

ASIA

Incorporation of the Principle of Sustainable Development into the Development Policies of the Asian Countries¹

by Surya P. Subedi*

I. Introduction

After the decolonisation process began after the Second World War, the newly independent Asian States began to accelerate their efforts for economic development and to assert political and economic freedom in the conduct of their international relations. Such attempts found their expression in various manifestations such as the concepts of Non-alignment, and a Zone of Peace for the Indian Ocean as well as for the whole of South-east Asian region, Afro-Asian co-operation, and the concepts of the permanent sovereignty of States over natural resources and the New International Economic Order etc.

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In their drive for industrial growth and economic development, the Asian countries, like other countries in other parts of the globe, were soon confronted with the harm caused by industrial activity to both the local and global environment. Given the increased awareness of environmental problems brought about by advances in science and technology and the massive population growth, the Asian States were expected to pay attention to actual and potential harm to the environment in their drive for economic development. It was at this juncture that the principle of sustainable development took centre stage of international environmental diplomacy in Asia.

The object of this article is to examine the incorporation of the principle of sustainable development into the development policies of the Asian States. Since Asia is

such a vast continent, a discussion of this nature will have to be brief and perhaps specific to certain sub-regional initiatives. Accordingly, this article will focus on the situation in the South and South-east Asian regions.

II. The formative years

In the formative years of the principle of sustainable development, the Asian States appeared keen to incorporate the principle into regional or sub-regional agreements. For instance, the ASEAN Agreement on the Conservation of Nature and Natural Resources concluded in Kuala Lumpur in 1985 is one of the most ambitious agreements in place, and has far-reaching implications in terms of the incorporation of the principle of sustainable development.² The preamble to the Agreement tries to assimilate the essentials of the principle of sustainable development. It states that "the interrelationship between conservation and socio-economic development implies both that conservation is necessary to ensure sustainability of development, and that socio-economic development is necessary to the achievement of conservation on a lasting basis." Article I includes an ambitious, progressive and comprehensive commitment to the principle of sustainable development. It reads as follows:

(1) The Contracting Parties, within the framework of their respective national laws, undertake to adopt singly, or where necessary and appropriate through concerted action, the measures necessary to maintain essential ecological processes and life-support systems, to preserve genetic diversity, and to ensure the sustainable utilisation of harvested natural resources under their jurisdiction in accordance with scientific principles and with a view to attaining the goal of sustainable development.

(2) To this end they shall develop national conservation strategies, and shall co-ordinate such strategies within the framework of a conservation strategy for the Region.

Article 2 of the Agreement goes on to state that

(1) The Contracting Parties shall take all necessary measures, within the framework of their national laws, to ensure that conservation and management of natural resources are treated as an integral part of development planning at all stages and at all levels.

(2) To that effect they shall, in the formulation of all development plans, give as full consideration to ecological factors as to economic and social ones.

Article 3 deals with genetic diversity of species and requires the contracting parties to maintain maximum genetic diversity. Article 4 requires States to pay attention to sustainable harvesting of species, and Article 5 seeks to protect endangered and endemic species. Of particular

interest is Article 6 of the Agreement, which requires States to protect their forests and control the clearance of vegetation. This Agreement was probably the first regional treaty to deal with environmental problems in such comprehensive manner, dealing with soil, water and other natural resources and their sustainable utilisation.

Since the 1985 Agreement, ASEAN has taken a number of other initiatives to promote sustainable development in the region. For instance, the Third ASEAN Ministerial Meeting on the Environment which met in Jakarta in October 1987 adopted the ASEAN Environment Programme III and the Jakarta Resolution on Sustainable Development. However, after the adoption of this resolution and the 1985 Agreement, a significant shift in policy appears to have taken place in the ASEAN member States. The 1985 Agreement never entered into force. When the international debate on sustainable development moved on to the idea of common but differentiated responsibility (after the publication of the World Commission on Environment and Development's report and the adoption of

the Montreal Protocol), the developing Asian States, which were by then seeking significant financial contribution from the industrialised countries for any developmental compromises they were expected to make, hardened their position.

