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Multilateral Environmental Agreements on Biological Diversity:

***Impact on Commonwealth
Caribbean judicial decision-
making***

Objective

- ◆ to investigate the potential impact on Commonwealth Caribbean judicial decision-making of treaties protecting biological diversity
- ◆ stimulate discussion on greater judicial use of biodiversity treaties
- ◆ introduce the wider implications of greater role for the domestic courts in MEA application

Why protect Biodiversity?

- ◆ ecosystems and related ecological processes are essential for the functioning of the biosphere in all its diversity
- ◆ maintaining maximum possible biological diversity of species of flora and fauna helps protect e.g., those which are rare, endemic, or endangered
- ◆ Biodiversity critical for food production, health and other aspects of human survival and sustainable development

Use of treaties

- ◆ Treaties are the most commonly used + fastest growing source of IEL
- ◆ In 1989 UN listed a total of 139; today there are over 300. Why?
- ◆ More than any other source, treaties permit int'l society to tackle complex int'l environmental problems with rapidity, specificity, adaptability.

A few Biodiversity Conventions

- ◆ Convention on Biological Diversity, 1992; Cartagena Protocol on Bio-safety 2000
- ◆ Convention on International Trade in Endangered Species (CIIES) 1973
- ◆ World Heritage Convention 1972
- ◆ Ramsar Convention on Wetlands 1971
- ◆ United Nations Convention on the Law of the Sea 1982
- ◆ Straddling and Highly Migratory Stocks 1995

A few (more) biodiversity treaties

- ◆ IMO MARPOL Convention 73/78
- ◆ Civil Liability Convention 1992
- ◆ Fund Convention 1992
- ◆ Basel Convention on Trans-boundary Movement of Hazardous Wastes 1989
- ◆ Stockholm Convention on POPs 2001
- ◆ Rotterdam Convention on PIC 1998
- ◆ Climate Change Convention 1992; Kyoto Protocol 1987

Some regional treaties

- ◆ Cartagena Convention on Protection and Development of the Caribbean Sea 1983
- ◆ 3 Protocols to Cartagena Convention
 - Protocol to combat oil spills 1983
 - Specially Protected Areas and Wildlife (SPA) Protocol 1990
 - Protocol on Land Based Sources of Marine Pollution (LBSMP) 1999

Biodiversity treaties: basic features

- ◆ A frame work agreement
(Cartagena 1983, CBD 1992)
- ◆ Protocols
(Oil Spill, SPAW, LBSMP; Cartagena)
- ◆ Annexes or Appendices
(list species or substances regulated)
- ◆ Institutional arrangement: self
regulating (Conference of Parties)

Refinement of biodiversity treaties

- ◆ Institutional practice (COP, Scientific
Bodies, Panels of Experts etc.)
- ◆ International judicial-decisions:
 - Arbitration
 - International Court of Justice (ICJ)
 - United Nations Tribunal on Law of Sea
 - World Trade Organization/General
Agreement on Tariffs and Trade
(WTO/GATT)

The Caribbean



The Caribbean Community (CARICOM)

- ◆ Revised Treaty of Chaguaramas (RTC) Establishing the Caribbean Community Including the CARICOM Single Market and Economy (CSME), 2001
 - Four freedoms: free regional movement of - goods, services, capital, skilled nationals
 - Convergence of macro-economic policies
- ◆ Agreement Establishing the Caribbean Court of Justice (CCJ) gives “compulsory and exclusive” jurisdiction to the CCJ over the RTC

Legal systems represented in CARICOM

- ◆ Some 16,000,000 people
- ◆ Civil Law countries
 - Haiti (8,000,000)
 - Suriname
- ◆ Common Law countries

Commonwealth countries of CARICOM

- ◆ Antigua and Barbuda
- ◆ Bahamas
- ◆ Barbados
- ◆ Belize
- ◆ Dominica
- ◆ Grenada
- ◆ Guyana
- ◆ Jamaica (3,000,000)
- ◆ St. Lucia
- ◆ St. Kitts and Nevis
- ◆ St. Vincent and the Grenadines
- ◆ Trinidad and Tobago (1,500,000)

