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 Co-Director of the
 Climate Justice Program
 ③ Apologize
 for Learning

Key Vulnerable Regions and Climate Change ✓
 Beijing, China
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LEGAL ASPECTS AND
 INTERPRETATION OF ARTICLE 2 OF
 THE UN FRAMEWORK CONVENTION
 ON CLIMATE CHANGE

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UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)
Preamble/Principles

- * Climate change is a common concern of humankind
- * Commitment to sustainable development
- * Intergenerational equity – concern for future generations
- * The no-harm rule
- * Common, but differentiated, responsibility

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)
The No-Harm Rule (from the Preamble)

“Recalling also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)
Intergenerational Equity (Article 3(1))

“The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.”

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE
Recognition of Special Needs (Art.4(8))

- (a) Small island countries;
- (b) Countries with low-lying coastal areas;
- (c) Countries with arid and semi-arid areas, forested areas and areas liable to forest decay;
- (d) Countries with areas prone to natural disasters;
- (e) Countries with areas liable to drought and desertification;
- (f) Countries with areas of high urban atmospheric pollution;
- (g) Countries with areas with fragile ecosystems, including mountainous ecosystems;
- (h) Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products; and
- (i) Land-locked and transit countries.

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)

- * Objectives & principles
- * Obligations
 - ** Substantive
 - ** Reporting
 - ** Monitoring
 - ** Financial
- * Institutions & procedures
- * Miscellaneous

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992) - ARTICLE 2 ✓

"The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner."

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992) - ARTICLE 2 ✓

Goals:

- * "stabilizations of greenhouse gas concentrations"
- * "to prevent dangerous anthropogenic interference with the climate system"
- * "within a time frame sufficient to allow ecosystems to adapt naturally to climate change"
- * "to ensure that food production is not threatened"
- * "to enable economic development to proceed in a sustainable manner"

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)

What does "*stabilization of greenhouse gas concentrations*" mean?

Because of the long lifetimes of these gases, it does not mean stabilization of the climate, but should at least mean stabilization at a safe level.

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992) ✓

What does "*dangerous anthropogenic interference with the climate system*" mean?

"dangerous anthropogenic interference with the climate system"

Is the determination of what is "*dangerous interference*" to be made by scientists?

Or does it require a policy judgment that all of us must participate in making?

What authority does the Conference of the Parties have to interpret the text of the treaty?

What are examples of "dangerous anthropogenic interference with the climate system"? ✓

* It has been suggested that stabilization of greenhouse gases at 450 ppm (to prevent temperatures from rising more than 2 degrees Centigrade above pre-industrial levels) is the appropriate target to prevent dangerous interference. Others have suggested setting 550 ppm as our goal. A target of 750 ppm would delay damage, but is unlikely to prevent adverse impacts.

* The IPCC estimates that even concentration levels of 450 ppm are likely to produce a long-term temperature rise of 2.5 degrees Centigrade.

* Damage to coral reefs can be prevented if the temperature does not rise more than 1 degree Centigrade over 1990 levels. Is that realistic?

What are examples of "dangerous anthropogenic interference with the climate system"? ✓

- * Disintegration of the West-Antarctic Ice Sheet?
- * Breakdown of the thermohaline circulation?

If Ecosystems Can Adapt to the Increase in Greenhouse Gases, Does Article 2 Then Permit the Increase? ✓

Article 2 does not prohibit all anthropogenic climate change, only *dangerous* change.

But is it possible for all ecosystems to adapt to the melting of the Antarctic ice sheet?

{ Prof. Rahmstorf }

The Language of Article 2 of the FCCC Was Reaffirmed in Paragraph 36 of the Johannesburg Plan of Implementation (2002) ✓

Can it be argued that the obligation to meet the objectives set out in Article 2 constitute a norm of customary international law of an *erga omnes* character?

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992) ✓

Is Article 2 a restatement of *the precautionary principle* as applied to climate change?

If so, does it have any binding content?

Should Article 2 be interpreted in light of Article 3(3)?

