

INCORPORATION OF SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL PROTECTION IN THE JURISPRUDENCE OF INTERNATIONAL COURTS*

Abstract

Sustainable development and environmental protection are key components of global development. Over the past few decades, international legal jurisprudence, within the domestic and international spheres of governance has been shaped to reflect the importance of these concepts in sustaining development. This paper examines the influence of treaties starting with the Rio Declaration which made a transition from international environmental law and international economic law to an international law of sustainable development. The paper further analyses the jurisprudential approach undertaken by the International Court of Justice (ICJ) in various cases giving the two concepts some judicial flavour with normative value having received general acceptance by the international community. The approach of this paper is the examination of the jurisprudence of International Court as it relates to environmental protection as a means of achieving sustainable development. This paper concludes that the court has by several proclamations consolidated the law and granted states greater legal certainty. By implication, legal jurisprudence will continue to develop as seen in rapid litigation on sustainable development.

Keywords: Sustainable Development, Environment, International Court, Jurisprudence, International Law

1. Introduction

‘Sustainable’ and ‘Development’, two seemingly irreconcilable concepts which first found their place together in international law especially in principles 3, 4 and 27¹ of the 1992 Rio declaration², have continued to be the subject of debate through adjudication in international courts. Though not formally binding, the adoption of the Rio declaration by a consensus of 176 states after a prolonged negotiating process and its normative character make it a particularly important example of the use of soft law instruments in the process of adjudication and development of international law. The vagueness of the concept of ‘sustainable development’ can be seen in Brundtland’s definition of it as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’³. Though the phrase ‘Sustainable development’ was used throughout the Rio declaration, it was the United Nations (UN) that first attempted definition of the concept in its 2002 world summit on ‘sustainable development’, which birthed the Johannesburg declaration. In the Johannesburg declaration, three pillars of sustainable development were identified, they are, economic development, social development and environmental protection⁴. These pillars are ‘interdependent and mutually reinforcing’⁵; a reasonable interpretation is that sustainable development represents a ‘compromise between environmental protection and economic growth’⁶. The fact that the contents making up the sustainable development concept represent basic goals all governments want to achieve, shows the potential of the concept and its’ possible implications.⁷ One author is even of the opinion that the Rio declaration is making a transition from international environmental law and international economic law to an international law of ‘sustainable development’⁸. Sands grouped the legal elements of the concept into four, that is; the need to preserve natural resources for the benefit of future generations (inter-generational equity); the aim of exploiting natural resources in a manner which is ‘sustainable’; the ‘equitable use of natural resources’⁹; and integration of environmental considerations into other economic

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¹ Report of the Consultation on ‘Sustainable Development: the challenge to International Law’, Review of European community and International environmental Law 3 (1994), 1

² UN 1992 Rio Declaration on Environment and Development (Entry into force, 1992)

³ Brundtland Report, ‘WCED: Our common future’ (Oxford, Oxford University Press, 1987) p 8

⁴ UN Report of the WSSD, UNDOC A/CONF 199/20 (2002), Resolution 1, Paragraph 5

⁵ Johannesburg Declaration on Sustainable Development, adopted at the 17th plenary meeting of the World Summit on Sustainable Development, on 4 September 2002; Available online at

(http://www.un.org/esa/sustdev/documents/WSSD_POI_PD.htm), accessed 23rd November, 2016, p 5

⁶ B Patricia, B Allan and C Redgwell, *International Law and the Environment*, (3rd edition, Oxford, Oxford University Press, 2009) p. 55

⁷ See the Independent Group of Scientists appointed by the Secretary-General, Global Sustainable Development Report 2019: The Future is Now – Science for Achieving Sustainable Development, (United Nations, New York, 2019). Page 41 box 2-4

⁸ P Sands, ‘International Law in the field of sustainable development’ (1994) 65 *BYBIL* 303 at 304

⁹ *ibid* p 253

projects. These elements in terms of ‘sustainable development’ have been invoked before international courts examined below.

