

# **The Paradigm Shift in The Greening of Northeast Asia : Soft- Institution Building**

*Suh-Yong Chung* \*

## **Abstract**

*Despite significant institutional developments in Northeast Asia aimed at addressing the region's serious marine pollution problems, the complex geopolitical situation of Northeast Asia has created many doubts about the effectiveness of these current initiatives. The traditional approach of hard-institution building, successfully used in the Mediterranean region to meet its own pollution issues, is unlikely to work in Northeast Asia. Northeast Asia may need a fundamentally different approach to tackling its pollution problems if it is to achieve effective clean-up of its regional seas. This paper argues that a soft-institution building approach may be the answer to Northeast Asia's difficulties in building a truly effective environmental regime.*

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\* Assistant Professor of Law, Myongji University. LL.B. & LL.M., Seoul National University; Dip. in World Politics, London School of Economics; J.S.M. & J.S.D., Stanford Law School.

This article has been reviewed by Yeon Wook Jeong, Foreign Legal Consultant, Shin & Kim.



## I. Introduction

In Northeast Asia, there has been a series of efforts in order to address the serious regional marine pollution problems such as pollution of the Yellow Sea.<sup>1)</sup> The Northwest Pacific Action Program (or NOWPAP) is amongst these efforts. Based on the Mediterranean Action Program, one of the most successful regional cooperation efforts to date, NOWPAP has developed institutional arrangements including the creation of NOWPAP secretariat in 2003.<sup>2)</sup> The secretariat of NOWPAP will bring better coordination among different initiatives. Despite the success of NOWPAP, many doubt whether NOWPAP initiative has been “effective” enough to clean up the large amount of pollutants in the Northeast Asian seas. Decreasing environmental quality and many environmental accidents are frequently reported and it is no longer considered strange news to hear about the Chinese government’s frequent bans on drinking from and fishing in coastal waters.<sup>3)</sup> These reports prompt various questions. Why is it that Northeast Asian seas still suffer from a degrading environmental quality despite regional efforts at cleaning up pollution? In particular, why has NOWPAP faced so many difficulties in effectively addressing regional marine pollution problems? What other efforts are required to achieve a true improvement in the region’s environment?

The obstacles that Northeast Asia has faced in its attempts to clean up the region have been numerous. They have included the lack of hegemony and a scientific research foundation in the region. To overcome these obstacles, policy-makers who attempt to establish a regional regime should consider the distinct physical, political,

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1) The main regional efforts to deal with environmental problems in Northeast Asia include:

- the Senior Officials Meeting on Environmental Cooperation in Northeast Asia;
- the Northeast Asian Conference on Environmental Cooperation;
- the UNDP Northeast Asia Environmental Project;
- the UNCED and Regional Environmental Cooperation;
- the UNDP Tumen River Environmental Cooperation;
- the Intergovernmental Oceanographic Commission; and
- the Northwest Pacific Action Program.

2) Report of Seventh Intergovernmental Meeting on the Northwest Pacific Action Plan, UNEP(DEC)/NOWPAP/IG.7/10 (2002).

3) E.g. Anne E. Platt, *Dying Seas*, World Watch, Jan/Feb. (1995).

economic and cultural factors of Northeast Asia. Since international regimes, by their very nature, require that all arrangements be established through “consensus rule,” negotiations for a regional environmental regime in Northeast Asia are further complicated by the region’s complex geopolitical situation.<sup>4)</sup> As a result of this geopolitical situation, the traditional approach of hard-institution building, which was used in the Mediterranean regional cooperation, is unlikely to work for Northeast Asia.<sup>5)</sup> Reaching an agreement among the member states, even if it were possible, would take a great deal of time; and, as Victor notes, a well-established treaty system does not always ensure the effectiveness of a given international program.<sup>6)</sup> Even if a hard-law based institution could be established in the region, the weakness of law in Asian governance as evidenced in the operations of China’s legal institutions is likely to prevent a positive implementation of regulatory rules in each regional state.<sup>7)</sup> Therefore, Northeast Asia may need a different approach to achieve genuine cooperation among the states. This paper argues that a soft-institution building approach may be the answer to the region’s difficulties in building a truly effective environmental regime.

## II. Concept of Soft Institution

Soft-institutions differ from hard-institutions in a crucial way: a soft-institution approach allows regimes to circumvent the implementation problems that a hard-institution approach poses.<sup>8)</sup> Soft-institutions allow for an informal process of

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4) See Oran R. Young, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY 99-100 (1994).

5) A hard institution usually has a series of well-established international agreements. These agreements usually provide a framework of the institution as well as detailed duties and obligations of the members. The “binding force” of the duties and obligations of the agreements provides legal grounds for punishing illegal acts of any actor in the institution. Frequently, detailed rights and obligations of the members are subsequently developed through a series of agreements. An enforcement system is critical as a component of a hard institution to ensure compliance with the rules.

6) See David G. Victor, et al., *Introduction and Overview in THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL COMMITMENTS: THEORY AND PRACTICE* 1, 1-46 (David G. Victor et al., 1998).

7) See generally, Veronica Taylor, *Beyond Legal Orientalism, in ASIAN LAW THROUGH AUSTRALIAN EYES* (1997).