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992) - ARTICLE 3(3)

"The Parties should take *precautionary measures* to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors...."

The Precautionary Principle ✓

- * Developments and initiatives affecting the environment should be thoroughly assessed before action is taken.
- * The burden is on the developer or initiator to establish that the new program is safe.
- * Alternative technologies should be explored.
- * The absence of full scientific certainty should not limit precautionary measures to protect the environment.
- * Whenever serious or irreversible damage is anticipated, the action should be postponed or canceled.

The Major Anthropogenic Greenhouse Gases

- * Carbon dioxide
- * Methane
- * Nitrous Oxide
- * Chlorofluorocarbons

They currently account for only 3% of the earth's atmosphere, but relatively small increases in their concentrations may alter the climate system.

The Expected Impacts of Climate Change

- * Increase in global temperature ✓
- * Which could cause the spread of water & insect-borne diseases, such as typhoid, dengue & malaria
- * Forests may not be able to adapt to the rate of change of the temperature
- * Leading to a loss of biodiversity & resources
- * Rise in the "energy" of storms – more extreme and more unpredictable
- * More floods
- * More severe droughts
- * Sea-level rise

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992) - ARTICLE 4(2)

Can the reference in Article 4(2)(b) to the "1990 levels" be viewed as a commitment to stabilize emissions at the 1990 levels?

Does this language have any binding force?

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992) - ARTICLE 4(2)

"(a) Each of these Parties [in Annex I] shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs....

"(b) ...each of these Parties shall communicate...detailed information on its policies and measures referred to in subparagraph (a) above,...with the aim of returning individually or jointly to their 1990 levels of these anthropogenic emissions of carbon dioxide and other greenhouse gases...

President
George
H.W.
Bush
(1989-93)



UN FCCC (1992) - ARTICLE 2

- * European Community (EC) sought commitments to return to the 1990 levels of carbon dioxide emissions by 2000.
- * The United States resisted any binding commitments on targets and timetables
- * In December 1991, White House Chief of Staff John Sununu – the chief opponent of greenhouse gas controls – resigned.
- * EPA Director William Reilly argued that stabilization tied to population growth was achievable.
- * By 1992, US agreed to the EC language in Article 2

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)

Articles 4(2)(d) and 7(2)(a) require the Conference of the Parties to evaluate the implementation of the Convention periodically to ensure that the commitments of the parties are adequate to meet the objectives in Article 2.

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)

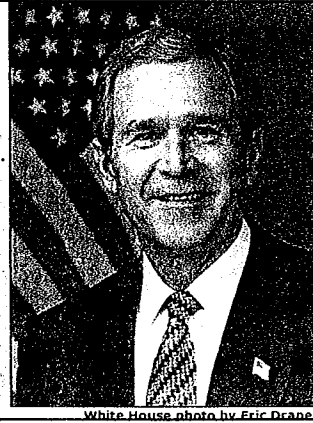
Institutional Framework

- * Conference of the Parties has policymaking authority.
- * Secretariat has responsibility for day-to-day monitoring of implementation.
- * Scientific and technical subsidiary body has advisory obligations.
- * Global Environment Facility is the interim financial mechanism.
- * Unique subsidiary body for facilitating implementation.

President William Clinton (1993-2001)



President George W. Bush (2001-?)



UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)

Was the US repudiation of the Kyoto Protocol a violation of its obligations under the Framework Convention?

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)

Are the UNFCCC and the Kyoto Protocol “unfair” because they do not impose similar obligations on developing countries?

Will the costs of meeting the commitments in these agreements be too high for the US economy?

Is the "common but differentiated responsibility" UNFAIR to the United States and other developed countries?

Its origins can be traced to Principle 7 of the Rio Declaration:

"In view of the *different contributions to global environmental degradation*, States have common but differentiated responsibilities."

Principle 3(1) of the UNFCCC refers also to the "*respective capabilities*" of the contracting parties, thus also distributing responsibility to *economic development and status of development*.

