UNEP

COMPENDIUM OF SUMMARIES OF JUDICIAL DECISIONS IN ENVIRONMENT RELATED CASES

December 2004

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INTRODUCTION

The Compendium has been developed in response to requests made by Chief Justices and senior Judges of over one hundred countries who participated in the UNEP Global Judges Symposium on Sustainable Development and the Role of the Judiciary, held in Johannesburg on the eve of the World Summit on Sustainable Development (WSSD) in August 2002, as well as over twenty five regional and national Judges Symposia on Environmental Law organised by UNEP during past few years. The outcome of this global initiative may be summarised as follows:

- Creation of a UNEP Global Alliance of Chief Justices and Senior Judges from over 100 countries, fully supportive of the UNEP Judges Programme and have declared their commitment to carry out capacity building of Judges **at national level** with the support of UNEP and its partner agencies,
- Creation of Regional Judges Forums for the Environment in Europe, Pacific, Southern Africa, Eastern and West Africa, the Arab States, the Francophone States and the Caribbean
- Development of a UNEP Judges Handbook and other Manuals/ case law books, including this Compendium, to respond to call from judiciaries of the developing world for urgently required books on environmental law. It became evident during the above mentioned global, regional and national judges meetings that most judges from developing countries do not have access to books on environmental law in their libraries. Some of these publications have also been translated to national languages (Chinese, Khmer, Lao and Vietnamese) at the request of national judiciaries.
- Mobilising a consortium of partners for the UNEP capacity building programme on environmental law of judiciaries, prosecutors, and other legal stakeholders. The organisations and institutions that have collaborated with UNEP in the above programme include, UNDP, the World Bank Institute, United Nations University, UNITAR, IUCN and its Academy of Environmental Law, Commonwealth

Secretariat, Francophone Secretariat, Commonwealth Magistrates and Judges Association, the Asia Foundation, the Hanns Seidel Foundation, Secretariat of the Pacific Regional Environment Programme (SPREP), South Asian Co-operative Environment Programme (SACEP), Environmental Law Foundation of the UK, Environmental Law Institute and the Centre for International Environmental Law.

- Commencement of systematic national training of judges through national judicial institutions with support of UNEP and partners agencies. While such national judges training programmes were held during 2004 in South Africa, Uganda, Tanzania, Vietnam, Cambodia, Lao PDR, plans are underway to hold similar national training workshops in over thirty countries during 2005.)

This compendium of judicial decisions in environment related cases consolidates earlier compendia published by UNEP in 1997 and 2002 and also includes summaries of several additional cases. It also includes a new index of cases by continent and, alphabetically, by country, as well as by subject matter. The indexes are contained in pages iii to xxvii. The case summaries themselves begin on page 1.

UNEP wishes to acknowledge the excellent work done by Professor Robert Lee of the University of Cardiff who edited the final version of the Compendium prepared by the staff of the DPDL Environmental Law Branch and also further developed the indexes. We also express our deep appreciation to the Rt. Hon. Lord Justice Robert Carnwath, Justice of the Court of Appeal of England and Wales, for writing the Foreword to this publication.

We sincerely hope that this Compendium and the other UNEP Environmental Law publications would contribute to meeting the information needs in the field of environmental law of judges and other legal stakeholders, especially in developing countries and countries with economies in transition.

Bakary Kante
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GHANA 1

Felicia Adjui v The Attorney General High Court Of Justice

Suit No. Misc. 811/96 Ghana

Introduction

The plaintiff filed suit claiming relief from nuisance committed during the construction of an open sewerage system at Tema, Ghana. This work was undertaken under funding granted to the Government of Ghana by the International Bank for Reconstruction and Development (The World Bank). The World Bank contended that the court did not have jurisdiction because Ghana had an obligation to recognize its immunity from suit unless waived. The plaintiff argued that there should be no immunity where the wrong done affected private citizens.

Legal Framework

The Diplomatic Immunities Act 1962

The Vienna Convention on Privileges and Immunities

Held

The court declined to exercise jurisdiction on the ground that to find the Bank subject to the jurisdiction of the court would expose it to numerous actions arising merely out of the fact that the Bank had extended aid to a Government project.

KENYA 1

Abdikadir Sheika Hassan & others v Kenya Wildlife Service

Civil Case No. 2059 Of 1996, High Court Of Kenya At Nairobi

Introduction

In this case, the Plaintiff on his own behalf and on behalf of the community sought an order from the High Court of Kenya restraining the defendant, a Kenya Government Agency operating under an Act of Parliament, from removing or dislocating a rare and endangered species named the "Hirola" from its natural habitat.

Legal Framework

Customary Common Law.

Wildlife Conservation Act.

Held

The Court observed that according to the customary law of the people, those entitled to the use of the land are also entitled to the fruits thereof including the fauna and flora. While this could be changed by law, according to the Wildlife Conservation Act, the defendant is required to conserve wild animals in their natural state. The Court held that the Respondent would be acting outside its powers if it were to remove any animals/flora from their natural habitat.

KENYA 2

Nairobi Golf Hotels (Kenya) Ltd v Pelican Engineering And Construction Co Ltd
High Court Of Kenya At Nairobi Civil Case N0.706 Of 1997

This was a preliminary objection raised against the plaintiff's application for an order of injunction.

Introduction

The Plaintiff owned land on which it erected a resort hotel/club, conference facilities and a 18 hole golf course. The Plaintiff claimed that it conserved nature by maintaining indigenous vegetation. The boundary of the land was the centre of the Gatharaini River, which flows from west to east. The Plaintiff, with the permission of the Water Apportionment Board, erected a dam from which it derived water for the maintenance of the golf course. The Plaintiff claimed rights to the use of water from the river as a riparian owner.

The Defendant, without permission from the Water Board, erected a concrete reinforced wall across the river up-stream, and erected a temporary water reservoir pending construction of a dam. It installed a water pump and diverting large quantities of water from the river via the reservoir to its land for irrigated floricultural and horticultural farming and water storage reservoirs thereby extinguishing the natural flow down stream of Gatharani River. The Defendants' actions adversely affected the plaintiff's user of its own dam and water rights causing the grass on the Golf course and vegetation to wither.

The Plaintiff filed a suit against the defendant claiming damages and a permanent injunction to restrain the defendant from constructing such dam and from trespassing on the plaintiffs' land. On the same day, plaintiff filed an application for an injunction to restrain the defendant from constructing a dam on Gatharani River, from diverting the river water, and from trespassing on the plaintiffs' land.

This injunction was granted and the Defendant raised a series of preliminary objections, including the plaintiff's lack of standing since, according to the Water Act, water is

vested in the Government. The Defendant argued that as the Water Apportionment Board is charged with determining the utilisation of water, the plaintiff should have lodged a complaint with that body and that the plaintiff could only come to court to seek judicial review after all the administrative machinery under the Water Act had been exhausted: Finally, because the Defendant leased the land to a third party responsible for the actions affecting the Plaintiff, the defendant argued that it had been sued wrongly.

Legal Framework Water Act

Held

Court held that although it is true that water in Kenya is vested in the Government, Section 3 of the Water Act provides that this is subject to any rights of user granted under the Act or recognized as being vested in any other person. This being so, the Court implied a duty to preserve, control and apportion water for the general good of the people; and a power to require permits for the extra ordinary use of water.

The Court stated that a "riparian owner is a person who owns land on a bank of a river, or along a river or bordering a river or contiguous to a river". Under the common law, and as permitted by section 38 of the Water Act, a riparian owner "has a right to take a reasonable amount account of water from a natural river as it flows past his land for ordinary purposes such as domestic use which includes such things as watering his animals, his garden…(and he) can even construct a dam", subject to certain limitations in the Water Act.

The Court suggested that if the defendant had taken water without the Government's permission, then the Government could bring a prosecution. However, the Court stated that others with an interest could also take proceedings against the defendant in such circumstances. The Plaintiff, as a riparian owner, was entitled to apply for an injunction to restrain the defendant from making extraordinary use of water for irrigation purposes. Finally, the court stated that although the defendant had leased its property to a third party, the plaintiff had a cause of action against the defendant who might then wish to join the third party to the proceedings.

KENYA 3

Paul Nderitu Ndungu and Others v Pashito Holdings Limited & Shital Bhandari
High Court Of Kenya At Nairobi, Civil Case N03063 Of 1996

Introduction

The defendants owned some parcels of land at Loresho, within the city of Nairobi. The parcels were subdivided and several of their subparcels were reserved for public utility. After the Commissioner of Lands purported to cancel the titles of the parcels properties, the plaintiffs sought a declaration that the allocation of the properties owned by the defendants was null and void ab-initio, and the corresponding injunction to restrain them from taking possession of them by fencing or developing the said parcels. Plaintiffs consider the parcels are public utility and that they acquired them in an illegal way.

Defendants challenged the locus staid of the defendants to bring the suit alleging their lack of sufficient interest.

Held

Considering the public utility character of the parcels, the Court stated the wide public interest of the issue and granted the locus standi of the plaintiffs.

KENYA 4

Prof. Wangari Maathai Pius John Njogu John Makanga v City Council Of Nairobi, Commissioner Of Lands and Market Plaza Limited
High Court Of Kenya At Nairobi, Civil Case N0 72 Of 1994

Introduction

The plaintiffs sued the defendants and seeking, *inter alia*, an injunction to restrain the third defendant from selling or carrying out any construction work upon a particular parcel of land, due to its alleged illegal acquisition. The third defendant challenged the standing of the plaintiffs to bring the action.

Legal Framework

Local Government Act 1972

Held

The Court held the plaintiffs had no locus standi to seek injunctive relief as they did not have the sufficient interest to bring the action. The Court established that section 222 of the Local Government Act 1972, only allowed the Attorney General to sue on behalf of the public for the purpose of preventing public wrongs. A private individual could not do so on behalf of the public, though he might be able to do so if he would sustain particular injury a result of a public wrong. However, the courts had no jurisdiction to entertain such claims by private individuals who had not suffered and were not likely to suffer damage.

KENYA 5

Kinyua Njuguna v Karui Muthuita

High Court of Kenya at Nairobi, Civil Case No. 1897/1980, Judgment on 27/10/86

Introduction

The Plaintiff sought orders for the transfer of three parcels of land registered in the Defendants name since 1958/59 when land consolidation took place in Kenya. The Plaintiff was 70 years old and the nephew of the Defendant who was 93 years old. The Plaintiff argued that these family lands were registered in the Defendant's name at a time in Kenya when both the Plaintiff and his father (the Defendants brother) were in political detention and when it was the practice for the brother left at home (i.e. the Defendant) to register the family lands in his name. The Defendant therefore held the land in trust for the family. The Defendant said the lands were his own as his deceased brother disposed off his share of the family land before his death ten years earlier.

Legal Framework

Customary Law & Practice

Registered Land Act

Limitation of Actions Act

Held

The Plaintiff had acquired by adverse possession an absolute title to certain land marked NKT 135, but the Defendant was sole proprietor of other land marked NK 130. The District Officer with the assistance of the District Surveyor was directed to inspect the remainder of the disputed land and report back with findings on its occupancy, and its environmental status with a view to determining whether subdivision between the parties was warranted.

KENYA 6

Mirigo Mwangi v Wambura Mwangi

High Court of Kenya at Nyeri Misc. Application No. 5 of 1987, Torgbor J

Introduction

This was a land dispute between two wives of the deceased husband. The applicant Mirigo sought to review the order of the High Court of 28 November 1983 by which two properties belonging to the deceased husband were divided equally between the two widows, even though the applicant Mirigo had three sons while the respondent widow Wambura had only one son. The District Magistrate following what he accepted as Kikuyu Customary Law divided equally between the two wives the total estate of 13 acres so that each wife took six and a half acres irrespective of the number of children in the family. The District Magistrate's decision was reversed by the Senior Resident Magistrate who awarded four and a half acres to the respondent and eight and a half acres to the Applicant, in accordance with the oral will of the deceased husband. This decision was then reversed by the High Court, which held that District Magistrates decision was correct and that there was no oral will. The applicant argued that the Kikuyu customary law was repugnant to justice and other written laws of the land.

Legal Framework: Customary Law, African Wills Act

Held

The court declined to declare the Kikuyu customary law repugnant to justice and other written laws because the mischief complained of arose not from repugnancy but from the failure of the previous courts to give proper consideration to the evidence. The conflict was not between customary law and other laws but between customary law and the evidence before the court. On the evidence neither party wanted a truly equal distribution of the total estate which would have been unduly disruptive of the domestic and farming lives and environments of the two families. There was no disruption if the applicant retained the eight and a half acres comprised in parcel No. 602 and the respondent retained the four and a half acres in parcel No. 319 as ordered by the court. The application for review was therefore successful.

KENYA 7

Nzasu Ndungu v Nzambulo Munyasya, High Court of Kenya at Machakos

Civil Appeal No. 27 of 1989

Introduction

This case involved a land dispute between the parties which was referred to the area District Officer who constituted a panel that arbitrated the dispute. The District Officer then sent the award as required by law to the Magistrates Court for registration and the issuance of a court decree in terms of the award. The magistrate found the award well balanced and dismissed the defendant's application to set it aside. The defendant appealed on the ground that the nature, landscape and portion of land awarded to the plaintiff was unclear and undefined. The defendant further argued that the proceedings before the Panel of Arbitrators and the Resident Magistrate were nullities for lack of *locus standi* and jurisdiction as the dispute was not referred to the Panel by the court but by the parties themselves.

Legal Framework

The Magistrate Courts Act

Order 45: Civil Procedure Rules

Held

It was not a legal requirement for parties who sought arbitration of a land dispute in Kenya first to file an expensive suit in technical legal language before obtaining a referral order to appear before an untechnical panel of village elders sitting as arbitrators. The court upheld the *locus standi* of the parties and the jurisdiction of the Magistrates Court and declared the award valid. However, to render the award efficacious the Court ordered it to be remitted to the arbitrators to consider the nature and landscape of the land and to define more clearly the portions awarded to each party.

KENYA 8

Stephen Thiongo Karanja v The Republic, Criminal Appeal No. 1593 of 1984

High Court of Kenya at Nairobi, Cockar and Torgbor J. J.

Introduction

The appellant was charged with wilful damage to property, consisting of numerous trees and crops, under section 339(1) of the Penal Code and was tried and convicted by the Senior Resident Magistrate at Kiambu, near Nairobi. The trees and crops were willfully uprooted by a person driving a tractor and employed by the appellant. The land belonged to the appellant who was present on the farm when the trees and crops were destroyed. The trial magistrate found that the destruction and damage occurred in the appellant's presence and with his concurrence, approval and participation and did not accept the appellant's evidence that the damage was done by the complainant in order to put the appellant in trouble. The appellant appealed against the conviction and sentence.

Legal Framework

Section 339(1) Penal Code Chapter 63 of the Laws of Kenya

Held

The Appellate Court found that the land belonged to the appellant. However, the crops and trees were planted by the Complainant by mutual arrangement. The trees destroyed included indigenous trees, some 1700 coffee trees and a variety of crops. The Complainant found the appellant on the farm at the material time and the appellant ignored the Complainant's warning to stop the damage. The Court found the damage extensive and costly, upheld the conviction and sentence and dismissed the appeal.

KENYA 9

Rogers Muema Nzioka & 2 others v Tiomin Kenya Ltd Civil Case No. 97 of 2001, Kenya, Hayanga J

Introduction

Tiomin Kenya Ltd, the Defendant was a local company and a fully owned subsidiary of the Canadian Company Tiomin Resources Incorporated. The company had obtained licences to prospect for minerals. The plaintiffs were local inhabitants who sought orders to restrain the defendants from mining in any part of land in the Kwale District of Mombasa, Kenya. They argued that the licences threatened the security of their environment and health and that the environmental impact report was misleading and inappropriate.

Legal Framework

Land Control Act

The Mining Act

The Environmental Management And Co-ordination Act No. 8 of 1999.

Held

The court found that the defendant had not taken any environmental factors into account in proposing the project. Although at that stage not all the facts were known and final decisions were still to be made, on the balance of probabilities the applicants had made a case for injunction, which was granted.

KENYA 10

Lawrence Nginyo Kariuki v County Council of Kiambu

HCCC Misc. No. 1446 of 1994; (Kenya)

Introduction

The applicant sought leave to apply for orders of prohibition against the County Council of Kiambu and the Commissioner of Lands from alienating, leasing or transferring title, and from the disposal or construction, excavation or erection of structures or felling of trees or interfering with the landscape of the Kamiti Forest Reserve.

Legal Framework

Section 61, Civil Procedure Act

Supreme Court Practice 1982 Edition

Held

A private individual cannot sue on behalf of the public for a public wrong though he might be able to do so if he would sustain injury as a result of that public wrong (Supreme Court Practice 1982 Ed. Para 15/11/1 and see also case 72 of 1994 reported as Kenya 4 above). However, on prima facie evidence, the applicant had sufficient interest, connection and association with the matter in the application. Leave was granted to the applicant to apply for an order of prohibition and to file Notice of Motion for judicial review within 14 days.

KENYA 11

Karanja Waweru v Gakunga Waitathu, High Court of Kenya at Nairobi
Civil Case No. 1531 of 1978

Introduction

The plaintiff sought recovery of a portion of land from the defendant. The plaintiff's case was that the Defendant, without the plaintiff's consent, became registered as co-owner of the disputed land. However, the plaintiff argued that the transaction of sale was void for lack of genuine consent from the Land Board, which takes environmental and other issues into consideration before granting consent.

Held

The Court found that there was a sale agreement in writing and the consent of the Divisional Land Board was duly obtained for the transfer of the land by Plaintiff to Defendant. The Plaintiff's claim was therefore dismissed.

KENYA 12

Wangari Maathai (Greenbelt Movement) v Kenya Times Media Trust

HCCC5403 of 1989 (Kenya)

Introduction

The plaintiff sought a temporary injunction restraining the defendant from constructing a proposed complex in a recreational park in central Nairobi. The plaintiff was coordinator of the Green Belt Movement, an environmental NGO, but sued in her own behalf. The defendant objected for lack of *locus standi*.

Held

The court upheld the defendants' contention that the plaintiff had no *locus standi*.

KENYA 13

Paul K. Nzangu v Mbiti Ndili, High Court of Kenya at Machakos

Civil Appeal No. 8 of 1991

Introduction

The plaintiff sued the defendant for damages for dumping rubbish on the plaintiff's land. There was evidence that the defendant had demolished a wall on his own plot and dumped the debris on the plaintiff's plot in the latter's absence. The defendant denied undertaking any renovations to his wall and specifically denied dumping the rubbish and polluting the environment. The trial magistrate resolved the conflicting evidence by finding that the defendant's servants or employees had indeed dumped the rubbish on the plaintiff's land but declined to award the plaintiff any damages for what the magistrate believed was the wrongdoing of an independent contractor and not the defendant himself. The plaintiff appealed.

Legal Framework

Polluter Pays Principle

Law of Nuisance

Held

On appeal, that the defendant, his servants or agents had dumped the rubbish on the plaintiff's land and therefore was responsible for removing the rubbish. Although the plaintiff had sought monetary damages the court declined to award pecuniary damages as the assessment of quantum was not satisfactory. The defendant was ordered to remove the rubbish at his own expense within one week of the court order.

KENYA 14

Kenya Ports Authority v East African Power & Lighting Co. Ltd. Court of Appeal, Mombasa 9 March 1982, Civil Appeal No. 41 of 1981

Introduction

The respondent had been licensed by the appellant to operate a power station inside the port of Mombasa on the appellant's land. Following a leakage from the pipes serving the power station, the waters of the port were contaminated with oil. The appellant sued the respondent for damages in cleaning up the harbour, which, as pleaded, had been done to avoid the possible combustion of the oil.

Legal Framework

Kenya Ports Authority Act

Laws of the East African Community

East African Harbours Corporation Act

Held

The port waters was *res nullius* (incapable of ownership) and was therefore not the property of the appellant. Moreover, no actual damage had been caused to any of the appellant's property from the pollution of the port waters.

MAURITIUS 1

Ste Wiehe Montocchio & Cie v Minister Of The Environment and Quality Of Life
Mauritius Environment Appeal Tribunal (Case No. 2/95)

Introduction

Ste Wiehe Montocchio & Cie (the appellant) appealed against the refusal of the Minister of Environment & Quality of Life to grant a licence to operate a poultry project at the St. Felix Industrial Estate at Chamouny. The Minister refused to grant the EIA licence noting: (1) its incompatibility in a residential area, and (2) the potential risk of nuisance to nearby neighbours by noise, odour and fly proliferation.

Legal Framework

Environmental Impact Assessment Act.

Held

The Environment Appeal Tribunal revoked the Minister of Environment & Quality of Life's decision refusing to grant an EIA licence. The Tribunal noted that the case rested on factual matters. It visited the proposed project site and found that both the site and buildings were suitable for the project, because there was adequate distance between the project and a neighbouring house. Further, the site was well-fenced and two buildings on the site were spacious and well-aerated. Finally, the appellant promised to maintain the project as well as abide by the conditions imposed by the Ministry of Health.

The Tribunal ordered that an EIA licence be granted to appellant on the condition that the two buildings at the poultry project were made flyproof, that waste be properly removed and disposed of, that the buildings and premises are cleaned and disinfected after each production cycle to the satisfaction of the Ministry of Health, and that no nuisance by virtue of noise, odour and fly proliferation is caused to the nearby residents.

The Tribunal also noted that the Ministry of Health is responsible for monitoring compliance with conditions set forth in an EIA licence, but that the Ministry of Environment & Quality of Life's EIA Committee is charged with making the decision about whether or not to grant an EIA licence.

MAURITIUS 2

Movement Social De PetitCamp/Valentina v Ministry Of The Environment and Quality Of Life, Mauritius Environment Appeal Tribunal (Case No. 2/94)

Introduction

Movement Social de Petit Camp (the appellant) appealed against the decision of the Minister of Environment & Quality of Life granting an EIA licence to Maurilait Production Limitee (MP Ltee) to operate a factory at the DBM Industrial Estate, Valentina. The appellant argued that the factory would cause numerous environmental problems including dust, ash, smoke emissions, water pollution, and noise pollution.

Legal Framework

Environmental Impact Assessment Act.

Held

The decision of the Minister of Environment & Quality of Life granting the EIA licence was affirmed. The Minister did not act unreasonably in granting this EIA licence.

The Tribunal found that: (1) the locality of Valentina is polluted and the pollution is caused by the Ramdenee Oil Factory and the Dye factories; (2) this pollution has affected the health of the inhabitants, the vegetation and plants, and environment of this area; (3) the Ministry of Environment & Qualitv of Life has taken steps to reduce the level of pollution and has succeeded in doing so. When the Tribunal visited the residential locality of Valentina, it noticed black dust in some areas as well as corroded iron sheets on a house. It did not, however, notice any sort of smell connected with pollution. The Tribunal also visited the M.P. Ltee factory, and did not notice any form of pollution--the site was neat, clean and pleasant. In fact, M.P. Ltee had abided by the conditions set out in the EIA licence, for example those relating to coal burning and the chimney's height and draft.

The Tribunal noted that the appellant had stated that inhabitants in the area of the factory had no problems with the EIA licence if M.P. Ltee met the EIA licence's conditions, and that M.P. Ltee was in material compliance with these conditions.

SOUTH AFRICA 1

Von Moltke v Costa Areosa (Pty) Ltd 1975 (1) [CPD] 255 SA

Introduction

Frederick Baldur Harrer Braun Von Moltke (the applicant) a resident of Llandudno, Cape Peninsula, had chosen to reside in Llandudno because he disliked crowded city life and wished to live in a peaceful and quiet area close to nature. His house is approximately one mile from Sandy Bay. On becoming aware that Sandy Bay was about to be developed as a township and that the respondent had submitted an application to the Divisional Council of the Cape, the applicant filed a written objection with the Secretary of the Provincial Administration. He also organized a petition with 4000 signatures and a protest meeting. He complained that bulldozing operations, which had already commenced, constituted nuisance to his enjoyment of his property and irreparable damage to the indigenous vegetation and sand dunes. He also complained of public nuisance and sought an injunction to restrain the respondent from carrying on further operations and an order for restoration of his property to its previous condition. The respondent challenged the applicants' *locus standi* to institute proceedings.

Legal Framework

Locus standi and protection of private rights. Public Nuisance Law
S.13 Ordinance 33 of 1934(c); Town & Country Planning Regulations

Held

Whether the party seeking an interdiction restraining a nuisance proceeds by way of summons or on motion he must show that he is suffering or will suffer some injury, prejudice or damage or invasion of a right peculiar to himself and over and above that sustained by the members of the public in general. It is not enough to allege that a nuisance is being committed. He must go further and at the very least allege facts from which it can be inferred that he has a special reason for coming to the court. It follows that the applicant is entitled to relief neither for the alleged public nuisance nor for the alleged contraventions of the Townships Ordinance and the Town Planning Regulations. The application was dismissed with costs.

SOUTH AFRICA 2

Van Huyssteen & others v Minister of Environmental Affairs & Tourism & others, 1996 (1) SA 283 (c) South Africa.

Introduction

The Respondents proposed the construction of a steel mill on a portion of a farm at Saldania, near the West Coast National Park and the Langerian Lagoon and had applied to the Provincial Administration of the Western Cape for the rezoning of the land under the Land Use Planning Ordinance 15 of 1985 (c). The Lagoon's wetlands were protected by the Convention on Wetlands of International Importance to which South Africa was a contracting party. Erf 2121 Langebaan was situated opposite the Lagoon and was owned by the Witterdrift Trust, the trustees of which were the first three applicants. The fourth applicant was joined in his personal capacity as a trust beneficiary. The trustees intended to build a holiday home or a permanent home on the trust property. Expert opinion was divided on whether the proposed mill would be environmentally undesirable. The applicants sought a temporary injunction and an order that the respondent to make available copies of all documents relevant to the proposed mill and to appoint a board of investigation to evaluate the environmental effects.

Legal Framework

S.23 of the Constitution of South Africa

S 151(1) of the Environmental Conservation Act 1989

Held

The applicants had no right to compel the first respondent to appoint a board of enquiry under S.151(1) of the Environmental Conservation Act 1989; but the applicants, under S.23 of the Constitution were entitled to require the documents sought for the purpose of protecting their rights to the trust property which was potentially threatened by the proposed mill. An injunction was accordingly granted.

SOUTH AFRICA 3

Verstappen v Port Edward Town Board & Others;
Case No. 4645/93 Durban & Coast Local Divison (SA)

Introduction

The applicant was co-owner of properties within the jurisdiction of the first respondent local authority. One of the properties was adjacent to a worked quarry and the other opposite it. In 1985 the respondent started using the quarry area as a site for waste disposal. The applicant sought an injunction against the respondents from using the quarry and for the removal of the rubbish. The applicant complained that the use of the site for waste disposal was a nuisance, illegal and contrary to the Environmental Conservation Act 1989. The respondent opposed the application for an injunction.

Legal Framework

The Environment Conservation Act 1989

Held

The case raises a number of issues, including the *locus standi* of the applicant. On this point the Court held that in order to determine whether a member of the public has *locus standi* to prevent the commission of an act prohibited by statute, the first inquiry is whether the legislature prohibited the doing of the act in the interests of only a particular person or class of persons or whether it was merely prohibited in the general public interest. If the former, any person who belongs to the class of persons in whose interests the doing of the act was prohibited may interdict the act without proof of any special damage. If not, the applicant must prove that he has suffered or will suffer such special damage as a result of the doing of the act. The court was satisfied there was no basis for holding that the applicant belonged to a special class of persons in whose interest the act was passed as the provisions were intended to operate in the interest of the public at large. The applicant had not therefore established *locus standi* to interdict the respondent from continuing with its unlawful operation. But she would have *locus standi* to interdict the nuisance if she is able to prove that the management and operation of the site constituted such nuisance.

SOUTH AFRICA 4

Wildlife Society of Southern Africa & others v Minister of Environmental Affairs & Tourism & others, Case No. 1672/1995 SA

Introduction

The applicants applied for an order compelling the respondents to enforce the provisions of Decree 9 (Environment Conservation) 1992. The first applicant was the Wildlife Society of Southern Africa and the second its Conservation Director. The third and fourth applicants were two lawful occupiers of cottages located on the coast and members of the (Wild) Coast Cottage Owners' Association. The first respondent was Minister of Environmental Affairs, the second the Premier of the Eastern Cape, the third the Minister of Agriculture and Environmental Planning and the fourth to seventh respondents were the chiefs or headmen of the Eastern Cape. The applicants contended that the fourth to the seventh respondents had granted rights of occupation and allocated sites within the coastal conservation area to private individuals for very small considerations. Shacks, dwellings, roads, pathways and tracks had been constructed on the sites resulting in environmental degradation but, the applicants argued, the Ministers responsible had taken no preventive measures.

Legal framework

Decree 9 (Environment Conservation) 1992

Locus standi based on S7(4) (b) read with S.29 of the Constitution of South Africa Act 200 of 1993.

Held

The locus standi of the applicants was challenged but later conceded by reason of the constitutional provisions and the Court ordered the first respondent to take such steps necessary to enforce the provisions of S.39(2) of Decree 9 (Environment Conservation) 1992 promulgated by the Government of Transkei. The 4th-7th respondents were restrained from granting any rights in land which formed part of the territory that formerly constituted the Republic of Transkei.

SOUTH AFRICA 5

Minister of Health & Welfare v Woodcarb (Pty) Ltd & Another 1996(3) SA 155

Introduction

The second respondent was owner of a saw milling business and installed a Reese burner to burn up the sawdust and wood chips that emanated from the mill. In 1968 the Minister of Health declared the whole country a scheduled area under the Atmospheric Pollution Act 1965 with the result that persons carrying on scheduled processes needed registration certificates authorizing such activity. Wood burning was made a scheduled process. The respondent applied for a registration certificate and a provisional one was issued. In March 1992 the Department of Health issued a directive that burners of the category of the Reese burner be phased out within three years. When the respondents' provisional certificate expired in 1994 the applicants refused to renew it. In June 1994 the applicants commenced litigation to prevent the respondent from continuing to use the Reese burner. The respondent contended that the applicants had no *locus standi*.

Legal Framework

The Atmospheric Pollution Act 1965

Held

The Act contained no specific provisions, which the applicants or any other interested party could invoke in order to stop a person from contravening it. In those circumstances the principle that the Act was exclusive as to what could be done to enforce its provisions did not arise. The whole purpose of the legislation and the provisions of ss 9-13 of the Act is to control the installation and use of scheduled processes throughout the Republic. The applicant needed the remedy of injunction to enable it to control these processes effectively and thereby discharge its duties under the Act. The first and second respondents were interdicted by order from 31 January 1996 from carrying on a wood burning process on the property with a Reese burner and ordered to pay the costs of the application.

SOUTH AFRICA 6

Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd 1990(4) SA 749

Introduction

The plaintiffs sought an order to interdict the defendants from manufacturing and distributing hormonal herbicides in South Africa. The plaintiffs alleged that hormonal herbicides used in South Africa were transported through water and air and deposited on fresh produce growing within Natal damaging plants grown and owned by the plaintiffs. The plaintiffs contended that the damage could not be prevented except by stopping the use of these herbicides in South Africa. The defendants said they were registered manufacturers and their activities were lawful and not wrongful.

Legal Framework

The Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act (36 of 1947).

Held

(1) The plaintiffs had no direct and substantial interest in the action to interdict the manufacture and distribution of hormonal herbicides.

(2) The plaintiffs' allegations did not disclose that the defendant's conduct was wrongful.

(3) The second and third plaintiffs were given leave to deliver amended particulars of their claim within 20 days.

SOUTH AFRICA 7

Save the Vaal v The Director Mineral Development Gauteng Region High Court of South Africa (Witwatersrand Local Division) Case No. 97021011 (1997)

Introduction

The applicant brought the application under Rule 53 against the First Respondent to review and set aside the decision of the First Respondent taken on 22 May 1997 whereby he granted the Fourth Respondent a mining authorization under Section 9 of the Minerals Act No. 50 of 1991 for the establishment of an open cast mine in the vicinity of Sasolburg. The licence would permit the respondent to mine on the riverbank of the Vaal River. The respondents opposed the application.

Legal Framework

The Mineral Act (50 of 1991)

Held

The complaint was based on the first respondent's failure to give the applicant an opportunity to be heard and the court declared the applicant to be entitled to be heard before the respondent took the decision to grant the licence.

SOUTH AFRICA 8

Leonardia Safaris v Premier of Gauteng Province High Court of South Africa. Witwatersrand Local Division, Case No. 98/18201

Introduction

The applicant wanted to import rhinos into the province and take them to a farm where he had a client who wished to shoot them. The applicant sought to compel the authorities to issue the relevant permits to enable this to be done. In order to import the animals into the province and then shoot them, two permits were required. The permits were not issued but the applicant alleged that the authority had been given for the permit to be issued at some future time so that he had a legitimate expectation of being granted a permit. The applicant commenced action when the permit was refused in 1998.

Legal Framework

Nature Conservation Ordinance No. 12 of 1983

Held

The court dismissed the application holding that a legitimate expectation did not amount to the acquisition of a legal right, which could be enforced in a court of law.

TANZANIA 1

Attorney General v Lohay Aknonaay,Civil Appeal No. 31 of 1994, Tanzania

Introduction

The respondents, a father and son living in the village of Kambi ya Simba in the Arusha region successfully sued for recovery of land held under customary law. However, while an appeal was pending a new law was passed declaring the extinction of customary rights in land, and prohibiting the payment of compensation for such extinction. The legislation purported to oust the jurisdiction of the court, and to terminate all proceedings in the courts, prohibiting enforcement orders from the courts. The respondents petitioned under the Constitution for a declaration that the new law was unconstitutional, null and void.

Legal Framework

Customary Rights Ordinance, Tanzania

Regulation of Land Tenure (Established Villages) Act 1992, Act No. 22 of 1992.

Sections 30(3) and 26(2) Constitution of Tanzania

Held

The sections of the 1992 Act that provided for extinction of customary rights in land and prohibition of compensation payments were unconstitutional, null and void. However, the provisions of the 1992 Act did not apply to the respondents because their customary rights were extinguished before the 1992 Act. As the appeal was partly allowed and partly dismissed there would be no order as to costs.

TANZANIA 2

Festo Balegele & 749 others v Dar es Salaam City Council,
Civil Appeal No. 90 of 1991

Introduction

The applicants sought orders of: (i) certiorari - to quash the decision of the respondent to allow the dumping of the city waste at Kunduchi Mtongari; (ii) prohibition - barring the future use of the refuse dump site; and (iii) mandamus - to direct the respondent to establish an appropriate refuse dumping site. It was not disputed that Kunduchi Mtongani lay within the jurisdiction of the city council and that, although that the site was zoned as a residential area and the applicants resided there, the respondent had been dumping the city refuse and waste at the site. The burning of the waste had generated smoke and offensive smells and had attracted flies. The respondent contended that the disposal of refuse in the area was temporary and sought an order to continue dumping as without this facility it could not perform its statutory duty of collecting refuse for disposal.

Held

The court upheld the locus standi of the applicants and granted them orders sought. The court ruled that it was a denial of a basic right deliberately to expose anybody's life to danger and it was eminently monstrous to enlist the assistance of the court in this infringement.

TANZANIA 3

Joseph D. Kessy and others v The City Council of Dar Es Salaam

Introduction

The residents of Tabata obtained a judgment from Court in which the City Council of Dar Es Salaam was ordered to, inter alia, to cease using the Tabata area for dumping of garbage collected in the City, and to construct a dumping ground at site or place where the activity would not pose a danger to life.

The City Council then filed an application for review of the judgment while seeking a stay of execution of the judgment, arguing that although the City Council had plans to move the dumping site, it would still take two more years to accomplish this. Because of this the Council had already begun work on establishing three mini-dumps in three districts of the city. This work would also take about a year to complete. Hence, the Council requested the execution of the judgment be stayed for one year, and the Court agreed to grant it.

Two days before the expiration of the extended term of compliance the defendant solicited a new extension for an additional year after alleging delays due to technical problems. The court again granted the requested extension. One day before its corresponding expiration, however, the situation was repeated and the defendant solicited a new extension of three months. The plaintiff fiercely opposed this further stay and argued that the defendant was failing in its duty to ensure the health of the city's residents, and that the court had no further jurisdiction to extend the original term of compliance.

The defendant argued that the Court could not take action to interfere with the Council's statutory authority.

Legal Framework

Civil Procedure Code of Tanzania

Penal Code of Tanzania

Held

The Court held that indeed once the judiciary had set a term for an injunction under principles of *functus officio* its jurisdiction ended. Regarding this matter, the court argued that "(t) the execution of an injunction…is the operation of the injunction itself; therefore to suspend the operation of such injunction is in effect to raise it'".

On the second matter, the court held that though it is generally true that the judiciary cannot interfere with the statutory authority, in this case there was grave pollution affecting the residents of Tabata. In consequence the continuing delay on the part of the Council constituted a tort as well as a criminal action, which the court was in no position to authorise.

TRANSKEI 1

Wildlife Society v Minister Of Environment Transkei Supreme Court – 1996

Introduction

The applicants applied for an order compelling the respondents to enforce the provisions of a law on environmental conservation. It was contended that the respondents had granted rights of occupation and had allocated sites within the coastal conservation area to private individuals. As a result of this encroachment, there was considerable and irreversible environmental degradation of the Transkei wild coast.

Held

Where a statute imposed an obligation upon the state to take certain measures in order to protect the environment in the interests of the public, then a body such as the applicant, with its main aim being to promote environmental conservation, should have *locus standi* to apply for an order to compel the state to comply with its statutory obligations.

It was not the case that to afford *locus stan*di to a body such as the applicant, in the circumstances as these, would open the floodgates to a torrent of frivolous or vexatious litigation against the state by cranks and busybodies. Neither was it certain, given the exorbitant costs of Supreme Court litigation, that should the law be so adapted, cranks and busy bodies would flood the courts with vexatious or frivolous applications. Should they be tempted to do so, an appropriate order of costs would soon inhibit such litigation. It might well be that the time has arrived for a re-examination of the common law rules of standing in environmental matters involving the state and for an adaptation of such rules to meet the ever-changing needs of society.

UGANDA 1

British American Tobacco Limited v Environmental Action Network Ltd
Civil Appl. No. 27/2003 - Arising from Misc. Appl. No. 70/2002
High Court of Uganda at Kampala

Introduction

The Environmental Action Network, Ltd (TEAN in short) filed and application seeking: (a) a declaration that the respondent failed to warn the consumers and potential consumers or its cigarettes of the health risks associated with smoking of the said products; (b) a declaration that the respondent's failure constituted a violation of or a threat to such persons' constitutional right to life; and (c) an order that the respondent place on packets of its cigarettes, its advertising and marketing materials, and at all its advertising and marketing events, warning labels or signage, with such wording, graphics, size and placement as in the court's determination, are sufficient to fully and adequately inform consumers of its cigarettes of the full risks to their health.

Legal framework

Articles 22 and 50(2) of the Constitution of Uganda

Held

The court could not determine fully and sufficiently the kind of information to be included in the desired labels and publication. It simply did not have the expertise to do so; and in fact, the way the pleadings were couched, it imposed on the court a duty it could not discharge. It was or the applicant to present the court with sufficient information that would allow the court to consider the matter at hand.

UGANDA 2

Greenwatch Limited v Attorney General And Uganda Electricity Transmission Company Ltd HTC-00-CV-MC-0139 of 2001 High Court of Uganda at Kampala

Introduction

The Government of Uganda entered into an Implementation Agreement (IA) with the AES Nile Power Limited, covering the building, operation and transfer of a hydroelectric power complex. In consequence of the IA, a Power Purchase Agreement (PPA) was executed by AES Nile Power Limited and Uganda Electricity Board – then a public corporation established and wholly owned by the Government of Uganda, with the commercial monopoly to generate, transmit and sell electric current in Uganda.

The Applicant, a Ugandan NGO whose main mission is environmental protection through advocacy and education, sought to obtain a copy of the PPA from the Government of Uganda. The Government however responded that the PPA "is a comprehensive document with a lot of information including the sponsor's technical and commercial secrets (and, thus) contains clauses on confidentiality and protection of intellectual property, which do not permit us to make it available to the entire public."

Following this letter, the Applicant commenced this action initially against the Attorney General.

Legal framework

Article 41 of the Constitution of Uganda
Section 72 of the Evidence Act

Held

Uganda's Minister of Energy and Mineral Development signed the IA on behalf of the Government. The Minister is a member of the executive organ of the Government of Uganda, and hence, the IA is an act in her official capacity. The IA is therefore a public document.

The IA and PPA are intertwined documents. Neither of these two agreements is complete without the other. As the IA is a public document, and the PPA is incorporated by reference into the IA, therefore the PPA is a public document also.

A corporate body can also qualify as a citizen under article 41 of the Constitution, and have access to information in the possession of the State or its organs and agencies. However, on the evidence before the judge, it was not shown that the Applicant qualified as a corporate citizen. On that account alone, the judge declined to grant the declaration that it was entitled to access the information.

UGANDA 3

Sibaji Waiswa v Kakira Sugar Works Ltd MISC. APPLICATION N0. 230/2001- FROM CIVIL SUIT N0. 63/2001 High Court of Uganda at Jinja

Introduction

The Applicant requested a temporary injunction: (a) Restraining the defendant from acquiring the Butamira reserve and uprooting the forest to establish a sugar cane plantation; (b) Restraining the defendant's servants or agents from evicting, intimidating, threatening or in anyway interrupting or destroying the applicant's and other residents' use and occupation of Butamira Forest reserve until the disposal of the main suit or until further judicial order.

The plaintiff had previously filed a suit against the respondent. Such suit was yet unheard but the respondent had entered the disputed forest reserve and uprooted trees therein and routinely destroyed seed nurseries, resulting in a irreparable damage to the environment.

Legal framework

0.37 rr. 2,3 and 9 of the Civil Procedure Rules

Held

The alleged damages were of a character that could not adequately be compensated by an award of damages alone. Although the respondent argued that since June 2000 the threat to the environment had ceased, documentary evidence showed continuing reasons for concern. The balance of convenience was therefore in favour of a temporary injunction being granted. The judge granted the request for an injunction and ordered restraint on the part of the defendant from uprooting the forest to establish sugar cane plantations pending the hearing of the main suit. The defendant was also restrained from evicting, intimidating, threatening or in any way interrupting the status quo pending the hearing of the main suit or until the Government provided a lasting solution, which ever came first. To avoid abuse of the court process, the life span of the injunction was set at 6 months from the date of the ruling, subject to renewal for just cause.

UGANDA 4

The Environmental Action Network Ltd v The Attorney General and the National Environment Management Authority MISC. APPLICATION No. 39 OF 2001
High Court of Uganda at Kampala

Introduction

The plaintiff, a public interest litigation group, brought an application on its own behalf and on behalf of the non-smoking members of the public, to protect their rights to a clean and healthy environment, their right to life, and for the general good of public health in Uganda. The plaintiff stated that several medical reports highlighted the dangers of passive smoking or environmental exposure to tobacco smoke. Therefore, he sought declarations and orders to this effect.

The issue came before the court on several preliminary objections raised by a State Attorney, including: (a) that the applicant had no cause of action; (b) there was inadequate evidence in support of the suit; (c) that the applicant was not an expert on the effects of secondary smoke; and, (d) that the applicant had no standing to represent Uganda's non-smokers.

Legal framework

Evidence Act of Uganda
Article 50 of the Constitution of Uganda

Held

The Court first established that smoking in public is not a crime either under any Ugandan statutes, and that Courts had no jurisdiction to create new criminal offences. The Court overruled the preliminary objection that referred to the credibility of the evidence (medical reports) presented, stating that such evidence could be challenged during the hearing. Then the Court established that the absence to date of judicial pre-emptive action was not a reason to prohibit the public from requesting immediate and urgent redress. Finally, the Court held that Article 50 of the Constitution did allow public interest litigation by the plaintiff, given that the interest of public rights should transcend procedural technicalities.

UGANDA 5

Greenwatch and Advocates Coalition For Development & Environment v Golf Course Holdings Ltd. MISC. APPUCATJON No390/2001(Arising From H.C.C.S. N0.834/2000) High Court of Uganda at Nakawa

Introduction

The plaintiffs (NGOs, whose main objectives are policy research and advocacy for protection of the environment and environmental rights in Uganda) claimed that the construction of a hotel on a land owned by the defendants threatened the environment and contravened environmental law. Thus, they requested a temporary injunction restraining the defendants from further development of the land until the final saying on the issue.

Legal framework

0.37 p. 1.7 and 9 of the Civil Procedure rules

Held

The second plaintiff was dismissed from the application since she never signed the plaint.

On the merits issues the Court held that, in order to grant a temporary injunction, there must be a pending legal action, which there was. There should also be a serious issue to be tried in that suit such that the applicant would be entitled to the relief sought, which the applicants should refer to in their affidavit. Finally, the occurrence of an irreparable damage to the applicant should be threatened. However, this last condition was not met by the applicants. The land referred to in the plaint belonged to the respondents. As the applicants did not have a proprietary interests in the suit property, notwithstanding the potential use, the application failed.

UGANDA 6

Byabazaire Grace Thaddeus v Mukwano Industries
MISC. APPLICATION No 909 of 2000 (Arising from Civil Suit No. 466 of 2000)
High Court of Uganda at Kampala

Introduction

The defendant operated a factory located adjacent to a residential area where the plaintiff lived. The factory released, into the air, obnoxious smoke that was said to be a health hazard to the community, particularly the plaintiff who already suffered adverse health effects. The plaintiff brought a suit arguing that the defendant failed to control smoke emissions from his factory, failed to purify the smoke to a safe level before the emission, and failed to alert the residents in the neighbourhood about the possible effects of the smoke emitted.

The defendant challenged the cause of action by the plaintiff affirming that Section 4 of the National Environment Statute of l995 (as referred to by the plaintiff) does not create a right to bring legal action on any individual, but, rather, vests the power in the National Environment Management Authority (NEMA) or in local environment committees formed under that Act. The defendant also argued that no action can lie against any person in respect of emissions unless such emissions exceed the standards and guidelines prescribed by NEMA under the National Environment Statute.

Legal framework

Section 4 National Environment Statute of l995.
Order 7, Rule 11 and 19 of the Civil Procedure rules

Held

The Court began stating the right to a healthy environment that is vested in every person; pointing out that NEMA is the body entrusted with the duty of guaranteeing adequate environmental standards for the enjoyment of this right. Considering that the plaintiff did not refer to any particular violation of a standard defined by NEMA, the Court considered the action was not based on the breach of right.

Finally, the Court held that the plaintiff had no locus standi. NEMA was "the only person vested with the power and duty to sue for violations committed under the Statute". The only recourse available to any person whose right to a healthy environment was violated was to inform NEMA.

UGANDA 7

National Association of Professional Environmentalists (NAPE) V AES Nile Power Limited (Respondent) Misc. Case. No 268 Of 1999
High Court Of Uganda At Kampala

Introduction

An application by Notice of Motion was brought under Order 48, rules 1 and 2 of the Civil Procedure Rules, Section 101 of the Civil Procedure Act and Section 72 of the National Environmental Authority Statute (4 of 1995). It sought an injunction to stop the respondent from concluding a power project agreement with the Government of Uganda until the National Environmental Management Authority (NEMA) had approved an environmental impact assessment.

Legal Framework

Civil Procedure Act
NEMA Statute 4 of 1995

Held

The court held that the action was premature. The mere signing of the agreement would not cause an environmental disaster. Until more information was available, it was difficult to formulate a claim or offer a remedy.

CANADA 1

R v Varnicolor Chemical Ltd Tri Union Chemical Of Elmira and Severin Argenton, Director/Owner And Officers (1992) 9 C.E.L.R. (N.S.) 177
Ontario Provincial Court

Introduction

The accused Company, its director/owner and its officers in Ontario were charged with an alleged breach under the Environmental Protection Act for unlawfully discharging hazardous waste into the environment. The company was granted a permit to recycle waste paint manufacturing solvents. Liquid waste described as waste derived fuel was rejected by the waste disposal facility in Michigan because it contained unacceptable levels of PCBs. At the time of the Ministry's audit the total inventory of the site was 3.3 times the legal capacity of the site. Further, the tank farms filled with hazardous liquid waste had insufficient containment facilities in the event of a spill. The tests showed that ground water both on and off the site greatly exceeded drinking water guidelines for various chemicals that are acutely and chronically toxic to humans, animals and fish. Some of the chemicals detected can cause injury to the nervous system. The hydrogeological report concluded that the contaminants detected will migrate with the ground water and may eventually be discharged into creeks and hence to rivers from which water is taken by municipalities in the region for residential supply. In addition, fire safety violations were also discovered, arising out of the inadequate storage of liquid and hazardous waste.

Decision

The company was not fined as it went out of business. However, the owner was fined and sentenced to eight months imprisonment. Fines of up to Can$ 15,000 were payable by officers of the Company.

CANADA 2

R v Bata Industries Limited & others (1992) 70 C.C.C. (3rd) 395

Ontario Provincial Court

Introduction

The Environment Inspector on a routine inspection noticed a large number of barrels containing chemical wastes on the premises of the accused company in varying states of decay. They were rusty, uncovered and leaking. Some of the chemicals were highly carcinogenic. It became evident that this process had been going on for several years. One of the directors who was charged, was an "on-site" director of the accused company. Although he had procrastinated in finding suitable waste haulers to dispose with the drums, it was found he had failed to exercise all reasonable care to prevent unlawful discharges as required by law. He had seen the storage area fill with increasingly deteriorating barrels until it seeped into the ground and failed to take positive steps to remedy the problem. It was further evident that the Technical Advisory Bulletins from the Bata Shoe Organisation had reminded the director of his responsibilities.

The other director charged was acquitted as the evidence indicated that, as a walk-around director on the site, he dealt with problems when brought to his attention by the on-site director promptly and appropriately. He had periodically reviewed the operations and performance goals of the facility.

The Court also found that the Company president had failed to exercise due diligence. It was not sufficient that instructions were given to the officers to remedy the problem. Once it was brought to his attention, the president had a responsibility to ensure that the instructions had been carried out.

Decision

The company was fined a total of Can$ 120,000 inclusive of a contribution to an environmental project. The two directors found in breach of their respective duties were each fined and the Company was ordered not to indemnify them in respect of the ordered fines. A probation order was also imposed against the Bata Shoe Organisation

(world-wide) requiring amongst other things the funding of a local toxic waste disposal program to pick up various household wastes in a number of regions in the countries where the accused company operated.

On Appeal to the High Court, the fines against both the company and the directors were reduced. The probation order was affirmed, applying only to its organisation in Canada and not world-wide. The Trial Judges order that the directors should not be indemnified was upheld on the grounds of policy.

However, the Court of Appeal struck out the condition relating to indemnification on the basis that it was difficult to enforce. All the company need do was to allow the period of probation to expire and then indemnify the directors. Moreover, such a condition was found to be in conflict with a statutory provision in the Ontario Business Corporation Act.

CANADA 3

R v Blackbird Holdings Limited & George Crowe (Controlling Shareholder) (1990) 6 C.E.L.R (N.S.) 119 Ontario Provincial Court

Introduction

The accused Crowe entered into a contract in 1974 with the Goodyear Tyre & Rubber Company on behalf of his former company Burprom, which went out of business in the early 1980's. Under the contract Burprom would purchase empty drums and remove and dispose of waste material from Goodyear's property. Blackbird Holdings was another company, also controlled by Crowe, which owned the property on which the drums were buried. To the knowledge of Goodyear, Burprom, with whom the contract was made, had no ability to deal with such materials. The contract expressly stated that Burprom should protect and save Goodyear from any fines or penalties provided for by federal, provincial, municipal or common law, and that Burprom should under no circumstances imply or mention that any such materials are products of GoodYear.

In May 1990, charges were brought as a result of a complaint from the tenant of the accused, that the water taken from a well on a property of the accused was contaminated. One hundred and eighty-five drums were excavated from the site and many were found leaking and oozing liquid, many had no lids on them when buried. The contamination had spread to adjoining wells. The chemicals leaking from the drums were determined to be human carcinogens.

Decision

The accused were found guilty. The company was fined a total of Can$ 90,000. Crowe was sentenced to six months imprisonment on the Water Resources Act charge, and to three months concurrent sentence on each of the other two offences under the Environmental Protection Act. The trial judge did not believe Crowe's denial of any knowledge of how the drums got buried in his property, and dismissed arguments that there was no evidence that the drums had been buried during the time set out in the charge, i.e. May 1988 to January 1990. The judge in sentencing noted that the contaminants were human carcinogens and that extensive clean up would be needed at taxpayers' expense.

CANADA 4

Attorney General, Quebec v Mark Levy, Lubrimax (1982) Inc. And D. M. Transport Ltd. Judgment Nos. 93-612, 93-613, 93-614, 93-615 1993, Jurisprudence Express No. 14 294-295

LubriMax (1982) Inc. stored hundreds of barrels of PCB liquid waste and electric equipment containing PCB in a warehouse without permit. In August 1988 a fire gutted the warehouse (alleged to have been started by one Alain Chapleau, an illiterate part-time labourer who was arrested, charged with arson by QPP but acquitted by a superior court judge). Levy had told an employee to entrust the transport of the equipment and barrels containing PCBs to TDM Transport which did not have a permit to transport dangerous wastes. The fire which sent toxic fumes (PCBs, dioxin and furans) over 25 kilometres (the immediate danger zone) and to a much lesser extent to neighbouring Ontario and New York State, resulted in the evacuation of nearly 5,000 people from 1,731 homes in three municipalities in the immediate danger zone for eighteen days.

Levy and the two accused companies were convicted, the final conviction being in July 1993 and a total of Can$ 35,000 fine was imposed on all three.

A Commission of Inquiry was established to investigate the circumstances of the fire. The Fire Commissioner in its report, made a series of general recommendations relating to environmental protection and fire prevention measures. It was evident that the warehouse had been violating several Provincial regulations and the Provincial Government had known this for nearly three years before the fire; yet it took no action. The Federal Government had no law regulating storage of PCBs, until legislation was enacted in June 1988, exactly two months before the fire. The Quebec Government tightened up its inspection programme and made changes to regulations to conform to Federal legislation.

CANADA 5

R v Tioxide Canada Inc., Turcotte, Eckersley, Gauthier, Lachance and Collingwood, Directors (Unreported) Quebec Court, 1993

Introduction

This case involved the pollution of the St. Lawrence River over a long period of time. The company was in violation of authorisations issued by the Province of Quebec. In the final stages it did not have a formal authorisation to operate either from the Province or from the Federal Government. So long as it had the operating authorisation and complied with its conditions, they were exempt from the application of the Fisheries Act regulation.

Federal, as well as Provincial Government authorities co-operated in efforts to prevent pollution of the St. Lawrence River. The Province had been negotiating operating plans since 1986. The accused initially complied with these, but in 1991 it neglected or refused to do so, or even to apply for same.

The board of directors had resolved in April 1991 to continue operations despite having no authorisation. As a result, criminal charges were brought against the company and its directors. After the charges were laid, the company closed the offending section of the plant.

The accused pleaded not guilty initially and elected for jury trial but changed their plea prior to the preliminary inquiry.

Decision

Tioxide was fined Can$ 1 million and ordered to pay Can$ 3 million to the Federal Treasury to be placed in a special account at the disposal of the Minister of the Environment. The funds would be used for fish stocks and fish habitat protection. The directors were given absolute discharge by the court on charges filed against them personally. This was as a result of plea-bargaining with the Prosecutors. The court ordered the accused to continue to close the section of the plant that was the source of pollution. This is the highest fine ever imposed in Canadian polluter.

CANADA 6

R v Westmin Mines Limited (Unreported) British Columbia Provincial Court

The accused were alleged to be discharging toxic waste, namely treated mine water containing excessively high levels of various metals such as zinc, copper and cadmium, into the Salmon River. The Salmon River is a transboundary river, which rises in Canada but crosses the international boundary between Canada and the United States, entering the ocean in Alaska. Westmin Mines Ltd operated a gold mine just a short distance from the British Columbia- Alaska border. At the time Westmin first sought a permit from the British Columbia Ministry of Environment to mine in the area, concerns of the United States Fish and Wildlife authorities and the citizens of Hyder, Alaska, were taken into account in the planning for the mine. Standards were set for the water discharge in the Mine Development Review Process.

There was a lack of evidence of any impact on water quality injuriously affecting either the Canadian or the United States side of the boundary. The Salmon River is sufficiently large, to make it impossible to detect any effect at all on water quality in the river as a result of the illegal discharges of treated mine water.

Decision

The accused was fined a total of Can$ 26,000 on thirteen of fifteen charges; two charges having been stayed by the court for lack of specificity. In imposing the fine the judge took into account the fact that the company had spent in excess of Can$ 900,000 to construct a lime water treatment plant and settling pond and the fact that there was no direct evidence of damage to the receiving environment. The judge rejected arguments that the illegal discharges were within fifteen per cent of the permitted levels and therefore were not excessive; that there was official inaction prior to charges being laid, which had led the accused to believe that the environment ministry tolerated the conduct; and that it had used reasonable care (defence of 'due diligence'). The judge noted that the regulations did not distinguish between 'minor' and 'major' violations; that the accused failed to provide any documentary proof that the ministry officials 'tolerated' non-compliance by the accused; and that the investments made to bring the mine into compliance were made after the offences occurred and charges laid.

CANADA 7

R v Aimco Solrec Limited (Unreported) Ontario Provincial Court

The accused was charged with unlawfully permitting the transfer of PCB waste to a waste transportation system by failing to package or mark the waste in accordance with the Canada Transportation of Dangerous Goods Act.

The accused pleaded guilty after a plea bargain with the prosecutor in which all but two charges were dropped. The Court fined it Can$ 50,000 on those two charges.

In Ontario, companies involved in the collection and transfer of hazardous industrial waste solvents and oils rely heavily on the availability of cheap incineration in the United States, specifically incinerators associated with the cement industry. Although the material is shipped as a waste, provided it meets minimum BTU and ash criteria, it is used as a fuel supplement in the cement manufacturing process.

Local industries and generators of hazardous waste are often charged up to Can$ 600 per drum for the disposal of hazardous wastes. The transfer sites are able to bulk and blend the waste cocktails to meet the United States incineration regulations. Initially companies were not diligent in analysing their waste to ensure they were not receiving and transferring PCBs and other restricted contaminants to the United States.

The accused loaded a tanker containing 7,800 gallons of PCB liquid waste from several generators without prior analysis. It had no equipment to undertake analysis of incoming and outgoing waste. The waste was sent to a Michigan company for use as fuel in cement kilns, but was rejected by that company as it had excessive levels of PCBs.

The United States company notified the Michigan State Department of Natural Resources which directed the tanker to be returned to Ontario.

The Michigan State Department of Natural Resources notified the Ontario Ministry of Environment. The Canadian Customs were notified and the inbound tanker was seized

at the Michigan/Ontario border. Ontario Ministry inspectors were at the scene and sampled the tanker. The analysis revealed a PCB concentration between 420 and 460 ppm, as against the maximum of 50 ppm allowed by the United States EPA for imports.

In related incidents, a national newspaper the "Globe and Mail" reported in May 1989 that PCBs and other hazardous chemical wastes were being secretly mixed in fuels and sold to unsuspecting customers in Southern Ontario, Quebec and Western New York. It was alleged that a small number of companies, operating mainly in the Buffalo, New York area were mixing hazardous wastes into gasoline, diesel and industrial heating fuel and then selling it, to Canadian importers. Many of these importers had set up temporary businesses for the purpose of importing relatively cheap fuel from the United States and selling it at market prices without paying Provincial sales tax.

In response, the Federal Government issued an interim order prohibiting the import and export of fuels containing hazardous waste except for the purpose of destruction, recycling or disposal of the fuel at an approved facility. Wastes that would likely be disposed of by dilution in fuels were included in the order, which has now been replaced by a permanent regulation.

CANADA 8

Re Sause Brothers Ocean Towing (Concerning an Oil Spill from the "Nestucca" off The Coast Of British Columbia) (1991) 769 F. Supp. 1147 (Dor.) United States District Court

In December 1988, the tanker barge the "Nestucca" while being towed by a towing vessel, the "Ocean Service," spilled 850,000 litres of oil off the southern coast of Washington, causing damage to wildlife and to the environment along approximately sixty-seventy miles of Vancouver Island coastline. Both vessels were owned by Sause Brothers Ocean Towing Corporation, a US company. The oil spill left in its wake some 500,000 dead migratory birds, several dead otters, and the oiling of numerous seals and sea lions. The shellfish and crab fisheries were closed and eelgrass was destroyed.

When the oil spill occurred, in December 1988, the Canadian Government did not have authority to sue for clean-up costs and pollution damage resulting from an oil spill occurring outside of Canadian waters. Four months after the oil spill, new amendments to the Canada Shipping Act came into force with the result that the Federal Government received the authority to claim for clean-up costs and pollution damage caused within Canadian territory, the territorial sea and the fishing zones of Canada even for the spill occurring those waters.

Ocean Towing filed a limitation action in the United States Federal Court for the Eastern District of Oregon admitting liability for the casualty, but seeking exoneration or limitation of liability.

The District Court rejected the petition to limit liability for the reasons that: 1. Ocean Towing was negligent when it failed to conduct an adequate inspection of the tow wire and to have an adequate and experienced crew. This contributed to the oil spill that occurred when the tug collided with a runaway barge and pierced the barge' s storage compartment: and 2. It failed to show lack of privity or knowledge of the negligence.

Claims were filed by two native Indian bands, the Quetsino Band and the Nuu-chah-nulth Tribal Council (NTC), for clean-up costs and damages to their reserves and harvesting rights off reserve. The NTC claimed Can$ 23,656,344 for clean-up and

opportunity costs, collective food loss and other environmental damage to the band members. The amount of the Quetsino band's claim is not known.

As permitted by the United States admiralty law the Federal and British Columbia Provincial Governments also applied to the United States Court for a share of the damage award, asserting that Ocean Towing's liability should not be limited. Their combined claim was Can$ 4,382,000 for clean-up costs and Can$ 3,349,500 for environmental damage.

In May 1992, after intensive negotiations supervised by the District Court, the claims of the Federal and Provincial Governments were settled with Ocean Towing. The NTC's separate claim in respect of environmental damage was a major impediment to the negotiations. In order to finally settle the matter, the Court directed that the parties negotiate among themselves the manner in which the environmental damage award would be divided. The claim of the Quetsino Band for environmental damage was not subject to negotiations because Ocean Towing challenged that claim on the grounds that it had been filed beyond the applicable limitation period. At the time of writing, that claim awaits the court's decision.

Through court supervised negotiations, Ocean Towing agreed to settle the claims of the Federal and Provincial Governments and of the NTC. This included: the full claim of clean-up costs of the Federal Government (Can$ 4,382,200), Can$ 3,349,500 for the environmental damage claim of the two Governments to be used for purposes of restoration of the environment (of which Can$ 1,600,000 would be paid by way of an annuity over a ten-year period); and a payment to the NTC of Can$ 700,000 for its environmental claims and Can$ 505,000 for all the individual claims, commercial fishing claims and clean-up claims. The claim of the Quetsino Band was not the subject of negotiation awaiting the court's decision on Ocean Towing's challenge thereto.

The Settlement Agreement along with a Full and Final Release of all claims was made an order of the United States District Court of Oregon, upon their execution in July 1992.