8) Victor, *supra* note 6, at 1-46.

consensus-building among the actors involved in a given regime. Its purpose is not to make binding rules or to establish a fixed system. Rather, a soft-institution building process provides a negotiation forum for the actors and prefers non-binding rules, such as principles, to traditional binding rules, such as conventions and protocols. Soft-institutions also provide more flexibility to the actors, including those in the private sector, to implement the arrangements that have been reached by consensus. As a result, a soft-institution approach may overcome the problems that traditional time-consuming diplomatic negotiation processes pose. The non-binding nature and flexibility of a soft institution can also increase the effectiveness of a regime because actors can reach a higher level of targets on a good faith basis. In other words, those states that care about their reputation in the international arena tend to keep their commitments rather than risk international critique for their non-compliance.<sup>9)</sup>

Currently, one of the best examples of successful soft-institution building is the Asia Pacific Economic Cooperation (APEC). Since its emergence in 1989, APEC has adopted a unique approach to building consensus amongst politically, economically and culturally diverse Asian Pacific states. Unlike regional institutions like the European Union and NAFTA, APEC has no binding treaties. It relies instead on soft laws such as self-regulations and guidelines.<sup>10)</sup> In policy terms, APEC focused on providing a forum for negotiations and tends to act as a consultant.<sup>11)</sup> In other words, most APEC meetings remain as a forum for consensus-building rather than one in which specific agreements are reached. In terms of its organizational framework, APEC has a relatively small secretariat with a small staff and budget.<sup>12)</sup> Despite its soft-institutional nature, APEC has been *effective* in dealing with Asia-Pacific economic issues. First, APEC has expanded its scope to encompass various economic issues. The self-regulating nature of APEC allows it to accommodate difficult issues more easily than a hard institution can.<sup>13)</sup> Further, despite APEC's lack of a rigid enforcement

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9) See Robert Keohane, AFTER HEGEMONY 105-106 (1984).

10) See, e.g., Bogor Declaration of APEC Leaders, in SPEC SECRETARIAT, SELECTED APEC DOCUMENTS: 1988-1994 (1995).

11) See Peter Drysdale & Andrew Elek, *APEC: Community-Building in East Asia and the Pacific*, in FROM APECT TO XANADU 37 (Donald C. Hellman & Kenneth B. Pyle eds., 1997).

12) See Yoichi Funabashi, ASIA PACIFIC FUSION: JAPAN'S ROLE IN APEC 139 (1995).

13) See Mary E. Hiscock, *Changing Patterns of Regional Law Making in Southeast Asia*, 39 ST. LOUIS U. L.J. 933, 938-43 (1995).

mechanism, members have, to date, strongly complied with its non-binding principles. According to Funabashi, this is possible because of the importance of shame in Asian society, which suggests that customs unique to the region play a role in soft-institution building.<sup>14)</sup> In summary, APEC has been workable in the Asia-Pacific region because its institutional design fits well within the cultural dynamics of the member nations. Given the great degree of overlap between the countries involved in APEC and the region of Northeast Asia, APEC provides us with an important model for soft-institution building in the area of environmental protection for the region.

### **III. Actors in Soft-Institution Building**

#### *A. Re-conceptualization of Sovereignty and Statehood*

The traditional concept of sovereignty is now the subject of hot debate in the area of international law and political economy. Since the 1648 Peace of Westphalia, the state has been the primary actor on the international stage, with each state regarded as possessing equal sovereign power. In the traditional theories, sovereign attributes are typically thought to include the ability to exercise exclusive jurisdiction over citizens of the state, equality with other states, and the power to structure politics constrained only by the impact of those policies on other states or by agreements entered into with other states.<sup>15)</sup> As Taylor has noted, this has “reinforced the identification of the state as the sole legitimate actor on the world stage, defining ‘sovereignty’ as the primary mechanism through which a State maintains its standing with other state actors.”<sup>16)</sup> But,

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14) See Funabashi, *supra* note 12, at 147. There has been series of debates on the concept of so-called “Asian Value.” Those who advocate this concept (including the former Prime Minister of Singapore, Lee Kuan Yew) argue that there is an “Asian way” based on traditional Confucianism. The various states that comprise Asian society share a unique value system, one which is not fully understood by the Western states. The importance of shame in Asian society, and the role it plays in the success of APEC summits, is just one example of the role unique values play in Asian society. While it has been yet not clear whether the “Asian way” is any more effective than Western methods when it comes to dealing with delicate issues such as trade liberalization, it is clear, as Funabashi notes, that the application of subtle personal and group pressure among APEC leaders has often overcome serious barriers to achieving consensus as evidenced by agreements like the Bogor Declaration. *Id.* at 17, 34, 147.

15) See Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. Int’l L. & Pol’y 717 (1995).

16) See Celia R. Taylor, *A Modest Proposal: Statehood and Sovereignty in a Global Age*, 18 U. PA. J. Int’l Econ.

in light of the many changes in the structure of international law and political economy that have taken place in the twentieth century, the traditional understanding of sovereignty needs to be expanded. Even if interstate relations remain very important in the international arena, the exclusive state-centric approach is no longer sufficient. Some modifications to this framework have already occurred, and the inclusion of non-governmental organizations in a few international negotiations provides us with one good example of the kind of changes that are taking place. For example, UNEP overcame the problems posed by the state-centric negotiations in the formation and evolution of the Mediterranean Action Program by taking over France's role and expanding the scope of the Med Plan to cover more pollution sources.<sup>17)</sup>

All of the efforts to re-conceptualize the concept of sovereignty and the state-centric model focus on the contention that the category of recognized actors in the international arena should be expanded to recognize new kinds of actors.<sup>18)</sup> For example, the functionalist stream in international law holds that sovereignty can be understood as a combination of several powers, rights, and obligations, and is divisible and transferable between original and subsequent owners.<sup>19)</sup> This understanding may be generalized in the contexts of international law and political economy by conceiving of sovereignty as "an elastic term" not incompatible with "individual rights, Non-State Actors, or permeable boundaries."<sup>20)</sup> According to functionalists, sovereignty may be understood as comprising several components. Although states remain the central component of the model, they comprise only one subset of actors, with other Non-State Actors, assuming some of the powers traditionally associated

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L. 745, 752. (1997).

17) See Peter M. Haas, *SAVING THE MEDITERRANEAN: THE POLITICS OF INTERNATIONAL ENVIRONMENTAL COOPERATION* 165-189 (1990).