2. International Courts and Sustainable Development

The concept of sustainable development received the first attention before an adjudicatory body in the case of *Gabcikovo – Nagymarus*¹⁰. In this case, the International court of Justice (ICJ) was requested to make a decision relating to 1977 treaty on the construction and operation of the *Gabcikovo – Nagymarus* dams in a dispute involving Hungary and Slovakia. The fact in issue was whether the building of two barrages on the Danube River (which were to be jointly operated) was envisaged in the 1977 treaty. The barrages would require diversion of a river to Czechoslovak territory and dual system of barrage operation by ‘Peak-Power’ instead of ‘run-off-river’ mode. Construction had already started, when in 1989 Hungary suspended work due to public pressure focused on the environmental aspects of the barrage. Czechoslovakia viewed the barrage as posing no serious threat to the environment, while Hungary was certain it will cause environmental hazards to water supplies. This intransigent approaches continued until 1992 when Czechoslovakia unilaterally implemented its ‘provisional solution’ called ‘Variant C’ which diverted 80 percent of Danube waters into Slovak territory canal.

In 1993, Czechoslovakia split into two countries, Czech Republic and Slovakia, Slovakia on agreement inherited the project. Following Hungary making known its intention to terminate the 1977 treaty, in 1993 the two countries agreed to refer the matter to the ICJ. The court, addressing the three questions posed by the parties ruled, firstly that Hungary was not entitled to suspend or terminate on environmental grounds the joint project. Secondly, that Slovakia’s unilateral solution in 1992 without Hungary’s agreement was not appropriate, though not unlawful. Thirdly, Hungary was not entitled to terminate the 1977 treaty which still remained in force. Considering the future, the court pointed at the basis for co-operation and agreement for the parties and suggesting ‘preservation of the status quo of one barrage’ jointly operated with no peak power as a solution. The court in effect re-wrote the 1977 treaty. In other words, having described ‘sustainable development’ as a concept, the ICJ ruled in part that ‘the parties together should look afresh at the effects on the environment of operation of the Gabcikovo power plant’ and ‘in particular they must find a satisfactory solution for the volume of the water to be released into the old bed of the Danube and into the side arms of both sides of the river’¹¹. The court invoked the concept of ‘sustainable development’ particularly as solution and truce for the parties in dealing with ‘risk for mankind-for present and future generation’ and ‘effects upon the environment’¹² as stated *inter alia* by ICJ in paragraph 140, ‘this needs to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development’¹³ Drawing inference from what court ruled in this case, three significant points are:

First, it invokes ‘sustainable development’ by implication; the term now has a ‘legal function’¹⁴. Second, it is a ‘concept’ and not a principle or a rule. Yet this does not necessarily limit its use, for the sustainable development ‘concept’ has both ‘procedural’ and ‘substantive’ aspects: ‘procedural’ when the court obliges the parties to ‘look afresh’ at the consequences the operation of the plant might have on the environment and ‘substantive’ with the obligation that a ‘satisfactory volume of water’ be released into the main river from the bypass canal¹⁵. In a dissenting opinion however, Judge Weeramantry stated that sustainable development is a broad principle of International law and not a concept of International law,¹⁶ but rather a principle with normative value and that the ‘concept’ has received general acceptance within the international community. He further noted that in the area of International law there must be both development and environmental protection, and that neither of these rights can be neglected. The extent of the ICJ’s incorporation of sustainable development in this case is substantially innovative in the development of its legal implications and the ‘concept’ but rather uncertain. The *Pulp Mills case* was more explicit. Weeramantry, in another dissenting opinion emphasises ‘This court, as the principal judicial organ of the United Nations, empowered to state and apply international law with an authority matched by no other tribunal must, in its jurisprudence, pay due recognition to the rights of the future generation. If there is any tribunal that can recognize and protect their interests under the law, it is this court.’¹⁷This was also his opinion in

¹⁰ ICJ Report 1997, p 7

¹¹ ICJ Report 1997 p 78 (paragraph 140)

¹² Ibid

¹³ Ibid 78 (paragraph 140)

¹⁴ P Sands ‘International Courts and the Application of the concept of Sustainable Development’ (1999) 3 *Max planck UNYB*, 389 at p 393

¹⁵ Ibid

¹⁶ ICJ Report 1997 p 208

¹⁷ ICJ Reports 1995 p 341 (Dissenting opinion of Judge Weeramantry)

the *Nuclear test cases*¹⁸. In the above cases, we find elements of the concept¹⁹ of ‘sustainable development’ such as ‘intergenerational equity’, applied along with principles of sustainable development implication like the duty to cooperate, integration, sustainable use, equity and the right to sustainable development, the human rights of sustainable development, and intergenerational equity.²⁰ However, the legal effectiveness of these terms has proved challenging, due to their ‘malleability and uncertainty’.²¹ They are still at the point of conception. Other international organisations have also made decisions on the concept and implications of Sustainable Development. This paper will now contrast the ICJ decisions with those of other international bodies.