CANADA 9

R (Environment Canada) v R (Northwest Territories Canada)
(1993)12 C.E.L.R. (N.S.) 55, Northwest Territories Territorial Court

The Government of the Northwest Territories was charged with discharging raw, untreated sewage of up to 56,000 cubic metres from the Iqaluit sewage lagoon into the waters of Koojesse Inlet on Baffin Island in the Northwest Territories. The lagoon is owned and operated by the Government of the Northwest Territories.

Decision

The judge found that the Territorial Government failed to exercise due diligence in the prevention of the sewage discharge. The lagoon had failed five times in ten years; the Government had in place the policy, the necessary engineering and scientific studies, and the management and operational guidelines. If the policy had been applied, it would have prevented the offence.

For the above reason, the Territorial Government was convicted and fined $49,000. It was also ordered to pay $40,000 to Environment Canada in trust for the purpose of promoting conservation and protection of fish and fish habitats in the Northwest Territories.

The judge rejected the joint submission of the parties that the accused, being a Government, be excused from financial penalty since a fine would amount to the transfer of the same taxpayers' money from one government's consolidated revenue fund to another's and therefore inappropriate and/or unnecessary.

It was the judge's view that a more compelling argument may be made for the opposite perspective that governments accused of offences should receive no special consideration and, indeed, their status may be an aggravating factor in certain cases.

The judge noted that governments can commit offences as readily as humans or corporations and they are not immune to breaking the law. Government conduct

resulting in an offence against the law is not something that should be taken lightly. It is the antithesis of good government and arguably constitutes a breach of trust.

The judge quoted the following passage from a judgement of a Superior Court judge in Quebec, where Environment Canada had successfully prosecuted Public Works Canada (another R. v. R. prosecution): "the Court must be much more severe when such a disaster is caused by agents of an arm of the Crown, since it is precisely the Crown on which the public relies to protect both the resource species and the environment."

CANADA 10

Recherches Internationales Quebec v Cambior Inc and Home Insurance and Golder Associes Ltd, 14 August, 1998 Superior Court, Province of Quebec, Canada

Introduction

This class action arose from the spill of toxic effluents into Guyana's main waterway, the Essequibo, when the effluent treatment plant of a gold mine burst. The goldmine was located in Guyana. The owner was Omai Gold Mines Ltd of Guyana but the majority shareholder was Cambior Inc. of Quebec. Some 23,000 victims of the spill filed suit in Quebec against Cambior, assisted by Recherches Internationales Quebec (RIQ). Cambior contested the courts' jurisdiction and denied responsibility for any acts of negligence of the Guyana Company. RIQ argued that Cambior financed the project and made all the strategic decisions relating to the operations in Guyana.

Legal Framework

The Quebec Civil Code

Held

The courts of both Quebec and Guyana had jurisdiction to try the issues. However, neither the victims nor their action had any real connection with Quebec. The mine was located in Guyana. That is where the victims resided. That is where the spill occurred. That is where the victims suffered damage. The law to determine the rights and obligations of the victims of Cambior was the law of Guyana. All the elements of proof upon which a court would base its judgement were located primarily in Guyana. Those factors taken as a whole pointed to Guyana, not Quebec as the natural and appropriate forum where the case should be tried. The motion by RIQ was dismissed.

UNITED STATES 1

Calvert Cliffs' Coordinating Committee v Automatic Energy Commission
United States Court Of Appeals, District Of Columbia 449 F.2d 1109 (1971)

Introduction

In 1969 the United States Congress passed, and President Nixon signed, the National Environmental Policy Act (NEPA), to protect natural resources in the United States. Section l01 of NEPA requires the federal government to "use all practicable means and measures" to protect the environment, and to consider environmental costs and benefits in government decisions.

Calvert Cliffs' Coordinating Committee (Calvert Cliff) brought this action against the Atomic Energy Commission, alleging that its recently adopted procedural rules failed to satisfy the demands of NEPA that this Commission give consideration to environmental factors.

Legal Framework

National Environmental Policy Act (NEPA) of 1969.

Held

The Atomic Energy Commission's procedural rules do not comply with Congressional policy enunciated in NEPA. These cases are remanded for further rule-making consistent with this opinion.

NEPA makes environmental protection a part of the mandate of every federal agency and department; federal agencies and departments must "consider" environmental issues just as they consider other matters within their mandates.

Section 102(2)(A) and (B) require a balancing process between environmental amenities and economic and technical considerations. Section 102(2)(C) requires responsible officials to prepare a detailed statement covering the environmental impact of major federal projects, and to develop appropriate alternatives. These procedural duties must be performed "to the fullest extent possible."

Section 102 mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties. There is a requirement for agencies to "use all practicable means consistent with other essential considerations" set forth for substantive duties under Section 101. This would probably not allow reviewing courts to reverse a substantive decision unless it was shown that the actual balance of costs and benefits was arbitrary. However, if a decision was reached procedurally without individualised consideration and balancing of environmental factors, it is the court's responsibility to reverse.

In this case, the court must review the Atomic Energy Commission's rules governing its consideration of environmental values. The Commission's rules allow its NEPA responsibilities to "be carried out in *toto* outside the hearing process" and the environmental records to "accompany the application through the Commission's review processes" when no party to a proceeding raises any environmental issue.

These rules make a mockery of NEPA's procedural requirements. Environmental factors must be considered through the agency review processes, and not merely accompany other records through the federal bureaucracy. In uncontested hearings the Atomic Safety and Licensing Board need not necessarily go over the same ground covered in its staff's statements, but it must determine if review by the staff has been adequate.

Cases Cited

State of New Hampshire v. Atomic Energy Commission 406 F.2d 170 (lst. Cir.), cert. denied, 395 U.S. 962, 89 S.Ct. 2100 (1969)

Zabel v. Tabb 430 F.2d 199 (Sth Cir. 1970)

UNITED STATES 2

Scenic Hudson Preservation Conference v Federal Power Commission
354 F.2d 608 (1965)

Introduction

The petitioners sought orders to set aside a licence to construct a pumped storage hydroelectric project on the Hudson River. Under the Federal Power Act, in order to be licensed by the Commission a prospective project had to meet the statutory test of being "best adapted to a comprehensive plan for improving or developing a waterway." The Commission therefore had to compare the project with available alternatives and only grant the application if no better adapted alternatives were available.

Legal Framework

The Federal Power Act

Held

For the Commission to discharge its duty properly the record on which it based its decision had to be complete. In this case the Commission had failed to compile a record which was sufficient to support its decision. It had ignored relevant factors and failed to make a thorough study of the possible alternatives to the project. The Commission's order was therefore set aside.

UNITED STATES 3

Vermont Yankee Nuclear Power Corp v
Natural Resources Defence Council 435 US 519.98 S Ct 1197 (USA)

Introduction

The petitioners sought consideration of the environmental effects of that portion of the "nuclear fuel cycle" attributable to the operation of a reactor. The Appeal Board held that the Licensing Boards must consider the environmental effects of transport of fuel to a reactor and of wastes to reprocessing plants but need not consider the operations of the reprocessing plants or the disposal of wastes in individual licensing proceedings. The trial Court held that, in the absence of effective generic proceedings to consider the issues in this case, they had to be dealt with in individual licensing proceedings.

Legal Framework

The National Environmental Protection Act

Held

The Supreme Court reversed the above decision on the basis *inter alia*, that the reviewing courts must not engraft their own notions of proper procedures upon agencies.

UNITED STATES 4

Just v Marinette County, 56 WIS.2D7 Nos 106, 107

Supreme Court of Wisconsin USA

Introduction

In 1961 the Just family purchased 36.4 acres of land in the town of Lake along the south shore of Lake Noquebay, a navigable lake in Marinette County. Subsequently an Ordinance was passed that designated the Just land a swamp and the Justs were required to obtain a conditional use permit before filling in some 500 sq ft of the land. In 1968 the Justs hauled sand onto the land without a conditional use permit in contravention of the Ordinance. The court had to decide whether the wetland filling restrictions were unconstitutional because they amounted to a constructive taking of the Justs' land without compensation.

League Framework

Marinette County's Shoreland Zoning Ordinance Number 24

US Constitution

Held

This was a restriction on the use of a citizen's property rather than to secure a benefit to the public. On the issue of constitutionality the Court held that the public purpose sought to be served by the Ordinance was the protection of navigable waters, and the public rights therein from the degradation and deterioration, which would result from uncontrolled use and developments of shorelands. Accordingly the shoreland zoning Ordinance was not held to be unconstitutional.

UNITED STATES 5

United States v Riverside Bayview Homes Inc 474 US 121: US Supreme Court

Introduction

The Clean Water Act prohibits any discharge of dredged or fill materials into "navigable waters" unless authorized by a permit issued by the Army Corps of Engineers (the Corps). Construing the Act to cover all "freshwater wetlands" that were adjacent to other covered waters, the Corps issued a regulation defining such wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support and which under normal circumstances do support a prevalence of vegetation typically adapted to life in saturated soil conditions." After the respondent begun placing fill material on its property near the shores the Corps filed a suit to stop it from filling its property without the Corps' permission.

Legal Framework

The Clean Water Act (CWA) 33 USC

Federal Water Pollution Control Act and Amendments 1972

Held

The Court of Appeal held that the Corps' authority must be narrowly construed to avoid taking without just compensation. However, the Supreme Court held that the land fell within the Corps' jurisdiction.

UNITED STATES 6

Fontainebleau Hotel Corp v Forty-Five Twenty-Five Inc.

District Court of Appeal of Florida 114 So 2d 357: August 27, 1959 (USA)

Introduction

The plaintiff sought to enjoin the defendants from proceeding with the construction of the addition to the Fontainebleau Hotel alleging that the construction would interfere with the light and air on the beach in front of the Eden Roc and cast a shadow of such size as to render the beach wholly unfit for the use and enjoyment of its guests, to the irreparable injury of the plaintiff. The defendant denied the material allegations of the complaint. The chancellor granted a temporary injunction restraining the defendant from continuing with the construction of the addition.

Legal Framework

Common Law

Chapter 9837 Laws of Florida 1923

Held

Since the plaintiff has not established a cause of action against the defendants arising out of the construction in question the order granting a temporary injunction would be reversed with directions to dismiss the complaint.

Tennessee Valley Authority v Hill, Supreme Court of the United States [437 US 153] June 15, 1978 (USA)

Introduction

This case raised the question whether endangered species should be protected at all costs. In 1966 the Tennessee Valley Authority (TVA) proposed building a dam on the Little Tennessee River. The Tellico Dam would turn 30 miles of the shallow turbulent Little Tennessee into a deep reservoir with over 16,000 surface acres of water. The Tellico Dam was opposed by a coalition of local property owners, conservationists and others who felt for various reasons that the dam should not be built. In 1973 a federal court in Tennessee decided that construction could proceed. The opponents argued breach of an environmental statute - The Endangered Species Act. The dam's opponents' case was that in a reservoir environment the snail darter (a 3 inch long - tannish coloured fish, a species of perch) would be doomed and they petitioned the Secretary of the Interior, under the citizen petition provision of the statute, to declare the snail darter fish an endangered species. TVA argued that the dam project was too far advanced to stop. The District Court agreed with TVA. The environmentalists appealed.

Legal Framework

The Endangered Species Act 1973, 16 USC
Public Works Appropriation Bill

Held

The Appeals Court in effect halted all further work on the dam until TVA decided what to do. TVA petitioned the Supreme Court, which decided that the snail darter fish had a "right to exist." The Secretary of Interior had promulgated regulations declaring the snail darter an endangered species whose critical habitat would be destroyed by the Tellico Reservoir. His determinations have not been challenged by judicial review. The Supreme Court concluded that TVA would contravene the Endangered Species Act if the construction proceeded and that an injunction was appropriate.

UNITED STATES 8

Tanner v Armco Steel Corporation

US District Court, Southern District, Texas [340 F. Supp. 532] 8 March 1972

Introduction

The Plaintiffs were residents of Harris County, Texas, and brought this action to recover damages for injuries sustained from exposure to air pollutants emitted by the defendants' petroleum refineries and plants located along the Houston Ship Channel. The plaintiffs based their case on the premise that the right to a healthy and clean environment is at the very foundation of the nation and guaranteed by the laws and Constitution of the United States.

Legal Framework

The Constitution of the United States

Due Process Clause of the 5th Amendment

The 9th and 14th Amendments

Civil Rights Act 1871

National Environment Policy Act 1969

Held

Taking as true all factual allegations in the complaint the plaintiffs have failed to allege a violation by the defendants of any judicially cognisable federal constitutional right which would entitle them to the relief sought. There is not a scintilla of persuasive content in the 14th Amendment to support the assertion that environmental rights were to be accorded protection. There is no legally enforceable right to a healthy environment, giving rise to an action for damages, guaranteed by the 14th Amendment or any other provision of the Federal Constitution. The action was accordingly dismissed.

The Village of Wilsonville v SCA Services, Inc.

Supreme Court of Illinois [426 N.E. 2d 824] May 22, 1981

Introduction

The plaintiff Village of Wilsonville (the Village) filed a complaint for injunctive relief on the ground that the operation of the defendant's chemical waste disposal site constituted a public nuisance and a hazard to the health of the citizens of the Village, the County and the State. The Trial Judge concluded that the site amounted to a nuisance and enjoined the defendant from operating its hazardous chemical waste landfill in Wilsonville. It ordered the defendant to remove all toxic waste buried there, along with all contaminated soil found at the disposal site as a result of the operation of the landfill. The Court also ordered the defendant to restore and reclaim the site. The defendant appealed.

Held

The appellate Court unanimously affirmed the trial courts' judgment.

UNITED STATES 10

National Audubon Society v Department of Water and Power of the City of Los Angles Supreme Court of California [658 P 2d 709] February 17, 1983

Introduction

Mono Lake, the second largest lake in California, sits at the base of the Sierra Nevada escarpment near the eastern entrance to Yosemite National Park. In 1940 the Department of Water and Power of the City of Los Angeles (DWP) was granted a permit to appropriate virtually the entire flow of four of the five streams flowing into the lake. As a result of these diversions the level of the lake dropped, the surface area diminished by one-third, one of the two principal islands in the lake became a peninsula, exposing the gull rookery there to coyotes and other predators. The plaintiffs argued that the scenic beauty and ecological values of Mono Lake were imperilled and filed suit to enjoin the DWP diversions on the basis that the shores, bed and waters of Mono Lake were protected by a public trust.

Legal Framework

Public Trust Doctrine

The Water Commission Act 1913 and 1921

The Water Code Section 1243

Held

The Court was confronted with a clash of values: Mono Lake is a scenic and ecological treasure of national significance imperilled by continued diversions of water, while the need of Los Angeles for water was apparent and its reliance on rights granted by the Board was evident. The cost of curtailing diversions would be substantial. The Court held that the state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. In effect the city's need for water does not preclude a reconsideration and reallocation to take into account the impact of water diversion on the Mono Lake environment.

UNITED STATES 11

Sierra Club Et. Alv. Coleman And Tiemann 14 Ilm P.1425 (1975) & 15 Ilm P.L417 (1976) United States: District Court For The District Of Columbia

Introduction

The construction of a highway to link the Pan American Highway system of South America with the Inter-American Highway was authorized by Congress in 1970. The actual administration of the project was left to the Secretary of Transportation. Thereafter the Department of Transportation and the Federal Highway Administration (FHWA) took the preliminary steps for the construction of a highway through Panama and Colombia. In view of the extensive environmental impact of the proposed highway, which was known as the Darien Gap Highway, the FHWA prepared and issued an Environmental Impact Assessment in order to comply with the provisions of the NEPA. The Sierra Club and three other environmental organisations, instituted action to obtain a preliminary injunction, restraining the FHWA from taking any further action on the project, on the basis that the preparation and insurance of the Assessment satisfied neither the procedural nor the substantive requirements of the NEPA. A preliminary injunction was accordingly granted.

Subsequently, the defendants prepared a Final Environmental Impact Statement (EIS), in order to comply with the provisions of the NEPA and to proceed with the proposed construction of the Darien Gap Highway. Upon a motion filed by the plaintiffs, on the basis that the EIS was defective in certain critical areas, the preliminary injunction was extended.

As a result of the above decision and also several other similar cases, the Council on Environmental Quality (CEQ) issued a memorandum entitled "Memorandum on the Application of the EIS Requirement to Environmental Impacts Abroad of Major Federal Actions".

Legal Framework

Section 102(2)(c) of the National Environmental Policy Act (NEPA).

Held

Preliminary Injunction

The Court issued the injunction prayed for on the grounds, inter alia, that the FHWA failed to circulate the Final Environmental Impact Assessment report or a draft thereof, to the Environmental Protection Agency for its comments, as required by the provisions of the NEPA. The Court held that "(t)here is no question but that the environmental effects of a major highway construction is within the expertise of EPS, and that agency might well have had valuable comments which could have affected FHWA's judgment as the Assessment was considered in the decision-making process in the selection of the highway's route". In fact, when the EPA finally learned of the existence of an Assessment, it drew attention to a major deficiency, viz. the lack of discussion in the Assessment, regarding the domestic consequences of the transmission of "foot and mouth disease" or "aftosa " into the United States along the proposed highway. The Court cited this major deficiency as one of the principal reasons, which warranted the issuance of an injunction.

The Court also said that the discussion of possible alternatives is imperative in the Assessment envisaged under the NEPA. As such, the failure of the Assessment in the instant case, to discuss possible alternatives to the route that has been chosen for the highway, was a defect of a substantive nature. Except for a fleeting reference to the "no build" alternative without any discussion of its relative environmental impact, the bulk of the section titled "Alternatives To The Proposed Project" was devoted to an analysis of why the proposed shorter route, the Atrato route was preferable to the longer route, the Chocó route, from an engineering and cost perspective. A discussion of the relative environmental impact of other land routes, such as the Chocó route was an indispensable requirement, though the latter route might have costed more or have been less feasible from an engineering perspective. This would also enable a complete analysis of the impact of the proposed highway on the lives of the Chocó and Cuna Indians.

Accordingly, the Court by its order dated 17th October, 1975 issued a preliminary injunction restraining the defendants from taking any action whatsoever, in furtherance of the construction of the Darien Gap Highway, pending final hearing and disposition of

the action or until the defendants had taken all necessary action to comply fully with the substantive and procedural requirements of the National Environmental Policy Act.

Extension of the Preliminary Injunction

In allowing the plaintiffs' motion for extension of the preliminary injunction, the Court held that the defendants' assessment contained in the EIS, still constituted inadequate compliance with the provisions of the NEPA.

Cases Cited

Atchison, Topeka, and Santa Fe Railway Co. v. Callaway 382 F. Supp. 610, 623 (D. D. C. 1974)

Lathan v. Volpe 455 F. 2d 1111, 1116 (9th Cir., 1971)

Keith -v. Volpe 352 F. Supp. 1324, 1349 (C. D. Cal., 1972)

United States v. City and County of San Francisco 310 U. S. 16, 60 S. Ct. 749 (1940)

Calvert Cliffs' Coordinating Committee, Inc. v. United States Stomic Energy Commission 146 U. S. App. D. C.33 at 39, 449f.2d llO9, at 1115 (1971)

Jones v. District of Columbia Redevelopment Agency 162 U.S. App. D.C. 366 at 376, 499 F.2d 502 at 512 9 1974)

Scientists Institute For Public Information v. Stomic Energy Commission 481 F.2d 1079 (C.A.D.C.,1973)

National Resources Defense Council v. Morton 458 F.2d 827 (C.A.D.C.,1972)

Carolina Environmental Study Group v. United States S 10 F.2d 796 (C.A.D.C.,1975)

Warm Springs Task Force v. Gribble 6 ERC 1737 (1974)

Wilderness Society v. Morton 463 G. 2d 1261 (D. C. Cir.1972)

Sierra Club v. Coleman 405 F. Supp. 53 (D. D. C.1975)

City of Davis v. Coleman 521 F. 2d 661 (9th Cir.,1975)

UNITED STATES 12

Sierra Club v Morton Supreme Court of the US, 405 U.S. 727, 92 S.Ct. 1361(1972)

Introduction

The Sierra Club brought this action to stop a ski resort development in, and the construction of a road through the Sequoia National Park. The injury alleged by the Sierra Club was the change in the use that this area would undergo. The plaintiff sued as a "membership corporation" claiming it had a special interest in the maintenance and conservation of the area. It claimed that the development would destroy or otherwise affect the scenery, natural and historic objects and wildlife in the park, and impair the enjoyment of the park for future generations.

Legal Framework

Section 10 Administrative Procedure Act.

Held

The Sierra Club does not have standing to bring this action. The impact of the proposed road will not fall indiscriminately upon every citizen, but will be felt directly only by those who use the park, and for whom the aesthetic and recreational values of the area will be lessened by the proposed development.

The Sierra Club has failed to allege that it or its members would be affected in any of their activities or pastimes by this development. Nowhere in the pleadings or affidavits does the Sierra Club claim that its members use the park for any purpose, much less that they would be significantly affected by the development.

In the absence of allegations that the Sierra Club or its members would be affected in any of their activities by the proposed development, the Sierra Club's alleged special interest in the conservation of national game reserves and forests is insufficient to give it standing.

Cases Cited

Baker v. Carr 369 U.S. 186, 82 S. Ct. 691 (NEPA)

ANTIGUA AND BARBUDA 1

The Barbuda Council v Attorney General & Others

High Court of Justice Antigua and Barbuda Civil AD 1993

Introduction

The plaintiff filed a motion for commitment of three persons to prison following an alleged breach of an interim injunction that prohibited a mining company, SANDCO, from mining sand in a designated area. There was an arrangement by which the Ministry of Agriculture would mine the sand in the area and sell on it the spot to SANDCO, which was forbidden by order from mining it.

Legal Framework

S.16 Crown Proceedings Act

Held

The court held that this arrangement was an attempt to get around the order of court and do the very same thing which the court order forbid the defendants from doing. The Minister of Agriculture who took the matter to Cabinet was prepared to defy the court order to assist the third defendant in mining the sand. Custodial sentences were deemed appropriate and the defendants were sentenced to prison each for one month.

ARGENTINA 1

Asociación Coordinadora de Usuarios, Consumidores y Contribuyentes v ENRE - EDESUR Camara Federal De Apelaciones De La Plata, Sala 2a, July 8, 2003

Introduction

Representing the inhabitants of the Ezpeleta locality, the plaintiff sought a court order that the defendant suspend the works establishing an electric grid above the locality and relocate it elsewhere. The plaintiff argued that the electromagnetic fields created by the grid were polluting the environment of Ezpeleta and resulting in harm to health of its residents, in certain cases by producing cancerous pathologies.

The plaintiff's request for an order was denied. There was insufficient evidence to establish a causal link between the operation of the grid and the health disorders of the inhabitants.

Legal Framework

Law 25675 of 2002, art. 4

Held

On appeal an order of certiorari (quashing the decision) was granted demanding the immediate suspension of the works performed by the defendant, which was ordered to produce a report on the prevention of the probable negative effects on the health of Ezpeleta's occupants by the electromagnetic field. Such a report should be drawn up with the participation of the inhabitants. This was in accordance with the principle demanding a precautionary approach to scientific uncertainty embodied in Law 25675 of 2002 and several international environmental law documents.

ARGENTINA 2

Asociación Para la Protección del Medio Ambiente y Educación Ecológica "18 de Octubre" V. Aguas Argentinas S.A and others
Camara Federal De Apelaciones De La Plata, Sala 2a, July 8, 2003

Introduction

The plaintiff, through an "amparo" procedure for the protection of the constitutional rights of its members, demanded that the defendant fix the hydro balance and suspend activity that allegedly resulted in a threat to the right of the inhabitants of the Quilmes area to enjoy a healthy environment. The plaintiff argued (inter alia) that, due to the defendant's water imports from the Plata River and failure in the management of the area's sewage system, there was a permanent flooding of polluted water in Quilmes.

The a quo agreed with the plaintiff and ordered the defendants to undertake immediate action restoring the hydro balance of the Quilmes area. However, the defendant appealed the a quo's decision, and the orders were not met, as litigation was provisionally suspended pending the release of the a quem's opinion.

Held

The tribunal confirmed the a quo's decision allowing the defendants 60 days to carry out the intricate administrative mechanisms foreseen in an agreement between the Quilmes municipality and the Province of Buenos Aires.

Moreover, due to the public utility character of the water and sewage service, the a quem decided to provide its opinion with erga omnes, extending its binding power to all similar relationships among the National Government and the localities of Buenos Aires.

BRAZIL 1

Ministerio Publico v Orlando Linden and Hermes Gildo Masera

Tribunal of Rio Grande do Sul April 30 1998

Introduction

The plaintiff alleged that the former and the present Municipal Prefects of Rolante-RS. While exercising their official duties (1989-1994), had continuously exposed human beings, animals, and vegetation to health hazards by waste deposits made without an environmental licence. Four tons of solid waste of domestic, industrial and hospital origin had been dumped daily by a river line within the locality of Gloria, in an area scheduled for permanent preservation. These waste dumps had caused environmental degradation; polluted the soil, the atmosphere, and the vegetation. They had caused irreparable damages to the fauna, flora, and the environment, by destructing aboriginal vegetation, causing sporadic fires over the waste dumps, and emitting polluting gases and other leachates.

Former prefect, Mr. Masera, did not dispute the facts but argued that the pollution situation had occurred during the previous administration of Mr. Linden. He also argued that although he had frequently requested the State authorities to approve another place for the dumping of the wastes, this authorization never took place. On the other hand, Mr. Linden stated that the city's wastes were formerly discarded in a place that, as time went by, became an actual human settlement. Because the people began inhabiting that place the designation of Gloria as a new place for waste deposition had become necessary.

Legal Framework

Law 6938 of 1991, arts. 7, 9 and 15

Law 8038 of 1990, art. 4

Law 9099 of 1995, art. 89

Criminal Procedure Code, art. 386

Law 9605 of 1998, art. 19

Constitution, arts. 5 and 225

Criminal Code, arts. 2 and 59

Held

The Tribunal concluded that there was enough appropriate documentary evidence to support the allegations environmental damage. It also held the defendants to be criminally liable for the resulting damages after considering that they did not do everything that they should or could have done to avoid the environmental damage. In fact, the complaints about environmental damage had begun in 1989, and only in 1994 were measures for solving the problem taken.

The Tribunal punished each defendant with two years of reclusion and 10 days of fine. They were also condemned to pay the procedural expenses, and their names were registered in the Book of Inculpated. However, reclusion could be substituted with a community service consisting in the maintenance of municipal parks and gardens during a same period of two years.

BRAZIL 2

Ministerio Publico v Volodymir Kysnichan

Federal Regional Tribunal of the 4th Region August 8 1999

Introduction

Captain Kishnichan, appealed the judicial decision that condemned him on the basis of his negligent behaviour during the shipwreck of the ship, the "Bahamas". The first instance decision considered the calamity was foreseeable but, nevertheless, external help was not requested, and the emergency equipment of the ship was not used. The shipwreck resulted in the spill of 3.1 tons of sulphuric acid, which resulted in ecological damages.

The plaintiff argued that Captain Kishnichan behaved in an illegal negligent manner, bearing in mind that that the ship demonstrated problems prior to the actual operation of the pumps on August 25 1998 (date of the shipwreck); and that it was clear that the defendant did not take the necessary measures to avoid the calamity, hiding the facts to the Brazilian authorities, and probably intentionally allowing the shipwreck.

The defendant, Captain Kisnichan demanded the nullity of the process and argued that a lack of evidence did not allow any conclusion on causation as that wrecked ship was never examined. He also argued that there was insufficient evidence for his condemnation since the link between his behaviour and the shipwreck was never established. The defendant knowing that he transported a corrosive material, but claimed to be ignorant of the material's actual corrosive power or that its strength increased when put in contact with water. He argued that his professional background did not imply his expertise in chemistry, and that the infringed punishment was too high. He also demanded the substitution of the reclusion penalty by the restriction of other of his rights.

Legal Framework

Criminal code, arts. 44, 55, 77 and 261

CPP, art. 386

Law 9537 of 1997

Held

The Tribunal confirmed the decision of the *a quo* and ratified the prison sentence of the defendant after stating his conscious fault. It determined that the Captain acted negligently when deciding to carry the ship to port to disembark in order to try to avoid the shipwreck. The Captain was condemned to prison without possibility to substitute it for another type of punishment.

BRAZIL 3

Ministerio Publico v Federal Union

Substitute Federal Judge of 2a Vara, State of Mato Grosso January 19 1998

Introduction

The plaintiff started a civil public action against the Federal Union, and requested the immediate suspension of any activity leading to the construction of the Paraguay Paraná hydroway. The project consisted of a navigation system along 3,440 kms in two of the largest rivers (Cáceres in Brazil and Nueva Palmira in Uruguay) of the second more important river basin of Latin America (basin of La Plata shared by Argentina, Bolivia, Brazil, Paraguay, and Uruguay) by the Intergovernmental Committee of the Paraguay-Paraná hydroway (CIH), a executive body created in 1989.

On June 26 1992 the River Agreement of Transportation was subscribed, and it entered into force March 13 1995, among the countries interested in carrying out the hydroway under the principles of free traffic, liberty of navigation, free participation of flags in the traffic among the signatory countries, equality and reciprocity of treatment, and security of navigation.

The chief of the Brazilian Delegation at the Committee stated that the project was not supported merely by technical studies but also by recently concluded environmental, economic, and technical studies of viability performed by international consortiums by means of the cooperation among CIH, the Inter-American Bank of Development, and the United Nations Program for Development.

The plaintiff argued that the aboriginal communities did not participate in the announced studies, even though the Constitution provides for this once Congress has authorized them. These communities (Guató) are located by River Paraguai.

Likewise, the plaintiff explained that the hydroway crosses river Paraguai from beginning to end and, specifically, the stretch at Ilha Insua, exactly where the indigenous communities are located within their officially recognized native lands. The plaintiff argued that the hydroway would cause direct and indirect environmental

effects, through the dredging and channelling of the river; the removal of its rocky material; the alteration of the courses of the rivers; and also a social impact on local populations' way of life, particularly on the directly and indirectly affected native communities. The plaintiff claimed that there was an urgent need to immediately incorporate the local populations in the respective planning and decision-making process, bearing in mind that the construction of the hydroway would drastically affect their customs and traditions, and affect their constitutional rights over their traditional lands.

Indigenous lands are, according to the Brazilian constitution, federal public goods within a special protection regime. Hence, any alteration of the native territories and of the nearby water resources violates the spirit and the letter of the Constitution. Thus, Congress may only authorize the hydroway once those affected have been heard.

Legal Framework

Constitution, arts. 20, 225 and 231

Held

The Judge decided to grant the legal order sought and restrain the Federal Union from: carrying out or authorizing the execution of any study or work of implementation of the hydroway; or from initiating its operation; or from any arrangement of resources for a similar end; before Congress, having heard the native communities, authorized the announced project. It also set a daily fine of 100,000 reales in the event of any breach of the order.

BRAZIL 4

Pedro Korkowski v Ministerio Publico

Federal Regional Tribunal of the 4th Region, Porto Alegre November 12 1992

Introduction

The appellant, Mr Korkowski, undertook works of enlargement without necessary approval of a building within his property, which is located near to the ruins of San Miguel das Missoes, a site declared a legacy of humanity by UNESCO. Seeking to restraining the appellant from continuing the said works and its consequent damage, the plaintiff demanded the demolition of the works. This request was accepted by the *a quo*. The appellant argued that this decision violated his property rights, and that the construction works did not obstruct or decrease the view of the monument.

Legal Framework

Decree-Law 25 of 1937, arts. 17 and 18

Law 3924 of 1961, arts 1 and 2

Constitution, art. 5

Held

Following legal doctrine, the tribunal stated that historic, artistic and natural sites have an aesthetic function that is to be preserved. The tribunal also affirmed that the ruins of San Miguel are visited by thousands of tourist each year, and that it is impossible to state that any alteration will not affect the monument as a whole. The tribunal stated that property rights are no longer sacred, as they were during the 19th century, and that the new principles of environmental law favour social over private concerns.

The Tribunal dismissed the appeal, allowing that the demolition order was justified when irregular works were performed in the environs of historic sites.

BRAZIL 5

GR Extracao de Areia and Transportes Rodoviarios Ltda v Ministerio Publico

Tribunal of Justice, State of Parana March 1 1994

Introduction

The corporation GR Extracao de Areia and Transportes Rodoviarios Ltda appealed the a quo's decision on a civil public action started by the Ministerio Publico. This demanded the liability of the appellant for activities (see below) that damaged the environment. The appellant argued that: a) she had already restrained from performing any activities by the Iguacu river, at the Ressaca locality; b) she had replaced the damaged plants; and c) there was an *ultra petita* nature to the *a quo* decision, since she was ordered (inter alia) to present an environmental impact assessment: an issue that was not initially raised in the plaint.

The Ministerio Publico stated that the corporation extracted sand from the river creating a 200 mts depression, without having a licence for performing said works, and without undergoing an environmental impact assessment. It also affirmed that the corporation was made aware of such irregularities, but did nothing to legalize her situation.

Legal Framework

Civil Procedure Code, art 334

Held

The court held that the environmental damages alleged by the plaintiff were proven, paving the way for the remedies proposed. The court held the corporation liable for the damage requiring it to reforest the damaged area, and to present an environmental impact assessment. As for the *ultra petita* question, the tribunal dismissed the request considering the environmental impact assessment had been requested by a third party (SUREHMA) and that, notwithstanding the above, mining activities required such assessment to be undertaken in advance, followed by the compliance with any required measures.

CHILE 1

Pablo Orrego Silva and others v Empresa Eléctrica Pange SA

Supreme Court, August 5 1993

Introduction

The petitioners appealed the decision of the *a quo*, which decided an action seeking the protection of the constitutional rights to life, to live in a healthy environment, and of property. The facts concerned the construction by the defendant of six dams with the purpose of generating electric energy, all along the high areas of river Bio-Bio. Plaintiffs argued that the said works threatened: a) the right to life of the people living around Bio-Bio because of the decrease of the river's water level; b) the fauna and flora of the area, including endangered species; and c) property rights, eroding lands adjacent to the river shores. The petitioners requested the suspension of the construction of the dams and the hydroelectric plant, until evidence was provided safeguarding the above constitutional rights.

The defendant argued that the alleged right to life was not endangered considering the use of the river's waters allowed their clean restitution to the main stream. Furthermore, the defendant stated that throughout the year the river's water level would not significantly decrease. For the same latter reason, the alleged right to property was not affected.

Legal Framework

Constitution, arts 19(1, 8, 20 and 24)

Resolutions 442 of 11/12/83, and of 05/01/90 issued by the Water Department of the General Direction of Waters of the Ministry of Public Works

Code of Waters, art. 14

Held

The court stated that its jurisdiction was limited to a review of whether the construction of the dams complied with corresponding legal requirements. It laid down certain legal requirements: to devolve waters to the river stream; to avoid spills that damaged the water drains; to let pass, at the water's raising point, an equal or smaller amount of water

to the corresponding daily media minimum use; not to affect third parties' security; and to avoid polluting the waters.

The court established that according to the technical reports the dam had to be full for the power plant to work, and hence the river stream had to be drained. It also found that the technical reports established clear soil impacts (localized erosion, sediment movements, temporary loss of the native forest, partial modification of the landscape, and others). There were also impacts on water (an increase in the water's turbidity, possible water pollution with hydrocarbons, possible death of fish and live organisms at the rivers' bed) and socio cultural impacts (larger opportunities for the indigenous *peruenche* communities, increase of commerce and services).

The tribunal also established that article 14 of the Water Code would be breached as there would not be an immediate restitution of the used waters, third parties would in fact be affected, and the river shores would be eroded at the dam waters' release.

The court upheld the appeal regarding the protection of constitutional rights limiting its scope to compliance with the legal conditions necessary in the construction of the dam, the uses of the waters and their release.

CHILE 2

Antonio Horvath Kiss and others v National Commission for the Environment

Supreme Court March 19 1997

Introduction

A third party, a corporation under the name of Forestal Trillium, voluntarily submitted an environment impact assessment on its exploitation project. The Regional Commission for the Environment of the XII Region (Magallanes and Antartida) stated that there were insufficient elements to state if the project fulfiled the requirements for its environmental viability; but nonetheless proceeded to declare its technical and environmental viability by means of Resolution 002.

The Foundation for the Development of the XII Region presented an administrative action arguing the inconsistency of Resolution 002, but the defendants sought to dispose of this through Resolution 005, which included certain requirements for the environmental viability of the project.

Resolution 005 of September 20 1996 by the National Commission for the Environment denied a previous claim by the plaintiffs regarding a third party's intention to exploit some 250,000 hectares of native forest within their property. The plaintiffs argued that the resolution issued by the defendant violated their constitutional rights: to equality before the law; to a healthy environment; to develop an economic activity that is not contrary to morality, public order, or national security; and to private property. The plaintiffs argued against the arbitrary nature of Resolution 005, in that it demanded the compliance of environmental requirements only once the project's viability had been accepted; and because Law 19,300 allowed that the defendants resolution could be positive or negative, but made no allowance for it to be conditional.

Forest Trillium argued that the plaintiffs lacked of standing since they were not directly affected by the project, and because a constitutional protection action could not be treated as a class action.

Legal Framework

Constitution, art. 19 (2, 8, 21 and 24)

Resolution 005 of 20/09/96

Law 19300, arts. 12 and 24

Resolution 002 of 22/04/96

Held

The court held the standing of the plaintiffs, ruling that the Constitution does not demand that the affected people themselves present the constitutional protection action. It also held Resolution 005 illegal since it should have rejected Resolution 002, and because it demanded environmental requirements only after the project's viability was admitted.

CHILE 3

Pedro Flores y Otros v Corporation Del Cobre (CODELCO)

Corte de Apelaciones: 23.6.1988: Rol 12.753.FS641 1988

Introduction

Chanaral is a small town 1,000 kilometers north of Santiago, Chile. For fifty years, a mining company deposited its copper tailing wastes directly on to the beaches of Chanaral, destroying any trace of marine life in the area. From 1939 to 1974, 200 million tons of waste were dumped into the Bay of Chanaral, creating a biologically dead artificial shore. This pollution affected more than fifteen miles of coastal zone and some of the richest resources of the ocean, killing all forms of animal and plant life and all potential for development and growth of the Chanaral port community. The harm to the beaches of Chanaral was irreversible. A 1983 UNEP survey listed Chanaral as one of the most seriously polluted areas of the Pacific Ocean.

Legal Framework

Constitution, art 19

Held

The court first compelled Codelco to disclose all information in its possession on the issues relevant to the case. Secondly the court ordered an inspection report under the court's "personal survey". This concluded that the coastline was indeed devastated by pollution. The court then granted the plaintiff's petition to enjoin Codelco for activities damaging the marine environment of Chanaral but gave the company one year to put a definitive end to dumping of its mineral tailings into the Pacific Ocean. The decision was affirmed by the Chilean Supreme Court.

CHILE 4

Aurelio Vargas y otros v. Municipalidad de Santiago y otros (The Lo Errazuriz Case) Corte Suprema 27.5.87.

Introduction

This case involved a garbage dump situated inside Santiago, which was operated by fourteen municipalities. The dump was in a place surrounded by people who had settled there before its installation and therefore created serious health problems as a result of its poor operation. It was a public interest case and the strategy employed by the residents consisted of: (i) using the "Protection Action" established in the Chilean constitution before the court to ask the court to assure urgent enforcement not only of the constitutional right of the residents "to live in an environment free from contamination", but also of all the statutes and regulations violated by the polluter companies' activities; (ii) garnering the participation of the people in the affected community; and, (iii) using procedural means in court to force the polluter companies to release information concerning the impact of the wastes on the ecosystem.

Legal Framework

The Constitution of Chile

Constitutional guarantees on environment.

Held

The Santiago Court of Appeals granted an order for the unsanitary garbage dump to be cleaned up or close down in 120 days.

CHILE 5

CODEFF v Ministro de Obras Públicas y otros Corte de Apelaciones 21.8.85

Introduction

In 1985, a private conservationist entity, CODEFF, sought protection against the Ministry of Public Works before the Court of Appeals of Arica. This arose out of the extraction of water from Lake Chungara for what was supposed to be an irrigation project. The plaintiffs complained that this project would violate the rights of those whose land was affected by the high salt content of the water. They also argued that the project would affect their constitutional right to live in an environment free from pollution.

Legal Framework

Constitution of Chile

Held

The Court of Appeals of Arica and the Supreme Court recognized the cause of action and ordered the suspension of the extraction project on Lake Chungara as long as the lake remained part of the Lanca National Park, and as long as it was included in the UNESCO list of biosphere reserves. By defining the constitutional concepts of "environment", "environmental heritage" and "preservation of nature" the court expanded the reach of the constitutional guarantee.

COLOMBIA 1

Raul Arturo Rincón Ardila v the Republic of Colombia
Constitutional Court April 9 1996

Introduction

In the judicial review of Law 208 of 1995 (Statute of the Genetic Engineering International Centre), the constitutional tribunal declared the conditional constitutionality of the statute. The conditions declared by the court were as follows:

- That the installations of experimental plants in Colombian territory follow the existing norms on genetic resources management; biosafety; life and heath protection; food production; and the cultural integrity of indigenous, black and peasant communities.

- That the principles and policies governing the Centre's activities, as well as the safety rulings for research activities that take place within the Colombian territory, do not contravene the existing norms on genetic resources management; biosafety; life and heath protection; food production; and the cultural integrity of indigenous, black and peasant communities.

- That intellectual and industrial property provisions of the law are subject to national, regional and international legislation related to industrial and intellectual property, and particularly, subject to respect the knowledge of ethnic and cultural minorities.

- That it is understood that the access to intellectual property rights that derive from the Centre's activities, should be reasonably favorable to Colombia when the said rights derive from developments or products obtained from Colombian biological or genetic resources.

- That in case of a conflict involving the Centre and a person within the Colombian territory, where the person is subject to domestic or regional laws, the case can be

brought before national and international jurisdictions for a dispute settlement that respects the existing rules within the Colombian territory.

Legal Framework

Law 208 of 1995

Biological Diversity Covenant

Agreement 160 of the International labour Organisation

Law 162 of 1994

Decisions 344, 345 and 351 of the Cartagena Agreement's Commission

GATT's Agreement on TRIPs

Law 44 of 1993

Law 191 of 1995

COLOMBIA 2

José Cuesta Novoa and Milciades Ramírez Melo v the Secretary of Public Health of Bogotá Constitutional Court May 17 1995

Introduction

The citizen petitioners sued the Secretary of Public Health of Bogotá and requested, through a *tutela* action, the protection of their constitutional rights to life and to a healthy environment. The petitioners, who lived within the Puente Aranda area of Bogotá, argued that the defendant failed to fulfil its duties of environmental protection. Particularly, they argued that the defendant tolerated the performance of various corporations that did not comply with environmental legislation. The *a quo* dismissed the request and ruled that the plaintiffs should have used a class action.

Legal Framework

Constitution, arts. 11, 79, 86 and 241

Decree 2591 of 1991, arts. 31 and 36

Decree 02 of 1982 of the Ministry of Health

Held

The Constitutional Court granted certiorari. The Court stated the extraordinary nature of the *tutela* action. After affirming its subsidiary nature, and its viability when a public authority or certain individuals threaten to violate a constitutionally protected right, the Court declared that even though the right to a healthy environment is not subject to the *tutela* procedure per se, such a right is understood as part of a set of "basic circumstances that surround mankind and allow its biological and individual existence".

The court declared that the right to a healthy environment is more likely to be protected through class actions when the specific facts threaten to violate the constitutional or legal rights of an undetermined number of people. However, although confirming the decision of the *a quo* in this regard, the Court also stated that the right to a healthy environment is frequently linked to other fundamental constitutional rights such as life, integrity or health.

COLOMBIA 3

Marlene Beatriz Durán Camacho v the Republic of Colombia

Constitutional Court September 26 1996

Introduction

In a judicial review involving various questions of environmentally related legislation, the Court stated that:

- Law 99 of 1993 (National Environmental Law) admits that those who contribute to the deterioration of the environment are charged with a special economic burden. Therefore, in developing a sustainable development framework, the law provides that those who take advantage of the natural resources bear the costs of mitigating the negative effects that their actions have on the environment.

- The law promoted a system of autonomous regional corporations the one in charge of carrying out the environmental policies, planning and projects.

- There are two kinds of environmental taxes: i) those of a retributive character, which aim to maintain natural resources such as the air, water, or soil in case of waste dumping; and ii) those of a compensatory nature, which address the renovation of natural resources damaged by the individuals.

Legal framework

Constitution, arts. 59, 150, 154, 241, 242, 338, 367

Law 99 of 1993, arts 42, 43 and 46 (a)

Decree Law 2811 of 1974

Decree 2067 of 1991

COLOMBIA 4

María Elena Burgos v. Municipality of Campoalegre (Huila)

Constitutional Court February 27 1997

Introduction

Ms. Burgos, a resident of the Municipality of Campoalegre, used the *tutela* procedure seeking the protection of her rights to health and a healthy environment, threatened by her neighbours. These bred pigs near to her residence: an activity that generated heavy stench and was said to produce fever and asphyxiation suffered by her family.

The *a quo* granted protection to the petitioner and ordered the demolition of the pig stalls, after establishing that Decree 2,257 of 1896 forbade domestic animal breeding for commercial purposes within urban localities. The defendant appealed the decision and the *a quem* overturned the first instance decision, considering the petitioner had other means of legal defence and because of the subsidiary character of *tutela* procedures.

Legal framework

Constitution

Decree 2591 of 1991

Decree 257 of 1986

Law 9 of 1979

Departmental Code of Police (Huila), art. 269

Held

Reviewing the *a quem's* decision, the Court stated that the right to privacy of citizens implied a right not to be disturbed in their residence. The constitutional tribunal established that there was enough evidence to confirm the stench and pollution produced by the pig breeding business, and that the right to a healthy environment of petitioner was certainly being obstructed. Hence, the Constitutional Court confirmed the decision of the *a quo.*

COLOMBIA 5

National Ombudsman v the Republic of Colombia

Constitutional Court December 3 1997

Introduction

In the judicial review of Law 99 of 1993 (National Environmental Law) the Court defined its position on the following issues:

i) Should environmental impact assessment be carried out by the Ministry of the Environment, or may it be contracted out to a third party?;
ii) Who has jurisdiction to decide over the character of natural national parks and national forest reserves?; and
iii) What rights of participation in decision making attached to this law?

Regarding the first issue, the Court established that the outsourcing of environmental impact assessments does not imply any lack of accountability on the part of the public servants originally responsible.

On the second question, the Constitutional Court ruled that the will of the constitutional assembly was that the areas incorporating the system of national parks could not be subject to acquisition or a change in their designation. Hence, no authority could decide on the above question since these designated areas cannot be changed.

Finally, the Court confirmed that Law 99 of 1993 abundantly incorporates participation mechanisms within its text.

Legal Framework

Constitution, arts. 2, 3, 6, 7, 8, 63, 79, 80, 102 and 103
Law 99 of 1993, arts 5(17 and 18) and 11(par)

COLOMBIA 6

Claudia Sampedro y Héctor A. Suárez v Ministry of the Environment and Direction of Stupefacient Substances Administrative Tribunal of Cundinamarca June 13 2003

Introduction

By means of a class action, the plaintiffs demanded that the defendant Ministry put an end to the fumigation of illicit drug crops in wide areas of the country, and to proceed to repair the consequent environmental damage. They argued that the environmental effects of the substances sprayed over illicit drug plantations (glyphosate) may go beyond their purpose in the eradication of illicit crops. There was a lack of scientific certainty over the side effects that they may have on the environment and human beings so that manual eradication methods provided better sustainable development from an environmental and social perspective. Hence, they requested the judicial protection of the right to enjoy a healthy environment, the safeguard of public health, and environmental action in harmony with sustainable development.

The defendant Ministry established that the appropriate official institution, the National Council for Stupefacient substances had duly authorized the use of the fumigation substances, and that there is no scientific evidence on environmental damages alleged by the plaintiffs. The Ministry argued that the national anti-drug policies were not within its jurisdiction but that nonetheless had requested the relevant institution to submit the necessary environmental impact assessments. Finally, the defendant argued that the plaintiffs had failed in taken legal action against the National Council of Stupefacient Substances, as the institution in charge of designing the counter narcotic policies; or those people responsible for the planting of illicit crops, who were the real cause of the alleged environmental damages.

The Direction of Stupefacient Substances – joined to the litigation by the Tribunal- declared that manual eradication methods had indeed been applied in the illegal crops eradication purpose, but that such policies failed to work in extensive illegal plantations, due to extent of the illegal business. It also stated that due to the social function of property principle, the Colombian State was legally pursuing public interest in areas that

were being used for criminal purposes. Finally, this defendant stated that glyphosate only had a low and temporary toxicity over human beings, which made it fit for sustainable use.

Legal framework

Constitution. Law 99 of 1993

Held

After considering a series of affidavits and other evidence on the toxicity of glyphosate, the tribunal held that there was no certainty on the harm that it could cause to human beings. Hence, applying on the precautionary principle contained in Law 99 of 1993, it ordered the temporary suspension of the fumigations until the necessary scientific studies on the effects of glyphosate were carried out.

Comment: The Colombian government appealed the former decision. To date there is not yet a response to the appeal by the Council of State of Colombia.

MEXICO 1

Regina Barba Pires and others v Secretary of Environment, Natural Resources and Fishery - Judge 10 of Administrative Affairs of the Federal District Fifth Administrative Tribunal of the Federal District December 15 1995

Introduction

By means of an *amparo* action, the petitioners requested the suspension of a resolution issued by the Secretary of Environment, Natural Resources and Fishery, the defendant. The resolution relieved certain industries from submitting an environmental impact assessment and, instead, ordered them to deliver a further simple pre-emptive report.

The a quo denied the temporary suspension of the resolution's effects after considering that the plaintiffs did not show that the resolution negatively affected their own or the collective interest. They had failed to prove the resolution's application to them.

Legal Framework

Agreement by means of which the procedure for the presentation of EIA is simplified
Law of "Amparo", arts. 124, 131, 132, and 142
Organic Law of the Federal Judiciary, art 37
General Law of Ecologic Balance
Constitution, arts. 103, and 107

Held

The petitioners appealed the a quo's decision before the Tribunal, who dismissed the appeal. The Tribunal established that the plaintiffs did not, indeed, demonstrate the negative impact on its own interest or on the public interest. The petitioners needed to show that the resolution infringed their rights, or caused them damage or injury in order to obtain relief by means of an *amparo* procedure.

MEXICO 2

Homero Aridjis and others v Secretary of Environment, Natural Resources and Fishery - Judge 5 of Administrative Affairs of the Federal District
First Administrative Tribunal of the Federal District November 12 1996

Introduction

The plaintiffs started an *amparo* action against the Secretary of Environment, Natural Resources and Fishery. The petitioners claimed that the former body should have undertaken, at their request, an administrative review of a resolution by which certain industries were relieved from submitting an environmental impact assessment and, instead, were ordered to deliver a further simple pre-emptive report. The plaintiffs further argued that the resolution should have been published following the provisions of the North American Agreement on Environmental Cooperation (NAAEC).

The a quo denied the petitioner's request after considering that they had failed to demonstrate their standing for the administrative review petition. Furthermore, the a quo established that the resolution addressed the regulation of the environment by imposing duties on industries. Thus, not being part of this class persons affected by the resolution, they lacked of the appropriate standing to request administrative review. In the view of the a quo, the resolution incorporated an administrative simplification measure, and was not an environmental regulation. Finally, the a quo established that NAAEC provisions were not applied to the resolution, bearing in mind that the resolution addressed a specific group of industries and not the wider public.

Legal Framework

Agreement by means of which the procedure for the presentation of EIA is simplified
Federal Law of Administrative Procedure, arts. 4, 43, 83, and 89
Constitution, arts. 14, 16, 103, and 107
Law of "Amparo", arts. 4, 13, 23, 73, 76, 77, 78, 80, 84, 85, and 86
North American Agreement on Environmental Cooperation (NAAEC), art. 4
General law of Ecologic Balance, arts 28, 29, and 33.

Held

The Tribunal reviewed the first instance decision and rejected its conclusions. The Appeal Tribunal stated that the content of the resolution related to the protection of the environment despite its goal of administrative simplification. Therefore, the tribunal granted the plaintiffs standing supported by domestic legislation, notwithstanding the fact that NAAEC also granted these same rights.

VENEZUELA 1

Donato Furio Giordano v Ministry of Environment and Renewable Natural Resources Supreme Court of Justice November 25 1999

Introduction

The plaintiff constructed a building that incorporated septic wells that did not comply with the existing environmental legislation. The septic wells were subsequently determined to be polluting marine waters near to the property, by filtering their wastes into the sea. The Ministry of Environment and Renewable Natural Resources enacted a resolution by means of which it ordered the demolition the building owned by the plaintiff. The resolution did not provide for the payment of any damages to the plaintiff, on the basis that the environmental legislation in force restricted the citizen's property rights.

Arguing the unconstitutionality of the resolution, the plaintiff requested it be annulled but the Ministry confirmed its decision and demolished the building. The plaintiff then proceeded to sue the Venezuelan State and requested the payment of: i) the price of the demolished property; ii) damages arising from the loss of use of the building; and iii) damages caused to him and his family by the demolition of the asset. The plaintiff argued that his constitutionally protected property rights had been violated and that the appropriate course of action was for the Ministry to have proceeded to expropriate the building on the grounds of a preferential public interest. In such circumstances compensation would have been payable.

The Attorney General *(Ministerio Público)* argued that the request should be dismissed. The resolution addressed the correction of an ongoing activity that threatened the environment; and the payment of damages was only legitimate when a person was deprived of a right for the good of the public interest.

Legal Framework

Resolution RI-1854 of 05/09/88 issued by the Ministry of the Environment and Natural Renewable Resources

Organic Law of the Environment, arts 20, 25(4), and 35

Constitution of 1961, arts. 99, 102, 106, and 136

Civil Code, art. 545

Held

The Court admitted the legal action commenced by the plaintiff. However, the court established that the Ministry of Environment had the duty of looking after the natural ecosystems where human life develops and, hence, the law entitles such an institution to demand the demolition of works that damage or threaten to damage the environment. The Court also affirmed that property rights are not of an absolute character and pointed out that the plaintiff had never denied that the water pollution did not derive from his septic wells. Finally the Court rejected the damages request by confirming that the Ministry had acted within a legitimate legal framework.

VENEZUELA 2

Jesús Manuel Vera Rivera v Ministry of Environment and Renewable Natural Resources, Supreme Court of Justice September 21 1999

Introduction

The plaintiff requested the annulment of a resolution issued by the General Direction of the Venezuelan Forest Sectoral Service (SEFORVEN) part of the Ministry. By means of the resolution, SEFORVEN denied the plaintiff the authorization to occupy land for the exploitation of a mining lease, previously granted by the Ministry of Mining and Energy.

Legal Framework

Constitution, preamble, arts. 96, 97, 106, 118, 121, and 128
Law of Mining, arts 7 and 19
Organic Law for the Territory's Organization, arts. 17, 43, 45, 46, 53, and 76
Organic Law of the Environment, arts. 3 and 7.
Law of Forests and Waters, art. 56

Held

The Court held that the State should never have granted the mining lease to the plaintiff, and, thus the corresponding resolutions were illegal. This was the consequence of an inconsistent analysis that ignored the incompatibility of the proposed mining and the forest activities within an area legally established as a forest reserve.

VENEZUELA 3

Kari'na Community v Municipality of Marin, State of Monagas

Supreme Court of Justice (Plenary) October 6 1998

Introduction

Arguing its unconstitutionality, the Kari'na Community requested the annulment of a resolution issued by the Municipality defendant, together with the protection of their constitutional rights. The resolution declared certain lands as public lands, notwithstanding that the former belonged to the plaintiff community, on the basis that the community no longer existed.

Legal Framework

Resolution on the Delimitation of Public Lands on the Municipality of Maturín
Law of Expropriation for Public Interest Reasons, arts. 3 and 4
Civil Code, arts. 545 and 546
Organic Law of the Municipal Regime, art. 123 (3)

Held

The Court held that the municipality had violated the Constitution for it did not have the jurisdiction to nullify the document that supported the property rights of the community. Such a power resided in the judiciary alone.

The Court referred to the international legal regime relating to the indigenous peoples rights and stated that such peoples were "one of the more exposed social groups to the violation of their human rights, due to their socio-economic and cultural conditions of poverty, marginality, and isolation; and the existence of different interests over their lands". Thus, the Court placed special emphasis on its commitment to protect the rights of indigenous peoples, and declared the nullity of the resolution. However, certain land leases over the indigenous lands, that were agreed during the legal existence of the resolution, were protected to guard the interests of third parties, despite the possibility of subsequent legal proceedings attacking their validity.

VENEZUELA 4

Promociones Terra Cardón v the Republic of Venezuela

Supreme Court of Justice January 27 1994

Introduction

The corporation as plaintiff sued the Republic of Venezuela and requested the payment of damages because the State had declared part of its property as national parkland.

Legal Framework

Law of Forests and Waters, arts. 10, 11, 12, 13, 14, 15, and 16

Organic Law of Territorial Organization, arts. 1, 2, 5, 15, and 63

Inter-American Convention for the Protection of Flora, Fauna and Beatuful Sceneries

Constitution, arts. 46, 99, 101, and 206

Law of Expropriation for Public Interest Reasons, art. 3

Held

The Court referred to the doctrinal concept of "vital and existential public order" and explained its meaning related to the harmonious synthesis of economic, social, biological and even esthetical issues. The Court established that the owner of a land within a national park keeps most of its property rights over its property but is indeed deprived of some of them related to the alteration and full enjoyment of the land. Hence, although establishing a private property as part of a national park does not constitute its expropriation, its owner does suffer certain damages. Thus, the Court dismissed the request for expropriation damages, but allowed the plaintiff partial damages for the restriction of his property rights.

VENEZUELA 5

Granja Porcina Isabel v Ministry of Environment and Renewable Natural Resources Supreme Court of Justice January 23 1992

Introduction

Mr. Antonio Nunes owned Granja Porcina Isabel, a pig breeding farm. His business was subject to a regulation related to liquid effluents. He was required to comply with this within a stated timeframe. The regulation provided the closing of the business if he did not comply. The Organic Law of the Environment provided also for the closing of establishments and/or industries whose activities by degraded or polluted the environment through direct or indirect means.

The Ministry of Environment and Renewable Natural Resources ordered the closing Mr. Nunes' business. Within the corresponding resolution, the Ministry forbade any entry to the property and established a security post to ensure this. The plaintiff requested the protection of his constitutional rights through an *amparo* action.

Legal Framework

Resolution 31 of 28 May 1985 on Effluent Liquids Regulations
Organic Law of the Environment, arts. 3, 25, and 26

Held

The Court studied whether the complementary orders closing decision where within the Ministry's jurisdiction, or that of the judiciary.

The law provided the executive power and jurisdiction to carry out the necessary orders, so that the Court rejected the plaintiff's request. The Court stated that before using the *amparo* procedure to attack administrative resolutions, the plaintiff must exhaust the ordinary procedures.

BANGLADESH 1

Dr. Mohiuddin Farooque v Bangladesh, Represented By The Secretary, Ministry Of Irrigation, Water Resources & Flood Control & others 48 Dlr 1996 Supreme Court Of Bangladesh Appellate Division (Civil) A.T.M. Afzal C. J, Mustafa Kamal J, Latifur Rahman J, Mohammad Abdur Rauf, J. & B.B. Roy Choudhury J.

Introduction

The Petitioner, the Secretary General of the Bangladesh Environmental Lawyers Association (BELA), appealed against an order of the High Court Division summarily dismissing a Writ Petition filed on behalf of a group of people in the district of Tangail whose life, property, livelihood, vocation, and environmental security were being seriously threatened by the implementation of a flood control plan, the Compartmentalisation Pilot Project, FAP-20. The Petition was dismissed by the High Court on the ground that BELA was not an 'aggrieved person' within the meaning of Article 102 of the Constitution of Bangladesh. Articles 31 & 32 of the Constitution protects the right to life as a fundamental right, but there is no express right to a healthy environment. The question before the Court was whether the fundamental right to life included the protection and preservation of the environment, ecological balance and an environment free from pollution essential for the enjoyment of the right to life.

Legal Framework

Articles 31, 32 and 102 of the Constitution of Bangladesh.

Held

The Appellate Division of the Supreme Court of Bangladesh allowed the appeal, granting the Petitioner locus standi to petition the High Court Division under Article 102 of the Constitution, stating that the expression "any person aggrieved" in Article 102 of the Constitution is not confined to individual affected persons only, but extends to the people in general, as a collective and consolidated personality. The Court considered the submissions of the Bangladesh Environmental Lawyers Association in the writ, and concluded that the Association should be given locus standi to maintain the writ petition stating that, in this case, the Association is a 'person aggrieved' within the meaning of Article 102 of the Constitution "because the cause it bona fide espouses,

both in respect of fundamental rights and constitutional remedies, is a cause of an indeterminate number of people in respect of a subject matter of great public concern"

"The expression 'any person aggrieved' approximates the test of or if the same is capsulized, amounts to, what is broadly called, "sufficient interest". Any person other than an officious intervener or a wayfarer without any interest in the cause beyond the interest of the general people of the country having sufficient interest in the matter in dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from a breach of some public duty or for violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. The real test of 'sufficient interest' of course essentially depends on the co-relation between the matter brought before the Court and the person who is bringing it." (Hon. Mr. Justice A.T.M. Afzal, Chief Justice.)

"Although we do not have any provision like Article 48A of the Indian Constitution for protection of environment, Articles 31 and 32 of our Constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation, without which life can hardly be enjoyed. Any act or omission contrary thereto will be violate of the said right to life" (Hon. Justice B.B. Roy Choudhury)

Cases Cited

Blackburn v. Attorney General [1971] 1 WLR 1037
Durayappah v. Fernando [1967] 2 AC 337
Giasuddin Bhuiyan v. Bangladesh 1 (1981) BCR (AD) 81
IRC v. National Federation of Self Employed and Small Business Ltd.
[1981] 2 All ER 93
Mian Fazal Din v. The Lahore Improvement Trust 21 DLR (SC) 225
Muntizma Committee v. Director Katchi Ahadies, Sindh PLD 1992 (Karachi)
RS Secretary of State for the Environment, ex parte Rose Theatre Trust Co. (Qbd)
[1990] 1 All ER 754
Shehla Zia v. WAPDA PLD 1994 (SC) 693
Sierra Club v. Morton 401 US 907 (1971) (No. 70-34)

BANGLADESH 2

Dr Mohiuddin Farooque v Secretary, Ministry Of Communication, Government of the Peoples' Republic of Bangladesh and 12 Others, Supreme Court Of Bangladesh High Court Division Writ Petition No. 300 Of 1995
A M Mahmudur Rhaman J and Mahfuzur Rahaman J.

Introduction

Dr Mohiuddin Farooque of the Bangladesh Environmental Lawyers Association, filed this petition against the Secretaries of the Ministries of Communication, Environment, Health, Home Affairs and Industries, and others including the Chairman of the Bangladesh Road Transport Authority and the Commissioner of Dhaka Metropolitan Police, to require them to perform their statutory duties and mitigate air and noise pollution caused by motor vehicles in the city of Dhaka.

The Petitioner argued that vehicles on Dhaka's roads did not comply with the required fitness standards and that they emitted smoke harmful to humans and that the use of prohibited horns and audible signaling devices was causing extreme noise pollution.

Petitioner argued that although the Constitution of Bangladesh contained no specific right to a safe and healthy environment, this right was inherent in the "right to life" enshrined in Article 32. The petitioner stated that this interpretation of Article 32 is supported by Article 31, which prohibits actions detrimental to life, body or property.

