International Environmental Law and the Emerging Concept of Common Concern of Mankind: Possible Impact on Climate Change Mitigation

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Agenda

• Territoriality of International Law
• The Impact on WTO
• Areas of Break Down
• Responses in Environmental Law
• Global Commons
• The Principle of Common Concern
• Unilateral Risks and Potentials
• Impact and Scope of WTO Trade Regulation
• Challenges ahead
Territoriality

• The Westphalian State System
  – Sovereignty and Accountability
  – Territorial Jurisdiction (Land, Continental Shelf EEZ)
  – Permanent Sovereignty over Natural Resources
  – Jurisdiction to Regulate, Adjudicate and Enforce related to Impact on Territorial Jurisdiction
Breakdowns and Shortcomings

- Internet Jurisdiction (domain names, fraud, criminal offenses)
- Absence of International Law in Land Registration and Real Property Regimes (except FDI)
- Jurisdiction on High Seas and State Responsibility over Natural Resources (Area)
- Jurisdiction over Space (Satellites)
- Arctic Claims
- Responsibility for Transboundary Resources (living, non-living, air)
- Tragedy of Global Commons
Responses in Natural Resource Law

• Transboundary Responsibility (Trail Smelter)
• The Maritime Revolution (CS and EEZ)
• The Doctrine of Common Heritage of Mankind (NIEO):
  – Shared Responsibilities, Benefit and Administration
  – Redistribution and Equity
  – Impact of Permanent Sovereignty
• The Doctrines of Global Commons and Common Concern
Global Commons

• From *res nullius* and Non-appropriation to shared Jurisdiction and Responsibility
  – Antarctica
  – Deep Sea Resources (Manganese Nodules)
  – Migratory Species
  – Endangered Species
  – Biodiversity
  – Atmosphere and Climate

• Treaty based: Absence of Customary Law
Concept of Common Concern

• Point of Departure:
  – Permanent sovereignty v. common heritage of mankind
  – Tradition of obligations *erga omnes* and emerging peremptory norms (*jus cogens*); emergence of polluter-pay principle and precautionary principle

• Shared Responsibility within Permanent Sovereignty over natural resources
  – Applicable beyond, as well as within the jurisdiction of individual states
  – Targeted at specific environmental processes or protective actions

• So far, treaty based and defined
Treaty Based Emanations

• **UN Framework Convention on Climate Change (FCCC)**
  • Preamble:
    “The Parties to this Convention,

    Acknowledging that change in the Earth’s climate and its adverse effects are a common concern of humankind…”

• **Convention on Biological Diversity CBD**
  • Preamble:
    The Contracting Parties,

    …. Affirming that the conservation of biological diversity is a common concern of humankind,

    Reaffirming that States have sovereign rights over their own biological resources…”
Climate Change as a Common Concern

- Climate Change is a Common Concern of Mankind - *UN GA Resolution 43/53, 1988*
- *UNFCCC (1992)* sets general commitments leaving specific obligations to future instruments
- Standards of the UNFCCC:
  - Affirmation of sovereign rights
  - No specific rule for conduct of states
  - Precautionary principle
  - Common but differentiated responsibility
  - Sustainable development
Towards Common Concern as a General Principle of Law

• Obligation to Respect Common Concern
• Obligation to Support Common Concern (affirmative action)
• Liability and State Responsibility *ergo omnes* in failing to act, respect and support Common Concern
• Differential Responsibility commensurate to Polluter Pays Principle
Implications for Unilateralism

• Common Concern as a justification of unilateral Intervention and Sanctions?
  – Environmental issues
  – Human rights issues

• Principle of Non-intervention (Art. 2.7 UN Charter), Independence and Sovereign Equality v. Humanitarian Intervention

• Risks of Ecological Imperialism and Neo-colonialism
Scenarios

- Unilateral Pressures
  - to introduce safe nuclear technology
  - to apply CO₂ and other green gases emission controls and filters
  - to accept Clean Development Mechanism Investment
  - to refrain from deforestation
  - to participate in emission trading schemes
  - to tax polluting activities
  - to refrain from supporting polluting technologies
  - to refrain from exporting environmentally unsound products (goods and services)
Scope for Unilateralism in WTO Law

- WTO law allows Members to take measures affecting imports of products, affecting production abroad
- Product related Standards
  - Technical norms and standards
  - Production and Process Methods (PPMs)
  - Eco labeling schemes and certification (consumer choice)
- Taxation (Border Tax Adjustment)
- Countervailing Subsidies (specificity required)
- Government Procurement Conditionalities
- GSP Conditionalities
Scope for Bilateralism and Multilateralism in WTO Law

• Carrots and Sticks:
  – Obligations to negotiate prior to unilateral measures deviating from WTO obligations under Article XX GATT (chapeau)
  – US – Shrimps Turtle AB report

• Negotiations on Environmental Goods and Services (EGS): Environmental Area Initiatives: MDGs

• Negotiations on Subsidies

• Negotiations on Agriculture (bio fuels)

• Negotiations on Transfer of Technology (TRIPs Agreement): Clean Development Mechanism

• Preferential Agreements (FTA, CUS), ODA and Migratory Agreements
Challenges ahead

• Integration of MEAs in WTO law (coherence)
  Kyoto Protocol II
• Risk of new protectionism (bio fuels) and additional distortions in agricultural trade
• Climate adaptation, food security and migration (risk management)
• Labour mobility (Mode 4 GATS)
• Graduation: Rules obliging DCs commensurate to competitiveness and pollution capacity
Thank you for your attention!