The appellate body of the World Trade Organization (WTO) analysed sustainable development in a case concerning import prohibitions imposed by the US on shrimp and shrimp products from India and others; on the ground that they were harvested in a way which negatively affected endangered sea turtles²². The US 1987 regulation pursuant to 1973 Endangered Species Act required all United States registered shrimp trawl vessels to use approved turtle excluder devices (TEDs) in area where there was enormous mortality of sea turtles in shrimp harvesting. The regulation became effective fully in 1990 and TEDs allow shrimp harvest without endangering other species including sea turtles. The US 1989 Public Law 101 – 162 had section 609 addressing the importation of certain shrimp and its product. S.609 (b) (1) imposed ban on importation of shrimp harvested with the commercial fishing technology which may affect sea turtles adversely. In 1996, further regulations required *inter alia*, annual certifications from harvesting nations with documentary evidence of adoption of a regulatory programme that protect sea turtles.

The WTO perspective of the difficulty was the application of US conservation laws extraterritorially within the jurisdiction-of third states or outside US jurisdiction and non Nationals of US. This raises the issue of general international law. US legislation was challenged before a WTO panel by India, Pakistan, Thailand and Malaysia. The WTO panel at first instance concluded that the US import ban, sequel to S.609 of its law, was not consistent with Article XI: 1 of GATT 1994 and could not be justified under Article XX of GATT 1994.²³ US appealed to the WTO appellate body, invoking Article XX (g) to justify its actions. The body followed three steps and ruled that the panel interpretation of Article XX was flawed. Second, the body invoked the concept of sustainable development to justify section 609 under Article XX (4) of GATT²⁴, but under the third step, the US action was however considered an ‘unjustifiable discrimination’ against importation of shrimp. The appellate body imposed the ‘concept of sustainable development’ as regards step 2 to determine US action as ‘provisionally justified’ and that Article XX (g) extends to protect living and non-living natural resources. Importantly and by implication, this body extends the ‘concept of sustainable development’ to living and natural resources by interpretation of Article XX (g) GATT and the preamble to the 1994 WTO agreement²⁵- which ‘explicitly acknowledge the objective of sustainable development’²⁶ and this was invoked to arrive at conclusion. The concept was also invoked by the body to ‘add colour texture and shading’²⁷ to the interpretation of ‘unjustifiable discrimination’ to arrive at the decision that procedural elements like diplomatic means, were not exhausted before ‘unilateral measures’²⁸ were taken by the US(third step). Hence where sustainable development principles are incorporated in the text of a treaty, this by implication enables the states to relate the matter of the treaty to wider public interest objectives.²⁹ This opinion departs from *Gabcikovo* case copiously quoted by the body but similar to *Pulp mills* case even though the two adjudicatory bodies incorporated the ‘concept of sustainable development’ in their jurisprudence. The second major environmental case delving into the concept of sustainable development before ICJ is the *Pulp Mills case*³⁰. *Pulp mills* case on the river Uruguay (*Argentina v Uruguay*) instituted in 2006 over the construction of two pulp mills on the banks of river Uruguay facing Gualeguaychu, a town in Argentina. Argentina claims *inter alia*, that The two mills will ‘damage the environment of the river Uruguay and its area of influence zone’³¹ with

¹⁸ ICJ Reports 1995 p 288

¹⁹ See page 1 of this paper

²⁰ D French, ‘*International Law and Policy of Sustainable Development*’ (Manchester, Manchester University Press,2005) pp 35-70

²¹ P Sands ‘*who governs a sustainable world? The role of International Courts and Tribunals* in Briden James and Downing Thomas (eds) ‘*Managing the earth – The Linacre Lectures*’ (Oxford, Oxford University Press, 2002) p 111 – 128 R 114