Legal Framework

Articles 31 and 32 of the Constitution of Bangladesh.
Dhaka Motor Vehicles Ordinance 1983.

Held

Respondent No. 2 (Chairman, Bangladesh Road Transport Authority) and Respondent No. 4 (Commissioner, Dhaka Metropolitan Police) were required to show cause as to why they should not be directed to take effective measures, as provided in the Motor Vehicles Ordinance 1983, to check air pollution caused by motor vehicle emissions and noise pollution resulting from audible signalling devices.

BANGLADESH 3

Sharif Nurul Ambia v Bangladesh Supreme Court Of Bangladesh, High Court Division, Dhaka (Special Original Jurisdiction) Writ Petition No. 937 Of 1995
M I U Sarker, J and A S Ahammed, J

Introduction

The Petitioner complained of certain serious environmental problems, which were likely to be aggravated if a multi-storey building was allowed to be constructed in a car park beside its office premises. The building was being constructed by the Municipal Authority of the town in violation of the approved master plan of the relevant building construction authority, of and the terms of the lease subject to which the land was transferred to it by another statutory authority.

Legal Framework

Article 102 (1)(2)(a) of the Constitution of Bangladesh.

Held

A Rule Nisi was issued calling upon the Respondents to show cause why the construction of the building being undertaken by two of the Respondents in the public car park should not be declared to have been undertaken unlawfully, against public interest and without lawful authority.

BANGLADESH 4

Bangladesh Environmental Lawyers Association v The Election Commission & others Supreme Court Of Bangladesh High Court Division Writ Petition No. 186 Of 1994 M.I.U. Sarker, J. And J.Ke. Hoque, J.

Introduction

The petitioner, Dr. Mohiuddin Farooque of the Bangladesh Environmental Lawyers Association, filed this application against the Election Commission and others, alleging that candidates for the offices of Ward Commissioner and Major were flouting election laws and causing environmental pollution in the city with noise from loudspeakers and unscheduled processions resulting in traffic jams, and city walls defaced by slogans.

The Election Commission had given direction to the Dhaka City Corporation and police authorities, and the Dhaka City Corporation subsequently published notices in the daily newspapers that undesirable posters, banners, and wall writings be removed. The Petitioner asked that these candidates be required to comply with the directives of the Election Commission that such pollution cease.

Legal Framework

Article 126 of the Constitution of Bangladesh (executive authorities shall assist Election Commission in discharge of its functions.)

Rule 3 of the Dhaka City Corporation Rules, 1983 (executive authorities shall assist Election Commission in performance of its functions.)

Held

It is clear that the Election Commission and the Dhaka City Corporation have taken steps to stop the alleged environmental pollution. In addition, the Attorney-General assured the Supreme Court that the government will take all necessary steps to implement the directions of the Election Commission.

In view of these facts, the Supreme Court held that further direction was unnecessary. The Supreme Court noted that "it is desirable to mitigate the environmental pollution as alleged by the Petitioner".

BANGLADESH 5

Farooque and Sekandar Ali Mondol v Bangladesh Supreme Court of Bangladesh High Court Division Writ Petition No. 998 of 1994 with Petition No. 1576 of 1994

Introduction

The petitioners questioned the activities and implementation of a flood control programme undertaken in the District of Tangail. The petitioners apprehended environmental damage from the flood control plan which would impact on the life, property, livelihood, vocation and environmental security of more than one million people. The petitioners had been authorised by a resolution of the Executive Committee of the Bangladesh Environmental Lawyers Association (BELA) to represent the association.

Legal Framework

Article 102 of the Constitution of Bangladesh

Held

The flood control programme (FAP-20) was a development project aimed at controlling floods, which regularly brought misery to the flood prone areas of the district of Tangail and an interference with the project would deprive the country of the benefits of the scheme and foreign assistance. Although the court found it impractical to stop the work, the court ordered the respondents to comply with the law on drainage and resettlement of displaced persons and not to implement the scheme with impunity.

INDIA 1

M C Mehta v Kamal Nath & others, Supreme Court Of India
(1997)1 Supreme Court Cases 388 Kuldip Singh, J.

Introduction

The Court took notice of an article which appeared in the Indian Express stating that a private company "Span Motels Pvt. Ltd.", to which the family of Kamal Nath, a former Minister of Environment and Forests, had a direct link, had built a motel on the bank of the River Beas on land leased by the Indian Government in 1981. Span Motels had also encroached upon an additional area of land adjoining this leasehold area, and this area was later leased out to Span Motels when Kamal Nath was Minister in 1994. The motel used earthmovers and bulldozers to turn the course of the River Beas, create a new channel and divert the river's flow. The course of the river was diverted to save the motel from future floods.

Legal Framework

Constitution of India Articles 21 and 32
Forest Conservation Act of 1980

Held

The Supreme Court of India quashed the prior approval for the additional leasehold land, given in 1994, and the Government were ordered to take over the area and restore it to its original condition. Span Motels were ordered to pay compensation to restore the environment, and the various constructions on the bank of the River Beas were to be removed and reversed. Span motels were required to show why a pollution fine should not be imposed, pursuant to the polluter pays principle. Regarding the land covered by the 1981 lease, Span Motels were required to construct a boundary wall around the area covered by this lease, and Span Motels were ordered not to encroach upon any part of the river basin. In addition, the motel was prohibited from discharging untreated effluents into the River.

This ruling is based on the public trust doctrine, under which the Government is the trustee of all natural resources which are by nature meant for public use and enjoyment.

The Court reviewed public trust cases from the United States and noted under English common law this doctrine extended only to traditional uses such as navigation, commerce and fishing, but that the doctrine is now being extended to all ecologically important lands, including freshwater, wetlands and riparian forests. The Court relied on these cases to rule that the Government committed patent breach of public trust by leasing this ecologically fragile land to Span Motels when it was purely for commercial use.

Cases Cited

City of Milwaukee v. State 193 Wis. 423

Crawford County Lever and Drainage Dist. No. 1 182 Wis 404

Gould v. Greylock Reservation Commission 350 Mass 410 (1966)

Illinois Central Railroad Co. v. People of the State of Illinois 146 U.S. 387 (1892)

Indian Council for Enviro Legal Action v. Union of India (1996) 3 SCC 212: JT (1996) 2 SC 196

Marks v. Whitney 6 Cal. 3d 251

National Audubon Society v. Superior Court of Alpine County 33Cal.3d419

Philips Petroleum Co. v. Mississippi 108 S.Ct. 791 (1988)

Priewev v. Wisconsin State Land and Improvement Co. 93 Wis. 534 (1896)

Robbins v. Dep 't of Public Works 244 N.E. 2d 577

Sacco v. Development of Public Works 532 Mass 670

State v. Public Service Commission 275 Wis l12

United Plainsmen v. N.D. State Water Cons. Comm'n 247 NW 2d 457 (N.D. 1976)

Vellore Citizen's Welfare Forum v. Union of India(1996) 5 SCC 647: JT (1996) 7 SC 375

INDIA 2

Research Foundation For Sciences, Technology And National Resource Policy v Union Of India, the Supreme Court Of India Writ Petition No. 657 0f 1995
Order Delivered On May 5th, 1997

Introduction

This case concerned the lack of activity by the relevant authorities in tackling the safe disposal of hazardous waste:

"The learned Additional Solicitor General stated on instructions that the quantity of hazardous waste generated in the country each day is about two thousand tons. This fact alone indicated sufficiently the magnitude of the problem and the promptitude with which it need to be tackled before the damage becomes irreversible. There is, therefore, no time to lose. Prompt action is required to be taken not only by the Central Government but also by all the State Governments as well as the Central and State Pollution Control Board. It is obvious that there has been considerable inaction so far by all the concerned authorities, including the Pollution Control Boards. Authorisation/ Permission granted so far without the availability of the required safe disposal sites is a matter of serious concern and will require further examination to fix the responsibility of the person whose duty it is to ensure availability of safe disposal sites at the time of granting authorisation/permission. However, it is necessary that the suitable direction may be given at this stage to prevent as much damage in the future as possible on account of the unchecked activity of import/generation/disposal of hazardous waste in the country.

The learned Additional Solicitor General also submitted that appropriate directions by this Court are necessary to ensure performance of duty by the State Government, the Pollution Control Board and Other concerned authorities. The learned ASG has also submitted a memorandum prepared by the Ministry of Environment and Forests indicating the tasks accomplished by the MoE&F so far and the proposed action planned by it."

Held

(l) Notice would be served on all the State Governments and the State Pollution Control Board requiring them to file their reply within four weeks of the receipt of the notice of the action taken by them in this behalf, particularly with reference to the identification/notification and availability of safe disposal sites, and the steps taken to ensure safe disposal of hazardous waste in their state, particularly while granting any authorisation/permission. They must also indicate the action plan, if any, made by them for tackling the problem relating to hazardous waste.

(2) With effect from today no authorisation/permission would be given by any authority for the import which have already been banned by the Central Government or by any order made by any court or any other authority.

(3) With effect from today, no import would be made or permitted by any authority or any person of any hazardous waste that is already banned under the Basel Convention, or which might be banned hereafter, with effect from the date specified.

In view of the magnitude of the problem and its impact, the State Governments are also required to show cause why an order be not made directing closure of the units utilising the hazardous waste where provision is not already made for requisite safe disposal site. Cause be also shown as to why an immediate order should not be made for the closure of all unauthorised hazardous wastes handling units.

The notices to the State Governments and the State Pollution Control Board would be served through the Central Agency.

INDIA 3

Indian Council For Enviro-Legal Action v Union Of India

Supreme Court Of India (1996) 3 Scc 212 B P Jeevan Reddy, J, and B N Kirpal, J.

Introduction

The petitioner, the Indian Council for Enviro-Legal Action brought this action to prohibit and remedy the pollution caused by several chemical industrial plants in Bichhri village, Udaipur District, Rajasthan. The Respondents operated heavy industry plants there, producing chemicals such as oleum (a concentrate form of sulphuric acid), single super phosphate and the highly toxic "H" acid (the manufacture of which is banned in western countries).

Respondents operated these plants without permits which caused serious pollution of the environment. Toxic waste water was untreated and left to be absorbed into the earth causing aquafers and the subterranean supply of water to be polluted. The soil also became polluted and unfit for cultivation. Several people in nearby villages are alleged to have contracted diseases due to the pollution, some of whom had died.

From 1989- 1992, the Court issued orders to respondents, directing them to, among other things, control and store the sludge. These orders were largely ignored. In 1994, the National Environmental Engineering Research Institute (NEERI) reported on the pollution caused by respondents, and in 1996, the Court held a final hearing on these matters.

Legal Framework

Constitution of India, Articles 21, 32, 48A and 51A(g).
Environment Protection Act, 1986
The Air (Prevention and Control of Pollution) Act, 1981
The Water (Prevention and Control of Pollution Act, 1974

Held

The Court noted the finding in the Oleum Gas Leak Case II under which an enterprise that is engaged in a hazardous or inherently dangerous activity, which results in harm to

anyone, is strictly and absolutely liable to compensate all those who are affected by the accident. Such liability is not subject to the exceptions of strict liability set forth in Rylands v. Fletcher. This rule is suited to conditions of India. The Court also endorsed the polluter pays principle, under which the financial costs of preventing or remedying damage lie with those who cause the pollution.

The Respondents generated this waste without the requisite clearances/consent/licence, did not install appropriate treatment equipment, did not carry out the Court's orders, and have persisted in an illegal course of activity. The damage they have caused by discharging highly toxic untreated waters into the environment is indescribable. It has adversely affected nearby villagers, the soil and water, and the environment in general.

Sections 3 and 5 of the Environment (Protection) Act 1986 empower the Central Government to take necessary measures to protect the environment. Accordingly, the Central Government will determine the amount of money needed to carry out remedial measures in this case. Respondents are liable to pay to improve and restore the environment in this area. Respondents are "rogue industries", and hence all their plants and factories in Bichhri village are ordered to be closed. Villagers can institute suits in the appropriate civil courts to claim damages from the Respondents.

The Central Government should consider treating chemical industries separately from other industries, and closely monitoring them to ensure they do not pollute the environment. Establishing environmental courts is a good suggestion and would ensure that environmental matters are given the constant and proper consideration they deserve.

Cases Cited

Indian Council for Enviro-Legal Action v. Union of India (1995) 3 SCC 77: (1995)
Pravinbhai Jashbhai Patel v. State of Gujarat (1995) 2 GLR 1210: (1995) 2GLH352
Cambridge Water Co. v. Eastern Counties Leather, [1994] 1 All ER 53
Burnie Port Authority v. General Jones Pty Ltd (1994) 68 Aus LJ331
Union Carbide Corp. v. Union of India (1991) 4 SCC 584
MC. Mehta v. Union of India (1987) 1 SCC 395: 1987 SCC (L&S) 37
Ballard v. Tomlinson (1885) 29 CH. D. 115: (1881-5) All ER Rep. 688
Rylands v. Fletcher (1868) LR 3 HL 330: (1861-73) All ER Rep. 1

INDIA 4

M/S Aziz Timber Corp & others v State Of Jammu & Kashmir
Through Chief Secretary & others, The High Court Of Jammu And Kashmir
At Srinagar O.W.P. No. 568-84/96 Continuing Petition No. 51/96

Introduction

Petitioners, M/S Aziz Timber Corporation and others, are involved in logging in the State of Jammu and Kashmir. In this State there is a significant problem with deforestation and illegal logging, and thus, pursuant to Writ Petition (Civil) No. 171, Environment Awareness Forum v. State of Jammu and Kashmir, the Supreme Court of India delivered an order on 10 May 1996 imposing a logging ban within the state. The Supreme Court of India also prohibited the removal from the State of any trees that had been cut, and directed the Chief Secretary of the State of Jammu and Kashmir to ensure strict and faithful compliance with this order. In addition, the Court stated that the order operated despite any licence/permit granted by any authority, or any order made by any court in the country.

The Principal Chief Conservator of Forests of Jammu and Kashmir subsequently issued an order on 9 August 1996 prohibiting sawn timber from moving beyond Jammu and Kashmir, but allowing transport of timber outside the State provided the source of the timber was "genuine" and that "codal provisions under the J&K Forest Act" were strictly followed.

The Petitioners subsequently challenged the August 1996 order in the High Court of Jammu and Kashmir, stating that they had licences for logging and were registered for the sale of timber. They also claimed that this order deprived them from carrying on their trade. On 20 August 1996 a single judge of the High Court of Jammu and Kashmir stayed the order of 9 August 1996.

This development was subsequently made known to the Supreme Court of India, who on 10 October 1996 observed that the 9 August 1996 order was in direct conflict with their earlier 10 May 1996 order regarding this matter. The Court suspended the 9 August 1996 order, and re-directed the strict compliance with their earlier order.

On 24 October 1996 the Court issued an order requiring the concerned state officials to show cause why proceedings should not be initiated against them for contempt of court. The Court also noted the 20 August 1996 interim order by the High Court of Jammu and Kashmir, and stated that the 10 May 1996 order superseded this order.

Legal Framework

Jammu and Kashmir Forest Act.

Held

The High Court of Jammu and Kashmir dismissed these writ petitions, in view of the earlier order by the Supreme Court of India regarding this matter. To prevent petitioners from further suppressing the facts in an attempt to further their trade and business interests, a copy of this order will be circulated to other subordinate judicial offices for their information and compliance, so as to avoid future contradictory orders, and to ensure that the 10 May 1996 order of the Supreme Court of India will be carried out.

The 10 May 1996 order of the Supreme Court suspended the petitioners' licences to log and to move timber out of the state of Jammu and Kashmir, and this order must be given effect.

INDIA 5

Vellore Citizens Welfare Forum v Union Of India, Supreme Court Of India AIR 1996 SCC 2715 Kuldip Singh, J, Faizan Uddin, J., andK. Venkataswami, J.

Introduction

The Petitioner, the Vellore Citizens Welfare Forum, filed this action to stop tanneries in the State of Tamil Nadu from discharging untreated effluent into agricultural fields, open lands and waterways. Among other types of environmental pollution caused by these tanneries, it is estimated that nearly 35,000 hectares of agricultural land in this tanneries belt has become either partially or totally unfit for cultivation, and that the 170 types of chemicals used in the chrome tanning processes have severely polluted the local drinking water. The Court has passed other orders relating to this case, and has monitored this petition for almost five years.

Legal Framework

Constitution of India, Articles 21, 32, 47, 48A, 51A(g).
The Water (Prevention and Control of Pollution) Act, 1974.
The Air (Prevention and Control of Pollution) Act, 1981.
Environment Protection Act 1986.
Environment (Protection) Rules, 1986.
Madras District Municipalities Act (1920).

Held

The Supreme Court noted that although the leather industry is a major foreign exchange earner for India and provided employment, it does not mean that this industry has the right to destroy the ecology, degrade the environment or create health hazards.

Sustainable development, and in particular the “polluter pays” principles and the precautionary principle, have become a part of customary international law. Even though section 3(3) of India's Environment Protection Act 1986, allows the Central Government to create an authority with powers to control pollution and protect the environment, it has not done so. Thus, the Court directed the Central Government to take immediate action under the provisions of this Act.

The Court ordered the Central Government to establish an authority to deal with the situation created by the tanneries and other polluting industries in the State of Tamil Nadu. This authority shall implement the precautionary principle and the polluter pays principle, and identify the (1) loss to the ecology/environment; and (2) individuals/families who have suffered because of the pollution, and then determine the compensation to reverse this environmental damage and compensate those who have suffered from the pollution. The Collector/District Magistrates shall collect and disburse this money.

If a polluter refuses to pay compensation, his industry will be closed, and the compensation recovered as arrears of land revenue. If an industry sets up the necessary pollution control devices now, it is still liable to pay for the past pollution it has generated.

Each tannery in the listed district is subject to a Rupees 10,000 fine which will be put into an "Environment Protection Fund". This fund will be used to restore the environment and to compensate affected persons. Expert bodies will help frame a scheme to reverse the environmental pollution. All tanneries must set up common effluent treatment plants, or individual pollution control devices, and, if they do not, the Superintendent of Police and the Collector/District Magistrate/Deputy Commissioner in each of the respective districts is authorised to close the plants down. No new industries shall be permitted to be set up within the listed prohibited areas.

This matter will now be monitored by a Special Bench- "Green Bench"- of the Madras High Court.

Cases Cited

Council for Enviro Legal Action v. Union India (1996) 2 JT (SC) 196:
(1996 AIR SCW 1069)

INDIA 6

Union Carbide Corporation v Union of India (Bhopal Case - Iii) AIR 1992 Sc 248

Ranganath Misra C J, K N Singh, M N Venkatachalliah, A M Ahmadi & N D Ojha, Jj.

Introduction

Several Writ Petitions and Review Petitions were filed in the Supreme Court under Articles 32 and 137 respectively of the Constitution, challenging the constitutionality, legal validity, propriety and fairness of the settlement in the mass tort action filed on behalf of the victims of the Bhopal gas leak. It was contended on behalf of the Appellant that prohibitions, limitations or provisions contained in ordinary law, irrespective of the importance of public policy on which it is founded, ipso facto act as prohibitions or limitations on the constitutional powers under Article 142 of the Indian Constitution.

Legal Framework

Constitution of India Articles 32, 137 and 142.

Held

The Supreme Court rejecting such a contention stated that in exercising powers under Article 142 of the Constitution and in assessing the needs of "complete justice" of a cause or matter, the apex court will take note of the express prohibitions in any substantive statutory provision based on fundamental principles of public policy and regulate the exercise of its power and discretion accordingly.

INDIA 7

M.C. Mehta v Union Of India & others Supreme Court Of India, Writ Petition (Civil) No. 860 Of 1991, The Chief Justice, G.N. Ray, J., And A.S. Anand, J.

Introduction

Petitioner, M.C. Mehta filed this application in the public interest, asking the Supreme Court to: (1) issue direction to cinema halls that they show slides with information on the environment; (2) issue direction for the spread of information relating to the environment on All India Radio; and (3) issue direction that the study of the environment become a compulsory subject in schools and colleges.

Petitioner made this application on the grounds that Article 51A(g) of the Constitution requires every citizen to protect and improve the natural environment, including forests, lakes, rivers and wildlife, and to have compassion for living creatures. To fulfil these obligations to the environment, the Petitioner argued that people needed to be better educated about the environment.

Legal Framework

Constitution of India, Article 5lA(g).
Water Pollution Control Act of 1974.
Air Pollution Control Act 1981.
Environment Protection Act of 1986.

Held

The Court noted the world-wide concern about environmental matters had increased greatly since the early 1970s. The Court also noted that the enormous increase in human population in the last fifty years, as well as changes in lifestyles, have necessitated that environmental issues be given more attention, and that it is the Government's obligation to keep citizens informed about such matters.

The Court noted that the Attorney-General of India agreed to work out procedures to take care of some of the Petitioner's concerns. Thus, the Court issued the following directions:

(1) The State Governments and Union Territories will require, as a condition of licences to all cinema halls, touring cinemas and video parlours, that at least two slides/messages provided by the Ministry of Environment, and which deal with environmental issues, will be shown free of cost as part of each show. Failure to comply with this order is grounds for cancellation of a licence.

(2) The Ministry of Information and Broadcasting will start producing short films which deal with the environment and pollution. One such film will be shown, as far as practicable, in one show every day by the cinema halls.

(3) All India Radio and Dooradarshan will take steps to make and broadcast interesting programmes on the environment and pollution. The Attorney-General has said that five to seven minutes can be devoted to these programmes each day on these radio/TV stations.

(4) The University Grants Commission will take appropriate steps to require universities to prescribe a course on the environment. They should consider making this course a compulsory subject.

In education up to the college level, every State Government and every Education Board connected with education up to the matriculation stage, as well as intermediate colleges, is required to take steps to enforce compulsory education on the environment in a graded way – Compliance to be required for the next academic year.

INDIA 8

Subash Kumar v State Of Bihar, AIR 1991 Sc 420 Kn. Singh And N. D. Ojha Jj.

Introduction

The Petitioner filed a public interest petition in terms of Article 32 of the Constitution, pleading infringement of the right to life guaranteed by Article 21 of the Constitution, arising from the pollution of the Bokaro River by the sludge/slurry discharged from the washeries of the Tata Iron and Steel Company Limited (TISCO). It was alleged that as a result of the release of effluent into the river, its water is not fit for drinking purposes nor for irrigation. The Respondents established that TISCO and the State Pollution Control Board, had complied with statutory requirements, and that the Petitioner was motivated by self interest.

Held

The Court observed that Article 32 is designed for the enforcement of fundamental rights. The right to life enshrined in Article 21, includes the right to enjoyment of pollution-free water and air for the full enjoyment of life. If anything endangers or impairs the quality of life, an affected person or a person genuinely interested in the protection of society would have recourse to Article 32. Pubic interest litigation envisages legal proceedings for vindication or enforcement of fundamental rights of a group of persons or community which are not able to enforce their fundamental rights on account of their incapacity, poverty or ignorance of law. However, public interest litigation cannot be employed to satisfy a personal grudge or enmity. Personal interest cannot be enforced through the process of Court under Article 32 in the garb of public interest litigation. Since the instant case was motivated by self-interest, it was accordingly dismissed.

INDIA 9

Charan Lal Sahu v Union Of India (Bhopal Case – Ii) Air 1990 Supreme Court 1480 Sabyasachi Mukherji, C. J., K.N. Singh, S. Ranganathan, A. M. Ahmadi & K.N. Saikia, Jj.

Introduction

Following the Bhopal Gas Leak tragedy when over 3000 people were killed by the leak of a highly toxic Methyl Isocyanate (MIC) gas from a storage tank at the Bhopal plant of Union Carbide (India) Ltd., the Government of India, acting as parens patriae, passed the Bhopal Gas Disaster (Processing of Claims) Act (1985) to take over and pursue the claims of the victims, as they were unable in their circumstances to pursue their claims fully and properly.

The Petitioner challenged the validity of the Bhopal Gas Disaster (Proceedings of Claims) Act, 1985 in the Supreme Court.

Legal Framework

Constitution of India, Articles 14 and 226.
Bhopal Gas Disaster (Processing of Claims) Act (1985).

Held

The Supreme Court held that the Act was valid and that the State had rightly taken over the exclusive right to represent and act on behalf of every person entitled to make a claim, as a majority of the victims were poor and illiterate. Consequently, the exclusion of the victims from filing their own cases, was held to be proper.

The Court also held that the Act only deals with civil liability and as such does not curtail or affect rights in respect of criminal liability.

INDIA 10

Chhetriya Pardushan Mukti Sangharsh Samiti vState of U P & others

AIR 1990 Sc 2060 Sabyasachi Mukharji, C. J. AndK.N.Saikia, J.

Introduction

A letter written to the Court was treated as a Writ Petition under Article 32 of the Constitution of India. The letter written by Chhetriya Pardushan Mukti Sanghartsh Samiti, alleged environmental pollution in the Sarnath area. It was also alleged therein that the Jhunjhunwala Oil Mills and refinery plant are located in the green belt area, touching three villages and the Sarnath temple of international fame. The smoke and dust emitted from the chimneys of the mills and the effluents discharged from these plants were alleged to be causing environmental pollution in the thickly populated area and were proving a serious health hazard. It was alleged that people were finding it difficult to eat and sleep. The Petitioners sought directions from the Court.

Legal Framework

Constitution of India-Articles 21 and 32.

Water (Prevention and Control of Pollution) Act 6 of 1974.

Air (Prevention & Control of Pollution) Act of No.6 of 1974-Sec. 21

Held

Having considered the facts and circumstances of this case, the Court declared that prima facie the provisions of the Air Pollution Control Act have been complied with and there was no conduct, which is attributable to the owners leading to pollution of air or creating ecological imbalances requiring interference by the Supreme Court.

The Court observed that “Article 32 is a great and salutary safeguard for preservation of fundamental rights of the citizens. Every citizen has a fundamental right to have the enjoyment of quality of life and living as contemplated by Art. 21 of the Constitution. Anything which endangers or impairs by conduct of anybody either in violation or in derogation of laws, that quality of life and living by the people is entitled to recourse in recourse of Art. 32 of the Constitution. But this can only be done by any person interested genuinely in the protection of the society on behalf of the society or

community. This weapon as a safeguard must be utilised and invoked by the Court with great deal of circumspection and caution. Where it appears that this is only a cloak to "feed fact ancient grudge" and enmity, this should not only be refused but strongly discouraged. While it is the duty of the Supreme Court to enforce fundamental rights, it is also the duty of the Court to ensure that this weapon under Art. 32 should not be misused or permitted to be misused creating a bottleneck in the superior court preventing other genuine violation of fundamental rights being considered by the Court. That would be an act or a conduct which will defeat the very purpose of preservation of fundamental rights."

Cases Cited

1988 1 SCR279:

AIR 1988 SC 1037

AIR 1988 SC 1037

AIR 1984 SC 802

INDIA 11

Rajasthan State Electricity Board v The Cess Appellate Committee & Another With Rajasthan State Electricity Board v Assessing Authority, Member Secretary, Rajasthan Board For Prevention & Control Of Pollution 1990 Sc 123 S. Ranganathan And A.M.Ahmadi, Jj.

Introduction

The Appellant established a thermal power station on the banks of River Chambal, which consumes water drawn from the river for cooling of the plant. The appellant filed an appeal under Section 13 of the Water (Prevention and Control of Pollution) Cess Act 1977 in respect of the cess (a levy or rental – see case India 27) claimed for a particular period. The appeal was dismissed by the appellate authority holding that the appellant was not entitled to a rebate. Following the dismissal of successive appeals and petitions, the appellant appealed to the Supreme Court challenging the dismissal of the petitions by the Divisional Bench of the Court of Appeal.

Legal Framework

Water (Prevention and Control of Pollution) Cess Act 1977 Sections 7 and 25(1) and Rule 6.

Held

The Supreme Court remitted the matter to the Assessing Authority for reassessment of the cess and gave further directions which the Authority was required to comply with. The Court said that Section 25(1) has nothing to do with a plant installed for the treatment of effluent, although the grant of consent to a new outlet can be conditional on the existence of a plant for the satisfactory treatment of effluents, to safeguard against pollution of water in the stream.

INDIA 12

Union Carbide Corporation v Union Of India And Others (Bhopal - I)
AIR 1990 Sc 273 R. S. Prathak, C. J., E.S. Venkataramiah, Ranganath Misra, M. N. Venkatachalliah, And N. D. Ojha Jj.

Introduction

The Union Carbide Corporation filed an application in revision in the Supreme Court, in terms of Section 155 of the CPC, against the order of the Bhopal District Court, in a claim for damages made by the Union of India on behalf of all the claimants, under the Bhopal Gas Leak Disaster (Processing of Claim) Act, 1985. The Union Carbide Corporation as well as the Union of India, filed separate appeals in the Supreme Court against the judgment of the Madhya Pradesh High Court, which were heard together.

Damages were sought on behalf of victims of Bhopal gas leak. The Court examined the prima facie material for the purpose of quantifying damages, and the question of domestication of the decree in the United States for the purpose of execution.

Legal Framework

Bhopal Gas Leak Disaster (Processing of Claim) Act, 1985.

Held

(1) The Union Carbide Corporation should pay a sum of U.S. Dollars 470 million (Four hundred and seventy million) to the Union of India in full settlement of all claims, rights and liabilities related to and arising out of the Bhopal gas disaster.
(2) The Union Carbide Corporation shall pay the aforesaid sum to the Union of India on or before 31 March 1989.
(3) To enable the effectuation of the settlement, all civil proceedings related to and arising out of the Bhopal gas disaster shall thereby stand transferred to the Supreme Court and shall stand concluded in terms of the settlement, and all criminal proceedings related to and arising out of the disaster shall stand quashed, wherever these may be pending.

Cases Cited

AIR 1987 SC p. 1086

INDIA 13

State Of Bihar v Murad Ali Khan AIR 1989 Sc 1

Ranganath Misra And M. N. Venkatachaliah Jj.

Introduction

In a written complaint filed in the Magistrates Court by a Range Forest Officer under the Wildlife (Protection) Act of 1972, it was alleged that the accused had shot and killed an elephant in a range forest and had removed the tusks. The Magistrate ordered issue of process against the accused, even though investigations by the police were in progress in relation to the same offence. The High Court of Patna quashed the order of the Magistrate and the present special leave petitions were taken up for hearing by the Supreme Court against the findings of the High Court.

Legal Framework

Wildlife Protection Act 1972 - Sections 9(1), 51 and 55.
Criminal Procedure Code - Section 210(1), 482.

Held

Section 9(1) of the Act provides that no person shall hunt any wild animals specified in Schedule 1. An elephant is included in Schedule 1. Violation of section 9(1) is an offence under section 51(1) of the Act. Section 55 of the Act specifies that no court shall take cognisance of any offence against this Act except on the complaint of the Chief Wildlife Warden or such other officer as the State Government may authorise in his behalf.

The Supreme Court held that it could not be said that the Magistrate acted without jurisdiction in taking cognisance of the offence and ordering issue of process against the accused, merely because an investigation by the police was in progress in relation to the same offence.

Cases Cited

AIR 1983 SC 67:(1983) 1 SCR 884: 1983 Cri LJ 159

AIR 1983 SC 158: (1983) 1 SCR 895 :1983 Cri LJ 172

Jeffiers v. United States (1977) 532 US 137: 53 Law Ed 2d 168:

AIR 1961 SC 578:(1961)3 SCR 107: 1961 (1) Cri Lj 725

AIR 1958 SC 119: 1958 SCR 822: 1958 Cri Lj 260

AIR 1957 SC 458: 1957 SCR 423: 1957 Cri Lj 575

AIR 1957 SC 592: 1957 SCR 868: 1957 Cri LJ 892

AIR 1952 SC 149: 1952 SCR425: 1952 Cri Lj 832(1931) 284 IS 299:

Blockburger v. United States 76 Law Ed 306

INDIA 14

Calcutta Youth Front v State Of West Bengal 1988 Sc 436 A P Sen & B C Ray Jj

Introduction

The Calcutta Municipal Corporation granted a licence to a company for construction of an underground basement market and parking place in a section of a public park. The licence was granted subject to the condition that the licensee shall improve and maintain the park on the terrace of the underground market. The Petitioner contended in the Supreme Court that the granting of such licence would create to an ecological imbalance in the area and also that the scheme does not fall within the ambit of "development work" as set out in section 353(2) of the Calcutta Municipal Corporation Act 1980.

Legal Framework

Calcutta Municipal Corporation Act 1980 - Section 353(2).

Held

In dismissing the Petition, the Supreme Court held that in the circumstances of this case, the High Court was justified in holding that the construction of the underground market would not destroy the intrinsic character of the public park and that there was no possibility of creating an ecological imbalance. On the contrary, the process of replanting of tall trees had already been effected in terms of the earlier order passed by the Divisional Bench, and the condition of the park had improved.

Cases Cited

AG. v. Cap. of Sunderland (1875-76) 2 Ch. D. 634

INDIA 15

Dr. Shiva Rao, Shanta Ram Wagle & others v Union Of India & others

Air 1988 Sc 953 A P. Sen And L.M. Sharma, Jj.

Introduction

A special leave petition was filed in the Supreme Court against the judgment and order of the High Court of Bombay, declining to issue a Writ of Mandamus which would have the effect of restraining the respondents from releasing 7500 cartons of butter imported into India from Ireland, on the ground that the butter was contaminated by radioactive fallout from the explosion in the Chernobyl nuclear reactor.

Legal Framework

Constitution of India Article 226.

Held

The Supreme Court dismissed the petition following consideration of the Report submitted to the Court by a three man Committee of specialists which it appointed to consider the question whether "milk and dairy products and other food products containing man-made radio nuclides within permissible levels by the Atomic Energy Regulatory Board imported on 27 August 1987, are safe and/or harmless for human consumption". The Committee was of the view that milk and the other dairy products in question were safe and harmless for human consumption.

INDIA 16

Kinkri Devi And Another v State Of Himachal Pradesh And Others
AIR 1988 Himachal Pradesh 4 P. D. Desai, C. J. And R. S. Thakur, J.

Introduction

The Petitioners sought an order of the Court to have a mining lease cancelled, to restrain the Respondents from operating the mines covered by the lease in such a manner as to pose a danger to the adjoining lands, water resources, pastures, forests, wildlife, ecology, environment and the inhabitants of the area, and for compensation for the damage caused by the uncontrolled quarrying of the limestone.

Legal Framework

Articles 48A and 5lA(g) of the Constitution.

Held

The Court issued the following interim directions:

-The State Government to set up a High-Level Committee to examine the question, inter alia, whether there has been a proper balance between the tapping of the mineral resources for development on the one hand and the preservation of the environment on the other in the issue of such grants, and to submit such report to the Court.

-The second respondent to refrain from carrying out mining operations until further orders.

-No lease for mining of limestone to be granted or renewed nor temporary permits issued till the report of the Committee is received and further orders made by the Court.

The Court observed that, in Articles 48A and 51A(g), there is both a constitutional pointer to the State and a constitutional duty of the citizens not only to protect but also to improve the environment and to preserve and safeguard the forests, the flora and fauna, the rivers and lakes and all the other water resources of the country, and went on to state: "To ensure the attainment of the constitutional goal of the protection and

improvement of the natural wealth and environment, and to protect the people inhabiting the vulnerable areas from the hazardous consequences of the arbitrary exercise of the power of granting mining leases and of indiscriminate operation of mines on the strength of such leases without due regard to their life, liberty and property, the court will be left with no alternative but to intervene effectively by issuing appropriate writs, orders and directions including the direction as to the closure of the mines, the operation whereof is proving to be hazardous and the total prohibition of the grant or renewal of mining leases till the Government evolves a long-term plan based on a scientific study with a view to regulating the exploitation of the minerals in the State without detriment to the environment, the ecology, the natural wealth and resources and the local population. However, the need for judicial intervention may not arise even in those cases where the Court's jurisdiction is invoked, if the administration takes preventive, remedial and curative measures".

Cases Cited

AIR 1985 SC 652

AIR 1985 SC 1259

1985(2)SCALE 906

AIR 1987 SC 359

AIR 1987 SC 359

INDIA 17

M.C. Mehta v Union Of India & others AIR 1988 Supreme Court 1037

E.S. Venkataramiah And K.N. Singh J.J.

Introduction

This was a continuation of earlier public interest litigation requesting the court to prevent tanneries, which were polluting the River Ganga, from operating until they installed primary effluent treatment plants. The court passed the order accordingly.

Held

In the context of this case, the following passages from the United Nations Conference of the Human Environment held in 1972 in Stockholm were quoted by the Court in its judgment:

"Both aspects of man's environment, the natural and the manmade, are essential to his well being and the enjoyment of basic human rights - even the right to life itself. The protection and improvement of the human environment is a major issue which affects the well being of peoples and economic development throughout the world, it is the urgent desire of the peoples of the whole world and the duty of all governments."

"What is needed is an enthusiastic but calm state of mind and intense but orderly work...To defend and improve the human environment for present and future generations has become an imperative goal...Achievement of this environmental goal will demand the acceptance of responsibility by citizens and communities and by enterprises and institutions at every level."

The Court, while ordering the closure of certain tanneries observed that it was conscious that the closure of the tanneries may bring unemployment.

INDIA 18

M.C. Mehta v Union Of India And Others

AIR 1988 Supreme Court 1115

E.S. Venkataramiah And Kn. Singh Jj.

Introduction

The Petitioner filed a writ petition in the Supreme Court for the prevention of nuisance caused by the pollution of the River Ganga by tanneries and soap factories on the banks of the river, at Kanpur. The petition was entertained as public interest litigation to enforce the statutory provisions which impose duties on the Municipal Authorities and the Boards constituted under the Water Act.

Legal Framework

Articles 21,32 and 226 of the Indian Constitution.

Municipalities Act, 1911, Sections 245 and 275.

Environment (Protection Act), 1986, Section 7.

Water (Prevention and Control of Pollution) Act- 1974 Sections 2 and 19.

Held

The Supreme Court issued several directives to the Kanpur Municipal Corporation to prevent and control pollution of the River Ganga at Kanpur. While making its order the Court observed that nuisance caused by the pollution of the River Ganga was widespread and was a serious public nuisance. On account of failure of authorities to carry out these statutory duties for several years, the water in the River Ganga at Kanpur has become so polluted that it can no longer be used by the people either for drinking or bathing.

The Court also pronounced that what they have stated in this case applies mutatis mutandis to all other Mahapalikas and Municipalities which have jurisdiction over areas through which the River Ganga flows, and ordered that a copy of its judgment be sent to all such institutions.

The Court also expressed the view that "having regard to the need for protecting and improving the environment which is considered a fundamental duty under the Constitution, it is the duty of the Central Government to direct all educational institutions to teach at least one hour a week lessons relating to the protection and improvement of the natural environment including forests, lakes, rivers, and wild life in the first ten classes"

Cases Cited

(I) AIR 1988 SC 1037

(ii) (1987) 4 SCC 463 1.4

(iii) (1953) Ch. 149

(iv) (1953) 2.WLR 179

INDIA 19

Rural Litigation And Entitlement Kendera v State Of U.P.

AIR 1988 Sc 2187 Ranganathan Misra And Murari Mohan Dutt, Jj.

Introduction

The case arose when the Supreme Court directed a letter received from the petitioner alleging unauthorised and illegal mining in the Dehra Dun area which adversely affected the region's ecology and caused environmental damage, to be registered as a writ petition under Article 32 of the Constitution, and issued notice on the Respondents.

Legal Framework

Constitution-Articles 32, 226.

Forest (Conservation) Act, Section 2.

Held

Having considered several reports made by Committees of Experts appointed by the Supreme Court to examine the environmental implications of limestone mining in the Dehra Dun Valley, the Court, by order dated October 19, 1987, ordered that mining in the area should be stopped, except for three mines in respect of which the leases had not expired. Their operations too, were to be subject to additional conditions set by the Court. In providing reasons for its conclusion, the Court said, "The writ petitions before us are not inter-party disputes and have been raised by way of public interest litigation and the controversy before the Court is as to whether for social safety and for creating a hazardless environment for the people to live in, the mining in the area should be stopped or permitted." The Court remarked that the Doon Valley limestone is a gift of nature to mankind and that forests provide the green belt and are a bequest of the past generations to the present. It also remarked that the problem of forest preservation and protection was no more to be separated from the life style of the tribal people.

Cases Cited

AIR 1987 SC 352: 1986 Supp SCC 517:1987

AIR 1987 SC 1073 AIR 1985 SC 652

AIR 1987 SC 2426 AIR 1985 SC 814

INDIA 20

U.P. Pollution Control Board v M/S. Modi Distillery And Others

AIR 1988 Sc 1128 A. P. Sen And Natarajan, Jj.

Introduction

M/S. Modi Distillery situated at Modi Nagar, Ghaziabad was engaged in the manufacture of industrial alcohol and was discharging highly noxious effluents into the Kali River in contravention of a statutory requirement to obtain a permit from the Pollution Control Board. The issue before Court was whether the Chairman, Vice Chairman, Managing Director and Members of the Board, were liable to be proceeded against under Section 47 of the Water (Prevention and Control of Pollution) Act in the absence of a prosecution of the Company owning the industry.

Legal Framework

Water (Prevention and Control of Pollution) Act 1974.

Held

The Court held that on a combined reading of sub sections (1) and (2) of Section 47 of the Act, it had no doubt that the Chairman, Managing Director, and members of the Board of Directors of Messers Modi Industries Limited, the Company owning the plant in question, could be prosecuted as having been in charge of and responsible to the company for the business of the industrial unit and could be deemed guilty of the offence for which they are charged.

INDIA 21

Ambica Quarry Works v State Of Gujarat & others

AIR 1987 Sc 1073, Sabyasachi Mukharji & K.N. Singh, Jj

Introduction

The State Government rejected an application for renewal of a mining lease under section 2 of the Forest (Conservation) Act 69 of 1980, which requires permission to be obtained from the Central Government for using forest areas for non-forest purposes. The appeal in the Supreme Court centred on the question of a proper balance between the need of exploitation of the mineral resources lying within forest areas, the preservation of ecological balance, and curbing the growing environmental deterioration.

Legal Framework

Gujarat Minor Mineral Rules 1966.

Forest (Conservation) Act, 1980.

Held

In dismissing the appeals, the Supreme Court said that the rationale underlying the Forest (Conservation) Act was a recognition of the serious consequences of deforestation, including ecological imbalances, and the prevention of further deforestation. The Court observed that in this case the renewal of the mining leases will lead to further deforestation or at least will not help reclaiming the areas where deforestation has taken place. The primary duty the Court said, was to the community and that duty took precedence in these cases. The obligation to the society must predominate over the obligation to the individual.

Cases Cited

AIR (1985)SC 814

AIR (1966)SC 296

1901 AC 495

INDIA 22

M.C. Mehta And Others v Shriram Food And Fertilizer Industries And Union Of India (Oleum Gas Leak Case - I) AIR 1987 Sc 965
P.N. Bhagwati C. J., D. P. Madan And G. L. Oza. Jj.

Introduction

The Petitioner, in the Supreme Court, sought the closure of a chlorine plant of Shriram Foods and Fertilizers Industries situated in a densely populated area, following the disastrous consequences of a leakage of oleum gas from the plant in December 1985, as a result of which one person died and several suffered serious harm. Following the gas leak, the District Magistrate acting under Section 133 of the Criminal Procedure Code, granted the management of the company 7 days to remove the dangerous substance from the company's premises. Subsequently, the Inspector of Factories ordered the closure of the chlorine and sulphuric plants. The closure of the plant affected 4000 employees and was firmly opposed by the management and the labour unions. The question before the Court was whether the chlorine plant should be allowed to re-start operations.

Legal Framework

Criminal Procedure Code Section 133.

Held

The Supreme Court was of the view that, considering the large scale unemployment and industrial dislocation that the shortage of products like chlorine would create, the plant should be permitted to re-start subject to detailed conditions. These conditions would pertain to weekly inspection, periodic health checks for the workers, setting up of safety committees comprising workers' representatives, training of workers in safety measures, etc.

The Court made observations regarding the importance of zoning of industries and providing green belts around hazardous industries. The Court also recommended the setting up of an Environmental Court.

Referring to the many cases that are coming before the courts for adjudication, involving issues of environmental pollution, ecological destruction and conflicts over natural resources, the Court stated that it might be "desirable to set up Environmental Courts on a regional basis, with one professional judge and two experts drawn from the Ecological Sciences Research Group, keeping in view the nature of the case and expertise required for its adjudication. There would be of course a right of appeal to this Court from the decision of the Environmental Court"

INDIA 23

M.C. Mehta & others v Shriram Food And Fertilizer Industries & Union Of India (Oleum Gas Leak Case - Ii) Air 1987 Sc 982
P.N. Bhagwati C. J., D. P. Madan And G. L. Oza. Jj.

Introduction

This was the second in a series of petitions that were filed in the Supreme Court following the leakage of gas from the chlorine and sulphuric acid plants at Shriram Fertilizers Industries in December 1985. The Company argued that every breach of the conditions specified in the previous Order should not warrant closure of the plant.

Held

The Court modified the conditions subject to which permission was granted to Shriram to re-open the chlorine plant in its order dated 17th February, 1986. The Court observed that if for any reason, Shriram does not comply with any of those conditions and is therefore unable to re-open the caustic chlorine plant, it will be open to Shriram to re-start the other plants in respect of which permission has been given by the Court by order dated 17th February, 1986, so long as it can do so without operating the caustic chlorine plant.

With regard to the liability of occupiers/officers, the Court restricted liability to an amount equivalent to their annual salary. The earlier Order was modified by holding that the Chairman/Managing Director were liable, except where “sabotage" or "an Act of God " is pleaded and proved.

INDIA 24

M.C. Mehta & others v Shriram Food And Fertilizer Industries & Union Of India (Oleum Gas Leak Case - Iii) AIR 1987 Sc 1026 P.N. Bhagwati C. J, And G. L. Oza, Ranganath Misra, M.M. Dhutt & K.N. Singh, Jj.

Introduction

This case was the third in a series of petitions to the Supreme Court which followed in the wake of the Oleum gas leak in December 1985, at Shriram Fertilizers Industries. The Petitioner filed this case under Article 32 of the Constitution, which provides for a writ against the State in case of breach of fundamental rights. Shriram contended that a writ should not be issued as it was a public company and not a State.

Legal Framework

Constitution of India- Article 32.

Held

The Supreme Court held that under Article 32(l) of the Constitution it is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and also has the power to issue whatever direction, order or writ as may be necessary in a given case including all incidental and ancillary power necessary for the enforcement of a fundamental right. The power of the Supreme Court is not only injunctive in ambit, that is preventing the infringement of fundamental rights, but it is also remedial in scope and provides relief against a breach of the fundamental rights already committed. In the circumstances, the Court has the power to grant compensation in appropriate cases. The Court also said that compensation could be awarded against Shriram Food and Fertilizer Corporation thereby bringing private corporations within the purview of Article 32 of the Constitution.

INDIA 25

Sachidanand Pandey v State Of West Bengal AIR 1987 Sc 1109

O. Chinnappa Reddy And v Khalid Jj.

Introduction

The Petitioner challenged the decision of the Government of West Bengal to allot a portion of six acres of land from a zoological garden for the construction of a five star hotel. His contention was that the Government's decision reflected lack of awareness of the serious environmental degradation that would result, and therefore required the intervention of the Court to have the decision reversed.

Legal Framework

Constitution of India Article 32, 48A, 51A and 226.

Held

The Court rejected the petition stating that upon consideration of all the relevant facts and circumstances, it felt assured that the proposed garden hotel would improve the ecology and environment of the land concerned.

The Court observed that society's interaction with nature is so extensive today that environmental issues have assumed proportions affecting all humanity. Industrialisation, urbanisation, the population explosion, over exploitation of resources, depletion of traditional sources of energy and raw materials, the disruption of natural ecological balances and the destruction of a multitude of animal and plant species are all factors which have contributed to environmental degradation. The Court also observed "When the Court is called upon to give effect to the Directive Principle and the fundamental duty, the Court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority. The least that a Court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded.

In appropriate cases, the Court may go further, but how much further must depend on the circumstances of the case. The Court may always give necessary directions.

However, the Court will not attempt to nicely balance the relevant considerations. When the question involves the nice balancing of relevant considerations, the Court may feel justified in resigning itself to acceptance of the decision of the authority".

Cases Cited

AIR 1986 S.C. 1158

AIR 1985 S.C. 1147

AIR 1983 S.C. 1207

AIR 1980 S.C. 1992

AIR 1979 S.C. 1628

INDIA 26

Bombay Environment Action Group, Shaym H.K. Chainani Indian Inhabitant, Save Pune Citizen's Committee v Pune Cantonment Board In The High Court Of Judicature At Bombay Appellate Side Writ Petition No. 2733 Of 1986
Dharmadhikari And Sugla, Jj

Introduction

The Petitioners addressed letters to the Respondents, the Pune Cantonment Board, requesting that they be granted inspection of applications made to the Board for building permits and the related plans. The Board refused to accede to this request stating that it was under no legal obligation to provide the public with access to such documents. The Petitioners filed the Writ Petition in the Supreme Court for a declaration/direction that it was incumbent upon the Cantonment Board to disclose all such documents to the Petitioners and grant them an opportunity to inspect them.

Legal Framework

Constitution of India, Article l9(1)(a). Pune Cantonment Board Act.

Held

The Supreme Court upheld the right to information and the rights of recognised social action groups to obtain such information, stating that the disclosure of information in regard to the functioning of the Government and the right to know flows from the right of free speech and expression guaranteed under Article 19 (l)(a) of the Constitution. The Court also said: "People's participation in the movement for the protection of the environment cannot be over-emphasised. It is wrong to think that by trying to protect the environment they are opposing the various development projects."

The Court also stated that the Cantonment's Executive Officer could refuse permission if it is found that a request for inspection is not made for a genuine purpose or it will be against public interest to grant such inspection.

Cases Cited

1985 AIR S.C. 652 1982 AIR S.C. 149 1975 AIR S.C. 865

INDIA 27

The Member-Secretary, Kerala State Board For Prevention & Control Of Water Pollution, Kawadiar, Trivandrum v The Gwalior Rayon Silk Manufacturing (Weaving) Company,Ltd., Kazhikode & others
AIR 1986 Kerala 256 V.S. Malimath, C. J. And K. Sukumaran, J.

Introduction

The Cess Act grants rebates in the cess payable to those who had installed a plant for the treatment of sewage or trade effluent. The Company claimed that it had installed a treatment plant and was therefore entitled to a rebate. This claim was declined. The legality of the levy of cess was thereupon challenged in the writ petitions. The present writ appeals are taken against the findings of the Judge in the writ petitions.

Legal Framework

Water (Prevention and Control of Pollution) Act 1978. Cess Act, 1977.

Held

If the plant installed is one which gives a satisfactory treatment of the trade effluent, rebate could be given under Section 7 of the Cess Act so long as the treatment of the effluent is effective from the point of view of the Pollution Act.

The Court was also of the view that the question involved is not a mere interpretation of a section of a statute but has larger overtones with a direct nexus to the life and health of the people. A reference to a treaty, protocol or convention is permissible while interpreting laws which have a link or background with such document. The Court surveyed recent international action in the area of environmental protection, including the 1972 United Nations Conference on the Human Environment, and national measures to develop environmental legislation and said that these had a direct connection with the enactment of the comprehensive Pollution Act, which the Court could not disregard.

Cases Cited

Wood v. Waud (1849)3 Exch. 748 AIR 1986 S 49

Derby and Derbyshire Angling Association Ltd. v British Celanese Ltd[1953] 1 Ch. 149

INDIA 28

Rabin Mukherjee & Others v State Of West Bengal & others

AIR 1985 Calcutta 222, Bhaghwati, C. J., Prasad, Banerjee. J.

Introduction

Application for a Writ of Mandamus filed in the Supreme Court by the petitioners for an order directing the Respondents to enforce the provisions of Rule 114 of the Bengal Motor Vehicles Rules containing restrictions against the use of electric and air horns which were creating noise pollution which was having an adverse effect on public health.

Legal Framework

Bengal Motor Vehicle Rules 1940- Rule 114(d).

Held

Referring to studies of noise pollution, the Supreme Court concluded that the noise pollution arising from the use of loud horns, in violation of the above mentioned Rule, is injurious to health and was among the different causes of environmental pollution.

The Court directed the State Authorities to issue notifications immediately regarding the restrictions contained in the Rule and direct the removal of electric or air horns which create a loud or shrill sound, and to ensure that no fitness certificate is granted to vehicles in the case of non-compliance with the Rule.

INDIA 29

Rural Litigation & Entitlement Kendera v Union Of India (Doon Valley Limestone Quarrying Case -Ii) AIR 1985 Sc 652 P N Bhagwati C J & Ranganath Misra J

Introduction

Following a public interest petition addressed to the Supreme Court by the Rural Litigation and Entitlement Kendera of Dhera Dun in the State of Uttar Pradesh, the Court directed that all fresh quarrying in the Himalayan region of the Dhera Dun District be stopped. Subsequently, acting on the basis of the reports of the Bandyopadhyay Committee and a three man expert committee, both of which were appointed by the Court, the Court ordered the closure of several mines in the area. Thereafter, the lessees of the mines submitted a scheme for limestone quarrying to the Bandyopadhyay Committee. The Committee rejected the scheme and the lessees challenged the decision of the Committee in the Supreme Court.

Legal Framework

Constitution of India Article 32.

Held

The Court stated that this case brings into sharp focus the conflict between development and conservation and serves to emphasise the need for reconciling the two in the larger interests of the country. The environmental disturbances caused by limestone mining has to be weighed in the balance against the need of limestone quarrying for industrial purposes. Having given careful consideration to these aspects of the case, the Court rejected the petition, expressing its approval of the decision of the Committee. However, in rejecting the Petition, the Court also stated that it was conscious of the fact that as a result of the closure of the mines workmen employed in the mines will be out of work and directed that immediate steps be taken for reclamation of the areas forming part of such quarries and that the affected workmen be as far as possible and in the shortest possible time, be provided employment in the reforestation and soil conservation programmes to be undertaken in the area.

Cases Cited

1985 S.C./42 VI G-2

INDIA 30

Tehri Bandh Virodhi Sangarsh Samiti And Others v The State Of Uttar Pradesh & others Supreme Court Of India Writ Petition No. 12829 Of 1985
Kn. Singh, J. And Kuldip Singh, J

Introduction

This Petition under Article 32 of the Indian Constitution was filed in the Supreme Court in the public interest. The petitioners prayed that the Union of India, State of Uttar Pradesh and the Tehri Hydro Development Corporation be restrained from constructing and implementing the Tehri Hydro Power Project and the Tehri Dam. The main grievance of the Petitioners was that in preparing the plan for the project the safety aspects have not been adequately taken into consideration. It was asserted that as the area in which the dam is to be constructed is prone to earthquakes, the construction of the dam would pose a serious threat to the life, ecology and the environments of northern India.

Legal Framework

Constitution of India - Article 32.

Held

The Court stated that it does not possess the requisite expertise to render any final opinion on the rival contentions of the experts. The Court can only "investigate and adjudicate the question as to whether the Government was conscious to the inherent danger as pointed out by the Petitioners and applied its mind to the safety of the dam. We have already given facts in detail which show that the Government has considered the question on several occasions in the light of the opinion expressed by the experts". In view of the material on record, the Court did not find any good reason to issue a direction restraining the respondents from proceeding with the implementation of the project and accordingly, the petition was dismissed.

INDIA 31

Ratlam Municipality v Vardhichand AIR 1980 Sc 1622

V.R. Krishna Iyer And Chinnappa Reddy. Jj.

Introduction

This application was made under Section 133 of the Criminal Procedure Code seeking an order from the Magistrate's Court, directing the Municipal Council of Ratlam to take necessary action to stop the stench caused by open drains and public excretion by slum dwellers for want of public lavatories. The Magistrate made order as prayed for, but it was reversed on appeal to the Court of Sessions. On further appeal, the High Court, as well as the Supreme Court, upheld the order of the Magistrate. The defence of the Municipality was that notwithstanding the public nuisance, it did not have the funds to carry out the necessary activities and that this exonerates it from statutory liability.

Legal Framework

Constitution-Part III

Criminal Procedure Code-Section 133

Municipalities Act-Section 123

Held

In rejecting the defence of the Municipality, the Supreme Court observed that the Criminal Procedure Code applies to statutory bodies and others regardless of their financial standing, just as human rights under Part III of the Constitution have to be respected by the State regardless of budgetary provisions. Section 133 of the Criminal Procedure Code considered in conjunction with Section 123 of the Municipalities Act, empowers the Court to require a municipality to abate a nuisance by taking affirmative action within a stipulated time. In arriving at this conclusion, the Court stated: "Public nuisance because of pollutants being discharged by big factories to the detriment of the poorer sections, is a challenge to the social justice component of the rule of law. Likewise, the grievous failure of local authorities to provide the basic amenity of public conveniences, drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under nature's pressure, bashfulness becomes a luxury and dignity a difficult art. A responsible Municipal Council constituted for the

precise purpose of preserving public health and providing better facilities cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies. Similarly, providing drainage systems, not pompous and attractive, but in working condition and sufficient to meet the needs of the people, cannot be evaded if the Municipality is to justify its existence. A bare study of the statutory provisions makes this position clear".

INDIA 32

Pollution Control Board v M.V. Nayudu Supreme Court of India Case No. 53

Introduction

The respondent purchased 12 acres of land and applied for consent for the establishment of a chemicals industry. When the application was rejected the respondent appealed to the court.

Legal Framework

The Industries (Development Regulations) Act 1951

The Constitution of India

The Environment (Protection) Act 1986

The National Environmental Authority Act 1997

Held

The court observed that the case involved adjudicating on the correctness of the technological and scientific opinions presented, a task which the Court was not equipped to undertake. It therefore referred the matters to the Appellate Authority under the National Environmental Authority Act 1997.

INDIA 33

Narmada Bachao Andolan v Union of India & others Judgement 18 October 2000

Introduction

The issue before the court was whether the environmental clearance granted by the Union of India has been granted without proper study and understanding of the environmental impact of the project and whether the environmental conditions imposed by the Ministry of Environment have been violated and if so, what was the legal effect of the violations.

Legal Framework

The Constitution

Article 21 and 32 Environment Protection Act 1986

Held

The evidence disclosed that the Government had been deeply concerned with the environmental aspects of the project and because there was a difference of opinion between the Ministries of Water Resources and the Environment and Forests the matter was dealt with by the Prime Minister who gave the clearance. The court ordered compensatory measures for environmental protection in compliance with the scheme framed by the Government and ordered the construction to continue while the alleviatory measures were carried out.

INDIA 34

Ramakrishnan v State of Kerala High Court of Kerala O.P. NO. 24160 of 1988-A

Introduction

This case highlights the dangers of smoking. The petitioner sought orders to prevent the smoking of tobacco in any form in public places and to order the state to take appropriate measures to prosecute and punish all persons guilty of smoking in public places and to treat such smoking as a nuisance under the Penal Code.

Legal Framework

The Indian Penal Code

Held

Smoking in public places violated the atmosphere and was noxious to the health of persons present. It was therefore an offence punishable under S.278 of the Penal Code.

INDIA 35

Vellore Citizens Welfare Forum v Union of India PIL 981-97

Introduction

This was a petition against pollution which was caused by discharge of untreated effluent by tanneries and other industries into agricultural fields, road sides, waterways and open lands and into the River Palar which is the source of water supply to the residents of the area. There was evidence that the tanneries and other industries had been exhorted for ten years to control pollution but to no avail.

Legal Framework

Sustainable Development,

Precautionary Principle

Polluter Pays Principle

The Constitution of India

The Environment Act 1986

The Water (Prevention and Control of Pollution) Act 1994

The Air Act 1981

Held

The court ordered the Central Government to constitute an authority and confer on it all powers necessary to deal with the situation. The authority was to implement the precautionary principle and the "polluter pays" principle. It would also identify the families who had suffered from the pollution and assess compensation and the amount to be paid by the polluters to reverse the ecological damage. The Court required the Madras High Court to monitor the implementation of its orders through a special bench to be constituted and called a "Green Bench".

MALAYSIA 1

Kajing Tubik & others v Ekran Biid & others Originating Summons No-55 (21 June 1995) High Court (Kuala Lumpur) James Fong J. 19 June 1996

Introduction

The plaintiffs claimed that they have been deprived of their right to obtain a copy of the Environmental Impact Assessment (EIA) relating to the construction of the Bakum Dam and to be heard and make representations before the EIA is approved. Under the Environment Quality Act of 1974 activities prescribed by the Minister in charge of environmental protection can only be carried out with the approval of the Director General of environment quality, the second defendant. The Guidelines approved by the D-G requires a detailed EIA prepared by the project proponent, to be made available to the public and the public afforded an opportunity to comment on the proposed project to a review panel. The Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 includes power generation and transmission activities involving dams and hydroelectric power as prescribed activity. However, on 27 March, 1995, the Minister issued an Order under the EQA declaring that the prescribed activities shall not apply to Sarawak, where the project in question is to be constructed.

Accordingly the Plaintiffs sought a declaration that before the first defendant carries out the prescribed activity it has to comply with the Environment Quality Act, including S.34A and/or the Guidelines prescribed by the second defendant under S.34A of the Act, and the regulations made thereunder.

Legal Framework

Environment Quality Act of 1974 (EQA) S.34A.
Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987, No: PU(A) 362/87 (PU (A) 362) -13.b.
Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) (Amendment) Order 1995 No: PU(A) 117.
Natural Resources Ordinance- S. 1lA(l).
Natural Resources and Environment (Prescribed Activities) Order 1994.
Interpretation Act 1948/1967 -S 20.

Held

On the question of locus standi the Court held that though the plaintiffs were only three of a community of 10,000, this did not in itself disentitle them to the relief claimed. The Court held that the process in the Guidelines made in terms of s.34 A (2) of the EQA concerning the Environmental Impact Assessment and public participation as set out in paragraphs 1.4.5, 1.6.1, 3.4.7, and 4.5 are mandatory. Accordingly, the entitlement to a copy of the EIA and public participation in such proceedings becomes a right. In this connection the Court stated that:

"The EQA was enacted to be applicable to the entire nation. Subsidiary legislation was permitted to give full effect to the EQA. Under the guidelines prescribed under the EA itself a valid assessment of an EIA prepared by the project proponent...cannot be made without some form of public participation...For this is a right vested with the plaintiffs..."

The Minister's order amounted to a removal of the entire rights of the plaintiff to participate and to give their views before the EIA is approved. Accordingly, the Court declared that the Environment Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987, was invalid and directed the 1st defendant to comply with the requirements of EIA and the Guidelines.

Cases Cited

Government of Malaysia v. Lim Kit Siang (1988) 2MIJ 12.
Tan Sri Hj Othman Saat v Mohamed Bin Ismail (1984 2 MLJ 177.
Ibeneweku v. Eqbuna (1964) 1 WLR219.
Lonrho Ltd & Anor v Shell Petroleums Co. Ltd. & Anor So.2)(1982) AC 173.
Saijah bte Ab-Lateh v Mohd Irwan Abdullah (1996) 1 SLR 63
Petalin Tin Bhd v Lee Kian Chan & others (1994) 1 MLJ 657
Gul-Marin & Doan Inc. v George Town Textile Mfg Co 249 SC 561, 155 SF2d618,621.
Gouriet v Union of Post Office Workers & Ors (1977) 3 All ER 70)
Howe Yoon Chang v Chief Assessor Property Tax Singapore (1978) 2 SJ 87
Chief Assessor Property Tax Singapore v. Howe Yoon Chang (1979)1 MLJ 207
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Phillips v Eyre (1870) LR 6 QB1

Penang Development Corp. v Tech Eng Hvat & Anor (1993) 2 MLT 97

Yamaha Motor Co. Ltd. v Yamaha Malaysia Sdn Bnd & Ors (1983) 1 MLJ 213.

