-operation will also be developed on environmental issues, with the aim of contributing to sustainable development.”

An APEC Environmental Vision Statement was issued at a meeting of the APEC Ministers for the Environment held in Vancouver, Canada in March 1994, prior to the Bogor Summit, in which the Ministers affirmed APEC members' commitment to sustainable development in the spirit of the Rio Declaration on Environmental and Development. The Ministers asserted that environmental protection and economic growth are inseparably linked, and supported the integration of “environmental considerations into relevant policy development and economic decisions throughout the region”. The potential for regional approaches to address global environmental problems was recognised by the Ministers, who called on APEC to take the lead in addressing these problems and developing solutions in line with the Rio Declaration. This commitment to promoting regional co-operation to achieve sustainable development was reiterated in The Framework of Principles for Integrating Economy and Environment in APEC also issued at the APEC Environment Ministers meeting.

As these quotes indicate, the Asia/Pacific region is characterised by its rapid economic growth, co-operation between diverse economies, liberalisation of trade and investment, and commitment to following the path of sustainable development. And the APEC approach is to be implemented in conformity with the principles of sustainable growth, equitable development and national stability.

It is with this regional context in mind that I intend to make some analytical comments about the features, characteristics and the development and implementation of global environmental instruments. UNEP has played a major role in the development and effective implementation of international environmental instruments and, in particular, has worked to facilitate such implementation at the national and regional levels. I hope that, the basis of my experience as a UNEP Lawyer, I can throw some light on these new and emerging issues. I should note that these are my personal preliminary views.

My comments will be divided into two parts. First, I will discuss global environmental instruments. Then I will move on to consider the Asia/Pacific dimension, raising in this regard two important and interrelated questions:

1. Are global environmental instruments complementary and mutually supportive of trends and development within the Asia/Pacific region?
2. Can environmental instruments be implemented more effectively within the context of regional co-operation, and can they serve as one of the important instruments and tools which will facilitate the realisation of APEC's objectives?

Global Environmental Instruments

Since 1972 there has been a marked growth in the number and scope of environmental treaties. In particular, after the 1992 Rio Conference, international legal instruments became more concentrated on addressing environment within the context of sustainable development and incorporated a number of new concepts and innovative approaches. Today I will offer some preliminary analysis with reference to recent conventions particularly those associated with the Rio Conference. Some of the relevant ideas, concepts and principles include: sustainable development equity, common concern of humankind, common but differentiated responsibilities and partnership.

Sustainable Development

The concept of sustainable development has a fundamental nature and serves as the basis for other new and innovative concepts and principles arising within environmental conventions. Sustainable development therefore appears both explicitly within conventions but is also reflected within operative provisions throughout environmental treaties.

The essential conceptual elements of sustainable development are, inter alia, the integration between ecological and economic issues and the notion of equity, both intra and inter generational.

- * The integration between ecological and economic issues refers to the understanding that environmental protection and must be dealt with in an integrated way. If socio-economic factors are not considered, the environment will not be effectively protected. Conversely, without regard for sustainable use and the environment generally, it is impossible to achieve development which is truly sustainable.
- * In the Climate Change Convention's Preamble, it is affirmed "that responses to climate change should be co-ordinated with social and economic development in an integrated manner.....". "The Desertification Convention recognised the need for "a new and more effective approach....at all levels within the framework of sustainable development"
- * It is essential to the notion of sustainable development that environmental law commitments address intra and inter generational equity.
- * Because of the diverse economies, capacities and capabilities of states, the concept of equity is necessary to ensuring sustainable development, that is, development that meets the needs of the present without compromising the ability of future generations to meet their own needs, in an ecologically and economically interdependent world.

Operative paragraphs of the Climate Change Convention, the Biodiversity Convention and the Desertification Convention note the aspiration to benefit present and future generations. The Biodiversity Convention articulates an explicit concern for fair and equitable sharing of benefits.

Sustainable development may have implications beyond environmental law as well, for legal principles as fundamental as those contained within the United Nations Charter. In the shadow of World War II, drafters of the Charter came to the important understanding that without economic and social development there is no solid foundation for international peace and security. International peace and security require socio-economic development but for that development to be stable, socio-economic development and environment issues must be dealt with in an integrated way. In other words, it must be pursued on the basis of sustainable development. In this regard, we can consider that contemporary understandings suggest the interrelatedness of peace, development and environment.