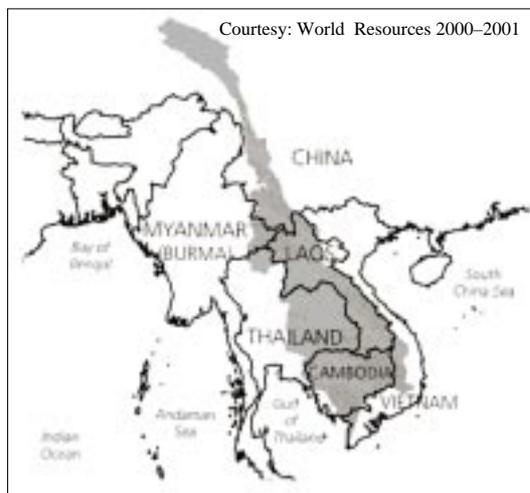
Owing to the acceleration of the globalisation process, the events leading up to the Rio Conference coincided with the massive worldwide growth in economic and commercial activity led by companies in industrialised countries. While these businesses were in the process of exploiting the unprecedented level of business opportunity offered by the

changed world political climate, the Asian States appeared keen to catch up with their economic development rather than implement the environmental principles embodied in agreements such as the 1985 ASEAN agreement. It is not that the Asian countries wanted to ignore or undermine the principle of sustainable development, but from then on the approach taken became a cautious and piecemeal one.

III. Developments in the post-Rio period

A high degree of commitment to the principle of sustainable development came about in relation to the utilisation of a specific natural resource – water resources – in 1995 when the riparian States of the River Mekong concluded an Agreement on the Co-operation for the Sustainable Development of the Mekong River Basin.³ The preamble to the Agreement sets the tone for the legal regime created for the Mekong River Basin. The contracting parties reaffirm

the determination to continue and co-operate and pro-



The Mekong River Basin and the potential areas that could benefit from its hydropower resources (highlighted in grey)

mote in a constructive mutually beneficial manner in the sustainable development, utilisation, conservation and management of the River Mekong basin water and related resources for navigational and non-navigational purposes, for social and economic development and the well-being of all riparian States, consistent with the needs to protect, preserve, enhance and manage the environment and aquatic conditions and maintenance of the ecological balance exceptional to this river basin.

Through Article 1 of the Agreement, Cambodia, Laos, Thailand and Vietnam committed themselves to "co-operate in all fields of sustainable development, utilisation, management and conservation of water and related resources of the River Mekong Basin". Accordingly, they further agreed

to protect the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects resulting from any development plans and uses of water and related resources in the Basin.⁴

The Mekong River Treaty is one of the most advanced international river treaties incorporating the principle of sustainable development in the utilisation and management of the resources of a river. Unlike the 1985 ASEAN Agreement on the protection of nature and natural resources, which did not enter into force, the 1995 Mekong River Agreement entered into force on the day it was concluded. Although some other similar treaties concluded with regard to other international river basins also include some elements of sustainable development, none is as advanced as the Mekong River treaty. For instance, the Treaty for Amazonian Co-operation of 1978 concluded among Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela requires these States to preserve the environment and to conserve and make a rational use of the natural resources of these countries.⁵

One of the reasons why both the 1985 ASEAN agreement and the Mekong River treaty are so advanced in incorporating the principle of sustainable development is the help and guidance received from the United Nations (UN) agencies, particularly UNEP (United Nations Environment Programme), in the preparation of these treaties. Similar agreements concluded under the auspices of UNEP for other parts of the world, such as the agreement on the Zambezi River system, also incorporate the principle of sustainable development. The preamble to the agreement on the Zambezi River system of 1987 states that the aim of the agreement was to develop regional co-operation based on "environmentally sound water resources management of the common Zambezi River system and to strengthen their regional co-operation for sustainable development."⁶ To this end, the contracting parties adopted, through the agreement, an Action Plan for the Environmentally Sound Management of the Common Zambezi River System.⁷