18) See Kanishka Jayasuriya, *Globalization, Law, and the Transformation of Sovereignty: the Emergence of Global Regulatory Governance*, 6 *Ind. J. Global Legal Stud.* 425 (1999); Franz Xaver Perrez, *The Efficiency of Cooperation: A Functional Analysis of Sovereignty*, 15 *Ariz. J. Int'l & Comp. L.* 515 (1998); Judith Bello, *National Sovereignty and Transnational Problem Solving*, 18 *Cardozo L. Rev.* 1027 (1996); Kal Raustiala, *Sovereignty and Multilateralism*, 1 *Chi. J. Int'l L.* 401 (2000); Sarah Richardson, *Sovereignty, Trade and the Environment - the North American Agreement on Environmental Cooperation*, 24 *Canada-United States L. J.* 183 (1998).

19) Taylor, *supra* note 7, at 754.

20) See Thomas G. Weiss & Jarat Chopra, *SOVEREIGNTY UNDER SIEGE: FROM INTERVENTION TO HUMANITARIAN SPACE, IN BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION* 87, 100 (Gene M. Lyons & Michael Mastanduno eds., 1995).

with “statehood” or “sovereignty.”<sup>21)</sup> According to Henkin, the several components of sovereignty include independence, equality, autonomy, personhood, territorial authority and integrity, and impermeability.<sup>22)</sup> Among these, several elements conventionally called “Claim Elements” are not transferable<sup>23)</sup> to non-state entities: these are independence, identifiable government, population, and personhood.<sup>24)</sup> This means that non-state entities such as international organizations like the U.N. and various multinational corporations may exercise various elements of statehood. On the other hand, “Exercise” elements are transferable. These “Exercise” elements include autonomy, impermeability, and equality.<sup>25)</sup> As a result of changes in the environment of international political economy, a state may directly or indirectly pass some of these elements on to another actor. In fact, we have already seen evidence of this phenomenon elsewhere. For example, UNEP played a significant leadership role in formulating the Mediterranean cooperation regime to address regional pollution problems, thus taking over roles that used to be played by states.<sup>26)</sup> In the case of Northeast Asia, multinational corporations have made a significant impact on the development of China’s economy, with their economic activities also influencing the environmental policy of the government in China.<sup>27)</sup> What remains to be seen is how states pass Exercise elements of sovereignty onto other actors.

“Exercise” elements of sovereignty may be passed from states to other actors in a number of ways. In the first of these, a state may choose to allocate Exercise elements to an international organization at the time that it joins the organization. By becoming a member of an international organization such as the UN, a state reduces its ability to act as an entirely free agent in favor of acting according to agreements established by

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21) Taylor, *supra* note 7, at 755-756.

22) See Louis Henkin, *International Law: Politics and Values 10* (DEVELOPMENTS IN INT’L LAW No. 18, 1995), *recited* from footnote 24 of Taylor, *supra* note 7.

23) Here, the transfer means : “All methods by which “exercise” elements change hands. A trader may involve an international act by a State, or may occur without such an act when a transfer of an “Exercise” element assumes it. A state may acknowledge a transfer, or may deny it even if other actors recognize the reallocation.”

*recited* from Taylor, *supra* note 7, at 770.

24) *Id.* at 757-761.

25) *Id.* at 762-767.

26) See generally, Haas, *supra* note 17.

27) See Wang Zhenhui, COUNTERMEASURES FOR INDUSTRIAL WATER CONSERVATION IN CHINA, UNEP INDUSTRY AND ENVIRONMENT 14 (July-December 1990).

the international organization.<sup>28)</sup> Exercise elements of sovereignty may also be passed on to disparate actors who may not have yet been clearly identified in this phase of the international political economy. As capital flows are increasingly important in the world economy, there are many international organizations such as the World Bank and IMF, as well as various private actors, which control pools of capital and exercise influence on state policy. International organizations and private actors may also influence state policy through forcing direct investments. A foreign investor such as a multinational corporation, may, for example, gain a measure of direct control of an entity by acquiring ownership of assets or by becoming a majority shareholder. To attract foreign investors, the state must craft legal regulations governing FDI. Since FDI sometimes involves giving equity control over assets to foreigners, states typically seek to control the extent and the nature of ownership permitted.<sup>29)</sup> The nature of these constraints largely depends on the level of economic development in the host country: developing countries usually have to transfer their control of important assets to foreigners indirectly in order to increase their FDI or to have their FDI remain at the same level.

### *B. The Increasing Importance of Non-state Actors*

Some may argue that the world is now becoming less state-centric due to increasing interdependencies among actors. On the one hand, non-state actors such as international organizations, multinational corporations, and NGOs are exerting increasing influence on international or transnational affairs including environmental matters.<sup>30)</sup> However, states still remain the major actors in world affairs; the involvement of non-state actors in international matters only makes sense when states are involved in the issue areas. Here, a question arises: to what extent have the non-state actors increased their influence on the behavior of the states in the world affairs? The following discussion focuses on the increased roles that international organizations

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28) *Id.* 770-771.

29) *Id.* at 783.

30) See Helmut Breitmeier, *International Organizations and the Creation of Environmental Regimes*, in GLOBAL GOVERNANCE 87, 88-89 (Oran R. Young ed., 1997); Gareth Porter & Janet Welsh Brown, GLOBAL ENVIRONMENTAL POLITICS 40-65 (1996).

and multinational corporations are playing in the field of the international environment.