²² AB – 1998 – 4, 12 October, 1998

²³ WT-DS 581R of 15 May 1998

²⁴ AB – 1998 – 4,k 12 October 1998 Parag. 125 – 145

²⁵ Ibid Paragraph 129

²⁶ Ibid

²⁷ North Sea Continental Case ICJ Reports 1969 at p 72

²⁸ Sands Philippe, op.cit 13 p 400

²⁹ D French, ‘*International Law and policy of Sustainable Development*’ (Manchester, Manchester University Press,2005) p36

³⁰ ICJ Order of 26th July 2006

³¹ Ibid Paragraph 33

concern of ‘significant risk of pollution of the river, deterioration of biodiversity, harmful effect on health and damage to fisheries resources’³² and the ‘extremely serious consequences for tourism and other economic interest’ which will be in violation of the statute of the river Uruguay (bilateral agreement) of 1975 and other international rules incorporated in the statute including the obligation to take measures for the exploitation of the river Uruguay.³³

A procedural obligation such as that of prior notification to the Administrative Commission of the River Uruguay (CARU) as well as obligation to preserve aquatic environment; protect biodiversity and; prevent pollution and prepare objective and full environmental impact study.³⁴ Argentina and Uruguay have requested provisional measures which the court rejected. The argument canvassed before the court is very promising regarding sustainable development and the judgement of 20th April 2010³⁵ state in part that ‘interconnectedness between equitable and reasonable utilization of shared resources and the balance between economic development and environmental protection that is the essence of sustainable development’ The court ruled that Uruguay breached ‘substantial treaty obligation’³⁶ and that Uruguay was under obligation based on bilateral treaty to consult Argentina before the construction of the *Pulp mills*³⁷. *Gabcikovo case* was quoted before the court in the Pulp mills case as the second major environmental case particularly on the concept of sustainable development, filed before ICJ in 2006 after 1997 *Gabcikovo case* and the third being 2008 *Aeria Herbicide case* pending before ICJ. This paper considers further the concept and its implication extent in courts’ jurisprudence.

3. Sustainable Development within the Jurisprudence of International Courts

The cases above confirm the concept of sustainable development which tends to compromise between environmental protection and economic growth. Rio declaration principle 4 states that ‘environmental protection shall constitute an integral part of the development process’; and Agenda 21 also envisages that courts are to have a role in dispute settlement. As a result of the cases above the ‘concept of sustainable development’ and its implications has formed an integral part of the ICJ’s jurisprudence. Though the ICJ decision was largely non-committal to the real issues confronting the parties in *Gabcikovo case* which might have adverse implications for similar cases in the future, the Pulp Mill case was more explicit in making the ‘sustainable development’ definition clearer which is a significant development in effectively incorporating the concept of sustainable development in international courts jurisprudence. Regarding the legal status of sustainable development, international courts have not been effective in identifying criteria to be used in deciding whether a particular development is sustainable. For example in the *Gabcikovo case*, the ICJ did not review national action nor conclude that the state actions fall short of the standard of ‘sustainable development’, but instead it readily addressed justiciable questions such as ‘equitable allocation of water flow on the applicability of international standards in the operation of the hydroelectric system’.³⁸ In the absence of a ‘justiciable standard for review’, it suggests that decisions on what ‘constitutes sustainability rest primarily with individual governments’.³⁹ However courts could review the ‘sustainability of economic development by reference to detriment to human rights’⁴⁰ and the right to water. This necessitated the African Commission on Human and People’s Right findings in the *Ogoni land case* (which again is in contrast to *Gabcikovo case*) that the repressive method of the Nigerian government and selfish modes of oil development in Ogoni land, coupled with lack of material benefits to the local population infringe on the rights of people to deal freely with their natural resources as well as their rights to ‘economically sustainable development’⁴¹. In this ground breaking case, the International tribunal in an extreme situation took a critical view of the merits of economic development in contrast to the *Gabcikovo case*.