This can be traced to Principle 23 of the Stockholm Declaration:

"it will be essential in all cases to consider... the extent of applicability to standards which are valid for the most advanced countries but *which may be inappropriate and of unwarranted social cost for developing countries.*"

Is the "common but differentiated responsibility" UNFAIR to the United States and other developed countries?

* Asymmetry of obligations

* Financial support for developing countries
(Article 4(3-4)&(9))

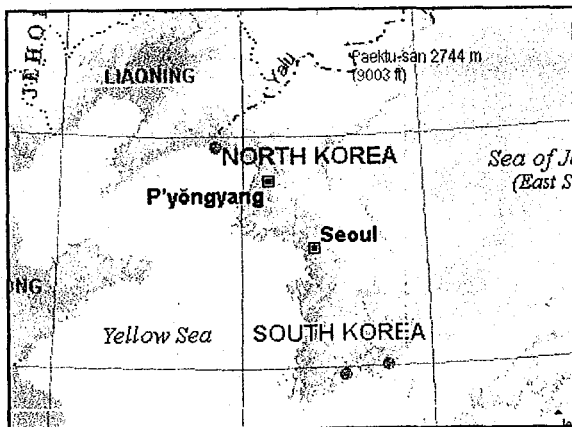
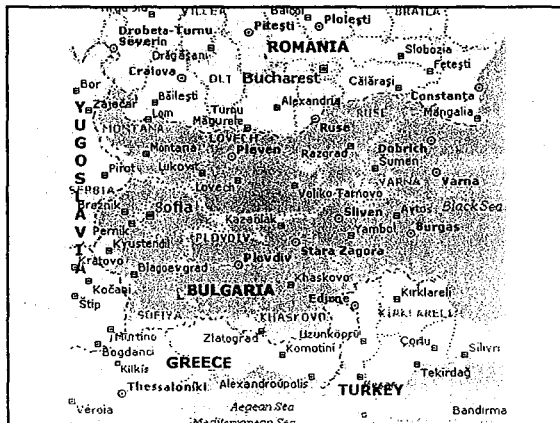
Is the Listing of "Developed Countries" in Annex I Logical in Relationship to the Climate Change Issue?

Annex I contains the members of the Organization of Economic Cooperation and Development (OECD) plus some (but not all) of the countries of Eastern Europe and the former Soviet Union.

Is Bulgaria more "developed" than the Republic of Korea or Malaysia?

Is Romania more "developed" than Slovenia or Singapore?

What are the responsibilities of China, India, Indonesia, Brazil, Nigeria, Egypt, etc.



Byrd-Hagel Resolution (US Senate 6/12/97)

- * Prohibited US ratification of the Kyoto Protocol unless developing countries take on commitments in the same compliance period.
- * Called for "meaningful participation of developing countries."
- * Said that the US Senate would not accept emission reductions unless "the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period."

Is this consistent with Article 3(1) of the UNFCCC?

Does the UNFCCC Implicitly Impose Obligations on Developing Countries?

It has been demonstrated that a greenhouse gas concentration level of 450 ppm or even 550 ppm cannot be reached if developing countries' emissions are allowed to grow unrestrained?

Climate change damage will primarily effect those countries that have no explicit obligation to control their emissions!!

Do the developing countries have a duty to cooperate?

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)

It has become clear that the original target of freezing emissions at 1990 levels for Annex I countries will not be sufficient to meet the objective of Article 2 – to achieve stabilization of greenhouse gas concentrates at a safe level.

And few Annex I countries have come close to meeting the 1990-level freeze.