### 1. The Various Roles of International Organizations

The influence of international organizations on global and regional environmental issues has greatly increased since the Stockholm Conference in 1972. International organizations such as UNEP and the World Bank have principally exercised their influences in the following five ways:<sup>31)</sup>

- By setting the agenda for global and regional action, and determining which issues will be dealt with by the international community;
- By articulating the aggregate interests of groups in negotiations;
- By convening and influencing negotiations in regard to global and regional environmental regimes;
- By developing normative codes of conduct (soft laws) for various environmental issues; and
- By influencing state policies on issues that are not under international negotiation.

No single international organization, however, carries out all five of these functions; international organizations tend to specialize in one or more functions despite the fact that each function may be linked to others. The following discussion explains these functions in more detail.

The first function of the international organizations is to set the agenda and determine the issues for global and regional actions. Agenda setting is “a process in which state actors, international organizations, and non-state actors struggle to decide whether an issue deserves a prominent place on the political agenda.”<sup>32)</sup> In this stage of regime formation, during which the actors are struggling for ideational hegemony, international organizations depend heavily on influential state actors to mobilize initiatives. Generally, the states involved recognize that international organizations are useful partners for representing and realizing their interests. For example, UNEP has

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31) *Id.* at 41.

32) Breitmeier, *supra* note 30, at 101.

been a catalyst and coordinator of environmental activities, and a focal point for such activities within the UN system. The agenda setting function by UNEP, therefore, has become a central function of this organization. It exerts this function primarily through the decisions taken by its governing council.

International organizations also influence regime formation. First, executive bodies of an international organization influence environmental diplomacy by participating directly in negotiations.<sup>33)</sup> For example, throughout the negotiations on the Montreal protocol, former UNEP executive director Mustafa Tolba lobbied hard in informal meetings for a complete phase-out of CFC's by working out a compromise on contentious issues such as technology transfer and bridging the gap between the U.S. and Western European timetables for a CFC phase-out. He also sometimes favored developing countries over developed ones as was demonstrated in one hazardous waste case. At Basel, Tolba fought for a ban on shipping hazardous waste to or from contracting parties and for a requirement that exporters check disposal sites at their own expense.<sup>34)</sup> Second, an international organization can exercise its influence on international negotiations by providing relevant information to the interested parties. For example, by supporting scientific research activities led by the IPCC and disseminating information to related actors, the WMO and UNEP have increasingly influenced the formulation of and development of negotiations on climate change.<sup>35)</sup>

Finally, international organizations facilitate the negotiation of common norms or rules that do not have a binding effect on the actors involved.<sup>36)</sup> A variety of non-binding norms and rules, widely known as "soft laws," have been developed to influence state behavior on environmental issues such as codes of conduct, declarations of principle, global action plans and other international agreements. When negotiations take place under the auspices of international organizations, these organizations can provide secretarial support for the drafting of reports on the negotiation sessions.<sup>37)</sup> International organizations can also lead the process of shaping

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33) Porter & Brown, *supra* note 30, at 43; Breitmeier, *supra* note 30, at 104-106.

34) Porter & Brown, *supra* note 30, at 43; despite this effort, Tolba and developing countries lost on both issues. Requested from "Discussion of Major UNEP Priority Activities with Executive Director," undated document in files of UNEP, Washington, D.C., Office.

35) See Breitmeier, *supra* note 30, at 104-105.

36) Porter & Brown, *supra* note 30, at 44.

37) Breitmeier, *supra* note 30, at 95.

international norms and rules by contributing draft texts of treaties and determining the content of such treaties by identifying problems and by presenting models about the effects of different options considered during the negotiations.<sup>38)</sup> The informal roles that international organizations play are also important in this regard; international organizations play such roles when they furnish national delegations with political guidance and expert knowledge.

Two international organizations, namely the World Bank and UNEP, need to be discussed in the context of environmental cooperation in Northeast Asia. UNEP is an important organization not only in terms of its leadership through NOWPAP, an institution to which it has played a formative role during the last several years, but also in terms of its function in coordinating the different interests of the actors involved in the introduction of a market-based institution to the region. The World Bank is another institution important to greening the region through its market-based institution building. What more, then, needs to be considered for these two international organizations in the context of Northeast Asia?

a) UNEP

UNEP's efforts in Northeast Asia have depended heavily upon a model developed in the Mediterranean region. This model is NOWPAP, which has been a forum for international negotiation among interested regional "states." Despite some progress with the NOWPAP scheme, such as the establishment of the Trust Fund and other policy measures, NOWPAP needs to find a way to accommodate within its structure other major actors such as local governments in China, major multinational corporations (especially those of Korea and Japan), and other influential financial institutions (especially the World Bank and the ADB). For example, the dollar amount of the Trust Fund, which is a single financial arrangement within NOWPAP that addresses region-wide pollution problems across Northeast Asia, remains small.<sup>39)</sup> Given the total amount of the fund, it is not hard to imagine the difficulty involved in cleaning up all the pollutants and developing institutions for better environmental governance. Further participation by the main economic actors, which are likely to

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38) *Id.*

39) See UNEP(WATER)/NOWPAP WG. 7/5 AT Annex IV (1996).

discharge pollutants into the river and seas, such as groups of major companies or their representative organizations, will provide more financial resources directly and/or indirectly to the region. These resources will be used to address the region's pollution problems as well as to build a common knowledge and understanding of pollution problems not only within the region but beyond it. Furthermore, given the huge amount of funds required to address large-scale pollution problems, it is crucial that a portion of these funds be efficiently allocated to the development of institutions that will provide future governance at the regional level.