Common Law System

- ◆ Westminster model of constitutional government: -
- ◆ Three (3) branches of government
 - Executive - policy making (PM)
 - Legislature – law making (PM's Cabinet)
 - Judiciary – law interpreting

Law of Treaties

- ◆ Executive – exclusive treaty making power (Prime Minister, Minister of Foreign Affairs, NB: Environment Minister (St. Kitts/Nevis))
- ◆ *Versus*
- ◆ Legislature – exclusive law making power (note provisions in Antigua and Barbuda)

DOCTRINE OF DUALISM

- ◆ Treaties have no legal force in Caribbean law – cannot be applied by courts -unless and until they have been incorporated by passage of domestic legislation
- ◆ Under constitutional provisions / arrangements, Legislature enjoys a monopoly on law-making
- ◆ *Council of Civil Service Union v Minister for Civil Service* [1985] AC 374

Application to Treaties on Biological diversity:

- ◆ *Acting Chief of Police v Bryan* (1985) 36 WIR 207) (High Court of BVI)
- ◆ *Seafood and Ting v NRCA* (1999) (Court of Appeal of Jamaica)
 - Winston Anderson, "Implementing MEAs in the Caribbean: Hard Lessons from Seafood and Ting" [2001] Vol. 10 No. 2 *Review of European Community and International Environmental Law* 227
- ◆ *Talisman (Trinidad) Petroleum Ltd., v The Environmental Management Authority* (No. EA3 of 2002)

But many bio-diversity treaties...

- ◆ Either not accepted
- ◆ OR accepted/ratified but not incorporated by legislation into domestic law

See: "Implementation of Maritime and Environmental Treaties in Organization of Eastern Caribbean States"

Prepared by Ocean Institute of Canada (OIC); Caribbean Law Institute Centre (UWI); OECS-Natural Resources Management Unit (1988)

Acceptance of Biodiversity Treaties

COUNTRY	1992 CBD	Cartagena Protocol '00	CITES	World Heritage	Ramsar / Wetlands
Antigua & B	9/3/93 r	10/9/03 r	8/7/97 a	1/11/'83 a	2/10/05
Bahamas	2/9/93 r	15/1/04 r	20/6/'79 a		7/6/97
Barbados	10/12/'93 r	6/9/02 a	9/12/'92 a	9/4/'02 a	12/4/06
Belize	30/12/'93 r	19/8/86 s	19/8/'86 s	6/11/'90 a	22/8/98
Dominica	6/4/94 r	4/8/95 a	4/8/95 a	4/4/'95 r	
Grenada	11/8/94 r	5/2/04 r	30/8/'99 a	13/8/'98 r	

Biodiversity Treaties, cont'd

COUNTRY	1992 CBD	Cartagena Protocol '00	CITES	World Heritage	Ramsar Wetlands
Guyana	29/8/94 r		27/5/'77 a	20/6/'77 a	
Jamaica	6/1/95 r		23/4/'97 a	14/6/'83 a	7/2/89
St Kitts & N	7/1/93 r	23/5/01 a	14/2/'94 a	10/7/'86 a	
St Lucia	28/7/93 a	16/6/05 a	15/12/'82a	14/10/'91r	19/6/02
St Vincent & G	3/6/96 a	27/8/03 a	30/11/'88a	3/2/'03 r	
Trinidad & T	1/8/96 r	5/10/0 a	19/1/'84 a	16/2/'05 r	21/4/93