FRAMEWORK CONVENTION (1992) / KYOTO PROTOCOL (1997)

Unresolved Outstanding Issues:

- * Scope & role of emissions trading & other “flexibility mechanisms”
- * Extent of land-use & forest changes allowed in the calculations for first-reporting commitments
- * Parameters of compliance monitoring & enforcement mechanisms
- * Funding & financing issues

FRAMEWORK CONVENTION (1992) / KYOTO PROTOCOL (1997)

Liability and Compensation Issues

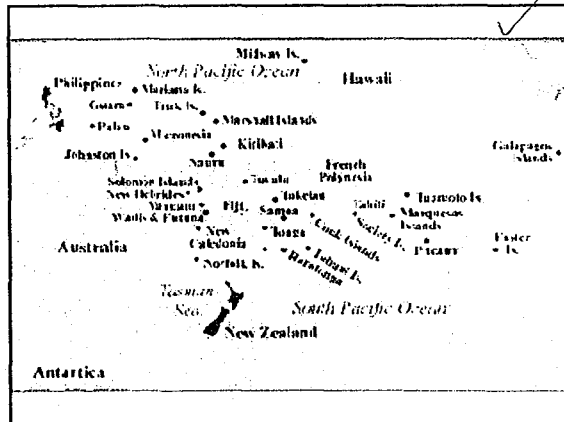
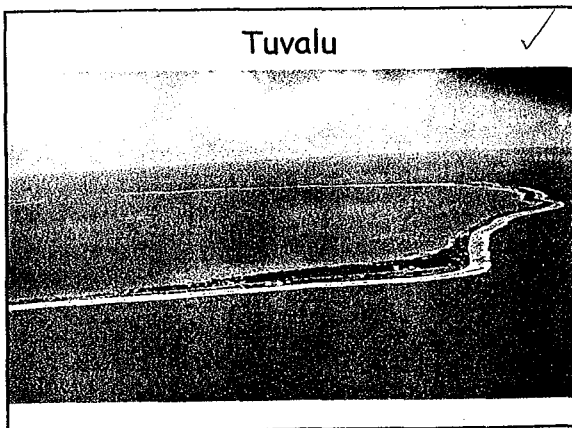
If Tuvalu becomes uninhabitable because of sea-level rise caused by global warming, can it bring a claim for compensation?

Is the report issued by the Intergovernmental Panel on Climate Change in 1995, concluding that *“the balance of evidence suggests that there is a discernible human influence on global climate,”* sufficient to establish causation?

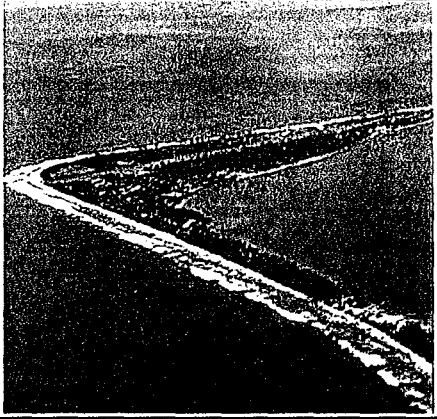
What tribunal would have jurisdiction? Could a claim be brought in a US court?

causation?

Dr. Day responsibility



Tuvalu



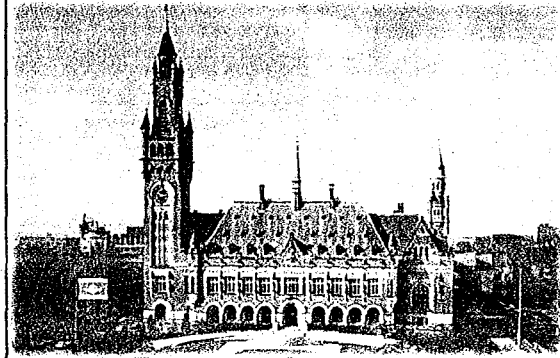
FRAMEWORK CONVENTION (1992) /
KYOTO PROTOCOL (1997)

Liability and Compensation Issues

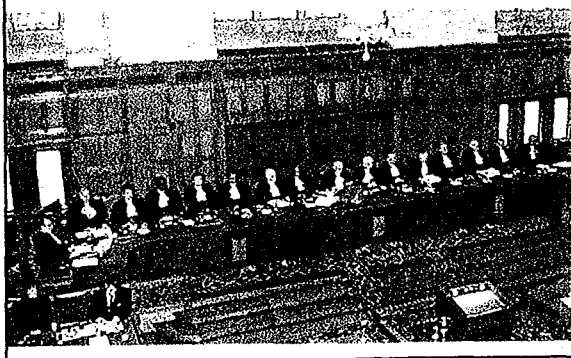
What if valleys in Nepal and Bhutan are inundated from glacial outburst floods caused by increased glacial melting in the Himalayas?