The broadening scope of international environmental law in connection with sustainable development may also mean a closer interaction with, and far-reaching implications for, the progressive development and codification of international law generally. For example, the sustainable development concept requires the complementary development of environmental law and trade law, a closer link between environmental law and human rights law and the further development of liability regimes to meet the requirements of sustainable development.

Common Concern of Humankind and Common but Differentiated Responsibilities

The concept of the common concern of humankind reflects humanity's increasing awareness of the interdependent and global nature of environmental problems. Environmental problems stretch across national boundaries and are shared concerns of humanity. The international community is increasingly recognising that all peoples and nations are stake-holders in the ecological and economic well-being of the world. The two basic assumptions implicit in the common concern concept are, inter alia:

- * that states should not cause harm with regard to issues of common concern, and
- * that they share the responsibility for addressing these common concerns.

Preambles to both the Climate Change Convention and the Biological Diversity Convention directly acknowledge that the environment issue at hand is a common concern of humankind. The notion appears also in a number of other international legal instruments.

The Climate Convention Preamble and Article 3 of the Biodiversity Convention affirm the principle that states have the sovereign right to exploit their own resources and, in addition, the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other State or of areas beyond the limits of national jurisdiction. This idea was incorporated within Principle 21 of the 1972 Stockholm Declaration and reaffirmed within recent instruments such as Principle 2 of the Rio Declaration.

The relevant conventions also illustrate the assumption of shared responsibilities. The Climate Change Convention is explicit in stating that "(t)he Parties should protect the climate system...on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities". Each Contracting Party to the Biological Diversity Convention undertakes to provide financial support and incentives for national activities in accordance with its capabilities. Here we can see that environmental law is also introducing the idea that shared obligations arising in accordance with common concerns should not necessarily give rise to the same responsibilities on the part of each and every nation. Rather, nations should contribute in fulfilment of their common responsibilities and in accordance with their capacities and capabilities.

These developments in environmental law also have implications for the progressive development of international law generally. These new trends should not be considered as a challenge to the fundamental notion of sovereignty and sovereign equality but, instead, represent its progressive enrichment. The evolution in environmental law is aimed at the protection and improvement of the environment and at achieving sustainable development. These goals will ultimately benefit each and every nation, protecting the fundamental interests which sovereignty and sovereign equality stand for.

Partnership

The idea of partnership - as it has been reflected within international environmental instruments - can be seen as an important part of the duty of States to co-operate with one another in accordance with the Charter as solemnly proclaimed in the 1970 Declaration on Principles of International Law.

The idea of partnership is being developed in the context of sustainable development and builds on the idea of co-operation, reflecting the need to strike co-operative arrangements between the economical and political factions of the world community in effectively addressing global environmental problems, in particular, between the North and South, rich and poor, among regional groupings, and between governmental and non-governmental institutions.

In international environmental instruments the partnership idea not only reflects the principle of equity, the requirements of the common concern and common but differentiated responsibilities concepts but, in addition, promotes development of the practical means by which to achieve it. A wide range of innovative enabling and facilitative mechanisms which appear within environmental conventions could somehow also be considered as a reflection of the idea of global partnership.

Examples of facilitative mechanisms include information exchange and reporting requirements and multilateral consultative processes. Of particular note, however are the enabling mechanisms which provide for financial co-operation and technology transfer. The Multilateral Fund established pursuant to the Montreal Protocol was an innovation and has provided a good example for further financial facilitative mechanisms within environmental treaties. The operation of financial mechanisms of recently developed conventions by the Global Environment Facility (GEF) is another such example. Implementation of the Climate Convention by developing countries is stated to be contingent upon financial commitments of, and technological transfer from, developed country Parties. The Biodiversity Convention is characteristic of recent conventions in committing parties "to provide and/or facilitate access for and transfer to other Contracting Parties of technologies" relevant to the purpose of the Convention.

The notion of global partnership and its importance are particularly emphasised in the Preamble to Agenda 21:

"humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. No nation can achieve this on its own; but together we can - in a global partnership for sustainable development (emphasis added).

Trade Measures

A further development which I would like to draw to your attention is that of trade measures within global environmental instruments.

At this point in time only a small number of environmental conventions contain trade provisions. However, such instruments have received a fair amount of attention for their apparent interface with the international trade regime. The need for complementarity between trade and environment policies has also received recognition and attention in environmental soft law instruments and in a range of international fora.