Governance of ocean biodiversity

COUNTRY	UNCLOS	Straddling Stocks	MARPOL 73/78	Civil Liability Convention
Antigua & B	2/02/1989		29/04/1988	14/06/2000
Bahamas	29/07/1983	16/01/1997	2/10/1983	1/04/1997
Barbados	12/10/1993	22/09/2000	6/08/1994	7/07/1998
Belize	13/08/1983	14/07/2005	26/08/1995	27/11/1998
Dominica	24/10/1991		21/09/2000	31/08/2001
Grenada	25/04/1991			7/01/1998
Guyana	16/11/1993		10/03/1998	10/12/1997
Jamaica	21/03/1983		13/06/1991	6/06/1997
St Kitts & N	7/01/1993		24/03/1998	7/10/2004
St Lucia	27/03/1985	9/08/1996	12/10/2000	20/05/2004
St Vincent &	1/10/1993		28/01/1984	9/10/2001
Trinidad & T	25/4/1986	13/09/2006	6/06/2000	6/03/2000

Treaties on Pollution Regulation and Trans-boundary Movement of Waste

COUNTRY	1989 Basel Convention	2001 Stockholm POP Convention	1998 Rotterdam Convention on PIC
Antigua & B	05/04/1993 a	10/09/2003	
Bahamas	12/08/1992 a	03/10/2005	
Barbados	24/08/1995 a	07/06/2004 a	
Belize	23/05/1997 a		20/04/2005 a
Dominica	05/05/1998 a	08/08/2003 a	30/12/2005 a
Grenada			
Guyana	04/04/2001 a		
Jamaica	23/01/1994 a		20/08/2002 a
St Kitts & Nevis	07/09/1994 a	21/05/2004 a	
St Lucia	09/12/1996 a	04/10/2002 a	
St Vincent & G	02/12/1996 a	15/09/2005 a	
Trinidad & T	18/02/1994 a	13/12/2005 a	

Treaties on Protection of the Atmosphere

COUNTRY	1992 Climate Change	1987 Kyoto Protocol
Antigua & B	02/02/1993 (R)	03/11/1998 (R)
Bahamas	29/03/1994 (R)	09/04/1999 (R)
Barbados	23/03/1994 (R)	07/08/2000 (R)
Belize	31/10/1994 (R)	26/09/2003 (R)
Dominica	21/06/1993 (R)	25/01/2005 (R)
Grenada	11/08/1994 (R)	06/08/2002 (R)
Guyana	29/08/1994 (R)	05/08/2003 (R)
Jamaica	06/01/1995 (R)	28/06/1994 (R)
St Kitts & N	07/01/1993 (R)	
St Lucia	14/06/1993 (R)	20/08/2003 (R)
St Vincent & G	02/12/1996 (R)	31/12/2004 (R)
Trinidad & T	24/06/1994 (R)	28/01/1999 (R)

Bio-diversity Treaties Accepted but not incorporated:

- ◆ Governmental inertia (Jamaica and *Draft Fisheries Act*)
- ◆ Reliance on inappropriate legislation (too old or too general) (*Sea Food & Ting* case, 1999)
- ◆ Unawareness of acceptance conventional obligations: (e.g., 1982 UN LOSC)
- ◆ Lack of resources to draft;
- ◆ Lack of domestic interest (*Sea Food & Ting*)

UNDESIRABILITY OF STRICT ADHERENCE TO DUALISM

- ◆ Separation of international law from domestic law: Juridical schizophrenia?
- ◆ Lack of access by our Judges to content of bio-diversity treaties (BDT)
- ◆ Lack of Access to institutional and judicial development of BDT and international environmental law

Forbidden country: International Environmental Jurisprudence

- ◆ *Behring Sea Fur Seals Arbitration*, 1 Moore Int'l Arb Awards 755-61 (1898)
- ◆ *Trail Smelter Arbitration (US v. Canada)*, (1931-1941) 3 UNRIAA 1905;
- ◆ *Lake Lanoux case (Spain v. France)* (1957) 4 ILR 101
- ◆ *Nuclear Test cases (Australia v. France; New Zealand v. France)* ICJ Rep. 99 (1973),
- ◆ *Icelandic Fisheries case* (1974) ICJ Rep.3