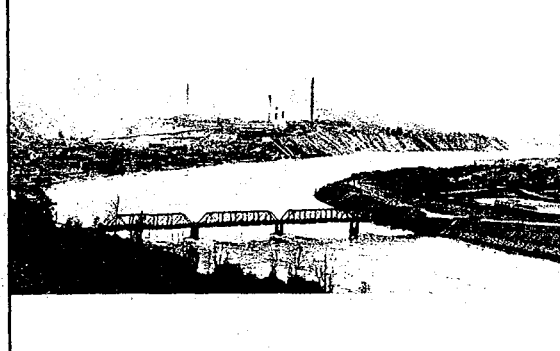
International Court of Justice



International Court of Justice



The Trail Smelter

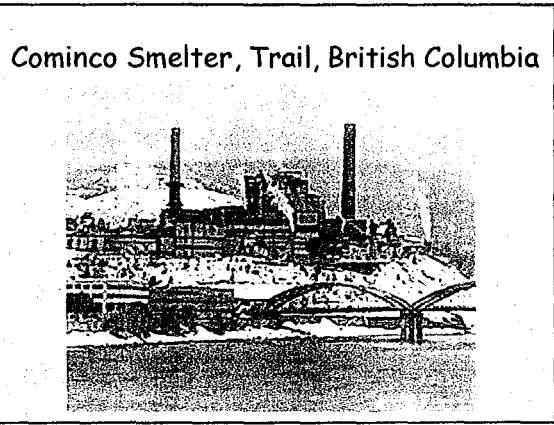
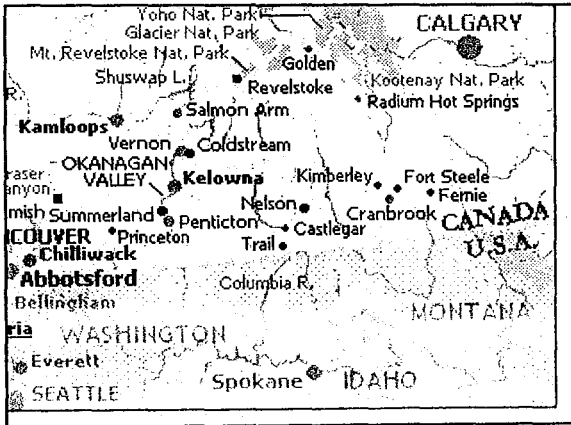




Trail Smelter Case [406]

Fumes from a smelting plant in British Columbia, Canada, come into the State of Washington, causing serious damage to cattle in the region.

Has international law been violated?



Cominco Smelter, Trail, British Columbia



Cominco Smelter, Trail, British Columbia

Website for Trail, British Columbia

“Trail’s transition from frontier to settlement began in 1895 when interest in locating a smelter in the area to serve the rich mines in Rossland was sparked. Augustus Heinze completed a small copper smelter on a bench above the townsite in 1896, named the British Columbia Smelting and Refining Company. Heinze sold the trail smelter and railway holdings to the Canadian Pacific Railway in 1898, and the company known as Cominco today was on its way.

“Trail’s Cominco smelter is the world’s largest zinc and lead smelting complex, *processing an astonishing 700,000 tonnes of concentrates annually*. The Giant on the Hill, Cominco, conduct regular free guided tours of its huge smelting operation, with hands-on exhibits and video presentations.”