Hanson v. Radiff Luban Urban District Council (1992)2 Ch. 490

Brickfield Properties v. Newton (1971) 3 All ER 328

NEPAL 1

Yogi Narahari Nath & other v Honorable Prime Minister Girija Prasad Koirala & other 33 NLR 1955 Supreme Court of Nepal

Surendra Prasad Singh CJ and Narendra Bahadur Neupane J.

Introduction

In August 1993, an agreement was signed between the Ministry of Education, Culture and Social Welfare and the International Society for Medical Education (USA) for the purpose of establishing a College of Medical Science in Nepal. To this end the Government of Nepal leased 28,000 sq.m of land for 50 years in Devghat area of Chitwan District to the International Society for Medical Education (USA).

Having considered the national importance of that land, the petitioners including Yogi Narahari Nath, a renowned scholar and preacher, filed a public interest litigation suit, under Art 88 (2) of the Constitution of the Kingdom of Nepal, 1990 with the Supreme Court asking for the government decision to be quashed. The petition was based on the contention that land of the Devghat area is of great significance to religion, culture, nature and archaeology, and therefore, such land must be protected in the best interests of the nation.

Legal Framework

i) Constitution of the Kingdom of Nepal, 1990, Art 12(1), 19(2), 26(4), 88(2)
ii) Forest Act 1993, Section 68
iii) Ancient Monuments Protection Act 1954 Sections 9 & 10

Held

Because of the public interest in the land of the sacred Devghat area surrounded by forests and their religious, biological, cultural and archaeological importance, the Supreme Court quashed the Government's decision to lease the land for the stated purpose.

While issuing the order of certiorari, the court, for the first time recognized the "public trust doctrine" by declaring that the protection and maintenance of the subject matter

and resources, which are archaeologically important, is the primary responsibility of Government. The Court also noted that if such archaeological or ancient heritage, is not protected, "we ourselves may forget our ancient civilization and culture".

The Court based its decision also on the ground that the Government did not have power to lease such an environmentally and archaeologically important sacred place such as Devghat in an arbitrary manner and that the Government could have given other parcels of land for the intended development.

While reaffirming the right to life *vis a vis* a pollution free environment, which had been already established in Surya Prasad Dhungel vs. Godawari Marble Industries Pvt Ltd, the court declared that "the environment is the integral part of human life, if it is degraded human beings as well as animals would suffer negative impact. Therefore resources like forests should be protected for the maintenance of pollution free environment."

NEPAL 2

Rajendra Parajuli & others v Shree Distillery Pvt Ltd & others Writ No 3259 1996
Supreme Court of Nepal Keshav Prasad Upadhaya & Kedar Nath Acharya JJ

Introduction

The Shree Distillery is situated at Nawalparasi district, Naya Belhani Village, on the banks of the Arun River and is engaged in the manufacture of industrial alcohol. It was discharging highly noxious effluents into the Arun River and directly into a pond located in the area of the distillery. Due to the discharge of such effluents the fish and other aquatic animals in the river were found dead. The waters of the river were highly polluted and unsuitable for drinking, irrigation or for any other purpose. The obnoxious smells released from the pond affected the villagers for one kilometre around and because of air pollution the agricultural crops and trees in the area were seriously damaged.

Due to public pressure the Distillery had agreed with the Office of the District Administration, Nawalparasi, to take all necessary steps and measures to control pollution. Nevertheless, the company failed to implement the agreement and the suffering of the villagers continued.

The petitioners filed a public interest petition in the Supreme Court seeking an appropriate order to stop the discharge of pollutants into the river and air and for the installation of a treatment plant by the distillery.

Legal Framework

i) The Constitution of the Kingdom of Nepal 1990, Art 12(1), 12(2) Clause (5), Art 26(4)
ii) Environment Protection Act, 1996
iii) Environment Protection Regulations, 1997
iv) Water Resources Act, 1963
v) Industrial Enterprises Act, 1992

Held

Having a licence for the operation of an industry does not excuse any industry from its obligation to protect the environment. An industry can not be permitted to operate at the cost of endangering the environment; every industry must adopt measures by which the environment can be preserved and protected. In line with the "principle of sustainable development" "every industry has an obligation to run its development activities without creating environmental deterioration. The Environment should not be viewed narrowly. It is imperative for any industry to be cautious towards the environment while it is in operation."

The Court issued an order of mandamus to Shree Distillery to enforce the written agreement with the District Administration Office for monitoring and supervising the implementation of the agreement and for keeping the environment free of pollution in the affected area.

NEPAL 3

Prakash Mani Sharma and others on behalf of Pro Public v Honorable Prime Minister Girija Prasad Koirala & others 312 NRL 1997 Supreme Court of Nepal Keshav Prasad Upadhaya & Kedar Nath Acharya JJ

Introduction

Rani Pokhari (Queen Pond) situated at the heart of Kathmandu, was built early in the eighteenth century by King Pratap Malla (King of Malla Dynasty) in memory of his demised queen. The Rani Pokhari area is full of temples, statues and other ancient monuments and has great historical, archaeological, cultural and religious significance. It is also considered a symbol of the beauty of Kathmandu City. Ignoring all this the Government started the construction of a mid-regional police building on the banks of Rani Pokhari. In spite of public pressure by civil society, the Government did not stop the construction. The petitioners, on behalf of Pro Public, filed a public interest litigation suit with the Supreme Court complaining that the construction of such a building on the banks of Rani Pokhari destroyed the beauty of an historical and archaeological heritage and sought orders of court to stop the construction works. Simultaneously, the petitioners also sought orders to demolish all the structures already constructed around Rani Pokhari.

Legal Framework

i) Constitution of the Kingdom of Nepal 1990, Arts 12(1), 18, 19, 26(4)
ii) Ancient Monument Protection Act 1954
iii) Town Development Committee Act 1989
iv) Treaty Act 1992
v) Convention for the Protection of the World Cultural and Natural Heritage 1972.

Held

The Court accepted the locus standi of the petitioners by observing that every individual is entitled to show concern for public property and "public rights" in terms of Art 88(2) of the Constitution of the Kingdom of Nepal 1990 and that no-one is entitled to do anything against the Directive Principles enshrined in chapter four of the Constitution.

For the first time, the Court emphasized the obligation of Government to give effect to the commitments under The Convention for the Protection of the World Cultural and Natural Heritage 1972 to which Nepal has became a party. Accordingly, the Court issued a directive order to the Government to take concrete and effective steps for maintaining uniformity in all areas by formulating a national policy regarding religious, cultural and historical places of importance.

NEPAL 4

Advocate Prakash Mani Sharma & others on behalf of Pro Public v HMG, Cabinet Secretariat & others, Writ No. 3017 of 1995 Supreme Court of Nepal
Hari Prasad Sharma and Kedar Prasad Giri JJ

Introduction

The banks of the holy Bagmati River are important rich in terms of the religion, culture and archeology of the Nepalese people. There are many ancient temples, cremation sites and other monuments on the banks of the Bagmati River. The petitioners commenced a public interest litigation in the Supreme Court challenging a government decision to construct a United Nations (UN) Park on the banks of this river from Shankhamul to Teku of Kathmandu.

The main contention of the petitioners was that the ongoing construction of the park and the dismantling of the existing structures would damage the environment of the affected areas. They alleged also that the construction will completely destroy the cultural and religious heritage and sought appropriate court orders for the protection of the area.

Legal Framework

Arts 19(2), 26(4) of the Constitution of the Kingdom of Nepal 1990
Ancient Monuments Protection Act 1956
Trust Corporation Act 1977
Municipality Act 1951
Standards prescribed by Kathmandu Valley Town Development Authority in 1993.

Held

The Supreme Court emphasized the obligation of all concerned authorities for the protection of religious, archaeological and cultural areas of importance and directed government to take into its consideration the legal provisions regarding environmental protection. In this case the Supreme Court issued orders of mandamus to the different institutions for the fulfilment of their obligations under various Acts:-

- To the Ministry of Youth, Sport, Culture and Archaeological Department, to make proper arrangements for the protection of temples and other archaeologically and

historically important places under the Ancient Monument Protection Act 1956.

- To the Trust Corporation, Central Office, to keep accounts for protection of ancient ornaments, religious and cultural assets under section 17(6) (b) of Trust Corporation Act 1977.
- To Kathmandu Metropolitan, to fulfil the obligation of protecting the environment, culture and archaeological assets under section 15(1) of Municipality Act 1991.
- To the District Administration Office Kathmandu, to fulfil the obligation of repairing and protecting public ponds, inns, temples, bridges, stone spouts and other important religious places as prescribed under section 9(6) of the Local Administration Act 1973.
- To HMG Bagmati Area Drain Construction and Reform Plan Committee (instituted by HMG for the protection of that area), to establish a treatment plant to purify drainage water before discharging into the Bagmati River and not to demolish cremation places.
- To Indira Rajya Laxmi Hospital Development Committee, not to encroach upon or destroy public cremation places along the Bagmati River.
- To HMG Cabinet Secretariat and Ministry of Housing and Physical Planning, to protect religious cultural and archaeologically important assets and to protect and promote a healthy environment through making the Bagmati River free of pollution.

NEPAL 5

Advocate Kedar Bhakta Shrestha & others v HMG, Department of Transportation Management & others, Writ No. 3109 of 1999 Supreme Court of Nepal
Laxman Prasad Aryal and Top Bahadur Singh JJ

Introduction

Three wheeler diesel engine tempos were found to be the main sources of air pollution in Kathmandu Valley from various scientific research studies. Therefore Government decided to stop the movement of such tempos in the Kathmandu Valley. Government also decided to stop the registration of the tempos outside the Kathmandu Valley. The petitioner filled a writ petition on behalf of the Asian Trading Company Pvt. Ltd, which was engaged in importing those vehicles and sought an order to quash all of the Government‘s decisions.

The petitioner alleged that the Government’s decisions contravened the right of the petitioner to carry on trade or business which is protected under the Motor Vehicle and Transportation Management Act 1993 and Articles 11 & 12 of the Constitution of the Kingdom of Nepal 1990. Government replied that the decisions have been taken in accordance with sections 24 and 118 of the said Act to protect public health.

Legal Framework

- Constitution of the Kingdom of Nepal 1990, Art. 12.
- Treaty Act 1990 Section 9
- Vienna Convention for the Protection of Ozone Layer 1985
- Environment Protection Act 1996
- Environment Protection Rules 1997
- Motor Vehicle and Transportation Management Act 1993

Held

The Court dismissed the writ petition and upheld the validity of the Government decision to stop the movement of three wheeler diesel tempos in Kathmandu and their registration outside the Kathmandu Valley.

The Court held that the Environment Protection Act 1996, Environment Protection Rules 1997, Nepal Vehicles Emission Standard 1999 have been brought into existence to protect and promote a healthy environment as mandated by the directive principles of the Constitution. Referring to the legal provisions regarding environmental protection and the Vienna Convention for The Protection of The Ozone Layer 1985 and the outcomes of the 1990 Rio Conference (which have been made effective by section 9 of the Treaty Act 1990), the Court said that the environment is interlinked with the right to life and therefore appropriate measures have to be made for the protection of the environment.

Rejecting the petitioners' contention that the Government's decisions violated the freedom to carry on business, the court maintained that personal freedom to carry on business or occupation, cannot limit and abrogate the right to a healthy environment, which is linked with the right to life of the people at large. No one is entitled to carry on business or occupation that is harmful to public health. Every individual has an inherent right to live in a healthy environment. Therefore it is the responsibility of the state to respect and protect such right.

Regarding the petitioners request to allow registration of such tempos outside Kathmandu, the Court said that it was unreasonable to say that a clean environment as a right is available only to the inhabitants of Kathmandu Valley where pollution standards have been prescribed and not to the people outside Kathmandu where such standards are not prescribed. It is less important whether standards are prescribed or not; the requirement is not to pollute the environment. Therefore the policy not to allow new registration of diesel tempos outside Kathmandu Valley was for the purpose of protecting the public interest and the right to live in a pollution free environment.

PAKISTAN 1

General Secretary, West Pakistan Salt Miners Labour Union (Cba) Khwra, Khelum v The Director, Industries And Mineral Development, Punjab Lahore 1996 Sc Mr 2061 Supreme Court

Introduction

A Petition was filed in the Supreme Court under Article 184 (3) of the Constitution seeking to restrain the pollution of a water supply source to the residents and mine workers of Khewra. The spring Mitha Pattan was the only major source of drinking water in the area. Accordingly, a water catchment area was reserved and grants of mining leases in the area were prohibited prior to 1911. Notwithstanding the prohibition, the authorities concerned had granted mining leases in the catchment area. The Petitioners alleged that as a result, poisonous waste water discharged from the mines polluting the reservoir and creating a health hazard. It was argued that the allotment and grant of leases for mining in the catchment area was illegal and made in bad faith and that an order should be made, and for cancellation of the licences.

Legal Framework

The Constitution of Pakistan 1973.
Article 184 (3), 9 and 14 were considered.

The claim of the Petitioners, though framed in general terms, seeks enforcement of the right of the residents to clean and unpolluted water.

Held

The Court allowed the petition stating that persons exposed to such danger are entitled to claim that their fundamental right to life, guaranteed to them by the Constitution, has been violated and that there is a case for enforcement of fundamental rights by giving directions or passing orders to restrain the parties and authorities from committing such a violation or to ordering them to perform their duties.

Quoting Article 184(3) of the Constitution, the Court observed that "It is well settled that in human rights cases/public interest litigation under Article 184(3), the procedural

trappings and restrictions, precondition of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the Court. This Court has vast power under Article 184(3) to investigate into questions of fact as well, independently, by recording evidence or appointing commissions or any other reasonable and legal manner to ascertain the correct position. Article 184(3) provides that this Court has power to make Order of the nature mentioned in Article 199. The fact that the Order or direction should be in the nature mentioned in Article 199 enlarges the scope of granting relief and the relief so granted by this Court can be moulded according to the facts and circumstances of each case."

Accordingly, the Court proceeded to deal with the facts relevant to the question of whether the mining activity could pollute the water supply and made an Order directing that PCC should shift within four months from the location of the mouth of mine 27A to a safe distance from the stream and small reservoir. The Court also appointed a Commission with powers of inspection, recording evidence etc. to monitor the implementation of the Orders. Additionally all the mines operating adjacent to the catchment area were to take measures to the satisfaction of the Commission which will prevent pollution of the reservoir, stream and catchment area.

The authorities concerned were also ordered not to grant new licences in the catchment area or to renew old ones referred to in a schedule, without the prior approval of Court.

Cases Cited

Shehla Zia v. WAPDA PLD 1994 SC 693

M.C. Mehta v. Union of India AIR 1988 SC 1115

M.C. Mehta v. Union of India AIR 1988 SC 1087

PAKISTAN 2

In Re: Human Rights Case (Environment Pollution In Balochistan)

Human Rights Case No: 31-K/92(Q)

Introduction

A news item entitled "N-Waste to be dumped in Balochistan" was published in "Dawn", a daily newspaper in its issue dated 3 July 1992. In the report, concern was expressed that certain businessmen were making attempts to purchase coastal areas of Balochistan and convert it into dumping grounds for waste material.

The Supreme Court having taken note of the news item issued an Order requiring Chief Secretary of Balochistan to provide the Court with full information on the allocation or the receipt of applications for allocation, of coastal land in Balochistan or any area within the territorial waters of Pakistan.

The reports revealed that land had been allotted in addition to the Pakistan Navy and Maritime Agency for defence purposes, for purposes such as ship breaking and agriculture.

Legal Framework

The Constitution of Pakistan (1973) - Articles 184 (3) and 9.

Held

1. The Balochistan Development Authority should submit to the Assistance Registrar, Supreme Court, Karachi a list of persons to whom land on the coastal area of Balochistan have been allotted giving their names and full addresses along with copies of the letters of allotment, lease or licence which may have been issued in their favour.

2. The Government of Balochistan and the Balochistan Development Authority are directed that if any application for allotment of coastal land is pending or in future any party applies for allotment of such land, then full particulars of such applicant shall be supplied to the Assistant Registrar, Supreme Court of Pakistan, Karachi before making any allotment to any such party.

3. The Government functionaries, particularly the Authorities which are charged with the duty to allot the land in coastal areas should insert a condition in the allotment letter/licence/lease that the allotee/tenant shall not use the land for dumping, treating, burying or destroying by any device, waste of any nature including industrial or nuclear waste in any form. The Balochistan Development Authority should also obtain similar undertaking from all those to whom allotments have been made for ship breaking, agriculture, or any other purpose.

PAKISTAN 3

Ms. Shehla Zia And Others v Wapda Human Rights Case No: 15-K Of 1992

Supreme Court

Introduction

The Respondent authority was constructing a grid station in a residential area. The Petitioners who were residents in the vicinity alleged that the electromagnetic field created by the high voltage transmission lines at the grid station would pose a serious health hazard to them and raised the following issues before the Supreme Court.

(i) Whether any Government agency has a right to endanger the life of citizens by its actions.

(ii) Whether Zoning Laws vest rights in citizens which cannot be withdrawn or altered without the citizen's consent.

As regards the first issue, the Respondent's position was that the concern over health hazards was totally unfounded. The parties produced a vast body of scientific evidence in support of their respective positions.

On the second issue, the Respondents stated that the site had been earmarked as an incidental space which was previously left unutilised along the bank of the River Nallah and was not designated as an open space or green area. It was further stated that the proposed site, was at a level 6 - l0 feet lower than the area where the houses are located, and that the grid station site was at least 40 feet away from the residential area.

Legal Framework

Constitution of Pakistan (1973), Articles 9, 14 and 184(3).

Held

(i) The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to

death. A wide meaning should be given to the word 'life' to enable a man not only to sustain life, but also to enjoy it.

(ii) Where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people, the Supreme Court in exercise of its jurisdiction under Art. 184(3) of the Constitution of Pakistan may grant relief to the extent of stopping such activities that create pollution and environmental degradation.

(iii) At present, scientific evidence regarding the possibility of adverse biological effects from exposure to power-frequency fields, as well as the possibility of reducing or eliminating such effects, is inconclusive. The remaining question is how the legal system, including both the judiciary and the various regulatory agencies, might respond to this scientific uncertainty. In such a situation, the precautionary principle should be applied. To stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence and precaution.

(iv) One cannot ignore the fact that energy is essential for present-day life, industry, commerce and day-to-day affairs. The more energy that is produced and distributed, the more progress and economic development becomes possible. Therefore, a method should be devised to strike a balance between economic progress and prosperity and to minimise possible hazards. In fact a policy of sustainable development should be adopted.

(v) The Court also held that constitutional rights are higher than rights conferred by other laws i.e. municipal law or common law. Therefore a conscientious citizen, aware of the rights vested under the Constitution and alive to the possibility of danger, could invoke Article 184 on behalf of a large number of citizens who cannot make such representations due to poverty, ignorance or any such disability.

(ix) The Court refrained from making any order, in view of the inconclusive nature of the evidence placed on record. However, with the consent of both parties the Court appointed NESPAK, as Commissioner, inter alia, to examine and study the scheme employed by WAPDA and report whether there is any likelihood of any hazard or adverse effect on the health of the residents of the locality.

Cases Cited

Munn v. Illinois (1876) 94 U.S. 113

Francis Coralie v. Union Territory of Delhi (AIR 1981 SC, 746)

Olga Tellis and others v. Bombay Municipal Corporation (AIR 1986 SC 18G)

State of Himachal Pradesh and another v. Urned Ram Sharma and others (AIR 1986 S.C. 847)

Rural Litigation & Entitlement Kendera and others v. State of UP. and others (AIR 1985 SC 652)

Shri Sachidanand Pandey and another v. the State of West Bengal and others (AIR 1987 SC 1109)

MC. Mehta v. Union of India (AIR 1988 S.C. 1115)

MC. Mehta v. Union of India (AIR 1988 S.C. 1037)

PHILIPPINES 1

Juan Antonio Oposa & others v The Honourable Fulgencio S. Factoran & another
G.R.No: 101083 Supreme Court

Introduction

The Petitioners were a group of Filipino minors, who brought this action on their own behalf and on behalf of generations yet unborn, through their respective parents together with the Philippine Ecological Network Incorporated. They claimed that the country's natural forest cover was being destroyed at such a rate that the country would be bereft of forest resources by the end of the decade if not sooner. They brought their action as a taxpayers' class suit claiming that as citizens and taxpayers they were entitled to the full benefit, use and enjoyment of "the natural resource treasure that is the country's virgin rain forests." They also asserted that they represented their generation as well as "generations yet unborn". They sought an order directing the Secretary to the Department of Environment and Natural Resources (DENR) to cancel all existing timber licence agreements and cease from accepting or approving new agreements.

The Petitioners' suit in the Regional Trial Court had been dismissed on a motion of the Respondent, pleading that they had no cause of action against him and that the issue raised by them was a political question which properly pertained to the legislative or executive branches of Government. The Trial Judge had further ruled that the granting of the relief prayed for would result in the impairment of contracts, which was prohibited by the fundamental law of the land. The Petitioners sought a writ of certiorari under Rule 65 of the Revised Rules of Court to quash the Regional Trial Court Judge's order of dismissal.

The Supreme Court recognised at the outset that this case raised the right of the people of Philippines to a balanced ecology and the concept of inter-generational responsibility and intergenerational justice. The Petitioners led extensive scientific evidence to support their case that the widespread granting of timber licence agreements by the first respondent and his predecessors had resulted in a vast depletion of the country's natural forest cover, and that at the present rate of deforestation the Philippines would be bereft of forest resources at the end of the decade, if not earlier. The Petitioners led evidence

of the adverse environmental effects already experienced by the present generation of Filipinos and the even more serious effects that would be experienced by the Petitioners and their successors if licences were given to continue the deforestation.

The Petitioners pleaded that the acts of the Respondent constituted a misappropriation and/or impairment of the natural resource property held in trust for the benefit of the plaintiff minors and succeeding generations. The Petitioners further pleaded that they had a constitutional right to a "balanced and healthful ecology" and were entitled to the protection of the State in its capacity as "parens patriae".

Held

(1) Since the subject matter of the complaint was of common and general interest to all citizens and it was impracticable to bring them all before Court, the Petitioners' suit was a valid class action under Section 12, Rule 3 of the Revised Rules of Court.

2) The Petitioners had the right to sue on behalf of succeeding generations because every generation has a responsibility to the next to preserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthful ecology.

(3) The Petitioners' complaint focused on one specific fundamental right, namely the right to a balanced and healthful ecology, which was incorporated in Article 16 of the 1987 Constitution. The fact that it was included under the Declaration of Principles and State Policies and not under the Bill of Rights did not make it any less important. This right implied, among other things, the judicious management and conservation of the country's forests.

In this regard the Supreme Court remarked: "As matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as State policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the State a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those

to come- generations which stand to inherit nothing but parched earth incapable of sustaining life."

(4) The Petitioners' right to a balanced and healthful ecology and the DENR's duty to protect and advance that right were both clear, and gave rise to a cause of action as defined by the law.

(5) The case brought by the Petitioners could not be said to raise a political question because policy formulation by the executive or legislature was not in issue. What was principally involved was the enforcement of right vis-a-vis policies already formulated. In any event the political question doctrine was no longer an insurmountable obstacle to the exercise of judicial power owing to the provisions of Article VIII of the Constitution which gave the courts power to review the exercise of discretion by Government departments.

(6) The Petitioners' application to set aside the Trial Judge's order of dismissal was accordingly allowed. The case was sent back to the Regional Trial Court with a direction to the Petitioners to proceed against the holders of the questioned timber licences as defendants.

Note: Associate Justice Florentino P. Feliciano concurred in the result but wrote a separate judgement.

Cases Cited

Militante v. Edrosolano 39 SCRA 473(1971)
Daza v. Singson 180 SCRA 496 (1989)
Tan v. Director of Forestry SCRA 302 (1983)
People v. Ong Tin 54 O.g.7576
Felipe Ysmel Jr. & Co. Inc. v. Deputy Executive Secretary 190 SCRA 673 (1990) Abe v. Foster Wheeler Corp. 110 Phil. 198 (1960)
Nebia v. New York 291 U.S. 502

SRI LANKA 1

Appeal By W.I.A.B. Fernando And Others Against Issue Of Environmental Protection Licence To Thaha Plastic Industries Ltd.
Appeal No. 3/95 S.D. Sabaratnam, Acting Secretary, Ministry Of Environment

Introduction

The Appellants, seven persons who were neighbours of Thaha Plastic Industries Ltd., appealed against the grant of an Environmental Protection Licence ("EPL") to Thaha Plastic Industries Ltd., by the Central Environment Authority (CEA).

Legal Framework

Section 23E National Environmental Act No. 47 of 1980.

Held

The Acting Secretary of the Ministry of the Environment, responded to the appeal, and stated that section 23E of the National Environmental Act only allowed him to entertain and decide appeals from an applicant for an EPL where an EPL was refused, suspended, cancelled or not renewed. The Acting Secretary stated he did not have jurisdiction to entertain an appeal from neighbours objecting to the grant of an EPL. Thus, he was required to formally dismiss the appeal.

The Acting Secretary did, however, attach a circular issued by the Inspector-General of Police regarding public nuisance. He also referred the appellants to the CEA, with instructions that an independent body should check the noise levels of the facility. He stated that if the industrialist was found to have violated the conditions of the EPL, these neighbours could request a formal investigation, and if the violations were proven, the CEA could cancel or suspend the EPL.

SRI LANKA 2

Appeal Under Section 23DD Of National Environmental Act By Ceylon Electricity Board Secretary, Ministry Of Environment (1995) Cecil Amarasinghe, Secretary, Ministry Of Environment

Introduction

The Ceylon Electricity Board (CEB) has appealed against the decision of the Central Environmental Authority (CEA) to refuse to approve the Upper Kotmale Hydropower Project (the UKH project). The CEA refused to concur in the decision of the Ministry of Irrigation, Power and Energy, the project approving agency (PAA), which recommended that this project be approved. As the case involved a variety of technical issues, a panel of experts was assembled to consider these issues and make a report, which the Secretary of the Ministry of Environment then considered to reach a decision.

The project has a long history, beginning with the formulation of a master plan study by the FAO in 1968. In 1985-87 the Japanese International Co-operation Agency (JICA) carried out a feasibility study of the project, and the CEB subsequently carried out an environmental impact assessment (EIA). The EIA report admitted that this feasibility study, which recommended two dam sites on technical and economic grounds only, did not adequately consider environmental issues. An engineering services study was carried out in 1993-94.

The technical evaluation committee (TEC) of the PAA identified several environmental impacts of the UKH project, including impacts on seven of Sri Lanka's waterfalls. The TEC found that these environmental considerations along with others were not given adequate consideration in the EIA. The TEC recommended that alternatives in the EIA be considered further. The PAA, however, went ahead and approved the UKH project, in spite of the TEC's recommendation.

Legal Framework

Section 23DD National Environmental Act.

Held

The Secretary of the Ministry of Environment reviewed United States case law dealing with EIA and concluded that an adequate and rigorous consideration of alternatives is at the heart of the EIA decision-making process. In addition, the EIA must produce information sufficient to permit a reasonable choice of alternatives as far as environmental aspects are concerned.

The CEB's EIA of this project was seriously flawed because it did not adequately address itself to alternatives to the project, and had not given adequate reasons for rejecting environmentally friendly alternatives. The original selection of the site was based on economic and technical grounds, with an inadequate consideration of environmental issues. A financial and technical evaluation must include a consideration of environmental costs and benefits. Environmental assets such as waterfalls and water quality can be assessed with available economic tools, however insufficient. The failure of the CEB to carry out such a rigorous evaluation left the decision-maker in doubt as to whether the chosen alternative was environmentally, financially and technically the better option.

In addition, it appeared that the PAA did not base its decision to reject the TEC's advice on a careful evaluation of these recommendations in an independent and unbiased way. If the PAA could not do so impartially because of commitments it had to CEB, a different PAA could have been chosen. The appeal was dismissed, and CEB was recommended to seek approval for the project with an EIA that addressed the concerns in the judgment. In the event of a failure by CEB to do so, another PAA should be nominated to conduct the EIA process.

Cases Cited

Natural Resources Defence Council Inc. v. Morton 458 F.2d 827 (D.C. Cir. 1972)

Monroe Country Conservation Council v. Volpe 3 ELR 20006-20007

Environmental Defence Fund v. Falk 2 ELR 2694

Calvert Cliffs Co-ordinating Committee Inc. v. Atomic Energy Commission 449 F.2d 1109 (D.C. Cir. 19711)

Libby Rod and Gun Club v. Potcat 8 ELR 20807

Sierra Club v. Callaway 499 F.2d 982 (5th Cir. 1974)

SRI LANKA 3

Appeal under Section 23e Of The National Environmental Act By E.M.S. Niyaz Secretary, Ministry Of Environment (1995) D. Nesiah, Secretary, Ministry Of Environment

Introduction

E.M.S. Niyaz (Niyaz) appealed against the decision of the Poojapitiya Pradeshiya Sabha (the PS) canceling the Environmental Protection Licence (EPL) issued to him under Section 23B of the National Environmental Act. Niyaz operated a sawmill, and the EPL covered the discharge of waste and transmission of noise from this saw mill.

Section 23D of the National Environmental Act allows the Central Environment Authority (CEA) to cancel an EPL, and Section 23E gives the party whose EPL is cancelled a right to appeal to the Secretary, Ministry of Environment.

Legal Framework

Sections 23B, 23D, 23E, 26 National Environmental Act.

Held

The Secretary, Ministry of the Environment, set aside the cancellation of the EPL of Niyaz, stating that the PS did not hold a proper inquiry with the participation of Niyaz and any complainants.

Once an EPL is granted, it creates legal rights and obligations in the licence holder. This licence can only be cancelled after a fair hearing. The CEA, and those to whom it has delegated the power to issue, suspend and cancel an EPL, must act judicially when they perform these acts. The CEA and its delegate institutions must follow principles of natural justice, which require that they act fairly and give affected parties a fair opportunity to state their case. The CEA must also make decisions on relevant data, evidence and facts.

This fair opportunity to make a case requires CEA and delegate institutions to:

(1) hear neighbourhood objections and carry out appropriate investigations prior to granting an EPL;

(2) entertain, investigate and inquire into community complaints about EPL violations or situations in which waste/noise is being discharged contrary to the National Environmental Act;

(3) grant EPL holders a reasonable opportunity to know the case against them and place their defence before the CEA and delegate institutions before an EPL is cancelled or suspended, unless an emergency situation requires that an EPL be suspended.

In this case, the PS did not give Niyaz a hearing or any opportunity to make representations prior to the cancellation of his EPL, and this decision was contrary to law and the National Environmental Act.

Cases Cited

Abdul Thassim v. Rodrigo 48 NLR 121

Buhari v. Jayarathne 48 NLR 224

Mohamed & Company v. Controller of Textiles 48 NLR 461

South-Western Bus Company Ltd. v. Arumugam 48 NLR 385

SRI LANKA 4

Appeal Under Section 23e Of The National Environmental Act By G.L.M. Kamal Fernando Secretary, Ministry Of Environment Appeal No. 1/95 D. Nesiah, Secretary, Ministry Of Environment

Introduction

G.L.M. Kamal Fernando, Appellant, appealed against the decision of the Divulapitiya Pradeshiya Sabha (PS) denying him an Environmental Protection Licence (EPL) for his brick kiln. The Central Environmental Authority (CEA) had earlier granted authority for the erection of this brick kiln subject to several conditions. The CEA had subsequently delegated its power of issuing licences for such brick kilns to the PS.

In related litigation, the Appellant's father had constructed another brick kiln on land belonging to him, and his neighbour (the fifth respondent in this case) took the case to court arguing that the kiln should be located at least 200 yards from a residence. The Magistrate's Court of Negombo agreed, and as this condition could not be satisfied, the court ordered that this kiln be closed.

The Appellant subsequently made a "site clearance application" to the CEA to construct a brick kiln on his land, which adjoins his father's land. CEA's inspecting officer originally stated that clearance could be granted, but the CEA subsequently imposed conditions of a 200 metre distance from the home of the third and fifth respondents (husband and wife), and the construction of a 30 foot chimney. The CEA explained that as the Negombo Magistrate's Court had imposed the 200 metre limit on Appellant's father, the CEA would impose this limit upon the Appellant as the brick kilns were in the same area.

The CEA stated that it had no general rule regarding the distances that had to be maintained between brick kilns and residential premises. The Appellant did not make a formal application for an EPL application, but both he and the PS proceeded on the basis that the “site clearance application” was an EPL application.

Legal Framework

Section 23E National Environmental Act, No. 47 of 1980
National Environmental (Protection and Quality) Regulation No. 1 of 1990
National Environmental (Appellate Procedure) Regulations of 1994

Held

Even though Appellant did not make a formal EPL application, the Secretary held that he had jurisdiction to entertain this appeal, as the site clearance application is a pre-EPL procedure. This site clearance permission allows the industrialist to obtain building approval and other necessary legal authorisations, and to begin construction with a reasonable degree of certainty that an EPL will be granted when formally applied for, if site clearance conditions are met. The law would be rendered ridiculous if a person to whom site clearance is denied has to make a formal EPL application and obtain a formal refusal before he can exercise his right to appeal. The site clearance process is part of the EPL process, and thus when site clearance is refused, a right to appeal arises under section 23E.

As the PS has in unambiguous terms refused to issue a licence, even before an application has formally been made, this was deemed to be a refusal to grant an EPL.

The Secretary then reviewed the merits of the appeal, and held that there was no technical basis for the stipulation of a 200 metre distance. The stipulation was not based on CEA general guidelines, or the recommendation of any of the inspecting officers, and was therefore unreasonable and unjustified. As the Appellant's father has no interest in Appellant's land, and their brick kilns are separate, the litigation in the other case did not bind Appellant.

The Secretary stated that the CEA must establish general guidelines for industrial siting and stipulation of EPL conditions. General conditions may be varied where exceptional circumstances justify a variation on scientific grounds. In this case, CEA's new Rule 3 which provides for a 100 metre distance between brick kilns and residences, subject to variation in exceptional circumstances, was acceptable.

The condition stipulating the 30 foot chimney, however, was made pursuant to a general CEA guideline for brick kilns and other industries. There is no evidence to suggest this condition was arbitrary.

The decision of the PS was set aside. The Appellant remained free to make a formal EPL application. The new 100 metre limit would be applied. The CEA and PS should inspect the site, gather scientific and environmental data, give the parties an opportunity to be heard, and make a variation if necessary.

SRI LANKA 5

Appeal Under Section 23dd of The National Environmental Act By Rajawella Holdings (Pvt.) Ltd Secretary, Ministry Of Environment (1994) D. Nesiah, Secretary, Ministry Of Environment

Introduction

Rajawella Holdings (Pvt.) Ltd. (RHL) lodged this appeal with the Ministry of Environment over a decision made by the Ministry of Agricultural Development and Research, the project approving agency (PAA), regarding the proposed "Rajawella Golf and Hotel Project". One party to the Appeal, the Environmental Foundation Ltd (EFL), raised two preliminary objections to the appeal that the Secretary had to consider before he could rule on the merits of the appeal.

Legal Framework

Section 23DD of the National Environmental Act No. 47 of 1980

Held

The Secretary overruled EFL's two preliminary objections. First, EFL stated that RHL has not made a proper appeal as required by law. Section 23DD of the National Environmental Act states that where the PAA refuses to grant approval for a prescribed project, the aggrieved person or body has a right to appeal. RHL's letter to the Ministry of Environment was headed with the word "Appeal" and stated that it disagreed with some aspects of the PAA's decision and agreed with others. If there are no specific provisions in the law as to the form of the appeal, a liberal standard is applied. Applying such a standard in this case, RHL's letter was an appeal within the meaning of section 23DD.

Second, EFL argued that a right to appeal is available only where the PAA has "refused" to approve the project, and as the PAA had approved the project subject to certain conditions, RHL does not have a statutory right to appeal under Section 23DD. The PAA separated this project impact into five components, and an examination of these five components revealed that four out of five were "refused" or "allowed" subject to conditions. In many cases, the environmental impact assessment requirements of

Chapter IVC of the National Environmental Act creates such situations where a per se approval (or disapproval) of a project is not possible.

If the PAA's decision substantively alters the structure of the project as proposed, the decision amounts to a "refusal" to approve the project, and a right of appeal arises under section 23DD. If, however, the attached conditions do not change the project structurally or substantially, there is an "approval" and hence no right to appeal. Each case must be reviewed on its own facts and circumstances.

In this case, the Secretary of the Ministry of Environment examined the facts and found that several conditions structurally altered the project, and thus the PAA's decision was a "refusal" to grant approval within the meaning of section 23DD, and RHL had a right to appeal this decision.

The Secretary then reviewed the merits of the appeal, and affirmed the PAA's decision, subject to some variations.

Cases Cited

Sierra Club v. Penfold 17 ELR 21061

T. Z Nambudiri v. A.N. Kurup 1965 AIR (Kerala) 1

SRI LANKA 6

The Environmental Foundation Limited & others v The Attorney-General & others, Supreme Court Of Sri Lanka S.C. Application No. 128/91
G. P. S. De Silva, C. J., K.M.M.B. Kulatunga, J., & P. Ramanathan, J.

Introduction

The Petitioners included residents of Nawimana and Weragampita villages in the South of Sri Lanka, as well as a company devoted to environmental protection. In 1987 the Southern Group took over a rock quarry near the Petitioners' villages. The Petitioners alleged that they had suffered serious injury to their physical and mental health, and serious damage to their property, as a result of large-scale blasting, which commenced at the quarry in 1987.

Among others allegations, the Petitioners stated that pieces of rock 20 centimetres in diameter were projected into their village, that the blasting created unbearable noise, severe vibrations and thick smoke, destruction of homes, and harm to their health and livelihoods.

The Petitioners argued: that despite their complaints, the Government Agent, Matara, renewed the licence for the quarry without giving the petitioners a hearing; that the Superintendent of Police, Matara did not exercise his powers to abate a public nuisance; that the Central Environmental Authority (CEA) did not exercise its powers under the National Environmental Act as the quarry's operator had not obtained a licence from the CEA; and that the Director of the Geological Survey Department and the Gramma Sevaka of the area failed to take action which they were empowered to take under the law despite petitioner's repeated complaints. These parties are all respondents in this action. Finally, the petitioners argued that the quarry's owner and operator, the Southern Group, benefited from the executive action (and inaction) of the other respondents, and should pay to restore the Petitioner's physical quality of life.

The Petitioners claimed violations of their rights under various articles of the Constitution: Article 3 (sovereignty is in the people and is inalienable and includes fundamental rights); Article 11 (no person shall be subjected to cruel, inhuman or

degrading treatment); Article 14(1)(g) (every citizen is entitled to freedom to engage in any lawful occupation); Article 14(1)(h) (every citizen is entitled to freedom of movement and choosing his residence).

After this action was instituted, CEA officials inspected the quarry, and met with the petitioners' representatives. In December 1992, the parties informed the Supreme Court that a settlement had been reached.

Legal Framework

Articles 3, 11, 14, 126 of the Constitution of Sri Lanka.

Held

The settlement was approved, and the application dismissed without costs.

The Court listed the terms of the settlement. The number of blasts was limited to three days a week (Monday, Wednesday, Friday), and if there is a necessity to increase the number, the Monitoring Committee (two persons nominated by Petitioners, two persons from the Southern Group, the Gamma Niladhari of the villages of Nawimana and Weragampita, and the Government Agent, Matara) must approve the change. If the blasting cannot be done on one of these three days, it can be done on an alternative day suitable to the Southern Group if 24 hours written notice is given to the Gamma Niladhari. Contingencies preventing a scheduled blasting include bad weather, and inability of the police to be present.

Blasting will take place between 10:00 a.m. and 5:00 p.m. There should be at least a 20 second time lapse between each blasting, and electronic etonation and the safety fuse method must be used. The depth of a bore hole cannot exceed 8 feet. The number of blasts per day is not stipulated.

The police must maintain a monthly report detailing: the total quantity of explosives used; the depth of bore holes; the dates on which blastings occurred; the commencement and close of blasting; the methods used for blasting; the number of bore holes on each day; and any complaints petitioners make. This report is maintained on the premises of the quarry, and certified by the site manager.

The settlement also discussed secondary blasting, maximum noise and vibrations, as well as the operation of the crusher. The crusher operation should be a continuous wet process, and the CEA should include in the environmental protection licence a condition requiring the construction of a sound barrier around the crusher. Finally, a siren should be sounded three times before blasting commences and after blasting is completed.

SRI LANKA 7

Keangnam Enterprises Limited v E.A. Abeysinghe & 11 Others
C. A. Application No. 259/92 Court Of Appeal

Introduction

The Petitioner-Company was engaged in the rehabilitation of the Ambepussa-Dambulla-Anuradhapura road and was extracting stone from the quarry for that purpose. The informants who obtained the Magistrate's Court order were a group of residents of the area who claimed to be affected by the blasting operations carried out by the Company. During the course of the proceedings the Court allowed separate applications from the Road Development Authority and four workers from the quarry who claimed that their livelihood would be affected if the quarry was shut down.

The Petitioner-Company sought revision of two orders of the Magistrate's Court of Kurunegala delivered respectively on 18 December 1991 and 26 March 1992 in the Court of Appeal. The Order delivered on 26 March 1991 merely affirmed after an inter partes inquiry, the order made ex-parte on 18 December 1991, restraining the Petitioner-Company under Section 98(1) of the Criminal Procedure code from operating a quarry on land it had leased, and directing the removal of a public nuisance under Section 104(1) of the Code.

Legal Framework

Criminal Procedure Code, Sections 98(1) 104(1), 106.
National Environmental Act No. 47 of 1980 (NEA), as amended by Act. No. 56 of 1988, Sections 23A and 29

The main argument of the Petitioner-Company in the Court of Appeal was that the Magistrate's power to make orders under Chapter IX of the Criminal Procedure Code (Sections 98 to 106) had been taken away by the provisions of the National Environmental Act No. 47 of 1980 as amended by Act No. 56 of 1988. Under Section 23A of the amended NEA, no person was allowed to discharge, deposit or emit waste into the environment which would cause pollution except under the authority of a licence issued by the Central Environmental Authority (CEA) and in accordance with

such standards and other criteria as may be prescribed under the Act. Section 29 of the Act declares that: "The provisions of the Act shall have effect notwithstanding anything to the contrary in the provisions of any other written law."

At the time that the Magistrate made his orders the Petitioner Company had applied for but had not obtained a licence from the CEA. It had commenced blasting operations on 1 September 1991 on the strength of a letter dated 10 July 1991 from the Director of the CEA, to the Kurunegala Pradeshiya Sabha, which stated that an environmental protection licence "shall be obtained by the developer" and that "the developer shall submit an application for the said licence to the CEA one month prior to the commencement of manufacturing operations."

A permit was eventually issued to the Petitioner-Company on 19 June1992 after the Magistrate had made his restraining and conditional orders and after the Petitioner Company had filed this revision application in the Court of Appeal.

Held

The mere application for a licence was not sufficient compliance with Section 23A of the Act and the Petitioner-Company had also acted in violation of the conditions stipulated in the letter of 10 July 1991 from the Director of the CEA. Since the Petitioner-Company was not in possession of a licence from the CEA as required by the Act, he could not invoke the provisions of the Act to defeat the action in the Magistrate's Court. The Magistrate had jurisdiction to make orders under Chapter IX of the Criminal Procedure Code if satisfied with the information furnished by the Informants regarding the nuisance of which they complained. Therefore, the revision application would be dismissed. However, since the Petitioner Company had subsequently obtained a licence from the CEA it was at liberty to revert to the Magistrates Court where the main inquiry under Section 101 of the Code was still pending and make submissions based on the provisions of the National Environmental Act as amended, with a view to have the orders made by the Magistrate annulled.

Case Cited

Kiriwantha and another v. Navaratne and another (S. C. Application No. 628/88)

SRI LANKA 8

S. C. Amarasinghe & 3 others v The Attorney General & 3 others

S. C. (Spl.) No. 6/92, Supreme Court Of Sri Lanka

Introduction

The Petitioner sought to quash an Order of the President of Sri Lanka dated 21 October1992 made under Section 2 of the Urban Development Projects (Special Provisions) Act No. 2 of 1980 declaring that, upon the recommendation of the Minister in charge of urban development, he was of opinion that the lands described in the Schedule to the Order were urgently required for an urban development project. The Attorney-General and the Road Development Authority were made respondents. It was common ground that the lands in question were to be acquired in connection with the construction of an expressway from Colombo to Katunayake. The Petitioners contended in the Supreme Court that there had been a failure of natural justice as there had been no hearing prior to making the order, despite the fact that under Section 2 of the Act the urban development project had to be a scheme "which would meet the just requirements of the general welfare of the people".

Legal Framework

Urban Development Project (Special Provisions) Act No. 2 of 1980 Sections 2,3 & 7.
National Environmental Act No. 47 of 1980 amended by Act No. 56 of 1988 of the State Lands (Recovery of Possession) Act. Sections 23 AA & 23 BB.

The Petitioners cited Sections 23AA and 23BB of the National Environmental Act No. 47 of 1980 as amended by Act No. 56 of 1988 which require that approval for all prescribed projects should be obtained from the appropriate project approving agency, which is first required to call for an environmental impact assessment report (EIA). They contended that the Presidential Order under Section 2 of the Urban Development Projects (Special Provisions) Act could not be made until the EIA had been prepared.

Held

(1) As the Order under Section 2 of the Urban Development Projects (Special Provisions) Act had of itself no adverse impact on a citizen's property, liberty or

livelihood and does not deprive him of or affect title to or possession of property, a public hearing was not required at that stage.

(2) The available material did not indicate that the decision to build the expressway was unreasonable and therefore the Court would not interfere.

(3) Section 3 of the Urban Development Projects (Special Provisions) Act did not take away the powers of the superior courts which were enshrined in the Constitution.

(4) Section 7 of that Act did not empower the State to take over privately owned land under the State Lands (Recovery of Possession) Act without first acquiring the land under the Land Acquisition Act.

(5) The provisions of Sections 23AA and 23BB of the National Environmental Act as amended, were not applicable, as no orders had yet been made listing any "prescribed projects". However, the Central Environmental Authority had power to call for an EIA in respect of any new project under the Act and the Court took note that the Respondents had given an undertaking that an EIA would be prepared and made available for public scrutiny for 30 days, which would be the appropriate stage at which to consider public representations on environmental factors.

Cases Cited

Hirdaramani v. Rathnavale 75 N.L.R.67
Visuvalingam v. Liyanage (1984) 2 Sri L.R.123
Wickremabandu v. Herath (1990) 2 Sri L.R.348
Weeraratne v. Colon Thome (1988) 2 Sri L.R.151
Fernandopulle v. Minister of Lands and Agriculture 79(2) N.L.R.115

SRI LANKA 9

Environmental Foundation Ltd. V Ratnasiri Wickramanayake Court of Appeal Sri Lanka CA Application No. 137/96

Introduction

The petitioner filed an application for a writ of certiorari to quash an order of the Director of the Department of Wildlife Conservation permitting the display of 30 species of animals at a private zoo that was open to the public for a fee. The relevant section of the law allowed authorization to keep animals in a zoo for the protection, preservation, or propagation or for scientific study. The petitioner submitted that only a national zoo and not a private zoo could be granted such authorization so that the permit was void.

Legal Framework

The Fauna and Flora Protection Ordinance

Fauna and Flora Protection (Amendment) Act No. 49 of 1993

Held

The court held that it could not interfere with the Minister's legitimate exercise of his discretion and declined to grant the orders sought.

SRI LANKA 10

Bulankulama v The Secretary, Ministry of Industrial Development Supreme Court Application No. 884/99 (FR) Sri Lanka

Introduction

The Sri Lanka Government wanted to conclude an agreement with a company for the manufacture of phosphate fertilizer using local deposits of apatite. The applicants petitioned the Court to stop the proposed agreement claiming that their lands would be destroyed if the project was implemented and about 2,600 families were likely to be permanently displaced from their homes and lands. The respondents countered that this apprehension was unjustified because the signing of the agreement would lead to exploration and feasibility studies and the approval of the Secretary would be obtained before the company could proceed with the construction and mining phases of the project.

Legal Framework

Articles 14 (I) (G) and 14 (1) (H) of the Constitution

The Mineral Investment Agreement Article 2.4

Held

Although mining may have more devastating consequences, exploration was not so harmless as to cause the appellants no apprehension of imminent harm to their homes and lands. The reliability of the proposed agreement had been considered in deciding whether there was an imminent infringement of the appellants' rights. The Court found nothing in the agreement to show that the signing would only result in exploration and a feasibility study and the applicants were entitled to be apprehensive. The Court ordered the respondents to desist from entering into the proposed agreement pending a comprehensive Environmental Impact Assessment Study.

SLOVAK REPUBLIC 1

Polovnicke Zdruzenie (Hunter's Association) Gajdoska Hronec v The Slovak Inspectorate of the Environment The Supreme Court of the Slovak Republic Ref No 3397001100/533-00-D dated October 30, 2000 Judges: Stanislav Lehotak, Valovic and Belko (Nature & Landscape Preservation)

Introduction

The applicant was charged with failing to comply with the law by committing an act in conflict with paragraph 26 Article 1 and paragraph 24 Article 2 of the Law by killing on 31 October 1998, in the locality of Gajdoska in the Cadastal area of the municipality of Osrblie, one individual lynx of a protected species. He was convicted and fined SK 15,000. He appealed for a review to the Supreme Court.

Legal Framework

Act of the NA SR No. 287/1994 Law Digest The Civil Code

Held

The Court found that no breach of the Law occurred as a result of the original decision of the Administrative Authority (The Slovak Inspectorate of the Environment) which was challenged by the plaintiff's complaint and therefore the judgment according to paragraph 250 j, Article 1 of the Civil Code amounted to a "a nonsuit to the plaintiff's complaint". There was no award of costs to either party.

SLOVAK REPUBLIC 2

UNIKOS, Co-operative Society v The Slovak Inspectorate of the Environment, Ref No: 43 960 046 00/100/Du, September 7, 2000 (Waste management offence)

Introduction

The plaintiff submitted a complaint for review of a decision whereby the defendant rejected the plaintiff's appeal and confirmed a decision by the Slovak Inspectorate of the Environment in a case of waste management. A fine of Sk. 120,000 was also upheld. The defendant contended there was reliable evidence of the plaintiffs' handling of hazardous waste without the permission of the competent authority and failing to provide accurate and complete information.

Legal Framework

The Waste Management Act No. 238/1991 The Civil Code

Held

That complaint was not justified. The Slovak Inspectorate of Waste Management carried out an inspection on 30 August and 3 and 9 September 1999 at the plaintiffs' premises and discovered that the plaintiff had been handling hazardous waste without a permit. The complaint was therefore rejected as unjustified.

SLOVAK REPUBLIC 3

Alzbeta Brovzova v Ministry of the Environment of the Slovak Republic

Ref. No: 220/936/2000 - 6.2/Hia dated 26 July 2000

Introduction

The plaintiff's complaint included a request for review of a decision dated 26 July 2000, taken by the defendant administrative authority, by which the authority had reversed a previous decision of the Regional Office of the Department of Environment dated 24 March 2000. The plaintiff's case was that the defendant's decision did not resolve the problem posed by the construction of a fence by a neighbouring house owner, which substantially impaired the environment and hindered the plaintiff from proper use of her premises.

Legal Framework

The Building Act No. 50/1976The Civil Code

Held

The Supreme Court reversed the decision that was the subject of the challenge and returned the case for further consideration pursuant to the Civil Code. No legal costs were awarded to either party.

UKRAINE 1

Joint Stock Company "Okean" Ministry of Environmental Protection and Nuclear Safety of Ukraine, Case No. 1/47 1997

Introduction

In 1995 construction of a complex for loading fertilizers commenced without a recommendation by the State Environmental Expert Body (TEC). The construction was suspended by the Deputy Minister, pending the findings of the expert environmental body. On 15 December 1995 the State Department of the Ministry of Environmental Safety of Ukraine made negative findings in relation to the project. On 6 May 1996 the state environmental body indicated that the local government, taking into account the interests of the city and its residents, should take the decision about the appropriateness of and the practical realization of the findings of the TEC. The plaintiff, who did not agree with the validity of this conclusion, filed a complaint to the court.

Legal Framework

Article 10 Law of Ukraine

Held

The court held that the complaint was well founded. Article 10 of the Law of Ukraine on Environmental Expertise obliged the applicants to announce, through the mass media, the findings of the TEC in the form of a special declaration on the findings. The defendant had not complied with this requirement. The court declared the conclusions invalid and ordered that the construction cease until proper findings were made.

UNITED KINGDOM 1

Englebert Ngcobo & Others v Thor Chemical Holdings Ltd.

Queen's Bench Division; 11 April 1995

Introduction

Workers at Thor Chemicals South Africa (Proprietary) Ltd. in Natal sued their parent company in England. The South African plant manufactured and reprocessed mercury compounds. This action was taken by three employees who were exposed to hazardous and unsafe quantities of mercury. However, by the date of this application the first and the third plaintiffs had died and were represented respectively by a wife and a mother. None of the plaintiffs could have sued the employer in South Africa because the Workmen's Compensation Act 1941 (SA) prohibited action by an employee against his employer for injuries sustained at work but, irrespective of fault an employee could claim compensation from the Commissioner and each of the workmen had been paid some compensation under the scheme. This was a minimal amount in comparison to common law damages, and the plaintiffs commenced proceedings in England. The defendants sought to stay the proceedings in England on the ground that England was not an appropriate forum, but the plaintiffs alleged that an unsafe system of work, known to the defendants, had been transferred from England to South Africa.

Legal Framework

Workmen's Compensation Act 1941 (South Africa)

Spiliada Maritime Corporation v Cansulex Limited [1987] 1 AC 460

Held

The evidence of negligence on the Defendants' part in England established a nexus with the damage in South Africa. There was grave danger that justice might not be done to the plaintiffs in South Africa if their case was dismissed in England. The Court therefore allowed the suit to proceed in England.

UNITED KINGDOM 2

R v Secretary of State for Trade & Industry Ex p Duddridge

Queen's Bench Division; 7 Journal of Environmental Law 224

Introduction

This was an application for judicial review of the decision of the Secretary of State for Trade and Industry for declining to issue regulations to the National Grid Company and other licence holders under the Electricity Act 1989 to restrict the electromagnetic fields from electric cables which were being laid as part of the national grid. The application was brought on behalf of three children who lived in the area where the National Grid Company was laying a new high voltage underground cable. The applicants alleged that the non-ionizing radiation to be emitted from the new cables would enter their homes and schools and expose them to leukaemia. They required the Secretary of State to issue regulations to remove the risk by restricting the level of the electromagnetic fields. There was no evidence of possible risk to the health of those exposed to such fields.

Legal Framework

The Electricity Act 1989

Article 130r(2) (now Art 174(2)) EU Treaty

Held

That Community Law did not impose upon member states an immediate obligation to apply the precautionary principle in considering legislation relating to the environment or human health. The applicants had therefore failed to show any ground for challenging the decision of the Secretary of State not to issue regulations.

UNITED KINGDOM 3

Lubbe v Cape PLC House of Lords; [2000] 4 All ER 268

Introduction

There were 3,000 plaintiffs. Each of them claimed damages in one of the 11 writs issued against the defendant between February 1997 and July 1999. All plaintiffs claimed damages for personal injuries (and in some cases death) suffered as the result of exposure to asbestos and related products in South Africa. The central issue is whether proceedings brought by the plaintiffs against the defendant should be tried in England or in South Africa. The defendant sought a stay of the proceedings in England.

Legal Framework

Public Interest Principle

Article 6 European Convention on Human Rights

Article 2 Brussels Convention

Held

The court refused to stay the proceedings. The court decided that in the interest of justice the matter should be tried in England. One judge stated, "I cannot conceive that this court would grant a stay in any case where adequate funding and legal representation of the plaintiff were judged to be necessary to the doing of justice and these were clearly shown to be unavailable in the foreign forum although shown to be available here."

UNITED KINGDOM 4

Empress Cars Ltd v National Rivers Authority House of Lords; [1999] 2 AC 22

Introduction

This was a water pollution case. The appellant maintained a diesel tank in a yard that stored cars and was alongside a river. The tank was surrounded by a bund to contain spillage, but the appellant had overridden that protection by fixing an extension pipe to the outlet of the tank so as to connect it to a drum standing outside the bund. On 20 March 1995 the tap was opened by a person unknown suspected to be a trespasser and the entire contents ran into the drum. The drum overflowed into the yard and down the drain into the river. The appellant was charged with causing pollution matter to enter controlled waters contrary to section 85 (1) of the Water Resources Act 1991. He was convicted by the Justices and his appeals to the Crown Court and OBD were dismissed.

Legal Framework

Section 85 of the Water Resources Act 1991

Held

The Law Lords dismissed the appeal. On a prosecution for causing pollution under Section 85 (1) of the Water Resources Act 1991 it was necessary to identify what the defendant was alleged to have done to cause the pollution. There was ample evidence upon which the lower courts had been entitled to find that the appellant had caused the pollution. It was sufficient that the company did something that allowed a state of affairs in which polluting matter could escape, whether or not this was the immediate cause of water pollution.

UNITED KINGDOM 5

Environment Agency v Brock Queen's Bench Division; [1998] 4 PLR 37

Introduction

It was alleged that on 2 December 1996, Brock Plc had caused polluting matter, namely tip leachate, to enter a ditch, a tributary of the River Dibbin from Hooton landfill site at Ellesmere Port contrary to Section 85 (1) and (6) of the Water Resources Act 1991. The Magistrates acquitted the company but stated a case for the opinion of the High Court. The central question was whether on the facts found by the Magistrates they were able to find that the company had not caused the entry of the leachate into the ditch because the company had not known of its escape.

Legal Framework

The Water Resources Act 1991

Held

The Magistrates were not aware at the time of their decision of the decision of the House of Lords in the Empress Car Co. Case (UK Case 4, above) making it clear that liability under Section 85 (1) is not based on negligence but is strict. The matter was remitted back to the Magistrates with a direction to convict the company.

UNITED KINGDOM 6

R v Her Majesty's Inspectorate of Pollution, Ex P. Greenpeace Ltd (No 2)

Queen's Bench Division; [1994] 4 All ER 329

Introduction

British Nuclear Fuels (BNFL) had been granted authorizations subject to specified conditions, permitting it to dispose of liquid and gaseous radioactive waste from its premises. The authorizations were varied to allow it to test its new thermal oxide processing plant which was in the process of completion. The applicant, an organization which had about 400,000 supporters (2,500 of whom were in the region of the company's site) and which campaigned for the protection of the national environment, sought judicial review of the decision to vary the authorizations. The company contended that the applicant did not have sufficient interest in the matter to bring the proceedings.

Legal Framework

The Radioactive Substances Act 1960

Held

"Premises" as defined in the Radioactive Substances Act 1960 Section 19(1) included plant on site and the company were already permitted to dispose of waste from their premises. Testing of the new plant was within the purpose of any undertaking carried on by the company at the premises in accordance with the licensing regime. It was appropriate, therefore, for the respondents as the regulatory authority to supervise this activity by variations of the licence. Nonetheless, the applicant had sufficient interest in the issues raised for it to be granted *locus standi*. Its supporters may not have an effective opportunity to bring action individually and it was entirely appropriate that an established body with a genuine interest in the issues should do so on behalf of its members.

UNITED KINGDOM 7

R v Secretary of State for the Environment Ex P. Greenpeace Ltd.

Queen's Bench Division; [1994] 4 All ER 352

Introduction

The applicant environmental pressure group and the local council applied for judicial review of the decision of the Secretary of State for Environment not to call in applications from a nuclear fuel company for authorizations to discharge radioactive waste from a plant and not to hold a local inquiry, and of the decision of the Secretary of State for Environment, the Minister of Agriculture Fisheries and Food and the Inspectorate of Pollution to grant authorizations pursuant to the Radioactive Substances Act 1993.

Legal Framework

The Radioactive Substances Act 1960 and1993

Euratom Treaty, Articles 30 and 31.

Council Directive (Euratom) 80/836 and (EEC) 85/337

Held

Although the 1993 Act did not require prior justification of radioactivity in terms of the net benefit, Council Directive (EC) 85/337 did concern itself with justification of certain practices. There was a legal obligation to justify the grant of the authorizations and although the Ministers had erred in concluding that justification was not relevant, their general approach to justification could not be faulted as they had weighed the benefits against the detriments in reaching their conclusion that there was a good economic case for proceeding with the new thermal oxide reprocessing plant. The 1993 Act gave wide discretion to the Ministers on whether to hold a local inquiry, and the Secretary of State in refusing to direct a local inquiry, acted lawfully within the wide powers conferred on him by Parliament. Accordingly the application was dismissed.

UNITED KINGDOM 8

R v Inspectorate of Pollution, Ex p. Greenpeace Ltd.

Court of Appeal; [1994] 4 All ER 321

Introduction

The Inspectorate of Pollution and the Minister of Agriculture, Fisheries and Food granted the application of a nuclear fuel company (BNFL) to vary the existing authorizations it had been granted to allow it to carry out a testing programme and thereafter operate a nuclear waste reprocessing plant. The applicant, an environmental pressure group was granted leave to apply for judicial review of the decision but its application for a stay of the implementation of the variations was refused. The applicant appealed against the refusal.

Legal Framework

The Radioactive Substances Act 1960

Held

There was evidence that the company already had authorization to discharge radioactive material within permitted limits, and that the emissions envisaged as part of the testing programme, would not exceed those limits. The applicant was unable to any cross undertaking in damages and the judge had applied the correct principles in refusing the stay, namely to examine the balance of convenience as between the parties. The appeal was dismissed.

UNITED KINGDOM 9

Merlin & another v British Nuclear Fuels plc, QBD; [1990] 2 QB 557

Introduction

In 1973 the plaintiffs, a married couple, purchased a house overlooking an estuary some six miles south of a nuclear reprocessing plant operated by the defendants. In 1977 a public inquiry was held to examine the defendants' plans to extend the plant. The plaintiffs collected a sample of house dust from their vacuum cleaner which was sent to the USA for analysis. The test indicated high levels of radioactive contamination. The plaintiff moved to another house and sold their old house for less than they had expected and claimed compensation under S.12(1) of the Nuclear Installation Act 1965 for financial loss due to the diminution in the value of their house caused by the radioactive contamination.

Legal Framework

Nuclear Installation Act 1965

The Vienna Convention on Civil Liability For Nuclear Damage 1963

Held

Liability under the 1965 Act for nuclear damage did not extend to any loss or damage other than proved physical or mental personal injury and physical damage to property. The ingress of radiation into a house did not amount to such injury within Section 7 of the 1965 Act. It followed that a claim for compensation could not be founded against the operators of the nuclear site from which the radioactivity had emanated. The plaintiffs' action was dismissed.