However, neither the ASEAN countries nor the riparian States of the River Mekong have expressed a similar

commitment to the principle of sustainable development in relation to the exploitation of other natural resources, including the tropical forests of the region, which have a tremendous impact on the local and global environment. Although the 1985 ASEAN Agreement on nature and natural resources sought to provide a comprehensive legal regime for the sustainable use of natural resources, including forests, this was of little significance since the agreement never entered into force. Indeed, the forests have continued to be regarded by the ASEAN States as an economic resource to be exploited to earn the foreign currency needed for economic development. For instance, when in 1992 Austria passed legislation to impose a high tariff on the import of all tropical timber and timber products, with a view to minimising the commercial exploitation of the tropical forests, many South-east Asian countries launched a collective campaign against this. When they threatened Austria with a petition to the GATT (General Agreement on Tariffs and Trade) dispute settlement mechanism alleging that the Austrian initiative was discriminatory and inconsistent with its GATT obligations, the Austrian government amended the law to accommodate the concerns of these States.

Little evidence of incorporation of the elements of the principle of sustainable development into regional or sub-regional treaties can be found elsewhere in Asia. The Charter of the South Asian Association for Regional Co-operation, adopted as late as 1985, contains no provisions for regional co-operation in the field of the environment, let alone in the area of sustainable development. The objectives of the Association include the acceleration of economic growth, social progress and cultural development. Even when the long-standing dispute between India and Bangladesh concerning the sharing of the waters of the River Ganges was resolved through the conclusion of a bilateral Ganges water treaty in 1996, no provision on the sustainable utilisation of the waters of the River Ganges was included in the treaty.

The Ganges Treaty is a narrow treaty in scope, and is confined mainly to the sharing of available water between the two countries. It has no provision for the management of water resources of the River Ganges Basin. The elements of water conservation, ecosystem or aquatic life protection, and the concept of sustainable use or exploitation do not figure in the treaty. The concept of development of water resources in the River Ganges basin is missing from the Treaty, and it has no provision concerning even pollution control in the river. It should be borne in mind that the Ganges is already one of the most polluted rivers in the world and the level of pollution is likely to increase with the massive industrialisation process that is underway in India.

The Ganges Treaty can be seen in sharp contrast to the Mekong River Basin Treaty concluded in 1995 which does contain provisions for sustainable development, utilisation, conservation and management of the Mekong River Basin and related resources. Bangladesh and India appear to have taken little account of developments since the Rio Conference. The situation is very similar in the Indo-Nepal Mahakali River Treaty concluded in 1996. The Mahakali

Treaty was concluded to exploit the water resources of a boundary river between the two States by building a multipurpose project, known as the Pancheswar Project, which includes the construction of a high dam in the upper reaches of the river. Neither the Ganges Treaty nor the Mahakali River Treaty contains any provision for sustainable development, conservation, management or utilisation of the water in the Ganges river basin.

However, this should not imply that the concept of sustainable development does not figure prominently in municipal environmental laws of these countries. In fact, the laws enacted in many Asian countries and the EIA (Environmental Impact Assessment) guidelines appear to incorporate the elements of sustainable development. What is more, in countries such as India, Pakistan, Nepal, and the Philippines, the legal system has played a very active role in guiding the government of the country to follow the path laid down by the Rio Conference.

IV. The role of the legal system

While the activities of governments in these countries appear to be focused primarily on their countries' economic development, the legal system has played a balancing role by taking bold decisions in favour of the vital environmental issues of the country. Thanks to the introduction of the EIA concept, many environmental and human rights non-governmental organisations (NGOs), other pressure groups and grass-roots organisations are now forcing their governments to comply with international environmental standards. The treatment accorded to the principle of sustainable development by the Supreme Court of Nepal in two recent important judgments is noteworthy. In *S. P. Sharma Dhungel v. Godavari Marble Industries*⁸ the Supreme Court of Nepal held that

...since a clean and healthy environment is an essential element for our survival, the right to life encompasses the right to a clean and healthy environment. Article 26(4) of the Constitution of the Kingdom of Nepal also serves as a confirmation of the fact that the Constitutional circumstances under which this application was made have been substantially changed. This is because this article regards the protection of the environment as one of the important Directive Principles of the State and is included in the fundamental policy principles of the State.⁹ Since one of the objectives of the applicant ... is to protect the environment it cannot be said that the applicant has no right to petition to prevent the degradation of the environment. That is why it must be accepted that the applicant has *locus standi* on this matter.