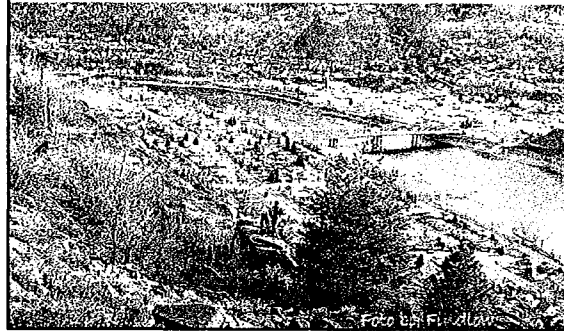
2 Colvilles file suit against B.C. firm over Columbia River pollution, July 23, 2004

Two members of the Confederated Tribes of the Colville Reservation sued Canadian mineral giant Teck Cominco yesterday over failure to comply with U.S. demands to assess its *years of polluting Washington's Columbia River*.

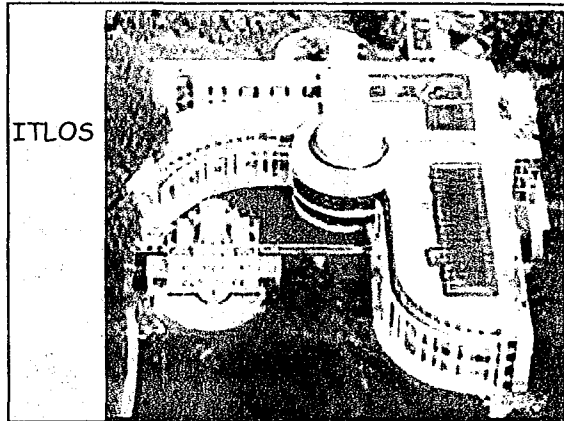
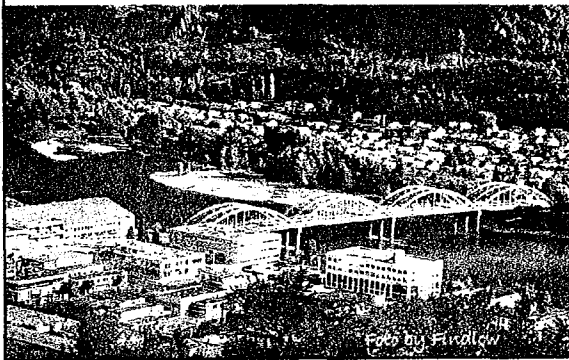
Between 1906 and 1995, the suit states, Teck Cominco annually dumped into the river more than 145,000 tons of slag, a byproduct of the smelting industry, which contains carcinogens such as arsenic and lead.

The Canadian government has offered the United States a deal where the two countries would combine resources to study potential pollution impacts, with Teck Cominco footing the bill.

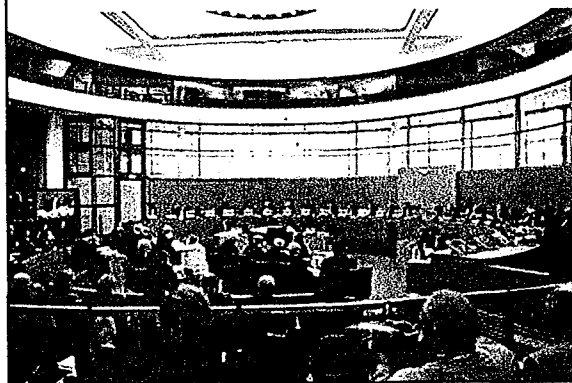
Trail, British Columbia



Trail, British Columbia

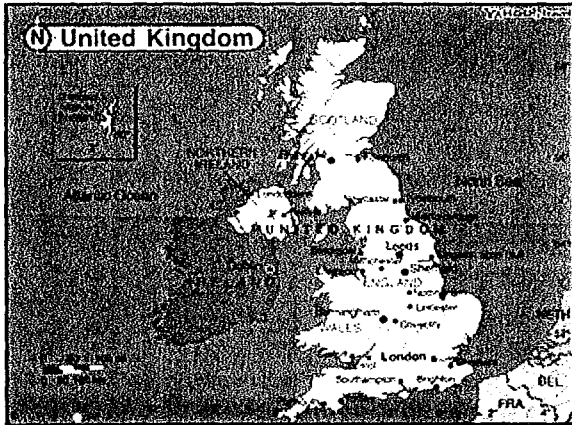


International Tribunal for the Law of the Sea



The MOX Plant Case (Ireland v. U.K.) (ITLOS 2001)