#### b) The World Bank

The World Bank showed little interest in environmental protection until it set up a Vice Presidency for Environmentally Sustainable Development in 1983. At the same time, it introduced procedural changes that allowed it to release more information to interested actors. The policy reformations undertaken have included a revision of its lending portfolio, the creation of new environmental policy, and the development of National Environmental Action Plans (NEAPs). These reforms, which are more ambitious and extensive than the institutional changes that have been undertaken by other multilateral development banks, have "enabled the World Bank to set the pace and standards by which other international organizations are held accountable by governments and the broader public."<sup>40</sup> However, the World Bank faces several immediate difficulties in the further development of its role in improving the global environment. These include:

- a disjuncture between the formal requirements of the Bank's improved policies and procedures, actual respect for the Bank's improved policies and procedures, and actual respect for those standards in the design and implementation of projects;
- the Bank's exclusion of important segments of civil society, including direct stakeholders and intended beneficiaries, from all stages of project design and implementation in favor of maintaining its

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40) See David Reed, *The Environmental Legacy of Bretton Woods: The World Bank*, in GLOBAL GOVERNANCE 227, 235 (Oran Young ed., 1997).

- privileged dialogue with governments;
- the incomplete integration of environmental issues into the core logic of the World Bank's development strategy; and
- failure throughout the past decade and a half in differentiating the impact of adjustment on extractive economies, agricultural economies, and diversified manufacturing economies in the undertaking of structural reforms in scores of developing countries.<sup>41)</sup>

The World Bank has also faced new challenges as a result of changes in international conditions. First, capital flows have surpassed the volume of merchandized goods; foreign direct investment and portfolio investment reached \$66 billion and \$14 billion in 1993.<sup>42)</sup> Second, even though three quarters of the total international trade still takes place between OECD countries, the pace of trade volume between developed and developing countries has increased rapidly. During this transition, the roles of the government in both middle and low income countries have been diminished as a result of widespread privatization programs; governments are playing more marginal roles in the administration and management of a country's environmental patrimony and other social services. Still, low income countries rely on the donor community, including international financial institutions such as the World Bank, to meet their pressing financial needs. These changing conditions in the world economy have recently led the World Bank to consider emphasizing the development of public sector goods and services, with particular emphasis on the environment. This trend should continue more emphatically in the future since "the social and environmental costs of the expanding private sector [will] continue to rise in coming years."<sup>43)</sup> Given this change in the world economy and the resulting new needs of the developing world, the World Bank could fulfill the following functions for national governments such as China:

- the development of meaningful national environmental action plans;

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41) *Id.* at 235-236.

42) See Pamela Stedman, SETTING A NEW MANDATE FOR THE BRETTON WOODS INSTITUTIONS (1995).

43) Reed, *supra* note 40, at 241.

- the integration of those plans into national economic growth strategies;
- the rebuilding of national regulatory and enforcement capacity;
- the integration of environmental performance and oversight units into government ministries with responsibility for specific economic sectors;
- the improvement of data collection capabilities on a national level;
- the development of market-based environmental incentive structures to meet the specific needs of individual countries;
- the nurturing of the increased participation of civil society in the management of natural resources; and
- the development of national environmental education programs that would strengthen public awareness and participation in environmental activities.<sup>44)</sup>

The World Bank also needs to develop its policy roles at the international level. Collecting environmental data, monitoring trends in environmental performance and issues, sharing information with the broader public, helping develop strategies for addressing environmental problems, and coordinating the allocation of resources and policy tools with other international organizations are just a few of the roles that the World Bank might play at the international level.<sup>45)</sup>

## 2. Multinational Corporations and the Global Environment

### a) The Growing Influence of Multinational Corporations in the International Political Economy

The changing dynamics of the international political economy during recent decades have placed states and multinational enterprises in a new relationship with one another. The growing interdependence between them has created various tensions. As a result, “firms have become more involved with governments and governments have come to recognize their increased dependence on the scarce resources controlled by

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44) *Id.* at 242.

45) *Id.* at 243.

firms.<sup>46)</sup> It is only in the last century that the multinational corporation has emerged in forms we would recognize today.<sup>47)</sup> Since their emergence in the international business arena, multinational corporations have increased the international production of goods and services while managing their overseas assets as part of an integrated unit rather than as passive investments in a portfolio. More recently, there has been an explosion of FDI, which overtook the volume of trade in goods and services in the mid-1980's.<sup>48)</sup> FDI is now regarded as being in a position comparable to world trade at the end of the 1940's when FDI was in its take-off phase as a new means of international economic integration.<sup>49)</sup> This increased influence of multinational corporations is very significant in the area of international political economy as it diminishes the power of states to control economic affairs.<sup>50)</sup> States retain only a "negative" power to manage or distort trade by controlling the entry of goods and services into their national markets. They cannot easily exercise their power to control the movement of goods and services that are aimed at a world market and which does not necessarily take place within their realm of power and influence. The positive power that states display when harnessing internal resources is constrained when states try to exercise their influence on places and methods of production within the international market. States frequently find that they cannot control usage and distribution of resources; they can only bargain.

What are the main reasons for the increasing role of multinational corporations in the world political economy? The first reason lies in the multinationals' share of and influence over world production and trade. Directly or indirectly, multinational corporations, or MNCs, control over one quarter of the world's economic activity outside their home countries. In 1985, the production of MNCs and trade accounted for about twenty percent of the total world activity.<sup>51)</sup> Since then, the proportion of trade

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46) See RIVAL STATES, RIVAL FIRMS: COMPETITION FOR WORLD MARKET SHARES (John M. Stopford & Susan Strange, 1991).

47) "The Phoenicians opened up new trade routes and stimulated new sources of production. Indeed, the traveling merchant has been one of history's unsung heroes in providing the initial contacts among entire cultures." *id.* at 13.

48) *Id.* at 14;

49) See D. Julius, GLOBAL COMPANIES AND PUBLIC POLICY: THE GROWING CHALLENGE OF FOREIGN DIRECT INVESTMENT 36 (1990).

50) Stopford & Strange, *supra* note 46, at 14.