UNITED KINGDOM 10

R v Secretary of State for the Environment, ex p Friends of the Earth

Court of Appeal; [1994] 2 CMLR 760

Introduction

A declaration was made by the European Court of Justice that the United Kingdom had failed to properly implement and apply Council Directive (EC) 80/778. The UK had failed to ensure that the quality of water supplied conformed with the Directive's requirements regarding nitrates. In order to rectify the breach of the Directive, the Secretary of State decided that he would accept undertakings from two water companies that they would take appropriate steps to comply with their duties under the Water Industry Act 1991 concerning the supply of wholesome water. He also decided that he would not make enforcement orders against the companies under section 18 of the Water Industry Act 1991. On the applicants' application for judicial review of the decisions, a judge held that the UK's obligation was to rectify the breach of the Directive as soon as possible and not merely as soon as practicable, but that it might not be possible to achieve a result earlier than was practicable. The applicants then appealed against the dismissal of their application.

Legal Framework

The Water Industry Act 1991

EC Council Directive 80/778 relating to the Quality of Water for Human Consumption.

Water Quality (Water Supply) Regulations 1989.

Held

The judge had correctly recognized the nature and extent of the UK's duty to remedy the breach of its obligations. However, there were practical difficulties in bringing all drinking water up to the required standard. The fact that the Secretary of State had accepted the undertakings did not preclude him from serving an enforcement notice at a later stage. Accordingly the appeal was dismissed.

UNITED KINGDOM 11

R v North Yorkshire County Council, ex parte Brown & Another

House of Lords; [2000] 1 AC 397

Introduction

In 1947 planning permission was granted for a quarry near a village in a conservation area just outside a national park. The permission was indefinite in duration and not subject to any environmental conditions. The respondent council, acting as the local mineral authority, carried out wide consultations and considered representations before imposing certain conditions. The applicants, who owned houses in the nearby village, were dissatisfied with the conditions and applied for judicial review to quash the council's decision contending that the council had made its decision as to the conditions to be imposed on the operation of the quarry without carrying out an environmental impact assessment as required by EEC Council Directive 85/337. The local council contended that imposition of conditions was not a "development consent" within the meaning of the Directive.

Legal Framework

Planning and Compensation Act 1991

EEC Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment.

Held

Although the source of the right to operate the quarry was and remained the permission granted in 1947, the determination pursuant to S22 of and Sch.2 to the 1991 Act of conditions under which the quarry could be operated was a necessary condition for future operation. That was sufficient to bring the determination of conditions within the concept of a "development consent" regulated by EEC Council Directive 85/337. The Appeal was therefore dismissed.

UNITED KINGDOM 12

R v Secretary of State for the Environment ex p Rochford District Council

Queen's Bench Division; [2000] 3 ALL ER 1018

Introduction

Following an appeal against the non-determination of a planning application by Rochford District Council (the authority), the developers asked the Inspector to award them their costs in exercise of his power under the Town and Country Planning Act 1990 and the Local Government Act 1972. The Inspector decided that the authority had behaved unreasonably in two respects, both of them relating to its non-determination of the planning application rather than its conduct in the appeal. He therefore made a costs order in favour of the developers. The authority applied for judicial review, contending that its conduct before the appeal was irrelevant to the award of costs.

Legal Framework

Town & Country Planning Act 1990

Local Government Act 1972

Held

The Inspector was not precluded from taking into account conduct before the appeal proceedings in making a cost order. The planning responsibilities were plainly linked to the principle that the planning system should not prevent or delay development which could reasonably be permitted. Consequently the Inspector's decision could not be faulted and the application was dismissed.

UNITED KINGDOM 13

R v Secretary of State for the Environment ex. p. Billson

Queen's Bench Division; [1998] 2 ALL ER 587

Introduction

Robert Billson applied for judicial review by way of an order of certiorari to quash the decision of the Secretary of State for the Environment. In 1929, owners of a common traversed by public footpaths, bridleways and tracks, by deed pursuant to the Law of Property Act 1925, granted to members of the public rights of access to the common for air and exercise. In 1984 part of the common was purchased by a company that sought to block public access to the common. The applicant applied to the county council for and obtained an order under the Wildlife and Countryside Act 1981 to include eight tracks as bridleways in the area map. The Inspector appointed by the Secretary of State to decide whether the order should be confirmed refused to do so. The applicant applied for judicial review of the Inspector's decision.

Legal Framework

The Law of Property Act 1925

The Wildlife and Countryside Act 1981

The Highways Act 1980

Held

The Inspector was entitled to conclude that the formal execution of the 1929 deed and the depositing of it with the appropriate government department was an overt act indicating the landowner's intention not to dedicate. In this case the members of the public were doing what they were permitted to do under the 1925 Act by virtue of the deed and no more. Their enjoyment of the tracks was by licence and not as of right. Therefore the Inspector was right not to confirm the order and the application for judicial review failed.

AUSTRALIA 1

Greenpeace Australia Ltd v Redbank Power Co Pty Ltd & Singleton Council, Land & Environment Court of NSW 86 Lgera 143 (1994) Pearlman Cj.

Introduction

In March 1994 Singleton Council granted development consent to Redbank Power Company for the construction of a power station at Warkworth in the Hunter Valley. Greenpeace Australia objected pursuant to section 98 of the Environmental Planning and Assessment Act 1979 (NSW) which allows a third party objector the right of appeal against development consent.

Greenpeace's main argument was that the impact of air emissions from the power station would unacceptably exacerbate the greenhouse effect in the earth's atmosphere, and that the court should apply the precautionary principle of the National Environmental Protection Agency (NEPA) and refuse development consent for the project.

Legal Framework

Section 98 Environmental Planning and Assessment Act 1979 (NSW).
Australian Intergovernmental Agreement on the Environment
Australian National Greenhouse Response Strategy
1992 United Nations Framework Convention on Climate Change

Held

The court held that the development project would be allowed to proceed. The application of the precautionary principle mandates a cautious approach in evaluating the various factors to determine whether a development consent should be granted. This principle does not require, however, that the greenhouse effect issue be given precedence over all others.

The Framework Convention on Climate Change, the Intergovernmental Agreement on the Environment and the National Greenhouse Response Strategy outline policy

objectives to address the problem of greenhouse gases, but they do not expressly prohibit any energy development which would emit such gases.

This power plant, a fluidised-bed combustion power plant, will produce energy for 100,000 homes. The power plant will use tailing as fuel, and thereby avoid the detrimental environmental effects of tailing disposal in dams, and it will produce lower emissions of sulphur dioxide and carbon dioxide, in comparison with the coal-fired power stations it is meant to displace. It will also reduce the amount of land sterilised by tailing dams, and convert a waste product into a usable one. The court stated that a review of these considerations demonstrates that the development application should be approved.

Cases Cited

Leatch v. National Parks & Wildlife Service (1993) 81 LGERA 270

AUSTRALIA 2

Nicholls v Director General Of Private National Parks And Wildlife & others, Land And Environment Court Of New South Wales 81 Lgera 397 Talbot, J.

Introduction

The Applicant appealed against the decision of the Director General of the National Wildlife Service under Section 92C of the National Park and Wildlife Act 1974, to grant a licence under Section 120 of that Act to the Forestry Commission of New South Wales to take or kill any protected fauna in the course of carrying out forestry operations within the Wingham Management Area.

Legal Framework

The National Park and Wildlife Act 1974

The Endangered Fauna (Interim Protection) Act 1991 (NSW)

Held

The Court held that the Fauna Impact Statement on the whole contained information to the extent required by Section 92D of the National Park and Wildlife Act 1974. While expressing concern for the workability of the precautionary principle, it was, the court said, 'a practical approach which the court finds axiomatic.'

Cases Cited

Leatch v National Parks and Wildlife Service and Shoalhaven City Council (1993) 81 LGERA 270;

Schaffer Corporation Ltd. v Hawkesburty City Council (1992) 77 LGRA 21

AUSTRALIA 3

Leatch v. National Parks And Wildlife Service And Shoalhaven City Council
Land And Environment Court Of NSW 81 Lgera 270 (1993) Stein, J.

Introduction

This Appeal sought to challenge a licence issued by the Director General of the National Wildlife Service to the Shoalhaven City Council to take or kill protected fauna in the course of carrying out a road development project.

Legal Framework

Under the National Parks and Wildlife Act l974 the Director General is empowered to issue licences 'to take or kill' endangered fauna. A licence so issued to Shoalhaven City Council was challenged by an objector submitting that the fauna impact statement is invalid or legally inadequate, as failing to comply with the requirements for a fauna impact statement as set out in Section 92(d) of the Act.

Held

In the course of the judgment Stein J. observed that:

1. A licence to take or kill endangered fauna should not in most circumstances be "general" in its coverage of endangered species but should specify the species which it permits to be taken.

2. The period of a licence to take or kill endangered fauna should be confined, so far as reasonable, because of possible changes in the physical environment and state of scientific knowledge.

3. The provisions allowing the Director General to seek further information from an applicant is clearly to assist the decision-maker in his task to inform the public and enable its participation and to supplement the fauna impact statement. Like an Environment Impact Statement, a fauna impact statement is not the decision, rather it is a tool to aid the decision-maker.

4. The Court also observed that when there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat. It was noted that this principle is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that, where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious. Application of the precautionary principle appears to be most apt in a situation of a scarcity of scientific knowledge of species population, habitat and impacts. Indeed, one permissible approach is to conclude that the state of knowledge is such that one should not grant a licence to '”take or kill" the species until much more is known.

AUSTRALIA 4

Yanner v Eaton (1999) HCA 53, High Court of Australia (Culture & Environment)

Introduction

The appellant is a member of the Gunnamulla Clan of the Gangalidda tribe of Aboriginal Australia. Between 31st October and 1st December 1994 he used a traditional form of harpoon to catch two juvenile estuarine crocodiles in Cliffdale Creek in the Gulf of Carpentaria, area of Queensland. He and members of his clan ate some of the crocodile meat, he froze the rest and kept the crocodile skins at home. The appellant had no licence, permit, certificate or authority under the Fauna Conservation Act 1994. He was charged and acquitted by the Magistrate Court which found that the taking of juvenile rather than the adult crocodiles had "tribal totemic significance and was based on spiritual belief". The informant appealed. The High Court set aside the order of the Magistrate. The appellant appealed to the Court of Appeal.

Legal Framework

The Fauna Conservation Act 1994

Held

The evidence and findings of the court pointed inexorably to a direct collision between the custom or right claimed, of taking and eating crocodiles, and the ownership of them by the state of Queensland. Opinion was divided but the Court eventually allowed the appeal, holding that regulating the way in which rights and interest may be exercised was not inconsistent with their continued existence. Regulating particular aspects or the usufructuary relation with traditional land does not sever the connection of the Aboriginal peoples with their land.

AUSTRALIA 5

Booth v Bosworth [2001] FCA 1453 (17 October 2001) Federal Court of Australia (Protection of World Heritage Area)

Introduction

Dr. Booth applied to the Federal Court of Australia for an injunction restraining the respondents, mother and son, from killing spectacled flying foxes on or near their lychee orchard at Dallacy Creek Kennedy, in Queensland. The orchard is approximately 60 hectares in area. A series of 14 aerial electric fences erected in a Grid pattern has been constructed within the lychee orchard to electrocute flying foxes that approach, fly between or depart over the respondents' orchard. The orchard is in close proximity to the Wet Tropics Heritage Area which is a listed property under the International Convention For the Protection of World Cultural and National Heritage. The Australian Parliament has enacted The Environmental Protection and Biodiversity Conservation Act 1999 for implementing Australia's international obligations under the World Heritage Convention. 377 spectacled flying foxes were being electrocuted per night and expert evidence showed that the number killed by the Grid during 2000 - 2001 lychee season was between 9,900 - 10,800. The respondents did not give evidence and chose not to participate at all in the proceedings.

Legal Framework

The Environment Protection and Biodiversity Conservation Act 1999
The Evidence Act 1995
Convention for the Protection of the World Cultural and National Heritage 1972.

Held

The court accepted expert evidence and concluded that the probable impact of the Grid will be to halve the Australian population of spectacled flying foxes in less than five years rendering the species endangered within that time frame. The Court was satisfied that the spectacled flying fox contributes to the heritage values of the Wet Tropics World Heritage Area, a very significant regional ecosystem of the World and concluded that an injunction should be issued restraining the operation of the Grid. But as the respondents' action in operating the Grid constitutes a contravention of the Act only

while there is no approval of the taking of the action by the respondents in operation under the Act, the injunction will be conditional as the person authorized by the Act to grant such approval is the Minister for the Environment.

AUSTRALIA 6

Ryan v Great Lakes Council [1999] FCA 177 5 March 1999 Federal Ct of Australia

Introduction

The Applicant filed suit against the Great Lakes Council and others for damages for contracting hepatitis A from eating contaminated oysters from Wallis Lake. The claim was grounded in negligence and a duty of care said to arise at common law although the Applicant also relied on statutory provisions. The Applicant argued that the Council ought to have used its powers to eliminate or reduce the risk of viral contamination of Wallis Lake because the Council knew of the pollution of the Lake and was entrusted with the management of the human/environment relationship in the specific context of effluent control. The Council denied any duty to test and warn the Applicant.

Legal Framework

Common Law Negligence Trade Practice Act 1974

Local Government Act

Clean Waters Act

Held

The Council at all material times knew that the waters of Lake Wallis were used for the growing of oysters for human consumption. It was aware also that the numerous facilities (septic tanks, pit toilets etc) within the lake catchment area constituted potential sources of human faecal contamination of the waters of the Lake, and that oyster consumers were likely to be adversely affected by any failure by the Council to take reasonable steps to minimize human faecal contamination of the Lake from faecal effluent from the said facilities. The Court entered judgment for the Applicant for his personal claim in the sum of $30,000 against the respondents.

AUSTRALIA 7

Environment Protection Authority v Charles Gardner Land and Environment Court of New South Wales Matter No: 50072/96 and 50074/96

Introduction

Charles Gardner was charged that he wilfully disposed of waste in a manner likely to harm the environment contrary to Section 5(1) of the Environmental Offences and Penalties Act 1989. The Court found that the accused and his wife owned and operated a caravan and relocatable home park at Karuah Jetty Village. Throughout a period between 1993 and 1996 he pumped effluent, including human faeces and urine from the Village into the waters of the Karuah River, and concealed the pumping and piping system. The accused denied the offence.

Legal Framework

The Environmental Offences and Penalties Act 1989

Held

The Court found that the pumping of effluent to the river caused harm to the environment within the meaning of Section 5(1) of the Act by changing the physical, chemical and biological condition of the waters of the river. There was evidence of smells in the Village emanating from the discharge, which degraded the aesthetic factors relating to the human surroundings, and the sediments near the outlet of the pipe were found to have accumulated viruses for a long period. This resulted in viral contamination of the waters adjacent to the discharge point, posing a grave health risk to the oyster leases located in the vicinity of the pipe outlet. The accused was convicted of the offence as charged, sentenced to 12 months imprisonment and to pay $250,000 and the prosecutor's costs of $170,000.

AUSTRALIA 8

Byron Shire Businesses for the Future Inc. v Byron Council and Holiday Villages (Byron Bay) PTY Ltd. Land And Environment Court of New South Wales (1994) LGERA 434 Pearlman CJ

Introduction

On 11 November 1993 the Council granted development consent, subject to conditions, to the second respondent for the construction of a coastal tourist village on land at Byron Bay. The land comprised an area of 91 hectares most of which was owned by the second respondent and the remainder by the Council and Crown. Parts of the land were wetlands. Reports, before the Council at the time of its determination of the development application, indicated several species of endangered fauna within or near the site. At the time of its determination the Council had not received a fauna impact statement or an environmental impact statement in respect of the development proposal. The applicant claimed a declaration that, for several reasons, the development consent was void, and injunction to prevent the proposal from proceeding.

Legal Framework

Environmental Planning and Assessment Act 1979 (NSW)
National Parks and Wildlife Act 1974 (NSW).

Held

The Application was upheld. It was not reasonably open to the Council, on the material before it, to conclude that there was not likely to be a significant effect on the environment of endangered fauna.

AUSTRALIA 9

Worimi Local Aboriginal Land Council v Minister Administering The Crown Lands Act and Another Land And Environment Court of New South Wales 72 LGRA (1991) Stein J

Introduction

The appellant made a claim under the Aboriginal Land Rights Act 1983 for land below mean highwater mark comprising 17 hectares of the waters of Port Stephens. Part of the claim included an area that was the subject of a development application for a proposed tourist hotel and extensions to an existing marina. The developer had made representations to the Minister to issue a certificate under the Act and to refuse the claim. The appellant was not given notice nor an opportunity to be heard prior to the Minister issuing the certificate stating the land was needed for essential public purposes of recreation, access, coastal environment protection and tourism.

The Certificate was issued after the Minister had refused the claim and after the appeal had been lodged.

Legal Framework

The Aboriginal Land Rights Act 1983.

Held

1. The Minister was not precluded in terms of time from issuing an otherwise valid certificate under the 1983 Act after he had refused the claim.

2. The appellant had been denied natural justice by not being afforded an opportunity to be heard and the certificate was a nullity.

3. But the claim failed as the land was not claimable Crown land and was lawfully used for essential public purposes.

NEW ZEALAND 1

Summers v The Far North District Council and others

Environment Court Decision A 132/98.

Introduction

The case concerned flooding and drainage of farms in the Motutangi district near Houhora, some 35 kilometers north of Kaitaia. Summers, a farm owner claimed that, as a result of overdrainage and inadequate clearing of public drains, the condition of his farm had deteriorated. He sought enforcement orders for the overdrainage to cease and restoration of the condition of his farm. The District Council contended that the drainage works were for the benefit of the whole district under a management plan.

Legal Framework

Section 314 of the Resource Management Act 1991.

Held

The court declined to make any of the enforcement orders sought by Summers and dismissed his application. The court commended to the parties the value of the proposed management plan for the drainage district and the opportunities for them to take part in the formulation of its content.

NEW ZEALAND 2

Paykel v The Northland Regional Council, Environment Court Decision No. A8/99

Introduction

This case related to a proposal to develop a fishing lodge and associated facilities. The Regional Council had granted coastal permits for a boat ramp and a dingy pull mooring, discharge permits for waste water and storm water and a water permit to take water from a deep bore. The appellants contended that the proposed lodge and fishing facilities would be inappropriate at the location in view of the proposed scale, intensity, function and design of the development.

Legal Framework

The Resource Management Amendment Act 1997

The Town and Country Planning Act 1977

Held

The court found that if the development was carried out in conformity with certain amended conditions it would not fail to sustain the potential of the resources involved nor fail to safeguard the ecosystems or the environment. The court granted the requisite consents.

NEW ZEALAND 3

Ravensdown Fertilizer Co-op Ltd and Smith v Otago Regional Council; Environment Court Decision No. A86/99

Introduction

The appellant sought amendments to various conditions attached to coastal and air discharge permits. He also sought to overturn and vary the Council's decision allowing discharges to the atmosphere for not affording adequate protection to property and the residential environment of Ravensdown generally.

Legal Framework

The Resource Management Act 1991

Held

The conditions for discharges to the atmosphere as formulated represented the best practicable options for mitigating the various actual and potential effects upon the amenity values of the surrounding areas and the quality of the environment, while efficiently utilizing the substantial plant and resources represented by the works.

NEW ZEALAND 4

Hatton v The Far North District Council Environment Court Decision No. A25/98

Introduction

By notice dated 13 June, 1996 the Council gave notice to the Hattons of its intention to take parts of their land for road development. The Council proposed to seal the road from State Highway 10 to the existing sealed section. The Hattons objected, contending inter alia, that the taking of the land was to further a private rather than the public interest, and that the Council had failed to meet the statutory responsibility to negotiate in good faith to acquire the land.

Legal Framework

Public Works Act 1928

Public Works Act 1981

Held

The court dismissed the objections, holding that the area of land to be taken for the road was not for private but for the public interest; that to define the land to be taken leaving strips of it under the Hattons' ownership and control would diminish the public purpose of the road for the private benefit of the Hattons; that allowing adjacent properties frontages was a proper exercise of the Council's power. There was no award of costs as, on the one hand, the Hattons lodged their objection to protect their interest on receiving the Council's notice, and, on the other hand, it was inappropriate to order the Council to pay costs as the objections failed.

NEW ZEALAND 5

Daroux v The Minister of Lands & others Environment Court Decision No. A88/99

Introduction

These proceedings resulted from the need for the town of Pukekohe to have a secure power supply. The option chosen was to upgrade power lines supply in the town from 33 Kilovolts to 110 kilovolts. The existing 33 Kilovolt lines transverse a number of properties. Counties Power have negotiated easements over some of those properties, and over other properties, it has negotiated permission to obtain access to the lines for upgrading work. The objectors lodged objections with the court under section 23 (3) of the Public Works Act 1981.

Legal Framework

The Public Works Act 1981: Section 23

The Resource Management Act Section 186

Held

The Court considered the adequacy of the consideration given to alternative routes and methods for achieving the objective and found the memoranda of consent filed by the parties were appropriate and that the easements should be granted for an unspecified term. The memoranda of consent was found to be fair, sound and reasonably necessary for achieving the objectives of the Minister and for granting the easements for an unspecified term.

NEW ZEALAND 6

Kotuku Parks Ltd v The Coast District Council

Environment Court Decision No. A73/2000

Introduction

These four appeals concerned a proposal for subdivision of land at the mouth of Waikanae River for residential development. Kotoku Parks Ltd bought the land there in the 1970s and had already completed subdivision and development of considerable areas which are now occupied by houses. The decisions of the Kapiti Coast District Council in relation to Stage IV of the development in granting subdivision consents and for the required earthworks and the conditions imposed gave rise to these appeals. There was testimony that the Waikanae River is a central feature of the tribal lands with profound landscape and cultural associations which would be adversely affected.

Legal Framework

Resource Management Act 1991

Held

Giving as much weight as possible to the positive benefits, the longstanding residential zoning, and the concept plan approval prior to the present regime, those factors are outweighed by the cumulative effects of the damage, of: failing to protect the adjacent significant habitat of indigenous fauna; the adverse visual effects; and the impairment to Kai Itakitanga. The proposal was too intensive and would have had too great an effect on the environment. The appeals were allowed, the respondents' decision cancelled, and the resource consent applications were refused.

NEW ZEALAND 7

Robert Te Kotahi Mahuta v The Waikato Regional Council & Anchor Products Ltd, Environment Court Decision No. A91/98

Introduction

Four appeals to the Environment Court arose from a joint decision of the Waikato Regional Council and the Waikato District Council granting resource consents. The resource consent that was granted by the primary consent authorities imposed numerous conditions. In their appeals the appellants sought the cancellation of the decisions of the Councils and the denial of the consents granted. In reply to the appeals, the Regional Council maintained that the conditions imposed were appropriate to ensure that the potential adverse effects on the Waikato River are avoided, remedied or mitigated.

Legal Framework

The Resource Management Act 1991

Held

The court considered the proposal, the contribution to community well-being of the dairy industry and to the country's economy, and in particular the contribution by Anchor Products which it was asserted would be enhanced by the proposed expansion at Te Rapa and the effects on the environment. The Court found that the proposed expansion of the dairy factory would represent managing the use, development and protection of the natural and physical resources involved in a way and at a rate which would enable the Waikato Dairy Community to provide for their economic well-being while achieving the goals of sustainability. The Court determined that the resource consents granted by the District Council and the Regional Council be confirmed, subject to amendments consequential on reduction in the capacity of the proposed cogeneration plant to 45 megawatts. Save in those respects the appeal was disallowed.

NEW ZEALAND 8

Contact Energy Ltd v Waikato Regional Council

Environment Court Decision No. A 04/2000

Introduction

Contact Energy appealed against the decisions of the Waikato Regional Council and Tampo District Council for refusing consent for a proposed geothermal power station near Taupo. Opponents of the application included the Tauhara Middle Trusts (TMT) holding over 1635 hectares of land in part of the Tauhara Geothermal Field in trust for 2400 members for the Tauhara Hapu. TMT's case was that the Tauhara Hapu have a special relationship with the Tauhara geothermal resource which they regard as highly valued taonga. They sought exclusive and undisturbed possession of the resource and did not want Contract Energy to have access to any more of "the limited and non-renewable geothermal resource from the Wairakei/Tauhara geothermal system." The District Council submitted that to grant the consents the Court must have a high degree of assurance and certainty about the extent, location and probability of adverse effects and that the effects can and will be avoided or remedied, or very substantially mitigated.

Legal Framework

The Resource Management Act 1991

Held

The appropriate scale or degree to ascribe to the relevant significance of the concerns advocated by the opponents, including the uncertainty of the predictions about adverse environmental effects, is not enough to warrant refusing the consents. The court found that the modified proposal would overall serve the purpose of sustainable management of natural and physical resources, and that the resource consents needed should be granted subject to conditions imposed by the court.

NEW ZEALAND 9

H Te M Parata v the Northland Regional Council

Environment Court Decision A 53/99

Introduction

The Northland Port Corporation (NZ) Ltd proposed to establish a new deep - water port in the Whangarei Harbour at Marsden Point and required resource consents to do so. The applications for some twenty four consents were opposed. There were ten appeals from the committees' decisions. To the extent that the proposed activities were classified as restricted coastal activities, the appeals were deemed inquiries and the court's function was not to decide the resource consent applications but to conduct an inquiry on the committees' recommendations and to report to the Minister of Conservation. Mr. Parata is of Te Waiariki descent and appealed against the decision to grant consent on the ground of the relationship of Maori and their culture and traditions with their ancestral land, water and sites and the impact of the consents on these.

Legal Framework

The Resource Management Act 1991

Held

The hearing proceeded on the basis that if the court decided that consent should be granted, the parties would then confer about the terms and conditions of the consent. Accordingly the court invited counsel to confer and to submit a draft formal order granting the consent needed for the modified proposal. In default of agreement the court will receive written submissions or hold a public sitting to hear submissions.

NEW ZEALAND 10

Auckland City Council and TranzRail Ltd v the Auckland Regional Council, Decision No. A 28/99

Introduction

This case raised the issue of compliance with land development plans by a proposed development project. It concerned appeals against decisions refusing consents in relation to a proposal for an underground transport and parking centre in Central Auckland.

Legal Framework

Resource Management Act 1991.

Held

The appeals were allowed. The Court held that the site was an area where the natural character of the coastal environment had long since been compromised and the diversion and taking of groundwater would not have an adverse effect on the environment.

EUROPEAN COURT OF JUSTICE 1

Greenpeace International v European Commission

Case No. C-321/95-p; 1998 EC 620

Introduction

Stitchting Greenpeace Council (Greenpeace) and others appealed under Article 49 of the E.C. Treaty of the Court of Justice against the order of the Court of First Instance (contested order) that declared inadmissible their action for annulment of the Commission's decision to disburse to Spain up to ECU 108m under the financial assistance scheme of the European Regional Development Fund for the construction of two power stations in the Canary Islands (Gran Canaris and Tenerife).The basis of the Greenpeace action was the alleged failure by the Construction Company, Union Electrica de Canaris (Unelco) to carry out an environmental impact assessment study in accordance with EC Council Directive 85/377/EEC 1985 on the effects of certain public and private projects on the environment. It sought the intervention of the court to stop the works, and also challenged the validity of the administrative authorizations issued to Unelco by the Gran Canary Government. The Commission objected to the proceedings on grounds of inadmissibility and for lack of locus standi had refused to make full disclosure of all information relating to certain measures taken by it on the grounds that it concerned the internal decision making procedures of the Commission. The Court of First Instance had upheld the Commission's objections and declared the action inadmissible.

Legal Framework

Article 49 EC Statute of the Court of Justice

Article 173 EC Treaty

Principle 10 of Rio Principles

EC Convention on Civil Liability for Damage from Activities Dangerous to the Environment

Held

The Appellate Court found that neither the natural persons suing as applicants nor the association claiming to have locus standi on behalf of the persons they represented were

affected by the contested order. Regarding the environmental interests underpinning the action, the Court emphasized that it was the decision to build the two power stations which was liable to affect the environmental rights arising under Directive 85/337 that the appellants sought to invoke. Therefore the contested order concerning the Community financing of the power stations affected those rights only indirectly. The rights of the applicants were fully protected by the national courts which may, if need be, refer a question to the EC Court for a preliminary ruling under article 177 of the Treaty. The appeal was therefore dismissed with costs against the appellants but Spain was to bear its own costs.

Commission of the European Communities v United Kingdom
C-337/89 (1993); ECJ Failure to Implement Directive

Introduction

Council Directive 80/778/EEC stipulates the maximum permissible concentration of nitrate in water for human consumption and requires member states to bring into force the laws, regulations and administrative provisions necessary to ensure compliance with those provisions within a specified period of time. The Commission instituted proceedings under the EEC Treaty Art 169 for a declaration that the United Kingdom had failed to implement the Directive because water supplied in a number of supply zones throughout the UK contained levels of nitrate which exceeded the permitted amounts. The UK Government contended that the Directive did not impose an obligation to achieve an objective but merely required member states to take all practical steps to comply with the standards laid down, and argued that the failure to reduce the concentration of nitrate to a permissible level was due to matters beyond its control, namely the effect of techniques used in agriculture.

Legal Framework

EEC Treaty Article 169

Directive 80/778/EEC

Held

The Directive required member states to ensure that certain results were achieved, and, except within the limits of certain derogations laid down in the Directive, they could not rely on special circumstances to justify a failure to discharge that obligation. The effect of agricultural techniques on nitrate levels was not a ground for derogation from the provisions of the Directive and, accordingly, the UK had failed to fulfil its obligations under the EEC Treaty.

Case 7/71 Re Euratom Supply Agency, EC Commission v France [1972] CMCR 453, ECJ

Introduction

Under Article 76 (2) of the Euratom Treaty provisions under Title II Chapter IV of the Treaty, measures relating to the supply of ores and nuclear fuels to member states, were to be confirmed seven years after coming into force of the Treaty on 1 January 1958 or be replaced. The provisions were therefore due to be confirmed or replaced on 1 January 1965. The French Government, from 1965 onwards failed to inform the Supply Agency of transactions regarding the import, supply and processing of enriched uranium and plutonium, in contravention of the provisions. The French Government maintained that since the provisions had been neither confirmed nor replaced after the expiry of 7 years, they were no longer applicable and could have no effect pending the issue of new provisions.

Legal Framework

Euratom Treaty provisions

Held

The French Government had failed to fulfil the obligation imposed on it by Title II Chapter IV of the Treaty establishing the European Atomic Energy Community.

EUROPEAN COURT OF JUSTICE 4

The Commission of the European Communities v French Republic (Supported by Kingdom of Spain) European Court of Justice Case No. C-258/00

Introduction

This was an application by the European Commission under Article 226 EC. It sought a declaration that, by failing to take the appropriate steps to identify waters affected by pollution, and consequent failure to designate the corresponding vulnerable zones, in accordance with Article 3 of and Annex 1 to Council Directive 91/676/EEC of 12 December 1991 Concerning the Protection of Waters against Pollution caused by Nitrates from Agricultural Sources, the French Republic has failed to fulfil its obligations under that Directive.

Spain was given leave to intervene in support of the form of order sought by France. In its application the Commission made several complaints against France and in particular that by failing to identify the Seine bay as waters which contain or could contain a concentration of nitrates greater than 50 mg/L, France failed to apply correctly Article 3(1) of and Annex 1 to the Directive. France contended in defence that the circular of 5 November 1992 had been amended by a circular of 24 July 2000 in order to take account of the significant – though not predominant - nature of pollution by nitrates of agricultural origin. It also pointed out that the Department of the Oise had been designated as a vulnerable zone. The Commission withdrew the complaints of pollution by nitrates of agricultural origin in the waters of the Oise.

Legal Framework

Community Law and Council Directive 91/676/EEC

The French Environment Ministry Circulars 1992 and 2000

Held

On the remaining issues the Court found that the objective of the Directives was to: protect human health and living resources; to protect aquatic ecosystems and to safeguard other legitimate uses of water; to reduce water pollution caused or induced by

nitrates; and to prevent such pollution. The Court held that, by failing to take appropriate steps to identify waters affected by pollution and to designate vulnerable zones, the French Republic had failed to fulfil its obligations under Article 3 of Annex 1 to Council Directive 91/676/EEC of 12 December 1991. France was ordered to pay costs and the Kingdom of Spain to bear its own costs.

Commission of the European Communities v French Republic European Court of Justice Case No. C-60/01

Introduction

By application lodged at the Court Registry on 12 February 2001 the Commission brought action under Article 226 EC for a declaration that France had failed to adopt all the necessary and appropriate measures to ensure that all incinerators currently operating in France are either operated in accordance with the combustion conditions laid down by Council Directive 89/369/EEC of 8 June 1989 on the Prevention of Air Pollution from New Municipal Waste Incineration Plants and Council Directive 89/429/EEC of 21 June 1989 on the Reduction of Air Pollution, taken out of operation by due date of 1 December 1990. France replied that Council Directives had been transposed into French Law by January 1991 and as a result of incinerators shutting down or being modified to comply with the rules the number of incinerators not meeting the prescribed condition had gone down from 27 in 1998 to 7 at end of 1999.

Legal Framework

Community Legislation & Directives 89/369/EEC and 89/429/EEC

Held

The Court declared that by failing to adopt all the necessary and appropriate measures to ensure that all incinerators in France are operated in accordance with the combustion conditions laid down by Council Directive 89/369/EEC of 8 June 1989 and 89/429/EEC of 21 June 1989, France has failed to fulfil its obligations under Article 4(1) of the said Directives.

EUROPEAN COURT OF JUSTICE 6

Commission of the European Communities v Ireland

European Court of Justice Case No. C-117/00

Introduction

The Commission lodged an application and an action under Article 226 EC for a declaration that, by failing to take all the measures necessary to comply with Articles 3 and 4(4) of Council Directive 79/409/EEC of 2 April 1979 on the Conservation of Wild Birds in respect of the red grouse and Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora in respect of the Owenduff - Nephin Beg Complex special protection area, Ireland failed to comply with those Directives and failed to fulfil its obligations under the EC Treaty. The Irish Government responded that the Commission failed to establish that the full facts of which it complained. The habitat of the red grouse had reduced to such a degree that it was no longer sufficient for its conservation.

Legal Framework

Community Law and Directives 79/409/EEC and 92/43/EEC

Rural Environment Protection Scheme adopted by Irish Authorities

Held

The Court declared that by failing to take the measures necessary to safeguard a sufficient diversity and area of habitats for the red grouse and by failing to take appropriate steps to avoid, in the Owenduff - Nephin Beg Complex special protection area, the deterioration of the habitats of the species for which the special protection area was designated, Ireland had failed to fulfil its obligations under Articles 3 and 6(2) of Council Directives 79/409/EEC of 2 April 1979 and 92/43/EEC of 21 May 1992. Ireland was ordered to pay the costs.

Commission of the European Communities v Hellenic Republic

European Court of Justice Case No. C-33/01

Introduction

The Commission brought action under Article 226/EC for a declaration that by failing to send to it, within the prescribed period, the information concerning every establishment or undertaking which carries out disposal and or recovery of hazardous waste required under Article 8(3) of Council Directive 91/689/EEC of 12 December 1991 on Hazardous Waste (as amended by Directive 94/31/EC of 27 June 1994) the Hellenic Republic failed to fulfil its obligation under the EC Treaty and the said Directive. In reply the Greek authorities pointed out that they had sent to the Commission by letter of 30 December 1998 the required information on behalf of third parties, adding that the hazardous waste produced in 1989 was 287,000 tons, of which 65,000 tons had been recovered.

Legal Framework

Community Law and Directives 91/689/EEC and 94/31/EC
Article 69(2) of the Rules of Procedure

Held

The Court declared that by failing to send to the Commission within the prescribed period all the information required under Article 8(3) of the Council Directive 91/689/EEC of 12 December 1991 on Hazardous Waste, in the version introduced by Council Directive 94/31/EC of 27 June 1994, the Hellenic Republic failed to fulfil its obligations under the Directive. The Hellenic Republic was ordered to pay costs.

Commission of the European Communities v Kingdom of Spain

European Court of Justice Case No. C-474/99

Introduction

The Commission brought action under Article 226 EC for a declaration that Spain failed to fulfil its obligations under various EEC directives. The allegation was that Spain failed to adopt the measures necessary to transpose correctly the obligation arising from Articles 2(1) and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment and by maintaining in force legislation, in breach of those provisions, that did not enable an assessment of the environmental effects of certain projects to be carried out in the whole of the national territory. Spain challenged the Commission's case by pointing out that Article 4(2) of the Directive granted Member States considerable latitude to decide whether the classes of projects listed must be made subject to an assessment.

Legal Framework

Community Law and Directive 85/337/EEC

Royal Decree - Law No. 2/2000 and 9/2000

Law No. 46/1999

Law No. 29/1985

Law No. 1836/1999

Held

By failing to adopt within the prescribed period all the laws, regulations and administrative measures to comply with Article 2(1) and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, in conjunction with Annex II thereto, the Kingdom of Spain has failed to fulfil its obligations under that directive.

EUROPEAN COURT OF JUSTICE 9

Commission of the European Communities v French Republic

European Court of Justice Case No C - 292/99

Introduction

The Commission brought action under Article 226 EC for a declaration that France had failed to fulfil its obligations under EEC directives. The basis was that France failed to draw up management plans either for the whole of its territory or for all waste, and to include a chapter relating to packaging waste in all of the waste plans adopted pursuant to: Article 7(1) of Council Directive 75/442/EEC of 15th July 1975 as amended by Directive 9/156/EEC of 18 March/991; Article 6(1) of Council Directive 91/689/EEC of 12 December 1991 on Hazardous Waste and under Article 14 of European Parliament and Council Directive 94/62/EC on Packaging and Packaging Waste. France rejected the allegations and invited the Court to find that the course of action prescribed by the directives concerning waste had already been commenced in all the departments and regions and that, where plans are lacking, any delay in their preparation was not the result of negligence on the part of the French authorities.

Legal Framework

Community Legislation - Directive 75/492/EEC

Law No. 92 - 646 of 13 July 1992

Various National Laws (No. 75 - 633; No. 95 - 101 of 2 February 1995)

Held

That by failing to draw up waste management plans for the whole of its territory and, by failing to draw up for certain regions or departments, such plans for waste containing polychlorinated biphenyls, medical waste and special domestic waste, and by failing to include a specific chapter relating to packaging waste in all of the waste management plans which it had adopted, the French Republic had failed to fulfil its obligations under Article 7(1) of Council Directive 75/442/EEC, Article 6 (1) of Directive 91/689/EEC and Article 14 of European Parliament and Council Directive 94/62/EC.

EUROPEAN COURT OF JUSTICE 10

Commission of the European Communities v Italian Republic

European Court of Justice Case No. C - 396/00

Introduction

The Commission brought action against the Italian Republic on 26 October 2000 for a declaration that Italy had failed to fulfil its obligation under Council Directives. The basis was that Italy had not ensured that by 31 December 1998 at the latest the discharges of urban waste water of the city of Milan were subject to stringent treatment requirements demanded by EC Directives. Milan is located within a catchment area draining into areas of the delta of the River Po and the north west coast of the Adriatic Sea. The Italian Government argued that the city area is neither part of either a sensitive area nor a relevant catchment area of a sensitive area; and that the relevant Decree has not defined the whole of Italy as a sensitive area.

Legal Framework

Article 226 EC Treaty

Decree - Law No. 152 of the Italian Republic of 11 May 1999

Council Directives 91/271/EEC; 91/676/EEC

Held

Italy has failed to fulfil its obligations under Article 5(2) of the Council Directives 91/676/EEC of 12 December 1991 and 19/271/EEC of 21 May 1991 by not ensuring that by 31 December 1998 at the latest, discharges of urban waste water of the city of Milan (within a relevant catchment area draining into the areas of the delta of the River Po and the north - west coast of the Adriatic Sea as defined by Decree - Law 152 of the Italian Republic of 11 May 1999) and provisions for prevention of water pollution, and urban waste - water treatment were subjected to the treatment prescribed by Articles 4 and 5(2) of the said Directives.

Palin Granit Oy European Court of Justice Case No. C- 9/00

Introduction

This was a reference to the Court under Article 234 EC by the Supreme Administrative Court of Finland Korkein hallinto - oikeus for a preliminary ruling in the proceedings pending before the Court instituted by Palin Granit Oy.

The Finnish Court referred to the European Court of Justice, for a ruling under Article 234 EC, certain questions on the interpretation of Council Directive 75/442/EEC of 15 July 1975 on waste as amended by Council Directive 91/156/EEC of 18 March 1991. Those questions were raised in appeal proceedings challenging the grant of an environment licence by the Yehmassalo Public Health Municipal Joint Board, to a company, Palin Granit Oy, to operate a granite quarry. Under Finnish Law, the municipal authorities are not competent to grant an environmental licence for a landfill and, consequently, the outcome of the main proceedings depends on whether leftover stone resulting from stone quarrying is to be regarded as waste.

Legal Framework

Article 234 EC and Community Legislation
Council Directives 75/442 and 91/156
EEC Finnish National Laws on Waste

Held

The Court in answer to the questions referred to it by the Korkein Hallinto - oikeus ruled that the holder of leftover stone resulting from stone quarrying which is stored for an indefinite length of time to await possible use discards or intends to discard that leftover stone, which is accordingly to be classified as waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste. The place of storage of leftover stone, its composition and the fact, even if proven, that the stone does not pose any real risk to human health or the environment are not relevant criteria for determining whether or not the stone is to be regarded as waste. The costs incurred by

the Finnish Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since for the parties to the main proceedings, this is one step in the action pending before the national Court, the decision on costs is a matter for that Court.

EUROPEAN COURT OF JUSTICE 12

Commission of the European Communities v Germany

(Spain and Netherlands Supporting) European Court of Justice Case No. c - 161/00

Introduction

The Commission brought action against the Respondent under Article 226 EC alleging failure by Germany to fulfil Council Directives. The Commission alleged that the Respondent had failed to take measures necessary to comply with the obligations in Article 5(4)(a) and point 2 of Annex III to Council Directive 91/676/EEC of 12 December 1991 concerning the Protection of Waters against Pollution caused by Nitrates from Agricultural Sources. The German Government contended that, given the wording, the purpose and the scheme of the Directive, making allowance for inevitable losses through evaporation was in conformity with the rules on maximum concentrations and that German Government regulations respected the general scheme of the Directive. The Netherlands maintained that point 2 of the Annex III to the Directive allowed a derogation from the nitrogen amounts and Spain submitted that since atmospheric deposition of vaporized ammonia from livestock manure is not the only source of emission of the gas, this must also be regulated in a comprehensive framework in vulnerable areas.

Legal Framework

Community Law and Directive 91/676/EEC

German Government Regulations on the Principles of Good Manuring and Fertilizing Practice (The Dungeverordnung) of 26 January 1996.

Held

The Federal Republic of Germany had not fulfilled its obligations under the stated Directive by its failure to adopt all the laws, regulations and administrative provisions necessary to comply with the obligations in Article 5(4)(a) and point 2 of Annex III to the Council Directive 91/676/EEC of 12 December 1991. Germany was ordered to pay the costs and Spain and Netherlands to bear their own costs.

Commission of the European Communities v Kingdom of the Netherlands
European Court of Justice Case No. C - 268/00

Introduction

The Commission brought action under Article 226 EC for a declaration that Netherlands has failed to fulfil its obligations under Community Law. The complaint was that Netherlands had failed to fulfil, within the periods prescribed by Council Directive 76/160/EEC of 8 December 1975 concerning the Quality of Bathing Water, its obligations under Articles 4(1) and 6(1) of that Directive. The aim of the Directive was to protect the environment and public health by measures to reduce the pollution of bathing water including freshwater and seawater. The Netherlands Government replied that national legislation had been amended in line with the Directive and the situation had improved appropriately. The Commission was not satisfied.

Legal Framework

Community Law and Directive 76/160/EEC

Held

That by failing to fulfil its obligations as regards the quality of bathing water and the frequency of sampling within the periods prescribed by Council Directive 76/160/EEC the Netherlands has failed to fulfil its obligations under Articles 4(1) and 6(1) of that directive.

Intervet International BV v Commission of European Communities

European Court of Justice Case No. T - 212/99

Introduction

This was an application for the annulment of an alleged Commission decision by letter of 16 July 1999 rejecting an application by the applicant for the insertion of the substance altrenogest in Annex III to Council Regulation (EEC) No 2377/90 of 26 June 1990 laying down a Community Procedure for the Establishment of Maximum Residue Limits of Veterinary Medicinal Products in Foodstuffs of Animal Origin. The applicants sought in the alternative, a declaration that the Commission unlawfully failed to prepare a draft of measures to be taken, with a view to such insertion and to initiate the procedure laid down in Article 8 of the regulation. The Commission contended that the application be dismissed, and challenged the admissibility of the claim for annulment, submitting that its letter of 16 July 1999 did not constitute a decision that can be subject of an action.

Legal Framework

Regulation EEC No 2377/90

Article 230 EC

Held

The Court found that the letter of 16 July 1999 was confined to explaining the reasons for the delays in including altrenogest in one of the annexes to the 1990 Regulation and stating the Commission’s intention to take the procedural steps laid down by that Regulation once a new opinion it had requested was available. Therefore the letter of 16 July 1999 did not incorporate a decision that could be subject to annulment under Article 230 EC. The claim for a declaration was therefore inadmissible and there was no need to adjudicate on the Commission's alleged failure to act; but the Commission was ordered to bear its own costs and to pay one half of the applicant's costs.

Abfall Service AG (ASA) v Bundesminister fur Unwelt, Jugend und Familie

European Court of Justice Case No. C - 6/00

Introduction

By order of 16 December 1999 the Austrian Administrative Court referred to the European Court for a preliminary ruling under Article 234 EC certain questions on the interpretation of Council Regulation EEC 259/93 of 1st February 1993 on the Supervision and Control of Shipments of Waste Within, Into and Out of the European Community. The questions were raised in proceedings between Abfall Service AG (ASA) and the Bundesminister, Jugend und Familie concerning the legality of a decision by which the Bundesminister had objected to a shipment of waste planned by Abfall Service. The waste was to be deposited in a former salt-mine at Kochendorf, Germany, to secure hollow spaces (mine-sealing). The ground of objection was that the planned shipment constituted a disposal operation and not recovery operation.

Legal Framework

Article 234 EC Treaty and EC Council Regulation 259/93 (as amended)

Held

That the competent authority of dispatch is competent to verify whether a proposed shipment classified in the notification as a shipment of waste for recovery does in fact correspond to that classification and the deposit of waste in a disused mine does not necessarily constitute a disposal operation for purposes of Council Directive 75/442/EEC of 15 July 1975 on waste. The deposit must therefore be assessed on a case-by-case basis to determine whether the operation is a disposal or a recovery operation within the meaning of that Directive. A deposit constitutes a recovery if its principal objective is that the waste serves a useful purpose in replacing other materials which would have had to be used instead.

Xavier Tridon v Federation Rhone - Alpes de Protection de la Nature

European Court of Justice Case No. C - 510/99

Introduction

The Regional Court, Grenoble, referred to the European Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 30 and 36 of the EC Treaty (see now Articles 28 and 30) and Council Regulation EEC No. 3626/82 of 3 December 1982 on the Implementation in the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) by regulating trade therein. The questions were raised in criminal proceedings against Mr. Tridon who was charged with selling captive born and bred specimens of macaw whose use for commercial purposes was prohibited in Guyane (France). The French Government submitted that no system of controls (other than an outright ban) would discourage fraudulent practices of passing off eggs or birds taken in the wild as those laid in captivity. The Commission submitted that the absolute prohibition of trade in specimens of species in Appendix II to CITES or Annex B to Regulation No. 338/97 with respect to captive born and bred specimens, goes beyond measures necessary to ensure the effective protection of those species, and constituted a barrier to trade.

Legal Framework

The CITES Convention

Ministerial Decree of 15 May 1986

Community Law

Held

That Council Regulation EEC 3626/82 must be interpreted as not precluding the legislation of a Member State laying down general prohibition in its territory of all commercial use of captive born and bred specimens. Further Regulation 3626/82 does not prohibit the commercial use of those species apart from cases where the specimens have been introduced contrary to Article 5 of that regulation.

Commission of European Communities v Kingdom of Sweden

European Court of Justice Case No. 368/00

Introduction

The Commission brought action under Article 226 EC for a declaration that Sweden has failed to fulfil the obligations under Article 4(1) and 6(1) of Council Directive 76/160/EEC of 8 December 1975. The basis was that Sweden had failed to take measures to ensure that the quality of bathing water conformed to the limit values laid down in the Directive and to adhere to the minimum sampling frequencies, which it laid down. Sweden responded that the samples taken in 1999 and 2000 indicated that, with a few exceptions, the quality of Swedish bathing water complied with the Directive.

Legal Framework

Article 226 EC Treaty

Council Directive 76/160/EEC

Held

That the Kingdom of Sweden had failed to fulfil its obligations under Articles 4(1) and 6(1) of Council Directive 76/160/EEC by not taking all necessary measures to ensure that the quality of bathing water conforms to the mandatory limit values laid down by the Directive and also by failing to adhere to the minimum sampling frequencies laid down by the Directive.

Commission of the European Communities v Hellenic Republic

European Court of Justice Case No. C - 64/01

Introduction

The Commission brought action against Greece for failing to take measures for pollution prevention and control. The allegation is that Greece failed within the prescribed period to adopt laws, regulations and administrative measures necessary to comply with Council Directive 96/61/EC of 24 September 1996 concerning Integrated Pollution Prevention and Control, or alternatively to communicate the same to the Commission. The Greek Government responded that the transposition of Directive 96/61 into national law was to be effected in two stages, was under way and should be completed before end of 2001.

Legal Framework

Article 226 EC Treaty

Council Directive 96/61/EC

Held

That the Hellenic Republic has breached its obligations under the Directive by failing to adopt laws regulations and administrative measures necessary to comply with Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control.

Commission of European Communities v Luxembourg

European Court of Justice Case No. 366/00

Introduction

The Commission brought action under Article 266 EC for a declaration that the Grand Duchy of Luxembourg had failed to fulfil its obligations under the EEC Treaty. The particulars are that Luxembourg had not adopted (or notified the Commission) within the prescribed period, the laws, regulations and administrative provisions necessary fully to comply with Council Directive 97/11/EC of 3 March 1997 amending Directive 85/33/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment. The Luxembourg Government did not dispute the allegation but claimed that all measures had been taken to enable it to carry out the transposition at the earliest possible opportunity, so that the Commission should withdraw its action.

Legal Framework

Article 226 EC Treaty

Council Directives 85/33/EEC and 97/11/EC

Held

That the Grand Duchy of Luxembourg had failed to fulfil its obligations under Article 3(1) of Directive 85/33/EEC and under the EC Treaty for failing to bring into force within the prescribed period the laws, regulations and administrative provisions necessary to comply with the said Directive.

EUROPEAN COURT OF JUSTICE 20

Daimler Chrysler AG v Land Baden - Wurttemberg

European Court of Justice Case No. 324/99

Introduction

The Federal Administrative Court of Germany referred to the European Court of Justice for a preliminary ruling under Article 234 EC certain questions on the interpretation of Council Regulation (EC) No. 259/93 of 1 February 1993 on the Supervision of and Control of Shipments of Waste Within, Into and Out of the European Community. The questions were raised in proceedings between Daimler Chrysler AG and Land Baden - Wurttemberg concerning the legality of a decree of the Government and the Minister for the Environment and Transport of that Land making it compulsory to offer certain waste for disposal to an approved body – in this case only to an incinerator in Hamburg.

Legal Framework

Articles 34, 36 and 234 EC Treaty

Council Regulation 259/93

Held

Where a national measure generally prohibiting export of waste for disposal is justified by the principles of proximity, priority for recovery and self-sufficiency, in accordance with Council Regulation (EEC) No. 259/93 it is not necessary for that national measure to be subject to a further and separate review of its compatibility with Articles 34 and 36 of the EC Treaty. The Court also considered whether Article 4(3) of the Regulation authorises a Member State which has adopted legislation, of the type above, allowing disposal to an approved body only to prescribe that transhipment to another Member State will only be permitted subject to the intended disposal satisfying the requirements of environmental protection legislation in that other State. The Court ruled that the Regulation did not allow the adoption of such a provision.

INTERNATIONAL COURT OF JUSTICE 1

Legality Of The Threat Or Use Of Nuclear Weapons. Advisory Opinion Of The International Court Of Justice (Request For Advisory Opinion By The General Assembly Of The United Nations) 1996

Introduction

The International Court of Justice complied with the request for an advisory opinion, and delivered its opinion by a vote of thirteen to one.

Held

1. There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons; (Unanimously).

2. There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such; (By eleven votes to three).

3. A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful; (Unanimously).

4. A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons: (Unanimously).

5. It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.

6. However, in view of the current state of International law, and of the elements of facts at its disposal, the Court cannot conclude definitively whether the threat or use of

nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake; (By seven votes to seven, by the President's casting vote).

7. There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control; (Unanimously).

INTERNATIONAL COURT OF JUSTICE 2

Legality Of The Use By A State Of Nuclear Weapons In Armed Conflict: Request For Advisory Opinion By The World Health Organisation 8 July 1996

Introduction

The Director General of the World Health Organisation, by a letter dated 27 August. 1993 sought an advisory opinion from the ICJ. The question reads as follows: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"

The Court considered that there are three conditions which must be satisfied in order to found the jurisdiction of the Court when a request for an advisory opinion is submitted to it by a specialised agency: The agency requesting the Opinion must be duly authorized under the Charter to request opinion from the Court, and the opinion requested must be on a legal question, and this question must be one arising within the scope of the activities of the requesting agency.

Held

The first two conditions had been met. With regard to the third, the Court found that although according to its Constitution the World Health Organisation is authorized to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in, the question put to the Court in the present case relates not to the effects of the use of nuclear weapons on health, but to the legality of the use of such weapons in view of their health and environmental effects. The Court further pointed out that international organisations do not, unlike States, possess a general competence, but are governed by the "principle of speciality" that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them. Besides, the WHO is an international organisation of a particular kind- a "specialised agency" forming a part of a system based in the Charter of the United Nations, which is designed to organise international co-operation in a coherent fashion

by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organisations, invested with sectoral powers. The Court therefore concluded that the responsibilities of the WHO are necessarily restricted to the sphere of public "health" and cannot encroach on the responsibilities of other parts of the United Nations system. And that there is no doubt that the questions concerning the use of force, the regulation of armament and disarmament are within the competence of the United Nations and lie outside that of the specialised agencies.

The request for an advisory opinion submitted by the WHO thus does not relate to a question which arises "within the scope of the activities" of the organisation.

INTERNATIONAL COURT OF JUSTICE 3

Request For An Examination Of The Situation In Accordance With Paragraph 63 Of International Court Judgment Of 20 December 1974 In Nuclear Tests Cases New Zealand v France 22 September 1995, General List No. 97

Introduction

On August 21, 1995, the New Zealand Government filed a "Request for an Examination of the Situation" with the International Court of Justice, following an announcement by France that it would conduct a final series of underground nuclear weapons tests in the South Pacific starting in September 1995. In a December 20, 1974 in a judgment between these two same countries over atmospheric nuclear testing, this Court found that it was not required to give a decision on New Zealand's claim because France had stated that it would not carry out further atmospheric nuclear tests, and thus New Zealand's claim no longer had any basis. In paragraph 63 of this 1974 judgement, however, the Court stated that "if the basis of this judgement were to be affected", New Zealand could request an examination of the situation. New Zealand argued that the France's planned September 1995 underground testing affected the basis of the 1974 judgment because had New Zealand realised in 1974 that France would switch to underground testing, the dispute would not have been resolved.

Held

The Court stated that the special procedure provided for by paragraph 63 was linked to the existence of circumstances set out in the judgment, and if those circumstances did not arise, that special procedure was not available. In deciding whether that basis of the 1974 judgment has been affected by the facts referred to by New Zealand, the Court held it is limited to an analysis of the 1974 judgment, and cannot now consider the question of broader objectives which New Zealand might have had in filing its application in 1973. The 1974 judgment dealt exclusively with atmospheric nuclear tests. Thus, this “Request for an Examination of the Situation” does not fall within the provisions of paragraph 63 and must be dismissed. This order is without prejudice to the obligations of States to respect and protect the natural environment.

Nuclear Tests Cases I.C.J. Rep. 1974, Pp. 253, 457

Introduction

In 1973 both Australia and New Zealand protested against announced forthcoming French nuclear tests to be held in the Pacific and instituted proceedings before the World Court, by unilateral application in accordance with the General Act for the Pacific Settlement of International Disputes as well as Article 36 of the Court's Statute. France denied the Court's competence and refused to appear. Australia and New Zealand also requested the Court to indicate interim measures of protection on the ground that radioactive fallout from any tests held before the final judgment of the Court on the legality of such tests would prejudice the interests of the two countries concerned. In 1973 the court issued the requested Order. France ignored the Order and announced a further series of tests. Australia and New Zealand asked the Court to declare such atmospheric tests as illegal and to order France to abstain in the future.

Held

The Court considered the hearing as related to preliminary matters and stated that it would avoid decisions on the substance. After the institution of proceedings, the French Government issued a number of statements intimating that no further tests would be held and the Court decided by 9 votes to 6 that the claims no longer had any object and that it was therefore not called upon to give a decision.

INTERNATIONAL COURT OF JUSTICE 5

United Kingdom v Iceland I.C.J. Reports 1974, P. 3

Introduction

The International Court of Justice considered a dispute between Iceland and the United Kingdom regarding a proposed extension by Iceland of its fisheries jurisdiction. Iceland failed to appear or to plead its objection in this case.

In 1948, Iceland's Parliament passed a law directing the Ministry of Fisheries to issue regulations establishing explicitly bounded conservation zones for fishing. A 4-mile zone was subsequently drawn in 1952. In 1958 this zone was extended to 12 miles, establishing a new 12-mile fishery limit around Iceland which was reserved for Icelandic fisherman. The United Kingdom did not accept the validity of the new regulations, and its fisherman continued to fish inside the 12-mile limit.

After the 1960 Second United Nations Conference on the Law of the Sea, England and Iceland began a series of negotiations to resolve their differences, and in 1961 reached a settlement in an Exchange of Notes agreeing to a 12-mile fishery zone around Iceland. In 1971, Iceland decided to extend its fisheries jurisdiction to a 50-mile zone, and maintained that the 1961 Exchange of Notes was no longer in effect. These actions form the core of this dispute.

Legal Framework

Anglo-Danish Convention of 1901
1948 "Law concerning the Scientific Conservation of the Continental Shelf Fisheries" (Iceland)
Geneva Convention on the High Seas of 1958
1958 Convention on the Territorial Sea and the Contingency Zone
1958 "Regulations concerning the Fisheries Limits off Iceland"
1959 North-East Atlantic Fisheries Convention.
1961 United Kingdom-Iceland Exchange of Notes re: Fisheries Limits.
1972 Icelandic Regulations
1973 United Kingdom-Iceland "Interim Agreement in the Fisheries Dispute"

Held

The 1972 Icelandic Regulations constitute a unilateral extension of the exclusive fishing rights of Iceland to 50 nautical miles. Iceland cannot unilaterally exclude the United Kingdom from areas between the fishery limits agreed to the 1961 Exchange of Notes.

Iceland and the United Kingdom must undertake negotiations in good faith to find an equitable solution to their differences concerning their respective fishery rights. The parties are to consider that Iceland is entitled to a preferential share in the distribution of fishing resources due to the special dependence of its people upon coastal fisheries, as well as the principle that each state must pay due regard to the interests of the other in the conservation and equitable exploitation of these resources.

The court noted two concepts that had been accepted as part of customary law: (1) the idea of a fishery zone in which each state may claim exclusive fishery jurisdiction independently of its territorial sea, and that a fishery zone up to a 12-mile limit from the baseline is generally accepted; and (2) the concept of preferential rights of fishing in adjacent waters in favour of the coastal state which has special dependence on its coastal fisheries.

Cases Cited

Fisheries Cases, I.C.J. Reports 1951, p. 116
Northern Cameroons, Judgement, I.C.J. Reports 1963, p. 33
North Sea Continental Shelf, I.C.J. Reports 1969, p. 47
Fisheries Jurisdiction (United Kingdom v. Iceland), Interim
Protection, Order 17August 1972, I.C.J. Reports 1972, p. 12
Fisheries Jurisdiction (United Kingdom v. Iceland), Interim
Measures, Order of 12 July 1973, I.C.J. Reports 1973, p. 303

INTERNATIONAL COURT OF JUSTICE 6

The Corfu Channel Case (Merits) I.C.J. Reports 1949, P. 4 Per Curiam

Introduction

In May 1946 British warships passed through the Corfu Channel, in Albanian territorial waters, and were fired upon by Albanian coastal batteries. In October 1946, when two British warships passed through the Corfu Channel the ships struck mines and were damaged. In November 1946 the British Royal Navy swept for mines in the Corfu Channel in Albanian waters without Albanian consent.

Legal Framework

Geneva Convention on the Territorial Sea. 1958. Art. 14. 516 U.N.T.S. 205.

Held

Albania is responsible for the October 1946 explosion in Albanian waters, and for the damage and loss of human life that resulted. A decision regarding the amount of compensation is reserved for further consideration. International decisions recognise circumstantial evidence, and such evidence in this case indicates that the laying of the minefield which caused the explosions in October 1946 could not have been accomplished without the knowledge of the Albanian government. Albania had the responsibility to warn British warships of the danger the minefields exposed them to. This responsibility flowed from well-recognized principles of humanity which are even more exacting in time of peace than in war, from the principle of freedom of maritime communication, and from the obligation of all states not to knowingly allow their territory to be used contrary to the rights of other states.

The United Kingdom did not violate the sovereignty of Albania when it passed through Albanian waters in October 1946. In times of peace, states have the right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal state, provided the passage is innocent.

However, when the Royal Navy swept for mines in November 1946, it violated the sovereignty of Albania. This operation did not have the consent of international mine clearance organisations, could not be justified as the exercise of a right of innocent passage, and international law does not allow a state to assemble a large number of warships in the territorial waters of another state and to carry out mine-sweeping in those waters. The United Kingdom's arguments regarding intervention and self-protection are not persuasive.

Cases Cited

U.S., ex rel. Amabile v. Italian Republic (1952) 14 R.I.A.A. 115

Corfu Channel (Assessment of Compensation) I.C.J. Rep. 1 949, p.224

Trail Smelter Arbitration (1938/1941) 3 R.I.A.A. 1905

Arbitral; Tribunal: U.S. And Canada

Introduction

The Columbia River rises in Canada and flows past a lead and zinc smelter at Trail, British Columbia. The climate from beyond Trail on the United States boundary is dry, but not arid. The smelter had been built under U.S. auspices, but had been taken over by a Canadian company in 1906. In 1925 and 1927, stacks, 409 feet high, were erected and the smelter increased its output, resulting in more sulphur dioxide fumes. The higher stacks increased the area of damage in the United States. From 1925 to 1931, damage had been caused in the State of Washington by the sulphur dioxide coming from the Trail Smelter, and the International Joint Commission recommended payment of $350,000 in respect of damage to 1 January, 1932. The United States informed Canada that the conditions were still unsatisfactory and an Arbitral Tribunal was set up to "finally decide": whether further damage had been caused in Washington and the indemnity due; whether the smelter should be required to cease operation; the measures to be adopted to this end; and compensation due. The Tribunal was directed to apply the law and practice of the United States as well as international law and practice.

Held

Referring to international law on various matters from the Alabama Case and decisions of the U.S. Supreme Court, the Tribunal found that taken as a whole, these decisions constitute an adequate basis for its conclusions, namely, that under the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Considering the circumstances of the case, the Tribunal held that the Dominion of Canada is responsible by international law for the conduct of the Trail Smelter. Apart from the undertakings of the Convention, it is therefore the duty of the Government of

the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.

Therefore, so long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals. The indemnity for such damage should be fixed in such a manner as the Governments should agree upon.

