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A Rocky Path Towards Sustainability: The Environmental Jurisprudence of International Courts

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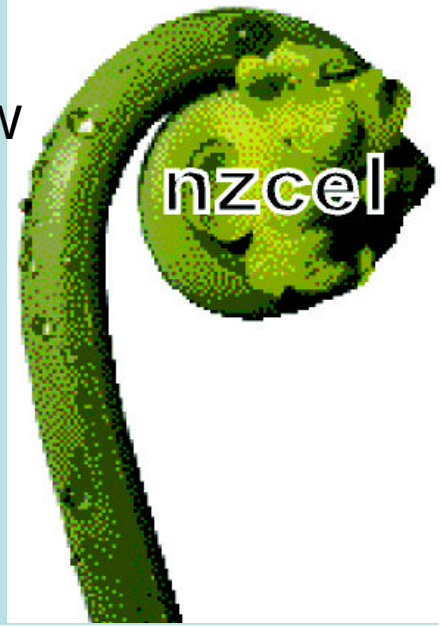

"Sustainability is a general concept and should be applied in law in much the same way as other general concepts such as liberty, equality and justice."

(NZ Ministry for the Environment, Working Paper No.24, 1989)

"If there is anything I have learnt from my eight years at UNEP, it would be that sustainability needs to completely transform present governance and law if it is to make a difference for humanity's future."

(Klaus Töpfer, Director, UN Environmental Programme, Key Note to the National Sustainability Conference, Berlin, 6 Sep. 2005)

Structure of Presentation:

I. Sustainable Development as a Legal Principle

II. Nature of the International Dispute Settlement System

III. Examination of key cases:

1. ICJ

2. ITLOS

3. WTO

4. UNHRC

IV. Conclusion

I. Sustainable development as a legal principle

1. Normative hierarchy of international legal concepts

a) Policy, Objective, Moral Principle:
Moral precept not mentioned in binding or non-binding international law, but in *travaux préparatoires* for int'l conferences etc.

b) Legal Principle:
Normative precept mentioned in binding or non-binding international law and referred to by courts as a legally compelling basis for judgement.

c) Legal Norm:
Legal principle accepted by a sizeable number of states and international actors a creating a binding legal obligation either through treaty or custom.

d) Legal Rule:
Legal norm creating specific rights and/or obligations

2. Sustainable development

Mentioned in binding and non-binding international law and referred to by courts.

"(N)ow established in international law, even if its meaning and effect are uncertain. It is a legal term which refers to a large body of international agreements on environmental, economic and civil and political rights" (Foundation of International Environmental Law, 2005)

II. International dispute settlement system: "closed", "open" or "multiple parallel"?

1. "closed" system: capacity to designate valid law within own jurisdiction creating a "wire fence" or "brick wall" against other jurisdictions

Example: typically, municipal legal system

2. "open" system: lacking such capacity, thus allowing for more openness towards emerging legal concepts

Example: international legal system

3. "multiple parallel" system: open externally, closed internally

Example: the main tribunals of the international dispute settlement system -
ICJ (sovereignty)
ITLOS (law of the sea)
WTO (free trade)
UNHRC (human rights)

III.1. ICJ and Sustainability

a) Gulf of Maine **Canada v. U.S. (1984)**
(Case Concerning Delimitation of the Maritime Boundary
In The Gulf of Maine (Can. v. U.S.), 1984 I.C.J. 59 (October 12))

Subject: delimitation of maritime boundaries

Against the U.S. arguing that demarcation-line should follow boundaries of ecosystems and fish populations, the ICJ applied the sovereignty principle of "*equity"* to create the boundary and relied on the *"tradition of friendly and fruitful cooperation"* between both states to take care of environmental ramifications.

III.1. ICJ and Sustainability

***b) Jan Mayen* Denmark v Norway (1993):**

(Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. (June 14))

Subject: delimitation of maritime boundaries

ICJ applied the equity principle.

J Weeramantry (Sep.Opinion) argued that environmental factors were crucial in maritime boundary delimitations and should be integral part of the concern for equity between states.

III.1. ICJ and Sustainability

c) *Nigeria v. Cameroon (2002):*

(Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig. with Eq. Guinea intervening), 2002 I.C.J. (October 10))

Subject: delimitation of land and maritime boundaries

ICJ applied equity principle.

III.1. ICJ and Sustainability

d) *Nuclear Weapons* Advisory Opinion (1996):

(Advisory Opinion On The Legality Of The Threat Or Use
Of Nuclear Weapons, 1996 I.C.J. 226 (July 8))

Subject: legality of threat or use of nuclear weapons

ICJ examined law of armed conflict, humanitarian law, human rights law and international environmental law. With respect to *"trans-boundary environmental affects"*, the Court *"recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn"* and concludes that *"environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict.*"

To this end, J Weeramantry (Sep.Opinion) argued that *"sovereignty of states should be proportionately diminished"*.