51) See S.H. Robock & K. Simmonds, INTERNATIONAL BUSINESS AND MULTINATIONAL ENTERPRISES (1989).

activity controlled by MNCs has risen rapidly, especially when the calculation accounts for trade between MNCs. Over half of the world trade in manufactured goods and services; eighty percent of the world's land cultivated for export crops; and a significant share of the world's technological innovations are accounted for by multinational corporations. The accumulated volume of the total FDI was estimated to be over \$1 trillion by the end of 1988.<sup>52)</sup> In 1992, the stock of FDI had reached \$2 trillion.<sup>53)</sup>

Multinational corporations have also increased their roles as agents of integration within the world system.<sup>54)</sup> A large and growing share of goods and financial trade is made within these networks of the companies. Over forty percent of the external trade in manufactured goods is conducted among the affiliates of MNCs. This figure increases if trade between multinationals is taken into account.<sup>55)</sup> For example, more than eighty percent of the technology payments received by the US are royalties paid by affiliates to their US parent companies.

#### b) The Environment and MNCs

Multinational corporations operate a wide range of pollution intensive and hazardous industries that have products or processes which may bring danger to the environment and human health.<sup>56)</sup> They are also involved in the development of resources industries such as mining, petroleum, and agri-businesses, all of which may have a serious impact on the environment and human health.<sup>57)</sup> Therefore, the environmental performance of multinational corporations is a matter of significant international concern.<sup>58)</sup>

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52) Table 1.1. Stock of Foreign Direct Investment, 1960-1988 in Stopford & Strange, *supra* note 46, at 17.

53) U.N. Conference on Trade and Dev., Programme on Transnational Corporations, WORLD INVESTMENT REPORT 1993: TRANSNATIONAL CORPORATIONS AND INTEGRATED INTERNATIONAL PRODUCTION, U.N. Doc. ST/CTC.15b, U.N. Sales No. E.93.II.A.14 (1993), at 1.

54) Stopford & Strange, *supra* note 46, at 17.

55) *Id.*

56) See Robert Fowler, *International Environmental Standards for Transnational Corporations*, 25 ENVTL. L. 1, 8 (1995)

57) *Id.*

58) UN Center on Transnational Corporations, TRANSNATIONAL CORPORATIONS IN WORLD DEVELOPMENT: TRENDS AND PROSPECTS, at 28, U.N. Doc. ST/CTC/89 (1988).

In fact, studies show that multinational corporations generally have a better record in relation to environmental, health, and safety concerns than local or state-owned enterprises in developing countries such as China.<sup>59)</sup> This is attributable to the superior financial, managerial, and technological resources which multinational corporations can utilize.<sup>60)</sup> Generally speaking, multinational corporations are larger than local firms, can afford the cost of environmental controls, and are able to employ more qualified managers and better skilled workers.<sup>61)</sup> They are also more likely to be aware of environmental management developments abroad and to have better access to modern environmental technology.<sup>62)</sup> Furthermore, the larger scale of their operations generates a greater risk of substantial impact upon the environment, particularly in the event of a serious accident. The risk of such an impact may encourage them to consider implementing practices that are sounder than those found in local firms.<sup>63)</sup> Finally, a study conducted by Tuffs University has demonstrated that MNCs are increasingly exhibiting voluntary self-regulation to prevent pollution regardless of the level of pre-existing regulation in developing countries.<sup>64)</sup>

#### **IV. Developing Environmental Standards Through Soft-Institution Building**

This paper suggests that a soft-institution approach would be more successful at allowing international organization and MNCs to participate in the institution building process because it generally encourages the participation of many actors. The next question is what kinds of institutional standards are required? There are several possible solutions to this difficult question.

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59) *Id.* at 47; U.N. Center for Transnational Corp. and Econ. & Soc. Commission for Asia and the Pacific, TRANSNATIONAL CORPORATIONS AND ENVIRONMENTAL MANAGEMENT IN SELECTED ASIAN AND PACIFIC DEVELOPING COUNTRIES, ESCAP/UNCTC Publications Series B, No. 13 (1988), at v-vi.

60) Fowler, *supra* note 56, at 13.

61) *Id.*

62) *Id.*

63) *Id.*

64) See Ann Pappaport & Margaret F. Flaherty, CORPORATE RESPONSES TO ENVIRONMENTAL CHALLENGES: INITIATIVES BY MULTINATIONAL MANAGEMENT 266 (1992).

### A. *International Law as a Source of Standards*

Since the Stockholm Conference, considerable efforts have been made to develop environmental standards at the international level. Agenda 21 of the global action plan for environmental management, which was adopted at the UN Conference of Environment and Development in 1992, states that the main objective is to promote and develop international standards for the protection of the environment while taking into account the different situations and capabilities of various countries.<sup>65)</sup> In the following discussion, the particular problems that Northeast Asia has in adopting such standards are considered.

#### 1. The Minimum Standard Approach

One approach to establishing standards that might be used to govern environmental matters at the transnational level is the concept of uniform international standards, which places reduced emphasis on the question of whether the standards are formulated through international agreement or by way of a process of harmonization of national standards. This approach has invited many critics. One critique is that such uniformity could work against so-called sustainable development by forcing inappropriate priorities on developing countries such as China.<sup>66)</sup> Economic analyses have also suggested that the adoption of uniform international standards would not equalize the international competitive position of multinational corporations and would not be economically efficient;<sup>67)</sup> the costs and benefits of emission and discharge standards would vary from one country to another. This difference would reflect geographic, ecological, and demographic variations among countries and hence differing capacities to assimilate pollution.<sup>68)</sup>

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65) THE EARTH SUMMIT: THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT 501 (Stanley P. Johnson ed., 1993).

66) See Fowler, *supra* note 56, at 19. A report says that developing countries do not need "high levels of environmental protection against cancer ... at the expense of basic human need[s] such as protection from high infant mortality and rampant malnutrition." in Pappaport & Flaherty, *supra* note 64, at 266.