The Court went on to add that

...everybody's attention seems to have been attracted towards the problems of environmental degradation after the Stockholm Conference of 1972. It seems that separate environmental laws have been enacted only since the 1970s even in developed countries such as the United States. It appears that both the developing and undeveloped States have recently enacted or started the process of enacting environmental laws. In our own

country no separate environmental laws have yet been enacted, but supporting and preparatory elements to that effect have already been put in place. It seems to be quite essential to have environmental laws enacted and implemented to protect the environment in an effective manner. This is because no programme of action can properly be managed and carried out without there being a law on the subject, and it is essential to have laws to define environmental crimes as well as to provide for punishment for such crimes... Therefore, it seems that the executive has to frame an environmental piece of legislation as soon as possible so that it can end confusion on this matter and fulfil its national and international obligations.

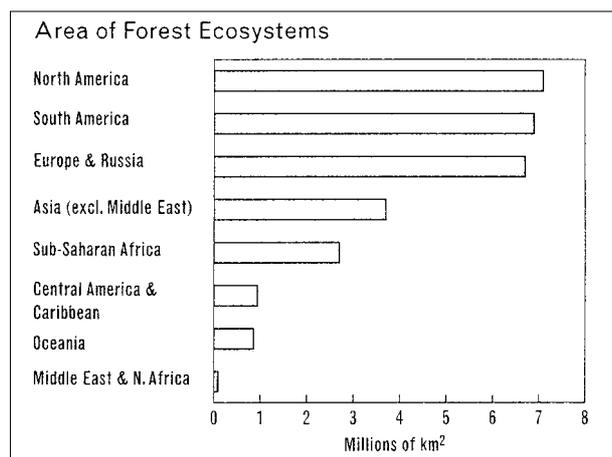
The Court then concluded that

...both the country and the society need development, but at the same time it is necessary to maintain a sound environment along with the industries. It is necessary to maintain a fine balance between the priority for environmental protection and the need to give continuous momentum to developmental activities. The Stockholm Conference developed the concept of sustainable development and the reports of various environmental commissions of the United Nations have lent their support to this concept. Whether it is on a bigger scale or a smaller scale every industry has an adverse impact on the environment. Therefore, where there is developmental activity there is an adverse impact on the environment. But it is necessary to adopt regulatory and remedial measures to minimise such adverse impacts. When such measures become ineffective in protecting the environment, the activity that is polluting the environment must cease. Development is for human welfare and prosperity. To survive is an end for a person, but development is a means of attaining a happy life. No one can live a clean and healthy life without a clean and healthy environment. Is not, then, the clean and healthy environment an integral part of our survival? Indeed, it is in keeping this fact in view that measures have to be adopted to prevent harm to the environment.

The second case of environmental significance decided by the Supreme Court is the case concerning the Arun III hydroelectric power project (*Gopal Siwakoti v. Ministry of Finance*).¹⁰ The Nepalese government had plans to build a huge hydroelectric power plant in a remote hilly district of Nepal to harness water from the River Arun. The project was going to be financed mainly by a loan from the World Bank. It was going to be not only the biggest ever developmental project in Nepal but also the biggest single hydroelectric power project to be supported by the World Bank. But various NGOs alleged that the people of Nepal were not informed enough about loan negotiations, the terms and conditions of loan repayment, the terms and conditions of the involvement of international contractors and, above all, the far-reaching economic implications of such a huge loan on the people of the country and the long-term environmental impacts of the project. In their

view, what was striking was that in spite of the commitments of the Nepalese government to the concept of an EIA, very little public involvement had been secured in planning the project before the government prepared to sign the agreement with the World Bank to borrow the money.

Some environmentalists, concerned about the implications of such a huge project on the environment, and economists, concerned about this enormous loan, began to galvanise public opinion against the project and sought more information about the project from the relevant government departments. When these departments appeared reluctant to provide the information sought, the executive



Courtesy: World Resources 2000–2001

director of one environmental NGO, INHURED, decided to go to the Supreme Court to force the government to release this information. The NGOs wanted to know everything about the project; in particular, whether an EIA of the proposed project had been carried out and, if so, what were its findings. When the government decided to provide information about the findings of the EIA it had carried out, it was reluctant to make public other information, in particular its dealings with the World Bank and other lending institutions and governments.