III.1. ICJ and Sustainability

e) Fisheries Jurisdiction **Spain v Canada (1998):**

(Fisheries Jurisdiction Case (Spain v. Can.), 1998 I.C.J. (December 4))

Subject: control over straddling fish stocks

Canada extended its area of control (*'regulatory area'*) to protect sustainability of their fish stocks, thereby effectively restricting ICJ's jurisdiction. Court noted that there are *"different perceptions of the relationship between the exigencies of the law of the sea, on the one hand, and environmental law in the other"* and held that sovereignty includes protection of legitimate interests such as protecting the environment. It does not, however, include the right of pursuit and arrest of the Spanish vessel operating in the '*regulatory area'*.

III.1. ICJ and Sustainability

f) Gabcikovo-Nagymaros **Hungary v Slovakia (1997):**
(Case Concerning the Gabcikovo-Nagymoros Project (Hung. v. Slovk.), 1997 I.C.J. 7)

Subject: unilateral termination of treaty on a Danube River dam project

Hungary pleaded a state of '*ecological necessity'* as its basis for ending the 1977 Treaty and stopping the project. Court accepted that Hungary's "natural environment" was an "essential interest of the State", quoted *Nuclear Weapons* and required the parties to renegotiate the treaty reasoning: *"It is clear that the Project's impact upon, and its implication for, the environment are of necessity a key issue…. Through the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects on the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind –for present and future generations- new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.*

J Weeramantry (Sep.Opinion) considered sustainable development *"a general principle of international law recognized by civilized nations"* and *"an integral part of modern international law", "by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community."*

III. 2. ITLOS and Sustainability

Legal Framework:

Preamble UNCLOS: *"… a legal order for the seas and oceans which will … promote … the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment*". Article 60 refers to *"maximum sustainable yield",* Article 136 to *"common heritage of mankind"* (seabed) and Part XII creates an anticipatory regime for *"Protection and Preservation".*

Part XV UNCLOS allows parties to choose between one of four compulsory dispute settlement mechanisms, i.e. ITLOS, ICJ, and Annex VII arbitration, or an Annex VIII special arbitration *("Montreaux Formula").* ITLOS has compulsory jurisdiction only with respect to prompt release of vessels and provisional measures.

III. 2. ITLOS and Sustainability

a) *Southern Bluefin Tuna* Australia&NZ v Japan (1999):
(Southern Bluefin Tuna Cases (Austl. and N.Z. v. Japan), 1999 I.T.L.O.S. 5, 7 (August 27))

Subject: Japan's alleged breach of the Convention For The Conservation of Southern Bluefin Tuna

Australia and NZ argued that Japan's 'scientific' program for fishing causes the depletion of southern bluefin tuna. ITLOS stopped Japan from continuing its practice *"to prevent serious harm to the marine environment"* and required the parties to act *"with prudence and caution to ensure effective conservation".*

III. 2. ITLOS and Sustainability

b) ***MOX Plant*** **Ireland v UK (2001):**
(Dispute Concerning The MOX Plant, International Movements Of Radioactive Materials, And The Protection Of The Marine Environment Of The Irish Sea (Ir. v. U.K.), 2001 I.T.L.O.S. 415 (December 3))

Subject: Impact on the marine environment of a nuclear power plant (Sellafield)

Ireland argued that radiation would affect the ecology of the Irish Sea and its surrounding ecosystem. ITLOS (contrary to *Bluefin*) switched the burden of proof from those who wanted to continue to use the resource (as it was in *Bluefin*) to those who wanted to prevent that use and held that Ireland *"failed to supply proof"* of *"irreparable damage"* or *"serious harm".*

III. 3. WTO and Sustainability

Legal Framework:

Preamble WTO Agreement: *"The Parties … recognize that their relations in the field of trade and economic endeavor should be conducted with a view to raising the standards of living … and expanding the production of and trade in goods and services while allowing for optimal use of the world's resources in accordance with the objective of sustainable development…"*

Article XX sets out "General Exceptions" for free trading: *"Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination …, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:*

….

(b) necessary to protect human, animal or plant life and health;

…

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."

III. 3. WTO and Sustainability

a) Tuna-Dolphin I **Mexico v U.S. (1991)**

(United States Restrictions on Imports of Tuna (Mex. v U.S.) GATT Panel Report 3 Sept.1991 as reported in 2 IELR, 48-114)

Subject: U.S. trade embargoes of tuna caught by methods or technologies causing incidental taking of Yellowfin Tuna

U.S. cited protection of *"life"* of dolphins as an *"exhaustible resource"* as justification for trade restriction. GATT Panel set the burden of proof "*on the party invoking Article XX"*. It also set a high threshold for its invocation: *"Article XX was only intended to allow contracting parties to impose trade restrictive measures … to the extent that such inconsistencies were unavoidable".*

III. 3. WTO and Sustainability

b) ***Tuna-Dolphin II*** **Eur.Com.&Netherlands v U.S. (1994):**
(United States Restrictions on Imports of Tuna (Eur.Com.&Neth. v. U.S.)
GATT Panel Report 16 June 1994 as reported in 2 IELR, 48-114)

Subject: U.S. trade embargoes of tuna caught by methods or technologies causing incidental taking of Yellowfin Tuna