67) See Charles S. Pearson, DOWN TO BUSINESS: MULTINATIONAL CORPORATIONS, THE ENVIRONMENT AND DEVELOPMENT 43-47 Charles S. Pearson (1985).

68) See Richard B. Stewart, *Environmental Regulation and International Competitiveness*, 102 Yale L.J. 2039,

From the environmentalist's point of view, the establishment of international standards for protecting the environment poses another problem: uniform standards inevitably lead to a lowest common denominator outcome which could threaten environmental gains in some countries. The likelihood of a common denominator outcome would increase new rules for free trade as there are those who regard higher environmental standards as a trade barrier that needs to be demolished.<sup>69)</sup> This critique has led to a focus on pollution prevention or waste minimization rather than end-of-pipe solutions.<sup>70)</sup> It is important to note that "no country should have the right to degrade the environment irreversibly for future generations in the name of national competitiveness."<sup>71)</sup>

The concept of minimum environmental standards allows for the reconciliation of two different approaches.<sup>72)</sup> This approach, a form of harmonization different from direct international regulation, provides interesting alternatives to the uniformity of standards option. Under it, countries would remain free to adopt higher environmental standards according to their specific situations. This approach would help prevent the negative effects of downward harmonization by leaving room for countries to decide how stringently they wish to apply international standards within their jurisdiction while avoiding the risk that they may breach free-trade rules. Minimum standards could operate on the basis of mutual trust by relying on equivalent requirements in national laws.<sup>73)</sup>

What types of minimum standards should be adopted? If standards are established through international agreements signed by member states, ambient standards, rather than discharge standards or emissions standards, would be preferable.<sup>74)</sup> There are already several international agreements in which standards of a quantifiable nature have been prescribed generally, thereby avoiding discharge or emissions standards. One example of this type of standard can be found in the Protocol to the 1979

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2042-2045 (1993).

69) Fowler, *supra* note 56, at 20.

70) *Id.*

71) Edith Brown Weiss, *Environmentally Sustainable Competitiveness: A Comment*, 102 Yale L.J. 2133, 2134-2135 (1993).

72) *Id.* at 2125; U.N. DEP'T OF ECO. & SOCIAL DEV., WORLD INVESTMENT REPORT 1992, at 241. NAFTA adopts another approach by requiring parties, to the greatest extent possible, to make compatible their respective standards-related measures.

73) Weiss, *supra* note 71, at 2134-2135.

74) Fowler, *supra* note 56, at 22.

Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes.<sup>75)</sup> Even if this Protocol does not specify quantifiable emissions standards, it sets targets and timetables for parties to reduce emissions.

## 2. Soft-Law Instruments

From a general and classical point of view, the rule of law is hard in its nature. It has binding effects on the actors. If it did not have binding effects, there would be no point to its existence. In the traditional international law field, sources of international law have been identified with several different forms such as treaty and customary law. All of these are equally binding in nature. In this sense, “*soft law* is a paradoxical term for defining an ambiguous phenomenon.”<sup>76)</sup> Nevertheless, soft law has become part of the contemporary law-making process even if it does not fit into classical or familiar legal categories.<sup>77)</sup> Several reasons can be identified for the emergence of soft law in the world community: 1) the increasing influence of international organizations and NGOs, 2) the diversification of the components of the world community, 3) the rapid evolution of the world economy and 4) increasing state interdependence combined with the development of new fields of activity as a result of developments in science and technology.<sup>78)</sup> Much of soft law is incorporated within non-binding soft instruments such as recommendations and resolutions of international organizations, declarations, and final acts published at the conclusion of international conferences and draft proposals by expert groups.<sup>79)</sup> These instruments create goals to be achieved in the future instead of imposing strict obligations. This feature of soft law, then, leaves a great deal of discretion to the actors. While avoiding politically sensitive and time-consuming negotiation processes for creating hard rules, the softness of soft law provides actors with political convenience.<sup>80)</sup>

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75) 31 I.L.M. 568.

76) See Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 Mich J. Int'l L. 420 (1991).

77) *Id.*

78) *Id.* at 420-421.

79) *Id.* at 240.

80) See Geogfrey Palmer, *New Ways to Make International Environmental Law*, 86 Am. J. Int'l L. 259, 269-270 (1992).

In fact, international environmental law has been a primary forum for discussion about soft law. Despite its tendency not to impose binding legal obligations on member states, soft law can be more *effective* in addressing certain issues than hard law. Its effectiveness derives in part from its “soft” nature; as Palmer noted, soft law can “serve to secure agreement where agreement may otherwise not be achieved.”<sup>81)</sup> Despite its ambiguity and non-binding nature, soft law also promotes feelings of international comity and cooperation.<sup>82)</sup> Finally, soft law can provide a “basis” for the incorporation of international rules into domestic law and eventually acquire the status of international customary law binding on “all” states through the accumulation of state practices and consents.<sup>83)</sup>

Where widespread international consensus on particular measures has not yet been achieved, the critique of soft law has been directed mainly towards its lack of binding force and the resulting political compromise.<sup>84)</sup> Again, however, the numerous soft law instruments that now exist concerning environmental matters serve as an important source for the development of international standards on the environment.<sup>85)</sup> The importance of soft law in the Northeast Asian context is significant, as the small number of countries may make reaching political compromise through soft law attainable.

### *B. Domestic Law and its Potential as a Source of International Standards*

In the absence of international law governing environmental matters, each state may exercise its sovereign right to regulate, control and manage environmental matters within its jurisdiction. This is especially important in the case where the state’s corporations operate business in a country that has environmental standards lower than its own, thus generating international concern. This problem can be approached in two different ways.

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81) *Id.*

82) *Id.* Victor, *supra* note 5, at 684-865; 687.