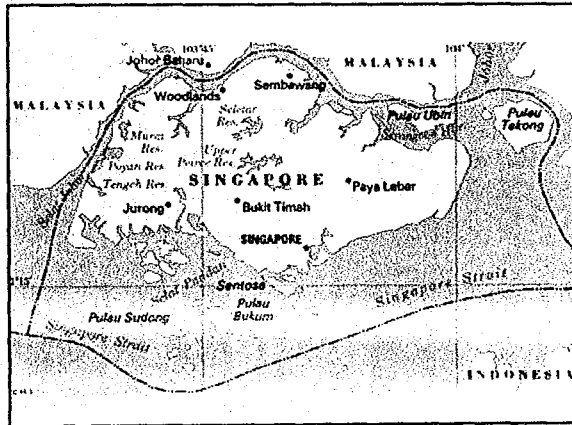
Ireland challenged the opening by the United Kingdom of a new facility in Sellafield designed to reprocess spent nuclear fuel into MOX (mixed oxide fuel – combining plutonium with uranium).



The MOX Plant Case (Ireland v. U.K.) (2001)

The Tribunal's Ruling – Dec. 3, 2001

The duty to cooperate required the two countries to exchange information concerning the risks created by the plant, to monitor the effects of the plant on the marine environment, and to work together to reduce those risks. Each country was required to submit a report to the Tribunal by Dec. 17, 2001.



CASE CONCERNING LAND RECLAMATION BY SINGAPORE IN AND AROUND THE STRAITS OF JOHOR (ITLOS 10-8-03)

Malaysia argued

- * that Singapore had breached its obligations under the 1982 Convention and under general international law by the initiation and continuation of its land reclamation activities without due notification and full consultation with Malaysia;
- * that Singapore should suspend its current land reclamation activities until it has conducted and published an adequate assessment of their potential effects on the environment and on the affected coastal areas, taking into account representations made by affected parties; and
- * in the light of the assessment and of the required processes of consultation and negotiation with Malaysia, revise its reclamation plans so as to minimise or avoid the risks or effects of pollution or of other significant effects of those works on the marine environment (including excessive sedimentation, bed level changes and coastal erosion).

CASE CONCERNING LAND RECLAMATION BY SINGAPORE IN AND AROUND THE STRAITS OF JOHOR (ITLOS 10-8-03)

Malaysia further argued that Singapore had placed itself in breach of its obligations under international law, specifically under articles 123, 192, 194, 198, 200, 204, 205, 206 and 210 of the Convention, and in relation thereto, article 300 of the Convention *and the precautionary principle*, which under international law must direct any party in the application and implementation of those obligations.

CASE CONCERNING LAND RECLAMATION BY SINGAPORE IN AND AROUND THE STRAITS OF JOHOR (ITLOS 10-8-03)

Para. 99: “[G]iven the possible implications of land reclamation on the marine environment, *prudence and caution require* that Malaysia and Singapore *establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned.*”

CASE CONCERNING LAND RECLAMATION BY SINGAPORE IN AND AROUND THE STRAITS OF JOHOR (ITLOS 10-8-03)

Prescribes, pending a decision by the Annex VII arbitral tribunal, the following provisional measures under article 290, paragraph 5, of the Convention:

Malaysia and Singapore *shall cooperate* and shall, for this purpose, enter into consultations forthwith in order to:

(a) *establish promptly a group of independent experts* with the mandate

(i) *to conduct a study*, on terms of reference to be agreed by Malaysia and Singapore, to determine, within a period not exceeding *one year* from the date of this Order, the effects of Singapore’s land reclamation and to propose, as appropriate, measures to deal with any adverse effects of such land reclamation....

(b) exchange, on a regular basis, information on, *and assess risks or effects of*, Singapore’s land reclamation works...