ICJ 1997 General List No. 92, 25 September 1997, Case Concerning The Gabcikovo-Nagymaros Project (Hungary/Slovakia)

Introduction

Several differences had arisen between Czechoslovakia and Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabcikovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 concerning the construction and operation of the Gabcikovo-Nagymaros System of Locks and related instruments, and on the construction and operation of the "provisional solution". By a Special Agreement that had been signed at Brussels on 7 April 1993 Hungary and Slovakia submitted to the International Court of Justice the following questions for adjudication:

(a) Whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the Treaty attributed responsibility to Hungary?

(b) Whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the "provisional solution" and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)?

(c) What are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary?

Held

The Court held, *inter alia,*

A. that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabcikovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it (by fourteen votes to one);

B. that Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" as described in the terms of the Special Agreement (by nine votes to six);

C. that Czechoslovakia was not entitled to put into operation, from October 1992, this "provisional solution" (by ten votes to five);

D. that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them (by eleven votes to four);

E. that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and C of the present operative paragraph (by thirteen votes to two).

The Court recalled that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

"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. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J Reports 1996, pp. 241-242, para. 29.)

The Court stated further that it was mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout 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 upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, and 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 with 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.

Separate Opinion Of Vice-President Weeramantry

(The Separate Opinion of Vice-President Weeramantry is reproduced in full.)

Introduction

This case raises a rich array of environmentally related legal issues. A discussion of some of them is essential to explain my reasons for voting as I have in this very difficult decision. Three issues on which I wish to make some observations, supplementary to those of the Court, are the role played by the principle of sustainable development in balancing the competing demands of development and environmental protection; the protection given to Hungary by what I would describe as the principle of continuing environmental impact assessment; and the appropriateness of the use of inter partes legal principles, such as estoppel, for the resolution of problems with an erga omnes connotation such as environmental damage.

A. The Concept of Sustainable Development

Had the possibility of environmental harm been the only consideration to be taken into account in this regard, the contentions of Hungary could well have proved conclusive.

Yet there are other factors to be taken into account - not the least important of which is the developmental aspect, for the Gabcikovo scheme is important to Slovakia from the point of view of development. The Court must hold the balance even between the

environmental considerations and the developmental considerations raised by the respective Parties. The principle that enables the Court to do so is the principle of sustainable development.

The Court has referred to it as a concept in paragraph 140 of its Judgement. However, I consider it to be more than a mere concept, but as a principle with normative value which is crucial to the determination of this case. Without the benefits of its insights, the issues involved in this case would have been difficult to resolve.

Since sustainable development is a principle fundamental to the determination of the competing considerations in this case, and since, although it has attracted attention only recently in the literature of international law, it is likely to play a major role in determining important environmental disputes of the future, it calls for consideration in some detail. Moreover, this is the first occasion on which it has received attention in the jurisprudence of this Court.

When a major scheme, such as that under consideration in the present case, is planned and implemented, there is always the need to weigh considerations of development against environmental considerations, as their underlying juristic bases the right to development and the right to environmental protection - are important principles of current international law.

In the present case we have, on the one hand, a scheme which, even in the attenuated form in which it now remains, is important to the welfare of Slovakia and its people, who have already strained their own resources and those of their predecessor State to the extent of over two billion dollars to achieve these benefits. Slovakia, in fact, argues that the environment would be improved through the operation of the project as it would help to stop erosion of the river bed, and that the scheme would be an effective protection against floods. Further, Slovakia has traditionally been short of electricity, and the power generated would be important to its economic development. Moreover, if the project is halted in its tracks, vast structural works constructed at great expense, even prior to the repudiation of the Treaty, would be idle and unproductive, and would pose an economic and environmental problem in themselves.

On the other hand, Hungary alleges that the project produces, or is likely to produce, ecological damage of many varieties, including harm to river bank fauna and flora, damage to fish breeding, damage to surface water quality, eutrophication, damage to the groundwater regime, agriculture, forestry and soil, deterioration of the quality of drinking water reserves, and sedimentation. Hungary alleges that many of these dangers have already occurred and more will manifest themselves, if the scheme continues in operation. In the material placed before the Court, each of these dangers is examined and explained in considerable detail.

How does one handle these considerations? Does one abandon the project altogether for fear that the latter consequences might emerge? Does one proceed with the scheme because of the national benefits it brings, regardless of the suggested environmental damage? Or does one steer a course between with due regard to both considerations, but ensuring always a continuing vigilance in respect of environmental harm?

It is clear that a principle must be followed which pays due regard to both considerations. Is there such a principle, and does it command recognition in international law? I believe the answer to both questions is in the affirmative. The principle is the principle of sustainable development and, in my view, it is an integral part of modern international law. It is clearly of the utmost importance, both in this case and more generals.

I would observe, moreover, that both Parties in this case agree on the applicability to this dispute of the principle of sustainable development. Thus, Hungary states in its pleadings that:

> "Hungary and Slovakia agree that the principle of sustainable development, as formulated in the Brundtland Report, the Rio Declaration and Agenda 21 is applicable to this dispute... International law in the field of sustainable development is now sufficiently well established, and both Parties appear to accent this." [1]

[1] See HR, paras. 1.45 and 1.47

Slovakia states that "inherent in the concept of sustainable development is the principle that developmental needs are to be taken into account in interpreting and applying environmental obligations" [2]

Their disagreement seems to be not as to the existence of the principle but, rather, as to the way in which it is to be applied to the facts of this case[3].

The problem of steering a course between the needs of development and the necessity to protect the environment is a problem alike of the law of development and of the law of the environment. Both these vital and developing areas of law require, and indeed assume, the existence of a principle which harmonizes both needs.

To hold that no such principle exists in the law is to hold that current law recognises the juxtaposition of two principles which could operate in collision with each other, without providing the necessary basis of principle for their reconciliation. The untenability of the supposition that the law sanctions such a state of normative anarchy suffices to condemn a hypothesis that leads to so unsatisfactory a result.

Each principle cannot be given free rein, regardless of the other. The law necessarily contains within itself the principle of reconciliation. That principle is the principle of sustainable development.

This case offers a unique opportunity for the application of that principle, for it arises from a Treaty which had development as its objective, and has been brought to a standstill over arguments concerning environmental considerations.

The people of both Hungary and Slovakia are entitled to development for the furtherance of their happiness and welfare. They are likewise entitled to the preservation of their human right to the protection of their environment. Other cases raising environmental questions have been considered by this Court in the context of environmental pollution arising from such sources as nuclear explosions, which are far removed from development projects. The present case thus focuses attention, as no

[2] SCM, para 9.53 See also paras. 9.54-9.59
[3] HR, para. 1.45

other case has done in the jurisprudence of this Court, on the question of the harmonization of developmental and environmental concepts.

(a) Development as a Principle of International Law

Article 1 of the Declaration on the Right to Development, 1986, asserted that "The right to development is an inalienable human right". This Declaration had the overwhelming support of the international community[4] and has been gathering strength since then[5]. Principle 3 of the Rio Declaration, 1992, reaffirmed the need for the right to development to be fulfiled.

"Development" means, of course, development not merely for the sake of development and the economic gain it produces, but for its value in increasing the sum total of human happiness and welfare[6]. That could perhaps be called the first principle of the law relating to development.

To the end of improving the sum total of human happiness and welfare, it is important and inevitable that development projects of various descriptions, both minor and major, will be launched from time to time in all parts of the world.

(b) Environmental Protection as a Principle of International Law

[4] 146 votes in favour, with one vote against. Nor was the principle without influential voices in its support from the developed world as well. Indeed, the genealogy of the idea can be traced much further back even to the conceptual stages of the Universal Declaration of Human Rights, 1948.

Mrs. Eleanor Roosevelt, who from 1946 to 1952 served as the Chief United States representative to Committee III, Humanitarian, Social and Cultural Affairs, and was the first Chairperson, from 1946-1951, of the United Nations Human Rights Commission, had observed in 1947, "We will have to bear in mind that we are writing a bill of rights for the world and that one of the most important rights is the opportunity for development". (M. Glen Johnson, "The Contribution of Eleanor and Franklin Roosevelt to the Development of the Intentional Protection for Human Rights", 9 Human Rights Quarterly (1987), p. 19, quoting Mrs. Roosevelt's column, "My Day", 6 Feb. 1947.) General Assembly resolution 642 (VII) of 1952, likewise, referred expressly to "integrated economic and social development".

[5] Many years prior to the Declaration of 1986, this right had received strong support in the field of human rights. As early as 1972, at the Third Session of the Institute Internationale de Droits de l'Homme, Judge Keba Mbaye, President of the Supreme Court of Senegal and later to be a Vice-President of this Court, argued strongly that such a right existed. He adduced detailed argument in support of his contention from economic, political and moral standpoints. (See K. Mbaye, " Le droit au development comme un droit l'homme", 5 Reveu des Droits de I' homme (1972), p. 503)

[6] The Preamble to the Declaration on the Right to Development (1986) recites that development is a comprehensive, economic, social and cultural process which aims at the constant improvement and well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

While, therefore, all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment.

(c) Sustainable Development as a Principle of International Law

After the early formulations of the concept of development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore development can only be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impact on the environment will, of course, be a question to be answered in the context of the particular situation involved.

It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development.

The concept of sustainable development can be traced back, beyond the Stockholm Conference of 1972, to such events as the Founex meeting of experts in Switzerland in June 1971[7]; the conference on environment and development in Canberra in 1971; and United Nations General Assembly resolution 2849 (XXVI). It received a powerful impetus from the Stockholm Declaration which, by Principle 11, stressed the essentiality of development as well as the essentiality of bearing environmental considerations in mind in the developmental process. Moreover, many other Principles of that Declarationg[8] provided a setting for the development of the concept of

[7] See Sustainable Development in International Law, Winfried Land Lang (ed.), 1995, p. 143
[8] For example, Principles 2, 3, 4, 5, 8, 9, 12, 13, and 14.

sustainable development[9] and more than one-third of the Stockholm Declaration related to the harmonization of environment and development[10]. The Stockholm Conference also produced an Action Plan for the Human Environment[11].

The international community had thus been sensitised to this issue even as early as the early 1970s, and it is therefore no cause for surprise that the 1977 Treaty, in Articles 15 and 19, made special reference to environmental considerations. Both Parties to the Treaty recognized the need for the developmental process to be in harmony with the environment and introduced a dynamic element into the Treaty which enabled the Joint Project to be kept in harmony with developing principles of international law.

Since then, it has received considerable endorsement from all sections of the international community, and at all levels.

Whether in the field of multilateral treaties[12], international declarations[13]; the foundation documents of international organisations[14], the practices of international financial institutions[15]; regional declarations and planning documents[16], or State practice[17], there is a wide and general recogniti,on of the concept. The Bergen ECE

[9] 'These principles are thought to be based to a large extent on the Founex Report - see Sustainable Development and International Laev, Winfried Lang (ed.), supra,
the United Nations Framework Convention on Climate Change, 1992, (XXXI ILM (1992) 849, Arts. 2 and 3); and the Convention on Biological Diversity (XXXI ILM (1992) 818, Preamble, Arts. 1 and 10 - "sustainable use of biodiversity").
[10] Ibid
[11] Action Plan for the Human Environment UN Doc. A/CONF.48/14/Rev. 1. See especially Chapter II which devoted its final section to development and the environment
[12] For example, the United Nations Convention to Combat Desertification (The United Nations Convention to Combat Desertification in those Countries Experiencing Serious Droughts and/or Desertification, Particularly in Africa), 1994, Preamble. Art.
[13] For example, the Rio Declaration on Environment and Development 1992, emphasizes sustainable development in several of its Principles (e.g., Principles 4, 5, 7, 8, 9, 20, 21, 22, 24 and 27 refer expressly to "sustainable development" which can be described as the central concept of the entire document); and the Copenhagen Declaration, 1995 (paras. 6 & 8), following on the Copenhagen World Summit for Social DeveloDment 1995.
[14] For example, the North American Free Trade Agreement (Canada, Mexico, United States) (NAFTA, Preamble, XXXII ILM (1993), p. 289); the World Trade organisation (WTO) (paragraph l of the Preamble of the Marrakesh Agreement of 15 April 1994, establishing the World Trade Organisation speaks of the "optimal use of the world's resources in accordance with the objective of sustainable development" XXXIII ILM(1994), pp. 1143-1144); and the European Union (Art. 2 of the ECT).
[15] For example, the World Bank Group, the Asian Development Bank, the African Development Bank, the InterAmerican Development Bank, and the European Bank for Reconstruction and Development all subscribe to the principle of sustainable development. Indeed, since 1993, the World Bank has convened an annual conference related to advancing environmentally and socially sustainable development (ESSD).
[16] For example, the Langkawi Declaration on the Environment, 1989, adopted by the "Heads of Government of the Commonwealth representing a quarter of the world's population" which adopted wsustainable development" as its central theme; Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific, Bangkok, 1990 (Doc.38a, p.567); and Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas Region, 1983 (para. 10 - "sustainable, environmentally sound development").
[17] For example, in 1990, the Dublin Declaration by the European Council on the Environmental Imperative stated that there must be an acceleration of effort to ensure that economic development in the Community is “sustainable and environmentally sound" (Bulletin of the European Communities, 6-1990, Ann. 11, p. 18). It urged the Community and Member States to play a major role to assist developing countries in their efforts to achieve "long-term sustainable development" (ibid., p. 19). It said, in regard to countries of Central and Eastem Europe, that remedial measures must be taken "to ensure that their future economic development is sustainable” (ibid.). It also expressly recited that: "As

Ministerial Declaration on Sustainable Development of 15 May 1990, resulting from a meeting of Ministers from 34 countries in the ECE region, and the Commissioner for the Environment of the European Community, addressed "The challenge of sustainable development of humanity" (para. 6), and prepared a Bergen Agenda for Action which included a consideration of the Economics of Sustainability, Sustainable Energy Use, Sustainable Industrial Activities, and Awareness Raising and Public Participation. It sought to develop "sound national indicators for sustainable development" (para. 13 (b)) and sought to encourage investors to apply environmental standards required in their home country to investments abroad. It also sought to encourage UNEP, UNIDO, UNDP, IBRD, ILO, and appropriate international organisations to support member countries in ensuring environmentally sound industrial investment, observing that industry and government should co-operate for this purpose (para. 15 (f))[18]. A Resolution of the Council of Europe, 1990, propounded a European Conservation Strategy to meet, inter alia, the legitimate needs and aspirations of all Europeans by seeking to base economic, social and cultural development on a rational and sustainable use of natural resources, and to suggest how sustainable development can be achieved[19].

The concept of sustainable development is thus a principle accepted not merely by the developing countries, but one which rests on a basis of worldwide acceptance.

In 1987, the Brundtland Report brought the concept of sustainable development to the forefront of international attention. In 1992, the Rio Conference made it a central feature of its Declaration, and it has been a focus of attention in all questions relating to development in the developing countries.

The principle of sustainable development is thus a 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.

The concept has a significant role to play in the resolution of environmentally related disputes. The components of the principle come from well-established areas of

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Heads of State or Government of the European Community, ... [w]e intend that action by the Community and its Member States will be developed ... on the principles of sustainable development and preventive and precautionary actionW (ibid., Conclusions of the Presidency, Point 1.36, pp.17-18).

[18] Basic Documents of International Environmental Law, Harald Hohmann (ed.), Vol. 1, 1992, p. 558

international law human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighbourliness to mention a few. It has also been expressly incorporated into a number of binding and far-reaching international agreements, thus giving it binding force in the context of those agreements. It offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection, and that neither of these rights can be neglected.

The general support of the international community does not of course mean that each and every member of the community of nations has given its express and specific support to the principle nor is this a requirement for the establishment of a principle of customary international law.

As Brierly observes:

> "It would hardly ever be practicable, and all but the strictest of positivists admit that it is not necessary, to show that every state has recognized a certain practice, just as in English law the existence of a valid local custom or custom of trade can be established without proof that every individual in the locality, or engaged in the trade, has practised the custom. This test of general recognition is necessarily a vague one; but it is of the nature of customary law, whether national or international..."[20]

Evidence appearing in international instruments and State practice (as in development assistance and the practice of international financial institutions) likewise amply supports a contemporary general acceptance of the concept.

> Recognition of the concept could thus, fairly, be said to be worldwide.[21]

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[19] Ibid., p. 598
[20] J Brierly, The Law of Nattons, 6th ed., 1963, p. 61; emphasis supplied.
[21] See, further, L. Kramer, E.C. Treaty and Environmental Law, 2nd ed., 1995, p. 63, analysing the environmental connotation in the word "sustainable" and tracing it to the Brundtland Report

(d) The Need for International Law to Draw upon the World's Diversity of Cultures in Harmonizing Development and Environmental Protection

This case, which deals with a major hydraulic project, is an opportunity to tap the wisdom of the past and draw from it some principles which can strengthen the concept of sustainable development, for every development project clearly produces an effect upon the environment, and humanity has lived with this problem for generations.

This is a legitimate source for the enrichment of international law, which source is perhaps not used to the extent which its importance warrants.

In drawing into international law the benefits of the insights available from other cultures, and in looking to the past for inspiration, international environmental law would not be departing from the traditional methods of international law, but would, in fact, be following in the path charted out by Grotius. Rather than laying down a set of principles a priori for the new discipline of international law, he sought them also a posteriori from the experience of the past, searching through the whole range of cultures available to him for this purpose[22]. From them, he drew the durable principles which had weathered the ages, on which to build the new international order of the future. Environmental law is now in a formative stage, not unlike international law in its early stages. A wealth of past experience from a variety of cultures is available to it. It would be pity indeed if it were left untapped merely because of attitudes of formalism which see such approaches as not being entirely de rigueur.

I cite in this connection an observation of Sir Robert Jennings that, in taking note of different legal traditions and cultures, the International Court (as it did in the Western Sahara case):

> "...was asserting, not negating, the Grotian subjection of the totality of international relations to international law. It seems to the writer, indeed, that at the present juncture in the development of the international legal system it may be more important to stress the imperative need to develop international law to

[22] Julius Stone, Human Law and Human Justice, 1965, p. 66: "It was for this reason that Grotius added to his theoretical deductions such a mass of concrete examples from history."

> comprehend within itself the rich diversity of cultures, civilisations and legal traditions . . ."[23]

Moreover, especially at the frontiers of the discipline of international law, it needs to be multi-disciplinary, drawing from other disciplines such as history, sociology, anthropology, and psychology such wisdom as may be relevant for its purpose. On the need for the international law of the future to be interdisciplinary, I refer to another recent extra-judicial observation of that distinguished former President of the Court that:

> "there should be a much greater, and a practical, recognition by international lawyers that the rule of law in international affairs, and the establishment of international justice, are inter-disciplinary subjects"[24]

Especially where this Court is concerned, "the essence of true universality"[25] of the institution is captured in the language of Article 9 of the Statute of the International Court of Justice which requires the "representation of the main forms of civilization and of the principal legal systems of the world" (emphasis added). The struggle for the insertion of the italicized words in the Court's Statute was a hard one, led by the Japanese representative, Mr. Adatci[26], and, since this concept has thus been integrated into the structure and the Statute of the Court, I see the Court as being charged with a duty to draw upon the wisdom of the world's several civilizations, where such a course can enrich its insights into the matter before it. The Court cannot afford to be monocultural, especially where it is entering newly developing areas of law.

This case touches an area where many such insights can be drawn to the enrichment of the developing principles of environmental law and to a clarification of the principles the Court should apply.

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[23] Sir Robert Y. Jennings, Universal International Law in a Multicultural World", in International Law and The Grotian Heritage: A Commemorative ColloquXum on the occasion of the fourth centenary of the birth of Hugo Grotius, ed & published by the T.M.C. Asser Institute, The Hague, 1985,P. 195

[24] "Intemational Lawyers and the Progressive Development of Intemational Law", Theory of International Law at the Threshold of the 21st Century, Jerzy Makarozyk (ed.). 1996. D. 423.

25 Jennings, "Universal Intemational Law in a Multicultural World", supra, p. 189.

[26] On this subject of contention, see Proces- Verbaux of the Proceedings of the Committee, 16 June-24 July 1920, esp. p. 136.

It is in this spirit that I approach a principle which, for the first time in its jurisprudence, the Court is called upon to apply a principle which will assist in the delicate task of balancing two considerations of enormous importance to the contemporary international scene and, potentially, of even greater importance to the future.

(e) Some Wisdom from the Past Relating to Sustainable Development

There are some principles of traditional legal systems that can be woven into the fabric of modern environmental law. They are specially pertinent to the concept of sustainable development which was well recognized in those systems. Moreover, several of these systems have particular relevance to this case, in that they relate to the harnessing of streams and rivers and show a concern that these acts of human interference with the course of nature should always be conducted with due regard to the protecticn of the environment. In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific, and Australia - in fact, the whole world. This is a rich source which modern environmental law has left largely untapped.

As the Court has observed, "Throughout the ages mankind has, for economic and other reasons, constantly interfered with nature." (Para. 140.)

The concept of reconciling the needs of development with the protection of the environment is thus not new. Millennia ago these concerns were noted and their twin demands well reconciled in a manner so meaningful as to carry a message to our age.

I shall start with a system with which I am specially familiar, which also happens to have specifically articulated these two needs - development and environmental protection - in its ancient literature. I refer to the ancient irrigation-based civilization of Sri Lanka[27]'. It is a system which, while recognising the need for development and

[27] This was not an isolated civilization, but one which maintained international relations with China, on the one hand, and with Rome (Ist C) and Byzantium (4th C), on the other. The presence of its ambassadors at the Court of Rome is recorded by Pliny (lib. vi c.24), and is noted by Grotius - De Jure Praedae Commentarius, G.L. Williams and W.H. Zeydol (eds.), Classics of International Law, Jarnes B. Scott (ed.), 1950, pp. 240-241. This diplomatic representation also receives mention in world literature (e.g., Milton, Paradise Regained, Book IV). See also Grotius' reference to the detailed knowledge of Ceylon possessed by the Romans - Grotius, Mare Liberum (Freedom oJthe Seas), tr. R. van Deman Magoffin, p. 12. The island was known as Taprobane to the Greeks, Serendib to the Arabs, Lanka to the Indians, Ceilao to the Portuguese and Zeylan to the Dutch. Its trade with the Roman Empire and the Far East was noted by Gibbon.

vigorously implementing schemes to this end, at the same time specifically articulated the need for environmental protection and ensured that the technology it employed paid due regard to environmental considerations. This concern for the environment was reflected not only in its literature and its technology, but also in its legal system, for the felling of certain forests was prohibited, garn sanctuaries were established, and royal edicts decreed that the natural resource of water was to be used to the last drop without any wastage.

This system, some details of which I shall touch on[28], is described by Arnold Toynbee in his panoramic survey of civilisations. Referring to it as an "amazing system of waterworks"[29] Toynbee describes[30] how hill streams were tapped and their water guided into giant storage tanks, some of them four thousand acres in extent[31], from which channels ran on to other larger tanks[32]. Below each great tank and each great channel were hundreds of little tanks, each the nucleus of a village.

The concern for the environment shown by this ancient irrigation system has attracted study in a recent survey of the Social and Environmental Effects of Large Dams[33], which observes that among the environmentally related aspects of its irrigation systems were the "erosion control tank" which dealt with the problem of silting by being so designed as to collect deposits of silt before they entered the main water storage tanks. Several erosion control tanks were associated with each village irrigation system. The significance of this can well be appreciated in the context of the present case, where the problem of silting has assumed so much importance.

Another such environmentally related measure consisted of the "forest tanks" which were built in the jungle above the village, not for the purpose of irrigating land, but to provide water to wild animals[34].

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[28] It is an aid to the recapitulation of the matters mentioned that the edicts and works I shall refer to have been the subject of written records, maintained ontemporaneously and over the centuries. See note 41 below

[29] Arnold J. Toynbee, A Shdv of History, Somervell's Abridgment, 1960, Vol. 1, p. 257.

[30] Ibid, p. Ro 1, citing Jonn Still, The Jungle Eide.

[31] Several of these are still.in use, e.g., the Eissawewa (3rd C, B.C.); the Ngwarawewa (3rd C, B.C.); the Minnerta Tank (275 A.D.); the Kalawewa (Sth C, A.D.), and the Parakrama Samudra (Sea of Parakraina, I Ith C, A.D.).

[32] The technical sophistication of this irrigation system has been noted also in Joseph
Needham's monumental work on Science and Civilization in China. Needham, in describing the ancient irrigation works of China, makes numerous references to the contemporary irrigation works of Ceylon, which he discusses at some length. See especially, Vol. 4, Physics and Physical Technolog,v, 1971, pp. 368 et seq. Also p. 215: "We shall see how skilled the ancient Ceylonese were in this art"

[33] Edward Goldsmith and Nicholas Hildyard, The Social and Envfronmental Effects of Large Darz,ts, 1985, pp. 291-304.

[34] For these details, see Goldsmith and Hildyard. ibid, pp. 291 and 296. The same authors observe:

This system of tanks and channels, some of them two thousand years old, constitute in their totality several multiples of the irrigation works involved in the present scheme. They constituted development as it was understood at the time, for they achieved in Toynbee's words, "the arduous feat of conquering the parched plains of Ceylon for agriculture"[35]. Yet they were executed with meticulous regard for environmental concerns, and showed that the concept of sustainable development was consciously practised over two millennia ago with much success.

Under this irrigation system, major rivers were dammed and reservoirs created, on a scale and in a manner reminiscent of the damming which the Court saw on its inspection of the dams in this case. This ancient concept of development was carried out on such a large scale that, apart from the major reservoirs[36], of which there were several dozen, between 25,000 and 30,000 minor reservoirs were fed from these reservoirs through an intricate network of canals[37].

Sri Lanka is covered with a network of thousands of man-made lakes and ponds, known locally as tanks (after tanque, the Portuguese word for reservoir). Some are truly massive, many are thousands of years old, and almost all show a high degree of sophistication in their construction and design. Sir Jarnes Emerson Tennent, the nineteenth c entury historian, marvelled in particular at the numerous channels that were dug undemeath the bed of each lake in order to ensure that the flow of water was 'constant and equal as long as any water remained in the tank'."

[35] Toynbee, supra p. 81. Andrew Carnegie, the donor of the Peace Palace, the seat of tbis Court, has described this ancient work of development in the following terms: tThe posibon held by Ceylon in ancient days as the great granary of Southern Asia explains the precedence accorded to agricultural pursuits. Under native rule the whole island was brought under irrigation by means of artificial lakes, constructed by dams across ravines, many of them of great extent - one sull existing is twenty miles in circumference - but the system has been allowed to fall into decay." (Andrew Carnegie, Round the World 1879, (1933 ed.), pp. (155-160.)

[36] The first of these major tanks was tbought to haw been constructed in 504 B.C. (Sir James Emerson Tennent, Ceylon. 1859, Vol. 1, p. 367). A few examples, straddling IS centuries. were:

- the Vavumk-kulam (3rd C, B.C.) (1,97S acres water surface, 596 million cubic feet water capacity), the Pavatkulam (3rd or 2nd C, B.C.) (2,029 acres water surface, 770 million cubic feet water capacity) - Parker, Ancient Ceylon 1909, DD. 363. 373
- the Tissawewa (3rd C, B.C.); and the Nuwarawewa (3rd C, B.C.), both still in service and still supplying water to the ancient capital Anuradhapura, which is now a provincial capital;
- the Minneriya tank (275 A.D.) "The reservoir upwards of twenty miles in circumference ... the great embankment remains nearly perfect" - Tennent, supra Vol. 11, p. 600;
- the Topawewa (4th C, A.D.), area considerably in excess of 1,000 acres;
- the Kalawewa (Sth C, A.D.) - embankment 3.25 miles long, rising to a height of 40 feet, tapping the river Kala Oya and supplying water to the capital Anuradhapura through a canal 50 miles in length;
- the Yodawewa (5th C, A.D.). Needham describes this as "A most grandiose conception ... the culmination of Ceylonese hydraulics ... an artificial lake with a six-and-a-half mile embankment on three sides of a square, sited on a sloping plain and not in a river valley at all." It was fed by a 50-mile canal from the river Malvatu-Oya;
- the Parakrama Samudra (Sea of Parakraina) (I Ith C, A.D.), embankment 9 miles long, up to 40 feet high, enclosing 6,000 acres of water area. (Brohier, Ancient Irrtgation Works in Ceylon, 1934, p. 9.)

[37] On the irrigation systems, generally, see H. Parker, Ancient Ceylon, supra; R.L. Brohier, Ancient Irrigation Worlss in Ceylon, 1934; Edward Goldsmith and Nicholas Hildyard, op. cit., pp. 291-304. Needham, describing the ancient canal

The philosophy underlying this gigantic system[38], which for upwards of two thousand years served the needs of man and nature alike, was articulated in a famous principle laid down by an outstanding monarch[39] that "not even a little water that comes from the rain is to flow into the ocean without being made useful to man"[40]. According to the ancient chronicles[41], these works were undertaken "for the benefit of the country", and "out of compassion for all living creatures"[42]. This complex of irrigation works was aimed at making the entire country a granary. They embodied the concept of development par excellence.

Just as development was the aim of this system, it was accompanied by a systematic philosophy of conservation dating back to at least the third century, B.C. The ancient chronicles record that when the King (Devanampiya Tissa, 247-207 B.C.) was on a hunting trip (around 223 B.C.), the Arahat[43] Mahinda, son of the Emperor Asoka of India, preached to him a sermon on Buddhism which converted the king. Here are excerpts from that sermon:

> "O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it[44]."

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system of China, observes that "it was comparable only with the irrigation contour canais of Ceylon. not with any work in Europet (op. cit., Vol. 4, p. 359).

[38] "so vast were the dimensions of some of these gigantic tanks that many still in existence cover an area from fifteen to twenty miles in circumference" (Tennent supra, Vol. 1, p. 364).

[39] King Parakrama Bahu (1153-1186 A.D.). This monarch constructed or restored 163 major tanks, 2,376 minor tanks, 3,910 canals, and 165 dams. His masterpiece was the Sea of Parakrama, referred to in note 36. All of this was conceived within the envirorunentai philosophy of avoiding any wastage of naturai resources

[40] See Toynbee's reference to this. "The idea underlying the system was very great. It was intended by the tank-building kings that none of the rain which fell in such abundance in the mountains should reach the sea without paying tribute to man on the way." (Toynbee, op. cit, P. 81.)

[41] The Mahavamsa, Tumour's translation, Chap. xxxvii, p. 242. The Mahavamsa was the ancient historicai chronicle of Sri Lanka, maintained contemporaneously by Buddhist monks, and an important source of dating for South Asian history. Commencing at the close of the 4tb century, A.D., and incorporating earlier chronicles and orai traditions dating back a further eight centuries, this constitutes a continuous record for over 15 centuries - see The Mahavamsa or The Great Chronzle of Ceylon, translated into English by Wilhelm Geiger, 1912, Introduction, pp. ix-xii. The King's statement earlier referred to, is recorded in the Mahavamsa as follows:

"In the realm that is subject to me are ... but few fields which are dependent on rivers with permanent flow ... Also by many mountains, thick jungles and by widespread swamps my kingdom is much straitened. Truly, in such a country not even a little water that awmes from the rain must flow into the ocean without being made useful to man." Ibid, Chap. LXVIII, verses 8-12.)

[42] See also, on this matter, Emerson Tennent, supra, Vol. 1, p. 311.

[43] A person who has attained a very high state of enlightenment. For its more technical meaning, see Walpola Rahula, History of Buddhism in Ceylon, 1956. pp. 217-221

[44] This sermon is recorded in the Mahavamsal, Chap. 14

This sermon, which indeed contained the first principle of modern environmental law - the principle of trusteeship of earth resources - caused the king to start sanctuaries for wild animals - a concept which continued to be respected for over twenty centuries. The traditional legal system's protection of fauna and flora, based on this Buddhist teaching, extended well into the 18th century[45].

The sermon also pointed out that even birds and beasts have a right to freedom from fear[46].

The notion of not causing harm to others and hence sic utere tuo ut alienum non laedas was a central notion of Buddhism. It translated well into environmental attitudes. 'Alienum" in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach.

This marked concern with environmental needs was reflected also in royal edicts, dating back to the third century B.C., which ordained that certain primeval forests should on no account be felled. This was because adequate forest cover in the highlands was known to be crucial to the irrigation system as the mountain jungles intercepted and stored the monsoon rains[47]. They attracted the rain which fed the river and irrigation systems of the country, and were therefore considered vital.

Environmental considerations were reflected also in the actual work of construction and engineering. The ancient engineers devised an answer to the problem of silting (which has assumed much importance in the present case), and they invented a device (the bisokotuwa or valve pit), the counterpart of the sluice, for dealing with this environmental problem[48], by controlling the pressure and the quantity of the outflow of

[45] See K. N. Iayatilleke, "The Principles of International Law in Buddhist Doctrine", 120 Recueil des Cows (1967-l), p. 558.
[46] For this idea in the scriptures of Buddhism, see Digha Nikaya, 111, Pali Text Society, p. 850.
[47] Goldsmith and Hildyard, supra, p. 299. See, also, R.L. Brohier, "The Interrelation of Groups of Ancient Reservoirs and Channels in Ceylon", Journal of the Royal Asiatic Society (Ceylon), Vol. 34, No. 90, 1937, p. 65. Brohier's study is one of the foremost authorities on the subject.
[48] H. Parker, Ancrent Ceylon, supra, p. 379:

"Since about the middle of the last century, open wells, called 'valve towers' when they stand clear of the embankment or'valve pits' when they are in it have been built in numerous reservoirs in Europe. Their duty is to hold the valves, and the lifting-gear for working them, by means of which the outward flow of water is regulated or totally stopped. Such also was the function of the bisokotuwa of the Sinhalese engineers; they were the first inventors ofthe valve-pit more than 2,100 vears avo."

water when it was released from the reservoir[49]. Weirs were also built, as in the case of the construction involved in this case, for raising the levels of river water and regulating its flow[50].

This juxtaposition in this ancient heritage of the concepts of development and environmental protection invites comment immediately from those familiar with it. Anyone interested in the human future would perceive the connection between the two concepts and the manner of their reconciliation.

Not merely from the legal perspective does this become apparent, but even from the approaches of other disciplines.

Thus Arthur C. Clarke, the noted futurist, with that vision which has enabled him to bring high science to the service of humanity, put his finger on the precise legal problem we are considering when he observed: "the small Indian Ocean island ... provides textbook examples of many modern dilemmas: *development versus environment*"[51], and proceeds immediately to recapitulate the famous sermon, already referred to, relating to the trusteeship of land, observing, "For as King Devanampiya Tissa was told three centuries before the birth of Christ, we are its guardians - not its owners"[52].

The task of the law is to convert such wisdom into practical terms - and the law has often lagged behind other disciplines in so doing. Happily for international law, there are plentiful indications, as recited earlier in this opinion, of that degree of "general

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[49] H. Parka, op. cit. Needham observes:

"Already in the first century, A.D. they [the Sinhalese engineers] understood the principle of the oblique weir ... But perhaps the most striking invention was the intaketowas or valve towas (Bisokotuwa) which were fitted in the reservoirs perhaps from the 2nJ Century B.C. onwards, certainly from the 2nd Century A.D.... In this way silt and scum-free water could be obtained and at the same time the pressure-head was so reduced as to make the outflow controllable." (loseph Needham, Science and Civilization in Chrna, op. cit., Vol 4, p. 372.)

[50] K.M. de Silva, A History of Sri Lanka, 1981, p. 30

[51] Arthur C. Clarke, "Sri Lanka's Wildlife Heritage", National Ceographic magazine, Aug. 1983, No. 2, p. 254; emphasis added.

[52] Arthur C. Clarke has also written:

> "Of all Ceylon's architectural wonders, however, the most remarkable - and certainly the most useful - is the enormous irrigation system which, for over two thousand years, has brought prosperity to the rice farmers in regions where it may not rain for six months at a time. Frequently ruined, abandoned and rebuilt, this legacy of the ancient engineers is one of the island's most precious possessions. Some of its artificial lakes are ten or twenty kilometres in circumference, and abound with birds and wildlife."
> (The View from Serendip, 1977, p. 121.)

recognition among states of a certain practice as obligatory"[53] to give the principle of sustainable development the nature of customary law.

This reference to the practice and philosophy of a major irrigation civilization of the premodern world[54] illustrates that when technology on this scale was attempted it was accompanied by a due concern for the environment. Moreover, when so attempted, the necessary response from the traditional legal system, as indicated above, was one of affirmative steps for environmental protection, often taking the form of royal decrees, apart from the practices of a sophisticated system of customary law which regulated the manner in which the irrigation facilities were to be used and protected by individual members of the public.

The foregoing is but one illustrative example of the concern felt by prior legal systems for the preservation and protection of the environment. There are other examples of complex irrigation systems that have sustained themselves for centuries, if not millennia.

My next illustration comes from two ancient cultures of sub-Saharan Africa - those of the Sonjo and the Chagga, both Tanzanian tribes[55]. Their complicated networks of irrigation furrows, collecting water from the mountain streams and transporting it over long distances to the fields below, have aroused the admiration of modern observers not merely for their technical sophistication, but also for the durability of the complex irrigation systems they fashioned. Among the Sonjo, it was considered to be the sacred duty of each generation to ensure that the system was kept in good repair and all able-bodied men in the villages were expected to take part[56]. The system comprised a fine network of small canals, reinforced by a superimposed network of larger channels. The water did not enter the irrigation area unless it was strictly required, and was not

[53] J. Brierly, The Law of Nations, sunra, p. 61

[54] "It is possible that in no other part of the world are there to be found within the same space the remains of so many works for irrigation, which are at the same time of such great antiquity and of such vast magnitude as in Ceylon ..." (Bailey, Report on Irrigation in Uva, 1859; see also R.L. Brohier, Ancient Irrigation Works in Ceylon, supra, p. 1);

"No people in any age or country had so great practice and experience in the construction of works for irrigation." (Sir Jarnes Emerson Tennent, op. cit., Vol. 1, p. 468);

"The stupendous ruins of their reservoirs are the proudest monuments which remain of the former greatness of their country ... Excepting the exaggerated dimensions of Lake Moeris in Central Egypt, and the mysterious 'Basin of Al Aram' ... no similar constructions formed by any race, whether ancient or modern, exceed in colossal magnitude the stupendous tanks of Ceylon." (Sir Emerson Tennent, quoted in Brohier, supra, p. 1.)

[55] Goldsmith and Hildyard, op. ciL, pp. 282-291

allowed to pass through the plots in the rainy season. There was thus no over-irrigation, salinity was reduced, and waterborne diseases avoided[57].

Sir Charles Dundas, who visited the Chagga in the first quarter of this century, was much impressed by the manner in which, throughout the long course of the furrows, society was so organized that law and order prevailed[58]. Care of the furrows was a prime social duty, and if a furrow was damaged, even accidentally, one of the elders would sound a horn in the evening (which was known as the call to the furrows), and next morning everyone would leave their normal work and set about the business of repair[59]. The furrow was a social asset owned by the clan[60].

Another example is that of the qanats[61] of Iran, of which there were around 22,000, comprising more than 170,000 miles[62] of underground irrigation channels built thousands of years ago, and many of them still functioning[63]. Not only is the extent of this system remarkable, but also the fact that it has functioned for thousands of years and, until recently, supplied Iran with around 75 per cent of the water used for both irrigation and domestic purposes.

By way of contrast, where the needs of the land were neglected, and massive schemes launched for urban supply rather than irrigation, there was disaster. The immense works in the Euphrates Valley in the third millennium B.C. aimed not at improving the irrigation system of the local tribesmen, but at supplying the requirements of a rapidly growing urban society (e.g., a vast canal built around 2400 B.C. by King Entemenak) led to seepage, flooding and over-irrigation[64]. Traditional farming methods and later irrigation systems helped to overcome the resulting problems of waterlogging and salinization.

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[56] Ibid, pp. 284-285.
[57] Ibid., p. 284.
[58] Sir Charles Dundas, Kilimanjaro and lts Peoples, 1924, p. 262
[59] Goldsmith and Hildyard, op. cit., p. 289
[60] See further Fidelio T. Masao, "The Irrigation System in Uchagga: An EthnoHistorical Approach", Tanzania Notes and Records, No. 75, 1974
[61] Qanats comprise a series of vertical shafls dug down to the aquifer and joined by a horizontal canal - see Goldsmith and Hildyard, supra, p. 277
[62] Some idea of the immensity of this work can be gathered from the fact that it would cost around one million dollars to build an eight kilometres qanat with an average tunnel depth of 15 metres (ibid, p. 280).
[63] Ibid., p. 277.
[64] Goldsnith and Hildyard, supra, p.308

China was another site of great irrigation works, some of which are still in use over two millennia after their construction. For example, the ravages of the Mo river were overcome by an excavation through a mountain and the construction of two great canals. Needham describes this as "one of the greatest of Chinese engineering operations which, now 2,200 years old, is still in use today[65]". An ancient stone inscription teaching the art of river control says that its teaching "holds good for a thousand autumns"[66]. Such action was often inspired by the philosophy recorded in the Tao Te Ching which "with its usual gemlike brevity says 'Let there be no action [contrary to Nature] and there will be nothing that will not be well regulated'[67]'. Here, from another ancient irrigation civilization, is yet another expression of the idea of the rights of future generations being served through the harmonization of human developmental work with respect for the natural environment.

Regarding the Inca civilization at its height, it has been observed that it continually brought new lands under cultivation by swamp drainage, expansion of irrigation works, terracing of hillsides and construction of irrigation works in dry zones, the goal being always the same - better utilization of all resources so as to maintain an equilibrium between production and consumption[68]. In the words of a noted writer on this civilization, "in this respect we can consider the Inca civilization triumphant, since it conquered the eternal problem of maximum use and conservation of soil"[69]. Here, too, we note the harmonization of developmental and environmental considerations.

Many more instances can be cited of irrigation cultures which accorded due importance to environmental considerations and reconciled the rights of present and future generations. I have referred to some of the more outstanding. Among them, I have examined one at greater length, partly because it combined vast hydraulic development projects with a meticulous regard for environmental considerations, and partly because both development and environmental protection are mentioned in its ancient records. That is sustainable development par excellence; and the principles on which it was based must surely have a message for modern law.

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[65] Op, ciL, Vol. 4, p. 288.
[66] Ibid., p.295
[67] Needham, Science and Civiltzation in China, Vol. 2, Histo)y of Scientifc Thought, 1969, p.69
[68] Jorge, E. Hardoy, Pre-Columbian Cities, 1973, p.415
[69] Jolul Collier, Los indios de Jas Americas, 1960, cited in Hardoy, op.cit., p.415. See also Donald Collier, "Development of civilization on the coast of Peru" in Irrigatfon Civilization: A Comparative Studj, Julian H. Steward (ed.), 1955.

Traditional wisdom which inspired these ancient legal systems was able to handle such problems. Modern legal systems can do no less, achieving a blend of the concepts of development and of conservation of the environment, which alone does justice to humanity's obligations to itself and to the planet which is its home. Another way of viewing the problem is to look upon it as involving the imperative of balancing the needs of the present generation with those of posterity.

In relation to concern for the environment generally, examples may be cited from nearly every traditional system, ranging from Australasia and the Pacific Islands, through Amerindian and African cultures to those of ancient Europe. When Native American wisdom, with its deep love of nature, ordained that no activity affecting the larld should be undertaken without giving thought to its impact on the land for seven generations to come[70]; when African tradition viewed the human community as threefold - past, present and future - and refused to adopt a one eyed vision of concentration on the present; when Pacific tradition despised the view of land as merchandise that could be bought and sold like a common article of commerce[71], and viewed land as a living entity which lived and grew with the people and upon whose sickness and death the people likewise sickened and died; when Chinese and Japanese culture stressed the need for harmony with nature; and when Aboriginal custom, while maximizing the use of all species of plant and animal life, yet decreed that no land should be used by man to the point where it could not replenish itself[72], these varied cultures were reflecting the ancient wisdom of the human family which the legal systems of the time and tribe absorbed, reflected and turned into principles whose legal validity cannot be denied.

[70] On Native American attitudes to land, see Guruswamy, Palmer, and Weston (eds.), International Environmental Law and World Order, 1994, pp. 298-299. On American Indian attitudes, see further J. Callicott, "The Traditional American Indian and Western European Attitudes Towards Nature: An Overview", 4 Environmental Ethics 293 (1982); A. Wiggins, "Indian Rights and the Environment", 18 Yale JInt'l Law 345 (1993); J. Hughes, American Indian Ecology (1983).

71 A Pacific Islander, giving evidence before the first Land Commission in the British Solomons (1919-1924), poured scorn on the concept that land could be treated "as if it were a thing like a box" which could be bought and sold, pointing out that land was treated in his society with respect and with due regard for the rights of future generations. (Peter G. Sack, Land Between Two Laws, 1993, p. 33.)

[72] On Aboriginal attitudes to land, see E. M. Eggleston, Fear, Favour and Affection, 1976. For all their concern with the envifonment, the Aboriginal people were not without their own development proiects.

"There were remarkable Aboriginal water control schemes at Lake Condah, Toolondo and Mount William in south western Victoria. These were major engineering feats, each involving several kilometers of stone channels connecting swamp and watercourses.

At Lake Condah, thousands of years before Leonardo da Vinci studied the hydrology of the norther Italian lakes, the original inhavitants of Australia perfectly understood the hydrology of the site. A sophisticated network of traps, weirs and sluices were designed…" (Stephen Johnson et al, Engineering and Society:An Australia perspective, 1995, p. 35)

Ancient Indian teaching so respected the environment that it was illegal to cause wanton damage, even to an enemy's territory in the course of military conflict[73].

Europe, likewise, had a deep-seated tradition of love for the environment, a prominent feature of Europe culture, until the industrial revolution pushed these concerns into the background. Wardsworth in England, Thoreau in the United States, Rousseau in France, Tolstoy and Chekhov in Russia, Goethe in Germany spoke not only for themselves, but represented a deep-seated love of nature that was instinct in the ancient traditions of Europe - traditions whose gradual disappearance these writers lamented in their various ways[74]. Indeed, European concern with the environment can be traced back through the millennia to such writers as Virgil, whose Georgics, composed between 37 and 30 B.C., extols the beauty of the Italian countryside and pleads for the restoration of the traditional agricultural life of Italy, which was being damaged by the drift to the cities[75].

This survey would not be complete without a reference also to the principles of Islamic law that in as much as all land belongs to God, land is never the subject of human ownership, but is only held in trust, with all the connotations that follow of due care, wise management, and custody for future generations. The first principle of modern environmental law - the principle of trusteeship of earth resources - is thus categorically formulated in this system.

The ingrained values of any civilization are the source from which its legal concepts derive, and the ultimate yardstick and touchstone of their validity. This is so in international and domestic legal systems alike, save that international law would require a worldwide recognition of those values. It would not be wrong to state that the love of nature, the desire for its preservation, and the need for human activity to respect the requisites for its maintenance and continuance are among those pristine and universal values which command international recognition.

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[73] Nagendra Singh, Human Rights an dthe Future of Mankind, 1981, p. 93

[74] Commenting on the rise of naturalism in all the arts in Europe in the later Middle Ages, one of this country's outstanding philosophers of science has observed:

> " The whole atmosphere of every art exhigited direct joy in the apprehension of the things around us. The craftsmen who executed the later mediaeval decorative sculpture, Giotto, Chaucer, Wordsworth, Walt Whitman, and at the present day the New England poet Robert Frost, are all akin to each other in this respect." (Alfred North Whitehead, Science and the Modern World, 1926, p. 17)

The formalism of modern legal systems may cause us to lose sight of such principles, but the time has come when they must once more be integrated into the corpus of the living law. As stated in the exhaustive study of The Social and Environmental Effects of Large Dams, already cited, "We should examine not only what has caused modern irrigation systems to fail; it is much more important to understand what has made traditional irrigation societies to succeed"[76]. Observing that various societies have practised sustainable irrigation agriculture over thousands of years, and that modern irrigation systems rarely last more than a few decades, the authors pose the question whether it was due to the achievement of a "congruence of fit" between their methods and "the nature of land, water and climate"[77]. Modern environmental law needs to take note of the experience of the past in pursuing this "congruence of fit" between development and environmental imperatives.

By virtue of its representation of the main forms of civilization, this Court constitutes a unique forum for the reflection and the revitalization of those global legal traditions. There were principles ingrained in these civilizations as well as embodied in their legal systems, for legal systems include not merely written legal systems but traditional legal systems as well, which modern researchers have shown to be no less legal systems than their written cousins, and in some respects even more sophisticated and finely tuned than the latter[78].

Living law which is daily observed by members of the community, and compliance with which is so axiomatic that it is taken for granted, is not deprived of the character of law by the extraneous test and standard of reduction to writing. Writing is of course useful for establishing certainty, but when a duty such as the duty to protect the environment is so well accepted that all citizens act upon it, that duty is part of the legal system in question[79].

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[75] See the Georgics, Book 11, 1. 36 ff.; 1. 458 ff. Also Encyclopacdia Britannica, 1992, Vol. 29, pp. 499-500. 16Goldsmith and Hildyard, op. cit., p. 316.
[76] Goldsmith and Hildyard, op. Cit., p.3 16.
[77] Ibid.
[78] See, for exarnple, M. Gluckman, African Traditional Law in Historical Perspective 1974, The Ideas in Barotse Jurisprudence, 2nd ed., 1972, and The Judicial Process among the Barotse, 1955; A. L. Epstein, Juridical Techniques and the Judicial ProcessA Study in African Customary Law, 1954.
[79] On the precision with which these systems assigned duties to their members, see Malinowski, Crime and Custom in Savage Society, 1926.

Moreover, when the Statute of the Court described the sources of international law as including the "general principles of law recognized by civilized nations", it expressly opened a door to the entry of such principles into modern international law.

(f) Traditional Principles that can assist in the Development of Modern Environmental Law

As modern environmental law develops, it can, with profit to itself, take account of the perspectives and principles of traditional systems, not merely in a general way, but with reference to specific principles, concepts, and aspirational standards.

Among those which may be extracted from the systems already referred to are such far reaching principles as the principle of trusteeship of earth resources, the principle of intergenerational rights, and the principle that development and environmental conservation must go hand in hand. Land is to be respected as having a vitality of its own and being integrally linked to the welfare of the community. When it is used by humans, every opportunity should be afforded to it to replenish itself. Since flora and fauna have a niche in the ecological system, they must be expressly protected. There is a duty lying upon all members of the community to preserve the integrity and purity of the environment.

Natural resources are not individually, but collectively, owned, and a principle of their use is that they should be used for the maximum service of people. There should be no waste, and there should be a maximization of the use of plant and animal species, while preserving their regenerative powers. The purpose of development is the betterment of the condition of the people.

Most of them have relevance to the present case, and all of them can greatly enhance the ability of international environmental law to cope with problems such as these if and when they arise in the future. There are many routes of entry by which they can be assimilated into the international legal system, and modern international law would only diminish itself were it to lose sight of them - embodying as they do the wisdom which enabled the works of man to function for centuries and millennia in a stable relationship with the principles of the environment. This approach assumes increasing importance at

a time when such a harmony between humanity and its planetary inheritance is a prerequisite for human survival.

* * *

Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law.

B. The Principle of Continuing Environmental Impact Assessment

(a) The Principle of Continuing Environmental Impact Assessment

Environmental Impact Assessment (EIA) has assumed an important role in this case.

In a previous opinion[80] I have had occasion to observe that this principle was gathering strength and international acceptance, and had reached the level of general recognition at which this Court should take notice of it[81].

I wish in this opinion to clarify further the scope and extent of the environmental impact principle in the sense that environmental impact assessment means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences. As long as a project of some magnitude is in operation, EIA must continue, for every such project can have unexpected consequences; and considerations of prudence would point to the need for continuous monitoring[82].

[80] Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in Nuclear Tests (New Zealand v. France Case, ICJ Reports 1995, p. 344. See, also, Legality of the Use by a State of Nuclear Weapons in Armed Conflict, I.C.J Reports 1996, p. 140.

[81] Major international documents recognizing this principle (first established in domestic law under the 1972 National Environmental Protection Act of the United States) are the 1992 Rio Declaration (Principle 17), United Nations General Assembly resolution 2995 (XXVII), 1972; the 1978 UNEP DraR Principles of Conduct (Principle 5); Agenda 21 (paras. 7.41 (b) and 8.4), the 1974 Nordic Environmental Protection Convention (Art. 6); the 1985 EC Environmental Assessment Directive (Art. 3); and the 1991 Espoo Convention. The status of the principle in actual practice is indicated also by the fact that multilateral development banks have adopted it as an essential precaution (World Bank Operational Directive 4.00).

[82] Trail Smelter Arbitration (I11 UNRIIA (1941), p. 1907).

The greater the size and scope of the project, the greater is the need for a continuous monitoring of its effects, for EIA before the scheme can never be expected, in a matter so complex as the environment, to anticipate every possible environmental danger.

In the present case, the incorporation of environmental considerations into the Treaty by Articles 15 and 19 meant that the principle of EIA was also built into the Treaty. These provisions were clearly not restricted to EIA before the project commenced, but also included the concept of monitoring during the continuance of the project. Article 15 speaks expressly of monitoring of the water quality during the operation of the System of Locks, and Article 19 speaks of compliance with obligations for the protection of nature arising in connection with the construction and operation of the System of Locks.

Environmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme.

Over half a century ago the Trail Smelter Arbitration[83] recognized the importance of continuous monitoring when, in a series of elaborate provisions, it required the parties to monitor subsequent performance under the decision[84]. It directed the Trail Smelter to install observation stations, equipment necessary to give information of gas conditions and sulphur dioxide recorders, and to render regular reports which the Tribunal would consider at a future meeting. In the present case, the Judgement of the Court imposes a requirement of joint supervision which must be similarly understood and applied.

The concept of monitoring and exchange of information has gathered much recognition in international practice. Examples are the Co-operative Programme for the Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe, under the ECE Convention, the Vienna Convention for the Protection of the Ozone Layer, 1985 (Arts. 3 & 4), and the Convention on Long-Range Transboundary Air Pollution, 1979

[83] III UNRIIA (1941), p. 1907
[84] See ibid., pp. 1934-1937

(Art. 9)[85]. There has thus been growing international recognition of the concept of continuing monitoring as part of EIA.

The Court has indicated in its Judgement (para. 155 2 C) that a joint operational regime must be established in accordance with the Treaty of 16 September 1977. A continuous monitoring of the scheme for its environmental impacts will accord with the principles outlined, and be a part of that operational regime. Indeed, the 1977 Treaty, with its contemplated regime of joint operation and joint supervision, had itself a built-in regime of continuous joint environmental monitoring. This principle of
environmental law, as reinforced by the terms of the Treaty and as now incorporated into the Judgement of the Court (para. 140), would require the Parties to take upon themselves an obligation to set up the machinery for continuous watchfulness, anticipation and evaluation at every stage of the project's progress, throughout its period of active operation.

Domestic legal systems have shown an intense awareness of this need and have even devised procedural structures to this end. In India, for example, the concept has evolved of the "continuous mandamus" - a court order which specifies certain environmental safeguards in relation to a given project, and does not leave the matter there, but orders a continuous monitoring of the project to ensure compliance with the standards which the court has ordained[86].

EIA, being a specific application of the larger general principle of caution, embodies the obligation of continuing watchfulness and anticipation.

(b) The Principle of Contemporaneity in the Application of Environmental Norms

This is a principle which supplements the observations just made regarding continuing assessment. It provides the standard by which the continuing assessment is to be made.

[85] XVIII ILM (1979), p. 1442.
[86] For a reference to environmentally-related judicial initiatives of the courts of the SAARC Region, see the Proceedings of the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development, held in Colombo, Sri Lanka, 4-6 July 1997, shortly to be published.

This case concerns a treaty that was entered into in 1977. Environmental standards and the relevant scientific knowledge of 1997 are far in advance of those of 1977. As the Court has observed, new scientific insights and a growing awareness of the risks for mankind have led to the development of new norms and standards.

> "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 with activities begun in the past." (Para. 140.)

This assumes great practical importance in view of the continued joint monitoring that will be required in terms of the Court's Judgement.

Both Parties envisaged that the project they had agreed upon was not one which would be operative for just a few years. It was to reach far into the long-term future, and be operative for decades, improving in a permanent way the natural features that it dealt with, and forming a lasting contribution to the economic welfare of both participants.

If the Treaty was to operate for decades into the future, it could not operate on the basis of environmental norms as though they were frozen in time when the Treaty was entered into.

This inter-temporal aspect of the present case is of importance to all treaties dealing with projects impacting on the environment. Unfortunately, the Vienna Convention offers very little guidance regarding this matter which is of such importance in the environmental field. The provision in Article 31, paragraph 3 (c), providing that "any relevant rules of international law applicable in the relations between the parties" shall be taken into account, scarcely covers this aspect with the degree of clarity requisite to so important a matter.

Environmental concerns are live and continuing concerns whenever the project under which they arise may have been inaugurated. It matters little that an undertaking has been commenced under a treaty of 1950, if in fact that undertaking continues in operation in the year 2000. The relevant environmental standards that will be applicable will be those of the year 2000.

As this Court observed in the Namibia case, "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[87], and these principles are "not limited to the rules of international law applicable at the time the treaty was concluded[88]".

Environmental rights are human rights. Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of their time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights.

Support for this proposition can be sought from the opinion of Judge Tanaka in South West Africa, when he observed that a new customary law could be applied to the interpretation of an instrument entered into more than 40 years previously[89]. The ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today's problems in this field the standards of yesterday. Judge Tanaka reasoned that a party to a humanitarian instrument has no right to act in a manner which is today considered inhuman, even though the action be taken under an instrument of 40 years ago. Likewise, no action should be permissible which is today considered enviromnentally unsound, even though it is taken under an instrument of more than 20 years ago.

Mention may also be made in this context of the observation of the European Court of Human Rights in the Tyrer case that the Convention is a "living instrument" which must be interpreted "in the light of present-day conditions"[90].

It may also be observed that we are not here dealing with questions of the validity of the Treaty which fall to be determined by the principles applicable at the time of the Treaty, but with the application of the Treaty[91]. In the application of an environmental treaty, it

[87] I.C.J. Reports 1971, p. 31, para. 53.
[88] Oppenheim's International Law, R. Y. Jennings and A. Watts (eds.), 1992, p. 1275, Note 2 1.
[89] I.C.J Reports 1966, pp. 293-294
[90] Judgement of the Court, Tyrer case, 25 April 1978, para. 31, publ. Court A, Vol. 26, at 15, 16.
[91] See further Rosalyn Higgins, "Some Observations on the Inter-Temporal Rule in International Law", in Theory of International Law at the Threshold of the 215' C,enturv, supra, p. 173.

is vitally important that the standards in force at the time of application would be the governing standards.

A recognition of the principle of contemporaneity in the application of environmental norms applies to the joint supervisory regime envisaged in the Court's Judgement, and will be an additional safeguard for protecting the environmental interests of Hungary.

C. The Handling of erga omnes Obligations in inter partes Judicial Procedure

(a) The Factual Background. The presence of the elements of estoppel

It is necessary to bear in mind that the Treaty of 1977 was not one that suddenly materialized and was hastily entered into, but that it was the result of years of negotiation and study following the first formulations of the idea in the 1960s. During the period of negotiation and implementation of the Treaty, numerous detailed studies were conducted by many experts and organizations, including the Hungarian Academy of Sciences.

The first observation to be made on this matter is that Hungary went into the 1977 Treaty, despite very clear warnings during the preparatory studies that the project might involve the possibility of environmental damage. Hungary, with a vast amount of material before it, both for and against, thus took a considered decision, despite warnings of possible danger to its ecology on almost all the grounds which are advanced today.

Secondly, Hungary, having entered into the Treaty, continued to treat it as valid and binding for around 12 years. As early as 1981, the Government of Hungary had ordered a reconsideration of the project and researchers had then suggested a postponement of the construction, pending more detailed ecological studies. Yet Hungary went ahead with the implementation of the Treaty.

Thirdly, not only did Hungary devote its own effort and resources to the implementation of the Treaty but, by its attitude, it left Czechoslovakia with the impression that the binding force of the Treaty was not in doubt. Under this impression, and in pursuance of

the Treaty which bound both Parties, Czechoslovakia committed enormous resources to the project. Hungary looked on without comment or protest and, indeed, urged Czechoslovakia to more expeditious action. It was clear to Hungary that Czechoslovakia was spending vast funds on the Project - resources clearly so large as to strain the economy of a State whose economy was not particularly strong.

Fourthly, Hungary's action in so entering into the Treaty in 1977 was confirmed by it as late as October 1988 when the Hungarian Parliament approved of the Project, despite all the additional material available to it in the intervening space of 12 years. A further reaffirmation of this Hungarian position is to be found in the signing of a Protocol by the Deputy Chairman of the Hungarian Council of Ministers on 6 February 1989, reaffirming Hungary's commitment to the 1977 Project. Hungary was in fact interested in setting back the date of completion from 1995 to 1994.

Ninety-six days after the 1989 Protocol took effect, i.e., on 13 May 1989, the Hungarian Government announced the immediate suspension for two months of work at the Nagymaros site. It abandoned performance on 20 July 1989, and thereafter suspended work on all parts of the Project. Formal termination of the 1977 Treaty by Hungary took place in May 1992.

It seems to me that all the ingredients of a legally binding estoppel are here present[92].

The other Treaty partner was left with a vast amount of useless project construction on its hands and enormous incurred expenditure which it had fruitlessly undertaken.

(b) The Context of Hungary's Actions

In making these observations, one must be deeply sensitive to the fact that Hungary was passing through a very difficult phase, having regard to the epochal events that had

[92] On the application of principles of estoppel in the jurisprudence of this Court and its predecessor, see Legal Status of Eastern Greenland, P. C. I J, Series A/IB, No. 53, p. 22; Fisheries (IJnited Kingdom v. Norway), I C.J Reports 1951, p. 116; Temple of Preah Vihear, I.C.J Reports 1962, p. 6. For an analysis of this jurisprudence, see the separate opinion of Judge Ajibola in Territorial Dispute (Libyan Arab JamahirEya/Chad), I.C.J Reports 1994, pp. 77-83.

recently taken place in Eastern Europe. Such historic events necessarily leave their aftermath of internal tension. This may well manifest itself in shifts of official policy as different emergent groups exercise power and influence in the new order that was in the course of replacing that under which the country had functioned for close on half a century. One cannot but take note of these realities in understanding the drastic official changes of policy exhibited by Hungary.

Yet the Court is placed in the position of an objective observer, seeking to determine the effects of one State's changing official attitudes upon a neighbouring State. This is particularly so where the latter was obliged, in determining its course of action, to take into account the representations emanating from the official repositories of power in the first State.

Whatever be the reason for the internal changes of policy, and whatever be the internal pressures that might have produced this, the Court can only assess the respective rights of the two States on the basis of their official attitudes and pronouncements. Viewing the matter from the standpoint of an external observer, there can be little doubt that there was indeed a marked change of official attitude towards the Treaty, involving a sharp shift from full official acceptance to full official rejection. It is on this basis that the legal consequence of estoppel would follow.

(c) Is it appropriate to use the Rules of inter partes Litigation to Determine erga omnes Obligations?

This recapitulation of the facts brings me to the point where I believe a distinction must be made between litigation involving issues inter partes and litigation which involves issues with an erga omnes connotation.