Forbidden country: International Environmental Jurisprudence

- ◆ *Phosphate Lands in Nauru case (Nauru v. Australia)* (1992) ICJ Rep. 240
- ◆ *Nuclear Tests case (New Zealand v. France)* (1995) ICJ Rep 3.
- ◆ *Gabcikovo-Nagymaros Project Case (Hungary v. Slovakia)* (1997) ICJ Rep. 7
- ◆ *Legality of the Threat or Use of Nuclear Weapons case* (1997) I.C.J. Rep (UNGA)
- ◆ *Southern Bluefin Tuna cases* ITLOS Nos. 3 & 4 (1999, 2001)

Forbidden country: International Environmental Jurisprudence

- ◆ *Fisheries Jurisdiction (Spain v. Canada)*
<http://www.icj-cih.org> (see Oxman, (1999) 93 AJIL 502)
- ◆ *Southern Blue-fin Tuna Cases* (1999) 39 ILM 1359 (2000) (Australia, New Zealand v Japan)
- ◆ *Swordfish case (Chile v EC)* (2002) (www.itlos.org)
- ◆ *(Mox Plant case (Ireland v United Kingdom))* (2001)
- ◆ *Barbados v Trinidad and Tobago* (2006) UNTLOS

Forbidden country: International Environmental Jurisprudence

- ◆ WTO/GATT decisions
- ◆ *GATT Panel Decision on Caribbean Bananas*, Vol.34 ILM 160 (1995)
- ◆ *United States - Restrictions on the Imports of Tuna* (Mexico v. US), (1991) (30 ILM 1991); (EC v. US), (1994) (33 ILM 839 (1994))
- ◆ *United States - Standards for Reformulated and Conventional Gasoline* Case (WTO) 35 I.L.M. 274 (1996)

Forbidden country: more WTO cases

- ◆ *European Communities - Measures Concerning Meat and Meat Products (Beef Hormones case)* (1997) (WT/DS26/AB/R, WT/DS48/A B)
- ◆ *United States Import Prohibition of Certain Shrimp and Shrimp Products* (May 15, 1998) www.wto.org; Gregory Shaffer, (1999) Vol. 93 AJIL 507
- ◆ *Biotech case* (2006) WTO Panel, AB (US v EC)

A Few Caribbean Cases

- ◆ *Spencer v. Attorney General of Antigua and Barbuda and Asian Village Antigua Ltd.* (1998), (CA)
- ◆ *Sea Food and Ting v NRCA of Jamaica* (1999) (CA)
- ◆ *National Trust for Cayman Islands v Planning Appeals Tribunal* (2000) CILR 521(HC)
- ◆ *Talisman (Trinidad) Petroleum Ltd. v EMA (No. EA3 of 2002)* (HC, CA)
- ◆ *Belize Alliance of Conservation NGOs v Department of the Environment* (2004) 64 WIR 68 (PC)
- ◆ *Belize Institute for Environmental Law and Policy v Chief Environmental Officer Department of the Environment* (2008)(HC)

EXCEPTIONS TO DUALISM (1)

- Matter falling within the legislative competence of Executive

Post Office v Estuary Radio ([1968] 2 QB 740)

EXCEPTIONS TO DUALISM (2)

- ◆ *Parliamentary ratification*
- ◆ e.g., Ratification of Treaties Act 1987 (No. 1 of 1987): Antigua and Barbuda
- ◆ Treaty must be ratified by Parliament (Resolution or Act of Parliament)

EXCEPTIONS TO DUALISM (3)

- ◆ *Incorporation by reference*
- ◆ *E.g., The National Conservation and Environmental Protection Act 1987 as amended in 1996 (No. 12 of 1996)*
 - The 1996 Amendment lists a number of Conventions in the Fifth Schedule:
 - CITES 1973
 - UN Climate Change 1992
 - UN Convention on Biological Diversity 1992
 - Vienna Convention on Ozone Layer 1985