Despite this, the key legal test by which to test interpretation of sustainable development was made by the ICJ in the *Gabcikovo case* when it told parties to ‘look afresh’ at the environmental consequences. This enables the ICJ to further the objective of sustainable development in accordance with the Rio declaration rather than deciding what is and is not sustainable. Also, the court emphasized that it would not determine in advance the final result

³² Ibid

³³ Order of 26 July 2006

³⁴ Ibid

³⁵ ICJ Judgement of 20th April 2010 paragraph 75 available at <http://www.icj-cij.org/docket/files/135/15877.pdf> (last visited December 5, 2017)

³⁶ C Payne, ‘*Pulp Mills on the River Uruguay: The International impact Assessment as a duty under international law*’ (2010) *ASIL Insights* p1

³⁷ Ibid

³⁸ P Birnie, A Boyle and C Redgwell (no 6) p127

³⁹ Ibid

⁴⁰ Ibid

⁴¹ *The Social and Economic Rights Action Center, The Center for Economic and Social Rights v. Nigeria ACHPR communication 155/96* (2002) Parag. 52-5.

of negotiations but rather the parties themselves must find an agreed solution considering the objective of the original treaty that foresaw the construction of a joint project, the essence of this is that the treaty governs the relationship of the two countries.

The judgment invoked development of new norms and standards, not encompassing a state's contemplation of new activities alone, but also activities began in the past. Sustainable development is now by implication a governing norm and principle of international law. Most importantly, as the definition of the concept in the *Pulp Mills case*, the *Gabcikovo case*, and the WTO appellate body decision in the *Shrimp Turtle case* shows; 'sustainable development' represents 'a policy which can influence the outcome of cases, the interpretation of treaties and the practice of states and international organizations and may lead to significant change and development in the existing law.'⁴² Thus, while the legal obligation of the concept still require clarification, the *Gabcikovo* and *Pulp Mills* cases have cast new light on the law as it relates to the 'concept'. Reliance on the concept of sustainable development is an 'innovation not only in the jurisprudence of the court but also in the law relating to the utilization of natural resources'⁴³ and has been widened to include living natural resources in the *Shrimp Turtle Case*.

4. Implications

One implication is change in focus from disputes regarding control of natural resources to disputes about sustainability and limit of resource use.⁴⁴ It also suggests the continued importance of the evolution of general international law in this field, as in others.⁴⁵ This is the first time the court is making explicit reference to the environment and sustainable development concept. By implication, it is an integration of environmental considerations and the concept in implementing international law related to 'sustainable development'. The court's familiarity with environmental concerns and the concept of sustainable development is about two decade old. The willingness of the two parties to invoke sustainable development in the *Gabcikovo* case is a signal in the right direction; and advisory opinions, judgements and dissenting opinions indicate that international courts are not only able, but willing to inculcate the concept in their jurisprudence, but with caution. The jurisprudence of the ICJ and opinion of Judge Weeramantry by implication have become precedents in other subsequent cases; hopefully principles can be developed expected to address issues like the existence of customary duties to assess and monitor the environmental impact of large projects as subsequently confirmed in *Pulp Mills case*; the relations between treaty and customary law in the area of environment, the limit of the right to economic development and the relative hierarchy of customary international environmental law. Also, inclusion of the concept in all treaties which are subject matter of the disputes before the court and parties reliance on them justify its legal implication since they can be used to justify their actions as in the cases above⁴⁶.

Jurisprudentially, the court has also consolidated the law and given states greater legal certainty, by implication, the jurisprudence will continue to develop as seen in rapid litigation on sustainable development between 1997 to 2010 as courts had given judicial nod and confirmation to the concept and the special chamber for environmental matters was formed by the court to deal with increasing cases. In essence, the concept or principle of sustainable development has gained 'currency' and its impact will be felt more and widely.⁴⁷ The ICJ chose to refer to it as a concept needed for its development as a framework to reconcile conflicts between 'environmental protection' and 'development' based on courts perception of its 'international acceptance'. It is a far-reaching conclusion by the court to have rewritten the 1977 treaty in the *Gabcikovo* case and also no international precedent can be found in WTO appellate body decisions which permit a state to conserve living resources endangered in another state subject to diplomatic relations. Though sustainable development has gained wide international acceptance, there is still need for binding obligations and authorities to enforce the concept which I think international courts, particularly environmental courts, should develop. It must be noted that for international courts, the development of international law is not a 'ground breaking' but rather a 'stock taking' system, despite being 'guardian angels' of general International Law, they still have their problems in developing the 'concept'. For example, International courts do not have compulsory jurisdiction except by consent of the disputing parties⁴⁸ and states seldom consent.