An important conceptual problem arises when, in such a dispute inter partes, an issue arises regarding an alleged violation of rights or duties in relation to the rest of the world. The Court, in the discharge of its traditional duty of deciding between the parties, makes the decision which is in accordance with justice and fairness between the parties. The procedure it follows is largely adversarial. Yet this scarcely does justice to rights and obligations of an erga omnes character - least of all in cases involving

environmental damage of a far-reaching and irreversible nature. I draw attention to this problem as it will present itself sooner or later in the field of environmental law, and because (though not essential to the decision actually reached) the facts of this case draw attention to it in a particularly pointed form.

There has been conduct on the part of Hungary which, in ordinary inter partes litigation, would prevent it from taking up wholly contradictory positions. But can momentous environmental issues be decided on the basis of such inter partes conduct? In cases where the erga omnes issues are of sufficient importance, I would think not.

This is a suitable opportunity, both to draw attention to the problem and to indicate concern at the inadequacies of such inter partes rules as determining factors in major environmental disputes.

I stress this for the reason that inter partes adversarial procedures, eminently fair and reasonable in a purely inter partes issue, may need reconsideration in the future, if ever a case should arise of the imminence of serious or catastrophic environmental danger, especially to parties other than the immediate litigants.

Indeed, the inadequacies of technical judicial rules of procedure for the decision of scientific matters has for long been the subject of scholarly comment[93].

We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond then and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights need to look beyond procedure rules fashioned for purely inter partes litigation.

When we enter the arena of obligations which operate erga omnes rather than inter partes, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. International environmental law will need to proceed beyond weighing the rights and

obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.

The present case offers an opportunity for such reflection.

* * *

Environmental law is one of the most rapidly developing areas of international law and I have thought it fit to make these observations on a few aspects which have presented themselves for consideration in this case. As this vital branch of law proceeds to develop, it will need all the insights available from the human experience, crossing cultural and disciplinary boundaries which have traditionally hemmed in the discipline of international law.

(Signed)

Christopher Gregory WEERAMANTRY.

[93] See, for example, Peter Brett, "Implications of Science for the Law", 18 McGil Law Journal (1972), p. 170, at p. 191. For a well known comment from the perspective of sociology, see Jacques Ellul, the Technological Society, tr. John Wilkinson, 1964, pp. 251, 291-300.

Mexico v United States of America, GATT Panel

Panel Report Circulated 3 September 1991, unadopted

Introduction

The Marine Mammal Protection Act of the United States of America (MMPA) banned importations of yellowfin tuna caught in purse-seine nets[1] in the Eastern Tropical Pacific Ocean. Based on the MMPA, in 1990 the US Government prohibited imports of yellowfin tuna and yellowfin tuna products harvested in the said marine area by Mexican vessels, unless the corresponding importer declared that none of its products had been harvested with purse-seine nets.

A GATT Panel was established on February 1991, at request of the Mexican Government to settle the dispute. Mexico argued that the import embargos imposed by the USA were restrictions on importation inconsistent with USA obligations under GATT Article XI (General Elimination on Quantitative Restrictions). Conversely, the USA said that the former were measures that constituted an enforcement at the time or point of importation of the requirements of the MMPA, and were therefore permitted, and also allowed under GATT Article XX(b) and XX(g), which provided a general exception from GATT obligations for measures "necessary to protect human, animal or plant life or health" and "relating to the conservation of exhaustible natural resources", respectively.

Held

The Panel held that the afore-mentioned prohibition of imports was contrary to GATT Article XI:1. According to the Panel, it was true that GATT parties were allowed to impose internal regulations on imported products, on a non-discriminatory basis. Nevertheless the Panel considered that the MMPA regulated the harvesting of tuna, but not tuna as a product.

[1] In the words of the Panel, according to this technique a fishing vessel "locates a school of fish and sends out a motor boat (a seine skiff) to hold one end of the purse-seine net. The vessel motors around the perimeter of the school of fish, unfurling the net and encircling the fish, and the seine skiff then attaches its end of the net to the fishing vessel". Bearing in mind that in the Eastern Tropical Pacific Ocean dolphins use to mingle with tuna schools, the announced method frequently results in incidental takes of dolphins while fishing for tuna.

The Panel also held that Articles XX(b) and XX(g) could not be applied to the case because of their restricted scope of jurisdiction. Regarding this matter, the Panel established that the announced articles were intended to protect the life and health of humans, animals and plants, as well as to regulate the consumption of exhaustible natural resources within the jurisdiction of the importing country (the USA).

The Panel entitled GATT contracting parties to impose non-discriminatory taxes or regulations that served environmental purposes, but prevented them from restricting imports of a country that had different environmental policies.

India, Malaysia, Pakistan and Thailand v. United States of America WTO Panel Panel Report Circulated 15 may 1998, adopted as modified by Appellate body

Introduction

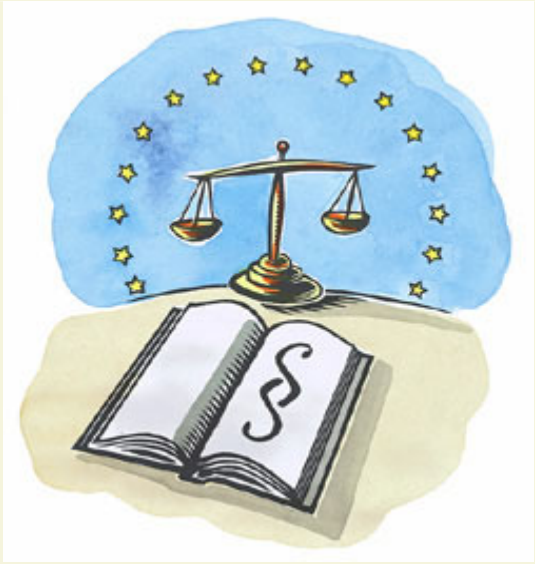
The USA Government banned the import of shrimp and shrimp products from countries that did not comply with harvesting methods that did not adversely affect sea turtles. The above methods were basically limited to shrimp harvested by commercial trawl vessels using "turtle excluder devices" (TED) similar to those authorized in the USA, and also artisan harvesting of shrimp.

A WTO Panel was established at the request of the plaintiff countries, which argued the illegitimacy of the announced import ban. The plaintiffs argued that the said ban was inconsistent with GATT's Article XI (General Elimination on Quantitative Restrictions), the most-favoured nation clause established in GATT Article I:1, and the prohibition on discriminatory administration of quantitative restrictions of GATT Article XIII:1.

The USA argued that the measures were justified under GATT, particularly in concerning the conservation of exhaustible natural resources (Article XX(g)). In fact, all seven kinds of sea turtles had been defined as endangered species in CITES. According to the USA, sea turtles were a shared global resource that deserved protective measures that escaped the USA national jurisdiction.

Held

The Panel held that although the WTO Agreement confirmed had an environmental concern, economic development through trade was that its core focus. The Panel stated that the plaintiff countries were subject to 'unjustifiable discrimination', after considering that global challenges, such as the protection of a shared natural resource, demanded a multilateral response. Hence the defendant must enter into corresponding international negotiations.



LEADING CASES
OF THE EUROPEAN COURT OF JUSTICE

EC ENVIRONMENTAL LAW

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NOTE: This is a selection for the five sectors that produce the highest number of open cases:

- **Horizontal Legislation, and in particular the Environment Impact Assessment (EIA)**
- **Air**
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- **Waste**
- **Nature**

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
HORIZONTAL LEGISLATION – EIA				
Council Directive 85/377/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment	Case C-431/92 under Articles 155 and 169 of the Treaty	Commission of the European Communities, applicant, v Federal Republic of Germany, defendant, supported by United Kingdom of Great Britain and Norther Ireland, intervener	**On those grounds,** **THE COURT** **hereby:** **1. Dismisses the application;** **2. Orders the parties, including the intervener, to bear their own costs.**	**Summary** 2. Directive 85/377 on the assessment of the effects of certain public and private projects on the environment, and in particular Article 12(1), must be interpreted as precluding a Member State which has transposed it into its national legal order after 3 July 1988, the time-limit for transposition, from waiving the obligations imposed by the directive in respect of a project consent procedure initiated after that time-limit. The sole criterion which may be used, since it accords with the principle of legal certainty and is designed to safeguard the effectiveness of the directive, to determine the date on which the procedure was initiated is the date when the application for consent was formally lodged, disregarding informal contacts and meetings between the competent authority and the developer. Furthermore, paragraph 2 of Annex I to the directive, under which projects for thermal power stations with a heat output of 300 megawatts or more must undergo an assessment, must be interpreted as requiring such projects to be assessed irrespective of whether they are separate constructions, are added to a pre-existing construction or even have close functional links with a pre-existing construction. A project of such a type which has links with an existing construction cannot therefore be within the category of "Modifications to development projects included in Annex I", mentioned in paragraph 12 of Annex II, for which only optional assessment is provided. Finally, Article 2, which lays down an obligation, incumbent on the competent authority in each Member State for the approval of projects, to make certain projects subject to an assessment of their effects on the environment, Article 3, which prescribes the

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
				content of the assessment, listing the factors which must be taken into account in it while leaving the competent authority a certain discretion as to the appropriate way of carrying out the assessment in the light of each individual case, and Article 8, which requires the competent national authorities to take into consideration in the development consent procedure the information gathered in the course of the assessment, must be interpreted as unequivocally imposing, regardless of their details, on the national authorities responsible for granting consent an obligation to carry out an assessment of the effects of the projects concerned on the environment. **See the full text of the judgement**
Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment	Case C-133/94 under Article 169 of the Treaty	Commission of the European Communities, applicant, v Kingdom of Belgium, , defendant, supported by Federal Republic of Germany, intervener	**On those grounds,** **THE COURT (Sixth Chamber)** **hereby:** **1. Declares that, by not completely and correctly transposing into Belgian law Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, the Kingdom of Belgium has failed to fulfil its obligations under that directive and under Article 189 of the EC Treaty;** **2. Orders the Kingdom of Belgium to pay the costs;** **3. Orders the Federal Republic of Germany to bear its own costs.**	**Summary** 2. Article 4(2) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment provides that projects of the classes listed in Annex II to the directive are to be made subject to an assessment where Member States consider that their characteristics so require and that Member States may, to this end, specify certain types of projects as being subject to an assessment or establish the criteria and/or thresholds necessary to determine which of the projects of the classes concerned are to be subject to an assessment. That provision must be interpreted as meaning that it does not empower the Member States to exclude generally and definitively one or more classes subject to possible assessment, since the criteria and/or the thresholds mentioned are not designed to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State, but only to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
				that obligation. **See the full text of the judgement**
Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment	Case C-72/95 under Article 177 of the EC Treaty	Aannemersbedrijf P.K. Kraaijeveld BV and Others v Gedeputeerde Staten van Zuid-Holland	**On those grounds, THE COURT, in answer to the questions referred to it by the Nederlandse Raad van State, by judgment of 8 March 1995, hereby rules: 1. The expression "canalization and flood-relief works" in point 10(e) of Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment must be interpreted as including certain types of work on a dyke running alongside waterways. 2. The expression "canalization and flood-relief works" in point 10(e) of Annex II to Directive 85/337 is to be interpreted as including not only construction of a new dyke but also modification of an existing dyke involving its relocation, reinforcement or widening, replacement of a dyke by constructing a new dyke in situ, whether or not the new dyke is stronger or wider than the old one, or a combination of such works. 3. Article 4(2) of Directive 85/337 and point 10(e) of Annex II must be interpreted as meaning that a Member State which establishes the criteria or thresholds necessary to classify projects relating to dykes at a level such that, in practice, all such projects are exempted in advance from the requirement of an impact**	**Summary** 2. The expression "canalization and flood-relief works" in point 10(e) of Annex II to Directive 85/337 on the assessment of the effects of certain public and private projects on the environment must be interpreted as including works for retaining water and preventing floods, and consequently dyke work along navigable waterways. Where it is liable permanently to affect the composition of the soil, flora and fauna or the landscape, such work is likely to have a significant effect on the environment within the meaning of the directive. That expression is also to be interpreted as including not only construction of a new dyke but also modification of an existing dyke involving its relocation, reinforcement or widening, replacement of a dyke by constructing a new dyke in situ, whether or not the new dyke is stronger or wider than the old one, or a combination of such works. 3. Article 4(2) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment provides that projects of the classes listed in Annex II are to be made subject to an assessment where Member States consider that their characteristics so require and that to that end Member States may specify the types of projects subject to an assessment or establish the criteria and/or thresholds necessary to determine which projects are to be subject to an assessment. That provision, together with point 10(e) of Annex II, which refers to canalization and flood-relief works, must be interpreted as meaning that where, in connection with dyke work which requires an assessment, a Member State establishes those criteria or thresholds in such a way that, in practice, all such projects are exempted in advance from the requirement of an impact

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			assessment exceeds the limits of its discretion under Articles 2(1) and 4(2) of the directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment. **Where under national law a court must or may raise of its own motion pleas in law based on a binding national rule which have not been put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State have remained within the limits of their discretion under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment.** **Where that discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.**	assessment, it exceeds the limits of its discretion under Articles 2(1) and 4(2) of the directive unless all the projects excluded could, when viewed as a whole, be regarded as unlikely to have significant effects on the environment. In addition, where under national law a court or tribunal hearing an action for the annulment of a decision approving a project must or may raise of its own motion pleas in law based on binding national rules which have not been put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State have remained within the limits of their discretion under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment. Where that discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment. **See the full text of the judgement**
Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private	Case C-81/96, under Article 177 of the EC Treaty	Burgemeester en wethouders van Haarlemmerliede en Spaarnwoude	**On those grounds,** **THE COURT** **(Sixth Chamber),** **in answer to the question referred to it by the Netherlands Raad van State by order**	**Summary** Directive 85/337 on the assessment of the effects of certain public and private projects on the environment is to be interpreted as not permitting Member States to waive the

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
projects on the environment		and Others v Gedeputeerde Staten van Noord-Holland	**of 12 March 1996, hereby rules: Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment is to be interpreted as not permitting Member States to waive the obligations regarding environmental assessments in the case of projects listed in Annex I of the directive where - the projects have already been the subject of a consent granted prior to 3 July 1988, the date by which the directive was to have been transposed into national law, - the consent was not preceded by an environmental assessment in accordance with the requirements of the directive and no use was made of it, and - a fresh consent procedure was formally initiated after 3 July 1988.**	obligations regarding environmental assessments in the case of projects listed in Annex I of the directive where - the projects have already been the subject of a consent granted prior to 3 July 1988, the date by which the directive was to have been transposed into national law, - the consent was not preceded by an environmental assessment in accordance with the requirements of the directive and no use was made of it, and - a fresh consent procedure was formally initiated after 3 July 1988. It is true that the principle of compulsory environmental assessment in accordance with the directive does not apply where the consent procedure was initiated before 3 July 1988 and was still in progress on that date. The reason for that is to avoid making more cumbersome and time-consuming, as a result of the specific requirements imposed by the directive, procedures which are already complex at national level and which were formally initiated before that date. Those considerations do not apply, however, in the circumstances mentioned above, particularly as national legal remedies are available in respect of the new consent procedure. **See the full text of the judgement**
Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment	Case C-392/96 under Article 169 of the Treaty (now Article 226 EC)	Commission of the European Communities, applicant, v Ireland, defendant	**On those grounds, THE COURT (Fifth Chamber) hereby: 1. Declares that, by not adopting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, the measures necessary to transpose**	**Summary** 3. Under Article 4(2) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, projects belonging to the classes listed in Annex II to the Directive are to be made subject to an assessment where Member States consider that their characteristics so require, to which purpose the Member States may specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to identify such projects. The limits of that discretion lie in the obligation set out in Article

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			Article 4(2) of that directive correctly, and by not transposing Articles 2(3), 5 and 7 thereof, Ireland has failed to fulfil its obligations under that directive; **2. Dismisses the remainder of the application;** **3. Orders Ireland to pay the costs.**	2(1) of the Directive, under which projects likely to have significant effects on the environment - by virtue inter alia of their nature, size or location - are to be subject to an impact assessment. Thus, a Member State which establishes criteria and/or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, exceeds the limits of its discretion under Articles 2(1) and 4(2) of the Directive. This is true also where a Member State establishes criteria and/or thresholds at a level such that, in practice, all projects of a certain type are exempted in advance from the requirement of an impact assessment, unless all the projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment. That is the position where a Member State merely sets a criterion of project size and does not also ensure that the objective of the legislation will not be circumvented by the splitting of projects. Not taking account of the cumulative effect of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive. **See the full text of the judgement**
Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment	Case C-435/97, under Article 177 of the EC Treaty	World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others	**On those grounds,** **THE COURT** **(Sixth Chamber),** **in answer to the questions referred to it by the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, by order of 3 December 1997, hereby rules:** **1. Articles 4(2) and 2(1) of Council**	**Summary** 3. Article 4(2) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment provides that projects of the classes listed in Annex II to the Directive are to be made subject to an assessment where Member States consider that their characteristics so require and that to that end Member States may specify certain types of project as

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
			Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment are to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a runway shorter than 2 100 metres, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment. It is for the national court to review whether, on the basis of the individual examination carried out by the national authorities which resulted in the exclusion of the specific project at issue from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment. **2. In the case of a project requiring assessment under Directive 85/337, Article 2(1) and (2) thereof are to be interpreted as**	being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes concerned are to be so subject. The limits of that discretion are to be found in the obligation, set out in Article 2(1) of the Directive, under which projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment must be subject to an impact assessment. The above provisions must be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, either under national legislation or on the basis of an individual examination of that project, unless the specific project, or those classes of project in their entirety, could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment. Where the discretion conferred by Articles 4(2) and 2(1) has been exceeded by the legislative or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions. In such cases, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment. 4. In the case of a project requiring assessment under Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, Article 2(1) and (2) thereof are to be interpreted as allowing a Member State to use an assessment procedure other than the procedure introduced by the

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
			allowing a Member State to use an assessment procedure other than the procedure introduced by the Directive where that alternative procedure is incorporated in a national procedure which exists or is to be established within the meaning of Article 2(2) of the Directive. However, an alternative procedure of that kind must satisfy the requirements of Article 3 and Articles 5 to 10 of the Directive, including public participation as provided for in Article 6. **3. Article 1(5) of Directive 85/337 is to be interpreted as not applying to a project, such as that at issue in the main proceedings, which, while provided for by a legislative provision setting out a programme, has received development consent under a separate administrative procedure. The requirements which such a provision and the process under which it has been adopted must satisfy in order that the objectives of the Directive, including that of supplying information, can be regarded as achieved consist in the adoption of the project by a specific legislative act which includes all the elements which may be relevant to the assessment of the impact of the project on the environment.** **4. Article 1(4) of Directive 85/337 is to be interpreted as meaning that an airport which may simultaneously serve both civil and military purposes, but whose main use is commercial, falls within the scope of the**	Directive where that alternative procedure is incorporated in a national procedure which exists or is to be established within the meaning of Article 2(2) of the Directive. However, an alternative procedure of that kind must satisfy the requirements of Article 3 and Articles 5 to 10 of the Directive, including the public participation requirement laid down in Article 6. 5. Article 1(5) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, under which the Directive is not to apply to projects the details of which are adopted by a specific act of national legislation, must be interpreted as not applying to a project, which, while provided for by a legislative provision setting out a programme, has received development consent under a separate administrative procedure. The requirements which such a provision must satisfy, as must the process under which it has been adopted, in order that the objectives of the Directive, including that of supplying information, can be regarded as achieved consist in the adoption of the project by a specific legislative act which includes all the elements which may be relevant to the assessment of the impact of the project on the environment. 6. Article 1(4) of Directive 85/337 on the assessment of the effects of certain public and private projects on the environment, under which the Directive does not cover projects serving national defence purposes, is to be interpreted as meaning that an airport which may simultaneously serve both civil and military purposes, but whose main use is commercial, falls within the scope of the Directive. **See the full text of the judgement**

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
			Directive. **5. Articles 4(2) and 2(1) of Directive 85/337 are to be interpreted as meaning that, where the discretion conferred by those provisions has been exceeded by the legislative or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions. In such a case, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.**	

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
AIR				
Council adopted Decision 88/540/EEC concerning the conclusion of the Vienna Convention for the protection of the ozone layer and the Montreal Protocol on substances that deplete the ozone layer	Case T-336/94 under Article 178 and the second paragraph of Article 215 of the EC Treaty	Efisol SA, a company incorporated under French law, having its registered office in Paris, applicant, v Commission of the European Communities, defendant	**On those grounds,** **THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition) hereby:** **1. Dismisses the application;** **2. Orders the Commission to pay the whole of the costs.**	**Conclusion Summary** 8. The incurring by the Community of non-contractual liability, within the meaning of the second paragraph of Article 215 of the Treaty, depends on fulfilment of a set of conditions as regards the unlawfulness of the conduct alleged against the Community institution, the fact of damage and the existence of a causal link between the conduct in question and the damage complained of. 9. The right to rely on legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration, by giving him precise assurances, has led him to entertain justified expectations. An individual cannot, by virtue of the allocation to him of an import quota, have a justified expectation that the import licences applied for will subsequently be issued to him, since such allocation is merely the first stage in securing an effective right to import. 10. If a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot avail himself of any legitimate expectation if the measure is then adopted. Such will be the case where a trader has set in motion the transport by train of the consignments ordered without awaiting the decision of the Community institution on the application for import licences and without taking the precautions necessary to safeguard his interests in the event of the application for licences being rejected. 11. There are two stages in the administrative procedure laid down in Regulation No 594/91 for obtaining authorization to import into the Community substances that deplete the ozone layer: first, the allocation of a quota under Article 3 of that

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
				regulation and, second, the issue, pursuant to Article 4 thereof, of one or more import licences corresponding to the quota allocated. It follows that the right to import, accorded when a quota is allocated, takes effect only once an import licence has been issued. 12. There can be no finding that a legitimate expectation has arisen on the part of an individual where the measure liable to give rise to such expectation has been withdrawn by the administration within a reasonable period. 13. A legitimate expectation cannot arise from conduct on the part of a Community institution which is inconsistent with Community rules. 14. Where the conduct on the part of a defendant institution, which was inconsistent with the Community rules, has contributed to the creation of a dispute, an applicant cannot be criticized for having instituted proceedings before the Court for an assessment of that conduct, as well as of any damage which may have resulted from it. It is therefore necessary, in such circumstances, to apply the second subparagraph of Article 87(3) of the Rules of Procedure, according to which the Court may order a party, even if successful, to pay the costs of proceedings which, by its own conduct, it has caused the opposite party to incur. **See the full text of the judgement**
Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management	Case C-417/99 Article 226 EC Treaty	Commission of the European Communities, applicant, v Kingdom of Spain, defendant	**On those grounds,** **THE COURT (Fifth Chamber)** **hereby:** **1. Declares that, by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary to designate the competent authorities and bodies referred to in the first paragraph of Article 3 of Council Directive 96/62/EC of**	**Conclusion Summary** 1. Directive 96/62, the aim of which is to define the basic principles of a common strategy to assess and manage ambient air quality, provides that Member States are to designate the competent authorities and bodies responsible in particular for controlling the limit values and alert thresholds to be set for the pollutants listed in Annex I to the Directive. The fact that the directive provides for certain details, such as limit values and

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
			27 September 1996 on ambient air quality assessment and management, the Kingdom of Spain has failed to fulfil its obligations under that directive; **2. Orders the Kingdom of Spain to pay the costs.**	alert thresholds for the pollutants listed in Annex I, to be decided on in the future cannot, in the absence of express provision to that effect, relieve Member States of their obligation to adopt within the prescribed period the measures necessary to comply with the directive. That obligation to designate, which constitutes a preliminary step in implementing the general objectives of the directive, is of a purely general nature, and remains, whether or not all the conditions for the application of the provisions of Community law have already been fulfilled. (see paras 30-32) 2. A directive must be transposed into national law by provisions capable of creating a situation which is sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations (see para. 38) **See the full text of the judgement**
Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants	Case C-139/00 under Article 226 EC Treaty	Commission of the European Communities, applicant, v Kingdom of Spain, defendant	**Operative part of the judgment** **On those grounds,** **THE COURT** **(Fifth Chamber)** **hereby:** **1. Declares that, by failing to adopt the measures necessary in order to ensure, as regards the three incineration furnaces installed at Mazo and Barlovento on the island of La Palma, the application of:** **- Article 6 of Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants, inasmuch as, with regard to those furnaces, the competent authorities** **- have not taken periodic measurements in**	**Conclusion Summary** APPLICATION for a declaration that, by failing to take the measures necessary in order to ensure, as regards the three incineration furnaces installed at Mazo and Barlovento on the island of La Palma (Spain), the application of: - Article 2 of Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants (OJ 1989 L 163, p. 32), inasmuch as those furnaces are operating without the required prior authorisation: - Article 6 of that directive, inasmuch as, with regard to those furnaces, the competent authorities - have not taken periodic measurements in respect of the parameters prescribed by that article; - have not given prior approval for the sampling and measurement procedures and have not determined the location of the measurement points concerned;

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			respect of the parameters prescribed by that article; **- have not given prior approval for the sampling and measurement procedures and have not determined the location of the measurement points concerned;** **- have not laid down any measurement programme;** **- Article 7 of that directive, inasmuch as those furnaces are not equipped with auxiliary burners, which would make it possible to maintain the minimum combustion temperature of 850_C, particularly during start-up and shut-down operations,** **the Kingdom of Spain has failed to fulfil its obligations under that directive;** **2. Dismisses the remainder of the action;** **3. Orders the Commission of the European Communities to pay one third of the costs and the Kingdom of Spain two thirds of the costs.**	- have not laid down any measurement programme; - Article 7 of that directive, inasmuch as those furnaces are not equipped with auxiliary burners, which would make it possible to maintain the minimum combustion temperature of 850_C, particularly during start-up and shut-down operations, the Kingdom of Spain has failed to fulfil its obligations under that directive. For all the reasons set out above, it must be held that, by failing to adopt the measures necessary in order to ensure, as regards the three incineration furnaces installed at Mazo and Barlovento on the island of La Palma, the application of: - Article 6 of Directive 89/369, inasmuch as, with regard to those furnaces, the competent authorities - have not taken periodic measurements in respect of the parameters prescribed by that article; - have not given prior approval for the sampling and measurement procedures and have not determined the location of the measurement points concerned; - have not laid down any measurement programme; - Article 7 of that directive, inasmuch as those furnaces are not equipped with auxiliary burners, which would make it possible to maintain the minimum combustion temperature of 850_C, particularly during start-up and shut-down operations, the Kingdom of Spain has failed to fulfil its obligations under that directive. The remainder of the action is dismissed. **See the full text of the judgement**
Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants	Case C-60/01 under Article 226 EC Treaty	Commission of the European Communities, applicant, v French	**On those grounds,** **THE COURT** **hereby:** **1. Declares that, by failing to adopt all the necessary and appropriate measures to ensure that all incinerators in France are operated in accordance with the**	**Conclusion Summary** APPLICATION for a declaration that, by failing to adopt all the necessary and appropriate measures to ensure that all incinerators currently operating in France are operated in accordance with the combustion conditions laid down by Council Directive 89/369/EEC of 8 June 1989 on the prevention

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Council Directive 89/429/EEC of 21 June 1989 on the reduction of air pollution from existing municipal waste incineration plants		Republic, defendant	**combustion conditions laid down by Council Directive 89/369/EEC of 8 June 1989 on the prevention of air pollution from new municipal waste incineration plants and Council Directive 89/429/EEC of 21 June 1989 on the reduction of air pollution from existing municipal waste incineration plants or that they ceased to operate by the due date, namely 1 December 1990 as regards new plants and 1 December 1996 as regards existing plants, the French Republic has failed to fulfil its obligations under Article 4(1) of Directive 89/369 and Articles 2(a) and 4 of Directive 89/429;** **2. Orders the French Republic to pay the costs.**	of air pollution from new municipal waste incineration plants (OJ 1989 L 163, p. 32) and Council Directive 89/429/EEC of 21 June 1989 on the reduction of air pollution from existing municipal waste incineration plants (OJ 1989 L 203, p. 50) or that they ceased to operate by the due date, namely 1 December 1990 as regards new plants and 1 December 1996 as regards existing plants, the French Republic has failed to fulfil its obligations under Article 4(1) of Directive 89/369, Articles 2(a) and 4 of Directive 89/429 and the third paragraph of Article 249 EC. As to those arguments, first of all, the third paragraph of Article 249 EC provides that `a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. It follows that one of the principal characteristics of directives is precisely that they are intended to achieve a specified result. 25. However, Community legislative practice shows that there may be great differences in the types of obligations which directives impose on the Member States and therefore in the results which must be achieved. 26. Some directives require legislative measures to be adopted at national level and compliance with those measures to be the subject of judicial or administrative review (see, for example, Article 4, in conjunction with Article 8, of Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250, p. 17); see, in this regard, Case C-360/88 Commission v Belgium [1989] ECR 3803 and Case C-329/88 Commission v Greece [1989] ECR 4159). 27. Other directives lay down that the Member States are to take the necessary measures to ensure that certain objectives formulated in general and unquantifiable terms are attained, whilst leaving them some discretion as to the nature of the

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				measures to be taken (see, for example, Article 4 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32); see, in this regard, Case C-365/97 Commission v Italy (the `San Rocco' case) [1999] ECR I-7773, paragraphs 67 and 68). 28. Yet other directives require the Member States to obtain very precise and specific results after a certain period (see, for example, Article 4(1) of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L 31, p. 1); see, in this regard, Case C-56/90 Commission v United Kingdom [1993] ECR I-4109, paragraphs 42, 43 and 44, Case C-198/97 Commission v Germany [1999] ECR I-3257, paragraph 35, Case C-307/98 Commission v Belgium [2000] ECR I-3933, paragraph 51, and Case C-268/00 Commission v Netherlands [2002] ECR I-0000, paragraphs 12, 13 and 14). 29. Accordingly, given that a failure to fulfil obligations can be found only if there is, on expiry of the period laid down in the reasoned opinion, a situation contrary to Community law which is objectively attributable to the Member State concerned, a finding that the failure at issue has occurred depends on the type of obligations imposed by the provisions of Directives 89/369 and 89/429. It follows that Directives 89/369 and 89/429 impose on the Member States obligations, formulated in clear and unequivocal terms, to achieve a certain result, in order that their incineration plants meet detailed and precise requirements within the stated time-limits. Having regard to all the foregoing considerations, it must be found that, by failing to adopt all the necessary and appropriate measures to ensure that all incinerators in France are operated in accordance with the combustion conditions laid down by Directives 89/369 and 89/429 or that they ceased to operate by the due date, namely 1 December 1990 as regards new plants and 1 December 1996 as regards existing plants, the French Republic

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				has failed to fulfil its obligations under Article 4(1) of Directive 89/369 and Articles 2(a) and 4 of Directive 89/429. **See the full text of the judgement**

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WATER				
Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water	Case C-278/01 under Article 228 EC Treaty	Commission of the European Communities, applicant v Kingdom of Spain, defendant	**On those grounds,** **THE COURT** **(Full Court),** **hereby:** **1. Declares that, by not taking the measures necessary to ensure that the quality of inshore bathing water in Spanish territory conforms to the limit values set in accordance with Article 3 of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water, notwithstanding its obligations under Article 4 of that directive, the Kingdom of Spain has not taken all the measures necessary to comply with the Court's judgment of 12 February 1998 in Case C-92/96 Commission v Spain and has accordingly failed to fulfil its obligations under Article 228 EC;** **2. Orders the Kingdom of Spain to pay to the Commission of the European Communities, into the account `European Community own resources', a penalty payment of EUR 624 150 per year and per 1% of bathing areas in Spanish inshore waters which have been found not to conform to the limit values laid down under Directive 76/160 for the year in question, as from the time when the quality of bathing water achieved in the first**	**Conclusion Summary** APPLICATION, first, for a declaration that, by not taking the necessary measures to ensure that the quality of inshore bathing water in Spanish territory conforms to the limit values set in accordance with Article 3 of Council Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L 31, p. 1), notwithstanding its obligations under Article 4 of that directive, the Kingdom of Spain has not complied with the judgment of the Court of Justice in Case C-92/96 Commission v Spain [1998] ECR I-505, and has accordingly failed to fulfil its obligations under Article 228 EC and, second, for an order that the Kingdom of Spain be required to pay to the Commission, into the account `European Community own resources', a penalty payment of EUR 45 600 per day of delay in adopting the measures necessary to comply with the said judgment in Commission v Spain, from the date on which judgment is delivered in this case until the date on which the said judgment in Commission v Spain is complied with. Since Article 395 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23) does not provide for any derogation from the Directive in favour of the Kingdom of Spain, the quality of Spanish bathing water should have conformed to the limit values set by the Directive as from 1 January 1986. In its judgment in the case of Commission v Spain, the Court of Justice declared that, by failing to take all necessary measures to ensure that the quality of inshore bathing water in Spain conforms to the limit values set in accordance with Article 3 of the Directive, the Kingdom of Spain had failed to fulfil its

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			bathing season following delivery of this judgment is ascertained until the year in which the judgment in Commission v Spain is fully complied with; **3. Orders the Kingdom of Spain to pay the costs.**	obligations under Article 4 thereof. The penalty payment must therefore be imposed not on a daily basis but on an annual basis, following submission of the annual report relating to the implementation of the Directive by the Member State concerned. In those circumstances, a penalty which does not take account of the progress which a Member State may have made in complying with its obligations is neither appropriate to the circumstances nor proportionate to the breach which has been found. In order for the penalty payment to be appropriate to the particular circumstances of the case and proportionate to the breach which has been found, the amount must take account of progress made by the defendant Member State in complying with the judgment in Commission v Spain. To that end it is necessary to require that Member State to pay annually an amount calculated according to the percentage of bathing areas in Spanish inshore waters which do not yet conform to the mandatory values laid down under the Directive. Multiplying the basic amount of EUR 500 by a coefficient of 11.4 (for ability to pay), 4 (for the seriousness of the breach) and 1.5 (for the duration of the breach) gives an amount of EUR 34 200 per day, or EUR 12 483 000 per year. That amount is based on the consideration that 20% of the bathing areas concerned did not conform to the limit values in the Directive; it must therefore be divided by 20, to obtain an amount corresponding to 1% of areas not in conformity, that is, EUR 624 150 per year. **See the full text of the judgement**
Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the	Case C-231/97 Reference for a preliminary ruling under Article 177 of the EC Treaty	A.M.L. van Rooij v Dagelijks bestuur van het waterschap de Dommel,	**On those grounds,** **THE COURT** **(Sixth Chamber),** **in answer to the questions referred to it by the Nederlandse Raad van State by judgment of 17 June 1997, hereby rules:**	**Conclusion Summary** The term “discharge” in Article 1(2)(d) of Directive 76/464 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community must be interpreted

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
aquatic environment of the Community	(now Article 234 EC)	third party: Gebr. Van Aarle BV	**1. The term `discharge' in Article 1(2)(d) of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community must be interpreted as covering the emission of contaminated steam which is precipitated on to surface water. The distance between those waters and the place of emission of the contaminated steam is relevant only for the purpose of determining whether the pollution of the waters cannot be regarded as foreseeable according to general experience, so that the pollution is not attributable to the person causing the steam.** **2. The term "discharge" in Article 1(2)(d) of Directive 76/464 must be interpreted as covering the emission of contaminated steam which is first precipitated on to land and roofs and then reaches the surface water via a storm water drain. It is not material in this respect whether the drain in question belongs to the establishment concerned or to a third party.**	as covering the emission of contaminated steam which is precipitated on to surface water. The distance between those waters and the place of emission of the contaminated steam is relevant only for the purpose of determining whether the pollution of the waters cannot be regarded as foreseeable according to general experience, so that the pollution is not attributable to the person causing the steam. The term "discharge" must also be interpreted as covering the emission of contaminated steam which is first precipitated on to land and roofs and then reaches the surface water via a storm drain. It is not material in this respect whether the drain in question belongs to the establishment concerned or to a third party. In those circumstances, since it considered that the dispute raised a question of the interpretation of the term "discharge" within the meaning of Directive 76/464, the Nederlandse Raad van State stayed proceedings and referred the following questions to the Court for a preliminary ruling: 1. Must the term "discharge" in Article 1(2)(d) of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23) be interpreted as covering precipitation of contaminated steam on to surface water? Is the distance from which the steam in question is precipitated on to the surface water relevant in that respect? 2. Does the term "discharge" cover steam which is first precipitated on to land and roofs and then reaches the surface water via a storm water drain, whether belonging to the establishment concerned or to residential or other buildings? Is it material to the reply to be given to this question whether the contaminated steam reaches the surface water via the storm water drain of the establishment concerned or via that of a third party? 3. If Questions 1 and/or 2 are answered in the negative, is it

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				permissible for national legislation to assign a different, more wide-ranging meaning to the term “discharge” than that in the directive?' Question 1 By its first question, the national court essentially asks whether the term “discharge” in Article 1(2)(d) of Directive 76/464 is to be interpreted as covering the emission of contaminated steam which is precipitated on to surface water, and whether the distance between the place where the steam is emitted and the waters on to which it is precipitated is relevant in this respect. In Case C-232/97 Nederhoff v Dijkgraf en Hoogheemraden van het Hoogheemraadschap Rijnland [1999] ECR I-6385, paragraph 37, judgment in which was given today, the Court held that the term `discharge' defined in Article 1(2) of Directive 75/464 is to be understood as referring to any act attributable to a person by which one of the dangerous substances listed in List I or List II of the Annex to the directive is directly or indirectly introduced into the waters to which the directive applies. It follows that Directive 76/464 applies to discharges of all the dangerous substances mentioned in the annex thereto, whatever their state. Accordingly, the answer to Question 1 must be that the term “discharge” in Article 1(2)(d) of Directive 76/464 is to be interpreted as covering the emission of contaminated steam which is precipitated on to surface water. The distance between those waters and the place of emission of the contaminated steam is relevant only for the purpose of determining whether the pollution of the waters cannot be regarded as foreseeable according to general experience, so that the pollution is not attributable to the person causing the steam. Question 2 By its second question the national court essentially asks whether the term “discharge” in Article 1(2)(d) of Directive 76/464 is to be interpreted as covering the emission of contaminated steam which is first precipitated on to land and roofs and then reaches

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				the surface water via a storm water drain, and whether it is material in this respect whether the drain in question belongs to the establishment concerned or to a third party. Consequently, the answer to Question 2 must be that the term "discharge" in Article 1(2)(d) of Directive 76/464 is to be interpreted as covering the emission of contaminated steam which is first precipitated on to land and roofs and then reaches the surface water via a storm water drain. It is not material in this respect whether the drain in question belongs to the establishment concerned or to a third party. Question 3 In view of the answers to Questions 1 and 2, there is no need to answer Question 3. **See the full text of the judgement**
Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community Council Directive 86/280/EEC of 12 June 1986 on limit values and quality objectives for discharges of certain dangerous substances included in List I of the Annex to Directive 76/464.	Case C-232/97 under Article 177 of the EC Treaty (now Article 234 EC Treaty)	L. Nederhoff & Zn. v Dijkgraaf en hoogheemraden van het Hoogheemraadschap Rijnland.	**On those grounds, THE COURT (Sixth Chamber), in answer to the questions referred to it by the Nederlandse Raad van State by judgment of 17 June 1997, hereby rules: 1. The term `discharge' in Article 1(2)(d) of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community must be interpreted as not including the pollution from significant sources, including multiple and diffuse sources, referred to in Article 5(1) of Council Directive 86/280/EEC of 12 June 1986 on limit values and quality objectives for discharges of certain dangerous substances**	**Conclusion Summary** The term "discharge" in Article 1(2)(d) of Directive 76/464 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community is to be interpreted as not including the pollution from significant sources, including multiple and diffuse sources, referred to in Article 5(1) of Directive 86/280 on limit values and quality objectives for discharges of certain dangerous substances included in List I of the Annex to Directive 76/464. The above term must be understood as referring to any act attributable to a person by which one of the dangerous substances listed in List I or List II of the Annex to the Directive is directly or indirectly introduced into the waters to which the Directive applies. On the other hand, the notion of pollution from significant sources, including

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Directive 76/769 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, as amended by Directive 94/60			**included in List I of the Annex to Directive 76/464.** **2. The expression `significant sources ... (including multiple and diffuse sources)' in Article 5(1) of Directive 86/280 must be interpreted as not including the escape of creosote from wooden posts placed in surface water, where the pollution caused by that substance is attributable to a person.** **3. The term `discharge' in Article 1(2)(d) of Directive 76/464 must be interpreted as including the placing by a person in surface water of wooden posts treated with creosote.** **4. Directive 76/464 permits Member States to make the authorisation for a discharge subject to additional requirements not provided for in that directive, in order to protect the aquatic environment of the Community against pollution caused by certain dangerous substances. The obligation to investigate or choose alternative solutions which have less impact on the environment constitutes such a requirement, even if it may have the effect of making the grant of authorisation impossible or altogether exceptional.** **5. The limitative conditions for the use of creosote laid down in point 32 of Annex I to Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of**	multiple and diffuse sources, referred to in Article 5(1) of Directive 86/280, relates to cases where the pollution, precisely because of its diffuse nature, cannot be attributed to a person and therefore cannot be the subject of prior authorisation. Consequently, the term “discharge” in Article 1(2)(d) of Directive 76/464 covers the placing by a person in surface water of wooden posts treated with creosote and the expression `significant sources ... (including multiple and diffuse sources)' in Article 5(1) of Directive 86/280 does not cover the escape of creosote from wooden posts placed in surface water, where the pollution caused by that substance is attributable to a person. Directive 76/464 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community permits Member States to make the authorisation for a discharge subject to additional requirements not provided for in that Directive, in order to protect the aquatic environment of the Community against pollution caused by certain dangerous substances. The obligation to investigate or choose alternative solutions which have less impact on the environment constitutes such a requirement, even if it may have the effect of making the grant of authorisation impossible or altogether exceptional. The limitative conditions for the use of creosote laid down in point 32 of Annex I to Directive 76/769 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, as amended by Directive 94/60, do not

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			certain dangerous substances and preparations, as amended by European Parliament and Council Directive 94/60/EC of 20 December 1994, do not preclude an authority of a Member State, when considering applications for authorisation concerning the introduction into surface water by professional users of wood treated with that substance, from establishing criteria of assessment such that its use is impossible or altogether exceptional.	preclude an authority of a Member State, when considering applications for authorisation concerning the introduction into surface water by professional users of wood treated with that substance, from establishing criteria of assessment such that its use is impossible or altogether exceptional. **See the full text of the judgement**
Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community	Case C-384/97 under Article 169 of the Treaty (now Article 226 EC Treaty)	Commission of the European Communities, applicant v Hellenic Republic, defendant.	**On those grounds,** **THE COURT (Sixth Chamber)** **hereby:** **1. Declares that, by failing to adopt pollution reduction programmes including quality objectives for the dangerous substances covered by the first indent of List II of the annex to Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, the Hellenic Republic has failed to fulfil its obligations under Article 7(1) of that directive;** **2. Orders the Hellenic Republic to pay the costs.**	**Conclusion Summary** 1. In the context of an action brought under Article 169 of the Treaty (now Article 226 EC), the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing at the end of the period laid down in the reasoned opinion, and subsequent changes cannot be taken into account by the Court. (see para. 35) 2. The programmes which the Member States are required to establish, under Article 7 of Directive 76/464, in order to reduce pollution of their waters by the substances within List II in the annex to the directive must be specific, that is to say, they must have a comprehensive and coherent approach, covering the entire national territory and providing practical and coordinated arrangements for the reduction of pollution caused by any of the substances in List II which are relevant in the particular context of each Member State, in accordance with the quality objectives

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				fixed by those programmes for the waters affected. Accordingly, national measures cannot be regarded as programmes within the meaning of Article 7 of the directive where, even if capable of contributing to a reduction in water pollution, they are merely ad hoc measures and not comprehensive and coherent programmes of that kind, based on studies of the waters affected and setting quality objectives. (see paras 39-40, 42) **See the full text of the judgement**
Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances	Case C-131/88 under Article 169 of the EEC Treaty	Commission of the European Communities, applicant v Federal Republic of Germany, defendant	**My consideration of the case leads me to the conclusion that the Commission's application must be upheld in its entirety. I would therefore suggest that the Court declare that the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty by failing to transpose adequately into national law Directive No 80/68/EEC, and order the Federal Republic of Germany to pay the costs.** **W. Van Gerven** **Judge-Rapporteur**	**Conclusion Summary** 1. The transposition of a directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts. Mere administrative practices, which are alterable at the will of the administration and are not given adequate publicity, cannot be regarded as constituting adequate compliance with the obligation imposed on Member States to whom a directive is addressed by Article 189 of the EEC Treaty.

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				2. Directive 80/68 seeks to protect the Community's groundwater fully and effectively by laying down specific and detailed provisions requiring the Member States to adopt a series of prohibitions, authorization schemes and monitoring procedures, which create rights and obligations for individuals, in order to prevent or limit discharges of certain substances. It must therefore be transposed in a manner which satisfies certain requirements as to precision and clarity. 3. Each Member State is free to delegate powers to its domestic authorities as it sees fit and to implement directives by means of measures adopted by regional or local authorities. That division of powers does not, however, release it from the obligation to ensure that the provisions of the directive are properly implemented in national law. **See the full text of the judgement**
Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources	Case C-161/00 under Article 226 EC Treaty	Commission of the European Communities, applicant v Federal Republic of Germany, defendant supported by Kingdom of Spain, interveners	**On those grounds, THE COURT (Sixth Chamber), hereby:** **1. Declares that, by failing to adopt all the laws, regulations and administrative provisions necessary in order to comply with the obligations laid down in Article 5(4)(a) and point 2 of Annex III to Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, the Federal Republic of Germany has failed to fulfil its obligations under that Directive;** **2. Orders the Federal Republic of**	**Conclusion Summary** APPLICATION for a declaration that, by failing to adopt all the measures necessary in order to comply with the obligations laid down in Article 5(4)(a) and point 2 of Annex III to Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1), the Federal Republic of Germany has failed to fulfil its obligations under that directive. The action programmes referred to in Article 5(4) of the Directive must contain the measures described in Annex

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			Germany to pay the costs; **3. Orders the Kingdom of Spain and the Kingdom of the Netherlands to bear their own costs.**	III thereto. In order to calculate the maximum allowed amount of livestock manure which may be applied, it is necessary to identify the moment at which the calculation of the nitrogen content of livestock manure must be made for the purposes of the Directive. The first thing to be observed in this regard is that, whilst the first paragraph of point 2 of Annex III to the Directive (`amount of livestock manure applied to the land') is not without ambiguity, the definition of `land application' in Article 2(h) of the Directive makes no distinction between the beginning and the end of the application process. The Directive does not therefore expressly identify the moment at which the nitrogen content of the livestock manure planned to be applied should be calculated in order to ensure that the maximum permissible amounts of nitrogen to be applied to the land each year are not exceeded. Next, it must be remembered that the Directive seeks to create the instruments needed in order to ensure that watercourses in the Community are protected against pollution caused by nitrates from agricultural sources (see Case C-293/97 Standley and Others [1999] ECR I-2603, paragraph 39). Thus, the Member States must define vulnerable zones (Article 3), encourage good agricultural practices (Article 4) and draw up and implement programmes to reduce water pollution caused by nitrogen compounds in those zones (Article 5). Given both the context and objectives of the Directive, it must be concluded that the decisive criterion which the

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				Directive lays down for limiting pollution by nitrates from agricultural sources is the amount of nitrogen applied to the land by spreading on its surface, by injection into the land, by placing below the surface of the land or by mixing with the surface layers of the land, and not the amount of nitrogen actually penetrating into the land. It follows that, in providing for the use of another criterion for calculating the maximum permissible amount of livestock manure to be applied each year per hectare, the Düngeverordnung is not in accordance with the Directive. The amounts quoted in point 2 of Annex III to the Directive are in fact fixed absolutely, whilst point 1(3)(c) of Annex III provides for a limitation of fertiliser amounts directly in relation to the fertiliser requirements of crops and states that fertiliser application must in any event be limited to the amounts allowing a balance to be preserved between the nitrogen requirements of crops and the amount of nitrogen available overall in the soil. The latter limitation does not take precedence over the limitation concerning maximum permissible amounts, which is absolute in character, even though the principle of balance thus does not operate in certain particular cases. So, even if the limitation set by the balance principle could at first produce an amount of nitrogen lower or higher than 170 kg, or, in certain defined cases, 210 kg per year per hectare, the maximum amount rules would preclude application to the land of more than the aforementioned amounts. Consequently, it must be held that, by failing to adopt all the laws, regulations and administrative provisions necessary in order to comply with the obligations laid

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				down in Article 5(4)(a) and point 2 of Annex III to the Directive, the Federal Republic of Germany has failed to fulfil its obligations under the Directive. See the full text of the judgement
Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources	Case C-258/00 under Article 226 EC Treaty	Commission of the European Communities, applicant, v French Republic, defendant, supported by Kingdom of Spain, intervener	**On those grounds, THE COURT (Sixth Chamber) hereby:** **1. Declares that, by failing to take the appropriate steps to identify waters affected by pollution and, consequently, to designate the corresponding vulnerable zones, in accordance with Article 3 of and Annex I to Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, the French Republic has failed to fulfil its obligations under that directive;** **2. Orders the French Republic to pay the costs;** **3. Orders the Kingdom of Spain to bear its own costs.**	**Conclusion Summary** APPLICATION for a declaration that, by failing to take the appropriate steps to identify waters affected by pollution and, consequently, to designate the corresponding vulnerable zones, in accordance with Article 3 of and Annex I to Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1), the French Republic has failed to fulfil its obligations under that directive. Findings of the Court 64. It should be noted at the outset that, in the written pleadings which it submitted to the Court, the French Government admits that there is, in the Seine bay, both enrichment by nitrogen compounds, which it does not deny are of agricultural origin, and accelerated growth of algae and of higher forms of plant life. In addition, it admits that it cannot be excluded that the persistence of certain phenomena which can be characterised as a disturbance to the balance of organisms present in the water or to the quality of the water makes it possible to consider that the Seine bay fulfils certain criteria for eutrophication. 65. It considers, none the less, in the light of the relevant objective and scientific criteria, that that zone need not be

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				identified as eutrophic within the meaning of the Directive. 66. However, as is clear from paragraphs 45 to 54 of this judgment, the interpretation given to the concept of eutrophication by the French authorities and the method which they have adopted to identify the waters affected by pollution are too restrictive and, consequently, incompatible with the Directive. 67. In addition, even if the phenomenon of eutrophication is not evident in the Seine bay itself, it is none the less the case that that zone contributes to the eutrophication of the North Sea, which is, as the fourth recital to the Directive indicates, a zone requiring special protection. 68. As is evident from the reasoned opinion, the eutrophication of the eastern part of the North Sea, of northern France and of Norway has its origin in the discharge of nutrients, inter alia nitrogen, by all the basins draining into the North Sea and the eastern part of the English Channel. The Seine alone produces an annual flow of over 100 000 tonnes of nitrogen, two thirds of agricultural origin, in a total flow of 400 000 tonnes a year going from the Channel to the North Sea. 69. It is not in dispute in the present case that the nitrate levels of the water in the Seine bay are high and that, in the salt water of the North Sea, nitrogen is the most important limiting factor in the growth of algae and of higher forms of plant life. 70 In the light of the preceding considerations, it must be concluded that, by failing to take the appropriate steps to identify waters affected by pollution and, consequently, to designate the corresponding vulnerable zones, in accordance with Article 3 of and Annex I to the Directive,

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				the French Republic has failed to fulfil its obligations under that directive. **See the full text of the judgement**
Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources	Case C-266/00 under Article 226 EC Treaty	Commission of the European Communities, applicant v Grand Duchy of Luxemburg, defendant	**On those grounds, THE COURT (Third Chamber) hereby:** **1. Declares that, by failing to adopt all the laws, regulations and administrative provisions necessary in order to comply with the obligations laid down in Article 5(4) and (6), and Article 10(1), in conjunction with Annex II A, Annex III 1, point 3, and Annex V 4(e), to Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;** **2. Orders the Grand Duchy of Luxembourg to pay the costs.**	**Conclusion Summary** In accordance with the third paragraph of Article 249 EC, a directive is binding, as to the results to be achieved, upon each Member State to which it is addressed. This obligation entails compliance with the time-limits set by directives (Case 10/76 Commission v Italy [1976] ECR 1359, paragraph 12). As regards the Commission's first complaint, it must be stated, first, that the Grand-Ducal Regulation relates only to the use of organic fertiliser in agriculture. It does not therefore relate to chemical fertilisers, even though they are covered, by virtue of Article 2(f) of the Directive, by the obligations laid down in the Directive. Next, none of the national regulations to which the Luxembourg Government referred during the pre-litigation procedure in order to show that it had complied with its obligations contains provisions which are sufficiently precise in order to meet the obligation in Annex III 1, point 3, to the Directive to establish a balance between, on the one hand, the foreseeable nitrogen requirements of crops and, on the other, the nitrogen supply to the crops, in particular by the addition of nitrogen compounds from chemical fertilisers. Lastly, none of the Luxembourg regulations to which the Luxembourg Government referred during the pre-litigation procedure meets the obligation laid down in Article 5(4), in conjunction with Annex II A, point 4, to the Directive relating to the conditions, such as the distance, to be

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				observed when applying chemical fertiliser close to water courses, with a sufficient degree of precision to ensure that, in the particular context of the application of such fertiliser, water courses will not be polluted. It follows from the foregoing that the Commission's first complaint is well founded. As regards the Commission's second complaint, it suffices to state that, by failing to lay down rules regarding the conditions for the land application of fertiliser to steeply sloping ground, irrespective of climatic conditions, the Grand Duchy of Luxembourg has failed to comply with the requirements of Article 5(4), in conjunction with Annex II A, point 2, and Annex III 1, point 3(a), to the Directive. As to the Commission's third complaint, it should be pointed out that Article 5(4), in conjunction with Annex II A, point 3, to the Directive, requires measures aiming to limit land application of fertiliser to snow-covered ground. Since there is no reason to believe that the likely risks of pollution where fertiliser is applied on snow-covered ground are lower when snow has been lying for less than 24 hours, the Grand-Ducal Regulation must be regarded as having failed to fulfil the obligations laid down in those provisions of the Directive. 35. As regards the Commission's fourth complaint, it is clear from the documents in the case that the information sent by the Luxembourg Government does not prove that the Grand-Duchy of Luxembourg has a monitoring system which covers all the surface and subterranean waters exposed to intensive agricultural pressure and which allows the spread of pollution and the impact of the action programmes to be assessed. Moreover, the information

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				provided does not show that the eutrophic state of Luxembourg waters is monitored. Furthermore, no evidence to show the existence of a monitoring programme was sent to the Commission by the date fixed in the supplementary reasoned opinion. Finally, the competent authorities did not, by that same date, finalise a model for assessing the effectiveness of the action programmes, so that they are unable to comply with the assessment obligation laid down in Article 5(6) of the Directive. 36. In those circumstances, the Commission's fourth complaint is well founded. 37. Finally, as regards the Commission's fifth complaint, it is clear from the documents before the Court that at the end of the period fixed by the supplementary reasoned opinion the Grand Duchy of Luxembourg merely informed the Commission that a study had been commissioned in order to evaluate the effectiveness of the provisions provided for under the Directive and that this study had not yet been submitted to the Commission. It follows that this complaint, based on failure to comply with Article 10(1), in conjunction with Annex V 4(e), to the Directive, is well founded. 38. It must therefore be held that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with the obligations laid down in Article 5(4) and (6), and Article 10(1), in conjunction with Annex II A, Annex III 1, point 3, and Annex V 4(e), to the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the Directive. **See the full text of the judgement**

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Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources	Case C-322/00 under Article 226 EC Treaty	Commission of the European Communities, applicant v Kingdom of the Netherlands, defendant	**On those grounds, THE COURT (Sixth Chamber) hereby:** **1. Declares that by failing to adopt the necessary laws, regulations and administrative provisions laid down in:** **- Article 5(4)(a) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, in conjunction with paragraph 1(2) and (3) and paragraph 2 of Annex III thereto;** **- Article 5(4)(b) of the Directive, in conjunction with Article 4(1)(a) thereof and paragraphs A(1), (2), (4) and (6) of Annex II thereto; and** **- Article 5(5) of the Directive,** **the Kingdom of the Netherlands has failed to fulfil its obligations under the Directive;** **2. Orders the Kingdom of the Netherlands to pay the costs.**	**Conclusion Summary** After it had examined the Netherlands implementing measures, the Commission took the view that the Kingdom of the Netherlands had not fulfilled its obligations under: - Article 5(4)(a) of the Directive, in conjunction with paragraph 1(2) and (3) and paragraph 2 of Annex III; - Article 5(4)(b) of the Directive, in conjunction with paragraphs A(1), (2), (4) and (6) of Annex II, and - Article 5(5) of the Directive. The Directive seeks to create the instruments needed to ensure that waters in the Community are protected against pollution caused by nitrates from agricultural sources (Case C-293/97 Standley and Others [1999] ECR I-2603, paragraph 39, and Case C-161/00 Commission v Germany [2002] ECR I-2753, paragraph 42). Therefore, as the Commission has pointed out, the final part of paragraph 1(2) of Annex III to the Directive must be interpreted as not enabling Member States to depart from their obligation under the Directive to adopt binding laws or regulations as regards storage capacity for livestock manure on farms, but as merely allowing them to authorise certain farms to depart from the minimum standard set by those provisions, on a case-by-case basis, to the extent that it is demonstrated that the livestock manure which cannot be stored on the farm will be disposed of in a manner which will not cause harm to the environment. When establishing the balance required under paragraph 1(3) of Annex III to the Directive, it is necessary to take into account all nitrogen inputs and outputs. Since papilionaceous plants are able to fix nitrogen, the Directive

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				requires that they be taken into account. In the light of the fact that, as is apparent from paragraphs 71 to 78 of this judgment, the Kingdom of the Netherlands has not met its obligation to include in the action programme the mandatory measures referred to in paragraph 1(3) of Annex III to the Directive, since the loss standards established under the MINAS system do not correctly implement the Directive in that regard, it follows that that system also cannot ensure compliance with the limits on the land application of livestock manure resulting from paragraph 2 of Annex III. The wording of paragraph 2 of Annex III to the Directive makes it clear that this provision requires use standards to be fixed so that Member States may lay down in advance that the amount of livestock manure applied to land is not to exceed the amount per hectare allowed. In any event, it is apparent from the documents before the Court that the Netherlands authorities applied for a derogation pursuant to paragraph 2(b) of Annex III to the Directive only in April 2000, that is to say, well after the period for applying the first action programme. It follows that the argument of the Netherlands Government that the exceeding of the amounts of livestock manure authorised for application to land was covered by the derogation laid down in that provision cannot be accepted. **See the full text of the judgement**

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WASTE				
Council Directive 75/442/EEC of 15 July 1975 on waste Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste	Case C-359/88 under Article 177 of the EEC Treaty	The Pretura (Magistrate' s Court), San Vito al Tagliamento, Italy, for a preliminary ruling in the criminal proceedings pending before that court v E . Zanetti and Others	**On those grounds, THE COURT (First Chamber), in answer to the questions referred to it by the Pretura di San Vito al Tagliamento, by order of 14 July 1988, hereby rules :** **(1) National legislation which defines waste as excluding substances and objects which are capable of economic reutilization is not compatible with Council Directives 75/442/EEC and 78/319/EEC.** **(2) National legislation which does not make the transport of waste covered by Council Directive 75/442/EEC subject to a system of prior authorization is compatible with Article 10 of that directive. However, the Member States may make the transport of waste covered by that directive subject to a system of prior authorization if they consider this necessary in order to achieve the aims of the directive.** **(3) The vesting in authorities which do not have competence at the national level of the power to issue authorizations for the transport of waste is compatible with Article 5 of Council Directive 75/442/EEC.**	**Conclusion Summary** 1. National legislation which defines waste as excluding substances and objects which are capable of economic reutilization is not compatible with Directives 75/442 and 78/319. 2. National legislation which does not make the transport of waste covered by Directive 75/442 subject to a system of prior authorization is compatible with Article 10 of that directive. However, the Member States may make the transport of waste covered by that directive subject to a system of prior authorization if they consider this necessary in order to achieve the aims of the directive. The vesting in authorities which do not have competence at the national level of the power to issue authorizations for the transport of waste is compatible with Article 5 of the directive. **See the full text of the judgement**

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Council Directive 91/156/EEC of 18 March 1991, amending Directive 75/442/EC on Council Directive 91/689/EEC of 12 December 1991 on hazardous waste Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community	Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 under Article 177 of the EC Treaty	The Pretura Circondariale di Terni (Cases C-304/94, C-330/94, C-342/94) and the Pretura Circondariale di Pescara (C-224/95) v Euro Tombesi and Adino Tombesi (C-304/94), Roberto Santella (C-330/94), Giovanni Muzi and Others (C-342/94), Anselmo Savini (C-224/95)	**On those grounds, THE COURT (Sixth Chamber), in answer to the questions referred to it by the Pretura Circondariale di Terni and the Pretura Circondariale di Pescara by order of 27 October, 14 November, 23 November and 15 December 1994, hereby rules:** **The concept of `waste' in Article 1 of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, referred to in Article 1(3) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste and Article 2(a) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, is not to be understood as excluding substances and objects which are capable of economic reutilization, even if the materials in question may be the subject of a transaction or quoted on public or private commercial lists. In particular, a deactivation process intended merely to render waste harmless, landfill tipping in hollows or embankments and waste incineration constitute disposal or recovery operations falling within the scope of the abovementioned Community rules. The fact that a substance is classified as a re-usable residue without its characteristics or purpose being defined is irrelevant in that regard. The same applies to the grinding of a waste substance.**	**Conclusion Summary** 3. (7) Article 2(a) of Regulation No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, provides, in Title I (`Scope and definitions'), that, for the purposes of the regulation, `waste' means the substances or objects defined in Article 1(a) of Directive 75/442, as amended. That common definition of waste, which was introduced in order to ensure that the national systems for supervision and control of shipments of waste conform with minimum criteria, applies directly to shipments of waste within any Member State. 4. (8) The concept of `waste' in Council Directive 75/442, as amended by Directive 91/156, referred to in Article 1(3) of Council Directive 91/689 on hazardous waste and Article 2(a) of Regulation No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community, is not to be understood as excluding substances and objects which are capable of economic reutilization, even if the materials in question may be the subject of a transaction or quoted on public or private commercial lists. In particular, a deactivation process intended merely to render waste harmless, landfill tipping in hollows or embankments and waste incineration constitute disposal or recovery operations falling within the scope of the abovementioned Community rules. The fact that a substance is classified as a re-usable residue without its characteristics or purpose being defined is irrelevant in that regard. The same applies to the grinding of a waste substance. **See the full text of the judgement**

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Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991	Case C-129/96 under Article 177 of the EC Treaty	Inter-Environnement Wallonie ASBL v Région Wallonne	**On those grounds, THE COURT, in answer to the questions referred to it by the Belgian Conseil d'État by judgment of 29 March 1996, hereby rules: 1. A substance is not excluded from the definition of waste in Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, merely because it directly or indirectly forms an integral part of an industrial production process. 2. The second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive 91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed**	**Conclusion Summary** The Belgian Conseil d'État referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 5 and 189 of the EEC Treaty and Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32). The Conseil d'État has referred the following questions to the Court for a preliminary ruling: (1) Do Articles 5 and 189 of the EEC Treaty preclude Member States from adopting a provision contrary to Directive 75/442/EEC of 15 July 1975 on waste, as amended by Directive 91/156/EEC of 18 March 1991, before the period for transposing the latter has expired? Do those same Treaty articles preclude Member States from adopting and bringing into force legislation which purports to transpose the abovementioned directive but whose provisions appear to be contrary to the requirements of that directive? (2) Is a substance referred to in Annex I to Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste and which directly or indirectly forms an integral part of an industrial production process to be considered "waste" within the meaning of Article 1(a) of that directive?' Question 2 25. By its second question, which it is appropriate to consider first, the national court is in essence asking whether a substance is excluded from the definition of waste in Article 1(a) of Directive 75/442, as amended, merely because it directly or indirectly forms an integral part of an industrial production process. First of all, it follows from the wording of Article 1(a) of