Directs Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts.

Examples of Countries Recognizing Their Obligation to Provide Compensation for Environmental Damage

* After US atmospheric tests in the Marshall Islands in the 1950s, the United States made a \$2,000,000 *ex gratia* payment to Japan for 1954 injury to fishers on the *Lucky Dragon* and has provided \$185,000,000 in compensation to Marshall Islanders

* Russian payment to Canada for cleanup costs associated with radioactive material from its Cosmos satellite that broke apart over Canada in the 1970s

* France stopped atmospheric testing in the Pacific after ICJ case brought by Australia & NZ in 1970s

* Payments by Australia & UK to Nauru after Nauru brought ICJ case for environmental despoilation (1990s)

Corfu Channel Case (UK v. Albania) (ICJ 1949)

ICJ ruled that Albania was liable for the damage to British ships and death of 45 British seamen and injuries to 42 others after their vessel was struck by mines while passing in the North Corfu Strait between Albania and the Greek island of Corfu.

The Court ruled that Albania was liable even though it had not laid the mine fields because it was in a position to know what was happening in its waters and had a duty to notify other states that might be endangered by the mines.

Corfu Channel Case (UK v. Albania) (ICJ 1949)

The Court stated that international law obliges every state “not to allow knowingly its territory to be used for acts contrary to the rights of other States.”

This case is particularly significant because the UK vessels knew that dangers lurked in the Corfu Channel when they sailed through. The Court ruled that the responsibility of Albania was not in any way reduced because the UK ships may have been contributorily negligent in sailing through these waters.



*opposite
harmful*

Against Which Countries Could a Claim for Damages Be Brought and How Would Damages Be Measured and Apportioned?

* **Product Liability Analogy:** Analogy to claims brought by women injured by defective birth-control devices implanted long ago (and the injured women were not able to identify which company manufactured the defective device).

* Court measured the *market shares* of the different companies for the defective products and required them to compensate the injured women in relation to their market share.

* Similar approach used for asbestos claims.

Against Which Countries Could a Claim for Damages Be Brought and How Would Damages Be Measured and Apportioned?

* Assuming that it can be established that damages resulted from global warming caused by emissions of greenhouse gases, those countries that have historically been emitting these gases would thus compensate for injuries in relation to the ratio over time of their emissions of into the atmosphere.

* The amount owing could be offset somewhat by financial contributions to international organizations (such as the GEF) that the countries have made to address this problem (as required by Article 4(3-4) of the UNFCCC).

Principle 17 of the 1992 Rio Declaration

“National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that *the polluter should, in principle, bear the costs of pollution*, with due regard to the public interests and without distorting international trade and investment.”

Is this Principle implicit in Article 3(1) of the UNFCCC?

The developed countries resisted efforts to put stronger language into the treaty.

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)

Duties of Developed Countries (Article 3(1))

“*The Parties should protect the climate system for the benefit of present and future generations of humankind*, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, *the developed country Parties should take the lead in combating climate change and the adverse effects thereof.*”

UN FRAMEWORK CONVENTION ON CLIMATE CHANGE (1992)

The No-Harm Rule (from the Preamble)

“*Recalling* also that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, *and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*”

Polluter Pays Principle

Is this essentially a principle of strict liability?

Conclusions

* Articles 2 and 4(2) of the UNFCCC establish *an obligation on the part of the developed countries to take action* to stabilize greenhouse gas concentrations in order to prevent dangerous interference with the climate system. This duty requires these countries to reverse their emission trends, because the objectives of Article 2 are otherwise unattainable.

* Article 2 and 4(1) require the developed countries *to take suitable adaptation measures* to prevent climate change damage.

Conclusions

* The UNFCC may also establish *an implicit obligation on the developing countries to cooperate in reaching this goal*, and this implicit obligation may also require the developing countries to reduce their emissions.

* Utilizing underlying principles of state responsibility and international environmental law, *countries injured by climate change can bring claims for damages* against the countries that have participated in causing these changes.