In this case, the GATT Panel went further articulating a three-step legal test. First, the policy had to be one *"to conserve"* or to *"protect"* health or life. Second, it had to be *"necessary"* and third, it had to be established as not being "*arbitrary or unjustifiable discrimination".* The Panel found that the U.S. have passed the first test, but failed the second and third. It also made the first mention of sustainable development: *"…the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the general Agreement. The panel observed [however] that the issue in this dspute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose a trade embargoes to secure changes in the policies which other contracting parties pursued within their own jurisdiction."*

III. 3. WTO and Sustainability

c) ***Turtle-Shrimps*** **India et al. v U.S. (1998):**
(United States Importation Prohibition of Certain Shrimp and Shrimp Products (India, Malay., Pak. and Thail. v. U.S.) W.T.O. Panel Report, 15 May 1998 as modified by W.T.O. Appellate Body Report adopted November 6 1998 as reported in 2 IELR, 270)

Subject: U.S. requirement of Turtle Exclusion Devices (TEDs) for all shrimp harvesting

With the experience of Tuna I and II behind them, the U.S. incorporated turtles already classified as endangered, both domestically (Endangered Species Act) and internationally (CITES). Nevertheless, the WTO Panel found the practice *"unjustifiable under Article XX"* (without applying the *Tuna Dolphin* three-step test).

The WTO Appellate Body did not reverse the Panel's decision, but made three points of interest. First, it rejected the Panel's "chapeau-down" approach in favour of first examining the Art.XX listed exceptions (a-g). Second, in examining exception (g) it stated: *"… recalling the explicit recognition by WTO Members of the objective of sustainable development… we hold that … measures to conserve exhaustible natural resources, whether living or non-living, may fall within Article XX(g)."* Third, the Appellate Body separated economic trade law from environmental law by leaving improved environmental standards to further negotiations: *"We have not decided that sovereign states that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should."*

III. 4. UNHR and Sustainability

a) ***Ominayak v Canada*** **(1984):**
(Ominayak and the Lubicon Lake Band v. Canada, U.N. Human Rights Committee, communication no. 167 (1984). As reported in 3 IELR, 26-61)

Subject: rights of the Cree people and oil and gas development

The Cree argued that environmental preservation is foundational for their culture which was the core of their self-determination. The HRC disconnected human rights from environmental concerns stating that *"… the rights protected by Article 27 [of the International Covenant on Civil and Political Rights] include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong."* It rejected the Cree's argument that the ecology of the land was at their right rather than any property and development rights.

Insofar, Mr. Ando (Sep.Opinion) disagreed: *"It is not impossible that a certain culture is closely linked to a particular way of life and that industrial exploration of natural resources may effect the band's way of life".*

III. 4. UNHR and Sustainability

***b) Länsman (Jouni) et al.* v Finland (1995):**
(Länsman (Jouni) et al. v. Finland, U.N. Human Rights Committee, communication no. 671 (1995) as reported in 3 IELR, 115-133)

Subject: rights of the Sami people in the face of resource development around them (intended logging of 3,000 hectares)

The Sami saw the *"ecological balance"* as a prerequisite to life and *"vital to their culture and livelihood".* The Committee held that the intended activities were not *"of such proportions"* sufficient to deprive the Sami of *"the right to enjoy their culture in that area",* but accepted that more of *"such activities, taken together, may erode the rights of Sami people to enjoy their own culture."*

III. 4. ECHR and Sustainability

***c) Bladet Tromsø* and Stensaas v Norway (1999):**
(Bladet Tromsø and Stensass v. Norway, European Court of Human Rights, Strasbourg (20 May 1999) as reported in 3 IELR, 462-520)

Subject: reporting of ecological harm caused by illegal acts related to the annual seal hunt

The ECHR considered the *"conflict of rights"* between *"freedom of expression"* and *"protection against unlawful attacks on his or her honor and reputation"* and stated that the critical issues should *"note be obscured by the sensitive nature of the seal hunting issue".*

IV. Conclusion

1. Sustainable development is a legal principle and has a growing presence in the recognition of disputes.

2. International judiciary systems have developed through the force of a normative imperative making it difficult for sustainable development to gain equivalent 'norm' status.

3. To compete with existing normative imperatives (sovereignty, free trade, human dignity), sustainable development needs its own parallel system of legal dispute settlement (e.g. International Environmental Court).

4. At present, sustainable development is too compromised and ambiguous to provide a normative imperative. The necessary coherence and force could only emerge from its core, i.e. ecological sustainability.

Ecological Sustainability: The New Zealand experience

Environmental law reform 1986-1996:

- integrated environmental management
- based on the sustainability principle
- Resource Management Act (1991)
- Environment Court (1996)

Sustainability as an adjudicatory norm:
Cases applying “ecological bottom-lines”
(vs. “overall judgment approach”)

Ecological Sustainability: The Earth Charter

- “unfinished business” of Brundtland and Rio
- for a just, sustainable and peaceful global society
- fundamentally based on ecological sustainability (‘respect and care for the community of life’ & ‘ecological integrity’)
- endorsed by UNESCO, IUCN, GO’s and NGO’s

THANK YOU!