83) See Rosalyn Higgings, PROBLEM AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT (1993).

84) See Gunther F. Handl, et als., *A Hard Look At Soft Law*, 82 Am. Soc’y Int’l L. Proc. 371 (1988).

85) See Patricia W. Birnie & Alan E. Boyle, INTERNATIONAL LAW AND THE ENVIRONMENT 28-30 (1992).

First, “host” countries can pass laws requiring all of its nationals including multinational corporations to apply specified standards to their operations regardless of where the operations are run. This particular approach was recommended in a report by the U.N.:

Governments should look into the possibility of revising policies and regulations so that [their nationals] are bound to adopt the environmental standards of their home countries, while at the same time allowing local firms to be regulated on the basis of local standards ... [L]ocal standards should be gradually upgraded on the basis of a schedule to give local firms time to adjust their operations according to the new standards required and for them to have time to plan out such changes.<sup>86)</sup>

In the real world, this approach proves difficult as it may lead to the inappropriate transfer of technology, or to decisions by nationals of a host country to pass over investments in a particular developing country due to the environmental costs involved, even if the proposed business activity would be beneficial to the country concerned. Another difficulty lies in the potentially discriminatory aspects of the approach, which contradict principles of national treatment that are based on sovereign equality and non-intervention into domestic matters. A host country may, however, be able to develop a “choice of standards” rule that permits it to overcome at least some of these obstacles. Such a rule may, however, discourage FDI and lead to a poor transfer of technology unless the host country can guarantee clear protection of intellectual property.

The second option is the application of domestic environmental standards by “home” countries to their nationals so as to give extraterritorial effect to its environmental rules. While the previous options could be criticized on the basis of their breach of national treatment, this one is vulnerable to criticism based on the non-intervention principle of international law. To overcome the difficulty of enforcing national standards abroad in practice, government insurance and finance mechanisms

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86) U.N. Center for Transnational Corp. and Econ. & Soc. Commission for Asia and The Pacific, ENVIRONMENTAL ASPECTS OF TRANSNATIONAL CORPORATION ACTIVITIES IN POLLUTION INTENSIVE INDUSTRIES IN SELECTED ASIAN AND PACIFIC DEVELOPING COUNTRIES, ESCAP/UNCTC Publications Series B, No. 15 (1990), at 75-76.

such as the Export Import Bank in a home country might develop environmental criteria that are to be directed abroad and applied to its nationals.<sup>87)</sup> Since, unlike other government agencies, these bodies have a direct involvement in the running of business, they are in better position to improve the implementation of a home country's environmental standards abroad.

The third option is to depend on export and import controls by the states, which have advanced environmental standards, to protect the environment. Such controls are allowed in several international environmental agreements such as those on endangered species, ozone-depleting substances, and hazardous wastes. Unilateral measures have also been introduced by some countries. However, these measures have encountered strong resistance by free-trade advocates who decry the supposed interference of free-trade principles in the name of environmental protection.<sup>88)</sup> A market based soft institution may avoid such difficulties.

## V. Market-Based Institution Building

One of the important conditions of institution building for environmental protection is the fulfillment of financial needs. In Northeast Asia, this is important because China, the political leader, is hesitant to cooperate with other countries in the region due to its pursuit of economic development and its lack of scientific capability. Even though sources such as the NOWPAP Trust Fund exist, state-led funding systems involve time-consuming and awkward mechanisms which reflect the results of political bargaining among states. A better funding system is required, one that does not derive from traditional political negotiation processes. In this instance, a non-state-centered market approach would be helpful in providing and allocating the funds.<sup>89)</sup> In the Climate Change and Ozone Depletion arenas, this non-state-centered market approach

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87) See Fowler, *supra* note 56, at 27-28.

88) See Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters*, 25 Harv. Env't.L.Rev. 1 (2001).

89) See generally D.J. Dudek & W.R.Z. Willey, *An Overview of Taxes and Trading as Environmental Control Policies*, in SOCIAL COSTS OF ENERGY: PRESENT STATUS AND FUTURE TRENDS 334-50 (O. Hohmeyer & R.L. Ottinger eds., 1994); Marjan G.W.M. Peeters, *Legal Aspects of Marketable Pollution Permits, Environmental Policy & The Economy* 151 (Frank J. Dietz ed., 1991); Thomas C. Heller, *Environmental Realpolitik: Joint Implementation and Climate Change*, 3 Ind. J. Global Legal Stud. 295, 295-340 (1996).

has successfully increased regime compliance on the part of originally hesitant developing countries.<sup>90)</sup>

The need for adopting a market approach as a means of building a soft institution also stems from the need for enforcement mechanisms within institutions. In traditional institutions, including that of the Mediterranean cooperation, central authorities have a great deal of difficulty guaranteeing the enforcement of regulations. In the case of the Mediterranean model, the regime has experienced problems enforcing legally binding transnational rules at the domestic level because a transnational authority cannot impose rules outright on sovereign domestic jurisdictions.<sup>91)</sup> This would most likely be a problem for Northeast Asia, too, were it to adopt the Convention-Protocol approach of the Mediterranean regional model. A market approach would work better because of its intrinsic self-adjustment capabilities, which are a function of the invisible hand. Further, as in the case of APEC, the unique importance of shame in Asian society increases the feasibility of a soft-institution building approach in Northeast Asia.

## VI. Conclusion

This paper has argued that soft-institution building would be a better option than traditional hard-law based institution building for Northeast Asia to establish more effective cooperation among states. To support this argument, I have discussed who the actors in a soft-institution approach might be and how they might develop new environmental standards. Finally, I have argued that a soft-institution approach in Northeast Asia would have to be market-based to allow actors to meet their financial needs while ensuring the effective implementation of institutional arrangements.

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90) *See, e.g., Heller, id.*

91) *See generally Haas, supra note 17.*