Agenda 21 states that environment and trade policies should be mutually supportive:

"An open, multilateral trading system makes possible a more efficient allocation and use of resources and thereby contributes to an increase in production and incomes and to lessening demands on the environment. It thus provides additional resources needed for economic growth and development and improved environment protection. A sound environment, on the other hand, provides the ecologic and other resources needed to sustain growth and underpin a continuing expansion of trade. An open, multilateral trading system, supported by the adoption of sound environmental policies, would have a positive impact on the environment and contribute to sustainable development".

The Commission on Sustainable Development has stressed the need for mutual compatibility. Specifically, the need for an open, balanced and integrated approach towards sustainability through an open, equitable and non-discriminatory multilateral trading system, improved market access for products from developing countries, effective environmental protection and mutually supportive trade and environment policies.

My very preliminary analysis of trade and environment suggest that, from both the environmental and free trade perspective's, some real attempt is being made to work toward compatible and complementary policies and law. As early as 1987, the London Guidelines on Exchange of Information on Chemicals in International Trade explicitly incorporated in its general principles the idea that regulations and standards should not create unnecessary obstacles to international trade and, also, that governmental control measures or actions should not

be more restrictive than those applied to the same products for domestic use or imported from a third state. Chemical law can also be looked to illustrate that the trade and environment interface is treated as an ongoing concern within environmental law. In preparations for negotiating an internationally legally binding instrument on Prior Informed Consent for hazardous chemicals in international trade, one of the major issues considered by the Experts Group is the interface between the PIC instruments and the rules of free trade. As illustrated by the Montreal Protocol, where trade provisions are used, positive measures such as financial co-operation are to be emphasised in the achievement of environmental goals.

GATT itself has always contained recognition of the importance of environmental protection. Article XX of the 1947 GATT provides a range of exceptions to the trade rules for overriding public policy goals. Particularly relevant for environmental protection have been ss (b) which provides an exception for measures necessary to protect human, animal or plant life or health, and ss (g) which provides an exception for measures relating to the conservation of exhaustive natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. Between the Tokyo and Uruguay negotiating rounds, there have also been relevant developments in the associated instruments such as the Agreement on Technical Barriers to Trade to the Agreement on the Application of Sanitary and Phytosanitary Measures. The Preamble to the 1994 Agreement Establishing the World Trade Organisation represents a further development of the guiding principles underlying the free trade regime: the Parties recognise that relations in the field of trade and economic endeavour should, inter alia, allow for "the optimal use of the world's resources in accordance with the objective of sustainable development, seeking to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".

As I referred to earlier in relation to Agenda 21, the multilateral trade regime plays a major role in facilitating economic development, and thereby enhancing the capacity of states to address environmental issues. Trade measures or provisions within environmental conventions should be used to facilitate the enhancement of environmental protection and the reduction and limitation of the negative impacts of trade. They must be used cautiously to avoid and prevent disguised restrictions on trade or trade discrimination, affecting, in particular, the access of developing countries to world markets, their ability to develop and ultimately to address environmental issues.

Environmental law is rapidly evolving and constrains a number of new and general ideas, concepts and mechanisms which require more precise legal formulation and interpretation. In contrast, the trade law regime is very well developed and reflects delicate negotiated balances. Therefore, while the general political consensus exists regarding the complementarity and mutual support of environment and trade, the implementation in practice remains an extremely important and complicated task. These are my personal views, expressed in reflection of my belief that this task is of crucial importance to achieving sustainable development and that lawyers, policy-makers and diplomats should therefore pay particular attention to accomplishing it.

The Asia/Pacific Region

In the implementation of any international legal instrument, including global environmental instruments, individual states are ultimately the major actors in ensuring that conventions fulfil their purposes. Much research is, therefore, being undertaken with regard to national implementation and reflects a variety of different paradigmatic approaches: economic, political and legal. Certainly, international cooperation is also crucial in this connection. This is particularly true, with regard to international environmental instruments. The new features they include - sustainable development, common concern and partnership etc. - mean that international cooperation, and in particular regional co-operation, is essential to effective implementation. Within a region there are close economic links and similar ecological issues. I would now like to comment more specifically on regional implementation in light of my overview of global environment instruments. I have conducted only limited research and have only limited knowledge on the Asia-Pacific region. These are, therefore, preliminary comments designed to promote discussion.