St. Kitts and Nevis, 1996 Amendment:

- ◆ Montreal Protocol 1987 to the Ozone Layer Convention
- ◆ Basel Convention on Control of Trans-boundary Movement of Hazardous Waste
- ◆ Civil Liability Convention for Oil Pollution Damage 1969 [NB: not 1992 Protocol]
- ◆ International Fund Convention for Oil Pollution Damage 1971 [NB: not 1992 Protocol]

Section 54A these treaties “shall have the force of law in Saint Kitts and Nevis”

What impact on judicial decision-making?

- ◆ All provisions of treaty?
- ◆ Obligations on state parties?
- ◆ Self-executing vs. non-self executing provisions: (*Sei Fujii v California* (1952) ILR 312)
- ◆ Doctrine of direct effect: (*Van Gend en Loos* case [1963] ECR 1)

EXCEPTIONS TO DUALISM (4)

- ◆ *Treaty codifies customary international law*
 - *North Sea Continental Shelf cases* (1969) ICJ Rep.
 - *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529
 - *R. v Director of Public Prosecutions and Another ex parte Dafney Schwartz* [1976] 24 WIR 491

Are there conditions precedent?

- ◆ Not inconsistent with statute or decisions of highest authority (*Dafney Schwartz* [1976] 24 WIR 491)
- ◆ Must custom be expressly accepted by the Caribbean state? If so, what of rules of *jus cogens*

EXCEPTIONS TO DUALISM (5)

- ◆ *Legitimate expectation*
 - *Boyce & Joseph v Attorney General of Barbados* (CCJ, 2006)
 - Men condemned to capital punishment had a legitimate expectation that Barbados would permit International Human Rights body to hear their appeal; and would consider the Report..
 - What's the juridical basis?
 - Applies in areas outside death penalty?

EXCEPTIONS TO DUALISM (6)

- ◆ Protection of rights of indigenous peoples
 - *Aurelio Cal v Attorney General of Belize and Minister of Natural Resources and the Environment* (2007)
 - Conteh, C.J.
 - Application of treaties and international decisions on rights of indigenous peoples
 - Used to decide land title rights of Mayans

Exceptions to Dualism (7)

- ◆ Caribbean Court of Justice (CCJ)
- ◆ Original jurisdiction
- ◆ Interpret and apply environmental RTC provisions (Art. 56: Natural resources; Art. 226 environmental exceptions)
- ◆ Art. 217: in original applies rules of international law:
 - e.g., treaties; custom;
 - e.g., cases from ICJ, LOSC, WTO/GATT
- ◆ Referral obligations and domestic courts

Conclusion (1): Summary

- ◆ Doctrine of dualism part of constitutional arrangements and must be respected
- ◆ Fully applicable in relation to treaties regarding biodiversity
- ◆ Strict application would stunt development of environmental law, esp. in Caribbean
- ◆ Exceptions exist to dualism and could allow Judges to have access to international jurisprudence

Conclusion (2): More Responsibility

- ◆ Broadens the responsibility of judges
- ◆ Greater demands with regard to legal education
 - Treaties
 - Law of treaties
 - International Judicial decisions
 - Customary international law
 - Decisions of the institutions created by treaties

Conclusion (3): Unresolved Problems

- ◆ Technical issues on avoidance of dualism
 - e.g., custom as common law
 - legitimate expectation
 - Self executing treaties; direct effect doctrine
- ◆ Direct enforcement could run into significant barriers:
 - Sovereign immunity
 - Standing
 - *Forum non conveniens*
 - The barriers removed in CCJ arrangements

Conclusion (4): Recommendations

- ◆ Press ahead with avoidance of dualism
- ◆ Enforcing biodiversity treaties improves nexus between domestic and international courts
- ◆ Legislature to assist process by further internalizing international environmental norms

Thank you!