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				Directive 75/442, as amended, that the scope of the term `waste' turns on the meaning of the term `discard'. It is also clear from the provisions of Directive 75/442, as amended, in particular from Article 4, Articles 8 to 12 and Annexes IIA and IIB, that the term `discard' covers both disposal and recovery of a substance or object. 29. First, Directive 75/442, as amended, applies, as is apparent in particular from Articles 9 to 11, not only to disposal and recovery of waste by specialist undertakings, but also to disposal and recovery of waste by the undertaking which produced them, at the place of production. 30. Second, while Article 4 of Directive 75/442, as amended, provides that waste is to be recovered or disposed of without endangering human health or using processes or methods which could harm the environment, there is nothing in that directive to indicate that it does not apply to disposal or recovery operations forming part of an industrial process where they do not appear to constitute a danger to human health or the environment. 31. Finally, it should be borne in mind that the Court has already held that the definition of waste in Article 1 of Directive 75/442, as amended, is not to be understood as excluding substances and objects which were capable of economic reutilization (Case C-359/88 Zanetti and Others [1990] ECR I-1509, paragraphs 12 and 13; C-422/92 Commission v Germany [1995] ECR I-1097, paragraphs 22 and 23, and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 Tombesi and Others [1997] ECR I-3561, paragraphs 47 and 48). 32. It follows from all those considerations that substances forming part of an industrial process may constitute waste within the meaning of Article 1(a) of Directive 75/442, as amended. 33. That conclusion does not undermine the distinction which must be drawn, as the Belgian, German, Netherlands and United Kingdom Governments have correctly submitted, between waste recovery within the meaning of Directive 75/442, as amended, and normal industrial treatment of products which are not waste,

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				no matter how difficult that distinction may be. 34. The answer to the second question must therefore be that a substance is not excluded from the definition of waste in Article 1(a) of Council Directive 75/442, as amended, by the mere fact that it directly or indirectly forms an integral part of an industrial production process. 50. The answer to the first question must therefore be that the second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive 91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed. **See the full text of the judgement**
Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991	Joined Cases C-418/97 and C-419/97 under Article 177 of the EC Treaty (now Article 234 EC)	ARCO Chemie Nederland Ltd v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (C-418/97) and between Vereniging Dorpsbelang Hees, Stichting Werkgroep Weurt+, Vereniging	**On those grounds, THE COURT (Fifth Chamber), in answer to the questions referred to it by the Nederlandse Raad van State by orders of 25 November 1997, hereby rules:** **Case C-418/97** **1. It may not be inferred from the mere fact that a substance such as LUWA-bottoms undergoes an operation listed in Annex IIB to Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, that that substance has been discarded so as to enable it to be regarded as waste for the purposes of that directive.** **2. For the purpose of determining whether the use of a substance such as LUWA-bottoms as a fuel is to be regarded as**	**Conclusion Summary** 1. In the absence of Community provisions, Member States are free to chose the modes of proof of the various matters defined in the directives which they transpose, provided that the effectiveness of Community law is not thereby undermined. The effectiveness of Article 130r of the Treaty (now, after amendment, Article 174 EC) and Directive 75/442 on waste, as amended by Directive 91/156, would be undermined if the national legislature were to use modes of proof, such as statutory presumptions, which had the effect of restricting the scope of the directive and not covering materials, substances or products which correspond to the definition of waste within the meaning of the directive. (see paras 41-42) 2. It may not be inferred from the mere fact that a substance undergoes a recovery operation listed in Annex IIB to Directive 75/442 on waste, as amended by Directive 91/156, that that substance has been discarded so as to enable it to be regarded as

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
		Stedelijk Leefmilieu Nijmegen v Directeur van de dienst Milieu en Water van de provincie Gelderland, joined party: Elektriciteitsproductiemaatschappij Oost- en Noord-Nederland NV (Epon) (C-419/97)	**constituting discarding, it is irrelevant that that substance may be recovered in an environmentally responsible manner for use as fuel without substantial treatment. The fact that that use as fuel is a common method of recovering waste and the fact that that substance is commonly regarded as waste may be taken as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442, as amended by Directive 91/156. However, whether it is in fact waste within the meaning of the directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.** **The fact that a substance used as fuel is the residue of the manufacturing process of another substance, that no use for that substance other than disposal can be envisaged, that the composition of the substance is not suitable for the use made of it or that special environmental precautions must be taken when it is used may be regarded as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of that directive. However, whether it is in fact waste within the meaning of the directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that**	waste for the purposes of the directive. (see para. 51 and operative part) 3. For the purpose of determining whether the use of a substance as a fuel is to be regarded as constituting discarding, it is irrelevant that those substances may be recovered in an environmentally responsible manner for use as fuel without substantial treatment. The fact that that use as fuel is a common method of recovering waste and the fact that those substances are commonly regarded as waste may be taken as evidence that the holder has discarded those substances or intends or is required to discard them within the meaning of Article 1(a) of Directive 75/442 on waste, as amended by Directive 91/156. However, whether they are in fact waste within the meaning of the directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined. (see paras 72-73 and operative part) 4. The fact that a substance used as fuel is the residue of the manufacturing process of another substance, that no use for that substance other than disposal can be envisaged, that the composition of the substance is not suitable for the use made of it or that special environmental precautions must be taken when it is used may be regarded as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442 on waste, as amended by Directive 91/156. However, whether it is in fact waste within the meaning of the directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined. (see para. 88 and operative part) 5. The fact that a substance is the result of a recovery operation within the meaning of Annex IIB to Directive 75/442 on waste, as amended by Directive 91/156, is only one of the factors which

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	 Operational part of the judgement
			its effectiveness is not undermined. **Case C-419/97** **3. It may not be inferred from the mere fact that a substance such as wood chips undergoes an operation listed in Annex IIB to Directive 75/442, as amended by Directive 91/156, that that substance has been discarded so as to enable it to be regarded as waste for the purposes of the directive.** **4. The fact that a substance is the result of a recovery operation within the meaning of Annex IIB to that directive is only one of the factors which must be taken into consideration for the purpose of determining whether that substance is still waste, and does not as such permit a definitive conclusion to be drawn in that regard. Whether it is waste must be determined in the light of all the circumstances, by comparison with the definition set out in Article 1(a) of Directive 75/442, as amended by Directive 91/156, that is to say the discarding of the substance in question or the intention or requirement to discard it, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.** **For the purpose of determining whether the use of a substance such as wood chips as a fuel is to be regarded as constituting discarding, it is irrelevant that that substance may be recovered in an environmentally responsible manner for**	must be taken into consideration for the purpose of determining whether that substance is still waste, and does not as such permit a definitive conclusion to be drawn in that regard. Whether it is waste must be determined in the light of all the circumstances, by comparison with the definition set out in Article 1(a) of the directive, that is to say the discarding of the substance in question or the intention or requirement to discard it, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined. (see para. 97 and operative part) **See the full text of the judgement**

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			use as fuel without substantial treatment. The fact that that use as fuel is a common method of recovering waste and the fact that that substance is commonly regarded as waste may be taken as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442, as amended by Directive 91/156. However, whether it is in fact waste within the meaning of that directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.	
Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991	Case C-9/00 under Article 234 EC Treaty	Korkein hallinto-oikeus (Finland) for a preliminary ruling in the proceedings pending before that court instituted by Palin Granit Oyand Vehmassalon kansanterveystyön kuntayhtymän hallitus,	**On those grounds, THE COURT (Sixth Chamber), in answer to the questions referred to it by the Korkein hallinto-oikeus by order of 31 December 1999, hereby rules: 1. The holder of leftover stone resulting from stone quarrying which is stored for an indefinite length of time to await possible use discards or intends to discard that leftover stone, which is accordingly to be classified as waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste. 2. The place of storage of leftover stone, its composition and the fact, even if proven, that the stone does not pose any real risk to human health or the environment are not relevant criteria for determining whether the stone is to be regarded as waste.**	**Conclusion Summary** 1. By order of 31 December 1999, received at the Court on 13 January 2000, the Korkein hallinto-oikeus (Supreme Administrative Court) (Finland) referred to the Court for a preliminary ruling under Article 234 EC one main question and four sub-questions on the interpretation of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32, hereinafter `Directive 75/442').  21. In order to determine which authority is competent to grant Palin Granit the environmental licence sought by it, the Korkein hallinto-oikeus decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling: `Is leftover stone resulting from stone quarrying to be regarded as waste within the meaning of Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, having regard to points

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				(a) to (d) below? (a) What relevance, in deciding the above question, does it have that the leftover stone is stored on a site adjoining the place of quarrying to await subsequent use? Is it relevant generally whether it is stored on the quarrying site, a site next to it or further away? (b) What relevance does it have that the leftover stone is the same as regards its composition as the basic rock from which it has been quarried, and that it does not change its composition regardless of how long it is kept or how it is kept? (c) What relevance does it have that the leftover stone is harmless to human health and the environment? To what extent generally is importance to be attached to its possible effect on health and the environment in assessing whether it is waste? (d) What relevance does it have that the intention is to transfer the leftover stone in whole or in part away from the storage site for use, for example for landfill or breakwaters, and that it could be recovered as such without processing or similar measures? To what extent in this connection should attention be paid to how definite the plans are which the holder of the leftover stone has for such use and to how soon after the leftover stone has been deposited on the storage site the use takes place?' The main question 22. In the first subparagraph of Article 1(a) of Directive 75/442 waste is defined as `any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'. Annex I and the EWC clarify and illustrate that definition, by providing lists of substances and objects which may be classified as waste. However, those lists are only intended as guidance and the classification of a substance or object as waste is, as the Commission rightly submits, primarily to be inferred from the holder's actions, which depend on whether or not he intends to discard the substances in question. Therefore, the scope of the term `waste' turns on the meaning of the term `discard' (Case C-129/96 Inter-Environnement Wallonie

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				[1997] ECR I-7411, paragraph 26). 24. More specifically, the question whether a given substance is waste must be determined in the light of all the circumstances, regard being had to the aim of Directive 75/442 and the need to ensure that its effectiveness is not undermined (ARCO Chemie Nederland, paragraphs 73, 88 and 97). The storage of leftover stone at the place of extraction or at a storage site thus constitutes either a disposal or recovery operation. 27. However, the distinction between waste disposal or recovery operations and the treatment of other products is often difficult to discern. Accordingly, the Court has already held that it may not be inferred from the fact that a substance undergoes an operation referred to in Annex II B to Directive 75/442 that that substance has been discarded and may therefore be regarded as waste (the judgment in ARCO Chemie Nederland, paragraph 82). The application of an operation listed in Annex II A or II B to Directive 75/442 therefore does not, of itself, justify the classification of that substance as waste. In its judgment in Vessoso and Zanetti (Joined Cases C-206/88 and C-207/88 [1990] ECR I-1461, paragraph 9), the Court held that the concept of waste does not exclude substances and objects which are capable of economic reutilisation. In Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 Tombesi and Others [1997] ECR I-3561, paragraph 52, the Court also stated that the system of supervision and control established by Directive 75/442, as amended, is intended to cover all objects and substances discarded by their owners, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or reuse. 30. Neither the fact that the leftover stone has undergone a treatment operation referred to in Directive 75/442 nor the fact

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				that it can be reused thus suffices to show whether that stone is waste for the purposes of Directive 75/442. 31. There are other considerations which are more decisive. 32. At paragraphs 83 to 87 of the judgment in ARCO Chemie Nederland, the Court pointed out the importance of determining whether the substance is a production residue, that is to say, a product not in itself sought for a subsequent use. According to its ordinary meaning, waste is what falls away when one processes a material or an object and is not the end-product which the manufacturing process directly seeks to produce. 33. Therefore, it appears that leftover stone from extraction processes which is not the product primarily sought by the operator of a granite quarry falls, in principle, into the category of `[r]esidues from raw materials extraction and processing' under head Q 11 of Annex I to Directive 75/442. 34. One counter-argument to challenge that analysis is that goods, materials or raw materials resulting from a manufacturing or extraction process, the primary aim of which is not the production of that item, may be regarded not as a residue but as a by-product which the undertaking does not wish to `discard', within the meaning of the first paragraph of Article 1(a) of Directive 75/442, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse. 35. Such an interpretation would not be incompatible with the aims of Directive 75/442. There is no reason to hold that the provisions of Directive 75/442 which are intended to regulate the disposal or recovery of waste apply to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products. 37. It therefore appears that, in addition to the criterion of

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				whether a substance constitutes a production residue, a second relevant criterion for determining whether or not that substance is waste for the purposes of Directive 75/442 is the degree of likelihood that that substance will be reused, without any further processing prior to its reuse. If, in addition to the mere possibility of reusing the substance, there is also a financial advantage to the holder in so doing, the likelihood of reuse is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to `discard', but as a genuine product. 39. The answer to the main question asked by the national court must therefore be that the holder of leftover stone resulting from stone quarrying which is stored for an indefinite length of time to await possible use discards or intends to discard that leftover stone, which is accordingly to be classified as waste within the meaning of Directive 75/442. Sub-questions (a) and (d) 41. In any event, under Article 11 of Directive 75/442, it remains possible for national authorities to lay down rules providing for exemptions from the permit requirement and to grant such exemptions in respect of disposal and recovery operations for certain waste, and for national courts to ensure that those rules are observed in accordance with the aims of Directive 75/442. 42. As regards sub-question (a), it should be observed that, in view of the answer which has just been given to the main question, the place of storage of the leftover stone, whether it be on the quarrying site, at a place next to it or further away, is not relevant to its classification as waste. Similarly, the conditions under which the materials are kept and the length of time for which they are kept do not, of themselves, provide any indication of either their value to the undertaking or the advantages which that undertaking may derive from them. They do not show whether or not the holder intends to discard the materials.

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				43. With respect to sub-question (b), it must be borne in mind that at paragraph 87 of the judgment in ARCO Chemie Nederland, the Court held that the fact that a substance is a production residue whose composition is not suitable for the use made of it or that special precautions must be taken when it is used owing to the environmentally hazardous nature of its composition may constitute evidence that the holder has discarded the substance, or intends or is required to discard it within the meaning of Article 1(a) of Directive 75/442. 44. The fact that the leftover stone has the same composition as the blocks of stone extracted from the quarry and that its physical state does not change may accordingly render it suitable for the uses which could be made of it. However, that argument would be decisive only if all the leftover stone were reused. There is no doubt that the commercial value of blocks of stone depends on their size, shape and potential uses in the construction sector, qualities which the leftover stone, despite having an identical composition, does not possess. That leftover stone is therefore still production residue. 46. In any event, even where a substance undergoes a full recovery operation and thereby acquires the same properties and characteristics as a raw material, it may nevertheless be regarded as waste if, in accordance with the definition in Article 1(a) of Directive 75/442, its holder discards it, or intends or is required to discard it. 47. As regards sub-question (c), it should be observed that the fact that the leftover stone does not pose any risk to public health or the environment also does not preclude its classification as waste. 48. First of all, Directive 75/442 on waste is supplemented by Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20), which implies that the concept of waste does not turn on the hazardous nature of a substance.

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				49. Next, even assuming that the leftover stone does not, by virtue of its composition, pose any risk to human health or the environment, stockpiling such stone is necessarily a source of harm to, and pollution of, the environment, since the full reuse of the stone is neither immediate nor even always foreseeable. 50. Finally, the harmlessness of the substance in question is not a decisive criterion for determining what its holder intends to do with it. 51. The answer to the national court's sub-questions must therefore be that the place of storage of leftover stone, its composition and the fact, even if proven, that the stone does not pose any real risk to human health or the environment are not relevant criteria for determining whether the stone is to be regarded as waste. **See the full text of the judgement**
Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991	Case C-114/01 under Article 234 EC Treaty	AvestaPolarit Chrome Oy, formerly Outokumpu Chrome Oy	**On those grounds, THE COURT (Sixth Chamber),** **in answer to the questions referred to it by the Korkein hallinto-oikeus by order of 5 March 2001, hereby rules:** **1. In a situation such as that at issue in the main proceedings, the holder of leftover rock and residual sand from ore-dressing operations from the operation of a mine discards or intends to discard those substances, which must consequently be classified as waste within the meaning of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, unless he uses them lawfully for the necessary filling in of the galleries of that mine and provides sufficient guarantees as**	**Conclusion Summary** 30. In those circumstances, the Korkein hallinto-oikeus decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling: (1) Are leftover rock resulting from the extraction of ore and/or ore-dressing sand resulting from the dressing of ore in mining operations to be regarded as waste within the meaning of Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, having regard to points (a) to (d) below? (a) What relevance, in deciding the above question, does it have that the leftover rock and ore-dressing sand is stored in the mining area or on the ancillary site? Is it relevant generally, with respect to falling within the definition of waste, whether the said by-products of mining operations are stored in the mining area, on the ancillary site or further away? (b) What relevance does it have, in assessing the matter, that the

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			to the identification and actual use of the substances to be used for that purpose. 2. In so far as it does not constitute a measure of application of Directive 75/442, as amended by Directive 91/156, and in particular Article 11 of that directive, national legislation must be regarded as `other legislation' within the meaning of Article 2(1)(b) of that directive covering a category of waste mentioned in that provision, if it relates to the management of that waste as such within the meaning of Article 1(d) of Directive 75/442, and if it results in a level of protection of the environment at least equivalent to that aimed at by that directive, whatever the date of its entry into force	leftover rock is the same as regards its composition as the basic rock from which it is quarried, and that it does not change its composition regardless of how long it is kept and how it is kept? Should ore-dressing sand which results from the ore-dressing process perhaps be assessed differently from leftover rock in this respect? (c) What relevance does it have, in assessing the matter, that leftover rock is harmless to human health and the environment, but that, according to the view of the environmental licence authorities, substances harmful to health and the environment dissolve from ore-dressing sand? To what extent generally is importance to be attached to the possible effect of leftover rock and ore-dressing sand on health and the environment in assessing whether they are waste? (d) What relevance does it have, in assessing the matter, that leftover rock and ore-dressing sand are not intended to be discarded? Leftover rock and ore-dressing sand may be re-used without special processing measures, for example for supporting mine galleries, and leftover rock also for landscaping the mine after it has ceased operation. Minerals may in future with the development of technology be recovered from ore-dressing sand for utilisation. To what extent should attention be paid to how definite plans the person carrying on mining operations has for such utilisation and to how soon after the leftover rock and ore-dressing sand has been tipped on the mining area or the ancillary site the utilisation would take place? (2) If the answer to the first question is that leftover rock and/or ore-dressing sand is to be regarded as waste within the meaning of Article 1(a) of the Council Directive on waste, it is further necessary to obtain an answer to the following supplementary questions: (a) Does "other legislation" within the meaning of Article 2(1)(b) of the Waste Directive (91/156/EEC), waste covered by which is excluded from the scope of the directive, and which under point (ii) concerns inter alia waste resulting from prospecting,

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				extraction, treatment and storage of mineral resources, mean exclusively the European Community's own legislation? Or may national legislation too, such as certain provisions of the Law on mines and the Regulation on waste in force in Finland, be "other legislation" within the meaning of the Waste Directive? (b) If "other legislation" means also national legislation, does that mean exclusively national legislation which was already in force at the time of entry into force of the Waste Directive 91/156/EEC or also that enacted only afterwards? (c) If "other legislation" means also national legislation, do fundamental European Community provisions relating to environmental protection or the principles of the Waste Directive set requirements for national legislation concerning the level of environmental protection as a condition for misapplying the rules of the Waste Directive? What sort of requirements could those be?' The first question 31. With respect to the first question, the Korkein hallinto-oikeus previously referred a largely similar question in Case C-9/00 Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus [2002] ECR I-3533 (`Palin Granit'). 32. In that judgment, which concerned not leftover rock and ore-dressing sand from a mining operation but leftover stone from a granite quarry, the Court held that: - the holder of leftover stone resulting from stone quarrying which is stored for an indefinite length of time to await possible use discards or intends to discard that leftover stone, which is accordingly to be classified as waste within the meaning of Directive 75/442; - the place of storage of leftover stone, its composition and the fact, even if proven, that the stone does not pose any real risk to human health or the environment are not relevant criteria for determining whether the stone is to be regarded as waste. The second question 47. Article 2(2) of Directive 75/442 expressly provides that

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				individual directives may regulate the management of certain categories of waste. It says that those directives may contain specific rules for particular instances or supplementing those in Directive 75/442. That means that the Community expressly reserved the possibility of enacting specific rules or more detailed ones than those in Directive 75/442 for certain categories of waste not defined in advance. That was the basis on which Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances (OJ 1991 L 78, p. 38) and Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20), for example, were adopted. 53. So, in the main proceedings, it will be for the national court to make sure if necessary, if it considers misapplying the national provisions adopted in application of Directive 75/442, that the alternative provisions of the Law on mines relied on for that purpose concern the management of mining waste and apply to the waste from the mine operated by AvestaPolarit. In the light of the documents in the case, the Court understands that that may be the case, with respect to non-hazardous soil and rock waste, if AvestaPolarit uses a procedure approved pursuant to that law. 57. Consequently, since when adopting Directive 91/156 the Community legislature considered it appropriate that, until specific Community rules were adopted on the management of certain individual categories of waste, the authorities of the Member States should retain the option of ensuring that management outside the framework laid down by Directive 75/442, and since it neither expressly excluded the possibility of that option being used on the basis of national legislation subsequent to the entry into force of Directive 91/156 nor set out considerations enabling a distinction to be drawn between such national legislation and legislation prior to that entry into force, Article 2(1)(b) of Directive 75/442 must be interpreted as meaning that `other legislation' within the meaning of that provision may have entered into force either before or after 1

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				April 1993, the date of entry into force of Directive 91/156. 60. In the main proceedings, it will thus be for the national court if need be, if it considers disapplying the national provisions taken in application of Directive 95/442, to make sure that the alternative provisions of the Law on mines relied on for that purpose result, as regards the management of mining waste, in a level of protection of the environment which is equivalent at least. Account must be taken here of the fourth recital in the preamble to Directive 91/156, which states that `in order to achieve a high level of environmental protection, the Member States must, in addition to taking action to ensure the responsible removal and recovery of waste, take measures to restrict the production of waste particularly by promoting clean technologies and products which can be recycled and reused, taking into consideration existing or potential market opportunities for recovered waste', and more particularly of the objectives defined in Articles 3(1) and 4 of Directive 75/442. 61 The answer to the second question must therefore be that, in so far as it does not constitute a measure of application of Directive 75/442, in particular Article 11 of that directive, national legislation must be regarded as `other legislation' within the meaning of Article 2(1)(b) of that directive covering a category of waste mentioned in that provision, if it relates to the management of that waste as such within the meaning of Article 1(d) of Directive 75/442, and if it results in a level of protection of the environment at least equivalent to that aimed at by that directive, whatever the date of its entry into force. **See the full text of the judgement**
Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC	Case C-365/97 under Article 169 of the Treaty (now Article 226 EC)	Commission of the European Communities, applicant,	**On those grounds, THE COURT hereby: 1. Declares that, by not taking the measures necessary to ensure that the waste discharged into the watercourse**	**Conclusion Summary** 4. Although the first paragraph of Article 4 of Directive 75/442, as amended by Directive 91/156, does not specify the actual

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of 18 March 1991		v Italian Republic, defendant	**bisecting the San Rocco valley is disposed of without endangering human health or harming the environment and by not taking the measures necessary to ensure that waste stored in a fly-tip is handed over to a private or public waste collector or a waste-disposal undertaking, the Italian Republic has failed to fulfil its obligations under the first paragraph of Article 4 and the first indent of Article 8 of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991;** **2. Dismisses the remainder of the application;** **3. Orders the Italian Republic to pay the costs.**	content of the measures which must be taken by Member States in order to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods likely to harm the environment, it is none the less true that it is binding on the Member States as to the objective to be achieved, whilst leaving to the Member States a margin of discretion in assessing the need for such measures. Consequently, it cannot in principle be inferred directly from the fact that a situation is not in conformity with the objectives laid down in the first paragraph of Article 4 of Directive 75/442, as amended, that the Member State concerned has failed to fulfil its obligation under that provision. However, if that situation persists and, in particular, if it leads to a significant deterioration in the environment over a protracted period without any action being taken by the competent authorities, it may be an indication that the Member States have exceeded the discretion conferred on them by that provision. 5. In infringement proceedings, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled, but in cases where it has produced sufficient evidence of the infringement alleged, it is for the Member State in question to challenge in substance and in detail the data produced and the inferences drawn, failing which the allegations must be regarded as proven. 6. In the context of the investigations in which the Commission seeks to establish whether or not Community law has been infringed, it is primarily for the national authorities to conduct the necessary on-the-spot investigations, in a spirit of genuine cooperation and in accordance with the duty, incumbent on each Member State under Article 5 of the Treaty (now Article 10 EC), to facilitate attainment of the general task of the Commission, which is to ensure that the provisions of the Treaty, as well as provisions adopted thereunder by the institutions, are applied. 7. Article 8 of Directive 75/442 on waste, as amended by Directive 91/156, places Member States under an obligation to

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				take the steps necessary to ensure that waste is handed over to a private or public waste collector or a waste-disposal undertaking, where it is not possible for the operator holding the waste to recover the waste or to dispose of it. Thus, where a Member State has merely ordered sequestration of an illegal tip and prosecution of the operator of that tip (who, on receiving consignments of waste, becomes the holder of that waste), it fails to fulfil the specific obligation imposed on it by the above provision. **See the full text of the judgement**
Council Directive 75/442/EEC of 15 July 1975 on waste Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste	Case C-38797 under Article 171(2) of the Treaty (now Article 228(2) EC)	Commission of the European Communities, applicant v Hellenic Republic, defendant	**On those grounds, THE COURT hereby:** **1. Declares that, by failing to take the measures necessary to ensure that waste is disposed of in the area of Chania without endangering human health and without harming the environment in accordance with Article 4 of Council Directive 75/442/EEC of 15 July 1975 on waste and by failing to draw up for that area plans for the disposal of waste, pursuant to Article 6 of Directive 75/442, and of toxic and dangerous waste, pursuant to Article 12 of Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste, the Hellenic Republic has not implemented all the necessary measures to comply with the judgment of the Court of 7 April 1992 in Case C-45/91 Commission v Greece and has failed to fulfil its obligations under Article 171 of the EC Treaty;** **2. Orders the Hellenic Republic to pay to the Commission of the European Communities, into the account EC own**	**Conclusion Summary** 1. Infringement proceedings brought by the Commission under Article 171(2) of the Treaty (now Article 228(2) EC) for a declaration that a Member State has failed to fulfil its obligations by not taking the necessary measures to comply with a judgment of the Court establishing a breach of obligations on its part and for an order requiring it to pay a periodic penalty payment are admissible where all the stages of the pre-litigation procedure, including the letter of formal notice, have occurred after the Treaty on European Union entered into force. (see para. 42) 2. Whilst Article 4 of Directive 75/442 on waste did not specify the actual content of the measures to be taken by the Member States in order to ensure that waste is disposed of without endangering human health and without harming the environment, it was none the less binding on the Member States as to the objective to be achieved, while leaving to them a margin of discretion in assessing the need for such measures. A significant deterioration in the environment over a protracted period when no action has been taken by the competent authorities is in principle an indication that the Member State concerned has exceeded the discretion conferred on it by that

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			resources, a penalty payment of EUR 20 000 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-45/91, from delivery of the present judgment until the judgment in Case C-45/91 has been complied with; **3. Orders the Hellenic Republic to pay the costs;** **4. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.**	provision. The same analysis can be made as regards Article 5 of Directive 78/319 on toxic and dangerous waste. (see paras 55-57) 3. The obligations flowing from Article 4 of Directive 75/442 on waste and Article 5 of Directive 78/319 on toxic and dangerous waste were independent of the more specific obligations contained in Articles 5 to 11 of Directive 75/442 concerning the planning, organisation and supervision of waste disposal operations and Article 12 of Directive 78/319 concerning the disposal of toxic and dangerous waste. The same is true of the corresponding obligations under Directive 75/442 as amended and Directive 91/689 on hazardous waste. (see paras 48-49, 58) 4. A Member State may not plead internal circumstances, such as difficulties of implementation which emerge at the stage when a Community measure is put into effect, to justify a failure to comply with obligations and time-limits laid down by Community law. (see para. 70) 5. Incomplete practical measures or fragmentary legislation cannot discharge the obligation of Member States to draw up a comprehensive programme with a view to attaining certain objectives. Legislation or specific measures amounting only to a series of ad hoc normative interventions that are incapable of constituting an organised and coordinated system for the disposal of waste and toxic and dangerous waste cannot be regarded as plans which the Member States are required to adopt under Article 6 of Directive 75/442 on waste and Article 12 of Directive 78/319 on toxic and dangerous waste. (see paras 75-76) 6. While Article 171 of the Treaty (now Article 228 EC) does not specify the period within which a judgment establishing that a Member State has failed to fulfil its obligations must be complied with, the importance of immediate and uniform

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				application of Community law means that the process of compliance must be initiated at once and completed as soon as possible. (see para. 82) 7. Article 171(1) of the Treaty (now Article 228(1) EC) provides that, if the Court finds that a Member State has failed to fulfil an obligation under the Treaty, that State is required to take the necessary measures to comply with the Court's judgment. If the Member State concerned does not take those measures within the time-limit laid down by the Commission in the reasoned opinion adopted pursuant to the first subparagraph of Article 171(2) of the Treaty, the Commission may bring the case before the Court. As provided in the second subparagraph of Article 171(2), the Commission is to specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. In the absence of provisions in the Treaty, the Commission may adopt guidelines for determining how the lump sums or penalty payments which it intends to propose to the Court are calculated, so as, in particular, to ensure equal treatment between the Member States. While these suggestions of the Commission cannot bind the Court, they are however a useful point of reference. (see paras 81, 83-84, 89) 8. It is stated in the third subparagraph of Article 171(2) of the Treaty (now the third subparagraph of Article 228(2) EC) that the Court, if it finds that the Member State concerned has not complied with its judgment, may impose a lump sum or a penalty payment on it. First, since the principal aim of penalty payments is that the Member State should remedy the breach of obligations as soon as possible, a penalty payment must be set that will be appropriate to the circumstances and proportionate both to the breach which has been found and to the ability to pay of the Member State concerned. Second, the degree of urgency that the Member State concerned should fulfil its obligations may vary in accordance with the breach. To that end, the basic

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				criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations. (see paras 89-92) **See the full text of the judgement**
Council Directive 75/442/EEC of 15 July 1975 on waste as amended by Council Directive 91/156/EEC of 18 March 1991 Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community	Case C-203/96 under Article 177 of the EC Treaty	Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer	**On those grounds, THE COURT (Sixth Chamber), in answer to the questions referred to it by the Raad van State by order of 23 April 1996, hereby rules:** **1. Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991 and Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community cannot be interpreted as meaning that the principles of self-sufficiency and proximity are applicable to shipments of waste for recovery. Article 130t of the EC Treaty does not permit Member States to extend the application of those principles to such waste when it is clear that they create a barrier to exports which is not justified either by an imperative measure relating to protection of the environment or by one of derogations provided for by Article 36 of that Treaty.** **2. Article 90 of the EC Treaty, in**	**Conclusion Summary** 3. Directive 75/442 on waste, as amended by Directive 91/156, and Regulation No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community cannot be interpreted as meaning that the principles of self-sufficiency and proximity are applicable to shipments of waste for recovery. That follows from the provisions of the directive and the regulation and from the preparatory texts. Furthermore, the difference in treatment between waste for recovery and waste for disposal reflects the intention of the Community legislature to encourage recovery of waste in the Community as whole, in particular by eliciting the best technologies, which means that waste of that type should be able to move freely between Member States for processing, thus excluding the application of the principles of self-sufficiency and proximity. Article 130t of the Treaty, which authorises Member States to adopt protective measures which are more stringent than those adopted pursuant to Article 130s, in so far as they are compatible with the Treaty, does not permit them to extend the application of those principles to waste for recovery when it is clear that those principles create a barrier to exports which is not justified

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			conjunction with Article 86, precludes rules such as the Long-term Plan whereby a Member State requires undertakings to deliver their waste for recovery, such as oil filters, to a national undertaking on which it has conferred the exclusive right to incinerate dangerous waste unless the processing of their waste in another Member State is of a higher quality than that performed by that undertaking if, without any objective justification and without being necessary for the performance of a task in the general interest, those rules have the effect of favouring the national undertaking and increasing its dominant position.	either by an imperative measure relating to protection of the environment or by one of the derogations provided for by Article 36 of the Treaty. **See the full text of the judgement**
Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Commission Decision 96/350/EC of 24 May 1996	Case C-458/00 under Article 226 EC Treaty	Commission of the European Communities, applicant, v Grand Duchy of Luxembourg, defendant	**On those grounds, THE COURT (Fifth Chamber)** **hereby:** **1. Dismisses the application;** **2. Orders the Commission of the European Communities to pay the costs;** **3. Orders the Republic of Austria to bear its own costs.**	**Conclusion Summary** APPLICATION for a declaration that by raising unjustified objections to certain shipments of waste to another Member State to be used principally as a fuel, in breach of Article 7(2) and (4) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1), and of Article 1(f) in conjunction with point R1 of Annex II B to Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32), the Grand Duchy of Luxembourg has failed to fulfil its obligations under Articles 2, 6 and 7 of that Regulation and under Article 1(f) in conjunction with point R1 of Annex II B to that Directive. 32. That provision should be interpreted as meaning that it covers the combustion of household waste if, first, the main purpose of the operation concerned is to enable the waste to be

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				used as a means of generating energy. The term `use' in point R1 of Annex II B to the Directive implies that the essential purpose of the operation referred to in that provision is to enable waste to fulfil a useful function, namely the generation of energy. 33. Second, the combustion of household waste constitutes an operation referred to in point R1 of Annex II B to the Directive where the conditions in which that operation is to take place give reason to believe that it is indeed a `means to generate energy'. This assumes both that the energy generated by, and reclaimed from, combustion of the waste is greater than the amount of energy consumed during the combustion process and that part of the surplus energy generated during combustion is effectively used, either immediately in the form of the heat produced by incineration or, after processing, in the form of electricity. 34. Third, it follows from the term `principally' used in point R1 of Annex II B to the Directive that the waste must be used principally as a fuel or other means of generating energy, which means that the greater part of the waste must be consumed during the operation and that the greater part of the energy generated must be reclaimed and used. 35.That interpretation is in accordance with the concept of recovery which comes from the Directive. 36. It follows from Article 3(1)(b) and the fourth recital of the Directive that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources (ASA, cited above, paragraph 69). 37. The combustion of waste therefore constitutes a recovery operation where its principal objective is that the waste can fulfil a useful function as a means of generating energy, replacing the use of a source of primary energy which would have had to have been used to fulfil that function. 38. In the light of those criteria, the Commission has failed to establish that the objection raised in the contested decisions does

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				not accord with the distinction between disposal operations and recovery operations laid down by the directive in Annexes II A and II B thereto. 44. The Commission has not adduced any evidence in the context of its action which shows that, contrary to what the competent Luxembourg authorities considered in the contested decisions, the principal objective of the operation in question was the recovery of waste. It has not provided any evidence at all of this, such as the fact that the waste in question was intended for a plant which, unless it was supplied with waste, would have had to operate using a primary energy source, or that the waste was to have been delivered to the processing plant in exchange for payment by the plant operator to the producer or holder of the waste. 45. The Commission only maintained in that regard that the shipments were of waste intended for use as a means of generating energy and that the purpose of the processing plant to which the waste was to be shipped did not constitute a relevant criterion for the purposes of classifying an operation for the shipment of waste. 46. Consequently, the Commission's application is unfounded and must therefore be dismissed. **See the full text of the judgement**
Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community	Case C-228/00 under Article 226 EC Treaty	Commission of the European Communities, applicant, v Federal Republic of Germany, defendant	**On those grounds, THE COURT (Fifth Chamber) hereby:** **1. Declares that by raising unjustified objections to certain shipments of waste to other Member States to be used principally as a fuel, the Federal Republic of Germany has failed to fulfil its obligations under Article 7(2) and (4) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of**	**Conclusion Summary** APPLICATION for a declaration that by raising unjustified objections against certain shipments of waste to other Member States to be used principally as a fuel the Federal Republic of Germany has failed to fulfil its obligations under Article 7(2) and (4) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1).

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			waste within, into and out of the European Community; **2. Orders the Federal Republic of Germany to pay the costs.**	40. In that regard, it should be observed that point R1 of Annex II B to the Directive includes among waste recovery operations their `[u]se principally as a fuel or other means to generate energy'. 41. That provision should be interpreted as meaning that it covers the use of waste as a fuel in cement kilns since, first, the main purpose of the operation concerned is to enable the waste to be used as a means of generating energy. The term `use' in point R1 of Annex II B to the Directive implies that the essential purpose of the operation referred to in that provision is to enable waste to fulfil a useful function, namely the generation of energy. 42. Second, the use of waste as a fuel in cement kilns is an operation referred to in point R1 of Annex II B to the Directive where the conditions in which that operation is to take place give reason to believe that it is indeed a `means to generate energy'. This assumes both that the energy generated by, and recovered from, combustion of the waste is greater than the amount of energy consumed during the combustion process and that part of the surplus energy generated during combustion should effectively be used, either immediately in the form of the heat produced by incineration or, after processing, in the form of electricity. 43. Third, it follows from the term `principally' used in point R1 of Annex II B to the Directive that the waste must be used principally as a fuel or other means of generating energy, which means that the greater part of the waste must be consumed during the operation and the greater part of the energy generated must be recovered and used. 44. That interpretation is in accordance with the concept of recovery which comes from the Directive. 46. The combustion of waste therefore constitutes a recovery operation where its principal objective is that the waste can fulfil

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				a useful function as a means of generating energy, replacing the use of a source of primary energy which would have had to have been used to fulfil that function. 47. Since the use of waste as a fuel meets the conditions referred to in paragraphs 41 to 43 above, it constitutes a recovery operation as referred to in point R1 of Annex II B to the Directive, without the need to take into consideration criteria such as the calorific value of the waste, the amount of harmful substances contained in the incinerated waste or whether or not the waste has been mixed. 53. Although the waste concerned was intended for use as a fuel in Belgium, where they were to replace sources of primary energy in heating cement kilns, the competent German authorities refused to consider that the shipments in question constituted a recovery operation as referred to in point R1 of Annex II B to the Directive, solely on the ground that the operations concerned did not meet certain general criteria laid down in the circulars it had adopted, such as the minimum calorific value of the waste. 54. As is made clear in paragraph 47 above, those criteria are not relevant for the purposes of determining whether the use of waste as a fuel in a cement kiln constitutes a disposal operation or a recovery operation within the meaning of the Directive and the Regulation. 55. In those circumstances, it must be declared that, by raising unjustified objections to certain shipments of waste to other Member States to be used principally as a fuel, the Federal Republic of Germany has failed to fulfil its obligations under Article 7(2) and (4) of the Regulation. **See the full text of the judgement**

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Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds	Case 247/85 under Article 169 of the EEC Treaty	Commission of the European Communities, applicant, v Kingdom of Belgium, defendant	**ON THOSE GROUNDS, The Court hereby:** **(1) Declares that, by not adopting within the prescribed period all the laws, regulations and administrative provisions needed to comply with Council Directive 79/409/EEC OF 2 April 1979 on the conservation of wild birds, the kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty;** **(2) Orders the Kingdom of Belgium to pay the costs.**	**Conclusion Summary** The transposition of a directive into national law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express legal provision of national law; a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner . However, a faithful transposition becomes particularly important in a case such as the transposition of directive 79/409 concerning the conservation of wild birds in which the management of the common heritage is entrusted to the member states in their respective territories. **See the full text of the judgement**
Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds	Case C-57/89 under Article 169 of the EEC Treaty	Commission of the European Communities, applicant, v Federal Republic of Germany, defendant, supported by United Kingdom of Great Britain and Northern	**On those grounds, THE COURT hereby:** **(1) Dismisses the application;** **(2) Orders the Commission to pay the costs, including the costs of the intervener and those relating to the application for interim measures.**	**Conclusion Summary** Although the Member States do have a certain discretion with regard to the choice of the territories which are most suitable for classification as special protection areas pursuant to Article 4(4) of Directive 79/409 on the conservation of wild birds, they do not have the same discretion to modify or reduce the extent of such areas, which contain the most suitable environments for the species listed in Annex I, and thus unilaterally escape from the obligations imposed on them by Article 4(4) of the directive. The power of the member States to reduce the extent of special protection areas can be justified only on exceptional grounds corresponding to a general interest which is superior to the general interest represented by the ecological objective of the directive. In that context the economic and recreational

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		Ireland, intervener		requirements referred to in Article 2 of the directive do not enter into consideration, since that provision does not constitute an autonomous derogation from the system of protection established by the directive. **See the full text of the judgement**
Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (	Case C-355/90 under Article 169 of the EEC Treaty	Commission of the European Communities, applicant, v Kingdom of Spain, defendant	**On those grounds, THE COURT hereby:** **1. Declares that, by not classifying the Santoña marshes as a special protection area and by not taking appropriate steps to avoid pollution or deterioration of habitats in that area, contrary to the provisions of Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Kingdom of Spain has failed to fulfil its obligations under the EEC Treaty;** **2. Orders the Kingdom of Spain to pay the costs.**	**Conclusion Summary** 1. Articles 3 and 4 of Directive 79/409 on the conservation of wild birds require Member States to preserve, maintain and re-establish the habitats of the said birds as such, because of their ecological value. The obligations on Member States under those articles exist even before any reduction is observed in the number of birds or any risk of a protected species becoming extinct has materialized. 2. In implementing Directive 79/409 on the conservation of wild birds, Member States are not authorized to invoke, at their option, grounds of derogation based on taking other interests into account. With respect, more specifically, to the obligation to take special conservation measures for certain species under Article 4 of the directive, such grounds must, in order to be acceptable, correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In particular, the interests referred to in Article 2 of the directive, namely economic and recreational requirements, do not enter into consideration, as that provision does not constitute an autonomous derogation from the general system of protection established by the directive. 3. In choosing the territories which are most suitable for classification as special protection areas pursuant to Article 4(1) of Directive 79/409 on the conservation of wild birds, Member States have a certain discretion which is limited by the fact that the classification of those areas is subject to certain ornithological criteria determined by the directive, such as the

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				presence of birds listed in Annex I to the directive, on the one hand, and the designation of a habitat as a wetland area, on the other. However, Member States do not have the same discretion under Article 4(4) of the directive to modify or reduce the extent of such areas. **See the full text of the judgement**
Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds	Case C-435/92 under Article 177 of the EEC Treaty	Association pour la Protection des Animaux Savages and Others v Préfet de Maine-et-Loire, Préfet de la Loire-Atlantique	**On those grounds, THE COURT, in answer to the questions referred to it by the Administrative Court of Nantes by judgments of 17 December 1992, hereby rules: 1. Pursuant to Article 7(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the closing date for the hunting of migratory birds and waterfowl must be fixed in accordance with a method which guarantees complete protection of those species during the period of pre-mating migration. Methods whose object or effect is to allow a certain percentage of the birds of a species to escape such protection do not comply with that provision; 2. It is incompatible with the third sentence of Article 7(4) of the directive for a Member State to fix closing dates for the hunting season which vary according to the species of bird, unless the Member State concerned can adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting**	**Conclusion Summary** Pursuant to Article 7(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the closing date for the hunting of migratory birds and waterfowl must be fixed in accordance with a method which guarantees complete protection of those species during the period of pre-mating migration. Methods whose object or effect is to allow a certain percentage of the birds of a species to escape such protection, such as those consisting in fixing the closing date for hunting by reference to the period during which migratory activity reaches its highest level, or those taking into account the moment at which a certain percentage of birds have started to migrate, or those consisting in ascertaining the average date of the commencement of pre-mating migration, accordingly do not comply with that provision. It is incompatible with the third sentence of Article 7(4) of the directive, concerning migratory species in particular, for a Member State to fix closing dates for the hunting season which vary according to the species of bird, unless the Member State concerned can adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of the species of bird liable to be affected by such staggering. The fixing of closing dates which vary between the different parts of the territory of a Member State is compatible with the Directive

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			does not impede the complete protection of the species of bird liable to be affected by such staggering; **3. On condition that complete protection of the species is guaranteed, the fixing of closing dates which vary between the different parts of the territory of a Member State is compatible with the directive. If the power to fix the closing date for the hunting of migratory birds is delegated to subordinate authorities, the provisions which confer that power must ensure that the closing date can be fixed only in such a way as to make possible complete protection of the birds during pre-mating migration.**	on condition that complete protection of the species is guaranteed. If the power to fix the closing date for the hunting of migratory birds is delegated to subordinate authorities, the provisions which confer that power must ensure that the closing date can be fixed only in such a way as to make possible complete protection of the species during pre-mating migration. **See the full text of the judgement**
Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds	Case C-118/94 under Article 177 of the EEC Treaty	Associazione Italiana per il World Wildlife Fund, Ente Nazionale per la Protezione Animali, Lega per l' Ambiente ° Comitato Regionale, Lega Anti Vivisezione ° Delegazione Regionale, Lega per l' Abolizione	**On those grounds, THE COURT (Fifth Chamber), in answer to the question referred to it by the Tribunale Amministrativo Regionale per il Veneto, by order of 27 May 1993, hereby rules: Article 9 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds is to be interpreted as meaning that it authorizes the Member States to derogate from the general prohibition on hunting protected species laid down by Articles 5 and 7 of the directive only by measures which refer in sufficient detail to the factors mentioned in Article 9(1) and (2).**	**Conclusion Summary** 1. Pursuant to the division of judicial functions between national courts and the Court of Justice provided for by Article 177 of the Treaty, the Court gives preliminary rulings where the questions referred concern the interpretation of a provision of Community law without, in principle, having to look into the circumstances in which the national courts were prompted to submit questions and envisage applying the provision of Community law which they have asked the Court to interpret. The matter would be different only if it were apparent either that the procedure provided for in Article 177 had been misused and was in fact being used to have the Court give a ruling when there was no genuine dispute or that the provision of Community law referred to the Court for interpretation was manifestly incapable of applying. 2. Article 9(1) of Directive 79/409 on the conservation of wild birds, which provides for the possibility for the Member States to

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		della Caccia, Federnatura Veneto, Italia Nostra ° Sezione di Venezia v Regione Veneto		derogate from the general prohibition on hunting protected species laid down in Articles 5 and 7 of the directive where there is no other satisfactory solution and for one of the reasons listed exhaustively therein, and Article 9(2), which defines the precise formal conditions for such derogations, must be interpreted as authorizing the Member States to grant those derogations only by measures which refer in sufficient detail to the factors mentioned in Article 9(1) and (2). In a sphere in which the management of the common heritage is entrusted to the Member States in their respective territories, faithful transposition of directives becomes particularly important. **See the full text of the judgement**
Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds	Case C-149/94 under Article 177 of the EC Treaty	The Tribunal de Grande Instance, Caen (France) for a preliminary ruling in the criminal proceedings pending before that court against Didier Vergy	**On those grounds, THE COURT (Third Chamber) in answer to the questions referred to it by the Tribunal de Grande Instance, Caen, by decision of 22 March 1994, hereby rules:** **1. Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds requires the Member States to prohibit trade in specimens belonging to a species of bird which is not listed in the annexes thereto ° in so far as the species concerned is a species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies ° subject to the option to derogate provided for by Article 9.** **2. Directive 79/409/EEC is not applicable to specimens of birds born and reared in captivity.** **3. Directive 79/409/EEC requires each**	**Conclusion Summary** Directive 79/409 on the conservation of wild birds requires the Member States to prohibit trade in specimens belonging to a species of bird which is not listed in the annexes thereto ° in so far as the species concerned is a species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies ° subject to the option to derogate provided for by Article 9. The duty to provide such protection is unaffected by the fact that the natural habitat of the species in question may not occur in the territory of the Member State concerned. The importance of complete and effective protection of wild birds throughout the Community, irrespective of the areas they stay in or pass through, causes any national legislation which delimits the protection of wild birds by reference to the concept of national heritage to be incompatible with the Directive. However, Directive 79/409 is not applicable to specimens of birds born and reared in captivity. To extend the protective regime beyond bird populations present in their natural

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			Member State to ensure the protection of a species of bird naturally occurring in the wild state in the European territory of the Member States to which the Treaty applies, even if the natural habitat of the species in question does not occur in the territory of the Member State concerned.	environment would not serve the environmental objective underlying the Directive. Furthermore, since the Community legislature has taken no action with regard to trade in specimens of birds born and raised in captivity, the Member States remain competent to regulate that trade, subject to Article 30 et seq. of the Treaty concerning products imported from other Member States. **See the full text of the judgement**
Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds	Case C-44/95 under Article 177 of the EC Treaty	Regina v Secretary of State for the Environment ex parte Royal Society for the Protection of Birds, Intervener: The Port of Sheerness Limited	**On those grounds, THE COURT in answer to the questions submitted to it by the House of Lords, by order of 9 February 1995, hereby rules: 1. Article 4(1) or (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds is to be interpreted as meaning that a Member State is not authorized to take account of the economic requirements mentioned in Article 2 thereof when designating a Special Protection Area and defining its boundaries. 2. Article 4(1) or (2) of Directive 79/409 is to be interpreted as meaning that a Member State may not, when designating a Special Protection Area and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive. 3. Article 4(1) or (2) of Directive 79/409 is to be interpreted as meaning that a Member State may not, when designating**	**Conclusion Summary** Article 4(1) or Article 4(2) of Directive 79/409 on the conservation of wild birds, which requires the Member States to take special conservation measures for certain species, and in particular to designate as Special Protection Areas the most suitable territories for their conservation, must be interpreted as meaning that a Member State is not authorized to take account of the economic requirements mentioned in Article 2 of the directive when choosing and defining the boundaries of a Special Protection Area or even to take account of economic requirements constituting a general interest superior to that represented by the ecological objective of that directive. Similarly, a Member State may not take account of economic requirements in so far as they amount to imperative reasons of overriding public interest of the kind referred to in Article 6(4) of Directive 92/43 on the conservation of the natural habitats of wild fauna and flora, as inserted in Directive 79/409. Although the latter provision widened the range of grounds on which it may be justified to encroach upon Special Protection Areas already designated as such, by expressly including therein reasons of a social or economic nature, it nevertheless did not make any change regarding the initial stage of classification referred to in Article 4(1) and (2) of Directive 79/409, and

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			a Special Protection Area and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats of wild fauna and flora.	therefore the classification of sites as Special Protection Areas must in all circumstances be carried out in accordance with the criteria accepted by those provisions. **See the full text of the judgement**
Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds	Case C-3/96 under Article 169 of the EC Treaty	Commission of the European Communities, applicant, v Kingdom of the Netherlands, defendant, supported by Federal Republic of Germany, intervener	**On those grounds, THE COURT, hereby:** **1. Declares that, by classifying as special protection areas territories whose number and total area are clearly smaller than the number and total area of the territories suitable for classification as special protection areas within the meaning of Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive;** **2. Orders the Kingdom of the Netherlands to pay the costs;** **3. Orders the Federal Republic of Germany to bear its own costs.**	**Conclusion Summary** 1. The aim of the pre-litigation procedure provided for in Article 169 of the Treaty is to give the Member State concerned an opportunity to justify its position or, as the case may be, to comply of its own accord with the requirements of the Treaty. If that attempt to reach a settlement proves unsuccessful, the Member State is requested to comply with its obligations as set out in the reasoned opinion which concludes the pre-litigation procedure, within the period prescribed in that opinion. The proper conduct of that procedure constitutes an essential guarantee intended by the Treaty not only to protect the rights of the Member State concerned but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter, the subject-matter being determined by the Commission's reasoned opinion. Where it is not disputed that the reasoned opinion and the procedure leading up to it were properly conducted, a Member State's right to a fair hearing is not infringed by the circumstance that the contentious procedure is opened by an application which takes no account of any new matters of fact or law put forward by the Member State concerned in its reply to the reasoned opinion. It is fully open to that State to raise those matters in the contentious procedure, to begin with in its first pleading in defence. 2. Article 4(1) of Directive 74/409 on the conservation of wild

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				birds requires Member States, if species mentioned in Annex I occur on their territory, to classify as special protection areas the most suitable territories in number and size for their conservation, an obligation which it is not possible to avoid by adopting other special conservation measures. Nor may the economic requirements mentioned in Article 2 of the directive be taken into account in this respect. As regards the Member States' margin of discretion in choosing the most suitable territories, that does not concern the appropriateness of classifying as special protection areas the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species in question. Consequently, where it appears that a Member State has classified as special protection areas sites the number and total area of which are manifestly less than the number and total area of the sites considered to be the most suitable, it will be possible to find that that Member State has failed to fulfil its obligation under Article 4(1) of the directive; for assessing the extent to which the Member State has complied with that obligation, the Court may use as a basis of reference the Inventory of Important Bird Areas in the European Community, 1989, which draws up an inventory of areas of great importance for the conservation of wild birds in the Community. **See the full text of the judgement**
Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and Council Directive	Case C-374/98 under Article 169 of the EC Treaty	Commission of the European Communities v French Republic	On those grounds, THE COURT (Sixth Chamber) hereby: 1. Declares that, by not classifying any part of the Basses Corbières site as a special protection area and by not adopting special conservation measures for that site sufficient	**Summary** 1. The inventory of areas which are of great importance for the conservation of wild birds, more commonly known under the acronym IBA (Inventory of Important Bird Areas in the European Community), although not legally binding on the Member States concerned, contains scientific evidence making it possible to assess whether a Member State has complied with its

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92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora			in their geographical extent, the French Republic has failed to fulfil its obligations under Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds; 2. Dismisses the remainder of the application; 3. Orders the parties to bear their own costs.	obligation to classify as special protection areas the most suitable territories in number and size for conservation of the protected species. It follows from the general scheme of Article 4 of Directive 79/409 on the conservation of wild birds that, where a given area fulfils the criteria for classification as a special protection area, it must be made the subject of special conservation measures capable of ensuring, in particular, the survival and reproduction of the bird species mentioned in Annex I to that directive. (see paras 25-26) 2. The text of Article 7 of Directive 92/43 on the conservation of natural habitats and of wild fauna and flora expressly states that Article 6(2) to (4) of that directive apply, in substitution for the first sentence of Article 4(4) of Directive 79/409 on the conservation of wild birds, to the areas classified under Article 4(1) or (2) of the latter directive. It follows that, on a literal interpretation of that passage of Article 7 of Directive 92/43, only areas classified as special protection areas fall under the influence of Article 6(2) to (4) of that directive. The fact that the protection regime under the first sentence of Article 4(4) of Directive 79/409 applies to areas that have not been classified as special protection areas but should have been so classified does not in itself imply that the protection regime referred to in Article 6(2) to (4) of Directive 92/43 replaces the first regime referred to in relation to those areas. (see paras 44-45, 49) See the full text of the judgement http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=61998J0374&model=guichett
Council Directive 92/43/EEC of 21 May	Case C-371/98 under Article	The Queen and	**On those grounds, THE COURT in answer to the question referred to it by**	**Conclusion Summary**

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
1992 on the conservation of natural habitats and of wild fauna and flora	177 of the EC Treaty (now Article 234 EC)	Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust	**the the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales by order of 21 July 1998, hereby rules:** **On a proper construction of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, a Member State may not take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of that directive, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance.**	Article 4(1) of Directive 92/43 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that a Member State may not take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of that directive, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance. To produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of special areas of conservation, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the directive's objective of conservation of natural habitats and wild fauna and flora. Only in that way is it possible to realise the objective, in the first subparagraph of Article 3(1) of Directive 92/43, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. Having regard to the fact that, when a Member State draws up the national list of sites, it is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States, it cannot of its own accord, whether because of economic, social or cultural requirements or because of regional or local characteristics, delete sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level. (see paras 22-23, 25 and operative part) **See the full text of the judgement**
Council Directive 79/409/EEC of 2 April	Case C-38/99 under Article	Commission of the	**On those grounds, THE COURT (Sixth Chamber) hereby:**	**Conclusion Summary**

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
1979 on the conservation of wild birds	169 of the EC Treaty (now Article 226 EC)	European Communities, applicant, v French Republic, represented, defendant	**1. Declares that, by failing correctly to transpose Article 7(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, by omitting to communicate all the transposition measures relating to the whole of its territory and by failing correctly to implement the aforesaid provision, the French Republic has failed to fulfil its obligations under that directive;** **2. Orders the French Republic to pay the costs.**	1. Article 7(4) of Directive 79/409 on the conservation of wild birds seeks in particular to impose a prohibition of hunting of all species of wild birds during the rearing periods and the various stages of reproduction and dependency and, in the case of migratory species, during their return to their rearing grounds. Moreover that article is designed to secure a complete system of protection in the periods during which the survival of wild birds is particularly under threat. Accordingly, protection against hunting activities cannot be confined to the majority of the birds of a given species, as determined by average reproductive cycles and migratory movements. (see para. 23) 2. The national authorities are not empowered by Directive 79/409 on the conservation of wild birds to lay down closing dates for hunting which vary according to species of migratory birds or waterfowl unless the Member State concerned can adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of species of bird liable to be affected by such staggering. (see para. 43) 3. The transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner. However, faithful transposition becomes particularly important in the case of Directive 79/409 on the conservation of wild birds where management of the common heritage is entrusted to the Member States in their respective territories. (see para. 53) **See the full text of the judgement**

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora	Case C-103/00 under Article 226 EC Treaty	Commission of the European Communities v Hellenic Republic	**On those grounds, THE COURT (Sixth Chamber) hereby:** **1. Declares that by failing to take, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle Caretta caretta on Zakinthos so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed to fulfil its obligations under Article 12(1)(b) and (d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;** **2. Orders the Hellenic Republic to pay the costs.**	**Conclusion Summary** APPLICATION for a declaration that, by failing to adopt or, in the alternative, to notify to the Commission, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle Caretta caretta on Zakinthos (Greece) so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed to fulfil its obligations under the EC Treaty and under Article 12(1)(b) and (d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7). The Commission emphasises the fact that the bay of Laganas on Zakinthos is a vital breeding region, perhaps even the most important in the Mediterranean, for the sea turtle Caretta caretta. Given the significance of the bay of Laganas, the Greek authorities have proposed that the region be classified as one of the sites of Community importance for the Natura 2000 network. It should be observed in this regard that the Court has consistently held that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, inter alia, Case C-166/97 Commission v France [1999] ECR I-1719, paragraph 18, and Case C-220/99 Commission v France [2001] ECR I-5831, paragraph 33). It must, therefore, be held that the Hellenic Republic did not take, within the prescribed time-limit, all the requisite specific measures to prevent the deliberate disturbance of the sea turtle Caretta caretta during its breeding period and the deterioration or destruction of its breeding sites. Consequently, the Commission's

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				application must also be granted on this point. 40 In the light of the foregoing, the Court finds that by failing to take, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle Caretta caretta on Zakinthos so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed to fulfil its obligations under Article 12(1)(b) and (d) of the Directive. **See the full text of the judgement**
Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds	Case C-117/00 under Article 226 EC Treaty	Commission of the European Communities, v Ireland, defendant	**On those grounds, THE COURT (Sixth Chamber) hereby:** **1. Declares that, by failing to take the measures necessary to safeguard a sufficient diversity and area of habitats for the Red Grouse and by failing to take appropriate steps to avoid, in the Owenduff-Nephin Beg Complex special protection area, the deterioration of the habitats of the species for which the special protection area was designated, Ireland has failed to fulfil its obligations under Article 3 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;** **2. Orders Ireland to pay the costs.**	**Conclusion Summary** APPLICATION for a declaration that, by failing to take all the measures necessary to comply with Article 3 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), in respect of the Red Grouse, and with the first sentence of Article 4(4) of that directive and Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), in respect of the Owenduff-Nephin Beg Complex special protection area, Ireland has failed to comply with those directives and has failed to fulfil its obligations under the EC Treaty. It must, therefore, be held that, by failing to take the measures necessary to safeguard a sufficient diversity and area of habitats for the Red Grouse and by failing to take appropriate steps to avoid, in the Owenduff-Nephin Beg Complex SPA, the deterioration of the habitats of the species for which the SPA was designated, Ireland has failed to fulfil its obligations under Article 3 of the Birds Directive and Article 6(2) of the Habitats Directive. **See the full text of the judgement**

DIRECTIVE	CASE NUMBER	PARTIES	J U D G E M E N T Conclusion	Operational part of the judgement
Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds	Case C-182/02 under Article 234 EC Treaty	Ligue pour la protection des oiseaux and Others v Premier ministre, Ministre de l'Aménagement du territoire et de l'Environnement, interveners: Union nationale des fédérations départementales de chasseurs, Association nationale des chasseurs de gibier d'eau	**On those grounds, THE COURT (Sixth Chamber), in answer to the questions referred to it by the Conseil d'État by decision of 25 January 2002, hereby rules:** **1. Article 9(1)(c) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds permits a Member State to derogate from the opening and closing dates for hunting which follow from consideration of the objectives set out in Article 7(4) of that directive.** **2. Article 9 of Directive 79/409 must be interpreted as allowing hunting to be authorised pursuant to Article 9(1)(c) where:** **- there is no other satisfactory solution. That condition would not be met, inter alia, if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of Directive 79/409;** **- it is carried out under strictly supervised conditions and on a selective basis;** **- it applies only to certain birds in small numbers; - mention is made of:** **(a) the species which are subject to the derogations;** **(b) the means, arrangements or methods authorised for capture or killing;** **(c) the conditions of risk and the**	**Conclusion Summary** By decision of 25 January 2002, received at the Court on 15 May 2002, the Conseil d'État (Council of State) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 9(1)(c) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1, hereinafter `the Directive'). It is clear from the foregoing that the hunting of wild birds for recreational purposes during the periods mentioned in Article 7(4) of the Directive may constitute a judicious use authorised by Article 9(1)(c) of that directive, as do the capture and sale of wild birds even outside the hunting season with a view to keeping them for use as live decoys or to using them for recreational purposes in fairs and markets (see Case 262/85 Commission v Italy [1987] ECR 3073, paragraph 38). The answer to the first question must therefore be that Article 9(1)(c) of the Directive permits a Member State to derogate from the opening and closing dates for hunting which follow from consideration of the objectives set out in Article 7(4) of the Directive. In the light of the foregoing, the answer to the second question must be that Article 9 of the Directive must be interpreted as allowing hunting to be authorised pursuant to Article 9(1)(c) where: - there is no other satisfactory solution. That condition would not be met, inter alia, if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive; - it is carried out under strictly supervised conditions and on a selective basis;

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			circumstances of time and place under which such derogations may be granted; **(d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;** **(e) the controls which will be carried out.**	- it applies only to certain birds in small numbers; - mention is made of: (a) the species which are subject to the derogations; (b) the means, arrangements or methods authorised for capture or killing; (c) the conditions of risk and the circumstances of time and place under which such derogations may be granted; (d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom; (e) the controls which will be carried out. **See the full text of the judgement**