Firstly, Sustainable Development

As I have noted, sustainable development is a major feature of recently developed global environmental instruments. The general objective of global environmental instruments is to promote environmental protection but also to have regard to the economic development of all countries, in particular, developing countries.

These major objectives of environmental conventions have notable similarities with the fundamental purposes of the APEC region. As my earlier review of APEC literature indicated, there is a strong commitment to endorsing

the sustainable development path. The Asia/Pacific region therefore has the ability to illustrate the responsible application of global environmental conventions within a progressive economic context - and to demonstrate their compatibility. If APEC takes the implementation of environmental conventions further into account in its overall development strategy, we may reasonably hope that regional co-operation within APEC would greatly contribute to the effective implementation of those conventions, relating to ozone depletion, climate change, biodiversity, chemicals and others. At the meeting in Vancouver of the APEC Ministers of the Environment, they stressed the importance of integrating environmental considerations into relevant policy development and economic decisions. As I understand, efforts are being made to integrate environmental considerations into the program of APEC working groups.

Secondly, Common Concerns / Partnership

As I mentioned earlier, both Agenda 21 and recent environmental conventions stress the importance of common and cooperative involvement in the implementation of environmental obligations. The Asia/Pacific region is characterised by its diverse economies; developed, newly industrialising and developing. It is just this diversity, among other things, which is recognised and accounted for in the principle of common but differentiated responsibilities and the global partnership idea.

APEC's basic documents indicate a commitment to enhancing co-operation in order to promote the region as a whole. This is consistent with the spirit of global environmental instruments and would also contribute to their effective implementation. The consistency can be illustrated by a couple of examples.

- * APEC's Working Group on Energy is developing programs on clean coal technology and on improving energy efficiency and conservation. These aspirations are compatible with the United Nations Framework Convention on Climate Change, particularly in light of recent discussions to develop a protocol which would promote energy efficiency. APEC strategy and further actions in this field would, therefore, enhance the implementation of the Climate Change Convention.
- * A further example is provided in the area of investment and technology transfer. The Asia/Pacific region aspires to an increased flow of technology and capital to developing countries. Related to this, the Trade and Investment Data Review Working Group is developing more reliable data on trade in goods, services and investments. As I have noted earlier, recent environmental conventions stress the importance of enabling mechanisms including financial assistance and technology transfer. There is a certain compatibility between these mechanisms and the APEC aspiration. As APEC continues to move in this direction, and in conjunction with respective obligations under environmental conventions, the region will be responsible for a valuable contribution to implementation of environmental law. This would have significant effect on the implementation of provisions concerning financial mechanisms and technology transfer. Wider access to technology and capital would broaden the ability of Parties from the region to meet environmental obligations and these in turn would contribute to the sustainable pattern of technological and capital flows.

Thirdly, Trade and Environment

The design, interpretation and application of trade measures to ensure complementarity with GATT/WTO rules and principles is a significant contemporary issue.

The complementarity between trade and environment law is of particular relevance to the Asia/Pacific region because of its rapid economic growth, facilitated in great part by increased trade flows. I would like to borrow a wedding cake analogy used by Senator Evans. As he pointed out, tier one of the Asia/Pacific cake - the foundation level of APEC activity - is within the region. APEC's rapid economic growth is to be facilitated by trade flows and environmental challenges will be an inevitable part of this economic process. The complementarity of environmental and trade policies, will therefore, be particularly important in this region. At the meeting of the APEC Minister of the Environment and Ministers recognised the challenge of achieving sustainable development while taking advantage of the dynamism that market economies provide. The Framework of Principles for Integrating Economy and Environment in APEC includes the principle of supporting multilateral efforts to make trade and environment policies mutually supportive, consistent with the Rio Declaration. APEC is well placed to make a significant contribution in this field.

Concluding Remarks

The Asia/Pacific region is undoubtedly a promising one and I am proud of my association with it.

My preliminary analysis - which I have shared with you today - suggests that there is a striking compatibility between the development strategy of the region and of the objectives of recent global environmental instruments. I would venture to predict that further study in this area would indicate that if the implementation of global environmental conventions were further built into the Asia/Pacific strategy, there would be significant benefit both to the implementation of Conventions and to the regional interests of the Asia/Pacific.

I therefore consider that this workshop, in focusing on environmental issues in this rapidly developing region, is a timely and important initiative. I greatly appreciate being part of it.