It was then that Gopal Siwakoti, the executive director of INHURED, together with Rajesh Gautam, submitted a writ to the Supreme Court alleging the violation of the people's constitutional right to information by the government.¹¹ In response, various government ministries argued that the project was environmentally sound and had only minor implications for the local environment. An EIA of the project, including public enquiries, had been carried out and all necessary remedial measures had been incorporated into the project to address the concerns expressed in the findings of the EIA report. Provisions had been made to ensure that the project did not damage the local environment. They also argued that they had done all they could to inform the public about the project.

In its decision the Court held that since the questions concerning Arun III were matters of public concern the applicants had a right to seek the intervention of the Court under its extraordinary jurisdiction (i.e. the writ jurisdiction). Accordingly, the Court found that the applicants'

demand to obtain the information relating to Arun III from government departments was in accordance with the provisions of the Constitution relating to the right to information.

Thus, while the principle of sustainable development may not be the official mantra of the governments of developing Asian States keen to achieve rapid economic growth, the principle has had a tremendous impact on the overall policy-making processes of the countries concerned.

V. Conclusion

The Asian States appear to view the principle of sustainable development as a goal to be achieved rather than a legal obligation to be fulfilled. In the meantime, they seem to be seeking to maintain a delicate balance between their developmental objectives and the need for environmental protection. In Asia, both the principle of permanent sovereignty of States over natural resources, which would allow unilateral exploitation of the natural resources of the country with little outside control, and sustainable development, which would impose certain qualifications on the right to economic development in favour of the environment, appear to be competing on an equal footing. While countries like Nepal, Laos, Bhutan, India and Thailand appear to view the waters of their rivers as an economic resource to be exploited for the economic development of the country, certain other South-east Asian states such as Malaysia and Indonesia appear to view their forests in the same manner.

Notes

¹ This article is based on a presentation made by the author at the European Conference on International Law held at The Hague, the Netherlands, to commemorate the centenary anniversary of the 1899 Hague Peace Conference and organised by the T.M.C. Asser Instituut, The Hague, 21 May 1999.

² 15 EPL 1985, p. 64; Mekong Region Law Centre and UNEP, *South-east Asia Handbook of Treaties and other Legal Instruments in the Field of Environmental Law*, 1997, p. 243.

³ The Agreement on Co-operation for Sustainable Development of the Mekong River Basin, 34 ILM 864 (1995).

⁴ Article 3 of the Agreement.

⁵ Article 1 of the Treaty for Amazonian Co-operation.

⁶ The Agreement on the Action Plan for Environmentally Sound Management of the Common Zambezi River System concluded between Botswana, Mozambique, Tanzania, Zambia and Zimbabwe; 27 ILM 1109 (1988).

⁷ Article 1 of the Zambezi River Agreement.

⁸ 14 Kartik 2052 [1994], Writ petition no. 35 of the year 2049 [1991]. A copy of this unpublished judgment in Nepali was supplied by the Registrar of the Supreme Court to the present author.

⁹ Article 26(4) of the present Constitution reads as follows: "The State shall give priority to the protection of the environment and also to the prevention of its further damage due to physical development activities by increasing the awareness of the general public about environmental cleanliness, and the State shall also make arrangements for the special protection of the rare wildlife, the forests and the vegetation." *The Constitution of the Kingdom of Nepal*, 1990, the Ministry of Law and Justice, Kathmandu, Nepal.

¹⁰ *Gopal Siwakoti and Rajesh Gautam v. Ministry of Finance*, 25 Baisakh 2051 [1993]. Writ petition no. 3049 of the year 2050 [1992]. *Nepal Law Reports* (in Nepali), 2051 (1995), No. 4, pp. 255–278. The English translation from Nepali is by the present author.

¹¹ Article 16 of the Constitution of the Kingdom of Nepal provides the following right to information to every citizen of the country: "Every citizen shall have the right to demand and receive information on any matter of public importance, provided that nothing in this Article shall compel any person to provide information on any matter about which secrecy is to be maintained by law." *The Constitution of the Kingdom of Nepal*, 1990, the Ministry of Law and Justice, Kathmandu, Nepal.