⁴² P Birnie, A Boyle and C Redgwell, no 6 p 127

⁴³ R Higgins, 'Natural Resources in the case Law of the international court' in Boyle A and Freestone D (eds) 'International Law and sustainable development' (2nd edition, Oxford, OUP 1999) p 67

⁴⁴ R Schrijver, 'Sovereignty, over natural resources' (Cambridge, Cambridge University Press, 1997) 164-168

⁴⁵ R Higgins no 39

⁴⁶ D French, no 28 p 44

⁴⁷ P Sands no 13 p 404

⁴⁸ Article 36 Statute of the International Court of Justice 1945

In essence, International Law imposes no obligation on a state to bring its dispute against another state for international adjudication.⁴⁹

As superpowers are often not willing to limit their sovereignty and submit to international court's jurisdiction, this constitutes a political impediment to litigation that does not facilitate 'mutually acceptable solutions to disputes'.⁵⁰ Hence states often opt for diplomatic mechanism such as negotiation instead. Thus, in *Gabcikovo case*,⁵¹ the court told the parties to 'negotiate in good faith'. Here the ICJ ended up simply acting as a catalyst for the negotiation. Similarly, the ICJ has been hindered by a 'perceived lack of bite'⁵², under the UN charter, which binds a nation to comply to an ICJ decision only if it is a party to the dispute⁵³. Thus in the *Fisheries jurisdiction case*⁵⁴, Iceland refused to obey a court order not to enforce a fifty mile fishing zone pending ruling an action filed by UK. Another problem is delay of cases before the court. For example, *Barcelona Traction case*⁵⁵ took eight years before the final decision, *Pulp Mills case* filed in 2006 was decided in April 2010. Even when it was decided, unresolved issues outside court review like air pollution, odours and noise have triggered protests that may lead to violation of the judgement until they are resolved.⁵⁷ Consequently, parties are reluctant to submit to the jurisdiction of International courts. Also, International tribunals rarely grant injunctive relief or punitive compensations for environmental damage.

Another impediment to effective development of the concept of 'sustainable development' in international courts jurisprudence is a procedural one. International courts have not changed their jurisprudence in respect of resources, and due to its *erga omnes* nature, no state can sue in respect of environmental harm on 'global commons resources'. Thus, the interests of future generations are left unprotected. Apart from these, only states can be parties before most international courts. Similarly, most global environmental matters are 'polycentric'⁵⁸. Courts are ill equipped to handle most scientific matters regarding the environment, hence, the call for an international court for the environment.

5. Conclusion

Despite the problems highlighted above, the concept has gained legal acceptance and status, having implications of widely felt impact. 'Sustainable development' can be relied upon to justify integration into human rights norms and development for environmental concerns into Investment Protection Treaties. The influence of the concept in subsequent cases, interpretation of treaties and state practice may be leading to effective changes and development of current law despite doubt on its legal obligation, the courts have opened up the concept to develop a frame work for the reconciliation of conflicts between development and environmental protection when they come up.

⁴⁹ R Shabtai, *The world Court: What it is and how it works* (Cambridge Cambridge University Press 1973) p 313

⁵⁰ J Dunoff, *Institutional misfits, The GATT, The ICJ & Trade-environment Disputes* (1994) 15 *Mich. J. Int'l L.* 1043 at p 21

⁵¹ ICJ Reports 1997

⁵² B H. John & B E Canter, *International Law and Institutions for a New Age* (1993), 81 *Geo. L.J.* 535, 540

⁵³ Article 94 UN Charter 1945

⁵⁴ ICJ Reports 1972 p 30

⁵⁵ ICJ Reports 1970 p 3

⁵⁷ C Payne, *op.cit* n 32 p5

⁵⁸ L Fuller, *The Forms and Limits of Adjudication* (1979) 92, *Hav. L. Rev.* 353, 395